

The Uniform Deployed Parents Custody and Visitation Act

by

Mark E. Sullivan*, G. Brentley Tanner**
and Ashley L. Oldham***

I. Introduction

In the aftermath of the terrorist attacks on the Twin Towers and the Pentagon on September 11, 2001, American forces rose to the challenge and participated in wave after wave of deployments to the Middle East for a dozen years. Just as President Barack Obama felt that he could withdraw American servicemembers from Iraq and Afghanistan, a new crisis – the rise of the terrorist militia called ISIS (Islamic State of Iraq and Syria) – made imperative the redeployment of troops into Iraq and other Middle Eastern countries.

One result of the attacks of 9/11 and these active-duty deployments was the mobilization of Reserve Component (“RC,” i.e., Reserves and National Guard) personnel to support and supplement the deployments and to serve as “back-fill” at the bases and installations in the United States, replacing the billets recently occupied by deploying troops. The nationwide mobilization of Guard and Reserve personnel was a demonstration of the nation’s fifty-state effort to respond to international terrorism. It was also instrumental in alerting parents, spouses, and siblings as to the far-reaching consequences of this broad commitment. The military personnel for this heightened operational tempo would no longer come solely from the active-duty armed services – Army, Navy, Air Force, Marine Corps and Coast Guard. With orders to active duty issuing from armories, drill halls, and RC headquarters throughout the country, the impact would truly be felt in the cities and counties of each state, in the towns and hamlets of urban and rural America, not just the communities surrounding America’s military bases, such as San Diego, Tampa, and Norfolk.

When a servicemember is deployed, it can throw his or her domestic life into turmoil, since transfers on military orders in

such cases may occur with little advance notice. This makes it hard for single parents in the military to resolve the visitation, custody, and care issues involving children in advance of departure for deployment through ordinary state custody and visitation procedures. In addition, the absence of parents who are on unaccompanied tours of duty raises concerns about the strength of the bond between child and absent parent during the military absence; the longer the absence, the harder it is – absent specific state law protections – for a parent to maintain connection with the distant child or children, and vice-versa.

When the absent military parent returns, other questions arise. When the absent parent was the custodian, how will the temporary arrangements for custody be terminated? If the absent parent was the visiting parent, how will visitation resume?

This article focuses on the events leading up to publication of the Uniform Deployed Parents Custody and Visitation Act, the purposes of the Act and its contents. In the sections below, the authors explore the background of the Uniform Deployed Parents Custody Act and the historical framework leading to its drafting. This article covers the unique terms used in the Act and the protections and procedures set out for servicemembers and non-deploying parents in structuring an agreement. It also covers the litigation alternative, as well as procedures upon the return of the absent military parent, both as to agreements and trial orders.

The Uniform Deployed Parents Custody and Visitation Act can promote an expeditious and fair resolution of custody and visitation issues when military deployment is imminent or anticipated. It helps to promote and maintain a proper balance of interests, that is, the protection of the rights of the deploying parent, the nonmilitary parent and – above all – the best interest of the children involved.

A. The Working Group on Protecting the Rights of Service Members

This nationwide sense of purpose stemming from the events of 9/11 prompted action by the American Bar Association. In July 2003, responding to a call to action by the then-President, Dennis Archer, a working group assembled to divide duties, assign responsibilities and parcel out tasks to assist in the study of

how to best provide protections for members of the armed forces during and after this period of national crisis. The result was the formation of the Working Group on Protecting the Rights of Service Members, whose task it was to outline strategies for legislative and regulatory action in the recognition and protection of military personnel and their families.¹

After identifying issues, problems and solutions submitted by thirty states, the Working Group's subcommittees began identifying gaps in state laws, finding and crafting improvements needed, and locating ways that statutes and rules can work against servicemembers. The Working Group set as its goal the assembly of a set of recommendations on how the gaps could and should be filled to avoid injustice to servicemembers, and how the rules could be written to create an agenda that was friendly to those in uniform and their families, consistent with the realities of the legal and political climate. These items would then become the list of proposals for the Working Group's final report ("the Report").

There were several recurring themes throughout the Report. Two of these involved common problem areas needing attention. The Report found that there was an overall lack of uniformity among the states as to the rights and benefits that are granted to servicemembers. In addition, the Working Group members

¹ *Report of the Working Group on Protecting the Rights of Service Members*, AMERICAN BAR ASSOCIATION, 1, 3, (2004), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/lamp/gwprsmreport.authcheckdam.pdf>. ("Our active duty, reserve, and National Guard service members are valued and respected citizens. The importance of their role as front-line defenders of our country in the global war on terror is widely understood and appreciated. However, they are not always treated fairly in our courts, the workplace, and other venues, where they often experience unequal treatment and economic disadvantage. Accordingly, our report is directed not only to the leadership and membership of the ABA, but to the governors, legislators, judges, and other state and community leaders who are responsible for the protection and well-being of America's warriors. ABA President Dennis Archer recognized the inequities that our service members encounter in such areas as family support, child custody, housing, tax law, and employment rights. He directed the formation of our Working Group and the production of this report, which is the culmination of the industry, talent, and expertise of many individuals and groups. His concern for military-related legal issues provided a lens that focused many diffuse elements into a cohesive effort the results of which will be of sustained and growing importance.").

found that, in general, there was a lack of awareness at the state and local legislative levels regarding the duties and demands of military service and the legal hardships faced by military personnel, especially those in the National Guard and Reserves.²

Examining areas as diverse as taxes, decedents' estates, education, landlord-tenant issues, and residential leases, the Working Group focused on a dozen issues where state laws, rules, and procedures could be improved, streamlined, changed, or eliminated to assist those in the armed forces and their families. One of these areas was family law, and the three sections of that subcommittee's report have direct relevance to the proposal that later became the Uniform Deployed Parents Custody and Visitation Act.³ The family law subcommittee investigated "state statutes, uniform laws, policies, procedures, customs and practices in the area of . . . child custody for purposes of identifying the specific disadvantages service members face because of their duties, and how to better protect them from unfair treatment by the courts."⁴ The first issues with which the subcommittee dealt were electronic testimony and expedited hearings.

B. *Electronic Testimony*

The custody section in the Report addressed the need for servicemembers to be allowed to give testimony and present evidence from remote locations (i.e., electronically, such as by telephonic or audiovisual means) when they are unable to appear in court due to military duties.⁵ When a military member is a party in a civil case, he or she may not be able to appear in court to present testimony or evidence due to daily military mission requirements. In addition, the military assignment might be at another base across the country or in another part of the world. When this occurs, the judge has the option of proceeding with the trial without the servicemember's testimony or else continuing the case. Moving the case forward without the evidence or testimony of the servicemember leaves the court without potentially relevant information upon which to base its decision. A continuance, on the other hand – also known as a stay of pro-

² *Id.* at 12-14.

³ *Id.* at 35-40.

⁴ *Id.* at 15.

⁵ *Id.* at 35-37.

ceedings under the Servicemembers Civil Relief Act (SCRA)⁶ – would only delay the progress of the case when the member is not available to participate in person.

There are occasions when the military member desires a hearing and wants the case to move forward with his or her active participation, rather than wants to delay the resolution of a controversy. This would be the case if the member wanted an interim order from the court allowing for remote communication with the children during a period of deployment or a mobilization from the Guard or Reserves. A servicemember who needs an adjustment to his visitation rights or a modification of his custody award might elect to request electronic testimony rather than allow delay to worsen the situation of a child with a distant military parent.

There are numerous options available for taking testimony electronically. In addition to use of the telephone, a servicemember can sometimes obtain face-to-face communication from far away through the use of a camera and a microphone in connection with Skype, Adobe Connect, FaceTime, GoToMeeting or other audiovisual methods of communication using the Internet.

The option of taking testimony and receiving evidence by electronic audiovisual means upon motion of the servicemember allows the court to move forward with the resolution of the case, rather than leaving the judge with only the options of denial of evidence/testimony, default, or delay. The Report recommended the enactment of a statute allowing electronic evidence and testimony upon the request of a servicemember using the following language:

Upon motion of a servicemember who is a party in a civil case, the court shall for good cause shown allow the servicemember to present testimony and evidence by electronic means (e.g., telephone, video teleconference, Internet) when the military duties of the servicemember have a material effect on his ability to appear in person at a regularly scheduled hearing. “Court” shall be defined pursuant to 50 U.S.C. App. § 511 (5) to mean any administrative agency or civil court.⁷

⁶ 50 U.S.C. § 522 (2012).

⁷ Report of the Working Group, *supra* note 1, at 36-37.

The subcommittee next took up the issue of speedy access to the courtroom for servicemembers.

C. *Expedited Hearings*

Servicemembers may need expedited hearings when they cannot attend regularly scheduled court sessions because of military duties, for the same reasons as are stated in the section above on electronic testimony.⁸ The court is usually left with only the options of default, delay or prioritizing the hearing. The granting of a stay of proceedings under the SCRA⁹ may have the effect of delaying the case for months or years until the member returns and is available to participate.

There are many occasions in domestic matters when military members desire prompt hearings so that they can participate in person, rather than put up with a delay in resolution of the case. An expedited hearing, for example, would be needed when a servicemember is asking for court permission to have access to the children for visitation during leave from deployment, which is often given at the midpoint in the tour of duty.

Delay in litigation frequently brings higher legal expenses for the servicemember. With this in mind, a military member might decide to ask for an expedited trial or hearing to resolve a case involving property division, divorce, visitation, or custody. The Report recommended that states enact a law that would allow for an expedited hearing in civil matters upon the motion of the servicemember, using the following language as an example: "Upon motion of a servicemember who is a party in a civil case, the court shall for good cause shown hold an expedited hearing when the military duties of the servicemember have a material effect on his ability to appear in person at a regularly scheduled hearing."¹⁰

D. *Delegated Visitation*

After review of electronic testimony and expedited hearings, the committee studied the issue of whether, in cases involving the children of servicemembers, courts should have the power to or-

⁸ *Id.* at 37-39.

⁹ 50 U.S.C. app. § 522.

¹⁰ Report of the Working Group, *supra* note 1, at 39.

der substitute visitation with the member's relatives if military duties make visitation with a servicemember-parent difficult or impossible.¹¹ When a deployed servicemember is unable to arrange visitation, his contact with his children is virtually terminated. Not infrequently the custodial parent will refuse to allow any visitation with relatives, claiming that visitation belongs solely to the noncustodial parent and that the courts lack the power to grant visitation to non-parents.¹² Such a situation may result in no effective access to or communication with the children.¹³

Under these circumstances a judge ought to be able to consider whether relatives of the servicemember who are close to the children should be allowed to "step into the shoes" of the member to visit with or care for the children during his military-related absence. The Report suggested the enactment by the states of statutes that would allow the delegation of visitation rights to relatives of a servicemember. The suggested wording was as follows:

Upon motion of a servicemember in a case involving custody or visitation (or upon the court's own motion), the court shall for good cause shown allow the visitation rights of the servicemember to be exercised by a relative of the servicemember who has a significant connection with the child or children when the military duties of the servicemember have a material effect on his ability to exercise said rights.¹⁴

E. *Military Custody Laws: The March Begins*

Several years after the publication of the Report, state legislatures began to recognize the gaps in their coverage of military custody and visitation protections, and the country saw a legisla-

¹¹ *Id.* at 39-40.

¹² See, e.g., *McQuinn v. McQuinn*, 866 So. 2d 570 (2003); *In re Marriage of DePalma*, 176 P.3d 829 (2008); *In re Marriage of Sullivan*, 795 N.E.2d 392 (2003).

