



# Military Parents & Custody Cases

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**This guide addresses potential issues parents in the military may face in New York State Family Court including:**

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## **Making Custody or Caretaking Arrangements Before Deployment**

### **1. I am being deployed and I want my children to live with another family member while I am away. What are my options?**

- That family member can petition for custody or guardianship of your child in Family Court.
- You can appoint that family member as a long-term or short-term care provider in your Family Care Plan.
- You can sign a letter of parental designation giving that family member temporary decision-making rights for health care and education of your child.



### **2. What things should I think about when deciding what is the best option?**

Every family is different and needs to think about different things. Some things to think about are:

- Do you have a court order or agreement that would cause a conflict between the rights of the non-custodial parent and your desired arrangement?
- What does the child want?

- How long do you think you will be away?
- How long do you think you will be deployed and/or called to active duty?
- What kind of support does the child need?

## Custody & Guardianship

### 3. What is the difference between custody and guardianship?

To have custody means to be in charge of someone. There are two kinds of custody: physical and legal. The same person often has physical and legal custody – but not always. Physical custody is when an adult is responsible for a child and takes care of the child. Usually the child lives with this adult. Legal custody is when an adult has the responsibility of making important decisions – such as medical, educational or religious decisions – about the life of a child.



There are two kinds of guardianship: guardianship of a person and guardianship of property. Guardianship of a person, is when an adult takes care of someone who is unable to take care of him or herself. The person is usually a child. A guardian is responsible for the child, cares for the child, and makes decisions about the everyday life of the child. Guardians have legal custody over a child. Guardians usually also have physical custody of the child.



In New York State, there are very few differences between custody and guardianship. However, in other states, there are big differences between the two. If the child will live in a state other than New York with your family member, you should find out about the laws in the state where they will live. This will help you decide whether another family member should petition for custody or guardianship of the child.

For more information on custody cases, please see the LIFT guide, “Custody and Visitation.” For more information on the rights of relatives in family court, including around custody and guardianship, please see the LIFT guide, “The Rights of Relatives in Family Court.”

### 4. How can someone get custody or guardianship of a child?

A person may file a petition for custody or a petition for guardianship in the borough or county where the child has lived for the last six months. A petition is a written request. Custody decisions can be made in Family Court or Supreme Court; guardianship decisions can be made in Family Court or Surrogate’s Court. On the day the person files the custody or guardianship petition, the person will be given another court date to come back to court. That date might be several months away.



### 5. How will a judge decide custody or guardianship of the child?

When a judge is deciding a custody case between a parent and someone who is not a parent, different factors will be considered. First, the judge will decide whether there are extraordinary circumstances. Examples of some extraordinary circumstances are: when a court has determined that there has been abuse or neglect; the child has been harmed by domestic violence; when there is drug abuse in the home; or when a parent voluntarily places a child in the grandparents’ home for at least two continuous years and the grandparents assume care and control of that child. It might also mean that the parent is incarcerated and unable to care for the child.

If there are extraordinary circumstances, the judge will decide what is in the best interests of the child. The judge will look at many things when figuring this out. The case will not be decided based on who loves the child more or who has more money. The judge does not favor a mother over a father, even if the case involves a young child. The judge will look at who has been the main person taking care of the child up until now.

#### **6. What if I already have an order and I want to change it?**

Things sometimes change, like a parent's military status, after the court makes a final custody or visitation order. That is called a change of circumstances. If this happens, you can file a petition to modify the old order. Modify means to change. It is the same process as above. When you file for a modification, you will be given a court date to come back to court. That date might be several months away. A petition to modify usually must be filed in the court that made the original order. For more information about jurisdiction, please see the LIFT guide, "Custody, Visitation and Jurisdiction."



#### **7. Is there a way to speed up the process if I am about to be deployed?**

You can file a motion to show cause in the borough or county where the child has lived for the last six months, or where the original order was made, if you are trying to modify that order. A motion is an application to appear before the judge to ask the court to make a specific decision. A motion to show cause can be filed when you must see a judge quickly due to an emergency or for some other reason that does not allow you the time to wait. The judge will decide whether or not to accept the application.

