

CASE NO. A10-1794

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*State of Minnesota*  
*In Court of Appeals*

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In Re the Marriage of:

Elizabeth Ann Murtha Boland  
a/k/a Elizabeth Ann Boland,

*Petitioner/Appellant,*

and

Thomas Francis Murtha, IV  
a/k/a Thomas Francis Murtha,

*Respondent.*

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**APPELLANT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF LEGAL ISSUES ..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS..... 4

ARGUMENT ..... 10

    I.    The district court abused its discretion in denying Appellant’s motion to restrict Respondent’s parenting time, without granting her an evidentiary hearing, when she clearly established a *prima facie* showing of endangerment..... 10

CONCLUSION..... 23

INDEX TO APPELLANT’S APPENDIX ..... 25

**TABLE OF AUTHORITIES**

**MINNESOTA STATUTES**

Minn. Stat. § 518,175, subd. 1 ..... 14  
Minn. Stat. § 518.175, subd. 5. .... 13-14

**MINNESOTA CASES PUBLISHED**

*Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001) (citations omitted),  
*review denied* (Minn. Oct. 24, 2001) ..... 10, 13  
*Bryant v. Bryant*, 119 N.W.2d 714, 717 (Minn. 1963)..... 13  
*Clark v. Bullard*, 396 N.W.2d 41, 45 (Minn. App. 1986) ..... 13  
*Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. App. 1997)..... 12, 13, 15, 18, 20, 23  
*Griese v. Kamp*, 666 N.W.2d 404 (Minn. App. 2003), *review denied* (Minn. Sept.  
24, 2003) ..... 11, 20  
*Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991)..... 12, 14, 22  
*Heinlein v. Heinlein*, 407 N.W.2d 138, 140 (Minn. App. 1987) ..... 14  
*Johnson v. Lundell*, 361 N.W.2d 125, 127 (Minn. App. 1985) ..... 13  
*Larson v. Larson*, 400 N.W.2d 379, 381-82 (Minn App. 1987)..... 12, 22  
*Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723-24 (Minn. App. 1990) ..... 11, 13-14  
*Lutzi v. Lutzi*, 485 N.W.2d 311, 316 (Minn. App. 1992)..... 12, 21, 22  
*Myhervold v. Myhervold*, 271 N.W.2d 837 (Minn. 1978) ..... 13  
*Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 723-24 (Minn. 1981) ..... 11, 12  
*Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied*  
(Minn. June 21, 1989). ..... 11  
*Ross v. Ross*, 477 N.W.2d 753, 777 (Minn. App. 1997)..... 11, 14, 18, 22  
*Simonson v. Simonson*, 292 N.W.2d 12, 13 (Minn. App. 1980)..... 14  
*Taflin v. Taflin*, 366 N.W.2d 315, 320 (Minn. App. 1985)..... 12

**MINNESOTA CASES UNPUBLISHED**

*Hoffman v. LaMar*, A03-2059, Minnesota Court of Appeal Unpublished Opinion,  
filed July 13, 2004..... 21

**STATEMENT OF ISSUE**

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO RESTRICT RESPONDENT'S PARENTING TIME, WITHOUT FIRST GRANTING HER AN EVIDENTARY HEARING, WHEN SHE ESTABLISHED A *PRIMA FACIE* SHOWING OF ENDANGERMENT?

## STATEMENT OF THE CASE

The parties were divorced in January 2005. *See Findings of Fact, Conclusions of Law and Order dated August 11, 2010, Finding of Fact #1, Appellant's Appendix 3 (herein after "AA")*. The parties are the parents of the minor child Katherine Murtha ("Katie"). *Id.* Appellant-Mother has sole physical custody of the Katie, subject to Respondent-Father's parenting time. *Id.*

In May 2010, Appellant-Mother, served and filed a motion with the district court, which included a request that the court restrict the Respondent's parenting time with the minor child, and order an evidentiary hearing. *See Appellant-Petitioner's Notice of Motion and Motion (AA-11)*. Mother's motion clearly alleged that unrestricted parenting time between the Respondent and minor child had and was likely to continue to endanger the child's physical and/or emotional health or impair her emotional development. *See Affidavit of Elizabeth Ann Boland (AA-14-41)*. Appellant's motion was supported not only by her own affidavit, but four other supporting affidavits, including an affidavit from the child's own therapist (*AA-44-55*).

