A legal note from Marshal Willick on the new law governing custody and visitation cases involving military members, and a discussion of the purpose of these newsletters.

I. BACKGROUND: MILITARY DIVORCE RATES AND CONGRESSIONAL POSTURING

The last decade has seen a rate of deployments, particularly among Reservists, that is unprecedented in modern history. As might be expected, the personal strain of such deployments has resulted in a large increase in the strain on military families. All services have seen a spike in their rate of divorce, up 40% since 2000, which necessarily increases the number of custody and visitation cases involving military members.

As of last December, the Air Force Times reported that the military divorce rate was "leveling off" at 3.6 per 100 – about 1 in 27 military marriages ended just in 2010. The data had both predictable components – the enlisted divorce rate is more than double that of officers, and the Army and Marines rate is higher than that of the Air Force – and some surprises, including that women service members divorce their spouses at more than double the rate of their male counterparts.

By an overwhelming majority, the usual arrangement for single parents in the armed forces is secondary custody (access or visitation rights), not primary physical custody. According to Defense Department regulations, first-term single enlisted parents cannot ***have*** custody of a minor child. Counsel versed in this area are therefore attuned to family law matters involving both custody and visitation relating to deployments.

Mark Sullivan of North Carolina (my successor as Chair of the ABA Family Law Military Committee; mark.sullivan@ncfamilylaw.com) has tirelessly worked to improve both education and substantive military-related family law; he designed the model State legislation now in effect in over 40 States that gives protections to military members involved with the family law system, and was the kernel of the proposed model uniform act now working its way through the Uniform Law Commissioners.

In the meantime, Rep. Mike Turner of Ohio has figured that he can score political points by trying to engraft specific child custody laws for military members onto the Servicemembers Civil Relief Act of 2003 (SCRA), despite the fact that the ABA, the AAML, and a host of other organizations that have looked at the matter, have protested that federalization of family law is a rotten idea for many reasons, including that it is unnecessary, invades traditional State law, and if passed would harm the people it purportedly was proposed to assist.

Naturally, these facts have had no impact on Congress. But they have in part spurred the remaining States, Nevada among them, to look at the subject.

II. THE NEVADA MILITARY CUSTODY AND VISITATION STATUTE

Nevada's AB 313 was introduced and passed in 2011, and goes into effect October 1, 2011. It

tracks, pretty exactly, the model legislation. As enacted in Nevada, the law modifies NRS 125.480 (dealing with child custody determinations), 125C.010 (dealing with visitation rights); and 125.510 (dealing with modification of orders). It applies to any unaccompanied deployment, including to temporary duty stations, but does not include annual Reservist or National Guard training.

A. PRESERVING RIGHTS OF MILITARY MEMBERS TO CUSTODY OR VISITATION

A court may not enter a "final order" altering either custody ***or*** visitation rights of a deployed member until 90 days after the member returns from deployment, unless the matter had already been litigated before the deployment, and all that remained was entry of the order.

The deployment of the member "must not, by itself," constitute a "substantial change of circumstances" to warrant entry of a permanent order modifying a custody or visitation order. A court ***may*** enter a "temporary order" to "reasonably accommodate" the deployment of the member.

However, if such a temporary order is entered, it must permit custody or visitation during leave if the prior order had provided for such (unless not in the child's best interest), and the court must consider whether and how to provide continuing contact between the child and the member during the deployment.

Any such temporary order "expires by operation of law" when the member's deployment ends, automatically restoring whatever custody or visitation order had been in effect prior to the deployment – unless something happens that presents an alleged "immediate danger of irreparable harm."

B. ACCOMMODATING MEMBERS' APPEARANCES

If a member receiving orders for deployment might not be able to participate in future hearings, a court on a showing of good cause must hold an expedited hearing, permit testimony and evidence from the member by affidavit or electronic means (phone, e-mail, or videoconferencing), or both.

Given the push to permitting electronic appearances in all cases, this portion of the legislation should not be particularly difficult to implement.

C. DELEGATION OF VISITATION RIGHTS TO OTHERS

As noted above, most military members do not have primary or joint custody. For those members, this could be the most important provision of the new legislation.

A court may order the visitation rights of the member delegated to a "family member" (a term curiously undefined in the statute) who has "a substantial relationship with the child" (also undefined) ***if*** the court finds that it would be in the best interest of the child to do so.

The statute cross-references as factors to be considered the exiting factors set out in NRS 125C.050 as to when a court should order visitation between a minor child and various relatives. The order terminates when the temporary order ends, or upon a showing that the delegated visitation is no longer in the best interest of the child.

