

BEST PRACTICES – Military Custody and Visitation Statutes

Subject: Many divorced, separated and unmarried parents in uniform are deployed away from their children. Some of these servicemembers (SMs) find that states do not consider the unique aspects of military service when making custody decision. Although the Department of Defense believes the welfare of children is paramount, it also believes the demands of military service should not harm the parent's rights. There are several protections the Department believes would serve both the parent's rights and the welfare of the children.

Discussion:

Many SMs have custody of, or visitation rights with, children whose other parent is not the SM's current spouse. Absences due to military service can undermine and disrupt existing arrangements, creating stress on parents and children. In spite of the substantially increased activity of our armed forces around the world today, not all States have passed legislation designed to address the unique aspects of military service when balancing equities involved in decisions about child custody and visitation rights. The states are in the best position to weigh and balance the equities and interests, and they should at a minimum address certain basic points and procedural protections such as the following:

- 1) No permanent orders altering existing custody arrangements should be entered while the custodial parent is unavailable due to military service.
- 2) Absence due to military service should not serve as the *sole* basis for altering a custody order in place prior to the absence.
- 3) The custody order in place before the absence of a military parent should be reinstated within a set time upon the return of the military parent, absent proof that the best interests of the child would be undermined. The non-absent parent should bear the burden of proof.
- 4) The mere *possibility* of future absence due to military service should not be an appropriate consideration for child custody determinations.
- 5) A SM with visitation rights be allowed to petition the court to allow those visitation rights to be delegated to a third person during the SM's absence due to military service.

Additionally, the Department believes states should facilitate hearings on custody and visitation involving servicemembers by enacting procedures to allow expedited hearings and electronic testimony.

Additional Provisions, Examples

A) Effect of Absence on Custody: States should address the impact that the absence of a SM with primary custody has on a custody determination upon the return of the SM. Military service itself should not be the *sole* basis for the returned SM losing custody. The return should give rise to the presumption that the arrangement in place before the absence would be restored upon the SM's return.

(1) Washington State SHB 1170 states:

If the parent with whom the child resides a majority of the time receives temporary duty, deployment, activation, or mobilization orders from the military that involve moving a substantial distance away from the parent's residence or otherwise would have a material effect on the parent's ability to exercise parenting functions and primary placement responsibilities, then:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger* has not been filed, the motion for an order restoring the previous residential schedule shall be granted; and*

(b) The temporary duty, activation, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer residential placement from the parent who is a military service member.

Note that some states have allowed such hearings with a lesser showing of adverse impact on the interests of the child. In addition, some states have allowed the *effects* of such absences to be considered when determining a change of circumstances or the best interests of the child.

B) Delegation of Visitation Rights: When SMs with visitation rights are absent due to military duty, their contact with their children is obviously curtailed. This is especially true if the custodial parent refuses to allow visitation with other relatives, claiming that visitation rights belong solely to the non-custodial parent. Court-approved delegated visitation rights would provide the absent SM greater contact with the child through the relative to whom the visitation rights were delegated.

(1) Washington State SHB 1170 states:

If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, at the request of the military parent, the court may delegate the military parent's residential time or visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

- C) Expedited Hearings: Although the Servicemembers Civil Relief Act (50 U.S.C. App. 501 *et seq.*) allows the stay or delay of hearings involving SMs, addressing child custody issues with the non-custodial parent before deployment almost always provides the SM with the best opportunity to resume the status quo upon return. Provisions for expedited hearings, therefore, are critical.

(1) N.C Gen. Statute §50-13. 7A states:

Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, for good cause shown, hold an expedited hearing in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.

- D) Electronic Testimony: Frequently, service members cannot be in court to present testimony or evidence due to their military duties. In interstate custody cases, Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act, and Section _____ of the Uniform Interstate Family Support Act permit an individual to be deposed or to testify by telephone, audiovisual means, or electronic means. However, in intrastate custody cases, state statutes usually provide only limited authority for electronic testimony. Therefore, these protections should allow the court to obtain this information through telephone, video, or other electronic means, instead of proceeding with the case without the SM's testimony or allowing a continuance.

Without the military parent's testimony, the court does not have the benefit of potentially useful and relevant information upon which to base its decision.

(1) N.C Gen. Statute §50-13. 7A states:

“Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, allow the parent to present testimony and evidence by electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled hearing. The phrase "electronic means" includes communication by telephone, video teleconference, or the Internet.”