Fight for Your Country, Then Fight to Keep Your Children: Military Members May Pay the Price . . . Twice

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We cannot give the American Soldier too much credit. . . . He deserves everything we can do for him and he deserves all the respect we can show him. . . . The American Soldier is among the greatest assets this country has . . . . They perform their duties magnificently and bravely . . . . And they do it unhesitatingly . . . . When you think of the freedom you enjoy in this country, think of the sacrifices the Soldier has made to keep us free.[1]

I. Introduction

"After Iraq Tour, National Guard Soldier Loses Custody of Son;"[2] "A Soldier's Service Leads to a Custody Battle Back Home;"[3] "Deployed Troops Battle for Child Custody;"[4] "Custody Battles Can Become a Rude 'Welcome Home' for Military Parents."[5] These various media headlines reveal the entirely different battlefield servicemembers face upon return from combat. These headlines are followed by narratives of servicemembers who were the primary physical custodians of their children prior to their mobilization or deployment in support of the War on Terror.[6] Upon their return, each of these military parents found themselves in a fight to bring regain custody of their children to bring them home.[7]

Lieutenant Eva Slusher (previously Eva Crouch)[8] had physical custody of her daughter for six years in accordance with her divorce order, when she was subsequently mobilized for eighteen months with her Kentucky National Guard unit.[9] During her mobilization, Slusher's ex-husband received a temporary order to keep their child.[10] A month after Slusher was released from active duty, a family court judge permanently modified the original custody order because it was "in the best interests of the child."[11] Slusher stated, "[e]very time I went to court . . . I kept thinking there was no way they could rule against a mother because she was serving her country."[12]

Specialist Tonya Towne maintained physical custody of her son for eight years before being deployed to Iraq in 2004.[13] When she returned home in 2005, a New York family court modified her original custody order and gave permanent physical custody to her ex-husband.[14] Despite finding Towne to be an "excellent mother," the appellate court refused to overturn the family court's decision.[15] Towne's opinion: "I don't care how they word it; it's a punishment to the [S]oldier. The whole reason I'm in this situation is because I did a job for the military."[16]

Staff Sergeant Jessica Tolbe's husband received temporary custody of their two children when she deployed to Iraq for a fifteen month tour with her Hawaii unit. [17] However, when she redeployed and travelled to Tennessee to pick up her two sons in February 2009, Tolbe's ex-husband refused to honor their original custody order.[18] Instead, he filed for permanent modification of the original custody order and currently has custody of their children pending resolution of his petition.[19] Tolbe believes she "should never have been in this situation," and admits she has contemplated failing to fulfill military family care plan

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[1] Interview by Sergeant Major (U.S. Army, Retired) Erwin H. Koehler for the Ctr. of Military History with Sergeant Major of the Army George W. Dunaway, Second Sergeant Major of the Army (December 1993), as *reprinted in* DANIELLE GIOVANELLI & MARIANNA MERRICK YAMAMOTO, THE SERGEANTS MAJOR OF THE ARMY ON LEADERSHIP AND THE PROFESSION OF ARMS 39, 86–87 (Saundra J. Daugherty ed., The Ass'n of the U.S. Army, 2009).

[2] *After Iraq, National Guard Soldier Loses Custody of Son* (North Country public radio broadcast Feb. 14, 2008), http://www.northcountrypublicradio.org/news/newstopics.php?tid=64&nophotos=l&limit=10&start=10 [hereinafter North Country Radio Broadcast].

[3] David Kocieniewski, *A Soldier's Service Leads to a Custody Battle Back Home*, N.Y. TIMES, Sept. 1, 2009, at A1.

[4] Pauline Arrillaga, *Deployed Troops Battle for Child Custody*, WASH. POST, May 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007//05/05AR2007050500673.html.

[5] Leo Shane III, *Custody Battles Can Become a Rude 'Welcome Home' for Military Parents*, STARS & STRIPES (Mideast), Sept. 6, 2009.

[6] *See supra* notes 2–5.

[7] *See id*.

[8] *See* Arrillaga, *supra* note 4.

[9] *Id.*

[10] *Id*.

[11] *Id*.

[12] Shane, *supra* note 5.

[13] North Country Radio Broadcast, *supra* note 2.

[14] *Id*.

[15] Diffin v. Towne (*Diffin II*), 849 N.Y.S.2d 687 (N.Y. App. Div. 2008).

[16] North Country Radio Broadcast, *supra* note 2.

[17] Shane, *supra* note 5.

[18] *Id*.

[19] *Id*.

requirements,[20] "effectively end[ing] her military career," six years before she is eligible to retire.[21]

One former United States Army Judge Advocate said he believes that hundreds of servicemembers have been affected.[22] One only has to do a "Google" search to confirm the accuracy of this statement.[23] Another military attorney and National Guard Soldier recalled a case "where the judge wanted my client to swear that he wasn't going to be deployed again."[24] On the other hand, the president of the National Council of Juvenile and Family Court Judges asserts that state court judges are simply following their state codes that typically say "the primary interest is the best interest of the child."[25] Too often, state court judges assume that awarding custody to a military parent does not serve this interest.

However, the standard for modification of initial custody orders is by no means consistent throughout the fifty states.[26] Lieutenant Slusher eventually regained custody of her daughter.[27] During her two-year court battle, Kentucky changed its custody laws and mandated modifications based "in whole or in part" on deployments or mobilization were automatically void.[28] Kentucky law now requires reinstatement of the original custody order upon the servicemember's redeployment or release from active duty.[29] Specialist Towne was not so lucky. Even though Towne had "demonstrated . . . an unwavering commitment to [her son] Derrell's well-being,"[30] the Court of Appeals of New York denied her motion for leave to appeal the lower court's decision.[31] Finally, in the case of Staff Sergeant Jessica Tolbe—the outcome of her custody battle will largely depend on whether jurisdiction to hear the case lies with Tennessee where the children currently reside with their father, or in Hawaii where they lived before her deployment.[32] In Tennessee, there is some protection against permanent modification of initial custody orders based on deployments unless the parent "volunteers for permanent military duty as a career choice."[33] Hawaii provides servicemembers no protection.[34]

The Department of Defense (DoD) acknowledges that servicemember custody cases in response to deployments and mobilizations are escalating.[35] In the active duty military alone, there are more than 70,000 single parents.[36] As of March 2009, more than 30,000 single parents have deployed overseas as part of the Global War on Terror.[37] Further, the military divorce rate is equivalent to the civilian population[38] and the military operational tempo shows no signs of slowing down.[39] Thus, thousands of parents remain subject to unpredictable and inconsistent treatment of military deployments under fifty individual state custody modification laws.

The United States needs a uniform custody act for servicemembers which prohibits state courts from considering the military deployments of all servicemembers, Active and Reserve Components, during permanent child custody modification proceedings (the "deployment rule").[40]

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[20] The military family care plan is a document required of single parents, dual military servicemembers, or divorced servicemembers with children. If a servicemember required to complete a family care plan fails to do so, this may result in involuntary separation from the military. The family care plan is discussed further in Part II.C of this article.

[21] *Id.*

[22] North Country Radio Broadcast, *supra* note 2.

[23] This author googled "Deployed Soldier Lose Custody" on 5 March 2010 and the search returned 25,500 hits.

[24] Shane, *supra* note 5.

[25] Arrillaga, *supra* note 4.

[26] *See infra* Part III.B (discussing the inconsistencies between the state statutes).

[27] Arrillaga, *supra* note 4.

[28] KY. REV. STAT. ANN. § 403.340(5) (West 2010).

[29] *Id.*

[30] *Diffin II*, 849 N.Y.S.2d 687, 690 (N.Y. App. Div. 2008).

[31] Diffin v. Towne (*Diffin III*), 889 N.E.2d 82 (N.Y. 2008).

[32] Ultimately jurisdiction will be determined by the provisions of the Uniform Child Custody Jurisdiction Enforcement Act, which both Tennessee and Hawaii have adopted. *See* HAW. REV. STAT. §§ 583A-101–317 (West 2010) and TENN. CODE ANN. §§ 36-6-201–43 (West 2009).

[33] TENN. CODE ANN. § 36-6-113(e) (West 2009). A strong argument can be made that this provision of the statute prevents a judge from applying the protections of Tennessee Code § 36-6-113 (b)(d) to a Soldier who enlists in the Active Component. This is in conflict with Tennessee Code § 36-6-113(a)(1) which states that the law's protections apply to the Active and Reserve Component. There is no case law interpreting these provisions of the statute yet.

[34] *See* HAW. REV. STAT. § 571-46(a)(6) (West 2010).

[35] North Country Radio Broadcast, *supra* note 2.

[36] Russ Bynum, *Charges Filed Against Non-Deployed Single Mom*, ARMY TIMES, Jan. 16, 2010, *available at* http://www.armytimes.com/news/2010/01ap_army_hutchinson_refused_deployment_011410/.

[37] *Women Warriors: Supporting She 'Who Has Borne the Battle,'* ISSUE REPORT (Iraq & Afg. Vet. of Am., N.Y., N.Y.), Oct. 2009, at 4 (citing data collected by the Defense Manpower Data Center on deployed demographics of single servicemembers).

[38] *Id.* at 5.

[39] *See infra* Part VI.A (discussing the current military operational tempo).

[40] In this article "deployment" means the temporary transfer of a servicemember serving in an active duty status to a location other than their normal place of duty or residence in support of a combat or military operation. This includes the mobilization of National Guard or Reserve servicemember to extended active duty status at Continental United Sates (CONUS) installations in support of military operations. "Deployment" does not include National Guard or Reserve annual training periods. This article only advocates for a deployment rule as defined above to be included in a uniform act on military child custody. This author acknowledges that there are additional areas regarding military child custody that are ripe for resolution, to include visitation rights during deployment "rest and recuperation" periods and assignment of temporary custody to third parties during deployment.

This rule is in the best interests of children and helps to provide more predictability to imprecise child custody standards by removing the ability of state judges to factor in military service based on their own personal and moral values.[41] Further, a deployment rule is required as a matter of policy. Such a rule is consistent with the multiple "nationalizing influences"[42] on family law over the last half-century.[43] This rule also recognizes that some consideration should be given to parental needs.[44] Finally, the rule is in keeping with this country's long tradition of providing special rights, protections, and benefits to those that sacrifice for the nation[45] and promotes Congress's constitutional directive to maintain[46] armed forces "for the common defence."[47]

This article will provide a summary of the current legal methodology for modification proceedings and background information on the Congressional and state response to the issues described above. The article will highlight the problems caused by the disparate or inexistent state laws through comparative analysis of the likely outcome of *Diffin v. Towne* (*Diffin II*)[48] under the laws of four states. Additionally, this article will explain that a deployment rule is in the best interest of children and is consistent with the fifty-year trend to establish national norms in family law, including the area of child custody. Next, the article will provide a recommendation for the best method to establish a deployment rule—state adoption of a uniform act on servicemember child custody. Finally, the article will conclude with the policy rationale in favor of a deployment rule.

Recently, the *Army Times* Managing Editor stated "the idea of volunteering to serve your country and then facing the prospect of losing your children is just, you know, it's a little mind-boggling."[49] Lieutenant Slusher still wonders why the law "protects your job while you're away," yet, "[i]t doesn't protect custody of your children."[50] This country needs a servicemember deployment rule to solve this problem.

II. Background

A. State Modification Standards in General

Generally, states resolve modification petitions by utilizing a two-pronged "change in circumstances" test that is mandated by statute[51] or judicial precedent.[52] Under this test, courts must find that there has been a substantial change in circumstances since the original custody award and that modification of the original order is necessary to the best interests of the child.[53] Normally, the parent seeking modification bears the burden of proving both prongs of the test.[54] As noted by scholars, the modification standard "virtually invites relitigation,"[55] because at any given

[41] *See infra* Part IV.C.

[42] Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713 (Winter 2009).

[43] *See infra* Part V.

[44] *See infra* Part VI.C.

[45] *See infra* Part VI.B.

[46] Congress is required to "raise and support Armies" and to "provide and maintain a Navy." U.S. CONST. art. I, § 8, cls. 12–13. This policy rationale is discussed in Part VI.A.

[47] *Id.* art. I, § 8, cl. 1. The Constitution spells "defense" as "defence." *Id.*

[48] 849 N.Y.S.2d 687 (N.Y. App. Div. 2008). This case is about a servicemember who lost primary physical custody of her child because she deployed to Iraq. *See also* Part III.A.1.

[49] North Country Radio Broadcast, *supra* note 2.

[50] Shane, *supra* note 5.

[51] *E.g.*, MO. ANN. STAT. § 452.410 (West 2009) (stating that in order to modify a previous custody order, courts must find "upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child"); ALASKA STAT. § 25-20-110(a) (2009) (stating that a child custody order "may be modified if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child").

[52] *E.g.*, Keel v. Keel, 303 S.E.2d 917, 921 (Va. 1983) (stating that modification of previous child custody orders require courts to answer two questions: "first, has there been a change in circumstances since the most recent custody award; second, would a change in custody be in the best interests of the children") (citations omitted); Wade v. Hirschman, 903 So. 2d 928, 931 (Fla. 2005) (upholding the substantial change test utilized in Cooper v. Gress, 854 So. 2d 262 (Fla. Dist. Ct. App. 1st Dist. 2003), which states that the parent seeking modification "must show both that the circumstances have substantially, materially changed since the original custody determination *and* that the child's best interests justify changing custody."); Brown v. Yana, 127 P.3d 28, 33 (Cal. 2006) (stating that "custody modification is appropriate only if the parent seeking modification demonstrates 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's best interest."); McLendon v. McLendon, 455 So. 2d 863, 865 (Ala. 1984) (stating that the parent "seeking modification [must] prove to the court's satisfaction that material changes affecting the child's welfare since the most recent decree demonstrate that custody should be disturbed to promote the child's best interests.").

[53] *Supra* notes 51–52.

[54] *E.g.*, McKinnie v. McKinnie, 472 N.W.2d 243, 244 (S.D. 1991) (finding that "as a general rule, a parent seeking a change of custody must show 1) a substantial change of circumstances, and 2) that the welfare and best interests of the child require modification."); Collins v. Collins, 51 P.3d 691, 693 (Or. Ct. App. 2002) (citing State *ex rel.* Johnson v. Bail, 938 P.2d 209, 212 (Or. 1997) (stating "we require the party moving for the change to demonstrate that (1) a change in circumstances has occurred since the most recent custodial order, and that (2) the modification will serve the best interests of the child."); Ellis v. Carucci, 161 P.3d 239, 242–43 (Nev. 2007) (holding that "modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification . . . the party seeking a modification of custody bears the burden of satisfying both prongs.").