Respondent-Father served and filed a responsive motion, which included his affidavit, and other supporting affidavits (*AA-76-109*). Respondent denied the allegations detailed by Appellant-Mother in her motion. *Id.*

The district court denied Appellant-Mother's motion to restrict Respondent-Father's parenting time, without granting her the opportunity to have an evidentiary hearing. *See Order (AA-10)*. The district court concluded that Petitioner had "failed to make a *prima facie* showing of serious endangerment such as to necessitate an evidentiary hearing on her motion to restrict Respondent's parenting time." *See Order, Conclusion of Law #15 (AA-10)*. The district court pointed out that it had read and considered all the motion papers, and that each allegation made by the Petitioner had been "denied and refuted by Respondent." *See Finding of Fact #11 (AA-5)*.

## STATEMENT OF FACTS

The parties were divorced pursuant to a Judgment and Decree filed January 11, 2005. *See Findings of Fact #1 (AA-3)*. Petitioner, Ms. Elizabeth Boland (hereinafter “Appellant-Mother”), was awarded sole physical custody of the parties’ minor daughter Katherine (DOB, October 25, 2000), and Respondent, Mr. Thomas Murtha (hereinafter Respondent-Father), was awarded parenting time with the minor child “as agreed by the parties \* \* \*”. *See Petitioner’s Memorandum of Law (AA-56); see also Respondent’s Responsive Affidavit (AA-79)*. Following an incident, disputed by Respondent-Father, in which the minor child, then four years old, reported that she shared a bed and slept with Respondent and his then girlfriend, and because Mother believed that valid health, welfare and safety concerns existed, she did not allow Respondent to have overnight parenting time with the minor child, but allowed him to have parenting time during a single day or afternoon approximately two to three times per month. *(AA-56)*.

The parties’ Judgment and Decree of Dissolution was amended by an order dated April 6, 2009, and Respondent was awarded parenting time every other weekend, designated holidays, and summer vacation time. *See Findings of Fact #1 (AA-3); Respondent’s Affidavit (AA-80)*.

Approximately 14 months later, on May 25, 2010, Appellant-Mother moved the district court for the appointment of a parenting time expediter to resolve

parenting time disputes between the parties, and to conduct a parenting time investigation and make recommendations related to Respondent Father's ongoing parenting time. *See Appellant's Notice of Motion and Motion (AA-11)*. Appellant-Mother further requested that the district court modify and restrict Respondent's parenting time with the minor child, asserting that parenting time between Respondent-Father and the minor child had and was likely to continue endangering the child's physical and/or emotional health or impair the child's emotional development. *See Findings of Fact #3 (AA-3); see also Notice of Motion (AA-12)*. Appellant-Mother specifically requested that the district court conduct an evidentiary hearing on the issue of modification of Respondent's parenting time. *See Finding of Fact #3 (AA-3)*.

In support of her motion, Appellant-Mother submitted a twelve-page affidavit, with several attachments. *See Affidavit of Elizabeth Ann Boland (AA-14-41)*. Appellant-Mother detailed in her affidavit that since the entry of the April 6, 2009 order granting Respondent overnight and extended parenting time that the minor child (hereinafter "Katie") had become "extremely difficult and stressed". *Id.* Mother detailed how as her weekend visits with Father approached, Katie would become agitated, tearful and distressed, complain that she didn't want to go with her Father, threaten to run away and even asked God in her bedtime prayers not to make her have to go with her Father. *Id.* Mother further detailed that on

Thursday nights prior to her weekend with Father that Katie often sobs uncontrollably, pleads with her to help her, and tells her that it is her fault that Katie has to go with her Father. *See Id. at 15*. Katie has reported that she cannot focus at school because she dreads going to her Father's for weekend parenting time. *Id.* Katie has reported to her Mother that she is "scared" of her Father because he gets angry at her, dismisses her feeling and makes her feel stupid. *Id. 15-16*. Katie reports that she does not feel "safe or secure" spending time with her Father and step-Mother "Janilyn." (AA-15). Katie states that her Father and step-mother gang-up on her and belittle her, and she has come to view her Father as "mean" and her stepmother with she previously seemed to have a good relationship as "harsh". (AA-57) Katie reported having to weigh her words carefully at Father's home for fear of being called a "liar", criticized, belittled or scolded. (AA-17). Katie told her Mother she hated staying at the Respondent's Aitkin County lake home, because she is afraid of insects and rodents in the home, and that it smells bad and has holes in the walls. (AA-17).

