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"Good to Go" (and Return!)
Part 1: Unraveling the Rules

By Mark E. Sullivan*

5.0—Military service and family responsibilities

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[The first section of this article will cover the ground rules for protecting and advising a military custodian as to mobilization, sea duty, deployments, and other military absences.]

Janet Smith was just stopping for a cup of coffee at The Courthouse Deli when she saw Sam Jones in a corner booth looking glum. After ordering, she came over and joined him, asking "Why the long face, Sam?"

Sam replied, "I've got a problem, Janet. Maybe you can help me – I know you were in the Army JAG Corps for four years, and you might know some answers. It's about a military custody situation."

"Sure," replied Janet. She had done her homework and was familiar with the literature on military custody issues.[1] "Let's hear what it involves."

Sam responded, "My client is Army Sergeant Jane Doe. She's about to be deployed, and she has custody of her son, Johnny. I've heard that when she deploys, she'll have to give custody over to the dad, her ex-husband, and that really worries her."

"No, she doesn't have to transfer custody," replied Janet. "So long as the father has been found to be unfit in court or else he has waived his rights to custody, she doesn't need to give up custody for the interim while she's away."

Sam sat up. "What do you mean? He's not been found to be unfit, and there's no waiver. Jane just wants to make sure that Johnny is in the right place while she's overseas. After all, it's about the child's best interest!"

[1] See, e.g., Mark E. Sullivan, "Third Rail Custody: The Military Case," Juvenile and Family Court Journal, Vol. 65, Issue 1, pp. 45-72 (Winter 2014), and Chapter 4, "Custody and Visitation," from Sullivan, The Military Divorce Handbook (ABA, 2nd Ed. 2011).

Janet replied, "Well, the 'right place' (as Jane calls it) is *probably* with dad, unless he's been excluded legally, such as by his own waiver, a custody consent order, termination of parental rights, or a court's finding of unfitness.

"Does she have to give custody of Johnny to him?"

"Probably so," Janet replied, "since he's not waived his rights to custody and isn't unfit. 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 would be asking for trouble if she tries to transfer custody of Johnny to her current husband, to her mother in San Diego, or to her cousin Elvira in Florida."

"A court order? 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?"

Janet answered, "Yes – it's enough for the Army. But a Family Care Plan is not a court order. When there's 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."

Sam protested, "But surely it's enough to have a court order granting custody to the child's grandmother in San Diego – right?"

"Yes, that's fine, so long as there's full compliance with state law requirements," responded Janet. "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 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*."

"However the preferable way to move forward," Janet continued, "would be to get the dad's consent to a relative taking custody – if you can obtain that consent. The general rule is that the other party, the non-custodial parent, cannot be excluded from custody – absent his consent – unless he is found by the court to be unfit by reason of abandonment, abuse, neglect or other conduct inconsistent with parental rights and responsibilities. And in some states, you must show *actual harm* before excluding the other parent."

Sam exploded. "Abandonment? Abuse or neglect? Whoa! How are we supposed to prove those charges?"

Janet coolly replied, "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."

Sam continued his questions. "What if dad is *not unfit* but he agrees to give custody to the maternal grandmother? Or, more likely, what if the father is not unfit and will not consent to giving up custody?"

"If the father isn't unfit but will agree, 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."

"If, on the other hand," continued Janet, "there is no unfitness and the dad won't agree, then I suppose that Jane Doe should consider transferring custody to him for the duration of her deployment, since he's not waived his rights to custody and he is not unfit."

Sam was having none of it. "But this guy is a real bum! He drinks, he smokes heavily and he's got a gun rack in his pick-up truck. Not only that, but we understand that he is also 'seeing another lady' these days. We're really worried about his getting custody!"

"So? Is he unfit? Can you prove it?"

Sam retrenched and dug in. "But the father will probably demand child support from my client!"

"Of course he will," answered Janet. "Why shouldn't he? He'll need help in supporting Johnny while Jane is overseas. There's nothing wrong with a father asking for child support when he's in charge of the kid and he has a custody order."

Sam's last-ditch question showed the ultimate concern his client had. "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!"

Janet responded, "There are many factors, Sam, which come into play in determining the custody of Johnny when a military absence (such as deployment, mobilization, TDY, or remote tour) ends. For example:

- Will Johnny be thriving in the new environment, or doing poorly?

