The Servicemembers Civil Relief Act: Why and How this Act Applies to Child Custody Proceedings

Sara Estrin†

Introduction

The Servicemembers Civil Relief Act (SCRA) is federal legislation aimed at protecting the legal rights of individuals serving in the United States armed forces.[1] The Act's stated purpose is "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service"[2] in order "to enable such persons to devote their entire energy to the defense needs of the Nation."[3] One way the SCRA accomplishes this purpose is by allowing courts to stay proceedings involving servicemembers[4] whose military service materially affects their ability to participate in the process.[5] Despite its good intentions, the SCRA has proved problematic when it comes to child custody hearings, because the granting of a stay suspends either the case or some designated proceeding(s) within it.[6]

Most states have a policy of providing for the best interests of

---

†. J.D. expected 2009, University of Minnesota; B.A. 2005, University of Michigan. The publication of this article would not have been possible without the staff and editors of *Law and Inequality: A Journal of Theory and Practice.* The author wishes to thank Professor Marvin Krislov for inspiring her to become a better writer, and her friends and family for their encouragement, love, and support.

1. *See* Servicemembers Civil Relief Act, 50 U.S.C.A. app. §§ 501–96 (West 2003).

2. *Id.* § 502(2).

3. *Id.* § 502(1).

4. *See* Mark E. Sullivan, *Child Custody*, OFFICER (Reserve Officer's Assoc. of U.S., Wash., D.C.), Nov. 1, 2006, at 56 (stating that a stay suspends "all or part of a civil case when one of the parties' military duties hinders his or her ability to respond in court").

5. *See* 50 U.S.C.A. app. § 522(b) (West 2004) (amended 2008).

6. *See* Lenser v. McGowan, 191 S.W.3d 506, 509 (Ark. 2004) (citing State Game & Fish Comm'n v. Sledge, 42 S.W.3d 427, 429 (Ark. 2001) (quoting BLACK'S LAW DICTIONARY 1413 (6th ed. 1990))) (stating that a stay "is a kind of injunction with which a court freezes its proceedings at a particular point" and that it "can be used to stop the prosecution of the action altogether, or to hold up only some phase of it").

the child[7] when it comes to custody decisions.[8] Reconciling the SCRA with state law, however, has produced a tremendous debate over which interests should take precedence: those of the child or those of the servicemember. Oregon Circuit Court Judge Dale Koch, who is also former President of the National Council of Juvenile and Family Court Judges, commented that as a judge, "[y]ou don't want to penalize a parent because they've [sic] served their country. On the other hand . . . you don't want to penalize the child."[9] Family court judges often feel "a continuing obligation to consider what's in the best interest of the child," even though many of these considerations directly conflict with military service.[10] As a result, servicemember parents have lost custody of their children because they answered our nation's call to duty.[11]

This Article argues that the current version of the SCRA inadequately protects the legal rights of servicemembers who are involved in child custody disputes during their military service and consequently should be amended to better protect these servicemembers' rights. Part I discusses the history of the SCRA, specifically detailing the challenges courts face when a parent is fighting for the United States and is thus unavailable to attend a custody proceeding. Part II examines the application of the SCRA to child custody proceedings involving servicemembers and the SCRA's incompatibility with the best interests of the child. Part III looks at what has been done to address these problems and whether it has been enough. Finally, Part IV proposes a uniform federal law that takes into account both the best interests of the child and the custodial expectations of parents who are

---

7. One law dictionary defines the "best interests of the child" as:

> A standard by which a court determines what arrangements would be to a child's greatest benefit, often used in deciding child-custody and visitation matters and in deciding whether to approve an adoption or a guardianship. A court may use many factors, including the emotional tie between the child and the parent or guardian, the ability of a parent or guardian to give the child love and guidance, the ability of a parent or guardian to provide necessaries, the established living arrangement between a parent or guardian and the child, the child's preference if the child is old enough that the court will consider that preference in making a custody award, and a parent's ability to foster a healthy relationship between the child and the other parent.

BLACK'S LAW DICTIONARY 170 (8th ed. 2004).

8. *See* Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 426 (2000).

9. Pauline Arrillaga, *Soldier-Parents Fight on 2 Fronts, Deployed GIs Lose Child Custody, and a Federal Law is of Little Help*, FORT WAYNE J. GAZETTE, May 6, 2007, at A8.

10. *Id.*

11. *Id.*

servicemembers.

I. Background

A. *The Servicemembers Civil Relief Act*

1. History of the Act

When a citizen leaves home to serve in the armed forces, the servicemember and his or her family may encounter tremendous financial and personal hardships, such as repossessions, decreased income, and indebtedness. As one scholar argues:

> [E]ven when military service does not cause economic hardship, a servicemember's geographic distance from home may make it hard for him or her to respond to legal problems as they arise . . . . Servicemembers in remote or hostile locations may find it difficult to communicate with, let alone retain, legal counsel to represent them.[12]

Historically, "Congress, state legislatures, and the courts have recognized the need to protect servicemembers who are unable to defend their legal rights because of their military service."[13] For example, during the Civil War, several states enacted moratoria "barring enforcement of plaintiffs' rights against servicemembers."[14]

After the Civil War, Congress passed the Act of June 11, 1864,[15] which "suspended any action, civil or criminal, against federal soldiers or sailors while they were in the service of the Union and made them immune from service of process or arrest."[16] Unfortunately, this absolute ban on suits against servicemembers had many unintended consequences.[17] As a result, Congress enacted the Soldiers' and Sailors' Civil Relief Act of 1918[18] after

---

12. 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, 332 (2007).

13. *Id.*

14. *Id.*

15. Act of June 11, 1864, ch. 118, 13 Stat. 123 (current version at 50 U.S.C. app. § 501 (1988)).

16. Amy J. McDonough et al., *Crisis of the Soldiers' and Sailors' Civil Relief Act: A Call for the Ghost of Major (Professor) John Wigmore*, 43 MERCER L. REV. 667, 669 (1992) (footnote omitted).

17. *See* Mary Kathleen Day, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act*, 27 TULSA L.J. 45, 46 (1991) (noting that this legislation "prevented creditors from filing lawsuits against servicemembers for the duration of their military service," thus creditors often refused to extend credit to servicemembers or their families).

18. Act of Mar. 8, 1918, ch. 20, 40 Stat. 440.

entering World War I.[19] This Act "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."[20] When the United States entered World War II, this Act was updated and renamed the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA).[21] Unfortunately, except for very minor amendments,[22] the SSCRA remained essentially unchanged until 2003 when the United States invaded Iraq, and Congress amended and recodified the SSCRA as the Servicemembers Civil Relief Act.[23] "The SCRA . . . updates the language of the [SSCRA] to remove archaic terminology and to reflect the modern military, including the service of women."[24] Additionally, the SCRA clarifies and expands the protections for servicemembers who cannot appear at judicial hearings.[25] Unlike under the SSCRA, where it was left to the trial court's discretion whether to grant "a stay on the ground that a party is absent in the military service and that his absence will materially affect his prosecution or defense of the action,"[26] under the SCRA "[a] stay of proceedings is mandatory upon a properly supported application by the servicemember, but not so if the

19. Cohen, *supra* note 12, at 333; *see also In re* Watson, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003) (stating that the SSCRA of 1918 "was created in order to protect those who have been obliged to drop their own affairs and take up the burden of the nation") (citations omitted).

20. Cohen, *supra* note 12, at 333.

21. Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178 (current version at 50 U.S.C.A. app. §§ 501–96 (West 2003)).

