CALL OF DUTY: FAMILY WARFARE EDITION

INTRODUCTION

Meet John. John is a career soldier. He is a Captain in the United States Army, and he serves with the 3rd Battalion, 75th Ranger Regiment out of Fort Benning, Georgia. As a member of Special Forces, John is a highly trained, in-demand soldier. But John is not just a soldier; he is also a father. His daughter, Zoe, is six years old.

Now, meet Kim. Kim is a bartender at a local bar. She often works the late shift and extra hours on weekends since the tips are better. Kim also happens to be John's ex-wife. Their fifteen-year marriage ended three years ago when John discovered that Kim was having an affair with a regular at the bar while John was deployed to Afghanistan.

When John and Kim's divorce was finalized last year, John was awarded primary custody of Zoe. The judge felt that it was in Zoe's best interests for her to live with John. Kim was given regular periods of visitation with Zoe during the week so as to not interfere with Kim's work hours.

Two weeks ago, John received orders that he is to deploy to Camp Buehring in Kuwait to be on hand should U.S. military ground forces be needed in Iraq to assist in the fight against ISIS. If the situation stabilizes, then John expects that his unit will be re-routed to Afghanistan for a short tour before ending up in South Korea to partake in training exercises. Although details are sparse, John believes he will be overseas for at least nine months. This will be his sixth deployment since the Global War on Terror began. The foremost question on John's mind is, "What does this mean for Zoe?" He calls his ex-wife, who asks for Zoe to stay with her temporarily until John returns to the United States. John's original plan was to send Zoe to his parents' house and to let her stay with her Nana and Pa, but Kim convinces John that she will make sure Zoe's needs come before her work.

Fast-forward nine months. John has just returned home from deployment. While he was fighting in the trenches, the one thought that kept John going day-after-day was returning home and holding his little girl once again. His first act is to call up Kim and inform her that he is back in town and on his way to pick up Zoe. To his surprise, Kim tells him that she has custody of Zoe now, and John had better stay away. He sits in his truck feeling the joy of being mere minutes away from a happy reunion with his daughter ebbing from his numb body. He drops his head into his hands and wonders, "What do I do now?" The question haunts him. "Did I answer the call of duty to my country only to lose my daughter?"

Sadly, the picture painted above is not that uncommon.[1] Since 2001, over 2.5 million servicemembers[2] have deployed to Iraq and Afghanistan, with at least 400,000 of those men and women having completed three or more deployments.[3] With over 150,000 single-parent servicemembers currently serving in the Armed Forces,[4] and more single parents on the

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[1] John's story is a fictional one. For a non-exhaustive collection of chilling tales and true stories of non-custodial parents using the servicemember's military obligations (such as an absence from the home due to military orders) as a tool to wrest away custody, see *In re* Marriage of Bradley, 137 P.3d 1030, 1031–32 (Kan. 2006); Crouch v. Crouch, 201 S.W.3d 463, 464 (Ky. 2006); Lyndsey M. D. Kimber, *Talk is Cheap; Defending Your Rights as a Servicemember is Not*, MINN. J., Feb. 2008, at 8, 9–10 (2008) (telling of a Minnesota case where, upon the death of the child's mother, the maternal grandparents were given custody of the child instead of the child's father because his military training schedule was deemed too disruptive); Janine Robben, *Military Deployment Raises Family Law Issues*, OR. ST. B. BULL., Dec. 2007, at 23, 23 (describing a situation where the father, who previously had had little contact with his child, took the child to Texas after the child's mother deployed); Pauline Arrillaga, *Deployed Parents Confront Custody Battles*, TELEGRAPH HERALD (Dubuque, IA), May 7, 2007, at D3 (citing four cases where a custody battle erupted after the servicemember was mobilized on military orders); Jon Monk, *US Navy Officer Deployed on Submarine Fights for Custody of Daughter*, TOLEDO NEWS NOW, June 20, 2014, http://www.toledonewsnow.com/story/25833158/us-navy-officer-deployed-on-submarine-fights-for-custody-of-daughter; Kristi Tousignant, *Volunteer Corps of Lawyers Helps Service Members*, CBS BALTIMORE (Oct. 6, 2013, 11:31 AM), http://baltimore.cbslocal.com/2013/10/06/volunteer-corps-of-lawyers-helps-service-members/ (describing a custody case where the judge denied custody to the servicemember-parent because her military responsibilities "interfered with her being a mother").

[2] Both "servicemembers" and "service members" are widely used in this area. *Compare* Tousignant, *supra* note 1 (using "service members"), *with Bradley*, 137 P.3d at 1033 (using "servicemember"). The author has elected to use the spelling of "servicemembers" to model the Servicemembers Civil Relief Act, a key federal statute which is discussed throughout this Note. 50 U.S.C. app. § 501 (2012).

[3] Chris Adams, *Millions Went to War in Iraq, Afghanistan, Leaving Many with Lifelong Scars*, MCCLATCHY NEWSPAPERS, Mar. 14, 2013, http://www.mcclatchydc.com/2013/03/14/185880/millions-went-to-war-in-iraq-afghanistan.html. Over 600,000 reservists and members of the National Guard have been involved in U.S. Central Command operations since 2001, including tours of duty in both Iraq and Afghanistan. Kristen M.H. Coyne et al., *The SCRA and Family Law: More Than Just Stays and Delays*, 43 FAM. L.Q. 315, 316 (2009). The increased use of Reservists and National Guard soldiers means that military custody issues are not confined to military bases where there is ready access to JAG lawyers. Christopher Missick, *Child Custody Protections in the Servicemembers Civil Relief Act: Congress Acts to Protect Parents Serving in the Armed Forces*, 29 WHITTIER L. REV. 857, 858 (2008).

For the story of a member of the 2nd Battalion, 75th Ranger Regiment who perished in 2011 during his *fourteenth* deployment, see Luis Martinez & Christina Caron, *Army Ranger Dies on 14th Deployment*, ABC NEWS, Oct. 25, 2011, http://abcnews.go.com/US/army-ranger-dies-14th-deployment/story?id=14811227.

[4] U.S. DEP'T OF DEF., U.S. DEP'T OF HOMELAND SEC. & U.S. DEP'T OF VETERANS AFFAIRS, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT (2011).

way,[5] the likelihood of deployed servicemembers having to grapple with child custody issues either during deployment or after their return is significant. There is no doubt that military deployments take a great toll on this Nation's servicemembers.[6] It is extremely difficult for a soldier to concentrate on the task at hand when he learns from his mother that his ex-wife is petitioning for custody of their daughter, and he knows there is nothing he can do about it while stuck 7,000 miles away in Iraq.[7] Servicemembers have to worry not only about IEDs, snipers, and suicide bombers, but also about whether they are going to lose custody of their son or daughter due to a mandatory deployment.[8] This may be the military

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[5] *See* Stephen Losey, *AF Opens Doors to Single Parents, Pregnant Women*, AIR FORCE TIMES, Aug. 12, 2013, at A14 (explaining that the Air Force is changing its enlistment and officer candidacy policies to allow single parents with minor children to join the ranks).

[6] Jeffrey P. Sexton & Jonathan Brent, *Child Custody and Deployments: The States Step in to Fill the SCRA Gap*, ARMY LAW., Dec. 2008, at 9, 9; *see also* Coyne et al., *supra* note 3, at 316 ("Some units report that approximately 10 percent of first-time deployed soldiers and 33 percent of second-time deployed servicemembers experience separation or divorce."); Gregg Zoroya, *Alcohol Abuse by GIs Soars Since '03—Stress on Army Seen in Rate of Treatment*, USA TODAY, June 19, 2009, at 1A.

It is also well-recognized that frequent parental deployment can have a negative effect on children. *See* Anita Chandra et al., *Children on the Homefront: The Experience of Children from Military Families*, 125 J. AM. ACAD. PEDIATRICS 16, 17, 21, 23–24 (2010); James Dao, *Deployments Taking Toll on Military's Children*, N.Y. TIMES, Dec. 7, 2009, at A16; Karen Jowers, *Study Shows Deployments Take Toll on Children*, AIR FORCE TIMES, Jul. 20, 2009, at 8; John Ramsey, *Stress of Military Deployments Take Toll on Youngest of Family Members*, FAYETTEVILLE OBSERVER, Jul. 28, 2013, http://www.fayobserver.com/military/stress-of-military-deployments-takes-toll-on-youngest-of-family/article_202f6607-bf15-599b-976b-a92dffa536ec.html.

However, some believe the military community is better suited to looking after these kids than the private sector. *See* Jeri Hanes, *Fight For Your Country, Then Fight to Keep Your Children: Military Members May Pay the Price . . . Twice*, ARMY LAW., Feb. 2011, at 4, 15 ("[T]he military community is better equipped to provide support to children to minimize stress after a parent's deployment."). For a discussion of the many benefits associated with being the child of a servicemember, see *id.* at 14–15. *See also* Mark E. Sullivan, *Military Family Law: Thirteen Common Questions*, GPSOLO, Jan./Feb. 2005, at 34, 38.

[7] This is the story of Marine Corporal Levi Bradley. *In re* Marriage of Bradley, 137 P.3d 1030, 1032 (Kan. 2006). After learning of court proceedings brought against him for custody, he was distracted at work and rolled a Humvee, earning him a reprimand from his commanding officer. *See* Arrillaga, *supra* note 1. For a full analysis of the case, see Lauren S. Douglass, *Avoiding Conflict at Home When There is Conflict Abroad: Military Child Custody and Visitation*, 43 FAM. L.Q. 349, 352–54 (2009).

