MEMORANDUM

TO: Drafting Committee for Uniform Visitation and Custody Statute for Military Personnel and their Families

FROM: Maxine Eichner, Professor of Law, UNC School of Law[1]

DATE: December 7, 2009

RE: Overview of Project; Issues for Conference Call

In 2007, about 295,000 U.S. troops were on active duty in foreign countries,[2] and about 139,000 personnel were called for active duty from their previous "drill weekend" status by the National Guard and Reserves.[3] Single parents accounted for more than 74,000 of the active duty troops, and more than 68,000 of the Guard and Reserve members.[4] When these single parents deploy, they place more at risk than just life and limb. Single parent service members (SMs) risk the loss of custody of and visitation rights with their children – rights that would not have been endangered had they not been obligated to serve their country. This memorandum explores how a uniform statute might be drafted to offer protection to deploying parents. In doing so, it also considers the interests of other interested parties, including the states, non-deploying parents, and children involved. Part I of the memorandum presents background information relevant to the statute. Part II considers issues that the committee must resolve in drafting such a statute. Finally, the Appendix catalogues the relevant sections of the thirty-four vastly varied state statutes promulgated in response to the need for greater SM protections.

[1] This memorandum was constructed with valuable research and writing assistance from Molly Maynard and Angie Spong, who also constructed the accompanying appendix and chart.
[2] U.S. Department of Defense, *DoD Personnel and Procurement Statistics, Selected Manpower Statistics, Table 2-4, Deployments, available at* <http://siadapp.dmdc.osd.mil/personnel/.
[3] Military.com Deployment Center, *available at* http://www.military.com/deployment.
[4] *Deployed Troops Battle for Custody*, Associated Press, military.com, May 7, 2007, *available at* (http://www.military.com/NewsContent/0,13319,134697,00.html).

TABLE OF CONTENTS

Part I: Background

Currently, the only existing statutory protection for single-parent SMs in states that do not have SM custody statutes is the federal Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C.A. app. §§ 501-96 (West 2003), which governs the general legal rights of a deploying SM. The SCRA is intended "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service," § 502(2), and "to enable such persons to devote their entire energy to the defense needs of the Nation," § 502(1). Until

2003, SCRA allowed judges the *discretion* to stay proceedings against SMs.[5] In response to the U.S.'s invasion of Iraq and the changing composition of the military population, however, Congress strengthened the Act. Now judges are *required* to grant stays, as long as letters are procured by the SM and her commanding officer proving that the military service will materially affect the SM's ability to participate in the proceedings. §522(b)(2). The SCRA was again amended in 2008 in response to the child custody issues that considerable numbers of deploying SMs were facing to make it explicit that custody proceedings fall within SCRA's ambit. §584.

Although the SCRA offers significant protection to deploying SMs facing many types of legal proceedings, child custody disputes might well be the square peg that does not fit within the SCRA's round holes. In the words of a Pennsylvania judge, "a child does not exist in 'suspended animation' during the pendency of any stay entered pursuant to the SCRA. Because of this, the issue of the child's custody during a parent's deployment must perforce be addressed." [6] In the absence of the SM, courts will generally grant custody to the other natural parent (as opposed to a person such as a grandparent to whom the SM might want to have custody) for the duration of the deployment because parental custody is deemed in the best interests of the child.[7] When the SM returns, courts sometimes require her to prove a "substantial change of circumstances" in order to regain her former custody rights, as well as show that her regaining custody is in the child's best interests. Courts highly concerned with the child's stability are sometimes loath to overturn a custody arrangement – even one originally deemed only "temporary" – unless the child is significantly worse off living with the non-deployed natural parent.[8] Furthermore, other relevant factors may similarly favor the non-military parent, including each parents' employment responsibilities, the future stability of the home environment,

[5] *Id.* at 214.
[6] Sara Estrin, *The Servicemembers Civil Relief Act: Why and HowThis Act Applies to Child Custody Proceedings*, 27 LAW AND INEQ. J. 211, 224-25 (2009) (citing *Tallon v. DeSilva,* No. FD02-4291-003 (Ct. Com. P. Alleghany County 2005)).
[7] Lieutenant Colonel Jeffrey P. Sexton, *Child Custody and Deployments: The States Step In to Fill the SCRA Gap*, 2008 ARMY LAW 9, 9 (2008).
[8] Estrin, *Servicemembers* at 222; 24A Am. Jur. 2d (citing *In re Marriage of Seagondollar*, 43 Cal. Rptr. 3d 575 (4th Dist. 2006)).

and even the preference of the child herself, who has been bonding most recently with the non-deployed parent.[9]

One of the primary concerns in drafting a statute to address military custody issues is striking a balance that accommodates the rights of the SM parent, the non-SM parent, and the child. The SCRA is concerned only with protecting the rights of the deployed SM. It does not consider the rights of the non-SM parent or the affected children. Because both parents have a constitutionally protected right to make decisions concerning the care, custody, and control of their children, *Troxel v. Granville* 530 U.S. 57 (2000), judges have expressed concern that statutory deference given to the SM parent, either in the form of a stay or by other means, might infringe on the right of the non-SM parent, or compromise the interests of the children.[10]

With these background concerns in mind, Part II considers specific issues that arise in drafting a uniform SM child custody statute. Case law analysis is included where it exists, but because many of the SM custody statutes have been promulgated within the last year or two, courts have not yet spoken on many of these precise issues.

PART II: ISSUES FOR THE DRAFTING COMMITTEE

1. The Custody Process Before or During Deployment

1(a) Should Service Members Have The Option Of An Expedited Hearing Before Deployment?

The SCRA permits only the *delay* of SM civil proceedings, which may not serve the interests of a child or either of her parents well. It does not require or recommend the opposite possibility of an expedited hearing. A handful of state statutes, however – Kansas, Mississippi, North Carolina, Ohio, and South Carolina – allow soon-to-deploy SMs expedited visitation and custody determinations. These statutes read as follows (with emphasis added):

Kansas: KAN. STAT. ANN. § 60-1630 (2008).

---

[9] Darrell Baughn, *Divorce and Deployment: Representing the Military Servicemember*, 28 FAM. ADVOC. 8, 12 (2005).

[10] *See* Sara Estrin, *Servicemembers*, at 231 (2009) (citing examples); *see also* 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, 869.

(g) Upon motion of a parent who has received deployment, mobilization, temporary duty or unaccompanied tour orders from the military, ***the court shall, for good cause shown, hold an expedited hearing in custody and parenting time matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.***

Mississippi: MISS. CODE ANN. § 93-5-34**:**

(5) Upon motion of a parent who has received military temporary duty, deployment or mobilization orders, ***the court shall, for a good cause shown, hold an expedited hearing in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.***

North Carolina: N.C. GEN. STAT. § 50-13.7A:

(e) *identical to* MISS. CODE ANN. § 93-5-34.