## **Family Care Plans**

#### **8. What is a Family Care Plan?**



The Department of Defense (DOD) requires a single parent with sole custody who enlists in any branch of the Armed Forces to complete a Family Care Plan with his or her Commanding Officer. This applies whether the parent is sent to serve for an extended period of time, in training, deployment or on a remote assignment. The Family Care Plan appoints short-term care providers, long-term care providers, and care provision details for family members who are unable to care for themselves in your absence. This is a less permanent option than a court order for custody or guardianship. Under DOD policy, a Family Care Plan is required for all single member parents who have custody of their children (for the Navy this can include shared custody if the parent is not married to the other parent) and military couples with dependents. A Family Care Plan is required if family circumstances or other personal status of a service member changes such that the service member becomes solely responsible for the logistical (housing, food, clothing, transportation), medical, or financial support of another person.

### **9. Can I appoint a friend or relative to care for my child in my Family Care Plan? Must a Family Care Plan follow any pre-existing custody or visitation order?**

A Family Care Plan cannot conflict with a court order already in place. Even with a Family Care Plan in place, a parent can ask the court to modify a custody order. In some cases, courts have upheld the custodial rights of the non-custodial parent even though a Family Care Plan appoints another family member to be the child's caretaker. You should discuss any previous court orders or agreements with your Commanding Officer when you are forming your Family Care Plan. If you have more questions about Family Care Plans, you can consult your base legal assistance office.

### **10. Is the Family Care Plan a legally binding document? Can I enforce it in Family Court?**

A Family Care Plan is evidence of your intention to care for your family in the best way you think possible. A Family Court judge can take these arrangements into consideration when determining the best interests of your child. However, the Family Care Plan is only one factor that the judge can use. The Family Care Plan may not be enforceable if it violates the rights of a parent, conflicts with an existing agreement or court order, or the judge finds that it fails to provide for the best interest of the child.

## **Letters of Parental Designation**

### **11. What is a designation of parental relationship?**

It is when a parent chooses someone over the age of 18 to temporarily make some medical and school related decisions for their child or children. It does not authorize the person to do anything else.

The person chosen is then thought of as being in "parental relation" with the child and that person is called the "designee". This designation can be granted for up to one month or up to six months. The designation is not the same as having legal custody. It is much more limited, meaning the person cannot make all of the same decisions. It also lasts for only a short period of time.

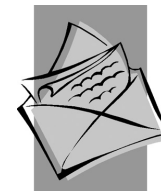


### **12. How can I designate a designee to be in parental relation?**

You may designate someone to be a designee by writing a letter. Depending on how long the designation will last, there are different requirements in the letter that must be met.

#### **Up to One Month — The letter must include:**

- Name of the parent
- Name of person being designated ("designee")
- Name of the children
- Whether the person can make health or education decisions or both.



It must be signed and dated by the parent.

## More than One Month Designation — The letter must include:

- The name, address and phone number of parent
- The name, address and phone number of the person being designated
- The date of birth of each child
- The date on which the designation starts
- Whether the person can make health or education decisions or both
- A statement that there is no court order that would prohibit the designation

It must be signed and dated by the parent. The parent's signature must be notarized. The person being designated (the "designee") must also sign a statement accepting the responsibility; that signature also must be notarized.

## Designations with No Time Frame:

- If there is no time frame set in the designation letter, then it will be in effect until it is revoked by the parent or by the expiration of 30 days from when it was signed; whichever is earlier. To revoke means to cancel or withdraw.

### 13. How can a letter of designation be revoked?

The designation can be revoked by either of the following:

- If the parent no longer wants the designation they can tell the person who they designated or inform the designee in writing.
- The parent can tell or write a letter to the school or health care provider to whom the letter of designation is presented that they no longer wish to have a designee.
- If the parent makes a new designation, the previous letter will be revoked.



Samples of these letters can be found on the New York State Kinship Navigator website at [www.nysnavigator.org](http://www.nysnavigator.org)

## Death of Caregiver

### 14. What if the custodial parent or caregiver dies while I am deployed and there is no stand-by guardian?

A standby guardian is a person who agrees to act as a guardian for a child in cases where the parent or caretaker of the child is suffering from a chronic or potentially fatal illness or is otherwise unable to care for the child.

