DRAFTING A MILITARY CUSTODY AND VISITATION STATUTE

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INTRODUCTION

With the substantially increased activity of our armed forces around the world today, more and more states are recognizing the need for statutes which protect the rights of servicemembers and their children. There are about 100,000 troops on active duty in Iraq and Afghanistan as this is being written, and the National Guard and Reserves have called up about 100,000 personnel for active duty from their previous "drill weekend" status, many from small towns and communities across the United States. Special provisions and protections for the children of servicemembers have come from the legislatures of Michigan, California, Texas, North Carolina, Colorado, Kentucky, Iowa, Virginia, Florida, North Dakota, Louisiana, Kansas and Mississippi, just to name a few. This paper outlines how to draft such a statute, and much of it is based on the law enacted in 2007 by the North Carolina General Assembly, found at North Carolina General Statute (NCGS) 50-13.7A.

PREAMBLE

The first task for the drafter is to prepare a justification for the new statute, often termed a preamble, legislative preface or legislative findings. The purpose of the preamble is to set forth facts which justify the passage of a new statute. In general, such facts might be the appearance of a new issue, problem or technology on the horizon. In the case of a military custody statute, the preface ought to focus on the state military population, both active-duty and Guard/Reserve, the nature and frequency of deployments and Guard/Reserve mobilizations, and the effect that these have on custodial arrangements (including custody for the servicemember and visitation rights he or she may be exercising). The preamble for the state of "East Virginia" might read:

> *AN ACT TO ESTABLISH CUSTODY RIGHTS, DELEGATION OF VISITATION, EXPEDITED HEARINGS, AND ELECTRONIC COMMUNICATION WITH THE COURT WHEN A PARENT RECEIVES MILITARY TEMPORARY DUTY, DEPLOYMENT, OR MOBILIZATION ORDERS.*

Whereas, currently there are four major military bases in East Virginia; and

Whereas, the military population of this State is the seventh largest in the nation, with active-duty servicemembers numbering over 40,000; and

Whereas, temporary duty, the deployment of an active-duty servicemember, or the mobilization of a member of the National Guard or Reserves, sometimes with little advance notice, can have a disruptive effect on custody or visitation arrangements involving minor children of servicemembers; and

Whereas, servicemembers should be protected, as should their minor children, from the loss of custodial arrangements and disruption of family contact due to the servicemember's absence pursuant to military orders for temporary duty, deployment, or mobilization; and

Whereas, other members of a servicemember's family, such as parents or current spouses, can provide love, comfort, care, and continuity to the servicemember's child through delegated visitation when a servicemember is absent due to military orders; and

Whereas, the regular scheduling of hearings may be harmful to the interest of servicemembers who, due to military orders, may need to have an expedited hearing or may need to use electronic means to give testimony when they cannot appear in person in court; and

Whereas, the use of expedited hearings and testimony by electronic means, at the request of the servicemember who is absent or about to depart, would aid and promote fair, efficient, and prompt judicial processes for the resolution of family law matters; Now, therefore,

The elected legislature of East Virginia hereby enacts the following duly enrolled statute…

OVERVIEW OF THE STATUTE

There are five provisions which are essential for a good military custody statute; it should cover the following, in situations involving temporary duty, mobilization of Guard/Reserve personnel or deployment of active-duty SMs -

1) allow expedited hearings upon the request of a servicemember.
2) let the court use electronic testimony when the SM is unavailable.
3) allow the court to delegate the visitation rights of the SM to another family member.
4) require that any temporary custody order entered upon a SM’s deployment end promptly after his or her return, which usually means that the SM resumes custody of the minor child; and
5) require that the SM’s absence due to deployment may not be the sole basis for a subsequent change of custody.

Each of these is handled somewhat differently in the states which have passed military custody

legislation.

DEFINITIONS

Since the protections set out in the statute are triggered by the absence of the SM, pursuant to military order, it is important to specify what kind of absence is involved. These definitions should be set forth in the first part of the statute, and they should encompass, at a minimum, military temporary duty, deployment, or mobilization orders:

> *Definitions. – As used in this section:*
> *(1) The term 'deployment' means the temporary transfer of a servicemember serving in an active-duty status to another location in support of combat or some other military operation.*
> *(2) The term 'mobilization' means the call-up of a National Guard or Reserve servicemember to extended active duty status. For purposes of this definition, 'mobilization' does not include National Guard or Reserve annual training.*
> *(3) The term 'temporary duty' means the transfer of a servicemember from one military base to a different location, usually another base, for a limited period of time to accomplish training or to assist in the performance of a noncombat mission.*