¹³ Report, *supra* note 1, at 39 ("Child custody/visitation: This is the single greatest area of concern. . . . [W]hen the service member is the non-custodial parent and visitation is not allowed to any other members of the non-custodial parent's family (to include siblings, step parent and grandparents). In some cases this effectively cuts off any and all communication between the child and the non-custodial parent for the duration of the deployment. Our service members are risking their lives they should not have to risk their families as well.")

¹⁴ *Id.* at 40.

tive crusade toward stronger and more creative laws in this field. State after state took up the issue of protecting and supporting the families of military personnel in custody and visitation cases. In 2007 North Carolina¹⁵ and Mississippi¹⁶ passed military custody legislation, with the latter copying virtually every word of the former's language. In 2009 South Carolina¹⁷ and Washington¹⁸ followed suit. The year 2010 was a banner one for the passage of military custody legislation, with statutes enacted in Alaska,¹⁹ Vermont,²⁰ Louisiana,²¹ and Hawaii.²² In 2011 Oklahoma,²³ Georgia²⁴ and Ohio²⁵ passed military custody legislation, and Kansas²⁶ enacted its military custody legislation in 2012.

States that enacted new statutes or improved existing protections focused on the three protections mentioned above – electronic testimony, expedited hearings, and delegated visitation – but they also added unique features of their own to facilitate contact between servicemembers and their children, to speed up reunification and restoration of the *status quo ante* when the member returned from his or her military absence, and to ensure that military absence (deployment, temporary duty, or assignment to a remote posting on an unaccompanied tour) would not be used against the member in determining the best interest of the child.²⁷ As the paragraphs below show, there is still considerable variance among the states as to what protections are offered.

¹⁵ N.C. GEN. STAT. § 50-13.7A. (2007).

¹⁶ MISS. CODE ANN. § 93-5-34 (2007).

¹⁷ S.C. CODE ANN. § 63-5-900 (2009).

¹⁸ WASH. REV. CODE §§ 26.09.004, 010, 260 (2009).

¹⁹ ALASKA STAT. §§ 25.20.095, 25.20.110 (2010).

²⁰ VT. STAT. ANN. tit. 15, §§ 681-689 (2010).

²¹ LA. REV. STAT. ANN. §§ 9:348; 9:359 (2010).

²² HAWAII REV. STAT. 3 §§ 1-571-91 (2010).

²³ OKLA. STAT. tit. 43, §§ 150-150.10; id. §§ 112(5), 112.7 (2011).

²⁴ GA. CODE ANN. § 19-9-1 (2011).

²⁵ OHIO REV. CODE § 3109.04(1) (2011).

²⁶ KAN. STAT. ANN. § 23-3217 (2012).

²⁷ See generally Mark E. Sullivan, *Drafting a Military Custody and Visitation Statute*, ROLL CALL (Newsletter of the Military Committee, ABA Family Law Section), Fall 2008.

F. Examples of State Statutes

Louisiana's Military Parent and Child Custody Protection Act contains robust protections for servicemembers and their children.²⁸ The specific provisions include the termination of temporary modification orders by operation of law upon completion of the servicemember's deployment,²⁹ reasonable visitation during periods of military absence,³⁰ and expedited hearings when the member's military absence is imminent.³¹ The courts are authorized to delegate visitation during periods when the servicemember is absent due to military orders.³² Electronic testimony is allowed when the member cannot appear in person for court because of his military duties³³ and the court may appoint counsel for the child when a stay of proceedings is denied by the court under the SCRA.³⁴ The court retains custody jurisdiction when a child custody order has been entered and a child is absent from the state during deployment.³⁵ The award of attorney fees is allowed when either party causes unreasonable delay or fails to provide information required by the Act.³⁶

The Commonwealth of Virginia has specific legislative protections for servicemembers and their children in the Virginia Military Parents Equal Protection Act.³⁷ The statute provides a definition of "deployment" and "deploying parent"³⁸ and it states that any court order which limits the previously ordered custody or visitation rights of a deploying parent or guardian must specify the deployment as the basis for the order, must be entered as a temporary order, and must require the nondeploying parent or guardian to provide advance written notice of changes in address and telephone number.³⁹ The state statute authorizes judges to delegate visitation to a family member (in-

²⁸ LA. REV. STAT. §§ 9:359 – 359.13 (2014).

²⁹ LA. REV. STAT. § 9:359.5.A.

³⁰ LA. REV. STAT. § 9:359.4.B.

³¹ LA. REV. STAT. § 9:359.4.D.

³² LA. REV. STAT. § 9:359.6.

³³ LA. REV. STAT. § 9:359.7.

³⁴ LA. REV. STAT. § 9:359.10.

³⁵ LA. REV. STAT. § 9:359.11.

³⁶ LA. REV. STAT. § 9:359.12.

³⁷ VA. CODE ANN. §§ 20-124-7 – 20-124.10 (2012).

³⁸ VA. CODE ANN. § 20-124.7.

³⁹ VA. CODE ANN. § 20-124.8.A.

cluding a stepparent) if a visiting parent or guardian is deployed,⁴⁰ to conduct expedited hearings for deploying parents or guardians when there is no court order in place for child custody, visitation or support,⁴¹ and to allow the use of electronic means to conduct the hearing, upon motion of that parent or guardian, when a deploying parent or guardian is not able to appear as a result of deployment.⁴² The law provides for accommodating the leave schedule of the absent parent or guardian, telephone and electronic contact between the absent party and the child, and advance notice to the non-deploying parent of the leave schedule of the party who is deployed.⁴³ There is also a general provision for expedited hearings on modifying custody, visitation, or support orders when a military party is involved; this may be invoked when there is a petition based on a change of circumstances due to deployment.⁴⁴

The statutes of Oregon contain terms for custody and visitation in military cases. In a proceeding to reconsider custody, the law states that a military deployment of the custodial parent is not, by itself, a change of circumstances.⁴⁵ There are limitations on modifying or setting aside any judgment as to custody or visitation when a parent is deployed⁴⁶ and there is a requirement that, when a court has entered a temporary order for custody and visitation, the child's absence from Oregon during the deployment shall be considered "a temporary absence for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act," so that Oregon retains exclusive continuing jurisdiction over custody.⁴⁷ Courts are authorized to allow delegated visitation if a visiting parent is deployed⁴⁸ and they may employ expedited hearings for deploying parents or parents whose deployment is imminent⁴⁹ and use electronic means to conduct the hearing when a deploying parent (or one whose deployment is imminent)

⁴⁰ VA. CODE ANN. § 20-124.8.B.

⁴¹ VA. CODE ANN. § 20-124.9.A.

⁴² VA. CODE ANN. § 20-124.9.B.

⁴³ VA. CODE ANN. § 20-124.10.

⁴⁴ VA. CODE ANN. § 20-108

⁴⁵ OR. REV. STAT. § 107.135(13) (2011).

⁴⁶ OR. REV. STAT. § 107.145(2)

⁴⁷ OR. REV. STAT. § 107.145(6).

⁴⁸ OR. REV. STAT. § 109.056(3).

⁴⁹ OR. REV. STAT. § 107.146(1).

is not able to personally appear for testimony.⁵⁰ The law also contains provisions for accommodating the leave schedule and other circumstances of the deployed parent by temporary order.⁵¹

Pennsylvania practitioners looking for military custody and visitation protections for military families will not find the rules for military visitation and custody where the rest of the custody and visitation statutes are found, in title 23 of the Pennsylvania Consolidated Statutes covering Domestic Relations. Instead, the custody and visitation rules for cases in which a military member is a party may be found in chapter 41 (Rights and Immunities) of title 51 of the Pennsylvania Consolidated Statutes covering Military Affairs, specifically in section 4109. The statute states that when a petition to change custody of an eligible servicemember's child is filed while he or she is deployed, no court may enter an order to modify a prior order or issue a new order that changes the custody arrangement for that child which existed on the date of deployment, except that the court may enter a temporary custody order.⁵² In any such temporary custody order, the court will require that, upon return of the servicemember, the prior custody order be reinstated.⁵³ If there is a petition to change custody of the child of an eligible servicemember (one who was deployed in support of a contingency operation) after the end of the deployment, no court may consider the servicemember's absence by reason of that deployment in determining the best interest of the child.⁵⁴ When an eligible servicemember fails to appear in court due to deployment, such absence – in and of itself – is not sufficient to justify a modification of a custody or visitation order.⁵⁵

The Iowa statutes with terms for protection of servicemembers and their children in military custody and visitation cases are found in the Iowa Code at sections 598.41C. and 598.41D. The statutes provide that, when ruling on a request for modification of a child custody or physical care (prior to or dur-

⁵⁰ OR. REV. STAT. § 107.146(2)

⁵¹ OR. REV. STAT. § 107.145 (3)(a) and (b)

⁵² 51 PA. CONS. STAT. § 4109(a) (2012).

⁵³ 51 PA. CONS. STAT. § 4109(b).

⁵⁴ 51 PA. CONS. STAT. § 4109(c).

⁵⁵ 51 PA. CONS. STAT. § 4109(d).

ing the time a parent is serving on military active duty), the judge may only order a temporary modification, based on clear and convincing evidence that the modification is in the child's best interest.⁵⁶ If a parent's active-duty service affects his or her ability to appear at a hearing, the court will set an expedited hearing for custody/visitation matters.⁵⁷ If active duty (or anticipated active duty) prevents a parent from appearing in person at a hearing, the court will allow the military parent to present testimony and evidence by electronic means (e.g., telephone, Internet, video teleconference).⁵⁸ When an individual's active duty is complete, the court will reinstate the prior order for custody or physical care.⁵⁹ When a modification request is filed after a parent completes active duty, that parent's absence due to active duty does not constitute a substantial change in circumstances, and the court shall not consider that absence in making a best-interest determination.⁶⁰ The court has the power to grant the assignment of visitation or physical care parenting time, upon motion of a parent on active duty in the military.⁶¹

G. *Falling Short of the Mark*

While the protections in these state statutes are important, many of the states' efforts do not cover the full expanse of rights and duties contained in the Uniform Deployed Parents Custody and Visitation Act. In the Iowa statute above, for example, there are no terms providing for the use of mid-tour leave to allow the servicemember and the child or children to see each other, and the member is not required to give the non-deploying parent a copy of his or her deployment orders. The non-deploying parent is not required to notify the servicemember as to any move to a different locale. The definitional section in the statute is sufficiently confusing that the practitioner may give up trying to parse out the meanings. The Pennsylvania statute lacks provisions for expedited hearings when a deployment is imminent and terms for electronic testimony by the member if he or she is unavailable

⁵⁶ IOWA CODE § 598.41C.1.a (2006).

⁵⁷ IOWA CODE § 598.41C.1.b.

⁵⁸ IOWA CODE § 598.41C.1.c.

⁵⁹ IOWA CODE § 598.41C.1.d.

⁶⁰ IOWA CODE § 598.41C.1.d.

⁶¹ IOWA CODE § 598.41D.1-11.

to testify in person. The Pennsylvania statute lacks a provision for delegated visitation, for access during mid-tour leave, for disclosing a copy of one's deployment orders, and for notice if the non-military parent is moving away. Clearly more is needed in some states, and a model statute would provide the guidance that state legislators value in taking a wide, detailed and comprehensive view of the problems, issues, and solutions present in the world of military custody and visitation. The stage was set for a model statute.

