



# Military Parents and Child Custody: State and Federal Issues

(name redacted)

Specialist in Military Manpower Policy

(name redacted)

US Air Force Fellow

May 31, 2013

Congressional Research Service

7-....

[www.crs.gov](http://www.crs.gov)

R43091

## Summary

The increased deployment of servicemembers beginning in 2001 as a result of Operations Enduring and Iraqi Freedom has raised difficult military child custody issues that in some cases potentially affect the welfare of military children as well as servicemembers' ability to effectively serve their country. Approximately 142,000 members of the Armed Forces (active, Guard, and Reserve) are single custodians of minor children. Temporary duty assignments, mobilization, and deployments to areas that do not allow the military member's dependent(s) to accompany them require the servicemember to have contingency plans providing for the care and well-being of their dependent(s) to include temporary custody arrangements if necessary. In some instances, custody battles have ensued when the military parent leaves for duty and the other parent decides to file for temporary or permanent custody of the child in the absence of the servicemember. Some servicemembers involved in such child custody cases have expressed concern that family courts in some states are using their military service against them in determining custodial arrangements. The issue addressed in this report is whether a federal child custody law is needed to protect servicemembers' rights in custodial disputes.

Since 2008, the Congress, led by Representative Michael Turner, has proposed federal military child custody legislation that would establish a national standard for litigating child custody cases in which the custodian is in military service. Although legislative efforts in the House have passed on several occasions (as part of the House version of the National Defense Authorization Act from FY2008 through FY2013) and once as a stand-alone bill by voice vote in 2008 (H.R. 6048), all versions of the proposed legislation have failed to pass in the Senate. At the heart of the legislative debate is the potential conflict between the protection of the rights of servicemembers, which is arguably a federal responsibility, and jurisdiction over child custody issues, which traditionally falls within the purview of the States.

Proponents of federal child custody legislation argue the lack of uniform state laws in the treatment of deployed and deploying military parents complicate child custody matters and that the potential exists for state courts to use a servicemember's deployment, or potential deployment, against them when making child custody determinations. Those proposing a national standard for determining military child custody cases argue such legislation would eliminate this possibility by prohibiting state courts from using deployment or the possibility of deployment against a servicemember when making child custody determinations. Opponents, however, argue that such legislation encroaches on the historical precedent of a state's right to adjudicate family law matters, would ultimately place the legal rights of the servicemember above those of the best interest of the child, and is not necessary, given that the Servicemembers Civil Relief Act already protects a servicemember's rights in child custody proceedings. Nevertheless, both sides of the debate agree that no court should show a bias for a non-deploying parent or a prejudice against a military parent solely because of military service. However, both sides disagree on the extent to which deployment or the threat of deployment plays in determining the best interest of the child which is the ultimate criterion for determining child custody cases.

Congressional interest in federal legislation for military child custody cases stems from Congress's authority to raise and support the standing armed forces of the U.S. and Congress's authority to make rules for the Government and regulation of the land and naval Forces as well as to provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the Service of the United States.

## **Contents**

Introduction.....	1
The Issue.....	2
Background.....	3
Proposed Federal Military Child Custody Legislation.....	3
Servicemembers Civil Relief Act.....	4
National Standard vs. States' Rights and Expertise.....	5
Effects of Deployment and the Best Interest of the Child.....	6
Federal Court Involvement in Child Custody Cases.....	7
Senate Opposition.....	8
Position of the Department of Defense.....	10
Positions of Other Groups.....	14
American Bar Association.....	14
National Governors Association.....	15
Adjutants General Association of the United States.....	15
National Military Family Association.....	16
Uniform Law Commission (The National Conference of Commissioners on Uniform State Laws).....	16
Status of State Initiatives.....	17
Conclusion.....	18

## **Tables**

Table E-1. State Child Custody Laws Related to Servicemembers.....	31
--	----

## **Appendixes**

Appendix A. H.R. 1898, 113 <sup>th</sup> Congress, 1 <sup>st</sup> Session, May 8, 2013.....	19
Appendix B. Status of H.R. 1898 and History of FY2013 (H.R. 4201) Military Child Custody Legislative Efforts.....	21
Appendix C. Servicemembers Civil Relief Act (“SCRA”) 50 U.S.C. App. §§ 501-597b— Applicable Excerpts.....	22
Appendix D. Priority Department of Defense Appeal FY2010 Defense Authorization Bill.....	28
Appendix E. State Child Custody Laws.....	31

## **Contacts**

Author Contact Information.....	37
---------------------------------	----

## Introduction

The issue of state courts using servicemember's military service as a factor in child custody hearings has been the subject of legislative action by the U.S. Congress since 2007. The catalysts behind the legislation were allegations from servicemembers that their military service, with the possibility of deployment in support of contingency operations, could be used as a factor in child custody cases to their detriment.

Active duty, reserve, and National Guard military members who are single parents with custody of one or more dependents are subject to temporary duty, mobilization, and deployment requirements, often for extended periods. Temporary duty assignments, mobilization, and deployments to areas that do not allow the military member's dependent(s) to accompany them (such as aboard ships or in hostile fire zones) require the servicemember to have contingency plans providing for the care and well-being of their dependent(s) to include temporary custody arrangements if necessary.<sup>1</sup> In some instances, custody battles have ensued when the military parent leaves for duty and the other parent decides to file for temporary or permanent custody of the child in the absence of the servicemember. In other instances, the parent with temporary custody decides he or she does not want to relinquish the child upon the servicemember's return from deployment and subsequently files for permanent custody.

The premise behind the proposed legislation is that a servicemember's deployment or potential for future deployments should not play a role in child custody decisions by courts. At the heart of the debate is the potential conflict between the protection of the rights of servicemembers, which is arguably a federal responsibility, and child custody issues, which are traditionally thought of as domestic relations matters within the purview of the States. Although over a century ago, the United States Supreme Court noted in *Ex parte Burrus*, 136 U.S. 586 (1890) that, "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States," proponents of federal military child custody legislation insist there is precedence for federal intervention where federal interests—such as the rights of servicemembers—are at stake.

The most recently proposed military child custody legislation—H.R. 1898 with full text in **Appendix A**—was introduced on May 8, 2013, and seeks to amend Title II of the Servicemembers Civil Relief Act (50 U.S.C. app. 521 et seq.).<sup>2</sup>

---

<sup>1</sup> U.S. Department of Defense Instruction No. 1342.19, "Family Care Plans," May 7, 2010, establishes DOD policy, assigns responsibilities, and prescribes procedures for the care of dependent family members of service members, including Reserve Component members and members of the Department of Defense Civilian Expeditionary Workforce (CEW) who are (1) single parents; (2) dual-member couples with dependents; (3) married with custody or joint custody of a child whose non-custodial biological or adoptive parent is not the current spouse of the member, or who otherwise bear sole responsibility for the care of children under the age of 19 or for others unable to care for themselves in the absence of the member; and (4) primarily responsible for dependent family members.

<sup>2</sup> H.R. 1898 is cosponsored by Representatives Michael Turner and Robert Andrews.

## The Issue

The increased deployment of servicemembers resulting from the conflicts in Iraq and Afghanistan has raised difficult child custody issues that some argue could potentially impact the welfare of military children and the ability of servicemembers to effectively serve their country. Of primary concern is the potential for state courts to use a servicemember's previous deployments or the possibility of future deployments when making child custody decisions. According to a 2010 Department of Defense (DOD) report,

Approximately 142,000 members of the Armed Forces (active, Guard, and Reserve) are single custodians of minor children. Additionally, a number of servicemembers have remarried and reside in a household comprised of one biological parent and his or her new spouse. Most complex of all situations, perhaps, are those in which a single servicemember has physical custody of a child without ever having obtained an order of custody from any court. When any of these custodial-servicemember parents deploy, attend military training, or attend a service-mandated school, the question arises: "Who takes care of the children while I'm gone?"<sup>3</sup>

Child custody cases are traditionally a state matter. And the question of "who takes care of the children while I'm gone" is traditionally answered by a state court family law judge. However, proponents of federal child custody legislation argue the lack of uniform state laws in the treatment of deployed and deploying military parents complicate child custody matters and that the potential exists for state courts to use a servicemember's deployment, or potential deployment, against them when making child custody determinations. Those proposing a national standard for determining military child custody cases argue such legislation would eliminate this possibility by prohibiting state courts from using deployment or the possibility of deployment against a servicemember when making child custody determinations. Opponents, however, argue that such legislation encroaches on the historical precedent of a state's right to adjudicate family law matters, would ultimately place the legal rights of the servicemember above those of the best interest of the child, and is not necessary given that the Servicemembers Civil Relief Act (SCRA) already protects a servicemember's rights in child custody proceedings.

Congressional interest in federal legislation for military child custody cases stems from Congress's authority to raise and support the standing armed forces of the U.S. and Congress's authority to, "make rules for the Government and regulation of the land and naval Forces" as well as to "provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the Service of the United States."<sup>4</sup>

---

<sup>3</sup> Department of Defense, *Report to the Senate Armed Services Committee and House Armed Services Committee: Report on Child Custody Litigation Involving Service of Members of the Armed Forces*, responding to Sec. 572, P.L. 111-84, (Washington, DC: May 14, 2010), 1.

<sup>4</sup> Constitution of the United States, Article I, Section 8.

