

## THE UNIFORM DEPLOYED PARENTS CUSTODY AND VISITATION ACT (UDPCVA) – PROBLEMS AND THE SOLUTIONS

This table serves several functions. First of all, it sets out the general structure and specific sections of the Uniform Deployed Custody and Visitation Act. This summary shows the extent of coverage and topics in the UDPCVA and serves as a helpful guide to facilitate passage of the Act. In addition, the table includes some examples of problems that might occur in the area of military custody and visitation. It sets forth questions and issues that courts seek to address in this area are identified. The summary sections to the right of these “problems and questions” show how the Act can resolve these questions and problems.

It should be noted that no statute is a solution for all of the problems it aims to solve. The purpose behind a statute establishing positive norms, restrictions and authorizations is not simply to set standards so that transgressors may be punished. It is also intended to set prescriptive standards for lawyers and the public so that citizens may conform their conduct to what the law requires, and so that lawyers can advise and encourage their clients to comply with the law’s standards. In the latter area, the law performs a preventive role, helping to keep cases out of court (and sometimes out of the arms of lawyers) by promoting appropriate conduct and communications by the parties.

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
	<b>General Provisions</b>	<b>Article 1</b>
Sample initial questions – Who should be covered? What is “deployment”? Should the law cover only active-duty personnel, or should it also include Guard/Reserve members? What is “caretaking authority”?	<u>Definitions</u> (e.g., “adult,” “caretaking authority,” “close and substantial relationship,” “deployment,” “service member” and “uniformed services”)	Sec. 102
The need for specific statutory authority to impose sanctions and grant attorney fees when a party does not comply with the statute or the court’s orders.	<u>Remedies for Noncompliance</u> : This includes attorney fees and costs	Sec. 103
Upon receipt of deployment orders, Sergeant Jane Doe leaves the state that initially entered a custody order, taking with her the two children in her legal custody. She turns them over temporarily to their father (her ex-boyfriend, Jerry) and then reports for duty. Jerry tries to get his own state to assert jurisdiction over custody, despite the prior custody order and the fact that Jane is only temporarily absent from the initial state. He argues that no one resides in the original state, and thus his own state has jurisdiction. <sup>1</sup> This section deals with the issues of residence and transfer of	<u>Jurisdiction</u> : The residence of the deploying parent is not changed by reason of deployment for the purposes of UCCJEA	Sec. 104

<sup>1</sup> See, e.g., *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012).

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
a military member to another state upon receipt of military orders.		
Captain Richard Roe tries to hide his impending deployment in the Middle East from his ex-wife, so she will not be able to get a court order for custody before he leaves. He plans, instead, to leave the children with his mother <sup>2</sup> . His keeping this information from his ex-wife precluded her from negotiating with him regarding a suitable parenting plan for the children during his absence. It also forced her to hire an attorney on “emergency terms,” which usually costs a lot more than a non-emergency case.	<u>Notice Required of Deploying Parent</u> : The deploying parent must give at least 7 days’ notice of deployment (in general); exchange of proposed parenting plans is required; reasonableness of a parent’s efforts to comply may be considered in custody determination	Sec. 105
Roberta Roe, the ex-wife of the above-mentioned Captain Richard Roe, plans to move away as soon as Richard is overseas. She doesn’t want to let Richard know where she will be, hoping to cause him maximum difficulties in reconnecting with his children.	<u>Duty to Notify of Change of Address</u> : Non-deploying parent must give address-change info to the deploying parent and the court; exception if an existing order prohibits this disclosure (e.g., domestic violence case)	Sec. 106
The ex-husband of Sergeant Jane Doe moves for modification of the custody decree on the ground that the mobilizations, deployments and TDY transfers of his ex-wife make her an inappropriate parent for continued custody.	<u>Gen’l Considerations in Custody Proceeding of a Parent’s Mil. Service</u> : Past and possible future deployments may not be considered in determining the best interest of the child, but court may consider “any significant impact” on child of such deployments	Sec. 107
	<b>Agreement Addressing Custodial Responsibility During Deployment</b>	<b>Article 2</b>
When deployment approaches, transfers and agreements are often done on the fly – with a handshake, a phone call or a simple power of attorney. This section specifies what should be in the custody transfer agreement, how it should be executed, and under what circumstances a court order is required.	<u>Form of Agreement</u> : Temporary agreement must be in writing, signed by parents and by any nonparent to whom custody duties are given. It may... <ul style="list-style-type: none"> <li>- Identify (to extent feasible) the destination, duration and conditions of the deployment</li> <li>- Specify the allocation of caretaking authority among deploying parent, other parent and any nonparent</li> <li>- Specify any decision-making authority that accompanies caretaking</li> <li>- Specify any grant of limited contact to a nonparent</li> <li>- Provide for dispute resolution when agreement shares custodial responsibility between parent and nonparent, or between two nonparents</li> <li>- Specify the frequency, duration and means of contact between deployed parent and child, role of other parent in facilitating contact, and allocation of any costs involved</li> </ul>	Sec. 201