[8] Sexton & Brent, *supra* note 6, at 9. The civilian parent uses the servicemember's lengthy deployment to establish a new status quo: new living arrangements for the child, new schools, new friends, new routine, and a whole new way of life. Then, because the child has become accustomed to her new surroundings, the civilian parent argues that the child should not be forced to relocate again just because the servicemember has returned home. *See* Missick, *supra* note 3, at 873. This puts the servicemember at a severe disadvantage. *See* Sara Estrin, *The Servicemembers Civil Relief Act: Why and How This Act Applies to Child Custody Proceedings*, 27 LAW & INEQ. 211, 232–33 (2009).

warrior's greatest battle because his fate lies within the hand of an unknown "enemy"—the judge—armed with a mighty weapon—the doctrine of the "best interests of the child."[9]

This Note will examine the problems associated with a servicemember's military deployment when it comes to child custody and evaluate the solutions that have been promulgated to solve these problems. Part I studies the military's method of addressing custody during deployment, specifically examining the role the Family Care Plan plays in military custody situations. Part II considers federal legislation that could potentially offer assistance to servicemembers embroiled in custody battles, looking first at the Servicemembers Civil Relief Act ("SCRA"). Following the discussion of the SCRA is a review of newly enacted federal legislation championed by Representative Michael Turner of Ohio that will amend the SCRA to include more substantive child custody provisions. Part III of this Note examines the types of legislation at the state level that have developed in this area. Part IV analyzes the recently approved Uniform Deployed Parents Custody and Visitation Act ("UDPCVA"). The UDPCVA was approved by the National Conference of Commissioners on Uniform State Laws in the summer of 2012 and has already been adopted by a handful of states.[10] Finally, Part V suggests which solution would be the most effective in protecting servicemember-parents who risk losing custody of their children in order to serve their country.

I. FAMILY CARE PLANS

The Family Care Plan is a form the military requires all single-parent servicemembers to complete before commencing military duties.[11] If a

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[9] Sexton & Brent, *supra* note 6, at 9–10; *see* Kimber, *supra* note 1, at 9 (stating that many courts have elevated the best interests of the child doctrine above the Servicemembers Civil Relief Act, a federal statute designed to protect servicemembers engaged in litigation while deployed). For a historical look at the best interests of the child doctrine, see generally Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337 (2008).

In general terms, the doctrine requires judges to weigh a variety of factors in making a child custody determination, such as:

> the wishes of the child's parents; the wishes of the child; the interaction and interrelationship of the child with his or her parents, siblings, and other persons who may significantly affect the child's best interests; the child's adjustment to his or her home, school, and community; and, the mental and physical health of all individuals involved.

Estrin, *supra* note 8, at 222.

[10] *See infra* notes 146–48 and accompanying text.

[11] Duncan D. Aukland, *Five Tips that Pro bono Attorneys Need to Know When a Servicemember is a Party to a Family Law Case*, 43 CLEARINGHOUSE REV. 232, 233 (2009);

servicemember does not complete a Family Care Plan, then he or she is subject to disciplinary action and risks being discharged from service.[12] The purpose of the plan is to make sure that the servicemember puts in place "the logistical, financial, medical, educational, and legal documentation necessary to ensure continuity of care and support for dependent family members."[13]

If servicemembers complete a Family Care Plan to designate the person they want to take care of their child during deployment, then why all the fuss? The problem is that sole reliance on the Family Care Plan to address custody is flawed. One complication in depending on the Family Care Plan to solve deployment-related custody issues is that servicemembers often prepare the plans without legal guidance.[14] Servicemembers tend to view the Family Care Plan as a weapon they can employ to completely cut off the non-custodial parent from the child for the duration of the servicemember's deployment, and they neglect to consider the legal ramifications of such an act.[15] The Department of Defense suggests that servicemembers work with the non-custodial parent to complete the Family Care Plan and recommends that the servicemember secure the non-custodial parent's consent if the servicemember plans to leave the child with a third party (such as the child's grandparents).[16] Yet, no contact with the non-custodial parent is actually required by the Department of Defense to complete the Family Care Plan.[17]

Another reason why it is inadequate to rely solely on the Family Care Plan is that, even if the non-custodial parent and the servicemember work out an agreement on custody for the period of deployment, there is nothing preventing the non-custodial parent from later refusing to follow the Plan.[18] After all, the Family Care Plan "is not a legal document that can

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see DEPARTMENT OF DEFENSE, DODI 1342.19, FAMILY CARE PLANS 2, 8 (2010) [hereinafter DODI].

12 DODI, *supra* note 11, at 8.

13 *Id.*

14 Aukland, *supra* note 11, at 233 (explaining that, instead of giving the Family Care Plan to judge advocate generals who are licensed attorneys, servicemembers give the completed form to their commanding officer who is not likely to question whether the plan is in conflict with an existing court order).

15 *See id.*

16 DODI, *supra* note 11, at 8.

17 *See id.* (requiring only an attempt to contact the non-custodial parent).

18 *See* DEP'T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATION, OPNAVINST, 1740.4C(4)(b) (2007) ("[T]he Family Care Plan may not be accepted by or enforceable against the natural or adoptive parent(s) of the minor child(ren) in question . . . ."); David Kocieniewski, *Soldier's Service Leads to a Custody Battle at Home*, N.Y. TIMES, Sept. 1, 2009, at A1, *available at* http://www.nytimes.com/2009/09/01/nyregion/01guard.html?_r=0.

change a court-mandated custodial arrangement."[19] Courts have held that they are not bound by the servicemember's plan in determining custody because "[t]o hold otherwise would effectively provide the United States Secretary of Defense or his delegees not simply the right to control the nation's armed forces but also the opportunity to control some cases in the states' family courts. Our law does not permit such a result."[20] The best one can hope for is to use the Family Care Plan or other agreement made between the servicemember-parent and the non-custodial parent as supporting evidence at a custody hearing.[21]

One of the most widely publicized military custody cases is that of Lieutenant Eva Crouch (now Eva Slusher).[22] Crouch, a member of the Kentucky National Guard, received mobilization orders.[23] In response, she arranged with her ex-husband for him to take care of their daughter while she was gone.[24] They agreed that this was just a temporary set-up.[25] In spite of their agreement, when the time came for Crouch to resume custody of her daughter, the ex-husband refused.[26] The trial court reviewed the parties' agreement and found that "at the time the agreed order was executed it was the intent of both parties that the child would be returned to the physical custody of [Crouch] at the conclusion of [her] military alert."[27] Nevertheless, the court promptly disposed of the agreement saying that if it "had been a contract for a sale of goods, the parties' intent would control as a matter of law. However, in the present arrangement the Court must consider the best interests of the child."[28]

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[19] ARMY REGULATION, 600-20, para. 5–5 (2012). The Family Care Plan's "sole purpose is to document . . . the plan by which [servicemembers] provide for the care of their [f]amily members when military duties prevent the [servicemember] from doing so." *Id.*

[20] Tallon v. DaSilva, No. FD02-4291-003 (Ct. Com. Pl. Alleghany Cnty. 2005); *see also* Lebo v. Lebo, 2004-0444, p.3 (La. App. 1 Cir. 6/25/04); 886 So.2d 491, 492 (deciding that implementing the servicemember's plan would give him the power to "unilaterally change custody of a minor child").

[21] DAVID F. BURRELLI & MICHAEL A. MILLER, CONG. RESEARCH SERV., R43091, MILITARY PARENTS AND CHILD CUSTODY: STATE AND FEDERAL ISSUES, CONGRESSIONAL RESEARCH SERVICE 9 (2013).

[22] *See, e.g.*, Douglass, *supra* note 7, at 356; Shawn P. Ayotte, Note, *Protecting Servicemembers from Unfair Custody Decisions While Preserving the Child's Best Interests*, 45 NEW ENG. L. REV. 655, 656–57 (2011); Arrillaga, *supra* note 1; Pauline Arrillaga, *Law Shields Military Parents; Custody Fights Delayed for Deployment*, SUN-SENTINEL (Fort Lauderdale), Jan. 31, 2008, at 2A.

[23] Crouch v. Crouch, 201 S.W.3d 463, 464 (Ky. 2006).

[24] *Id.* at 464.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

The trial court then awarded custody to the ex-husband.[29] Though Crouch was eventually able to get the trial court's decision overturned on appeal, the cost to her for responding to the call of duty was $25,000 in fees and expenses plus two years of her life fighting through the Kentucky court system simply to get the custodial arrangement that she and her ex-husband had agreed to before she ever left.[30] If a signed agreement between the parties does not prevent ongoing custody battles, then a Family Care Plan developed solely by the servicemember with zero input from the other party has little chance of surviving a challenge by the non-custodial parent.

Finally, the Family Care Plan is not a realistic solution to military custody issues because courts are concerned about servicemembers using the Family Care Plan to subvert the non-custodial parent's constitutional protections.[31] Many of the custodial challenges that arise during deployments are birthed at the moment the non-custodial parent learns that the servicemember has deployed and the child is staying with a stepparent or grandparent pursuant to the Family Care Plan instead of with the non-custodial parent.[32] The Supreme Court has held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[33] Consequently, the "laws in most states favor natural parents over any other guardian, [which means] the non-servicemember parent has a good chance of prevailing" when challenging the rights of a third party to exercise custody in the absence of the servicemember-parent.[34]

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[29] *Id.*

[30] *Id.* at 464–65, 467; Arrillaga, *supra* note 1.

[31] *See* Troxel v. Granville, 530 U.S. 57, 69–70 (2000) (plurality opinion); *see also* Aukland, *supra* note 11, at 233; *infra* Part V.C.

[32] Aukland, *supra* note 11, at 233. Some suggest that the civilian parent strategically waits for the servicemember to be deployed before filing a custody suit. That way, the civilian parent has physical custody of the child and develops a pattern of being the one responsible for the daily welfare for the child. This sets up the civilian parent nicely heading into a custody hearing. *See* Nakia C. Davis, *Child Custody and the SCRA: My Child or My Country?*, HUMAN RIGHTS, Spring 2008, at 10, 11 (2008).

[33] *Troxel,* 530 U.S. at 66. For a look at how the laws of the states have evolved with respect to third-party visitation in light of *Troxel*, see Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 5 (2013).

[34] Sexton & Brent, *supra* note 6, at 9.