22. Some additions and modifications were made to the SSCRA following the Persian Gulf War. *See e.g.*, Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, 105 Stat. 34 (amending "to improve and clarify the protections provided by" the SSCRA); James P. Pottorff, Jr., *The Servicemembers Civil Relief Act: A Modern Replacement for the SSCRA*, J. KAN. B. ASS'N, Oct. 2005, at 20, 20–21 (noting that from 1991 to 1992 representatives from the Judge Advocate Generals met "with staffers from the House Committee on Veterans' Affairs to identify and propose changes to the SSCRA," which resulted in "a draft restatement of the SSCRA").

23. 50 U.S.C.A. app. §§ 501–96 (West 2003); *see* H.R. REP. No. 108-81, at 32 (2003), *reprinted in In re* Templehoff, 339 B.R. 49, 53 (Bankr. S.D.N.Y. 2005) (stating that due to the hundreds of thousands of servicemembers fighting in the war on terrorism and the war in Iraq, "the Committee believes the Soldiers' and Sailors' Civil Relief Act (SSCRA) should be restated and strengthened to ensure that its protections meet their needs in the 21st century").

24. Pottorff, *supra* note 22, at 21.

25. *See e.g.*, 50 U.S.C.A. app. § 512(b) (West 2003) (stating that "[t]his Act [sections 501 to 596 of this Appendix] applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act [said sections]. This Act [said sections] does not apply to criminal proceedings.").

26. Martin v. Wagner, 25 So.2d 409, 411 (Ala. 1946) (citing Boone v. Lightner, 319 U.S. 561, 575 (1943)).

statutory conditions are not met."[27] Furthermore, the SCRA now affords protection to Army, Navy, Air Force, Marine Corps, and Coast Guard servicemembers, including active-duty members, reservists, and National Guard members called to active duty.[28] Even with all of these changes, however, the SCRA's broad purpose remains the same as that of its predecessors: to enable servicemembers to "devote their entire energy to the defense needs of the Nation."[29]

2. Legal Standard for Granting a Stay Pursuant to the SCRA

Even though the SCRA allows courts to stay civil proceedings involving certain categories of servicemembers, in order for a stay to be granted a servicemember must do more than merely tell the court that he or she has been called to active duty. Rather, in order for a court to grant his or her stay request, the servicemember must prove that his or her current military duties materially affect his or her ability to appear.

Pursuant to the SCRA § 522(b)(1):

> At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party,[30] the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.[31]

Section 522(b)(2) of the SCRA states:

> An application for a stay under paragraph (1) shall include the

---

27. *In re* Marriage of Bradley, 137 P.3d 1030, 1034 (Kan. 2006).

28. *See* 50 U.S.C.A. app. § 511(1) (West 2004) ("The term 'servicemember' means a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10, United States Code.").

29. 50 U.S.C.A. app. § 502(1) (West 2003); *see id.* § 502. According to the statute:

> The purposes of this Act [sections 501 to 596 of this Appendix] are—(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act [said sections] to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

Id.

30. *See* 50 U.S.C.A. app. § 522(a) (West 2004) (amended 2008) (stating that the "section applies to any civil action or proceeding [where a party] at the time of filing an application under this section—(1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding").

31. *Id.* § 522(b)(1).

following:

(A) 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.

(B) 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.[32]

The structure of section 522(b)(2) indicates that even if a servicemember proves to the court that his or her current military duties materially affect his or her ability to appear, the servicemember still must include a communication from his or her commanding officer stating the aforementioned and that he or she is not authorized for military leave.[33] A stay under the SCRA is only mandatory if the servicemember fulfills both of these requirements.[34]

3. The Judiciary's Interpretation of the Legal Standard for Granting a Stay Under the SCRA

Levi Bradley was serving with the military in Iraq when his ex-wife, Amber Bradley, filed a motion seeking to modify the current temporary custody order which granted sole legal custody of their son to Levi and physical custody of their son to Levi's mother.[35] Levi responded by requesting that the court stay the proceeding, pursuant to the SCRA, until he was available to testify.[36] The court decided, however, that Levi did not properly apply for a stay.[37] Consequently, the court granted Amber's motion for temporary physical custody, which later became permanent.[38] In *Bradley*, the court interpreted the language of SCRA § 522(b)(1) to mean "that a court's discretion to grant a stay on its own motion depends on satisfaction of the statutory conditions."[39] As a result, the court held that "where there is a

32. *Id.* § 522(b)(2).

33. *See In re* Marriage of Bradley, 137 P.3d 1030, 1033 (Kan. 2006).

34. *Id.*

35. *Id.* at 1032.

36. *Id.*

37. *Id.* at 1034.

38. Arrillaga, *supra* note 9, at A8.

39. *Bradley*, 137 P.3d at 1034. The court stated:

> The Act expressly provides for a mandatory stay of proceedings on a servicemember's motion if the motion includes (1) a statement as to how his current military duties materially affect his ability to appear

failure to satisfy the conditions of the Act, then the granting of a stay is within the discretion of the trial court."[40] Notably, the *Bradley* court also concluded that "[a] stay of proceedings is mandatory upon a properly supported application by the servicemember."[41] This burden[42] is placed "on the servicemember to demonstrate 'material affect' by providing a factual basis for supporting the stay request."[43] For Levi, who was deployed to Iraq, this meant that for the court to stay the proceeding, he needed to provide a statement that his "current military duty prevents his appearance and [a] statement that he has no military leave presently authorized."[44] Since the court concluded that Levi failed to provide either one, it denied his stay request.[45]

In determining whether a servicemember's military service[46] has a material effect on his or her ability to participate in an action, the two factors most often considered "are (1) the

---

> and when he will be available to appear and (2) a statement from his commanding officer stating that the servicemember's current military duty prevents his appearance and military leave is not authorized for him at the time of the statement.

Id. at 1033.

40. *Id.* at 1034.

41. *Id.* (indicating that the court did not reach the question of whether the trial court could have denied the temporary order changing custody if the SCRA's conditions for a stay had been complied with).

42. *See* 50 U.S.C.A. app. § 522 (West 2004); H.R. REP. NO. 108-81, at 38 (2003) (stating that the SCRA assigns the burden of production to the servicemember); *cf.* Boone v. Lightner, 319 U.S. 561, 570 (1943) (holding that under the SSCRA, the district court has discretion "as to whom the court may ask to come forward with facts needful to a fair judgment").

43. *In re* Marriage of Grantham, No. 03-2100, 2004 WL 2579567, at *4 n.7 (Iowa Ct. App. Nov. 15, 2004) (citation omitted), *vacated*, 698 N.W.2d 140, 146–47 (Iowa 2005).

44. *Bradley*, 137 P.3d at 1034.

45. *Id.*

46. The term "military service" means:

> (A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—
>
> (i) active duty, as defined in section 101(d)(1) of title 10, United States Code, and
>
> (ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds;
>
> (B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and
>
> (C) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

50 U.S.C.A. app. § 511(2) (West 2004).

servicemember's availability, and (2) the necessity of the servicemember's presence."[47] Even if a litigant is "on active duty and stationed at a base in a foreign country[, d]epending upon whether the soldier has available leave time, and the option of using the said leave time, the Court may find that the litigant's military service is not materially affecting his or her ability to proceed."[48]

However, the United States Supreme Court has held that "[t]he SCRA is to be 'liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.'"[49] In *Le Maistre v. Leffers*,[50] the court declared that "the Act [SSCRA] must be read with an eye friendly to those who dropped their affairs to answer their country's call."[51] Additionally, the SCRA "is to be administered as an instrument to accomplish substantial justice," even though this "may result in detriment to parties who are not in the military service,"[52] as "[o]ur country's servicemembers must have peace of mind that they will not be subject to civil actions which they cannot appear and defend."[53]

B. Parental Rights and the Best Interests of the Child Doctrine

1. Family Care Plans

The Army requires soldiers who are "single parents or who have a spouse in the military to complete a 'family care plan' that will provide for children during the soldier's deployment."[54] As part of a family care plan, a parent must resolve guardianship of his or her children while on active duty.[55] Although a JAG officer

47. Cohen, *supra* note 12, at 346.

48. Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *3 (N.Y. Fam. Ct. May 21, 2004) (citation omitted).

