

Modification of custody order of minor children in Illinois

UPDATED: MARCH 8, 2005

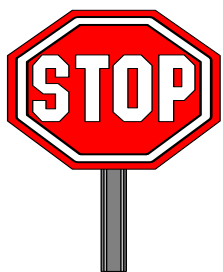


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Disclaimer — Please read

This packet of information was prepared to answer general questions and give general advice about the law in Illinois. This packet may or may not also include forms that you can use. When reading this packet or using the forms, keep in mind that the advice, information, and forms were created to assist readers with general issues, not specific situations, and as such does not replace the advice or representation of an attorney licensed to practice in the State of Illinois. Because of this and because of unanticipated changes in the law, the School of Law at Southern Illinois University and the person, institution, or agency who gave you this packet make no claim as to whether the use of this packet will achieve the result you desire and disclaim any responsibility for the consequences of any form prepared or action taken in reliance upon the information in this packet. If you are concerned or do not understand whether this packet will be of assistance to you or will apply to your specific situation, you should talk to an attorney who is licensed to practice in the State of Illinois. If you have any questions about this disclaimer,

Look for these symbols to tell you when to:



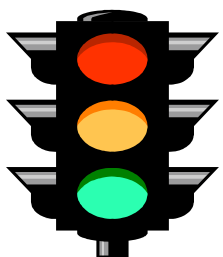
STOP!

You need legal representation or advice to continue.



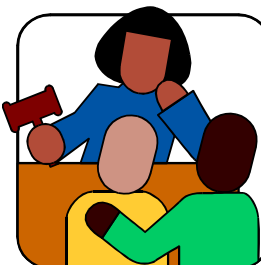
USE CAUTION!

This is a complicated step so pay attention.



GO!

You can proceed to the next step.



CHECK IT OUT!

This issue is discussed in another packet.

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Warning to all readers



4

Before you proceed with using this packet, you should ask yourself the following questions:

1. Have I tried to consult a private attorney?

No self-help publication, packet, or form can replace the advice and experience of a licensed attorney. An attorney may not cost as much as you think, especially if you just need to ask questions. Before you proceed on your own, call several local attorneys, compare prices, and find out whether you can pay an attorney or not.

2. If I cannot afford an attorney, have I tried to find a free source of legal assistance?

There are several agencies which provide legal assistance for free to certain groups of individuals. Some of these agencies are listed to the right. While they may not be able to help you with a particular problem, it does not hurt to call them to find out before you proceed on your own.

3. Is this something that I can do on my own?

If you have trouble following directions, or have difficulty reading, writing, or speaking in public, you may not be able to follow the directions and advice in this packet. If this is the case, find a friend or someone who can help you before your proceed on your own.

Free sources of legal help

Land Of Lincoln Legal Assistance

Serves the 65 southernmost counties in Illinois

Toll free: 877-342-7891

For additional information, you may visit their website at:

[Http://www.lollaf.org](http://www.lollaf.org)

Prairie State Legal Services

Serves most of northern and north central Illinois outside of Cook County

815-965-2134

800-331-0617

Coordinated Advice and Referral Program for Legal Service

serving Cook County

312-738-9200

Will County

Serving Will County

815-727-5123

Who these people are



Judge:

The judge is the person who presides over the courtroom. In most cases, including divorce cases, the judge makes all of the final decisions and approves all agreements. When a judge makes a decision or a finding, it has the force of law. The judge also sets and enforces court rules (like dress codes) and in some courthouses, the judge decides when cases are scheduled.



Circuit Clerk:

The Circuit Clerk is responsible for creating, managing, and updating court files. When you want to put something in a court file, see a court file, or make a copy of something in a court file, you talk to the Circuit Clerk's staff. In some courthouses, the Circuit Clerk also decides when cases are scheduled.



Sheriff:

The Sheriff's main duty is to keep the peace and to enforce the law. His/her role in the legal system, however, is usually to "serve" (give notice) to people of pending or upcoming court cases or hearings. The sheriff does this by giving the person a notice called a "summons". The sheriff also enforces the judge's orders.