II. Enter the Uniform Deployed Custody and Visitation Act

The genesis of the project which eventually became the Uniform Deployed Custody and Visitation Act (UDPCVA) was in a proposal in late 2008 by Susan Nichols of North Carolina, a Commissioner of the Uniform Law Commission (ULC). She put forth the idea on the suggestion of the late Robinson Everett, also a Commissioner from North Carolina, who was a Senior Judge on the U.S. Court of Military Appeals. The ULC approved the creation of a drafting committee in July 2009. This committee was chaired by Commissioner Paul Kurtz of the University of Georgia School of Law, with Professor Maxine Eichner of the University of North Carolina School of Law as Reporter.⁶² The committee's members included three advisors from the American Bar Association. Also attending meetings as observers were attorneys with the Army Judge Advocate General's Legal Assistance Policy Division, the Minnesota Army National Guard, the Great Lakes Naval Legal Services Office and several others.⁶³ The drafting committee met three times during 2010–11 and presented a draft for a first reading at the ULC Annual Meeting in July 2011. The committee met twice during 2011–12

⁶² E-mail from John A. Sebert, ULC Executive Director (Dec. 18, 2012) (on file with the authors) (Stating that one of the documents which was included in Ms. Nichols' proposal was Mark E. Sullivan, Drafting a Military Custody and Visitation Statute, *supra* note 27, at 1).

⁶³ UDPCVA (Draft Approved and Recommended for all States 2012), p. 1.

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and its draft received final approval at the ULC Annual Meeting in July 2012.⁶⁴

The UDPCVA was approved for publication by the American Bar Association's House of Delegates in February 2013. As of March 1, 2015, the UDPCVA is already the law in nine states: – Arkansas,⁶⁵ Colorado,⁶⁶ Nebraska⁶⁷ Nevada,⁶⁸ North Carolina,⁶⁹ North Dakota,⁷⁰ Oklahoma,⁷¹ South Dakota,⁷² and Tennessee.⁷³

A. Purposes and Nature of the UDPCVA

The Uniform Deployed Parents Custody and Visitation Act⁷⁴ focuses on the rights and duties of parents who are deployed or otherwise absent from their children due to military duties, and it deals with issues of care, control, communication, and contact with the children. Such issues are not part of most custody and visitation codes in state law.⁷⁵ The goals and purposes of the Act are to benefit servicemembers, children, and the courts by encouraging parents in military custody disputes to reach enforceable agreements on custodial arrangements and communications during deployment and to protect the residence of the deploying parent, thus discouraging interstate jurisdiction litigation, in support of the goals of the UCCJEA. The Act also establishes prompt court hearing procedures and electronic testimony to assist in moving the case forward and not delaying the planned deployment. And it allows judges to grant delegated

⁶⁴ *Id.* at 1-2,

⁶⁵ Arkansas Acts, Act 1213 (2015).

⁶⁶ COLO. REV. STAT. § 14-13.7-101 (2013).

⁶⁷ Legislative Bill 219, One Hundred Fourth Legislature, First Session, 2015.

⁶⁸ NEV. REV. STAT. §§ 125C.0601 e (2014).

⁶⁹ N.C. GEN. STAT. §§ 50A-350 - 50A-376 (2013). (There is also a small section in N.C. GEN. STAT. 50-13.2(f); this provides that, in a military custody case, the judge cannot consider the military parent's past or future deployment as the sole basis in deciding the best interest of the child).

⁷⁰ N.D. CENT. CODE §§ 14-09.3-01 (2013).

⁷¹ OKLA. STAT. tit. 43, §§ 150-150.10 (2011); *id.* §§ 112(5), 112.7.

⁷² S.D. CENT. L. §§ 25-4B-103 to 25-4B-503 (2014).

⁷³ TENN. CODE ANN. §§ 36-7-101 to 36-7-503 (2014).

⁷⁴ UDPCVA.

⁷⁵ *See* UDPCVA at 1-2.

visitation rights to family members who have a close relationship with the child, so long as this is in the child's best interest.

B. *Contents of the UDPCVA*

The UDPCVA is divided into five articles, each covering a specific area. Article 1 treats preliminary matters, such as definitions, enforcement, notice requirements, and attorney's fees. It also specifies that a parent's residence is not changed by reason of deployment, and it states that deployment may not be considered in deciding the best interest of the child.

Article 2 addresses matters that come up after the member receives notice of deployment and during his or her absence on military orders, when the case is resolved by agreement. One of the goals of the UDPCVA is to encourage parents to settle visitation and custody issues instead of litigating them. Consistent with this purpose, Article 2 establishes the substantive terms and procedural protections that are contained in the parties' agreement.

When the parents are unable to reach agreement, they would turn to Article 3, which covers terms and procedures for adjudicated cases. This Article deals with contested issues, and it includes provisions for electronic testimony and expedited procedures. Article 3 also gives the court the power to grant substitute visitation to a nonparent who has a close and substantial relationship with the child, so long as it is in the child's best interest.

The last substantive issue in the Act is the return from deployment. The duties, rights, and procedures are covered in Article 4, and this includes termination of the temporary custody arrangement following the return of the servicemember-parent.

The final section of the Act is Article 5. This contains an effective date provision, a transition provision, and boilerplate terms that are common to all uniform acts sponsored by the ULC. A chart showing each of the sections of the Act, summarizing the terms of the section, and illustrating what issues the section was intended to address is found at Appendix A.

Since many military custody and visitation cases involve (or potentially involve) more than one jurisdiction, the Act attempts to create some uniformity of language. While most states retain the traditional terms of custody and visitation, there are other terms that crop up in different jurisdictions, such as "residential parent," "managing conservator," and "primary custodian," to

name a few. If there are state-specific terms, they may be added to the definitions of the specific terms used in the Act.

C. Definitions

The definitional portion of the Act is Section 102. This contains all of the unusual and unique terms that are necessary to understand the UDPCVA. Such terms as “close and substantial relationship,” “caretaking authority,” “custodial responsibility,” “decision-making authority,” “deploying parent,” “family member,” “record,” and “return from deployment” have specific roles in the statute.

Those who are covered by the Act are members of the “uniformed services.” This is defined in the UDPCVA to mean:

(A) active and reserve components of the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States; (B) the Merchant Marine, the commissioned corps of the Public Health Service, or the commissioned corps of the National Oceanic and Atmospheric Administration of the United States; or (C) the National Guard.⁷⁶

Mobilizations and tours of duty that are “unaccompanied” (i.e., without authorization to bring dependents) include temporary duty assignments (TDY), transfers to a combat zone or high-risk environment, and remote assignments. According to the Act, “deployment” means:

The movement or mobilization of a service member to a location for more than [90] days, but less than [18] months, pursuant to an official order that (A) is designated as unaccompanied; (B) does not authorize dependent travel; or (C) otherwise does not permit the movement of family members to that location.⁷⁷

Section 1 of the Act also contains a requirement that the deploying parent must give prompt notice of deployment to the parent left behind, to enable the latter to prepare and plan for the necessary modification of custody or visitation terms.⁷⁸ Non-military parents are required to provide change-of-address information to the deployed parent if the custodial, nonmilitary parent moves while the other parent is deployed.⁷⁹

⁷⁶ UDPCVA § 102(18) (2012).

⁷⁷ UDPCVA § 102(8).

⁷⁸ UDPCVA § 105.

⁷⁹ UDPCVA § 106.

Article 1 of the UDPCVA also contains provisions that allow the court to assess attorney's fees and costs against a party if the court finds bad faith or intentional failure to comply with the Act. The court can also order other appropriate relief.⁸⁰

D. *Deployment as a Factor*

Section 107 of Article 1 states:

In a proceeding for custodial responsibility of a child of a service member, a court may not consider a parent's past deployment or possible future deployment in itself in determining the best interest of the child but may consider any significant impact on the best interest of the child of the parent's past or possible future deployment.

Some judges and practitioners may express discomfort with the Act's placing "off-limits" the issue of past or future deployments of a military parent in deciding about the child's best interest, whether the parent in uniform is the custodial or the visiting parent. Asked informally, most of these attorneys and judges would probably say that "impact on the child" ought to be appropriate for a judge to consider, that the court's sole focus should be the best interest of the child, and that is all that may be considered in custody cases.

The first of these concerns – the impact on the child – is covered in the second half of the sentence in Section 107. This allows the judge to take into account any significant impact on the best interest of the child regarding the parent's past or possible future deployment.

The second point, that "best interest" is the only issue in custody cases, is a common misconception about custody. While best interest of the child (BIOC) is a central issue, it is by no means the only focal point. As a general rule, BIOC is not addressed if the case involves a prior custody order until the judge decides whether there has been a change of circumstances sufficient to justify a modification of custody. Only after a determination that such a change exists can the court examine BIOC.⁸¹

⁸⁰ UDPCVA § 103.

⁸¹ See, e.g., Pulliam v. Smith, 501 S.E.2d 898, 905 (N.C. 1998) (Orr, J., concurring) (" . . . the trial court would first determine whether a change of circumstances has occurred. . . and then determine whether the change of circumstances is substantial and has some rational relationship to the polar star issue in all custody determinations, i.e., the welfare of the child."); Vodvarka v.

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Judicial efficiency takes precedence over BIOC in this situation. Why inquire into BIOC if there has been no substantial change of circumstances?

The issue of BIOC is also excluded when the court is examining a third-party custody claim. At the initial stages of the case, in most states, the court can inquire into BIOC only if it first decides that the parents of a child are unfit, have abandoned or abused the child, have neglected the child's welfare, or have otherwise relinquished their primary and fundamental constitutional rights as parents.⁸² The policy of virtually every state is to prefer custody for parents rather than non-parents. This leaves only a secondary role for BIOC, namely, as the deciding factor if both parents have been ruled out.

A court's consideration of BIOC is also absent in determining whether the court's jurisdiction is based on "home state" or "significant connection/substantial evidence," under the terms of section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), or whether the court loses jurisdiction under section 202 of the UCCJEA.⁸³

Grasmeyer, 675 N.W.2d 847, 853 (Mich. Ct. App. 2003) ("the Legislature's directives that a court find 'proper cause' (or a change of circumstances) before it determines the existence of a custodial environment and conducts a review of the statutory best interest factors are designed to be obstacles to revisiting custody orders."); Rossow v. Aranda, 522 N.W.2d 874, 875 (Mich. Ct. App. 1994) ("where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors."); Caudill v. Foley, 21 S.W.3d 203, 213 (Tenn. App. 1999) ("When considering a non-custodial parent's request for a change of custody, the court must first determine whether there has been a material change in circumstances If there has been a material change in circumstances, the court must then determine whether a change of custody is in the best interests of the child.") (citations omitted).

⁸² See, e.g., *In re Bennett v. Jeffreys*, 40 N.Y.S.2d 543 (N.Y. 1976) (state may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other extraordinary circumstances; if such circumstances are present, then the disposition of custody is determined by what is in the best interest of the child).

⁸³ Uniform Child Custody Jurisdiction and Enforcement Act, § 201(b) (only the conditions specifically enumerated in § 201(a), which do not include the best interest of the child, are to be used to determine jurisdiction).

Finally, since this is a military case involving at least one parent in uniform, it should be noted that BIOC plays no role in a motion for stay of proceedings under the Servicemembers Civil Relief Act.⁸⁴ The court must decide the issue of whether to stay the case based solely on the issues in the statute, not on the child's best interest. The Supremacy Clause in the U.S. Constitution and the concerns of Congress in protecting the civil rights of servicemembers have priority over the issue of BIOC.

In all of these areas, "best interest of the child" plays no part. Public policy priorities override the notion that BIOC is "all there is" in a custody case.

Another issue which comes up arises from the mobility of military families. They cross state lines a lot, and thus multijurisdictional aspects of custody come into play with many military cases.

