

Domestic Delegation: The Uniform Deployed Parents Custody and Visitation Act

by Adam Astley and Angela Dunne

Authors' note: We collectively grew up on military bases in Texas, Germany, California, Arkansas, Nebraska, Portugal, and England. From the time we were born to the time we reached high school, we had eight moves between the two of us. Finally we were both transplanted in Bellevue, where our fathers retired from the United States Air Force after a final station assignment at Offutt Air Force Base. This allowed us the privilege of growing up carrying the official title of "military brats" and that, coupled with us being in the trenches as divorce lawyers for more than a decade, we believe uniquely qualifies us to write about the "How To's" of the newly-enacted Uniform Deployed Parents Custody and Visitation Act.

The Need for the Act

The Uniform Deployed Parents Custody and Visitation Act (UDPCVA) (hereinafter "the Act") seeks to resolve the unique child custody issues presented when a parent is tem-

porarily deployed under military orders and when the orders do not permit family members to accompany them. These military deployments occur frequently, and the military units based in Nebraska are no exception. For example, personnel from Offutt Air Force Base's 55th Wing have been continuously deployed in the Middle East on a rotating basis since the beginning of Operation Desert Storm in 1991.

The Act seeks to ensure that parents who serve their country are not penalized for their service, while providing adequate weight to the interests of the other parent and the child. Prior to the enactment of the Act, judges were left to solve difficult and time-sensitive custody disputes without well-established procedures and principles to govern their decisions.

History of Development

The Uniform Law Commission drafted the Act for adoption by state legislatures in 2012. The Commission is a non-profit group that seeks to provide states with non-partisan, well-drafted legislation to bring clarity and stability to critical

Adam Astley



Adam Astley is a partner with the firm of Slowiaczek, Albers & Astley in Omaha. The firm devotes substantially all of its practice to family law. Adam has conducted original research on the practical affect of Nebraska's Child Support Guidelines on families of different economic backgrounds and is a permanent member of the Nebraska Supreme Court's Technology Committee. He is

a 2011 graduate of the NSBA Leadership Academy. He joined his current partners in 2004 after graduating *magna cum laude* from Creighton University School of Law.

Angela Dunne



Angela Dunne is the managing partner of Koenig | Dunne Divorce Law. She is also a Fellow of the American Academy of Matrimonial Lawyers and is a co-author of *Divorce in Nebraska: The Legal Process, Your Rights and What to Expect*. You can find more information about Angela's practice, a link to the blog, and contact her at www.nebraskadivorce.com.

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areas of state-based statutory law. Most attorneys will recognize the Commission as the creator of staples such as the Uniform Commercial Code, the Uniform Probate Code, and for family law practitioners, both the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Uniform Interstate Family Support Act (UIFSA). The drafting committee was comprised of judges, law professors, practicing attorneys and representatives of the military. In 2013, the American Bar Association approved the proposed Act for consideration by the 50 states.

In 2013, Nebraska began considering adoption of the Act. Senator Sue Crawford from Bellevue recognized the need for legislation such as the Act to address the needs of a military community. She formed a group of practicing Nebraska divorce attorneys, military members, legislators, and liaisons to determine whether the Act was a good fit for our military families. Both authors of this article served on the committee. The committee met several times with Senator Crawford in 2014 to discuss several considerations, including integrating other Nebraska statutes and case law into the Act, whether the Act would modify the existing requirements that the Court consider the best interests of the child, the constitutionality of the Act, and whether the Act unnecessarily usurped the independent discretion of the Court. Senator Crawford's staff integrated several amendments into the uniform version of the Act to address the concerns raised by committee members.

On February 26, 2015, Senator Crawford introduced a bill to adopt the Act, and the bill was passed by the Legislature, approved by the Governor, and enacted into law. The Act amended Sections 43-2922 and 43-2929, Revised Statutes Cumulative Supplement, 2014, and outright repealed Section 43-2929.01.

What It Means

Under the Act, a deploying parent may delegate all or part of his or her custodial responsibility to an adult non-parent for the period of the deployment. This delegation is accomplished in one of three ways: (1) by mutual agreement between the parties, in which case the agreement is enforceable by its terms, and no court action is required; (2) by executing a power of attorney delegating custodial responsibility if no other parent possesses custodial responsibility; or (3) by obtaining a temporary court order prior to deployment.

Regardless of the method selected, any delegation of custodial responsibility will terminate after the deploying parent returns from deployment. Further, the grant does not create an independent continuing right as to caretaking authority, decision-making authority, or limited contact in an individual to whom it is granted.