EXPEDITED HEARINGS

There are already laws which allow the stay or delay of hearings involving servicemembers. The Servicemembers Civil Relief Act, 50 U.S.C. App. 501 *et seq.* provides for discretionary and mandatory delays in military cases where the court makes certain findings. But why should *delay* be the only option for the court? Why not consider its opposite, the expedited hearing? Expedited hearings allow servicemembers to get their affairs in order promptly before a mobilization or deployment which will take them far away from the locale of the court. While there are laws which require expedited process for child support cases, there are no specific statutes which allow expedited hearings for visitation and custody cases when one of the parties is in the military. Based on statutory provisions already in place in North Carolina and Mississippi, the model statute might provide as follows:

> *Expedited Hearings. – Upon motion of a parent who has received military temporary duty, deployment, or mobilization orders, the court shall, for 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.*

Such a prompt hearing lets the SM to participate in person, rather than delay resolution of the case until his or her return. It allows the court to immediately enter orders for the care and custody of minor children during the member's absence. Delay in litigation almost always creates higher legal expenses for the SM, as well as the non-military parent. Military members who need an adjustment to visitation rights or a modification of the custody award can thus request expedited consideration of their cases. They do not have to rely on general rules for peremptory settings or the unfettered generosity or stinginess of a judge as to a speedy hearing.

ELECTRONIC TESTIMONY

When servicemembers cannot be in court to present testimony or evidence due to their military duties, the court should be able to 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. Doing without the military parent's testimony leaves the court without the benefit of potentially useful and relevant information upon which to base its decision.

State statutes usually provide only provide limited authority for electronic testimony. When the case involves two different states, the Uniform Interstate Family Support Act (UIFSA) provides for parties to "testify by telephone, through audiovisual means or by any other electronic means." In interstate custody cases, Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) permits an individual to be deposed or to testify by telephone, audiovisual means or electronic means.

A clause for the model statute might read:

> *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.*

There are numerous options available for taking testimony electronically. In addition to use of

the telephone, servicemembers 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 possible testimony from locations which do not have commercial VTC facilities.

The option of taking electronic testimony and evidence upon motion of servicemembers allows judges to facilitate the prompt disposition of the case when a prompt hearing is needed. It avoids leaving the court with only the options of default or delay. Mississippi and North Carolina have passed legislation containing this provision.

DELEGATION OF VISITATION RIGHTS

Consider the case of the servicemember who has visitation rights and is deployed. If Major John Doe is sent some distance away from his residence on military orders, his children's contact with him is virtually terminated. This is especially true if his ex-wife, who has custody, refuses to allow their visitation with relatives, claiming that visitation belongs solely to the non-custodial parent and that the courts lack the power to grant visitation to non-parents.

The magnitude of the problem was 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 Service Members:

> Child custody/visitation: This is the single greatest area of concern -- when the servicemember 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 service members are risking their lives; they should not have to risk their families as well.

Should the custodial parent have a veto power over the children's contact with other members of the SM's family? Or should the court consider whether MAJ Doe's children ought to be able to visit – upon court order and with a best-interest finding – with those relatives of his who have a significant connection with them, so that they can step into his shoes and see the children during his military-related absence? When there is a new spouse or there are grandparents who are close to the children, it makes

sense to allow the judge (not the former spouse, as is the case without such a law) to let them exercise the visitation rights that is unavailable to the absent military parent due to his or her military assignment. The new statute should allow the judicial delegation of visitation rights. It might be written as follows:

> *Visitation. – 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 visitation rights, the court may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the minor child for the duration of the parent's absence, if delegating visitation rights is in the child's best interest.*

There is authority in other states to support the award of visitation rights to relatives in lieu of the visitation granted to a parent who is absent on military service. For example, in 1996 the Supreme Court of Mississippi upheld an order for visitation rights to paternal grandparents of a child in place of the child's father, who was unable to exercise visitation due to his Navy service. In *Settle v. Galloway*[1], the trial judge stated that:

> …it is through these grandparents that Chase [the minor child] is exposed to his father with the exchange of video tapes and other means by which the grandparents utilize during visitations with the child. But for this contact the child would have little exposure to his dad as a result of the father being in the United Stated Navy.[2]

The case was decided under the grandparent visitation statute of Mississippi.

