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A Roadmap for the Uniform Deployed Parents Custody and Visitation Act

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Q. Drop everything – I need some help right now! I have a new appointment in an hour, it's a military custody case… and my hair's on fire! What do I need to know?

A. For claims and motions filed after October 1, 2013, the operative law for much of a military custody case will be the Uniform Deployed Parents Custody and Visitation Act. The UDPCVA is the law in five states already – Nevada, Oklahoma, North Dakota, North Carolina and Colorado – and it was only approved February 2013 by the American Bar Association House of Delegates. It contains many *must-know* rules for cases involving deployment, military custodians, delegated visitation rights, return from military absence, electronic testimony and expedited hearings, just to name a few. Lawyers in North Carolina, which has the third-largest military population in the country, should be familiar with the contours of the Act, the detours, the roadblocks, the highways and the byways.

Q. First of all, I need find it. Where's the UDPCVA located?

A. Most of it is found in Article 3 of Chapter 50A of the General Statutes, but a small section is found at G.S. 50-13.2(f). The latter provides that, in military custody cases, the judge cannot consider the military parent's past or future deployment as the sole basis in deciding the best interest of the child.

Q. Well, hold on right there – I have lots of problems with that! What if the deployment has a major impact on the child or children? And what about "best interest of the child" – isn't that the sole issue in custody cases?

A. The first of these concerns – the impact on the children – is covered in the second sentence of G.S. 50-13.2(f), which says that "The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment." The second point, that "best interest" is the only issue in custody cases, is a common misconception about custody. While BIOC (best interest of the child) is a central issue, it is by no means the only focal point.

- BIOC plays no role, for example, when the judge is deciding whether there has been a change of circumstances sufficient to justify a modification of custody. Only after a determination that such a change exists can the court examine BIOC. Judicial efficiency takes precedence over BIOC in this situation. Why inquire into BIOC if there has been no substantial change of circumstances?
- Likewise, public policy prevents consideration of BIOC in the initial stage of a third-party custody claim. The court can inquire into BIOC only if it first decides that the parents of a child are unfit or have neglected the child's welfare. The policy of North Carolina is to prefer custody for parents rather than non-parents.
- There is also no consideration of BIOC in determining whether the court's jurisdiction is based on "home state" or "significant connection/substantial evidence," under the terms of Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act, or whether the court loses jurisdiction under Section 202.
- Finally, BIOC plays no role in a motion for stay of proceedings under the Servicemembers Civil Relief Act, 50 U.S.C. App. 522. The court must decide the issue of whether to stay the case based solely on the issues in the statute, not on the child's best interest. The Supremacy Clause in the U.S. Constitution and the concerns of Congress in protecting the civil rights of servicemembers have priority over the issue of BIOC.

In all of these areas, public policy priorities override the notion that BIOC is "all there is" in a custody case.

Q. You mentioned deployment. The judges in my county are not exactly "spittin' distance" from the nearest military base, so I'll need to explain this when I'm in court. What is" deployment," and why is it important?

A. In the opening scene of "The Music Man," the assembled salesmen all agree that "you've got to know the territory." The same is true with military custody legislation. A lot of terms are used in this arcane arena, and the judge and practitioner must know the territory and speak the language. Mobilizations and tours of duty which are "unaccompanied" (e.g., without authorization to bring dependents) include temporary duty assignments (TDY), transfers to a combat zone or high-risk environment, and remote assignments. According to the Act, "deployment" means "The movement or mobilization of a service member to a location for more than 90 days, but less than 18 months, pursuant to an official order that (i) is designated as unaccompanied; (ii) does not authorize dependent travel; or (iii) otherwise does not permit the movement of family members to that location." G.S. 50A-351(9). Members of the "uniformed services" are covered, meaning "(i) the active and reserve components of the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States; (ii) the Merchant Marine, the commissioned corps of the Public Health Service, or the commissioned corps of the National Oceanic and Atmospheric Administration of the United States; or (iii) the National Guard." G.S. 50A-351(18).