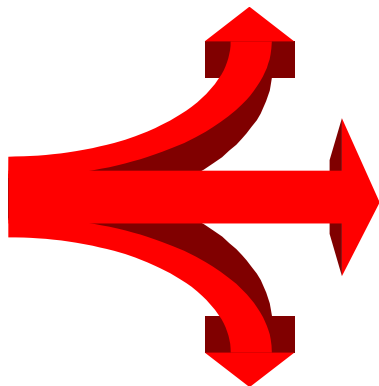
attorney:

An attorney is someone who can help you with your legal problem by providing you with advice about the law, the legal system, and the merits of your case. An attorney can act as your advocate and can represent you in court and in negotiation settlements.



State's Attorney

The State's Attorney is an attorney who represent the State of Illinois in lawsuits. Generally, the State's Attorney's office handles criminal cases. If you need assistance getting a visitation order enforced in a state outside of Illinois, you should call this office.



Modify Visitation Order

If you are the non-custodial parent, and you want more time with your children, then consider modifying the visitation order. However, the court must find that there has been “a substantial change in circumstances” to modify visitation. There is more information on this in Packet #8 of the Family Series by the Self Help Center.

Mediation

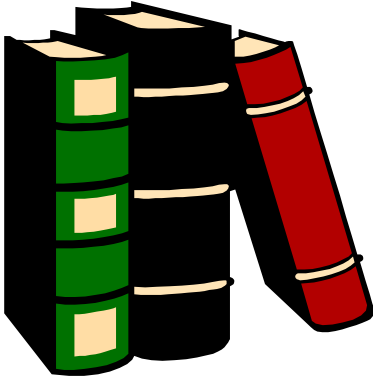
In some cases, you may be able to work out an agreement with the other parent as to what visitation you should be getting. A mediator is someone who can meet with you and the person with whom you are having the dispute and help you both come to a resolution you can both agree on. A mediator is not a judge and does not make decisions, but rather helps you and the other parent make a decision. In some counties, mediation is required in certain types of family law cases, including visitation cases.

Mediation should also be used if you think you and your former spouse can come to a peaceful resolution about changing custody. An agreement between you and your spouse is the easiest way to change the custody agreement, and a mediator might be able to help you reach that agreement.

State’s Attorney’s Office

If you want to change custody because you are not getting the visitation you and your spouse agreed, you can contact the State’s Attorney’s Office in a particular county, and get the visitation enforced. In most counties, you must have already filed a complaint under the visitation interference law before the State’s Attorney can get involved. For a discussion on enforcing a visitation order, See Packet #7 of the Family Series. You can find the telephone number the local State’s Attorney’s Office in the Yellow Pages.

Books on Custody change



Disclaimer: Please Read !!

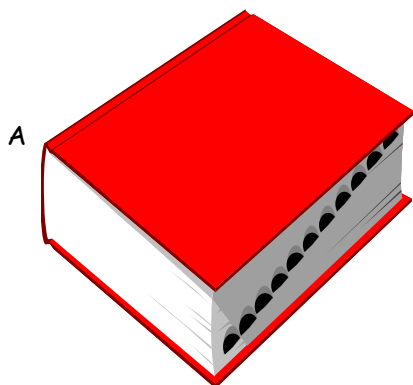


The following is a list of publications which discuss the issues of and or . Some of these publications are specific to Illinois and others are more general in nature. Because of this and because of unanticipated changes in the law, the School of Law at Southern Illinois University and the person, institution, or agency who gave you this packet make no claim as to the accuracy of the content of these publications including whether they will achieve the result you desire. The School of Law at Southern Illinois University and the person, institution, or agency who gave you this packet disclaim any responsibility for the consequences of any action taken in reliance upon the information in these publications. If you are concerned or do not understand whether a particular book will be of assistance to you or will apply to your specific situation, you should talk to the publication's publisher or an attorney who is licensed to practice in the State of Illinois. If you have any questions about this disclaimer, call the Self Help Legal Center.

Kids, the law, and you: understanding and using the legal system to protect our children by Robert Craig Waters

Child custody made simple: understanding the laws of child custody and child support by Webster Watnik

The law of child custody by Margaret C. Jasper



affidavit

sworn statement by a person. Lying in an affidavit can result in a charge of perjury which could mean a fine, imprisonment, or both.

alimony (maintenance)

Financial support paid to one spouse by another. This support is not for the children, but, rather is to maintain the standard of living for the receiving spouse. These forms do not allow you to ask for maintenance. If you want maintenance, you need to seek legal assistance.

circuit

The judicial system in Illinois is divided into Circuits. Each circuit defines a particular geographic area in Illinois.

child support

This is what the non-custodial parent pays to the custodial parent to help support his or her child. The amount of child support is set by law.

