

## CUSTODY CONCERNS/ISSUES FOR MILITARY FAMILIES

By: Shelby Duffy Benton

## OVERVIEW

- Initial Custody Determination
- Modification of Custody Orders
- Enforcement of Out-of-State Custody Orders
- Uniform Deployed Parent Act

## INITIAL CUSTODY CASES

Lt. Sally shows up in your office to advise that she believes that she and her spouse of 10 years are going to separate. She tells you that she has two minor children and she is concerned about what the law is in North Carolina concerning custody.

## WHAT DO YOU TELL HER?

- Jurisdiction – UCCJEA
  - Joint Legal Custody
  - Joint Physical Custody
  - Primary/Secondary Custody
  - Custody/Visitation
- Contact Local Civilian Counsel

## UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)

N.C. Gen. Stat. Chapter 50A, Article 2

- Home State Jurisdiction
- Emergency Jurisdiction
- What happens when there is no home state?

## JOINT LEGAL CUSTODY

- Shared legal decision making
- Generally, joint legal custody means that both parents get to share equally in the making of major decisions regarding a child's health, welfare, and education.

### JOINT PHYSICAL CUSTODY

- Typically, joint physical custody means that custody of a child alternates on some regular basis between the parents.
- The schedule is often times a 50/50 schedule, for example each parent may exercise physical custody of the child every other week.

### PRIMARY/SECONDARY CUSTODY vs. CUSTODY/VISITATION

#### Primary/Secondary Custody

- This schedule gives both parents rights to physical custody of the minor child but defines that one parent will be entitled to more physical custody than the other. The parent exercising more time with the child is said to have primary physical custody.
- It really comes down to the language used in the Order.

#### Custody/Visitation

- This is the most general language used when referencing custody of a minor child.

### OVERVIEW OF CUSTODY

- Does the child get to choose?
- What is custody mediation?
- When can a party seek attorney's fees?
- What is the financial burden of a court action for custody?
- What if the other party failed to meet their child support obligation, can a party withhold visitation?
- Can the Court use my deployment against me?

### CONTACT LOCAL CIVILIAN COUNSEL

It is important that you provide information concerning attorneys that are knowledgeable both in family law and in how family law affects or interacts with military personnel and their families.

- ❖ The North Carolina State Bar website for the LAMP Committee and you will find on that website a reference to specialists. [www.ncslamp.gov](http://www.ncslamp.gov)
- ❖ North Carolina Bar Association for Family Law Section members. [www.ncbar.org](http://www.ncbar.org)
- ❖ Familiarize yourself with lawyers in your district or areas that practice family law so that you will be able to give appropriate referrals.
- ❖ Reference to article on LAMP website for interviewing an attorney on military issues. [www.ncslamp.gov](http://www.ncslamp.gov) click on Legal Eagle and choose "How to Find a Military Divorce Attorney".

### CUSTODY BY SEPARATION AGREEMENT

V.

### CUSTODY BY COURT ORDER

### CUSTODY BY SEPARATION AGREEMENT

A Separation Agreement is not enforceable by contempt, therefore, I recommend that all custody issues be handled by Court Order. There are some times when you would use a Separation Agreement, particularly when you have jurisdictional issues or a person who is going to be moving out of the State of North Carolina.

## CUSTODY BY COURT ORDER

In most instances a Court Order is the preferred document to handle custody. It is enforceable by contempt and under North Carolina law only a District Court Judge has the authority to enter custody Orders.

## MODIFICATION OF CUSTODY ORDER

Now it's a couple of years later and Capt. Sally is back in your office because she has gotten orders to Alaska and needs to know how to modify the prior custody Order.

You must be able to prove that there has been a substantial change in circumstances that appreciably affects the custody of the minor child in order to modify a Court Order for custody.

A move may not be considered a substantial change in circumstances under North Carolina law. You will need to discuss any and all changes that have occurred from the time that the initial Order was entered until the date of any filing for modification.

## ENFORCEMENT OF OUT-OF-STATE CUSTODY ORDERS

You receive a phone call from your counterpart in Arizona telling you that they have an airman who has an Arizona Court Order giving him custody of the minor child. You are further told that the minor child came for a summer visitation to North Carolina and now the mother of the child is refusing to return the minor child to Arizona in accordance with the Arizona Court Order.