[55] Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 763 (1985).

moment in time a parent may assert that there have been circumstances requiring modification of the initial custody order to promote the child's best interests.[56] Further, courts have nearly unlimited discretion in determining whether the prongs of the change in circumstances test have been satisfied.[57] For example, in Virginia, where judges are required to consider several statutory factors during the best interests portion of modification proceedings,[58] there is no requirement to "quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors."[59] Additionally, the broad statutory language states that judges may consider "[s]uch other factors as the court deems necessary and proper to the determination."[60] For servicemembers who have previously been awarded physical custody of their children, this regime leaves them especially vulnerable to modification petitions by the noncustodial parent before or after deployments. The state modification standards and their effect on deployed servicemember child custody cases have evoked a response from Federal and state lawmakers and other interested parties.[61]

B. Federal, State, and the Uniform Law Commission Response to Servicemember Cases

1. United States Congress

The 2008 National Defense Authorization Act added the words "including any child custody proceeding" to the default judgment and ninety-day stay of proceedings provisions of the Servicemember's Civil Relief Act (SCRA).[62] Despite this explicit clarification of the applicability of the SCRA to child custody proceedings, the change offers little relief to servicemembers. This is because deployments are typically longer than the minimum ninety-days courts are required to stay proceedings pursuant to the SCRA, and courts are authorized to refuse additional requests.[63] Additionally, courts are not precluded from issuing temporary modification orders that may affect the best interests of the child analysis during permanent modification proceedings after the servicemember redeploys.[64] Finally, the American Bar Association (ABA) and the DoD have contested multiple Congressional efforts to broaden the child custody protections with federal legislation.[65] Consequently, the SCRA remains silent regarding what consideration courts may give to deployments in permanent modification proceedings.

2. State Legislatures

The state response has been varied. Some states have passed military child custody statutes,[66] while others have not.[67] Among the states that have acted, many fail to

[56] *See generally id.* at 763 (arguing for stricter standards before a court has discretion to make child custody modifications); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979) (arguing against modification except in cases of imminent harm to the child).

[57] *E.g.*, Brown v. Brown, 518 S.E.2d 336, 338 (Va. Ct. App. 1999) ("In deciding whether to modify a custody order, the trial court's paramount concern must be the children's best interests. However, the trial court has broad discretion in determining what promotes the children's best interests.") (citations omitted); *Yana*, 127 P.3d at 36 (citing Navarro v. LaMusga, 88 P.3d 81 (Cal. 2004) (stating that a court has "'wide discretion'" in its change of circumstances and best interests determinations during child custody modification proceedings)).

[58] VA. CODE ANN. § 20-124.3 (West 2009).

[59] *Brown*, 518 S.E.2d at 338 (citations omitted).

[60] VA. CODE ANN. § 20-124.3(10) (West 2009).

[61] *See infra* Part II.B and Part II.C (explaining initiatives or reaction by Congress, state legislatures, the American Bar Association (ABA), and others).

[62] National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, H.R. 5986, Pub. L. No. 110-181, 122 Stat. 3 (codified at 50 U.S.C.A. App. §§ 521(a), 522(a) (West 2009)). *See* Part IV.B.2 (discussing provisions of the Servicemember's Civil Relief Act (SCRA)).

[63] 50 U.S.C.A. App. §§ 521(b)(1), 521(d) (West 2009).

[64] *See, e.g.*, *infra* Part III.A (discussing that the *Diffin II* court found that the child had adjusted to his new environment under the temporary order and returning to the original custody order would cause disruption while he readjusted to his previous home). *See also* Whitaker v. Dixon, No. 32, 2009 WL 3837254 (Md.) (citing Lenser v. McGowan, 191 S.W.3d 506, 511 (Ark. 2004) (stating their agreement with the Lenser court's analysis that temporary custody orders are not precluded by the SCRA)).

[65] *See* Anita M. Ventrelli & Donald J. Guter, American Bar Association Resolution 106 (February 2009), *available at* http://www.abanet.org/leadership/2009/midyear/recommendations/106.pdf (stating the ABA opposition to any federal legislation related to military child custody cases child involving a deploying parent). Resolution 106 was adopted by the entire ABA at their 2009 Mid-Year Assembly. ABA, 2009 Midyear Assembly Meeting Minutes (Feb 14, 2009), *available at* http://www.abanet.org/yld/assembly/my09recap.shtml; *see also* e-mail from Colonel Shawn Shumake, Dir., Office of Legal Pol'y, Office of the Under Sec'y of Def. for Pers. and Readiness, to author (Jan. 14, 2010) (with attachment) (Priority Department of Defense Appeal FY 2010 Defense Authorization Bill) (on file with author). Congressional efforts to modify the SCRA include H.R. 4469, 11th Cong. (2d Sess. 2010); H.R. 2647, 111th Cong. (1st Sess. 2009) (located at title. V, subtitle H, § 208); H.R. 5658, 110th Cong. (2d Sess. 2008) (located at title XLV, § 4510); and S. 1658, 110th Cong. (1st Sess. 2007).

[66] The following states have some form of military child custody statute: Arizona, Arkansas, California, Colorado, Florida, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin; *see also infra* Appendix A; Part III.B.4 (discussing that the rights and protections provided by the individual military child custody statutes are extremely diverse). Just because a state has passed a military child custody statute does not mean that they have protected military parents from losing custody of their children due to a deployment. Many of the states provide extremely limited protections. *See infra* note 156.

[67] The following states have no military child custody statute: Connecticut, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Nevada, New Hampshire, New Mexico, Rhode Island, Vermont, Washington D.C., and Wyoming. The following states have bills that have been pending since as early as 2006: Alabama (H.B. 332, Reg. Sess. (2006)); Alaska (H.B. 264, 25th Leg., 1st Sess. (2007)); Delaware (H.B. 294, 144th G.A., Reg. Sess. (2008)); Minnesota (H.F. 2494, 85th Leg Sess. (2007)); New Jersey

provide guidance on the consideration courts should give to deployments in change of circumstances determinations and/or best interests analysis.[68] Thus, in a majority of states, these findings are entirely subjective and based on a particular judge's personal value system.

3. Uniform Law Commission

Formed in 1892, the Uniform Law Commission (ULC) is a not-for-profit, "unincorporated association" of commissions from every state.[69] The ULC strives to establish uniformity in state laws where it is "desirable and practicable,"[70] by promulgating "uniform" or "model" acts for adoption by state legislatures.[71] In the past, the ULC has drafted uniform acts for real estate law, family law, and consumer law. The ULC was also responsible for creating the Uniform Interstate Family Support Act (UIPSA), which was adopted by all fifty states.[72]

In 2009, the ULC responded to the inconsistent actions of the state legislatures in the area of military child custody by approving the formation of the Drafting Committee on Visitation and Custody Issues Affecting Military Personnel and Their Families (Military Custody Committee).[73] The committee will meet periodically for at least two years during an "open drafting process" in which they will solicit the expertise of representatives that reflect the positions of the various interests.[74] At a minimum, the draft act will be submitted to the entire ULC at the National Conference of Commissioners on Uniform State Laws (NCCUSL) for debate at two annual meetings prior to its approval and promulgation to the states for adoption.[75] The ULC website states that the Military Custody Committee will prepare an act that provides "standards and procedures" for military child custody issues for presentation at the 2011 annual meeting.[76] However, given the ABA's vigorous opposition to numerous proposals to amend the SCRA to reconcile state military custody laws,[77] the changes to the composition of the ULC Military Custody Committee is significant. Since the committee's original 2009 formation, three notable ABA members have been added to the drafting committee, while many original committee members are no longer participants.[78] The ABA now holds the majority of drafting committee members.[79]

C. The ABA and the DoD

In ABA Resolution 106, the organization asserts that "Americans owe many things to those who disproportionately bear the burden of national sacrifice," yet opposes any amendment to the SCRA which would prohibit state courts from using deployments as justification to modify child custody orders.[80] The ABA argues that federal legislation creates the risk of federal-question jurisdiction[81] in an area historically resolved by state courts.[82] Further, the ABA asserts that federal legislation is unnecessary since several individual states have passed legislation related to military child custody issues.[83] Finally, the ABA argues that such legislation would harm the best interests of the child standard and "tie the hands of judges" by forcing them to honor the custody order in effect prior to a parent's deployment.[84] However, the ABA resolution fails to address

(S.2910, 2006–2007 Leg. Sess.); Ohio (H.B. 503, 126th G.A., Reg. Sess. (Ohio 2006); *see also*, *infra* Appendix A.

[68] *See, e.g.*, MD. CODE ANN., FAM. LAW § 9-107 (West 2010); TEX. FAM. CODE ANN. § 156.105 (West 2009).

[69] Uniform Law Commission (ULC), Frequently Asked Questions About The National Conference of Commissioners on Uniform State Laws (NCCUSL), http://www.nccusl.org/Update/Desktop Default.aspx?tabindex =5&tabid=61 (last visited Mar. 1, 2010) [hereinafter FAQS About NCCUSL].

[70] NCCUSL CONST. art. 1, § 1.2 (2002), *available at* http://www.nccusl.org/ Update/DesktopDefault.aspx?tab index =3&tabid=18.

[71] FAQS About NCCUSL, *supra* note 69.

[72] *Id.*

[73] Press Release, ULC, New Drafting and Study Committees to be Appointed (Aug. 1, 2009), *available at* http://www.nccusl.org/Update/ DesktopModules/NewsDisplay.aspx?ItemID=219.

[74] FAQS About NCCUSL, *supra* note 69.

[75] *Id.* There is a two-step approval process which includes a vote of all commissioners followed by a vote of each state commission. If the ULC approves an act, it must be approved by the majority of state commissions. The second vote balances the advantage of states with large commissions on the initial vote of the entire ULC.

[76] ULC, Drafting Committees, http://www.nccusl.org/update/DesktopDe fault.aspx?tabindex=0&tabid=59 (last visited Feb. 28, 2010) [hereinafter Drafting Committees].

[77] Ventrelli & Guter, *supra* note 65.

[78] *Compare* ULC, Visitation and Custody Issues Affecting Military, http://www.nccusl.org/update/CommitteeSearchResults.aspx?committee= 340 (last visited Feb. 28, 2010) (providing for twelve drafting committee members, listed with the appropriate title as Committee Chair, Committee Member, or Committee Reporter), *with* Drafting Committees, *supra* note 77 (showing the deletion of all but two of the original drafting committee members and adding three new drafting committee members, listed with the following titles: ABA Advisor, Government and Public Sector Lawyers Division; ABA Section Advisor, Government and Public Sector Lawyers Division; and ABA Section Advisor, Family Law Section).

[79] *See* Drafting Committees, *supra* note 76.

[80] Ventrelli & Guter, *supra* note 65.

[81] *See* 28 U.S.C. § 1331 (2006) (providing for federal jurisdiction in cases involving federal laws); *id.* § 1446 (providing procedures for removal of certain state court actions to a federal district court).

[82] Ventrelli & Guter, *supra* note 65. *But cf. infra* Part V.C (explaining numerous instances where federal courts have become involved in family law issues to include child custody and visitation).

[83] Ventrelli & Guter, *supra* note 65. *But cf., supra* note 67 (listing the numerous states that have failed to act); *supra* note 66 (explaining the dramatic differences between the rights and benefits given to military parents under the state statutes); *infra* Part III.B (analyzing the diversity in the state laws).

[84] Ventrelli & Guter, *supra* note 65.

alternatives to federal legislation which would prevent federal-question jurisdiction;[85] how to resolve the wide variance in benefits and protections among the enacted state military custody statutes;[86] or the problems associated with the nearly unfettered discretion given to state court judges under the best interests of the child standard.[87] Instead, the ABA advocates for the status quo and against any law which would "upset the well-established legal-social framework for managing child custody cases."[88] This framework leaves thousands of deploying military parents vulnerable to extensive attorney fees, repeated court appearances, and protracted litigation to maintain custody of their children, as the price of their sacrifice for the nation each time they are ordered to deploy.

In an unsigned and undated DoD position paper, DoD advocates against federal legislation protecting deploying servicemembers from losing custody of their children.[89] The DoD notes that current state laws governing military child custody "vary to some degree" and that at least forty percent of states have failed to pass any legislation giving guidance to the courts.[90] Yet, the DoD position is that federal legislation providing consistent guidance to the states and protection to servicemembers who have served the nation would be "counterproductive."[91] Instead, the DoD asserts that judge advocates should work with the ABA to publicize opportunities for servicemembers to receive pro-bono representation from civilian family law attorneys and encourages those states that have not passed military child custody statutes to do so.[92] Finally, the DoD claims that pending adjustments to the military family care plan by each branch of service will resolve many of the problems that "result in litigation after deployment."[93]

On 27 October 2009, Chief of Naval Operations issued a new U.S. Navy family care policy.[94] On 30 November 2009, the Army issued a rapid action revision to the family care plan provision of its Regulation 600-20.[95] The revised Navy and Army guidance addresses whom is responsible for completing a family care plan and the importance of pre-deployment planning with the noncustodial parent.[96] However, the revamped plans inadequately resolve military child custody issues because a non-military parent cannot be forced to sign the plan. Additionally, even if the non-military parent does sign the family care plan, it is "not binding upon a court of law."[97]

Specialist (SPC) Leydi Mendoza's custody battle after her Army National Guard deployment to Iraq illustrates this point. Specialist Mendoza had a family care plan in place and agreed upon by her child's father prior to her deployment.[98] The agreement specified that upon her redeployment they would resume shared custody of their two-year-old daughter.[99] Unfortunately, when SPC Mendoza returned home, the child's father refused to abide by the agreement and claimed that visits of more than a few hours between SPC Mendoza and her daughter were "too disruptive."[100] The unenforceable family care plan did little to resolve SPC Mendoza's problem. As a result, she has spent thousands in legal fees thus far to gain access to a daughter she saw everyday prior to the deployment.[101] Additionally, servicemembers involved in custody proceedings similar to SPC Mendoza's should take little comfort in the progress of her case. Analysis of state child custody laws indicate that the same case heard in another state would likely result in a completely different outcome.[102]

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[85] *See infra* Part VII.B (explaining the best method to protect military parents from losing their children is to create a Uniform Act for adoption by all fifty states).

