

MEMORANDUM

TO: National Conference of the Commissioners on Uniform State Laws

FROM: Maxine Eichner, Reporter, and Paul Kurtz, Chair, of the Drafting Committee on Deployed Parents Visitation and Custody Act

DATE: June 1, 2011

RE: Brief Summary of the Draft Deployed Parents Visitation and Custody Act

The following is a brief memorandum regarding the Deployed Parents Visitation and Custody Act, which is being read for the first time this summer before the Committee of the Whole. The Drafting Committee for the act met for the first time in February 2010, and has now had three meetings. The purpose of the Committee is to construct a uniform act that deals with the custody and visitation issues that arise for service members. Hundreds of thousands of U.S. troops currently are on active duty in foreign countries,¹ and more than a hundred thousand personnel currently are on active duty from the National Guard and Reserves.² Many of these service members are single parents. When these parents deploy, they place more at risk than just life and limb to serve their country; they also risk the loss of custody and visitation rights with their children.

In the absence of explicit statutory direction, courts will generally grant custody to the other natural parent (as opposed to a person such as a grandparent to whom the service member might want to have custody) for the duration of the deployment because parental custody is deemed in the best interests of the child. When the service member returns, courts sometimes require proof of a “substantial change of circumstances” in order to regain their custody rights, as well as a showing that return of custody is in the child's best interests. Courts highly concerned with the child’s stability are sometimes loath to overturn a custody arrangement – even one originally deemed only “temporary” – unless the child is shown to be significantly worse off living with the non-deployed natural parent.

The only federal statutory protection for single-parent service members is the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C.A. app. §§ 501-96, which governs the general legal rights of a deploying service member. Under it, judges, on request, are required to grant stays of legal proceedings, including custody proceedings, as long as the military service will materially affect the service member’s ability to participate in the proceedings. §522(b)(2); §584. Yet such stays are mandatory only for the first 90 days, while most deployments last for a significantly longer period of time; after that, entry of such stays are discretionary, and often overridden by the interests of the affected children. Furthermore, the SCRA provides no procedures to facilitate entry of a temporary custody decision for the many service members who recognize that it is in their child’s interests for custody to be settled during their absence. Neither does the SCRA give courts guidance regarding how to balance the service members’ interests against other relevant interests.

¹U.S. Department of Defense, *DoD Personnel and Procurement Statistics, Selected Manpower Statistics, Table 2-4, Deployments*, available at <<http://siadapp.dmdc.osd.mil/personnel/>>.

² Military.com Deployment Center, available at <http://www.military.com/deployment>.

In recent years, the majority of states have sought to fill this gap via individual state statutes governing custody issues on deployment. These statutes, however, vary widely from state to state, often fail to address the range of custody issues that service members face, and sometimes fail to weigh adequately the interests of others aside from the service member. The task of the Drafting Committee has been to draft a uniform statute that properly balances the important interests of the deploying parent and the interests of the other parent and, above all, the affected child.

I. Brief Summary of the Act's Content

Although the current act is shorter than would usually warrant division into articles, the Drafting Committee believes that it is far clearer if structured in this way. Organized in this manner, Articles One and Six both contain general provisions, and Two through Five are divided into sections that are ordered roughly chronologically relating to deployment.

Article One largely sets out the act's definitional provisions. Among other things, it distinguishes between three different types of relationships with a child: "primary custodial responsibility;" "visitation;" and "limited contact." These terms are defined primarily for the purposes of Article Three, which sets out rules concerning assignment of custodial responsibility to nonparents. The term "limited contact" was created by the committee to refer to a form of visitation that could be assigned to nonparents, which is more limited than courts usually grant outside the deployment context.

Article Two sets out custody procedures that govern once a service member has received notice of deployment. This article provides for a set of expedited procedures for entry of a temporary custody order during deployment, and allows use of electronic testimony when either parent cannot be available personally. It also declares that no permanent custody order can be entered pending or during deployment without the service member's consent. Finally, it sets out the provisions that a temporary order must contain; among other things, these provisions seek to ensure that the deploying parent continues to have regular contact with the child during deployment.

