

Child Custody and Deployments: The States Step In to Fill the SCRA Gap

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A significant issue facing military leaders during any time of conflict is the welfare of the family members of deploying servicemembers. Family distracters prevent servicemembers from concentrating fully on their military duties and can have an adverse impact on unit and individual readiness, safety, and morale. Of major concern to countless servicemembers is the risk of losing permanent custody of their children while mobilized or otherwise deployed outside the state or country. This has been especially true during the current War on Terror, in which the combination of high divorce rates and frequent mobilizations and deployments force servicemembers of all components, whether reserve or active, to deal with custody issues before, during, and after mobilization and deployment.¹

A typical situation involves a divorced servicemember with joint legal custody of his children, with the primary physical care being with the servicemember. The servicemember then receives orders to deploy (or to activate and mobilize in the case of a member of the Reserve Components). As part of a Family Care Plan,² the servicemember arranges for a relative, such as a grandparent, to take care of the children during the deployment. Then, while the servicemember is deployed, the other parent sues for permanent physical custody of the children. Since laws in most states favor natural parents over any other guardian, the non-servicemember parent has a good chance of prevailing, especially if the court denies the servicemember's request to delay the proceedings and moves forward with the case in the servicemember's absence.³ Furthermore, when the servicemember returns from deployment, he faces an uphill battle to regain custody of the children since most state laws forbid modification of child custody decrees unless there has been a significant change in circumstances.⁴ To make matters worse, even if the servicemember obtains a hearing upon return from deployment, there is a risk that the court will view the servicemember's military profession, and the possibility of future deployments, as a detrimental factor when determining what custody solution would be in the "best interest" of the child.⁵

Traditionally, the Servicemembers Civil Relief Act (SCRA) has protected servicemembers from having to deal with important legal and financial issues during periods of military service.⁶ However, the SCRA fails to provide specific protection to servicemembers embroiled in child custody disputes. Although Congress recently amended the SCRA in the National Defense Authorization Act for Fiscal Year 2008 (NDAA)⁷ to emphasize that the stay provisions of sections 521 and 522 of the SCRA apply to child custody proceedings in addition to other civil proceedings,⁸ the amendment does not require

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¹ See, e.g., Pauline Arrillaga, *Deployed Troops Battle for Custody of Children*, USA TODAY, May 5, 2007, available at http://www.usatoday.com/news/nation/2007-05-05-parentswar_N.htm.

² U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-5 (18 Mar. 2008).

³ See, e.g., *In re Marriage of Grantham*, 698 N.W. 2d 140 (Iowa 2005); *Diffin v. Towne*, 849 N.Y.S.2d 687 (N.Y. App. Div. 2008).

⁴ See, e.g., ORE. REV. STAT. § 107.169(5) (2007) ("Modification of a joint custody order shall require showing of changed circumstances."); WIS. STAT. § 767.451(1)(b)1b (2007) (requiring "substantial change of circumstances" as one element in order to obtain a modification).

⁵ The "best interest of the child" is the standard used generally in all the states to "determine which of the parents will be awarded custody." 3-32 FAMILY LAW AND PRACTICE § 32.06 (2008). Depending on the jurisdiction, under the best interest standard, military mobilizations and deployments may weigh against the servicemember parent. See, e.g., Rick Maze, *Bill Would Safeguard Child Custody Rights*, A.F. TIMES, June 2, 2008, available at http://www.airforcetimes.com/news/2008/05/airforce_vabills_053008p/ (citing a situation where a servicemember, during her custody proceeding, was told by a judge that the mere possibility of her deployment weighed against the best interests of the child).

⁶ Servicemembers Civil Relief Act, 50 U.S.C.S. App. §§ 501-596 (LexisNexis 2008). Examples of benefits and protections provided by the SCRA include reduction of interest on debts to 6% for debts incurred before entry on active duty, stays of civil proceedings, protection against default judgments, tolling of statutes of limitation, termination of residential and automobile lease provisions, and protection from eviction without a court order. See, e.g., *Diffin*, 849 N.Y.S.2d 687.

⁷ National Defense Authorization Act for Fiscal Year 2008, H.R. 5986, Pub L. No. 110-181, 110th Cong. (enacted).

