ISSUE: Family law attorneys and military legal assistance attorneys sometimes get calls from military personnel regarding how to get benefits for children who are not theirs by birth or adoption (i.e., a child who is not a dependent of the military member for any other purpose). And they occasionally receive communications from military clients who want to know how to obtain custody of non-dependent minors other than their own children, and the issue of privileges and benefits is only secondary – typically an adult child gets into trouble with drugs or the law, and the child’s grandparents or aunt and uncle attempt to get the minor out of harm’s way by obtaining custody.

While stepchildren are covered and eligible for military privileges and benefits, other minor children are not, unless they fit into a narrow range of cases. This info-letter will explain the rules.

ANALYSIS: The rules for benefits across the board in uniformed services cases are found in a joint services regulation, currently designated AFI [Air force Instruction] 36-3026. Here is the text of the applicable section:

AFI36-3026_IP 17 JUNE 2009
4.13. Legal Custody Wards (See Terms for complete definition). The following basic eligibility criteria apply: 4.13.1. An unmarried child, including a foster child or a child to whom a managing conservator has been designated, who has been placed in legal custody of a member or former member as a result of an order of a court of competent jurisdiction in the United States (or a territory or
possession of the United States). The court order must stipulate the child will be in the care and custody of the sponsor for no less than 12 consecutive months. The court order can designate the length of custody by age, time or permanency. Note: The unmarried child may be eligible for full ID card benefits and privileges if:

4.13.1.1. Child is dependent on the member or former member for over one-half of his or her support, and 4.13.1.2. Child resides with the member or former member unless separated by the necessity of military service or to receive institutional care as a result of disability or incapacitation, and 4.13.1.3. Is not a dependent of a member or former member under any other category.

The relevant statute, 10 U.S.C. § 1072, states:

10 USC 1072 Definitions...

(2) The term "dependent," with respect to a member or former member of a uniformed service, means.....

   (I) an unmarried person who—

       (i) is placed in the legal custody of the member or former member as a result of an order of a court of competent jurisdiction in the United States (or a possession of the United States) for a period of at least 12 consecutive months;

       (ii) either—

           (I) has not attained the age of 21;

           (II) has not attained the age of 23 and is enrolled in a full time course of study at an institution of higher learning approved by the administering Secretary; or

           (III) is incapable of self-support because of a mental or physical incapacity that occurred while the person was considered a dependent of the member or former member under this subparagraph pursuant to subclause (I) or (II);

       (iii) is dependent on the member or former member for over one-half of the person's support;

       (iv) resides with the member or former member unless separated by the necessity of military service or to receive institutional care as a result of disability or incapacitation or under such other circumstances as the administering Secretary may by regulation prescribe; and

       (v) is not a dependent of a member or a former member under any other subparagraph.

(3) The term "administering Secretaries" means the Secretaries of executive departments specified in section 1073 of this title [10 USCS § 1073] as having responsibility for administering this chapter [10 USCS §§ 1071 et seq.].
Recently confronted by this custody-and-benefits issue, Dwain Alexander – a legal assistance attorney at the Region Legal Service Office, Mid Atlantic, Norfolk, Virginia – contacted DFAS (the Defense Finance and Accounting Service) to explain the problem and try to work out a solution. His communication stated:

*I am writing because I have a retired Air Force officer who got legal custody of his grandchildren. His daughter and son-in law needed help and he had to take the children. The custody order was entered by mutual agreement. The Newport News Juvenile and Domestic Relations Court indicated in the order that the officer was granted full legal and physical custody and that the order was final.*

*The issue is that pursuant to Air Force Instruction (AFI) 36-3026, sections 4.13.1, the court order must stipulate that the child will be in the care and custody of the sponsor for no less than 12 consecutive months.*

Mr. Alexander indicated that the domestic court found it hard to believe that a military regulation would try to put a deadline on custody granted pursuant to a court order, which are always subject to review and modification based on changed circumstances, so a statement that the custody must be for at least 12 months would be inaccurate, impossible to enforce and possibly against public policy to boot! In addition, Mr. Alexander pointed out that:

- In family law few things are guaranteed. An order for custody or other family matters issued with the best of plans and intentions for 12 months or 2 years may have to be modified if there is a material change in circumstance and is in the best interest of the child.

- Virginia courts have been unable to apply a strict standard of 12 months due to the nature of family law.

- Current application of the Instruction and statute leaves the wards of some guardians without access to military and medical services.

- The spirit and the letter of the law would be respected by use of some specific proposed language for the court order [see below], so as to provide needed access to military services for the new dependents of servicemembers and retirees.

He asked the policy personnel at DFAS if there was any way to recognize the realities of custody and yet comply with the Air Force Instruction so that minor children, in the legal
custody or under a guardianship of a military member through an order of the court, would be eligible for military privileges and entitlements.

The June 17, 2016 response from DFAS was sent by Kirk A. Knoll, Senior Associate Counsel, Office of General Counsel, and it stated that –

• DFAS agrees with the proposal for alternate language as complying with the spirit, if not letter, of AFI 36-3026. That language is below:

  The prevailing party shall have custody (or guardianship) of the minor child for a period of not less than 12 months. This order is subject to further court order and modification should there be a substantial and material change of circumstance affecting the welfare of the minor child.

• Such a court order meets the statutory and regulatory requirements that the member be granted care custody of the ward for a period of at least 12 consecutive months.

Mr. Knoll continued –

  The language at issue would be sufficient as it demonstrates both the court's and the party's intent that the guardianship is intended (at the time the court order is issued) to last for a period of at least 12 months. Thus, our office would advise our activities [i.e., other Department of Defense departments, offices or agencies] to accept that language as meeting the requirements of the regulation. This office cannot guarantee that all activities would accept such court orders for that purpose if they have not coordinated with OGC. But if they do, we will advise as indicated.

CONCLUSION: Please keep this in mind when counseling servicemembers and retirees about obtaining custody of non-dependent children and the availability of military benefits for those children.

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