E. *Custody Jurisdiction*

The primary factor in determining custody jurisdiction is the place that is the home state of the child. It is the court in that state which assumes or retains jurisdiction in the usual case.

Military parents move their homes frequently, however, and a change of duty station every three or four years is typical. A parent who is in the Florida National Guard may be ordered to active duty and assigned to an unaccompanied tour. She will likely have to turn over the child to the other parent, who may be living in Seattle, especially if there is a formal custody order between the parties. It would be customary for the parties to agree that she would resume custody upon her return.

What happens, however, when she finishes her duties and, going through demobilization at Ft. Bragg, North Carolina, contacts the father to arrange for the child's return twelve months later? Will he gladly cooperate? Or will he decide that he wants to keep the child, especially since he enjoys *receiving child support* rather than *paying it*? Is the child's home state now Washington? Or was the custody transfer only a temporary arrangement, which would make it subject to section 102(7) of the UCCJEA? This provision specifies that "a period of temporary absence of any of the mentioned persons is part of the [six

⁸⁴ 50 U.S.C. app. § 522.

month] period” required to establish a home state.⁸⁵ What evidence or proof is there to back up the servicemember-mother’s statements that her absence was only temporary, and that the parents had agreed to the child’s return to Florida at the end of the deployment?

A case that is strikingly similar to the above is *In re Marriage of Brandt*⁸⁶ and it deals with the definition of “home state” for the military parent and child. *Brandt* involved a dispute between Maryland and Colorado when the custodial mother received deployment orders. The mother and daughter had lived in Maryland after the parties’ divorce, and a Maryland court had entered an order granting custody to the mother. The mother later entered the Army Nurse Corps. When the Army ordered her to active duty at Ft. Hood, Texas, she and the daughter moved there. She was then deployed for six months to Iraq. When she returned to Ft. Hood for demobilization, she received orders transferring her back to Maryland for a non-deployable assignment.

Pursuant to the Army’s rules and her own Family Care Plan, the mother had transferred custody to her former husband in Colorado when she deployed overseas. Upon her return to the United States, she and her ex-husband reached an agreement to allow the child to stay in Colorado to complete the school year, a period of about seven months which ended in May 2011. However, in May 2011, instead of returning the child to the mother, the father filed in Colorado for the court to assume custody jurisdiction, arguing that neither the mother nor the child currently resided in Maryland. He also filed a motion to change custody from the mother to him. The trial judge agreed with the father and issued an order assuming jurisdiction.

Pursuant to the UCCJEA, the Maryland and Colorado judges conferred about custody jurisdiction by telephone. But they could not reach an agreement as to which state should have jurisdiction; each one maintained that *his state* was properly exercising jurisdiction.

At that point the mother filed for a rule to show cause in the Colorado Supreme Court.⁸⁷ She argued that the district court

⁸⁵ UDPCVA § 102(7).

⁸⁶ *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012).

⁸⁷ *Id.*

erred in finding that she no longer resided in Maryland for custody jurisdiction purposes and requested that the Court enter a show cause order – which it did.

The Colorado Supreme Court took issue with the trial judge’s custody jurisdiction ruling, finding that the phrase “presently reside” in the UCCJEA is not the same as “currently reside” or “physical presence,” and stating that the trial court is required to inquire into the totality of the circumstances, including the examination of what makes up a person’s permanent home, that is, her legal residence or *domicile*.⁸⁸ The possible factors in the court’s inquiry into “totality of circumstances” should include a) the length of time for the absence of the parents and child; b) the reasons therefor; c) their intent in departing from the issuing state and in returning to it; d) the nature of a parent’s military duties and assignments, whether active-duty or Guard/Reserve in nature; e) the usual indicia of “legal residence” or domicile, such as where the departing parent maintains her home, car, driver’s license, job, professional licenses (if any), voting registration and state income taxes; f) the issuing state’s determination of residency based on the facts and the issuing state’s law; and g) other circumstances raised by the evidence.⁸⁹ The Supreme Court of Colorado also ruled that the parent claiming that the initial state has lost “exclusive, continuing jurisdiction” has the burden of proof in the initial hearing.⁹⁰

Thus the Court reversed and vacated the district’s judge’s order assuming jurisdiction. The case was remanded for further proceedings. In its final remarks, the Supreme Court of Colorado stated:

[The trial court’s] order assuming jurisdiction to modify Maryland’s custody decree cannot stand because that order appears to be based solely on Christine Brandt being out of Maryland on military assignment. The UCCJEA provision allowing Colorado to divest Maryland of jurisdiction based on where the parties “presently reside” should not be interpreted to allow one parent to re-litigate the issue of custody simply by winning the race to the courthouse when the other parent is absent from the issuing state.⁹¹

⁸⁸ *Id.* at 410.

⁸⁹ *Id.* at 415.

⁹⁰ *Id.* at 408.

⁹¹ *Id.* at 416.

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Section 104 of the Act covers issues regarding child custody jurisdiction. It states that “the residence of the deploying parent is not changed by reason of the deployment for the purposes of [the UCCJEA] during the deployment.”⁹² This rule applies whether the custody order in place is temporary, one that is designated as permanent, or a foreign custody order. This section helps to ensure that a temporary absence of the servicemember in compliance with military orders does not work a hardship to him or her in a custody proceeding.

It should be noted, however, that section 104 does not attempt to enact substantive rules and procedures as to child custody in military cases, since that is properly the province of the Uniform Law Commission committee which is responsible for the UCCJEA. The Act does not alter the UCCJEA, and it does not attempt to create or refine rules for initial or subsequent custody jurisdiction.

F. Resolution by Agreements

The Uniform Deployed Parents Custody and Visitation Act allows parents the option to resolve through settlement any visitation and custody issues by having the parents enter into a written agreement signed by both parents (or by a nonparent who has been awarded custodial responsibility). As stated in section 202 of the Act, these agreements are temporary in nature and were “intended to encourage and facilitate the parents mutually agreeing to a custody arrangement during deployment.”⁹³

More specifically, section 201 of the Act provides that an agreement must, if feasible, address particular areas regarding custody and visitation. Although individual states may enact variations of the UDPCVA, all such agreements should contain these minimum provisions related to deployment:

- (1) “To the extent feasible, identify the destination, duration, and conditions of the deployment that is the basis for the agreement.”⁹⁴

⁹² UDPCVA § 104.

⁹³ National Conference of Commissioners on Uniform State Laws, Uniform Deployed Parents Custody and Visitation Act (2012), available at http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf.

⁹⁴ UDPCVA § 201(c)(1).

This provision is important because it sets in place the framework for why the agreement is being executed in the first place and allows for proper factual findings in the event that any disputes arise during the pendency of the deployment or reasons surface why the agreement should be terminated.

- (2) “Specify the allocation of caretaking authority among the deploying parent, the other parent, and any nonparent.”⁹⁵

If a deployed servicemember is assigned to duties halfway across the world, there is limited custodial authority that the servicemember can have on day-to-day decisions, such as child care during the deployment. However, there are some facets of caretaking that may be so critically important to the servicemember that decisions could and should be made by a deployed parent. For example, a deployed parent would likely want some say in elective/cosmetic surgery for a minor child, would want some authority in emergency medical decisions, or would want to halt some activities that may be offensive to the deployed parent or detrimental to the well-being of the minor child, such as practices that go against the religious observances of a parent or participating in extracurricular activities that the deployed parent believes would likely put the minor child in physical harm.

- (3) “Specify any decision-making authority that accompanies a grant of caretaking authority.”⁹⁶

The grant of caretaking authority for another parent (or for a nonparent) may be for the physical care, custody, and control of the minor child. This is not necessarily intended to confer specific ability to make *all* decisions for the minor child, but rather to provide a specific means of decision-making.

- (4) “Specify any grant of limited contact to a nonparent.”⁹⁷

This may be important to a deploying parent if there are concerns about the parameters for contact between a minor child and a nonparent during the deployment period. An example of this would be where a step-parent, relative, or other third party has issues that can be detrimental to the minor child, such as prior physical or sexual abuse, substance abuse, or acrimony between the nonparent and minor child.

⁹⁵ UDPCVA § 201(c)(2).

⁹⁶ UDPCVA § 201(c)(3).

⁹⁷ UDPCVA § 201(c)(4).

- (5) “If the agreement provides for a sharing of custodial responsibility between the other parent and a nonparent, or between two nonparents, the agreement may also set forth a process to resolve any dispute that may arise.”⁹⁸

When the deploying parent is overseas, the last thing he or she will want to contemplate is how to resolve any disputes between the caregivers of the minor child. As a result, there should be strong considerations about the dispute resolution measures to be taken if issues arise with the agreement. The best practice in determining the process for dispute resolution is to tailor the mechanisms for dispute resolution to the specific facts and circumstances of each custody arrangement. For example, the physical distance between the non-deployed parent and the nonparent with caretaking authority may result in a dispute resolution process conducted through electronic means as opposed to an in-person meeting. There are a myriad of available options for consideration, including mediation, arbitration, collaborative meetings, or judicial settlement conferences to render a temporary but conclusive decision to the dispute. However, there may be significant matters that need supplemental measures to resolve other disputes. In that event, the parties may need to designate a third party with final decision-making authority during the pendency of the agreement, such as a parenting coordinator.

- (6) “Specify (i) the frequency, duration, and means, including electronic means, by which the deploying parent will have contact with the child; (ii) any role to be played by the other parent in facilitating the contact; and (iii) the allocation of any costs of communications.”⁹⁹

This is perhaps the most important provision for the deploying parent. Depending on the location of the deployment, the use of electronic communications may be available to continue and foster the parent-child relationship of the deploying parent. Common examples utilized in families with a deployed parent including Adobe Connect, Skype, and Apple’s FaceTime. The use of video teleconferencing, albeit not consistently reliable at this time, is available in places such as Afghanistan and Iraq. There should be some level of predictability as to the schedule

⁹⁸ UDPCVA § 201(c)(5).

⁹⁹ UDPCVA § 201(c)(6).

that the deploying parent will have for conducting such teleconferences with the minor child. If there is hostility in the relationship between the deployed parent and the non-deployed parent, it may be prudent to have the videoconferencing sessions during the time the minor child is with the deploying parent's designated caregiver in order to prevent any interruptions with the electronic communication. However, given the nature of combat-related deployments, there should also be some flexibility in the scheduling of electronic communications between the deploying parent and minor child to account for the unpredictable and volatile nature of a deployed parent's presence in a combat zone or deployment in a hazardous duty environment.

- (7) "Specify the contact between the deploying parent and child during the time the deploying parent is on leave or is otherwise available."¹⁰⁰

The deploying parent may likely have a period of leave in which he or she has one or two weeks back in the United States during the middle of the deployment. During mid-tour leave, the deploying parent should have a schedule with reasonable and significant periods of visitation, access, and communication with the minor child. The obvious reason for this is that it could be the last time that the deploying parent and minor child see each other.

- (8) "Acknowledge that any party's existing child-support obligation cannot be modified by the agreement, and that changing the terms of the obligation during deployment requires modification in the appropriate court."¹⁰¹

Sometimes, a temporary change in the custodial arrangement causes the parents to consider an alteration of the child support being paid during the deployment. However, this section prevents the custodial agreement from modifying a child support obligation that has been previously determined by a court of lawful jurisdiction. As such, a deployed parent who desires a modification in child support would still need to seek modification through filing a motion. What is not clear under the Act is whether the child support obligation addresses only court-

¹⁰⁰ UDPCVA § 201(c)(7).

¹⁰¹ UDPCVA § 201(c)(8).

ordered obligations or whether prior contractual child support obligations are also covered.

