

CHANGE OF CUSTODY IN A MODIFICATION

Change of Custody on a Temporary Basis in a Modification

In a modification, the court may not render a temporary order if the effect is to change the designation of a sole or primary joint managing conservator appointed in a final order unless it is necessary because:

- the child's present living environment may endanger the child's physical health or significantly impair the child's emotional development;
- the child's managing conservator has voluntarily relinquished the actual care, control, and possession of the child for more than 6 months and the temporary order is in the best interest of the child; or
- the child is 12 years of age or older and has filed with the court in writing the name of the person who is the child's choice for managing conservator and the temporary order naming that person as managing conservator is in the best interest of the child.

Change of Custody on a Final Basis in a Modification

In a final trial, the standard for making an order that has the effect of changing the primary caretaker is somewhat easier than on a temporary basis. However, the Courts do not like to make major changes without cause, so be ready to clearly prove the following:

- circumstances of the child or either parent have "materially and substantially changed" since the last order **OR**
 - the last order has become unworkable or inappropriate under current circumstances
- AND**
- modification would be a positive improvement for and in the best interest of the children.

Please see the attached Code Provisions regarding Modification of Custody

TEXAS FAMILY LAW CODE PROVISIONS

PERTINENT FAMILY CODE SECTIONS - CONSERVATORSHIP

§§ 153.131. Presumption That Parent to be Appointed Managing Conservator

(a) Subject to the prohibition in Section 153.004, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

(b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

§§ 153.132. Rights and Duties of Parent Appointed Sole Managing Conservator

Unless limited by court order, a parent appointed as sole managing conservator of a child has the rights and duties provided by Subchapter B and the following exclusive rights:

- (1) the right to establish the primary residence of the child;
- (2) the right to consent to medical, dental, and surgical treatment involving invasive procedures, and to consent to psychiatric and psychological treatment;
- (3) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
- (4) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (5) the right to consent to marriage and to enlistment in the armed forces of the United States;
- (6) the right to make decisions concerning the child's education;
- (7) the right to the services and earnings of the child; and
- (8) except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

§§ 153.133. Agreement for Joint Managing Conservatorship

(a) If a written agreement of the parents is filed with the court, the court shall render an order appointing the parents as joint managing conservators only if the agreement:

- (1) designates the conservator who has the exclusive right to establish the primary residence of the child and:
 - (A) establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence; or
 - (B) specifies that the conservator may establish the child's primary residence without regard to geographic location;
 - (2) specifies the rights and duties of each parent regarding the child's physical care, support, and education;
 - (3) includes provisions to minimize disruption of the child's education, daily routine, and association with friends;
 - (4) allocates between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent provided by Chapter 151;
 - (5) is voluntarily and knowingly made by each parent and has not been repudiated by either parent at the time the order is rendered; and
 - (6) is in the best interest of the child.
- (b) The agreement may contain an alternative dispute resolution procedure that the parties agree to use before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency.

§§ 153.134. Court-Ordered Joint Conservatorship

(a) If a written agreement of the parents is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors:

- (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;
- (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
- (3) whether each parent can encourage and accept a positive relationship between the child and the other parent;
- (4) whether both parents participated in child rearing before the filing of the suit;

- (5) the geographical proximity of the parents' residences;
- (6) if the child is 12 years of age or older, the child's preference, if any, regarding the appointment of joint managing conservators; and
- (7) any other relevant factor.

(b) In rendering an order appointing joint managing conservators, the court shall:

- (1) designate the conservator who has the exclusive right to determine the primary residence of the child and:
 - (A) establish, until modified by further order, a geographic area consisting of the county in which the child is to reside and any contiguous county thereto within which the conservator shall maintain the child's primary residence; or
 - (B) specify that the conservator may determine the child's primary residence without regard to geographic location;
- (2) specify the rights and duties of each parent regarding the child's physical care, support, and education;
- (3) include provisions to minimize disruption of the child's education, daily routine, and association with friends;
- (4) allocates between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter 151; and
- (5) is voluntarily and knowingly made by each parent and has not been repudiated by either parent at the time the order is rendered; and
- (6) is in the best interest of the child.