Ohio: OHIO REV. CODE ANN. 3109.04:

(I) Upon receipt of an order to active military service in the uniformed services, a parent who is subject to an order allocating parental rights and responsibilities or in relation to whom an action to allocate parental rights and responsibilities is pending and who is ordered to active military service shall notify the other parent who is subject to the order or in relation to whom the case is pending of the order to active military service within three days of receiving the military service order. ***Either parent may apply to the court for a hearing to expedite an allocation or modification proceeding***. The application shall include the date on which the active military service begins. ***The court shall schedule a hearing upon receipt of the application and hold the hearing not later than thirty days after receipt of the application***, except that the court shall give the case calendar priority and handle the case expeditiously if exigent circumstances exist in the case.

South Carolina: 2009 S.C. Acts 25:

Section 63-5-920: (D) If there is no existing order establishing the terms of custody or visitation and it appears that military service is imminent, ***upon motion by either parent, the court shall expedite a temporary hearing to establish temporary custody or visitation to ensure the military parent has access to the child, to establish support, and provide other appropriate relief.***

A right to an expedited hearing may give the SM a chance to participate in person and thus participate more fully. It also allows the court immediately to enter orders for

the care and custody of minor children during the SM's absence so that he or she can go overseas having tied up loose ends, and so that children can be placed securely during that time. With that said, providing a right to an expedited hearing may burden the schedules of already overburdened courts. In addition, preparing adequately for such an important hearing in such a short amount of time may also pose a challenge to both parents, and particularly the SM who is preparing to deploy. This might increase the possibility that court proceedings will not put each side's best case before the judge, and therefore risk an outcome that is not in the best interests of the child.

1(b) Should Service Members Have The Option Of An Electronic Hearing Before Or During Deployment?

An alternative or complementary provision to an expedited hearing for deploying SMs is found in state statutes that grant SMs the right to participate electronically in custody hearings. These statutes provide that when SMs cannot be in court to present testimony or evidence due to their military duties, the court should obtain this information through telephone, video or other electronic means, instead of proceeding with the case without the SM's testimony or allowing a continuance. In the absence of such statutes, there is usually only limited authority for any kind of electronic testimony.

Three states – Mississippi, North Carolina, and South Carolina – have passed statutes to provide SMs greater ability to participate during deployment:

Mississippi: MISS. CODE ANN. § 93-5-34**:**

> (6) Upon motion of a parent who has received military temporary duty, deployment or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, ***allow the parent to present testimony and evidence by affidavit or electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled teleconference, or the Internet.***

North Carolina: N.C. GEN. STAT. § 50-13.7A:

> (f) Electronic Communications. -- Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, ***allow the parent to present testimony and evidence by electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled hearing.*** The phrase

> "electronic means" includes communication by telephone, video teleconference, or the Internet.

South Carolina: 2009 S.C. ACTS 25:

> Section 15-1-340: (A) A service member who is entitled to a stay in civil proceedings pursuant to the Service Members Civil Relief Act, 50 U.S.C. App. Section 501, et seq. ***may elect to proceed while the service member is reasonably unavailable to appear in the geographical location in which the litigation is pursued and may seek relief and provide evidence through video-conferencing, internet camera, email, or another reasonable electronic means.*** Testimony presented must be made under oath, in a manner viewable by all parties, and in the presence of a court reporter. In matters when a party who is physically present in the State is permitted to use affidavits or seek temporary relief, the service member may submit testimony by affidavit.

There are a range of technological options available for SMs to participate electronically. In addition to use of the telephone, SMs can sometimes obtain access to videoteleconference (VTC) resources at commercial facilities, which allow real-time audiovisual interaction with SMs as if they were in the courtroom. The use of a camera and a microphone in connection with a computer connected to the Internet makes testimony possible even from locations that do not have commercial VTC facilities. Giving SMs the option to take advantage of such equipment allows judges to facilitate the prompt disposition of the case when it is needed, especially when expedited hearings may not be possible or even desirable.

Allowing electronic means in a hearing does raise some due process concerns, though. According to *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), "[t]he fundamental requirement of Due Process is the opportunity to be heard at a meaningful time and in a meaningful manner." A state statute allowing two-dimensional presence frames the option as an outright benefit, but it comes with some risks for the SM who takes advantage of it. In *U.S. v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001), a judge noted that "virtual reality is rarely a substitute for actual presence." The lack of actual presence is "particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion." *Edwards v. Logan*, 38 F.Supp.2d 463, 467 (W.D. Va. 1999). If equipment

is malfunctioning or if it is not of the highest quality, it may be still more difficult for the SM to present his or her best case to the judge.

The teleconferencing situation also potentially creates a sticky situation for the SM's counsel. If the attorney is with her client, she will not be able to interact as effectively with opposing counsel or with the judge. *See Rusu v. INS*, 296 F.3d 316, 323 (2002). If, instead, the attorney is present in the courtroom, she will not be able to counsel her client privately, and the client will not be able to read her attorney's body language. This is why teleconferencing has been held to violate the Sixth Amendment guarantee of right to counsel in criminal cases.[11]

2. Substantive Custody Issues Before or During Deployment

2(a) Should the Statute Provide That Any Order Modifying Custody Because of a Service Member's Deployment Be Temporary?

Most state SM custody statutes provide that any custody order entered because of a SM's deployment must be temporary, and that custody should revert to the prior order at the end of the SM's deployment (the reversion procedure after deployment is discussed *infra*). Examples of these provisions are excerpted below:

Colorado: COLO. REV. STAT. § 14-10-131.3:

> (I) ***Modifications of parental responsibilities and parenting time that are based solely upon the deployment or federal active duty of reserve or National Guard members are limited in duration;*** and
> (II) Upon the service member parent's return from deployment or active duty, the allocation of parental responsibilities and parenting time reverts to the orders in place at the time the service member was deployed or called to federal active duty.

Florida FLA. STAT. ANN. § 61.13002 (2008):

> (1) ***If a supplemental petition or a motion for modification of time-sharing and parental responsibility is filed because a parent is activated, deployed, or temporarily assigned to military service and the parent's ability to comply with time-sharing is materially affected as a result, the court may not issue an order or modify or amend a previous judgment or order that changes time-sharing as it existed on the date the parent was activated, deployed, or temporarily assigned to military service, except***

[11] *See Constitutional and Statutory Validity of Judicial Videoconferencing*, 115 A.L.R.5th 509 (2009), and sources cited therein.

that a court may enter a temporary order to modify or amend time-sharing if there is clear and convincing evidence that the temporary modification or amendment is in the best interests of the child*….*

Iowa: IOWA CODE § 598.41C: 1.

If an application for modification of a decree or a petition for modification of an order regarding child custody or physical care is filed prior to or during the time a parent is serving active duty in the military service of the United States, the court may only enter an order or decree temporarily modifying the existing child custody or physical care order or decree if there is clear and convincing evidence that the modification is in the best interest of the child.

Kentucky: KY. REV. STAT. ANN. § 403.340 (2008):

2. Any federal active duty of a parent or a de facto custodian as a member of a state National Guard or a Reserve component;

(a) ***shall be temporary and shall revert back to the previous child custody decree at the end of the deployment outside the United States or the federal active duty, as appropriate****.*

Michigan: MICH. COMP. LAWS SERV. § 722.27 (LexisNexis 2005):

(c) …***If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child.***

North Dakota: N.D. CENT. CODE § 14-09-06.6 (2008):

If a motion for change of custody is filed during the time a parent is in active duty service, the court may not enter an order modifying or amending a previous judgment or order, or issue a new order, which changes the child's placement that existed on the date the parent was called to active duty service, except the court may enter a temporary custody order that is in the best interest of the child. The temporary custody order must explicitly provide that custody must be restored to the service member upon the service member's release from active duty service, unless the court finds by clear and convincing evidence that restoration of custody would not be in the best interest of the child.