Under the Act, a court may grant caretaking authority to a

non-parent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship. "Close and substantial relationship" means a relationship in which a significant bond exists between the child and the non-parent. "Custodial responsibility" includes all powers and duties relating to caretaking authority and decision-making authority for a child. "Family member" means a sibling, aunt, uncle, cousin, stepparent or grandparent or an individual recognized to be in a familial relationship with a child under Nebraska law.

Unless a grant of caretaking authority to a non-parent is agreed to by the non-deploying parent, the Court cannot delegate parenting time greater than (1) the amount of time granted to the deploying parent under a permanent custody order, but the court may add unusual travel time necessary to transport the child; or (2) in the absence of a permanent custody order that is currently in effect, the amount of time that the deploying parent habitually cared for the child before being notified of deployment, but the court may add unusual travel time necessary to transport the child.

Two relevant examples where a Court might grant caretaking authority would include a stepparent or grandparents who are deeply involved in the child's life. In that case, particularly if there is significant conflict between the deploying and non-deploying parent, it is easy to see how the child would benefit from continued contact with these relatives during the deployment. Further, it is plausible that the impact of the deployment on the child would be increased if the child was prohibited from contacting the deployed parent or any member of the deployed parent's family for a period of several months to one year.

Our primary concern with the original version of the Act was that it lacked specific criteria of required evidence to show what demonstrates a "close and substantial relationship" and it lacked critical consideration of the best interests of the child. The Nebraska version of the Act therefore includes a unique set of factors the court must consider in evaluation of any delegation of custodial responsibility. That list of criteria includes:

1. The emotional, physical, and developmental needs of the minor child;
2. The minor child's opinion or preference;
3. The level of involvement and the extent of pre-deployment parenting responsibility exercised by the non-parent;
4. The quality of the relationship between the minor child and the non-parent;
5. The strength of the minor child's ties to the non-parent;
6. The extent to which the delegation would interfere or support the minor child's existing school, sports, and extra-curricular activities;

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7. The age, maturity, and living conditions of the non-parent; and
8. The likelihood that allowing the delegation would increase or decrease the hostilities between the parties involved.

We were concerned that, without this type of framework, there could be a “free-for-all” in terms of the types of people for whom delegation would be sought and the reasons given for the delegation. We intended this list of factors to help Courts filter the “desirable” cases, where delegation made sense, from the frivolous ones.

Constitutional Considerations

In addition to our desire to provide guidance to District Courts, we were also concerned that the delegation of parenting functions might violate the U.S. Supreme Court’s ruling in *Troxel v. Granville*, 530 U.S. 57 (2000). *Troxel* struck down a broadly-worded Washington statute that allowed for any third party to petition a Court for child visitation rights over the objection of the biological parent. But *Troxel* made waves because it involved a statute being invoked by a grandparent whose child (the biological father) was deceased, and who sought visitation with her granddaughter. In a sense, *Troxel* invalidated an undesirable statute that was being invoked for what most lawyers would consider to be a legitimate purpose.

The Uniform Law Commission’s Drafting Committee considered the *Troxel* decision in detail and concluded that the Act is constitutional. The *Troxel* decision relied heavily on the principle that a fit parent’s decisions regarding their child’s best interest must be accorded significant weight in a child custody determination. Because only one biological parent was living in *Troxel*, there was no disagreement *between biological parents* concerning the best interests of the child. The surviving parent’s determination was therefore entitled to substantial consideration by the Court, and that consideration was not provided for in the Washington statute. Unlike the facts in *Troxel*, contested parental delegation cases brought under the Act would involve the competing determinations between two biological parents as to the best interests of their child. Since both biological parents have the same fundamental constitutional rights to make child-rearing decisions, a Court acts appropriately when its actions serve only to break a tie.

Secondly, the Drafting Committee felt that parental delegation cases under the Act were distinguishable from the *Troxel* opinion because only a portion of the parenting time or authority would be delegated, the delegation would be temporary, and the full rights of the non-deploying parent (as determined by their custody order) would be left intact. As such, the Committee felt that, when used properly, the Act would only permit delegation of the rights allocated to the deploying parent, which would be analogous to a parent exercising his or her

right to leave the child with a third party when he or she goes on vacation. Such a practice might not be always desirable, but it does not rise to the level of a constitutional violation.