## Background

### Proposed Federal Military Child Custody Legislation

The issue of state courts potentially using military service and deployments against servicemembers in determining child custody cases first came to the attention of Representative Michael R. Turner of Ohio via the 2004 case of Kentucky National Guard Lieutenant Eva Slusher. Lieutenant Slusher (formerly Crouch) temporarily lost custody of her daughter to her ex-husband after serving twelve months on active federal duty followed by an additional four months of temporary duty in order to attend Officer Training School (total of 16 consecutive months on active duty). After a two-year legal battle, Lt. Slusher ultimately regained custody of her daughter after a state appellate court reversed the trial court's decision.<sup>5</sup>

Since 2008, some Members of Congress have proposed amendments to the Servicemembers Civil Relief Act (50 U.S.C. App. §§501-597b) that would establish a national standard for litigating child custody cases in which the child custodian is in military service.<sup>6</sup> The latest version of the proposed legislation—H.R. 1898 (May 8, 2013)—mandates:

- If a court renders a temporary order for custodial responsibility for a child based solely on a deployment or anticipated deployment of a parent who is a servicemember, then the court shall require that, upon the return of the servicemember from deployment, the custody order that was in effect immediately preceding the temporary order shall be reinstated, unless the court finds that such a reinstatement is not in the best interest of the child;
- Would prohibit a court from using deployment or the possibility of deployment as the sole factor in determining the best interest of a child;
- Seeks to establish that nothing in H.R. 1898 shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal; and,
- Establishes that where State laws applicable to child custody proceedings involving a temporary order provide a higher standard of protection to the rights of the parent who is a deploying servicemember than the rights provided under H.R. 1898, the appropriate court shall apply the higher State standard.<sup>7</sup>

Similar language has passed only in the House on seven separate occasions; six times as part of the House version of the National Defense Authorization Act (FY08/09/10/11/12/13), and once as a stand-alone bill by voice vote in 2008 (H.R. 6048). However, all versions of the proposed legislation have failed to pass in the Senate where concerns exist over enacting federal legislation that would preempt State laws and their approach to child custody issues.

---

<sup>5</sup> *Crouch v. Crouch*, in *Kentucky Supreme Court*, 201 S.W. 3<sup>rd</sup> 463.

<sup>6</sup> Representative Turner has introduced military child custody legislation as an amendment to the House version of the National Defense Authorization Act every year since 2008, twice as legislation proposed in the House Committee on Veterans Affairs (H.R. 4469 and H.R. 4201), and once as a stand-alone bill (H.R. 6048). The most recent submission is H.R. 1898, May 8, 2013, which seeks to amend Title II of the Servicemembers Civil Relief Act (50 U.S.C. App. 521 et seq.).

<sup>7</sup> H.R. 1898, 113<sup>th</sup> Congress, 1<sup>st</sup> Session, May 8, 2013.

## **Servicemembers Civil Relief Act**

The only existing federal statutory protection for single-parent servicemembers involved in child custody disputes is the Servicemembers Civil Relief Act (SCRA) (50 U.S.C. App. §§501-597b), formerly known as the Soldiers' and Sailors' Civil Relief Act (SSCRA). The purpose of this act is (1) to provide for, strengthen, and expedite the national defense through protection extended by the SCRA to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service<sup>8</sup> (applicable excerpts from the SCRA pertaining to child custody can be found in **Appendix C**). In response to Congress's earlier attempts at passing federal child custody legislation, language was passed in the FY2008 National Defense Authorization Act (P.L. 110-181) that amended Sections 201(a) and 202(a) of the SCRA clarifying its applicability to child custody cases.<sup>9</sup>

Under the SCRA, judges must grant a stay of legal proceedings applicable to any civil action or proceeding, including any child custody proceeding, in which the defendant's military service affects their ability to participate in the proceedings.<sup>10</sup> However, such stays are mandatory for only the first 90 days after a servicemember's deployment after which time they may apply for an additional stay based on the continuing material effect of military duty on the servicemember's ability to appear. Entry of such additional stays is at the discretion of the court and many times are not granted based on resolving custody issues in the interest of the affected child/children.<sup>11</sup>

Proponents of federal child custody legislation argue the SCRA is inadequate when it comes to the rights of servicemembers dealing with child custody issues. Although it protects the rights of the servicemember to be present at the custody proceedings by requiring judges to grant a stay of legal proceedings, proponents argue the SCRA does not prevent courts from using the servicemember's military service against them in making the final custody determination. In addition, proponents point out the SCRA does not provide procedures for entry of temporary custody arrangements nor does it provide guidance on how courts should balance servicemembers' interests against other relevant interests, including the best interest of the child.

---

<sup>8</sup> *Servicemembers Civil Relief Act*, 50 US Code, Section 502.

<sup>9</sup> The phrase "including any child custody proceeding" was added to Sections 201(a) and 202(a) of the Servicemembers Civil Relief Act by P.L. 110-181, effective January 28, 2008. In Conference Report 110-477 to accompany H.R. 1585, the conference committee wrote, "The conferees recognize that service members who have been awarded custody of minor children but who are required to deploy or be absent from their children as a result of their military duties are vulnerable to litigation initiated by non-custodial parents. The procedural protections of the SCRA apply in child custody cases and, in most cases, should prevent adverse judgments until members can be present to defend their interests. The modifications to the SCRA included in this provision underscore the importance of SCRA protections in child custody cases. While the facts in child custody disputes are central to determination of the best interests of minor children, the conferees would urge judges who must decide such cases not to consider the mere absence of a service member who is performing military duty to constitute the sole or even a major factor in a court's determination about what is in the best interest of a child."

<sup>10</sup> The phrase "including any child custody proceeding" was added to Sections 201(a) and 202(a) by P.L. 110-181, effective January 28, 2008.

<sup>11</sup> Uniform Law Commission (The National Conference of Commissioners on Uniform State Laws), *Deployed Parents Custody and Visitation Act Summary*, October, 2012, May 6, 2013, <http://www.uniformlaws.org/ActSummary.aspx?title=Deployed%20Parents%20Custody%20and%20Visitation%20Act>



Opponents argue the SCRA provides military parents protection in concert with state laws and without federal litigation. In a May 22, 2012 letter to the Senate Armed Services Committee, William T. Robinson III, President of the American Bar Association, wrote that, “The SCRA prevents any permanent change in parental rights until a reasonable time following an absent servicemember’s return” and “unlike the proposed legislation, the SCRA applies to all cases, including support and visitation rights, those involving custody over an incapacitated adult and the considerable cases where there is no original custody order in place.”<sup>12</sup> In 2010, the DOD submitted a Priority DOD Appeal to the FY2010 Defense Authorization Bill (H.R. 2647, Section 584) arguing that in many of the high-visibility child custody cases, the basic and generally easily met prerequisites for automatic 90-day stays under the SCRA were simply not followed (DOD’s priority appeal can be found in **Appendix D**). In other cases, judges simply ignored the SCRA or it was not properly pled. In the DOD’s assessment, this indicates a lack of education about the effect and use of the SCRA rather than a problem with its substantive limitations.<sup>13</sup>

## **National Standard vs. States’ Rights and Expertise**

At the heart of the legislative debate is the potential conflict between the protection of the rights of servicemembers, which is arguably a federal responsibility, and jurisdiction over child custody issues, which traditionally falls within the purview of the States. Representative Turner and other proponents argue that federal legislation protecting servicemembers in child custody cases will provide a national uniform standard for determining military child custody cases instead of the multiple legal precedencies used amongst the states. Citing differences in state laws on the question of whether deployment or the potential for deployment can be used as criterion by courts in child custody determinations, proponents argue this lack of a national standard creates the risk for servicemembers that their military service will be used against them in determining the best interest of the child. Proponents also argue that difference in state laws could provide an opportunity for ex-spouses to venue shop until they find a state that will alter previously settled custody agreements.<sup>14</sup> Furthermore, proponents also point out that many servicemember custody battles may involve up to three states which further compounds the problem; the state of the original custody order, the state where the child is residing, and the state where the servicemember is stationed. Proponents argue federal legislation establishing a national standard for resolving military child custody cases would resolve the inconsistencies among the states, create more certainty in the process, and enhance military readiness and morale.

Opponents of a federal standard argue that the issue of child custody and any family law matter are the proper province of state law. In a 2011 white paper on federal military child custody, the American Bar Association (ABA) noted that, rather than encouraging states to pass laws, proposed legislation would federalize the area of child custody, removing any incentive for states

---

<sup>12</sup> William T. Robinson III, President, American Bar Association, to The Honorable Carl Levin, Chair, Senate Armed Services Committee and The Honorable John McCain, Ranking Member, Senate Armed Services Committee, letter, May 22, 2012.

<sup>13</sup> Department of Defense, Priority Department of Defense Appeal FY2010 Defense Authorization Bill, (Subject: Protection of Child Custody Arrangements for Parents who are Members of the Armed Forces Deployed in Support of a Contingency Operations), appeal citation: H.R. 2647, Section 584.

<sup>14</sup> Representative Michael R. Turner has made this argument as documented in his child custody bill executive summary, *Protecting Deployed Servicemembers and Their Children* (May 6, 2013, [http://turner.house.gov/UploadedFiles/Turner\\_One\\_Page\\_Executive\\_Summary\\_on\\_Child\\_Custody\\_Bill\\_final.pdf](http://turner.house.gov/UploadedFiles/Turner_One_Page_Executive_Summary_on_Child_Custody_Bill_final.pdf)); however, the States will ultimately make the final decision as to jurisdiction and not the spouse who is potentially “venue shopping” until they find a state that will alter custody agreements.

to pass or improve existing custody laws protecting servicemembers.<sup>15</sup> According to the ABA, the states have the background and expertise to write, pass and enforce such legislation.<sup>16</sup> In addition, the ABA argues there is “no single national standard” for the return of child custody after a deployment, nor should there be. The ABA writes,

Throughout the area of family law, the states have been preeminent, as against the concept of “single standard” whether in the area of military pension division, grounds for divorce for military personnel, or establishment of family support. Each case is unique, and a single national standard would tie up military cases involving custody into a federal straightjacket.... It is not the province of federal law to provide detailed and specific instructions on how to handle child custody cases, whether these involve custodial parents who are members of the armed forces, the State Department, the Central Intelligence Agency or the federal civil service. Congress should not interject itself into writing rules for custody and visitation; this is the responsibility of state courts.<sup>17</sup>

Opponents also argue that passage of federal child custody legislation would lead directly to federal court involvement where the final custody determination will be made by federal judges who are not versed in family law issues—not to mention the increased cost, delay, and uncertainty for all parties involved due to increased oversight by the federal courts.<sup>18</sup> Furthermore, opponents argue that states have residency requirements that must be met that in effect, limit or make difficult the possibility of “venue shopping” or multiple jurisdiction venues.

