



MINNESOTA JUDICIAL TRAINING UPDATE



POST-DECREE MOTIONS TO MODIFY CUSTODY BASED ON ENDANGERMENT

QUESTION: When Ruling on a Post-Decree Motion To Modify Custody (Based on a Claim of Endangerment) What is the “Rule of Nice-Petersen” and What 3-Step Analysis MUST the Court Follow?

STATUTORY AUTHORITY - M.S. 518.18 (d)the court shall not modify a prior custody order.....unless it finds, upon the basis of facts, unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement....unless the court finds one of the following five (5) grounds for modification:

- 1) Modification based on child’s best interest if parties previously agreed to apply best interest standard, or;
- 2) Both parties agree to the modification, or;
- 3) The child has been integrated into the family of the Petitioner with the consent of the other party, or;
- 4) The Court denied a request of the primary custodial parent to move residence of the child to another state, and the primary custodial parent has relocated to another state despite the Court’s order, or;
- 5) The child’s present environment endangers the child’s physical or emotional health or impairs the child’s emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of the change to the child.

RULE OF NICE-PETERSEN: A motion to modify custody must be supported by affidavit(s) setting forth facts in support of modification. If the facts in the moving party’s affidavit(s) establish a prima facie case of endangerment the Court MUST order an evidentiary hearing. If a prima facie case does not exist, the Court MUST summarily deny the motion. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471 (Minn.1981).

THREE STEP ANALYSIS**STEP ONE: After reviewing the affidavits of both parties the Court MUST:**

- a) Accept as true the allegations in the Petitioner's affidavits;
- b) After reviewing the Respondent's affidavits the Court must distinguish those statements that contradict the allegations of Petitioner's affidavits from those that explain or contextualize them;
- c) The Court must then disregard the contrary assertions, but may consider the explanatory statements that place Petitioner's allegations in proper context. For example:
 - i) Petitioner (mother) states in her affidavit that Respondent smokes marijuana and always smells like pot. Father in his responsive affidavit denies smoking marijuana. Father further explains that what Petitioner smells is not marijuana but rather his cologne called "Demeter" made from the Cannabis flower. Father's denial that he smokes marijuana is a contrary assertion and must be disregarded by the Court. However, father's statement that what Petitioner smells is not marijuana but rather his cologne made from the Cannabis flower is an explanation and helps to contextualize mother's assertion, so that part of father's statement may be considered by the Court.

NOTE: On appeal this step is reviewed de novo.

STEP TWO: The Court must determine whether Petitioner has established a prima facie case of endangerment that would warrant modification of custody.

- a) In making this determination, the Court must bear in mind that "the concept of endangerment is unusually imprecise," and "any threat of harm to a child might arguably constitute endangerment," but "the legislature likely intended to demand a showing of a significant degree of danger." *Boland v. Murtha*, 800 N.W.2d 179, 186 (Minn.2011).

- b) For those reasons “we entrust to the sound discretion of the district Court the determination of whether the allegations supporting the motion - when taken as true and viewed in light of the explanatory statements in affidavits submitted in opposition to the motion - establish a prima facie case for modifying custody or restricting parenting time.” *Id.* at 186.
- c) Emotional abuse alone may constitute sufficient endangerment. *Harkema v. Harkema*, 474 N.W.2d 10 (Minn.App.1989).
- d) On appeal this step is reviewed for an abuse of discretion.

STEP THREE: If the Court concludes that a prima facie case exists, the Court MUST order an evidentiary hearing. The order must be supported by specific findings. But if the Court concludes that a prima facie case does not exist, the Court MUST deny the petition without an evidentiary hearing. The denial order does not have to be supported by specific findings. *Axford v. Axford*, 402 N.W.2d 143 (Minn.App.1987).

Note: Even though specific findings for a denial are not required, it is a recommended practice to include a written explanation for the denial in the court file. Because there are no time restrictions for filing Nice-Peterson motions, in some counties a petitioner could re-file a denied motion before a different judge.

QUESTION: What About Motions To “Restrict” Parenting Time?

- a) A motion to “restrict or substantially modify” parenting time is subject to the same standards and analysis as outlined above for modification of custody.
- b) Under M.S. 518.175, subd 5 the district court “may not restrict parenting time unless it finds that: (1) parenting time is likely to endanger the child’s physical or emotional health or impair the child’s emotional development, or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time.”
- c) However, a change in parenting time that reduces the amount of time a parent has with a child is not necessarily a restriction of parenting time. A restriction occurs when a change to parenting time is “substantial” as opposed to a modification.
- d) Modifications are “less substantial changes” in parenting time. Modifications are allowed when it is in a child’s best interest. M.S. 518.175, subd 5; M.S. 518.18 (d); See also, *Dahl v. Dahl*, 765 N.W.2d 118 (Minn.App.2009).