

SILENT PARTNER

Custody and Single-Parent Enlistment

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association's Family Law Section. Please send any comments, corrections and suggestions regarding this pamphlet to the address at the end of this Silent Partner.*

1. Q. My new client is Jane Doe. She is single, has two children, and was never married to the father, Louie Jones. Jane was referred by a local recruiter and she wants to enlist. She was told by someone that she has to give away her kids to get into the armed forces, and her plan is to give them to her mom in San Diego. What do I need to know?

A. You can't understand custody and single-parent enlistment without knowing the regulations. Here they are –

- Army – AR (Army Regulation) 601-210;
- Navy – COMNAVCRUITCOMINST (Navy Recruiting Manual – Enlisted) 1130.8F;
- Air Force – AFRS (Air Force Recruiting Service) Instruction 36-2001;
- Marine Corps – Marine Corps Order P 1100.72C, Chapter 3, Section 2; and
- Coast Guard – COMDTINST (Commandant Instruction) M1100.2E.

The legal authority which applies throughout the Department of Defense is DoD (Department of Defense) Instruction 1304.26.

2. Q. Where can I find those regulations?

A. Website locations, or URL's, are constantly changing. The following points may help you:

>The location of the Army regulations is www.usapa.army.mil/ and you can find any regulation or publication there which the Army publishes.

>Marine Corps regulations can be found online at: www.marines.mil/directiv.nsf/web+orders
The website lists Orders and Directives, and you'll find a separate listing for "P" directives (i.e., Publications that have a P in front of the order number and are generally much longer orders.) You can also go to the USMC home page, where the bar across the top of the website lists "Publications." That will lead to a drop-down box for "Orders and Directives."

Since the Marines are part of the Navy, you can also find Marine Corps orders at the same place you would find Instructions and Directives from the Secretary of the Navy:
<http://neds.daps.dla.mil/default.aspx>.

The Air Force instruction can be found at: <http://www.e-publishing.af.mil/pubfiles/afrs/36/afrsi36-2001/afrsi36-2001.pdf>

>All publications of the U.S. Coast Guard may be found at:

www.uscg.mil/ccs/cit/cim/directives/welcome.htm.

USCG directives are at: www.uscg.mil/ccs/cit/cim/directives/ci.html,

>In general, if you need a copy of a regulation, you can usually obtain it from the Internet by typing into a search engine (e.g., Google, Yahoo) the number of the regulation and the name of the branch of service (such as – *Army 601-210*). You can also get a copy from an armed forces recruiter.

2. Q. Before we go any further, tell me what's *the bottom line* here. How can I best help Jane to get into the armed services?

A. The bottom line is that *single parents with custody can't enlist*. DoD Instruction 1304.26 states the "The Military Services may not enlist ...unmarried individuals with custody of any dependents under the age of 18." The Navy regulation states "Single applicants who have custody of another person are ineligible for enlistment. This is a non-waiverable requirement, so there is no such thing as a 'custody waiver.'" In the words of a Marine Corps legal assistance attorney, "Applicants with sole custody are not eligible for enlistment in the Marine Corps and there are no waiver provisions."

3. Q. Why is that?

A. The reason is that the armed forces view single-parent custody as inconsistent with the training and mobilization needs of the military at the initial enlistment stage. The Army regulation, for example, states –

Persons who are sole parents would be placed in positions, as any other soldier, where they are required at time to work long or unusual hours, to be available for worldwide assignment, and to be prepared for mobilization, all of which would create conflicting duties between children and military requirements for the sole parent.

So if you want to help Jane to enter the armed services, get a court order for her which transfers custody of the kids to someone else.

4. Q. Wait a second. This sounds *way too complicated*. There isn't even a custody order in place right now between Jane and Louie! Can't I do this with a simple power of attorney?

A. No. A power of attorney will not suffice. You must have an order transferring custody. When you read the applicable regulation, you will learn that each of the armed services demands a court order for custody. The Coast Guard regulation specifically states: "A Power of Attorney is not the equivalent of a court order."