## **Effects of Deployment and the Best Interest of the Child**

Although both sides of the debate agree that no court should show a bias for a non-deploying parent or a prejudice against a military parent *solely* because military service may require the servicemember to be temporarily away from the child, they disagree on the extent to which deployment or the threat of deployment plays in determining the best interest of the child.

When courts make child custody determinations (specifically, the home in which to place the child) the ultimate criteria for determination is usually cited to be “the best interest of the child.” A decision in “the best interest of the child” could include considering the wishes of the child’s parents, the wishes of the child, the child’s relationship with each parent, siblings and other persons who may substantially impact the child’s best interests, the child’s comfort in his home, school and community, and the mental and physical health of the involved individuals.<sup>19</sup> There is rarely, if ever, a single variable that plays as the *sole* determiner in child custody decisions. Therefore, although a DOD review of 33 military child custody cases did not reveal a single

---

<sup>15</sup> The ABA originally made this statement in response to the FY2012 House National Defense Authorization Act (H.R. 1540), specifically, Section 573, where Representative Michael Turner proposed amendments to the Servicemembers Civil Relief Act, 50 U.S. Code Appx. 501 *et seq.* The most recent version of this proposed legislation is H.R. 1898, cosponsored by Representatives Michael Turner and Robert Andrews.

<sup>16</sup> American Bar Association, *Federal Military Custody*, White Paper, August, 2011, [http://www.americanbar.org/content/dam/aba/administrative/family\\_law/201108\\_turneramendment\\_whitepaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/family_law/201108_turneramendment_whitepaper.authcheckdam.pdf).

<sup>17</sup> *Ibid.*

<sup>18</sup> Such argument was made by William T. Robinson III, President, American Bar Association in a letter to The Honorable Howard P. “Buck” McKeon, Chair, House Armed Services Committee and The Honorable Adam Smith, Ranking Member, House Armed Services Committee, May 8, 2012.

<sup>19</sup> Cornell University Law School, Legal Information Institute, *Child Custody: An Overview*, [http://www.law.cornell.edu/wex/child\\_custody](http://www.law.cornell.edu/wex/child_custody), March 11, 2013.

instance in which deployments or threat of deployments was the *sole* factor in withholding custody or loss of custody from a servicemember, the *effects* of deployments on the child's best interest was considered by courts in some cases as one of the myriad of factors analyzed in determining the best interest of the child.<sup>20</sup>

Supporters of federal legislation argue this is not always the case and all too often, state courts disproportionately use a servicemember's military service against them, therefore, a federal standard is needed to prohibit a court from using deployment or the possibility of deployment when determining the best interest of a child. However, opponents point to the DOD's study as evidence there is no reported child custody case in which deployment or the threat of deployment was the *sole* factor in any initial determination of custody or loss of custody by a servicemember. Furthermore, opponents argue such legislation, if enacted, would ignore any potential *effects* deployments would or could have on a child and would ultimately place the rights of servicemembers over those of the best interest of the child—which is and should be the ultimate determinant in child custody cases. Likewise, they contend this change would only affect one element—military service considerations—in custody hearings and, arguably, would not “federalize” such cases.

## Federal Court Involvement in Child Custody Cases

Legal experts and opponents of federal child custody legislation point out that proposed legislation would allow any loser of a military child custody case at the state level to seek a better outcome in federal court.<sup>21</sup> Although language in the most recent legislative proposal (H.R. 1898, May 8, 2013) states, “Nothing in this section shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal,” most legal analysts agree such a provision is misleading. According to the American Bar Association (ABA), such language would not prevent removal to federal court under 28 USC § 1442a and cannot prevent federal review of the enforcement of a right conferred under federal statute.<sup>22</sup> Sighting the legal precedence established in *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 53 S.Ct. 477, 77 L.Ed. 903 (1933), the ABA points out that, “Federal jurisdiction may be invoked to vindicate a right or privilege claimed under federal statute.” In the opinion of the ABA, federal rights such as those proposed in H.R. 1898 would lead directly to federal court involvement in military child custody cases.<sup>23</sup> According to the ABA,

Whenever counsel wants to avoid unpleasant results in state court, the procedure of removal to federal court is the logical next step. While Mr. Turner's bill doesn't *create* a federal right of action, it says nothing about the existing remedy of *removal* under 28 U.S.C. § 1442a if the defendant is a servicemember-parent. Such a transfer will add months and months onto

---

<sup>20</sup> Department of Defense, *Report to the Senate Armed Services Committee and House Armed Services Committee: Report on Child Custody Litigation Involving Service of Members of the Armed Forces*, responding to Sec. 572, P.L. 111-84, (Washington, DC: May 14, 2010), 6.

<sup>21</sup> Col Mark E. Sullivan, USAR JAG, Ret, as quoted by Tom Philpott in, *Reforms Sought for Military Child Custody Issues*, Kitsap Sun, June 7, 2012, May 28, 2013, <http://www.kitsapsun.com/news/2012/jun/07/tom-philpott-reforms-sought-for-military-child/#axzz2Uc4T2ZDo>.

<sup>22</sup> William T. Robinson III, President, American Bar Association, to The Honorable Carl Levin, Chair, Senate Armed Services Committee and The Honorable John McCain, Ranking Member, Senate Armed Services Committee, letter, May 22, 2012.

<sup>23</sup> American Bar Association, *Federal Military Custody*, White Paper, August, 2011, [http://www.americanbar.org/content/dam/aba/administrative/family\\_law/201108\\_turneramendment\\_whitepaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/family_law/201108_turneramendment_whitepaper.authcheckdam.pdf).

the custody litigation, while a federal judge decides whether to take the case or send it back to state court ... It's simple: there's nothing in the proposed legislation which bars *removal to federal court*.<sup>24</sup> [emphasis in original]

## Senate Opposition

Although efforts at child custody legislation has received general support in the House, having passed on seven separate occasions and with sixty members from both sides of the aisle signing on to a previous version (H.R. 6048, 110<sup>th</sup> Congress) as co-sponsors, this has not been the case in the Senate. All seven federal child custody bills passed in the House and introduced in the Senate since 2008 have not made it out of Senate committees. Most in the Senate agree there should be some level of protection for military personnel in child custody disputes, but they oppose federal legislation as a means to provide it. Most concerns in the Senate center on the potential for federal intrusion in what is traditionally a state matter and the opinion that the Servicemembers Civil Relief Act adequately provides protection to servicemembers in child custody disputes. In a July 28, 2009 letter to Representative Turner, Senator John McCain noted that

Child custody laws and litigation, as you know, have traditionally been the province of the States. I suggest that we need to proceed with care in considering federal legislation that would preempt the States in their approaches to the child custody issues you have identified ... I'm am not convinced at this point that there needs to be a nationwide standard in view of the historical federal deference to the State legislatures and the obvious concern that the States have shown about this issues.

I also have some concerns about the opposition that has been raised to your proposal from Associations with expertise in this area. The Senate Veterans' Committee, the committee with jurisdiction over the Servicemembers Civil Relief Act, has opposed the legislation you have advanced. In addition, the American Bar Association, led by its Standing Committee on Legal Assistance for Military Personnel, issued a resolution in February 2009 that opposed modifying the SCRA in the way you have suggested.<sup>25</sup>

In what appears to be a compromise and concerted attempt at acquiring more data to support any decision on the matter, the Senate Armed Services Committee (SASC) supported a House Armed Services Committee (HASC) recommendation that would require the Secretary of Defense to submit to both committees a report on judicial cases involving child custody disputes in which the service of a deployed or deploying member of the armed forces, active or reserve, was an issue in a child custody dispute.<sup>26</sup> In their support for the report, as required by the 2010 National Defense Authorization Act (P.L. 111-84, Section 572) the SASC wrote,

The committee [SASC] believes that comprehensive factual information regarding State courts' actual experience with this issue and an assessment of the scope and nature of this problem is essential before any federal preemption of State legislation would be warranted.<sup>27</sup>

---

<sup>24</sup> Ibid.

<sup>25</sup> The Honorable John McCain, Ranking Member, Senate Armed Services Committee, to The Honorable Michael R. Turner, U.S. House of Representatives, letter, July 28, 2009.

<sup>26</sup> S.Rept. 111-35, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., July 2, 2009.

<sup>27</sup> Ibid.

(Results of this report, accomplished by the DOD and submitted in May, 2010, are discussed below.)