Article Three sets out procedures for the court, on the service member's request, to assign custodial responsibility to a third party other than a parent. The issue of such an assignment may arise in a variety of situations: for example, when a deploying parent with primary custody seeks to transfer that custody to his or her spouse, the child's stepparent; when a deploying parent with joint custody seeks to transfer that custody to his or her parent, the child's grandparent; when the half-sibling of the child, with the consent of the service member, seeks continuing contact with the child; and so forth.

After much consideration of the variety of issues that could arise, the Committee decided to separate these requests into three different categories, depending on the nature of the contact requested. Section 302 governs requests to assign a third party primary custodial responsibility, which means physical custody of the child for 50% or more of the child's time. Provided that the court can assign no more custodial time than the deploying parent previously had, the section allows a court to make such an assignment if it is in the best interests of the child. The Committee, however, is divided on the issue of whether there should be a presumption that primary physical custody in a nondeploying parent, rather than the third party, is in the best interests of the child. It therefore has proposed two alternative versions of this provision, the second of which contains the presumption.

Section 303 governs requests to assign a third party visitation, that is, physical custody of the child for less than 50% of the child's time. Provided that the court can assign no more custodial time than the deploying parent previously had, the section declares that a court may make such an assignment if it is in the best interests of the child.

Section 305 governs requests to assign a third party "limited contact" with the child. Such an assignment would not give the third party the bundle of decision making rights concerning the child that generally accompany a grant of physical custody or visitation. Because granting such limited contact can be an important way to help the child retain a relationship with the service member and his or her family, Section 305 contains a presumption in favor of allowing such limited contact unless it is contrary to the best interests of the child.

Article 4 sets out procedures governing the termination of the temporary custody order following the service member's return from deployment. In this article, the Committee sought to weigh the service member's interest in quickly and easily returning to the previous custody arrangement against the possibility that resumption of custody may no longer be in the child's best interest because of changes in the child's situation or physical or mental injury to the service member. Concerns about the child's best interests caused the Committee to reject automatic reversion to the previous custody order following the service member's return, although the act still seeks to make reversion as easy as possible for the service member without risking the child's best interests.

Section 402 sets out an abridged procedure for resuming the previous custody arrangement if both parties consent. Section 403 sets out the procedure that applies when a service member unilaterally requests resumption of the previous custody arrangement. In the case of the nondeploying parent's failure to object, it directs the court to enter an order revoking the temporary custody order. If the nondeploying parent objects, the section provides for an expedited hearing on the issue, and directs the court to terminate the temporary order unless it finds that doing so is likely to cause the child substantial harm. It was the Committee's view that a relatively higher standard to retain the temporary order was appropriate given that the temporary order was intended only to govern during the term of deployment. In the absence of such risk of harm, the nondeploying parent may still move for a change of custody in the best interests of the child under the ordinary child custody procedures of the state; however, the deploying parent should be able to resume the previous custody arrangement unless and until the other parent proves his or her case.

Article 5, in contrast to earlier articles, does not directly concern custody procedures connected with a service members' deployment. Instead, it seeks to amend the state's general standard for child custody to guard against the possibility that courts will use past or possible future deployment as a negative factor in determining custody by service members, without serious consideration of whether the child's interests were or would be truly harmed by such deployments. This section prohibits the court from using a parent's military service, including past deployment or possible future deployment, itself as a negative factor in determining the best interests of the child. In contrast, however, the material effects on the child of the parent's past or possible future service may be considered. It is anticipated that states would codify this article separately from the rest of the act, as part of their general custody provisions.

II. Major Issues That the Conference Should Review

A. Judicial Assignment of Custodial Responsibility to Third Persons

1. Are there constitutional limitations on such transfer?

The issue of the transfer of a service member's custodial responsibility to a person other than a parent is still unsettled as a constitutional matter. This is the case despite the fact that a number of the states that have passed statutes protecting service members' custody rights provide for such transfer. In 2000, in *Troxel v. Granville*, the U.S. Supreme Court reaffirmed the proposition that a competent parent's decision regarding visitation must generally be respected.³ Although the Court stated that there were exceptions to this rule, for example where the parent's decision would cause real harm to the child, as a general matter *Troxel* means that courts may not generally award custody or visitation to a nonparent over the objection of a parent.

