

INFORMATION ABOUT MODIFYING YOUR DIVORCE DECREE

Jurisdiction

The Texas court that granted a divorce retains the power to modify the parts of the decree relating to children until a child is out of high school or living on his own. If, however, the children have lived for at least six months in another county in Texas, the case must be moved to that county upon any party's request.

If the children whose parents divorce in Texas have lived for at least six months in a different state, any suit to change custody will have to be tried in the state in which the children live. The same rule applies to parents who were divorced in another state and whose children have lived in Texas for at least six months. This rule is part of the Uniform Child Custody Jurisdiction Act, which has been adopted by almost every state in the nation, including Texas. Cases dealing with only support and visitation issues may be kept in the original court if one parent continues to live in the place where the divorce was granted, even if the children have moved out of state.

Persons Who May Bring Suits for Modification

Any person who has rights to possess a child under a court order may ask for a modification. This will almost always include both of the child's parents and n one else. In some limited cases, other people may be allowed to bring a suit to modify a prior order. Examples are listed below.

Grandparents

A grandparent may start a suit asking for Managing Conservatorship of a child only if the grandparent can prove that the current court order puts the grandchild at risk of serious physical harm. Grandparents may ask the court to order specific times for them to visit a grandchild. Grandparents can start a suit to get only visitation rights if they can prove that:

1. The parent who is the child of the grandparent has been in jail, prison, or has been found to be incompetent; or
2. The parents of the child are divorced or have been living apart for at least three months; or
3. The child has been abused or neglected by a parent; or
4. The child has been found to be delinquent; or

5. The grandparent is the parent of a person whose parental rights have been terminated (unless the child has been adopted by someone other than a step-parent); or
6. The child has lived with the grandparent for at least six months out of the previous 24 months.

Persons with Whom the Child has Lived for Six Months

If the conservators under a court order have allowed a child to live with a person who is not a conservator for six months or more, the person who has cared for the child may ask a court to modify a prior court order to give him or her Managing Conservatorship. This would include a step-parent in situation where the child's parent dies.

Proof Requirements

In each suit to modify a divorce decree the court will require the person who brings the suit (called the "movant") to prove certain facts. If the Movant cannot do this, the court will order that the divorce decree not change. Suits asking to change various parts of the decree require a Movant to prove different elements, but all elements must be proved by credible evidence presented through witnesses and documents. Generally, affidavits are not accepted by a court as evidence.

Changed Circumstances

Any time a person asks for changes in a decree, he or she must prove that the circumstances of one or both of the parents, or of the child, have materially and substantially changed since the time of the prior order. Whether a change is "material and substantial" is decided on a case by case basis. Courts have ruled that anything from the increased costs of older children to a move by a parent and the children across the county are material and substantial change.

Elements Required for Modifying Specific Provisions

A suit to modify a prior order will require the Movant to prove different elements depending on the part of the divorce decree he or she is trying to change. The elements a Movant will be required to prove in the most frequently sought modifications are listed below.

Motions to Modify Sole Managing Conservatorship:

A Possessory Conservator may believe that the child would be better off living with him or her than with the parent who was named Managing Conservator at the time of the original court order. In this event, the Possessory Conservator would have to prove that:

- 1) the circumstances of one or both of the parents or the children have materially and substantially changed since the rendition of the prior order;
- 2) retaining the current Managing Conservator of the child would be injurious to the child; and
- 3) appointing the Movant as the Managing Conservator would be a positive improvement for the child.

If a parent who is a Sole Managing Conservator has allowed a child to reside for more than six months with the other parent or another person, that can also be grounds for changing Sole Managing Conservatorship.

If a suit is brought within a year of a prior custody order, the Movant must also prove that the conservatorship as set out in the current order presents a serious threat to the physical safety or emotional welfare of the child. Unless the Managing Conservator has left the child with the Movant for six months or more, a court must find a threat to the child before the Movant will even get a hearing.

Motions to Change Joint Managing Conservatorship to Sole Managing Conservatorship:

Courts view a change from Joint Managing Conservators to Sole Managing Conservator/Possessory Conservator as a major change for a child. A Joint Managing Conservator seeking to be named Sole Managing Conservator will have to prove that-

- 1) the welfare of the child is a matter of immediate and serious concern; or
- 2) there has been a substantial and unexcused violation of the terms and conditions established in the existing Conservatorship decree; or
- 3) the circumstances of the child or one or both of the Joint Managing Conservators have so materially and substantially changed since the

rendition of the decree that it has become unworkable or inappropriate under existing circumstances; and

- 4) the appointment of a Sole Managing Conservator would be a positive improvement for and in the best interest of the child.