II. FEDERAL LEGISLATION

A. Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act ("SCRA"), formerly known as the Soldiers and Sailors Civil Relief Act of 1940 ("SSCRA") was enacted in 2003

> (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
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> (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.[35]

The SCRA offers protections to active duty servicemembers, as well as those in the National Guard or Reserves who are called up to active duty.[36] Most of the protections are in the commercial arena (such as limiting the interest rate on all liabilities of the servicemember upon mobilization or the prohibition against the commencement of foreclosure proceedings by a bank without first obtaining a court order).[37] Civilian attorneys whose client base includes military personnel are likely aware that the SCRA also prohibits the entry of a default judgment against a servicemember for failure to appear and dictates that the court appoint an attorney to represent the servicemember-defendant.[38]

For family law and, more particularly, for custody cases involving deployed servicemembers, the key piece of the SCRA by which servicemembers often live and die is the stay provision.[39] The provision requires courts, upon application by the servicemember, to stay (*i.e.*, put on hold) an ongoing legal battle for ninety days.[40] The court could also issue a stay *sua sponte*.[41] When servicemembers petition for a stay, they must provide the court with a written statement explaining how their current military duties prevent them from appearing before the court and offer a date upon which they would be available.[42] In addition, the servicemember has to include a written statement from the commanding officer that describes how the servicemember's current duties do not allow

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35 50 U.S.C. app. § 501-02 (2012).

36 *Id.* § 511.

37 *Id.* §§ 527, 533.

38 *Id.* § 521.

39 *Id.* §§ 521(d), 522(b). A section 521 stay is for the servicemember who has not yet made an appearance in the court proceeding. *See id.* § 521(a). A section 522 stay is available when the servicemember has received notice of a court proceeding. *See id.* § 522(a).

40 *Id.* § 522(b)(1).

41 *Id.* §§ 521(d), 522(b)

42 *Id.* § 522(b)(2).

him or her to be present in court and that military leave has not been authorized.[43] As long as those two written components are present, then the judge, according to the statute, must issue a ninety-day stay.[44]

The effectiveness of the SCRA stay in military custody cases is limited for two reasons. First, a stay of ninety days is undoubtedly insufficient when an average deployment is nine months.[45] In order to be a truly effective protection for servicemembers, the stay should last for the duration of the deployment.[46] The SCRA does allow the servicemember to petition for additional stays, but the decision of whether to grant an additional stay is within the judge's discretion.[47] As discussed below, when military personnel consistently run into obstacles trying to persuade the judge to honor the *mandatory* ninety-day stay provision of the SCRA,[48] it is not hard to imagine the roadblocks the servicemember must overcome to have a *discretionary* stay issued.[49]

The second, and bigger, problem is the failure of judges to adequately balance the competing interests of the servicemember and the child.[50] When weighing the state's best interests of the child standard against the stay provisions of the SCRA, the federal statute often loses.[51] Rather than blame judges for ignoring federal law, some commentators reason that

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[43] *Id.* § 522(b)(2)(B). The two factors most commonly considered by the court in evaluating whether military duties have a material effect on the servicemember's ability to participate in a court proceeding are "the servicemember's availability, and . . . the necessity of the servicemember's presence." Estrin, *supra* note 8, at 217–18.

[44] *See* 50 U.S.C. app. § 522(b).

[45] In 2011, the Army reduced the average soldier's deployment length to nine months, but at times during the military engagements in Iraq and Afghanistan, Army deployments were as long as fifteen months. Larry Shaughnessy, *Army to Reduce Deployment Time in War Zone to 9 Months*, CNN.COM (Aug. 5, 2011), http://www.cnn.com/2011/US/08/05/army.afghan.deployment/. Marines have seen their standard six-month deployment schedule increase to eight- and nine-month intervals in the past year. Sam Fellman & Gina Harkins, *7 1/2- to-8 Month MEU Pumps 'the New Norm*,*'* ARMY TIMES, Dec. 2, 2013, http://archive.armytimes.com/article/20131202/CAREERS/312020007/7-8-month-MEU-pumps-new-norm. A ninety-day stay provision in the face of a nine-month, one-year, or fifteen-month deployment amounts to a Band-Aid at best.

[46] *See* Sexton & Brent, *supra* note 6, at 9–10.

[47] 50 U.S.C. app. § 522(d) (2012).

[48] *See* Dennis Pelham, *Submarine Duty No Defense in Child Custody Case*, DAILY TELEGRAM (June 17, 2014), http://www.lenconnect.com/article/20140617/NEWS/140619158.

[49] *See* BURRELLI & MILLER, *supra* note 21, at 4.

[50] *See* Missick, *supra* note 3, at 858 ("An inherent conflict exists between placing the highest priority on the needs of the child and protecting those called to national service.").

[51] *In re* Marriage of Bradley, 137 P.3d 1030, 1032 (Kan. 2006) (denying the servicemember's petition for a stay, in part, because it believed that family law trumped federal law and opining that "this Court has a continuing obligation to consider what's in the best interest of the child"); *see* BURRELLI & MILLER, *supra* note 21, at 5; *see also* Kimber, *supra* note 1, at 9 (stating that many state courts have elevated the best interests of the child doctrine above the SCRA).

this result is to be expected when a civilian court is trying to implement a military-related law.[52] Some posit that confusion and lack of education among state court judges causes the inequity, not a flaw in the law itself.[53] Still others lay the blame at the feet of the servicemember.[54] After all, the servicemember has the burden of submitting the necessary paperwork to the judge in order to get the stay, they say.[55] In the words of the Kansas Supreme Court, "where there is a failure to satisfy the conditions of the [SCRA], then the granting of a stay is within the discretion of the trial court."[56] The root of the problem may be in dispute, but there is no debate over the fact that judges are not adhering to the SCRA.[57]

The Supreme Court has held that the statute is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[58] Under the SSCRA, courts retained discretion as to whether to grant a stay.[59] However, when the SCRA was enacted in 2003, Congress decided to change the law to make the first ninety-day stay mandatory upon petition by the servicemember.[60] Congress eliminated the "judicial discretion" element for the first stay, yet judges are still injecting themselves into the proceedings and eschewing the SCRA in favor of the best interest of the child.[61] The judges' actions are inconsistent with the notion that the Act "is to be administered as an instrument to accomplish substantial justice."[62] "Substantial justice" would be better achieved by extending grace to servicemembers who are trying to manage the strenuous requirements of being in a hostile fire zone

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[52] Missick, *supra* note 3, at 858, 869.

[53] BURRELLI & MILLER, *supra* note 21, at 5; Douglass, *supra* note 7, at 354–55.

[54] *See* BURRELLI & MILLER, *supra* note 21, at 5 (referring to a 2010 Department of Defense Priority Appeal to the FY 2010 Defense Authorization Bill in which the Department of Defense argued 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").

[55] Estrin, *supra* note 8, at 217.

[56] *Bradley*, 137 P.3d at 1034.

[57] Sexton & Brent, *supra* note 6, at 9–10. "The bottom line is that despite the . . . SCRA stay provisions, servicemembers are still at the mercy of the individual court's approach to the contentious issues surrounding military service and child custody rights." *Id.*

[58] Boone v. Lightner, 319 U.S. 561, 575 (1943) (referring to the SCRA's predecessor, the SSCRA); *see also* Le Maistre v. Leffers, 333 U.S. 1, 6 (1948) (maintaining that the SSCRA "must be read with an eye friendly to those who dropped their affairs to answer their country's call").

[59] Estrin, *supra* note 8, at 214–15.

[60] 50 U.S.C. app. § 522(b) (2012).

[61] *See supra* notes 48–57 and accompanying text.

[62] *In re* Watson, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003).

while also meeting the state court's demands, often acting without the benefit of legal counsel.[63]

In an attempt to address the pandemic of judge's ignoring the SCRA in custody cases, the SCRA was amended in 2008.[64] The phrase "including any child custody proceeding" was inserted into the two sections of the Act authorizing a stay of proceedings.[65] The revision clarified the intent of Congress for the SCRA and its procedural protection of a mandatory stay to apply to custody cases.[66] However, the 2008 amendments included no substantive protection for servicemembers on custody-specific issues.[67] For example, the SCRA did not forbid the court from using military service as a factor in determining custody.[68] Neither did it restrict judges from entering temporary custody orders; orders which are used as a tool to get around the servicemember's inability to be present in court.[69] Even after the 2008 amendment to the SCRA, the substantive gaps in the Act and the ability of judges to circumvent the stay provisions render it an unreliable solution to the deployed parent's custody problem.

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[63] Estrin, *supra* note 8, at 230–31. "Servicemembers in remote or hostile locations may find it difficult to communicate with, let alone retain, legal counsel to represent them." *Id.* Why should servicemembers receive grace in such situations?

> What occupation sends you to places where bullets are flying, for months or years, and your employer can imprison you if you don't obey these "travel opportunities"? What occupation requires your presence on the job every morning at 6:00 a.m. for physical training and at 7:30 for work, with the option of criminal charges if you don't show up? What occupation has over eight million former employees being treated by a department of the federal government for wounds, illnesses, and other conditions incurred during employment?

Mark E. Sullivan, *Introduction to the Uniform Deployed Parents Custody and Visitation Act*, 47 FAM. L.Q. 97, 103–04 (2013). Employing grace and a "liberal construction" of the SCRA stay provision requirements seems like the least the court could do for this Nation's warriors.

[64] National Defense Authorization Act for Fiscal Year 2008 § 584, Pub. L. No. 110-81, 122 Stat. 3, 128 (2008).

[65] *Id.*

[66] Ayotte, *supra* note 22, at 664.

[67] *Id.* at 663–64.

[68] BURRELLI & MILLER, *supra* note 21, at 4.

[69] *Compare* Ratliff v. Ratliff, 15 N.W.2d 272, 274 (Iowa 1944) (refusing to overturn the stay granted by the trial court and declaring that "a hearing on an application to change the status of the custody of [children] while [a parent] is in military service and when he is not in a position to be personally present, would materially affect his right to properly present his side of the case and would have a disturbing and emotional effect upon him"), *with* Tallon v. DaSilva, No. FD02-4291-003 at 8 (Ct. Com. Pl. Alleghany Cnty. 2005) (awarding temporary custody to the non-servicemember parent because "a child does not exist in 'suspended animation' during the pendency of any stay entered pursuant to the SCRA" and "custody during a parent's deployment must perforce be addressed"), *and* Lenser v. McGowan, 191 S.W.3d 506, 507 (Ark. 2004) (holding that the SCRA does "not prevent the circuit court from entering a temporary order of custody").

