

**Pro Se Membership
Program**



UNDERSTANDING ALL THINGS CHILD CUSTODY- NORTH DAKOTA



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A STEP- BY-STEP E-GUIDE

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CHILD CUSTODY IN NORTH DAKOTA

North Dakota courts make custody decisions by evaluating what custody arrangement would be in the best interests of the child. Your custody arrangement will address both physical custody and legal custody, also called "residential responsibility" and "decision-making responsibility" in North Dakota.

Residential Responsibility

A parent with "residential responsibility" over the child is the parent who primarily lives with the child. The parent with primary residential responsibility is referred to as the "custodial parent". The other parent (called the "noncustodial parent") will have ample parenting time with the child, but won't necessarily live with the child.

Decision-Making Responsibility

A parent with "decision-making responsibility" can make major educational, medical, legal, and religious decisions on the child's behalf. In many cases share decision-making responsibilities. However, when parents can't agree on a matter involving the child, the custodial parent has the final say.

Joint Custody

When a judge awards parents residential responsibility and decision-making responsibility, it can be joint or sole. Parents with joint physical custody ("joint residential responsibility") will both spend substantial amounts of time with the child, although not necessarily equal. For example, a joint physical custody award may grant one parent 4 or 5 nights per week and the other parent 2 or 3 nights per week. Parents with joint legal custody ("joint decision-making responsibility") will share equally in the upbringing of their children and will make major educational, medical, or religious decisions involving the child, together.

Sole Custody

Sole custody gives only one parent legal or physical custody rights over the child. A parent with sole physical custody (or "sole residential responsibility") lives primarily with the child. However, the other parent is still entitled to regular and frequent visits with the child. A parent with sole legal custody ("sole decision-making responsibility") will make all major decisions on the child's behalf alone and without input from the child's other parent.

DECIDING CUSTODY: CHILD'S BEST INTERESTS IN NORTH DAKOTA

Whether parents reach their own agreement or leave things up to a judge to decide, a child's best interests are central to any custody decision. When evaluating residential responsibility and each parent's decision-making responsibility, a judge will consider all the factors that impact a child's best interests. Specifically, a judge will examine the following to determine the arrangement most suited to your child's needs:

- each parent's relationship with the child
- each parent's physical and mental health
- each parent's overall ability to provide for the child
- the child's relationship with siblings and extended family members
- the child's educational, physical, and emotional needs, including special needs, if any
- the child's ties to school and the community
- each parent's moral fitness
- the child's custodial preference if of a sufficient age and maturity
- either parent's history of domestic violence, and
- any other factor relevant to the child's best interests.

A parent with a history of domestic violence resulting in bodily injury or recurrent abusive behavior is presumed to be unfit to have "residential responsibility" over a child. It is possible, however, for the parent who committed the abusive behavior to still receive residential responsibility if that parent produces clear and convincing evidence that it is in the child's best interest for that parent to have custodial privileges.

This would probably mean showing that the parent had taken a parenting course or anger management course and had gained a better understanding of how to control violence tendencies. Ultimately, a child's best interests will control the outcome of your North Dakota child custody case. See N. D. Cent. Code § 14-09-06.2 (2020).

CUSTODY MODIFICATION

When a North Dakota state district court awards residential responsibility (custody) 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 which parent has primary residential responsibility (custody) in the existing case, if certain requirements are met.

The parent asking to modify which parent has primary residential responsibility (custody) must establish, in writing, a *prima facie* case for modification. The other parent may challenge the modification request, in writing.

The court reviews the documents served and filed by the parent asking for modification and the documents served and filed by the other parent in response.

If the court determines that the parent requesting modification established a *prima facie* case for modification, in writing, the court will schedule an in-person evidentiary hearing.

At the hearing, the parent asking to modify which parent has primary residential responsibility (custody) has the burden of proving they meet all of the legal requirements for modification.

(“*Prima facie case*” is not defined in the laws enacted by the North Dakota State Legislature related to modifying which parent has primary residential responsibility (custody). You will need to research court opinions to define *prima facie case* and interpret for your circumstances. Information about legal research is available in the forms and guides linked below.)

GUARDIAN AD LITEM

A guardian ad litem (GAL) is someone appointed by the court who serves as an advocate for a minor in divorce or the end of a nonmarital relationship. A GAL may be appointed if the child's parents are involved in a contentious custody dispute and the court wants clarity on the child's best interests from a third party. Either party involved in a divorce also may request a GAL.

The GAL will assess the child's situation and provide an independent recommendation regarding what is in the child's best interest in terms of physical or legal custody, parenting plans, living arrangements with siblings or extended family, child support or other aspects of the child's life.

In order to serve as a GAL in North Dakota, you must be an attorney who has completed training specific to the GAL role. In addition, GALs must complete continuing education every three years to remain eligible to serve in that capacity.

RECUSAL OF A JUDGE

Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceedings;
- (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:

- (i) is a party to the proceeding, or an officer, director or trustee of a party;
- (ii) is acting as a lawyer in the proceeding;
- (iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;
- (iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

Commentary:

1. The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification
2. (2) A judge shall keep informed about the judge's personal and fiduciary* economic interests,* and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.
3. F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

RULES OF CONDUCT FOR JUDGES

<https://www.ndcourts.gov/legal-resources/rules/ndcodejudconduct/canon-3-4>

<https://www.legis.nd.gov/cencode/t27c23.pdf>

<https://casetext.com/rule/north-dakota-court-rules/north-dakota-code-of-judicial-conduct>

ATTORNEY ETHICS

https://www.sband.org/page/ethics_opinions

<https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/>

<https://www.ncbar.gov/rules/>

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Former Family Law attorney with almost 20 years in Family Court. Providing services geared specifically towards the self-represented.

- ✓ Family Court Strategist,
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GO TO:

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