Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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MEMORANDUM

TO: State legislators and others considering passage of the Uniform Deployed Parents Custody and Visitation Act (UDPCVA)

FROM: Maxine Eichner, Reef Ivey Professor of Law, University of North Carolina School of Law, Reporter for the Drafting Committee of the UDPCVA

DATE: April 1, 2014

RE: The UDPCVA and the Constitutional Rights of Parents

INTRODUCTION

The Uniform Law Commission studied, drafted and promulgated the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) for adoption by state legislatures in July 2012. In February 2013, the American Bar Association's Board of Governors approved it for consideration by the 50 states. The UDPCVA's Drafting Committee included judges, law professors, and practicing lawyers. Attorneys appointed by the American Bar Association (and its appropriate Sections) and representatives of the military actively participated in all drafting meetings.

The UDPCVA is intended to facilitate resolution of the child custody issues that arise when a parent is deployed for military or other national service on orders that do not permit accompaniment by family members. The Act seeks to ensure that parents who serve their country are not penalized for their service, while still giving adequate weight to the interests of the other parent and, most importantly, the best interest of the child.

Article 3 of the UDPCVA provides that if a child's parents cannot reach agreement on custody issues upon notice of deployment, they may seek judicial resolution of these issues. Sections 306 and 307 of this Article allow a judge resolving such issues, at the request of a deploying parent, temporarily to assign a portion of that parent's custodial rights to a nonparent or another person with a close relationship to the child if such an assignment would be in the child's best interest. The Uniform Law Commission contemplated that these provisions would allow, for example, a judge to rule that a child who had been living with his father, stepmother, and half-siblings, could remain under the care of his stepmother in his home and at his current school during the deployment, rather than having to move out of state to live with the other parent, if the judge determined it was in the child's best interest. Of course, if the judge determined that the child's best interest was served by living with the nondeploying parent, the Act would require that the judge order temporary custody to that parent.

The UDPCVA's Drafting Committee considered the U.S. Supreme Court's decision in *Troxel v. Granville*[1] and comparable state law while drafting Article 3. Based on this consideration, the Drafting Committee concluded that judicial assignment of the deploying parent's custody rights to a nonparent in the circumstances permitted by Article 3 is constitutionally permissible.

Troxel **Does Not Dictate the Outcome in Article 3 Cases Since These Cases Involve Two Parents with Conflicting Views Regarding Care and Custody of their Children, Each of Whom Possesses Constitutional Rights.**

In the *Troxel* case, the U.S. Supreme Court struck down the application of a Washington State statute that allowed visitation of a child's grandparents over the objections of the child's mother. In that case, the grandparents' son, who was the child's father, was deceased. The statute at issue provided that a court could grant visitation to nonparents based on "the best interest of the child." The Supreme Court struck down the Washington statute's application in the case before it because the trial court, in granting visitation over the mother's objection, "gave no special weight at all to Granville's determination of her daughters' best interests."[2] In the Court's words, so long as a parent is deemed "fit," the state may not "infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[3] *Troxel* stands for the proposition that the fundamental right of parents to make decisions concerning the care, custody, and control of their children means that their decisions regarding a child's best interest must be accorded significant weight in custody determinations.[4] A number of states have developed similar doctrines based on their state constitutions.[5]

The Drafting Committee determined that judicial assignment of a portion of the deploying parent's custodial responsibility to a nonparent in the circumstances permitted by Article 3 is constitutional under *Troxel* and parallel state law. Cases under Article 3, the Committee concluded, involve two critical differences from the facts presented in *Troxel*:

- First, they do not involve the uncontradicted determination of a child's parent regarding custody. Instead, they involve *two* parents whose views regarding are in conflict on the issue: the deploying parent, who wants the child to stay in the care of a nonparent; and the nondeploying parent, who wants the child to stay with himself or herself.

- Second, cases under Article 3 do not involve the independent grant of custodial responsibility to a nonparent, as was the case in *Troxel*. Instead, Article 3 provides for

[1] 530 U.S. 57 (2000).
[2] *Id.* at 69.
[3] *Id.* at 72-73.
[4] The Court declined to define the precise scope of exceptional circumstances that would warrant overruling a fit parent's views. *Id.* at 73.
[5] *See, e.g.,* Downs v. Scheffler, 80 P.3d 775, 781 (Ariz. 2003); In re Guardianship of D.A. McW., 460 So.2d 368, 370 (Fla. 1984); Durkin v. Hinich, 442 N.W.2d 148, 153 (Minn. 1989); Petersen v. Rogers, 445 S.E.2d 901, 905 (N.C. 1994).