Appellant-Mother asserted Respondent-Father exposed Katie to cats and ragweed, despite being warned by the child's physician that she should not be exposed directly or indirectly to these things because of her asthma condition. *See Findings of Fact #3, Appellant's Memorandum of Law and Exhibits I, J, K, L (AA-3,59,64-68)*.

Even more troubling, Mother argued to the district court Katie had been endangered in Father's care when he: (a) left Katie alone in a public restroom for an extended period of time while she was sick and vomiting on the floor while he went shopping; (b) left Katie alone sleeping in a car while he went in and ate a restaurant meal. *See Findings of Fact #6; see also affidavits of Erin P. McPherson; Theodora Metiva and Jennifer Cook (AA-4,44-55).*

In support of her motion, Mother submitted an affidavit from Erin P. McPherson, who is the minor child's therapist. (AA-44-47). Ms. McPherson detailed that she had been acting as the child's therapist since August 2009, related to Katie's resistance to go to court-ordered parenting time with her Father. (AA-44). Ms. McPherson outlined how when discussions with Katie turned to her Father, that she: "shows marked anxiety", and dreaded upcoming visits with her Father so much that she shut down and at times refused to talk about upcoming visits with her father. *Id.*

Ms. McPherson states that some of the things that Katie has reported to her are at the very least neglectful, if not dangerous situations for Katie. (AA-45). Katie has reported to Ms. McPherson having become very ill and having a serious extreme allergic reaction because she was exposed to cats during her parenting time with Father. *Id.* Katie also told Ms. McPherson about her Father taking her to a grocery store in another city when she was sick and leaving her alone in the

bathroom. *Id.* Katie reported lying on the floor of the bathroom and throwing up for “lengthy period of time” before her father returned. *Id.* Katie further told her that she had been left alone by her Father on another occasion when she woke-up alone in his car not knowing where her father was, and later learned that he had gone into a restaurant and ate a meal. *Id.*

Ms. McPherson further detailed having concerns about Katie’s emotional safety and welfare while having parenting time with Father because Father and his Wife often got mad at her, and repeatedly called names like “stupid” “spoiled” and “a liar”. (AA-46). Ms. McPherson concluded that Katie feels “unsafe, unloved and insecure with her father” and that because her health needs and wishes are not taken into consideration continued parenting time without changes could endanger Katie’s emotional health or impair her emotional development. (AA-46-47). Ms. McPherson clearly stated in her affidavit that there was nothing in Katie’s demeanor that lead her to believe that she was making anything up or seeking attention. (AA-44)

Appellant-Mother also submitted supporting affidavits from three other individuals, namely: (a) Teodora Mateva; (b) John Storkamp; and (c) Jennifer Cook. (AA 48-55) The affidavit of Ms. Mateva clearly detailed how Katie reported to her that she had been left alone in a public bathroom when she was sick and vomiting while her Father went grocery shopping, and that she was scared

when other people were coming in-and-out of the bathroom while she was lying on the floor. (AA-48). Katie also reported to Ms. Mateva that on another occasion she woke up in the back seat of her Father's car in a parking lot and didn't know where he was because he and his wife were in the gas station and had left her alone. *Id.* Katie reported to Ms. Mateva that she does not trust her Father and is "scared" of him. *Id. at 49.* Ms. Jennifer Cook in her affidavit also detailed how Katie reported to her that she had been sick and left alone by her Father in a grocery store bathroom for "what seemed like five hours" while he went shopping, and that he also left her alone in a car at night while he was in a gas station. (AA-54).

In her motion, Appellant-Mother requested that the court restrict Respondent's parenting time to shorter day visits, and suspend overnight and extended parenting visits. (AA-21).

Respondent-Father submitted a responsive motion, affidavit and various other affidavits in support of his request that the court deny Mother's request to restrict or modify his parenting time. (AA-76-114). Respondent in his motion papers essentially denied all the allegations alleged by the Mother in her motion papers.