- Will he have lots of new friends near his dad's home, 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?

- Neighborhoods play 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? And 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? Most states have statutes which say 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 promptly after the return of the absent military parent.

- If there is a temporary custody order, what does it say? 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, according to Janet, is this:

1. If you're the lawyer for the soon-to-be-absent parent, 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. If there are flaws, problems, advantages or facts which need to be established (such as the child's progress in school, the benefits of the current neighborhood, or the prior misconduct of the other parent), then the order needs to explain these. If you want Johnny to return to the previous environment when the absence ends, you need 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, the order 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.

These are the key points in maintaining military custody for a parent in uniform, dealing with the custody claims of the other parent during a military absence, appointing a step-parent or relative as alternate custodian, and to resuming custody when your client returns from overseas.

[The second part of this article will cover the danger of adverse court action if the servicemember doesn't plan ahead.]

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"Good to Go" (and Return!)
Part 2: The Sailor and the Perfect Storm

*by Mark E. Sullivan

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[The previous section of this article covered the ground rules for protecting and advising a military custodian as to mobilization, sea duty, deployments, and other military absences. It also outlined the key points in maintaining military custody for a parent in uniform, dealing with the custody claims of the other parent during a military absence, appointing a step-parent or relative as alternate custodian, and to resuming custody when your client returns from overseas.]

Despite good planning, many military custody cases hit a "bump in the road" and overturn. Sometimes there's good planning, and sometimes there's NO planning. The results – which usually involve the absence of the military custodian with no legal back-up custodian outside of the other parent – lead to heartbreak, surprise, legal expenses, and sometimes child endangerment.

The reality in military life is that travel and reassignments are constant factors. No one stays in one place very long. Plans must be made for the day when a military custodian cannot be there to take care of the child due to military duties.

But some military custodians, it seems, do little planning for the eventual day when "military absence" removes them from caring for the minor child or children. Sometimes it's a remote tour, such as to Iceland, Korea, Turkey or other places where military rules designate the assignment as "unaccompanied." Sometimes the mission is called TDY, or temporary duty; often these assignments are unaccompanied. Assignments to combat zones and hostile fire areas are likewise without dependents. Any military absence can become a stumbling block in a case where the parent in uniform has sole or primary custody of the child. Here's an example -

Submarine duty no defense in child custody case

by Dennis Pelham
Daily Telegram Staff Writer
The Daily Telegram - Adrian, MI

Being posted on a submarine in the Pacific Ocean does not exempt a father from obeying child custody orders, a judge ruled Monday in Lenawee County Circuit Court.

If Matthew Hindes is not available, then his current wife should have returned his daughter to the girl's mother, said Lenawee County Circuit Judge Margaret M.S. Noe. She ordered last week that the child be placed in Angela Hindes' custody in Adrian pending the outcome of a hearing on a custody petition she filed last year. The 6-year-old girl, Kaylee, is in Washington state with Matthew Hindes' wife, Benita-Lynn Caoile Hindes.

Attorney Rebecca Nighbert of Adrian asked for a stay in the case under the federal Servicemembers Civil Relief Act. The law provides a 90-day stay in civil court proceedings if military service affects a member's ability to participate. Matthew Hindes is a petty officer in the United States Navy, currently assigned to the *USS Michigan*. The submarine is now somewhere in the middle of the Pacific Ocean, Nighbert said. She presented a letter from a Navy administrative officer to confirm his duty posting.

Noe denied the motion for a stay, ruling that he could have arranged for his wife to bring the child to her mother. "At this point, I don't think I have any alternative but to enter a bench warrant for his arrest," Noe said. "If the child is not in the care and custody of the father, the child should be in the care and custody of the mother"….

Nighbert said the wife has put together money to pay for a flight from her home in Washington, but does not yet have money to rent a car to drive to Adrian from the airport. Angela Hindes offered to drive to the airport to pick up her daughter. Noe agreed to waive an existing order that the wife not be present during the transfer of custody for parenting time.

Noe delayed her order for a bench warrant until Friday to allow the wife to bring the child to the airport. Noe also ordered the pre-trial hearing in the custody case to continue at 9 a.m. Monday, June 23.

