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# Military Child Custody Disputes: The Need for Federal Encouragement for the States' Adoption of the Deployed Parents Custody and Visitation Act

Amy C. Gromek\*

## I. Introduction

When Michael Grantham, the primary physical custodian of his two children pursuant to a decree of dissolution, was called to active duty with the Iowa National Guard, he arranged for his children to reside with his mother.<sup>1</sup> The children's mother then filed a petition seeking permanent physical care of the children and temporary custody of the children pendente lite while Michael was away for service.<sup>2</sup> Michael requested a stay of the custody proceedings under the applicable law until he returned to civilian status, but the district court denied the request.<sup>3</sup> Ultimately, with Michael in attendance,<sup>3</sup> the district court ruled that permanent physical care of the children should be changed from Michael to his ex-wife.<sup>4</sup> The court of appeals reversed and emphasized how “[a]s a result of the judgment of the district court, a soldier, who answered our Nations call to defend, lost physical care of his children because he was ‘obliged to drop [his] own affairs to take up the burdens of the nation.’”<sup>5</sup> The Iowa Supreme Court, however, reinstated the district court's ruling, agreeing that circumstances had significantly changed since the entry of the dissolution decree and the children's mother was presently the most effective parent to both children.<sup>6</sup>

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<sup>1</sup> In re Marriage of Grantham, 698 N.W.2d 140, 142–43 (Iowa 2005).

<sup>2</sup> *Id.* at 143.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> In re Marriage of Grantham, 695 N.W.2d 43 (Iowa Ct. App. 2004).

<sup>6</sup> In re Marriage of Grantham, 698 N.W.2d 140, 146–47 (Iowa 2005).

In February 2003, Eva Crouch, a member of the Kentucky National Guard, was ordered to report to active federal duty within 72 hours.<sup>7</sup> In this short time frame, she made arrangements to transfer physical custody of her child to her ex-husband for the duration of her active deployment—an arrangement that both parties intended to be temporary.<sup>8</sup> Eva was mobilized and deployed to Fort Knox, Kentucky for one year.<sup>9</sup> In 2004, she contacted her ex-husband to arrange for reassuming physical custody of their child.<sup>10</sup> Her ex-husband, however, refused to transfer physical custody without a court order.<sup>11</sup> The trial court instead entered an order finding that it was in the child’s best interests to remain with the father.<sup>12</sup> After two years of litigation and about \$25,000 in legal fees,<sup>13</sup> Eva regained custody of her child when the Supreme Court of Kentucky held that the order made prior to Eva Crouch’s deployment was temporary and, therefore, not a modification of the prior permanent custody order.<sup>14</sup> In a subsequent comment to the media, Eva said, “I’d have spent a million [dollars]. My child was my life ... I go serve my country, and I come back and have to go through hell and high water.”<sup>15</sup>

These cases, along with several other stories documented in the news in recent years,<sup>16</sup> portray how child custody disputes involving members of active military service

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<sup>7</sup> Crouch v. Crouch, 201 S.W.3d 463, 464 (Ky. 2006).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Deployed Troops Fight for Lost Custody of Kids*, NBCNEWS.COM, May 5, 2007, <http://www.msnbc.msn.com/id/18506417/>.

<sup>14</sup> Crouch, 201 S.W.3d at 464–65.

<sup>15</sup> *Deployed Troops Fight for Lost Custody of Kids*, *supra* note 13.

<sup>16</sup> *See id.*; *see also* Michelle Miller, *Military Parents Fight for Custody at Home*, CBSNEWS.COM, Dec. 16, 2009, [http://www.cbsnews.com/2100-18563\\_162-5972251.html](http://www.cbsnews.com/2100-18563_162-5972251.html); *see also* David Kocieniewski, *Soldier’s Service Leads to a Custody Battle at Home*, N.Y. TIMES, August 31, 2009, [http://www.nytimes.com/2009/09/01/nyregion/01guard.html?pagewanted=all.](http://www.nytimes.com/2009/09/01/nyregion/01guard.html?pagewanted=all;); *see also* Ann Scott Tyson,

have the potential to become unpleasant and costly by-products of active military duty. Since October 2001, there have been unprecedented levels of deployment and increased reliance on Reserve and Guard members.<sup>17</sup> With the United States' ongoing involvement in conflicts in Afghanistan and Iraq, the inadequacies of legal protections for military servicemembers who are single and divorced, many of whom maintain physical custody of their children prior to deployment, have come to the forefront of discussion and political debate.<sup>18</sup> While some sources have drawn attention to the stories of servicemember-mothers involved in custody battles as a result of military deployment,<sup>19</sup> the problem is one that transcends gender lines. In effect, "single parents in uniform fight a war on two fronts: For the nation they are sworn to defend, and for the children they are losing because of that duty."<sup>20</sup>

The federal Servicemembers Civil Relief Act ("SCRA") provides procedural protections for servicemembers, such as staying child custody proceedings for at least 90 days if the active-duty servicemember meets particular conditions,<sup>21</sup> but it does not address the impact that a servicemember's deployment may have on future custody determinations. In the past several years, many states have implemented laws designed to protect servicemembers in child custody and visitation cases, but these laws are not consistent

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*Deployment Being Used Against Parents in Child Custody Battles*, THE WASHINGTON POST, Dec. 30, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/29/AR2008122902611.html>.

<sup>17</sup> U.S. DEP'T OF DEF., REPORT ON THE IMPACT OF DEPLOYMENT OF MEMBERS OF THE ARMED FORCES ON THEIR DEPENDENT CHILDREN 1 (2010), available at [http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Reports/Report\\_to\\_Congress\\_on\\_Impact\\_of\\_Deployment\\_on\\_Military\\_Children.pdf](http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Reports/Report_to_Congress_on_Impact_of_Deployment_on_Military_Children.pdf).

<sup>18</sup> *Senators Still Skeptical of Federal Child Custody Protections*, REUTERS, June 25, 2012, available at 2012 WLNR 14268077.

<sup>19</sup> Rachelle L. Paquin, Note, *Defining the "Fit": The Impact of Gender and Servicemember Status on Child Custody Determinations*, 14 J. GENDER RACE & JUST. 533, 574–75 (2011).

<sup>20</sup> *Deployed Troops Fight for Lost Custody of Kids*, *supra* note 13.

<sup>21</sup> See generally Servicemembers Civil Relief Act, Pub. L. No. 108–189, 177 Stat. 2835 (2003) (codified as amended at 50 U.S.C. app. §§ 501–594 (2006)).

across the country.<sup>22</sup> In July 2012, the Uniform Law Commission<sup>23</sup> (“ULC”) granted final approval to the Deployed Parents Custody and Visitation Act, which state legislatures could adopt to standardize custody rights for deployed servicemembers.<sup>24</sup> Since 2008, however, proponents of federal legislation have proposed that Congress should amend the SCRA to provide greater legal protection for servicemembers in child custody disputes.<sup>25</sup>

In Parts II and III, this Comment will examine military policy regarding single-parent service and state-court efforts to address child custody issues for single-parent servicemembers. Part IV will look to the current Servicemembers Civil Relief Act and Congressman Michael Turner’s proposed amendments to the federal legislation. Part V will analyze the benefits and shortcomings of the ULC’s Deployed Parents Custody and Visitation Act. Finally, Part VI will argue that Congress should defer to the approach proposed by the Deployed Parents Custody and Visitation Act but that Congress should make funding for welfare contingent on states’ adoption of the uniform law in order to encourage its adoption in all states.

## II. Background and Military Policy Regarding Single-Parent Service

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<sup>22</sup> *Deployed Parents Custody and Visitation Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Deployed%20Parents%20Custody%20and%20Visitation%20Act> (last visited Oct. 27, 2012).

<sup>23</sup> The ULC is a group of practicing lawyers, judges, legislators and legislative staff, and law professors who have been appointed by state governments to research, draft, and promote enactment of uniform state laws. UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited February 13, 2013).

<sup>24</sup> *Panel: Improve Child Custody Rules for Military*, USATODAY.COM, July 18, 2012, <http://www.usatoday.com/news/military/story/2012-07-18/military-child-custody/56294984/1>.

<sup>25</sup> Letter from Michael R. Turner and Robert Andrews, Members of Congress, to Leon Panetta, U.S. Sec’y of Defense (Mar. 29, 2012), available at [http://turner.house.gov/uploadedfiles/hasc\\_child\\_custody\\_letter\\_to\\_secretary\\_panetta\\_-\\_3-29-12.pdf](http://turner.house.gov/uploadedfiles/hasc_child_custody_letter_to_secretary_panetta_-_3-29-12.pdf); *see also* *Senators Still Skeptical of Federal Child Custody Protections*, *supra* note 18.