> the temporary assignment of a portion of the deploying parent's custodial responsibility to the nonparent, leaving the rights of the nondeploying parent intact. As such, a grant of custody under Article 3 constitutes the exercise of the deployed parent's own custodial rights to determine the care of his or her child. In this respect it is similar to the generally recognized right of parents to leave the child with another responsible adult when they go away on vacation.[6]

In these circumstances, the Drafting Committee concluded, neither parent's wishes is presumptively entitled to overrule the wishes of the other parent as a constitutional matter. Instead, a court's assignment of custody or visitation to a nonparent pursuant to Article 3 is constitutionally permissible.

A Substantial Majority of Courts Have Upheld the Constitutionality of Assigning Custody or Visitation to a Nonparent When a Parent Deploys.

The great majority of courts that have considered the assignment of visitation or custodial rights to a nonparent during a parent's military deployment have upheld the assignment on these grounds. For example, in a 2013 decision, *In re Trotter*[7] the Iowa Court of Appeals upheld the trial court's order allowing the father to assign his custodial rights over his son, X.B., to the father's wife, (the child's stepmother,) during the father's one-year deployment. The child's mother had challenged the facial constitutionality of Iowa's military custody statute, which allowed a custodial parent called to active duty to ask the court to "temporarily assign the parent's physical care parenting time to a family member of the minor child . . . ."[8] The mother contended that the statute allowed the court to grant custody to a nonparent over a parent, in violation of the fundamental rights of a parent pursuant to *Troxel*.

The Court of Appeals, however, rejected the mother's argument that the temporary assignment of custody under the statute "should be imputed to the nonparent and treated as a request by the nonparent for parenting time."[9] Instead, the Court held that a custody dispute between parents on the deployment of one parent is correctly treated as conflict between *both* parents, each of whom possesses constitutional rights regarding the child.[10] The Court therefore upheld the constitutionality of the military custody statute, determining that "there is a reasonable fit between the[se] provisions . . . and the State's interest in not penalizing military service people for their public service while deployed, avoiding a chilling effect on people volunteering for military service due to fear of losing custody of their children, and furthering the long-range best interests of children by maintaining stability and consistency for the children during a parents' temporary deployment."[11]

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[6] *See, e.g.,* McQuinn v. McQuinn, 866 So.2d 570, 573-74 (Ala. Civ. App. 2003); In re Marriage of DePalma, 176 P.3d 829, 833 (Colo. App. 2007).
[7] In re Trotter, No. 12–0902, 829 N.W.2d 191, at *1 (Iowa Ct. App. 2013) (Table) (unpublished disposition, text in Westlaw).
[8] *Id.* at *2 (citing IOWA CODE § 598.41D).
[9] *Id.* at *3.
[10] *Id.*
[11] *In re Trotter*, No. 12–0902 at *3.

The *Trotter* Court then turned from assessing the facial constitutionality of the Iowa statute to the mother's constitutional challenge to the trial court's assigning of custody to the child's stepmother, rather than to herself, in the case at bar. The Court rejected the mother's assertion that, as the natural parent of the child, "her claim to temporary custody is clearly superior to that of . . . the minor child's stepmother."[12] According to the Court:

> [I]t is important to note the district court treated this matter as a dispute between two parents regarding the arrangements for the care of their child during the custodial parent's parenting time, rather than a dispute between a nonparent seeking parenting time and a parent opposing it. Specifically, this dispute concerns John's physical care of X.B., and John's determination, as set forth in his application for temporary assignment of his physical care parenting time, that it would be in the best interest of X.B. to allow him to continue the usual physical care schedule, maintain his relationship with his stepmother and stepsister, and not relocate several states away during John's temporary deployment.
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> Iowa courts recognize a presumption that fit parents act in the best interests of their children. . . . Because this case concerns a dispute between a mother and father, the district court was correct in weighing the wishes of both and considering the other relevant factors to determine what was in X.B.'s best interests.[13]