Matthew Hindes was given custody of his daughter in 2010 after she was removed from Angela Hindes' home by Michigan Department of Human Services' Child Protective Services. An Oct. 1, 2010, divorce judgment gave him permanent custody, but Angela Hindes petitioned for a change in the custody order in August last year.

Analyzing this article requires guessing about a lot of facts, rules and information. Not much is revealed about the relationship of the parties, the terms of the custody order, the logistics of the divorce settlement negotiations which probably led to dad's getting custody, and the provisions – if any – for the child should the father become unavailable due to military absence (remote tour, deployment, TDY – temporary duty- or other reasons). Here are some of the questions about which the reader remains clueless:

- Did the custody order mention the protective order which removed the child from the mother's home? If not, why?
- When the divorce court granted the father custody, did it grant visitation to the mother? If so, why?

- If the mother's actions were serious, why didn't the father go to court and demand termination of the mother's parental right? Or at least termination of her visitation rights?
- What recitation, if any, is in the current custody order about what mom did to merit intervention by Child Protective Services? Was it a temporary lapse of judgment, or serious endangerment? Is it likely to happen again?
- Was the mother's visitation, if granted by the court, structured as supervised visitation? If not, why? Did the father demand a hearing on this so that, while we was in court and available in person, he could press his case for NO visitation or – at least – supervised visitation?
- Did the father, upon being given custody, simply consent to the order and drop his other legitimate demands, such as the payment of child support and the restriction of mom's access to the child (in favor of his new wife as alternate custodian)?
- Was there perhaps a trade, which is common in domestic cases like this – custody to the father in exchange for no mention of the mother's wrongdoing and the waiver of child support from the mother? What were the terms of the bargain?

However the court order was written, it clearly did little to protect the child during the period when dad was at sea. Such duties for sailors are expected. They are part of the job description which begins, "You are now a member of the United States Navy…." All Navy personal – "sailors" – are expected to serve at sea regularly.[2] It is hard to imagine a judge's overlooking this fact of life, or the attorney for the father leaving out any plans for "sea duty" from the custody order which he or she either drafted or reviewed before it was signed by the judge and filed.

Clearly the father left his wife, the stepmother, in the worst possible position – unarmed against the demands of the child's mother and without the sailor's presence, protection and testimony in a contest with a strong-willed judge who became aware of the absence of the designated custodian. Like virtually all judges, this one probably ruled that there is a constitutional preference for parental custody, when one parent is absent the other is expected to care for the child, and only when one parent is proven to be unfit by virtue of abandonment, abuse, neglect or such other conduct as is inconsistent with parental responsibilities may the court designate custody in a third party.

There are few exceptions to the parental preference doctrine. One of them is consent. If a parent consents to the award of custody, on a permanent or temporary basis, to a third party, then that decision will be binding upon the parent. Another is waiver. If a parent, by his actions or inaction, waives the rights which the parental preference doctrine gives him then he cannot later step into court to demand their protection and enforcement.

The Servicemembers Civil Relief Act (SCRA) provides some protections for members of the military in civil lawsuits. The Act was passed to protect the rights of those in uniform. But what rights would be protected in this case? The father was given the right, nay, the duty to care for

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[2] *See, e.g.*, Schmalhofer v. Schmalhofer, 2003 Tenn. App. LEXIS, at 7 (case involving Navy mother in which her supervisor testified that someone in the mother's position "was usually scheduled to work 48 months on shore, then 36 months at sea").

a protect the minor child in the custody order. How can he exercise this right when he is on a submarine in the middle of the ocean? Why would the SCRA be employed to protect rights which he no longer has? Why should the Act be used to keep the child with his new wife, who is not protected by the SCRA, when he cannot care for the child due to military duties? Why would the father try to use the act to defeat the rights of the mother of the child?

Use of the Servicemembers Civil Relief Act in such a custody case is almost universally rejected by the courts. The reason is in a doctrine known as "The Sword and the Shield." A good example of this equitable rule can be found in a New York military custody case, *Diffin v. Towne.*[3]

The SM-mother in that case, as in the Michigan case, also urged the court to find that a stay of proceedings barred the entry of a custody order, even on an interim basis. She said that that her new husband should take care of the child of her former marriage This case, absent the protective order aspect, is a close parallel to the newspaper scenario above involving sea duty for the sailor-father.