(b) The agreement may contain an alternative dispute resolution procedure that the parties agree to use before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an

§§ 153.135. Equal Possession Not Required

Joint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint conservators.

§§ 153.138. Child Support Order Affecting Joint Conservators

The appointment of joint managing conservators does not impair or limit the authority of the court to order a joint managing conservator to pay child support to another joint managing conservator.

PERTINENT FAMILY CODE SECTIONS - MODIFICATION OF CONSERVATORSHIP

§§ 156.101. Grounds for Modification of Order Establishing Conservatorship or Possession and Access

The court may modify an order or portion of a decree that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and:

- (1) the circumstances of the child a conservator, or other party affected by the order have materially and substantially changed since the rendition of the order;
- (2) the child is at least 12 years of age and has filed with the court, in writing, the name of the conservator who is the child's preference to have the exclusive right to determine the primary residence of the child; or
- (3) the conservator who has the exclusive right to establish the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.

§§ 156.102. Modification of Exclusive Right to Determine Primary Residence of Child Within One Year of Order

(a) If a suit seeking to modify the designation of the person having the exclusive right to determine the primary residence of a child is filed not later than one year after the date of rendition of the order, the person filing the suit shall execute and attach an affidavit as provided by Subsection (b).

- (b) The affidavit must contain, along with supporting facts, at least one of the following allegations:
- (1) that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development;
 - (2) that the person who has the exclusive right to determine the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or
 - (3) that the person who has the exclusive right to determine the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child.

(c) The court shall deny the relief sought and refuse to schedule a hearing for modification under this section unless the court determines, on the basis of the affidavit, that facts adequate to support an allegation listed in Subsection (b) are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, the court shall set a time and place for the hearing.

§§ 156.006. Temporary Orders

(a) Except as provided by Subsection (b), the court may render a temporary order in a suit for modification.

(b) While a suit for modification is pending, the court may not render a temporary order that has the effect of changing the designation of a sole or joint managing conservator appointed in a final order unless:

- (1) the order is necessary because the child's present living environment may endanger the child's physical health or significantly impair the child's emotional development;
- (2) the child's managing conservator has voluntarily relinquished the actual care, control, and possession of the child for more than six months and the temporary order is in the best interest of the child; or
- (3) the child is 10 years of age or older and has filed with the court in writing the name of the person who is the child's choice for managing conservator and the temporary order naming that person as managing conservator is in the best interest of the child.

SUBCHAPTER F. STANDARD POSSESSION ORDER

§§ 153.311. Mutual Agreement or Specified Terms for Possession

The court shall specify in a standard possession order that the parties may have possession of the child at times mutually agreed to in advance by the parties and, in the absence of mutual agreement, shall have possession of the child under the specified terms set out in the standard order.

§§ 153.312. Parents Who Reside 100 Miles or Less Apart

(a) If the possessory conservator resides 100 miles or less from the primary residence of the child, the possessory conservator shall have the right to possession of the child as follows:

- (1) on weekends beginning at 6 p.m. on the first, third, and fifth Friday of each month and ending at 6 p.m. on the following Sunday or, at the possessory conservator's election made before or at the time of the rendition of the original or modification order, and as specified in the original or modification order, beginning at the time the child's school is regularly dismissed and ending at 6 p.m. on the following Sunday; and
- (2) on Wednesdays of each week during the regular school term beginning at 6 p.m. and ending at 8 p.m., or, at the possessory conservator's election made before or at the time of the rendition of the original or modification order, and as specified in the original or modification order, beginning at the time the child's school is regularly dismissed and ending at the time the child's school resumes, unless the court finds that visitation under this subdivision is not in the best interest of the child.