The SASC report, although supportive of the House recommended report from the DOD, went on to express apprehension towards federal child custody legislation by expressing the preference to emphasize personal responsibility of the servicemember, along with the DOD's oversight responsibility, in preparing and coordinating effective family care plans.<sup>28</sup> The Senate's version of the 2009 National Defense Authorization Act (S. 1390) included a "Sense of Senate" on the preparation and coordination of family care plans and made the following finding:

Family Care Plans provide a military tool to document the plan by which members of the Armed Forces provide for the care of their family members when military duties prevent members of the Armed Forces from doing so themselves. Properly prepared Family Care Plans are essential to military readiness. Minimizing the strain on members of the Armed Forces of unresolved, challenged, or voided child custody arrangements arising during deployments or temporary duty directly contributes to the national defense by enabling members of the Armed Forces to devote their entire energy to their military mission and duties.

When Family Care Plans are properly prepared and coordinated with all affected parties, the legal difficulties that may otherwise arise in the absence of the military custodial parent often can be minimized, if not eliminated.<sup>29</sup>

It should be noted that although Family Care Plans are an effective tool in arranging for the terms of care for dependent family members of servicemembers in the event of a deployment or extended active duty, they are not legally binding and do not codify the terms of any existing or any potential future custody dispute between a servicemember and his or her ex-spouse. It is simply a plan—ideally with the consent of both the servicemember and the ex-spouse—for the care of the dependent(s) while the servicemember is gone. However, if properly drafted with the concurrence of both parties and with proper legal assistance, the terms of the Family Care Plan may be used—on a case-by-case/state-by-state basis—as supporting evidence in any potential custody dispute resulting from the servicemember's deployment or active duty service associated with the execution of that Family Care Plan.

The Senate committee responded to the House version of the FY2013 National Defense Authorization Act (H.Rept. 112-479, Part 1, sec 564) with a recommendation to obtain the views of the Council of Governors regarding such legislation.

The committee (SASC) directs the Secretary of Defense to request the views and recommendations of the Council of Governors regarding legislative proposals to amend title II of the Servicemembers Civil Relief Act (50 U.S.C. App. 521 et seq.) (SCRA), or otherwise to establish federal law that would prohibit State courts from considering the

---

<sup>28</sup> U.S. Department of Defense Instruction No. 1342.19, "Family Care Plans," May 7, 2010, establishes DOD policy, assigns responsibilities, and prescribes procedures for the care of dependent family members of Service members, including Reserve Component members and members of the DOD Civilian Expeditionary Workforce (CEW) who are (1) single parents; (2) dual-member couples with dependents; (3) married with custody or joint custody of a child whose non-custodial biological or adoptive parent is not the current spouse of the Member, or who otherwise bear sole responsibility for the care of children under the age of 19 or for others unable to care for themselves in the absence of the Member; and (4) primarily responsible for dependent family members.

<sup>29</sup> S. 1390, sec. 556, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., July 23, 2009.

absence of the service member by reason of deployment, or the possibility of deployment, in determining the best interest of the child in cases involving child custody.

As the Supreme Court noted in *Ex parte Burrus*, 136 U.S. 586 (1890), over a century ago, “the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the law of the United States.”

The committee [SASC] is concerned that the implications of preemptive legislation that would extend beyond existing procedural protections in the SCRA and that would create a standard for adjudicating child custody disputes are not warranted either by case law or the proactive legislation enacted by more than 40 States. A federal legal standard would preempt the efforts of the States over a matter traditionally left to State courts. State Governors should be afforded the opportunity to formally express their views prior to congressional action being taken.

This recommendation by the SASC did not make the final Senate version of FY2013 NDAA (S. 3254) and thus, was not included in the final version of the FY2013 NDAA (P.L. 112-239).

## Position of the Department of Defense

Overall, DOD has generally opposed repeated congressional attempts at federal child custody legislation with the exception of a brief period in early 2011 when then Secretary Gates had a seemingly change of heart near the end of his tenure.<sup>30</sup> However, during the earlier stages of these legislative efforts, former Secretary Gates had expressed DOD’s opposition to federal child custody legislation in a September 25, 2009 letter to Representative Turner:

In response to the *New York Times* story about Specialist Mendoza and your most recent letter, I asked my staff to take a fresh look at this issue. Our General Counsel has reviewed the various state law protections for Service members. We find that, at present, some level of protection for Service members facing child custody issues exists in approximately 28 states, but the states’ approaches to the issues vary widely. Many of these variances no doubt reflect different societal dimensions of the problem in different communities across the country. Thus, we have concluded that it would be unwise to push for federal legislation in an area that is typically a matter of state law concern.<sup>31</sup>

However, Secretary Gates did go on to acknowledge in the letter a number of steps that he and DOD should take in an effort to ensure protection of Service members in child custody cases to include

- Personally contacting the governors of each of the states that have yet to pass legislation addressing the special considerations of child custody cases in the military and to urge them to pass such legislation;

---

<sup>30</sup> According to a February 23, 2011 press release from Representative Michael Turner’s office, Representative Turner received a letter from Secretary of Defense Robert Gates on February 15, 2011 in which the Secretary agreed with Congress’s efforts for a uniformed standard of protection for servicemembers in child custody disputes. Press release, May 29, 2013, at <http://turner.house.gov/news/documentsingle.aspx?DocumentID=226089>.

<sup>31</sup> Secretary of Defense Robert M Gates to The Honorable Michael R. Turner, U.S. House of Representatives, letter, September 25, 2009.

- Including concerns over child custody matters on the list of the Department's 10 Key Quality of Life Issues that were presented to governors, state legislators and other state officials;
- Improving liaison efforts between the Department's Office of Legal Policy and the Department's ten Regional State Liaisons to aggressively reach out to state officials whose legislators have not addressed military custody concerns to provide them with appropriate and effective draft language and to develop a general strategy for focusing on those states with the largest military populations;
- Having the military service Judge Advocates General and Staff Judge Advocate to the Commandant ensure they are doing all they can to work with the American Bar Association (ABA) to publicize, emphasize and support the ABA's national pro bono project to provide Service members free legal representation from some of the country's most accomplished child custody practitioners; and,
- Engaging with the military services to update and standardize Family Care Plans (FCPs) across the services... The Department is convinced that these efforts can resolve far more issues in favor of our Service members than can new federal legislation.<sup>32</sup>

In addition to Secretary Gates' September 2009 letter, DOD also issued a Priority Department of Defense Appeal to the FY2010 Defense Authorization Bill, H.R. 2647, Section 584 (**Appendix D**), stating,

The Department opposes section 584. This proposal, which has been included in substantially the same form for the last three legislative sessions, would disrupt State domestic schemes, discourage passage of broader, more helpful State laws, and increase cost, delay, and uncertainty due to increased oversight by the Federal courts. The Department applauds the efforts by almost thirty States to pass legislation that addresses the special circumstances facing parents who have dropped their own affairs to take up the burdens of the nation, and encourages the remaining States to consider similar legislation. The Department also recognizes the complexities of such cases, and the difficulties in balancing the interests of the Servicemember against the best interest of the child and the consequences of a parent's absence due to military service. The States, however, are in the best position to balance these equities within the context of their domestic relations laws. To complement the exceptional efforts of the State, DoD is revamping its Family Care Plan (FCP) guidance to the Services, further obviating the need for this legislation.<sup>33</sup>

Although Section 584 of H.R. 2647 did not pass in the Senate, language in the FY2010 National Defense Authorization Act (P.L. 111-84, Section 572) did pass requiring DOD to submit to the Committees on Armed Services of the Senate and House of Representatives a report on all known reported cases since September 2003 involving child custody disputes in which the deployment status of a service member of the Armed Forces, whether a member of a regular component or a reserve component, was an issue in the custody dispute. The report, which was submitted to

---

<sup>32</sup> Family Care Plans are developed to ensure that families are taken care of during times of drills, annual training, mobilization and deployment. FCPs include provisions for long-term and short-term care, care and support for children, and financial arrangements including power(s) of attorney.

<sup>33</sup> Department of Defense, Priority Department of Defense Appeal FY2010 Defense Authorization Bill, Subject: Protection of Child Custody Arrangements for Parents Who Are Members of the Armed Forces Deployed in Support of a Contingency Operation, Appeal Citation: H.R. 2647, sec. 584.

Congress on May 14, 2010, looked at 33 reported appellate cases decided since 2003 and an America Law Review Annotation, “Effect of Parent’s Military Service Upon Child Custody,” 21 A.L.R. 6<sup>th</sup> 577 (2007). The DOD report concluded:

As the research into reported cases and the other evidence gathered during preparation of this Report have shown, no custody battle is decided by a single factor and there is no judicial trend and no reported case suggesting that servicemembers are losing custody of their children *solely* because of their military service. [emphasis in original]

Moreover, it is abundantly clear that the legislatures of the states are the appropriate venue for balancing the competing equities of the deploying servicemember and the best interest of the child. Federal legislation in this area would be counter-productive at best and harmful at worst. The United States Supreme Court has indicated on any number of occasions that matters related to child custody and visitation or other “adjustments to family status” are best left to state—and not federal—courts. *see Ankenbrandt v. Richards and Kessler*, 504 U.S. 689, 703-04 (1992).

There is no evidence of any trend in family courts to remove custody of minor children from servicemembers *solely* as a result of deployment or the prospect of deployment. The vast majority of cases reported by the media in which such allegations have been made involve servicemembers who ultimately prevail in litigation against their former spouses (or the other biological parent of the child involved), and who are understandably unhappy about the expense in attorney fees and time that such litigation causes. However, no legislation can prevent dedicated ex-spouses from filing change of custody actions and efforts at “one size fits all” statutes that mandate a particular outcome based on a single factor are ill-advised and unworkable. [emphasis in original]

The Department believes that effective legislation on the state level more appropriately address the issues of child custody related to military service. Moreover, the most effective measure to minimize the potential disruption of child custody litigation involving deployed or deploying servicemembers is an appropriate Family Care Plan, which emphasizes early consultation with the non-custodial parent concerning custody arrangements in the event of deployment.<sup>34</sup>

Although military service was not the sole factor—positively or negatively—in the custody decisions presented, the DOD’s report does exclude such service as playing a contributing role in the final decision as to the best interest of the child. Thus, the House Armed Services Committee was not wholly satisfied with the DOD’s report and expressed concern with its conclusions with language in H.Rept. 111-491 on the FY2011 National Defense Authorization Act (H.R. 5136).