Pennsylvania: S.B. 1107, 2007-2008 GEN. ASSEM., 2007 SESS. (PA. 2007):

(a) Restriction on change of custody.--If a petition for change of custody of a child of an eligible servicemember is filed with any court in this Commonwealth while the eligible servicemember is deployed in support

of a contingency operation, no court may enter an order modifying or amending any previous judgment or order, or issue a new order, that changes the custody arrangement for that child that existed as of the date of the deployment of the eligible servicemember, except that a court may enter a temporary custody order if it is in the best interest of the child.

(b) Completion of deployment.--In any temporary custody order entered under subsection (a), a court shall require that, upon the return of the eligible servicemember from deployment in support of a contingency operation, the custody order that was in effect immediately preceding the date of the deployment of the eligible servicemember is reinstated.

South Carolina: 2009 S.C. Acts 25: SECTION 63-5-920

(A) ***If a military parent is required to be separated from a child due to military service, a court shall not enter a final order modifying the terms establishing custody or visitation contained in an existing order until ninety days after the military parent is released from military service.*** . . .

(B) ***An existing order establishing the terms of custody or visitation in place at the time a military parent is called to military service may be temporarily modified to make reasonable accommodation for the parties because of the military parent's service.***

Tennessee: TENN. CODE ANN. § 36-6-1:

(b) ***A court shall not permanently modify a decree for child custody or visitation solely on the basis that one (1) of the parents is a mobilized parent.***

…(d) ***Any court-ordered modification of a child custody decree based on the active duty of a mobilized parent shall be temporary and shall revert back to the previous child custody decree at the end of the deployment, as appropriate.***

2(b) Should There Be a Heightened Standard of Proof for a Court to Modify Custody (Even Temporarily) on the Deployment of Service Members?

Although some state SM custody statutes declare that a court may enter a custody order on the SM's deployment if a temporary modification of custody is in the best interests of the child, several statutes require that the best interests test must be met by clear and convincing evidence. These include Florida, Iowa, Michigan, New Jersey, and New York:

Florida: FLA. STAT. ANN. § 61.13002 (2008):

(1) If a supplemental petition or a motion for modification of time-sharing and parental responsibility is filed because a parent is activated, deployed,

or temporarily assigned to military service and the parent's ability to comply with time-sharing is materially affected as a result, ***the court may not issue an order or modify or amend a previous judgment or order that changes time-sharing as it existed on the date the parent was activated, deployed, or temporarily assigned to military service, except that a court may enter a temporary order to modify or amend time-sharing if there is clear and convincing evidence that the temporary modification or amendment is in the best interests of the child****….*

Iowa: IOWA CODE § 598.41C: 1.

If an application for modification of a decree or a petition for modification of an order regarding child custody or physical care is filed prior to or during the time a parent is serving active duty in the military service of the United States, ***the court may only enter an order or decree temporarily modifying the existing child custody or physical care order or decree if there is clear and convincing evidence that the modification is in the best interest of the child.***

Michigan: MICH. COMP. LAWS SERV. § 722.27 (LexisNexis 2005):

(c) …If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty***, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child.***

New Jersey: S. 941, 213th Legis., 2008-2009 Sess.:

g. If a motion for a change of custody is filed during a time a parent is in active military duty, ***the court shall not enter an order modifying or amending a judgment or order previously entered, or enter a new order that alters the custody arrangement in existence on the date the parent was called to active military duty, except that the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child.***

New York: New York MCKINNEY'S DRL 75-l (2009):

2. ***During such period the court may enter a temporary order to modify or amend custody if there is clear and convincing evidence that the temporary modification or amendment is in the best interests of the child.***

Such a provision raises the bar for a court to enter even a temporary order of custody during the SM's deployment. The result is to make it easier for SMs

with custody or visitation rights to delegate those rights during their absence without court approval, since orders drafted prior to deployment are more likely to remain in effect. (The issue of delegation is addressed *infra* in the next section.)

Much the same result is accomplished in other states, including Idaho and Illinois, by provisions declaring that deployment does not constitute a substantial or material change of circumstances for the purposes of modifying custody orders. These provisions are as follows:

Idaho: IDAHO CODE ANN. § 32-717 (2009).

> Custody of children -- Best interest
> (6) With reference to this section, when an active member of the Idaho national guard has been ordered or called to duty as defined in section 46-409, Idaho Code, or when a member of the military reserve is ordered to active federal service under title 10, United States Code, ***such military service thereunder shall not be a substantial or material and permanent change in circumstance to modify by reducing the member's previously decreed child custody and visitation privileges.***

Illinois: 2009 ILL. A.L.S. 676 *(*effective 2010)

> § 610. Modification.
> **(e*) a party's absence, relocation, or failure to comply with the court's orders on custody, visitation, or parenting time may not, by itself, be sufficient to justify a modification of a prior order if the reason for the absence, relocation, or failure to comply is the party's deployment as a member of the United States armed forces***.

The notable downside to the inclusion of such a provision in the uniform statute is that some modifications during deployment that are truly in the best interests of the child may not be ordered because they do not rise to the level of the clear and convincing standard. In contrast, North Carolina's statute specifically states that "[n]othing in this section shall alter the duty of the court to consider the best interest of the child in deciding custody or visitation matters." N.C Gen. Stat. § 50-13.7A(g).

3. Delegation By the Service Member Before or During Deployment

Of the thirty-four states that have passed SM custody statutes, ten of them have included provisions that specifically allow SMs to *transfer* custody or visitation rights they already possess (and that they will be unable to exercise from thousands of miles away) to a third party. These statutes do not *create* new third-party visitation rights. In 2000, the U.S. Supreme Court reaffirmed the proposition that a competent parent's decision regarding visitation must generally be respected. *Troxel v. Granville*, 530 U.S. 37 (2000). Accordingly, states must couch their delegation provisions in terms of rights derived from the competent parent who is to be deployed overseas, not in terms of the rights that grandparents or relatives may otherwise possess. Currently, state statutes that authorize delegation divide on the issues of (a) whether it must be accomplished by court order; (b) whether custody rights (as opposed to simply visitation rights) can be delegated; and (c) to whom custody or visitation can be delegated. Each of these issues is discussed in turn.

3(a) Assuming Delegation Is Allowed, Should a Court Order Be Required or Is Execution of a Power of Attorney Sufficient?