In addressing military child custody matters, it is first necessary to consider the military's underlying policies and regulations concerning single-parent service. Department of Defense Instruction 1304.26 provides in pertinent part: "The Military Services may not enlist married individuals with more than two dependents under the age of 18 *or unmarried individuals with custody of any dependents under the age of 18.*"<sup>26</sup> The Air Force Recruiting Service has specifically emphasized that an unmarried applicant who has physical or legal custody of a family member incapable of self-care "does not have the flexibility required to perform worldwide duty, short-notice TDY, remote tours, and varied duty hours."<sup>27</sup> As such, an applicant falling into this category is ineligible for enlistment unless permanent physical and legal custody has been transferred by court order.<sup>28</sup>

Although this enlistment restriction exists across all branches of the armed services, married individuals who are already serving in the military sometimes become single parents, by way of divorce or death of spouse. As of 2009, there were a total of 74,754 single parent active-duty members in the Army, Navy, Marine Corps, and Air Force combined.<sup>29</sup> There were 77,181 single parents serving in the Selected Reserves, which includes Guard components as well as the Reserve components and the Coast Guard Reserve.<sup>30</sup> Out of the servicemembers who deployed to Operation Enduring

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<sup>26</sup> U.S. DEP'T OF DEF., INSTRUCTION NO. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION 8 (2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/130426p.pdf> (emphasis added). *See also* U.S. Dep't of Army, Reg. 601-210, Active and Reserve Components Enlistment Program 11 (2011); U.S. Dep't of Navy, MCO P1100.72C, Military Personnel Procurement Manual, Volume 2: Enlisted Procurement 3-37 (2004); Air Force Recruiting Service, Instruction 36-2001, Recruiting Procedures for the Air Force 49 (2012).

<sup>27</sup> Air Force Recruiting Service, Instruction 36-2001, *supra* note 26.

<sup>28</sup> *Id.*

<sup>29</sup> U.S. DEP'T OF DEF., DEMOGRAPHICS 2009: PROFILE OF THE MILITARY COMMUNITY 64 (2009), available at [http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/QOL%20Resources/Reports/2009\\_Demographics\\_Report.pdf](http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/QOL%20Resources/Reports/2009_Demographics_Report.pdf).

<sup>30</sup> *Id.* at 128.

Freedom/Operation Iraqi Freedom, single parents make up 17 percent, according to 2010 data.<sup>31</sup>

Considering the practical difficulties presented when military servicemembers are responsible for the care of dependents, the military has implemented ways to standardize the family-care requirements for all of the military services. Department of Defense Instruction Number 1342.19 provides that “[a]ll Service members . . . shall plan for contingencies in the care and support of dependent family members, and shall develop and submit a family care plan within the timeliness set forth in this Instruction.”<sup>32</sup> The Army, for example, emphasizes how plans must be made “to ensure Family members are properly and adequately cared for when the Soldier is deployed, on [temporary duty], or otherwise not available due to military requirements.”<sup>33</sup> Despite the necessity of these plans for single military parents, the Family Care Plan (“FCP”) as mandated under Instruction Number 1342.19 is notably not a legal document that can change a court-mandated custodial arrangement.<sup>34</sup> The FCP’s “sole purpose” is to document for the military how soldiers plan to provide for the care of their family members when military duties call.<sup>35</sup> The FCP must include proof that the servicemember has obtained consent to the planned designation of guardianship from all parties with a legal interest in the custody and care of the minor child,

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<sup>31</sup> REPORT ON THE IMPACT OF DEPLOYMENT OF MEMBERS OF THE ARMED FORCES ON THEIR DEPENDENT CHILDREN, *supra* note 17, at 13. Notably, the Department of Defense would likely never extend Instruction 1304.26 to cover servicemember parents who become single by divorce or death of a spouse because, along with conveying a severe lack of sensitivity, this measure would surely mean the actual loss of a considerable number of current servicemembers.

<sup>32</sup> U.S. DEP’T OF DEF., INSTRUCTION NO. 1342.19, FAMILY CARE PLANS 2 (2010), available at <http://www.dtic.mil/whs/directives/corres/pdf/134219p.pdf>.

<sup>33</sup> U.S. Dep’t of Army, Reg. 600-20, Army Command Policy 5-5 (2008).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

or, alternatively, “proof that *reasonable efforts* have been made to obtain consent to such designation.”<sup>36</sup>

In sum, because a FCP lacks overall legal enforceability, it is of little assistance if a custody dispute erupts between a deployed servicemember, who created the plan, and a non-military party with legally enforceable custody rights.<sup>37</sup> If the non-military, non-custodial natural or adoptive parent challenges the FCP and seeks to modify the custody status of the child in court, the FCP has no legally binding effect. Some states have made efforts to provide greater legal protections for the rights of deployed military personnel in the child custody context.<sup>38</sup> Part III will explore these efforts and the associated problems and shortcomings.

### III. State-Court Efforts to Address Child Custody Issues for Returning Servicemembers

Single-parent servicemembers who arrange for temporary custody of their children, often through FCPs, and plan to resume physical custody following deployment face certain legal complications. On the most basic level, there is a tension at times between state family law’s “best interests of the child” standard and the servicemember’s interest in resuming custody of his or her child.

#### A. “Best Interests of the Child” Framework and Custody Modification

In 2000, the Supreme Court reaffirmed that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions

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<sup>36</sup> *Id.* (emphasis added).

<sup>37</sup> Shawn P. Ayotte, Note, *Protecting Servicemembers from Unfair Custody Decisions While Preserving the Child’s Best Interests*, 45 NEW ENG. L. REV. 655, 662 (2011).

<sup>38</sup> See Jeffrey P. Sexton & Jonathan Brent, *Child Custody and Deployments: The States Step in to Fill the SCRA Gap*, ARMY LAW, December 2008, at 9, 11.



concerning the care, custody, and control of their children.<sup>39</sup> In general, courts aim to make decisions in accordance with the best interest of the child while remaining within constitutional parameters.<sup>40</sup> Courts will typically look to a variety of factors to determine what is in the child’s best interest when making a custody determination.<sup>41</sup> The Uniform Marriage and Divorce Act, though enacted in only a handful of states, codifies factors that are commonly relied upon in most jurisdictions.<sup>42</sup> These factors include, but are not limited to, the following: (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school, and community and (5) the mental and physical health of all individuals involved.<sup>43</sup>

Most courts will modify a custody decision only if there is a “substantial change in circumstances.”<sup>44</sup> States vary, however, on the specific requirements to obtain a hearing and the standards used for modification.<sup>45</sup> For example, the Supreme Court of Florida has held that a two-part substantial change test applies to modification of all child custody agreements: the movant seeking modification of custody must show both that the circumstances have substantially and materially changed since the original custody

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<sup>39</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“liberty” under the Due Process Clause includes the right of the individual to “establish a home and bring up children”), *and Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534-35 (1925) (discussing “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

<sup>40</sup> WALTER WADLINGTON AND RAYMOND C. O’BRIEN, *FAMILY LAW IN PERSPECTIVE* 7 (3d ed. 2012).

<sup>41</sup> JUDITH AREEN ET. AL., *FAMILY LAW CASES AND MATERIALS* 768 (6th ed. 2012).

<sup>42</sup> *See* Unif. Marriage & Divorce Act § 402 (amended 1973).

<sup>43</sup> *Id.*

<sup>44</sup> JUDITH AREEN ET. AL., *supra* note 41, at 948.

<sup>45</sup> LINDA ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 17:1 (Westlaw 2012).

determination and that the child's best interests justify changing custody.<sup>46</sup> The substantial change must be one that was not reasonably contemplated at the time of the original judgment.<sup>47</sup> In Alaska, an award of custody of a child or visitation with the child “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.”<sup>48</sup>

One risk associated with these standards in the context of military servicemember custody disputes is that “the court will view the servicemember’s military profession, and the possibility of future deployments, as a detrimental factor when determining what custody solution would be in the ‘best interest’ of the child.”<sup>49</sup> This can be attributed to the emphasis courts generally place on assuring continuity for the child,<sup>50</sup> and the fact that military service can involve mobilization and deployment that disrupts continuity and stability.<sup>51</sup> In recent years, state legislatures have been enacting child custody protections for servicemembers,<sup>52</sup> some of which aim to address this potential risk and to provide greater protection for servicemembers’ interests.<sup>53</sup> The ULC, however, has identified several persistent problems.<sup>54</sup>

## B. State variations in Child Custody Laws For Servicemembers

The ULC has pointed out significant variation in states’ approaches to custody issues raised by a parent’s deployment, including how some courts will grant custody to the other

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<sup>46</sup> *Wade v. Hirschman*, 903 So. 2d 928, 932 (Fla. 2005).

