



Preparing for an Evidentiary Hearing on a Motion to Modify Primary Residential Responsibility

An Informational Guide to North Dakota State Civil Court Process

The North Dakota Legal Self Help Center provides resources to people who represent themselves in civil matters in the North Dakota state courts. The information provided in this informational guide **isn't** intended for legal advice but only as a general guide to a civil court process.

If you decide to represent yourself, you need to do additional research to prepare.

If you're unsure how to proceed, don't know if this informational guide suits your needs, or need legal advice or legal representation, consult a lawyer licensed to practice in North Dakota. For information about how to find a lawyer, go to ndcourts.gov/legal-self-help/finding-a-lawyer.

When you represent yourself, you're expected to know and follow the law, including:

- State or federal laws that apply to your case;
- Case law, also called court opinions, that applies to your case; and
- Court rules that apply to your case, which may include:
 - North Dakota Rules of Civil Procedure;
 - North Dakota Rules of Court;
 - North Dakota Rules of Evidence;
 - North Dakota Administrative Rules and Orders;
 - Any local court rules.

Links to the laws, case law, and court rules can be found at ndcourts.gov.

A glossary with definitions of legal terms is available at ndcourts.gov/legal-self-help/glossary.

When you represent yourself, you're held to the same requirements and responsibilities as a lawyer, even if you don't understand the rules or procedures.

***This information isn't a complete statement of the law.** This covers basic information about how to prepare for an evidentiary hearing on a motion to modify primary residential responsibility in a North Dakota state district court. The Center isn't responsible for any consequences that may result from the information provided. The information can't replace the advice of a lawyer licensed in North Dakota.*

Use at your own risk.

Important!

The Judge or Judicial Referee orders an evidentiary hearing **only after the parent making the motion to modify primary residential responsibility (also called the Moving party) established a **written** prima facie case for modification.**

Contents of the Informational Guide

Resources Available through the ND Legal Self Help Center	3
Overview	3
Definitions	4
Step 1: Learn the Basics	6
Review the Motion and Answer to Motion Documents and Your Legal Research	
Review the Guide to a Civil Action, or Case	
Review the Evidence Research Guide	
Review Pretrial and Trial Guidebooks	
Watch an Evidentiary Hearing	
Step 2: Prepare for the Evidentiary Hearing	8
Begin Preparing a Trial Notebook	
Discovery	
Subpoenas	
Identify Your Witnesses and Exhibits	
Find out if the Evidentiary Hearing will be Recorded	
Request Remote (Electronic) Attendance (if necessary)	
Request Special Assistance (if necessary)	
Step 3: Attend the Evidentiary Hearing	11
If the Evidentiary Hearing is In-Person, Arrive Early	
If the Evidentiary Hearing is by Zoom, Make Sure You Can Connect	
Bring Documents, Etc. to the Evidentiary Hearing	
Be Prepared to Take Detailed Notes	
Conduct of Evidentiary Hearing	
The Judge or Judicial Referee Makes a Decision	
Step 4: After the Evidentiary Hearing	13
Preparing Proposed Order and Proposed Judgment (if necessary)	
Lawyer Resources and Limited Legal Representation	14

Resources Available Through the ND Legal Self Help Center

The ND Legal Self Help Center has a variety of forms and guides for modifying primary residential responsibility (custody) awarded in your current judgment. Forms aren't available for every situation or circumstance.

Go to ndcourts.gov/legal-self-help/custody for the forms and guides available through the ND Legal Self Help Center.

The forms and guides available for preparing for an evidentiary hearing are found at ndcourts.gov/legal-self-help/custody/modify-primary-residential-responsibility-no-agreement. Scroll to the end of the webpage.

North Dakota Legal Self Help Center forms aren't official court forms and courts aren't required to accept them. There's no guarantee all judges and courts will accept forms available through the Center. Use at your own risk.

For help making decisions about forms, or help creating legal documents, consult a lawyer licensed to practice in North Dakota. Ask the lawyer about Limited Legal Representation.

Lawyers licensed to practice in North Dakota may agree to help you with part of your civil case, such as preparing legal documents, while you handle the rest of your civil case. You and the lawyer must agree in writing to Limited Legal Representation.

Overview of Preparing for an Evidentiary Hearing

When a parent wants to modify the primary residential responsibility (custody) awarded in their current judgment, that parent (the Moving party) must make a written motion in their current case. The other parent (the Opposing party) must answer the motion in writing, if they don't agree with the modifications.

