

FAMILY CARE PLAN:
WHAT IT DOES AND DOESN'T DO
(WHAT YOU SHOULD KNOW TO PROTECT YOUR CHILD)

The uniformed military services require all personnel, on active duty or in the ready reserve, to be ready to deploy throughout the world on short notice and to be able to fully execute their military duties. To assure readiness dual military couples and single servicemembers who have responsibility for a child or children under 19 years of age or other family member unable to care for them in the servicemember's absence are required to complete a Family Care Certificate (FCC).

The Family Care Certificate:

- a. Designates the principal care provider who will accept dependent care responsibility;
- b. Establishes arrangements with a nonmilitary person in the local area to assume temporary responsibility for dependents until that responsibility is transferred to the principal care provider;
- c. Identifies the principal care provider, who in the event of death or incapacity has agreed to assume temporary responsibility for the servicemember's minor children until the guardian named in the will assumes responsibility, or until a legal guardian or other custodian is appointed by a court of competent jurisdiction, or until the child(ren)'s non-custodial natural parent assumes custody, whichever occurs first; and,
- d. Provides an acknowledgement by the principal care provider accepting responsibility.

The fact that the military issues and requires the execution of the FCC may give servicemembers the impression that while they are deployed, the care provider has all the rights and authorizations to properly care for servicemember's child(ren). *However, the FCC does not have legal authority outside of the military and does not provide the legal means to execute the servicemember's plan.* In most cases, completion of the FCC is just the beginning, not the end of the plan. There is considerably more work to be done to make the plan effective.

Problem. The most frequent methods employed by servicemembers to implement the Family Care Plan are powers of attorney and wills. These methods are disastrously ineffective when custody is contested or when the designated Family Care Provider is not the other biological parent and the other parent has not affirmatively provided his/her consent to the designation. The U.S. Supreme Court has held that biological or adoptive parents of a child have superior authority and responsibility above all others. When one parent uses a power of attorney to delegate authority over a child to a third person (for example a stepparent or a grandparent), the other biological parent has inherent veto power and rights to the child.

There are other complications as well. Relocating the child to where the third party caregiver lives may infringe upon the parental rights of the non-

custodial parent—which may be a criminal act. All fifty states have laws that make the removal of a child from the state in violation of an existing custody order a crime. Twenty-one states have laws prohibiting interference with visitation. Fifteen states have laws that make the pre-judgment removal of a child from the state that deprives the other parent of his or her visitation rights a crime.

Enrolling the child in school or daycare, traveling with the child out of the country, and getting medical care for the child may all be impossible without the permission of one or both parents. Many school districts and daycare providers will not allow a child to register and enroll without a court order establishing that the adult attempting to register and enroll the child has legal custody. Child abduction statutes cause airlines to question and sometimes refuse to allow one parent or a third party to travel out of the country with a child without the clear permission of the parents.

Solution. For a Family Care Plan to function as intended with minimal risk of disruption, the documents that the servicemember needs in order to execute the plan are *written agreements and court orders*.¹ The service member needs at a minimum a written agreement between him/herself and the other biological or adoptive parent that can be merged or incorporated into a court order. If the parties cannot agree, then a court determination of the custodial rights between the parents is necessary. Both the agreement and the court order should reference the possibility of the temporary absence of the custodial parent and provide for the child to reside with the other parent or a third party and be returned to the custodial parent at the end of the absence. Without the agreement or order the FCC is ineffective. The non-custodial parent will almost always have the ability and authority to seize the child upon the custodial parent's absence.

Orders regarding children are subject to modification upon a material change in circumstances that was not contemplated by the parties in the original order. The proposed modification will usually be granted if it is in the best interests of the child. Absent a finding that a parent is unfit, courts overwhelmingly agree that a child belongs with his or her biological or adoptive parent. The orders submitted on behalf of a service member must contemplate his or her temporary absence due to deployment and provide for a temporary custodian in his or her absence with the return to the custodial parent upon the end of the deployment.

If you think you may have difficulty in carrying out your Family Care Plan, please feel free to visit with a NLSO legal assistance attorney for suggested language for written agreements and orders.

¹ If both parents are military members, an easy solution is for the parents to agree to and sign the FCC.