

Modification of Custody in Arkansas

How do I modify custody?

This is one of the most frequently asked questions that I receive. Typically it is a non-custodial parent that has serious concerns about the welfare of their child(ren), due to something that the custodial parent has done (or failed to do), and therefore wants the court to change a previous order of custody, reverse the flow of child support, etc. The Arkansas Supreme Court has consistently held that “the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary.” *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

To change custody, the moving party must first show a material change in circumstances has transpired since the time of the previous decree or order. See generally, *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). Further, the court must also determine that it is in the best interest of the child to change the custody. See generally, *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002). As a practical note, the moving party may often need to show the court that a change in custody itself is not a material change that would adversely impact the child.

So the question then becomes, what exactly constitutes a “material change in circumstance?” Every case is fact-specific, so there’s no general answer to this question. Confusing matters more, Arkansas appellate courts have been all over the map lately with what is and what isn’t considered “material.” However, as a rule, courts generally impose more stringent standards for modification in custody than for initial determinations of custody in order to promote stability and continuity in the life of the child. *Stehle v. Zimmerebner*, 375 Ark. 446, 291 S.W.3d 573 (2009).

Some examples of issues that have previously resulted in custody being changed include: a pattern of alienation by one parent, *Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007), or when the parties in a joint custody agreement have fallen into such discord that they are unable to cooperate in sharing the physical care of the children. *Word v. Remick*, 75 Ark.App. 390, 58 S.W.3d 422 (2001). A finding of a “radical and positive change” in the noncustodial parent’s circumstances coupled with “evidence of a further decline in [the custodial parent’s] already dismal circumstances” has been held to be a material change. *Mason v. Mason*, 82 Ark.App. 133, 111 S.W.3d 855 (2003). Note however, that it would appear that a change of circumstances of the noncustodial parent alone is not sufficient to justify modifying custody. *Lloyd v. Butts*, 343 Ark. 620, 626, 37 S.W.3d 603, 607 (2001); see also *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Jones v. Jones*, 328 Ark. 97, 940 S.W.2d 881 (1997). In other words, you likely need to have both a rise in the non-custodial parent’s situation, as well as a decline on the custodial parent’s side.

What about relocation of one parent?

This is a hotly debated topic all over the country right now. One parent wants to move out of state, typically because of job, family, etc., and the other parent opposes the move, since it will make visitation much more difficult. Arkansas courts have held that relocation of a primary custodian and his or her children alone is not a material change in circumstance. *Hollandsworth v. Knyzewski*, 109 S.W.3d 653 (Ark. 2003). In *Hollandsworth*, the Court announced a new (at the time) presumption in favor of relocation for custodial parents with primary custody. The noncustodial parent now has the burden to rebut the relocation presumption. Put another way, the custodial parent no longer has the

responsibility to prove a real advantage to herself or himself and to the children in relocating, the burden is upon the non-custodial parent to show that it is not in the best interest of the child(ren) to relocate, which is often times a very difficult hurdle to clear. Factors that the judge considers in deciding whether the noncustodial parent has sufficiently rebutted the presumption and whether the move is in the children's best interests include: (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in which the custodial parent and children will relocate; (3) the visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; and (5) the preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference." *Chastain v. Chastain*, 2012 Ark. App. 73. And courts continue to struggle with this issue today, as there is recent caselaw in Arkansas holding that a written agreement between the parties (as part of the divorce decree or settlement agreement) that says both parents agree to stay within a certain geographic distance (in an attempt to sidestep the Hollandsworth issue) is void.

These are just a few examples of cases where Arkansas courts have struggled to determine what is in the best interest of a child. As I said before, every case is fact-specific, and the law is always changing. If you are contemplating asking a court to modify your existing custody order, I would urge you to first speak with an attorney who focuses a majority of their practice on custody and support issues, to make sure that you are in the best position possible to move the court to make a change. The hurdles are not insurmountable, but they are definitely there, and your attorney can advise you on the best potential strategy, as it relates to the facts of your case.

Posted March 1, 2012 by Patrick Lewis, P.A.

Updates from Arkansas Advocates for Parental Equality

Act 1156 of 2013 added "If, at any time, the circuit court finds by a preponderance of the evidence that one parent demonstrates a pattern of willfully creating conflict in an attempt to disrupt a current or pending joint-custody arrangement, the circuit court may deem such behavior as a material change of circumstances and may change a joint custody order to an order of primary custody to the nondisruptive parent."

Nothing contained in this post is intended to be construed as legal advice. You should consult an attorney for advice regarding your individual situation.