## What do you tell them?

Pull out this manuscript and refer them to the North Carolina Administrative Office of the Courts (AOC) website at [www.nccourt.org](http://www.nccourt.org) where you will find the following forms:

<b>STATE OF NORTH CAROLINA</b> _____ County		In the General Court of Justice District Court Division
Name of Plaintiff _____  Name last known or believed _____ <b>VERSUS</b> _____  Name of Defendant(s) _____  Name of Plaintiff's Next Friend _____ Name of Plaintiff's Next Friend's Next Friend _____  Name of Plaintiff's Next Friend's Next Friend's Next Friend _____ Name of Plaintiff's Next Friend's Next Friend's Next Friend's Next Friend _____	<b>NOTICE OF REGISTRATION OF FOREIGN CHILD CUSTODY ORDER</b>  <div style="text-align: right;">U.S. SUP. 305</div>	
<p style="text-align: center;"><b>TO THE DEFENDANT OR OTHER PERSON NAMED ABOVE:</b></p> <p>Pursuant to U.S. 20A-305, Note, notice that the Foreign Child Custody Order, referenced in the caption above, was registered in the office of the Clerk of the Superior Court of the above named county, on _____, and that said custody order is enforceable as of the date of registration in the same manner as a child custody determination entered by a court of this State.</p> <p>If you want to contest the validity of the registered foreign child custody order, you must file a written request for a hearing to contest the confirmation of the registered order. See Rules AOC-001.01, B-001.01, Motion To Confirm Validity Of A Registered Foreign Child Custody Order And Notice Of Hearing. This request for a hearing must be filed with the Clerk of Superior Court in the above named county after 30-60 DAYS after you are served with this Notice. Failure to contest the validity of the foreign child custody order will result in the confirmation of the order and preclude further contest of the order with respect to any matter that could have been asserted.</p> <p>Date _____ Section _____ <input type="checkbox"/> Home Office <input type="checkbox"/> Clerk of Superior Court</p>		
<p><b>NOTICE TO PLAINTIFF:</b></p> <p>This Notice Of Registration Of Foreign Child Custody Order must be served upon the defendant and any other person entitled to notice under the Rules For Registration of Foreign Child Custody Order. Service on any other person entitled to notice under the rules of this Court, or service on any person not so designated by a rule of this Notice, is registered, admitted, returned, and filed in the office of the Clerk of Superior Court in the above named county, and will be with the court or Affiliated Service By Registered Mail, Certified Mail, Or Overnighted Delivery Service. AOC-001.06E</p>		

AOC-COURT, Rev. 2012

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<b>STATE OF NORTH CAROLINA</b>		 In the General Court of Justice District Court Division
Case No. _____ County _____  Cause Name (If Plaintiff) _____	<p style="text-align: center;"><b>MOTION TO CONTEST VALIDITY OF A REGISTERED FOREIGN CHILD CUSTODY ORDER AND NOTICE OF HEARING</b></p> <p style="text-align: right; font-size: small;">(U.S. 95B-000)</p>	
Case No. (If Contesting Child Custody Order) _____ Date Hearing (Date Contested Child Custody Order Was Made) _____ Name And Address Of Person Making Motion ("Plaintiff") The Defendant _____		
<p>The undersigned states as follows:</p> <ol style="list-style-type: none"> <li>1. I contest the validity of the foreign child custody order registered in the above captioned matter.</li> <li>2. The foreign child custody order is not valid and should not be confirmed because: (NOTE TO PERSON MAKING THIS MOTION: "You must check at least one of the following.")           <ul style="list-style-type: none"> <li><input type="checkbox"/> the hearing court did not have jurisdiction to enter the order;</li> <li><input type="checkbox"/> the foreign child custody order had been vacated, appeal or modified by a court with appropriate jurisdiction;</li> <li><input type="checkbox"/> laws entitled to enforce it were not given appropriate notice in the proceedings where the foreign child custody order was entered;</li> </ul> </li> <li>3. I demand a hearing to contest the validity of the foreign child custody order.</li> </ol>		
Name _____	Address _____	City/State/Zip Code _____
<p style="text-align: center;"><b>CERTIFICATE OF SERVICE</b></p> <p>I certify that this Motion To Contest Validity Of A Registered Foreign Child Custody Order And Notice Of Hearing has been served on all persons who are required to receive it, in accordance with the provisions of Rule 10(a), by personal delivery to each person, or by certified mail, return receipt requested, or by first class air mail, return receipt requested, on the date indicated below, and I certify that the copies of this motion and notice of hearing were delivered to each person and to each of the United States Postal Service.</p> <p>Date _____ Method _____  <input type="checkbox"/> Delivered In Person    <input type="checkbox"/> Certified Mail    <input type="checkbox"/> First Class Air Mail    <input type="checkbox"/> Other _____</p>		
<p style="text-align: center;"><b>VERIFICATION AND AFFIRMATION - NOTICE OF HEARING</b></p> <p style="text-align: center;"> <input type="checkbox"/> PLAINTIFF    <input type="checkbox"/> DEFENDANT    <input type="checkbox"/> OTHER _____     </p> <p>You are notified as per the date, time and place shown below for a hearing on the above Motion To Contest Validity Of A Registered Foreign Child Custody Order.</p> <p>Date Of Hearing _____ Time Of Hearing _____ Place _____  <input type="checkbox"/> Court Room    <input type="checkbox"/> Neutral Office    <input type="checkbox"/> Court Of Superior Court</p>		