Thirdly, the Drafting Committee found that courts in many states have upheld similar delegations of parenting time and authority when the delegation was incident to a military deployment and temporary in nature. Some of those opinions are *In re Trotter*, 829 N.W.2d 191 (Iowa Ct. App. 2013); *Faucett v. Vasquez*, 984 A.2d 460 (N.J. Super. Ct. App. Div. 2009); *McQuinn v. McQuinn*, 866 So.2d 570 (Ala. Civ. App. 2003); and *In re Marriage of DePalma*, 176 P.3d 829 (Colo. App. 2007). In each of these opinions, the courts construed these disputes not as “non-parent” or grandparent visitation cases, but rather, as disputes between two fit parents over how to handle one parent’s impending military deployment. Those courts found that because the delegation orders were temporary and did not infringe on the parenting time allocated to the non-deploying parent, they passed constitutional muster.

How the Act Works

First, a deploying parent is required to notify the other parent of a pending deployment no later than seven days after receiving notice of deployment. Then each parent must provide, in writing to the other parent, a plan for fulfilling that parent’s share of custodial responsibility during deployment as soon as reasonably possible. The parents may enter into a temporary agreement during deployment and such agreement must be in writing and signed by both parents and any non-parent to whom custodial responsibility is granted.

A temporary agreement must include:

1. The destination, duration and conditions of the deployment that is the basis for the agreement;
2. The allocation of caretaking authority among the deploying parent, the other parent, and the non-parent;
3. Details regarding any decision-making authority that accompanies the caretaking authority;
4. Details regarding any grant of limited contact to the non-parent;
5. A process for dispute resolution between the other parent and non-parent;
6. The frequency, duration, and means by which the deploying parent will have contact with the minor child;
7. Details regarding the contact between the deploying parent and child while the deploying parent is on leave;
8. Acknowledgement that any party’s child support obligation cannot be modified by the agreement and that changing the terms of the obligation during deployment requires court-ordered

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modification; and

9. Statement that the agreement will terminate after the deploying parent returns.

If the parents are unable to reach an agreement, the court has the authority to issue a temporary order granting custodial responsibility upon a motion filed by either parent. The court is required to conduct an expedited hearing and to consider the factors identified related to the best interests of the child. The court may grant part of the deploying parent's decision-making authority if the deploying parent is unable to exercise that authority. If doing so, the court must specify the decision-making powers granted, including decisions regarding the child's education, religious training, health care, extracurricular activities and travel.

A court order under the Act must contain the same provisions as an agreement between the parties, except that the court is instructed to provide for *liberal* communication between the deploying parent and the child, provide for *liberal* contact between the deploying parent and child during periods of leave unless contrary to the best interests of the child, and provide for reasonable contact between the deploying parent and 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.

At any time after the return from deployment, an agreement may be terminated by an agreement to terminate that is signed by both parties. The court may terminate the grant of limited contact upon a motion filed by the deploying parent. If no such agreement or court order is issued, by default, a temporary agreement granting custodial responsibility terminates 60 days after the deploying parent gives notice to the other parent that the deploying parent has returned.

Other Practical Considerations

First, the Act goes into effect in Nebraska on January 1, 2016. Nebraska's version of the Act contains a large number of incidental provisions, but the most notable are the following:


1. The Act requires the Court to give binding effect to any prior order which contemplates an allocation of custodial

responsibility in the event of a deployment unless the moving party can meet the burden found in our existing domestic relations laws for a modification of that Order.

2. The Act in effect creates a presumption that temporary orders incident to a deployment are temporary, and will expire automatically 60 days after the end of the deployment. In that sense, the Order has the "springing" effect in that it will be vacated and the prior custody order will be reinstated automatically. Without this provision, an Order that operates for an extended period of time and grants more parenting time to the non-deploying parent could create a presumption of sorts that it should remain in effect upon expiration of the deployment. The Act provides for the exact opposite—the presumption returns to the pre-deployment Order, and the party seeking to keep the Order in place bears the burden of proof that a change in circumstances has occurred since the last Order that would justify a new modification.

3. The Act tweaks the UCCJEA to prevent the child's home state from changing if the child is temporarily relocated and the relocation lasts for more than six months. Once adopted by a significant number of states, this provision should prevent a number of interstate custody disputes that might otherwise have been caused by the temporary relocation of children or parents during a deployment.

Conclusion

The Uniform Deployed Parents Custody and Visitation Act is an important piece of uniform legislation that will assist Nebraska practitioners and judges as they seek to stabilize transition periods for military families. By encouraging agreement between the parties, providing for expedited hearings, and establishing a framework for the Court to solve the problems that are unique to military deployments, we hope the Act will ease the process of deployments and strike a balance between the best interests of children rights of parents who serve our country. 

Editor's note: Philip Katz will be a speaker at the Military Law Section-sponsored CLE at the NSBA Annual Meeting on October 9th at 10 a.m. This CLE will provide a more in-depth presentation on the Act, with a focus on practice pointers related to the Act.