The ten states that allow delegation of custody or visitation split down the middle on whether delegation may occur through a power of attorney, or whether a judicial proceeding that is subject to the best interests of the child standard is required. State statutes allowing delegation by power of attorney include Georgia, Idaho, Louisiana, Maine and South Dakota (emphasis added below):

Georgia: GA. CODE ANN. § 19-9-122:

> (a) A parent of a minor child may delegate to any grandparent residing in this state caregiving authority regarding the minor child when hardship prevents the parent from caring for the child. ***This authority may be delegated without the approval of a court by executing in writing a power of attorney*** for the care of a minor child in a form substantially complying with the provisions of this article.
> (b) Hardships may include, but are not limited to:
> …(6) ***A period of active military duty of a parent exceeding 24 months***.

Idaho: IDAHO CODE ANN. § 15-5-104:

A parent or a guardian of a minor or incapacitated person, ***by a properly executed power of attorney, may delegate to another person, for a period not exceeding six (6) months, or in the case of military personnel serving beyond the territorial limits of the United States for a period not exceeding twelve (12) months, any of the parent's or guardian's powers regarding care, custody, or property of the minor or ward*** including, but not limited to, powers for medical care and educational care of the minor or ward, except the parent's or guardian's power to consent to marriage or adoption of a minor or ward. The delegation for a minor to a grandparent of the minor, or to a sibling of the minor, or to a sibling of either parent of the minor, shall continue in effect until the time period, or date, or condition set forth in the power of attorney for automatic expiration of the power of attorney occurs. If the power of attorney does not provide a time period, or date, or condition for automatic expiration of the power, the power of attorney shall continue in effect for a period of three (3) years. The power may be revoked prior to the expiration of the three (3) year period, or prior to the time period, or date, or condition for automatic expiration, in a writing delivered to the grandparent or sibling by the delegating parent or guardian. The power of attorney does not need to be notarized or recorded to be valid. However, if the power is recorded, any revocation of the power by a writing must also be recorded before the revocation is effective.

Louisiana: LA. REV. STAT. ANN. 9:3879.1:

In a military power of attorney, the language granting power with respect to the care, custody, and control of a minor child empowers the agent to do all of the following:

(1) The general functions, powers, and duties accorded to tutors pursuant to Chapter 8 of Title VI of Book VII of the Code of Civil Procedure, except those that require court approval.

(2) Consenting to and authorizing such medical care, treatment, or surgery as may be deemed necessary for the health, safety, and welfare of the child or children.

(3) Enrolling the child or children in such schools or educational institutions as may be deemed necessary for his due and proper education.

(4) Disciplining the child in such reasonable manner as may be necessary for his proper rearing, supervision, and training.

Maine: ME. REV. STAT. ANN. 18-A, § 5-104:

A) A parent or guardian of a minor or incapacitated person, ***by a properly executed power of attorney, may delegate to another person, for a period not exceeding 6 months, any of that parent's or guardian's powers regarding care, custody or property of the minor child or ward***, except the power to consent to marriage or adoption of a minor ward. A delegation by a court appointed guardian becomes effective only when the

power of attorney is filed with the court.
B) ***Notwithstanding subsection (a), unless otherwise stated in the power of attorney, if the parent or guardian is a member of the National Guard or Reserves of the United States Armed Forces under an order to active duty for a period of more than 30 days, a power of attorney that would otherwise expire is automatically extended until 30 days after the parent or guardian is no longer under those active duty orders or until an order of the court so provides.***

South Dakota: S.D. CODIFIED LAWS § 33-6-10:

> Temporary delegation of guardianship during active service in armed forces. A member of the armed forces of the United States, including a member of the reserve component of the armed forces of the United States called into active service of the armed forces, and who is the physical custodian or guardian of a minor or incapacitated person may ***delegate by a properly executed power of attorney to another person for a period of one year or less any of the powers regarding care and custody of the minor child or ward***, except the power to consent to marriage or adoption of a minor ward. ***If the custodian or guardian is serving on active duty with the armed forces of the United States, and a power of attorney properly executed by such person lapses prior to the release of such custodian or guardian from active duty, the power of attorney shall be automatically extended for an additional year unless the custodian or guardian is sooner released from active duty.*** The execution of such a power of attorney pursuant to this section or upon activation of the service member into the armed forces of the United States does not constitute a material change in circumstances for an action seeking to change the custody of the affected child or children by the parent without physical custody.

Allowing a parent to delegate through a power of attorney makes it clear that new rights have not been created in the assigned guardian, and that the rights are rescindable to the rightful possessor at any time. In addition, a power of attorney provides the SM a quick, inexpensive and easy way to delegate, and it allows the SM the same authority to choose with whom her child will spend time that she had before she was deployed. Furthermore, the power of attorney does not preclude the other parent from challenging the delegation at any point that she has reason to suspect that it is not in the best interests of the child.

Statutes providing that the courts, instead, must authorize any delegation have been promulgated by Kansas, Mississippi, North Carolina, Texas and Washington (emphasis added below):

Kansas: KAN. STAT. ANN. § 60-1630:

> (f) If a parent with parenting time rights receives deployment**,** mobilization, temporary duty or unaccompanied tour orders from the military that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise parenting time rights, ***the court may delegate the parent's parenting time rights, or a portion thereof, to a member or members of the service member's family with a close and substantial relationship to the minor child for the duration of the parent's absence***, if delegating parenting time rights is in the ***best interests of the child***.

Mississippi: MISS. CODE ANN. § 93-5-34:

> (4) If the parent with visitation rights receives military temporary duty, deployment or mobilization orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise rights, the court otherwise ***may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the service member's minor child for the duration of the parent's absence***, if delegating visitation rights is in ***the child's best interest.***

North Carolina: N.C. GEN. STAT. § 50-13.7A:

> *Identical to* MISS. CODE ANN. § 93-5-34 (*see above*).

Texas: TEX. FAM. CODE § 153.3161.

> (a) In addition to the general terms and conditions of possession required by Section 153.316, if a possessory conservator or a joint managing conservator of the child without the exclusive right to designate the primary residence of the child is currently a member of the armed forces of the state or the United States or is reasonably expected to join those forces, the court shall:
> (1) ***permit that conservator to designate a person who may exercise limited possession of the child during any period that the conservator is deployed outside of the United States***; and
> (2) if the conservator elects to designate a person under Subdivision (1), provide in the order for limited possession of the child by the designated person under those circumstances, subject to the court's determination that the limited possession is in the best interest of the child.
> (b) ***If the court determines that the limited possession is in the best interest of the child***, ***the court shall provide in the order*** that during periods of deployment:
> (1) the designated person has the right to possession of the child on the first weekend of each month beginning at 6 p.m. on Friday and ending at 6 p.m. on Sunday;
> (2) the other parent shall surrender the child to the designated person at the beginning of each period of possession at the other parent's residence;

(3) the designated person shall return the child to the other parent's residence at the end of each period of possession;
(4) the child's other parent and the designated person are subject to the requirements of Sections 153.316(5)-(9);
(5) the designated person has the rights and duties of a nonparent possessory conservator under Section 153.376(a) during the period that the person has possession of the child; and
(6) the designated person is subject to any provision in a court order restricting or prohibiting access to the child by any specified individual.
(c) After the deployment is concluded, and the deployed parent returns to that parent's usual residence, the designated person's right to limited possession under this section terminates and the rights of all affected parties are governed by the terms of any court order applicable when a parent is not deployed.