The mother in *Diffin v. Towne,* a member of the Army Reserve, had remarried after a divorce from the child's father about four years previously. She was served in April 2004 with a motion from her ex-husband asking for custody of their child in light of her upcoming mobilization to Fort Drum, New York.

The mother tried to defend against the motion by asking for a stay and pointing out that she had prepared a military Family Care Plan (which is required by military regulations) designating her new husband and her mother as guardians for the child.

In addition she argued that a stay of proceedings (requested under New York statutes that are similar to the SCRA) bar the judge from proceeding with any temporary or permanent relief. Finally, the Reservist-mother claimed that the stability derived from their child's continued education in the Fort Plain School District was more important in the child's life than living with the father. The new husband also petitioned for temporary custody.

The court in its opinion reminded the parties that a stay of proceedings is simply intended as a shield to protect SMs, not as a sword with which to deprive others of their rights.[4] In the absence of extraordinary circumstances, such as abandonment, unfitness, or persistent neglect, the court must grant custody to the secondary custodial parent in a case such as this when the primary custodian cannot fulfill his or her custodial duties. Finding no such disqualifying circumstances, the court swept aside the mother's argument that her new husband should take care of the child pending her return from an indefinite mobilization period, stating that:

> the step-father has no legal or moral obligation to support the child, has no legal ability to obtain medical care for the child, and has no legal ability to inquire as to the education of the child.[5]

Here it should be noted that the court in Michigan could, if given the opportunity, hold a hearing on fitness and make a ruling as to the qualifications, ability and fitness of the mother

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3Diffin v. Towne, 3 Misc. 3d 1107A (2004) (unpublished).

4Diffin v. Towne, No. 504650, Slip Op. at 2 (2004 N.Y. Misc. LEXIS 622 at 5).

5Diffin v. Towne, No. 504650, Slip Op. at 6 (2004 N.Y. Misc. LEXIS 622 at 17).

for extended care of the child as the alternate custodian. The problem with this solution, of course, is absence of the best witness for the child, that is, the child's father. How can the dad argue and testify about the mother's conduct and ability (or lack thereof) to care for the child when he is in the middle of an ocean? Why did he not anticipate this possibility when the custody order was entered initially?

The New York trial court opinion went on to explain that the court had the power to enter a temporary order pending the final resolution of the matter regardless of the entry of a stay of proceedings because

> children of military personnel are not only entitled to receive support during their parent's tours of duty, but . . . they are also entitled to stability with regard to their care, upbringing and custody.[6]

Finally, the court noted that it was

> being asked to leave the child with a step-parent until such time as the mother is able to proceed. This is not in the child's best interest and the law requires this Court to enter a temporary order pending the trial of this action. To fail to provide for the child's legal physical custody during the pendency of the stay would result in an untenable situation where the child would be living with his step-father, a legal stranger to him, and his natural father's rights would be subrogated to the step-father. The Court agrees with the father, that the child should be allowed to complete the current school year in New York and then physical custody should be transferred to the father, the available natural parent, until such time that the mother is no longer on active duty in the military or a trial is held on this matter.[7]

Similar results, granting application of the stay provisions of the SCRA but allowing placement or temporary custody of the child on an interim basis, occurred in *In re Marriage of Grantham.*[8] In that case, the father attempted to give custody through his military Family Care Plan to the child's paternal grandmother, and the mother obtained temporary custody while the father pursued an appeal that was ultimately unsuccessful. It is not difficult to understand why the court affirmed the trial court's transfer of custody and upheld its denial of the father's stay motion. Inequitable conduct by the servicemember-parent, turning the Act's protective shield into a sword, usually will result in a denial of a stay request, even though there is nothing in the SCRA stating this or even mentioning misconduct by a party. The SCRA is intended to protect the rights of a servicemember. It is hard to argue that a sailor who has been given custody of a child by the court, but who is now absent from his custody duties due to military assignment, still has rights to protect. What are those rights? In virtually every custody order, one parent is granted primary care and custody of the child. This is intended by the court to be

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6*Id*. at 20 (citing Gilmore v. Gilmore, 185 Misc. 535, 536, 58 N.Y.S.2d 556, 557 (1945) and Kelley v. Kelley, 38 N.Y.S.2d 344, 348–50 (1942)) (cases providing for family support while rest of matter was stayed).

7*Id*. at 21.