A hearing was held on the parties' respective motions and both parties waived the right to make oral arguments on their motions and instead agreed that

the court could decide the motions based on the parties' affidavits and written arguments. (AA-2)

The district court issued an order dated August 11, 2010. (AA-1). Although Appellant-Mother had made a *prima facie* showing of physical and emotional endangerment, the court found that the Respondent-Father had "denied and refuted" all of the allegations. *See Findings of Fact # 11. (AA 8-9)* The district court gave "little weight" to the affidavit of Katie's therapist because she allegedly had made no effort to contact the Father regarding the child's allegations. *See Finding of Fact #14 (AA-9)*. The district court erroneously concluded that Mother had failed to make a *prima facie* showing of serious endangerment and therefore was not entitled to an evidentiary hearing on her motion to restrict parenting time.

### ARGUMENT

**I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO RESTRICT RESPONDENT'S PARENTING TIME, WITHOUT FIRST GRANTING HER AN EVIDENTIARY HEARING, WHEN SHE ESTABLISHED A *PRIMA FACIE* SHOWING OF ENDANGERMENT.**

Generally, the district court is granted broad discretion to determine what is in the best interests of the child when it comes to [parenting time] decisions and the Court of Appeals will not overturn its determination absent "an abuse of discretion." *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001) (citations omitted), *review denied* (Minn. Oct. 24, 2001).

However, in *Griese v. Kamp*, 666 N.W.2d 404 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003), the Minnesota Court of Appeals held that when a district court's decision relies upon affidavits that are available in the same form to an appellate court, the Court of Appeals reviews the decision *de novo*. *See also Ross v. Ross*, 477 N.W.2d 753, 755-56 (Minn. App. 1997). Since the Court of Appeals in this matter is called on to read and interpret the same affidavits that were available to the district court in determining whether the Appellant made a *prima facie* showing of endangerment which would entitle her to an evidentiary hearing, the appropriate standard of review in this matter should be *de novo*.

Pursuant to *Nice-Peterson v. Nice-Peterson* and its progeny, the district court must determine whether the moving party has established a *prima facie* case by alleging facts that, if true, would provide sufficient grounds for modification. 310 N.W.2d 471, 472 (Minn. 1981). For purposes of this determination, the court must accept the facts in the moving party's affidavits as true, and the allegations do not need independent substantiation. *See Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723-24 (Minn. App. 1990) (reversing where district court dismissed on ground the moving party's abuse allegations were not corroborated).

If the moving party's affidavits do not provide sufficient grounds for modification, the district court should deny an evidentiary hearing. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June

21, 1989). Conversely, if sufficient evidence warranting consideration of a modification order is asserted by the moving party, the court must order an evidentiary hearing to allow for introduction of evidence, cross-examination of witnesses and a determination of the truth of the allegations. *Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. App. 1997); *Taflin v. Taflin*, 366 N.W.2d 315, 320 (Minn. App. 1985). Additionally, when some fact dispute exists related to whether or not there is present endangerment of the child, the district court should schedule an evidentiary hearing, as the purpose of an evidentiary hearing is to resolve disputes where contradictory evidence exists. *Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991); *see Larson v. Larson*, 400 N.W.2d 379, 381-82 (Minn App. 1987) (holding that contradictory, mitigating affidavits justify an evidentiary hearing).

In deciding whether a moving party has made a *prima facie* showing of endangerment, a district court is to disregard any directly contrary affidavits and may only use an opposing party's contrary affidavits to "explain the circumstances surrounding the accusations." *Geibe*, 571 N.W.2d at 779.

In *Lutzi v. Lutzi*, 485 N.W.2d 311, 316 (Minn. App. 1992), the Court of Appeals concluded that the *Nice-Petersen* doctrine not only governs motions to modify custody, but also applies to motions related to substantial changes of parenting time, stating that "substantial restrictions of [parenting time] [are] treated

by statute with the same seriousness as changes of custody.” Therefore, motions for a substantial modification of parenting time require an evidentiary hearing, when the moving party makes a *prima facie* showing that parenting time is likely to endanger the child’s physical or emotional health or impair the child’s emotional development. *Braith*, 632 N.W.2d at 716; *see also* Minn. Stat. § 518.175, subd. 5.