The issue for the Conference's purposes really boils down to how to consider judicial assignment of the service member's custodial rights to a third person, such as a step-parent or grandparent, on the service member's request. On the one hand, the assignment could be conceived as simply a delegation of the service member's existing custody rights, which are generally construed to allow custodial parents to let others care for their child temporarily. Such an assignment, then, would be seen as similar to the action of a custodial parent who allows a friend or babysitter to care for their child while they are out of town for the weekend, an assignment considered valid in most states. On the other hand, the assignment could be conceived as an actual change of custodial rights to the third party. In this case, it would seem to implicate the constitutional prohibition on assigning such rights to the third party rather than the nondeploying parent, unless some exception to the *Troxel* rule, such as harm to the child, applied.

Few courts have directly confronted these issues thus far. An exception is the Court of Civil Appeals of Alabama in *McQuinn v. McQuinn*.⁴ In that case, the court found the service member father's delegation of his visitation rights to be constitutionally permitted. 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 65. 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. . . .

. . . 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

³ 530 U.S. 37 (2000).

⁴ 866 So.2d 570 (2003).

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.⁵

In addition, at least four state courts have specifically allowed the assignment of service members' visitation rights to relatives by judicial decision in the absence of a statute specifically authorizing the assignment. For instance, in a 2003 Illinois case, an appellate court stated that a trial court, even without specific statutory authority, could properly assign a service member's visitation to his family over the mother's objection.⁶ In doing so, the court rejected the mother's argument that such an assignment would violate her state constitutional rights as a parent:

[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.⁷

2. Should service members be able to delegate custody without judicial approval?

The states that allow delegation of custody or visitation for service members split on whether delegation may occur simply through a power of attorney, or whether a judicial proceeding that is subject to the best interests of the child standard is required. Allowing a parent to delegate through a power of attorney makes it clear that new rights have not been created in the assigned guardian. In addition, a power of attorney provides the service member a quick, inexpensive and easy way to delegate, and it allows the service member the same authority to choose with whom the child will spend her custodial time.

The Committee instead, however, has chosen to follow those states that provide that courts must authorize such an assignment. In the Committee's view, requiring a court to approve assignment of rights provides an important safeguard against assignments that may not be in the child's best interests.

3. To whom should delegation be allowed?

Existing state statutes that allow assignment of custodial rights during military deployments vary regarding to whom rights may be extended. Some only permit delegation to a family member; others permit delegation to any third party. The Committee has chosen a route between these two points, allowing assignment of custodial rights not only to family members, but also to persons who have a "close and substantial relationship" with the child, meaning a relationship in which a significant bond exists between the person and the child. The Committee believes that there could be many cases in which it would serve the child's best interests to allow assignment beyond family members. For example, a child reared long-term in a household with

⁵ *Id.* at 573-75.

⁶ *In re Marriage of Sullivan*, 795 N.E.2d 392 (2003).

⁷ *Id.* at 396-97.

the deploying parent and his or her nonmarital partner may be better served by remaining in the household rather than moving to a geographically different state to live with a parent with whom he or she has spent little time. Similarly, it may be in the interests of a child to visit routinely with his or her godparent, if the relationship has been long-term and close. Further, given that assignment of custodial rights under the statute must be approved by a court, the Committee believes that any risk to the child from expanding the category will be adequately checked.

B. What Procedures, If Any, Should Be Required to Return to the Previous Custody Arrangement on the Service Member's Return from Deployment?

Many state statutes specify that reversion to the prior parenting arrangement will occur automatically following the service member's return from deployment. As a matter of judicial economy, these provisions keep these cases off the court dockets. However, these statutes will overlook children's best interests where the deployment has altered the arrangement that best serves the child in some way. This may be a particular concern where the service member returns with physical or mental difficulties resulting from deployment. Further, in cases in which a service member does not seek to resume custody, an automatic reversion provision would mean the court's custody records will not match the actual custodial situation.

For these reasons, the draft statute contemplates that a court must order the termination of the temporary order in order for reversion to occur. Where both parties consent to reversion, the statute sets out an abbreviated procedure that allows reversion to occur. Where the other party objects, the act provides an expedited procedure to ensure protection of the child's best interests while still guaranteeing that the service member's custody request is heard and decided as rapidly as possible.