

# **SILENT PARTNER**

## **“Good to Go” (and To Return Home!)**

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section and the North Carolina State Bar's military committee. Please send any comments, corrections and suggestions regarding this pamphlet to the address at the end of this Silent Partner.*

**1. My client, Sergeant Jane Doe, is about to be deployed. She has custody of her son, Johnny. Does she have to give custody over to the dad, her ex-husband?**

A. No, so long as the father has been found to be unfit in court or else he has waived his rights to custody.

**2. What do you mean? He's done nothing of the kind! She's just trying to make sure that Johnny is in the right place while she's 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. Does she have to give custody of Johnny to him?**

A. Probably so – 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 – if it's unfitness – the finding must be made in a court order. That means Jane be in trouble if she tries to transfer custody of Johnny to her current husband, to her mother in San Diego, or to her cousin Flo in Florida... even if that's what she puts in her Family Care Plan.

**5. A court order? That means she'll have to file a lawsuit against him, right?**

A. Yes, if there is not a pending case already.

**6. But she already has a family care plan listing her mother as Johnny's caregiver. It's an official Army document. It's required by law and by Department of Defense regulations. It has been approved by her 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 written agreement with the other parent, and when the only document is one without a judge's signature, then the client has serious exposure.

**7. Surely it's enough to have a court order granting custody to the child's grandmother in San Diego – right?**

A. Yes, that's fine, so long as there's full compliance with state law requirements. In that case, 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 –

- Mom has located dad and properly served him with the initial complaint and summons;
- She's also given him reasonable advance notice of the hearing; and

- She 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. Dad's consent if necessary? Why?**

A. This is a question of individual state law, but 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 are we 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, or if you think that dad might change his mind later.

#### **11. What if dad isn't unfit and won't consent to a transfer of custody?**

A. Then your client should consider transferring custody to him.

#### **12. What?? Give custody of Johnny to him?**

A. Yes – since he's not waived his rights to custody and he is not unfit.

**13. But this Defendant is really a bum! He drinks, he smokes heavily and he's got a gun rack in his pick-up truck. No only that, but we understand that he is also "seeing another lady" these days. We're really worried about give custody to him!**

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

#### **14. But the father will probably demand child support from my client!**

A. So?

**15. But we're really, really worried that he won't return the child when the deployment's over. We think that he'll demand permanent custody!**

A. There are many factors which come into play in determining the custody of Johnny when the military absence (e.g., deployment, mobilization, TDY, remote tour) ends. For example:

- Will Johnny be thriving in the new environment, or doing poorly?
- Will he have lots of new friends, few friends, or about the same?

- Let's talk about Johnny's health. Will dad neglect his physicals, shots and dental check-ups? Or will he do a great job, better – perhaps – than *your client* 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 your client's home?
- How about Johnny's outside activities – with your client, and with the 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 your client? What about dad's participation in school activities and parent-teacher conferences, compared to *your client's* participation?
- 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 the military custodian in a change-of-custody motion, and that any temporary custody order during deployment ends ten days after the return of the absent military parent.
- What does your temporary custody order state? A *good court order* will say that Johnny's environment prior to the deployment was satisfactory in every way. It will also state that Johnny is to be returned to the mother immediately upon her return from deployment. This return to mom is to be done without delay, without the need to go to court, without the requirement of any court order to effectuate the return of custody.

The bottom line is:

1. You're the lawyer for Jane, and you owe her your best efforts to write up an airtight custody consent order – bullet-proof and rock-solid.
2. You should draft and get signed – upon trial or by consent – a foolproof temporary custody order, drafted after thinking about the possible objections and changes-of-mind that dad will have “after the fact.”
3. That order should be one which states explicitly the current circumstances of the child. It needs to say that the child is in an excellent situation at present, prior to the deployment.
4. And, in addition to requiring the automatic return of the child upon the deployed mother's return home, it should also provide for the rights and protections which your client wants for herself and for her child, such as interim visitation during any leave which she has, and telephone contact with the child during her absence.

That is the key to resuming custody when your client returns from overseas.

[rev.12/1/09]

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**SILENT PARTNER** is prepared by Mark E. Sullivan, a retired Army Reserve JAG Colonel, member of the Military Committee, ABA Family Law Section, and author of *The Military Divorce Handbook* (American Bar Association, May 2006). Revisions, comments and suggestions should be sent to him at Law Offices of Mark E. Sullivan, P.A., 2626 Glenwood Avenue, Ste. 195, Raleigh, NC 27608 (919-832-8507); e-mail – Mark.Sullivan@ncfamilylaw.com.