[86] *See infra* Part III.B (arguing that the only way to prevent the variance in benefits and protections provided to servicemembers is for the states to adopt a uniform act that includes a deployment rule).

[87] *See infra* Part IV (discussing in part, the indeterminate and unpredictable nature of the bests interest of the child standard and the increased litigation that results from such a standard).

[88] Ventrelli & Guter, *supra* note 65.

[89] CBS Evening News with Katie Couric, Department of Defense Statement on Federal Child Custody Legislation (n.d.), http://www.cbsnews.com/stories/2009/12/12/eveningnews/main5972251.shtml (last visited Mar. 3, 2010) [hereinafter DoD Statement]. The paper's reference to a 22 September 2009 meeting between several Department of Defense (DoD) representatives on the issue of child custody indicates the paper was completed after this date. *Id*. This author has made numerous attempts to obtain a signed statement from the DoD. On 12 January 2010, the Office of the Under Secretary of Defense for Personnel and Readiness confirmed telephonically that the memorandum on the CBS news website is the DoD's statement.

[90] *Id*.

[91] *Id*.

[92] *Id*. Although DoD encourages states that do not have military custody statutes to pass legislation, they give no guidance regarding what the statute should include or which state to follow as a model statute. *Id*. This is significant because the variance in the states that have passed legislation is significant. *See infra* Part III.B.

[93] DoD Statement, *supra* note 89.

[94] U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1740.4D, U.S. NAVY FAMILY CARE POLICY (Oct. 27, 2009) [hereinafter OPNAVINST 1740.4D].

[95] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-5 (Nov. 30, 2009) [hereinafter AR 600-20].

[96] OPNAVINST 1740.4D, *supra* note 94, at 3–4, 6; AR 600-20, *supra* note 95, paras. 5-5(a)(2), 5-5(b).

[97] AR 600-20, *supra* note 95, paras. 5-5(j)(1); *see also* OPNAVINST 1740.4D, *supra* note 94, at 2.

[98] Victor Epstein, *NJ Soldier Wins in Custody Dispute*, ARMY TIMES, Sept. 3, 2009, *available at* http://www.armytimes.com/news/2009/09/ap_090109.

[99] *Id*.

[100] Kocieniewski, *supra* note 3.

[101] *Id*. Thus far, a New Jersey court has granted Specialist Mendoza daily visitation and weekend overnight visits. Epstein, *supra* note 98.

[102] *See infra* Part III.

III. Comparative Analysis

One of the bedrock principles of the American legal system is that similarly situated individuals should be treated alike by the courts.[103] Some family law scholars assert that this equity precept should be applied to child custody in the form of "rule-like" standards, preventing judges from relying on their individual value systems to make custody determinations.[104] Other benefits of such a custody scheme are that it reduces fairness concerns and provides more predictable results, thereby reducing litigation of original custody orders.[105] However, under the current hodgepodge of state laws, the same case heard in different states may yield fifty different outcomes. Indeed, comparative analysis of *Diffin II*[106] under New York law and three sample states illustrates this point.[107] This operating system does little to instill a sense of fairness for servicemembers facing custody modification proceedings or provide predictability, which is ultimately in the best interests of the child.

A. *Diffin II*

1. Background and Facts

Richard Diffin and Tanya Towne were married in 1993.[108] They had a son in 1995.[109] In 1997, the couple separated.[110] Their April 2000 divorce decree incorporated the custody provision of their separation agreement,[111] awarding primary physical custody to Towne, a member of the Army National Guard.[112] Four years later, Towne received active duty orders to deploy to Iraq.[113] On April 30, 2004, Diffin petitioned for permanent modification of the initial custody order based on Towne's deployment.[114] A New York family court awarded temporary custody to Diffin for the duration of the deployment and stayed final judgment until Towne redeployed.[115] In October 2005, in anticipation of her November redeployment, Towne requested the court reinstate the original custody order that she and Diffin had operated under from 1997 until her deployment in 2004.[116] The Montgomery County, New York Court refused, despite their finding that both parents were "fit and financially able to care for the child."[117] On January 3, 2008, the New York Supreme Court, Appellate Division, affirmed the family court's judgment.[118] On May 6, 2008, the Court of Appeals of New York denied Towne's motion for review.[119]

2. Outcome of Diffin II *If Adjudicated in New York*

In New York, modification requires a preliminary finding that there has been a substantial change in circumstances since the initial custody order.[120] Only then will the courts determine if a custody change is in the child's best interests.[121] During the litigation of *Diffin II*, a New York statute specifying the consideration courts should give to military deployments when determining either a change of circumstance or the best interests of the child did not exist.[122] The New York Appellate Court states that they "do not hold that her [Towne's] deployment in and of itself constitutes a significant change in circumstances."[123] Nevertheless, the rest of the opinion does not support this statement. The only other stated basis for the court's finding a change in circumstance was Towne's legal separation from her second husband after redeploying from Iraq.[124] However, under New York precedent, this should not have triggered the required "significant" change in circumstances.[125]

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[103] *See, e.g.*, HERBERT LIONEL ALDOLPHUS HART, THE CONCEPT OF LAW 124–54 (Penelope Bulloch & Joseph Raz eds., 2d ed. 1994); LISA M. SEGHETTI & ALISON M. SMITH, CONG. RESEARCH SERV., FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS AND POLICY OPTIONS, at CRS-11 to CRS-14 (2007) (discussing that the belief that indeterminate sentencing "promoted unwarranted disparity in sentences as well as uncertainty of punishment" was part of the rationale for the federal sentencing guidelines).

[104] CLAIRE BREEN, THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW 57 (2002); JONATHAN W. GOULD & DALE A. MARTINDALE, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS 33 (2007).

[105] BREEN, *supra* note 104, at 57.

[106] 849 N.Y.S.2d 687 (N.Y. App. Div. 2008).

[107] *See infra* Part III.A.

[108] *Diffin II*, 849 N.Y.S.2d at 689.

[109] *Id*.

[110] *Id*.

[111] *Id*.; Diffin v. Towne (*Diffin I*), 3 Misc.3d 1107(A), 2004 WL 1218792, at *1 (N.Y. Fam. Ct.).

[112] *Diffin II*, 849 N.Y.S.2d at 689; *Diffin I*, 2004 WL 1218792, at *1.

[113] *Diffin II*, 849 N.Y.S.2d at 689; *Diffin I*, 2004 WL 1218792, at *1.

[114] *Diffin I*, 2004 WL 1218792, at *1.

[115] *Id*. at *8.

[116] *Diffin II*, 849 N.Y.S.2d at 689.

[117] *See id*. at 690.

[118] *Id.* at 687.

[119] *Diffin III*, 889 N.E.2d 82, 82 (N.Y. 2008).

[120] *See, e.g.*, Kerwin v. Kerwin, 833 N.Y.S.2d 694, 695 (N.Y. App. Div. 2007); Peck v. Bush, 826 N.Y.S.2d 496 (N.Y. App. Div. 2006).

[121] *See, e.g.*, *Kerwin*, 833 N.Y.S.2d at 69; Meyer v. Lerche, 807 N.Y.S.2d 151 (N.Y. App. Div. 2005).

[122] N.Y. DOM. REL. § 75-l (regarding military service by parents and the effect on child custody orders took effect on 24 March 2009). The amended § 75-l took effect on 15 November 2009.

[123] *Diffin II*, 849 N.Y.S.2d at 690.

[124] *Id*.

[125] New York courts have found that similar circumstances—remarriage or introduction of new members into a household—do not warrant modification. *See* Said v. Said, 878 N.Y.S.2d 384 (2009); Bradley v. Bradley 10 N.Y.S.2d 699(1939); *see also* Scanlon v. Ciaravalli, 152 N.Y.S.2d 494 (1956). The Scanlon court stated, "other than respondent's

Further, the significance the court placed on Towne's deployment is even more apparent in their best interest analysis. New York courts consider several non-exclusive factors when determining best interests, to include parental fitness, the prior performance of each parent, each parent's ability to ensure the child's well-being, and each parent's willingness to encourage a relationship with the other parent.[126] Applying these factors, the court found that Diffin and Towne were "both excellent parents" that have demonstrated "stable employment, adequate income, suitable homes, and an unwavering commitment to Derrell's [the child's] wellbeing."[127] The court goes on to state that under the original custody order, Diffin and Towne "enjoyed a long-standing shared custody arrangement that nurtured Derrell's relationships with both parents."[128] Furthermore, the court finds that the "record establishes that Derrell would be loved, supported and well cared for in the custody of either parent."[129] The court's dicta reflect that under best interest analysis, these parents were equal at minimum. Thus, there was no legal rationale to support the family court's permanent modification order. Towne should have been able to maintain physical custody of her child. Instead, she lost custody of her child solely because of her military deployment. Indeed, the court states, "but for the mother's deployment in 2004," the original custody order "might well remain in effect today."[130] Subsequently, New York has essentially codified the circumstances of *Diffin II*—deployments alone are a per se "change in circumstance" justifying modification proceedings; and judges have full discretion to determine what weight to give deployments in their best interests analysis.[131]

3. Outcome of Diffin II *If Adjudicated in Iowa*

This case would have resulted in the exact opposite outcome had it been heard in Iowa. Similar to New York case law, Iowa requires the parent seeking modification to show a "substantial change in circumstances" since the initial custody order.[132] However, the original order will only be changed if that parent also proves that they "can offer the child superior care," based on the best interests of the child.[133] Unlike the New York Domestic Relations Law § 75-l, the Iowa legislature has mandated that custody orders in effect preceding a deployment must be reinstated if a temporary order is issued due to the deployment.[134] Additionally, the Iowa law explicitly states that deployments do not establish a substantial change in circumstances and may not be considered in the best interest analysis during modification proceedings.[135] In Iowa, Towne's original custody order would have been reinstated as soon as she returned. If Diffin requested permanent modification upon her return, the court could only consider Towne's separation from her second husband, not her deployment, in the change of circumstances determination. Even if an Iowa court determined that Towne's separation by itself created a substantial change in circumstances, the original custody order would likely remain in effect. Assuming the validity of the *Diffin II* findings—that Towne and Diffin were equally effective caregivers[136]—Diffin would be unable to show that he could "minister more effectively to the child's well being," the second requirement for modification.[137]

Finally, the likelihood of such an outcome in Iowa is underscored by the Iowa Court of Appeal's retroactive application of the Iowa military custody statute in a 2009 case.[138] The court refused to consider a parent's Iraq deployment during their review of a case heard by the lower court prior to the statute's July 2008 effective date.[139] The court stated, "[W]e readily agree with the sound policy behind this legislation, believe such a policy should apply even before the effective date of the legislation, and

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remarriage, we find no such change of circumstances here." 152 N.Y.S.2d at 495–96. The court went on to find that the remarriage was not "a sufficient ground or reason for modification" of the original custody order. *Id*. at 496. It follows that elimination of a member of the household should not establish a significant change in circumstance.

[126] *Diffin II*, 849 N.Y.S.2d at 689. The courts also consider the child's wishes, the child's stability, and each parent's residential environment. *Id*.

[127] *Id*. at 690.

[128] *Id*.

[129] *Id*.

[130] *Id.*

[131] Under the New York Statute effective 15 November 2009, modification orders may be issued based on temporary assignment, orders to active duty, or deployment if there is "clear and convincing evidence" that modification is in the child's best interest. N.Y. DOM. REL. § 75-l(1)–(2) (West 2009). The servicemember's return from the relevant period of active duty or deployment, is a per se substantial change in circumstance which entitles either parent to a modification hearing. *Id*. § 75-l(3). If a previous order was issued during the servicemember's deployment, it will only be changed if the court determines that it is in the best interests of the child. *Id*.

[132] Brueland v. Baldus, No. 08-0946, 2009 WL 250347, at *4 (Iowa App. Feb. 4, 2009); *see also In re* Maher, 596 N.W.2d 561, 565 (Iowa 1999); Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973).

[133] *Brueland*, 2009 WL 250347 at *5. The opinion goes on to state that even if there is a change in circumstances, if parents are found to be equally fit, custody should not be changed. *Id*.

[134] IOWA CODE ANN. § 598.41C(1) (West 2010). This statute may have been a reaction to the case, *In re Grantham*, wherein a temporary custody order awarding primary physical custody to the noncustodial parent during the custodial parent's deployment was made permanent after the custodial parent redeployed. 698 N.W.2d 140 (Iowa 2005).

[135] *Id*.

[136] *Supra* notes 127–29.

[137] *Brueland*, 2009 WL 250347, at *5. The opinion goes on to state that even if there is a change in circumstances, if parents are found to be equally fit, custody should not be changed. *Id*. at *4.

[138] *See id*. at *4.

[139] *See id*.; *see also* IOWA CODE ANN. § 3.7(1) (West 2010) (stating all laws passed during sessions of the Iowa General Assembly take effect on first day of July after passage).

accordingly have applied that policy in our de novo review."[140]

4. Outcome of Diffin II *If Adjudicated in North Carolina*

In North Carolina, like New York and Iowa, the general standard for modification requires an initial determination of substantially changed circumstances, followed by a determination that the change is in the best interests of the child. [141] North Carolina also has a military child custody statute that provides a third version of the consideration courts should give deployments.[142] Courts may not consider temporary duty, deployments, and mobilizations in change of circumstance determinations during permanent modification proceedings.[143] The breadth of this prohibition includes the "temporary disruption to the child's schedule" caused by temporary duty, deployment, or mobilization.[144] This prevents the courts from circumventing the statute by considering the immediate consequences of the deployment in lieu of the deployment.[145] However, if a noncustodial parent successfully alleges an independent basis establishing a significant change in circumstances, North Carolina courts may consider deployments in their best interests of the child analysis.[146] A North Carolina hearing of *Diffin II* would only have assured Towne of maintaining physical custody of her son if the court determined that the separation from her second husband was an insufficient basis for a change in circumstances.