<sup>47</sup> *Id.*

<sup>48</sup> ALASKA STAT. ANN. § 25.20.110 (West 2012).

<sup>49</sup> *Sexton & Brent*, *supra* note 38, at 9.

<sup>50</sup> JUDITH AREEN ET. AL., *supra* note 41, at 769.

<sup>51</sup> *See generally* Ayotte, *supra* note 37, at 672.

<sup>52</sup> Christopher Missick, Comment, *Child Custody Protections in the Servicemembers Civil Relief Act: Congress Acts to Protect Parents Serving in the Armed Forces*, 29 WHITTIER L. REV. 857, 875 (2008).

<sup>53</sup> *See infra* notes 59, 60, 64 and accompanying text.

<sup>54</sup> *See Deployed Parents Custody and Visitation Act Summary*, *supra* note 22.

legal parent for the duration of the deployment, sometimes over the wishes of the deploying parent, while other courts will grant custody to the person that the servicemember wishes to designate as custodian (i.e. a grandparent).<sup>55</sup> Importantly, the ULC also notes that some courts will not overturn a “temporary” custody arrangement granted to the non-deployed parent when the servicemember returns “unless the child is shown to be significantly worse off living with the non-deployed natural parent.”<sup>56</sup> This standard, of course, presents extreme difficulties for most deployed parents to satisfy. This is because, as one scholar put it, “The soldier is at a disadvantage in a custody suit brought before the court either during or after deployment, because the other parent has often gained an advantage by being the custodial parent during the deployment.”<sup>57</sup> The non-servicemember parent “is the last person to have created and maintained the child’s home and community connections.”<sup>58</sup>

A look at the laws of just a few states demonstrates the inconsistency among their laws on this complex issue. For example, Kentucky’s statute states that any court-ordered modification of a child custody decree based, in whole or in part, on the active duty of a parent deployed outside the United States or federal active duty shall be temporary and *revert back* to the previous child custody decree at the end of the deployment or federal active duty, as appropriate.<sup>59</sup> Noticeably, the statute does not address or prohibit deployment itself as a consideration during a best interests determination.

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<sup>55</sup> *Deployed Parents Custody and Visitation Act Summary*, *supra* note 22.

<sup>56</sup> *Id.*

<sup>57</sup> Darrell Baughn, *Divorce & Deployment: Representing the Military Servicemember*, FAM. ADVOC., Fall 2005, at 8, 12.

<sup>58</sup> Ayotte, *supra* note 37, at 672.

<sup>59</sup> KY. REV. STAT. ANN. § 403.340(5)(2) (West 2012) (emphasis added).

By contrast, Arizona’s statute covers similar, yet additional, ground.<sup>60</sup> According to the statute, if a parent with whom the child resides a majority of the time is deployed, a court shall not enter a final order modifying a preexisting order until ninety days after the deployment ends, unless a modification is agreed to by the deploying parent.<sup>61</sup> Moreover, a court “shall not consider a parent's absence caused by deployment or mobilization or the potential for future deployment or mobilization *as the sole factor* supporting a real, substantial and unanticipated change in circumstances pursuant to this section.”<sup>62</sup> All temporary modification orders must include a specific transition schedule to facilitate a return to the pre-deployment order within ten days after the deployment ends, however, “taking into consideration the child's best interests.”<sup>63</sup>

South Dakota’s statute<sup>64</sup> is comprehensive. There is a noticeable difference between its provision regarding assessment of past or future deployment in considering a substantial and material change of circumstances and Arizona’s provision. Under the South Dakota statute, a servicemember ordered to deployment, who is the physical custodian of a minor, may delegate by a power of attorney to another person for a period of one year or less any of the powers regarding care and custody of the minor child.<sup>65</sup> Notably, “[n]either the execution of such a power of attorney pursuant to this section, *nor* the deployment itself, *may be considered a factor* in considering a substantial and material change of circumstances, nor a factor in a best interest of the child determination for purposes of

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<sup>60</sup> ARIZ. REV. STAT. ANN. § 25-411 (2012) (West).

<sup>61</sup> § 25-411(B).

<sup>62</sup> § 25-411(C) (emphasis added).

<sup>63</sup> § 25-411(H).

<sup>64</sup> S.D. CODIFIED LAWS § 33-6-10 (2012).

<sup>65</sup> § 33-6-10.

permanent child custody modification proceedings.”<sup>66</sup> This contrasts with Arizona’s statute, which states that a court shall not consider absence caused by deployment or the potential for future deployment as the *sole* factor supporting a real, substantial, and unanticipated change in circumstances.<sup>67</sup> South Dakota’s statute also includes a provision for an automatic stay of all proceedings seeking a permanent change in custody of a minor child where the parent with physical custody is a servicemember called to active duty for deployment.<sup>68</sup> Such a stay shall continue for the period of service due to deployment, unless waived in writing by the servicemember.<sup>69</sup> Furthermore, any temporary order modifying physical custody of the child automatically terminates when the servicemember returns from deployment and reverts back to the custody status in effect prior to the deployment.<sup>70</sup> If, however, upon the servicemember’s return from the deployment either the servicemember or child “exhibits a substantial and material change in circumstances which adversely affects the servicemember’s ability to adequately care for the child, the best interests of the child shall be determinative.”<sup>71</sup> Thus, while Kentucky and South Dakota both use the specific language “revert back,” South Dakota’s statute provides much more detail on when this should happen, whereas Kentucky simply states “as appropriate.”<sup>72</sup>

As just these three state statutes show, there is considerable variation among state attempts to provide guidance and, in some ways, greater protections for servicemembers who prior to deployment maintained physical custody of their minor children. Some states,

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<sup>66</sup> § 33-6-10 (emphasis added).

<sup>67</sup> See *supra* note 62 and accompanying text.

<sup>68</sup> § 33-6-10.

<sup>69</sup> § 33-6-10.

<sup>70</sup> § 33-6-10.

<sup>71</sup> § 33-6-10.

<sup>72</sup> See *supra* note 59 and accompanying text.

the ULC reports, have not even adopted any statutes on this issue.<sup>73</sup> Overall, the variation in the states creates a “patchwork of laws,”<sup>74</sup> which, as the following Parts of this Comment will discuss, is highly problematic.

#### IV. The SCRA and the Turner Amendment: A Federal Attempt to Strengthen Protections for Military Servicemembers

At the state level, there exists a serious lack in uniformity of legislation that addresses custody matters for single-parent servicemembers. This lack of uniformity in custody laws specifically addressing servicemembers is problematic due to the unique nature of military work. Military service is not only especially mobile in nature, but it is also necessary for national protection. Arguably, greater predictability and uniformity is needed for servicemember child custody laws because the states’ variant laws make it “difficult for [military] parents to resolve these important issues quickly and fairly [and] hurt[] the ability of deploying parents to serve the country effectively [.]”<sup>75</sup> Unfortunately, current federal law also proves inadequate to fully address servicemembers’ custody interests.

##### A. Problems with the Current SCRA

The Servicemembers Civil Relief Act (“SCRA”) is federal legislation enacted in 2003 aimed at protecting certain legal rights of United States servicemembers.<sup>76</sup> Congress passed the SCRA to clarify and revise the Soldiers’ and Sailors’ Civil Relief Act

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<sup>73</sup> *Deployed Parents Custody and Visitation Act Summary*, *supra* note 22.

<sup>74</sup> Missick, *supra* note 52, at 875.

<sup>75</sup> *Why States Should Adopt the Uniform Deployed Parents Custody and Visitation Act*, UNIFORM LAW COMMISSION, [http://www.uniformlaws.org/Shared/Docs/Deployed\\_Parents/UDPCVA%20Why%20States\(1\).pdf](http://www.uniformlaws.org/Shared/Docs/Deployed_Parents/UDPCVA%20Why%20States(1).pdf) (last visited February 15, 2013).

<sup>76</sup> See Servicemembers Civil Relief Act, Pub. L. No. 108-189, 177 Stat. 2835 (2003) (codified as amended at 50 U.S.C. app. §§ 501–594 (2006)).