The Appellate Division of the New Jersey Superior Court arrived at a similar conclusion in the 2009 decision of *Faucett v. Vasquez.*[14] The minor child in that case had lived with his father, his stepmother, and his step-siblings for several years before the father was notified of his impending deployment overseas. In opposing the mother's application for full custody during the deployment, the father asked the court to allow the child to continue to live with his wife. The trial court agreed with the father, finding "no evidence that the child's best interest w[ould] be served . . . by an abrupt change of custody," particularly given that the child would be living in an "intact family unit" of which he had been a part since 2002.[15]

In assessing the constitutionality of the trial court's ruling, the Appellate Division began by noting two fundamental principles underlying custody law: First, "that 'a legal parent has a fundamental right to the care, custody and nurturance of his or her child;'" second, that "when the dispute is between a fit parent and a third party, only the fit parent is presumed to be entitled to custody."[16] The Court stated that, although on first blush these principles might appear to resolve the case before it, a "more careful examination" of the issue revealed that "the parental presumption does not apply when one parent seeks modification of a previously-entered court order regarding custody solely because of the other parent's impending military deployment."[17] In such a dispute, the Court stated, the nondeploying parent's rights were not being curtailed by a nonparent; that parent retained the same right to legal custody of the child that he or she possessed before the deployment. What changed, instead, was simply that the deployed parent

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[12] *Id.* at *4.
[13] *Id.*
[14] 984 A.2d 460 (N.J. Super. Ct. App. Div. 2009).
[15] *Id.* at 465.
[16] *Id.* at 466 (citations omitted).
[17] *Id.* at 475.

temporarily allowed the child's stepmother to exercise a portion of his custodial responsibility.[18]

The Court added that "[t]here are other reasons why the parental presumption ought not to apply when the [parent with primary custody] is facing *temporary* military deployment. . . . [P]laintiff will hopefully return from his deployment in good health and in a relatively short, finite period of time, after which he can resume his relationship with [the child] as before."[19] The Appellate Court also noted that "reported cases [from other jurisdictions] support our conclusion that the parental presumption does not apply to this dispute."[20]

Likewise, the Court of Civil Appeals of Alabama held that a father's delegation of his visitation rights to family members during his deployment was constitutionally permissible in *McQuinn v. McQuinn.*[21] In that case, the appellate court reversed the trial court's refusal to allow visitation with the father's family. According to the Court:

> We note that although the mother, not the father, is the primary physical custodian of the children, the father's fundamental right to direct the care, control, and association of his children is no less fundamental and protected than the right of the mother to do the same. *See Troxel v. Granville*, 530 U.S. at 66, 120 S.Ct. 2054. The decision in *Troxel* does not differentiate between custodial and noncustodial parents as to their fundamental rights to determine the care, control, and association of their children.
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> The mother incorrectly labels this a "grandparent-visitation" case, and claims that the trial court improperly attempted in its original judgment to grant "de facto" visitation with the father's parents and family members. . . . What the mother misunderstands is that this case does not involve whether grandparents or third parties have a right to visitation, but instead involves the father's right, during his visitation periods, to determine with whom his children may visit. . . . [T]he mother is free to leave the children in day care during her working hours, with babysitters when she has social engagements, and apparently (based upon the statement of her counsel at trial) with her sister (or other family members) in Tennessee for what her counsel described as extended "regular visitation periods," all without his approval or even his knowledge. Essentially, the mother argues that the father, as the noncustodial parent, has been stripped of the rights of a parent and that she, and only she, may exercise those parental rights. She is mistaken.[22]

The Colorado Court of Appeals applied similar reasoning in rejecting the challenge of a nondeploying parent in the 2007 decision, *In re Marriage of DePalma*.[23] In that case, the mother appealed the trial court's order granting the deployed father's request to allow his wife (the children's stepmother) to care for the parties' children during the father's allotted parenting time.

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[18] *Faucett*, 984 A.2d. at 468.
[19] *Id.*
[20] *Id.* at 469 (citing In re Marriage of DePalma, 176 P.3d 829, 831 (Colo. App. 2007); Lebo v. Lebo, 886 So.2d 491, 492 (La. Ct. App. 2004); In re Marriage of Rayman, 47 P.3d 413, 416 (Kan. 2002).
[21] 866 So.2d 570 (Ala. Civ. App. 2003).
[22] *Id.* at 573-74.
[23] 176 P.3d 829 (Colo. App. 2007).