5. Outcome of Diffin II *If Adjudicated in Texas*

The Texas Legislature has passed a fourth version of a military child custody statute. The Texas rendition prohibits judges from basing their change of circumstance determinations "*solely*" on military deployments in the case of permanent modification proceedings.[147] Dissimilar to Iowa and North Carolina, states that have entirely barred courts from considering military deployments in change of circumstances determinations,[148] Texas judges have wide discretion to determine whether or not modification is justified in cases of deploying parents. Additionally, the case law gives little guidance. Texas courts have stated that "there is no definite guide line as to what constitutes a material change of circumstances."[149] The Texas statute fails to address how deployments should be factored into the best interest analysis once a court has found a substantial change in circumstances. Thus, *Diffin II* would likely result in a much different outcome if heard in Texas versus another state such as Iowa or North Carolina. Furthermore, the Texas statute would likely produce inconsistent results if *Diffin II* were heard by two different jurisdictions *within* the state. The results will depend on which judge hears the case and each judge's worldview and subjective opinion of how much weight to give deployments in change of circumstances and best interests determinations. As scholars have warned, "little guidance and a lot of discretion" in child custody proceedings may result in "arbitrary and heavy-handed" decisions.[150]

B. Analysis of Diversity in State Laws

The tremendous diversity among state laws demonstrated by the four examples above only highlight *some* of the differences. Twenty states do not have a military child custody statute.[151] In the states that have passed legislation, similarly situated servicemembers should expect vastly inconsistent outcomes between and within jurisdictions because of the following conflicts of law:

> (1) Uneven application. Six states have made their statutes applicable to members of the Reserve Component only;[152]

[140] *Brueland*, 2009 WL 250347, at *4. The servicemember eventually lost this case based on the teen daughter's preference to live with her mom and her hostile relationship with her stepmother. *Id*. at *5–7.

[141] *See* N.C. GEN. STAT. ANN. §§ 50-13.7(a), 50-13.2(a) (West 2009); *see also* Shipman v. Shipman, 586 S.E.2d 250 (N.C. 2003); Speaks v. Fankek, 470 S.E.2d 82 (1996 N.C. App.); Steele v. Steele, 244 S.E.2d 466 (N.C. 1978).

[142] *See* N.C. GEN. STAT. ANN. § 50-13.7A (West 2009).

[143] *Id.* § 50-13.7A(c)(2).

[144] *Id*.

[145] This is essentially what the Court did in *Diffin II* when they stated that the deployment did not "in and of itself constitute a significant change in circumstances," and then emphasized that the deployment caused a temporary "disruption" in the child's life and required him to establish himself in a different school, make new friends, and become comfortable in his dad's home. *Diffin II*, 849 N.Y.S.2d 687, 691 (N.Y. App. Div. 2008).

[146] *See* N.C. GEN. STAT. ANN. § 50-13.7A(g) (West 2009).

[147] *See* TEX. FAM. CODE ANN. § 156.105 (West 2009).

[148] *See supra* notes 134, 143.

[149] Wright v. Wright, 610 S.W.2d 553, 555 (Tex. Civ. App. 1980); *see also In re* A.L.E., 279 S.W.3d 424, 428 (Tex. Ct. App. 2009) (stating that courts are not "confined to rigid or definite guidelines" in change of circumstances determinations).

[150] BREEN, *supra* note 104, at 57.

[151] *Supra* note 67.

[152] *See* ARK. CODE ANN. § 9-13-110 (West 2010); COLO. REV. STAT. ANN. § 14-10-131.3 (West 2010); IDAHO CODE ANN. § 32-717 (West 2010); ME. REV. STAT. ANN. 37-B, § 343 (West 2009); OR. REV. STAT. ANN. § 107-169 (West 2009); TENN. CODE ANN. §36-6-113 (West 2009).

(2) Dissimilar definitions of key terminology, such as servicemember, deployment, and active duty;[153]

(3) Disparate limitations on qualifying deployment lengths. For example, in Arizona, only deployments of six months or less qualify for the statutory protections.[154] On the other hand, in Oregon, deployments of up to 30 continuous months qualify;[155]

(4) Extremely diverse rights and protections. For example, compare the vast protections offered to deploying servicemembers in Iowa with the expedited hearing and limited rights available to Maryland and Virginia servicemembers.[156] Additionally, while some states prohibit courts from considering deployments in change of circumstance determinations, at least one state mandates that courts consider redeployment a change in circumstances permitting modification proceedings upon request of a parent.[157] Other states allow their courts to consider deployments in change of circumstances determinations, so long as it is not the sole consideration.[158] There is also wide variance in the weight state courts may give deployments in best interests of the child determinations during permanent modification proceedings.[159]

Deployment must not be a factor in permanent child custody modification proceedings.[160] This will ensure a custody standard that "offers effective and useful guidelines, so that similar cases are decided similarly."[161] A uniform act that includes a deployment rule would prevent "extralegal factors," such as a local judge's personal opinion of military deployments, from "significantly affecting final dispositions."[162]

IV. Best Interests of the Child Standard

As discussed in Part II of this article, during permanent modification proceedings, states require courts to determine that changing the previous custody order is in the best interests of the child.[163] However, a rule excluding military deployments from consideration during these proceedings is in the best interests of the child because it decreases the likelihood of constant relitigation of custody orders, acknowledges the benefits of growing up as a military dependent, takes a step away from the current indeterminate child custody regime, and takes a step towards national norms in family law.

A. Deployment Rule Will Decrease Modification Litigation, Which Is Consistent with the Best Interests of Children

In the 1970s, renowned child psychiatrists Goldstein, Freud, and Solnit asserted that repeated litigation of child custody was harmful to children and that initial child

[153] *Compare, e.g.*, N.Y. DOM. REL. § 75-l (West 2009) (which has no definitions in its statute), *and* COLO. REV. STAT. ANN. § 14-10-131.3(II)(2)(a) (West 2010) (defining "active duty" as serving in "[a] reserve component of the armed forces; or [t]he National guard for a period that exceeds thirty consecutive days in a calendar year."), *with* IOWA CODE ANN. § 598.41C(1) (West 2010) (stating "'active duty' means active military duty pursuant to orders issued under Title X of the United States Code. However, this section shall not apply to active guard and reserve duty or similar full-time military duty performed by a parent when the child remains in the actual custody of the parent.").

[154] ARIZ. REV. STAT. ANN. § 25-411 (West 2010).

[155] OR. REV. STAT. ANN. § 107.169 (West 2009).

[156] *Compare, e.g., supra* Part III.A.3 (describing the broad protections of Iowa Code Ann. § 598.41C (West 2010)), *and* MD. CODE ANN., FAM. LAW § 9-107 (West 2010) (providing for "expedited" hearing rights), *with* VA. CODE ANN. § 20-124.8 (West 2009) (providing a right to a hearing within 30 days after redployment; if a temporary order has been issued, the non-deploying parent has to show that the order in place before the deployment is no longer in the child's best interests). Note that in the Maryland statute there is no time limit associated with the expedited hearing. It is unclear whether this right is violated if there is no hearing within seven days? fifteen days? After the first available court date on the judge's docket? Additionally, neither the Maryland nor the Virginia statute have any enforcement mechanism associated with the expedited or 30 day hearing rights, leaving them both open for abuse by over-docketed family courts.

[157] *Compare, e.g.*, MISS. CODE ANN. § 93-5-34 (West 2009), *with* N.Y. DOM. REL. § 75-l (West 2009).

[158] *See, e.g.*, S.C. CODE ANN. §§ 63-5-910, 63-5-920 (West 2009); CAL. FAM. CODE § 3047 (West 2010).

[159] *Compare, e.g.*, MICH. COMP. LAWS ANN. § 722-27 (West 2010); IOWA CODE ANN. § 598.41C (West 2010) (stating that courts must disregard deployments completely in best interests of the child determinations), *with* KAN. STAT. ANN. § 60-1630 (West 2010); S.D. CODIFIED LAWS § 33-8-10 (West 2009) (stating that deployments may not be the sole consideration in best interests of the child determinations).

[160] The focus of this article is on modifications after an initial custody order. However, it follows that servicemembers involved in initial custody proceedings immediately before or after a deployment should also receive the benefit of this protection. For example, in a North Dakota case, a National Guard Soldier completed divorce proceedings immediately upon his return from an Iraq deployment. The district court "penalized him for being absent due to military deployment," and awarded physical custody to his non-military spouse. Lindberg v. Lindberg, 770 N.W.2d 252, 258 (N.D. 2009). The North Dakota Supreme Court "commend[ed] Chris Lindberg's service to our country," and upheld the district court's decision. *Id*.

[161] Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, PSYCHOL. PUB. POL'Y & L., 843, 845 (2000).

[162] *Id*.

[163] *See supra* Part II.A (discussing that state modification proceedings generally require a substantial change in circumstances followed by a determination that modification is in the best interests of the child).

custody orders assigning primary physical custody to a "fit" parent should not be subject to modification.[164] Others have commented on the damage caused by repeated custody litigation, including the emotional trauma children experience by being repeatedly forced to choose sides, feeling like a bargaining chip or pawn, and having to serve in uncomfortable adult-like roles of referee or mediator between two hostile parents.[165] Yet, under the current child custody litigation format, the behavior that leads to this trauma is encouraged.

Continual litigation of initial custody determinations is more likely because an argument can always be made for modification under the subjective best interests analysis.[166] Further, this system not only encourages re-litigation of custody orders, but fosters calculated decisions which are also harmful to children, such as the use of experts and witnesses that denigrate the character of the other parent, and delay tactics which may favor a parent who has physical custody under a temporary order.[167] This regime, which "emphasizes finger-pointing over cooperation,"[168] does not serve the best interests of children. A rule that prohibits courts from considering military deployments in best interests determinations would discourage modification litigation by making futile any petition prompted by a custodial parent's military deployment. The noncustodial parent would know with certainty a petition brought on this basis would not succeed, thereby reducing the harm children experience during protracted custody litigation.

B. A Deployment Rule Acknowledges the Benefits of Being a "Military Brat"

1. Children Who Grow Up in the "Military Lifestyle" Turn Out Well

Significant empirical evidence runs counter to the frequent assertion that military life has a negative impact on military children.[169] As early as the 1960's, studies have shown that military children are less likely to have behavioral disorders and participate in juvenile crimes than civilian children.[170] Since then, numerous studies cast doubt on the commonly held belief that the "stresses of military life" can lead to childhood problems.[171] In 1981, a researcher published a six-year comparative study of 374 military and non-military children under the age of nineteen.[172] He found that that military children were fifty percent less likely to abuse drugs and alcohol, eleven percent less likely to smoke cigarettes, and that fewer military dependents exhibited personality disorders or hyperactivity.[173] Ten years later, a group of military psychiatrists studied 213 military dependents between the ages of six and twelve to determine whether military children are more likely to have behavioral health problems than their civilian counterparts.[174] They concluded that the "results do not support the notion that levels of psychopathology are greatly increased in children of military parents."[175] In fact, in their study of the children's symptom self-reports and teacher's ratings of these same children, the military children were "at or below national norms."[176]

In a similar study by Dr. Henry Watanabe, based on a survey of 135 children in the next age range—thirteen through eighteen—the Walter Reed physician concluded that the "the military adolescent is able to develop a healthy self-image, even with the experience of having to grow up in an environment where frequent adjustments must be made because of military necessities and demands."[177] His findings indicate that children raised by a military parent thrive. His study specifically revealed that military teenagers have a "strongly positive" body image, are sexually "conservative," and possess "exceptional" impulse control and social skills when compared to civilian teenagers.[178] Finally, Dr. Wantanabe notes that the "military community and sociocultural milieu seem to impact in a

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[164] GOLDSTEIN, FREUD & SOLNIT, *supra* note 56, at 37.

[165] Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 24 (1987); Linda Elrod, *When Should Custody Orders Be Modified?*, 26 SPG FAM. ADVOC. 40, 41 (2004).

[166] Elster, *supra* note 165, at 24; *see infra* Part IV.C (discussing the best interests of the child standard).

[167] Katherine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 471 (1999); Elster, *supra* note 165, at 23–24.

[168] Bartlett, *supra* note 167, at 472.

[169] *See* MILITARY BRATS AND OTHER GLOBAL NOMADS 68–69 (Morton G. Ender ed. 2002) [hereinafter MILITARY BRATS AND OTHER GLOBAL NOMADS] (discussing the research suggesting that geographic mobility, parental absence, and other aspects of military life can damage the development of a child); *but see* Anita Chandra et al., *Children on the Homefront: The Experience of Children from Military Families*, 125 J. AM. ACAD. PEDIATRICS 16, 16–25 (2010) (reporting that military children have more emotional difficulties than their civilian counterparts).

[170] James A. Kenny, *The Child in the Military Community*, J. AM. ACAD. CHILD PSYCHIATRY 51, 57–60 (1967). *But cf.*, Don M. Lagrone, *The Military Family Syndrome*, 135 AM. J. PSYCHIATRY 1040, 1040–43 (1978) (discussing his two-year study finding that behavioral disorders were more frequent in 792 military children than their civilian counterparts).

[171] James Morrison, *Rethinking the Military Family Syndrome*, 138:3 AM J. PSYCHIATRY 354, 354 (1981).

[172] *Id.* Fifty-nine percent of the military children had experienced a separation from their military parent that was six months or more. *Id.*

[173] *Id*.

[174] Commander Peter S. Jensen et al., *The "Military Family Syndrome" Revisited: "By the Numbers,"* 179:2 J. NERV. MENT. DIS. 102, 102 (1991).

[175] *Id*.

[176] *Id*. at 106.

[177] Henry K. Watanabe, *A Survey of Adolescent Military Family Members Self-Image*, 14:2 J. YOUTH & ADOLESCENCE 102, 106 (1985).