Q. When a servicemember has custody and is about to deploy, what happens to custody of the child?

A. There are several deployment rules under the UDPCVA which need to be understood. First of all, the deploying parent must give written notice to the non-deploying parent within seven days of learning of the deployment. An exchange of proposed parenting plans is required, and the reasonableness of a parent's efforts to comply with this may be considered in a custody determination. G.S. 50A-354.

Q. Can the non-deploying parent leave the state and "go back home" to Montana, without notice to the military parent on deployment?

A. No. While there is no restriction on the ability of the non-deploying parent to "go back home," he or she must give address-change information to the deploying parent and to the court. There is an exception if an existing order prohibits this disclosure (e.g., a domestic violence case). G.S. 50A-355.

Q. Can't that unrestricted ability to "go back home" have an impact on custody jurisdiction? After all, now no one is living in North Carolina! Didn't the ULC think of that in drafting this Act?

A. Quite to the contrary, the issue of custody jurisdiction was "front and center" in the ULC drafting committee meetings as a result of a recent case involving Colorado and Maryland involving a custodial parent who was "called to the colors."[1]

The mother had a Maryland custody order and she lived with the daughter in that state. Mobilized by the Army, she and the child moved to Ft. Hood, Texas, for a year, and then she was deployed to Iraq for six months. Upon her return to Texas, she was ordered back to Maryland for a non-deployable assignment.

In accord with the Army's rules and her own Family Care Plan, the mother turned over custody to her ex-husband in Colorado when she was deployed. Upon her return to the U.S., the parties agreed that the child would stay in Colorado for the next seven months to finish the school year, ending in May 2011. In May 2011, the father filed in Colorado for the court to assume custody jurisdiction, since neither mother nor child "currently resided" in Colorado. He also filed a motion to change custody. The trial judge agreed with the father and issued an order assuming jurisdiction.

Pursuant to the UCCJEA, the judges from Maryland and Colorado conferred about custody jurisdiction by telephone. But they could not agree. Each one maintained that *his state* was properly exercising jurisdiction.

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[1] *In re* Marriage of Brandt, 268 P.3d 406 (Colo. 2012).

The mother filed for an extraordinary writ in the Colorado Supreme Court. She asked that court to grant an order to show cause—which it did—arguing that the district court erred in finding that she no longer resided in Maryland for custody jurisdiction purposes. The Colorado Supreme Court disagreed with the trial judge's custody jurisdiction ruling, stating that the phrase "presently reside" in the UCCJEA is not the same as "currently reside" or "physical presence," and that the judge must make an inquiry into the totality of the circumstances, examining what makes up a person's permanent home, her *domicile*. The Court further held that the parent who claims that the initial state has lost "exclusive, continuing jurisdiction" has the burden of proof in showing this before the trial judge. Accordingly, the Supreme Court reversed and vacated the district's judge's order assuming jurisdiction. Any other solution, the Court noted, would mean that the UCCJEA could be interpreted as allowing one parent to relitigate custody simply by winning the race to the courthouse when the other parent, under military orders, is temporarily absent from the issuing state.[2]

Q. So what did the ULC do about the problem? Where's the solution found in the UDPCVA?
A. The answer is found in G.S. 50A-353, which states that the residence of the deploying parent is not changed by reason of deployment for the purposes of UCCJEA during the deployment. This provision ensures that a temporary absence in compliance with military orders does not disadvantage the servicemember in a custody proceeding. However, the section stops there. The Act does not modify the Uniform Child Custody Jurisdiction and Enforcement Act, and it does not attempt to create or refine rules for initial or subsequent custody jurisdiction.

Q. What's covered next in the UDPCVA?
A. Parts 2 and 3 deal with matters that come up upon notice of deployment and during the actual absence, depending on whether the case is resolved by settlement or litigation. Central to military custody cases and to the UDPCVA is the concept of anticipating "military absence." Military absences may include deployment, TDY, or a remote tour of duty. Such absences require military parents to prepare a temporary plan for custody and visitation arrangements during their absence, and to reduce the plan to writing. After the absence is over, the temporary plan ends and the parties return to the *status quo ante*. The Act encourages parents who wish to settle visitation and custody issues. Where there is a negotiated settlement, Part 2 sets out the substantive terms and procedural protections that cover the agreement.