5. Q. But there is no custody order now. We'll have to file a new lawsuit!

A. Yes, that's right.

6. Q. But surely an order granting custody to the grandmother in San Diego is okay?

A. If you comply fully with state law requirements, then state law will probably let a judge transfer custody of the children to the grandmother if the father doesn't appear and contest, or if he consents to the transfer. The requirements of state law would include –

- a) you have located dad and properly served him with the initial complaint and summons;
- b) you also gave him reasonable advance notice of the hearing; and
- c) you filed suit in compliance with the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), which requires that (ordinarily) the children must have lived in your state for at least the last six months preceding the filing. In other words, you clearly have *custody jurisdiction*.

The usual route you would take to move forward in this case is to *obtain the father's consent*.

7. Q. Why is dad's consent necessary?

A. While this is a question of state law, the general rule is that he cannot be excluded from custody, absent his consent, unless he is unfit by reason of abandonment, abuse, neglect or other conduct inconsistent with parental rights and responsibilities.

8. Q. Abandonment? Abuse or neglect? Whoa! How am I supposed to prove those charges?

A. Look to state law and cases for elements of proof in this area. You will usually find the answers under "termination of parental rights" or a similar heading.

9. Q. What if dad is *not unfit* but he agrees to give custody to the maternal grandmother?

A. Then you should file for custody, serve the father and grandmother, and prepare a consent order or "agreed order" for the transfer of custody to the grandmother. Make sure you have secured dad's *unconditional consent*. Consider getting an appearance before the judge or a notarized statement, if appropriate under state law.

10. Q. Let's talk about writing up the court order. Is it all right to phrase the order as granting "temporary custody" to the grandmother?

A. *Absolutely not*. These words amount to a *red flag*! The order needs to be for full, final, permanent custody to the other party. If your state doesn't use these words, then just "custody" or "sole custody" will do. Don't fool around with "joint custody" or "shared custody." These will only cause more complications and more work!

11. Q. What if dad isn't unfit and won't consent to a transfer of custody?

A. Then you should consider transferring custody to him.

12. Q. But dad – Louie Jones – is really a bum! He drinks, he smokes heavily and my client tells me that he has a gun rack in his pick-up truck. Not only that, but I understand that he is also "seeing another lady" these days. My client is really worried about giving custody to him!

A. So? Is he unfit? Can you prove it?

13. Q. But dad will probably demand child support from my client!

A. So?

14. Q. But my client is worried that he won't return the kids to her when she finishes her first term of enlistment. What can I tell her?

A. The advice you should give her is that custody doesn't revert to her when her initial enlistment ends. She must give away custody permanently to enter the armed services. The transfer of custody is not just a short-term dodge.

15. Q. You mean that Jane can't just give away custody temporarily and then regain custody later on?

A. That's right. The transfer of custody must be permanent. In fact, the Army's discharge regulation, "Active Duty Enlisted Separations," AR 635-200, has a special provision covering discharges based on misrepresentation of intent with regard to legal custody of children. With such a discharge, Jane will lose all the benefits she was hoping to gain by serving in the armed forces, and all her work will have been for nothing.

16. Q. What if mom and dad share joint custody – will that disqualify her?

A. Again, *read the regulations*. Air Force answers may not be okay with the Coast Guard. Some armed services rules are quite detailed in this area, and some mention nothing about shared or joint custody. The Army regulation states –

When a joint custody agreement or order requires joint physical custody by an applicant without a spouse, the applicant is not eligible for enlistment. Visitation or joint decision rights with respect to education, medical procedures, or other parental decisions, other than actual physical custody are not considered as requiring joint physical custody. However, if a mandatory period of residence is required, then joint physical custody exists and the applicant is not eligible to enlist. Mandatory physical custody does not include negotiable periods of visitation or voluntary agreement to have custody for short periods that are negotiable and compatible with military service.