[178] *Id*. at 103.

favorable manner on the military adolescent dependent," in his explanation of the "superior showing" of military teenagers.[179]

2. Academic Achievement Is High Among Children Raised by Military Parents

Research indicates that military children succeed academically as well. In a six-year survey of approximately 607 adults raised as military dependents, educational achievement was high. Greater than ninety-five percent completed a year of post-secondary education and twenty-nine percent possessed graduate school degrees.[180] Additionally, nearly eighty-one percent of these same adults spoke a language other than English and attributed it to their military childhood.[181]

The DoD school system achievement numbers support the success of the sample above. In 2003, DoD eighth graders achieved the first and fourth highest scores in reading compared to all other state scores and fourth graders achieved the third and fifth highest scores.[182] African-American and Hispanic children had the top scores in the nation in both mathematics and reading compared to minorities in all other states.[183] In national standardized tests of fourth and eighth graders from 1992 through 2009, DoD students have beaten the national average each time.[184] Further, children raised by military parents are able to obtain academic achievement advantages early because they have access to the military childcare system which has been lauded over the last two decades. In 1997, President Clinton called the Military Child Development Program a "model for the nation" and recognized the DoD's commitment to standards, financial support, and oversight of the military childcare system.[185] Finally, in 2007, the National Association of Child Care Resource & Referral Agencies ranked DoD as having the number one child care system in the country.[186]

3. Military Support Systems Are Equipped to Handle Children's Needs Due to Deployments

We know that children do experience stress *during* a parent's deployment[187]—that is inevitable whether the child's primary custodian is the servicemember or the non-military parent. However, the military community is better equipped to provide support to children to minimize stress after a parent's deployment. A deployment rule, ensuring that previous orders awarding physical custody to servicemembers remain in place, facilitates access to a litany of services for children. Studies prove that military dependents of deployed personnel benefit from family resource centers such as Army Community Service or the Navy's Fleet and Family Support Center and the use of military youth centers.[188] Additionally, military installations offer services through unit family readiness group programs[189] and have DoD schools that are more likely than their civilian counterparts to employ teachers and counselors who themselves are spouses of deploying men and women.[190] As one researcher who studied the behavior of military children noted, "the military service provides a relatively close-knit 'family' atmosphere, in which job, social, school, and medical components touch one another at more points than may be true in the civilian community."[191] A deployment rule is in children's best interests because it gives them increased access to this "close-knit" village-type atmosphere.

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[179] *Id*. at 106.

[180] MILITARY BRATS AND OTHER GLOBAL NOMADS, *supra* note 169, at 88.

[181] *Id*.

[182] Press Release, Dep't of Def. Educ. Activity, DoD School Students Continue Top Tier National Performance (Nov. 13, 2003) [hereinafter, DoD School National Performance] (on file with author). Eighth graders at overseas DoD schools scored first in the nation, eighth graders at stateside DoD schools scored fourth in the nation, fourth graders at overseas DoD schools scored third in the nation, and fourth graders at stateside DoD schools scored fifth in the nation. *Id*. *See also* News Release, Dep't of Def. Educ. Activity, DoD School Students Continue to Improve in Mathematics (Nov. 13, 2003) [hereinafter DoD School Mathematics] (noting that eighth graders at overseas DoD schools scored third in the nation; eighth graders at stateside DoD schools scored seventh in the nation; and fourth graders at overseas and stateside DoD schools scored sixth in the nation) (on file with author).

[183] DoD School National Performance, *supra* note 182; DoD School Mathematics, *supra* note 182.

[184] U.S. DEP'T EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4 AND 8: THE NATION'S REPORT CARD MATHEMATICS 16, 32 (2009).

[185] Press Release, U.S. Dep't of Def., Military Child Development Program Cited as National Model (Oct. 21, 1997), *available at* http://www.defense.gov/Releases/Release.aspx?ReleaseID=1450.

[186] Press Release, Nat'l Ass'n of Child Care Res. & Referral Agencies, New State Report Card on Child Care: States Fall Short in Protecting Children's Safety and in Promoting Learning in Child Care (Mar. 1, 2007), *available at* http://www.naccrra.org/news/press-releases/31/.

[187] Chandra et al., *supra* note 169, at 16–25; U.S. ARMY MORALE, WELFARE & RECREATION, WHAT WE KNOW ABOUT MILITARY FAMILIES: UPDATE 89 (2007) [hereinafter MILITARY FAMILIES].

[188] MILITARY FAMILIES, *supra* note 187, at 90; MILITARY BRATS AND OTHER GLOBAL NOMADS, *supra* note 169, at 71.

[189] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE app. J (Army Family Readiness Group Operations) (19 Sept. 2007).

[190] *See* RAND NAT'L DEF. RES. INST., WORKING AROUND THE MILITARY: CHALLENGES TO MILITARY SPOUSE EMPLOYMENT AND EDUCATION 23, 105 (2004) (noting that in a study of 1100 military spouses, the fourth most common occupation was teaching; teaching was the number one occupation of military spouses with graduate degrees and military spouses of senior officers; and the number two profession of junior officer spouses).

[191] Morrison, *supra* note 171, at 356.

C. A Deployment Rule Takes an Important Step Away from a Flawed and Indeterminate Child Custody Regime

The best interests analysis has been assessed as "too discretionary and unpredictable to provide guidance to courts and litigants and too vague to guard against the risk of arbitrary decision-making."[192] Another critic noted that "decisions made in this framework are less a product of reasoned application of precedent than of the personality . . . and biases of the trial judge."[193] A deployment rule moves away from one of the significant critiques of the best interests analysis—its indeterminate nature[194]—by removing a judge's discretion to determine what weight to give military deployments in modification proceedings. Further, this step towards a more rule-like standard in child custody is beneficial since many common precepts of the best interests analysis are flawed and inconsistent with scientific data. For example, the common assumptions that (1) young children need their mothers; and (2) and that boys should be placed with their fathers is contradicted by findings of "no direct linear relationship" between age and gender and child adjustment in several studies.[195] A myth related to military children recently invalidated is that their rate of mobility is a significant factor in their psychological adjustment.[196] The lack of empirical support for general assumptions often applied under best interests analysis makes establishing national norms, such as a deployment rule, more attractive. As psychiatrists Goldstein, Freud, and Solnit noted over thirty years ago, "[s]implicity is the ultimate sophistication in deciding a child's placement."[197] A deployment rule is in keeping with this standard.

V. Standardization of Family Law

Although many in the legal community have concluded that family issues are "a matter of exclusive state concern and beyond federal regulation,"[198] this has not slowed the expansion of national norms in family law through the growth of national associations and organizations, significant federal laws and Supreme Court decisions, and the work of the NCCUSL.[199] As discussed in Part III of this article, a deployment rule would produce more consistent results in military child custody disputes, regardless of the state forum. This reflects the country's fifty-year trend of establishing uniformity among the states in family law matters, to include child custody.

A. National Associations and Organizations

Since the 1950s, national organizations have formed, which resulted in increased interaction between relevant family law practitioners—from psychiatrists to lawyers to social workers.[200] For example, the National Association of Social Workers was formed in 1955. Their mission is to contribute to the "professional growth and development of its members, create and maintain standards for the profession, and to advance sound social policies."[201] The organization currently has more than 25,000 members whose primary practice area is related to children and families.[202] It logically follows that increased discussion between family law-related professionals has helped to foster general practice norms throughout the United States.[203]

B. Uniform Acts

The ULC has been an important force to reconcile state family laws over the last fifty years.[204] The ULC has drafted and proposed to state legislatures more than 200 Acts providing "uniformity" where "diversity obstruct[ed] the interests of all citizens of the United States."[205] Further, the ULC has been quite active in family law, and child custody in particular. Since 1968, the Commission has promulgated more than a dozen Uniform Acts relevant to children and

[192] ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY 162 (2004).

[193] Wexler, *supra* note 55, at 762.

[194] *E.g.*, Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 172 (1992); Elster, *supra* note 166, at 11–16.

[195] Krauss & Sales, *supra* note 161, at 854.

[196] Lisa B. Finkel et al., *Geographic Mobility, Family, and Maternal Variables as Related to the Psychosocial Adjustment of Military Children*, 168:12 MIL. MED. 1019–24 (2003).

[197] GOLDSTEIN, FREUD & SOLNIT, *supra* note 56, at 116.

[198] Sylvia Law, *Families and Federalism*, 4 WASH. U.J.L. & POL'Y 175, 178 (2000).

[199] *See infra* Parts V.A–D.

[200] *See, e.g.*, *General Fact Sheets*, NAT'L ASS'N OF SOC. WORKERS, *available at* https://www.socialworkers.org/pressroom/features/general/ nasw.asp. The National Association of Social Workers formed in 1955. *Id*. *See also About the Academy*, AM. ACAD.OF MATRIMONIAL LAWYERS, *available at* http://www.aaml. org/go/about-the-academy/ (noting that this association was formed in 1962, "[t]o encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected," and that there are currently nearly 2000 attorney-members in all fifty states); *About AFCC*, ASS'N OF FAMILY AND CONCILIATION COURTS, *available at* http://www.afccnet.org/about/ index.asp (explaining that the AFCC was founded in the 1960s and includes family law professionals from various fields, including judges, attorneys, mediators, social workers, psychologists, and educators who come together to exchange information, share perspectives and work collaboratively on projects).

[201] *General Fact Sheets*, NAT'L ASS'N OF SOCIAL WORKERS, *available at* https://www.socialworkers.org/ pressroom/features/general/nasw.asp.

[202] *Id*.

[203] *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: the Interests of Children in the Balance*, 42(3) FAM. L.Q. 381, 383 (2008).

[204] *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law*, 42 FAM. L.Q. 713, 714 (Winter 2009); *see also* Elrod & Dale, *supra* note 203, at 383.

[205] FAQS About NCCUSL, *supra* note 69.

family issues.[206] Aspects of the Uniform Child Custody Prevention Act (UCCPA) and the Model Marriage and Divorce Act (MMDA) are especially relevant for their application to a military deployment rule.

1. Uniform Child Custody Prevention Act

The UCCPA demonstrates the important role Uniform Acts can play in resolving inconsistent definitions and terminology among state laws. In 2006, the ULC proposed the UCCPA to the states for adoption and passage.[207] The UCCPA resolves the inconsistencies between the state parental custodial interference criminal statutes. Although every state has criminalized custodial interference, the UCCPA addresses the large disparities in the elements establishing the offense, prerequisites to prosecution, and the minimum and maximum sentences.[208] The UCCPA reconciles these inconsistencies by establishing uniform and exclusive factors that all state courts must apply to determine whether standard abduction prevention measures must be applied in a particular case.[209] Just as the disparate state custodial interference laws spurred the ULC to submit UCCPA to the states for passage in 2006, there is a similar need to prevent inconsistent outcomes and establish standard definitions for military custody modification proceedings.[210]

2. Model Marriage and Divorce Act

Approved by the NCCUSL in 1970, the MMDA includes provisions standardizing legal rules for child custody modification.[211] The MMDA is particularly relevant to a deployment rule because it was promulgated to establish a rigorous modification standard and a presumption in favor of the original custodial parent.[212] The MMDA prohibits motions for modification earlier than two years after initial custody determinations absent a reasonable belief of serious danger to a child's physical, mental, or emotional health.[213] Further, for all other modification proceedings, a judge's discretion to change the initial custody order is greatly restricted.[214] The MMDA drafters believed finality was the critical factor in child custody, rather than continually litigating which of two fit parents is "more fit" at any particular moment in time.[215]

Despite MMDA §409's lack of widespread state adoption, scholars have advocated that a "stricter, clearer, more certain standard governing custody modification is essential,"[216] and the NCUSSL continues to champion the MMDA to "serve as guideline legislation" that states should use to draft their child custody statutes.[217] It is unlikely that a military deployment would ever be adequate to substantiate modification under the MMDA standard.

C. Supreme Court Decisions

In the 1899 case, *Simms v. Simms*, the Supreme Court stated, "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not the laws of the United States."[218] Yet, in *Meyer v. Nebraska*, the Court jumped feet first into setting national

[206] *See* ULC, Final Acts and Legislation, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2 &tabid=60 (last visited Mar. 1, 2010) (providing a searchable webpage with links to the following Uniform or Model Acts: (1) Uniform Child Abduction Prevent Act; (2) Uniform Child Custody Jurisdiction Enforcement Act (replacing the previously promulgated Uniform Child Custody Jurisdiction Act); (3) Uniform Child Witness Testimony by Alternative Methods Act; (4) Uniform Disposition of Community Property Rights at Death Act; (5) Uniform Guardianship and Protective Proceedings Act; (6) Uniform Interstate Family Support Act; (7) Uniform Parentage Act; (8) Uniform Premarital Agreement Act; (9) Uniform Transfers to Minors Act; (10) Model Adoption Act; (11) Model Marital Property Act; and (12) Model Marriage and Divorce Act). Model Acts were initially Uniform Acts and later reclassified as Models. *Id.*

[207] ULC, A Few Facts About the Uniform Child Abduction Prevention Act (UCAPA), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucapa.asp (last visited Mar. 1, 2010).

[208] NCCUSL, *Uniform Child Abduction Prevention Act (Statutory Text, Comments and Unofficial Annotations by Linda D. Elrod, Reporter),* 41(3) FAM. L.Q. 23, 29 (2007).

[209] ULC, Summary: UCAPA, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucapa.asp (last visited Mar. 1, 2010) (noting some of the factors courts must consider include lack of cooperation with a previous custody order, selling assets, domestic violence, and requesting a child's academic records).

[210] *See supra* Part III.C (discussing the variance in state laws regarding who qualifies as a service member and whether deployments may be considered in change of circumstance and best interest determinations).

[211] Unif. Marriage and Divorce Act (MMDA) § 409, 9 U.L.A. 628 (1987) (amended 1971, 1973). The MMDA was downgraded to a Model Act in 1983 due to limited state enactment. *See* John J. Sampson, *Uniform Family Laws and Model Acts,* 42(3) FAM. L.Q. 673, 685 (2008). Arizona, Colorado, Illinois, Kentucky, and Washington have adopted the UMDA child custody modification provisions in part. *See* ARIZ. REV. STAT. ANN. § 25-411A (West 2009); COLO. REV. STAT. ANN. § 14-10-129 (West 2009); ILL. COMP. STAT. ANN. h. 750 § 5/610 (West 2009); KY. REV. STAT. ANN. § 403.340(2)-(4) (West 2009); WASH. REV. CODE ANN. § 26.09.260 (West 2009).

[212] *See* UMDA § 409, 9 U.L.A. 628 (1987) (amended 1971, 1973).

[213] *Id.* § 409(a).

[214] *Id.* § 409(b). A court must find: (1) a change in circumstances; and (2) modification is in the child's best interest; and one of the following: (a) the custodian agrees; or (b) the child has been integrated into another home with the custodian's consent; or (c) the child's physical, mental or emotional health is in serious danger and modification is more beneficial to the child than the current custody situation.

[215] Wexler, *supra* note 55, at 774. Wexler also points out that academic studies reinforce the benefit of strict modification standards. For example, one study found that "low levels of interparental conflict and hostility . . . following a divorce correlate with diminished adjustment problems in children's social, emotional and cognitive development." *Id.* at 789–90.

[216] *Id.* at 784.

[217] ULC, About NCCUSL: Introduction, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex= 0&tabid=11 (last visited Mar. 1, 2010).