The Moving party's motion must make a written prima facie case for modification. If the Opposing party doesn't agree with the modifications, their written answer to the motion must conclusively show that the Moving party's motion has no credibility, and/or show the Moving party's motion isn't legally enough to justify modification.

If, based only on the documents filed by the Moving party and the Opposing party, the judge or judicial referee decides the Moving party made a prima facie case for modification, the court schedules an evidentiary hearing.

At the evidentiary hearing, the Moving party must prove everything they wrote in their motion documents. They must bring evidence, which may include witnesses, to prove they meet the legal requirements to modify the primary residential responsibility awarded in the current judgment.

At the evidentiary hearing, the Opposing party must prove everything they wrote in their answer to motion documents. They must bring evidence, which may include witnesses to prove that the Moving party's legal arguments have no credibility, and/or prove the Moving party doesn't meet the legal requirements to justify modification.

After the evidentiary hearing ends, the judge or judicial referee makes their decision. If they decide the Moving party doesn't meet the legal requirements for modification, the motion is denied and the primary residential responsibility awarded in the current judgment stays in place.

If the judge or judicial referee decides the Moving party meets the legal requirements for modification, they issue an order amending the judgment, and an amended judgment with the modifications. The modifications are effective after the amended judgment is signed, dated, and filed in the case.

Definitions

Best Interests of the Child: The 13 factors the District Court uses when deciding the residential responsibility and parenting time arrangements that are in the best interests of the child. The 13 factors are listed in [North Dakota Century Code Section 14-09-06.2](#).

Custody: See Residential Responsibility.

Decision Making Responsibility: The responsibility to make decisions concerning the child. The term may refer to decisions on all issues or on specific issues, but not child support issues.

Exhibit: As used in the ND Legal Self Help Center forms for this process and this guide, a separate document from the judgment that contains the parenting plan. For example, a parenting plan exhibit is referenced in the judgment and incorporated as part of the judgment. (May also be called an Attachment or an Appendix.)

Judicial Officer: Either a District Court Judge or a District Court Judicial Referee. A motion to modify primary residential responsibility may be heard by either a District Court Judge, or a District Court Judicial Referee. A Judicial Referee is appointed by the Presiding Judge.

Material Change in Circumstances: Significant change or changes since the original judgment, unknown at the time of the original judgment, requiring a modification in primary residential responsibility to serve the best interests of the child.

Obligor: The person ordered by the court to pay child support.

Obligee: The person receiving child support ordered by the court.

Parental Rights and Responsibilities: All the rights and responsibilities a parent has concerning the parent's child.

Parenting Plan: A written plan describing each parent's rights and responsibilities. The parenting plan is required to be in all judgments modifying a parent's rights and responsibilities. The parenting plan may be included in the judgment document, or a separate document that is referenced in the judgment as an exhibit, which is incorporated into the judgment.

Parenting Schedule: The schedule of when the child is in the care of each parent.

Parenting Time: The time when the child is to be in the care of a parent. (Also known as visitation.)

Prima Facie Case: Evidence presented in writing that is strong enough, if **not** contradicted, to support a change in primary residential responsibility awarded in a current judgment. Evidentiary facts are presented by declaration or affidavit. The Opposing party may present counter declarations or affidavits to show the Moving party's declarations or affidavits aren't credible or are insufficient.

Primary Residential Responsibility: A parent with more than 50% of the residential responsibility.

Residential Responsibility: A parent's responsibility to provide a home for the child. (Also known as custody.)

Visitation: See Parenting Time.

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Step 1: Learn the Basics

Representing yourself effectively at an evidentiary hearing requires a lot of research and preparation. You're held to the same requirements and responsibilities as a lawyer, even if you don't understand the laws, rules, or procedures.

If you can, consult a lawyer for help.

Review the Motion and Answer to Motion Documents Filed with the Court and Your Legal Research.

Review the motion and answer to motion documents filed by both parties. These documents include the legal arguments and facts to support each party's legal arguments.

The evidentiary hearing will focus on these legal arguments and facts.

Refer to the legal research you used when you prepared your brief and declaration, or affidavit, in support of your motion or answer to motion.

If you used the evidence worksheet available through the ND Legal Self Help Center to organize your evidence for your written motion or answer to motion documents, refer to that worksheet.

Review the [Guide to a Civil Action, or Case](#), an informational guide to North Dakota civil court process. A motion to modify primary residential responsibility is a civil court process.

