LAW REVIEW 14077[1]

July 2014

Judge Orders Navy Sailor on Sub in Pacific to Appear at Court Hearing in Michigan—Can She Do that?

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

4.3—SCRA right to a continuance and protection against default judgment
5.0—Military service and family obligations

Several ROA members have brought to my attention news media reports about the sad case of Matthew Hindes (a U.S. Navy petty officer serving on a submarine in the Pacific), his six-year-old daughter Kaylee, and his ex-wife, Angela Hindes. Judge Margaret Noe[3] ordered Petty Officer Hindes to appear in person in court in Michigan on Monday, June 23, 2014. Judge Noe threatened Hindes with arrest if he did not appear, but he is currently serving on a submarine in the Pacific and was unable to appear.

Kaylee was born in 2008, and her parents divorced when she was an infant. Kaylee's mother (Hindes' ex-wife) was awarded primary custody of Kaylee. In 2010, when the child was two, Child Protective Services removed the child from the custody of her mother, and custody was eventually awarded to the father, Hindes, with visitation rights for the mother.

Hindes has remarried, and he serves on the USS MICHIGAN (SSGN-727), a submarine that is home-ported in Bangor, Washington. Hindes, his new wife, and the child were living in an apartment in Washington when Hindes deployed with the submarine to the Pacific. Under the Uniform Child Custody, Jurisdiction and Enforcement Act (UCCJEA)[4], one cannot oust a state court of jurisdiction over issues concerning custody, support, and welfare of a child by physically removing the child from the state. Thus, the 39th Circuit Court in Michigan (Judge Noe) retains jurisdiction over this case. Under the uniform state law, the authorities in Washington will pick up the child and send her back to Michigan, upon request of the Michigan authorities, if such action were to become necessary.

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,300 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] Captain Wright is the Director of the Service Members Law Center at the Reserve Officers Association. He earned his JD from the University of Houston in 1976 and his LLM (advanced law degree) from Georgetown University in 1980. He served in the Judge Advocate General's Corps in the Navy and Navy Reserve for more than 30 years. He is available by telephone at 800-809-9448, extension 730, or by e-mail at SWright@roa.org.

[3] Judge Noe presides over the 39th Circuit Court in Lenawee County, Michigan. She was elected to a six-year term in 2008.

[4] The National Conference of Commissioners of Uniform State Laws drafted this model act and presented it to the states in 1997. Since then, 49 states (including both Michigan and Washington), the District of Columbia, Guam, and the Virgin Islands have adopted this model act as state statutes.

It is most unfortunate that Hindes and his new wife either did not have access to competent legal advice or they ignored the advice that they received.[5] If I had heard from Hindes, I would have advised him that he did not have the legal authority or right to designate his new wife as the substitute custodian of the child and that when he learned that he would be deployed he should have returned to the Michigan court to seek clarification of the child custody order in light of the changed circumstances (his deployment).

I invite the reader's attention to Law Review 0951 (October 2009), by Colonel John S. Odom, Jr. and me. The article is titled "What Happens to the Child when I Get Mobilized?" In the article, Colonel Odom and I respond to questions posed by an Army Reserve Captain who was being mobilized and deployed and who was the single mother of a four-year-old son.[6] She wanted to turn the boy over to her parents, to care for the child during her deployment, and not to inform the court that had awarded her sole custody of the child or her former husband, the boy's father.

In the article, Colonel Odom and I strongly counseled her against that proposed course of action. We wrote:

"We think that you are going about this the wrong way. You need to inform the boy's father as soon as the mobilization is reasonably certain. If the father does not agree to the plan of having the maternal grandparents take custody, you will need to go back to the court that granted you custody and get the court to order an appropriate custodial arrangement for the child during your deployment.

The court made a finding that giving you custody was in the best interests of the child. The court retains jurisdiction to make redeterminations about the best interests of the child whenever there is a material change in circumstances. Your upcoming deployment to Afghanistan is most certainly a material change in circumstances.

Your ex-husband is the other parent of the child. His position is likely to be, 'Hey, give me my kid. When my ex-wife gets back from war, we can sort all this out, but for now I am the other parent and I want custody.' The court is quite likely to go along with that pitch, in the absence of clear evidence of child abuse by your ex-husband.

The court gave you custody of the boy, but the court did not and cannot delegate to you the authority to determine an alternative custodial arrangement if for any reason you will not be able

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[5] As the Director of the Service Members Law Center (SMLC) (established June 2009), I am available during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays, to answer questions like this from service members, military family members, attorneys, employers, congressional staffers, reporters, and others. In 2013, I received and responded, by e-mail or telephone, to 9,193 inquiries. We provide information to service members and others, without regard to whether they are members of or eligible to join the Reserve Officers Association (ROA).

[6] In the scenario discussed in Law Review 0951, the custodial parent (mother) was a reservist, for whom mobilization and deployment were distinct possibilities. By way of contrast, Hindes is a regular, for whom deployment is a regularly recurring part of his Navy career.

to exercise custody of the child for an extended period. You simply do not have the legal power or right to turn the child over to your parents upon your deployment."

If I had heard from Hindes, I would have directed his attention to Law Review 0951, and I would have given him advice that was consistent with what Colonel Odom and I wrote in 2009.

Hindes could have and should have avoided a lot of trouble by contacting his ex-wife (Kaylee's mother) and consulting with her about custodial arrangements for the child during his upcoming deployment. If Hindes and the mother were unable to agree, Hindes should have taken the matter back to Judge Noe for clarification of her custody order, in light of the new circumstances brought about by his deployment.