Factors constituting a significant change in circumstances are determined on a case-by-case basis, therefore, findings of endangerment must be based on the particular facts of each case. *See Myhervold v. Myhervold*, 271 N.W.2d 837 (Minn. 1978). Endangerment has been defined as a “significant degree of danger”. *Ross*, 477 N.W.2d at 756. Allegations of abuse, physical or emotional, have both been held to endanger a child’s well-being. *Lilleboe*, 453 N.W.2d at 724. Fear of the custodial parent and spouse is also a recognized sign of present endangerment. *See Clark v. Bullard*, 396 N.W.2d 41, 45 (Minn. App. 1986); *Johnson v. Lundell*, 361 N.W.2d 125, 127 (Minn. App. 1985). Behavioral problems of a child are another recognized indication of endangerment to a child’s well-being. *See Clark*, 396 N.W.2d at 44.

In *Geibe*, 571 N.W.2d at 774, the Court of Appeals held a child’s preference sufficient to warrant a hearing even though it may not be determinative in modifying custody, and in *Bryant v. Bryant*, 119 N.W.2d 714, 717 (Minn. 1963), the visitation wishes of the child may be considered by the district court.

District courts have been cautioned to pay special attention to cases alleging present endangerment, and have been strongly encouraged by appellate courts to conduct an evidentiary hearing in such cases in order to protect the interests of the child. *Id*; see also *Ross*, 477 N.W.2d at 756 (evidentiary hearings strongly encouraged where allegations are present of endangerment to child's health or emotional well-being).

In *Lilleboe*, 453 N.W.2d at 724, the Court of Appeals held that an evidentiary hearing was required to provide for the best interests of the child where allegations of abuse, fear of the custodial parent, changes in the children's attitude and behavior proved to be sufficient facts which, if true, may endanger the children's physical and emotional health or development. *Id*.

In *Harkema*, 474 N.W.2d at 10, the Court of Appeals reversed a district court's decision dismissing a motion to modify child custody without an evidentiary hearing where the affidavit submitted facts which, if true, would constitute emotional endangerment. In *Harkema*, the moving party's affidavit had alleged that her two boys were emotionally abused by being yelled at by stepmother and told they were "stupid and dumb".

When a child's emotional or physical health is in danger, a court may place restrictions on parenting time. Minn. Stat. § 518.175, subd. 5; *Heinlein v. Heinlein*, 407 N.W.2d 138, 140 (Minn. App. 1987); see *Simonson v. Simonson*,

292 N.W.2d 12, 13 (Minn. App. 1980). If a parent makes specific allegations that parenting time by the other parent places the child in danger of harm, the court shall hold a hearing “at the earliest possible time” to determine the need to modify the order granting parenting time. Minn. Stat. § 518.175, subd. 1. Those restrictions that a court may place on parenting time include limiting the time, place, duration, or supervision of parenting time or may deny parenting time entirely. *Id.*

Here, the district court had before it Appellant-Mother’s affidavit and attachments, four supporting affidavits and a memorandum of law. In determining Appellant Mother’s motion, the district court should have accepted her affidavits as true. *See Geibe*, 571 N.W.2d at 777 (a district court must accept the moving party’s affidavits as true).

Mother’s motion papers, and supporting affidavits, detailed that Katie: (a) was afraid of her Father, didn’t trust him, and believed that she was not safe with him; (b) viewed her Father and stepmother as ganging-up on her, and had come to view her father as “mean” and her step-mother as “harsh”; (c) did not want to exercise parenting time with her father; (d) was agitated, tearful and distressed prior to parenting time with her father; (e) threatened to run away and asked God in her prayers that she not to have to go to parenting time with her Father; (f) felt her Father refused to listen to or address her fears; (g) reported having to weigh her

words carefully at Father's during parenting time for fear of being called a "liar", criticized, belittled or scolded; (h) was carelessly exposed to cats and ragweed during parenting time with Father, despite being warned by the child's physician not to expose her directly or indirectly to these things because she has an asthma condition; (i) hated spending time at Father's lake home because she was afraid of insects and rodents, and because the house smelled bad and had holes in the walls; (j) was left lying on the floor alone in a public restroom for an extended period of time while she was sick and vomiting while Father went shopping; and (k) was left alone sleeping in a car while her Father went in and ate a restaurant meal. Appellant-Mother clearly detailed how Respondent Father-had failed to nurture Katie, and did not provide for her safety, comfort and security during his parenting time with her, as well as thoughtlessly exposed her to the risk of physical harm. *See Affidavit of Appellant (AA-14-43); see also affidavits of Erin P. McPherson; Theodora Metiva and Jennifer Cook (AA-4,44-55); see also Appellant's Memorandum of Law (AA-56-75).*

