

So, you want to change custody?

Pointers and Potholes

A view from the Bench

Introduction

- Attorney in private practice for six years
 - Domestic relations
 - Juvenile advocacy (GAL and parent advocate)
- County Attorney for three years
 - Steady caseload of abuse/neglect and delinquency
- District Court Judge – 12th Judicial District
 - Approximately 33 to 50 % of cases are domestic relations

In Re Interest of Ethan M.
18 Neb. App. 63 (October 13, 2009)

- Causing much heartburn (maybe some mild indigestion)
- Not as troubling or confusing as it might appear
- Essentially the holding can be boiled down to “If you’re going to act like a District Court then you are bound by their rules”

Statutes of Note

- Neb. Rev. Stat. sec. 25-2740
 - Defines a “custody determination” – “a proceeding to determine custody of a child under Neb. Rev. Stat. sec. 42-364
 - Empowers juvenile courts to have jurisdiction over paternity actions (43-1411 to 43-1418) and custody proceedings under 42-364
- Neb. Rev. Stat. sec. 42-364
 - Sets out standards and general procedures for custody determinations in paternity actions, dissolution proceedings and post-decree/order modifications
- Neb. Rev. Stat. sec. 43-247
 - Basic statute re: juvenile actions

Nebraska Parenting Act

Neb. Rev. Stat. sec. 43-2921 et seq

- Critical change in the law
 - If you haven't practiced domestic relations law for more than two years you must read this Act and get familiar with it
- New requirements
 - Must attach a parenting plan to every decree/order and post-decree/order modification
 - Must set forth and make certain findings
 - Must require mediation (some exceptions)
 - No more "fair and reasonable" visitation
- New procedures/language
 - Must complete parenting class(es)
 - Must follow the Parenting Act directives
 - Applies to new cases and older cases up for modification
 - Not visitation – it's parenting time now

Differences

Juvenile v. District Court

- General authority
 - Juvenile Court is a court of limited/special jurisdiction
 - District Court is a court of general jurisdiction
 - Equitable authority too
- Timeframes
 - Juvenile Court abuse/neglect/dependency case
 - Case Progression Standard
 - District Court domestic relations case
 - Case Progression Standard