(b) The following provisions govern possession of the child for vacations and certain specific holidays and supersede conflicting weekend or Wednesday periods of possession. The possessory conservator and the managing conservator shall have rights of possession of the child as follows:

- (1) the possessory conservator shall have possession in even-numbered years, beginning at 6 p.m. on the day the child is dismissed from school for the school's spring vacation and ending at 6 p.m. on the day before school resumes after that vacation, and the managing conservator shall have possession for the same period in odd-numbered years;
- (2) if a possessory conservator:
 - (A) gives the managing conservator written notice by April 1 of each year specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for 30 days beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven days before school resumes at the end of the summer vacation, to be exercised in not more than two separate periods of at least seven consecutive days each; or
 - (B) does not give the managing conservator written notice by April 1 of each year specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for 30 consecutive days beginning at 6 p.m. on July 1 and ending at 6 p.m. on July 31;
- (3) if the managing conservator gives the possessory conservator written notice by April 15 of each year, the managing conservator shall have possession of the child on any one weekend beginning Friday at 6 p.m. and ending at 6 p.m. on the following Sunday during one period of possession by the possessory conservator under Subdivision (2), provided that the managing conservator picks up the child from the possessory conservator and returns the child to that same place; and
- (4) if the managing conservator gives the possessory conservator written notice by April 15 of each year or gives the possessory conservator 14 days' written notice on or after April 16 of each year, the managing conservator may designate one weekend beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven days before school resumes at the end of the summer vacation, during which an otherwise scheduled weekend period of possession by the possessory conservator will not take place, provided that the weekend designated does not interfere with the possessory conservator's period or periods of extended summer possession or with Father's Day if the possessory conservator is the father of the child.

§§ 153.313. Parents Who Reside Over 100 Miles a Part

If the possessory conservator resides more than 100 miles from the residence of the child, the possessory conservator shall have the right to possession of the child as follows:

- (1) either regular weekend possession beginning on the first, third, and fifth Friday as provided under the terms applicable to parents who reside 100 miles or less apart or not more than one weekend per month of the possessory conservator's choice beginning at 6 p.m. on

the day school recesses for the weekend and ending at 6 p.m. on the day before school resumes after the weekend, provided that the possessory conservator gives the managing conservator 14 days' written or telephonic notice preceding a designated weekend, and provided that the possessory conservator elects an option for this alternative period of possession by written notice given to the managing conservator within 90 days after the parties begin to reside more than 100 miles apart, as applicable;

- (2) each year beginning on the day the child is dismissed from school for the school's spring vacation and ending at 6 p.m. on the day before school resumes after that vacation;
- (3) if the possessory conservator:
 - (A) gives the managing conservator written notice by April 1 of each year specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for 42 days beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven days before school resumes at the end of the summer vacation, to be exercised in not more than two separate periods of at least seven consecutive days each; or
 - (B) does not give the managing conservator written notice by April 1 of each year specifying an extended period or periods of summer possession, the possessory conservator shall have possession of the child for 42 consecutive days beginning at 6 p.m. on June 15 and ending at 6 p.m. on July 27;
- (4) if the managing conservator gives the possessory conservator written notice by April 15 of each year the managing conservator shall have possession of the child on one weekend beginning Friday at 6 p.m. and ending at 6 p.m. on the following Sunday during one period of possession by the possessory conservator under Subdivision (3), provided that if a period of possession by the possessory conservator exceeds 30 days, the managing conservator may have possession of the child under the terms of this subdivision on two nonconsecutive weekends during that time period, and further provided that the managing conservator picks up the child from the possessory conservator and returns the child to that same place; and
- (5) if the managing conservator gives the possessory conservator written notice by April 15 of each year, the managing conservator may designate 21 days beginning not earlier than the day after the child's school is dismissed for the summer vacation and ending not later than seven days before school resumes at the end of the summer vacation, to be exercised in not more than two separate periods of at least seven consecutive days each, during which the possessory conservator may not have possession of the child, provided that the period or periods so designated do not interfere with the possessory conservator's period or periods of extended summer possession or with Father's Day if the possessory conservator is the father of the child.

§§ 153.314. Holiday Possession Unaffected by Distance Parents Reside Apart

The following provisions govern possession of the child for certain specific holidays and supersede conflicting weekend or Wednesday periods of possession without regard to the distance the parents reside apart. The possessory conservator and the managing conservator shall have rights of possession of the child as follows:

