

To: New Jersey Law Revision Commission
From: Marna L. Brown
Re: Uniform Deployed Parents Custody and Visitation Act
Date: March 11, 2013

MEMORANDUM

In 2012, the National Conference of Commissioners on Uniform State Laws, now known as the Uniform Law Commission (“ULC”), approved the Uniform Deployed Parents Custody and Visitation Act (“UDPCVA”) for adoption in all states. The Prefatory Note explains that the UDPCVA addresses child custody and visitation issues that arise when parents are deployed in military or other national service because custody issues raised by such deployment are not “adequately dealt with in the law of most states.” This memorandum examines the UDPCVA and the status of the law in New Jersey, and provides Staff conclusions.

OVERVIEW

The ULC explains in its Prefatory Note that although issues of child custody and visitation are generally determined by state law, a uniform law is deemed necessary because of the mobile nature of national service and the fact that the parent who is not deployed often will live in or move with the child to a state that is different than the home state of the deployed service member.

State laws differ on several issues, including the following: whether the service member is eligible for the protection of state law; whether an expedited court procedure before deployment is available for the service member; whether there will be automatic reversion to the permanent custody order upon the service member’s return from deployment; and whether the service member, without a court order, may delegate custody to a person other than the child’s non-deployed parent. Some states have no laws at all regarding custody issues relating to service members. As will be explained, New Jersey has a recent statute that addresses the concerns raised by the uniform law.

THE UNIFORM LAW GENERALLY

The UDPCVA is divided into five articles: (1) an article on general provisions including definitions, jurisdiction and notification required of the deploying parent; (2) an article covering agreements that address custodial responsibility during deployment; (3) an article covering court orders that address custodial responsibility during deployment; (4) an article pertaining to return from deployment; and (5) miscellaneous boilerplate provisions.

Notably, the custody relationships under the uniform act are temporary, until the parent returns from deployment. The uniform law, as would be expected, also seeks to establish uniformity of language used in custody cases arising from deployment, although states are encouraged to add any state-specific terminology to the defined terms already used in order to facilitate resolution of cases involving multiple jurisdictions.

The uniform law also contemplates that courts will supplement the uniform act's provisions with general custody law of the state. The ULC gives the example of a situation where if state law would give a child's preferences significant weight in a custody determination, then the same weight also should be given to a child's preferences in a temporary custody determination pursuant to the act. Similarly, where a state statute permits the shifting of attorneys' fees between parents in custody cases, a court may apply that statute in custody determinations made under the act.

Significantly, provisions of this uniform law follow and rely upon for their enforcement, the Uniform Child Custody Jurisdiction and Enforcement Act, which was adopted in New Jersey in 2004. See N.J.S. 2A: 34-53 et seq.

Finally, although there is a federal statute, The Servicemembers Civil Relief Act, 50 U.S.C. App. §§501-597b, which governs the general legal rights of a deploying service member, that federal law does not cover aspects of custody arrangements that are covered in the UDPCVA.

A SUMMARY OF AND COMMENTS REGARDING KEY PROVISIONS OF UDPCVA

Section 102 of the act defines eighteen terms used in the act, including "caretaking authority", "custodial responsibility", "decision-making authority", "deploying parent", "deployment", "return from deployment" and "service member".

Section 103 of the act provides remedies for noncompliance including an award of attorney's fees and costs against a party who has acted in bad faith or intentionally failed to comply with the act or with a court order issued under the act.

A court may issue an order under section 104, only if the court has jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. Section 105 of the act requires the deploying parent to notify the other parent of the pending deployment no later than seven days after receiving notice of deployment unless reasonably prevented from doing so by the circumstances of service, in which case notice shall be given as soon as reasonably possible. Each parent also is required to provide the other parent with a "plan for fulfilling that parent's share of custodial responsibility during deployment."

Section 107 provides that 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 of the parent's past or future deployment on the best interest of the child.

Article 2 of the uniform law addresses agreements for custodial responsibility during deployment, permitting the parents of a child to enter into a temporary agreement granting custodial responsibility during deployment so long as the agreement contains certain elements. See Section 201.