In a 2003 Illinois case, *In re Marriage of Sullivan*[3], an Illinois appellate court reversed the trial court, which had dismissed a petition from a deployed SM-father to allow substitute visitation. There the servicemember-father petitioned the court to allow his family to have continued visitation with his son while he was on active military duty. His military service was expected to last for a one- to two-year period. He stated that it would be in the child's best interest to continue his visitation schedule with the family and that the mother, his former wife, would prevent the son from such visitation. The appellate court held that under common law Illinois courts could award visitation to a parent's family members when special circumstances were shown. Distinguishing the case from those involving grandparent

[1] *Settle v. Galloway*, 682 So. 2d 1032 (Miss. 1996).
[2] *Id.* at 1034.
[3] *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 795 N.E. 2d 392 (2003).

visitation, the appeals court remanded for a hearing on whether it would be in the child's best interest to modify the visitation schedule as requested by the father.

The *McQuinn* case in Alabama[4], also decided in 2003, got to the same result but used a different approach. The decision allows the court-ordered delegation of visitation rights with family members with whom the child had a close connection. The trial judge ordered that the SM-father could permit his children to visit with any member of his extended family while he was absent on active duty in the Navy, and the court barred the mother's right to veto the father's choices as to whom his children could visit "without any particular reason."

Addressing the issue of constitutionality, the appeals court held

> We note that although the mother, not the father, [*8] 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, 147 L. Ed. 2d 49, 120 S. Ct. 2054*. 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.5

The court of appeals then dealt with the mother's argument that this was a "grandparent visitation case" and the judge had improperly tried to give *de facto* visitation to the father's parents and family members:

> The father correctly argues that the instant case does not involve grandparent-visitation rights pursuant to any Alabama statute; rather, this lawsuit results from the mother's decision to prevent the children from visiting their father or from developing and maintaining any continuing association with members of the father's family.
>
> The mother appears to argue that the father, during the periods in which he is entitled to direct the care, custody, and control of his children, does not have the right to allow his parents or siblings or other suitable family members to visit with the children in his stead, while asserting that she does have such rights during the periods in which she has custody of the children. In previous visitation cases, this court has reversed trial-court judgments providing for visitation, either directly or by implication, to the noncustodial parent at the sole discretion of the custodial parent. See *K.L.U. v. M.C., 809 So. 2d 837 (Ala. Civ. App. 2001)*, and *Bryant v. Bryant, 739 So. 2d 53 (Ala. Civ. App. 1999)*. The record reveals that this case is more analogous to those visitation cases than to a grandparent-visitation case.6

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[4] *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. App. 2003).
5 *Id.* at 573.
6 *Id.*

The Court of Civil Appeals then proceeded to review the rights of the father as to visitation and the ability to let others, during his visitation periods, care for the children:

> Furthermore, it is the consensus of this court that the father did not forfeit any of his fundamental parental rights when he divorced, or when he joined the armed services. Because no such forfeiture occurred, the father retains the right to allow other suitable family members to visit with his children during his visitation periods even when he is unable to be present.
>
> The mother argues that the trial court's list of "designees" who may exercise the father's visitation in his absence violates Alabama's grandparent-visitation statute, *§ 30-3-4.1, Ala. Code 1975*, in part because it permits the grandparents visitation without requiring that they meet the evidentiary burdens placed upon them by the statute. 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 determine with whom his children may visit. Properly viewed, the father's right does not, as the mother characterizes it, allow third-party visitation through a "back door." Nor does the recognition of the father's right to determine the care, control, and association of his children during his visitation periods amount to what the mother describes as "routinely forcing the children to visit with third parties." Instead, the mother's contentions concern whether one parent can veto the other parent's choices concerning with whom the children visit without, from what we can perceive in the record, any particular reason.
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> As the father points out, the 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. The judgment properly permits the father to "take the children to such reasonable activities as [he] may determine."7

In November 2006 the Idaho Supreme Court in *Webb v. Webb*[8] approved the decision of a trial judge to allow the delegation of visitation rights through a power of attorney to the child's grandparents while the father was deployed. The case involved a statute which allows military personnel to grant custody and visitation rights through a power of attorney:

> The plain language of *I.C. § 15-5-104* clearly provides that the parent of a child may delegate his or her powers regarding care, custody or property for a certain period of time depending on the status of the parent or designee. The plain language of the statute broadly applies to delegation of parental powers. Since the statute allows for delegations of custody, it is for us to decide whether the legislature intended this language to include

7 *Id.* at 574-575.
[8] *Webb v. Webb*, 148 P. 3d 1267 (Ida. 2006).

delegation of visitation.