If the custodial parent or caregiver dies while a service member is deployed and there is no standby guardian, the service member will be notified by the Red Cross about the death. The unit commander then has the discretion to grant you an emergency leave. Emergency leave is normally granted in these situations. Emergency leave is not granted to care for children when the custodial parent is ill, unless you are the only one that can resolve issues of child care. The initial period of emergency leave is 30 days, but an extension can be granted by the unit commander for up to 60 days. Emergency leave days are counted against you.

If you decide to seek custody of the children, you will have to immediately go to the family court of the children's jurisdiction. This will be the court in the borough where the children have been living for the past six months. Due to the urgency of the situation, you may file a motion to show cause (see page 3, number 7) along with your custody petition to expedite the matter. It is recommended that you bring any type of documentation that would support your motion to show cause, such as your leave authorization form. Again, custody will be granted if the judge feels it is in the best interest of the children. Because in these situations, you will still be required to return to your unit deployed overseas, you will have to arrange for care of the children until your return.

## Custody Changes While Deployed

### 15. Do I have the right to be notified if there is a custody case started against me while I am deployed?

Under the Service Members Civil Relief Act (SCRA), you have a right to be notified before any legal action is taken against you. Notice is given so that you will have time to prepare for your court date, get a lawyer, or request a stay. A stay is when the Family Court delays making a final decision for a short time.



Sometimes, however, a court may not be able to give you notice of a court case because your military service makes it difficult or impossible for the court to locate you. In that case, the court may automatically grant a stay of at least 90 days if the court decides that your presence is necessary to defend yourself. Under the SCRA, you will also be appointed a lawyer who is responsible for taking action in your absence.

### 16. How can service be carried out against me if I am on active duty? What about if I am deployed?



If the petitioner (the person who started the case) knows where you are stationed, he or she will likely have to contact your Commanding Officer or supervisor to personally serve you. Personal service means that someone over the age of 18 who is not part of the case handed you the papers. If the court date comes and the petitioner has not been able to serve the papers with the help of your Commanding Officer or supervisor, the petitioner can give the judge a written list of all of the ways he or she tried to serve you. The judge may set a new date for the case and ask the petitioner to keep trying. Or the judge may say he or she can serve the papers in another way. This is called alternate service.

### 17. Can a custody order be modified while I am deployed?

Yes. A custody order can be modified based on your military service, but only if there is clear and convincing evidence that it would be in your child's best interest and only if the court has followed the notice procedures stated in the Service Members Civil Relief Act. "Clear and convincing" is a legal standard used to explain how much the judge must be convinced that something is true or necessary.

### 18. Can a custody order be made against me while I am deployed?



Yes, but only after the judge determines that your absence is due to military service and appoints you a lawyer. When a lawyer is appointed in your absence, there is a chance that the lawyer will not be able to communicate with you because of your military duty. In order to protect you from actions your lawyer takes without being able to consult you, you could file to vacate the order when you return. If the court fails to appoint a lawyer, then the default judgment is voidable. Voidable means that the judgment can be dismissed.

If you have not received notice of your court case, you can move to reopen your default judgment if: 1) the judgment was made when you were on active duty or was made within 60 days of you being relieved from active duty, and 2) your military service prevented you from defending yourself when the case was decided. A default judgment is an order made against you without you being there. You must move to reopen the default judgment while you are still on active duty or within 90 days of being relieved from active duty.

### 19. Can I attend my Family Court hearings if I am deployed?

Yes. You can file an application for a telephonic hearing with the court that is hearing the case. A telephonic hearing is when one or both of the parties to a case are allowed to testify or appear using the telephone rather than in person.



To ask for a telephonic hearing, you make a written request to your judge. To do this, you must fill out a form. The form is called “Electronic Testimony Application and Waiver of Physical Presence.” On the form, you must explain why you are asking for the telephonic hearing.

Your request must be approved by the judge hearing your case.

The form can be downloaded from the New York State Courts website here: <http://www.courts.state.ny.us/forms/familycourt/pdfs/ucCJEA-7.pdf>. You can also get the form by contacting the judge’s Part (courtroom) to ask for the form. In some courthouses, you can get the form from the petition room or record room. The same form can be used to request permission to testify by audio-visual or other electronic means.