The committee is concerned the Department limited the scope of the report to cases where military service was the sole factor in determining custody instead of cases where it was an issue in the custody dispute.

The committee is aware that during a hearing held by the House Veteran’s Affairs Subcommittee on Economic Opportunity in February 2010, the Department of Defense (DOD) witness testified that the department had to “resort to anecdotal data” in the course of preparing the report mandated by the National Defense Authorization Act for Fiscal Year 2010. The report discusses the challenges faced with gathering data through available case law research tools and the limited information to conduct detailed research required by the

---

<sup>34</sup> Department of Defense, *Report on child Custody Litigation Involving Service of Members of the Armed Forces* (Washington, DC: May 14 2010), 28-30.



National Defense Authorization Act for Fiscal Year 2010. From this, the committee concludes that there is not sufficient data available to ascertain the full scope of how many members of the Armed Forces experience the loss of child custody as a result of their service. Although the committee is encouraged with the Department's efforts to encourage states to change their laws to better support service members and its efforts to better educate service members who may have potential child custody issues; the committee continues to support the need for congressional legislation to provide maximum protection for our service members and their children, who, while deployed, remain at risk of having that deployment used against them to determine or change child custody arrangements.<sup>35</sup>

Nevertheless, on February 15, 2011 outgoing Secretary Gates sent a letter to Representative Turner withdrawing his objections to the federal child custody legislation. No specific reason was cited by Secretary Gates for his change in position and the judge advocates in the Pentagon who had consistently opposed the proposed legislation were not consulted before the letter was sent.<sup>36</sup> In the letter, Secretary Gates wrote,

I have been giving this matter a lot of thought and believe the Department of Defense should change its position to one where they are willing to consider whether appropriate legislation can be crafted that provides Service members with a federal uniform standard of protection in cases where it is established that military service is the sole factor involved in a child custody decision involving a Service member ... we should work with Congress to pursue an acceptable legislative formula.<sup>37</sup>

Since Secretary Gates' reversal in position and his departure in July, 2011, DOD support for federal child custody legislation has been somewhat in question. In testimony before the HASC, former Secretary of Defense Leon Panetta's support for child custody legislation was questioned as well as his support in opposing efforts by the Uniform Law Commission in drafting the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) of 2012.<sup>38</sup> In response to such questioning, Secretary Panetta stated, "As I indicated to you in my letter, I support the efforts that you've made, you've provided tremendous leadership on this issue, and I will do the same with regards to the amendments on the Senate side."<sup>39</sup> However, when the legislation passed in the House version of the FY2013 National Defense Authorization Act, Secretary Panetta responded with a letter to Representative Turner on April 30, 2012 stating, "the bill as written ... and now passed by the House ... needs a small but critical revision and that without it, the bill would appear to constitute a federal mandate to state courts that they, in certain circumstances, subordinate the best interest of the child to the interest of an adult service member. As I [Secretary

---

<sup>35</sup> H.Rept. 111-491, 111<sup>th</sup> Cong., 2d sess., 2010, 284-285.

<sup>36</sup> American Bar Association, *Federal Military Custody*, White Paper, August, 2011, [http://www.americanbar.org/content/dam/aba/administrative/family\\_law/201108\\_turneramendment\\_whitepaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/family_law/201108_turneramendment_whitepaper.authcheckdam.pdf).

<sup>37</sup> Secretary of Defense Robert M Gates to The Honorable Michael R. Turner, U.S. House of Representatives, letter, February 15, 2011.

<sup>38</sup> The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) provides states with non-partisan legislation in an attempt to provide rules and procedures that are consistent from state to state but also reflect the diverse experience of the states. The goal of Uniform Deployed Parents Custody and Visitation Act is to facilitate expeditious and fair disposition of cases involving the custody rights of a military member, ultimately protecting the rights of the service member, the other parent and the best interest of the child involved.

<sup>39</sup> House, *Back from the Battlefield: DOD and VA Collaboration to Assist Service Members Returning to Civilian Life* (Joint Committee on Armed Services and Committee on Veterans' Affairs), 112<sup>th</sup> Cong., 2d sess., July 25, 2012, [http://armedservices.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=105](http://armedservices.granicus.com/MediaPlayer.php?view_id=2&clip_id=105).

Panetta] understand it, the best interest of the child should always be the highest priority in child custody cases.”<sup>40</sup> Secretary Panetta expressed his concern by writing,

As a lawyer and former legislator, I am sensitive to avoiding legislation that dictates an outcome in certain court cases, without regard to the best interests of the parties before the court in the particular situation—that is especially important when children are involved. One potential solution is to add the words “as the sole factor” between the words “deployment” and “in determining” at lines 25-26 of page 2 of the bill. We believe this simple addition preserves a degree of flexibility that enables the court to always fashion a remedy in the best interest of the child.<sup>41</sup>

The language “as the sole factor” was incorporated into the latest legislative proposal (H.R. 1898). However, no further statements have been made by DOD since former Secretary Panetta’s letter to Representative Turner. It is unclear which side of this debate recently-confirmed Secretary of Defense Hagel will take.

## Positions of Other Groups

### American Bar Association

The American Bar Association (ABA) is on record opposing any federal child custody legislation through ABA Resolution 106, passed in 2009.<sup>42</sup> Resolution 106 argues against congressional action to place in federal law a set of protections for military members who have custody and are being deployed or returning from deployment. The resolution points out that this is the responsibility of the states, about 40<sup>43</sup> of whom have already passed such legislation.<sup>44</sup> Specifically, the resolution states:

RESOLVED, That the American Bar Association opposes the enactment of federal legislation that would:

- (a) create federal question jurisdiction in child custody cases, including cases involving servicemember-parents,
- (b) dictate case outcomes or impose evidentiary burdens in state child-custody matters involving servicemember-parents,
- (c) co-opt the discretionary authority of state courts, in cases involving servicemember-parents, to determine the best interest of the child and award custody accordingly,

---

<sup>40</sup> Secretary of Defense Leon Panetta to The Honorable Michael R. Turner, U.S. House of Representatives, letter, April 30, 2012.

<sup>41</sup> Ibid.

<sup>42</sup> American Bar Association Resolution 106, 2009.

<sup>43</sup> When ABA Resolution 106 was written in 2009, only 40 States had past military child custody legislation. However, since 2009, an additional six states have passed similar legislation bringing the total number of states with military child custody legislation to 46. (See **Appendix D** for a complete listing of these states.)

<sup>44</sup> American Bar Association, “White Paper on Federal Military Custody,” 2011, [http://www.americanbar.org/content/dam/aba/administrative/family\\_law/201108\\_turneramendment\\_whitepaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/family_law/201108_turneramendment_whitepaper.authcheckdam.pdf).

(d) pre-empt the growing body of state laws that comprehensively address servicemember domestic relations matters, including child custody,

FURTHER RESOLVED, That the American Bar Association urges the states to enact legislation prohibiting denial of child custody to a servicemember based solely on absence due to military deployment.

## **National Governors Association**

The National Governors Association went on record opposing federal efforts to intervene in military family matters that are addressed by state law. In a May 20, 2010 letter to both the Senate and House Armed Service Committees, Governors James Douglas (Vermont) and Joe Manchin III (West Virginia), on behalf of the nation's governors, wrote,

The nation's governors oppose federal efforts to intervene in sensitive and complex military family matters that are addressed by state law.

The challenges of repeated and extended deployments of our service men and women place a great strain on military families. States recognize these challenges and are taking steps to support and protect the rights of both servicemembers and the needs of their children. To date, nearly 30 states have passed substantive legislation tailored to address family law complexities surrounding deployed parents. In addition, states continue to work closely with the Department of Defense regarding special considerations for military child custody cases.

States have the systems, social services resources and expertise in place to appropriately and efficiently address domestic relations issues. Consequently, congressional intervention is not warranted and could have unintended adverse consequences for those it is trying to help.

We urge Congress to reject legislative attempts to preempt state family law with federal legislation.<sup>45</sup>

## **Adjutants General Association of the United States**

The Adjutants General Association of the United States (AGAUS), consisting of the fifty-four Adjutants General, represents the senior leadership of the Army National Guard and Air National Guard of the fifty states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. AGAUS went on record in May 19, 2010 stating, "AGAUS believes domestic relations matters involving National Guard and other service component members are best adjudicated through the existing framework of state laws and court-integrated social services and their existing safeguards built into the federal Servicemembers Civil Relief Act."<sup>46</sup> In their stated resolution, AGAUS opposes enactment of federal legislation that would:

---

<sup>45</sup> Governor James H. Douglass and Governor Joe Manchin III to The Honorable Carl Levin, Chairman and The Honorable John McCain, Ranking Member, Senate Armed Services Committee, and The Honorable Ike Skelton, Chairman and The Honorable Howard P. McKeon, Ranking Member, House Armed Services Committee, letter, May 20, 2010.

<sup>46</sup> Adjutants General Association of the United States (AGAUS), Resolution in opposition to federal child custody legislation, May 19, 2010.