The Court of Appeals held that the mother was not constitutionally entitled to the father's parenting time:

> [T]he trial court treated this matter as a dispute between two fit parents regarding the arrangements for the care of the children during father's parenting time, rather than a dispute between a nonparent seeking parenting time and a parent opposing it. We are not persuaded that the court erred in doing so. Stepmother never requested parenting time in her own right, and we are aware of no authority for the proposition that a parent's request that a stepparent or other nonparent be permitted to provide care for a child should be imputed to the nonparent and treated as a request by the nonparent for parenting time.
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> Because the dispute was between mother and father, and not between mother and stepmother, the presumption that a parent has a 'first and prior' right to the custody of his or her child was not implicated, and there was no need for the court to comment upon the presumption that a parent's right to custody is superior to that of a nonparent.
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> Because the dispute was between mother and father, the court did not err in according the presumption that a fit parent acts in the best interests of the children to father as well as to mother.[24]

The Court of Appeals also observed that:

> [P]arents routinely entrust their children to the care of teachers, family, and daycare providers during their parenting time. Although mother suggests that there is a substantive difference between leaving a child with a nonparent on a short-term basis and doing so for an extended period, she has not cited any authority in support of this proposition or explained why she believes this to be true. Nor has she explained why the entrustment of children to the care of a nonparent over a longer period necessarily requires the extension of parental rights to the nonparent.[25]

The Supreme Court of Kansas employed a similar approach to custody issues on a father's deployment to Korea for one year in *In re Marriage of Rayman.*[26] In that case, the court below had ruled in favor of the father, who had primary residential custody of the two children for the four years before the deployment and who sought to allow the children to remain in the care of his present wife, the children's stepmother. Although the Court did not explicitly address the mother's constitutional argument (on the ground that it was not properly raised below), it did consider whether the trial court's ruling violated the presumption of parental custody established by the Kansas custody statute. On this issue, the Kansas Supreme Court stated:

> This is not a contest as to custody between a natural parent and a grandparent or nonparent who have no permanent right to the child's custody . . . . What [the mother] in fact appears to request on appeal . . . is for a bright line rule that a parent with residential custody of his or her children loses that custody when required to be away from his or her

[24] *Id.* at 832.
[25] *Id.* at 833.
[26] 47 P.3d 413 (Kan. 2002).

> children for an extended period of time such as a 5 ½-month military tour to Korea, followed by a month's time with his or her family, and then followed by an additional 5 ½ -month military tour back to Korea. We decline to adopt such a bright line rule requiring change of residential custody to the noncustodial parent.
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> Each situation involving military families has distinct differences, as do the facts of temporary changes which relate to nonmilitary custodial relationships. The temporary transfer of the parent with residential custody must not automatically trigger a custody change. We reject [the mother's] argument that the parental preference doctrine was violated by the trial court's ruling under the facts of this case. Custody is an issue to be determined on a case-by-case basis as the trial court did here.[27]

Finally, the Appellate Court of Illinois analyzed the military deployment issue similarly in upholding a trial court's ruling that assigned a deploying father's visitation rights to his family over the mother's objection. In *In re Marriage of Sullivan*,[28] the Court rejected the mother's argument that the assignment violated her constitutional rights as a parent under the Illinois Constitution:

> [T]he present case does not involve grandparents filing petitions in their own capacity seeking to visit their grandchildren. Rather, this case involves a father petitioning to modify his visitation rights so that his family can visit his son while he is serving in the military overseas. As such, . . . this case does not involve a judge deciding what is in the best interest of a child between a fit parent and a nonparent. . . . Instead, this case involves the trial court's weighing of the wishes of two fit parents to determine what is in the child's best interests. . . . [T]he trial court has the authority to make such a determination.[29]

Besides these cases, other appellate courts have approved of the assignment of a service member's custody rights to a nonparent without explicitly addressing the issue of the parent's rights to determine custody issues. Thus in *Webb v. Webb*,[30] the Supreme Court of Idaho upheld entry of an order allowing the service member father to delegate his visitation rights to his parent pursuant to an Idaho statute addressing military custody issues. In addition, the Court of Appeals of Louisiana upheld a service member's assignment of custody in *Lebo v. Lebo*,[31] on the ground that a custodial parent who was called to active duty in Afghanistan could leave the child with his current wife since "the law gives [the custodial parent] the authority to make all decisions affecting the child unless otherwise provided in a custody implementation order."[32] The Court held, however, that the Louisiana custody statute did not give the domiciliary parent the ability to unilaterally change custody by a power of attorney; the existing statute allowed modification of custody only through the courts.[33]

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[27] *Id.* at 416-17.
[28] 795 N.E.2d 392 (Ill. App. Ct. 2003).
[29] *Id*. at 396-97.
[30] 148 P.3d 1267 (Idaho 2006).
[31] 886 So.2d 491 (La. Ct. App. 2004).
[32] *Id.* at 492.
[33] *Id.* at 492-93.