AR 601-210, para. 2-10 c.(3)(a)

17. Q. Can I state in the order that it's being granted "because mom is joining the Navy"?

A. That is definitely a *bad idea*. While you may need to explain to the judge, or state in the order's findings of fact, why the custody provisions in the order are necessary and mom is relinquishing custody of the children, the military may see this as an attempt by the mother to give away custody temporarily, which is not permitted. Jane needs to give away custody permanently, fully and finally. Period. And at least one service – the Coast Guard – will disqualify mom if she has a custody order with this kind of phrasing. The USCG regulation specifically states –

Prospects/applicants who relinquish legal custody of another individual solely for gaining enlistment are ineligible for enlistment in the Coast Guard or Coast

Guard Reserve. This includes any applicant whose court documentation is dated on or after the date of initial contact with a recruiter.

COMDTINST M1100.2E, para. 2.B.1.e.1.b.

For another example, look at the Air Force instruction –

Transferring custody of family members for the purpose of entering the Air Force is prohibited and renders the enlisted programs applicant permanently disqualified.

AFRSI 36-2001, para. 4.23.1.

Even a custody order entered for permissible reasons may be insufficient if it's not granted early enough. The Marine Corps Order says that –

...unmarried applicants who have relinquished permanent legal and physical custody of dependent children by court order one year or more prior to enlistment are eligible for a CG Region waiver.

There can be no waiver if the order is entered less than a year before enlistment, because the basic Marine Corps policy, as stated above, is that applicants with sole custody are not eligible for enlistment in the Marine Corps and there are no waiver provisions.

When in doubt – and it's *easy to be in doubt in this area* – you should check with the recruiting folks in the branch of service involved.

18. Q. What can *they* tell me?

A. They're usually aware of the rules and requirements, as well as the exceptions and waivers available. Regulations are often revised or updated, and this could affect your client. For example, five months after this SILENT PARTNER was first posted on the internet, the author received an e-mail from Staff Sergeant William S. Peery, the commander for the Pittsburgh recruiting station, who noted the following update:

Currently the US Army Reserve Command is allowing single parents to enlist. However they have to follow Army Regulations and provide a family care plan with power of attorney and it must be pre-approved by the gaining reserve unit prior to being able to enlist. The unit must provide the recruiter with a memo stating such.

The date of the Army Reserve regulation change was May 14, 2007.

19. Q. Are there any other complications or issues I need to know about?

A. There are lots of complex issues because each service regulation is somewhat different. The Navy regulation, for example, treats male applicants who are unmarried differently than unmarried female applicants. The Army has an adequate explanation of joint custody; there is no such explanation in the Coast Guard regulation. The Air Force and the Coast Guard have charts in their regulations showing who is eligible for initial enlistment and who is not. When you handle one of these cases, the first order of business should be getting a copy of the

regulation so that you can help your client get into compliance with it, or else tell her that she cannot enlist.

20. Q. Is a guardianship okay?

A. Probably so, if it's the same thing as an order of custody under state law. The Navy regulation states that "A court order giving guardianship of the child to a third party generally suffices, but this varies from state to state and is also dependent on the exact wording of the order. In some states, "guardianship" is equivalent to "custody," but this is not the case elsewhere. In North Carolina, for example, a guardianship proceeding is based on both parents being deceased or mentally incompetent.

21. Q. This is all so confusing! How can I find definitive answers so that I can handle this case competently?

A. Often there is a recruiting office or command SJA (staff judge advocate) who can help. He or she cannot give you advice, since the SJA represents the command and not the individual. But you may be able to get a message to him or her through the recruited, who can submit the issue or problem and then ask for communication directly back to you. This also serves to educate recruiters and ensure that attorneys have all the facts before giving out advice. If something is unclear, sometimes the SJA can help answer the problem.

22. Is there a clear flow chart which shows my client and me what to do?

A. Yes – see the chart at the end of this infoletter.

[rev.1/24/08]

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[NOTE: Single-Parent Enlistment Flow Chart follows on next page]

SINGLE-PARENT ENLISTMENT FLOW CHART