49. Reed v. Albaaj, 723 N.W.2d 50, 54 (Minn. Ct. App. 2006) (quoting Boone v. Lightner, 319 U.S. 561, 575 (1943)).

50. Le Maistre v. Leffers, 333 U.S. 1 (1948).

51. *Id.* at 6 (citing *Boone*, 319 U.S. at 575) (discussing the SSCRA).

52. *In re* Watson, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003) (citations omitted); *cf.* Slove v. Strohm, 236 N.E.2d 326, 328 (Ill. App. Ct. 1968) (stating that the Act "may not be used as a sword against persons with legitimate claims against servicemen. Some balancing between the rights of the respective parties must be arrived at.").

53. *In re* Templehoff, 339 B.R. 49, 53 (Bankr. S.D.N.Y. 2005).

54. Darrell Baughn, *Divorce & Deployment: Representing the Military Servicemember*, 28 FAM. ADVOC. 8, 8 (2005) (citing U.S. Dep't of Army, Reg. 600-20, Army Command Policy 5-5 (May 13, 2002)).

55. *See id.* at 8 (stating that the "family care plan provides proof to the Army

can "draft a special power of attorney for temporary guardianship, thereby granting another family member or qualified person guardianship of the child or children,"[56] this is not a legal guardianship.[57]

Wilton Lebo, a member of the Louisiana National Guard, was called to active duty effective July 10, 2003.[58] Prior to being deployed to Afghanistan, Mr. Lebo, who was the domiciliary parent, "executed a power of attorney naming his current wife, Lee Anna Lebo, as guardian of the child and giving her authority to act on the child's behalf."[59] However, when Mrs. Farlow, Mr. Lebo's ex-wife, found out that Mr. Lebo was deployed, she refused to return the child to Mrs. Lebo and petitioned the court for temporary custody.[60] In response, the court denied Mrs. Farlow's petition and granted Mrs. Lebo's civil warrant for the child's return.[61] On appeal, the court stated that according to Louisiana law,[62] "Mr. Lebo was acting within his authority in leaving his child in the care of his current wife."[63] The court noted, however, that Louisiana law "does not authorize a domiciliary parent to unilaterally change custody of a minor child as Mr. Lebo apparently attempted to do in his power of attorney."[64]

---

that the solider has made financial provisions for dependents, that the soldier has thoroughly briefed guardians on their responsibilities, and that guardians can access all military benefits available to the dependent").

56. *Id.* at 9.

57. The military power of attorney form specifically provides:

> "You must understand that a POA will not prevent another person, such as a non-custodial parent or relative of your child (ren) [sic], from petitioning a court of competent jurisdiction to obtain temporary or permanent custody of your children." It also provides, "You must also understand that depending on the law or other requirements where your child (ren) will be living, a POA may not always be effective for your designated guardian to care for your child (ren) [sic] under any or all circumstances."

Lebo v. Lebo, 886 So.2d 491, 493 n.1 (La. App. Ct. 2004) (quoting the military power of attorney form).

58. *Id.* at 492.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See* LA. REV. STAT. ANN. § 9:335(B)(3) (1994) (stating that "[t]he domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. . . . It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.").

63. *Lebo*, 886 So.2d at 492.

64. *Id.* at 492–93 (stating that the authority to modify a custody order is reserved to the courts). Accordingly, the court remanded the case, stating that it was an error for the trial court to deny Mrs. Farlow's petition for temporary custody without conducting a hearing, but noted that the issue of temporary custody was likely now moot since Mr. Lebo had already returned from deployment.

In *Tallon v. DaSilva*,[65] the court decided whether the servicemember father could use a power of attorney to assign his custody rights to his parents while he was deployed on active duty.[66] After producing an extensive record, the court concluded "custody rights are not assignable to third parties, [since t]he best interests of children in custody disputes are determined not by unilateral fiat of one parent, but by the courts."[67] Accordingly, the court held parents may not "use powers of attorney to assign custody rights to grandparents or others while deployed outside the Commonwealth on active military service."[68] The court based this conclusion on a slippery slope argument stating "[i]f a parent is permitted to assign custody rights to a grandparent, there is no principled reason as a matter of law why he or she could not also assign these custody rights to any other third party."[69] Additionally, the court noted it was not bound by the father's Military Family Plan, nor by his power of attorney because "[t]o hold otherwise would effectively provide the United States Secretary of Defense or his delegees not simply the right to control the nation's armed forces but also the opportunity to control some cases in the states' family courts. Our law does not permit such a result."[70]

2. Parental Rights

In *Troxel v. Granville*,[71] the United States Supreme Court held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[72] In

---

See id. at 494.

65. Tallon v. DaSilva, No. FD02-4291-003 (Ct. Com. Pl. Alleghany County 2005), *reprinted in* 153 PITTSBURGH LEGAL J. 164 (2005) [hereinafter *Tallon*].

66. *Id.* at 165.

67. *Id.*

68. *Id.* at 164; *cf.* Curtis v. Klimowicz, 631 S.E.2d 464, 467 (Ga. Ct. App. 2006) (holding that even though the father could not take his daughter with him if he was deployed overseas, he would still retain primary physical custody because his daughter would remain at home with his current wife, and he would be free to exercise his custody rights by returning to the U.S. during off-duty periods or upon completion of his assignment).

69. *Tallon*, *supra* note 65, at 165; *cf. In re* Marriage of Grantham, No. 03-2100, 2004 WL 2579567, at *8 (Iowa Ct. App. Nov. 15, 2004), *vacated*, 698 N.W.2d 140, 146–47 (Iowa 2005) (noting that in reality, the Family Care Plan just "steps in for a soldier; it governs who will exercise the soldier's rights under the decree while the soldier is on active duty. Thus, Family Care Plans take no rights from the other party to the decree; they merely exercise the soldier's rights while on active duty.").

70. *Tallon*, *supra* note 65, at 165.

71. Troxel v. Granville, 530 U.S. 57 (2000).

72. *Id.* at 66.

New York, a court must first determine that extraordinary circumstances exist before allowing "a non-parent to challenge the right of the natural parent to custody of his or her child."[73] Similarly, in Iowa, "[c]ourts can modify the custodial terms of a dissolution decree only when it is established 'by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change.'"[74] Additionally, "[t]he change must be more or less permanent and relate to the welfare of the children."[75]

Since the SCRA "is a complete restatement of the law,"[76] cases decided under the SSCRA are still applicable to the SCRA[77] and "[d]ecisions construing the Act indicate that when a military parent seeks a stay of a child-custody or visitation proceeding, the trial judge should consider the impact of such a stay on the other parent's right to visit and communicate with the children."[78] In *Ex parte K.N.L.*, the mother petitioned the court for a writ of mandamus after the Baldwin Juvenile Court denied her motion to stay a pendente lite[79] child-custody proceeding pursuant to the SSCRA.[80] On appeal, the Alabama court failed "to see how the juvenile court's refusal to stay a pendente lite custody order could materially affect the mother's ability to defend her interests at a final custody hearing after she returns from active duty," and as a

---

73. Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *4 (N.Y. Fam. Ct. May 21, 2004) (citing Bennett v. Jeffreys, 356 N.E.2d 277, 283 (N.Y. 1976)).

74. *Grantham*, 2004 WL 2579567, at *8 (quoting *In re* Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983)).

75. *In re* Marriage of Walton, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

76. 149 CONG. REC. H3688 (daily ed. May 7, 2003) (statement of Rep. Smith). "A 'restatement' of a law has long been understood to mean a law that has been updated, clarified and strengthened, including a gathering of the relevant judicial interpretations and a measured casting aside of those few interpretations that do not comport with the author's understanding of the law's intent." *Id.*

77. Susan H. Seabury & Jack F. Williams, *Bankruptcy and Debt Under the Servicemembers Civil Relief Act*, NORTON ANN. SURV. BANKR. L. Part II § 4 (2008).