Review the [Evidence Research Guide](#). This guide is your starting point for your research into gathering and presenting evidence at the evidentiary hearing.

Review pretrial and trial guidebooks for self-represented litigants, paralegals and lawyers. Your local public or academic library may have resources available.

Search [ODIN \(Online Dakota Information Network\)](#), a shared library database of many North Dakota academic, public, state agency, and special libraries, for books and other resources that may be available in a North Dakota Library near you. If the book is available for interlibrary loan through ODIN, ask library staff of your local North Dakota library how to request the book.

Following are a selection of library resources on ODIN that may be of interest to you:

- *A Short & Happy Guide to Civil Procedure*, Richard D. Freer, West Academic Publishing, c. 2019.
- *A Short & Happy Guide to Evidence*, Sydney Beckman, West Academic Publishing, c. 2018.

- *Courtroom Evidence Handbook: 2018-2019 Student Edition*, Steven Goode, Olin Wellborn III, West Academic Publishing, 2018.
- *Nolo's Deposition Handbook*, Paul Bergman, Albert Moore, Nolo, c. 2018.
- *Nolo's Essential Guide to Child Custody & Support*, Emily Daskow, Nolo, c. 2015.
- *One Hundred Days Before Trial: A Family Lawyer's Guide to Preparation and Strategy*, Steven N. Peskind, ABA Publishing, c. 2015.
- *Represent Yourself in Court: How to Prepare & Try a Winning Case*, Paul Bergman, Sara Berman, Nolo, c. 2019.

Watch an evidentiary hearing on a motion to modify primary responsibility. If possible, watch a hearing with the same judge or judicial referee assigned to your case. In general, hearings and trials in civil cases are open to the public.

To find upcoming family law hearings in your North Dakota county, go to [District Court Case Search](#), read the information and click the "Click Here to Proceed" button.

- Select a location from the pull-down list and click on "Court Calendar".
- Search for future hearings by "Date Range". Make sure only "Family" is selected in "Case Category".

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Step 2: Prepare for the Evidentiary Hearing

There are a lot of things you need to do to get ready for an evidentiary hearing, such as:

- Gathering your evidence;
- Requesting evidence from other people if needed (called "discovery");
- Preparing witnesses to testify; and
- Letting the other party and the judge or judicial referee know what evidence and witnesses you plan to present at the evidentiary hearing.

Begin Preparing a Trial Notebook:

A trial notebook is a common way lawyers prepare for an evidentiary hearing or a trial. A trial notebook is used to organize documents and trial preparation outlines to help you present your case effectively.

If you decide to use a trial notebook, you can find examples in pretrial and trial guidebooks for self-represented litigants, paralegals and lawyers.

Discovery:

If you're served with discovery requests, Don't ignore them!

There are strict deadlines for you to respond. If you don't respond within the deadline, you may miss your chance to object. You may also have to explain to the judge or judicial referee why you didn't respond.

If you don't know how to respond to a discovery request, consult a lawyer.

The [scheduling order](#) issued by the judge or judicial referee will have discovery deadlines. The parties must complete discovery by the deadline in the order.

Discovery is a formal process where the parties ask each other for information. The parties may also ask non-parties for information.

The "Discovery Rules" are Rule 26 through Rule 37 of the [North Dakota Rules of Civil Procedure](#).

For more information about discovery, go to the "Discovery" section in the [Guide to a Civil Action, or Civil Case](#).

Subpoenas:

The [Subpoenas](#) webpage has all of the information about subpoenas available through the ND Legal Self Help Center.

A subpoena is the process to require the attendance of a non-party witness at deposition, hearing or trial.

A subpoena is also the process to require a non-party to produce documents, electronically stored information or tangible things; or to require the inspection of premises.

Subpoenas may be used by a party in a civil case to require a person do the following at a specific time and place:

- Attend and testify at a deposition, evidentiary hearing or trial;
- Produce the documents listed in the subpoena;
- Produce the electronically stored information listed in the subpoena;
- Produce the tangible things listed in the subpoena (the tangible things must be in the person's possession, custody or control); or
- Permit the inspection of the premises listed in the subpoena.

When you represent yourself in a civil case, you **can't** issue a subpoena on your own. Only a Clerk of District Court or a lawyer for a party can issue a subpoena.

Identify Your Witnesses and Exhibits:

Exhibits are all of the documents and objects you plan to offer into evidence at the evidentiary hearing.