- Create federal-question jurisdiction in child custody cases, including cases involving National Guard and other service component member-parents; or
- Dictate case outcomes or impose evidentiary burdens in state child-custody matters involving National Guard or other service component member-parents; or
- Infringe upon the sovereign authority of states to enact state laws, applied and enforced in state courts, to determine family law matters including child custody and to award custody based on a state court assessment of the best interest of the child; or
- Preempt state law that address child custody and other domestic relations matters so long as such laws do not discriminate against National Guard and other service component members based upon their military status or the performance of their military duties.<sup>47</sup>

AGAUS further resolved to urge states to enact legislation prohibiting a change of custody or denial of child custody to a National Guard or other service component member based solely on the service member's status or absence due to military deployment.<sup>48</sup>

## **National Military Family Association**

Founded in 1969, the National Military Family Association (NMFA) is recognized as the leading non-profit organization focusing on issues important to military families. In a July 21, 2009 letter to the Senate Armed Services Committee, the NMFA went on record in their support for the ABA's Resolution 106 stating, "Based on our (NMFA) experience, we agree with the ABA that federal intervention in what has traditionally been a state matter would be burdensome to the states and stifle the efforts they have already made to address the issues. Educating state and local judges would also go a long way in alleviating confusion and misconceptions about the Servicemembers Civil Relief Act."<sup>49</sup> The NMFA has also expressed their support of the Uniform Law Commission's, Uniform Deployed Parents Visitation and Custody Act (UDPCVA) and recommends its adoption by all 50 states.<sup>50</sup>

## **Uniform Law Commission (The National Conference of Commissioners on Uniform State Laws)**

In response to federal legislative efforts, the Uniform Law Commission (also known as The National Conference of Commissioners on Uniform State Laws) drafted and approved the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) in July, 2012 that addresses the issue of child custody and visitation that arise when parents are deployed in military or other national service. Established in 1892, the Uniform Law Commission provides states with non-

---

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Mary T. Scott, National Military Family Association Chairman, Board of Governors to The Honorable Benjamin E. Nelson, Chair, and The Honorable Lindsey O. Graham, Ranking Member, Personnel Subcommittee, Senate Armed Services Committee, U.S. Senate, letter, July 21, 2009.

<sup>50</sup> National Military Family Association, "Custody and Visitation Rules for Deployed Military Parents," <http://www.militaryfamily.org/feature-articles/custody-and-visitation-rules.html>.

partisan, draft legislation that seeks to bring standardization to critical areas of state statutory law. The UDPCVA offers a set of uniform codes that state legislatures can adopt to standardize custody rights for military parents who are deployed.

Attorney Eric Fish, legal counsel for the Uniform Law Commission, acknowledges that state courts have struggled with issues such as how to determine jurisdiction when a member is assigned to a base in another state, whether a step-parent or grandparent can have visitation rights when a parent is deployed, and whether a temporary custody arrangement should be made permanent when a parent returns from deployment. According to Mr. Fish, “States are all across the board on those issues, so the impetus for the uniform act was to provide states with a well-conceived piece of legislation that takes the best practices from all the states that we have seen and give them some guidance.”<sup>51</sup>

The Uniform Law Commission opposes any federal legislation that seeks to protect deployed servicemembers in child custody cases based on the argument that family law is a state’s rights issue. According to Mr. Fish, while the proposed federal law and the UDPCVA share some similarities, the federal law is vague and would create unnecessary complexity to an already complicated area of law. Mr. Fish argues that the Uniform Law Commission’s approach “maintains states’ rights and protects service members across the country, without creating an invasive federal system that is just going to confuse child custody.”<sup>52</sup>

Representative Turner disagrees with Mr. Fish’s assessment and argues his bill would not create federal jurisdiction for custody matters, but instead would ensure minimum protections for military parents: “Our bill only establishes a floor minimum ... States could have and do have much more stringent pro-military custody statutes.”<sup>53</sup> Representative Turner argues, “Our bill certainly permits the courts’ taking into consideration the best interests of the child, however, it does not permit the service member’s absence in serving our country to be used against them. The uniformed law that’s currently being considered would do absolutely that and would result in service member’s losing their children.”<sup>54</sup>

## Status of State Initiatives

According to data compiled by the Congressional Research Service Legal Division and the Uniform Law Commission, 46 of the States have passed some version of military child custody legislation that is in line with and/or incorporates some aspect of the Uniform Deployed Parents Custody and Visitation act (see **Appendix E**) with the exceptions being Alabama, Massachusetts, Minnesota, and New Mexico (and the U.S. territories of Guam, Puerto Rico and the Virgin Islands). Of those four states without a current law, Massachusetts has legislation pending.

---

<sup>51</sup> Nashville Associated Press, “Panel: Improve child custody rules for military,” *USA Today*, July 18, 2012, <http://usatoday30.usatoday.com/news/military/story/2012-07-18/military-child-custody/56294984/1>.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

## **Conclusion**

The issue of military child custody will likely continue to be the subject of legislative action by the Congress until supporters of such legislation are satisfied that state courts are in fact, not using servicemember's military service as a the sole factor in determining child custody hearings. Although previous attempts at passing military child custody legislation indicates there is strong support in the House, the Senate remains cautious about passing legislation that, in their perspective, could potentially intrude on the rights and jurisdiction of the states to try such cases. Nevertheless, 46 states have taken action to pass some form of military child custody legislation. Therefore, the future debate in Congress will potentially center on the extent to which federal involvement in military child custody cases is needed given the perceived adequacies/inadequacies of each states laws. Ultimately, any legislation, whether federal, state, or a combination, will most likely hinge on determining what is in the best interest of the child/children as most legal experts agree, that is the most important factor when determining child custody cases.

## **Appendix A. H.R. 1898, 113<sup>th</sup> Congress, 1<sup>st</sup> Session, May 8, 2013**

### **A BILL**

To protect the child custody rights of deployed members of the Armed Forces, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### **SECTION 1. PROTECTION OF CHILD CUSTODY ARRANGEMENTS FOR PARENTS WHO ARE MEMBERS OF THE ARMED FORCES.**

(a) CHILD CUSTODY PROTECTION.—Title II of the Servicemembers Civil Relief Act (50 U.S.C. App. 521 et seq.) is amended by adding at the end the following new section:

#### **“SEC. 208. CHILD CUSTODY PROTECTION.**

(a) RESTRICTION ON TEMPORARY CUSTODY ORDER.—If a court renders a temporary order for custodial responsibility for a child based solely on a deployment or anticipated deployment of a parent who is a servicemember, then the court shall require that, upon the return of the servicemember from deployment, the custody order that was in effect immediately preceding the temporary order shall be reinstated, unless the court finds that such a reinstatement is not in the best interest of the child, except that any such finding shall be subject to subsection (b).

(b) LIMITATION ON CONSIDERATION OF MEMBER’S DEPLOYMENT IN DETERMINATION OF CHILD’S BEST INTEREST.—If a motion or a petition is filed seeking a permanent order to modify the custody of the child of a servicemember, no court may consider the absence of the servicemember by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child.

(c) NO FEDERAL JURISDICTION OR RIGHT OF ACTION OR REMOVAL.—Nothing in this section shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal.

(d) PREEMPTION.—In any case where State law applicable to a child custody proceeding involving a temporary order as contemplated in this section provides a higher standard of protection to the rights of the parent who is a deploying servicemember than the rights provided under this section with respect to such temporary order, the appropriate court shall apply the higher State standard.

(e) DEPLOYMENT DEFINED.—In this section, the term ‘deployment’ means the movement or mobilization of a servicemember to a location for a period of longer than 60 days and not longer than 540 days pursuant to temporary or permanent official orders—

(1) that are designated as unaccompanied;

(2) for which dependent travel is not authorized; or

(3) that otherwise do not permit the movement of family members to that location.

(b) CLERICAL AMENDMENT.—The table of contents 18 in section 1(b) of such Act is amended by adding at the end of the items relating to title II the following new item: “208. Child custody protection.”



## **Appendix B. Status of H.R. 1898 and History of FY2013 (H.R. 4201) Military Child Custody Legislative Efforts**

### **H.R. 1898, 113<sup>th</sup> Congress**

5/8/2013: Referred to the House Committee on Veterans' Affairs.

5/24/2013: Referred to the Subcommittee on Economic Opportunity.

### **H.R. 4201 Servicemember Family Protection Act, 112<sup>th</sup> Congress**

3/16/2012: Referred to the House Committee on Veterans' Affairs.

4/27/2012: Committee Consideration and Mark-up Session Held. (Markup report: CQ)

4/27/2012: Ordered to be Reported by Voice Vote.

5/18/2012 3:37 pm: Reported by the Committee on Veterans' Affairs. H.Rept. 112-488.

5/18/2012 3:37 pm: Placed on the Union Calendar, Calendar No. 341.

5/30/2012 5:33 pm: Mr. Stearns moved to suspend the rules and pass the bill.

5/30/2012 5:33 pm: Considered under suspension of the rules. (consideration: CR H3234-3236)

5/30/2012 5:33 pm: DEBATE - The House proceeded with forty minutes of debate on H.R. 4201.

5/30/2012 5:47 pm: At the conclusion of debate, the Yeas and Nays were demanded and ordered. Pursuant to the provisions of clause 8, rule XX, the Chair announced that further proceedings on the motion would be postponed.

5/30/2012 7:01 pm: Considered as unfinished business. (consideration: CR H3248-3249)

5/30/2012 7:07 pm: On motion to suspend the rules and pass the bill Agreed to by the Yeas and Nays: (2/3 required): 390 - 2 (Roll no. 295). (text: CR H3234)

5/30/2012 7:07 pm: Motion to reconsider laid on the table Agreed to without objection.

6/4/2012: Received in the Senate and Read twice and referred to the Committee on Veterans' Affairs.

