



Through the Eyes of a Child

Custody Modification in the Juvenile Courts

Judge Teresa K. Luther
Ninth Judicial District

In the “Olden Days” . . .

There was a persistent problem that plagued the attorneys and the judges: When a district court entered a custody order and then later a juvenile court through a case plan gave custody of the child(ren) to the other parent, conflicting orders caused untold dilemmas for all.



A New Day Dawns. . .

- Sec. 25-2740 amended
Juvenile courts can determine custody under Sec. 42-364.
- Sec. 43-247 (Juv. Code amended).
- *In re Ethan M.*, 28 Neb.App. 63 (2009).

Sec. 25-2740

- Subsection (2) provides that any domestic relations matters, including custody, parenting time, and child support shall be filed with the clerk of the district court and the party may choose whether the matter will be heard by a county court or district court judge.
- Subsection (3) provides:

In addition to the jurisdiction provided for paternity or custody determinations under subsection (2) of this section, a county court or separate juvenile court which already has jurisdiction over the child whose paternity or custody is to be determined has jurisdiction over such paternity or custody determination.

Sec. 43-247

The juvenile court jurisdiction statute was amended to add:

(11) The paternity or custody determination for a child over which the juvenile court already has jurisdiction.

In re Ethan M., 18 Neb.App. 63 (2009)

- Acknowledged the Legislature's expansion of juvenile court jurisdiction through LB 280.
- Set forth procedures for invoking the juvenile court's newly established jurisdiction in custody matters.
- Provided a remedy for the problem that arises when a juvenile court case plan changes custody originally set by a district court proceeding.

Modification of Custody: Procedure

- ❑ A party must file a Complaint to Modify.
- ❑ A Summons must be issued or a voluntary appearance filed.
- ❑ All requirements of the Parenting Act must be followed.
- ❑ A hearing must be held for either contested or uncontested matters.
- ❑ An order must be entered that:
 - Approves the parties' Parenting Plan or establishes its own Parenting Plan and attaches that Parenting Plan.
 - Sets child support and attaches that child support calculation.

Complaint to Modify Custody

A complaint to modify custody must allege:

- A material change in circumstances that warrants modifying custody

AND

- The change in custody is in the child(ren)'s best interests.

Personal Service

In order to have jurisdiction over both parties, the nonmoving party must be personally served.

If service by publication is necessary, the court will be limited in its ability to decide all matters relating to the children.

Without personal jurisdiction. . .

- ❑ Court can award the plaintiff custody.
- ❑ Court cannot award child support or impose any affirmative duty on the defendant.
- ❑ Parenting Plans will need to be modified to address special circumstances.

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. *Brown v. Brown*, 260 Neb. 954 (2000).



Change in Circumstances

- A “material change in circumstances” sufficient to support modification of child custody 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. *Adams v. Adams*, 13 Neb.App. 276 (2005)

Examples of “change in circumstances”

- In modifying an order of joint custody, the parents' inability or unwillingness to execute duties jointly led to result the one or the other had to be given primary responsibility for the children's care. Father found to be more flexible and less likely to control Mother's parenting, and thus, was awarded custody.

Coffey v. Coffey, 11 Neb.App. 788 (2003)

Examples of “change in circumstances”

- Court modified custody from Father to Mother after showing that Mother had moved to Nebraska, obtained employment, gotten married, while Father had been charged two times with domestic assault, had gotten married and divorced twice, and had filed for bankruptcy.

Lamb v. Lamb, 14 Neb.App. 337 (2005)

Best Interests of Child

In determining a child's best interests in custody and visitation matters, factors to be considered include the relationship of the minor child to each parent; the desires and wishes of the minor child; the general health, welfare, and social behavior of the minor child; and credible evidence of abuse.

Schnell v. Schnell,

12 Neb. App. 321 (2003)



Best Interests of Child

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 (1991).

Best Interests of Child

Child's preference is not controlling, but if the child is of sufficient age and has expressed an intelligent preference, that preference is entitled to consideration.

Beran v. Beran, 234 Neb. 296 (1990)

Best Interests of Child

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, this factor will not be given much weight.

Smith-Helstrom v. Yonker, 249 Neb. 449 (1990)

Best Interests of Child

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 (1980)

What's New Under the Parenting Act?

- Parenting class
- Mandatory mediation
- Parenting plan

The Parenting Act

Sec. 43-2923 states that the best interests of the child require:

- ❑ Parenting Plan that provides for child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress for school-age children;
- ❑ Provision for safety of victim parent in situations of domestic abuse;
- ❑ Active involvement of both parents;
- ❑ Court must approve any Parenting Plan;
- ❑ Education for parents; mediation of Parenting Plan.

Parenting Class

Sec. 43-2928

- ❑ All parties must complete a divorcing parents' class approved by the Court Administrator's Office.
- ❑ If there is domestic violence, the court may order a second-level parenting course.
- ❑ Purpose of class is to help parties parent from different households.
- ❑ Participation can be delayed or waived.

Mediation, Sec. 43-2937

- All cases filed after July 1, 2010, are subject to mandatory mediation.
- If parties cannot develop a parenting plan in the time set by the court, they shall be ordered to participate in mediation or specialized alternative dispute resolution with a mediator, a court conciliation program, or an approved mediation center.



PARENTING PLAN CONTENTS

Sec. 43-2929

Parenting Plan shall include:

- Assist in developing a restructured family and include:
 - Legal and physical custody
 - Parenting time
 - Location of child
 - Transition plan
 - Procedures for decision-making
 - Remediation process
 - Safety arrangements: day-to-day and domestic violence situation
 - School attendance and progress
- Notification of change of address
- Mutual discussion of major decisions—health, education, spiritual
- Regardless of parenting plan, parents shall have right to education and medical records and shall be able to make emergency medical decisions. (42-381)
- Consideration of child's age, developmental needs

What to do with an absent or uncooperative parent. . .

If a parent is absent or fails to cooperate in developing a parenting plan, the custodial parent may propose a plan that may include:

- ❑ Condition that absent parent complete parenting class
- ❑ Parenting time must be requested from custodial parent with reasonable notice
- ❑ Schedule of parenting time that is reasonable under the circumstances

Any proposed plan would be subject to court approval.



Hearing on Parenting Plan

After hearing on the record, the court shall determine whether the submitted parenting plan meets all of the requirements of the Parenting Act and is in the best interest of the child. If the parenting plan lacks any of the elements or is not in the child's best interests, the court shall:

- ❑ modify and approve the parenting plan as modified
- ❑ reject the parenting plan and order parties to develop new one
- ❑ reject and create new one

Final Order of Custody - BEWARE!

- ❑ A final appealable order must dispose of all issues presented by the pleadings. Failure to include a parenting plan will be fatal for purposes of appeal.

Bhuller v. Bhuller, 17 Neb.App. 607 (2009)

- ❑ A child support determination is an inherent part of a custody modification action, so even if a pleading for modification fails to ask for a modification of child support, the court as part of its equitable relief powers must modify the child support.

Johnson v. Johnson, 15 Neb.App. 292 (2006)

What to Include in a Final Order

A final order must include the following:

- ❑ An award of custody and parenting time
- ❑ A Parenting Plan
- ❑ A child support order with an attached child support calculation

