

## **MODIFICATION OF CHANGE OF CHILD CUSTODY ORDERS IN TRIBAL COURT**

This page will explain how to go about moving the court for a modification of a prior existing child custody order to reflect a change of custody. It also explains what to do if you are served with a Motion to Modify.

**PURPOSE.** This packet includes a **Motion for Change of Custody** and is to be used when the court has ordered and awarded child custody to the opposing party and you want the court to change custody to you. For example, if you feel you should now have custody of your children, you can ask the court to modify its order to reflect a change of custody.

**How to file a Motion for Change of Custody.** You must file your motion for change of custody by filing the original with the court and by mailing a copy to the opposing party if they are not represented by legal counsel or to their attorney if the opposing party is represented. The clerk will find a hearing date and send notice of hearing to all parties.

**BURDEN OF PROOF.** The moving party has the burden of proving that claim in court. In a typical civil case the moving party has the burden of proving their claim by a preponderance of the evidence. This means that by representing your self in a legal matter it is your responsibility to prove your case. Don't expect the judge to prove your case for you. Proving something by a preponderance of the evidence means evidence with greater weight or that is more convincing than the evidence of the opposing party(s). The moving party has the burden of showing the following to the court:

If there was a stipulated agreement between the parties regarding custody, the person seeking modification (the moving party) only has to show the court that the change of custody 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 a change of custody 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).

That it would be in the child(ren)'s best interest that you be awarded custody of them. The court's primary concern when awarding custody is the best interest of the child(ren) and not the shortcomings of the parents unless those shortcomings reflect on a party's ability to care for the child(ren). What this means is that the plaintiff and their witnesses need to testify who cares for the child(ren) such as taking them to medical appointments, dealing with their education needs, bathing them, sheltering them, feeding them and generally caring for the children.

If you feel that the child(ren) would be in danger by being in the other party's care you need witnesses and evidence to prove those allegations. 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.

A history of denying you visitation may be grounds to modify custody. You should probably file an order to show cause for failure to obey the visitation order form every time you are denied custody so the court has knowledge of this history.

## **WHAT HAPPENS IF YOU ARE SERVED WITH A MOTION FOR CHANGE OF CUSTODY**

If you receive a motion in the mail from the opposing party, the opposing party is requesting the court to modify a custody order and that the court should change custody. The court will typically set the motion for hearing. At the hearing you can contest or fight the opposing party's motion. Again, you need to appear at the scheduled hearing and voice your objection. If you fail to appear at the hearing the court may order a bench warrant for your arrest and you may have been deemed to have waived your right to object later. You can also file an Answering Affidavit in writing. But you still need to appear at the scheduled hearing.

## **WHAT DO I DO WHEN I GO TO COURT FOR A MOTIONS HEARING**

The party bringing the Motion to the court has the burden of proving the substance of their motion by a preponderance of the evidence. The moving party (the party who brings the motion to the court) presents their evidence first and then the non-moving party presents their evidence to the court.

**How to present your Evidence to the Court.** There are several ways of presenting your evidence for and against a motion in court. The best way is through live testimony of witnesses. This would include you (you need to testify to your motion) and any other person who has personal and relevant knowledge of the facts of your motion. It is your responsibility to get your witnesses to court and to ask them questions about their knowledge of the facts. In order to compel or force your witnesses to testify at your trial or hearing you may need to subpoena each of your witnesses well before the hearing date (Use the **Motion to Subpoena Witnesses** form to request the court to issue a subpoena to compel a witness to appear at your motions hearing if they won't voluntarily appear). You can also subpoena a person or witnesses to bring evidence such as documents to your motions hearing (Use the **Motion to Subpoena a Person to Bring Evidence to Court** form to request the court to issue a subpoena to compel a person to appear at your motions hearing and bring specified evidence with them if they won't voluntarily appear). Once you and your witnesses testify the opposing party can cross examine you and your witness. This means that they can ask you and your witnesses questions.

It will be your responsibility to directly ask questions (direct examination) of your witnesses and to get your evidence introduced into the record. You can only ask questions during direct examination. Do not attempt to make statements or comments when you ask questioning witnesses. Your witnesses should be asked who they are, what they know and how they know it or anything they might have observed. Like cross examination you should prepare your

questions for each of your witnesses well before the motions hearing and take notes of any strong points testified to that you can use in your closing arguments to the Court.

It will also be your responsibility to get objects and other physical evidence, such as documents, introduced into the record. You do this by laying the foundation for the admissibility of the evidence by questioning the person you subpoenaed to bring the objects or pieces of evidence you want introduced into evidence. Ask the Court to mark the evidence as an Exhibit. Then you must ask this person who they are, what objects or pieces of evidence they brought to the Court, a description of the objects or pieces of evidence, how the evidence came into that persons possession and if the evidence are documents then you must ask if the documents are kept in the ordinary course of business. Then you must ask the Court to have the evidence introduced and accepted as evidence. Only evidence accepted by the Court after it is ruled admissible will be seen or considered by the Court.

You must cross examine the opposing party's witnesses to cast doubt on the opposing party's motion(s). Cross examination is your chance to ask questions of the opposing party's witnesses. You can only ask questions of the opposing party's witnesses during cross examination. Do not attempt to make statements or to testify during cross examination of another witness, the Court will shut you off from doing so.

**Be courteous in Court.** When you go to court the judge will control the proceedings. The moving party presents their case first. Then the non-moving party presents their side of the case. Do not interrupt the other side when they are testifying unless you have an objection. Both sides will have an opportunity to cross examine the other party and their witnesses. Be courteous to the other side. If you disrupt the proceedings the judge could hold you in contempt and throw you in jail.