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CITIZENSHIP		
Therefore, the Court concludes as a matter of law:		
<input type="checkbox"/> 1. That the foreign child custody order should be enforced. <input type="checkbox"/> 2. That the foreign child custody order should NOT be enforced. <input type="checkbox"/> 3. The Court either concludes:		
<input type="checkbox"/> 4. The foreign child custody order should be enforced.	<input type="checkbox"/> 5. The foreign child custody order should not be enforced.	
<input type="checkbox"/> 6. The foreign child custody order should not be enforced and is no longer registered in the State of South Carolina.		
<input type="checkbox"/> 7. Additional reasons:		
<input type="checkbox"/> 8. The Clerk of Superior Court shall serve a copy of this order on all parties. <input type="checkbox"/> 9. I swear as the following additional persons:		
Date: _____	Time: _____	Signature of District Judge: _____
<b>CERTIFICATION</b>		
I, County Clerk, do hereby certify that a copy of this Order, <i>Excluding Exemptions to Filing of Exemptions or Payment of Costs</i> , was sent by first class mail to plaintiff and defendant, <input type="checkbox"/> and other persons named above.		
Date: _____	Time: _____	Clerk of Superior Court: _____

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<b>STATE OF NORTH CAROLINA</b> <div style="display: flex; justify-content: space-between; align-items: center;"> <span>County _____</span> <span style="text-align: right;">             In the General Court of Justice            Western District Division         </span> </div>	
State and County of Plaintiff _____  State and County of Defendant _____ <b>VERSUS</b> _____  State of North Carolina Plaintiff _____ State and County of Plaintiff _____	<b>ORDER FOR HEARING ON PETITION FOR EXPELLED ENFORCEMENT OF FOREIGN CHILD CUSTODY ORDER</b>  <div style="text-align: right; font-size: small;">             U.S. State Bar              State of North Carolina Judicial Branch - Western District Division              State and County of Plaintiff _____           </div>
<div style="display: flex; justify-content: space-between;"> <div> <b>FACTS</b>            State of North Carolina Plaintiff _____            State and County of Plaintiff _____         </div> <div> <b>CONCLUSIONS OF FACT</b>            State of North Carolina Plaintiff _____            State and County of Plaintiff _____         </div> </div>	
The matter coming on before the undersigned judge, the Court finds as follows: <ol style="list-style-type: none"> <li>1. Plaintiff filed a petition to expedite enforcement of the foreign child custody order pursuant to 26 U.S.C. 601(a).</li> <li>2. Attached to that petition is a certified copy of a foreign child custody order entered on (date) _____ at (city) _____ in (state) _____ as an action required _____.</li> <li>3. Plaintiff alleges that the foreign child custody order gives her/him the right to immediate physical custody of the following children: (list child or children) _____.</li> </ol>	
<ol style="list-style-type: none"> <li>4. In addition, plaintiff alleges a "Material" or "Substantial" Grounds of a child's direct law enforcement to take immediate possession of the defendant's legal custody of the child.</li> <li>5. Plaintiff is entitled to a hearing showing law enforcement to take immediate possession of the child. A Material Showing Law Enforcement To Take Immediate Possession of Child (Docket # 2023-01-001) is attached.</li> <li>6. Plaintiff is not entitled to a hearing showing law enforcement to take immediate possession of the child(s) because _____.</li> </ol>	
<ol style="list-style-type: none"> <li>7. In addition, the Court finds _____.</li> </ol>	

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- 6

## G.S. 50A-350 through 355

⌘ Are the general provisions for ...