B. Representative Michael Turner's Federal Legislation

One of the leading advocates for further amending the SCRA to include greater substantive protections is Representative Michael Turner, a Republican from Ohio's Tenth District, which includes Wright Patterson Air Force Base.[70] Disturbed by the stories he had heard of military parents losing custody because of serving their country, Turner made military custody and the rights of servicemember-parents his platform.[71] Beginning in 2006, Turner has introduced a military custody bill each year in an effort to provide protections at the federal level for servicemembers engaged in custody litigation.[72] In 2013, Turner's military custody provisions were buried deep in the Veterans Economic Opportunity Act of 2013, and though the bill passed through the House (as did each previous incarnation of his custody bill), it never made it out of the Senate Committee on Veterans' Affairs.[73]

Turner finally saw success in 2014.[74] Section 566 of House Bill 3979 calls for the SCRA to be amended to offer more protection to servicemembers embroiled in custody battles than does the current SCRA.[75] Turner's legislation consists of three major components: (1) limitations on the court's ability to modify custody arrangements after the servicemember has deployed; (2) resumption of the pre-deployment custodial arrangement upon the servicemember's return if a temporary custody order has been entered during his or her absence; and (3) prohibition against the consideration of military service (and particularly, the servicemember-parent's absence due to past or future deployments) in

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[70] Tom Philpott, *House Custody Bill Unnecessary*, DAILY PRESS (Newport News, VA), June 11, 2012, at A2.

[71] Rick Maze, *Bill Would Safeguard Deployed Troops' Child Custody Rights—Measure Dropped from '08 Defense Act*, AIR FORCE TIMES, June 9, 2008, at 26 [hereinafter Maze, *Safeguard Deployed Troops' Child Custody Rights*]. Turner's bill in 2008 would have greatly expanded the SCRA's application to child custody matters, but by the time the National Defense Authorization Act was signed by then-President Bush, Turner's language had been removed and replaced with the "including any child custody proceeding" phrase. Missick, *supra* note 3, at 873–74.

[72] Rick Maze, *Lawmaker Renews Push for Troops' Child Custody Rights*, AIR FORCE TIMES, May 14, 2012, at 15.

[73] H.R. 1898, 113th Cong. (2013). This bill was consolidated into H.R. 2481 along with a number of other bills. H.R. REP. NO. 113-207 (2013); Veterans Economic Opportunity Act of 2013, H.R. 2481, 113th Cong. § 14 (2013). *See H.R. 2481—Veterans Economic Opportunity Act of 2013*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/2481/all-info#all-actions (last visited Apr. 13, 2015).

[74] Press Release, Turner Secures Important Protections for the Parental Rights of Our Service Men and Women (Dec. 12, 2014), http://turner.house.gov/media-center/press-releases/turner-secures-important-protections-for-the-parental-rights-of-our.

[75] *Compare* H.R. 3979, 113th Cong. § 566 (2014), *with* 50 U.S.C. app. § 521–22 (2012).

evaluating the best interests of the child.[76] This third prong of Turner's legislation might be the most important as many of the highly publicized custody battles have involved judges who are loathe to uproot the child and to disrupt the status quo (developed while the servicemember was gone) once the servicemember returns.[77]

Turner has met with strong opposition in his attempt to federalize military custody through the passage of his bill.[78] Attorneys, judges, and military organizations have all publicly decried Turner's legislation.[79] These individuals and organizations recognize that there is a problem, for as one judge put it, "[p]eople serving their country and putting themselves at risk, and coming back and losing their kids, is not good public policy."[80] However, these groups do not believe that federal legislation is the answer.[81] Even the Department of Defense at one point went on record as being against Turner's position. In an unsigned statement released to CBS News, the Department of Defense said that it

> opposes efforts to create Federal child custody legislation affecting Service members. . . . We strongly believe that Federal legislation in this area of the law, which has historically and almost exclusively been handled by the States, would be counterproductive.
>
> The Department applauds the efforts by those States that have passed legislation . . . and encourages other States to consider similar legislation.[82]

The American Bar Association's opposition to Turner's bill is well-documented. In 2009, the ABA passed Resolution 106, which made its position on the issue of federal legislation official.[83] In 2011, the ABA published a white paper on federal military custody that contained strong

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[76] Missick, *supra* note 3, at 871–73.

[77] *See id.* at 872–73. Though, it is worth noting that these judges do not show the same level of concern over uprooting the child during the soldier's deployment.

[78] Turner's continued effort to push through a military custody bill "is opposed by the National Governors Association, the Adjutants General Association of the United States, . . . the National Council of Juvenile and Family Court judges, the Conference of Chief Justices and State Court Administrators, the National Conference of State Legislatures, the Uniform Law Commission . . . and the National Military Family Association." Am. Bar Ass'n, *White Paper on Federal Military Custody* 1 (Sept. 2013), http://www.americanbar.org/content/dam/aba/administrative/family_law/201304_turneramendment_whitepaper.authcheckdam.pdf (internal references omitted) [hereinafter 2013 White Paper].

[79] *Id.*

[80] Robben, *supra* note 1 (quoting Dale Koch, past-president of the National Council of Juvenile and Family Court judges).

[81] BURRELLI & MILLER, *supra* note 21, at 14–17.

[82] *Department of Defense Position*, CBS NEWS, http://www.cbsnews.com/htdocs/pdf/DOD_position_child_custody.pdf. Based on information gleaned from Major Jeri Hanes in order to authenticate the statement for her 2011 article, it appears as if the Department of Defense's statement was released in 2009. *See* Hanes, *supra* note 6, at n.89.

[83] BURRELLI & MILLER, *supra* note 21, at 14.

language against federalizing custody.[84] An updated white paper was posted in September of 2013 that retained much of the 2011 version while incorporating additional arguments against the need for a federal military custody statute.[85] The ABA labels Turner's legislation as "a solution in search of a problem."[86]

The ABA has also called Turner's bill "misguided" and an "intrusion" into an area of the law that is "the responsibility of the states."[87] In its most recent critique of Turner's legislation, the ABA declared that

> [i]t 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.
>
> . . . If the "national military—national standard" argument were valid, then we would have a national set of laws for servicemembers on drivers' licenses, voting requirements, child support, the age of majority, and a host of other issues.[88]

As one family law scholar noted, Congress would be "tip-toeing atop a slippery slope" by entering into the custody arena, and "frankly, that would be a nightmare."[89]

Another concern of the ABA is that Turner's bill would create a right of removal for those parties unhappy with the state judge's decision.[90] Turner's response was to include language in his bill mandating that "[n]othing in this section shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal."[91] However, legal experts agree that Turner's language does not actually bar removal to the federal courts.[92]

There is also worry that the federal statute on child custody would forever tilt the delicate balance between the servicemember's parental interests and those of the child in the favor of the servicemember.[93] Those who oppose Turner believe that his legislation "ignore[s] any potential

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[84] Am. Bar Ass'n, *White paper on Federal Military Custody* (Aug. 2011) (on file with Regent University Law Review) [hereinafter 2011 White Paper].

[85] *See* 2013 White Paper, *supra* note 78, at 1–3.

[86] *Id.* at 2.

[87] *Id.* at 1, 3.

[88] *Id.* at 2–3.

[89] Davis, *supra* note 32, at 12.

[90] 2013 White Paper, *supra* note 78, at 5–6.

[91] H.R. 3979, 113th Cong. § 566 (2014).

[92] BURRELLI & MILLER, *supra* note 21, at 7; *see* 2013 White Paper, *supra* note 78, at 6.

[93] BURRELLI & MILLER, *supra* note 21, at 2.

effects deployments would or could have on a child and . . . ultimately place[s] 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."[94] The newly passed piece of legislation amending the SCRA dictates that the deployment of the servicemember cannot be used as the sole factor in entering a permanent custody order.[95] Furthermore, it requires that temporary custody orders entered while a servicemember-parent is deployed must expire when the period of deployment is over.[96] This is disconcerting because the statute fails to consider the high rates of post-traumatic stress disorder and increased instances of suicide that have soared since the wars in Iraq and Afghanistan.[97] Turner's opponents believe that it is neither safe nor advisable to make an automatic return of custody to the servicemember once the deployment ends without considering the possible effect on the child.[98]

Though Turner was finally able to push through his platform, it is questionable whether support for the bill is genuine.[99] A few years ago, Turner's highest-profile backer was former-Defense Secretary Robert Gates who, in 2011, announced that the Department of Defense was reversing its previously stated position and throwing its support behind Turner.[100] This marked a major shift from comments Gates made in 2009 asserting that "it would be unwise to push for federal legislation in an area

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[94] *Id.* at 7 (emphasis omitted); 2013 White Paper, *supra* note 85, at 3 ("Congress should *not* be directing our courts, whether state or federal, on how to look after the best interest of a child, which is exactly what [Turner's] legislation does.").

[95] H.R. 3979, 113th Cong. § 566 (2014).

[96] *Id.*

[97] *See* Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 851 (2012). In 2012, there were over 500 suicides by active, reserve, and National Guard servicemembers. In the first 6 months of 2014, the total number of suicides among military personnel was 224. *See* JACQUELINE GARRICK, DEFENSE SUICIDE PREVENTION OFFICE, DEPARTMENT OF DEFENSE QUARTERLY SUICIDE REPORT CALENDAR YEAR 2014 2ND QUARTER 2 (2014).

[98] *See* Missick, *supra* note 3, at 873. "[T]he well-being of children may be placed at risk if protections afforded servicemembers trumped current child-protection laws." *Id.* at 869.

[99] *See* Philpott, *supra* note 70, at A2 (revealing that the Congressman "has coaxed, harangued, . . . even bullied colleagues, defense officials and service associations into supporting his bill, always citing the same few cases of members who lost or nearly lost custody of children following deployment or temporary stateside reassignment. Family law experts who have reviewed details of these cases say the outcomes would not have been different had Turner's bill been in effect"); *see also* Maze, *Safeguard Deployed Troops' Child Custody Rights*, *supra* note 71, at 26 (referencing comments made by fellow House Republican, Steve Buyer, who questioned the wisdom of implementing federal legislation in this area).