custody

The person who makes the decisions in the child's life regarding issues of health care, education, religion, and lifestyle. It is not who has physical control over the child or where the child resides.

hearing (trial)

An opportunity for both parties to tell the judge or jury their side of a dispute. Some hearings are court ordered so missing them can result in being held in contempt of court. For hearings which are not court ordered, failure to appear can result in the other side getting what they want in relief.

joint custody

When two people share custody. (see custody)

judgment

A decision or order of the court.

jurisdiction

Whether the court in a particular state has the power to hear a case or to order someone to do something depends upon whether it has "jurisdiction". Jurisdiction can be either over a person or over a subject. For a state court to have jurisdiction over a person, generally, the person must either reside in the state or have committed an act in the state.

minor children

Children under the age of 18.

motion

A written or oral request to the judge after a lawsuit has been started (see petition).

notary public

A person who verifies that a signature on a document. The notary public does not verify the content of the document itself.

petition

A written request to the court. A petition usually starts a lawsuit.

primary caretaker or residential parent

The person whom a child resides with most of the time. It is not who has custody of the child.

pro-se

A person who is not represented by an attorney.

reasonable visitation

Sometimes a visitation order does not award a specific amount of visitation to a parent, but rather awards the parent "reasonable visitation." This is usually done in cases where both parents agree on the visitation amount or when the non-custodial (the visiting) parent is held in default (doesn't respond) in a lawsuit and consequently, is not present when the visitation is set by the court. Unfortunately, what is "reasonable" can vary depending upon whom you ask. As long as the parents of the child(ren) cooperate and agree on visitation, "reasonable visitation" is fine. However, if the parents do not agree as to how much, how often, or in what manner visitation is to take place, they should modify the visitation order to be more specific.

restricted or supervised visitation

When a parent poses a threat of physical, mental, or emotional harm to his/her child(ren), the judge can order that the parent's visitation with the child(ren) be supervised or restricted. Supervised visitation means that the parent is not left alone with the child(ren) during visitation and that another person (usually a qualified professional) supervises the visitation. Restricted visitation means that the parent's visitation is restricted to a certain time, place, or manner.

serve or service

The process where a person is officially notified of a pending lawsuit.

statute

The law that the state legislature or federal government enacted on a particular subject.

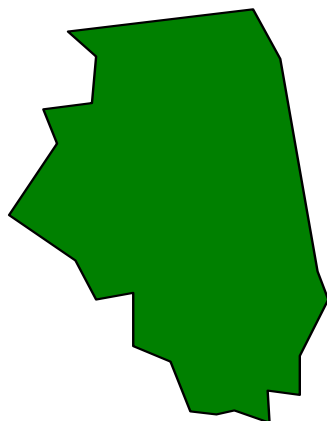
supporting parent

The non-custodial or non-residential parent who has been ordered to pay child support to the custodial or residential parent.

visiting parent

The non-custodial or non-residential parent who has been allowed by court order to visit with the child

Summary of the law in this area



The law which governs most of the area of child custody in Illinois is the Illinois Marriage and Dissolution of Marriage Act. It can be found in Act 5 of Chapter 750 of the Illinois Compiled Statutes. The specific legal citation is 750 ILCS 5/610.

Unless agreed upon by the parties, no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may seriously endanger his physical, mental, moral, or emotional health.

The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment:

- 1) A change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody; and
- 2) Modification is necessary to serve the best interests of the child.

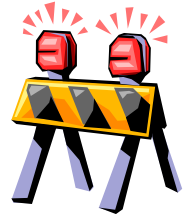
In the case of joint custody, if the parties agree to a termination of a joint custody arrangement, the court shall terminate the joint custody and make any modification which is in the child's best interest. If either party opposes this modification or termination, the court shall state in its decision specific findings of fact in support of its modification or termination of joint custody .



Step One: Prepare the necessary forms to start the process.

In the supplement to this packet you will find 3 forms: the Petition For Modification of Custody, an Affidavit, and the Application to Sue as a Poor Person. Using the guide in the supplement to this packet, you will need to complete these forms.