“SSCRA”).<sup>77</sup> The SSCRA essentially “gave trial courts discretion to grant relief when a litigant’s military status would materially affect the servicemember’s ability to protect his or her legal rights or comply with the obligation in question.”<sup>78</sup> Under the current SCRA, the court shall, upon application by the servicemember, stay any civil action or proceeding, including any child custody proceeding, for a period of not less than 90 days if the particular application conditions are met.<sup>79</sup> An application must include a letter or other communication stating the manner in which current military duty requirements materially affect the servicemember’s ability to appear and a letter or communication from the servicemember’s commanding officer stating that the servicemember’s current military duty prevents appearance.<sup>80</sup> One of the stated purposes of the SCRA is “to provide for, strengthen, and expedite the national defense through protection extended by [the] Act to servicemembers . . . to enable such persons to devote their entire energy to the defense needs of the Nation.”<sup>81</sup> The SCRA’s protections apply to active-duty members of the Army, Navy, Air Force, Marine Corps, and Coast Guard as well as National Guard members called to active service.<sup>82</sup>

Despite the procedural protection the SCRA provides for servicemembers, scholars have identified several pitfalls of the SCRA in its current state. First, the SCRA does not

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<sup>77</sup> Paquin, *supra* note 19, at 545.

<sup>78</sup> Sara Estrin, Article, *The Servicemembers Civil Relief Act: Why and How This Act Applies to Child Custody Proceedings*, 27 LAW & INEQ. 211, 214 (2009), citing Mark S. Cohen, *Entitlement to a Stay or Default Judgment Relief Under the Soldiers’ and Sailors’ Civil Relief Act*, 35 AM. JUR. PROOF OF FACTS 3D 323, 333 (2007).

<sup>79</sup> § 522. Notably, in 2008 Section 202(a) of the SCRA (now 50 U.S.C. App. § 522(a)) was amended by inserting, “including any child custody proceeding,” after what had originally said only “civil action or proceeding.” Similarly, Section 201(a) of the SCRA (now 50 U.S.C. App. § 521(a)), pertaining to protection of servicemembers against default judgments, was amended by inserting, “including any child custody proceeding,” after “proceeding.” National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 584, 122 Stat. 3, 128 (2008); *see also* Missick, *supra* note 52, at 874.

<sup>80</sup> § 522.

<sup>81</sup> § 502.

<sup>82</sup> § 511.

require courts to grant stays for the duration of a servicemember's deployment.<sup>83</sup> The language of the SCRA provides only "for a period of not less than 90 days."<sup>84</sup> Next, though the SCRA purports to stay custody proceedings until the servicemember can participate in the litigation, case law has shown that courts have "sidestepped the SCRA" by issuing temporary custody orders despite the SCRA's mandated stays.<sup>85</sup> For example, in *Tallon v. DaSilva*, a mother and father shared physical custody of their child.<sup>86</sup> When the father was deployed on active military service, he executed a power of attorney to assign his custody rights to his mother (the child's grandmother).<sup>87</sup> In an emergency motion, the mother requested that the court enter an interim order awarding her primary physical and legal custody pending the father's return from deployment.<sup>88</sup> The court acknowledged that the stay provision of the SCRA necessarily applies to custody cases.<sup>89</sup> The court then asserted that "a child does not exist in 'suspended animation' during the pendency of any stay entered pursuant to the SCRA" and that "the issue of the child's custody during a parent's deployment must perforce be addressed."<sup>90</sup> The court awarded temporary primary custody to the mother while the father was deployed.<sup>91</sup>

Similarly, in *Lenser v. McGowan*, a mother and father were living separately but were not yet divorced.<sup>92</sup> The paternal grandmother was caring for the child when the circuit

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<sup>83</sup> Sexton & Brent, *supra* note 38, at 9–10.

<sup>84</sup> § 522.

<sup>85</sup> Ayotte, *supra* note 37, at 670.

<sup>86</sup> *Tallon v. DaSilva*, No. FD02-4291-003 (Ct. Com. Pl. Allegheny Cnty., Pa. 2005), reprinted in 153 PITTSBURGH LEGAL J. 164, 165 (2005).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Lenser v. McGowan*, 191 S.W.3d 506, 507 (2004).



court entered a temporary custody order awarding custody to the mother.<sup>93</sup> The circuit court actually entered this temporary custody order before it entered the SCRA stay for the servicemember father.<sup>94</sup> The Supreme Court of Arkansas, however, held that even if the stay had been in place when the temporary custody was considered, it would not have prevented the circuit court from issuing the order.<sup>95</sup> It reasoned that the stay of the SCRA “does not freeze a case in permanent limbo and leave a circuit court with no authority to act at all.”<sup>96</sup>

While a temporary order of custody in favor of the non-servicemember may not seem especially unfair to the servicemember parent, these temporary orders are increasingly apt to become permanent.<sup>97</sup> This is because “stability” and “connection” often carry significant weight in a subsequent custody battle.<sup>98</sup> As one scholar puts it, “The end result is that the non-servicemember parent is able to use the servicemember parent’s absence to initiate proceedings for temporary custody that ultimately culminate in a permanent custody order.”<sup>99</sup> Additionally, despite the SCRA’s procedural protections, in some states a servicemember’s past or future deployment itself may have a substantive impact on future custody determinations if it is considered as a “best interest” factor.<sup>100</sup> Some may argue that

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 509.

<sup>95</sup> *Id.* at 511.

<sup>96</sup> *Id.* at 509. Notably, these two cases, *Tallon* and *Lenser*, were prior to the 2008 amendment of Section 202(a) of the SCRA (now 50 U.S.C. App. § 522(a)) to state, “including any child custody proceeding,” after what had originally said only “civil action or proceeding.” Both courts recognized, however, that the SCRA included a stay provision that was applicable in custody cases.

<sup>97</sup> Ayotte, *supra* note 37, at 670.

<sup>98</sup> *Id.* at 672.

<sup>99</sup> *Id.* at 673. The non-servicemember parent also might already have temporary custody through the agreed-upon FCP. Still, there is the same potential that the temporary arrangement would become permanent upon the servicemember’s return.

<sup>100</sup> Sexton & Brent, *supra* note 38, at 11; *see also Child Custody Bill Executive Summary*, CONGRESSMAN MICHAEL TURNER,

this is necessary, particularly where, for example, the child was very young when the parent was deployed and it would be destabilizing to change the custody arrangement.<sup>101</sup> There is a difference, however, between using a servicemember's past or future deployment *itself* as a sort of automatic strike against the servicemember in a best interests determination and a consideration of any *significant impact* on the best interests of the child of the parent's past or possible future deployment. A servicemember parent is at least given a chance at establishing there has been no significant impact on the child with the latter option, whereas with the former this chance is absolutely precluded.

## B. Amendment Proposal for the SCRA

Congressman Michael Turner (R-Ohio) has proposed a bill to amend the Servicemembers Civil Relief Act.<sup>102</sup> According to Turner, "It's a disservice to our military personnel to think their leadership does not value their commitment enough to provide needed federal child-custody protection while on active duty. . . . Penalizing a service member for their performance of duty is unfair and a dishonor to our military parents who freely give so much to this nation."<sup>103</sup> Turner's bill (i) prohibits state courts from using past deployments or the possibility of deployment against servicemembers when making child custody determinations, (ii) prohibits courts from permanently altering custody orders during a parent's deployment, and (iii) requires pre-deployment custody to be reinstated unless that is not in the best interest of the child.<sup>104</sup>

## C. Political Hurdles

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[http://turner.house.gov/uploadedfiles/turner\\_one\\_page\\_executive\\_summary\\_on\\_child\\_custody\\_bill\\_final.pdf](http://turner.house.gov/uploadedfiles/turner_one_page_executive_summary_on_child_custody_bill_final.pdf) (last visited Oct. 27, 2012).

<sup>101</sup> See generally Ayotte, *supra* note 37, at 672.

<sup>102</sup> *Child Custody Bill Executive Summary*, *supra* note 100.

<sup>103</sup> Michael R. Turner, Op-Ed., *Ensuring Child-Custody Protection*, WASHINGTON TIMES, October 8, 2009, <http://www.washingtontimes.com/news/2009/oct/08/ensuring-child-custody-protection/>.

<sup>104</sup> *Child Custody Bill Executive Summary*, *supra* note 100.