### 20. What are my options if I cannot attend my court date?



If you are aware of your court case but cannot attend because of your military service, you can ask the judge to grant you a minimum 90-day stay of the proceeding. The request must include a letter or other communication from you or your Commanding Officer that states: 1) how your current military duty affects your ability to appear in court, and 2) the date when you will be available to appear. Your request must also include a letter or other communication from your Commanding Officer stating: 1) that your current military duty prevents your court appearance, and 2) that you are currently not authorized for military leave. An application for an additional stay may be made at the time of the original request or later. If the court refuses to grant an additional stay, then the court must appoint a lawyer to represent you.

## Custody After Deployment

### 21. How does a judge consider my military status when making a determination about the best interests of my child in a custody case?



Judges make decisions about custody between two parents based upon what is in the best interests of the child. The judge will look at many things when figuring this out. The case will not be decided based on who loves the child more or who has more money. The judge does not favor a mother over a father, even if the case involves a young child. The judge will look at who has been the main person taking care of the child up until now.

Military status is just one factor among many that a judge will consider when deciding custody. A parent's call to active duty or deployment can be a major disruption in a child's life. In this situation, a judge can consider other factors in determining the best interests of the child. These factors may also include the presence of the non-custodial parent, the relationship between the child and the guardians appointed in the Family Care Plan, the stability of the home, and what the child wants, among others.

### 22. If I try to get custody of my child when I return from deployment, will my time away be held against me?

While your deployment does not necessarily work against you, the judge can consider the length and frequency of your time away, as well as the possibility of you being deployed in the future, when considering the best interests of your child. This is because courts attempt to make decisions that create the most stable home for your child.

### 23. When I return from deployment, can I modify my custody order to get custody of my child?

In New York, a return from deployment is automatically considered to be a substantial change in circumstance, unless you agreed otherwise in a previous agreement or court order. This allows you to reopen your custody case when you return. You must then prove that it is in the best interest of your child for you to have custody.

## Legal Assistance for Military Parents

### 24. Can the military give me a lawyer to help me if I have a Family Court case?

Maybe. The types of Legal Assistance Services available depend on your military base and your branch of military service. Generally, your base's Legal Assistance Program can help you prepare your Family Care Plan and advise you on certain topics, including Family Law issues. Some branches of service offer an Expanded Legal Assistance Program, where a Legal Assistance Attorney may be able to provide in-court representation to you or your family if you could not otherwise afford legal representation. A Legal Assistance Attorney may also be able to refer you to a civilian attorney who has agreed to represent military service members for free. Free legal services are limited, and you can contact your base's Legal Assistance Office to find out what services are available to you.





**25. How can I locate a Legal Assistance Office to find out what services are offered?**

The Department of Defense has a website called MilitaryINSTALLATIONS, where you can search for military installation and state resources for you and your family, including the nearest Legal Assistance Office. The website can be found here: [www.militaryinstallations.dod.mil](http://www.militaryinstallations.dod.mil)

**26. What about legal assistance while I am deployed?**

As mentioned earlier, under the Service Members Civil Relief Act (SCRA) when a court is unable to give you notice of a court case because your military service makes it difficult or impossible for the court to locate you, the court may automatically grant a stay of at least 90 days if the court decides that your presence is necessary to defend yourself. Under the SCRA, you will also be appointed a lawyer who is responsible for taking action in your absence.

**27. What services does LIFT have to help Military Parents?**

Military parents with cases in New York State can call or email LIFT's free Family Law Information Hotlines. They can call 212-343-1122, Monday-Friday from 9AM-5PM EST, or email our Email Hotlines through our website at [www.LIFThotline.org](http://www.LIFThotline.org).

**Need more help? Contact LIFT:**

**Call: 212-343-1122**

**Email: [www.LIFThotline.org](http://www.LIFThotline.org)**

**Visit: [www.LIFToonline.org](http://www.LIFToonline.org)**

*This document should not take the place of a consultation with a lawyer. LIFT encourages all individuals involved with the Criminal and Family Court systems to consult with a lawyer.*

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