- Definitions;
- Remedies – This includes attorney fees and costs;
- Jurisdiction;
- Notice – deploying parent is required to give at least 7 days notice of deployment;
- Notify of Change of address

## Agreement on Custodial Responsibility During Deployment

⌘ G.S. 50A-360 – Temporary Agreement must be in writing, signed by parents and any nonparent to whom custody duties are given. It may...

- Identify destination, duration and conditions of deployment;
- Allocate the caretaking authority among deploying parent, other parent and any nonparent;
- Specify decision-making authority between parents and nonparent;
- Grant of limited contact to a nonparent;
- Specify frequency, duration and means of contact for child with deployed parent while gone and on leave;

## Continued...

G.S. 50A-360 (continued)

- Acknowledge that the child support order can only be modified by Court Order;
- Provide for termination of the agreement after return from deployment;
- If agreement must be filed under 50A-364, specify which parent is responsible for filing.

## Continued....

⌘ 50A-361 – Agreement is temporary and ends upon return from deployment; no independent rights created; nonparent given authority or contact rights has standing to enforce agreement.

⌘ 50A-362 – Can only be modified by mutual consent of both parents and nonparents who have custodial rights under agreement.

⌘ 50A-363 – Deploying parent may delegate all or part of custodial rights to nonparent through a Power of Attorney (POA) while deployed under certain circumstances.

⌘ 50A-364 – Requires filing of agreement or POA with Court or agency within reasonable time.

## Judicial Procedure - Granting Custodial Responsibility During Deployment

~ 50A-370 – Court may enter Temporary Custody Orders unless barred by SCRA; Non permanent custody order except with consent of deploying parent.

~ 50A-371 – Court shall hold expedited hearing before deployment if requested.

~ 50A-372 – Court can allow party or witness to testify by electronic means unless good cause is shown for personal appearance.

~ 50A-373 – Prior order for custody in a deployment case is binding unless circumstances justify modification; court shall enforce agreement of parties unless contrary to best interest of child.

## Judicial Procedure - Granting Custodial Responsibility During Deployment

⌘ 50A-374 – Upon motion of a deploying parent, court may grant caretaking authority to nonparent who is adult family member, or who has a close and substantial relationship with the child, if it is in the best interest of the child. Absent an agreement by other parent, caretaking time is limited to....

~ ordinary visitation of the deployed parent in existing order;

~ if no order, the time the deployed parent cared for the child prior to the notice of the deployment.

Court may grant decision making authority to a nonparent, and the order shall specify areas of authority (health, education, etc.). This nonparent will be a party to the action until the grant of authority is terminated.

### Judicial Procedure - Granting Custodial Responsibility During Deployment

- § 50A-375 – Upon motion of deploying parent, the court **shall** grant limited contact to a nonparent who is an adult family member or who has a close and substantial relationship with the child, if it is in the best interest of the child. This nonparent will be a party to the action until the grant of authority is terminated.
- § 50A-376 - This authority is temporary, ends upon return from deployment; does not create an independent right; nonparent granted authority or contact has standing to enforce. Nonparent has no continuing right to party status after the grant is terminated.

### Judicial Procedure - Granting Custodial Responsibility During Deployment

- § 50A-377 – Content of Temporary Order:
  - Set out as temporary order;
  - Identify destination, duration and conditions of deployment;
 If applicable, temporary order for custodial responsibility must..
  - Allocate caretaking authority among parents and nonparents;
  - Provide dispute resolution between parents and nonparents;
  - Provide for liberal communication between child and deploying parent and allocate costs of communication;

### Judicial Procedure - Granting Custodial Responsibility During Deployment

- § - Provide for liberal contact while deployed parent is home on leave;
- § - Provide for reasonable contact between deploying parent and child upon return from deployment until temporary order is terminated, which may be more time than before the deployed parent left;
- § -Specify decision making authority;
- § -Specify any grant of limited contact with nonparent;
- § -Provide for termination of the order upon return from deployment in accord with the Statute.