8*In re* Marriage of Grantham, 698 N.W.2d 140, 2005 Iowa Sup. LEXIS 75 (Iowa 2005). For a contrary result, *see* Dilley v. Dilley, Chancery No. CH04-195, 2004 Va. Cir. LEXIS 235 (Cir. Ct., Shenandoah Co., Nov. 2, 2004) (trial-level decision granting continued custody to the SM-mother and maternal grandmother despite the mother's absence overseas, allowing the mother's stay request, and denying the father's motion for temporary custody).

exercised in person. Most courts expect that, if a parent is unable or unwilling to fulfill the heavy duties which come with custody, he will give them up and transfer them to the other parent, or else the other parent will ask the court to perform this function.
[The final part of this article will discuss a prescription for avoiding disaster by crafting the court's custody order with an eye to the future and a plan for who gets custody when the military member is absent.]

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"Good to Go" (and Return!)
Part 3: Planning and Prevention

*by Mark E. Sullivan

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[The previous two sections of this article covered the ground rules for protecting and advising a military custodian, and the danger of adverse court action if the servicemember doesn't plan ahead. This article concludes with a prescription for avoiding disaster by crafting the court's custody order with an eye to the future and a plan for who gets custody when the military member is absent.]

It didn't have to be this, way, of course. There should not be a crisis when a sailor is called to sea duty and he has custody of a minor child. The Defense Department has issued clear instructions as to the responsibilities of servicemembers,[9] of commanders[10] and of legal

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9 Enclosure 3, "Procedures," to Department of Defense Instruction 1342.19 states that -
(2) Each Member shall:
(b) Attempt, to the greatest extent possible, to inform the non-custodial biological or adoptive parent of his or her children, as applicable and as far in advance as practicable, of his or her impending absence due to military orders….

10 The same source, Enclosure 3, "Procedures," to Department of Defense Instruction 1342.19, provides the following requirements for Navy commanding officers: (3) … Commanders shall: …
e. Inform Members of the overriding authority of State courts to determine child custody arrangements, notwithstanding a family care plan….
f. Advise Members of the risks involved if they are unable or unwilling to contact or gain the consent of the non-custodial biological or adoptive parent if the family care plan would leave the child in the custody of a third party. Strongly encourage them to obtain legal advice as far in advance of the absence as is practicable about the implications of failing to include the noncustodial biological or adoptive parent in the family care plan process. Emphasize that the failure to involve, or at least inform, the non-custodial biological or adoptive parent of custody arrangements in anticipation of an absence can undermine, or even render useless, the family care plan….
g. Encourage Members to seek the assistance of military and community support resources, to include family support centers; legal assistance offices; family program directors, coordinators, and ombudsmen; Service relief

assistance attorneys[11] on base and at sea in regard to matters involving single parents, custody orders and non-custodial parents who reside elsewhere.

The Navy has undertaken very clear instructions as to duties and responsibilities in these types of cases. The Navy's regulation on family care plans, OPNAV INSTRUCTION 1740.4D (27 Oct 09), states:

> 4.b. "Exclusive reliance on a family care plan without the assistance of implementing court orders or written agreements from natural or adoptive parents, non-military personnel or institutions, may result in challenges to custody and/or denial of services by institutions."
>
> 4.c. "When single, domestically separated, and/or divorced Service members with minor children are required to travel unaccompanied for extended periods of time (e.g., training exercises, temporary duty (TEMDU), deployments, and unaccompanied tours), there is a possibility that the other natural or adoptive parent of the minor children, or others with legally enforceable custody rights will challenge the family care plan or existing court orders and seek to create or modify the custody and support status of the Service member's minor children. This action can only be addressed through detailed and thorough planning and action. Single, domestically separated, and divorced Service members with minor children should contact a legal assistance office for advice and assistance in evaluating the effectiveness of their proposed family care plan and complying with any legal formalities necessary to prevent unwanted challenges to custody and support arrangements."
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> 6. Requirements.
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> c. The family care plan shall include written provisions for:
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> …(7) Verification of consent from all natural and adoptive parents, and other legal custodians, regarding the planned designation of custody or guardianship of a minor child or written documentation that reasonable efforts have been made to obtain such consent. In the alternative, proof of a court order reflecting that the planned designation is acceptable. Where a separation agreement, court order, or divorce decree addressing child custody and support issues is in force, the family care plan should be consistent with such court agreement, order, or decree.