Washington: WASH. REV. CODE 26.09.260:

(12) If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, ***at the request of the military parent, the court may delegate the military parent's residential time or visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest***. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time under RCW 26.09.191. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

Requiring a court to approve delegation of rights provides a safeguard against assignments to guardians whose contact with the child may not be in his or her best interests. In addition, if the guardian is subject to judicial scrutiny and a hearing, it will underscore the importance of the role s/he is being asked to play much more so than delegation by a mere form will. On the other hand, requiring a court to review delegation

places the SM at a disadvantage to the other natural parent. As the Alabama appellate court in *McQuinn v. McQuinn*[12] stated:

> What the mother misunderstands is that this case does not involve whether grandparents or third parties have a right to visitation, but instead involves the father's right, during his visitation periods, to [**12] determine with whom his children may visit. . . . [T]he mother is free to leave the children in day care during her working hours, with babysitters when she has social engagements, and apparently (based upon the statement of her counsel at trial) with her sister (or other family members) in Tennessee for what her counsel described as extended "regular visitation periods," all without his approval or even his knowledge. Essentially, the mother argues that the father, as the noncustodial parent, has been stripped of the rights of a parent and that she, and only she, may exercise those parental rights. She is mistaken.[13]

3(b) Should the Statute Allow Delegation of Visitation and Custody Rights?

All ten states that explicitly authorize delegation by statute allow delegation of visitation rights. There are strong reasons to do so in the context of military deployment. As noted by Lieutenant Colonel Francine I. Swan, Legal Advisor to the Adjutant General, New Hampshire National Guard, in her 2004 comments to an inquiry by the American Bar Association's Working Group on Protecting the Rights of SMs:

> This is the single greatest area of concern – when the SM is the non-custodial parent and visitation is not allowed to any other members of the non-custodial parent's family (to include siblings, step-parent and grandparents). In some cases this effectively cuts off any and all communication between the child and the non-custodial parent for the duration of the deployment. Our servicemembers are risking their lives; they should not have to risk their families as well.

In the absence of SM delegation statutes, at least four state courts have specifically allowed the delegation of visitation rights to relatives by judicial decision. These decisions help to illuminate the arguments in favor of delegation of visitation rights. For instance, in a 2003 Illinois case, *Sullivan v. Sullivan,*[14] an appellate court stated that a trial court, even without specific statutory authority, could delegate a SM's

[12] 866 So. 2d 570 (Ala. Civ. App. 2003).
[13] *Id.* at 574-575.
[14] 795 N.E. 2d 392 (2003).

visitation to his family if doing so was in the best interests of the child.[15] Similarly, in *McQuinn v. McQuinn*,[16] the court found such delegation permissible. Addressing the issue of constitutionality, the appeals court held:

> We note that although the mother, not the father, is the primary physical custodian of the children, the father's fundamental right to direct the care, control, and association of his children is no less fundamental and protected than the right of the mother to do the same. *See Troxel v. Granville, 530 U.S. at 65*. The decision in *Troxel* does not differentiate between custodial and noncustodial parents as to their fundamental rights to determine the care, control, and association of their children.[17]

However, different issues are raised by delegation of visitation rights, on the one hand, and custody rights, on the other, although the distinction between the two forms of rights is often murky. Currently, only some of the ten state statutes that allow delegation include custody rights in addition to visitation. These states are Georgia, Idaho, Louisiana, Maine, and South Dakota, which are excerpted *supra* at 3(b). At least one family law court, in the absence of a delegation statute, held that it would be inappropriate to allow a SM father to assign custody rights to his parents, at least through the use of a power of attorney. According to the court, "custody rights are not assignable to third parties, [since t]he best interests of children in custody disputes are determined not by unilateral fiat of one parent, but by the courts."[18] Delegating custody might also be deemed to violate *Troxel v. Granville* by allowing a non-parent custody over a fit parent.

3(c) To Whom Should Delegation Be Allowed?

Statutes that allow delegation during military deployments vary considerably regarding to whom delegation of rights may be extended. As demonstrated by the statutes excerpted in § 3(a) *supra*, Georgia only permits delegation to grandparents; Kansas, Mississippi and North Carolina only permit delegation to a family member with a close

---

[15] *But see* Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at 6 (N.Y. Fam. Ct. May 21, 2004) (which found that deployment did not constitute "extraordinary circumstances," because one parent's deployment does not affect the fitness of the non-deploying parent to be a guardian.).
[16] McQuinn v. McQuinn, 866 So. 2d 570 (Ala. Civ. App. 2003).
[17] *Id.* at 573.
[18] *Tallon v. Desilva*, No. FD02-4291-003 (Ct. Com. Pl. Alleghany County 2005), reprinted in 153 PITTSBURGH LEGAL J. 164 (2005).

and substantial relationship; and Idaho, Maine, Louisiana, South Dakota, Texas, and Washington permit delegation to any third party. Limiting delegation to family members has the benefit of helping to ensure that the SM's choice is someone who has a permanent tie to both the SM and the child. On the other hand, not requiring a blood or marriage relationship between the SM and the guardian would allow SMs to designate a same-sex partner whom s/he could not legally marry, but with whom the child has developed strong bonds.

4. Contact with Service Member Parent During Deployment

4 (a) Should The Statute Require The Court And/Or the Non-Service Member Parent To Maximize, to the Extent Feasible, The Child's Communication With The SM Parent During Deployment?

Several states have adopted provisions designed to insure that deployed parents are able to stay in touch with their children during the course of their deployment. Some of these statutes require that the court provide for, if feasible, contact through means such as electronic mail, webcam, and telephone for this purpose, or order the nondeploying parent to facilitate such communication. Examples of these provisions are excerpted below, with emphasis added:

Florida: FLA. STAT. ANN. § 61.13002 (2008): When entering a temporary order under this section, the ***court shall consider and provide for, if feasible, contact between the military servicemember and his or her child, including, but not limited to, electronic communication by webcam, telephone, or other available means***. The court shall also permit liberal time-sharing during periods of leave from military service, ***as it is in the child's best interests to maintain the parent-child bond during the parent's military service.***

Kansas: KAN. STAT. ANN. § 60-1630 (2008).

(i) Any order entered pursuant to this section shall provide that:
. . . (2) ***the nondeploying parent shall facilitate opportunities for telephonic and electronic mail contact between the parent subject to deployment, mobilization, temporary duty or unaccompanied tour orders and the child during the period of such deployment, mobilization, temporary duty or unaccompanied tour*** . . . .

Maryland: MD. FAM. LAW CODE ANN. § 9-108 (2009):

> Any custody or visitation order issued based on the deployment of a parent shall require that:
> (2) ***the other parent facilitate opportunities for telephone and electronic mail contact between the parent who is subject to the deployment and the child during the period of deployment***…

New York: MCKINNEY'S DRL 75-l (2009): When entering a temporary order under this section, the ***court shall consider and provide for, if feasible and if in the best interest of the child, contact between the military service member and his or her child including, but not limited to, electronic communication by webcam, telephone, or other available means***.