In addition to Appellant Mother's affidavit, the district court had before it supporting affidavits of four other individuals, including the Katie's own therapist, Erin P. McPherson. Specifically, Ms. McPherson reported that Katie: (a) showed marked anxiety, and dreaded upcoming visits with her Father so much that she shut down and at times refused to talk about upcoming visits; (b) reported becoming

very ill and having a very extreme allergic reaction because she was exposed to cats while with her father; (c) reported being taken by Father to a grocery store in another city when she was sick, and left her alone in the bathroom, lying on the floor and throwing up for a “lengthy period of time” before her father returned; and (d) stated on another occasion when she was with her Father, she woke up alone in car not knowing where her father was, and later learned that he went into a restaurant to eat a meal. (AA-44-47). Ms. McPherson clearly detailed having concerns about Katie’s emotional safety and welfare while having parenting time with Father because he and his Wife often get mad at her, and repeatedly called her names like “stupid” “spoiled” and “a liar”. (AA-46). Ms. McPherson concluded that some of the things that Katie has reported to her were at the very least “neglectful, if not dangerous situations for Katie.” (AA-45). Ms. McPherson concluded that Katie feels “unsafe, unloved and insecure with her father” because her health needs and wishes are not taken into consideration and that continued parenting time without changes could endanger Katie’s emotional health or impair her emotional development. (AA-46-47). Ms. McPherson clearly stated in her affidavit that there was nothing in Katie’s demeanor that led her to believe that she was making anything up or seeking attention. (AA-44)

Taken as true, the allegations in Appellant-Mother’s affidavit alone were sufficient to establish a *prima facie* case that unrestricted visitation in its current

form endangered the minor child's physical and emotional health or impaired her emotional development, which warranted the district court allowing her an evidentiary hearing. However, Mother submitted additional affidavits which were before the court, including the affidavit of the minor child's own therapist, which clearly demonstrated that parenting time in its present form endangers the minor child's physical and emotional health or impairs her emotional development. The endangerment detailed in Appellant Mother's affidavits and supporting documentation was significant, and the district court should have granted her request for an evidentiary hearing. *See Geibe*, 571 N.W.2d at 777; *see also Ross*, 477 N.W.2d at 756 (hearings are strongly encouraged where allegations are made of present endangerment to a child's health or emotional well being).

However, instead of accepting the facts in Appellant Mother's affidavits and supporting documents as being true and ordering an evidentiary hearing, the district court went though some of the allegations of endangerment made by Appellant in her motion papers, and noted that the Respondent denied the allegations. In Findings of Fact #4, the court found that Respondent denied any direct exposure to cats, and denied that Katie exhibited any asthmatic symptoms on the times alleged. (AA-3). In Findings of Fact #6, the court found that Respondent denied leaving the minor child alone in a restroom while sick or alone in the car while he ate a restaurant meal. (AA-4). In Findings of Fact #7, the court

found that Respondent alleged that Katie did not become agitated and distressed regarding parenting time, and he described Katie as being an entirely different child who was happy and loving. (AA-4). The district court further found that Respondent contradicted the Petitioner's claims that Katie hates his lake home, and is afraid to go there. *See* Findings of Fact #8 (AA-8). Moreover, the district court found that all of the allegations raised by Appellant have been "denied and refuted" by Respondent. (AA-5).

The district court instead of taking what Appellant-Mother detailed in her affidavit as true, incorrectly concluded that her allegations were overreactions consistent with her acknowledged diagnosis with stress disorder. *See* Conclusion of Law #9 (AA-9). The district court, borrowing from medical jargon, and solely based upon Appellant's affidavit, found in Finding of Fact #10 that "Petitioner presents as being hyper-vigilant about Katie's asthma and rather extraordinarily over-reactive \* \* \*" The district court also notes that the allegations Mother makes are similar to those made prior to the court's order. However, rather than concluding that allegations existed that Respondent continued to engage in a pattern of endangerment, the court found that all allegations had been denied or refuted. It is noteworthy that, aside from the January 2005 default dissolution hearing, and district court has never heard Mother testify or had a chance to assess her credibility. Just because Mother has a stress disorder and is on Social Security

Disability does not mean that the district court should not accept the statements outlined in her affidavit as true and allow her the opportunity of an evidentiary hearing. Moreover, the Mother's motion is supported by other supporting affidavits, including the minor child's therapist.