78. *Ex parte* K.N.L., 872 So.2d 868, 871 (Ala. Civ. App. 2003) (citation omitted); *see In re* Marriage of Rayman, 47 P.3d 413, 416 (Kan. 2002) (refusing to adopt a "bright line rule that a parent with residential custody of his or her children loses that custody when required to be away from his or her children for an extended period of time").

79. *See* T.J.H. v. S.N.F., 960 So.2d 669, 672 (Ala. Civ. App. 2006) (citing Hodge v. Steinwinder, 919 So.2d 1179, 1182 (Ala. Civ. App. 2005)) ("A pendente lite custody order is an order that is effective only during the pendency of the litigation in an existing case and is usually replaced by the entry of a final judgment.").

80. *K.N.L.*, 872 So.2d at 871–72. This case was decided under the SSCRA because it was final prior to the SCRA's enactment. *See* 50 U.S.C.A. app. § 501 (West 2003) (stating that the SCRA applies "to any case that is not final before [Dec. 19, 2003].").

result affirmed the lower court's denial of the stay.[81]

3. Best Interests of the Child Doctrine

In the nineteenth century, the best interests of the child doctrine emerged to displace absolutist protections of fathers' rights.[82] This doctrine has the "underlying assumption that decisions about children ought to take into account the well-being of an individual child whose case is under adjudication."[83] "Treating children with the dignity owed to individual persons requires an assessment of their needs even if they have no autonomous views to articulate. This is the core purpose of the best-interest standard."[84]

In determining the best interests of the child, one scholar argues:

> [T]he court must consider all relevant factors, including: the wishes of the child's parents; the wishes of the child; the interaction and interrelationship of the child with his or her parents, siblings, and other persons who may significantly affect the child's best interests; the child's adjustment to his or her home, school, and community; and, the mental and physical health of all individuals involved.[85]

Additionally, in making this determination, "a court must review the totality of the situation."[86] If after considering the best interests of the child, the court determines that "there is no indication that a change in custody will result in significantly enhancing a child's welfare, it is generally considered in his best interest not to disrupt his life."[87]

In Ohio, a court will not modify a prior child custody decree unless it finds that there has been a change in the circumstances that makes modification necessary to serve the best interests of the child.[88] Additionally, the change in circumstances "must be a change of substance, not a slight or inconsequential change."[89] In

---

81. *Id.*

82. Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105, 117 (2002).

83. *Id.*

84. *Id.* at 118.

85. George L. Blum, *Right of Parent to Regain Custody of Child After Temporary Conditional Relinquishment of Custody*, 6 A.L.R. 6th 229, 241 (2005) (citing AM. JURIS. 2d *Divorce and Separation* § 931 [sic]).

86. Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *5 (N.Y. Fam. Ct. May 21, 2004) (citations omitted).

87. Pawelski v. Buchholtz, 459 N.Y.S.2d 190, 191 (App. Div. 1983) (citations omitted).

88. *See* OHIO REV. CODE ANN. § 3109.04(E)(1)(a) (Supp. 2008).

89. Davis v. Flickinger, 674 N.E.2d 1159, 1162 (Ohio 1997).

Alabama, a parent seeking to modify a previous custody order bears a heavy burden of proof.[90] The parent must prove that a material change in circumstances has occurred since the prior judgment, that a change of custody will materially promote the child's best interest, and that the benefits of the change will "more than offset the inherently disruptive effect caused by uprooting the child."[91]

In New York, when "a non-parent is being considered to take custody of a child in contravention of the rights of a natural parent, the [c]ourt must first determine whether extraordinary circumstances" exist.[92] In one New York case, the father petitioned the court for physical custody of his child after he learned that his ex-wife, Tanya Towne, was being called to active duty in the Army National Guard.[93] Towne acknowledged her pending deployment and stated that she had already "executed guardianship papers allowing for her current husband and her mother to care for the child."[94] Towne argued that because of her deployment, the proceeding should be stayed and her child should remain with her current husband.[95] The court found, however, that extraordinary circumstances did not exist that would justify leaving the child in the custody of a non-parent pending trial, in derogation of the natural parent's rights.[96] In reaching this conclusion, the court stated that "[t]he fact that the mother will be unavailable as a physical custodian for her son due to her military service is not an extraordinary circumstance with regard to the *father's ability* to be the physical custodian of his son."[97] As a result, the court stayed the proceeding but entered a temporary order transferring the child's physical custody to his father, "the available natural parent, until such time that the mother is no longer on active duty in the military or a trial is held on this matter."[98]

---

90. *See Ex parte* McLendon, 455 So.2d 863, 866 (Ala. 1984).

91. *Id.* at 865.

92. Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *4 (N.Y. Fam. Ct. May 21, 2004) (citing Bennett v. Jeffreys, 356 N.E.2d 277, 283 (N.Y. 1976)).

93. *Id.* at *1.

94. *Id.*

95. *Id.* at *2.

96. *See id.* at *6. The court noted that "if in fact extraordinary circumstances exist, the Court will then proceed to the analysis of the best interest of the child to determine custody on that ground." *Id.* at *4. Furthermore, the court noted that "in determining what is in the best interest of the child, a court must review the totality of the situation." *Id.* at *5.

97. *Id.* at *6 (emphasis in original).

98. *Id.* at *7.

In *In re Marriage of Grantham*,[99] after the father, Michael, the primary physical custodian, was called to active duty with the Iowa National Guard, his ex-wife, Tammara, filed a petition requesting permanent physical custody of their two children and temporary custody of the children pendente lite.[100] The father requested that the court stay the child custody proceedings pursuant to the SSCRA until he was no longer on active duty, but the court denied the request.[101] Shortly thereafter, the trial court ruled that the mother should be given permanent physical custody of the children.[102] Disagreeing with the appellate court,[103] the Iowa Supreme Court stated that "it is not in the interests of an accurate adjudication of Tammara's request for permanent custody, or in the best interests of the minor children, to ignore matters that happened during Michael's absence if those matters weigh in favor of a change of child custody."[104] However, "[a]s a result of [this] judgment . . . a soldier, who answered our Nation's call to [duty], lost physical care of his children because he was 'obliged to drop [his] own affairs to take up the burdens of the nation.'"[105]

C. The Conflict Between the SCRA and State Law

In *Tallon v. DaSilva*, the court had to decide whether state custody proceedings are included in the category of civil matters stayed pursuant to the SCRA.[106] After extensive research, the court concluded that "pursuant to the Supremacy Clause of the United States Constitution,[107] the stay provision of the SCRA

99. *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005).

100. *Id.* at 143.

101. *Id.* This case was decided under the SSCRA because it was final prior to the SCRA's enactment. *See* 50 U.S.C.A. app. § 501 (West 2003) (stating that the SCRA applies "to any case that is not final before" December 19, 2003).

102. 698 N.W.2d at 143.

103. *See In re* Marriage of Grantham, No. 03-2100, 2004 WL 2579567, at *10 (Iowa Ct. App. Nov. 15, 2004), *vacated*, 698 N.W.2d 140 (Iowa 2005) (stating that the underlying purpose of the SSCRA was violated when the district court conducted a hearing based on the mother's petition for modification of child custody, when the district court's "decision was based upon temporary circumstances that would not have existed had the proceedings been properly stayed or had the district court not impermissibly granted temporary change of physical care").

104. *In re* Marriage of Grantham, 698 N.W.2d at 144–45.

105. *In re* Marriage of Grantham, No. 03-2100, 2004 WL 2579567, at *10 (citing Boone v. Lightner, 319 U.S. 561, 575 (1943)).