⁸ The first paragraph of both section 521 and section 522 of the SCRA now states as follows: "Applicability of section. This section applies to any civil action or proceeding, including any child custody proceeding . . ." 50 U.S.C.S. App. §§ 521-522.

the courts to grant stays for the duration of the deployment. Nor does the amendment prohibit courts from making permanent changes to pre-deployment custody arrangements. Further, even with the amendment's new language, some courts may still be inclined to deny or ignore stay requests outright, asserting that the best interests of the child outweigh the authority and interests of the SCRA.⁹ The bottom line is that despite the new language in 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.

The good news is that as the War on Terror progresses and mobilizations and deployments continue, the issue of servicemember child custody disputes has gained the attention of state legislatures. This has resulted in more and more states stepping forward with protective legislation. As of this writing, twenty-one states have passed laws that provide some form of protection for servicemembers dealing with challenging custody situations, and eleven states have bills currently pending.¹⁰ As the chart in the Appendix suggests, the states are varied in their approach. Some states address only one particular topic, such as prohibitions on permanent custody orders during deployment,¹¹ while other states cover the whole spectrum of issues, to include expedited hearings for deploying troops,¹² delegation of guardianship rights during deployment,¹³ and even the opportunity for a servicemember to present electronic testimony when not physically present at a custody hearing.¹⁴

The following section provides a brief overview of current state legislative activity on this important topic.

State Child Custody Legislation

State attempts to deal with servicemember child custody situations generally address three areas: (1) prohibitions on permanent custody orders during deployment/mobilization; (2) limitations on the use of past and/or future deployments/mobilizations in making custody determinations; and (3) other assorted protections, such as expedited custody hearings, delegated custody rights, and electronic testimony and visitations. An individual state's statute might provide some or all of these protections.

Prohibitions on Permanent Change in Custody Orders During Deployments/Mobilizations

This is a common protection measure designed to prevent the non-servicemember parent from obtaining permanent custody orders during the servicemember's deployment. For example, numerous state statutes forbid the issuance of permanent custody orders while a parent is deployed or on active duty, stating instead that only temporary custody orders can be implemented.¹⁵ Other statutes provide that any custody order made while a parent is deployed or otherwise on active duty is automatically considered to be a temporary order.¹⁶

An interesting related issue is the process by which temporary orders are terminated or vacated upon the return of the servicemember. The States vary in their approach. For example, Colorado requires the servicemember to give written notice to the court that he or she has returned, after which the custody order in place before the deployment goes back into effect without the need for court action.¹⁷ Other states require the court to reinstate the original custody order upon the

⁹ Lyndsey Kimber, *Talk is Cheap, Defending Your Rights as a Servicemember Is Not*, 25 MINN. J. 8-10 (2008), available at <http://www.citizensleague.org/publications/journal/MNJJournalFebruary2008.pdf> (pointing out that some courts take the approach that the best interest of the child standard trumps the servicemember's right to a stay in court proceedings).

¹⁰ See the chart at the end of this article for a state-by-state breakdown of applicable legislation in each state.

¹¹ See, e.g., ARK. CODE ANN. § 9-13-110(d) (2008).

¹² See, e.g., MISS. CODE ANN. § 93-5-34 (2008).

¹³ See, e.g., S.D. Codified Laws § 33-6-10 (2008).

¹⁴ See, e.g., N.C. GEN. STAT. § 50-13.7A(c)(1) (2008).

¹⁵ See, e.g., FLA. STAT. ANN. STAT. § 61.13002 (2008) (Florida custody statute); MICH. COMP. LAWS SERV. § 722.27 (LexisNexis 2008) (Michigan custody statute).

¹⁶ See, e.g., KY. REV. STAT. ANN. § 403.340(5)(b) (2008); VA. CODE ANN. § 20-125.8(A) (2008).