The Petition is your formal written request to the court for a modification of custody. It also serves as a notice to your spouse as to your position on these issues so your spouse can respond. The Petition is a very important form and needs to be completed carefully. If you do not request something in your Petition, the court cannot grant it to you. **You must attach a copy of the Custody Order that you are trying to modify to your Petition. The custody order might be a part of the Judgment for Dissolution of Marriage, and if so, attach a copy of that. The Affidavit is the form you will use to state your reasons for wanting the modification of custody. Make sure anything stated in #5 of the Petition is also stated in the Affidavit. You must attach the Affidavit to the Petition that you file.**



The Application is your request that the court waive the fees that are required for a person to file a Petition. The amount of these fees varies by county. Typically, only persons of low income will receive a fee waiver, but there is no statutory definition as to what level of income is required for a person to receive a waiver. Consequently, if you think you may be eligible — your best bet is to apply. Denial of a fee waiver will not impact your case except that you will have to pay a fee to file documents with the Clerk.



Step Two: File your documents

You should file your Petition in the county where the original custody order was entered. If you do not apply for a waiver of the filing fee — see below — you may have to pay to file your Petition.

If you want to apply for a fee waiver, your first step is to give the Application To Sue as A Poor Person to the Circuit Clerk and ask that it be presented to a judge for his/her approval. Wait (this may take several days) to see if it is approved, and if it is, you can then file your Petition without paying any filing fees.

After your fee waiver is either approved or denied (or if you don't apply for a waiver) you should file your Petition for Modification of Custody. Remember to take the original and 2 copies of the Petition with you to the Circuit Clerk's office (one for yourself and one for your spouse).



Step Three: Notify the other parent of the request to modify custody.

You will need to serve a copy of your Petition on the other party. Since you are modifying an existing court order, you can serve the other party by mail. Mail a file stamped copy of the Petition and the Affidavit to the party you are suing.

After you have mailed the Petition to the other parent, you will need to complete and file a Certificate of Mailing with the Clerk certifying the date and the address to which you mailed the Petition. This form is included in the supplement to this packet. You will then need to mail a file stamped copy of the Certificate of Mailing to the person you are suing.



If the person you are trying to sue will waive being served by mail and will agree to the terms as you have requested in your Petition, have him/her sign the Entry of Appearance, Waiver, and Consent form included in the supplement to this packet. Please note that this person must have seen a copy of the Petition and Affidavit that you filed as well as a copy of the Order you plan to give to the Judge. Your spouse's signature must be notarized. Once you file this form with the Circuit Clerk, you can move to Step Four. If the person you are suing will not sign this form, you will need to serve this person as described in the above paragraph.



Step Four: Request/Get a hearing date:



Once you have served the other party with your Petition, you will need to wait 30 days to see if he/she files a response to your Petition. If he/she has failed to file a response after 30 days have passed, you should request a hearing date.

NOTE: If the person you are suing has signed an Entry of Appearance, Waiver, and Consent form waiving service, you do not need to wait the 30 days before requesting your hearing.

If the person you are suing has filed a response and it appears from the response that he/she has an attorney, or if an attorney contacts you at any time before or during the hearing, you should seek legal assistance immediately as it is not a good idea for you to proceed against a person who is represented by an attorney on your own.



Depending upon the county in which you filed your Petition, you will need to contact either the Circuit Clerk or the secretary of the judge who usually handles the custody cases to request a hearing date. You can do this either by phone, or by mail. When contacting the clerk or the judge's secretary, be sure to ask for the default or pro se hearing date. Some counties require you to send a Notice to the other parent of the hearing. If this is the case, you will need to complete and send the Notice form to the other parent and file the Certificate of Mailing of Notice to certify when you mailed it. These forms can be found in the packet supplement.



Step Five: Prepare for the hearing:

You will need to prepare the Order For Modification Of Custody. The Order is the document which the judge signs which modifies the current custody order.

Prepare your testimony using the Petition For Custody and your Affidavit as your guide. You will need to testify about all of the facts you have alleged in your petition (the numbered parts of the Order) and you will need to testify as to what you want the court to do (the letter parts of the Order). If you ask the court to do something that was not in your Petition, you may have to either amend your Petition or you may not get it.