106. *Tallon*, *supra* note 65, at 164.

107. U.S. CONST. art. VI, cl. 2.

necessarily applies to custody cases."[108] However, the court held that since "a child does not exist in 'suspended animation' during the pendency of any stay entered pursuant to the SCRA[, t]he issue of the child's custody during a parent's deployment must perforce be addressed."[109] As a result, the court awarded temporary physical custody of the child to the mother, the non-deployed parent.[110]

Similarly, in *Lenser v. McGowan*,[111] the court had to decide whether it could enter a temporary custody order if it were to grant a stay of the divorce proceeding under the SCRA.[112] Lenser, who filed for divorce while on active duty, argued that because the circuit court stayed the divorce proceeding, it lacked jurisdiction to issue a temporary custody order.[113] Accordingly, Lenser stated that since the child was in his custody when the stay was granted, the child should remain with him pending trial.[114] However, the court held that even though the SCRA provides a stay in domestic relations cases, it does "not prevent the circuit court from entering a temporary order of custody."[115] This is because the "relief afforded against adverse effects may not be used to gain an advantage, or in other words, may not be used as a sword. The idea is to relieve servicemembers from disadvantages arising from military service, not to provide advantages by reason of military service."[116] Therefore, the court stated that if it accepted Lenser's argument, it "would create an environment in which a servicemember could always gain custody by simply making sure the child is staying with the servicemember when the stay is requested. That would provide servicemembers an advantage rather than protect against adverse affects."[117]

In contrast, in *Ratliff v. Ratliff*,[118] a non-custodial mother petitioned the court for a custody modification, but the trial court stayed the proceeding since the child's father was out of the country serving with the United States military.[119] On appeal, the

108. *Tallon*, *supra* note 65, at 165 (citations omitted).
109. *Id.* (citation omitted).
110. *Id.*
111. Lenser v. McGowan, 191 S.W.3d 506 (Ark. 2004).
112. *Id.* at 509.
113. *Id.*
114. *Id.* at 507.
115. *Id.*
116. *Id.* at 511.
117. *Id.*
118. Ratliff v. Ratliff, 15 N.W.2d 272 (Iowa 1944).
119. *Id.* at 275.

Iowa Supreme Court held that the stay was properly granted on behalf of the soldier father.[120] The court based its conclusion on the fact that conducting "a hearing on an application to change the status of the custody of [children] while [a parent] is in military service, and when he is not in a position to personally be present, would materially affect his right to properly present his side of the case . . . ."[121]

D. Legislation Enacted in Response to this Conflict

1. State Law

Since 2005, at least twelve states have amended their child custody statutes in an attempt to accommodate both the best interests of the child and the legal rights of the servicemember parent.[122] For example, in Michigan, where one of the first such amendments was enacted, the statute provides:

> If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. Upon a parent's return from active military duty, the court shall reinstate the custody order in effect immediately preceding that period of active military duty. If a motion for change of custody is filed after a parent returns from active military duty, the court shall not consider a parent's absence due to that military duty in a best interest[123] of the child determination.[124]

---

120. *Id.*

121. *Id.* at 274; *cf.* Deborah F. Buckman, Annotation, *Construction and Application of Federal Servicemembers Civil Relief Act, 50 App. U.S.C.A. §§ 501 et seq.*, 2007 A.L.R. FED. 2d 6 (2007) (citing Mattmiller v. Kopesky, No. Civ.05-1841 PAM/JJG, 2006 WL 980816 (D. Minn. Apr. 12, 2006), *cert. of appealability denied*, No. 05-1841 (PAM/JJG), 2006 WL 1431354 (D. Minn. May 24, 2006) (holding "that the Servicemembers Civil Relief Act does not preempt state law regarding the determination of domicile or residency for purposes of a tax evasion action")).

122. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.27 (Supp. 2008); N.D. CENT. CODE § 14-09-06.6(9) (Supp. 2007).

123. *See* MICH. COMP. LAWS ANN. § 722.23 (West 2002). According to the law:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if

Similarly, North Dakota law provides that once a servicemember parent is called to active duty, a court may not modify or amend "a previous judgment or order, or issue a new order, which changes the child's placement that existed on the date the parent was called to active duty service, except the court may enter a temporary custody order that is in the best interest of the child."[125] "The court may issue a temporary custody order in the best interest of the child for the time period of the active duty service."[126] However, "[i]f an original custody decision is pending and the service member is alerted for active duty service, or is absent for active duty service, the court may not issue a permanent custody order until the return of the service member from active duty."[127]

Section 9-13-110 of the Arkansas Code states that "[a] court shall not permanently modify an order for child custody or visitation solely on the basis that one of the parents is a mobilized parent,"[128] and includes a list of factors that the court should consider in determining whether to order a temporary modification.[129] Additionally, North Carolina recently enacted a

---

any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Id.

124. *Id.* § 722.27.

125. N.D. CENT. CODE § 14-09-06.6(9) (Supp. 2007).

126. *Id.*

127. *Id.*

128. ARK. CODE. ANN. § 9-13-110(b) (Supp. 2007).

129. *See id.* § 9-13-110(c). According to the law:

(1) A court of competent jurisdiction shall determine whether a

law that does not provide guidance for a court making a custody determination upon a servicemember's return, but that does aim "to provide a means by which to facilitate a fair, efficient, and swift process to resolve matters regarding custody and visitation when a parent receives temporary duty, deployment, or mobilization orders from the military."[130] Regarding custody, the statute provides:

> When a parent who has custody, or has joint custody with primary physical custody, receives temporary duty, deployment, or mobilization orders from the military that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise custody responsibilities: (1) Any temporary custody order for the child during the parent's absence shall end no later than 10 days after the parent returns . . . and (2) The temporary duty, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer custody from the service member.[131]

The North Carolina statute also allows a parent's visitation rights to be delegated to another family member during the parent's absence,[132] but it provides the general disclaimer that "[n]othing

---

> temporary modification to an order for child custody or visitation is appropriate for a child or children of a mobilized parent.
> (2) The determination under this subsection (c) includes consideration of any and all circumstances that are necessary to maximize the mobilized parent's time and contact with his or her child that is consistent with the best interest of the child, including without limitation:
> (A) The ordered length of the mobilized parent's call to active duty;
> (B) The mobilized parent's duty station or stations;
> (C) The opportunity that the mobilized parent will have for contact with the child through a leave, a pass, or other authorized absence from duty;
> (D) The contact that the mobilized parent has had with the child before the call to active military duty;
> (E) The nature of the military mission, if known; and
> (F) Any other factor that the court deems appropriate under the circumstances.

Id.

130. N.C. GEN. STAT. ANN. § 50-13.7A(a) (West 2007).

131. *Id.* § 50-13.7A(c).

132. *Id.* § 50-13.7A(d). The statute provides:

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

in this section shall alter the duty of the court to consider the best interest of the child in deciding custody or visitation matters."[133]

2. The Federal Amendment to the SCRA

On January 28, 2008, the National Defense Authorization Act for Fiscal Year 2008 was signed into law by President George W. Bush.[134] Section 584 of the Act states:

> Sec. 584. Protection of Child Custody Arrangements for Parents who are Members of the Armed Forces Deployed in Support of a Contingency Operation.
>
> (a) Protection of Servicemembers Against Default Judgments.—Section 201(a) of the Servicemembers Civil Relief Act (50 U.S.C. App. 521(a)) is amended by inserting ", including any child custody proceeding," after "proceeding".
>
> (b) Stay of Proceedings When Servicemember Has Notice.—Section 202(a) of the Servicemembers Civil Relief Act (50 U.S.C. App. 522(a)) is amended by inserting ", including any child custody proceeding," after "civil action or proceeding".[135]

This means that the SCRA now explicitly states that Section 521, which deals with default judgments,[136] is applicable to child custody proceedings involving active duty servicemembers; and that in accordance with Section 522(b), the proceeding may be stayed.[137] Although this amendment to the SCRA attempts to ameliorate the custody problems facing servicemembers, the SCRA remains flawed in several ways.