> We hold that it does. Neither *I.C. § 15-5-104* nor *Chapter 7, Title 32 of the Idaho Code* defines visitation for child custody purposes. Nonetheless, *Chapter 14, Title 7 of the Idaho Code* defines visitation as "custodial period, custodial schedule, residential schedule, parenting, or parenting time." *I.C. § 7-1402(10)*. Therefore, it is clear from Idaho law that visitation is a form of custody, and the plain language of *I.C. § 15-5-104* allows for the delegation of custody. As such, the magistrate did not err by allowing Christopher to delegate to the Webbs his custody rights to visitation with his daughters.9

Colorado recently joined the states which are recognizing delegated visitation rights through case law. In *In re the Marriage of DePalma*, 2007 Colo. App. LEXIS 1397, (Colo. Ct. App. July 26,2007) the Court of Appeals held that the court had the power to delegate visitation rights to the father's new wife while he was on military deployment, by having the children in his home with the wife during his parenting time.

Clearly a provision in the model statute which allows the assignment of visitation rights by a trial judge is not "grandparent visitation." The law authorizes the delegation of the visiting parent's rights, not the creation of new rights to family members in their own name. It allows MAJ Doe, the visiting parent - whose absence is not his own fault - to ask the court to let his family members step into his shoes and have contact with the children, just as he had the right to let them do so while he was present and exercising visitation rights. It requires judicial approval, a best-interest determination, and a finding that the family member has a close and substantial relationship with the child, so as to safeguard the child's delegated visitation rights.

Texas has enacted a law stating that, if a visiting parent is in the military (federal service or National Guard) or is reasonably expected to be, then the court shall permit that parent to designate a person to exercise visitation while the military parent is outside the United States. The visitation terms resume after the absent parent returns to the U.S. Louisiana law allows "compensatory visitation" when a servicemember on active duty is unable to exercise court-ordered visitation rights. North Carolina and Mississippi have both enacted statutes with the wording of the model statute set out above.

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9 *Id.* at 1271.

MILITARY CUSTODY PROTECTIONS

Provisions of a military custody statute must address the issue of how to deal with the absence of a SM who has custody of a minor child. Some states have legislation which require the reinstatement of a previous custody order when the SM returns from the deployment or other absence. This is too broad a remedy. There may be valid reasons why a returning SM could not, or should not, resume custody of the minor child, including his/her physical or mental disability due to combat. Perhaps the better approach would be to have the new law requires that any temporary custody order that was entered at deployment or mobilization of the military custodial parent terminate within ten days of his or her return. The statute should also address the issue of absence due to military orders, and it should state that the SM's absence of the member due to deployment orders is not, by itself, sufficient justification to allow a change of custody due to a change of circumstances. The wording of the model statute would be:

> *Custody. – When a parent who has custody, or has joint custody with primary physical custody, receives temporary duty, deployment, or mobilization 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 custody responsibilities:*
>
> *(1) Any temporary custody order for the child during the parent's absence shall end no later than 10 days after the parent returns from the military absence, and the resumption of custody by that parent shall not require any further order of the court This shall not limit the court from considering a motion for a change of custody filed by the parent who had the child during the absence of the military parent, nor shall it impair the judge's ability to hear an emergency custody motion upon return of the military parent upon the filing and service of a verified application for same which alleges an immediate danger of irreparable harm to the child.*
>
> *(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.*

Depending on the preference of the drafters of the statute, the wording of the first subsection could also read as follows:

> *(1) When there is a temporary custody order for the child during the military parent's absence, it shall be presumed that it is in the best interest of the child for custody to return to the military parent upon his or her return.*

Certain aspects of military life are inconsistent with custody. A deployment to another base, when the military orders specify that it is an "unaccompanied tour," will mean that the SM cannot bring a

spouse or children along. Tours of duty like this include shipboard duty, duty at Camp Red Cloud (just across the Demilitarized Zone in Korea), and other "select locations" in the underdeveloped world. A mobilization of a Guard/Reserve parent sometimes means that he or she will also be deployed overseas, or may mean that the tour of duty will be at a stateside base, which would not in itself disqualify the parent from bringing a child along who is in his or her custody. TDY, or temporary duty, is usually "unaccompanied" since it often involves schools and training or else a limited-term non-combat assignment.

