

## **MODIFICATION OF CUSTODY AND VISITATION**

This page discusses when and how to modify a court decree or order involving custody and/or visitation. South Dakota and tribal laws allow for modification of child custody, visitation and/or child support orders.

### **HOW DO I MODIFY A CUSTODY OR VISITATION**

You can request such orders be modified by a Motion to Modify. The other party can contest this. If the other party opposes your Motion to Modify, the court will set the Motion for a hearing where you will have to show the court why you want the order modified. The court that entered the original order retains jurisdiction to modify the order and you do not have to start a new action to modify.

### **WHAT DO I HAVE TO SHOW TO MODIFY CUSTODY OR VISITATION**

This depends on whether there was an agreement between the parties regarding custody and/or visitation. That is to say that the court did not have to hear evidence or testimony regarding custody and visitation because the parties agreed to these matters before a trial.

If there was an agreement between the parties, the person seeking modification (the moving party) only has to show the court that modification would be in the best interest of child(ren).

If the issues of custody and visitation were contested and the court made these decisions after a trial then the person seeking modification must show two (2) things in order for the court to modify a custody or visitation order. First, the moving party must show that there has been substantial and material change of circumstances since the order was entered. Second, the moving party must also show that modification would be in the best interest of the child(ren).

### **WHAT IS A SUBSTANTIAL AND MATERIAL CHANGE OF CIRCUMSTANCES**

If the issues of custody, visitation or child support were contested then the moving party must show a substantial and material change of circumstances has occurred since the order was entered.

The mere fact that conditions have changed since entry of the order by itself is not sufficient to warrant modification. A change of a party's financial situation by itself is not a substantial and material change of circumstances. A child's preference, remarriage of a party, or relocation of a party may not be enough to show a substantial and material change of circumstances.

The court will decide if there is a substantial and material change of circumstances on a case by case basis. If a party moves 1,000 miles away from the state, most courts would find this to be a substantial and material change of circumstances. Courts could make a similar ruling if the child(ren) have been living with the non-custodial parent for a long period of time, or if the custodial parent has neglected or abused the child(ren).

The court has discretion to modify custody, visitation, and child support orders. As long as the court does not abuse its discretion in finding whether there is a substantial and material change of circumstances, the court's decision will be upheld on appeal.

### **WHAT DOES IN THE BEST INTEREST OF THE CHILD(REN) MEAN**

The court will look at what is in the best interest of the children to determine if custody and visitation should be modified. This means the court will look at the child(ren)'s temporal, mental and moral welfare. It does not mean what is in the parent's best interest. And it does not mean which parent has more money or can provide a better life for the child(ren). This means the court will look at the child(ren)'s temporal, mental and moral welfare. It does not mean what is in the parent's best interest. And it does not mean which parent has more money or can provide a better life than the other parent. The courts primary concern when awarding custody is the best interest of the child(ren) and not the shortcomings of the parents. What this means is that the court will consider who cares for the child(ren) such as bathing, cleaning for, sheltering, feeding and generally caring for the children. Evidence or testimony of alleged immoral conduct of the opposing party is not relevant unless it has a direct bearing or effects the best interest of the child(ren). For example, if the opposing party abuses alcohol this would not be relevant unless you can show that the opposing party neglected or abused the child(ren) while abusing alcohol.

The court has discretion to modify custody and/or visitation. As long as the court does not abuse its discretion in finding what is in the best interest of the children, the court's decision will be upheld on appeal.