Motions to Change Sole Managing Conservatorship to Joint Managing Conservators:

If a Possessory Conservator wishes to be named Joint Managing Conservator of a child, he or she must prove that:

- 1) the circumstances of one or both of the parents or the children have materially and substantially changed since the rendition of the prior order; and
- 2) retention of the Sole Managing Conservatorship would be detrimental to the child; and
- 3) Joint Managing Conservatorship between the parents would be a positive improvement for a child.

It is rare to see a contested case in which a Movant is able to change his or her status from Possessory Conservator to Joint Managing Conservator. Most judges believe that Joint Managing Conservators must have a high level of cooperation. For this reason, courts are not likely to appoint parents as Joint Managing Conservators without their agreement.

Motions to Change Visitation:

A motion to change the terms and conditions of visitation can occur within a Joint Managing Conservatorship or a Sole Managing Conservatorship. To win such a modification, the Movant must prove the following:

- 1) the circumstances of one or both of the parents or the children have materially and substantially changed since the rendition of the prior order; or
- 2) the order or portion of the decree to be modified has become unworkable or inappropriate under existing circumstances; or
- 3) one of the parents has moved without giving the required 60 days' notice of the move to the other parent.

A change in the terms and conditions of visitation will usually revise the schedule of time a child spends with each parent. In some unusual circumstances, however, such a modification could deal only with non-schedule issues such as requiring a parent's time with a child to be supervised.

A modification of the schedule of visits is almost always required when one parent moves more than about 50 miles away from the child, and this is the most common time that a suit to modify visitation occurs. A court will also decide who should pay any increased costs relating to visits, including transportation costs like air fare or bus tickets for the child or hotel accommodations for a parent who visits a child from out of town.

Recent changes to the Texas Family Code now allow parents with weekend visitation to elect to extend their periods of weekend possession so that they begin at the time school ends on Friday and end at the time school resumes the following Monday. If such a provision is not in the prior order, the election may be made at the time other visitation provisions are modified.

Motions to Change the Relative Rights and Powers of Conservators:

Often, Joint Managing Conservators will discover that a joint right -- for instance a right to determine where a child attends school -- is unworkable because they cannot agree. That would be the appropriate time for one of the Joint Managing Conservators to ask the court to modify the parents' rights, privileges, powers and duties. Similarly, if a Possessory Conservator can prove that there is a need for the child to receive psychological treatment and the Managing Conservator refuses to take the child to a therapist, the Possessory Conservator might ask a court to modify a prior order to give him or her the right to make decisions relating to the child's mental health.

A Conservator who wants a change in the relative rights, privileges, powers and duties of the Conservators must prove that:

- 1) the circumstances of one or both of the parents or the children have materially and substantially changed since the rendition of the prior order; or
- 2) the decree or a portion of the decree to be modified has become unworkable or inappropriate under existing circumstances.

A Joint Managing Conservator who wants to change the relative rights and duties of the parents must also prove that such a change would be a positive improvement for and in the best interest of the child.

Sometimes a modification of the rights and duties as divided in a Joint Managing Conservatorship can have the same effect as a change in custody. For instance, a Joint Managing Conservatorship can be set up so that one parent maintains the child's primary residence and has the child with him or her at all times except when the other parent exercises standard visitation rights. If a parent files a suit asking to be given the right to move the child 500 miles away, it means a major change in the lives of the child and the parents, even though no formal request for change of custody has been filed.

Motions to Modify Child Support:

The Movant must only show that the circumstances of one or both of the parents or the child have materially and substantially changed since the prior order to change the amount of child support. Support modifications may not be entered for amounts that were owed prior to the filing of a request for an increase or decrease. A parent who had custody of a child during a period for which he or she owed support may use that fact as a defense against a motion for contempt for nonpayment of child support during that period.

The Texas legislature has enacted guidelines setting out the amounts of child support that should be paid based on the paying parent's net income from all sources. A new spouse's income should not be considered in setting child support. Orders that were entered before there were child support guidelines may be modified so that the amount ordered is consistent with the guidelines. The Family Code is clear, that an increase in the needs, standard of living, or lifestyle of the person who receives the support is not a reason to raise the paying parent's child support obligation. However, the courts will rule that if the paying parent's lifestyle has improved, the children should benefit from his or her ability to pay more.

