

Juvenile Court Custody  
Modifications Through the Eyes of a  
District Judge

**Judge Robert B. Ensz**  
**7<sup>th</sup> Judicial District**

Lawyers, I suppose, were  
children once.

-Charles Lamb

## Prior Law

- **Modification of a dissolution decree was not considered a new or independent proceeding. As such, jurisdiction over the proceeding lay only in the district court granting the original decree. *Nemec v. Nemec*, 219 Neb. 891, 367 N.W. 2d 705 (1985).**

# LB 280, 2008 Legislature

- Sec. 25-2740 was amended.
  - now includes proceedings to determine child custody under sec. 42-364.
  - county court/separate juvenile court which already has jurisdiction over the child whose custody is to be determined has jurisdiction over the custody determination.

# LB 280, 2008 Legislature

- Sec. 43-247 (juvenile code) was amended.
  - The juvenile court now has jurisdiction of the custody determination for a child over which the juvenile court already has jurisdiction.

*In re Ethan M.*

18 Neb. App. 63 (2009)

- “ . . . (in LB 280) the Legislature modified the jurisdiction of juvenile courts and county courts sitting as juvenile courts so that these courts could exercise jurisdiction over custody matters when the court already has jurisdiction over the juvenile for another purpose.”

## *In re Ethan M.* (continued)

- “Prior to the passage of L.B. 280, juvenile and county courts sitting as juvenile courts did not have subject matter jurisdiction over such proceedings.”
- “We conclude that in passing L.B. 280, the Legislature’s explicit intent was to vest the juvenile courts with jurisdiction to make a custody determination pursuant to Sec. 42-364 under the same standards applicable to a custody modification proceeding heard in district court.”

## *In re Ethan M.* (continued)

- “ . . . (I)n passing L.B. 280, the Legislature did not intend to modify procedure, but, rather, intended to expand the jurisdiction of juvenile and county courts.”
- “ . . . (I)t is readily apparent that the primary purpose of L.B. 280 was to remedy the problem that the district court, which normally determines custody, could not do so when the child was under the jurisdiction of the juvenile court.”

## *In re Ethan M.* (continued)

- “ . . . (I)n order to modify custody, the county court was supposed to conduct a custody modification proceeding in the manner that a custody modification proceeding is normally conducted in district court.”
  - The court used the wrong standard.
  - The court did not follow the requirements of Sec. 42-364.

## *In re Ethan M.* (continued)

- “We hold that where the only issue placed in front of the county court is whether a case plan is in the child’s best interests, permanent child custody cannot be modified merely through the adoption of a case plan. However, we also emphasize that a case plan could be used to place a child with a noncustodial parent as a dispositional order under the continuing supervision of the juvenile court.”

# Parenting Act, Sec. 43-2901 et seq.

- Pursuant to Sec. 42-364(6), modification of a parenting plan is governed by the Parenting Act.
- Custody is a component of a parenting plan.
- A parenting plan will have previously been approved by the district court in the dissolution case.

# Parenting Act (continued)

- Parenting plan must include (Sec. 43-2929):
  - The form of legal custody and physical custody,
  - Apportionment of parenting time and details as to implementation,
  - Procedures for making daily decisions consistent with the form of custody,
  - Provisions for remediation,
  - Provisions to ensure school attendance and progress,
  - Provisions for safety when there has been abuse, neglect, parental conflict, or criminal activity which is harmful to child.

# Modification Procedure

- Complaint to modify custody.
- Personal service or voluntary appearance.
- Mediation or waiver.
- Two steps of proof before court can change custody:
  - Material change in circumstances.
  - Changing custody is in the child's best interests.

# Burden of Proof

- The party seeking modification of child custody bears the burden of showing a material change of circumstances affecting the best interests of the child. *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991).

# Material Change in Circumstances

- Ordinarily, custody of a child will not be modified unless there is a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).
- A material change in circumstances means the occurrence of something, which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.*

# Best Interests of the Child

- Section 43-2923 of the Parenting Act requires:
  - A parenting arrangement and parenting plan,
  - Active involvement of child’s families and those serving in parenting roles,
  - Determination by the court that any parenting plan is in the best interests of the child,
  - “That certain principles provide a basis upon which education of parents is delivered and upon which negotiation and mediation of parenting plans are conducted.”

# Best interests (continued)

- In determining custody the court must consider the best interests of the child, which shall include, but are not limited to:
  - The foregoing factors (previous slide),
  - The relationship of the child to each parent prior to the start of the action or any subsequent hearing,
  - The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning,

## Best interests (continued)

- The general health, welfare, and social behavior of the child,
- Credible evidence of abuse inflicted on any family or household member,
- Credible evidence of child abuse or neglect or domestic intimate partner abuse.

# Best interests (continued)

- In determining a child's best interests, courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide physical care and satisfy the educational needs of the child. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

## Best interests (continued)

- Proof of an unstable living environment may be considered as an element influencing the child's welfare or best interests. *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980).

# Best interests (factors)

- Child's preference
  - While the wishes of a child are not controlling, if a child is of sufficient age and has expressed an intelligent preference, that preference is entitled to consideration. *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990).

# Best interests (factors) (continued)

- Cohabitation and moral fitness
  - “While it is true that evidence concerning moral fitness of the parents, including sexual conduct, can be considered as a factor in determining a child’s best interests, absent a showing that the mother’s cohabitation adversely affected her son, we do not give this factor much weight.” *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996), citing *Ritter v. Ritter*, 234 Neb 203, 450 N.W.2d 204 (1990) and *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986).

# Best interests (factors)(continued)

- Educational decisions
  - The custodial parent's decision to change the nature or extent of the child's schooling does not support a change in custody absent an affirmative showing by the party seeking the modification that the custodial parent's decision has injured or harmed, or will jeopardize, the child's physical or mental health, safety, or well-being. *Peterson v. Peterson*, 239 Neb. 113, 474 N.W.2d 862 (1991).

# Best interests (factors) (continued)

- Miscellaneous factors
  - It is appropriate to consider which parent would better promote visitation/parenting time and a positive relationship between the children and the other parent. *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).
  - Ordinarily, remarriage alone is not considered a change of circumstances warranting a change of custody. *Youngberg v. Youngberg*, 193 Neb. 394, 227 N.W.2d 396 (1975).

# Best interests (factors)(continued)

- Miscellaneous factors (continued)
  - A child's consumption of alcohol does not necessarily constitute a material change in circumstances justifying a change in custody. *Kennedy, supra.*
  - Obtaining employment, by itself, does not warrant a change of custody. *Peterson, supra.*

# The Order

- The factors considered and found to be dispositive of the complaint for modification should be incorporated into findings of fact by the judge. “If the findings are not made, this court can make little application of our general rule that in our de novo review, we consider, and may give weight to the fact that the trial court saw and heard the witnesses.” *Parker v. Parker*, 234 Neb 167, 499 N.W.2d 553 (1989).

## The Order (continued)

- A custody order is not a final judgment for purposes of appeal unless it incorporates a parenting plan as is required by Sec. 43-2929. *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

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- Can a juvenile court hear a custody request where no custody determination has previously been made?
- Uniform Child Custody Jurisdiction and Enforcement Act?
- What interaction is necessary between the juvenile and district courts in modifications?
  - Related files in different courts
  - Child support calculations
  - Parenting plan changes