Q. What does Part 2 say about agreements for custody in a *deployment situation*?
A. Pursuant to G.S. 50A-361, temporary agreements must be in writing, and signed by the parents and by any nonparent to whom custody duties are given. Such a temporary custody agreement may –

- Identify (to extent feasible) the destination, duration and conditions of the deployment
- Specify the allocation of caretaking authority among deploying parent, other parent and any nonparent
- Specify any decision-making authority that accompanies caretaking
- Specify any grant of limited contact to a nonparent
- Provide for dispute resolution when the agreement provides for shared custodial responsibility between a parent and a nonparent, or between two nonparents
- Specify the frequency, duration and means of contact between the deployed parent and the child, the role of other parent in facilitating contact, and the allocation of costs between them
- Specify the contact between the deploying parent and the child during any period of leave
- Acknowledge that a party's child support obligation only be changed during deployment by the appropriate court, not by the agreement, during the deployment
- Provide for termination upon return from deployment under Article 4 procedures.

If the agreement must be filed under G.S. 50A-364, it needs to specify which parent will do so.

Q. What else does Part 2 of the UDPCVA do?
A. It states that the temporary custody agreement ends upon return from deployment; it does not create independent rights or authority in persons to whom responsibility is given, and any nonparent given

[2] *Id.* at 416.

authority or contact rights has standing to enforce agreement. G.S. 50A-361. The agreement may be modified by mutual consent of both parents and any nonparent who will exercise custodial responsibility under the agreement. G.S. 50A-362. The deploying parent may delegate all or part of his or her custodial responsibility to a nonparent through a power of attorney for the period of deployment; it is revocable by the deploying parent through a revocation of the power of attorney signed by the deploying parent. G.S. 50A-363. The Act requires the filing of the agreement and/or power of atty. with court or agency within reasonable period of time. G.S. 50A-364.

Q. I've had a few custody cases in which the parties couldn't agree on anything except the existence of their child. What happens when there's no agreement and no prospect of reaching one?
A. When court is the last resort, it's important to know that – under G.S. 50A-370 – the judge can issue a temporary custody order for custodial responsibility after a parent receives notice of deployment and also during deployment. This is allowed unless there is a prohibition or restriction pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 521-522 (misstated in G.S. 50A-370 and -379 as "50 U.S.C. §§ 521-522"). A court cannot enter a permanent custody order in the absence of the deploying parent without his or her consent.

Q. The Servicemembers Civil Relief Act? Isn't that what used to be called the Soldiers' and Sailors' Civil Relief Act? What does that say about custody cases?
A. Yes. It was completely rewritten in 2003 and renamed. Section 521 deals with entry of orders in default of the appearance of the servicemember, and Section 522 covers a request by the servicemember for a stay of proceedings. You can find a full explanation of these sections in "A Judge's Guide to the Servicemembers Civil Relief Act."[3]

Q. What if Navy Commander Jane Doe wants to get her affairs in order before she deploys? Is there anything in the Act which can light a fire under good ol' Judge Foonblatt and prioritize her custody and visitation case here in Cowpie County?
A. Pursuant to G.S. 50A-371, the court is required to conduct an expedited hearing if a motion to grant custodial responsibility is filed before a deploying parent deploys. In addition, a party or witness who is not reasonably available to appear personally may appear and provide testimony and present evidence by electronic means unless the court finds good cause to require a personal appearance. G.S 50A-372.

Q. By "electronic means"? What's that? We don't do *Facetime* in Judge Foonblatt's court!
A. It can be just about anything that allows the missing person to testify electronically. For example, use of the telephone, *Facetime* or *Skype* would certainly be included in the scope of this section.

Q. Does the judge have to enforce a previous agreement under Part 2?
A. Yes – G.S. 50A-373 states that the court will enforce a prior written agreement of the parties for custodial responsibility in the event of deployment, whether made under Part 2 or not, unless it is contrary to the best interest of the child.