Since 2008, Congressman Turner’s legislative language addressing this issue has passed the House of Representatives six times as part of the National Defense Authorization Act,<sup>105</sup> including as a section of the 2013 National Defense Authorization Act, H.R. 4310.<sup>106</sup> In 2008, the language passed the House as a stand-alone bill (H.R. 6048) by voice vote.<sup>107</sup> Additionally, on May 30, 2012, the House also passed a stand-alone version of the bill, H.R. 4201: Servicemember Family Protection Act.<sup>108</sup> It was approved by a 390-2 vote.<sup>109</sup>

Nevertheless, the Senate Armed Services Committee remains unconvinced of the need for federal legislative amendment.<sup>110</sup> In its June 4, 2012 report on its version of the 2013 National Defense Authorization Act, the Senate Armed Services Committee asserted that “[a] federal legal standard would preempt the efforts of the States over a matter traditionally left to State courts.”<sup>111</sup> The Senate Armed Services Committee directed the Secretary of Defense to request the “views and recommendations” of the Council of Governors regarding legislative proposals to amend Title II of the SCRA or “otherwise to establish federal law that would prohibit State courts from considering the absence of a service member by reason of deployment, or the possibility of deployment, in determining the best interest of the child in cases involving child custody.”<sup>112</sup> The Senate Armed Services Committee requested the Secretary to ensure that the views and recommendations

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<sup>105</sup> Letter from Michael R. Turner and Robert Andrews, *supra* note 25; see also *Senators Still Skeptical of Federal Child Custody Protections*, *supra* note 18.

<sup>106</sup> See *H.R. 4310: National Defense Authorization Act for Fiscal Year 2013*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr4310> (last visited Oct. 27, 2012).

<sup>107</sup> Letter from Michael R. Turner and Robert Andrews, *supra* note 25.

<sup>108</sup> Press Release, Congressman Michael Turner, House Overwhelmingly Approves Turner’s Military Child Custody Bill (May 30, 2012), available at <http://turner.house.gov/news/documentsingle.aspx?DocumentID=297678>.

<sup>109</sup> See *H.R. 4201: Servicemember Family Protection Act*, GOVTRACK.US, <http://www.govtrack.us/congress/votes/112-2012/h295> (last visited Oct. 27, 2012).

<sup>110</sup> *Senators Still Skeptical of Federal Child Custody Protections*, *supra* note 18.

<sup>111</sup> S. COMM. ON ARMED SERVICES, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013, S. REP. NO. 112-173, at 118 (2012).

<sup>112</sup> *Id.*

of the Council of Governors are submitted to the Committees on Armed Services and Committees on Veterans' Affairs of the Senate and the House of Representatives no later than March 1, 2013.<sup>113</sup>

The Department of Defense has also opposed federal child-custody protections for servicemembers.<sup>114</sup> A Department of Defense statement asserted the following:<sup>115</sup>

The Department of Defense opposes efforts to create Federal child custody legislation affecting Service members . . . 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.

In 2011, however, then-Secretary of Defense Robert Gates was reported to have sent a letter to Congressman Michael Turner indicating his changed position.<sup>116</sup> Turner stated in his February 18, 2011 press release that Gates wrote he believed the Department of Defense should change its position to one that was “willing to consider whether appropriate legislation can be crafted that provides Service members with a federal uniform standard of protection in cases where it is established that military service is the sole factor involved in a child custody decision involving a Service member[.]”<sup>117</sup>

In a March 29, 2012, letter to the current Secretary of Defense, Leon Panetta, Congressmen Michael Turner and Robert Andrews enclosed the letter from Secretary Gates

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<sup>113</sup> *Id.*

<sup>114</sup> Michael R. Turner, Op-Ed., *supra* note 103.

<sup>115</sup> U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE POSITION 1 (2009), available at [http://www.cbsnews.com/htdocs/pdf/DOD\\_position\\_child\\_custody.pdf](http://www.cbsnews.com/htdocs/pdf/DOD_position_child_custody.pdf).

<sup>116</sup> Karen Jowers, *Gates Now Supports Law to Protect Child Custody*, ARMY TIMES, February 17, 2011, <http://www.armytimes.com/news/2011/02/military-child-custody-gates-021711w/>.

<sup>117</sup> Press Release, Congressman Michael Turner, Gates Joins Turner in Fight for Service Member Child Custody Rights (Feb. 18, 2011), available at <http://turner.house.gov/news/documentsingle.aspx?DocumentID=225787>.

and stated that they looked forward to the same level of support.<sup>118</sup> During a Joint House Armed Services and Veterans' Affairs Committee Hearing on July 25, 2012, Turner raised the legislation to Secretary Panetta, who replied, "I support the efforts that you've made. You've provided tremendous leadership on this issue, and I will do the same with regards to the amendments on the Senate side."<sup>119</sup> Other than these brief hearing comments, however, the current level of support from the Department of Defense for Congressman Turner's proposal is unclear.

Meanwhile, opinions from some expert associations and individuals have been particularly critical toward Congressman Turner's proposed legislation. Many of these concerns are grounded in federalism. For example, Patricia Apy, on behalf of the American Bar Association ("ABA"), gave a four-point testimony to the House Committee on Veterans' Affairs on February 25, 2010 regarding the ABA's opposition to the bill. Her prepared statement included the argument that by amending the SCRA to accomplish its aims, the bill "will unintentionally but surely introduce federal litigation to a matter reserved to the states and in which the federal government has no expertise."<sup>120</sup> Expressing similar sentiments in his statement, Retired Army JAG Colonel Mark E. Sullivan<sup>121</sup> asserted that "[t]he passage of an overarching gridwork of Federal law in a field which has always been reserved for the states will completely destroy the initiative of those states which are

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<sup>118</sup> Letter from Michael R. Turner and Robert Andrews, *supra* note 25.

<sup>119</sup> *Back from the Battlefield: DOD and VA Collaboration to Assist Service Members Returning to Civilian Life: Hearing Before the H. Comm. on Armed Services and H. Comm. on Veterans' Affairs*, 112th Congress (2012), available at [http://armedservices.house.gov/index.cfm/hearings-display?ContentRecord\\_id=d6cf0b67-de1b-468e-8114-4152fdae2122&ContentType\\_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group\\_id=41030bc2-0d05-4138-841f-90b0fbaa0f88&MonthDisplay=7&YearDisplay=2012](http://armedservices.house.gov/index.cfm/hearings-display?ContentRecord_id=d6cf0b67-de1b-468e-8114-4152fdae2122&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=41030bc2-0d05-4138-841f-90b0fbaa0f88&MonthDisplay=7&YearDisplay=2012).

<sup>120</sup> *Hearing on H.R. 4469 Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 111th Cong. (2010) (prepared statement of Patricia E. Apy, Chair of the ABA Family Law Section Military Law Committee, American Bar Association).

<sup>121</sup> Mark E. Sullivan is the author of *The Military Divorce Handbook* and has helped state legislatures and bar associations with military custody and visitation bills in several states.

considering initial legislation or thinking about improving their current laws to protect military members and their children.”<sup>122</sup>

Ultimately, though Congressman Turner’s proposed SCRA amendment is well meaning, it is highly unlikely that his approach will ever be successful due to the political impasse. Since 2008, Congressman Turner’s proposed legislative language has passed in the House eight times, yet all eight times it has been subsequently rejected in the Senate.<sup>123</sup> Without sufficient support in Congress and from family law experts for the amended SCRA, another more realistic solution must be implemented.

#### V. Analysis of the Uniform Law Commission’s Proposal: the Deployed Parents Custody and Visitation Act

Given concerns about an amendment to the SCRA, some critics have instead endorsed the ULC’s recent proposal.<sup>124</sup> The ULC has set forth the Uniform Deployed Parents Custody and Visitation Act (“UDPCVA”) to address the states’ “patchwork of rules.” The ULC consists of more than 300 commissioners, including lawyers and judges, who are appointed by state governments to draft and propose statutes in areas of the law where uniformity among the states is desirable.<sup>125</sup> The Commission approved and recommended the UDPCVA for enactment in all the states at the National Conference of Commissioners on Uniform State Laws’ annual conference held July 13-19, 2012.<sup>126</sup>

##### A. The Proposed UDPCVA

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<sup>122</sup> *Hearing on H.R. 4469 Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans’ Affairs*, 111th Cong. (2010) (prepared statement of Mark E. Sullivan, Colonel, USA (Ret.)).

<sup>123</sup> See *supra* notes 105–108 and accompanying text.

<sup>124</sup> Mark E. Sullivan, *The Uniform Deployed Parent Custody and Visitation Act*, *FAM. LAW.*, Sept. 27, 2012, available at <http://familylawyermagazine.com/articles/the-uniform-deployed-parent-custody-and-visitation-act>.

<sup>125</sup> *About the ULC*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Oct. 27, 2012).