- (1) the possessory conservator shall have possession of the child in even-numbered years beginning at 6 p.m. on the day the child is dismissed from school for the Christmas school vacation and ending at noon on December 26, and the managing conservator shall have possession for the same period in odd-numbered years;
- (2) the possessory conservator shall have possession of the child in odd-numbered years beginning at noon on December 26 and ending at 6 p.m. on the day before school resumes after that vacation, and the managing conservator shall have possession for the same period in even-numbered years;
- (3) the possessory conservator shall have possession of the child in odd-numbered years, beginning at 6 p.m. on the day the child is dismissed from school before Thanksgiving and ending at 6 p.m. on the following Sunday, and the managing conservator shall have possession for the same period in even-numbered years;
- (4) the parent not otherwise entitled under this standard order to present possession of a child on the child's birthday shall have possession of the child beginning at 6 p.m. and ending at 8 p.m. on that day, provided that the parent picks up the child from the residence of the conservator entitled to possession and returns the child to that same place;
- (5) if a conservator, the father shall have possession of the child beginning at 6 p.m. on the Friday preceding Father's Day and ending on Father's Day at 6 p.m., provided that, if he is not otherwise entitled under this standard order to present possession of the child, he picks up the child from the residence of the conservator entitled to possession and returns the child to that same place; and
- (6) if a conservator, the mother shall have possession of the child beginning at 6 p.m. on the Friday preceding Mother's Day and ending on Mother's Day at 6 p.m., provided that, if she is not otherwise entitled under this standard order to present possession of the child, she picks up the child from the residence of the conservator entitled to possession and returns the child to that same place.

§§ 153.315. Weekend Possession Extended by Holiday

(a) If a weekend period of possession of the possessory conservator coincides with a school holiday during the regular school term or with a federal, state, or local holiday during the summer months in which school is not in session, the weekend possession shall end at 6 p.m. on a Monday holiday or school holiday or shall begin at 6 p.m. Thursday for a Friday holiday or school holiday, as applicable.

(b) At the possessory conservator's election, made before or at the time of the rendition of the original or modification order, and as specified in the original or modification order, periods of possession extended by a holiday may begin at the time the child's school is regularly dismissed.

§§ 153.316. General Terms and Conditions

The court shall order the following general terms and conditions of possession of a child to apply without regard to the distance between the residence of a parent and the child:

- (1) the managing conservator shall surrender the child to the possessory conservator at the beginning of each period of the possessory conservator's possession at the residence of the managing conservator;
- (2) if the possessory conservator elects to begin a period of possession at the time the child's school is regularly dismissed, the managing conservator shall surrender the child to the possessory conservator at the beginning of each period of possession at the school in which the child is enrolled;
- (3) the possessory conservator shall be ordered to do one of the following:
 - (A) the possessory conservator shall surrender the child to the managing conservator at the end of each period of possession at the residence of the possessory conservator; or
 - (B) the possessory conservator shall return the child to the residence of the managing conservator at the end of each period of possession, except that the order shall provide that the possessory conservator shall surrender the child to the managing conservator at the end of each period of possession at the residence of the possessory conservator if:
 - (i) at the time the original order or a modification of an order establishing terms and conditions of possession or access the possessory conservator and the managing conservator lived in the same county, the possessory conservator's county of residence remains the same after the rendition of the order, and the managing conservator's county of residence changes, effective on the date of the change of residence by the managing conservator; or
 - (ii) the possessory conservator and managing conservator lived in the same residence at any time during a six-month period preceding the date on which a suit for dissolution of the marriage was filed and the possessory conservator's county of residence remains the same and the managing conservator's county of residence changes after they no longer live in the same residence, effective on the date the order is rendered;
- (4) if the possessory conservator elects to end a period of possession at the time the child's school resumes, the possessory conservator shall surrender the child to the managing conservator at the end of each period of possession at the school in which the child is enrolled;
- (5) each conservator shall return with the child the personal effects that the child brought at the beginning of the period of possession;



- (6) either parent may designate a competent adult to pick up and return the child, as applicable; a parent or a designated competent adult shall be present when the child is picked up or returned;
- (7) a parent shall give notice to the person in possession of the child on each occasion that the parent will be unable to exercise that parent's right of possession for a specified period;
- (8) written notice shall be deemed to have been timely made if received or postmarked before or at the time that notice is due; and
- (9) if a conservator's time of possession of a child ends at the time school resumes and for any reason the child is not or will not be returned to school, the conservator in possession of the child shall immediately notify the school and the other conservator that the child will not be or has not been returned to school.