Virginia: VA. CODE ANN. §§ 20-124.7 - 20-124.10:

> Any order entered pursuant to § 20-124.8 shall provide that . . . ***(ii) the nondeploying parent shall facilitate opportunities for telephonic and electronic mail contact between the deploying parent or guardian and the child during the deployment period***. . . .

The ability for deployed SMs and their children to remain in touch while the SM parent is away would likely be very beneficial to both the SM and child. For the child, there is first and foremost the clear benefit of maintaining as normal as possible a relationship with both of her parents. In addition, the continuous contact would likely ease the transition back to spending time with the SM parent on her return home. This would also allow the SM parent to remain aware of what is happening in her child's life while she is away, which would likely ease the transition back to the daily reality of parenting on her return. Another benefit for SM parents is that these communications would reduce the likelihood that a child would be uncomfortable returning to the care of an SM parent they barely know after months or years apart. This is important both because it would be a factor that weighed against returning custody to a SM, and because it is likely to be a heartbreaking reality for a parent to face.

However, there may also be considerable difficulties in making these communications possible. The cost of these communications, especially when the SM parent is overseas, may be high. Overseas phone calls, especially those of any significant length, are not inexpensive. For many families the high speed internet necessary to use a webcam successfully might be a burdensome expense. In addition to expense, there is a possibility that these communications would be disruptive to a child's life. Deployed SMs frequently have very restricted schedules and are only infrequently available to use

the internet or telephone. For SMs in time zones very different than their children, this might mean phone calls in the middle of the night or significantly past a young child's bedtime. Another concern is that children who come to rely on regular contacts with their deployed parent might be extremely distressed when the SM parent is unable to make an expected call or webcam appointment for reasons beyond her control, a level of stress that a court or non-SM parent (or even the deployed parent herself) may be understandably reluctant to introduce into a child's life. Many of these concerns apply only to "live" communications like phone calls and webcams, however, and are not relevant to electronic mail.

4(b) Should The Statute Require That the Court and/or the Non-Service Member Parent Facilitate the Service Member's Contact With the Child During Leaves?

Many of the states with military custody statutes also encourage or require that courts and non-SM parents make accommodations for the SM parent's leave, so that the child and SM parent can spend time together. Again, these provisions are clearly targeted at preventing the decay of the parent-child bond during long deployments, and seek to achieve this by creating as many opportunities as possible for meaningful contact between the two. A selection of the statutes with these provisions are excerpted below, with emphasis added:

Florida: FLA. STAT. ANN. § 61.13002 (2008):

> When entering a temporary order under this section, the court shall consider and provide for, if feasible, contact between the military servicemember and his or her child, including, but not limited to, electronic communication by webcam, telephone, or other available means. ***The court shall also permit liberal time-sharing during periods of leave from military service, as it is in the child's best interests to maintain the parent-child bond during the parent's military service.***

Kansas: ***The nondeploying parent shall reasonably accommodate the leave schedule of the parent subject to deployment.***

Maryland: MD. FAM. LAW CODE ANN. § 9-108 (2009):

> ***Any custody or visitation order issued based on the deployment of a parent shall require that:***
> ***(1) the other parent reasonably accommodate the leave schedule of the parent who is subject to the deployment;***

New York: MCKINNEY'S DRL 75-l (2009):

> When entering a temporary order under this section, the court shall consider and provide for, if feasible and if in the best interest of the child, contact between the military service member and his or her child including, but not limited to, electronic communication by webcam, telephone, or other available means. ***During the period of the parent's leave from military service, the court shall consider the best interest of the child when establishing a parenting schedule.*** For such purpose, a "leave from service" shall be a period of not more than three months.

South Carolina: 2009 S.C. ACTS 25:

> Section 63-5-920 (C) ***A temporary modification order issued pursuant to this section must provide that the military parent has custody of the child or reasonable visitation, whichever is applicable pursuant to the original order, with the child during a period of leave granted to the military parent during their military service. If a temporary modification order is not issued pursuant to this section, the nonmilitary custodial parent shall make the child or children reasonably available to the military parent when the military parent has leave to ensure that the military parent has reasonable visitation and is able to visit the child or children.***

Virginia: VA. CODE ANN. §§ 20-124.7 - 20-124.10:

> ***Any order entered pursuant to § 20-124.8 shall provide that (i) the nondeploying parent or guardian shall reasonably accommodate the leave schedule of the deploying parent or guardian . . . .***

West Virginia: W. VA. CODE, § 48-9-404:

> (c) ***A temporary parenting plan pursuant to this section shall provide that the military parent has at least substantial custodial responsibility of the child during a period of leave granted to the military parent during their military service, unless the court determines that it is not in the best interest of the child. If a temporary parenting plan is not issued pursuant to this section, the nonmilitary custodial parent shall make the child or children reasonably available to the military parent when the military parent has leave to ensure that the military parent has reasonable custodial responsibility and is able to exercise custodial responsibility of the child or children.***

As with long-distance communications, these statutes do not consider the cost, both monetary and in the disruption of the child's routine, that the non-SM parent and child might incur in the process of making these accommodations. Most of the statutes, however, do specify that the accommodations need only be "reasonable" and that this ultimately must be in the best interest of the child.

5. Proceedings Following Deployment

5(a) What Procedures, If Any, Should Accompany Reversion to the Previous Custody Order?

Many state statutes either specify that reversion to the parenting order in effect before deployment will occur automatically following the SM's return from deployment, or do not specify that any procedure should precede reversion. Some of these provisions are excerpted here:

Colorado: COLO. REV. STAT. § 14-10-131.3:

> (I) Modifications of parental responsibilities and parenting time that are based solely upon the deployment or federal active duty of reserve or National Guard members ***are limited in duration;*** and
> (II) ***Upon the service member parent's return from deployment or active duty, the allocation of parental responsibilities and parenting time reverts to the orders in place at the time the service member was deployed or called to federal active duty***.

Kentucky: KY. REV. STAT. ANN. § 403.340 (2008):

> **2.** Any federal active duty of a parent or a de facto custodian as a member of a state National Guard or a Reserve component;
> *(a)* ***shall be temporary and shall revert back to the previous child custody decree at the end of the deployment outside the United States or the federal active duty, as appropriate***.

North Dakota: N.D. CENT. CODE § 14-09-06.6 (2008):

> . . . ***The temporary custody order must explicitly provide that custody must be restored to the service member upon the service member's release from active duty service, unless the court finds by clear and convincing evidence that restoration of custody would not be in the best interest of the child.***

Pennsylvania: S.B. 1107, 2007-2008 GEN. ASSEM., 2007 SESS. (PA. 2007):

> (b) Completion of deployment.--***In any temporary custody order entered under subsection (a), a court shall require that, upon the return of the eligible servicemember from deployment in support of a contingency operation, the custody order that was in effect immediately preceding the date of the deployment of the eligible servicemember is reinstated.***

South Carolina: 2009 S.C. Acts 25: SECTION 63-5-920

> (B) An existing order establishing the terms of custody or visitation in place at the time a military parent is called to military service may be temporarily modified to make reasonable accommodation for the parties

> because of the military parent's service. ***A temporary modification automatically terminates when the military parent is released from service and, upon release, the original terms of the custody or visitation order in place at the time the military parent was called to military service are automatically reinstated.***

Tennessee: TENN. CODE ANN. § 36-6-1:

> …(d) Any court-ordered modification of a child custody decree based on the active duty of a mobilized parent ***shall be temporary and shall revert back to the previous child custody decree at the end of the deployment, as appropriate.***

These automatic reversions are preferred by many advocates of SM parents' rights. As a matter of judicial economy, these provisions also keep the cases off the court dockets. However, the child's may be overlooked under these statutes where the deployment has altered the arrangement that serves the best interest of the child in some way. This may be a particular concern where the SM returns with physical or mental difficulties resulting from deployment.