<sup>2</sup> See, e.g., *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005).

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
	<ul style="list-style-type: none"> <li>- Specify contact between the deploying parent and child during any period of leave</li> <li>- Acknowledge that child support may only be changed during deployment by the appropriate court, not by the agreement of the parties</li> <li>- Provide for termination upon return from deployment under Article 4 procedures</li> <li>- If agreement must be filed under Section 205, state which parent will do so</li> </ul>	
When a nonparent is granted caretaking authority or limited contact, he or she may have “grand designs” about extending this authority beyond the end of deployment; this section makes it clear that the above grants are simply temporary expedients with a clear end-point. In addition, the non-parent delegatee may need to apply to the court for an order to back up the rights or powers that he or she is granted, since the other parent may at some point have a “change of heart” and decide to resist the sharing of time or responsibilities which was agreed upon previously.	<u>Nature of Authority Created by Agreement:</u> Agreement is temporary and ends upon return from deployment; it does not create independent rights or authority in persons to whom responsibility is given; a nonparent given authority or contact rights has standing to enforce agreement	Sec. 202
During the deployment, it becomes clear that the custody arrangement is unworkable, or the child’s schedule changes because he or she joins a new activity.	<u>Modification of Agreement:</u> Agreement may be modified by mutual consent of both parents and any nonparent who will exercise custodial responsibility under the agreement	Sec. 203
Captain Richard Roe is deployed on short notice and seeks to transfer custody to his current wife, the child’s stepmother. May he do so without a court order? Alternatively, Capt. Roe seeks to transfer his visitation rights to his parents during the term of his deployment by means of a power of attorney. <sup>3</sup>	<u>Power of Attorney:</u> Deploying parent may delegate all or part of custodial responsibility to a nonparent through power of attorney for the period of deployment under certain circumstances	Sec. 204
Parents in the military can, if allowed by case law or statute, transfer the rights of access and visitation to another party during their deployment. <sup>4</sup> Without the filing of an agreement or power of attorney, the court and law enforcement authorities will not be on notice as to the terms of an agreement or power of attorney for purposes of enforcement. This clarifies for law enforcement purposes	<u>Filing Agreement or Power of Atty. with Court:</u> Requires filing of agreement and/or power of atty. with court or agency within reasonable period of time..	Sec. 205

<sup>3</sup> See, e.g., *Webb v. Webb*, 148 P.3d 1267 (Ida. 2006) (Father who was about to be deployed designated his parents to exercise his visitation rights pursuant to Idaho statute which allowed the designation for up to 12 months for one in the military serving beyond the territorial limits of the United States. His ex-wife, the mother of their two children, objected to the designation. The trial court approved and the Supreme Court affirmed, stating that the clear language of the statute allowed the father to grant visitation by power of attorney to his parents.)

<sup>4</sup> Id.