II. The SCRA and Child Custody Proceedings

The SCRA's purpose is "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service"[138] in order "to enable such persons to devote their entire energy to the defense

---

Id.

133. *Id.* § 50-13.7A(g).

134. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).

135. *Id.* § 584.

136. *See* 50 U.S.C.A. app. § 521(a) (West 2003) (amended 2008) (stating that "[t]his section applies to any civil action or proceeding in which the defendant does not make an appearance").

137. 50 U.S.C.A. app. § 522(b) (West 2004) (amended 2008); *see also id.* § 522(a) (stating that the "section applies to any civil action or proceeding [where a party] at the time of filing an application under this section—(1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding").

138. *See* 50 U.S.C.A. app. § 502(2) (West 2003).

needs of the Nation."[139] Even though the SCRA provides for civil proceedings to be stayed when certain conditions are met, state judges often find it difficult to delay custody proceedings.[140] Difficulties arise because some state judges believe that state family law and the best interests of the child take precedence over the protections awarded to servicemembers pursuant to the SCRA.[141] Some courts have tried to reach a compromise by staying child custody proceedings while allowing temporary custody decisions to be made pending trial.[142] By doing this, however, the Act's purposes are not being served.

A. When Courts Refuse to Stay Child Custody Proceedings, the Purpose of the SCRA is Not Being Served

The United States Supreme Court held that "[t]he SCRA is to be 'liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation'"[143] and that "the Act [SSCRA] must be read with an eye friendly"[144] to servicemembers. Additionally, the SSCRA "is to be administered as an instrument to accomplish substantial justice," even though this "may result in detriment to parties who are not in the military service."[145] The underlying rationale is that "[o]ur country's servicemembers must have peace of mind that they will not be subject to civil actions [for] which they cannot appear and defend."[146]

Congress enacted the SCRA in large part to protect servicemembers who were unable to defend themselves in litigation due to their military duties.[147] "Servicemembers in remote or hostile locations may find it difficult to communicate

---

139. *See id.* § 502(1).

140. *See, e.g.*, *Tallon*, *supra* note 65, at 165 (stating that "a child does not exist in 'suspended animation' during the pendency of any stay entered pursuant to the SCRA").

141. *See, e.g.*, Arrillaga, *supra* note 9; *see also Tallon*, *supra* note 65, at 165 (stating that "the issue of the child's custody during a parent's deployment must perforce be addressed").

142. *See, e.g.*, Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *3 (N.Y. Fam. Ct. May 21, 2004); Lenser v. McGowan, 191 S.W.3d 506, 507 (Ark. 2004).

143. Reed v. Albaaj, 723 N.W.2d 50, 54 (Minn. Ct. App. 2006) (quoting Boone v. Lightner, 319 U.S. 561, 575 (1943)).

144. Le Maistre v. Leffers, 333 U.S. 1, 6 (1948) (citing *Boone*, 319 U.S. at 575).

145. *In re* Watson, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003) (citations omitted).

146. *In re* Templehoff, 339 B.R. 49, 53 (Bankr. S.D.N.Y. 2005).

147. *Id.*

with, let alone retain, legal counsel to represent them."[148] Additionally, servicemembers who are preoccupied with pending litigation are unable to fully concentrate on assignments.[149]

Levi Bradley, a mechanic with the 8th Communications Battalion, admitted that his "mind wasn't where it was supposed to be" after a court refused to stay his child custody proceeding while he was in Iraq.[150] Because of the time difference, Levi would stay up until midnight so he could call his mother for updates on his case.[151] This constant distraction proved costly when one day Levi rolled a Humvee that he was driving.[152] Luckily, Levi was not injured.[153] It is incidents like this that have caused military commanders to grow increasingly concerned about the distractions that result from an ongoing child custody proceeding.[154]

Even though the SCRA is designed to protect servicemembers and allow them to devote their full attention to their military duties, some active duty servicemembers have been forced to rush home from deployment because judges refuse to stay child custody proceedings.[155] This has caused military commanders to worry that "the court hearings could endanger battlefield readiness."[156] In attempting to justify this defiance of the SCRA, family court judges often argue that because a child does not exist in "suspended animation," the best interests of the child cannot support staying child custody proceedings.[157] Judges have also argued that the effects of a stay would allow servicemembers to unilaterally modify custody orders, and would therefore violate the non-servicemember parent's constitutional right "to make decisions concerning the care, custody, and control of their children."[158]

---

148. Cohen, *supra* note 12, at 332.

149. *See, e.g.*, Arrillaga, *supra* note 9, at A8.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See* Associated Press, *Custody Hearing Goes on Despite Deployment,* May 29, 2007, http://www.armytimes.com/news/2007/05/ap_custodyhearing_070529/.

156. *Id.*

157. *See e.g., Tallon, supra* note 65, at 165 (concluding that "pursuant to the Supremacy Clause of the United States Constitution, the stay provision of the SCRA necessarily applies to custody cases," but since "a child does not exist in 'suspended animation' during the pendency of any stay entered pursuant to the SCRA[, t]he issue of the child's custody during a parent's deployment must perforce be addressed").

158. Troxel v. Granville, 530 U.S. 57, 66 (2000).

These arguments, however, ignore the fact that the SCRA must be administered to provide servicemembers "peace of mind that they will not be subject to civil actions [for] which they cannot appear and defend"[159] themselves, even though this "may result in detriment to parties who are not in the military service."[160] This means that even though staying a custody proceeding may be detrimental to the non-deployed parent, a stay pursuant to the SCRA should still be granted, assuming that the conditions for granting a stay have been met. The SCRA's purpose is to enable servicemembers to "devote their entire energy to the defense needs of the nation,"[161] and when courts refuse to stay custody proceedings, this purpose is not achieved. Levi's Humvee accident is just one example of the potential consequences. Additionally, the SCRA is intended to protect servicemembers from some of the adverse legal effects of military service,[162] and when temporary custody orders issued during a servicemember's absence are allowed to become permanent upon the servicemember's return, the SCRA's purposes are not being served.

B. The Conflict Between Staying Proceedings Pursuant to the SCRA and Child Custody Proceedings as Seen Through Case Law

The Arkansas Supreme Court has held that the SCRA does "not prevent the circuit court from entering a temporary order of custody."[163] The court reasoned that if it stayed the custody proceeding and refused to grant a temporary custody order, the child would be left where he was when the stay was granted, which would "provide servicemembers an advantage rather than protect[ing them] against adverse affects."[164] The court also acknowledged, however, that the Act's purpose was "to relieve servicemembers from disadvantages arising from military service."[165] But, awarding an ex-spouse temporary custody of a child does not relieve the servicemember "from disadvantages arising from military service,"[166] when there would have been no change in custody, even temporarily, if the custodial parent was

159. *In re* Templehoff, 339 B.R. 49, 53 (Bankr. S.D.N.Y. 2005).
160. *In re* Watson, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003) (citations omitted).
161. 50 U.S.C.A. app. § 502(1) (West 2003); *see id.* § 502.
162. *See* Lenser v. McGowan, 191 S.W.3d 506, 511 (Ark. 2004).
163. *Id.* at 507.
164. *Id.* at 511.
165. *Id.*
166. *Id.*

not a member of the military.