D. MISCELLANEOUS PROVISIONS

The military member has the burden of giving a copy of any deployment orders to the other parent. If the child happens to not be in Nevada when a deployment arises, the child's absence is deemed a "temporary absence" under the UCCJEA, and the deployment may not be used as the basis for an "inconvenient forum" claim.

Finally, and wisely, the provisions of the new statute do not apply to custody or visitation orders made in a temporary or extended order for protection against domestic violence.

III. BOTTOM LINE TO THE NEW STATUTE

Those of us who have been working in the field of military-related family law have been debating the proper contours of such custody and visitation laws for many years. The Nevada statute is a "middle-of-the-road" statute that preserves the priority of the best interest of the child while providing protections and accommodations to military members as possible and necessary to preserve their relationships with their minor children.

It strikes a fair balance among the competing interests, and should do some good for military members, and their children, while remaining cognizant of the rights and responsibilities of the non-military parents. Hopefully, it – and measures like it – will suffice to prevent the fat-fingered feds from mucking up the law of child custody by way of misguided federal enactments.

IV. AN ASIDE ABOUT VAIN PARANOIA, NASTINESS, AND PURPOSE

When I walked into a motion hearing the other day, my usually-considered-fairly-respectable opponent leaped out of the chute with a loud, venomous tirade including the following:

> Maybe that is something Mr. Willick can write about in his next newsletter. Ok. Instead of criticizing everybody else in the world about what goes on in the court system maybe we can have some criticism about what happens within his office. He has filed a Reply late, I don't care whether you read it, as frivolous as the motion is, but again it is late and it probably should be stricken.

After observing that his comments were irrelevant, uncalled-for, and unnecessarily nasty, I addressed the merits of the motion hearing.

It was not until I walked back from court that I figured out that my opponent's rant was apparently

a response to legal note No. 41, "Small progress, and the triumph of anarchy at family court," posted at http://www.willicklawgroup.com/newsletters, which addressed the mindless waste of resources by counsel who myopically fixate on affidavit form as a means of sock-puppet distraction from the merits of legal issues. Apparently, being an attorney who did such, he figured it was about him.

Carly Simon was onto something in 1972. Although "You're so vain, you probably think this legal note is about you" lacks much lyrical power, in fact that note had nothing to do with that opponent, whose existence had not even crossed my mind while I wrote it. However, the harangue I endured at court gives rise to a good opportunity to expound a bit on the nature of these newsletters.

This series is not a gossip column. It is not designed to "target" or to embarrass anyone in the legal system, and certainly is not designed to project the pretense that this law office never makes mistakes (on that last point, of ***course*** we do – it is endemic to all human activities). It would take pretty unbridled arrogance for any lawyer, or judge, to claim to be always free from error; that is why we have appeals. See http://www.willicklawgroup.com/appeals.

But these notes are not about "mistakes." They have several purposes, including analysis and education, but a primary purpose is attempting to foster a dialogue from which improvements in the substance, policy, and procedures of the court system might arise, often starting with criticizing misguided policies or Kafka-esque absurdities that cannot help but create error and injustice.

The topics addressed in these newsletters are rarely based on one person, or one incident or event, unless specifically identified. That is why names of individual lawyers, or judges, are unnecessary to discussion of the policies at issue. The things discussed here usually are persistent – sometimes endemic – problems requiring improvement, either that I've noticed or that others have identified and brought to my attention, being unsure how else to address them.

It should go without saying that anyone interested can put pen to paper and voice an independent opinion on anything desired. And anyone who wishes to can simply disagree with the mechanisms I suggest for solving problems; multiple viewpoints should yield superior solutions. And, of course, anyone who wishes to not see these notes can easily opt out – the instructions for doing so are at the bottom of every newsletter.

But the only reason anyone should feel ***angry*** about the discussion of problems and their solution is if he realizes that he has been caught doing something he should not have been doing. If a reader identifies himself as doing one of the things criticized as being economically, legally, or ethically indefensible, maybe the correct response would be, not a rabid attack on the messenger, but some introspection and perhaps a change in behavior. Just a thought.

In the larger picture, it's easy to sit back and criticize, or decide to be offended, rather than taking some action intended to improve the practice. But taking the time and making the effort to actually ***do*** something is the cost of being a net positive, rather than a negative, actor in our collective world.

VI. QUOTES OF THE ISSUE

"Criticism is something we can avoid easily by saying nothing, doing nothing, and being nothing."
– Aristotle

"Provided a man is not mad, he can be cured of every folly but vanity."
– Jean Jacques Rousseau, *Emile; or, On Education*, IV.

"Lead, follow, or get out of the way."
– Thomas Paine

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.