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
who has legal custody of a child.		
	<b>Judicial Procedure for Granting Custodial Responsibility During Deployment</b>	<b>Article 3</b>
<p>Roberta Roe decides that now – when her ex-husband has just received deployment orders – is the perfect time to get custody of the children. She files for custody (or moves the court for a change of custody if there is already a custody case), asking the court for “full custody” or “permanent custody” in light of the impending absence of the children’s current custodian, Captain Richard Roe.</p> <p>Section 301 makes it clear that the court cannot grant a permanent custody order except with the deployed parent’s agreement, and that temporary orders must comply with the Servicemembers Civil Relief Act (SCRA), which provides for a stay of proceedings (50 U.S.C. Appx. 522) and bars a default judgment if the servicemember has not entered an appearance (50 U.S.C. Appx. 521).</p>	<p><u>Proceeding for Temporary Custody Order</u>: Court may issue temporary custody order unless barred by Servicemembers Civil Relief Act, 50 U.S.C. Appx. 521-522; no permanent custody order except with consent of deploying parent</p>	Sec. 301
<p>When Sergeant Jane Doe is about to deploy and wants to transfer custody of her child to her mother, she needs a prompt hearing so she can put her affairs in order, especially if the other parent will not agree, pursuant to Article 2, to terms for custody and visitation during her absence. This section provides explicit authority for the court’s allowing a peremptory setting for her motion for relief under Article 3, especially if the child’s father realizes that delay benefits him i, that all he needs to do is wait till she’s gone and that there is no one to oppose his actions regarding the child’s custody or monitor his conduct.</p>	<p><u>Expedited Hearing</u>: Court shall conduct expedited hearing upon motion for same before deployment</p>	Sec. 302
<p>Jane’s deployment orders do not allow time for her to appear and testify in person regarding custody and visitation matters. Current state statutes only provide limited authority for electronic testimony. When the case involves two different states, Section 316(f) of the Uniform Interstate Family Support Act (UIFSA) provides for parties to “testify by telephone, through audiovisual means or by any other electronic means.” In interstate custody cases, Section 111 of the Uniform Child Custody Jurisdiction and Enforcement</p>	<p><u>Testimony by Electronic Means</u>: A party or witness who is not reasonably available may testify and present evidence by electronic means unless good cause for personal appearance.</p>	Sec. 303

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
Act (UCCJEA) permits an individual to be deposed or to testify by telephone, audiovisual means or electronic means. This section give the court authority, even if the case involves only in-state custody issues which are not covered by the UCCJEA, to allow testimony by electronic means, such as telephone, Skype, Polycom or FaceTime.		
Capt. Richard Roe wants to leave his children with his parents on his deployment, although the custody order entered at the time he divorced states that his ex-wife will have custody on deployment. Roberta, his ex-wife, opposes Richard's assigning custody to his parents.	<u>Effect of Prior Judicial Decree or Agreement</u> : Prior order for custodial responsibility in case of deployment is binding unless circumstances justify modification; court shall enforce agreement of parties for custodial responsibility unless contrary to best interest of child.	Sec. 304
Jane Doe wants the court to allow her current husband to have the children while she is on deployment orders. He has a good relationship with the kids, the children have lived with him since birth, and he is fit and proper for this role. Jane's ex-boyfriend, Jerry – the father of the children – raises strenuous objections, stating that Jane is impermissibly trying to establish parental rights for her new husband that the husband could not obtain in his own right. Jerry states that he has paramount and presumptive parenting rights with the kids when Jane is not available, meaning that he should have them on a full-time 100% basis. He says that he should not be forced to give up his own parenting time in favor of a nonparent. <sup>5</sup>	<u>Grant of Caretaking or Decision-Making Authority to Nonparent</u> : Upon motion of deploying parent, court may grant caretaking authority to nonparent who is adult family member, or who has close and substantial relationship with child, if in child's best interest. Absent agreement by other parent, caretaking time is limited to... <ul style="list-style-type: none"> <li>- Ordinary visitation time of deploying parent in existing order (plus unusual travel time, if necessary)</li> <li>- If no existing order, the time that deploying parent cared for child prior to notice of deployment (plus unusual travel time, if necessary).</li> </ul> Court may grant part of decision-making authority for a child to said nonparent, and order shall specify areas of decision-making, including health, education and religion	Sec. 305
Richard Roe wants to have his parents visit with the children one Saturday a month while he's deployed. Roberta, his ex-wife, opposes this request on the ground that it would violate her primary right to custody of the children when Richard isn't around. She claims that she alone has the right to determine with whom the children associate. Roberta says that visitation rights are personal, exercisable only by Richard; they cannot be delegated to another by the court for	<u>Grant of Limited Contact</u> : Upon motion of deploying parent, court shall grant caretaking authority to nonparent who is adult family member, or who has close and substantial relationship with child, unless court finds this not in child's best interest.	Sec. 306