Q. Commander Jane Doe tells me that she wants her new husband, Richard, to step into her shoes during the deployment and take over her time with Grizelda, her daughter. Can the court do that?
A. G.S. 50A-374(a) and (b) state that, upon her motion, the court may grant caretaking authority to a nonparent who is an adult family member, or who has close and substantial relationship with child. It must be found to be in the child's best interest to do so. Unless the other parent agrees, caretaking time is limited to –

- Ordinary visitation time of the deploying parent in the existing order (plus unusual travel time, if necessary)

[3] Found at the website of the North Carolina State Bar's military committee, www.nclamp.gov > Resources (last visited Oct. 26, 2013). See also Mark E. Sullivan, "The New Servicemembers Civil Relief Act," 11 N.C. ST. B.J. 22 (2006).

- If there is no existing order, the time that the deploying parent cared for child prior to notice of deployment (plus unusual travel time, if necessary).

The court may grant part of the decision-making authority for Grizelda to Richard (if Jane isn't able to exercise such authority), and the order must specify the areas of decision-making (e.g., health, education and religion). G.S. 50A-374(c). Any nonparent to whom caretaking authority or decision-making authority is granted must be made a party to the action until the grant is terminated. G.S. 50A-374(d).

Q. What is caretaking authority?

A. It's the right to live with and care for a child on a day-to-day basis, including physical custody, parenting time, right to access, and visitation. G.S. 50A-351(2).

Q. What about a more limited form of access for Richard?

A. The judge can order "limited contact," for Richard, which is the opportunity for a nonparent to visit with a child for a limited period of time. The term includes authority to take the child to a place other than the residence of the child. Once again, Richard must be made a party to the action. G.S. 50A-375. A grant of authority or limited contact order is temporary, ending upon Jane's return from deployment. It does not create independent rights or authority in those to whom responsibility is given. G.S. 50A-376(a). If however, there is a violation of a court order, a nonparent who has been granted authority or contact rights has standing to enforce the grant. G.S. 50A-376(b).

Q. Why was there a need for these provisions?

A. In a series of visitation cases, military parents have fought to keep contact through their new spouses or their parents when the children are denied such access by the children's mothers. In such cases, courts have found that the court can delegate or assign visitation rights to family members during a deployment.[4] In each of these cases, the nonmilitary parents have objected to attempts to involve the rest of the SM's family in substitute visitation, have argued that visitation is a personal right that belongs only to the deployed parent, and have claimed that when the SM is absent there are *no visitation rights available*. Such assertions have often been rejected in favor of "substitute visitation." The Act codifies the results in the five leading cases in this area.

Q. What must a temporary custodial order do?

A. Under G.S. 50A-377, an order granting custodial responsibility must state that it is temporary, and it must identify (to the extent feasible) the destination, duration and conditions of the deployment. In addition, if applicable, a temporary custodial responsibility order must –

- Specify the allocation of caretaking authority among the deploying parent, the other parent and any nonparent
- Provide for dispute resolution when an agreement shares custodial responsibility between a parent and a nonparent, or between two nonparents
- Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means (unless this contrary to the best interest of the child), and allocate any costs of communications
- 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
- Provide for reasonable contact between the 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
- Specify any decision-making authority that accompanies caretaking
- Specify any grant of limited contact to a nonparent

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[4] Webb v. Webb, 148 P.3d 1267 (Ida. 2006); Settle v. Galloway, 682 So. 2d 1032 (Miss. 1996); *In re* Marriage of DePalma, 176 P.3d 829 (Colo. App. 2008); *In re* Marriage of Sullivan, 795 N.E.2d 392 (Ill. App. Ct. 2003); McQuinn v. McQuinn, 866 So. 2d 570 (Ala. Civ. App. 2003). *But see* Lubinski v. Lubinski, 761 N.W.2d 676 (Wis. Ct. App. 2008) (not allowing stepmother to exercise father's physical placement rights when he is on military duty).

- Provide for termination upon return from deployment under Part 4 procedures.

Q. What if the court transfers custody from Jane Doe to her ex-husband, John Doe? Wouldn't he be entitled to child support?

A. Yes – just because Jane is deployed and halfway around the world does not mean that there should be no child support. The court's power to address this issue is in G.S. 50A-378, which says that when there is a caretaking authority order, or an agreement under Part 2 granting caretaking authority, the court may enter a temporary order for child support consistent if jurisdiction exists under UIFSA, the Uniform Interstate Family Support Act, found at Chapter 52C of the General Statutes.

