

May 30, 2017
House Judicial Committee
SB 1055 STATEMENT FROM MARK. E. SULLIVAN

I am a member of the N.C. State Bar's military committee, a position I have held since 1981 when I helped found the committee. I am also a past chair of the American Bar Association's Legal Assistance for Military Personnel Committee and the Military Committee of the ABA Family Law Section. After I retired from the Army Reserve as a JAG colonel, I wrote THE MILITARY DIVORCE HANDBOOK (ABA, 2nd Ed. 2011) and served for three years on the drafting committee of the Uniform Law Commission which prepared the Uniform Deployed Parents Custody and Visitation Act (UDPCVA). I also write the statute in North Carolina, N.C. Gen. Stat. 50-37A, which was the predecessor of the UDPCVA.

Delegation of Visitation Rights

The issue of delegated visitation is a very important one for military personnel and their children. Consider the servicemember who is deployed and unable to arrange visitation. If Major John Doe is sent some distance away from his residence on military orders, his children's contact with him is virtually terminated. This is especially true if his ex-wife, who has custody, refuses to allow their visitation with relatives, claiming that visitation belongs solely to the non-custodial parent and that the courts lack the power to grant visitation to non-parents.

The size of the problem was noted by Lieutenant Colonel Francine I. Swan, Legal Advisor to the Adjutant General, New Hampshire National Guard, in her 2004 comments to an inquiry by the American Bar Association's Working Group on Protecting the Rights of Service Members:

Child custody/visitation: This is the single greatest area of concern -- when the servicemember 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.

Should the custodial parent have a veto power over the children's contact with other members of the SM's family? Or should the court consider whether MAJ Doe's children ought to be able to visit – upon court order and with a best-interest finding – with those relatives of his who have a significant connection with them, so that they can step into his shoes and see the children during his military-related absence? When there is a new spouse or there are grandparents who are close to the children, it makes sense to allow the judge (not the former spouse, as is the case without such a law) to let them exercise the visitation rights that is unavailable to the absent military parent due to his or her military assignment.

In Louisiana, the remedy for loss of visitation rights came from the legislature. La.R.S. 9:348 deals with the loss of visitation due to military service and the issue of compensatory visitation. When servicemember on active duty is unable to exercise court-ordered visitation rights due to military duties, the statute says that he may request a period of compensatory visitation if this is in the child's best interest. It is intended to be a day-for-day pay-back of the

missed visitation. This is to be negotiated with the custodial parent and if the parties cannot agree, then either may petition the court for a decision.

Texas has enacted a statute which provides that, if a visiting parent is in the military (federal service or National Guard) or is reasonably expected to be, then the court shall permit that parent to designate a person to exercise visitation while the military parent is outside the United States. The visitation terms resume after the absent parent returns to the U.S. Texas Family Code § 153.3161 Sub-chapter F.

There is authority in other states to support the award of visitation rights to relatives in lieu of the visitation granted to a parent who is absent on military service. In *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 795 N.E. 2d 392 (2003), an Illinois appellate court reversed the trial court, which had dismissed a petition from a deployed SM-father to allow substitute visitation. There the servicemember-father petitioned the court to allow his family to have continued visitation with his son while he was on active military duty. His military service was expected to last for a one- to two-year period. He stated that it would be in the child's best interest to continue his visitation schedule with the family and that the mother, his former wife, would prevent the son from such visitation. The appellate court held that under common law Illinois courts could award visitation to a parent's family members when special circumstances were shown. Distinguishing the case from those involving grandparent visitation, the appeals court remanded for a hearing on whether it would be in the child's best interest to modify the visitation schedule as requested by the father.

In the Alabama case of *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. App. 2003), the same result was reached by a different approach. The decision allows the court-ordered delegation of visitation rights with family members with whom the child had a close connection. The trial judge ordered that the SM-father could permit his children to visit with any member of his extended family while he was absent on active duty in the Navy, and the court barred the mother's right to veto the father's choices as to whom his children could visit "without any particular reason."

In 2006, the Idaho Supreme Court decided *Webb v. Webb*, 148 P. 3d 1267 (Ida. 2006), approving the decision of a trial judge to allow the delegation of visitation rights through a power of attorney to the child's grandparents while the father was deployed. The case involved a statute which allows military personnel to grant custody and visitation rights through a power of attorney.

In 2007, Colorado joined the states which are recognizing delegated visitation rights through case law. In *In re Marriage of DePalma*, 176 P.3d 829, (Colo. Ct. App., July 26,2007) the Court of Appeals held that the court had the power to delegate visitation rights to the father's new wife while he was on military deployment, by having the children in his home with the wife during his parenting time.

An example of a delegated visitation statute is N.C. Gen. Stat. 50-13.7A, which was superseded several years ago by the UDPCVA (also containing delegated visitation terms) which allowed the judicial delegation of visitation rights:

- (d) *Visitation. – If the parent with visitation rights receives military temporary duty, deployment, or mobilization orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise visitation rights, the court may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the minor child for the duration of the parent's absence, if delegating visitation rights is in the child's best interest.*

The same terms were enacted by Mississippi in its own military custody statute. This provision is a common one for military custody legislation and ought to be favorably considered for Oregon.

I will be happy to supplement my statement so as to clarify any points in it.