- (9) “Provide that the agreement terminates following the deploying parent’s return from deployment according to the procedures set out in the UDPCVA.”¹⁰²

Another important consideration for a deployed parent is to understand that the custodial agreement will not be a permanent determination of custodial rights. These custodial agreements are temporary in nature and terminate once the deployment concludes. As such, there should be an express understanding by all parties involved that the agreement has a terminating provision, preferably with an actual ending date if feasible. It is important to state clearly when the temporary arrangement ends and when the prior custody situation is resumed. Reversion to the *status quo ante* and achieving finality can be a frustrating issue for parents fighting a military custody case. For whatever reason, a number of “deployment custody cases” end up with a new custody trial at which the military parent has to fight to regain (or attempt to regain) custody.

A good example is found in *Crouch v. Crouch*,¹⁰³ in which the servicemember-mother was granted custody in a 1996 court order. In 2003, she received a 72-hour mobilization order from the Kentucky Army National Guard, and she transferred custody to the father through an order that was entered by consent, an “agreed order.” However, when she finished her military duties and returned to civilian life, the father denied that the consent order was anything other than a “permanent order,” which would require the mother to show that there had been a change of circumstances since the consent order to regain custody. This was despite the fact that, as the mother argued, both parties had intended for the agreed order to be a temporary arrangement during her call to active duty. The father took the position that custody should remain with him unless the mother could succeed in a hearing on a change of custody back to her based on a change of circumstances.

As a result, the case went to the Kentucky Court of Appeals and then the Kentucky Supreme Court. Both appellate tribunals

¹⁰² UDPCVA § 201(c)(9).

¹⁰³ *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006).

ruled that the agreed order was only temporary, with no requirement for the mother to show a change in circumstances to regain custody.¹⁰⁴ The Kentucky Supreme Court also noted briefly that this interpretation of the 2003 order was consistent with a new state statute covering the issue of custody when a parent is a member of the military and called to active duty.¹⁰⁵

The dissenting opinion in the Supreme Court put the matter of finality and reversion to the prior custody arrangement into perspective for those who may not appreciate the importance of writing in clear and straightforward terms the result of return from deployment or any other military absence:

Simply put, there was nothing in the Agreed Order that stated the child would automatically go back to live with the Appellee. A further order from the court was required. If the court only meant the order to remain in effect until Appellee returned from deployment, the order would have said that; but, it did not — and for good reason. Speculation (as to the future circumstances), even by a court, would be inappropriate when “the best interest of [a] child” is involved.¹⁰⁶

(10) “If the agreement must be filed pursuant to specified statutory provisions in the governing jurisdiction, specify which parent shall file the agreement.”¹⁰⁷

Depending on the forum state’s specific version of the UDPCVA, there may be a requirement that the custodial agreement entered into is also filed with the trial court. It should be set out which party will take on the responsibility of filing the agreement; often times, this would be the non-deployed parent since the deployed parent will not have the same amount of time to effectuate the filing. As such, this provision provides specificity as to which party should file the agreement and, if the drafters of the agreement are being prudent, should provide pre-determined timing for the filing of the agreement. Moreover, “an agreement or power of attorney must be filed within a reasonable time with any court that has entered an order for custodial responsibility or child support concerning the child who is the subject of the agreement or power.”¹⁰⁸ There are a plethora of

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 466.

¹⁰⁶ *Id.* at 468 (Scott, J. dissenting).

¹⁰⁷ UDPCVA § 201(c)(10).

¹⁰⁸ UDPCVA § 205.

issues that could arise, however, if a precise date for filing the agreement is not specified. First, the agreement may not take effect until the moment it is filed within the governing jurisdiction. Second, the reliance on the parents on the reasonable time standard could result in a fundamental disagreement as to the urgency of the filing. Third, the jurisdiction may set a different time-frame for the reasonable time period than the parents intended when entering the agreement. Lastly, there may be multiple jurisdictions whereby the agreement will have to be filed. For instance, one state may have child custody jurisdiction and another state could have child support jurisdiction. Under the language of section 205, the agreement (or power of attorney) must be filed in each jurisdiction. The UDPCVA also requires that the case number and heading of the pending cases concerning custodial responsibility or child support be provided to the court with the agreement or power of attorney.¹⁰⁹

While the listed areas of consideration are significant, they should not be construed as being exhaustive or otherwise limiting in the agreement's ability to delineate the terms for custody and visitation. Instead, each particular situation should be determined on a case-by-case basis.

An agreement reached under the UDPCVA is temporary and terminates following return from deployment, unless the agreement has been terminated or modified before that time by court order. Moreover, the agreement derives from the parents' custodial responsibility and does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom custodial responsibility is given. However, it should also be noted that a nonparent given caretaking authority, decision-making authority, or limited contact by an agreement has standing to enforce the agreement until it has been modified pursuant to an agreement of the parents or terminated as set out by court order.¹¹⁰

There can also be modifications to the agreement. For instance, the parents may by mutual consent modify an agreement regarding custodial responsibility. If an agreement made under Section 203(a) of the UDPCVA is modified before deployment

¹⁰⁹ *Id.*

¹¹⁰ UDPCVA § 202(b).

of a deploying parent, the modification must be in writing and signed by both parents and any nonparent who will exercise custodial responsibility under the modified agreement.¹¹¹ If an agreement made under the UDPCVA is modified during deployment of a deploying parent, the modification shall be agreed to, in a record, by both parents and any nonparent who will exercise custodial responsibility under the modified agreement.¹¹²

A “record” is defined in the earlier parts of the UDPCVA as being “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”¹¹³ Hence, it would appear that the record could include electronic signatures through e-mail or perhaps affirmation through text messages. However, these fairly novel ways to create records can cause a host of other ancillary issues including the authenticity of affirmations made through electronic mail or text messaging when there is a dispute as to who delivered the correspondences.

There is also another available option for a parent having sole custodial responsibility to delegate custodial authority to another individual; specifically, the power of attorney option available under section 204 of the UDPCVA. If no other parent possesses custodial responsibility or if an existing court order prohibits contact between the child and the other parent, a deploying parent may utilize a power of attorney to delegate all or part of custodial responsibility to an adult nonparent for the period of deployment.¹¹⁴ The power of attorney may be rescinded by the deploying parent through a revocation of the power of attorney signed by the deploying parent.¹¹⁵ Furthermore, a military power of attorney “is exempt from any requirement of form, substance, formality, or recording that is provided to powers of attorney under the laws of a State; and shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.”¹¹⁶ Therefore, a power of attorney entered into under section 204 that may

¹¹¹ UDPCVA § 203(b).

¹¹² UDPCVA § 203(c).

¹¹³ UDPCVA § 102(13).

¹¹⁴ UDPCVA § 204.

¹¹⁵ *Id.*

¹¹⁶ 10 U.S.C. § 1044b(a).

have deficiencies in terms of form or format, for example, can still be honored if it was executed as a military power of attorney.

It should also be noted that the governing jurisdiction needs to determine whether or not delegation of custody or visitation can be effectuated through a power of attorney or whether it has to be judicially established after determining the best interests of the minor child. Some states that allow the use of a power of attorney to delegate custodial rights include Georgia,¹¹⁷ Idaho,¹¹⁸ Louisiana,¹¹⁹ Colorado,¹²⁰ South Dakota,¹²¹ Nevada,¹²² North Carolina,¹²³ Nebraska,¹²⁴ Tennessee,¹²⁵ Ohio,¹²⁶ and Maine.¹²⁷ The benefit of using the power of attorney approach is that it is a faster and more cost-effective way to achieve the delegation of the custodial rights. This power of attorney would not, however, disable another parent or guardian from challenging in court the delegation based on the best interests of the minor child. There are some states, however, that do not allow for power of attorneys as a means to delegate custodial responsibilities but instead require a court order. Examples include Kansas,¹²⁸ Mississippi,¹²⁹ Texas,¹³⁰ and Washington.¹³¹ Requiring the court's approval provides a safeguard against delegating custodial rights to third parties whose interaction is not in the best interest of the minor child. Moreover, the involvement by a tribunal will allow for a judicial examination of the proposed delegated caregiver. The biggest drawback from judicial involvement is that it adds a greater financial and time burden on the deployed parent to ef-

¹¹⁷ GA. CODE ANN. § 19-9-122 (2015).

¹¹⁸ IDAHO CODE ANN. § 15-5-104 (2015).

¹¹⁹ LA. REV. STAT. ANN. § 9:3879.1 (2015).

¹²⁰ COLO. REV. STAT. § 14-13.7-204 (2014).

¹²¹ S.D. CODE. ANN. 25-4B-204 (2014).

¹²² NEV. REV. STAT. § 125C.0655 (2014).

¹²³ N.C. GEN. STAT. § 50A-363 (2015).

¹²⁴ Neb. Leg. Bill 219, Feb. 26, 2015, <http://nebraskalegislature.gov/FloorDocs/104/PDF/Slip/LB219.pdf>

¹²⁵ TENN. CODE ANN. § 36-7-204 (2015).

¹²⁶ OHIO REV. CODE ANN. tit. 31, § 8109.52 (2015).

¹²⁷ ME. REV. STAT. ANN. tit. 18-A, § 5-104 (2014).

¹²⁸ KAN. STAT. ANN. § 60-1630 (2010), replaced by KAN. STAT. ANN. § 23-3217 (2012).

¹²⁹ MISS. CODE. ANN. § 93-5-34 (2010).

¹³⁰ TEX. FAM. CODE § 153.3161 (2007).

¹³¹ WASH. REV. CODE § 26.09.260 (2009).

fectuate the new custodial arrangement in lieu of the power of attorney.

However, the signatures on an agreement or power of attorney do not end the requisite steps for the deploying parent. An agreement or power of attorney created pursuant to the UDPCVA must be filed within a reasonable period of time with any court that has entered an existing order on custodial responsibility or child support. The case number and heading of the existing case concerning custodial responsibility or child support shall be provided to the court with the agreement or power of attorney. Therefore, the deploying parent entering into the agreement or power of attorney must file the agreement or power of attorney with the court that has previously adjudicated child custody or child support issues. The inquiry here which remains unanswered is if parents have multi-jurisdictional orders (e.g., child custody order in one jurisdiction and child support order in another jurisdiction), must the deploying parent file the agreement or power of attorney in each jurisdiction? The prudent approach would be to take the document and file it in both locations.

III. Contested Cases

Article 2 of the UDPCVA encourages parents to reach an agreement on the allocation of caretaking and decision-making authority while a parent is unavailable due to military assignment. In the event the parents cannot reach an agreement, they may submit the issue for judicial determination. Judges hearing cases involving military parents often encounter a host of challenges unique to military families. Should a judge make a permanent decision about custody while one parent is overseas fighting for his or her country? Must a judge uproot children from their primary home to vest custody with the biological parent remaining stateside when there is a stepparent remaining in the primary home? Does a custodial parent have veto power over the children's contact with members of the servicemember's family or may a judge provide for visitation with the servicemember's relatives while he or she is absent? Article 3 of the Act provides the guidelines for judges who are forced to make these decisions.

A. Expedited Hearings and Electronic Testimony under the UDPCVA

Consider the New York case of *Diffin v. Town*¹³² in which the mother, a member of the Army Reserve, was awarded custody by court order. Four years later, she received orders for a year-long deployment to Iraq and was served with a motion from her ex-husband asking for custody of their child. Prior to receiving deployment orders, the mother had written a Family Care Plan directing custody of her child to be transferred to her current husband in the event of military absence. The mother attempted to defend against the motion by asking for a stay of proceedings under the Servicemembers Civil Relief Act (SCRA),¹³³ arguing that the SCRA barred the judge from proceeding with any temporary or permanent relief. As a result, the judge was faced with the delicate balance of protecting the servicemember from being required to litigate a custody case while preparing for a year-long deployment or, worse yet, while already overseas, versus protecting the welfare and best interest of the child by taking and hearing evidence on who could best care for the child during the mother's absence.