<sup>5</sup> See, e.g., *In re Marriage of DePalma*, 176 P.3d 829 (Colo. App. 2007) (rejecting all of the arguments raised above).

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
the limited time of Richard's absence, regardless of whether this is in the best interest of the children. <sup>6</sup>		
Roberta Roe also claims that the court cannot extend "special rights" to the grandparents, that they must apply for such rights in their own names, and that they are not legally authorized to do so since both parents are fit and proper. She maintains that these "independent rights" cannot be awarded to Richard's parents.	<u>Nature of Authority Granted by Order</u> : Grant of authority is temporary, ends upon return from deployment; it does not create independent rights or authority in persons to whom responsibility is given; nonparent granted authority or contact rights has standing to enforce the grant. See also notes at Section 202 above.	Sec. 307
<p>Jerry, Jane Doe's ex-boyfriend, refuses to facilitate any communication between Jane and the children. He says that "It's her problem that she decided to stay in the Army Reserve," and that he needn't go out of his way or expend any effort to put the kids in touch with their mother while she is absent. If there are any costs involved, he says, she will need to bear 100% of the charges since it is she who chose military service, with the ever-present possibility of TDY or deployment.</p> <p>Jerry also contends that he has no duty to facilitate access of Jane with her children during Jane's two-week mid-tour leave. Besides, he states, he has already made plans to be elsewhere with the kids during that time.</p> <p>When Jane returns, Jerry seeks to claim that the order for transfer of the children to him during deployment was <i>not</i> a temporary order, and that Jane must show a substantial change of circumstances to obtain return of the children.<sup>7</sup></p>	<p><u>Content of Temporary Custody Order</u>: An order granting custodial responsibility must...</p> <ul style="list-style-type: none"> <li>- designate order as temporary</li> <li>- Identify (to extent feasible) the destination, duration and conditions of the deployment</li> </ul> <p>If applicable, temporary order for custodial responsibility must...</p> <ul style="list-style-type: none"> <li>- Specify the allocation of caretaking authority among deploying parent, other parent and any nonparent</li> <li>- Provide for dispute resolution when agreement shares custodial responsibility between parent and nonparent, or between two nonparents</li> <li>- Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless contrary to the best interest of the child, and allocate any costs of communications</li> <li>- Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or is otherwise available, unless contrary to the best interest of the child</li> <li>- Provide for reasonable contact between deploying parent and child following return from deployment until the temporary order is terminated, which may include more time than the deploying parent spent with the child before entry of the temporary order</li> <li>- Specify any decision-making authority that accompanies caretaking</li> <li>- Specify any grant of limited contact to a nonparent</li> <li>- Provide for termination upon return from deployment under Article 4 procedures</li> </ul>	Sec. 308

<sup>6</sup> See, e.g., *McQuinn v. McQuinn*, 866 So.2d 570 (Ala. Civ. App. 2003) and *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 795 N.E.2d 392 (2003) (rejecting all of the arguments raised above).

<sup>7</sup> See, e.g., *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006) (after an agreement to transfer custody from servicemember-mother to the child's father for duration of mother's absence, father reneged and challenged status of the court order in Kentucky Court of Appeals and Supreme Court, claiming that the initial order was not a temporary one but rather a custody order which required the mother to show a change of circumstances to regain custody).