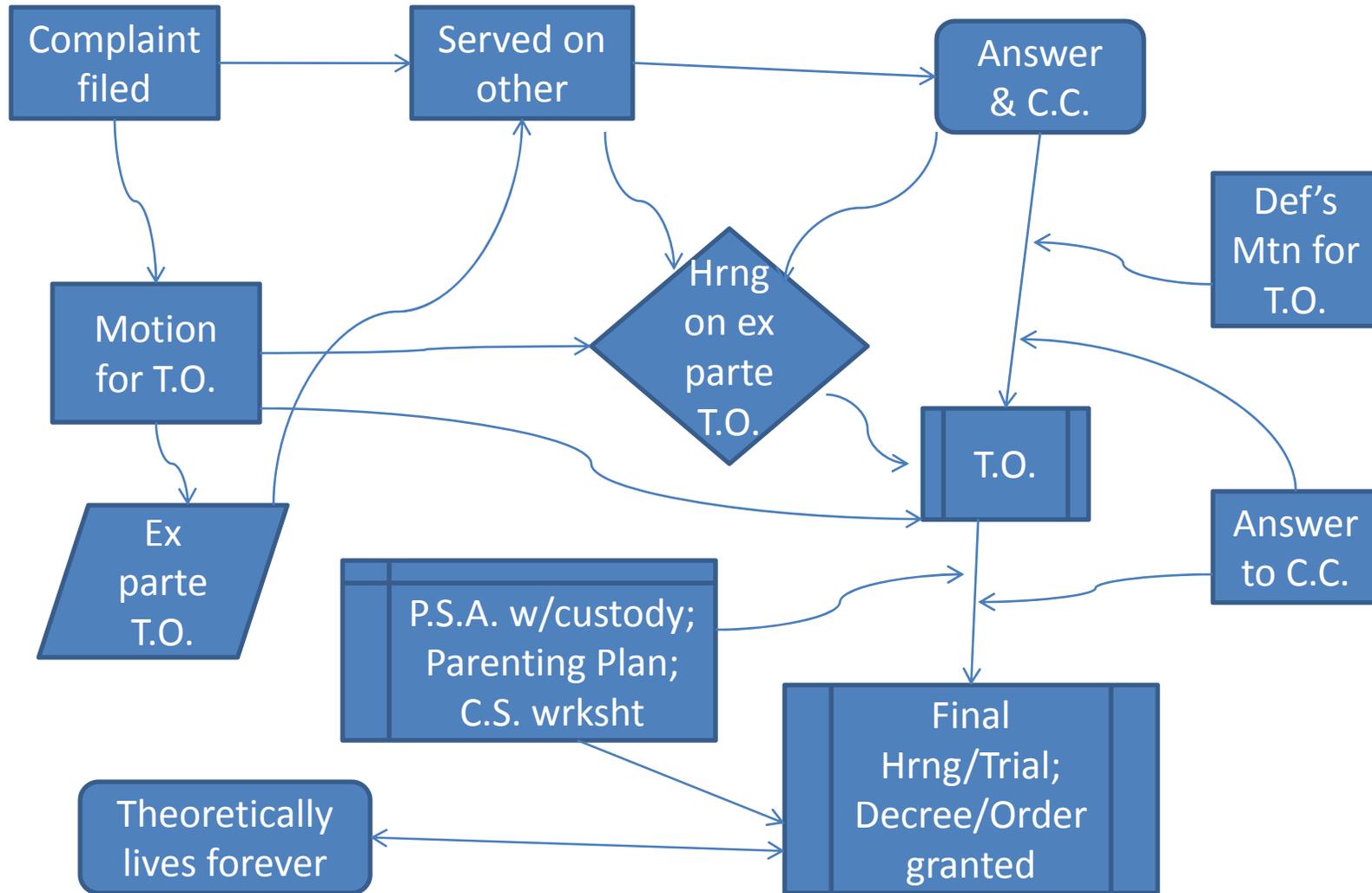
Differences cont'd

Juvenile v. District Court

- Participants
 - Juvenile
 - State (CAO and HHS)
 - Parents
 - Parents attorneys (+ parent's GAL)
 - GAL
 - Foster parents
 - CASA
 - Speak Out
 - Boys & Girls Home
 - Divorce/custody/paternity actions
 - Parents
 - Parents attorney(s)
 - GAL (only in certain circumstances)