The Two Appellate Decisions Holding That a Nondeploying Parent Is Presumptively Entitled to Custody Over a Nonparent Failed to Consider the Deploying Parent's Own Constitutional Rights.

Against the weight of these cases, only two appellate decisions have held that, in the deployment context, the constitutional rights of the nondeploying parent require that he or she be presumptively granted custody or visitation over a nonparent designated by the deploying parent. In *Lubinski v. Lubinksi*,[34] the Wisconsin Court of Appeals concluded that a service member improperly sought to transfer his physical placement rights to his new wife, reasoning that the "[father] cannot seek to enforce his physical placement with [the child] by transferring that placement to [the stepmother]."[35] While the *Lubinski* court cited *Troxel* for the proposition that "a fit parent's decision regarding . . . visitation" should be given particular weight,[36] the court considered only the preferences of the nondeploying parent in its analysis, and failed to consider the fundamental rights of the deploying parent to make decisions regarding visitation. Thus, while the court in *Lubinski* ultimately concluded that there is a constitutional limit on the father's transfer of parental rights, it did so under an incomplete framing of the issue: by viewing the father's action as an independent transfer of legal rights to the stepmother, rather than as a temporary delegation of a portion of his own custodial responsibility, and therefore an exercise of his own constitutional rights as a parent.

Likewise, in *In re Marriage of Grantham*,[37] the Iowa Supreme Court upheld the trial court's order granting temporary custody in favor of the mother after the father was called to active duty. Although most of the opinion involved the Court's determination that the Servicemembers Civil Relief Act[38] did not prohibit entry of a temporary custody order, the Court also stated that the mother's "claim to temporary custody was clearly superior to that of [the service member's] mother."[39] As with *Lubinski*, the Court did not consider the alternative framing of the issue as one of conflicting custody preferences on the part of both parents; indeed, this issue was only raised obliquely by the deploying father.[40]

CONCLUSION

The Drafting Committee for the UDPCVA spent many hours considering the rights of parents, the import of the *Troxel* decision, and the need to respect the unique abilities of parents

[34] 761 N.W.2d 676 (Wis. Ct. App. 2008).
[35] *Id.* at 681.
[36] *Id.* (citing *Troxel*, 530 U.S. at 68-69).
[37] 698 N.W.2d 140 (Iowa 2005).
[38] 50 U.S.C. Appx. 501 *et seq*..
[39] *Id.* at 145.
[40] *See* Appellant's Brief and Request for Oral Argument, In re Marriage of Grantham, 698 N.W.2d 140 (Iowa 2005) (No. 03-2100) 2004 WL 4928736. In Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *1 (N.Y. Fam. Ct. May 21, 2004), the trial court applied a similar analysis to that of the court in In re Marriage of Grantham. The trial court found that no extraordinary circumstances existed that would allow a nonparent to assume custody as against a natural parent. The opinion reached this conclusion without considering the possibility that the case should be treated as a conflict between the two wishes of two fit parents, which would therefore make application of the natural-parent preference inappropriate.

to decide the best interest of their children. Based on the substantial weight of legal authority, the Committee determined that a limited grant of authority to a nonparent, which temporarily assigns a portion of the deployed parent's custody or visitation rights at that parent's request, comports with *Troxel* and comparable state law. A court may constitutionally assign a portion of a deployed parent's custodial responsibility to a nonparent under Article 3 of the Uniform Deployed Parents Custody and Visitation Act.[41]

[41] In the event that a court might reach a contrary result based either on state law or the federal constitution, the UDPCVA ensures that this result will be incorporated into the Act through Section 306's requirement that any grant of custodial responsibility be "in accordance with law of this state other than this [act]." The result would be that, in the event of such a ruling, courts could subsequently grant custody to a nonparent under section 306 only where some ground existed to overrule the presumption of parental custody on the facts of that case be treated as a conflict between the two wishes of two fit parents, which would therefore make application of the natural-parent preference inappropriate.