[100] *See* Karen Jowers, *Gates Now Supports Law to Protect Child Custody*, AIR FORCE TIMES, Feb. 28, 2011, at 15.

that is typically a matter of state law concern."[101] In announcing the position change, Gates explained that federal legislation that protects servicemembers "in cases where it is established that military service is the sole factor involved in a child custody decision," is beneficial.[102] Ironically, in 2010, the Department of Defense reviewed thirty-three military custody cases and concluded that there was not a single instance where military service (including deployments or the threat of deployments) was the "*sole* factor" involved in a child custody dispute.[103] Furthermore, the 2010 study concluded that "[f]ederal legislation in this area would be counter-productive at best and harmful at worst."[104]

The impetus for Gates' change of heart is unknown.[105] Not even lawyers working at the Pentagon were aware that Gates was going to execute an about-face on the issue.[106] It has been suggested that Gates made a political move to curry favor from Turner who, at the time, was the Chairman of the Strategic Forces Subcommittee of the House Armed Services Committee.[107] Perhaps the growing media attention, including soldier interviews on the Oprah Winfrey show, put pressure on Gates to reverse course.[108]

Gates' successors have not been as transparent with their thoughts on Turner's efforts to pass a military custody statute. While in office, Leon Panetta conveyed mixed signals.[109] When testifying before the House Armed Services Committee, Panetta said he supported efforts to pass legislation in this area.[110] However, after the bill passed the House that year, Panetta wrote Turner a letter in which he stated that the bill needed a slight revision so that it would not "constitute a federal mandate to state courts that they, in certain circumstances, subordinate the best interest of the child."[111] Panetta recommended inserting the phrase "as the sole factor" in the section of the bill that sought to prevent courts from using

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[101] BURRELLI & MILLER, *supra* note 21, at 10.

[102] *Id.* at 13.

[103] *Id.* at 7.

[104] *Id.* at 12. "[I]t 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." *Id.*

[105] 2013 White Paper, *supra* note 78, at 1.

[106] *Id.*

[107] *Id.*

[108] *See* Charlie Reed, *Pentagon to Support Bill to Protect Troops' Child Custody Rights,* STARS & STRIPES (Feb. 17, 2011), http://www.stripes.com/news/us/pentagon-to-support-bill-to-protect-troops-child-custody-rights-1.135134; *see also Female Soldiers' Custody Battles*, OPRAH.COM (Oct. 13, 2010), http://www.oprah.com/oprahshow/Fighting-for-Their-Children.

[109] BURRELLI & MILLER, *supra* note 21, at 13–14.

[110] *Id.* at 13.

[111] *Id.* at 13–14.

instances of deployment in determining custody.[112] The version of Turner's bill that was recently approved by the Senate incorporates Panetta's suggested revision.[113]

III. STATE LEGISLATION

Representative Michael Turner's doggedness to pass a federal military custody statute has paid dividends in the state law arena in that it has forced states to act.[114] As recently as 2010, there were only fifteen states that had laws in place to address custody issues that arise in families where a parent is in the military.[115] That number rose dramatically to forty-six states and the District of Columbia by 2013.[116] In 2014, New Mexico became the forty-seventh state to pass legislation addressing military custody issues.[117] The three states which have yet to enact substantive laws in this area are Alabama, Massachusetts, and Minnesota.[118]

The ways in which the states have approached military custody issues are varied, but most state laws can be categorized as one of three types of statutes: one that (1) only prohibits the entry of permanent custody orders during the servicemember's deployment; (2) excludes past and/or future deployments from being used as a factor in custody decisions; or (3) addresses a wide spectrum of issues including expedited hearings prior to deployment, delegation of custody or visitation rights during deployment, and allowance for electronic testimony in hearings that transpire while the servicemember is deployed.[119] As an example of a

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[112] *Id.* at 14.

[113] H.R. 3979, 113th Cong. § 566 (2014). The language reads,

> 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.

Id. (emphasis added).

[114] Philpott, *supra* note 70.

[115] Rick Maze, *5th Try to Protect Child Custody for Troops*, NAVY TIMES (May 14, 2010) [hereinafter Maze, *5th Try to Protect Custody*], http://www.navytimes.com/article/20100514/NEWS/5140309/5th-try-to-protect-child-custody-troops.html.

[116] BURRELLI & MILLER, *supra* note 21, at 18; D.C. CODE § 16-914.02 (Westlaw through Jan. 5, 2015).

[117] N.M. STAT. ANN. § 40-10D (Westlaw through 2014 Reg. Sess.).

[118] *See* BURRELLI & MILLER, *supra* note 21, at 18. Minnesota, however, does have legislation pending that, if approved, would see the state adopt the Uniform Deployed Parents Custody and Visitation Act. S.F. 73, 2015 Leg., 89th Sess. (Minn. 2015); H.F. 260, 2015 Leg., 89th Sess. (Minn. 2015).

[119] Sexton & Brent, *supra* note 6, at 10. For a chart providing a state-by-state breakdown of the provisions in place for custody issues involving deployed parents as of early-2013, see Sullivan, *supra* note 63, at 107 app. I.

category one provision, the law in Arkansas is that a custody order cannot be permanently modified while the servicemember-parent is involuntarily deployed, but a temporary modification of custody is acceptable.[120] Wisconsin's statute prohibiting the court from considering the servicemember's past and future deployments in an action to modify custody is an example of a category two provision.[121] Florida has a very comprehensive statute that would be representative of the types seen in category three.[122] The statute forbids the use of deployments as a factor in determining the best interests of the child, only allows for temporary orders during deployment, grants the servicemember the ability to delegate his visitation rights to a relative or step-parent of the child, allows for an expedited hearing on custody upon motion by either party, and provides for the servicemember to "attend" a court hearing via electronic or telephonic means.[123] The protections crafted by the states are, in large part, more extensive than those offered in Turner's legislation.[124]

Even though the actions taken by the individual states to enact military custody statutes have been heralded,[125] there are still some, including Representative Turner, who remain unsatisfied.[126] One of the problems, as Turner sees it, is that there is no single standard.[127] In his mind, letting each state draft and enact its own laws encourages the non-custodial parent to forum shop to find a custody statute that is more favorable to his or her position.[128] Turner also believes that, without a national standard, servicemembers will receive disparate treatment based on the state in which the parent is domiciled.[129] While this may be true,[130] the ABA views the lack of a national standard as a non-issue.[131]

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[120] ARK. CODE ANN. § 9-13-110(b), 110(c)(1) (LEXIS through 2014 Fiscal Sess.).

[121] WIS. STAT. § 767.451(5m)(c) (Westlaw through 2013).

[122] FLA. STAT. § 61.13002 (Westlaw through 2014 2d Reg. Sess.).

[123] *Id.*

[124] 2013 White Paper, *supra* note 78, at 3.

[125] *See Department of Defense Position*, *supra* note 82; 2013 White Paper, *supra* note 78, at 7.

[126] *See* Estrin, *supra* note 8, at 239; Maze, *5th Try to Protect Custody*, *supra* note 115.

[127] Maze, *5th Try to Protect Custody*, *supra* note 115.

[128] Press Release, *supra* note 74. Turner's fear is unfounded since it fails to take into account the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"), which dictates the appropriate forum for custody cases. For a discussion of the UCCJEA, see Brittany A. Jenkins, Comment, *My Country or My Child?: How State Enactment of the Uniform Deployed Parents Custody and Visitation Act Will Allow Service Members to Protect Their Country & Fight for Their Children*, 45 TEX. TECH. L. REV. 1011, 1018–24 (2013).

[129] Maze, *5th Try to Protect Custody*, *supra* note 115.

[130] For a comparative analysis of how one fact-pattern would yield four different results in four different states, see Hanes, *supra* note 6, at 10–12.

[131] 2011 White Paper, *supra* note 84, at 2.

For example, there are a number of different state laws governing how child support is calculated.[132] Also, the methodology behind dividing the servicemember's military pension upon divorce differs widely among the states.[133] Even the requirements for obtaining a divorce, such as the period of separation needed prior to filing an action for dissolution of the marriage, vary among the fifty states.[134] Accordingly, the ABA sees no reason for custody to be singled out.[135] Instead, the ABA sees the states as having the "background and expertise to write, pass and enforce [military custody] legislation," not the federal government.[136]

IV. UNIFORM DEPLOYED PARENTS CUSTODY AND VISITATION ACT

A. Implementation of the UDPCVA

In March, 2011, the President of the Uniform Law Commission ("ULC"),[137] Robert Stein, wrote to members of the House Committee on Veterans' Affairs to express concerns about Turner's repeated attempts to federalize military custody.[138] In the letter, Stein declared that "[c]omplex family matters are best reserved to the state courts, which over the course of time have developed appropriate expertise and mechanisms to make fact-driven determinations regarding military parents and their minor children."[139] Even though Stein favored leaving legislation in the hands of the states as opposed to the federal government, the ULC recognized that the states needed guidance as to the content of said legislation.[140] Also, the

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[132] *Compare* MD. CODE ANN., FAM. LAW § 12-204 (LEXIS through 2014 legis.) (calculating child support using gross income and allowing deductions only for other alimony and child support obligations) *with* MISS. CODE ANN. § 43-19-101(3), (LEXIS through 2014 Reg. Sess.) (calculating child support using net income).

[133] *Compare* IND. CODE ANN. § 31-9-2-98(b) (Westlaw through 2014 2d Reg. Sess.) (only vested pensions are divisible as marital property), *with* N.C. GEN. STAT. § 50-20.1 (LEXIS through 2014 Reg. Sess.) (allowing for the division of both vested and nonvested pensions).

[134] *Compare* CONN. GEN. STAT. ANN. § 46b-40(c)(2) (Westlaw through 2014) (requiring an eighteen-month period of separation between the parties) *with* MONT. CODE ANN. § 40-4-104 (Westlaw through 2013 Reg. Sess.) (requiring the parties to remain separated for 180 days prior to filing).

[135] 2011 White Paper, *supra* note 84, at 2.

[136] 2013 White Paper, *supra* note 78, at 2.

[137] The ULC was formed over a hundred years ago with support from the ABA. At its inception, seven states appointed individuals to meet and discuss the possibility of developing uniformity among the laws of the several states. Currently, every state, plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, appoints commissioners to serve on the ULC. Elizabeth Kent, *The Uniform Law Commissioners*, HAW. B.J., Dec. 2012, at 30, 30 (2012).

[138] 2013 White Paper, *supra* note 78, at 13.

