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## Mother Loses Custody After Tour in Iraq

BY JOEL STASHENKO

ALBANY—A Family Court properly granted primary physical custody of a child to his father after the mother went through a period of absence and upheaval starting with her tour of duty in Iraq, an upstate appeals court has determined.

Tanya Towne's stint in Iraq in 2004 and 2005 was validly considered as part of a sequence of events that resulted in her former husband, Richard S. Diffin Jr., gaining primary physical custody of their son, an Appellate Division, Third Department, panel concluded last week.

"The fact remains that the mother was deployed and, while we do not hold that her deployment in and of itself constitutes a significant change in circumstances, we must consider the consequences of her extended absence in determining whether such a change exists," Presiding Justice Anthony V. Cardona wrote for the unanimous court in *Diffin v. Towne*, 502429.

**The decision  
will be published  
Thursday.**

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Before her deployment by the Army National Guard, Ms. Towne had primary physical custody of their son, Derrell, who was born in 1995. Ms. Towne and the boy were living at the home of Ms. Towne's second husband, Jason Towne, with whom she had had a second son. Ms. Towne wanted Derrell to live with Mr. Towne and her other son, but Mr. Diffin secured a temporary custody order to have Derrell live with him in Virginia while Ms. Towne was in Iraq.

When Ms. Towne petitioned Family Court in Montgomery County for restoration of the original custody arrangement upon her return from Iraq late in 2005, Mr. Diffin contested it. In addition to the separation caused by Ms. Towne's tour of duty, Mr. Diffin noted that Ms. Towne separated from Mr. Towne when she returned to the United States and moved out of the home where Derrell lived when Ms. Towne had primary physical custody of the boy.

Montgomery County Family Court Judge Philip V. Cortese granted Mr. Diffin's request to receive primary physical custody. Ms. Towne was granted visitation rights every summer and winter recess and other school recesses on a biennial basis.

The Third Department noted that this differs from many custody disputes in that both Mr. Diffin and

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Ms. Towne are "excellent parents." Derrell would be "loved, supported and well cared for in the custody of either parent," the court held.

"Both have demonstrated stable employment, adequate income, suitable homes, and an unwavering commitment to Derrell's well-being," Justice Cardona wrote.

If not for Ms. Towne's deployment, she and Mr. Diffin might still have a nurturing shared-custody arrangement with the boy, the court said.

## Child's Best Interests

However, with the reality that the boy has lived, attended schools and made friends in Virginia since moving there in 2004, a hard decision now had to be made whether the boy's return to Montgomery County will be in his best interests, the court ruled.

"Although it is likely that Derrell would be equally well settled and happy had he continued living with his mother without interruption, and although the disruption caused by her deployment was not her fault, this record does not demonstrate that Derrell's best interests would be enhanced by ordering a change in his present physical custody," Justice Cardona wrote. "Under the circumstances of this

case, his interests are best served by the stability of an uninterrupted custody arrangement."

The court noted that Derrell did not state a preference for living with his mother or his father. Keeping the boy primarily in Virginia with his father was supported by Joseph Nalli, the Fort Plain attorney who is Derrell's law guardian, the court said.

Justices Karen K. Peters, Edward O. Spain, Anthony J. Carpinello and John A. Lahtinen joined in the ruling.

Robert M. Cohen, a solo practitioner who represented Mr. Diffin, said he was "glad for the result" but felt the court could have relied more heavily, if not exclusively, on the separation caused by Ms. Towne's deployment.

"When a parent is out of the country a year or more, I think that is a change of circumstances regardless of what the cause is," Mr. Cohen said in an interview Friday.

Ms. Towne was represented by William E. Lorman of the Lorman Law Firm in Amsterdam. He was in China last week and unavailable for comment.

Albany attorney Mathew B. Tully, who specializes in representing military personnel and their families, said legislation is needed to safeguard the rights of soldiers so they do not lose their standing in

custody arrangements because of their deployment.

Mr. Tully, of Tully, Rinckey & Associates, said he has noticed more challenges to the custody status of service personnel who have been deployed in the past few years.

"In 2002 and 2003, there was a lot more patriotism," Mr. Tully, a major in the New York Army National Guard, said Friday. "People were less likely to fight [service personnel] for custody after Sept. 11. Now people are more brazen."

Mr. Tully was not involved in the *Towne* case.

In another custody-related case, a Third Department panel set aside one provision in a stipulation between parents after finding it usurped the authority of the Family Court in Albany County.

The provision at issue in *Gaitor v. Morrissey*, 500774, granted authority to a therapist to determine when supervision over the mother's visitations could end.

"Family Court improperly delegated its responsibility to determine when the mother's visitation may be modified," the court decided in a ruling by Justice Peters.

Justices Cardona, Spain, Robert S. Rose and Anthony T. Kane joined in the opinion.

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