The UDPCVA attempts to strike a balance between these two competing interests. Article 3 of the Act directs judges to abide by the requirements of the SCRA, including granting a ninety-day stay of proceedings if requested by the servicemember, but encourages the use of temporary orders to address caretaking and decision-making authority during the servicemember's absence. Section 302 provides that any time after a deploying parent receives notice of deployment, either parent may file a motion regarding custodial responsibility of a child during deployment.¹³⁴ In *Diffin*, the mother attempted to prevent the court from entering either a temporary or permanent order, thereby automatically vesting *de facto* custody of the child with her new husband in lieu of the child's father. The court reminded the parties that a stay of proceedings under the SCRA was intended as a shield to protect servicemembers, not as a

¹³² 47 A.D. 3d 988 (N.Y. App. Div. 2008).

¹³³ 50 U.S.C. app. § 522.

¹³⁴ UDPCVA § 302(b).

sword with which to deprive others of their rights. The court stated:

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[s] . . . natural father's rights would be subrogated to the step-father.¹³⁵

As a result, the court granted temporary custody to the father during the mother's military absence.

While the SCRA can provide servicemembers valuable protection by staying a lawsuit while the servicemember is absent serving the needs of the nation, delays in litigation almost always create higher legal expenses for the servicemember and can create a tenuous situation for the minor child awaiting a caretaking decision. Section 303 of the Act requires the court to conduct an expedited hearing in the event a motion under the UDPCVA is filed prior to the parent's deployment.¹³⁶ A prompt hearing allows the servicemember to participate in person prior to deployment, which could last six months or more, rather than delay resolution of the case until the servicemember's return.

Additional procedural protections are found in section 304, which provides that a party or witness who is not reasonably able to appear personally may appear, provide testimony, and present evidence by electronic means.¹³⁷ The option of taking electronic testimony and evidence allows the servicemember to participate in the hearing even after the member is sent on a temporary duty assignment or deployment. As a result, taking electronic testimony and evidence allows judges to move the case forward rather than staying the proceedings until the servicemember is available to participate in person.

The procedural provisions of sections 303 and 304 of the Act lessen and sometimes may eliminate the need for servicemember-parents to file for a stay of proceedings under the SCRA. These provisions of the Act encourage a more expeditious resolution of "deployment custody cases" like *Diffin* by preventing unnecessary delays and their accompanying uncertainty for all involved.

¹³⁵ *Diffin v. Towne*, 787 N.Y.S.2d 677, 680 (2004).

¹³⁶ UDPCVA § 303.

¹³⁷ UDPCVA § 304.

B. *Temporary Orders*

Unfortunately, even when temporary absences of a military parent are addressed prior to deployment, a number of “deployment custody cases” end up with a new custody trial at which the military parent has to fight to regain (or attempt to regain) custody. In the analysis of *Crouch v. Crouch* above, the mother found that her interpretation of the agreed order for custody was not the same as the father’s.¹³⁸ Upon the conclusion of her active-duty service and return to civilian life, she found that the father was claiming that their agreed order was a “permanent order,” even though both had intended for it to be temporary. To prevail over his argument that she had to prove a change of circumstances to regain custody, she had to take the case to the state appeals court and ultimately to the Supreme Court of Kentucky. Both appellate courts agreed with her, ruling that the order was only temporary, with no requirement that she show a change in circumstances for the return of custody.¹³⁹

Section 302 of the UDPCVA aims to eliminate the situation faced by the mother in *Crouch*. Section 302 provides that the court may issue temporary orders allocating custodial responsibility during the pendency of the servicemember’s absence but is forbidden from issuing a permanent order without the consent of the deploying parent.¹⁴⁰ As a result, there is no longer any ambiguity surrounding whether the order is temporary or permanent and whether the returning parent must show a substantial change in circumstances to regain custody.

Article 309 contains an excellent guide for the judge or the family law practitioner on the contents of a temporary custody order. It states:

- (b) If applicable, an order for custodial responsibility under this [article] must:
 - 1) Specify the allocation of caretaking authority, decision-making authority, or limited contact among the deploying parent, the other parent, and any nonparent;
 - 2) If the order divides caretaking or decision-making authority between individuals, or grants caretaking authority to one indi-

¹³⁸ See *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006).

¹³⁹ *Id.* at 465.

¹⁴⁰ UDPCVA § 302.

- vidual and limited contact to another, provide a process to resolve any dispute that may arise;
- 3) Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless contrary to the best interest of the child, and allocate any costs of communications;
 - 4) Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or otherwise available, unless contrary to the best interest of the child;
 - 5) Provide for reasonable contact between the deploying parent and the child after return from deployment until the temporary order is terminated, even if the time of contact exceeds the time the deploying parent spent with the child before entry of the temporary order; and
 - 6) Provide that the order will terminate pursuant to [Article] 4 after the deploying parent returns from deployment.

By clearly stating the key requirements for any temporary order entered under the Act, the UDPCVA anticipates issues that may arise during a parent's military absence and aims to address those issues at the outset, thereby avoiding repetitive litigation.

C. Delegated Visitation

Perhaps the most difficult decision faced by judges in "deployment custody cases" is deciding how to allocate caretaking and decision making authority in the military parent's absence. In *In re Marriage of Sullivan*,¹⁴¹ a deploying servicemember-father petitioned the court to allow his family to have continued visitation with his son while he was on an unaccompanied military assignment that was anticipated to last one to two years. He stated that it would be in the child's best interests to continue his visitation schedule with the family and that the mother, his former wife, would prevent the son from such visitation in the absence of a court order. The appellate court held that under common law, Illinois courts could award visitation to a parent's family members when special circumstances were shown and ultimately remanded the case for a determination on whether it would be in the child's best interests to modify the visitation schedule as the father requested.

¹⁴¹ *In re Marriage of Sullivan*, 795 N.E.2d 392 (Ill. App. Ct. 2003).

Similar cases, involving grandparents, stepparents, and other relatives have been litigated across the United States and they often hold in favor of “substitute visitation” for a servicemember’s family members.¹⁴² The UDPCVA addresses delegated visitation in section 306(a), which states:

On motion of a deploying parent and in accordance with law of this state other than this [act], if it is in the best interest of the child, a court may grant caretaking authority to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship.¹⁴³

In the absence of an agreement to the contrary, the delegated visitation is limited to the time assigned to the absent military parent, with adjustments for unusual travel time.¹⁴⁴ The Act also provides for the assignment of decision-making authority to a nonparent, with the requirement that the court will “specify the decision-making powers granted, including decisions regarding the child’s education, religious training, health care, extracurricular activities, and travel.”¹⁴⁵

Section 306 of the UDPCVA, specifically the section providing for delegated visitation rights, has elicited much debate among lawyers and legislators as to whether the judicial assignment of the deploying parent’s custody rights to a nonparent is constitutionally permissible. The U.S. Supreme Court decision in *Troxel v. Granville*¹⁴⁶ and comparable state law across the country have recognized that, so long as a parent is deemed “fit,” the state may not “infringe on the fundamental right of parents to make child rearing decisions.”¹⁴⁷ The UDPCVA’s Drafting Committee considered the *Troxel* decision and ultimately determined that judicial assignment of a portion of the deploying parent’s custodial responsibility to a nonparent in the circumstances per-

¹⁴² *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. App. 2003); *In re Marriage of De Palma*, 176 P.3d 829 (Colo. App. 2008); *Webb v. Webb*, 148 P. 3d 1267 (Idaho 2006); *Settle v. Galloway*, 682 So. 2d 1032 (Miss. 1996).

¹⁴³ UDPCVA § 306(a).

¹⁴⁴ UDPCVA § 306(b).

¹⁴⁵ UDPCVA § 306(c).

¹⁴⁶ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁴⁷ *See, e.g., Downs v. Scheffler*, 80 P.3d 775, 781 (Ariz. 2003); *In re Guardianship of D.A. McW.*, 460 So.2d 368, 370 (Fla. 1984); *Durkin v. Hinich*, 442 N.W.2d 148, 153 (Minn. 1989); *Petersen v. Rogers*, 445 S.E.2d 901, 905 (N.C. 1994).

mitted by Article 3 would be constitutional for two reasons. First, the UDPCVA contemplates a custodial dispute between two parents rather than a parent and a nonparent, as was present in *Troxel v. Granville*. The Act allows judges to make a decision regarding the child's best interest in situations where the deploying parent wants the child to stay in the care of a nonparent while the nondeploying parent wants the child to stay with himself or herself. Because this custodial dispute is between two parents rather than a parent and a nonparent, the constitutional presumptions outlined in *Troxel* are not triggered. Second, the UDPCVA only allows a temporary assignment of the deploying parent's custodial responsibility to a nonparent while the deploying parent is absent. As such, the temporary assignment of custodial responsibility under the UDPCVA is simply an exercise of the deploying parent's own custodial right to determine the care of his or her child. It is not an independent grant of custodial authority to a nonparent. For further analysis and understanding of the interplay between *Troxel* and the UDPCVA, see the Uniform Law Commission's memorandum regarding the UDPCVA and the constitutional rights of parents published April 1, 2014.¹⁴⁸

IV. Return from Deployment

From the viewpoint of the military parent with custody, ideally every temporary custody order entered to address the military parent's temporary absence would provide for the immediate and automatic return of custody upon the parent's return from military assignment. This ideal collides with reality in many military custody cases. Occasionally when the military custodian departs for deployment, the other parent changes his or her mind and decides to retain custody. As a result, a number of "deployment custody cases" end up with extended delay in returning the child, and sometimes necessitating a new custody trial. For example, in *In re Marriage of E.D.U. and J.E.*,¹⁴⁹ the

¹⁴⁸ Maxine Eichner, *The UDPCVA and the Constitutional Rights of Parents*, Uniform Law Commission memorandum (Apr. 1, 2014), available at <http://www.uniformlaws.org/shared/docs/employed.parents/Troxel%20Memo%20final.pdf>.

¹⁴⁹ 212 Cal. App. 4th 1377 (2012).

father had primary physical custody pursuant to a court order for nine years prior to receiving orders to deploy to Afghanistan for a year. The parties' prior custody order anticipated that the father might at some time be called to active military duty and provided: "If military deployment should require either parent to leave California, the parent remaining in California should assume the role of primary parent, with a return to the established parenting plan upon the return of the [deployed] parent to California."¹⁵⁰ The father attempted to return to the established parenting plan upon his return from deployment but the mother refused to return the child. The parties litigated the case over the next two years but ultimately the California Court of Appeals reinstated the original order.

An expensive, time-consuming, and emotionally draining legal battle should not be necessary if the parties agree to a temporary order with return of custody to the military parent at the end of his or her absence. Article 4 of the UDPCVA addresses the return of the servicemember following military absence. Section 401 covers temporary agreements and their termination, either on the date specified in the original agreement, on a date upon which the parties subsequently agree, or in the absence of either of the above, on a date sixty days from when the deploying parent gives notice to the other parent of having returned from deployment.¹⁵¹ Section 402 addresses the consent termination of temporary custody orders; at any time after the return from deployment, the parties may file an agreement to end the temporary order for custodial responsibility entered under Article 3, and the court will then issue an order ending the temporary order.¹⁵² Section 403 covers interim visitation by the deploying parent before termination, allowing the returning parent visitation with the children during any debriefing or reintegration the servicemember may undergo.¹⁵³ Section 404 deals with non-consent termination, providing that the temporary order terminates by operation of law sixty days from when the returning parent provides notice of his or her return.¹⁵⁴

¹⁵⁰ *Id.* at 1380.