Judge Noe awarded custody of the child to Hindes, the father. Now that she has learned that Hindes does not in fact have actual custody of the child, because of his deployment, she certainly has the authority to order that the child be brought to her court so that she can ensure that the child is safe and that she (Judge Noe) can make decisions about custody that are in the best interests of the child—the standard that must always be foremost in judicial determinations about children.

Judge Noe did not have the authority to order Hindes to do the impossible—to report in person to a court in Michigan, from a submarine in the Pacific. Judge Noe can and must make an interim determination about custody of Kaylee, now that she realizes that the child is not in the actual custody of the father, as she had ordered. Judge Noe must not make a *permanent* determination about custody of the child now, when the father is unable (because of his service to our country) to appear in person and give his side of the story.

Congress enacted the Servicemembers Civil Relief Act (SCRA) in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after our country entered World War I. When our country joined "the war to end all wars", millions of "doughboys" (and a few thousand "doughgirls") entered active military service, by draft, by voluntary enlistment, or by call-up from the nascent Army National Guard, Army Reserve, Naval Reserve, and Marine Corps Reserve. While in boot camp and then on the front lines in France, they could not attend to civilian legal matters back home.

In 1917, John Henry Wigmore was the Dean of the Northwestern University School of Law and already a distinguished legal scholar—the first edition of Wigmore on Evidence was published in 1905. He volunteered to come on active duty as a Major in the Army's Judge Advocate Department. In a matter of days, he drafted the SSCRA, and Congress quickly enacted his handiwork into law.

The original SSCRA applied during the period of national emergency that began when the United States entered World War I and ended in 1919. In 1940, as the United States contemplated the possibility of entering World War II, Congress enacted a new SSCRA that was almost identical to the first one. After World War II, when it became clear that our country would need a large military establishment in peacetime as well as wartime, Congress made the SSCRA permanent.

On August 2, 1990, Saddam Hussein's Iraq invaded and occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew "a line in the sand" and announced that he would protect Saudi Arabia and liberate Kuwait. As part of his forceful military response, he called up Reserve and National Guard units, in the first significant Reserve Component (RC) call-up since the Korean War. Only a handful of units were mobilized for the Vietnam War.

The RC call-up of 1990-91 showed some deficiencies in the SSCRA, and Congress made piecemeal amendments (dealing with health insurance and medical malpractice insurance) in 1991, backdating their effective date to August 1, 1990. Judge advocates from all five armed forces began a systematic study of the SSCRA and drafted a replacement law. Finally, in December 2003, Congress enacted their handiwork as the Servicemembers Civil Relief Act (SCRA), a long-overdue rewrite of the SSCRA. The SCRA is codified at sections 501 through 597b of the Appendix to title 50 of the United States Code. (50 U.S.C. App. 501-597b).

Through his civilian lawyer, Hindes sought a continuance (delay) in the proceedings in Judge Noe's court, in accordance with section 202 of the SCRA, which provides as follows:

§ 522. Stay of proceedings when servicemember has notice

(a) Applicability of section. This section applies to any civil action or proceeding, *including any child custody proceeding*, in which the plaintiff or defendant at the time of filing an application under this section--

(1) is in military service or is within 90 days after termination of or release from military service; and

(2) has received notice of the action or proceeding.

(b) Stay of proceedings.

(1) Authority for stay. At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and *shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.*

(2) Conditions for stay. An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

(c) Application not a waiver of defenses. An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).

(d) Additional stay.

(1) Application. A servicemember who is granted a stay of a civil action or proceeding under

subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b)(2) shall be included in an application under this subsection.
(2) Appointment of counsel when additional stay refused. If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.

(e) Coordination with section 201. A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 201.

(f) Inapplicability to section 301. The protections of this section do not apply to section 301.

50 U.S.C. App. 522 (emphasis supplied).

Hindes apparently met the requirements set forth above, including providing a letter from his commanding officer stating that he cannot be made available to attend a judicial hearing in Michigan at this time. To her credit, Judge Noe recognized that she is required by federal law to grant a continuance of at least 90 days, and she granted a 120-day stay on the determination of child custody and the order that Hindes appear in person in her court.

Hindes is entitled to and now has received a continuance, as required by the SCRA. But that does not change the fact that the child was in a custodial arrangement that had not been judicially approved. Hindes' current wife (stepmother and *de facto* custodian of the child) brought the child to Michigan and turned her over to the mother, in compliance with Judge Noe's order. The mother will have custody of the child for the time being, and after Hindes has returned from deployment a new determination will be made about the best interest of the child and new custodial and visitation arrangements will be made.

The mission of the Service Members Law Center (SMLC) is to educate service members (Active, Reserve, National Guard, etc.) and their families about their rights under laws like the SCRA, and to educate judges, legislators, employers, and others about the special circumstances of military service and about the laws that Congress and the state legislatures have enacted to protect the rights and interests of those who serve our country in uniform. As the SMLC Director, I am here at my post at ROA headquarters answering e-mails and calls during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays.[7] In 2013, I received and responded to 9,193 inquiries from service members, military family members, attorneys, employers, congressional staffers, reporters, and others.

[7] The point of the evening availability is to make it possible for service members, especially Reserve and National Guard members, to call me or e-mail me from the privacy of their own homes, not from the civilian or military jobs.