[218] 175 U.S. 162, 167 (1899).

norms in this area by reaffirming that parents' right to educate their children is a constitutionally-protected liberty.[219] This case was followed by others that have had a significant impact in establishing uniformity in state family laws, including *Griswold v. Connecticut*, establishing the right to privacy in marital relations,[220] *Loving v. Virginia*, prohibiting states from criminalizing interracial marriage,[221] and *Troxel v. Granville*, finding that parents—not the state—have the right to determine when grandparent visitation is appropriate.[222] Constitutional experts recognize that despite the Court's sometimes mantra that family law is reserved to the states,[223] it has been "among the forces transforming American family law over the last fifty years."[224]

D. Federal Laws

Although it is a widely held view that the states are primarily responsible for legislation regarding families,[225] "the federal government has considerable authority to intervene and has often done so."[226] Federal laws have frequently been used to "promote particular family values."[227] Some federal statutes are particularly relevant to the goals of a deployment rule because they illustrate how federal legislation has been used to mandate uniform and consistent state treatment in family law, including laws affecting children.

1. Child Abuse Prevention and Treatment Act of 1974[228]

The Child Abuse Prevention and Treatment Act (CAPTA) was established to assist in the "prevention, identification, and treatment of child abuse and neglect."[229] The Act effectively creates national definitions for key terms such as "child abuse" and "neglect"[230] by requiring the states to use the federal definitions in order to receive grant money.[231] Additionally, federal funds are dependent on numerous eligibility factors,[232] including requirements that the states (1) institute laws that allow for termination of parental rights of parents convicted of certain heinous crimes committed against another parent or child;[233] and (2) assign an attorney or special advocate as guardian ad litem in every court proceeding involving child abuse or neglect.[234] A deployment rule would accomplish exactly what this Act did—common definitions for critical terms such as "active duty," "deployment," and "servicemember," and similar state requirements in permanent military child custody modification proceedings.

2. Indian Child Welfare Act of 1978[235]

This Act was passed as a remedy to the "alarmingly high percentage" and "often unwarranted" removal of Indian children from their homes through state proceedings.[236] Importantly, the Act recognized that American Indians are a unique population and that the states frequently discounted the special social and cultural aspects related to Native Americans.[237] The Act provides Indian tribes with exclusive jurisdiction over child custody proceedings involving all Indian children within a tribe's reservation,[238] requires the states to transfer any foster care or parental rights proceeding involving an Indian child that does not reside within reservation to the appropriate tribe,[239] and empowers Indian

[219] 262 U.S. 390, 399 (1923).

[220] 381 U.S. 479, 485–86 (1965).

[221] 388 U.S. 1, 2 (1967).

[222] 530 U.S. 57, 57–8 (2000).

[223] *See Simms*, 175 U.S. at 167; *see also* Law, *supra* note 198, at 178–80 (discussing Supreme Court holdings in United States v. Lopez, 514 U.S. 549 (1995), United States v. Morrison, 529 U.S. 598 (2000), and Ankenbrandt v. Richards, 504 U.S. 689 (1992)).

[224] David D. Meyer, *The Constitutionalization of Family Law*, 42(3) FAM. L.Q. 529, 529 (2008).

[225] *See* Law, *supra* note 198, at 178.

[226] *Id*. at 184.

[227] *Id*.

[228] Pub. L. No. 93-347, 8 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101–07 (2006)).

[229] *Id.*

[230] 42 U.S.C. § 5106(g). The terms mean, "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm."

[231] *See id.* § 5106(a)(b)(2)(A). The available grants under this Act are currently pending reauthorization by Congress. Since 1974, reauthorizations have occurred in 1978, 1984, 1986, 1989, 1992, 1996, and 2003 (through FY 2008). Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?*, 42(3) FAM. L.Q. 481, 485–90 (2008).

[232] 42 U.S.C. § 5106(a)(b)(c).

[233] *Id.* § 5106(a)(b)(2)(A)(xvii). These crimes include felony assault resulting in serious bodily injury and murder or voluntary manslaughter, including conspiracy, solicitation or attempt to commit murder or voluntary manslaughter. *Id.*

[234] *Id.* § 5106(a)(b)(2)(A)(xiii).

[235] Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–63).

[236] *Id.* § 2(4), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1901(4)).

[237] *Id.* § 2(5), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1901(5)).

[238] *Id.* § 101(a), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1911). Child custody proceeding is defined as a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. *Id.* § 4. The term does not include divorce custody orders unless custody is awarded to a third party. *See* Thomas J. Meyers & Jonathan J. Siebers, *The Indian Child Welfare Act: Myths and Mistaken Application*, 83 MICH. BAR J. 19, 20 (2004).

[239] § 101(b), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1911). The state court may retain jurisdiction if the tribal court declines to take the case or if either parent objects. *Id.*

tribes to intervene, at any time, in any state proceeding involving foster care or parental rights.[240] There are similarities between a deployment rule for servicemembers and the Indian Child Welfare Act (ICWA). First, the ICWA established a national rule for certain child custody cases for a unique population within the United States. Second, by removing the state from these custody proceedings, the ICWA prevented state court judges from considering the special circumstances associated with being raised by Native American parents.

During the last fifty-plus years, the growth of national organizations, the efforts of the NCCUSL, relevant Supreme Court decisions and even federal legislation have all worked to establish national norms in family law, to include child custody. A deployment rule is in keeping with this trend towards standardization and would produce more consistent results in military child custody modification disputes.

VI. Policy Considerations: The Constitution, a Tradition of Special Protections for Servicemembers, and Parental Needs and Rights

Experts have asserted there is a "practical need to make compromises" when there are conflicting "protected interests" in child custody proceedings.[241] One academic pointed out that in these situations, the cases have been determined in accordance with the "priorities established legislatively or traditionally."[242] This nation's traditions and legislative priorities establish the legitimacy of a uniform child custody law that forbids courts from considering military deployments in modification proceedings as a matter of policy.

One has to look no further than the Constitution, which grants to Congress the power to "provide for the common defence"[243] and "raise and support" armed forces,[244] to find strong policy rationale for such a rule. Additionally, Congress has frequently provided special benefits based on military status similar to minorities, the disabled, and other protected groups.[245] These benefits have routinely been upheld by the courts.[246] Finally, the rights and needs of parents is a policy interest long recognized by the Supreme Court[247] and often missing from the current child custody legal methodology.[248] One scholar noted that there are situations where "public policy would have to take precedence" in child custody cases. [249] It is difficult to imagine a situation more deserving of such precedence than the deployment of the nation's servicemembers.

A. The Constitution Directs Congress to Maintain a Sufficient Fighting Force

Certainly, a critical policy consideration is Congress's constitutional power "[t]o raise and support armies . . . [and] [t]o provide and maintain a navy."[250] This power is exceptionally important now, after more than eight years of military deployments in support of Operation Enduring Freedom[251] and Operation Iraqi Freedom.[252] Military recruitment has suffered—quantitatively and qualitatively. In 2006 and 2007, the Army National Guard and the Air National Guard failed to meet their recruiting goals.[253] During this same period in the active component, the Army accepted approximately ten percent fewer high school diploma graduates than their benchmarks in order to meet its overall recruiting targets.[254] Further, in 2007, after missing recruiting quotas for the summer months, the Army only reached its goal of 80,000 recruits by introducing a $20,000.00 bonus in August 2007 for any person willing to "quick ship" and report to basic training within thirty days.[255] The Army Under Secretary of Defense for Personnel and Readiness proclaimed 2008 to be "the strongest recruiting year we've had since 2002" after the Army met its 80,000 Soldier recruitment goal by 517 Soldiers.[256] However, in order to reach this goal, the Army opened its own General Education Diploma completion center at Fort Jackson, South Carolina and relied on extensive bonuses and moral waivers for serious

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[240] § 101(c), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1911).

[241] MENTAL HEALTH ASPECTS OF CUSTODY LAW 70 (Robert J. Levy ed., 2005).

[242] *Id*.

[243] U.S. CONST. art. I, §8, cl. 1.

[244] *Id.* art. I, § 8, cl. 12.

[245] *See infra* Part VI.B.

[246] *See id.*

[247] *See infra* Part V.C.

[248] *See id.*

[249] BREEN, *supra* note 104, at 59.

[250] U.S. CONST. art. I, §8, cls. 12–13.

[251] *See Operation Enduring Freedom—Operations*, GLOBALSECURITY.ORG, *available at* http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm ("Operation Enduring Freedom began on 7 October 2001, four weeks after the 11 September 2001 terrorist attacks on America.").

[252] *See id.* (Operation Iraqi Freedom began on 19 March 2003).

[253] CHARLES A. HENNING & LAWRENCE KAPP, CONG. RESEARCH SERV., RECRUITING AND RETENTION: AN OVERVIEW OF FY 2006 AND FY 2007 RESULTS FOR ACTIVE AND RESERVE COMPONENT ENLISTED PERSONNEL, at CRS-6 (Feb. 2008).

[254] *Id*. at CRS-4.

[255] Josh White, *Army Exceeds Recruitment Goal For August by 528*, WASH. POST, Sept. 5, 2007, *available at* http://www.washington post.com/wp-dyn/content/article/2007/09/04/AR2007090401976.hmtl.

[256] News Release, U.S. Army, Army Exceed Recruiting Goal for Fiscal Year 2008 (Oct. 10, 2008), *available at* http://www.army.mil/-newsreleases/2008/10/13228-army-exceed-recruiting-goal-for-fiscal-year-2008/.

misconduct.[257] Over the last few years, the Army has doubled the maximum allowable number of Category IV recruits,[258] provided more personnel and money to its Recruiting Command, raised the maximum age for enlistees from thirty-five to forty-two, eased appearance standards, and doubled enlistment bonuses in an effort to maintain its force.[259]

Further, the strain on the military shows no sign of decreasing. After taking office, President Obama deployed an additional 21,000 servicemembers to Afghanistan.[260] In July 2009, Defense Secretary Gates authorized 22,000 additional active duty troops for a three-year period.[261] In December 2009, President Obama announced a 30,000 troop surge to Afghanistan in 2010.[262] The current operational pace warrants incentives and not disincentives—like the prospect of losing custody of their children—for servicemembers to remain in the military.

Congress's mandate has been the driving force behind numerous policies, from legislation on military recruiting at educational institutions[263] to bonuses to retain active duty personnel.[264] In 2002, Congress flexed this power in a way that impacted children by enacting the No Child Left Behind Act (NCLB).[265] Secondary schools that refused to provide student information to military recruiters were excluded from receiving funding under the act.[266] Additionally, high schools were required to provide recruiters with equal access to students as given to university representatives and potential employers.[267] Federal courts have rejected local attempts to challenge these policies. Recently, a California district court struck down local ordinances that prohibited military recruiting of any kind within city limits.[268] The court found that even if the local school districts chose not to receive funds under the NCLB, the ordinances were unconstitutional in violation of the Supremacy Clause based on Congress's declaration of "national policy in favor of recruiting persons for voluntary enlistment in the [A]rmed [F]orces."[269] The court further found that "the ordinances aim[ed] to frustrate that congressionally declared objective."[270]

The Solomon Amendment also faced a court challenge in *Rumsfeld v. Forum for Academic Institutional Rights*.[271] Universities argued that allowing military recruiters on their grounds violated campus policies prohibiting discrimination based on sexual preference and amounted to endorsement of the "Don't Ask, Don't Tell" policy.[272] They asserted that this was an infringement of their First Amendment speech rights.[273] However, the Supreme Court found that the Congressional interest in "rais[ing] and support[ing]" military forces[274] took precedent over university free speech rights, regardless of whether other means of achieving this interest were sufficient.[275]

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[257] *Id*.

[258] Category IV recruits are those that score in the 10th through the 30th percentile on the Armed Forces Qualification Test. *See* HENNING & KAPP, *supra* note 253, at CRS-4.

[259] *Id.* at CRS-2–3.

[260] Peter Baker & Mark Landler, *Obama Demands Afghan Reforms Produce Results*, N.Y. TIMES, Nov. 20, 2009, *available at* http://www.nytimes.com/2009/11/20/world/asia/20policy.html.

[261] Robert Gates, U.S. Sec'y of Def. & Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, News Briefing from the Pentagon (Jul. 20, 2009) (transcript available at http://www.defenselink.mil/transcripts.transcript.aspx?transcriptid=4447).

[262] Barack Obama, President of the United States, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009) (transcript available at http://www.whitehouse.gov /the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan).

[263] *See infra* Part VI.A.

[264] *See, e.g.*, PERSONNEL PLANS AND TRAINING OFFICE, JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, app. Personnel Policies sec. IV (1 Nov. 2009). This publication outlines a package of loan repayments, incentive pay and bonuses totaling $185,000 during a Judge Advocate's career. The publication states "The Judge Advocate Officer Incentive Program was created to facilitate the accessing and retaining of lawyers in the Regular Army." *Id*.

[265] An Act to Close the Achievement Gap with Accountability, Flexibility, and Choice, So That No Child is Left Behind (No Child Left Behind Act), Pub. L. No. 107-110, 115 Stat. 1425 (2002).

[266] *See* 20 U.S.C. § 7908(a)(1) (2006); *but cf. id.* § 7908(a)(2) (The No Child Left Behind Act does include a provision that enables parents to request the school withhold their child's information.).

[267] *See id.* § 7908(a)(3).

[268] United States v. City of Arcata, 2009 U.S. Dist. LEXIS 57555 (N.D. Cal. 2009) (The city ordinances stated, "No person who is employed by or an agent of the United States government shall, within the City of [Arcata or Eureka], in the execution of his or her job duties, recruit, initiate contact with for the purposes of recruiting, or promote the future enlistment of any person under the age of eighteen into any branch of the United States Armed Forces.").

[269] *Id*.

[270] *Id*. In the mid-nineties, Congress enacted aggressive legislation to ensure military recruiters and officer training programs were not excluded from college campuses. In 1994, the "Solomon Amendment" was passed as part of the NDAA for FY 1995. NDAA for FY 1995, Pub. L. No. 103–337, 108 Stat. 2776 (1994). The amendment denied certain funds to universities that refused military recruiters' access to students, student information, or campus facilities. *Id.* Then in the NDAA for FY 1996, Congress denied funding to universities with "anti-ROTC" policies. NDAA for FY 1996, Pub. L. No. 104–106, 110 Stat. 315 (1996) (as codified in 10 U.S.C. § 983 (2006)). The term "anti-ROTC" was substituted for "policy or practice (regardless of when implemented) that either prohibits, or in effect prevents" the establishment of ROTC programs or a student from attending a ROTC program at a neighboring university. *Id*.