NAVPERS Form 1720/6 contains the following statement:

> 9. In the event of my… incapacity, [name, address telephone number] has agreed to assume temporary responsibility for my minor children until… a legal guardian or other

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organizations; the CEW Readiness Cell; and online resources (e.g., Military OneSource), in the completion of the family care plan.

[11] From Enclosure 3, "Procedures," to Department of Defense Instruction 1342.19 -- 4. LEGAL ASSISTANCE ATTORNEYS. Legal assistance attorneys or other qualified legal counsel shall, when appropriate, ensure their clients receive:

(1) A full explanation of the potential consequences of not including the non-custodial biological or adoptive parent in the creation of a family care plan.

(2) A discussion of appropriate courses of action, to include the benefits of validating temporary custody arrangements and the return of the child to the Member upon the Member's return, with an appropriate court.

custodian is appointed by a court of competent jurisdiction, or until my child(ren)'s noncustodial natural parent assumes custody, whichever occurs first.

The Family Care Plan Checklist at Enclosure (3) of OPNAV INSTRUCTION 1740.4D contains the following information:

2. Family Care plan contains provisions for: …
[ ] Legal review for relocation of minors subject to custody and visitation orders.
[ ] Legal review for relocation of minors without the consent of the natural or adopted parent.
3. Caregiver(s) briefed by Service member on:
[ ]Responsibility under the Family Care Plan.
[ ]Logistical, financial, medical, and legal arrangements.
[ ]Possible challenges to custody, visitation, and support of minor children and adult family members/dependents.

It's hard to imagine a stronger set of directives or a clearer incentive to take into account the possibility of the non-custodial parent's return to court to obtain custody (and, as an added bonus, monthly child support by garnishment) when the sailor becomes unavailable to care for the minor child.

There are numerous cases in which the military parent who has custody seizes the moment to craft a comprehensive order which anticipates not only his routine "shore duty" but also his periods of "sea duty." The might be called a "Plan A/Plan B" situation. Good planning, the advice of a good attorney, and the wisdom of a judge who can see beyond the immediate issue of custody and into the future of the parents' relationship are what is needed.

Consider the situation where the military parent is to be granted primary or sole custody of the child. When a judge decides, or the parties agree, that a third party (such as a new spouse of the custodian or a grandparent of the child) should replace the non-custodial parent, it makes sense to place appropriate findings for third-party custody in the order (pursuant to appropriate state law, which usually does not favor third-party custody).[12] The following is an example of language to insert:

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 current husband, Ralph Roe, is hereby designated alternate custodian of Jack 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. The above appointment is being made in place of John Doe, the father of Jack Doe. [This clause should be followed by one specifying why the other parent, John Doe, is not fit for alternate custody in the event of military absence, or stating that John Doe has consented to this arrangement,

12Note that some states, at least in contested matters, do not allow for contingent changes of custody. *See* Dellinger v. Dellinger, 278 Ga. 732, 609 S.E.2d 331 (2004). Be sure to read the case law, understand the contrary cases, and build in as many facts and factors as possible when writing up a consensual contingency for change of custody.

which his signature accompanying the order, or has waived any claim to alternate custody, with appropriate findings as to how he waived his rights.]

While it is always wise to draft the custody order for a military custodian (active duty or Guard/Reserve) with provisions for "Plan B" in case of mobilization or deployment, there is no guarantee that such a provision will be upheld or enforced in court if challenged, especially if it grants custody to a non-parent and the child's other parent has a change of heart. To make the consent order "airtight," consider the following checklist:

- Join all necessary parties; those who are left out will complain the loudest!
- Set out the circumstances, environment and living situation of each party, as well as any special facts or needs regarding the children. Do this in detail. The more "specifics," the stronger your order will be, as against a later challenge that there has been a subsequent change of circumstances.
- Specify in the findings of fact and conclusions of law that the "Plan A" custody arrangements are in the best interest of the children, as is their return after the military custodian's deployment or mobilization ends.
- State *why* the return of the children and the "Plan A" environment are in the children's best interest.
- State that it is in the children's best interest for them to reside temporarily with the noncustodial parent if there is a mobilization or deployment.
- Research state law to be sure that such "alternate custody plans" are allowed and binding on the noncustodial parent.

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