Additionally, instead of taking what the child's therapist outlined in her affidavit as true, the district court instead admittedly gave "little weight" to her affidavit even though it outlined serious allegations of physical and emotional endangerment, because the child's therapist did not receive any input from the Respondent. Such a determination by the court, related to the weight to give the therapist's affidavit and the allegations contained therein, was premature when the court had not even conducted an evidentiary hearing and weighed credibility and the evidence.

*Geibe* provides that a district court is to disregard any directly contrary evidence and may only use an opposing party's affidavit to "explain the circumstances surrounding the accusations." *See* 571 N.W.2d at 779. Two cases before the Court of Appeals have dealt with similar issues concerning how a district court should treat contradictory evidence. In *Griese*, 666 N.W.2d at 404, the Court of Appeals reversed district court's dismissal of a motion for modification of custody without an evidentiary hearing. The Court of Appeals held that the district court erred by denying an evidentiary hearing because

conflicting affidavits demonstrated that an evidentiary hearing [was] needed to ascertain whether a child was in a dangerous situation. In *Hoffman v. LaMar*, (A03-2059), an *unpublished opinion* filed July 13, 2004, the Court of Appeals reversed and remanded a motion to modify custody, because the record showed that appellant established a *prima facie* case of endangerment. In *Hoffman*, the district court had dismissed the motion because although the moving party's affidavit alleged facts of endangerment, a social worker concluded that physical abuse could not be proven by a preponderance of the evidence.

The use of the word "refuted" by the district court is telling and demonstrates that the district court was weighing evidence in this case, instead of treating the statements in Mother's motion papers as being true. The use of the term "refute" suggests that the Respondent had produced some evidence "proving" the allegations made by the Appellant were "wrong by argument or evidence," or showing them to be "false or erroneous." See definition of word "refute", Webster's Collegiate Dictionary, Eleventh Edition, 2004. Respondent Father's serial denials do not "refute" anything. If the district court's findings are viewed in their entirety, almost all of the court's findings are either based upon unwarranted conclusions drawn from disputed facts for which the court had no basis for assessing credibility, or rest on conclusions that in a due process hearing would require expert medical or psychological testimony.

If the allegations that Appellant-Mother's affidavits and submissions to the Court are viewed as true, as the law requires, Mother made a *prima facie* showing that the current parenting time arrangement, without restrictions, endangered Katie's emotional and physical health or impaired her emotional development.

Although Respondent submitted affidavits denying the allegations in Mother's affidavit, the district court should have disregarded any contrary statements in his submissions, except those that explained the circumstances surrounding the accusations. *See Geibe*, 571 N.W.2d at 779.

The analysis of the court should have focused on the allegations in Mother's affidavit and whether those allegations, if true, established a *prima facie* case. *See Lutzi*, 485 N.W.2d at 316. Instead, the district court viewed the Father's affidavits denying the allegations, as essentially nullifying the allegations made by the Mother, which should have been treated by the court as true.

The district court ruling is directly contrary to the rule that the district court must accept as true the moving party's affidavits, and must disregard any affidavits contrary to the moving party's affidavits. Where contradictory evidence existed related to whether the present endangerment occurred, the district court should schedule an evidentiary hearing. *See Ross*, 477 N.W.2d at 756 (citing *Harkema*, 474 N.W.2d at 14) ("hearings are strongly encouraged where allegations are made of present endangerment to a child's health or emotional well being"). In the case

the hand, the parties have clearly submitted clearly contradictory evidence. Therefore, the district court should have granted Appellant Mother's request for an evidentiary hearing.

### CONCLUSION

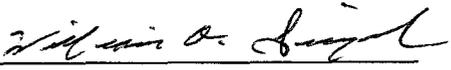
If the Court of Appeals reviews this matter "*de novo*" and examines the parties' affidavits and submissions to the district court, it will see that the Appellant-Mother clearly made a *prima facie* showing of endangerment and entitled her to an evidentiary hearing.

In the alternative, if the Court of Appeals applies an abuse of discretion standard, then the district court clearly abused its discretion by failing to accept the allegations in Appellant Mother's affidavit as true, and denying her request for an evidentiary hearing even though she established a *prima facie* case of endangerment.

Appellant Mother respectfully requests that the Court of Appeals reverse the district court's order and remand the matter for an evidentiary hearing.

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