Step Six: Attend the hearing:

While there is no way to know exactly what will happen at your hearing. Here are some things you should do:

- Bring with you your copies of all the documents you filed with the Circuit Clerk and any other papers relating to your Petition.
- Arrive at least 30 minutes before your hearing. Whatever you do, don't be late. Check the docket or ask the Clerk exactly what room you will be in. Tell the Clerk or the Judge's secretary that you are ready to proceed when called and wait for your case number and name to be called.
- When the Judge enters the courtroom, stand until you are told to be seated. When your case is called, approach the bench. Always refer to the Judge as "your honor".
- Before you begin, the Judge may then ask you preliminary questions about your case. Be prepared to answer whether your spouse was served, and if so, when.
- To testify, you will need to call yourself as a witness. At this time, the Judge will put you under oath and you will present your testimony. when you testify, your testimony should include:

- your name and address;
- the other party's name and children;
- the names and birthdates of the children;
- where the children live;
- what visitation you have now, if any;
- why the current custody and visitation schedule is not working; and
- what new custody and visitation schedule you want and why.

- After you have testified, the other party (if they show up) will be allowed to ask you questions. You should answer all questions truthfully and directly. After the other side is finished asking you

questions, you can either continue to testify to clear up any matters brought up by the questions asked by the other parent or you may sit down.

If you need other witnesses to testify about certain facts, you should call these witnesses at this time. Like yourself, they will have to be sworn in. Since you are representing yourself, you will have to ask your witness questions so that they give the judge the information you want them to. When you are done asking questions, the other party can ask questions of your witnesses

After you are finished with your side of the case, the other party will be given the opportunity to testify and to call witnesses. Like the other party, you too will be given the opportunity to ask the other party and their witnesses questions about their testimony.



After both sides are finished presenting their case, the judge will ask both sides if they have any final comments to make and he/she will then either make a decision or he/she will tell you when you can expect to receive a decision.

If the Judge grants your Petition, present your Order for Modification of Custody to the Judge for his/her signature. If the Judge wants corrections made, don't panic, you can ask for permission to submit a corrected version by mail.

Step Seven: Wrap it up:

After the judge has signed the Order for Modification of Custody you will need to file your Order with the Clerk and send a file-stamped copy of it to the other party.

To certify (prove) that you have done this, you will need to file a Certificate of Mailing with the Clerk. As with all documents you file, be sure to keep file stamped copies of these documents for yourself. Remember to hold on to your Order as it is your proof that you are entitled to support. If you lose your Order, however, don't panic, as with any document you file, you can always get another copy from the Circuit Clerk. You may, however, have to pay for the copies.

Q: What if my request is denied?



If your request to modify custody was denied due to insufficient evidence to support your request, then you will have to wait until the circumstances surrounding your request for custody change change before you can file another Petition. This is because once the court makes a decision, it cannot address that same incident or event again. If your request was denied because of a procedural error on your part (for example, you did not get proper service), then you should correct the error and request another hearing.

Finally, whenever you lose in court, you have the right to request the court to reconsider its decision and you have the right to appeal the decision to a higher court. Please note that in most cases you have 30 days or less from the date of the judge's decision to exercise these rights or you may lose your right to reconsideration or appeal. You should seek the assistance of an attorney to exercise these rights.



Q: What is a court file?

A: The file is the way that the courthouse keeps track of a lawsuit.

The file includes all of the documents that were filed, notices of hearings, notes by the judge and clerk, and letters to and from the judge and clerk.

Q: When do you need to file a document in a court file?

A: Generally, you will file a document when you want to:

have evidence that a task was completed; record an event or a statement; or give notice to someone about something.

Q: What does it mean to file a document in a court file?

A: Generally, filing a document means giving the Circuit Clerk a copy of a document so that he/she can place it in the court file you want it to go in. When the Clerk files the document, he/she will stamp it with a stamp that says the date (and sometimes the time) the document was filed.

Q: Does filing a document make it legal?

A: No. The Clerk will not check to make sure that your document is in compliance with the law. Most of the time you can file anything you want as long as you are willing to pay for the filing costs. It does not mean, however, that what you have filed is correct.

Q: Why is filing so important?

A: Most of the time, filing is the primary way to show that you have met the deadline for something — either to initiate a lawsuit or to notify someone of a lawsuit or a hearing. Filing is also the way that you notify the court of your answer (response) to lawsuit started against you.



Please note that failure to file something on time can cause you to lose your right to proceed with your claim or you may be forced to start over.



Get help

If you have trouble following directions, doing things on time, filling out forms, or keeping track of paperwork, then doing your own divorce may be much more stressful than it needs to be. If, however, you have a friend you can help you do these things, the job will be a lot easier.

Keep in mind, however, that a friend cannot take the place of the advice and experience of an attorney licensed to practice in the State of Illinois. Consequently, if you need legal advice or if doing your own divorce proves to be too difficult a task for you, talk to an attorney.