Section 202 states that an agreement under this article is temporary and terminates after the deploying parent returns from deployment unless it already has been terminated by court order or modification. This section further clarifies that the agreement does not create an independent and continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom custodial responsibility is given. Section 203 permits the parents, by mutual consent, to modify an agreement made pursuant to article 2 and sets forth how that is to be accomplished.

Section 204 permits by a power of attorney, the delegation of all or part of custodial responsibility to an adult nonparent for the period of deployment. The deploying parent must file the power of attorney within a reasonable time with a court that has entered a custodial responsibility order. See Section 205.

Much of article 3 appears to contradict principles articulated under *Winberry v. Salisbury* by setting forth court procedures for motion practice, expedited hearings, providing testimony, content of orders, etc. Section 308 clarifies that a grant of authority under article 3 is temporary and terminates under article 4 upon the return from deployment of the deploying parent, unless otherwise terminated before that time by court order. Again, this section clarifies that the grant does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom it is granted.

Finally, article 4 of the uniform act sets forth the procedures upon return from deployment including the method for terminating the temporary grant of custodial responsibility established by agreement between the parents or established by court order, as well as other provisions for temporary interim conduct during the time period that commences after a deploying parent returns from deployment up until the temporary agreement or order for custodial responsibility is terminated.

Notably, the UDPCVA has not yet been enacted in any jurisdiction, but, in 2013, was introduced in three states: Colorado, North Carolina and North Dakota.

CURRENT NEW JERSEY LAW AS COMPARED TO THE UNIFORM LAW

Early this year, P.L. 2013, c.7, (which supplements P.L. 2004, c.147)¹, was enacted in New Jersey. This act concerns child custody and parenting time arrangements related to certain military service absences and addresses the same concerns addressed by the uniform law. The statutory sections affected are N.J.S. 9:2-12.1 (definitions); and N.J.S. 2A:34-65 through 2A:34-66 (initial child custody jurisdiction and exclusive, continuing jurisdiction).

¹ P.L. 2004, c. 147 enacted New Jersey's version of the Uniform Child Custody Jurisdiction and Enforcement Act upon the recommendation of this Commission.

“Deployment” and other defined terms

Section 9:2-12.1(a) defines four terms: “deployment”; “military”; “service member” and “service-related treatment”. The definition of the term “deployment” is significantly different under this statute than it is under the uniform law. The uniform law definition is much broader in scope and requires the “movement or mobilization” of a service member for more than 90 days but less than 18 months pursuant to military orders. New Jersey’s definition requires a “prolonged absence of 30 or more days, making the service member unable during that absence to exercise parenting time with a child for whom the service member is a parent or caretaker”. In contrast, the uniform law definition does not expressly state that the service member must not be able to exercise parenting time with the child, although that is implied. Instead, the UDPCVA requires that the service member’s military orders are designated as “unaccompanied”, do not permit dependent travel, or “otherwise do not permit the movement of family members to the location to which the service member is deployed.”

Unlike New Jersey’s statute, the uniform law also does not specifically cover a service member who is receiving service-related treatment that requires a prolonged absence, although arguably such a service member could be included under the broader UDPCVA definitions of “deploying parent” and “deployment”.

Determination of best interest of child

N.J.S. 9:2-12.1(b) provides that a court, when making a determination concerning child custody or parenting time, shall not consider the absence or potential absence of a military service member by reasons of deployment or service-related treatment as a factor in determining the best interest of that service member’s child. It also provides that the court shall, to the extent possible, expedite a determination on an application concerning a child custody or parenting time arrangement by a service member or the other parent or caretaker for a child whenever no child custody or parenting time order exists and the service member has received official written notice of deployment or service-related treatment.

Here, too, although the concepts used in both laws are similar, the uniform law language is unhelpful. The uniform law provides that 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.” Although this may be viewed as a distinction without a difference, it is just not clear. What is meant by “possible future deployment”? What is the difference between the deployment “itself” and the deployment’s “significant impact” on the child’s best interests? These are questions that would need to be examined and answered if uniform law language were to be recommended for adoption.

New Jersey law further requires that during the period of deployment or service-related treatment, the court shall not enter an order modifying any judgment or order concerning child custody or parenting time, or otherwise change an existing custodial

arrangement in effect, unless the court finds “it to be in the best interest of the child” to do so. However, the court may appoint a guardian ad litem, an attorney, or both, to represent the child’s interests and the court may order parenting time for a family member of the service member if the court finds this to be in the best interest of the child.