In any of these situations, the SM who has custody under a court order should ordinarily transfer custody to the other parent by means of a temporary consent order. The consent usually grants temporary custody to the other parent after setting out the military orders and the factual basis for the order. In other cases, it may just be a brief custody consent order with no mention of mobilization, deployment, TDY or an isolated assignment. Such consent orders often are done "on the fly" since sometimes a mobilized Guard or Reserve servicemember gets as little 72 hours' advance notice. However it is written, the purpose of the temporary consent order is virtually always the same. It provides for an alternate custodian during the temporary military assignment, after which custody resumes with the military parent.

In an ideal world, every order would be written the same way - as an interim order providing for a change of custody for a limited time, with custody reverting to the military parent at the deployment, TDY or isolated tour. The order would state that the child is doing well at the present custodial location, and that the need for the order arises from military travel orders. No change of circumstances would need to be shown to get the child back. In fact, no further court order would be needed. The return of custody would be immediate and automatic, and each parent who remained behind would promptly return the child upon the return of the military parent who previously had custody.

The ideal collides with the real in many military custody cases. When the military custodian leaves, occasionally the other parent changes his or her mind and decides to retain custody. Sometimes that was the other parent's intention from the beginning. Often the lure of *receiving*, rather than *paying*, child support each month is the clincher. And sometimes the child is doing better in the new

environment, leading the other parent to question the wisdom of returning custody to the military parent.

For whatever reason, a number of "deployment custody cases" end up with a new custody trial at which the military parent has to fight to regain (or attempt to regain) custody. There are numerous cases in the last several years which have borne this out. For example, in *Crouch v. Crouch*[10], a 2006 Kentucky case, the mother received custody in a 1996 order. In 2003 she received a 72-hour mobilization order from the Kentucky Army National Guard, and she transferred custody by consent order to the father. But when she finished her military duties and returned to civilian life, the father denied that the order was anything other than a "permanent order," even though both parties had intended for it to be temporary, and he argued that the mother had to prove a change of circumstances in order to retrieve custody. The case went to the state appeals court and then the Kentucky Supreme Court; both courts stated that the order was only temporary, with no requirement for the mother to show a change in circumstances to regain custody. The Supreme Court also noted briefly that this interpretation of the 2003 order was consistent with a new state statute covering the issue of custody when a parent is a member of the military and called to active duty (see below).

The model statute cannot prevent such a new hearing. In fact, such a hearing would be appropriate if the SM returned with mental or physical conditions that impaired his or her ability to parent. Such a hearing might also be proper if the child were doing poorly while with the military parent and were thriving in the care of the other parent. All the new law does is to require the termination of a temporary custody order ten days after the SM's return (which would mean in most cases that the child/children would then return to the military parent), and that the SM's absence in compliance with military orders would not be held against him or her.

There are a number of states which provide for such protections in their statutes. North Carolina and Mississippi have enacted legislation which mirrors the language set out above. Here are some other examples of states which have recognized the problem and have acted:

- The law in Arizona states that the military deployment of a child's custodian is not a change of

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

circumstance if the military custodian has filed a military Family Care Plan with the court at the prior custody proceeding and if the deployment is for less than six months.

- Under Michigan law, if a motion to change custody is filed while a parent is on active duty, the court may not enter an order changing the prior custody order so as to change the child's placement; however, the court may enter a temporary custody order, based on clear and convincing evidence. Upon the absent parent's return from military duty, the court must reinstate the prior custody order. If a motion for change of custody is filed after a parent returns from active duty, the court may not consider a parent's absence due to that military duty.
- Kentucky law provides that, except for consent orders, any court-ordered modification of a child custody decree – if based on a parent's deployment or Guard/Reserve service – shall be temporary and will revert back to the previous child custody decree at the end of such service.
- California law provides that a party's absence, relocation or failure to comply with custody or visitation orders shall not, by itself, be sufficient to justify changing a custody or visitation order if the reason for the above is the party's activation to military service and deployment out of state.

EFFECTIVE DATE

Finally, it is essential to specify an effective date for the new legislation. It the drafters intend that the statute should apply to all cases which are filed (that is, the initial filing of a complaint or petition), then the wording would be as follows:

This statute shall be effective on [date] for all cases which are filed on or after that date.

If those drafting the statute intend, on the other hand, for the law to apply to all cases in which there is a custody order already in place, then the appropriate language would be:

This statute shall be effective on [date] for all cases which involve custody claims, regardless of when they were filed.

CONCLUSION

A military custody statute, as outlined above, can provide significant new protections for the military parent and the child or children of that parent. Numerous states have already shown the way in

this regard. This is a unique opportunity for the legislatures of the remaining jurisdictions to enact laws which provide a fair trial to servicemembers and a fair shake for the children.