¹⁷ COLO. REV. STAT. § 14-10-131.3(3)(b) (2008).

servicemember's return.¹⁸ Additional states simply state that, upon the servicemember's return, the temporary order will *automatically* revert back to the order in place at the time of deployment.¹⁹ Another approach that was recently enacted in Pennsylvania and is pending in Minnesota is to require the court to specify in the temporary order that the order will revert to the pre-deployment order upon the return of the servicemember.²⁰ The State of North Dakota is slightly different, requiring temporary orders to explicitly provide for custody to be returned to the servicemember *unless* the court finds by clear and convincing evidence that this would not be in the best interest of the child.²¹ Finally, there are states in which temporary orders that were issued based on military service automatically end ten days after the servicemember returns unless the non-servicemember parent motions for an emergency hearing, citing an immediate danger to the child.²²

Use of Deployments/Mobilizations in Custody Determinations

Another approach by some states is to limit the significance that deployments/mobilizations play in custody determinations. This type of legislation typically provides that courts are not allowed to take past deployments/mobilizations into account when applying the best interest test.²³ Other states go a step farther by providing that the possibility of additional *future* active duty service cannot be taken into account as well. For example, Wisconsin law provides that in an action to modify a custody order, the court may not consider the fact that a servicemember has been or *may be* called to active duty or the fact that he may be absent from his home due to military service.²⁴ Still other state statutes provide that mobilization or deployment by itself is not sufficient to justify modification of an order based on a change of circumstances.²⁵ As a result, a non-servicemember parent would have difficulty modifying an order if the sole reason is based on a mobilization or deployment.

Other Protections

Numerous states give additional child custody protections to mobilized and deployed servicemembers. Some states explicitly allow a servicemember to delegate custody during deployment.²⁶ Other states authorize expedited custody hearings for servicemembers about to deploy,²⁷ allow electronic testimony from a servicemember who cannot physically attend a custody hearing,²⁸ or both.²⁹ In the event that the non-servicemember parent does obtain custody for the duration of the deployment, two states require the non-servicemember parent to maximize contact between the child and the deployed parent via electronic means and to make the child available for visitation during the deployed parent's leave.³⁰

¹⁸ See FLA. STAT. ANN. STAT. § 61.13002(2); MICH. COMP. LAWS SERV. § 722.27(1)(c).

¹⁹ See KY. REV. STAT. ANN. § 403.340(5)(a)2; TENN. CODE ANN. § 36-6-1(d) (2008).

²⁰ See S.B. 1107, 2007–2008 Gen. Assem., 2007 Sess. (Pa. 2007); H.R. 2494, 2007–2008 Legis., 85th Sess. (Minn. 2007) (as of this writing, this bill is pending).

²¹ N.D. CENT. CODE § 14-09-06.6(9) (2008).

²² See MISS. CODE ANN. § 93-5-34(3)(a) (2008); N.C. GEN. STAT. § 50-13.7A(c)(1) (2008).

²³ See, e.g., MICH. COMP. LAWS SERV. § 722.27(c).

²⁴ WIS. STAT. § 767.451(5)(c) (2007).

²⁵ See, e.g., NEB. REV. STAT. ANN. § 43-2923(3) (2008); ORE. REV. STAT. § 107.169(6)(a) (2007).

²⁶ See IDAHO CODE ANN. §§ 15-5-104 (2008) (allowing the custodial parent to delegate any powers regarding care and custody except the power to consent to marriage or adoption); ME. REV. STAT. ANN. tit. 18-A, § 5-104 (2008) (delegating any powers regarding care and custody except the power to consent to marriage or adoption); S.D. CODIFIED LAWS § 33-6-10 (2008).

²⁷ H.B. 2621, 2007/2008 Leg., 2008 Sess. (Kan. 2008) (as of this writing, this bill is pending).

²⁸ H.R. 808, 2007–2008 Gen. Assem., 117th Sess. (S.C. 2007) (as of this writing, this bill is pending).

²⁹ MISS. CODE ANN. §§ 93-5-23, 93-11-65 (LexisNexis 2008); N.C. GEN. STAT. § 50-13.7A(e), (f) (2008).

³⁰ FLA. STAT. ANN. STAT. § 61.13002(1) (2008); VA. CODE ANN. §§ 20-124.10 (2008).