The uniform law permits the grant of caretaking or decision making authority to a nonparent who is either an adult family member of the child or an adult with whom the child has a close and substantial relationship, if the court finds it is in the best interest of the child, but only upon motion of a deploying parent. Moreover, if the grant of caretaking authority is to a nonparent, unless the other parent agrees to the grant, the grant is limited to a certain specified time period. (See section 306). New Jersey law also contemplates that a person other than a parent may be a caretaker for a child. See N.J.S. 9:2-12.1 (b) (2) and N.J.S. 2A:34-66 (referring to person “acting as a parent.”) In any event, under New Jersey law, the best interest of the child standard always guides the court in any determination made with regard to custodial issues.

The uniform law permits modification of a custodial responsibility agreement by mutual consent of the parents. New Jersey law also states that nothing in the law prevents agreement to a care arrangement for a child during the period of deployment or service related treatment. See N.J.S. 9:2-12.1(h). The New Jersey language is broad enough to allow for care to be transferred to a nonparent or “person acting as a parent”, as appropriate.

Written notification to non-deploying parent

N.J.S. 9:2-121.1(c) provides that the service member who is a party to a child custody or parenting time arrangement and has received an official written notice of deployment or service-related treatment shall notify the other parent or caretaker, no later than the day immediately preceding the service member’s departure, or the 10th day after receipt of the official written notice for the deployment or treatment, whichever occurs first, unless prohibited from doing so by the military. It also provides that the parent about to be deployed or receiving service-related treatment, shall provide timely information regarding the person’s scheduled leave or other availability during the period of deployment or service-related treatment, again, unless prohibited from doing so by the military. Further provisions require that the other parent or caretaker make the child reasonably available to the service member while the service member is on leave and facilitate opportunities for communication, including telephonic and electronic mail contact to the extent feasible.

Under the uniform law, the service member must provide notice to the other parent no later than seven days after receiving notice of deployment “unless reasonably prevented from doing so by the circumstances of service.” (See section 105). Thus, not only is the time frame for notification longer in the New Jersey statute, the language used in the New Jersey statute is more precise and less subject to interpretation.²

² Section 106 of the UDPCVA also expressly requires an individual to whom custodial responsibility has been granted during deployment to notify the deploying parent and any other person with custodial

Jurisdiction

Similar to the concepts set forth in the uniform law, New Jersey law provides that during the period of the service member's deployment or service-related treatment, and for a period of 90 days following the completion of deployment or treatment, New Jersey shall retain exclusive, continuing jurisdiction over any determination concerning child custody or parenting time, in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act.

N.J.S. 2A:34-65 provides the circumstances under which a court of this State has jurisdiction to make an initial child custody determination.³ Continuing jurisdiction is covered by N.J.S. 2A:34-66 which provides that except as provided under N.J.S. 9:2-12.1 (already discussed above), a court of this State that has made a child custody determination consistent with the act has exclusive, continuing jurisdiction over the determination until a New Jersey court determines either that neither the child, the child and one parent, nor the child and a person acting as a parent, have a significant connection with New Jersey and substantial evidence is no longer available here concerning the child's care, protection, training, and personal relationships; or that a court determines that neither the child, nor a parent, nor any person acting as a parent, resides in New Jersey.

The uniform law does not make a distinction between initial and continuing jurisdiction but states that a court may issue an order regarding custodial responsibility under the act only if the court has jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. (See section 104.)

responsibility of the child of any change of mailing address or residence until the grant is terminated. Notice is to be provided to the court and confidentiality of the information maintained. Whether this addition to New Jersey law is recommended is not considered at this time because of Staff's conclusion that the uniform law should not be recommended for adoption.

³ A court has initial jurisdiction under the statute only if any of the following occur:

(1) this State is the home state of the child on the date of commencement of the proceeding, or was the home state within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live here; or

(2) a court of another state does not have jurisdiction in accordance with this section or a court of the child's home state has declined to exercise jurisdiction on the basis that New Jersey is the more appropriate forum under the statute; and (a) the child and the child's parents (or the child and at least one parent or person acting as parent) have a significant connection with this State other than mere physical presence; and (b) substantial evidence is available in this State concerning the child's care, protection, training and personal relationships; or

(3) all courts having jurisdiction under the statute decline to exercise it on the ground that a New Jersey court is a more appropriate forum; or

(4) no state would have jurisdiction under the statute.