[271] 547 U.S. 47 (2006).

[272] *Id*. at 50.

[273] *Id*.

[274] U.S. CONST. art. I, § 8, cl. 12.

[275] *Rumsfeld*, 547 U.S. at 67 ("Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces . . . The issue is not whether other means of raising an army and providing for a navy might be adequate . . . It suffices that the means chosen by Congress add to the effectiveness of military recruitment.").

Congressional and judicial activity in mandating military access to secondary schools and college campuses establishes a precedent for holding our national interest in a healthy fighting force over other competing interests, even when children are involved. Similarly here, Congress's interest in providing for the "common defence"[276] should carry significant weight against other interests in military custody cases, except when a child is in danger of imminent harm.

B. Special Protections for Servicemembers

In a Supreme Court decision upholding Congress's special grant of tax exempt status to veterans' organizations involved in "substantial lobbying," the Court stated "[v]eterans have been obliged to drop their own affairs to take up the burdens of the nation."[277] The Court goes on to explain that "[o]ur country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has 'always been deemed to be legitimate.'"[278] The Supreme Court's assertion is supported by numerous nationally-mandated protections relevant to establishing a deployment rule for child custody cases, such as the Uniform Services Employment and Reemployment Rights Act (USERRA) and the SCRA.[279]

1. Uniform Services Employment and Reemployment Rights Act of 1994 [280]

The purposes served by preventing courts from considering deployments in modification hearings match up well to the goals of the USERRA. The first purpose of USERRA is to promote military service by decreasing the repercussions of service on the member's civilian employment.[281] Similarly, a deployment rule would remove the disincentive to serve for fear of losing custody of one's children.

The second purpose of USERRA is to "minimize disruption in the lives of the service member, employers, co-workers and communities by providing for the prompt reemployment of a member upon completion of service."[282] Again, the purpose of the deployment rule is quite similar—to minimize the disruption in the lives of children, caregivers, custodial and noncustodial parents after a servicemember returns from deployment by providing for the smooth transition of children back to their custodial parents without disruptive and protracted modification proceedings.

Finally, USERRA forbids employers from discriminating against members of the military based on their service.[283] Likewise, a deployment rule would prevent state court judges from using military deployments as a method of distinguishing between fit parents in child custody modification proceedings.

The USERRA treats military members as a "special" or "protected" class similar to the status given to minorities or the disabled in Title VII of the Civil Rights Act and the American with Disabilities Act.[284] Additionally, the judicial and legislative branches have actively enforced USERRA benefits. The courts have "broadly construed [USERRA] in favor of its military beneficiaries."[285] Further, in 2008, Congress abolished complaint filing deadlines in the Veterans Benefits Improvement Act.[286]

Enforcement of USERRA places a burden on employers, who confront "business related hardships due to the absence of their reserve service member employees."[287] Nevertheless, the interest in maintaining a strong military has trumped the potential burden to employers. The USERRA gives servicemembers "special" status despite competing interests. Servicemembers should receive this same preferential treatment by law and by the courts in the matters of child custody.

2. Servicemembers Civil Relief Act of 2003[288]

The SCRA serves to "strengthen, and expedite the national defense"[289] by endowing servicemembers with

[276] U.S. CONST. art. I, §8, cl. 1.

[277] Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (citing Boone v. Lightner, 319 U.S. 561, 575 (1943)).

[278] *Id.* at 550 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

[279] *See infra* Part VI.B.

[280] 38 U.S.C. §§ 4301–4334 (2006).

[281] *See* Major Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 289–90 (2007).

[282] *Id.*

[283] *See id.*

[284] *See id*. at 294 (citing Lieutenant Colonel Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 56 (1999)). The Uniform Services Employment and Reemployment Rights Act (USERRA) provides for protection against discrimination based on protected status (military service), similar to Title VII's protection from discrimination based on race, sex, creed, color and national origin. The USERRA also contains the duty to make reasonable accommodations for an employee seeking reinstatement who has become disabled due to his or her military service, similar to the accommodations in the Americans with Disabilities Act. *Id.*

[285] Forte, *supra* note 281, at 295.

[286] *See* 38 U.S.C. § 4327(b) (2006).

[287] Forte, *supra* note 281, at 291.

[288] 50 U.S.C. app. § 501–596 (2006).

[289] *Id.* § 502(1).

special rights and privileges so that servicemembers may "devote their entire energy to the defense needs of the Nation."[290] Although the current version of the SCRA is only six years old, the goals are no different than the Soldiers' and Sailors' Civil Relief Acts (SSCRA) of 1918 and 1940.[291] Similar to USERRA, enforcement of the SCRA "may result in detriment to parties who are not in the military service."[292] The SCRA is evidence of the country's long-standing tradition of treating servicemembers special as a matter of policy. As the Supreme Court explained:

> The justification for providing a special benefit for veterans, as opposed to nonveterans, has been recognized throughout the history of our country. It merits restatement. First, the simple interest in expressing the majority's gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation, is itself an adequate justification for providing veterans with a tangible token of appreciation. Second, recognition of the fact that military service . . . justifies additional tangible benefits . . . to help overcome the adverse consequences of service.[293]

The SCRA includes provisions for certain eviction protections,[294] early termination of home and automobile leases,[295] and reduced interest rates on pre-service debts.[296] The SCRA protects all members of the Armed Forces, to include the Reserve Component, during periods of military service[297] and is applicable to every civil, judicial, or administrative matter held in any state or territory of the United States.[298] Significantly, the SCRA requires courts to stay any civil proceeding for at least ninety days upon receipt of an application that includes:

> (1) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear; [and]
>
> (2) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.[299]

Accordingly, as long as a servicemember meets the requirements of the provision above, courts have no flexibility in determining whether or not to grant a stay. This is exactly the type of mandatory provision which is necessary in the area of permanent child custody modification proceedings in order to protect servicemembers and maintain a robust volunteer military. The nation's warfighters should have peace of mind that when they are deployed to a combat zone or activated to fill a critical military need, that the price will not be the loss of their children.

3. Education & Immigration

Opponents of a deployment rule may argue that it is different than other servicemember protections because it also impacts military children.[300] However, our nation has previously adopted servicemember protections which also impact or benefit military children. For example, the immigration rights of military children are directly impacted by their parent's military service. Non-citizen servicemembers receive expedited citizenship processing based solely on their military status.[301] Children of non-citizens may apply time spent overseas pursuant to military orders towards their own residency requirements for naturalization.[302]

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[290] *Id*.

[291] *See* Sara Estrin, *The SCRA: Why and How this Act Applies to Child Custody Proceedings*, 27 LAW & INEQ. J. 211, 213 (Winter 2009) (discussing the history of the SCRA and its purposes beginning with the Civil War).

[292] Hunt v. UAW Local 1762, 2006 U.S. Dist. LEXIS 12673 (E.D. Ark. Mar. 7, 2006) (citing Craven v. Vought, 1041 Pa. Dist. & Cnty. Dec. LEXIS 239 (PA C.P. 1941)).

[293] Hooper. v. Bernalillo Cnty. Assessor, 472 U.S. 612, 626 (1985).

[294] 50 U.S.C. app. § 531 (2006).

[295] *Id*. § 535.

[296] *Id*. § 527.

[297] *Id*. § 511.

[298] *Id*. § 512(a)(1)–(3).

[299] *Id*. § 522(b)(2)(A)–(B).

[300] *But see supra* Part IV (explaining that a deployment rule is in the best interest of children and has a positive impact on military children).

[301] Lieutenant Colonel Jeffrey P. Sexton, *Noncitizen Servicemembers: Do They Really Have to Die to Become U.S. Citizens?*, ARMY LAW., Sept. 2008, at 50, 51–52 (noting that since July 2002, servicemembers have had the right to immediately naturalize without meeting the normal residency time requirements; military applications are all detailed to the Nebraska Service Center for more efficient processing; and the 2004 NDAA required that servicemembers have complete access to the naturalization process, to include taking the oath of citizenship, at overseas duty stations); *see also* Exec. Order No. 13,269, 67 C.F.R. 485, 287 (2002), *reprinted as amended in* 8 U.S.C. § 1440 (2006).

[302] 8 U.S.C. § 1433(d) (2006).

Additionally, the Post-9/11 Veterans Educational Assistance Act of 2008 (VEAA) was passed,[303] largely as a result of the increased sacrifices attributable to the Global War on Terror.[304] During the last twenty-five years, the Montgomery GI Bill (MGIB) has served as the predominant source of assistance to servicemembers seeking post-secondary education.[305] The VEAA significantly increases the benefits available under the MGIB,[306] and includes a provision that allows servicemembers to transfer VEAA benefits to their children.[307] These examples illustrate that often our nation provides the military with special protections, even when they impact children. Further, often these benefits explicitly extend to military children.

C. Parental Rights

Another important policy consideration is parental rights. As one scholar noted, a child's "protection should not be achieved at the expense of large losses in parental welfare rights." [308] This is precisely what happens when redeploying parents have their original custody jurisdiction reversed as a result of their service. A deployment rule reflects the assertions of many experts that some weight should be given to parental needs in custody determinations.[309] Further, this viewpoint is bolstered by the Supreme Court's long tradition of recognizing parenting as a "fundamental right" requiring significant due process prior to state action regarding these rights.[310] In *Troxel*, a mother contested a state court's award of increased visitation to her children's paternal grandparents against her wishes.[311] The judge's ruling was based on a Washington statute that allowed for such visitation so long as it was in the best interests of the children.[312] Ultimately, the U.S. Supreme Court found the statute "unconstitutionally infringe[d] on parents' fundamental right to rear their children."[313] In reaching its holding, the Court gave no consideration and included no discussion of the best interests of the children.[314] Indeed, the Court *only* considered the rights and interests of the adults involved.[315] The Supreme Court's holding in this case supports the proposition that there are important factors—other than what one state court judge determines is in the best interests of the child—that should be considered in child custody determinations.

Consideration of parental needs of deploying servicemembers, this country's extensive history of granting special protections to the military, and Congress's mandate to build and maintain armed forces all provide heavy weight to the argument that military deployments should be excluded as a factor from permanent child custody modification proceedings.

[303] Post-9/11 Veterans Educational Assistance Act of 2008 (VEAA), Pub. L. No. 110-252, 122 Stat. 2357 (codified at 38 U.S.C. §§ 101, 3301, 3311–3319, 3321–3324 (2006)).

[304] *See* Joseph B. Keillor, *Veterans at the Gates: Exploring the New GI Bill and its Transformative Possibilities*, 87 WASH. U. L. REV. 175, 177 (2009) (noting comments by Senator James Webb that only a "'very small percentage of the country'" serve in the military and that those "'serving since 9/11 [ought] to receive a GI Bill that is worthy of their service,'" and comments by the Dartmouth College President in support of the bill, "'[f]ew Americans realize that the young people who are serving their country in Iraq and Afghanistan will not receive the kind of assistance that their grandfathers received when they returned from World War II.'"); *see also* Ravi Shankar, *Recent Development: Post-9/11 Veterans Educational Assistance Act of 2008*, 46 HARV. J. ON LEGIS., 303, 303 (2009) (noting the Montgomery GI Bill was "intended as a small recruitment incentive during peacetime").

[305] Veterans' Educational Assistance Act of 1984 (MGIB), Pub. L. No. 98-525, 98 Stat. 2553 (1984) (codified at 38 U.S.C. §§ 3001–3002, 3011–3020, 3021–3023, 3031–3036 (2006)).

[306] *See, e.g.*, Benefit Comparison Chart (U.S. Dep't of Veterans Affairs), *available at* http://www.gibill.va.gov/gi_bill_info/CH33/Benefit_Comparison_Chart.htm (showing that in addition to direct tuition payments to a qualifying institution of higher learning, the VEAA provides a monthly housing allowance equal to the E-5 Basic Allowance for Housing rate, a yearly book stipend of up to $1000, expands eligibility to include service academy and ROTC graduates, eliminates MGIB requirement for enrollees to pay $100 per month for the first twelve months of their enlistment; decreases minimum requirement to receive some benefit from two years to ninety days of active duty service; increases period to use benefit from ten years to fifteen years); *but c.f.* Keillor, *supra* note 304, at 185–86 (noting instances where the MGIB is more advantageous, including those who wish to participate in correspondence and apprenticeships and those who reside in low-cost areas and are already attending school tuition free (due to scholarships or a state benefit)).

[307] 38 U.S.C. § 3319(c), (g)(2)(A)(i) (2006). Servicemembers who have completed six years of active duty service may transfer their education benefits to their children, so long as they agree to serve for an additional four years. Children may not use the benefits until the servicemember has completed ten years of active duty service.

[308] BREEN, *supra* note 104, at 61–62.

[309] Becker, *supra* note 194, at 172; Elster, *supra* note 165, at 16–21; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 499–503 (1984).

[310] *See* Troxel v. Granville, 530 U .S. 57, 65 (2000) (stating "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this court."); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the right to raise one's children has been deemed "essential to the orderly pursuit of happiness by free men."); May v. Anderson, 345 U.S. 528, 533 (1953) (stating that the "right to the care, custody, management and companionship of [a parent's] minor children . . . [are] far more precious . . . than property rights."); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[311] *Troxel*, 530 U.S. at 57.

[312] *See* WASH. REV. CODE § 26.10.160(3) (West 2009) (stating, "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.").

[313] *Troxel*, 530 U.S. at 57 (affirming the holding of *In re Troxel*, 940 P.2d 698 (Wash. App. Div. 1997)).

[314] Daniel W. Shuman, Troxel v. Granville *and the Boundaries of Therapeutic Jurisprudence*, 41 FAM. CT. REV. 67, 71 (2003); *see also Troxel*, 530 U.S. at 67–71.

[315] Shuman, *supra* note 314; *see also Troxel*, 530 U.S. at 67–71.