A court may set support in an amount that is different than what the guidelines call for based on factors including whether the paying parent is putting a child through college, the expense related to visitation and the income of the receiving parent.

A parent who pays support is also expected to pay the child's health insurance premium and part of the uncovered medical expenses for the child. Given the rising cost of both health insurance and medical care, issues relating to

health insurance -- including policy types and minimum coverage requirements -- are frequently the subject of motions to modify child support.

Effective September 1, 1993, the legislature revised the child support guidelines to lower percentages of net income to be paid to each family in cases where a paying parent owes support to more than one family. These new provisions may allow a parent who pays for children in more than one family to change the amounts paid to each family.

The receiving parent may seek to modify a child support order which calls for support to be paid only through a child's eighteenth birthday. Newer orders continue child support until a child is out of high school. In cases where children become disabled after a child support order has been established, modification is available to extend support indefinitely.

Best Interest of the Children

In all cases, the Movant must also prove that the requested modification would be in the best interest of the children involved.

Testimony of Children

Generally, judges take the position that children should not be asked to testify in custody matters. It is very difficult for a child to sit on a witness stand, look a parent in the eye and say under oath that he wants to live with the other parent. Judges may interview the children privately, however, and are required to talk to a child who is more than 12 years old if any party requests that the child be interviewed. Judges can decide whether to interview children who are under 12.

Children who are at least 12 years old may sign a statement choosing one parent as their Managing Conservator. A child's testimony about where he wants to live or the fact that a statement of choice has been signed are not binding on a judge. If a parent can convince a judge that pressure to choose has been put on a child or that a child's choice would not be best for him or her, the child's choice will not be honored. Generally, however, the choice of a teenager will greatly influence a custody decision.

Procedure for Modifying Prior Orders

Contents of Motion

All suits by parents to change court orders are started by filing a Motion to Modify Prior Order in Suit Affecting the Parent-Child Relationship. Suits brought by persons who were not mentioned in a prior order, like grandparents or persons with whom a child has lived for more than six months, would file a Petition for Further Action in Suit Affecting the Parent-Child Relationship.

Each request for a change in court orders must state that the elements necessary to prove the requested modification (listed above) exist. Motions which seek to change conservatorship within a year of a prior custody order must also contain an affidavit signed by the Movant stating specific facts to support a claim that the child is in danger of physical or emotional harm.

Citation and Service

Each person whose rights are affected by the order to be modified must be served with the Motion. Persons who are served with a motion must file a written answer within about 20 days if they want to participate in the modification proceedings. A court may not make a valid modification order unless all persons involved have been served with citation or have taken part in the suit.

Temporary Orders

A court can grant a party's request to make an immediate change in the prior order until a full hearing on the requested modification can be held. In larger counties, hearings on temporary orders are heard by Associate Judges who hear only family law matters. A party to a modification proceeding who disagrees with the ruling of an Associate Judge may request a new trial before a District Judge, called a trial *de novo*. Parties pursuing trials *de novo* after an Associate Judge's ruling are required to follow strict procedural rules to protect that right.

A court will not change Managing Conservatorship of a child during temporary orders unless it finds that the child's physical or emotional welfare would be in danger if custody were not changed immediately, or unless a child over the age of 12 years has signed a statement choosing one parent as a Managing Conservator. Even in cases where children have filed such statements, if a Movant is unable to prove that the temporary custody change would be in the best interest of the child, the change will not be ordered.

In situations where the children have lived for more than six months in a county other than where the prior order was entered, the original court may enter temporary orders before moving the case to the new county.

Final Hearings

Attorneys prepare for final hearings on Motions to Modify Prior Orders in Suit Affecting the Parent-Child Relationship in the same way that they prepare for original divorce trials and other law suits. Clients are asked to prepare lists of possible witnesses and written questions to be answered under oath, called interrogatories, may be sent to each party. Documents, photographs, video and audio tapes relating to the matters in question will also be collected by each side. Often, the parties and some experts will be required to give depositions.

In suits to modify prior orders, parents are entitled to a jury only if custody is contested. Judges decide requests to change visitation, support or the relative rights of the parents. Even in cases where a parent wants a change of custody, the jury only gets to decide who gets custody, not the parents' rights, visitation or support.

Modifying Orders

Changes to child-related parts of a prior order will be set out in an Order Modifying Prior Order in Suit Affecting the Parent-Child Relationship. Parts of the prior order not addressed by the new order will remain in effect.