Witnesses are the people you plan to have testify at the evidentiary hearing.

- If you filed any supporting declarations or affidavits of other people with your motion or answer to motion, you must have those people available to testify at the evidentiary hearing.

Review your [scheduling order](#) for your deadline to identify the witnesses and exhibits you plan to introduce at the evidentiary hearing. The scheduling order may require you to exchange your witness and exhibit list with the other party before the evidentiary hearing.

A Witness and Exhibit List form is available at ndcourts.gov/legal-self-help/custody/modify-primary-residential-responsibility-no-agreement.

Find Out if the Evidentiary Hearing Will Be Recorded:

Many, but not all, evidentiary hearings are recorded. If the evidentiary hearing was recorded, parties in the civil case can [request an audio recording](#). Parties get the audio recording free of charge.

Audio recordings are very useful, especially if the judge or judicial referee assigns either or both parties to prepare proposed orders following the evidentiary hearing.

Contact the [Clerk of District Court's](#) office to find out if the evidentiary hearing will be recorded. If not, and you want to ask that the evidentiary hearing be recorded, you may [make a motion](#). The judge or judicial referee decides whether the evidentiary hearing will be recorded.

If the evidentiary hearing isn't recorded, you may [request a transcript](#). You're required to pay for transcripts.

Remote (Electronic) Attendance at an Evidentiary Hearing:

If the evidentiary hearing is scheduled to be held in-person at the courthouse, you can ask the judge or judicial referee for permission to attend remotely (electronically).

You can also ask the judge or judicial referee for permission for a witness to attend remotely (electronically).

The judge or judicial referee isn't required to grant your request, so have a back-up plan to attend in-person if your request is denied.

[Make your request](#) as soon as possible.

If You Need Special Assistance at the Evidentiary Hearing or Trial:

If you have a disability, don't read or understand English well, or require special accommodations at the hearing, contact the [Clerk of District Court's](#) office as soon as possible.

An American with Disabilities Act (ADA) Accommodation Request form is also available [here](#).

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Step 3: Attend the Evidentiary Hearing

The evidentiary hearing is an examination of the facts and law, presided over by the judge or judicial referee assigned to the case.

The Moving party has the opportunity to prove everything they wrote in their motion documents. They must bring evidence, which may include witnesses, to prove they meet the legal requirements to modify primary residential responsibility awarded in the current judgment.

The Opposing party has the opportunity to challenge the Moving party's evidence, and to prove everything the Opposing party wrote in their answer to motion documents. They must bring evidence, which may include witnesses to prove that the Moving party's legal arguments have no credibility, and/or to prove the Moving party doesn't meet the legal requirements to justify modification.

The judge weighs the facts and arguments presented by both parties and decides whether the Moving party proved the legal requirements to modify primary residential responsibility.

If the Evidentiary Hearing is Held In-Person, Arrive Early to the Courthouse on the Date of Evidentiary Hearing:

Don't miss your evidentiary hearing. If you have a serious, unavoidable reason you can't attend, contact the [Clerk of District Court's](#) office as soon as possible. Be aware that the judge or judicial referee may decide to hold the evidentiary hearing without you.

If the Evidentiary Hearing is Held by Zoom, Make Sure You Can Connect to Zoom Before the Evidentiary Hearing Begins:

Well before the evidentiary hearing begins, make sure you can connect and understand how to function in Zoom.

Don't miss or be late to your Zoom evidentiary hearing. If you have a serious, unavoidable reason you can't attend, contact the [Clerk of District Court's](#) office as soon as possible. Be aware that the judge or judicial referee may decide to hold the evidentiary hearing without you.

Bring the Information, Documents, Etc. You Prepared for the Evidentiary Hearing:

If you prepared a trial notebook, bring it with you.

Bring all of the files, paperwork, etc. that you gathered and organized while preparing for the evidentiary hearing. Bring the outline of what you want to say.

Be prepared to take detailed notes during the evidentiary hearing.

You need to make note of all of the judge's or judicial referee's decisions, including whether the judge or judicial referee allowed your witnesses and exhibits to be presented as evidence.

A worksheet is a common way to keep track of whether your witnesses and exhibits are allowed to be presented as evidence. A worksheet is a running list of your witnesses and exhibits with a short description of each. A worksheet includes checkboxes for the most common events when presenting evidence. For example, offered, objected, reserved, overruled, sustained, withdrawn, and received.