In *Tallon v. DaSilva,* the court held that parents may not "use powers of attorney to assign custody rights to grandparents or others while deployed outside the Commonwealth on active military service."[167] However, in *Troxel v. Granville*, the United States Supreme Court held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[168] The Court's decision in *Troxel* did not hold that only non-deployed parents have a fundamental right "to make decisions concerning the care, custody, and control of their children,"[169] but that all parents have that right. This means that when a court grants a temporary custody order that modifies the custodial arrangement established by the servicemember parent prior to deployment, the court is violating the servicemember parent's fundamental right "to make decisions concerning the care, custody, and control of their children."[170] Although the *Tallon* court favored the rights of the non-deployed parent, the SCRA is intended both to protect and to provide substantial justice for active duty servicemembers, even if it "may result in detriment to parties who are not in the military service."[171]

Courts have erroneously claimed that a temporary custody award does not materially affect servicemembers' ability to defend themselves at later custody hearings.[172] The Alabama Court of Civil Appeals "fail[ed] to see how the juvenile court's refusal to stay a pendente lite custody order could materially affect the mother's ability to defend her interests at a final custody hearing after she returns from active duty," and as a result affirmed the lower court's denial of the stay.[173]

These courts, however, ignore the fact that "[t]he 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."[174] As a result of this disadvantage, soldiers who are

167. *Tallon, supra* note 65, at 165; *see supra* notes 68–69.

168. Troxel v. Granville, 530 U.S. 57, 66 (2000).

169. *Id.*

170. *Id.*

171. *In re* Watson, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003) (citations omitted).

172. *See, e.g., Ex parte* K.N.L., 872 So.2d 868 (Ala. Civ. App. 2008).

173. *Id.* at 871–72.

174. Darrell Baughn, *Divorce & Deployment: Representing the Military Servicemember*, 28 FAM. ADVOC. 8, 12 (2005).

fighting for our nation can lose custody of their children.[175] In *In re Marriage of Grantham*, the Iowa Supreme Court held that it would not serve the best interests of the children to ignore matters that occurred during the father's military service "if those matters weigh in favor of a change of child custody."[176] Accordingly, the court awarded the non-deployed parent permanent physical custody of the children because it concluded that the children's "situation ha[d] improved substantially since their placement with their mother pursuant to the court's temporary order."[177] In *In re* Marriage of Bradley, a Kansas trial judge said that he "didn't believe [the case] was subject to the federal law because 'this Court has a continuing obligation to consider what's in the best interest of the child.'"[178] Consequently, the judge awarded temporary physical custody of the child to Levi's ex-wife, and shortly thereafter "that order was made permanent."[179] As a result, Levi gets to see his son for four days at a time when he is able to get to Kansas on leave.[180]

III. An Examination of Legislative Attempts to Resolve the Conflict Between the SCRA and Child Custody Proceedings

Prior to the recent amendment to the SCRA, which specifically states that the Act applies to child custody proceedings,[181] courts often decided that state family law trumped the SCRA.[182] However, even when finding that the SCRA applied

---

175. *See, e.g., In re* Marriage of Grantham, 698 N.W.2d 140 (Iowa 2005).

176. *Id.* at 144–45.

177. *Id.* at 146. *But see In re* Marriage of Grantham, No. 03-2100, 2004 WL 2579567, at *10 (Iowa Ct. App. Nov. 15, 2004), *vacated*, 698 N.W.2d 140 (Iowa 2005). The court stated:

> All of these assertions occurred after the district court granted Tammara temporary physical care of the children and would not have occurred but for this change in placement. Thus, reliance on them would only further prejudice Michael by exacerbating the statutory and due process violations accompanying the denial of his request for a stay of the proceedings and the resulting temporary care order.

Id.

178. Arrillaga, *supra* note 9, at A8 (quoting *In re* Marriage of Bradley, 137 P.3d 1030, 1032 (Kan. 2006)).

179. *Id.*

180. *Id.*

181. 50 U.S.C.A. app. § 522 (West 2008) ("This section applies to any civil action or proceeding, including any child custody proceeding . . . .").

182. *See, e.g.*, Lenser v. McGowan, 191 S.W.3d 506, 511 (Ark. 2004) (stating that since children do not live in "suspended animation . . . the court properly entertained the issue of . . . temporary custody"); Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *3 (N.Y. Fam. Ct. May 21, 2004) (stating that "even

to child custody proceedings, courts found it difficult to balance the best interests of the child with the parent's right to stay a proceeding under the SCRA.[183] Cognizant of this issue, state legislatures have recently begun enacting statutes that provide guidance to courts in balancing these issues and that establish a legal framework for how these complex issues should be handled.

A. Current State Responses

Although there is slight variation among the states, the majority of recently enacted state statutes provide for a reinstatement of the most recent custody order that existed prior to the servicemember parent's deployment, unless, in the discretion of the court, it is in the best interests of the child for the temporary order to be made permanent.[184] Additionally, many state statutes specify that, in most circumstances, the only relief a court can grant in a custody proceeding involving an active duty servicemember is an order for temporary custody.[185] Some statutes also deal with the servicemember parent's absence due to military service and how that should affect a best interests of the child determination.[186]

In Michigan, the law states that "[i]f a motion for change of custody is filed after a parent returns from active military duty, the court shall not consider a parent's absence due to that military duty in a best interest of the child determination."[187] But what

---

in instances where a stay is granted, the Courts have the power to award temporary relief to the non-moving party" in family situations).

183. *See, e.g., Lenser*, 191 S.W.3d at 511 (determining that "support, custody, and other similar matters" can be considered by the court despite a stay).

184. *See, e.g.*, N.C. GEN. STAT. ANN. § 50-13.7A(c)(1) (2007) ("Any temporary custody order for the child during the parent's absence shall end no later than 10 days after the parent returns . . . ."); N.D. CENT. CODE § 14-09-06(9) (Supp. 2007) ("The temporary custody order must explicitly provide that custody must be restored to the service member upon the service member's release from active duty service . . . .").

185. *See, e.g.*, ARK. CODE ANN. § 9-13-110(c)(1) (2007) ("A court . . . shall determine whether a temporary modification to an order for custody order or visitation is appropriate for [the] child . . . ."); N.C. GEN. STAT. ANN. § 50-13.7A(c)(1) (2007) (stating that a court may enter a temporary custody order); N.D. CENT. CODE § 14-09-06.6(9) (Supp. 2007) (stating that the court may only "enter a temporary custody order that is in the best interest of the child").

186. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.27 Sec. 7(1)(c) (West Supp. 2008) ("The court shall not modify or amend its previous judgments or order or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."); N.D. CENT. CODE § 14-09-06.6(9) (Supp. 2007) (stating that if a parent is on active duty status, a court may only "enter a temporary order that is in the best interest of the child").

187. MICH. COMP. LAWS ANN. § 722.27 Sec. 7(1)(c) (West Supp. 2008).

does it mean to "not consider a parent's absence?"[188] If it means that a court should only consider the child's situation before the servicemember parent was on active duty, this would ignore what is in the child's best interests at the time the court is determining custody. If the law means that the servicemember parent's absence and lack of active involvement in the child's life during that time will be ignored, then it does not change the fact that a temporary custody order can become permanent because the best interests determination favors the most recent custodial parent. It is necessary for the meaning of this language to be clarified before the law's effectiveness can be ascertained.

The law in North Dakota is similar to the Michigan law in most respects, but it also tries to confront a critical aspect of the problem facing judges when a parent is on active duty during a divorce proceeding. The North Dakota law states that "[i]f an original custody decision is pending and the service member is alerted for active duty service, or is absent for active duty service, the court may not issue a permanent custody order until the return of the service member from active duty."[189] Thus, at a minimum, this law clearly states that judges are not to issue permanent custody orders when a parent is absent due to active military service.[190]

The Arkansas law is slightly different, in that it states "[a] court shall not permanently modify an order for child custody or visitation solely on the basis that one (1) of the parents is a mobilized parent."[191] The Arkansas Legislature intended to prevent courts from issuing a permanent custody order when the only change in circumstances had been a servicemember parent's mobilization.[192] This law, however, does not address whether it would be permissible for a court to permanently modify a custody order if, in addition to the parent's mobilization, another factor exists that is only minor and itself inadequate to justify a change in custody. This may mean that the additional factor could be combined with the servicemember parent's absence as a basis for changing custody. Additionally, the other factor allowing a court to permanently modify a custody order may be a factor that only arose as a result of the servicemember parent's mobilization. Once these issues are addressed, section 9-13-110 of the Arkansas Code

188. *Id.*
189. N.D. CENT. CODE § 14-09-06.6(9) (Supp. 2007).
190. *See id.*
191. ARK. CODE. ANN. § 9-13-110(b) (2007).
192. *See id.*

may resolve some of the problems that servicemember parents confront when they are called to active duty to protect our nation's interests at home and abroad.