Provisions in other state statutes contemplate a court ordering the termination of the temporary order on the return of the SM, in order for reversion to occur. These provisions, however, can delay the return of custody to the SM, as well as impose some burden on the courts. Examples of such provisions are set out here:

Florida: FLA. STAT. ANN. § 61.13002 (2008):

> (1) If a supplemental petition or a motion for modification of time-sharing and parental responsibility is filed because a parent is activated, deployed, or temporarily assigned to military service and the parent's ability to comply with time-sharing is materially affected as a result, the court may not issue an order or modify or amend a previous judgment or order that changes time-sharing as it existed on the date the parent was activated, deployed, or temporarily assigned to military service, except that a court may enter a temporary order to modify or amend time-sharing if there is clear and convincing evidence that the temporary modification or amendment is in the best interests of the child….
> (2) ***If a temporary order is issued under this section, the court shall reinstate the time-sharing order previously in effect upon the servicemember parent's return from active military service, deployment, or temporary assignment.***

Iowa: IOWA CODE § 598.41C: 1.

> If an application for modification of a decree or a petition for modification of an order regarding child custody or physical care is filed prior to or

> during the time a parent is serving active duty in the military service of the United States, the court may only enter an order or decree temporarily modifying the existing child custody or physical care order or decree if there is clear and convincing evidence that the modification is in the best interest of the child. ***Upon the parent's completion of active duty, the court shall reinstate the custody or physical care order or decree that was in effect immediately preceding the period of active duty***.

Michigan: MICH. COMP. LAWS SERV. § 722.27 (LexisNexis 2005):

> (c) …If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. ***Upon a parent's return from active military duty, the court shall reinstate the custody order in effect immediately preceding that period of active military duty.***

Perhaps the best compromise between supporting the interests of SMs and safeguarding the best interests of the children involved is to take the approach adopted by both North Carolina and Mississippi. These state statutes specify that reversion will occur automatically within a certain number of days of the SM's return. They also provide, however, that emergency motions to change custody can be heard within that time. The relevant provisions of these statutes follow:

North Carolina: N.C. GEN. STAT. § 50-13.7A:

> ***Any temporary custody order for the child during the parent's absence shall end no later than 10 days after the parent returns, but shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within 10 days of the filing of a verified motion for emergency custody alleging an immediate danger of irreparable harm to the child.***

Mississippi: MISS. CODE ANN. § 93-5-34:

> *Identical to* N.C. GEN. STAT. § 50-13.7A.

Although both the North Carolina and Mississippi statutes allow an expedited hearing only for allegations of an immediate danger of irreparable harm to the child, the uniform statute, instead, could allow expedited hearings for any challenges to the reversion.

5(b) Should the Statute Alter the Standard of Proof Required to Prevent Reversion?

The North Dakota SM custody statute declares that a court may prevent reversion to the prior custody order only if it determines by clear and convincing evidence that it would not be in the best interests of the child:

North Dakota: N.D. CENT. CODE § 14-09-06.6 (2008)

> If a motion for change of custody is filed during the time a parent is in active duty service, the court may not enter an order modifying or amending a previous judgment or order, or issue a new order, which changes the child's placement that existed on the date the parent was called to active duty service, except the court may enter a temporary custody order that is in the best interest of the child. ***The temporary custody order must explicitly provide that custody must be restored to the service member upon the service member's release from active duty service, unless the court finds by clear and convincing evidence that restoration of custody would not be in the best interest of the child.***

As with respect to the similar provisions discussed *supra* at 2(b), such a provision would make it more likely that SMs could regain their previous custody rights. Yet it has the notable downside that it could result in prior custody arrangements being restored even when they are not in the best interests of the affected children.

A more moderate advantage is given to the returning SM by Kansas' and Virginia's statutes, which simply place the burden of proof on the non-SM parent, but retain the preponderance of the evidence standard of proof:

Kansas: KAN. STAT. ANN. § 60-1630 (2008). Child custody and parenting time for parents deployed by the military; modification of orders; hearing.

> (d)The court, on motion of the parent returning from deployment, mobilization, temporary duty or unaccompanied tour, seeking to amend or review the custody or parenting time order based upon such deployment, mobilization, temporary duty or unaccompanied tour, shall set a hearing on the matter that shall take precedence on the court's docket and shall be set within 30 days of the filing of the motion. Service on the nondeploying parent shall be at such nondeploying parent's last address provided to the court in writing. Such service, if otherwise sufficient, shall be deemed sufficient for the purposes of notice for this subsection. ***For purposes of***

this hearing, such nondeploying parent shall bear the burden of showing that reentry of the custody or parenting time order in effect prior to deployment, mobilization, temporary duty or unaccompanied tour is no longer in the best interests of the child.

Virginia: VA. CODE ANN. § 20-124.8:

> B. The court, on motion of the deploying parent or guardian returning from deployment seeking to amend or review the custody or visitation order entered based upon the deployment, shall set a hearing on the matter that shall take precedence on the court's docket, and shall be set within 30 days of the filing of the motion. ***For purposes of this hearing, the nondeploying parent or guardian shall bear the burden of showing that reentry of the custody or visitation order in effect before the deployment is no longer in the child's best interests.***

5(c) Should The Statute Limit Consideration Of Past Deployments In Determining or Modifying Custody?

A few statutes, for example, Michigan's, Pennsylvania's, and Wisconsin's, declare that past deployments may not enter into the best interests of the child determination. The language of these statutes is excerpted below (with emphasis added):

Michigan: MICH. COMP. LAWS SERV. § 722.27 (c):

> …***If a motion for change of custody is filed after a parent returns from active military duty, the court shall not consider a parent's absence due to that military duty in a best interest of the child determination***.

Pennsylvania: 51 PA. CONS. STAT. ANN. § 4109:

> (c) Exclusion of military service from determination of child's best interest.--***If a petition for the change of custody of the child of an eligible servicemember who was deployed in support of a contingency operation is filed after the end of the deployment, no court may consider the absence of the eligible servicemember by reason of that deployment in determining the best interest of the child***.

Wisconsin: WIS. STAT. § 767.451:

> (c) In an action to modify a legal custody order, if a party is a service member, as defined in s. 767.41(2)(e)1., ***the court may not consider as a factor in making a determination whether the service member has been or may be called to active duty in the U.S. armed forces and consequently is, or in the future will be or may be, absent from the service member's home***.