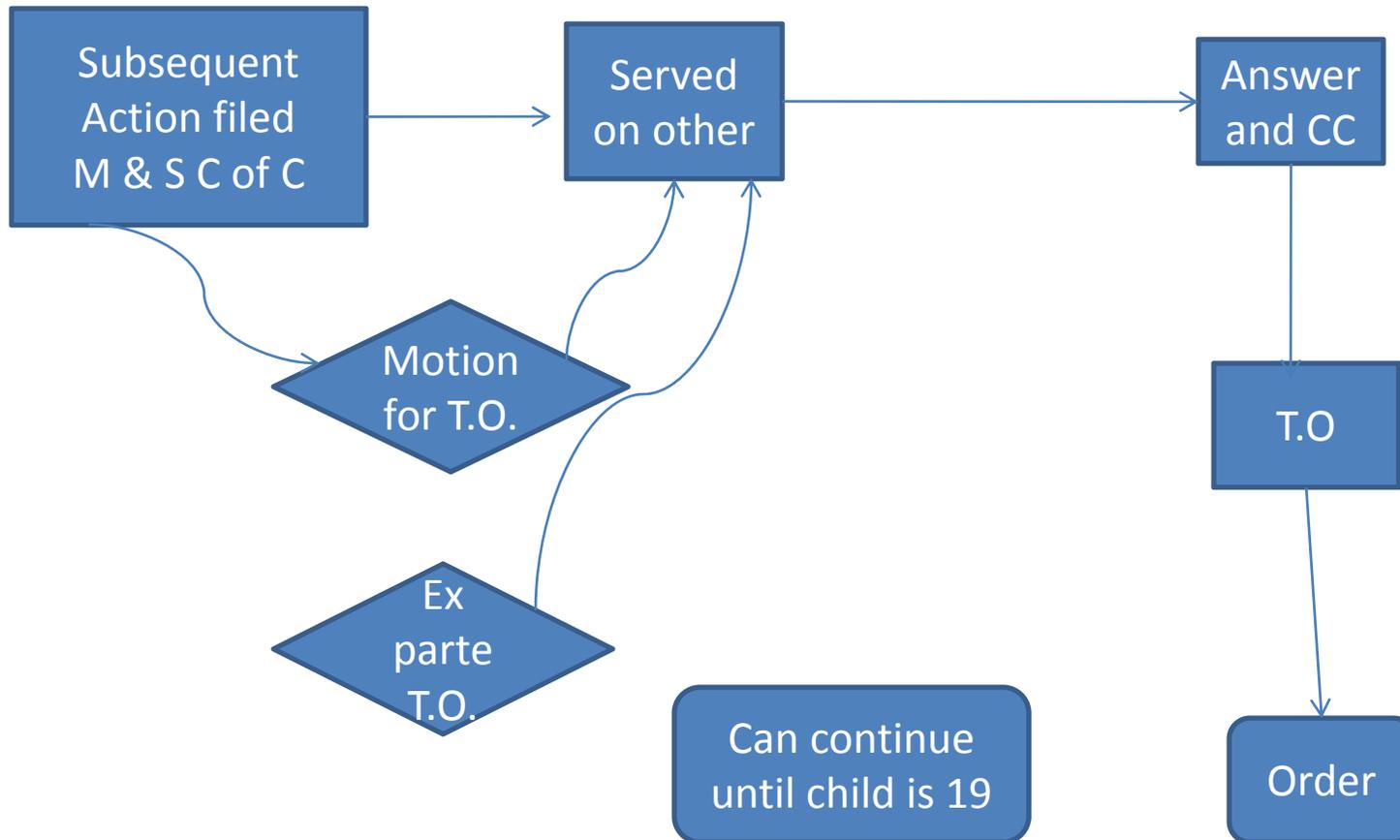
Divorce Flow Chart

Initial action



Divorce Flow Chart

Subsequent Action



Modification Procedures

1. Something must be different than the last time order changed/modified
 - a. material and substantial change of circumstances
 - b. something that had the Court known at the time of the prior Order would have changed the decision
 - c. things/events prior to last Order are irrelevant
 - d. Questions: What has changed? Why is that important?

Modification Procedures cont'd

2. If you believe that something sufficient has changed, then file a Complaint/Petition to Modify Custody
 - a. allege material and substantial change of circumstances
 - b. identify with some specificity M & S C of C

Modification Procedures cont'd

3. Who moves/complains/petitions?
 - a. parents
 - b. GAL (?)
 - c. CAO (?)
 - 1) In re Interest of Ethan M. refers in dicta “moving party whether it was the State or [mom]”
 - 2) suggests that State could be moving party
 - 3) this is potentially hazardous route unless CA knows something of domestic relations law
 - 4) also raises questions re: what services are provided through the CAO

Modification Procedures cont'd

4. Steps necessary (see flowchart)
 - a. service on opposing party
 - 1) Question: Who gets served?
 - a) just mom and dad
 - b) or State and GAL too
 - b. responsive pleadings and cross-claims
 - c. discovery
 - d. trial setting

Modification Procedures cont'd

5. Burden of proof

a. on moving party

b. must show

1) M & S C of C and

2) best interests of child (or)

3) parental unfitness

Modification Procedures cont'd

6. What is M & S C of C?
 - a. something more than just normal course of business
 - 1) differences can be obvious or subtle and still be enough or not

Example #1

New roommates

X moves in with someone – probably not enough

X moves in with Ted Bundy's slightly more deranged half-brother

Example #2

Religious upbringing

X goes to a different church than you or no church at all – probably not enough

X goes to the Jim Jones branch of Cults-r-us

Example #3

Recent criminal charge

X gets a DUI

X gets a DUI with both kids in the car

More detailed Example #1

X has Rx of meth use

- a. two prior convictions (1 year ago and 6 years ago)
- b. Dad met her while they were shooting up together
- c. one of the two kids was conceived at a time during which the two parents were using together

X just got arrested for possession of meth (residue)

- a. kids were around at the time
- b. Dad on probation with recent “hot” test

More detailed example #2

X is a convicted batterer

Mom is a chronic alcoholic and has numerous short-term boyfriends

More detailed Example #3

Mom is found to be unfit (pick a reason)

Dad has never been around

- mostly absent
- sometimes around

More detailed Example #4

Mom has been found to be unfit but is working diligently on rehab program and Caseplan

Dad is unknown and not locatable

Great foster parents who want to adopt

Big Question

How often is it in the child's best interest to not be in either biological parents care/custody?

Complicators

1. Inexperienced attorneys/(judges)
2. Time consumption of hearings/trials
3. Who is paying for all of this?
4. Are CAs and Pub Defs now to be domestic relations attorneys too?
5. Use of experts, witnesses, etc
6. Cranky District Judges not wanting their Orders modified by anyone but themselves

More Complicators

7. Nebraska Parenting Act
 - a. Parenting Plan
 - b. Mandatory mediation
 - c. Parenting class requirement
8. Child Support Guidelines

One Modest Suggestion

- In the absence of a written stipulation and agreement, drafted by an experienced domestic relations attorney, don't try to change custody in County Court

OK, maybe two modest suggestions

- Keep the District Court informed in a proper and timely fashion

So maybe I really meant three modest suggestions

- When in doubt ask someone to help you out

Thank you

Questions?