[139] *Id.*

[140] *See id.*

ULC was concerned with "the mobile nature of national service," and the likelihood that a child's parents would reside in two different states.[141]

> [T]here are many times that that [sic] these custody issues involve two or more states. Yet different states now apply very different substantive law and court procedures from one another when custody issues arise on a parent's deployment. The resulting patchwork of rules makes it difficult for the parents to resolve these important issues quickly and fairly, hurts the ability of deploying parents to serve the country effectively, and interferes with the best interest of children.[142]

Consequently, the ULC began work on a uniform statute that would "go well beyond the federal legislation" and "establish a comprehensive set of procedures and protections for the custody issues that military families face."[143] The goal was to "increase predictability and certainty" and "increase fairness" for military families.[144] To accomplish that, the drafting committee reviewed the existing legislation in the states along with relevant case law and pulled out the best principles and protections to form the new uniform statute.[145] The uniform statute, which was completed and approved in July 2012, is called the Uniform Deployed Parents Custody and Visitation Act ("UDPCVA").[146] The ABA House of Delegates approved the UDPCVA in February 2013.[147] Currently, eight states have enacted the uniform statute: Arkansas, Colorado, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, and Tennessee.[148]

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[141] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT, Prefatory Note 1 (2012), *available at* http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf.

[142] *Why States Should Adopt the Uniform Deployed Parents Custody and Visitation Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Shared/Docs/Deployed_Parents/UDPCVA%20Why%20States%281%29.pdf (last visited Apr. 13, 2015).

[143] 2013 White Paper, *supra* note 78, at 13 tbl.3.

[144] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT, Prefatory Note 1 (2012).

[145] Sullivan, *supra* note 63, at 98.

[146] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT (2012).

[147] 2013 White Paper, *supra* note 78, at 8.

[148] S.B. 792, 90th Gen. Assemb., Reg. Sess (Ark. 2015); COLO. REV. STAT. § 14-13.7-101(LEXIS through 2014 Reg. Sess.); L.B. 219, 104th Leg., 1st Sess. (Neb. 2015); NEV. REV. STAT. § 125C.0601 (Westlaw through 2014 Spec. Sess.); N.C. GEN. STAT. § 50A-350 (LEXIS through 2014 Reg. Sess.); N.D. CENT. CODE § 14-09.3-01 (LEXIS through 2013 Reg. Sess.); S.D. CODIFIED LAWS § 25-4B-101 (Westlaw through 2014 Reg. Sess.); TENN. CODE ANN. § 36-7-101 (LEXIS through 2014 Reg. Sess.).

Although New Mexico passed the "Deployed Parents Custody and Visitation Act" in 2014, the state is not included in this list of enacting states because it only adopted limited portions of the first three articles of the UDPCVA. *Compare* N.M. STAT. ANN. §§ 40-10D-2 to 40-10D-9 (Westlaw through 2014 Reg. Sess.), *with* UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT (2012).

B. Articles of the UDPCVA

The UDPCVA is divided into five articles.[149] Throughout each of the five parts, custody and visitation rights are primarily referred to under one umbrella term—"custodial responsibility."[150] Custodial responsibility is then broken down into three components, each of which can be delegated to another during a servicemember's deployment.[151] The three components are "caretaking authority," "decision-making authority," and "limited contact."[152] In the parlance of state law, caretaking authority is often referred to as "primary physical custody," whereas decision-making authority is frequently termed "legal custody."[153] "Limited contact" is used in the articles of the UDPCVA to refer to the ability of the servicemember to designate another person to spend time with the child while the servicemember is deployed.[154] The Act is drafted to offer protections to all active duty members of the armed forces as well as reservists and those serving with the National Guard.[155] This level of protection is in stark contrast to the application of the SCRA, which only applies to those men and women in the National Guard or the Reserves who are called up to active duty.[156]

Article 1 of the UDPCVA consists of definitions and general provisions relating to military custody issues.[157] One of the general provisions requires the servicemember to communicate with the other parent about custody issues immediately upon learning of the impending deployment.[158] Another general provision, which is included to permit the Act to work in concert with the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"), declares that the residence of the servicemember is not changed by reason of his deployment.[159] In other words, the servicemember's absence from the state cannot be used as

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149 UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT (2012).

150 *Id.* § 102 cmt.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 102(18).

156 50 U.S.C. app. § 511 (2012).

157 UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT §§ 101–107.

158 *Id.* § 105. This is a significant improvement from the military's Family Care Plan regulations, which merely recommends, but does not require, communication between the parents leading up to deployment. *See supra* text accompanying notes 16–17.

159 UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 104. This should alleviate Turner's concerns about forum shopping by the non-custodial parent, since there has been no change in the military parent's residence; thus, there is no change to warrant transferring the custody case to another state. *See supra* note 128 and accompanying text.

grounds to challenge or change jurisdictions, except in case of an emergency.[160] Provisions in Article 1 also prevent the court from using the servicemember's future or past deployment as a reason to not award custody to the servicemember absent a "significant impact on the best interest of the child."[161]

The terms of Articles 2 and 3 apply to situations that may transpire either prior to or during the servicemember's deployment.[162] Article 2 promotes the notion that parents should develop their own parenting agreement, without involving the courts, by setting out easy procedures for parents to follow.[163] It even gives parents a list of ten clauses that should be included in the agreement, such as setting out a schedule for the deployed parent and the child to contact each other by electronic means, arranging for the deployed parent and the child to have time together when the servicemember is granted a period of leave, and specifying if a nonparent is to have any type of custodial responsibility with the child during the deployment.[164] To avoid the type of nasty surprise that awaited Lieutenant Eva Crouch upon her return home when her ex-husband refused to honor their parenting agreement,[165] the UDPCVA mandates that any agreement entered into under the statute automatically terminates, using the terms set out in Article 4, once the servicemember-parent returns from deployment.[166]

Article 3 is the most extensive of the five articles and encompasses court proceedings and other actions to bring judicial resolution to custody cases.[167] Several of the terms seen in state statutes are included here, such as expedited hearings and testimony by electronic means.[168] Article 3 also

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[160] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 104 cmt.

[161] *Id.* § 107. This seems a better rule than Turner's absolute prohibition against using deployment as a factor because, for example, it allows the court the flexibility to consider the mental state of the servicemember upon his return from war where warranted. *See supra* notes 95–98 and accompanying text. Yet, it also requires that the effect on the child be "significant," not something trivial like having to transfer schools. UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 107 cmt. (2012). Turner's legislation "focuses the court's analysis on the best interest of the parent, whereas the UDPCVA focuses on the best interest of the child." Jenkins, *supra* note 128, at 1036. Turner, however, is critical of this provision of the UDPCVA. He feels that it gives courts leeway to use the servicemember's absence from home against him in analyzing the best interests of the child and the result will be that servicemembers will continue to lose their children. BURRELLI & MILLER, *supra* note 21, at 17.

[162] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT art. 2, 3.

[163] *Id.* §§ 201–204.

[164] *Id.* § 201.

[165] Crouch v. Crouch, 201 S.W.3d 463, 464 (Ky. 2006).

[166] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT art. 4.

[167] *Id.* §§ 301–311.

[168] *Id.* §§ 303–304.

forbids the judge from entering a permanent custody order before or during deployment without the servicemember-parent's consent.[169] The UDPCVA does allow for the entry of temporary orders for custody, but only to the extent said orders are not prohibited by the SCRA.[170] To assist judges unfamiliar with the nuances of military service, the UDPCVA contains a clause listing the things that should be covered in the temporary custody order.[171] As with the parenting agreement, custodial responsibility awarded by the court through a temporary order under Article 3 terminates when the servicemember returns home.[172]

Article 4 governs termination of the temporary custody arrangement once the deployment has ended and the servicemember-parent has returned home.[173] A construction of three different procedures allows the Act to cover almost every eventuality. One set of procedures applies when the parents mutually agree on termination of the temporary custody agreement.[174] The second set applies only when the parents mutually agree on termination of a temporary custody order.[175] The final set of procedures applies when there is no agreement between the parents and court intervention is necessary to resolve custody.[176] If there is a delay between the deployed parent returning home and the temporary agreement or order being terminated, then the UDPCVA directs the court to "issue a temporary order granting the [servicemember-parent] reasonable contact with the child unless it is contrary to the best interest of the child, even if the time of contact exceeds the time the [servicemember] spent with the child before deployment."[177] This is a key provision, because it is widely recognized that "both parents are important for a child's emotional needs and development. By restricting a child's access to his or her servicemember-parent once that parent returns home, courts may be harming not only the [servicemember], but also the child."[178] The final article of the UDPCVA contains administrative

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169 *Id.* § 302.

170 *Id.*

171 UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 309 (2012).

172 *Id.* § 308.

173 *Id.* §§ 401–404.

174 *Id.* § 401.

175 *Id.* § 402.

176 *Id.* § 404.

177 UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 403 (2012).

178 Rachelle L. Paquin, Note, *Defining the "Fit": The Impact of Gender and Servicemember Status on Child Custody Determinations*, 14 J. GENDER RACE & JUST. 533, 562 (2011) (footnote omitted).

provisions, such as the date of effectiveness of the Act (to be set by the enacting state).[179]

The UDPCVA shows that the ULC took great care to respect the individuality of the states.[180] The Act allows each state to add state-specific terminology to the definitions section.[181] It also permits enacting states to change both the default length of time that constitutes a "deployment" and the number of days that must run after the servicemember-parent gives notice of his return before the temporary order or agreement terminates.[182] In addition, it is the intent of the ULC for each state to supplement the UDPCVA with its own custody statutes.[183] Eric Fish, legal counsel for the ULC, has championed the uniform statute as a way to protect men and women in uniform and maintain the sovereignty of the states in this area "without creating an invasive federal system that is just going to confuse child custody."[184]

V. ACHIEVING THE OBJECTIVE

Out of the five possible solutions considered (the Family Care Plan, the SCRA, Representative Turner's bill, state legislation, and the UDPCVA), both Turner's legislation and the UDPCVA are armed with a "master statute" that would promote uniformity across the nation. Uniformity and predictability is something that servicemen and servicewomen need. Furthermore, both the federal statute and the UDPCVA take positive steps toward limiting the "degree to which the child's living arrangements during the servicemember parent's deployment" is factored into the judge's custody order.[185] There are benefits to using federal legislation to solve the military custody conundrum.[186] Nevertheless, for the reasons explored below, the UDPCVA

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[179] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT §§ 501–504 (2012).

