



# THE LEGAL EAGLE

## “GOOD TO GO” (and TO RETURN HOME)

*INTRODUCTION: This client info-letter was written to answer questions about military deployments, custody and visitation. It is, of course, very general in nature since no handout can answer your specific questions. We do ask, however, that you read over these explanations carefully in connection with a military legal assistance attorney so that you may have the fullest information available to help you with your family law problem. Please send comments, corrections and suggestions regarding this pamphlet to the address at the end of the last page.*

### **1. I'M ABOUT TO BE DEPLOYED, AND I HAVE CUSTODY OF MY SON, JOHNNY. DO I HAVE TO GIVE HIS CUSTODY OVER TO MY EX-HUSBAND, HIS DAD?**

**A.** No, so long as Johnny's dad has been found to be unfit by the courts or else he has waived (i.e., given up) his rights to custody.

### **2. WHAT DO YOU MEAN? HE'S DONE NOTHING OF THE KIND! I JUST WANTED TO MAKE SURE THAT JOHNNY WAS IN THE RIGHT PLACE WHILE I'M OVERSEAS.**

**A.** Well, the "right place" is *probably* with dad, unless he's been excluded legally (e.g., waiver by him, consent order, termination of parental rights, finding of unfitness).

### **3. I HAVE TO GIVE CUSTODY OF JOHNNY TO HIM?**

**A.** Most likely you do – since he's not waived his rights to custody and isn't unfit.

### **4. WHY IS THAT?**

**A.** The law in virtually every state says that you cannot exclude the other parent from custody without one of these two conditions. And the finding must be made in a court order if it's unfitness. That means you'll be in trouble in you try to give custody of Johnny to your new husband, your mother in San Diego, or your cousin Flo in Florida. Even if that's what you put in your Family Care Plan!

### **5. A COURT ORDER? THAT MEANS I'D HAVE TO FILE A LAWSUIT AGAINST HIM, RIGHT?**

**A.** Yes, if you don't have a pending case already.

### **6. BUT I HAVE A FAMILY CARE PLAN LISTING MY MOTHER AS JOHNNY'S CAREGIVER. IT'S AN OFFICIAL ARMY DOCUMENT. IT'S REQUIRED BY LAW, AND IT HAS BEEN APPROVED BY MY COMMANDING OFFICER. ISN'T THAT ENOUGH?**

**A.** Yes – it's enough for the Army. But a Family Care Plan is not a court order. When there is no agreement (in writing) with the other parent, and when the only document is one without a judge's signature, then you've got exposure.

### **7. SURELY IT'S ENOUGH TO HAVE AN ORDER GRANTING CUSTODY TO THE CHILD'S GRANDMOTHER IN SAN DIEGO - RIGHT?**

**A.** Yes, that's fine, so long as you comply fully with state law requirements, then state law will probably let a judge transfer custody of the children to the grandmother if the father doesn't appear and contest, or if he consents to the transfer. The requirements of state law ordinarily would include –

a) you have located dad and properly served him with the initial complaint and summons;

b) you also gave him reasonable advance notice of the hearing; and

c) you filed suit in compliance with the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), which requires (ordinarily) that the children must have lived in your state for at least the last six months preceding the filing. In other words, you clearly have *custody jurisdiction*.

The preferable way to move forward, however, would be to get the dad's consent to a relative taking custody – if you can obtain that consent.

## **8. WHY IS DAD'S CONSENT NECESSARY?**

**A.** While this is a question of individual state law, the general rule is that dad cannot be excluded from custody, absent his consent, unless he is unfit by reason of abandonment, abuse, neglect or other conduct inconsistent with parental rights and responsibilities. In some states, you must show "actual harm."

## **9. ABANDONMENT? ABUSE OR NEGLECT? WHOA! HOW AM I SUPPOSED TO PROVE THOSE CHARGES?**

**A.** Look to state law and cases for elements of proof in this area. You will usually find the answers under "termination of parental rights" or a similar heading.

## **10. WHAT IF DAD IS *NOT UNFIT* BUT HE AGREES TO GIVE CUSTODY TO THE MATERNAL GRANDMOTHER?**

**A.** Then you should file for custody, serve the father and grandmother, and prepare a consent order or "agreed order" for the transfer of custody to the grandmother. Make sure you have secured dad's *unconditional consent*. Consider getting an appearance before the judge or a notarized statement, if appropriate under state law.

## **11. WHAT IF DAD ISN'T UNFIT AND WON'T CONSENT TO A TRANSFER OF CUSTODY?**

**A.** Then you should consider transferring custody to him.

## **12. I HAVE TO GIVE CUSTODY OF JOHNNY TO HIM?**

**A.** Yes, you do – since he's not waived his rights to custody and he isn't unfit.

## **13. BUT DAD IS REALLY A BUM! HE DRINKS, HE SMOKES HEAVILY AND HE'S GOT A GUN RACK IN HIS PICK-UP TRUCK. NOT ONLY THAT, BUT I UNDERSTAND THAT HE IS ALSO "SEEING ANOTHER LADY" THESE DAYS. I'M REALLY WORRIED ABOUT GIVING CUSTODY TO HIM!**

**A.** So? Is he unfit? Can you prove it?

## **14. BUT DAD WILL PROBABLY DEMAND CHILD SUPPORT FROM ME!**

**A.** Yes, he probably would. So?

## **15. BUT I'M REALLY, REALLY WORRIED THAT HE WON'T RETURN MY SON TO ME WHEN MY DEPLOYMENT'S OVER. HE'S GOING TO ASK FOR PERMANENT CUSTODY!**

**A.** There are many factors which come into play in determining the custody of Johnny when you get back from your military absence – whether it’s temporary duty (TDY), mobilization for the Guard or Reserves, or just a PCS (permanent change of station) to an unaccompanied tour of duty in a remote location. For example:

- Will Johnny be thriving in the new environment, or doing poorly?
- Will he have lots of new friends, or few?
- How about his health? Will dad neglect his physicals, shots and dental check-ups? Or will he do a great job, better – perhaps – than *you* did?
- Neighborhood plays a part. What are each of the neighborhoods like – that of Johnny when he was at “home,” and the new neighborhood with dad? How does dad’s home stack up against yours?
- How about Johnny’s outside activities – with you, and with his father? How do they compare?
- If Johnny’s in school, then we’ll need to look at his grades. What kind of progress is he making with dad? How does that compare to his academic performance when he was with you?
- What does state law say about return of the child at the end of the deployment? North Carolina and Mississippi, for example, state that a deployment cannot be held against you in a change of custody motion, and that any temporary custody order during deployment ends ten days after you return.
- What does your temporary custody order state? A good order will say that Johnny’s environment prior to the deployment was satisfactory in every way, and that he must be returned to it – and to your custody – immediately upon your return from deployment, without delay, without the need to apply to the court for an order. The single best piece of advice is this: Draft and sign a good, solid temporary custody order which provides the rights and protections which you want for yourself and for your child. That is the key to resuming custody when you return from overseas.

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