Q. What if the court had granted limited contact to Jane's current husband, Richard, and he later became unsuitable for that role? Could the court modify the limited contact order to replace Richard with Al and Alicia, Jane's parents (and the maternal grandparents of Grizelda)?

A. Yes. So long as the court's actions are consistent with the Servicemembers Civil Relief Act, the court may modify or terminate a grant of caretaking authority, decision-making authority, or limited contact when that action is in the best interest of the child. This is contained in G.S. 50A-379, which also states that any modification will be temporary, terminating after the end of deployment according to the procedures under Part 4, unless the grant has been terminated earlier.

Q. Where does the UDPCVA explain how to bring an end to all of this? Is there a termination section?

A. The section of the Act on termination procedures is Part 4, "Return from Deployment."

Q. How does termination work for an agreement under Part 2?

A. This is covered at G.S. 50A-385, and it can be done at any time after the end of deployment upon the signatures of both parents. Otherwise the agreement ends on the termination date which is set out in it.

Q. What if there was no date set out in it for termination, and there is no written agreement to terminate?

A. In that case, it ends 60 days from date the deploying parent gives notice to other parent of his or her return from deployment, unless earlier terminated upon the date stated in an order terminating the temporary grant of custodial responsibility or the death of the deploying parent. G.S. 50A-385. If the temporary agreement was filed with the court under G.S. 50A-364, then the agreement to terminate must be filed within a reasonable period of time after signing.

Q. Suppose that there is a court order containing a temporary grant of custodial responsibility and the parties agree to end the temporary grant. How do they go about it?

A. At any time after return from deployment, both parents may file with court an agreement to terminate custodial responsibility order. After this is filed, the court will issue order ending the temporary order on the date set out in agreement to terminate. If there is no date set out, then the order is issued immediately. G.S. 50A-386.

Q. What about terms for interim visitation after the deploying parent returns? Can the judge enter an order for temporary access pending termination of the agreement or the temporary order for custodial responsibility?

A. Yes. After the servicemember's return from deployment and until termination of a temporary agreement (under Part 2) or an order (under Part 3) for custodial responsibility, the court shall enter a temporary order granting the deploying parent reasonable contact with the child, unless this is contrary to the best interest of child. The court may enter an order for access time exceeding that which the deploying parent spent with child before deployment.

Q. When there has been a temporary order entered for custodial responsibility under Part 3 of the Act, how is that terminated?

A. If there's no filing of an agreement between the parties for termination under G.S. 50A-386, then the temporary order ends 60 days from the date the deploying parent gives notice of having returned from deployment or upon the death of the deploying parent, whichever occurs first.

Q. All of this seems a lot simpler now that I've seen how the UDPCVA operates. Do you have some parting tips on how to avoid problems in a custody case where the child's custodian wears a military uniform?

A. A key concept in the UDPCVA is thinking ahead to anticipate "military absence." Military absences may include deployment, TDY, or a remote tour of duty. Such absences require military parents to prepare a temporary plan for custody and visitation arrangements during their absence. The military calls this document a Family Care Plan. After the absence is over, the temporary plan ends and the parties return to the *status quo ante*.

When there isn't an intact family unit, keep in mind "Plan A and Plan B" as the best approach to an agreement or consent order as to visitation and custody. The usual situation – transfer of the child to the other parent – can be drafted in general terms as follows:

> Since Jane Doe is a member of the U.S. Navy and may be deployed in the future on an unaccompanied tour (that is, an assignment where family members are not allowed), her former husband, John Doe, is hereby designated alternate custodian of Grizelda Doe, the minor child of the parties, in such an event. He shall hold and exercise all the rights and responsibilities of a custodial parent during such a deployment and shall promptly return the child to Jane Doe at the deployment's end.

When the military parent is the one with custody and the nonmilitary parent is the alternate or successor custodian in the event of military absence, the agreement or consent order should always include appropriate findings of fact and conclusions of law regarding the present fitness of the parent and the best interest of the child. To state it simply, an order awarding physical custody to an active-duty or Guard/Reserve military custodian ("Plan A") should always contain a "Plan B" in the event of the parent's mobilization or deployment.

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