North Carolina recently enacted a law that states: "The temporary duty, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer custody from the service member."[193] Like the Arkansas law, the North Carolina law fails to address whether the effects of this temporary mobilization may be considered as "a factor in a determination of change of circumstances if a motion is filed to transfer custody from the service member."[194] This omission is important because if the mobilization's effects may be considered as a factor in a determination of change of circumstances, then this law, in effect, does nothing to change the current problems that servicemember parents face. This problem arises because, if a deployed servicemember parent delegates his or her custodial rights to a non-parental relative, this change of custody, which only arose as a result of the servicemember's mobilization, could be used in support of a finding of a change in circumstances. However, if the mobilization's effects may *not* be considered in a change of circumstances determination, then it is possible that the natural parent's rights could be subordinated to those of a third party. Additionally, the North Carolina law provides a general disclaimer that "[n]othing in this section shall alter the duty of the court to consider the best interest of the child in deciding custody or visitation matters."[195] Consequently, this law still favors the temporary custodian because most of the best interest considerations favor the parent who most recently had custody of the child.[196] That said, the North Carolina law is still commendable because it allows a court to delegate a servicemember parent's visitation rights to another family member if the parent's military service prevents him or her from exercising his or her visitation rights and such a delegation would be in the best interests of the child.[197] This provision is important

193. N.C. GEN. STAT. ANN. § 50-13.7A(c)(2) (2007).

194. *Id.*

195. *Id.* § 50-13.7A(g).

196. *See* Arrillaga, *supra* note 9, at A8.

197. *See* N.C. GEN. STAT. ANN. § 50-13.7A(d) (stating that "[i]f the parent with visitation rights receives [orders that prevent that parent from exercising] visitation rights, the court may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the minor child for the duration of the parent's absence," if it is in the child's best interests).

because it allows a servicemember parent to still feel as if he or she has some involvement in the child's life, even if he or she cannot be personally involved.

B. The Federal Amendment to the SCRA

Although several states have enacted laws that address the problems posed by the current version of the SCRA and its application to child custody proceedings, Congress recognized that a national solution was needed. As a result, Congress recently amended the SCRA so that it explicitly states that the default judgment and stay provisions of the Act are applicable in child custody proceedings involving active duty servicemembers.[198] This new federal amendment, however, fails to address the issue of whether the SCRA preempts state family law in child custody proceedings. Additionally, the new federal amendment does not adequately address how courts should resolve the conflict between a temporary custody order and any resulting best interests of the child determination. For these reasons, Congress should enact legislation that explicitly deals with the problem of staying child custody actions pursuant to the SCRA, state courts across the nation are facing.

IV. A Proposal for a New Federal Law that Amends the SCRA and Takes into Account Both the Best Interests of the Child and the Rights of Servicemembers

As discussed previously, several states have enacted laws attempting to address the conflict between the best interests of the child and the staying of a child custody proceeding pursuant to the SCRA.[199] Congress has only recently enacted an amendment to the SCRA that directly deals with child custody proceedings,[200] but this amendment still fails to address several problems. Thus, a new federal law should be enacted that balances the competing interests of minor children and servicemember parents.

The main reason why a federal law addressing these issues should be enacted is because servicemembers are being treated differently depending on their state of residence.[201] This is true even though they are often deployed, on behalf of this country, to engage in combat in a foreign country or to assist in a federal

198. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 584, 122 Stat. 3, 128.

199. *See supra* Part III.A.

200. *See* 50 U.S.C.A. app. § 522 (West 2008).

201. *See supra* Part III.

disaster. This difference in treatment often is a result of differing interpretations among state courts of the applicability and meaning of a federal law, the SCRA.[202] Because servicemembers are not serving individual states, but the country as a whole, they should not be treated differently in the legal system with respect to issues that arise in connection with their military service. Additionally, if Congress had not felt this problem was necessary to address and had only wanted to afford servicemembers some general sort of protection, then Congress could have simply required each state to enact its own legislation to protect active servicemembers.

To be effective, any amendment to the SCRA must explicitly state that the Act applies to child custody proceedings, *and* that it preempts state law. This language is necessary to ensure that all servicemembers are treated uniformly regardless of their state of residence. Additionally, this amendment must recognize that, due to changed circumstances, what is in the best interests of the child is not always compatible with the previous custody order.

The goal of this federal law, however, should be to prevent any foreseeable litigation involving the child of a servicemember during that parent's military service. Accordingly, the law should mandate that when a servicemember parent is enlisted, but not on active duty, at the time of a divorce or the issuing of an initial custody order, the initial custody order must specify who will have custody of the child if the servicemember parent is deployed.

Additionally, to prevent custody disputes from arising after a servicemember parent has been deployed, the SCRA must be amended to require that all servicemember parents make a good faith effort, before deployment, to notify any other person who would currently have standing to petition the court for an order modifying custody that the servicemember parent is being deployed. Once contacted, those individuals would have a specified period of time to notify the servicemember and the court if they plan to petition for a modification of custody; and if notice is not given within that time, those individuals would waive their right to petition the court for a modification of custody while the servicemember is on active duty. However, if an individual who has standing to petition the court for custody is not notified of the servicemember parent's absence until after deployment, then temporary custody may be granted to that individual if the court believes it is in the child's best interests. This notice requirement

202. *Compare* Lenser v. McGowan, 191 S.W.3d 506 (Ark. 2004) *with In re* Marriage of Bradley, 137 P.3d 1030, 1032 (Kan. 2006).

would provide a servicemember parent with an incentive to tell the non-servicemember parent, and any other individuals who may have standing to petition the court for custody, about their deployment, since a failure to do so could result in a temporary custody order being issued while the servicemember parent is deployed.

Another possible amendment would require courts to uphold custodial designations made pursuant to a Military Family Plan or a power of attorney, if those documents have been signed by the non-deployed parent. This requirement would promote communication between the parents and would resolve custodial conflicts prior to a servicemember's deployment. In situations where the servicemember parent agrees to give the non-deployed parent custody during his or her absence, or in situations where both parents agree on whom the temporary custodian should be, this would not be a difficult task to accomplish.

Finally, the SCRA should be amended to require that unless consented to, any delegation of custodial rights by a servicemember parent must not interfere with the non-deployed parent's custodial or visitation rights. A federal amendment to the SCRA based on the aforementioned considerations would allow state judges to better accommodate the competing interests of servicemember parents, non-deployed parents, and the best interests of the child.

Conclusion

According to Congress, the SCRA is intended to protect servicemembers from the adverse legal effects of military service,[203] in order "to enable such persons to devote their entire energy to the defense needs of the Nation."[204] The purpose of the SCRA is not being served, however, when temporary custody orders issued during a servicemember's absence are allowed to become permanent upon the servicemember's return. Accordingly, in order for the SCRA to effectively protect the legal rights of all individuals serving in the armed forces, including those with children, the SCRA must be amended. Otherwise, servicemember parents will continue to lose custody of their children simply because they answered our nation's call to duty.

203. *See* 50 U.S.C.A. app. § 502(2) (West 2003).
204. *See id.* § 502(1).