ND Legal Self Help Center staff created a template for a witness and exhibit list worksheet you may use as a starting point for creating your own. You may edit the template in a word processing program, for example, Microsoft Word, WordPerfect, Google Docs, or Open Office.

- [Witness & Exhibit List Worksheet](#)

Conduct of the Evidentiary Hearing:

The evidentiary hearing officially begins when all are asked to rise when the judge or judicial referee comes into the courtroom. In general, the evidentiary hearing proceeds in the following order:

- Opening statements:
 - Each party gives an opening statement. An opening statement describes the issues to be decided by the judge or judicial referee and what the party expects to prove during the evidentiary hearing.
 - Usually the Moving party goes first.
- The Moving party presents their witnesses and evidence first:
 - The Opposing party has the opportunity to cross-examine witnesses and object to evidence presented by the Moving party.
- The Opposing party presents their witnesses and evidence last:
 - The Moving party has the opportunity to cross-examine witnesses and object to evidence presented by the Opposing party.
- Closing arguments:
 - Often, each party gives a closing argument. A closing argument is a summary of the evidence the judge or judicial referee allowed to be presented and an argument to the judge or judicial referee on how the issues should be decided.
 - Usually the Opposing party goes first.

The Judge or Judicial Referee Makes a Decision:

The judge or judicial referee considers all of the evidence allowed to be presented and makes decisions. The judge or judicial referee may tell you their decisions immediately in court, or the judge or judicial referee may decide to think about the evidence and make decisions later.

Step 4: After the Evidentiary Hearing

After the evidentiary hearing ends, the judge or judicial referee makes their decision.

If the judge or judicial referee decides the Moving party didn't prove they meet the legal requirements for modification, the motion is denied and the primary residential responsibility awarded in the current judgment stays in place.

If the judge or judicial referee decides the Moving party proved they meet the legal requirements for modification, they issue an order amending the judgment, and an amended judgment with the modifications is also issued.

The modifications to primary residential responsibility aren't effective until **after** the amended judgment is signed, dated, and filed in the case.

The judge or judicial referee might write the order amending the judgment, and write the amended judgment with the modifications. However, the judge or judicial referee is allowed to require one or both parties to prepare a proposed order amending the judgment and a proposed amended judgment.

Preparing a Proposed Order and a Proposed Amended Judgment:

General-use templates for preparing a proposed order amending a judgment and a proposed amended judgment are available at ndcourts.gov/legal-self-help/custody/modify-primary-residential-responsibility-no-agreement.

Refer to the detailed notes you took during the evidentiary hearing. If the evidentiary hearing was recorded, you can [request an audio recording](#).

If the evidentiary hearing wasn't recorded, you may [request a transcript](#). You're required to pay for transcripts.

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Lawyer Resources & Limited Legal Representation

You're not required to hire a lawyer to represent you in a civil case in North Dakota state courts. If you decide to represent yourself, you must follow all of the rules, laws and procedures a lawyer is required to follow.

Go to ndcourts.gov/legal-self-help/finding-a-lawyer for more information about finding a lawyer.

Lawyer Resources

If you decide to find a lawyer 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 lsnd.org.
- The **State Bar Association of North Dakota** 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 sband.org. The cost is \$30.00 for a 30 minute consultation with a lawyer.
- **Dakota Plains Legal Services** is a non-profit legal services organization that provides free legal assistance to low-income individuals, older Americans and veterans. Dakota Plains Legal Services (DPLS) has eight offices and serves communities across South Dakota and North Dakota, including nine tribal nations. DPLS is committed to increasing access to justice with quality legal assistance. Contact information is available on the DPLS webpage of dpls.org.
- For a list of all lawyers who are licensed to practice in North Dakota, go to the North Dakota Supreme Court website at ndcourts.gov/Lawyers. You can narrow your search by name or location.

Limited Legal Representation

Lawyers licensed to practice in North Dakota may provide Limited Legal Representation in civil cases. Limited Legal Representation (sometimes called "unbundling") is a way that a lawyer 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 lawyer handled.

For example:

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

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

North Dakota Free Legal Answers

This civil legal program is a partnership of the American Bar Association and the State Bar Association of North Dakota.

The purpose of the program is to provide free answers to **specific** civil legal question to low-moderate income North Dakotans who submit their questions online. Anonymous volunteer attorneys answer your question, but can't represent you.

Go to nd.freelegalanswers.org or information about the program, the online application, and, if you qualify, ask your civil legal question.

This program **doesn't** provide any assistance with criminal legal questions.