¹⁵¹ UDPCVA § 401(c).

¹⁵² UDPCVA § 402.

¹⁵³ UDPCVA § 403.

¹⁵⁴ UDPCVA § 404 (a).

V. Update - 2015

The nationwide importance of military custody was apparent even in the waning days of 2014 when Congress reached agreement on the National Defense Authorization Act (NDAA) of 2015.¹⁵⁵ Section 566 of the NDAA provides for amendments to the Servicemembers Civil Relief Act¹⁵⁶ regarding military custody. Pursuant to the statute, a court is barred from considering deployment as the sole factor in determining the child's best interest in custody proceedings. In addition, it states that if the court orders temporary custody based on military deployment, then at the end of deployment the previous custody order must be reinstated, unless the court finds that this is not in the best interest of the child. The Act also provides that the servicemember's absence due to deployment may not be the sole factor in deciding on the child's best interest in setting or modifying custody rights.¹⁵⁷

VI. Conclusion

The military custody or visitation case brings a new level of stress, expense, and complexity to an area that is already very difficult to understand and navigate. A substantial improvement came with the promulgation of the Uniform Deployed Parents Custody and Visitation Act by the Uniform Law Commission. The Act helps to ensure that courts will not use past or potential future deployments against a servicemember unless there are substantial issues regarding the impact of a deployment on the child's best interest. It grants significant protections – both procedural and substantive – to the servicemember who is deploying, the non-deploying parent, and the child or children. It helps to create a structure to deal with the deployment of a parent in uniform. Military parents should be free to serve their country without having that service held against them in a custody case.

¹⁵⁵ Pub. L. No. 113-291, 128 Stat. 3292 (2014).

¹⁵⁶ 50 U.S.C. app. § 501

¹⁵⁷ *Id.* at § 566.

Appendix A

THE UNIFORM DEPLOYED PARENTS CUSTODY AND VISITATION ACT (UDPCVA) – PROBLEMS AND SOLUTIONS

This table serves several functions. First of all, it sets out the general structure and specific sections of the Uniform Deployed Custody and Visitation Act. This summary shows the extent of coverage and topics in the UDPCVA and serves as a helpful guide to facilitate passage of the Act. In addition, the table includes some examples of problems that might occur in the area of military custody and visitation. It sets forth questions and issues that courts seek to address in this area are identified. The summary sections to the right of these “problems and questions” show how the Act can resolve these questions and problems.

It should be noted that no statute is a solution for all of the problems it aims to solve. The purpose behind a statute establishing positive norms, restrictions and authorizations is not simply to set standards so that transgressors may be punished. It is also intended to set prescriptive standards for lawyers and the public so that citizens may conform their conduct to what the law requires, and so that lawyers can advise and encourage their clients to comply with the law’s standards. In the latter area, the law performs a preventive role, helping to keep cases out of court (and sometimes out of the arms of lawyers) by promoting appropriate conduct and communications by the parties.

Problem or Issue	How UDPCVA Addresses It	Section
<p>Sample initial questions – Who should be covered? What is “deployment”? Should the law cover only active-duty personnel, or should it also include Guard/Reserve members? What is “caretaking authority”?</p>	<p>General Provisions <u>Definitions</u> (e.g., “adult,” “caretaking authority,” “close and substantial relationship,” “deployment,” “service member” and “uniformed services”)</p>	<p>Article 1 Sec. 102</p>
<p>The need for specific statutory authority to impose sanctions and grant attorney fees when a party does not comply with the statute or the court’s orders.</p>	<p><u>Remedies for Noncompliance</u>: This includes attorney fees and costs</p>	<p>Sec. 103</p>
<p>Upon receipt of deployment orders, Sergeant Jane Doe leaves the state that initially entered a custody order, taking with her the two children in her legal custody. She turns them over temporarily to their father (her ex-boyfriend, Jerry) and then reports for duty. Jerry tries to get his own state to assert jurisdiction over custody, despite the prior custody order and the fact that Jane is only temporarily absent from the initial state. He argues that no one resides in the original state, and thus his own state has jurisdiction.¹⁵⁸ This section deals with the issues of residence and transfer of a military member to another state upon receipt of military orders.</p>	<p><u>Jurisdiction</u>: The residence of the deploying parent is not changed by reason of deployment for the purposes of UCCJEA</p>	<p>Sec. 104</p>
<p>Captain Richard Roe tries to hide his impending deployment in the Middle East from his ex-wife, so she</p>	<p><u>Notice Required of Deploying Parent</u>: The deploying parent must give at least 7 days’ notice of deployment</p>	<p>Sec. 105</p>

¹⁵⁸ See, e.g., *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012).

Problem or Issue	How UDPCVA Addresses It	Section
<p>will not be able to get a court order for custody before he leaves. He plans, instead, to leave the children with his mother.¹⁵⁹ His keeping this information from his ex-wife precluded her from negotiating with him regarding a suitable parenting plan for the children during his absence. It also forced her to hire an attorney on “emergency terms,” which usually costs a lot more than a non-emergency case.</p>	<p>(in general); exchange of proposed parenting plans is required; reasonableness of a parent’s efforts to comply may be considered in custody determination</p>	
<p>Roberta Roe, the ex-wife of the above-mentioned Captain Richard Roe, plans to move away as soon as Richard is overseas. She doesn’t want to let Richard know where she will be, hoping to cause him maximum difficulties in reconnecting with his children.</p>	<p><u>Duty to Notify of Change of Address:</u> Non-deploying parent must give address-change info to the deploying parent and the court; exception if an existing order prohibits this disclosure (e.g., domestic violence case)</p>	<p>Sec. 106</p>
<p>The ex-husband of Sergeant Jane Doe moves for modification of the custody decree on the ground that the mobilizations, deployments, and TDY transfers of his ex-wife make her an inappropriate parent for continued custody.</p>	<p><u>Gen'l Considerations in Custody Proceeding of a Parent's Mil. Service:</u> Past and possible future deployments may not be considered in determining the best interest of the child, but court may consider “any significant impact” on child of such deployments</p>	<p>Sec. 107</p>
<p>When deployment approaches, transfers and agreements are often done on the fly – with a handshake, a phone call, or a simple power of attorney. This section</p>	<p>Agreement Addressing Custodial Responsibility During Deployment Form of Agreement: Temporary agreement must be in writing, signed by parents and by any nonparent to whom custody duties are given. It may:</p>	<p>Article 2 Sec. 201</p>

¹⁵⁹ See, e.g., *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005).

Problem or Issue	How UDPCVA Addresses It	Section
<p>specifies what should be in the custody transfer agreement, how it should be executed, and under what circumstances a court order is required.</p>	<ul style="list-style-type: none"> - Identify (to the extent feasible) the destination, duration and conditions of the deployment - Specify the allocation of caretaking authority among deploying parent, other parent, and any nonparent - Specify any decision-making authority that accompanies caretaking - Specify any grant of limited contact to a nonparent - Provide for dispute resolution when agreement shares custodial responsibility between parent and nonparent, or between two nonparents - Specify the frequency, duration, and means of contact between deployed parent and child, role of other parent in facilitating contact, and allocation of any costs involved - Specify contact between the deploying parent and child during any period of leave - Acknowledge that child support may only be changed during deployment by the appropriate court, not by the agreement of the parties - Provide for termination upon return from deployment under Article 4 procedures - If agreement must be filed under Section 205, state which parent will do so 	
<p>When a nonparent is granted caretaking authority or limited contact, he or she may have “grand designs” about extending this authority beyond the end of</p>	<p><u>Nature of Authority Created by Agreement:</u> Agreement is temporary and ends upon return from deployment; it does not create independent rights or authority in</p>	<p>Sec. 202</p>

Problem or Issue	How UDPCVA Addresses It	Section
<p>deployment; this section makes it clear that the above grants are simply temporary expedients with a clear end-point.</p> <p>In addition, the non-parent delegee may need to apply to the court for an order to back up the rights or powers that he or she is granted, since the other parent may at some point have a “change of heart” and decide to resist the sharing of time or responsibilities which was agreed upon previously.</p>	<p>persons to whom responsibility is given; a nonparent given authority or contact rights has standing to enforce agreement</p>	
<p>During the deployment, it becomes clear that the custody arrangement is unworkable, or the child’s schedule changes because he or she joins a new activity.</p>	<p><u>Modification of Agreement:</u> Agreement may be modified by mutual consent of both parents and any nonparent who will exercise custodial responsibility under the agreement</p>	<p>Sec. 203</p>
<p>Captain Richard Roe is deployed on short notice and seeks to transfer custody to his current wife, the child’s stepmother. May he do so without a court order? Alternatively, Capt. Roe seeks to transfer his visitation rights to his parents during the term of his deployment by means of a power of attorney.¹⁶⁰</p>	<p><u>Power of Attorney:</u> Deploying parent may delegate all or part of custodial responsibility to a nonparent through power of attorney for the period of deployment under certain circumstances</p>	<p>Sec. 204</p>

¹⁶⁰ See, e.g., *Webb v. Webb*, 148 P.3d 1267 (Idaho 2006) (A father who was about to be deployed designated his parents to exercise his visitation rights pursuant to Idaho statute which allowed the designation for up to 12 months for one in the military serving beyond the territorial limits of the United States. His ex-wife, the mother of their two children, objected to the designation. The trial court approved and the supreme court affirmed, stating that the clear language of the statute allowed the father to grant visitation by power of attorney to his parents.)

Problem or Issue	How UDPCVA Addresses It	Section
<p>Parents in the military can, if allowed by case law or statute, transfer the rights of access and visitation to another party during their deployment.¹⁶¹ Without the filing of an agreement or power of attorney, the court and law enforcement authorities will not be on notice as to terms of an agreement or power of attorney for purposes of enforcement. This clarifies for law enforcement purposes who has legal custody of a child.</p>	<p><u>Filing Agreement or Power of Atty. with Court:</u> Requires filing of agreement and/or power of atty. with court or agency within reasonable period of time. . .</p>	<p>Sec. 205</p>
<p>Roberta Roe decides that now – when her ex-husband has just received deployment orders – is the perfect time to get custody of the children. She files for custody (or moves the court for a change of custody if there is already a custody case), asking the court for “full custody” or “permanent custody” in light of the impending absence of the children’s current custodian, Captain Richard Roe. Section 301 makes it clear that the court cannot grant a permanent custody order except with the deployed parent’s agreement, and that temporary orders must comply with the Servicemembers Civil Relief Act (SCRA), which provides for a stay of proceedings (50 U.S.C. app. § 522) and bars a default judgment if the</p>	<p>Judicial Procedure for Granting Custodial Responsibility During Deployment</p> <p><u>Proceeding for Temporary Custody Order:</u> Court may issue temporary custody order unless barred by Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 521-522; no permanent custody order except with consent of deploying parent</p>	<p>Article 3</p> <p>Sec. 301</p>