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
	<u>Order for Child Support</u> : If caretaking order issued or agreement executed, court may order temporary child support if there is jurisdiction under UIFSA	Sec. 309
Jane's new husband, to whom she assigned custody during deployment, develops a substance abuse problem during her absence. Alternatively, Jane and Jerry end their marriage during the deployment. <sup>8</sup>	<u>Modifying or Terminating Assignment or Grant of Custodial Responsibility to Nonparent</u> : The court may modify or terminate an order providing for caretaking, decision-making or limited contact. Any modification is temporary and ends upon return from deployment, unless earlier terminated. On motion of deploying parent, court shall end order of limited contact.	Sec. 310
	<b>Return from Deployment</b>	<b>Article 4</b>
Richard Roe returns from deployment on June 1 and notifies his ex-wife of his return. She agrees to the return of custody. What do they need to do to end the temporary custody agreement?	<u>Procedure for Terminating Temporary Grant of Custodial Responsibility Established by Agreement</u> : At any time after return from deployment, a temporary custodial responsibility agreement may be terminated upon signatures of both parents. If no agreement to terminate is reached, the temporary custody arrangement ends 60 days from date the deploying parent gives notice to other parent of return from deployment. If temporary agreement was filed with court/agency under Sec. 205, then agreement to terminate must also be filed within reasonable period of time after signing. Case number and heading must be provided.	Sec. 401
Jane Doe returns from deployment and wants custody back from her ex-husband, who agrees that custody should be returned to her. That custody, however, had been transferred by court order during the deployment. Must they return to court again?	<u>Consent Procedure for Terminating Temporary Grant of Custodial Responsibility Established by Court Order</u> : At any time after return from deployment, both parents may file with court an agreement to terminate custodial responsibility order. After agreement is filed, court shall issue order ending the temp. order on date set out in agreement. If no date set out, then order is issued immediately.	Sec. 402
Roberta Roe, in efforts to avoid returned custody to her ex-husband on his return from deployment, serves discovery on him, changes lawyers, demands continuances and does everything in her power to stop the children's return. She alleges that he is suffering from battle fatigue and PTSD, and she obtains a temporary order barring the return of full custody to Richard. Given the court's schedule for "fully contested cases," this may mean 6-8 months before a plenary hearing with no visitation for Richard.	<u>Visitation before Termination of Temporary Grant of Custodial Responsibility</u> : After return from deployment and until order or agreement is terminated, court shall enter temporary order granting deploying parent reasonable contact with child (unless contrary to best interest of child), even though time may exceed that spent with child before deployment.	Sec. 403
Jerry doesn't want to give the children back to Jane Doe when she returns. He has no lawyer, no grounds and no money. He just wants to keep the kids and he refuses to	<u>Termination by Operation of Law of Temporary Grant of Custodial Responsibility Established by Court Order</u> : If no agreement to end temporary order for custodial responsibility, then it ends 60 days from date the deploying parent gives notice of	Sec. 404

<sup>8</sup> See, e.g., *Diffin v. Towne*, 849 N.Y.S.2d 687 (N.Y. Ct. App. 2008) (custody transferred to child's father after, among other things, separation of servicemember-mother and her new husband, to whom she had previously attempted to delegate all responsibility for the child, without consent of the child's fully fit father).

<u>Problem or Issue</u>	<u>How UDPCVA Addresses It</u>	<u>Section</u>
respond to any of her requests for the children. He refuses to execute an agreement for the return of the children to Jane.	return from deployment to other parent and any nonparent given custodial responsibility. Any proceeding to prevent termination of temporary custodial responsibility order is governed by other provisions of state law.	
	<b>Miscellaneous Provisions</b>	<b>Article 5</b>
	<u>Uniformity of Application and Construction:</u> Court should consider need for uniformity.	Sec. 501
	<u>Relation to Electronic Signatures in Global and National Commerce Act:</u> This Act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 <i>et seq.</i> , but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. 7003(b).	Sec. 502
	<u>Transition Provision:</u> Act does not affect validity of temp. order re custodial responsibility during deployment that was entered before the effective date of Act.	Sec. 503
	<u>Effective Date:</u> This Act takes effect....	Sec. 504