[180] *See, e.g.*, *id.* § 102 cmt. (describing custody using new generic terms instead of showing preference for one state's terminology over another).

[181] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT, Prefatory Note 2 (2012).

[182] *See, e.g.*, UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT §§ 102(8), 401(c), 404(a) (2012).

[183] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT Prefatory Note 2. "For example, where state law would give a child's preferences significant weight in a custody determination, significant weight should also be given to a child's preferences in a temporary custody determination pursuant to this Act." *Id.*

[184] BURRELLI & MILLER, *supra* note 21, at 17.

[185] Ayotte, *supra* note 22, at 658.

[186] *Id.* at 676 ("Federal legislation has the benefit of being uniform, allowing servicemember parents to feel comfortable in the knowledge that their state of residence will not determine the outcome of a custody battle. [It] also has the benefit of being fast; instead of waiting for each state to adopt some measure of protection, a federal law could, in one act, apply equally to all servicemembers, regardless of home state.") (footnotes omitted).

is the best means of achieving the objective, which is to safeguard the servicemember-parent's custodial rights while still balancing the competing interests of the child and the civilian parent.

A. Domestic Relations Exception

The Constitution vests Congress with the authority to "raise and support Armies," "provide and maintain a Navy," and to regulate "land and naval Forces."[187] It is to this authority that Turner links his federal legislation governing military custody cases.[188] Turner and his supporters "insist there is precedence for federal intervention where federal interests—such as the rights of servicemembers—are at stake."[189] However, custody is about taking care of the child, not the servicemember. The standard is "the best interest of the child," not "the best interest of the servicemember-parent."

Despite Turner's assurances to the contrary, if there is a federal custody act, then custody matters could be litigated in federal courts under federal question jurisdiction.[190] However, this runs afoul of the traditional domestic relations exception, which is the principle that federal courts lack jurisdiction over certain family law matters.[191] In *Ankenbrandt v. Richards*, the United States Supreme Court admitted that the historical background of the exception was blurred, but the Court was "unwilling to cast aside an understood rule that ha[d] been recognized for nearly a century and a half."[192] The result is that the federal courts lack the "power to issue divorce, alimony, and *child custody* decrees."[193] Furthermore, over a hundred years ago, the Court held that

> [t]he 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. As to the right to the control and possession of th[e] child, . . . it is one in regard to which neither the Congress of the United

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187 U.S. CONST. art. I, § 8, cl.12–14.

188 *See* BURRELLI & MILLER, *supra* note 21, at 1–2.

189 *Id.* at 1.

190 "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2; *see also supra* notes 90–92 and accompanying text.

191 Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1443–46 (2006). For a look at the history of the domestic relations exception, see generally *id.*

192 Ankenbrandt v. Richards, 504 U.S. 689, 694–95 (1992). "[W]e have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders." *Id.* at 703.

193 *Id.* (emphasis added).

> States nor any authority of the United States has any special jurisdiction.[194]

Federal courts should not and do not have the authority to enter child custody orders. This is the province of the states.[195] Accordingly, the UDPCVA is the best solution that respects state sovereignty while offering comprehensive uniform protections for servicemembers, regardless of where they are stationed.

B. Logistics

It would be a logistical nightmare for custody cases to be handled by federal courts. First of all, custody cases would bombard the federal court docket.[196] As the Supreme Court recognized in *Ankenbrandt*, the "[i]ssuance of [custody] decrees . . . not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts."[197]

Additionally, the state courts are the ones with the expertise in this area of the law, not the federal courts.[198] The judges in state courts adjudicate over custody cases routinely, whereas federal judges have little to no experience presiding over such emotionally-charged cases. Moreover, because family law practice occurs in state courts, family law attorneys do not generally need to be admitted to federal practice and typically do not practice in federal court. Thus, if custody cases go to federal court, then not only are the federal judges inexperienced in this area, but also the attorneys.[199]

Locality of the courts is also a concern. It is unreasonable for a member of the 185th Engineer Company, Maine National Guard, based out of Caribou, Maine, to have to travel 170 miles one way to the federal district court in Bangor, Maine every time his custody case comes up on

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[194] *In re* Burrus, 136 U.S. 586, 593–94 (1890).

[195] U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

[196] *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2011–2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471, 519 (2013) (concluding that custody cases are often among the twenty percent of a court's caseload that takes up eighty percent of the court's time).

[197] Ankenbrandt, 504 U.S. at 703–04.

[198] *See id.* at 704.

[199] A servicemember is faced with retaining either a family law attorney who handles custody cases every day but who has never stepped foot in a federal courtroom and has no knowledge of the Federal Rules of Civil Procedure aside from what they recall from their first year law class, or retaining an attorney used to practicing in federal court with no familiarity with the substantive law in this area. Whatever choice he or she makes, it is the servicemember who pays the price for the attorney's steep learning curve.

the court calendar when there's a state-level district court well-versed in family law matters right there in Caribou.[200] As previously mentioned, custody cases rarely involve a single appearance before the judge. Frequent appearances in court are the norm, especially when dealing with young children who are years away from attaining the age of majority.[201] There can be hearings to enter a temporary order,[202] hearings to make a permanent award of custody,[203] hearings to modify custody,[204] show cause hearings for violating terms of an order,[205] hearings because one parent wants to relocate out of the state,[206] and more. Having to make a 170-mile trip—one way—to the federal courthouse each and every time is absurd. Yet, the caring parent seems to have no other choice.

Interestingly, the new federal statute allows that

> [i]n 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.[207]

This concession all but guarantees substantial litigation between parties over which law "provides a higher standard of protection": the state or the new federal statute. Turner believes his legislation will help servicemembers, but by placing custody in the realm of the federal courts, he is actually creating more stress for military personnel.

C. Delegated Visitation

Delegated visitation is one of the most powerful provisions in the UDPCVA, and it is completely missing from Turner's legislation. As one scholar wrote, "it is important to protect the interests of children to

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[200] *185th Engineer Support Company*, MAINE ARMY NATIONAL GUARD, http://www.me.ngb.army.mil/units/185EN.aspx (last visited Apr. 13, 2015); United States District Court, District of Maine, http://www.med.uscourts.gov/ (last visited Apr. 13, 2015); State of Maine Judicial Branch, Maine District Court—Caribou, http://www.courts.maine.gov/maine_courts/findacourt/caribou_district.shtml (last visited Apr. 13, 2015). For the 170-mile distance, the author used Google Maps to determine the fastest driving route between the two and recorded the mileage.

[201] *See, e.g.*, Dion v. Blake, No. C052005, 2008 WL 2918151 at *3 (Cal. Ct. App. July 30, 2008) (describing a "record setting number of court appearances"); Hartley v. Hartley, 886 P.2d 665, 668 (Colo. 1994); Van Dyke v. Van Dyke, 538 N.W.2d 197, 199–200 (N.D. 1995); Johns v. Cioci, 865 A.2d 931, 934 (Pa. Super. Ct. 2004).

[202] *See, e.g.*, Buttle v. Buttle, 196 P.3d 174, 176 (Wyo. 2008).

[203] *See, e.g.*, Pace v. Pace, 700 S.E.2d 571, 572 (Ga. 2010).

[204] *See, e.g.*, J.L.P. v. V.L.A., 30 P.3d 590, 593, 595 (Alaska 2001).

[205] *See, e.g.*, Jackson v. Jackson, 665 S.E.2d 545, 547–48 (N.C. App. 2008).

[206] *See, e.g.*, Tropea v. Tropea, 665 N.E.2d 145, 146–48 (N.Y. 1996).

[207] H.R. 3979, 113th Cong. § 566 (2014) (enacted).

maintain contact with persons with whom they have had a particularly close relationship . . . . The third party with the close relationship with the child also has an interest that should be protected."[208] The UDPCVA does this.

Section 306 allows the servicemember to petition the court to delegate his or her share of custodial responsibility to a nonparent while deployed. The delegee must be either a family member or someone with whom the child has a "close and substantial relationship"—like a stepparent.[209] The court must consider the petition in light of the best interest of the child, for there is no presumption in favor of or against such a delegation of custodial responsibility.[210] The court is limited in that it can only give the nonparent an aspect of custodial responsibility that the servicemember already possessed, and even then, in the case of decision-making authority, that custodial right could be narrower than what the servicemember enjoys.[211]

Section 307 lets the servicemember petition the court to grant "limited contact" (i.e., visitation) to a nonparent.[212] This Section does carry with it a rebuttable presumption that such a grant is in the best interest of the child.[213] The good thing about this type of custodial responsibility under the Act is that it is not limited to adults. Limited contact is extended to children, which means step-siblings or half-siblings (whether young or old) can be given time with their brother or sister during the servicemember-parent's deployment.[214]

Third-party visitation statutes came under challenge in *Troxel v. Granville*.[215] In that case, the United States Supreme Court struck down a Washington statute that provided for nonparent visitation because it was too broad.[216] After the death of the girls' father, the paternal grandparents sought to have two weekends of visitation with their granddaughters every month, but the girls' mother objected to them having more than one day of visitation per month.[217] In affirming the state supreme court's decision denying visitation to the grandparents, the United States Supreme Court interpreted the Fourteenth Amendment as

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[208] Atkinson, *supra* note 33, at 13.

[209] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 306 & cmt. (2012). For the definition of "close and substantial relationship," see *id.* § 301.

[210] § 306 cmt.

[211] *See id.*

[212] *Id.* § 307. For a definition of "limited contact," see *id.* § 102(10).

[213] UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 307 cmt. (2012).

[214] *Id.* § 102 cmt.

[215] 530 U.S. 57 (2000) (plurality opinion).

[216] *See id.* at 67, 73.