¹⁶¹ *Id.*

Problem or Issue	How UDPCVA Addresses It	Section
<p>servicemember has not entered an appearance (50 U.S.C. app. § 521).</p> <p>When Sergeant Jane Doe is about to deploy and wants to transfer custody of her child to her mother, she needs a prompt hearing so she can put her affairs in order, especially if the other parent will not agree, pursuant to Article 2, to terms for custody and visitation during her absence. This section provides explicit authority for the court's allowing a peremptory setting for her motion for relief under Article 3, especially if the child's father realizes that delay benefits him, that all he needs to do is wait till she's gone and that there is no one to oppose his actions regarding the child's custody or monitor his conduct.</p>	<p><u>Expedited Hearing</u>: Court shall conduct expedited hearing upon motion for same before deployment</p>	<p>Sec. 302</p>
<p>Jane's deployment orders do not allow time for her to appear and testify in person regarding custody and visitation matters. Current state statutes only provide limited authority for electronic testimony. When the case involves two different states, Section 316(f) of the Uniform Interstate Family Support Act (UIFSA) provides for parties to "testify by telephone, through audiovisual means or by any other electronic means." In interstate custody cases, Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) permits an individual to be deposed or to testify by telephone, audiovisual means, or electronic</p>	<p><u>Testimony by Electronic Means</u>: A party or witness who is not reasonably available may testify and present evidence by electronic means unless good cause for personal appearance.</p>	<p>Sec. 303</p>

Problem or Issue	How UDPCVA Addresses It	Section
<p>means. This section give the court authority, even if the case involves only in-state custody issues which are not covered by the UCCJEA, to allow testimony by electronic means, such as telephone, Skype, Polycom, or FaceTime.</p>		
<p>Capt. Richard Roe wants to leave his children with his parents on his deployment, although the custody order entered at the time he divorced states that his ex-wife will have custody on deployment. Roberta, his ex-wife, opposes Richard's assigning custody to his parents.</p>	<p><u>Effect of Prior Judicial Decree or Agreement:</u> Prior order for custodial responsibility in case of deployment is binding unless circumstances justify modification; court shall enforce agreement of parties for custodial responsibility unless contrary to best interest of child.</p>	<p>Sec. 304</p>
<p>Jane Doe wants the court to allow her current husband to have the children while she is on deployment orders. He has a good relationship with the kids, the children have lived with him since birth, and he is fit and proper for this role. Jane's ex-boyfriend, Jerry – the father of the children – raises strenuous objections, stating that Jane is impermissibly trying to establish parental rights for her new husband that the husband could not obtain in his own right. Jerry states that he has paramount and presumptive parenting rights with the kids when Jane is not available, meaning that he should have them on a full-time 100% basis. He says that he should not be forced to give up his own parenting time in favor of a</p>	<p><u>Grant of Caretaking or Decision-Making Authority to Nonparent:</u> Upon motion of deploying parent, court may grant caretaking authority to nonparent who is adult family member, or who has close and substantial relationship with child, if in child's best interest. Absent agreement by other parent, caretaking time is limited to. . .</p> <ul style="list-style-type: none"> - Ordinary visitation time of deploying parent in existing order (plus unusual travel time, if necessary) - If no existing order, the time that deploying parent cared for child prior to notice of deployment (plus unusual travel time, if necessary). <p>Court may grant part of decision-making authority for a</p>	<p>Sec. 305</p>

Problem or Issue	How UDPCVA Addresses It	Section
<p>nonparent.¹⁶²</p> <p>Richard Roe wants to have his parents visit with the children one Saturday a month while he's deployed. Roberta, his ex-wife, opposes this request on the ground that it would violate her primary right to custody of the children when Richard isn't around. She claims that she alone has the right to determine with whom the children associate. Roberta says that visitation rights are personal, exercisable only by Richard; they cannot be delegated to another by the court for the limited time of Richard's absence, regardless of whether this is in the best interest of the children.¹⁶³</p> <p>Roberta Roe also claims that the court cannot extend "special rights" to the grandparents, that they must apply for such rights in their own names, and that they are not legally authorized to do so since both parents are fit and proper. She maintains that these "independent rights" cannot be awarded to Richard's parents.</p>	<p>child to said nonparent, and order shall specify areas of decision-making, including health, education and religion</p> <p><u>Grant of Limited Contact:</u> Upon motion of deploying parent, court shall grant caretaking authority to nonparent who is adult family member, or who has close and substantial relationship with child, unless court finds this not in child's best interest.</p>	<p>Sec. 306</p>
<p>Roberta Roe also claims that the court cannot extend "special rights" to the grandparents, that they must apply for such rights in their own names, and that they are not legally authorized to do so since both parents are fit and proper. She maintains that these "independent rights" cannot be awarded to Richard's parents.</p>	<p><u>Nature of Authority Granted by Order:</u> Grant of authority is temporary, ends upon return from deployment; it does not create independent rights or authority in persons to whom responsibility is given; nonparent granted authority or contact rights has standing to enforce the grant. See also notes at Section 202 above.</p>	<p>Sec. 307</p>

¹⁶² See, e.g., *In re Marriage of DePalma*, 176 P.3d 829 (Colo. App. 2007) (rejecting all of the arguments raised above).

¹⁶³ See, e.g., *McQuinn v. McQuinn*, 866 So.2d 570 (Ala. Civ. App. 2003); *In re Marriage of Sullivan*, 795 N.E.2d 392 (Ill. App. Ct. 2003) (rejecting all of the arguments raised above).

Problem or Issue	How UDPCVA Addresses It	Section
<p>Jerry, Jane Doe's ex-boyfriend, refuses to facilitate any communication between Jane and the children. He says that "it's her problem that she decided to stay in the Army Reserve," and that he needn't go out of his way or expend any effort to put the kids in touch with their mother while she is absent. If there are any costs involved, he says, she will need to bear 100% of the charges since it is she who chose military service, with the ever-present possibility of TDY or deployment.</p> <p>Jerry also contends that he has no duty to facilitate access of Jane with her children during Jane's two-week mid-tour leave. Besides, he states, he has already made plans to be elsewhere with the kids during that time.</p> <p>When Jane returns, Jerry seeks to claim that the order for transfer of the children to him during deployment was <i>not</i> a temporary order, and that Jane must show a substantial change of circumstances to obtain return of the children.¹⁶⁴</p>	<p><u>Content of Temporary Custody Order</u>: An order granting custodial responsibility must:</p> <ul style="list-style-type: none"> - designate order as temporary - Identify (to the extent feasible) the destination, duration and conditions of the deployment <p>If applicable, temporary order for custodial responsibility must . . .</p> <ul style="list-style-type: none"> - Specify the allocation of caretaking authority among deploying parent, other parent, and any nonparent - Provide for dispute resolution when agreement shares custodial responsibility between parent and nonparent, or between two nonparents - Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless contrary to the best interest of the child, and allocate any costs of communications - Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or is otherwise available, unless contrary to the best interest of the child 	<p>Sec. 308</p>

¹⁶⁴ See, e.g., *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006) (after agreement to transfer custody from servicemember-mother to the child's father for duration of mother's absence, father reneged and challenged status of the court order in Kentucky Court of Appeals and Supreme Court, claiming that the initial order was not a temporary one but rather a custody order which required the mother to show a change of circumstances to regain custody).

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Problem or Issue	How UDPCVA Addresses It	Section
	<ul style="list-style-type: none"> - Provide for reasonable contact between deploying parent and child following return from deployment until the temporary order is terminated, which may include more time than the deploying parent spent with the child before entry of the temporary order - Specify any decision-making authority that accompanies caretaking - Specify any grant of limited contact to a nonparent - Provide for termination upon return from deployment under Article 4 procedures 	
	<p><u>Order for Child Support</u>: If caretaking order issued or agreement executed, court may order temporary child support if there is jurisdiction under UIFSA</p>	Sec. 309
<p>Jane's new husband, to whom she assigned custody during deployment, develops a substance abuse problem during her absence. Alternatively, Jane and Jerry end their marriage during the deployment.¹⁶⁵</p>	<p><u>Modifying or Terminating Assignment or Grant of Custodial Responsibility to Nonparent</u>: The court may modify or terminate an order providing for caretaking, decision-making or limited contact. Any modification is temporary and ends upon return from deployment, unless earlier terminated. On motion of deploying parent, court shall end order of limited contact.</p>	Sec. 310
	<p>Return from Deployment</p>	Article 4

¹⁶⁵ See, e.g., *Diffin v. Towne*, 849 N.Y.S.2d 687 (N.Y. Ct. App. 2008) (custody transferred to child's father after, among other things, separation of servicemember-mother and her new husband, to whom she had previously attempted to delegate all responsibility for the child, without consent of the child's fully fit father).

Problem or Issue	How UDPCVA Addresses It	Section
<p>Richard Roe returns from deployment on June 1 and notifies his ex-wife of his return. She agrees to the return of custody. What do they need to do to end the temporary custody agreement?</p>	<p><u>Procedure for Terminating Temporary Grant of Custodial Responsibility Established by Agreement:</u> At any time after return from deployment, a temporary custodial responsibility agreement may be terminated upon signatures of both parents. If no agreement to terminate is reached, the temporary custody arrangement ends 60 days from date the deploying parent gives notice to other parent of return from deployment. If temporary agreement was filed with court/agency under section 205, then agreement to terminate must also be filed within reasonable period of time after signing. Case number and heading must be provided.</p>	<p>Sec. 401</p>
<p>Jane Doe returns from deployment and wants custody back from her ex-husband, who agrees that custody should be returned to her. That custody, however, had been transferred by court order during the deployment. Must they return to court again?</p>	<p><u>Consent Procedure for Terminating Temporary Grant of Custodial Responsibility Established by Court Order:</u> At any time after return from deployment, both parents may file with court an agreement to terminate custodial responsibility order. After agreement is filed, court shall issue order ending the temp. order on date set out in agreement. If no date set out, then order is issued immediately.</p>	<p>Sec. 402</p>
<p>Roberta Roe, in efforts to avoid returned custody to her ex-husband on his return from deployment, serves discovery on him, changes lawyers, demands continuances and does everything in her power to stop the children's return. She alleges that he is suffering</p>	<p><u>Visitation before Termination of Temporary Grant of Custodial Responsibility:</u> After return from deployment and until order or agreement is terminated, court shall enter temporary order granting deploying parent reasonable contact with child (unless contrary to best</p>	<p>Sec. 403</p>

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Problem or Issue	How UDPCVA Addresses It	Section
<p>from battle fatigue and PTSD, and she obtains a temporary order barring the return of full custody to Richard. Given the court's schedule for "fully contested cases," this may mean 6-8 months before a plenary hearing with no visitation for Richard.</p> <p>Jerry doesn't want to give the children back to Jane Doe when she returns. He has no lawyer, no grounds and no money. He just wants to keep the kids and he refuses to respond to any of her requests for the children. He refuses to execute an agreement for the return of the children to Jane.</p>	<p>interest of child), even though time may exceed that spent with child before deployment.</p> <p><u>Termination by Operation of Law of Temporary Grant of Custodial Responsibility Established by Court Order:</u> If no agreement to end temporary order for custodial responsibility, then it ends 60 days from date the deploying parent gives notice of return from deployment to other parent and any nonparent given custodial responsibility. Any proceeding to prevent termination of temporary custodial responsibility order is governed by other provisions of state law.</p>	<p>Sec. 404</p>
	<p>Miscellaneous Provisions</p> <p><u>Uniformity of Application and Construction:</u> Court should consider need for uniformity.</p> <p><u>Relation to Electronic Signatures in Global and National Commerce Act:</u> This Act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7031 (2013), but does not modify, limit, or supersede section 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. § 7003(b).</p>	<p>Article 5</p> <p>Sec. 501</p> <p>Sec. 502</p>

Problem or Issue	How UDPCVA Addresses It	Section
	Transition Provision: Act does not affect validity of temp. order re custodial responsibility during deployment that was entered before the effective date of Act. <u>Effective Date:</u> This Act takes effect. . .	Sec. 503
		Sec. 504