Bill was not incorporated in the FY2013 National Defense Authorization Act.

## **Appendix C. Servicemembers Civil Relief Act ("SCRA") 50 U.S.C. App. §§ 501-597b — Applicable Excerpts**

### **§ 501. Short title *[Sec. 1]***

This Act [50 U.S.C. App. §§ 501 *et seq.*] may be cited as the Servicemembers Civil Relief Act.

### **§ 502. Purpose *[Sec. 2]***

The purposes of this Act are—

- (1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
- (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

## **TITLE I—GENERAL PROVISIONS**

### **§ 512. Jurisdiction and applicability of Act *[Sec. 102]***

#### **(a) Jurisdiction**

This Act applies to—

- (1) the United States;
- (2) each of the States, including the political subdivisions thereof; and
- (3) all territory subject to the jurisdiction of the United States.

#### **(b) Applicability to proceedings**

This Act applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act. This Act does not apply to criminal proceedings.

#### **(c) Court in which application may be made**

When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court which would otherwise have jurisdiction over the matter.

### **§ 513. Protection of persons secondarily liable *[Sec. 103]***

(a) Extension of protection when actions stayed, postponed, or suspended. Whenever pursuant to this Act a court stays, postpones, or suspends (1) the enforcement of an obligation or liability, (2) the prosecution of a suit or proceeding, (3) the entry or enforcement of an order, writ, judgment, or decree, or (4) the performance of any other act, the court may likewise grant such a stay, postponement, or suspension to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily subject to the obligation or liability the performance or enforcement of which is stayed, postponed, or suspended.

(b) Vacation or set-aside of judgments. When a judgment or decree is vacated or set aside, in whole or in part, pursuant to this Act, the court may also set aside or vacate, as the case may be, the judgment or decree as to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily liable on the contract or liability for the enforcement of the judgment or decree.

(c) Bail bond not to be enforced during period of military service. A court may not enforce a bail bond during the period of military service of the principal on the bond when military service prevents the surety from obtaining the attendance of the principal. The court may discharge the surety and exonerate the bail, in accordance with principles of equity and justice, during or after the period of military service of the principal.

(d) Waiver of rights.

(1) Waivers not precluded. This Act does not prevent a waiver in writing by a surety, guarantor, endorser, accommodation maker, comaker, or other person (whether primarily or secondarily liable on an obligation or liability) of the protections provided under subsections (a) and (b). Any such waiver is effective only if it is executed as an instrument separate from the obligation or liability with respect to which it applies.

(2) Waiver invalidated upon entrance to military service. If a waiver under paragraph (1) is executed by an individual who after the execution of the waiver enters military service, or by a dependent of an individual who after the execution of the waiver enters military service, the waiver is not valid after the beginning of the period of such military service unless the waiver was executed by such individual

#### **§ 514. Extension of protections to citizens serving with allied forces [Sec. 104]**

A citizen of the United States who is serving with the forces of a nation with which the United States is allied in the prosecution of a war or military action is entitled to the relief and protections provided under this Act if that service with the allied force is similar to military service as defined in this Act. The relief and protections provided to such citizen shall terminate on the date of discharge or release from such service.

#### **§ 516. Extension of rights and protections to reserves ordered to report for military service and to persons ordered to report for induction [Sec. 106]**

(a) Reserves ordered to report for military service. A member of a reserve component who is ordered to report for military service is entitled to the rights and protections of this title and titles II and III during the period beginning on the date of the member's receipt of the order and ending on the date on which the member reports for military service (or, if the order is revoked before the member so reports, or the date on which the order is revoked).

(b) Persons ordered to report for induction. A person who has been ordered to report for induction under the Military Selective Service Act (50 U.S.C. App. 451 *et seq.*) is entitled to the rights and protections provided a servicemember under this title and titles II and III during the period beginning on the date of receipt of the order for induction and ending on the date on which the person reports for induction (or, if the order to report for induction is revoked before the date on which the person reports for induction, on the date on which the order is revoked).

## **TITLE II—GENERAL RELIEF**

### **§ 521. Protection of servicemembers against default judgments [Sec. 201]**

(a) Applicability of section. This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit. In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit—

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) Appointment of attorney to represent defendant in military service. If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) Defendant's military status not ascertained by affidavit. If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act.

(4) Satisfaction of requirement for affidavit. The requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

(c) Penalty for making or using false affidavit. A person who makes or uses an affidavit permitted under subsection (b) (or a statement, declaration, verification, or certificate as authorized under subsection (b)(4)) knowing it to be false, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(d) Stay of proceedings. In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that—

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

(e) Inapplicability of section 202 procedures. A stay of proceedings under subsection (d) shall not be controlled by procedures or requirements under section 202 [50 U.S.C. App. §522].

(f) Section 202 protection. If a servicemember who is a defendant in an action covered by this section receives actual notice of the action, the servicemember may request a stay of proceeding under section 202 [50 U.S.C. App. §522].

(g) Vacation or setting aside of default judgments.

(1) Authority for court to vacate or set aside judgment. If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that—

(A) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(B) the servicemember has a meritorious or legal defense to the action or some part of it.

(2) Time for filing application. An application under this subsection must be filed not later than 90 days after the date of the termination of or release from military service.

(h) Protection of bona fide purchaser. If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act, that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment.

## **§ 522. Stay of proceedings when servicemember has notice [Sec. 202]**

(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 [50 U.S.C. App. §521]. A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 201 [50 U.S.C. App. §521].

(f) Inapplicability to section 301 [50 U.S.C. App. §531]. The protections of this section do not apply to section 301 [50 U.S.C. App. §531].

**§ 524. Stay or vacation of execution of judgments, attachments, and garnishments [Sec. 204]**

(a) Court action upon material affect determination. If a servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a court judgment or order, the court may on its own motion and shall on application by the servicemember—

(1) stay the execution of any judgment or order entered against the servicemember; and

(2) vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment.

(b) Applicability. This section applies to an action or proceeding commenced in a court against a servicemember before or during the period of the servicemember's military service or within 90 days after such service terminates.

**§ 525. Duration and term of stays; codefendants not in service [Sec. 205]**

(a) Period of stay. A stay of an action, proceeding, attachment, or execution made pursuant to the provisions of this Act by a court may be ordered for the period of military service and 90 days thereafter, or for any part of that period. The court may set the terms and amounts for such installment payments as is considered reasonable by the court.

(b) Codefendants. If the servicemember is a codefendant with others who are not in military service and who are not entitled to the relief and protections provided under this Act, the plaintiff may proceed against those other defendants with the approval of the court.

(c) Inapplicability of section. This section does not apply to sections 202 and 701 [50 U.S.C. App. §§522 and 591].

## Appendix D. Priority Department of Defense Appeal FY2010 Defense Authorization Bill

### **Priority Department of Defense Appeal FY 2010 Defense Authorization Bill**

**Subject:** Protection of Child Custody Arrangements for Parents Who are Members of the Armed Forces Deployed in Support of a Contingency Operation

**Appeal Citation:** H.R. 2647, sec. 584

**Language/Provision:** This section would amend 50 U.S.C. App. § 521 et seq. (The Servicemembers Civil Relief Act (SCRA)) by adding a new section to prevent a court from modifying or changing an existing order or issuing a new order that changes a child custody arrangement that existed on the date of a Servicemember's deployment in support of a contingency operation, unless such modification or change was in the child's best interest. In addition, the previous custody arrangement would be reinstated upon the return of the deployed Servicemember. Also, upon the end of a deployment, no court would be allowed to consider the Servicemember's absence by reason of that deployment in determining the best interests of the child.

**DoD Position/Impact:** The Department **opposes** section 584. This proposal, which has been included in substantially the same form for the last three legislative sessions, would disrupt State domestic schemes, discourage passage of broader, more helpful State laws, and increase cost, delay, and uncertainty due to increased oversight by the Federal courts. The Department applauds the efforts by almost thirty States to pass legislation that addresses the special circumstances facing parents who have dropped their own affairs to take up the burdens of the nation, and encourages the remaining States to consider similar legislation. The Department also recognizes the complexities of such cases, and the difficulties in balancing the interests of the Servicemember against the best interest of the child and the consequences of a parent's absence due to military service. The States, however, are in the best position to balance these equities within the context of their domestic relations laws. To complement the exceptional efforts of the States, DoD is revamping its Family Care Plan (FCP) guidance to the Services, further obviating the need for this legislation.

### **Federal Question Jurisdiction:**

Although changes to the current proposal from those previously offered would likely prevent Federal courts from actually hearing child custody disputes, the risk of Federal court oversight of State implementation of Federal law still creates an unacceptable risk of stress and disruption on our Servicemembers who would face increased cost, delay, and uncertainty in litigating these matters in both State and Federal courts. Such stress and disruption impact mission readiness, which is obviously a matter of the highest importance to the Department of Defense.

### **State Authority and Expertise:**

Matters of child custody have traditionally been reserved to the States. The States have the expertise, experience, and the social service resources to best legislate in this area, and manage any unique military circumstances that may affect such determinations.

### **State Laws:**

Approximately twenty-nine States have recognized the potential competing interests of the child and the custodial Servicemember, and have passed specific legislation designed to balance those



interests. Many of these acts and bills create an expansive, in-depth system to address unique State concerns within an already intricately designed State system. Many States are addressing issues beyond those in this proposal and passing comprehensive statutes that address other important aspects of child custody, such as delegation of visitation rights, authority for expedited hearings, and expanded use of video conferencing. The Department is concerned that a one-size-fits-all Federal standard—even of limited scope—may not only disrupt current State schemes, but would also serve as a disincentive for consideration of more helpful legislation.