<sup>126</sup> UNIF. DEPLOYED PARENTS CUSTODY AND VISITATION ACT §§ 101–504 (2012), available at [http://www.uniformlaws.org/shared/docs/Deployed\\_Parents/2012\\_DPCVA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf).

The UDPCVA, as proposed by the ULC, is organized into five articles.<sup>127</sup> Article 1 notably provides that in a proceeding for custodial responsibility of a servicemember's child, a court may not consider a parent's past deployment or possible future deployment in itself in determining the best interest of the child, but may consider any significant impact on the best interest of the child of the parent's past or possible future deployment.<sup>128</sup> Articles 2 and 3 address two distinct possible scenarios. Article 2 provides a procedure for parents who agree to a custody arrangement during deployment and enter into a "temporary agreement."<sup>129</sup> Article 3 establishes that, in the absence of such an agreement, a court may issue a temporary order granting custodial responsibility after a deploying parent receives notice of deployment and during the deployment.<sup>130</sup> Under Article 3, however, a court may not issue a permanent order granting custodial responsibility without the consent of the deploying parent.<sup>131</sup> Article 4 addresses return from deployment. The article contains procedures for when the parents agree that the temporary custody agreement formed pursuant to Article 2 should be terminated, procedures for when the parents agree that the temporary custody order formed pursuant to Article 3 should be terminated, and procedures for when there is no parental agreement regarding the termination of the temporary custody

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

arrangement.<sup>132</sup> Lastly, Article 5 contains miscellaneous provisions, such as an effective date provision and a transition provision.<sup>133</sup>

## B. The Advantages of Adopting the UDPCVA

The UDPCVA approach will help to provide greater protections for servicemembers in custody matters. The UDPCVA provides that a court may not consider a parent's past deployment or possible future deployment in itself in determining the best interest of the child, but may consider any significant impact on the best interest of the child of the parent's past or possible future deployment.<sup>134</sup> A Comment to the UDPCVA provides greater insight into what is meant by "significant" impact:<sup>135</sup>

The term "significant" is meant to exclude the court's considering trivial impact of a parent's deployment, such as the need to enroll a child in a different school. Under this standard, the court may only consider impacts that are material or substantial. For example, the court may consider that the child has bonded closely with step-siblings while in a temporary custody arrangement during a deployment, or that the child does not adjust well to new situations and therefore will likely have difficulty relocating if a parent is deployed in the future.

Accordingly, the UDPCVA is helpful to servicemembers because using deployment itself as a best interests factor necessarily works against the servicemember. The court may still consider "any significant impact" of the deployment on the best interests of the child. The court, however, may not consider trivial impact of a parent's deployment, which again works to the advantage of the servicemember.

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<sup>132</sup> UNIF. DEPLOYED PARENTS CUSTODY AND VISITATION ACT §§ 101–504 (2012), available at [http://www.uniformlaws.org/shared/docs/Deployed\\_Parents/2012\\_DPCVA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf). If an agreement between the parties to terminate a temporary order for custodial responsibility under Article 3 has not been filed, the order terminates 60 days after the deploying parent gives notice to the other parent and any nonparent granted custodial responsibility that the deploying parent has returned from deployment. *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> UNIF. DEPLOYED PARENTS CUSTODY AND VISITATION ACT § 107 (2012), available at [http://www.uniformlaws.org/shared/docs/Deployed\\_Parents/2012\\_DPCVA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf).

<sup>135</sup> § 107 cmt.



Under Article 4 of the UDPCVA, in the event that the parents do not agree on whether to terminate a temporary custody arrangement established by court order, the custody arrangement terminates 60 days after the deploying parent gives notice to the other parent that the deploying parent returned from deployment.<sup>136</sup> As the ULC’s Comment points out, concerns about the child’s best interests “resulted in rejection in the UDPCVA of an immediate, automatic reversion to the previous custody order following the service member’s return.”<sup>137</sup> The “lag time” allows the other parent time to contest the reversion of custody under other state law if the parent believes the reversion is not in the best interest of the child.<sup>138</sup> This section can be viewed as an attempt to balance fairness to all parties. Altogether, what the UDPCVA seeks to do is to “ensure that parents who serve their country are not penalized for their service, while still giving adequate weight to the interests of the other parent, and, most importantly, the best interest of the child.”<sup>139</sup>

The states’ adoption of the UDPCVA is preferable to amendment of the SCRA for several reasons. First, the UDPCVA is arguably more explicit in its protections for servicemembers. Both the UDPCVA and the SCRA amendment prohibit courts from considering a parent’s past deployment or possible future deployment in itself in a child custody determination.<sup>140</sup> Congressman Turner’s proposed SCRA amendment, however, requires pre-deployment custody to be reinstated “unless that is not in the best interest of the child.”<sup>141</sup> The UDPCA, on the other hand, allows courts to consider any “significant

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<sup>136</sup> § 404.

<sup>137</sup> Art. 4 cmt.

<sup>138</sup> Art. 4 cmt.

<sup>139</sup> §§ 101-504 prefatory note.

<sup>140</sup> *Child Custody Bill Executive Summary*, *supra* note 100; UNIF. DEPLOYED PARENTS CUSTODY AND VISITATION ACT § 107 (2012), available at [http://www.uniformlaws.org/shared/docs/Deployed\\_Parents/2012\\_DPCVA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf).

<sup>141</sup> *Child Custody Bill Executive Summary*, *supra* note 100.

impact” on the best interest of the child of the parent’s past or possible future deployment.<sup>142</sup> Arguably, a “significant impact” on the best interests of the child is a clearer and higher standard than simply “not in the best interest of the child.” It is possible there could be situations where a servicemember would resume physical custody under the UDPCVA because there was no “significant impact” but may permanently lose physical custody under the SCRA amendment’s vaguer standard. Even situations like those of Michael Grantham and Eva Crouch may play out differently depending on the applicable law, with a potentially greater likelihood under the UDPCVA that the servicemembers would achieve the return of their children.<sup>143</sup>

Additionally, the UDPCVA approach will likely placate federalist concerns. As noted *infra*, critics’ concerns have been grounded in the idea that an amended SCRA will introduce federal litigation to a matter reserved to the states and in which the federal government has no expertise.<sup>144</sup> The UDPCVA, though of course intended to provide uniformity across the states, ensures that child custody laws remain *state* law, rather than *federal* law.<sup>145</sup>

Furthermore, the UDPCVA avoids altogether an argument regarding a federal right of action. The Supreme Court has previously emphasized how “federal courts . . . lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees.”<sup>146</sup> Even though

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<sup>142</sup> UNIF. DEPLOYED PARENTS CUSTODY AND VISITATION ACT § 107 (2012), available at [http://www.uniformlaws.org/shared/docs/Deployed\\_Parents/2012\\_DPCVA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf).

<sup>143</sup> See *supra* Part I. Ultimately, Eva Crouch did regain custody, but she had to appeal all the way to the Kentucky Supreme Court. *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006).

<sup>144</sup> See *infra* Part IV.C.

<sup>145</sup> See *supra* Part VI for a discussion of how the UDPCVA should be implemented and why the approach should not raise federalism concerns.

<sup>146</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992).

the language of the stand-alone version of the SCRA amendment bill, H.R. 4201, explicitly states, “[n]othing in this section shall create a Federal right of action,”<sup>147</sup> critics have argued that there are other ways counsel could get a case involving federal rights into federal courts.<sup>148</sup> These ways include the procedure of removal to federal court pursuant to 28 U.S.C. 1442a<sup>149</sup> and possibly a declaratory judgment suit in federal court under 28 U.S.C. 2201.<sup>150</sup> Thus, because the UDPCVA would become state law once adopted, concerns regarding federal custody litigation would generally be averted.

### C. The Problems with the Proposed UDPCVA

While the ULC has the authority to propose laws, no uniform law is effective until a state legislature adopts it.<sup>151</sup> The uniform law commissioners work toward enactment of ULC acts in their home jurisdictions,<sup>152</sup> but all fifty states may not adopt the ULC’s suggested acts. Therefore, even though the UDPCVA would facilitate some needed protections for servicemembers, it remains unlikely that all of the states will adopt it without some greater impetus to do so.

Indeed, several other of the ULC’s proposed schemes, in the family-law context and otherwise, have failed to provide the intended uniformity. Within the family-law context, the 2002 Uniform Parentage Act addresses parentage determinations, including genetic

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<sup>147</sup> H.R. 4201, 112th Cong. (2012).