VII. Creating a Uniform Deployment Rule

A. What a Uniform Deployment Rule Must Include

A deployment rule that includes the following provisions is in the best interests of children, is consistent with establishment of national norms in family law, and is required as a matter of policy:

> (1) Neither deployments nor the immediate consequences of deployment, to include temporary disruption to children before, during, or after the period of deployment, may be considered in change of circumstance determinations and best interests analysis conducted during permanent child custody modification proceedings.
>
> (2) Temporary modification orders issued during a deployment terminate immediately upon a servicemember's return to their usual place of residence or permanent duty station and automatically revert back to the custody order in effect prior to the deployment.
>
> (3) Applicability. Paragraphs (1) and (2) are applicable to all servicemembers.
>
> (4) Definitions.
>
> a. "Servicemember" means any member serving in an active duty status in the Armed Forces of the United States, National Guard, or the Reserves.
>
> b. "Active duty" means service pursuant to United States Code Title 10 or full-time National Guard duty pursuant to United States Code Title 32 § 502(f)(2) for the purpose of homeland defense operations.
>
> c. "Deployment" means the temporary transfer of a servicemember serving in an active duty status to a location other than their normal place of duty or residence in support of a combat or military operation. This includes the mobilization of National Guard or Reserve servicemember to extended active duty status at CONUS installations in support of military operations. "Deployment" does not include National Guard or Reserve annual training periods.
>
> d. "Child custody order" means a court ordered or court approved agreement regarding the physical and residential placement of children, including orders regarding visitation.
>
> e. "Permanent child custody modification proceedings" means any judicial proceeding to change the custody order in effect prior to a military deployment. This includes proceedings that would change court orders regarding visitation rights of servicemembers that are not the primary physical custodians of their children. Temporary modification orders during the length of the deployment are authorized.

B. Best Method to Achieve a Uniform Deployment Rule

Servicemember protections and standardized family laws have been achieved through a variety of methods to include federal legislation as discussed in Part V of this article; however, a Uniform Military Child Custody Act promulgated by the ULC and adopted by the states is the best method for creating a deployment rule. This method ensures that the states are utilizing common definitions and will reconcile disparate rules regarding qualifying servicemembers and military deployments.[316] Consistent terminology and guidance to courts will make it more likely that similarly situated servicemembers achieve similar outcomes no matter their jurisdiction. Additionally, a uniform act is in compliance with the DoD opposition to federal legislation in this area[317] and prevents any possibility of federal-question jurisdiction, as raised by the ABA in its 2009 Resolution opposing a child custody amendment to the SCRA.[318] Finally, a uniform act has a high likelihood for full state adoption in a relatively short time period as evidenced by the widely-adopted Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and UIFSA.

1. Uniform Child Custody Jurisdiction Enforcement Act

Ultimately, it is the "state legislatures, not NCCUSL, that determine the need for uniformity."[319] However, the UCCJEA and its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA), show that when there is great diversity between the states, uniform acts are universally accepted and adopted by the states. The ULC submitted the UCCJA to the states for adoption in 1968 to synchronize state child custody jurisdiction statutes and prevent noncustodial parents from driving their children to a

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[316] *See supra* Part III.B.

[317] *See* DoD Statement, *supra* note 89.

[318] *See* Ventrelli & Guter, *supra* note 65.

[319] Sampson, *supra* note 211, at 674.

neighboring state in search of a court that would modify another state's custody order to their benefit.[320] The 1968 UCCJA was adopted by every state to include Washington D.C., and the U.S. Virgin Islands.[321] In 1997, the ULC updated the UCCJA and replaced it with the UCCJEA. The UCCJEA improves upon the UCCJA by establishing (1) that the child's state of residence is the appropriate jurisdiction to determine which state will have jurisdiction over initial child custody disputes; and (2) clarifying that the original state of child custody jurisdiction is the only state that may modify a previous custody order until both parents and the child no longer reside in the state.[322] Subsequently, all states have adopted the UCCJEA with the exceptions of Massachusetts and Vermont where the UCCJA is still law.[323] The UCCJEA was widely adopted because it was a vehicle for bringing "clearer standards" in child custody jurisdiction law and "uniform procedure to the law of interstate enforcement that [was] . . . producing inconsistent results."[324] A servicemember custody act which includes a deployment rule should be similarly accepted as a vehicle for providing definite standards to be applied in military child custody modification proceedings to prevent inconsistent outcomes for deploying servicemembers depending on the state of jurisdiction.

2. Uniform Interstate Family Support Act

The UIFSA reduces the possibility for multiple state support orders and makes procedures for initiating and enforcing support orders more efficient.[325] If a uniform act on military child custody does not enjoy the quick and widespread adoption of the UCCJEA, the UISFA provides a model to ensure state implementation. The UIFSA was originally promulgated in 1992 and was subsequently adopted by thirty-five states.[326] In 1996, the UIFSA was amended in response to requests for clarification by federally funded child support agencies.[327] Congress endorsed the amended act by conditioning federal aid for child support enforcement to state adoption of the UIFSA as amended within eighteen months.[328] Every state adopted the UIFSA within this timeline.[329] Similarly, in the case of military child custody modifications, there are federal interests in maintaining armed forces and providing consistent standards for servicemembers, which make a uniform act ripe for this type of federal endorsement.

VIII. Conclusion

> *A Soldier is the most-trusted profession in America. Americans have trust in you because you trust each other. No matter how difficult times are, those of us who love the Army must stick with it.*[330]

A uniform custody act for servicemembers that prohibits state courts from considering deployments as a factor in permanent child custody modification is in the best interests of children. Such a rule reduces the likelihood of emotional damage to children caused by continual relitigation of custody orders, removes some of the discretion which leads to judgments based on personal biases in custody proceedings, and increases children's access to military support services following a custodial parent's deployment. Additionally, a deployment rule is consistent with the trend towards national norms in family law, is in accordance with Congress's responsibility to maintain this country's Armed Forces and the nation's long history of granting special rights and protections to its servicemembers. Finally, using a uniform act as the vehicle to establish a deployment rule does not conflict with DoD or the ABA's opposition to amending the SCRA to establish this protection.

An Army officer, who recently returned from Afghanistan only to discover her ex-husband refused to give back her son stated, "We're asked to drop everything to go to combat . . . . Is it too much to ask that we have protection

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[320] ULC, Summary: Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), http://www/mccis;/org/Update/uniformact_summaries/uniformacts-s-uccjea.asp (last visited Mar. 1, 2010) [hereinafter UCCJEA Summary].

[321] NCCUSL, UCCJEA (with prefatory notes and comments) 1 (1997) [hereinafter UCCJEA Notes].

[322] UCCJEA art. 2, § 201; *id.* art. 2, § 202. The UCCJEA explicitly states that the state of original jurisdiction has "exclusive, continuing jurisdiction" until the child or both parents no longer reside in that state. *Id.* Whereas the UCCJA stated that a "legitimate exercise of jurisdiction must be honored by any other state until the basis for that exercise of jurisdiction no longer exists." UCCJEA Summary, *supra* note 320.

[323] ULC, A Few Facts About The UCCJEA, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Mar. 1, 2010).

[324] UCCJEA Notes, *supra* note 321.

[325] *See* John J. Sampson, *Uniform Interstate Family Support Act (2001) with Prefatory Notes and Comments* (UIFSA), 36 FAM. L.Q. 329, 342–46 (2002) (discussing the UIFSA's long arm jurisdiction and continuing, exclusive jurisdiction which help to maintain support proceedings in one state; also discussing UIFSA's provision enabling support proceedings to be initiated by administrative agencies instead of courts in interstate proceedings and allowing for direct enforcement of support orders through the employer).

[326] *Id.* at 337.

[327] *Id*.

[328] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, subtit. C, § 321, 110 Stat. 2105 (codified at 42 U.S.C.A. § 666 (West 2010)).

[329] Sampson, *supra* note 325, at 338.

[330] Ninth Sergeant Major of the Army Richard A. Kidd (July 1991–June 1995), Medical Training Resources, Quotes on The Army Values, MEDTRNG.COM, http://www.medtrng.com/janldrshipquotes.htm (last visited Mar. 1, 2010).

for when we come back to get our children back?"[331] This country needs a uniform act that includes a deployment rule, enabling the servicemembers of this nation's all-volunteer force to serve without fear that they will lose custody of their children.

[331] Michelle Miller, *Single Parents Who Battle in America's Wars Can Find Themselves Fighting for Custody of Their Children When They Return*, CBSNEWS.COM, Dec. 12, 2009, http://www.cbsnews.com/stories/2009/12/12/eveningnews/main5972251.shtml.

Appendix A

State Military Modification Statutes

State	Statute	Pending Bills
Alabama	No Deployment Statute	H.B. 332, Reg. Sess. (2006)
Alaska	No Deployment Statute	H.B. 264, 25th Leg., 1st Sess. (2007)
Arizona	ARIZ. REV. STAT. ANN. § 25-411 (West 2010)	
Arkansas	ARK. CODE ANN. § 9-13-110 (West 2010)	
California	CAL. FAM. CODE § 3047 (West 2010)	
Colorado	COLO. REV. STAT. ANN. § 14-10-131.3 (West 2010)	
Connecticut	No Deployment Statute	
Delaware	No Deployment Statute	H.B. 294, 144th Gen. Assemb. (2008)
Florida	FLA. STAT. ANN. § 61.13002 (West 2010)	
Georgia	No Deployment Statute	
Hawaii	No Deployment Statute	
Idaho	IDAHO CODE ANN. § 32-17 (West 2010)	
Illinois	No Deployment Statute	
Indiana	No Deployment Statute	
Iowa	IOWA CODE ANN. § 598.41C (West 2010)	
Kansas	KAN. STAT. ANN. § 60-1630 (West 2010)	
Kentucky	KY. REV. STAT. ANN. § 403.340 (West 2010)	
Louisiana	No Deployment Statute	
Maine	ME. REV. STAT. ANN. 37-B § 343 (West 2010)	
Maryland	MD. CODE ANN., FAM. LAW § 9-107 (West 2010)	
Massachusetts	No Deployment Statute	
Michigan	MICH. COMP. LAWS ANN. § 722-27 (West 2010)	
Minnesota	No Deployment Statute	H.F. 2494, 85th Leg. Sess. (2007)
Mississippi	MISS. CODE ANN. § 93-5-34 (West 2009)	
Missouri	MO. ANN. STAT. 452-412 (West 2009)	
Montana	MONT. CODE ANN. § 40-4-212 (2009)	
Nebraska	NEB. REV. STAT. ANN. § 42-364 (2009)	
Nevada	No Deployment Statute	
New Hampshire	No Deployment Statute	
New Jersey	No Deployment Statute	S.2910, 2006-2007 Leg. Sess.
New Mexico	No Deployment Statute	
New York	N.Y. DOM. REL. § 75-l (West 2009)	
North Carolina	N.C. GEN. STAT. ANN. § 50-13.7A (West 2009)	

North Dakota	N.D. CENT. CODE § 14-09-06.6 (2009)	
Ohio	No Deployment Statute	H.B. 503, 126th Gen. Assemb. (2006)
Oklahoma	OKLA. STAT. ANN. TIT. 43, §112 (West 2009)	
Oregon	OR. REV. STAT. ANN. § 107.169 (West 2009)	
Pennsylvania	51 PA. STAT. ANN. § 4109 (West 2009)	
Rhode Island	No Deployment Statute	
South Carolina	S.C. ANN. §§ 63-5-910, 63-5-920 (West 2009)	
South Dakota	S.D. CODIFIED LAWS § 33-8-10 (West 2009)	
Tennessee	TENN. CODE ANN. § 36-6-113 (West 2009)	
Texas	TEX. FAM. CODE ANN. §§ 153.702, 156.102 (West 2009)	
Utah	UTAH CODE ANN. § 30-3-40 (West 2009)	
Vermont	No Deployment Statute	
Virginia	VA. CODE ANN. § 20-124.8 (West 2009)	
Washington	WASH. REV. CODE ANN. §§ 26.09.010, 26.09.260 (West 2009)	
Washington D.C.	No Deployment Statute	
West Virginia	W. VA. CODE ANN. § 48-9-404 (West 2009)	
Wisconsin	WIS. STAT. ANN. § 767.451 (West 2009)	
Wyoming	No Deployment Statute	

Appendix B

Department of Defense Statement on Child Custody Legislation[333]

DEPARTMENT OF DEFENSE POSITION

The DoD opposes efforts to create Federal child custody legislation affecting Service members. At least 30 States provide some level of statutory child custody protection for Service members and their families. These States' laws understandably vary to some degree because they are tied to substantive and procedural differences found in their body of family law. Also, many of these variances reflect different societal dimensions found in different communities across the country. By encouraging each State to address the issues within the context of their already-existing body of State law, these cases will proceed quicker and more smoothly with less likelihood of lengthy appellate review. We strongly believe that Federal legislation in this area of the law, which has historically and almost exclusively been handled by the States, would be counterproductive.

The Department applauds the efforts by those States that have passed legislation to the Department and encourages the other States to consider similar legislation.

Meanwhile, the Department is itself taking, or will take, a number of steps to further protect our Service members:

First, the Secretary of Defense has personally written the governors of the States that have yet to pass legislation addressing the special considerations of child custody cases in the military to urge them to pass such legislation.

Second, DoD has included concerns over child custody matters on the list of the Department's 10 Key Quality of Life Issues, and these are now being presented to governors, State legislators and other State officials. On September 22, 2009, a representative from the Department's Office of Legal Policy and an expert in military child custody met with each of the Department's ten Regional State Liaisons and discussed military child custody issues. These liaisons are now reaching out to State officials whose legislatures have not addressed military custody concerns to encourage them to act.

Third, DoD will ask the military service Judge Advocates General and the Staff Judge Advocate to the Commandant to ensure they are doing all they can to work with the American Bar Association (ABA), and State Bar leaders to publicize, emphasize, and support the ABA's national pro bono project, as well as pro-bono initiatives in the States. These pro-bono efforts can provide our Service members access to free legal representation from some of the country's most accomplished child custody practitioners. Fourth, DoD is engaged with the military services to update and standardize Family Care Plans across the services. These plans are developed to ensure that families are taken care of during absences due to drills, annual training, mobilization, and deployment. They include provision for long-term and short-term care of children. The Department recognizes that improvements to its Family Care Plan guidance can address many of the custody issues that

[333] DoD Statement, *supra* note 89. This statement was cut and pasted into this article directly from the document available at the CBS evening news website. The first paragraph is highlighted exactly as it was highlighted in the document on the website.

could otherwise result in litigation after deployment. By clarifying those who require a Family Care Plan and emphasizing the importance of custody negotiations with the noncustodial parent early in the process—before deployment—the issues that most often give rise to litigation can largely by avoided. The Department is convinced that these efforts can resolve far more issues in favor of our Service members than can new Federal legislation.