

Memorandum

TO: NCCUSL Drafting Committee for the Deployed Parents Visitation and Custody Act

CC: Observers

From: Maxine Eichner

Date: September 9, 2011

This memorandum summarizes key issues for discussion at the Committee's September 2011 meeting. However, I have made substantial changes in the last draft of our Act as a result of commissioners' comments at our first reading this past summer. Many of these changes raise relatively limited issues, which I address in questions and comments in the margins of the circulated draft and do not address here. As a result, there will undoubtedly be many issues in addition to the issues presented here to discuss at the meeting.

1. Global issue: Can the Act be simplified?

The one set of comments I received that applies globally to the Act came in an email from Commissioner John Cannel after the meeting. In relevant part it says the following:

First, less is more. As I see it, there are only a few important principles that the act needs to enforce: 1) Notice by the parent who is to be deployed of the impending deployment. 2) An expedited hearing (if either parent requests it) to determine custody/visitation issues affected by the deployment. 3) The custody order should be temporary, ending when deployment ends. 4) Persons other than a natural parent should be considered eligible for physical custody. 5) There should be a hearing at the end of deployment to restore the original arrangement with any changes required by changed circumstances. All of this should require no more than half a dozen short sections. Ordinary principles of custody determinations will supply the context and should not be restated.

Second, do not multiply categories without reason. All of the principles, above apply equally to various kinds of custody (physical, legal, joint, individual) and visitation (short or long, with or without decision making authority). Do not try to distinguish all of these kinds of custody and visitation. They vary too much from state to state and from case to case. They defy categorization and you do not need to sort them out. Also, it is not necessary to create new kinds of hearing to implement the purposes of the act. Now, custody/visitation issues are always open when circumstances change. All you need to do is plug a few new (and important) ideas into the existing structures.

. . . I believe strongly that the Deployed Parents Act needs thorough rewriting.

In response to the Commissioner's comments, I have tried to simplify the Act, and have noted several places in the margins where we could delete particular provisions. At the meeting, we should discuss these possible changes and whether there are other ways in which the Act can be simplified.

2. Section 104: Should we rethink our decision allowing a state in which a temporary custody order has entered to retain jurisdiction during deployment?

Bob Spector, the (wonderful) Reporter for the UCCJEA, has been running through some of the implications of our current version of section 104. He sent me the following questions/comments/hypotheticals that we should discuss at our meeting.

1. What is the effect of the PKPA on the statute? The PKPA provides for continuing jurisdiction if a state has jurisdiction under its own law (which is the UCCJEA and this Act) and a parent remains a resident of the state. The Deployed Parents Custody and Visitation Act satisfied the first requirement. However, federal law will determine whether the Act's definition satisfies the PKPA's requirement that one parent continue to be a resident of the original state. Consider a case where State A makes a custody determination, the father is deployed and the custodial mother moves to State B. State B could decide that under the PKPA the father is no longer a resident of State A and therefore jurisdiction has now shifted to State B. It is also entirely possible that State A could decide that regardless of the Act, the PKPA should be interpreted to require actual "living in the state" in order to remain a resident for PKPA purposes. If so the PKPA would end up preempting the Deployed Parent Act.

2. Problems when one state has adopted this act and another has not. I'm also worried about the problems that are going to result as the act begins to be adopted by the states. If past experience is any predictor, not all states will adopt this act. In the family law area our best results have come from UIFSA and the UCCJ[E]A. However, UIFSA has a federal mandate. Even the UCCJEA has not been adopted by every state. We are still missing Massachusetts. [Vermont looks like it will adopt it this year.] This means for the foreseeable future we will be facing a patchwork quilt of states, some of which will adopt the act and some of which will not. During this period of time I am afraid that the effect of the Deployed Parent Act will be to substantially increase litigation and reduce the jurisdictional uniformity that presently exists.

Consider the following hypotheticals:

A . Assume State A has the Act and the deployed parent leaves the state. The other parent who has temporary custody under the Act also leaves the state for State B. Under the Act, state A continues to have jurisdiction. However, if the state to which the other parent moves does not have the act, then there is conflicting jurisdiction. The state which has the act claims continuing jurisdiction under the act. The state to which the custodial parent moves would claim jurisdiction as the new home state. The PKPA would be required to resolve this issues with whatever interpretation State A and State B would give to the PKPA’s term “remains a residence.”

B. Assume State A does not have the Act and enters an order providing for custody with the mother while father is deployed. Mother moves with the child to state B which does have the act. Mother is now deployed and wishes to have an order entered to allow the maternal grandmother to have temporary custody while she is deployed. Under the Act she must do this in state A which since it does not have the Act would not have jurisdiction since there is no one left in the state. State B which does have the act cannot enter the order because it has the act and under the act jurisdiction is proper in State A. Resolution of this problem has to be covered under the UCCJEA and is probably going to be covered by the jurisdiction by necessity provision, something we really did not intend to occur.

C. Under the above, assume father’s deployment ends and he is now stationed in State C. I assume under the act that the “deemed to reside” provision ends when the deployment is over. Thus the exclusive continuing jurisdiction of State A automatically comes to an end at that point and jurisdiction is now proper in State B.

I have probably missed something given that your group has been thinking about this a lot longer than I have, but I am concerned about what I see as substantially increased litigation, especially in the short term.

3. Article 2: Should the Act allow the service member to delegate custody during deployment pursuant to a power of attorney (and without judicial approval)?

At the prompting of several commissioners, I have redrafted Article 2 to permit a deploying parent to delegate custody during deployment pursuant to a POA. Article 3 then provides that the POA can be contested by the other parent in court. This is, needless to say, a substantial departure from the procedures that the committee decided on at past meetings. We need to determine whether to adopt this change.

4. Article 3: Should all the provisions relating to judicial proceedings before deployment be consolidated into the same article, including those relating to custody assignments to third parties?

I have restructured Article 3 to consolidate the provisions contained in past drafts of both Article 2 (dealing generally with custody proceedings on deployment) and Article 3 (dealing with assignment of custody to third parties). My view is that this is a somewhat cleaner organization. Does the committee agree?

5. Section 304: If we allow a service member to delegate custody by a power of attorney and the other parent contests this delegation in court, should the court apply a presumption that the delegation is in the best interests of the child?

Alternatively, we could announce that no presumption exists (as the current draft does), or not discuss the issue at all in the Act.

6. Section 403: Should a custody arrangement established through the service member's execution of a power of attorney be terminable at will or only by agreement with the nondeploying parent or a third party with custody?

I have drafted the provision to require that on the service member's return from deployment, either an agreement or court approval is necessary to terminate the temporary custody arrangement. I did this in order to impose a check on the service member's revocation of the POA in case of issues connected with his or her fitness to regain custody. It is strange, however, to construct a power of attorney that cannot be terminated unilaterally. Another alternative would be to allow the service member to terminate the POA unilaterally, but then to allow the nondeploying parent or non-parent with temporary custody to file an action/petition for emergency custody.