<sup>148</sup> *Hearing on H.R. 4469 Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans’ Affairs*, 111th Cong. (2010) (prepared statement of Mark E. Sullivan, Colonel, USA (Ret.)).

<sup>149</sup> 28 U.S.C.A. § 1442a (West 2012) (“A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States . . . in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof . . . may at any time before the trial . . . be removed for trial into the district court of the United States[.]”)

<sup>150</sup> 28 U.S.C.A. § 2201 (West 2012). (“In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”)

<sup>151</sup> *About the ULC*, *supra* note 125.

<sup>152</sup> *Id.*

testing and assisted conception provisions.<sup>153</sup> Only a few states and the District of Columbia have adopted it.<sup>154</sup> The Uniform Comparative Fault Act, which provides a system of allocating damages in personal injury actions, is another of the many examples of proposed uniform schemes that the states have failed to enact.<sup>155</sup> According to the ULC's website, the only states to have enacted the Uniform Comparative Fault Act are Kentucky and Missouri.<sup>156</sup>

## VI. A Proposed Solution: The Federal Government Must Encourage States' Adoption of the UDPCVA

Although many of the ULC's proposals have not been widely adopted, there are instances in which uniform laws have gained traction because the federal government has conditioned the receipt of federal funds upon the states' adoption of the proposed law. Congress is able to attach conditions to the states' receipt of federal funds because of its Spending Power under the United States Constitution.<sup>157</sup> Though the Spending Power is subject to some limitations, Congress has routinely employed this power to attain states' compliance with certain laws and directives.<sup>158</sup> Accordingly, the best way to ensure that the states adopt the UDPCVA is to condition the states' receipt of welfare funds upon their adoption of this uniform law.

### A. The Uniform Interstate Family Support Act and the Uniform Child Custody Jurisdiction and Enforcement Act: A Roadmap for the UDPCVA

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<sup>153</sup> See UNIF. PARENTAGE ACT §§ 101–905 (amended 2002).

<sup>154</sup> *Parentage Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act> (last visited Feb. 10, 2013).

<sup>155</sup> See UNIF. COMPARATIVE FAULT ACT §§ 1–11.

<sup>156</sup> *Comparative Fault Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Comparative%20Fault%20Act> (last visited Oct. 27, 2012).

<sup>157</sup> See U.S. Const. art. 1, § 8, cl. 1.

<sup>158</sup> *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987).

In other notable instances, Congress has used its Spending Power to induce states into adopting the ULC's recommendations. The Uniform Interstate Family Support Act ("UIFSA") and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") are two examples of uniform laws that nearly all fifty states<sup>159</sup> have enacted in exchange for federal assistance and funding.<sup>160</sup> The UIFSA, first promulgated in 1992,<sup>161</sup> provides uniform rules for the enforcement of family support orders by setting jurisdictional standards for state courts and "by determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding, by establishing rules for determining which state issues the controlling order in the event proceedings are initiated in multiple jurisdictions, and by providing rules for modifying . . . another state's child support order."<sup>162</sup> In 1993, only two states had enacted the UIFSA, Arkansas and Texas.<sup>163</sup> By the summer of 1996, this number totaled thirty-five states.<sup>164</sup> That year was significant in the history of the UIFSA because the ULC then set forth significant amendments to the Act.<sup>165</sup> Even more significantly, Congress passed "welfare reform" legislation in August, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), which mandated that the states enact the amended UIFSA in order to receive federal funding for child support enforcement.<sup>166</sup> As one scholar put it, in using the PRWORA to compel

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<sup>159</sup> All fifty states have enacted the UIFSA. Patricia W. Hatamyar, *Interstate Establishment, Enforcement, and Modification of Child Support Orders*, 25 OKLA. CITY U. L. REV. 511, 512 (2000). Forty-nine states have adopted the UCCJEA. JUDITH AREEN ET. AL., *supra* note 41, at 1190.

<sup>160</sup> WADLINGTON AND O'BRIEN, *supra* note 40, at 3.

<sup>161</sup> Hatamyar, *supra* note 159, at 514.

<sup>162</sup> *Interstate Family Support Act Amendments (2008) Summary*, UNIFORM LAW COMMISSION, [http://www.uniformlaws.org/ActSummary.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20\(2008\)](http://www.uniformlaws.org/ActSummary.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20(2008)) (last visited January 10, 2013).

<sup>163</sup> John J. Sampson & Barry J. Brooks, *Uniform Interstate Family Support Act (2001) with Prefatory Note and Comments (with Still More Unofficial Annotations)*, 36 FAM. L.Q. 329, 337 (2002).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 338.

states to adopt the amended UIFSA, Congress “assured that nationwide acceptance of the amended Act was virtually certain.”<sup>167</sup> Indeed, by 1998, all fifty states had enacted the UIFSA.<sup>168</sup>

The Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) is a second example of a uniform law that the states have adopted in response to Congress’s strategic use of its Spending Power.<sup>169</sup> The ULC promulgated the UCCJEA in 1997, but there were other related acts that lead up to its enactment.<sup>170</sup> First, the ULC promulgated the Uniform Child Custody Jurisdiction Act (“UCCJA”) in 1968 with the purpose of (1) establishing jurisdiction over a child custody case in one state, and (2) protecting the order of that state from modification in any other state, as long as the original state retained jurisdiction over the case.<sup>171</sup> States were very slow, however, to adopt the UCCJA.<sup>172</sup> Only forty-three states had adopted some form of the UCCJA by the time Congress enacted the Parental Kidnapping Prevention Act (“PKPA”) in December 1980.<sup>173</sup> The PKPA was “an effort to put the weight of full faith and credit behind the principles of the Uniform Child Custody Jurisdiction Act.”<sup>174</sup> Eventually, by 1984, all states adopted a version of the

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<sup>167</sup> *Id.* at 337–38.

<sup>168</sup> *Id.* at 338.

<sup>169</sup> WADLINGTON AND O’BRIEN, *supra* note 40, at 3.

<sup>170</sup> *Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited February 14, 2013).

<sup>171</sup> *Id.*

<sup>172</sup> Ann T. Wilson, Comment, *The Parental Kidnapping Prevention Act: Is There an Enforcement Role for the Federal Courts?*, 62 WASH. L. REV. 841, 843 (1987).

<sup>173</sup> *Id.* at 843 n.21.

<sup>174</sup> *Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited February 14, 2013).

UCCJA,<sup>175</sup> but differences between the UCCJA and the PKPA regarding applicable jurisdictional principles remained apparent.<sup>176</sup> Therefore, in 1997, when the ULC finally promulgated the UCCJEA, it reconciled UCCJA principles with the PKPA and it also addressed interstate civil enforcement for child custody orders.<sup>177</sup> Importantly, Congress conditioned the states' receipt of federal assistance for children under the PRWORA on their adoption of the new UCCJEA.<sup>178</sup> In response to Congress's prompt, forty-nine states adopted the UCCJEA.<sup>179</sup> The majority of states did so within four years.<sup>180</sup> Overall, these two examples, the UIFSA and the UCCJEA, demonstrate that federal compulsion can be needed to lead states to efficiently adopt proposed uniform laws.

#### B. The Best Approach: The UDPCVA and Contingent Federal Funding

Though the UDPCVA is substantively the best approach to provide greater protections for servicemember parents in custody proceedings,<sup>181</sup> its effectiveness as a uniform law will be eclipsed if all states do not adopt it. Therefore, a plan must be put in place to ensure that all states adopt the UDPCA in a timely manner. The states' adoption of

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<sup>175</sup> Linda M. Demelis, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for A National Standard*, 45 HASTINGS L.J. 1329, 1330 (1994).

<sup>176</sup> *Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited February 14, 2013). (“The UCCJA [did] not give first priority to the “home state” of the child in determining which state may exercise jurisdiction over a child custody dispute. The PKPA does. The PKPA also provides that once a state has exercised jurisdiction, that jurisdiction remains the continuing, exclusive jurisdiction until every party to the dispute has exited that state. The UCCJA simply state[d] that a legitimate exercise of jurisdiction must be honored by any other state until the basis for that exercise of jurisdiction no longer exists.”)

<sup>177</sup> *Id.*

<sup>178</sup> WADLINGTON AND O'BRIEN, *supra* note 40, at 3.

<sup>179</sup> A bill is pending in Massachusetts for the UCCJEA's adoption. JUDITH AREEN ET. AL., *supra* note 41, at 1190.