### Judicial Procedure - Granting Custodial Responsibility During Deployment

- § 50A-378 - If an order is entered or caretaking agreement executed the Court may enter child support orders if it has jurisdiction under UIFSA.
- § 50A-379 - Court may modify or terminate an order for caretaking, decision making or limited contact. Any modification is temporary and ends upon return from deployment. On motion of deploying parent, court shall end order of limited contact.

### Return from Deployment

- § 50A-385 – After return from deployment, agreement can be terminated upon consent of both parents. Otherwise the Order/Agreement terminates upon the time set out in the agreement or Order. If no date, then it ends 60 days from the date the deploying parent gives notice to the other parent of return from deployment, unless earlier terminated upon date in order or at death of deploying parent. If temporary agreement was filed, then agreement to terminate must be filed within a reasonable time after signing.

### Return from Deployment

- § 50A-386 – Anytime after return from deployment, both parents may file with Court an agreement to terminate the temporary Order. After agreement is filed the Court **shall** issue an Order ending the temporary Order on the date set out in the agreement or if no date then immediately.

## Return from Deployment

- § 50A-387 - After deployed parent returns from deployment and until Order or Agreement is terminated, Court **shall** enter temporary Order granting deploying parent reasonable contact, unless contrary to best interests of child, even though time may exceed that spent with child before deployment.
- § 50-388 - If there is no agreement to end the temporary Order, then it ends 60 days from the date the deploying parent gives notice of return from deployment to the other parent and any nonparent given custodial responsibility, or at the death of the deployed parent. Any proceeding to terminate or prevent termination of temporary Order is governed by other provisions of State Law.

## RESOURCES

North Carolina State Bar LAMP website:  
[www.nclamp.gov](http://www.nclamp.gov)

- Take -1 Handouts
- The Legal Eagle
- Co-Counsel Bulletins
- Silent Partners

## Take - 1 Handouts

- Custody & child support: The interstate connection
- Registration of out of state custody Orders
- International custody & visitation issues
  - Child custody & visitation

## The Legal Eagle

Overseas custody and visitation issues  
 How to find a military divorce attorney  
 Good to go and return

## Co-Counsel Bulletins

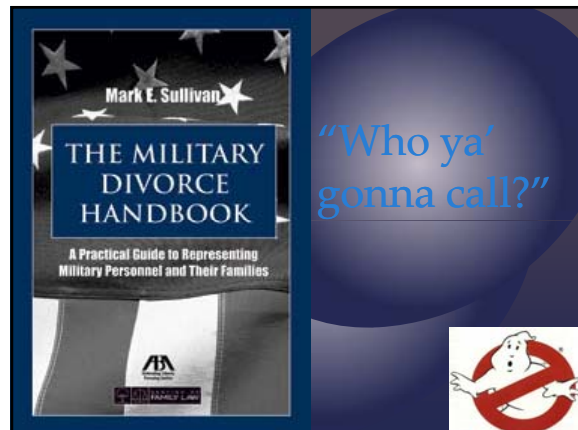
Counseling on custody and visitation issues  
 Consent modification of child custody  
 -Separation agreement  
 Consent modification of child custody  
 -Order  
 Child snatching

## Silent Partners

Custody Enforcement – Domestic  
 Counseling on Custody and Visitation Issues  
 Custody and Single – Parent Enlistment  
 Visitation Travel Cost

## 2013 CLE

Custody and Visitation for the  
Military Practitioner  
- Mark Sullivan



North Carolina Bar Association

[www.ncbar.org](http://www.ncbar.org)

Website for the Family Law Section

~ Resource for contact information for  
family law attorneys

~ Continuing Legal Education, some of  
which cover military custody issue.

North Carolina State Bar

Family Law Specialist List

[www.nclamp.gov](http://www.nclamp.gov)

Click on Family Law

Click on link to Specialist

Equip the client with interview questions that  
will assist them in finding an attorney that is  
knowledgeable on Military family law issues.

[www.nclamp.gov](http://www.nclamp.gov)

The Legal Eagle

How to Find a Military Divorce Attorney

Ultimately some of the best advice that can be  
given anyone in a custody matter is:

- ❖ Know your Judge
- ❖ Know your Judge
- ❖ Know your Judge