

## **MOTION FOR MODIFICATION OF VISITATION ORDERS IN TRIBAL COURT**

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

**PURPOSE.** Use the **Motion for Modification of Visitation** when the court has ordered and awarded visitation and you want the court to modify visitation order. For example, if you want more visitation or want the court to give less visitation to the other party.

**How to file a Motion for Modification of Visitation.** You must file your motion for modification of visitation 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.** If you file a Motion for Modification of Visitation, you have the burden of proving that claim in court. In a typical civil case you have the burden of proving your 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). You as the moving party have the burden of showing the following to the court:

If there was an agreement between the parties regarding visitation the person seeking modification (the moving party) only has to show the court that modification of the visitation order would be in the best interest of child(ren). Best interest of the child for visitation modification could include the safety and well-being of the child, whether regular school attendance is affected by visitation, the child's wishes if the child is of sufficient age to decide, any evidence of neglect or abuse, when a party is interfering with the other party's relationship with the child, failure to properly parent the child, any substance abuse, mental health issues, alienation of child's by the other parent of the child, failure to allow visitation contrary to the visitation order, or failure to exercise visitation rights.

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 also show that modification would be in the best interest of the child(ren). Second, the moving party must show that there has been substantial and material change of circumstances since the visitation order was entered. A substantial and material change of circumstances could include one of the parents moving some distance from the other party and child, when a party with visitation rights is failing to exercise those rights or when the custodial parent is denying those visitation rights, or the visitation as ordered is creating hardship on the child or a party, evidence of neglect or abuse, a party is interfering with the other party's relationship with the child, failure to properly parent the child, any substance abuse, mental health issues, if one of the party's is alienating of child's affections from other the parent, failure to allow visitation contrary to the visitation order, or

failure to exercise visitation rights.

What this means is that the moving party and their witnesses need to testify to any circumstances and facts that would warrant modification of the visitation order.

If you feel that the child would be in danger during visitation or by being in the other party's care you need witnesses and evidence to prove those allegations. In that case you can ask the court for supervised visitation or in extreme cases no visitation.

If you have visitation rights and want the visitation order modified for more visitation, you must prove why it would be in the child's best interest.

### **WHAT HAPPENS IF YOU ARE SERVED WITH A MOTION FOR MODIFICATION OF VISITATION**

If you receive a motion in the mail from the opposing party, the opposing party is requesting the court to modify a the visitation set out in the order and that the court should modify visitation. 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 you may have been deemed to have waived your right to object later. 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.