Limiting Factors

Several states place significant limitations on the protections they offer. In seven states, the protections only apply to members of the National Guard and/or members of the Reserve, with some states only protecting *their own* National Guard members.³¹ This is a significant limitation given that deployed active component servicemembers experience the same issues and difficulties regarding child custody disputes as do their activated reserve component colleagues. The limitation likely originates from thinking by state legislatures, whether legitimate or not, that active component servicemembers have affirmatively assumed the risks involved in making the military their full-time profession.

Similarly, laws in Arkansas and Tennessee provide that the protections do not apply if the servicemember parent volunteers for permanent military duty as a career choice.³² Since terms such as “volunteer,” “permanent military duty,” and “career choice” are not clearly defined, it is difficult to anticipate how a court would resolve the evidentiary issues associated with proving that a servicemember volunteered for “permanent military duty as a career choice.” After all, just because an active component servicemember is currently serving beyond an original service obligation, it does not necessarily mean he or she has decided to “make a career” of the military. Further, under traditional state civil protections and similar SCRA protections afforded to servicemembers, it is generally irrelevant whether a servicemember has made a choice to make the military a career.

Finally, with regard to other limiting factors, in a rare approach not taken by other states, Texas has passed a law explicitly stating that deployment *does* constitute a “change in circumstances” for the purposes of modification.³³

Conclusion

As previously mentioned, the chart in the Appendix provides a state-by-state listing of state laws that address in one way or another the intersection between child custody issues and the performance of military duty. Although the chart is a good starting point for legal assistance practitioners attempting to assist servicemembers facing child custody disputes, practitioners should keep in mind that this is a fluid issue with more states coming on board and new legislation appearing each year. Numerous states currently listed on the chart as “pending” may have passed legislation since the publication of this article, and the language of the legislation may have changed from the bills originally submitted. It is also important to remember that every state is different; there is not a “one size fits all” approach. It is the professional responsibility of every legal assistance attorney to check and double-check the law in a particular jurisdiction to ensure that advice and assistance to their clients is timely and accurate.

³¹ COLO. REV. STAT. § 14-10-131.3 (2)(d) (2008) (member of a reserve component of the United States Armed Forces or a member of the state National Guard); IDAHO CODE ANN. §§ 32-717(6) (2008) (member of military reserve or of Idaho National Guard); ME. REV. STAT. ANN. tit. 18-A, § 5-104(B) (2008) (member of the National Guard or of the reserves of the Armed Forces); N.D. CENT. CODE § 14-09-06.6(9) (2008) (member of the National Guard or a reserve unit of the U.S. Armed Forces); Ohio, H.R. 61, 127th Gen. Assem., Reg. Sess. (Ohio 2007) (member of the Ohio National Guard or any reserve component of the armed forces); ORE. REV. STAT. § 107.169 (2007) (member of the Oregon National Guard); WIS. STAT. § 767.451 (2007) (member of the National Guard or a reserve unit of the U.S. Armed Forces).

³² ARK. CODE ANN. § 9-13-110(d) (2008); TENN. CODE ANN. § 36-6-1(e) (2008).

³³ TEX. FAM. CODE § 156.105(b) (2007).