Temporary orders and arrangements

Under both the uniform law and New Jersey law, custodial arrangements during deployment, either by order or agreement, are intended to be temporary. However, the language used to convey this concept is expressed quite differently.

N.J.S. 9:2-12.1 (f) simply provides that upon the service member's return from deployment or service-related treatment, the child custody or parenting time order in effect on the day immediately preceding the service member's departure for that deployment or treatment shall be resumed. This section also provides that upon the return of the deployed service member, the custody order shall not be subject to modification for 90 days following the day the deployment (or treatment) ended although this provision does not preclude any application to preserve the "health, safety, and welfare of the child."

In contrast, the uniform law contains multiple and separate sections devoted to each type of custodial arrangement and the method by which the temporary nature must be terminated. The sections are cumbersome and confusing.

For example, Section 201 states that parents may enter into a "temporary agreement under this article granting custodial responsibility during deployment." Section 202 states that any agreement entered into under this article is "temporary and terminates pursuant to article 4 after the deploying parent returns from deployment, unless the agreement has been terminated before that time by court order or modification . . ." At the same time, section 401 provides that upon return from deployment, a temporary agreement granting custodial responsibility "may be terminated by an agreement to terminate signed by the deploying parent and the other parent." Similarly confusing provisions address the temporary nature of grants of custodial authority by court order.⁴

Section 403 provides for the issuance of temporary interim court orders that grant the deploying parent reasonable contact with the child unless it is contrary to the best interest of the child for the time period after the deploying parent returns from deployment until a temporary agreement or order for custodial responsibility established under prior articles is terminated. And finally, section 404 provides for an automatic termination of a temporary order for custodial responsibility if an agreement between the parties to terminate the temporary order has not been filed.

⁴ Section 308 provides that a grant of authority by court order under article 3 is "temporary and terminates under article 4 after the return from deployment of the deploying parent, unless the grant has been terminated before that time by court order." But section 309 also provides that an order granting custodial responsibility under this article must "(1) designate the order as temporary." Similarly, section 402 provides that upon return from deployment, the deploying parent and the other parent may file with the court an agreement to terminate a temporary order for custodial responsibility issued under article 3. After an agreement has been filed, the court shall issue an order terminating the temporary order effective on the date specified in the agreement . . ."

In short, Staff believes that New Jersey's approach of simply stating that upon the service member's return from deployment, the child custody or parenting arrangement in effect before deployment shall be resumed is far preferable.

Creation of legal entitlement

Both the uniform law and New Jersey statute provide, in essence, that a custodial arrangement or parenting time does not create a continuing right to parenting authority. However, once again, the language used differs between the two sets of provisions.

N.J.S. 9:2-12.1 (d) (2) provides that a court may modify any judgment or order concerning child custody or parenting time, or issue a new order that changes the existing child custody arrangement during the deployment, to give parenting time for a family member of the service member who has a close and substantial relationship with the child. However, the statute also provides that this parenting time shall not create a legal entitlement or standing to assert any other right to parenting time with the child.

Similarly, the uniform law provides in section 202 that an agreement under this article 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. Section 308, pertaining to temporary custody orders, also states that a grant of authority under this article does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom it is granted.

CONCLUSION

New Jersey's recently enacted P.L. 2013, c. 7, addresses all of the concerns raised in the UDPCVA except issues that require rulemaking authority (which under New Jersey law are dealt with by court rule and not statute.) The New Jersey statutes provide a straightforward mechanism for achieving these goals consistent with New Jersey practice. Thus, adoption of the UDPCVA is not necessary. Even if adoption of a uniform law would foster greater consistency among states and more uniform language, the UDPCVA language would not enhance current New Jersey law. Finally, recommending further changes to a New Jersey law so recently enacted is not appropriate at this time. For these reasons, Staff does not believe that the Commission should recommend adoption by the New Jersey legislature of the UDPCVA.