SM statutes in other states take a related tack in declaring that the fact of past deployment should not constitute a change of circumstances that could give rise to modification. One state's statute, Iowa's, contains provisions barring past deployment for consideration in *both* the material change of circumstances and best interests analyses. Examples of these statutes appear below:

Illinois: 2009 ILL. A.L.S. 676 (effective 2010)

> § 610. Modification.
> (E) ***a party's absence, relocation, or failure to comply with the court's orders on custody, visitation, or parenting time may not, by itself, be sufficient to justify a modification of a prior order if the reason for the absence, relocation, or failure to comply is the party's deployment as a member of the United States armed forces***.

Iowa: IOWA CODE § 598.41C (2008).

> 1. . . . If an application for modification of a decree or a petition for modification of an order is filed after a parent completes active duty**,** ***the parent's absence due to active duty does not constitute a substantial change in circumstances, and the court shall not consider a parent's absence due to that active duty in making a determination regarding the best interest of the child.***

Kansas: KAN. STAT. ANN. § 60-1630 (2008).

> (b) ***The absence, relocation or failure to comply with a custody or parenting time order by a parent who has received deployment, mobilization, temporary duty or unaccompanied tour orders from the military, shall not, by itself, constitute a material change in circumstances warranting a permanent modification of a custody or parenting time order.***

Mississippi: MISS. CODE ANN. § 93-5-34 (2009***).***

> *(b)* ***The temporary duty, mobilization or deployment of the service member and the temporary disruption to the child's schedule shall not be factors in a determination of change of circumstances if a motion is filed to transfer custody from the service member***.

Statutes limiting consideration of past deployment communicate the important public policy that those who chose to serve their country should not be penalized for doing so (and also serve the broader purpose of the SCRA). These statutes are unclear, however, with respect to how broadly their prohibitions should be construed. Does the bar on considering the past deployment also bar

consideration of the *effects* of the deployment?[19] If it does, the court might be compelled to ignore something as pertinent to a child's interests and safety as a parent's severe case of post-traumatic stress disorder. Likewise, it might be required to overlook the child's current relationships with both parents, which will likely have changed over the course of the deployment. The better course, if the committee does decide to exclude the fact of deployment from consideration, is to specify that the effects of deployment may be considered by the court. North Carolina's statute, excerpted below, goes at least part of the way toward this goal in suggesting that only one of the effects of deployment – temporary disruption to the child's schedule – is excluded from consideration of the court:

North Carolina: N.C. GEN. STAT. § 50-13.7A (2008)

> ***(2) The temporary duty, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer custody from the service member.***

5(d) Should The Statute Bar Consideration Of Future Deployments In Determining or Modifying Custody?

One statute, Wisconsin's, bars not only consideration of past deployment, but future deployments, as well. That provision is excerpted *supra* at section 5(c). In contrast, Tennessee and Arkansas specifically allow courts to find that a custodial parent's choice to enter military service as a career can tip the scales in the other parent's favor. Tennessee's and Arkansas's statutes are excerpted below:

Tennessee: TENN. CODE ANN. § 36-6-113 (e):

> This section shall not limit the power of a court of competent jurisdiction to permanently modify a decree of child custody or visitation in the event that a parent volunteers for permanent military duty as a career choice, regardless of whether the parent volunteered for permanent military duty while a member of the armed forces.

Arkansas: ARK. CODE ANN. § 9-13-110 (d):

> *Same language as above.*

[19] Estrin, *Servicemembers* at 236-37.

Wisconsin's approach offers a guarantee to SMs that they will not be penalized by their decision to defend their country. It may also, however, preclude consideration of a factor that is important to a child's best interests, given that the parent may be a less stable caretaker because of the need to move or be deployed while in service. In contrast, Tennessee and Arkansas allow a court to determine that a parent who assumes the obligations of a career in which deployments may take her far from her child may, as a result, lose custody if that affects the best interests of the child.

6. Coverage Issues

Should Some Branches Of The Military Be Excluded From These Protections?

Several SM custody statutes have definitional sections that limit the statute's protections to the National Guard and military reserves. These statutes are premised on the view that members of the Guard and military reserves face particular challenges in ordering their family affairs because they have not chosen the military as a career.[20] States that limit coverage in this manner include Colorado, Oregon, and Wisconsin. The relevant sections of of these statutes follow:

Colorado: COLO. REV. STAT. § 14-10-131.3:

> (a) "Active duty" means full-time service in:
> (I) ***A reserve component of the armed forces; or***
> ***(II) The National Guard for a period that exceeds thirty consecutive days in a calendar year***[5].

Oregon: ORE. REV. STAT. § 107.169 (2007):

> (2) "Active state duty" ***means full-time duty in the active military service of the state under an order of the Governor*** issued under authority vested in the Governor by law, and includes travel to and from such duty. ***The term "active state duty" also includes all Oregon National Guard personnel serving on active duty under Title 32 U.S.C. 502 (f).***]
> (*excluding members of other state's national guards*)

Wisconsin: WIS. STAT. §767.41:

> (e)1. In this paragraph, "service member" means a member of the national guard or of a reserve unit of the U.S. armed forces.

[20] Lieutenant Colonel Jeffrey P. Sexton, *Child Custody and Deployments: The States Step In to Fill the SCRA Gap.* 2008 Army Law 9, 12 (2008).

In contrast, the definitional provisions of other state statutes, including Arkansas, Pennsylvania, and South Carolina, have provisions that include career military members within the statute's protection. The relevant portions of these statutes follow:

Arkansas: ARK. CODE ANN. § 9-13-110 (2009).

> ***(1) "Armed forces" means the National Guard and the reserve components of the armed forces, the United States Army, the United States Navy, the United States Marine Corps, the United States Coast Guard, and the United States Air Force, and any other branch of the military and naval forces or auxiliaries of the United States or Arkansas.***

Pennsylvania: 51 PA.C.S.A. § 4109 (2007)

> ***"Eligible servicemember." A member of the Pennsylvania National Guard or a member of an active or reserve component of the Armed Forces of the United States who is serving on active duty, other than active duty for training, for a period of 30 or more consecutive days, in support of a contingency operation***.

South Carolina:

> For purposes of this article:
>
> ***(A)(1) In the case of a parent who is a member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or a Reserve component of these services, 'military service or service' means a deployment for combat operations, a contingency operation, or a natural disaster based on orders that do not permit a family member to accompany the member on the deployment.***
>
> ***(2) In the case of a parent who is a member of the National Guard, 'military service or service' means service under a call to active service authorized by the President of the United States or the Secretary of Defense for a period of more than thirty consecutive days pursuant to 32 U.S.C. 502(f) for purposes of responding to a national emergency declared by the President and supported by federal funds.***

The committee may decide that career SMs should not be entitled to all the protections offered by SM custody statutes. For example, it may decide that the fact of deployments should be excluded from best interests of the child consideration only when it comes to reserve or Guard SMs. Even if this is the case, however, there is a strong argument that at least some procedural protections that may be encompassed within the statute drafted by this committee, such as those making electronic hearings and expedited

hearing to deploying SMs, should be available to all those who deploy, rather than simply to National Guard and reserve members. Because of this, it may make more sense to draft the definitional section of the statute to include all military members, and, if the committee wishes to do so, to exempt certain specific SM categories from coverage only within individual provisions of the statute.