Appendix

State Custody Laws Related to Deployment of SM Parents

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not factor in custody determination	Deployment does not justify modification	Deployed SM can delegate guardianship	Expedited / Electronic Hearing for deployed parent
Alaska	Pending	H.B. 264, 25th Leg., 1st Sess. (Ala. 2007)	X		X			
Ariz. ^{1,2}	Passed	Ariz. Rev. Stat. § 25-411 (LexisNexis 2008)				X		
Ark. ³	Passed	Ark. Code Ann. § 9-13-110 (2008)	X					
Cal.	Passed	Cal. Fam. Code § 3047 (Deering 2007)				X		
Colo. ⁵	Passed	Colo. Rev. Stat. § 14-10-131.3 (2008)	X	X ⁹				
Del.	Pending	H.B. 294, 114th Gen. Assem., 2dSess. (Del. 2008)	X					
Fla. ⁴	Passed	Fla. Stat. Ann.Stat. § 61.13002 (2008)	X	X ¹⁰				
Idaho ⁶	Passed	Idaho Code Ann. §§ 32-717, 15-5-104 (2008)				X	X	
Ill.	Pending	H.R. 1250, 95th Gen. Assem., (Ill. 2007)					X	
Iowa	Passed	Iowa Code § 598.41C (forthcoming 2009)	X	X ¹⁰	X	X		
Kan.	Pending	H.B. 2621, 2007/2008 Leg., 2008 Sess. (Kan. 2008)	X	X ¹¹		X		X
Ky.	Passed	Ky. Rev. Stat. Ann. § 403.340 (2008)	X	X ¹²				
Me. ⁵	Passed	Me. Rev. Stat. Ann. tit. 18-A, § 5-104 (2008)					X	
Md.	Pending	H.B. 346, 2008 Gen. Assem., 425th Sess. (Md. 2008)	X	X ¹²				
Mich.	Passed	Mich. Comp. Laws Serv. § 722.27 (LexisNexis 2008)	X	X ¹⁰	X			
Minn.	Pending	H.R. 2494, 2007–2008 Legis., 85th Sess. (Minn. 2007)		X ¹³	X			
Miss.	Passed	Miss. Code Ann. § 93-5-34 (2008)		X ¹¹		X		X
Neb.	Passed	Neb. Rev. Stat. Ann. § 43-2923 (2008)				X		
N.J.	Pending	S. 2910, 212th Legis., 2006–2007 Sess. (N.J. 2007)	X			X		
N.Y.	Pending	A.O. 6027, 2007 Sess. (N.Y. 2007)			X			
N.C.	Passed	N.C. Gen. Stat. § 50-13.7A (2008)		X ¹¹		X		X
N.D. ⁵	Passed	N.D. Cent. Code § 14-09-06.6 (2008)	X	X ¹⁴				
Ohio ⁶	Pending	H.B. 61, 127th Gen. Assem., Reg. Sess. (Ohio 2007)	X			X		
Okla.	Passed	Okla. Stat. tit. 43, § 112 (2008)	X					
Or. ⁷	Passed	Ore. Rev. Stat. § 107.169 (2007)				X		

State	Status	Statute	No permanent custody orders	Temporary orders may revert back	Deployment not factor in custody determination	Deployment does not justify modification	Deployed SM can delegate guardianship	Expedited / Electronic Hearing for deployed parent
Pa.	Passed	S.B. 1107, 2007–2008 Gen. Assem., 2007 Sess. (Pa. 2007)	X	X ¹³	X	X		
S.C. ⁴	Pending	H.R. 808, 2007-2008 Gen. Assem., 117th Sess. (S.C. 2007)	X	X ¹²		X		X
S.D.	Passed	S.D. Codified Laws § 33-6-10 (2008)	X				X	
Tenn. ³	Passed	S.B. 2547 / Tenn. Code Ann. § 36-6-113 (2008)	X	X ¹²				
Tex.	Passed	Tex. Fam. Code §§ 156.105, 153.3161 (2007)				Rev. ⁸		
Va. ⁴	Passed	Va. Code Ann. §§ 20-124.7 - 20-124.10 (2008)	X					
Wash.	Pending	S.B. 6331, 60th Legis., 2008 Reg. Sess. (Wash. 2007)	X	X ¹²				
Wis. ⁵	Passed	Wis. Stat. § 767.451 (2007)			X			

¹ Judge should defer to family care plan

² Pre-deployment custody order must address the issue of post-deployment custody

³ Court can make a permanent modification if the parent volunteers for active duty as a career choice

⁴ Non-SM parent must maximize child's communication with SM parent while SM is deployed

⁵ Law only protects members of the armed forces reserves and the National Guard

⁶ Law only protects members of the armed forces reserves and that state's National Guard

⁷ Law only protects members of that state's National Guard

⁸ Texas law specifically mentions that deployment by itself is sufficient to justify a modification

⁹ Servicemember gives notice that he has returned, after which previous order goes back into effect

¹⁰ Court shall re-instate the custody decree in place before deployment

¹¹ Temporary orders end 10 days after the servicemember returns, unless the other parent files a motion

¹² Orders revert automatically upon the return of the servicemember

¹³ Court is required to state in the temporary order that the order will revert upon the return of the servicemember

¹⁴ Court is required to state in the temporary order that the order will revert upon the return of the servicemember, unless the court has clear and convincing evidence that this is not in the best interest of the child