The progress with which the States have embraced these military-specific issues has been phenomenal and shows no indication of waning. Seven military custody bills have become law since we commented on a similar legislative proposal last year. It would be a mistake to intrude on the significant protections enacted and creativity demonstrated by the States.

To encourage the remaining 22 States to follow the lead of the other 28, the Department has directed that child custody matters be included on the list of the Department's 10 Key Quality of Life Issues, which will be presented to the Governors, State legislators, and other State officials.

#### **Adverse Impact on SCRA:**

Apart from the disruption occasioned by the risk of Federal oversight of the State court process, the adverse impact on the SCRA itself could be significant. One possible impact would be the inference that by legislating in the narrow area of "judgment cases" (those where there has already been a court's involvement and prior order or direction), the greater majority of cases—those without court involvement—would appear to be excluded. Furthermore, the application of the SCRA to other areas of domestic law, such as support and visitation, might be excluded. This would create a potentially dizzying set of rules and forums depending upon arbitrarily established distinctions in timing, prior court involvement, and the specific aspect of domestic relations at issue.

The limitation of House section 584 to those cases involving the motions brought after deployment in support of a contingency operation—a term that will not be well understood in State courts—creates another arbitrarily created distinction between those involved in a contingency operation and those who must be absent from their child for other military-directed reasons. Why should the deployment of a Servicemember in support of a combat operation, as opposed to a humanitarian operation, be forced to operate under different laws and perhaps in different courts? Few other provisions of the SCRA turn on such arbitrarily-imposed distinctions.

#### **SCRA Protections Currently Available:**

The SCRA currently provides powerful rights to mobilized custodial caregivers. A number of high-visibility custody cases have resulted in custody decisions adverse to deployed Servicemembers; however, in many of these cases the basic and generally easily met prerequisites for automatic 90-day stays under the SCRA were not followed. In other cases, judges simply ignored the SCRA or it was not properly pled. This indicates a problem of a lack of education about the effect and use of the SCRA rather than a problem with its substantive limitations. To address failures of State courts to follow the SCRA's explicit terms, and implement its significant and strong protections, by passing laws such as section 584 could suggest that the SCRA does not currently mean what it says with respect to these and other areas of family law.

#### **Family Care Plans:**

The Department has recognized that improvements to its Family Care Plan (FCP) regulation can address many of the issues that otherwise too often result in custody litigation arising after deployment. By clarifying those who require an FCP and emphasizing the importance of custody negotiations with the non-custodial parent early in the process before deployment, the issues that have too frequently resulted in litigation can be obviated. The Department is convinced that these efforts, in conjunction with the significant protections already available under the SCRA, will resolve far more issues in favor of parents who are Servicemembers than will additional Federal legislation, and our ongoing efforts will do so without the risks discussed above.

**Conclusion:**

Although mindful of the impact that child custody issues could have on the readiness of mobilized Servicemembers, the Department urges that House section 584 not be included in the final National Defense Authorization Act. The need for this legislation should be examined from the perspective of pending and recently enacted State legislation, and the Department's current FCP initiatives. Through its State liaison program the Department believes it can encourage many of the remaining States to provide basic protections that would *not* run the risk of unintentionally undermining current SCRA protections, and disrupting the carefully crafted State systems that have handled child custody cases well and efficiently for many years.

## Appendix E. State Child Custody Laws

This appendix provides information and status concerning state law provisions related to U.S. servicemembers and child custody. The following chart, originally published in 2009,<sup>55</sup> has been extensively updated by CRS to reflect developments in various states laws.

**Table E-1. State Child Custody Laws Related to Servicemembers**

("C" mean established by case law)

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not a factor in custody determination	Deployment does not solely justify modification	Guardianship or visitation can be delegated	Expedited/Electronic Hearing for deployed parent	Only National Guard and/or Reserves are protected
AL	None						C		
AK	Passed	Alaska Stat. §§ 25.20.095, 25.20.110		X	X		X	X	
AZ	Passed	Ariz. Rev. Stat. § 25-411 (effective 1/1/13)	X	X		X	X	X	
AR	Passed	Ark. Code Ann. § 9-13-110	X						
CA	Passed	Cal. Fam. Code § 3047		X		X	X	X	

<sup>55</sup> Mark E. Sullivan, "Military Custody and Visitation Cases, Appendix 7-1," in 2010 Family Law Update, ed. Ronald L. Brown and Laura W. Morgan (Austin: Aspen Publishers, 2010), pp. 292-296. (The foreword highlighting changes in the 2010 Update is dated 10/2009).

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not a factor in custody determination	Deployment does not solely justify modification	Guardianship or visitation can be delegated	Expedited/Electronic Hearing for deployed parent	Only National Guard and/or Reserves are protected
CO	Passed	Colo. Rev. Stat. § 14-10-131.3	X	X			C		X
CT	Passed	HB 5395/Public Act No. 12-90	X		X			X	
D.C.	Passed	B19-0332	X		X			X	
DE	Passed	Del.Code.Ann. § 727(d)	X	X	X			X	
FL	Passed	Fla. Stat. Ann. Stat. § 61.13002	X	X			X	X	
GA	Passed	SB 112 (2011-2012)	X	X	X		X	X	
Guam	None								
HI	Passed	Haw. Rev. Stat. §§ 571-91 to -97		X			X	X	
ID	Passed	Idaho Code Ann. §§ 32-717, 15-5-104				X	X		X
IL	Passed	750 Ill. Comp. Stat. 5/602, 5/610	X	X		X	C		
IN	Passed	Ind. Code §§ 31-17-2-21.1 to -21.3	X	X	X		X	X	
IA	Passed	Iowa Code §§ 598.41C, -41D	X	X	X	X	X	X	

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not a factor in custody determination	Deployment does not solely justify modification	Guardianship or visitation can be delegated	Expedited/Electronic Hearing for deployed parent	Only National Guard and/or Reserves are protected
KS	Passed	Kan. Stat. Ann. § 23-3217	X	X		X	X	X	
KY	Passed	Ky. Rev. Stat. Ann. § 403.340	X	X					
LA	Passed	La. Rev. Stat. Ann. §§ 9:348; 9:359 et. seq.	X		X			X	
ME	Passed	Me. Rev. Stat. tit. 18-A, §5-104, tit. 37-B, § 343			X		X		X
MD	Passed	Md. Code Ann., Fam. Law § 9-108						X	
MA	Pending	H.R. 1358 Referred to House Judiciary Cmte 1/22/2013							
MI	Passed	Mich. Comp. Laws Serv. § 722.27	X	X	X				
MN	None								
MS	Passed	Miss. Code Ann. § 93-5-34		X		X	X	X	
MO	Passed	Mo. Rev. Stat. § 452.412		X		X			

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not a factor in custody determination	Deployment does not solely justify modification	Guardianship or visitation can be delegated	Expedited/Electronic Hearing for deployed parent	Only National Guard and/or Reserves are protected
MT	Passed	Mont. Code Ann. §§ 40-4-212, 212, 216, 219, 228, 234	X		X	X	X	X	
NE	Passes	LB673	X	X	X				
NV	Passed	Nev. Rev. Stat. §§ 125C.100-185	X	X		X	X	X	
NH	Passed	N.N. Rev. Stat. Ann. §§ 458-E:1 to -E:9	X	X		X		X	
NJ	Passed	S No. 1051 (P.L.2013 Ch 7)	X	X	X	X	X	X	
NM	None								
NY	Passed	N.Y. Dom. Rel. Law § 75-l	X						
NC	Passed	N.C. Gen. Stat. § 50-13.7A		X		X	X	X	
ND	Passed	N.D. Cent. Code § 14-09-06.6 (2008)	X	X					X
OH	Passed	Ohio Rev. Code 3109.04	X	X		X		X	
OK	Passed	Okla. Stat. tit. 43, §§ 112, 150 to 150.10	X	X			X	X	

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not a factor in custody determination	Deployment does not solely justify modification	Guardianship or visitation can be delegated	Expedited/ Electronic Hearing for deployed parent	Only National Guard and/or Reserves are protected
OR	Passed	Or. Rev. Stat. § 107.169				X			X
PA	Passed	51 Pa. Cons. Stat. § 4109	X	X	X	X	X		
P.R.	None								
RI	Passed	H7274 (2012)			X			X	
SC	Passed	S.C. Code Ann. §§ 63-5-910, -920	X	X		X		X	
SD	Passed	S.D. Codified Laws § 33-6-10	X	X	X	X	X		
TN	Passed	Tenn. Code Ann. § 36-6-113	X	X				X	
TX	Passed	Tex. Fam. Code §§ 153.702, 156.105		X		X	X	X	
UT	Passed	Utah Code Ann. § 30-3-40	X	X			X		
VT	Passed	15 Vermont Stat. Ann. §§ 681-689	X	X	X	X	X	X	
VA	Passed	Va. Code Ann. §§ 20-124.7 to 20-124.10	X				X	X	

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not a factor in custody determination	Deployment does not solely justify modification	Guardianship or visitation can be delegated	Expedited/ Electronic Hearing for deployed parent	Only National Guard and/or Reserves are protected
WA	Passed	Wash. Rev. Code §§ 26.09.004, -010, -260	X	X			X	X	
WV	Passed	W. Va. Code § 48-9-404	X			X		X	
WI	Passed	Wis. Stat. §§ 767.41, -451			X				X
WY	Passed	HB 0105 (2011)	X		X			X	



## **Author Contact Information**

(name redacted)  
Specialist in Military Manpower Policy  
[redacted]@crs.loc.gov, 7-....

(name redacted)  
US Air Force Fellow  
[redacted]@crs.loc.gov, 7-....

# EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.