[217] *Id.* at 61.

protecting "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[218] Since the grandparents had not alleged that the mother was an unfit parent, there was "no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[219]

Still, the Court did not hold that nonparent visitation statutes were in violation of the Due Process Clause *per se*.[220] Thus, after *Troxel*, the states began amending their third-party visitation statutes to recognize the rights of parents in decision-making.[221] The result is a smorgasbord of legislation in this area[222]—a problem the UDPCVA seeks to fix and one that Turner's legislation completely ignores, which is interesting considering one of the driving forces behind Turner's federal legislation was the idea of creating a "national standard" to prevent disparate results under different state laws.[223]

Pro-military groups have advocated for six major protections for servicemembers in this area: (1) prohibiting the entry of permanent custody orders during deployment; (2) terminating temporary orders entered during deployment upon the servicemember's return home; (3) eliminating deployment from the factors to be considered in determining custody; (4) allowing delegation of custody or visitation for the period of deployment; (5) providing for expedited hearings and electronic testimony

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[218] *Id.* at 66.

[219] *Id.* at 68–69.

[220] *Id.* at 68, 73. For a detailed analysis of the constitutionality of Article 3 of the UDPCVA in light of the *Troxel* decision, see Memorandum from the Unif. Law Comm'n to State legislators (Apr. 1, 2014), *available at* http://www.uniformlaws.org/shared/docs/deployed_parents/Troxel%20Memo%20final.pdf.

[221] Atkinson, *supra* note 33, at 1. For a summary of the changes implemented by the states, see *id.* at 5.

[222] *E.g., In re* Marriage of DePalma, 176 P.3d 829, 831–32 (Colo. App. 2007) (determining that the servicemember-father can assign his custody rights to his new wife, the children's stepmother, during his deployment); Webb v. Webb, 148 P.3d 1267, 1270–71 (Idaho 2006) (allowing the servicemember to delegate his custody time to his parents during deployment); *In re* Marriage of Sullivan, 795 N.E.2d 392, 395–96 (Ill. App. 2003) (reasoning that the best way to make sure the father was focused on his military duties during deployment was to resolve his concern as to the care of his children by allowing delegated visitation to the servicemember's parents); Fischer v. Fischer, 157 P.3d 682, 686–87 (Mont. 2007) (holding that a guardianship for the minor child during the servicemember's deployment is not allowed when the non-custodial civilian parent's rights have not been terminated or abridged); Smallwood v. Mann, 205 S.W.3d 358, 365 (Tenn. 2006) (rejecting assignment of the servicemember-father's parental rights to the grandparents); Lubinski v. Lubinski, 2008 WI App 151, 761 N.W.2d 676, 681 (Wisc. Ct. App. 2008) (prohibiting the deployed servicemember from delegating his period of custody during the summer to his new wife).

[223] *See supra* notes 126–30 and accompanying text.

capabilities; and (6) extending these protections to reservists as well as to those in the National Guard.[224] The only solution that addresses all six areas of reform is the UDPCVA.

CONCLUSION

Military custody warfare affects a wide spectrum of people—attorneys, judges, servicemember-parents, civilian parents, and most importantly, children. One thing is clear; something has to be done. Captain John should not have to sue his ex-wife Kim to get back custody of his daughter, Zoe, when the only thing that caused him to lose custody in the first place was his deployment. Lieutenant Eva Crouch should not have had to spend $25,000 of her hard-earned money to get the court to give her something she and her ex-husband had already agreed she was to receive upon her return. The only thing Corporal Bradley should be concerned with is doing his job and coming home in one piece, not worrying about whether his daughter will be there when he gets back. This Nation's Armed Forces could be losing out on excellent leaders and warriors who fear losing custody of their children should they heed the country's call to duty.[225]

This Note has considered five possible solutions to the problems that arise in a military custody battle, but only one covers the whole field of reform that is needed—the Uniform Deployed Parents Custody and Visitation Act. The eight states that have already enacted the UDPCVA represent only about 15% of the current active duty military force and less than 12% of Reserve and Guard members.[226] Clearly, a greater push is needed to get state legislatures on board to best address the custodial rights of the servicemember-parent. It is not enough to rely on the newly-passed federal legislation shepherded by Representative Turner. The new statute amending the SCRA leaves Reservists and Guardsmen

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[224] Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIMONIAL LAW. 311, 327 (2013).

[225] *See* M. Turner Pope, Jr., *PCSing Again? Triggering Child Relocation and Custody Laws for Servicemembers and Their Families*, ARMY LAW., June 2012, at 5, 16; Paquin, *supra* note 178, at 560–61; *see also* Joe Duggan, *Serving the Nation Need Not Mean Losing Kids*, OMAHA WORLD-HERALD (IOWA), Mar. 2, 2015, at A1 (telling the story of Danelle Nelson who deployed six times in fifteen years and testified before the Nebraska Legislature that she would leave the military before completing a seventh deployment because of "the stress she felt on being a divorced military parent who could not transfer to another adult the visitation rights to her two children").

[226] *See* OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF DEF., DEP'T OF DEF., 2012 DEMOGRAPHICS—PROFILE OF THE MILITARY COMMUNITY 34, 85 (2012), *available at* http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf; *see also supra* note 148 and accompanying text.

hanging in the wind, and to its detriment, it also lacks the breadth of the UDPCVA.

It is worth noting that Turner's bill became federal law on December 19, 2014,[227] and within a month or so of its enactment, legislators in six states introduced bills to modify their state's existing custody statute: Michigan,[228] Mississippi,[229] Minnesota,[230] Nebraska,[231] New York,[232] and South Carolina.[233] In March of this year, Arkansas became the seventh state to introduce a new military custody bill.[234] Of the bills introduced in

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[227] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014).

[228] H.B. 4071, 2015–2016 Sess. (Mich. 2015). The bill was introduced on January 27, 2015. *House Bill 4071 (2015)*, MICHIGAN LEGISLATURE, http://www.legislature.mi.gov/(S(4dfwyj45qjeem3yeahe2uvvy))/mileg.aspx?page=GetObject&objectname=2015-HB-4071 (last visited Apr. 13, 2015).

[229] H.B. 239, 2015 Reg. Sess. (Miss. 2015). The bill was introduced on January 12, 2015 but died in committee in February. *HB 239—History of Actions / Background*, MISSISSIPPI LEGISLATURE, http://billstatus.ls.state.ms.us/2015/pdf/history/HB/HB0239.xml (last updated Feb. 3, 2015).

[230] S.F. 73, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 260, 89th Leg., Reg. Sess. (Minn. 2015). The Senate bill was first introduced on January 12, 2015, followed by the House bill on January 20, 2015. *SF 73 Status in the Senate for the 89th Legislature*, MINNESOTA STATE LEGISLATURE, https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF0073&ssn=0&y=2015 (last visited Apr. 13, 2015); *HF 260 Status in the Senate for the 89th Legislature*, MINNESOTA STATE LEGISLATURE, https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF0260&ssn=0&y=2015 (last visited Apr. 13, 2015).

[231] L.B. 219, 104th Leg., 1st Sess. (Neb. 2015). The bill was introduced on January 13, 2015. *LB219-Change and eliminate child custody provisions and adopt the Uniform Deployed Parents Custody and Visitation Act*, NEBRASKA LEGISLATURE, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=24425 (last visited Apr. 10, 2015). The Nebraska bill passed and was signed into law by the Governor on February 26, 2015. *Id.*

[232] Assemb. B. A03787, 238th Leg., 2015–2016 Reg. Sess. (N.Y. 2015).The bill was introduced on January 26, 2015. *Bills: A03787*, NEW YORK STATE ASSEMBLY, http://assembly.state.ny.us/leg/?default_fld=&bn=A03787&term=2015&Summary=Y&Actions=Y&Text=Y (last visited Apr. 13, 2015). An identical bill was introduced in the State Senate on February 4, 2015. S.B. S03297, 238th Leg., 2015–2016 Reg. Sess. (N.Y. 2015); *Bills: S03297*, NEW YORK STATE ASSEMBLY, http://assembly.state.ny.us/leg/?default_fld=&bn=S03297&term=2015&Summary=Y&Actions=Y&Text=Y (last visited Apr. 13, 2015).

[233] H. 3156, S.C. Gen. Assemb., 121st Sess. (S.C. 2015); S. 6, S.C. Gen. Assemb., 121st Sess. (S.C. 2015). The two bills were introduced on January 13, 2015. *Bill Search by Bill Number: S 0006*, SOUTH CAROLINA LEGISLATURE, http://www.scstatehouse.gov/billsearch.php?billnumbers=6&session=0&summary=B (last visited Apr. 13, 2015); *Bill Search by Bill Number: H 3156*, SOUTH CAROLINA LEGISLATURE, http://www.scstatehouse.gov/billsearch.php?billnumbers=3156&session=0&summary=B (last visited Apr. 13, 2015).

[234] S.B. 792, 90th Gen. Assemb., Reg. Sess (Ark. 2015). The bill was filed on March 4, 2015. SB792-To Enact the Uniform Deployed Parents Custody and Visitation Act, ARKANSAS STATE LEGISLATURE, http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/

these states, the legislation in Arkansas, Minnesota, Nebraska, and South Carolina each proposed that their state adopt the UDPCVA.[235]

Before former Secretary of Defense Gates changed his mind on this topic, he was said to have corresponded with the governors of each state to encourage them to pass legislation addressing military custody issues at the state level.[236] What a welcome sight it would be if the newly-confirmed Secretary of Defense Ashton Carter[237] would reach out to the governors once again—this time to encourage them to enact the UDPCVA in each and every state. It is the best and brightest hope for all warrior moms and dads who have answered the call of duty to serve "We the People of the United States."[238]

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BillInformation.aspx?measureno=SB792. The Arkansas bill passed the House and Senate on March 31, 2015 and was delivered to Governor the next day. *Id.*

[235] S.B. 792, 90th Gen. Assemb., Reg. Sess (Ark. 2015); S.F. 73, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 260, 89th Leg., Reg. Sess. (Minn. 2015); L.B. 219, 104th Leg., 1st Sess. (Neb. 2015); H. 3156, S.C. Gen. Assemb., 121st Sess. (S.C. 2015); S. 6, S.C. Gen. Assemb., 121st Sess. (S.C. 2015).

[236] BURRELLI & MILLER, *supra* note 21, at 11.

[237] Stephen Dinan, *Senate Approves Ashton Carter As Next Defense Secretary*, THE WASHINGTON TIMES, Feb. 13, 2015, *available at* 2015 WLNR 4472499.

[238] U.S. CONST. pmbl.

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