<sup>180</sup> See *UCCJEA Adoptions*, UNIFORM LAW COMMISSION, <http://uniformlaws.org/Shared/docs/UCCJEAadoptions.pdf> (last visited February 14, 2013); see also *UCCJEA Adoption Table*, THE LAW OFFICES OF DAVID A. BLUMBERG, <http://www.uccjea.net/resources/adoptions.shtml> (last visited February 14, 2013).

<sup>181</sup> See *infra* Part V.B.

the UIFSA and the UCCJEA demonstrates that Congress can successfully use its Spending Power to achieve the states' adoption of uniform laws.<sup>182</sup> Accordingly, Congress should use its Spending Power in this instance, too. One way Congress can validly do so is to make funding for welfare contingent on the states' adoption of the UDPCVA. Since its creation under PRWORA in 1996, Temporary Assistance for Needy Families ("TANF") has been a block grant program that provides states federal funds each year to develop and maintain their welfare programs.<sup>183</sup> TANF provides billions of dollars to the states each year.<sup>184</sup> Thus, if Congress were to condition the receipt of TANF funds on the states' adoption of the UDPCVA, the states would have no viable option but to adopt the uniform law.

### C. Possible Disadvantages of the Proposed Approach

In advocating for this approach, it is necessary to address its few potential disadvantages. From a critic's perspective, the first concern may be that states will adopt the uniform law with variations. The UCCJEA has been adopted in every state, for example, but the language of the states' statutes varies.<sup>185</sup> Nevertheless, this variation is arguably minor. For instance, the ULC's UCCJEA defines "commencement" of a child custody proceeding as "the filing of the first pleading in a proceeding."<sup>186</sup> By contrast, Wisconsin's UCCJEA states that "commencement" means "the filing of the first pleading in a proceeding, provided that service is completed in accordance with the applicable

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<sup>182</sup> See *infra* Part VI.A.

<sup>183</sup> *Temporary Assistance for Needy Families (TANF) Overview*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/recovery/programs/tanf/tanf-overview.html> (last visited February 14, 2013).

<sup>184</sup> *Id.*

<sup>185</sup> Kevin Wessel, *Home Is Where the Court Is: Determining Residence for Child Custody Matters Under the UCCJEA*, 79 U. CHI. L. REV. 1141, 1149 n.55 (2012).

<sup>186</sup> UNIF. CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT § 102 (1997), available at [http://www.uniformlaws.org/shared/docs/child\\_custody\\_jurisdiction/uccjea\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf).



provisions of ch. 801.”<sup>187</sup> As such, it is arguable that Wisconsin’s definition of “commencement” is slightly more restrictive than the ULC’s definition, but this is overall a minor distinction. Similarly, Mississippi’s UCCJEA exemplifies slight deviation from the ULC’s version. The ULC’s UCCJEA essentially establishes that exclusive jurisdiction can be lost in two ways, one of them being that “a court of this State or a court of another State determines that the child, the child’s parents, and any person acting as a parent do not *presently* reside in this State.”<sup>188</sup> Mississippi’s exclusive jurisdiction section uses the term “*currently* do not reside.”<sup>189</sup> It is unclear, however, that there is any significant difference. Overall, despite minor linguistic variations in the states’ versions, the UCCJEA still has been successful at achieving a high level of uniformity.<sup>190</sup>

Even if the states adopt the UDPCVA with slight variations or changes in language, its mandated adoption in order to receive welfare funding will at least ensure that states that do not currently have any protections implement some. Moreover, this proposed approach ideally works to ensure the states’ adoption of the *core precepts* of the UDPCVA, and that in itself would contribute to greater uniformity among the states.

It is unlikely that Congress would ever condition federal funding on the states’ adoption of the exact language of the UDPCVA because of federalism concerns, mainly the still prevalent notion that family law should in some way be left to the states.<sup>191</sup> Notably,

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<sup>187</sup> WIS. STAT. ANN. § 822.02(5) (West 2012).

<sup>188</sup> UNIF. CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT § 202 (1997), available at [http://www.uniformlaws.org/shared/docs/child\\_custody\\_jurisdiction/uccjea\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf) (emphasis added).

<sup>189</sup> MISS. CODE. ANN. § 93-27-202 (West 2012) (emphasis added); *see also* Wessel, *supra* note 185, at 1149 n.55.

<sup>190</sup> *See generally* Acts: *Child Custody Jurisdiction and Enforcement Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited January 15, 2013).

<sup>191</sup> *See infra* Part V.B.

critics may argue that a uniform law with a federal requirement that states adopt it or lose federal funding still poses federalism problems. The notion that the states have the autonomy to make slight changes to the language of their adopted uniform acts, however, helps to dispel federalist critique but still preserves the needed level of uniformity. Additionally, the ULC's member composition suggests that the states were represented in a meaningful way when the ULC drafted and approved the UDPCVA. The ULC's members include lawyers, judges, legislators, and law professors who have been appointed by state governments to research, draft, and promote enactment of uniform state laws.<sup>192</sup> While some may argue that the states are similarly represented in Congress in debate over the SCRA, Congressman Turner's bills consistently fail to garner Senate support.<sup>193</sup> Therefore, the SCRA amendment lacks from state representatives what the UDPCVA has—sufficient approval.

Another concern may be that a state could still refuse to adopt the UDPCVA, as Massachusetts has done in failing to adopt the UCCJEA.<sup>194</sup> Although Massachusetts has not yet adopted the UCCJEA, a bill to enact it is currently pending in its Legislature.<sup>195</sup> Additionally, a similar scenario with the UDPCVA, though admittedly possible, is unlikely given the financial and social consequences a state would face if it failed to adopt the UDPCVA. The withholding of welfare funds that would result if a state did not adopt the UDPCVA is severe enough that most, if not all, states would buckle to the Congressional demand.

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<sup>192</sup> *About the ULC*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited February 13, 2013).

<sup>193</sup> See *infra* note 123 and accompanying text.

<sup>194</sup> See JUDITH AREEN ET. AL., *supra* note 41, at 1190; see also Julie A. Morley, Note, *A Silver Lining in Domestic Turmoil: A Call for Massachusetts to Adopt the UCCJEA's Emergency Jurisdiction Provision*, 43 NEW ENG. L. REV. 135 (2008).

<sup>195</sup> H. 31, 188th Leg. (Ma. 2013), available at <http://www.malegislature.gov/Bills/188/House/H31>.

In sum, making funding for welfare contingent on states' adoption of the UDPCVA would not be a novel approach to uniform laws within the family law realm. Instead, it would be an appropriate approach given the success and ubiquity of other uniform laws pertaining to family law through the same type of Congressional encouragement.

### Conclusion

With a large number of single parents serving in the military<sup>196</sup> and increased deployments in the past several years,<sup>197</sup> an abundance of reports have surfaced that many military servicemembers face battle overseas and return home to a battle for custody of their children.<sup>198</sup> A servicemember may make temporary custody arrangements for his or her child, sometimes with the nonservicemember parent, through a non-binding family care plan only to return from deployment to find that the nonservicemember parent will not relinquish custody. Alternatively, a nonservicemember parent may gain custody through a temporary order while a servicemember is deployed, despite the SCRA's mandated stays, with the result that the temporary order becomes permanent upon the servicemember parent's return home. Also, there remains the possibility that in some jurisdictions "deployment" itself or the "potential for future deployment" will be used in the court's best interests determination.

In recent years, some states have taken steps to implement laws that provide greater protection for servicemembers in the context of child custody disputes. Nevertheless, these laws are varied and in some states they do not exist at all. There are also serious inadequacies in the current Servicemembers Civil Relief Act. There have been multiple attempts at passage of an amendment to the SCRA, but the lack of support in the Senate and

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<sup>196</sup> See *supra* note 29 and accompanying text.

<sup>197</sup> See *supra* note 17 and accompanying text.

<sup>198</sup> See *supra* note 16 and accompanying text.

criticism from other fronts indicate that a strictly federal approach is not likely to succeed. In the face of this void, the ULC has proposed the Uniform Deployed Parents Custody and Visitation Act, which aims to standardize custody rights for military parents in child custody cases. Though the UDPCVA is not guaranteed to assist every military servicemember fighting for his or her custodial rights, it strikes a balance that moves toward a much more consistent application of law in the country that these military servicemembers bravely serve. Additionally, the UDPCVA will largely avoid the problems posed by SCRA amendment, including critic's concerns grounded in federalism.

State legislatures are not required to adopt uniform law proposals. Nevertheless, the states undoubtedly will adopt the UDPCVA if the receipt of welfare funds is made contingent on the states' adoption of it. As a result, the problem that the ULC seeks to address—a lack of uniformity among the states—could be ameliorated with the strategic encouragement of the federal government.