

Avoiding Conflict at Home when There is Conflict Abroad: Military Child Custody and Visitation

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I. Introduction

In an all too common scenario, a servicemember¹ who learns she² will soon be deployed entrusts her child to the care of a grandparent or stepparent, rather than the child's biological parent. While the servicemember is away on active duty, the other biological parent seeks custody of the child. If the custody arrangement is altered, the servicemember often faces a complicated legal battle to regain custody upon her return, in spite of her previous role as primary caregiver.

Though the servicemember can request a stay of the proceedings under federal law, a lack of familiarity with the law often creates confusion among both the lawyers and judges involved, resulting in a denial or misapplication of the stay. Even if it is granted, a judge must balance the parents' rights with those of the child and may decide that the child's best interests trump the federal mandate and issue a new custody order in spite of the federal law.

Many who have been through this ordeal argue that the federal law, applicable in all civil disputes, is insufficient to protect their rights in child custody cases, which are unique from most, if not all, other civil cases. They feel as though they are being penalized for serving their country and that the purpose of the federal law, to allow servicemembers to concentrate on the war effort

¹Although "servicemember" is traditionally considered two words, in the title of the federal legislation to which I will be referring throughout the paper, it is used as one word. For consistency I will be using the term "servicemember."

²Masculine and feminine pronouns are intended to be interchangeable.

rather than a legal war at home, is being defeated. Meanwhile, the courts struggle to guard the rights of both parents and their children.

To combat this confusion and the sometimes-conflicting interests of parents and their children, many states are developing their own legislation to address the rights of servicemembers in child custody and visitation cases. This paper examines one such legislative effort from Kansas, House Substitute for Senate Bill 32 (Substitute for S.B. 32).³ In addition to tracking the evolution of the bill, this paper will look at the problem the bill is meant to address, the proposed solution it encompasses, its potential impact, and the possibility that further steps will need to be taken. Finally, it will show that while legislation can be helpful, especially if it further defines the rights of servicemembers and gives judges the discretion to weigh the best interests of the child, the most effective measures would also include continuing education on the issue with an emphasis on preventing custody battles in the first place.

II. The Problem Substitute for S.B. 32 is Meant to Address

A. The Servicemembers Civil Relief Act

In 2003, the United States Congress passed the Servicemembers Civil Relief Act (SCRA), revising its predecessor, the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA).⁴ The purpose of the act is to allow servicemembers "to devote their entire energy to the defense needs of the Nation," by temporarily suspending judicial and administrative proceedings in

³H. Sub. for S.B. 32, 2007-2008 Legis. Sess. (Kan. 2008). As you will see in later paragraphs, the bill was introduced as House Bill 2621 but is currently known as House Substitute for Senate Bill 32. In the text, I will refer to the bill as "Substitute for S.B. 32" when it is discussed generally and when discussing the changes it has undergone since the House Judiciary Committee inserted the text of House Bill 2621 into Senate Bill 32. Otherwise, it will be referred to as "H.B. 2621."

⁴Mark A. Sullivan, *A Judge's Guide to the Servicemembers Civil Relief Act*, 1 (Feb. 5, 2005), <http://www.abanet.org/family/military/scrajudgesguidecklist.pdf>. See also, 50 U.S.C. App. §§ 501-596 (2000 & Supp. 2004).

which a servicemember is a party.⁵ It is applicable in civil cases in all courts and administrative agencies⁶ and affects active members of the armed forces, including the National Guard.⁷ In January 2008, the SCRA was amended to explicitly state that it applies in child custody cases.⁸

There are two ways the SCRA is used in a military child custody or visitation proceeding:⁹ (1) when a servicemember fails to appear, the SCRA requires the court to appoint counsel to represent the servicemember¹⁰ and (2) upon application by a servicemember, the court must grant a stay of the proceedings if the application contains the required documents.¹¹

1. SCRA GUIDELINES WHEN A SERVICEMEMBER FAILS TO APPEAR

When a party fails to appear in a case, the court must check to see whether that person is a member of the military and if so, must appoint counsel to act on the servicemember's behalf.¹² Later, if the court determines that the servicemember may have a valid defense to the action that cannot be presented in her absence, or if "counsel has been unable to contact the defendant or

⁵50 U.S.C. App. § 502 (2000 & Supp. 2004).

⁶50 U.S.C. App. § 512(b) (2000 & Supp. 2004).

⁷50 U.S.C. App. § 511 (2000 & Supp. 2004).

⁸Pub. L. No. 110-181, § 584, 122 Stat. 3, 128 (2008).

⁹This section's summary addresses only those parts of the act that affect child custody and visitation cases. For a summary of the act as a whole see Sullivan, *supra* note 4. For a more in-depth look at the SCRA, see ARMY JUDGE ADVOCATE GENERAL SCHOOL GUIDE TO THE SCRA, <http://www.jagcnet.army.mil/TJAGLCS> (follow "TJAGLCS Publications" link; then follow "Servicemembers Civil Relief Act Guide" link, found under the "Legal Assistance" heading); SERVICEMEMBER'S CIVIL RELIEF ACT INFORMATION CENTER, PUBLIC PREVENTATIVE LAW PAGE, ARMY JAG CORPS, <http://www.jagcnet.army.mil/legal>.

¹⁰50 U.S.C. App. § 521 (2000 & Supp. 2004).

¹¹50 U.S.C. App. § 522 (2000 & Supp. 2004).

¹²50 U.S.C. App. § 521(b) (2000 & Supp. 2004).

otherwise determine if a meritorious claim exists,” the court must grant a minimum ninety-day stay of the proceedings.¹³

Additionally, a servicemember who has received a default judgment can ask the court issuing the original judgment to reopen it if the judgment was entered while the servicemember was on active duty or up to sixty days after being released from service.¹⁴ For the judgment to be reopened, the servicemember must make the request while on active duty or up to ninety days after being released from service¹⁵ and must show that she is unable to defend herself and has a meritorious defense.¹⁶

2. SCRA GUIDELINES WHEN A SERVICEMEMBER APPLIES FOR A PROCEDURAL STAY

To be eligible for a procedural stay, a servicemember must provide two things: (1) a letter or other communication (a) explaining how her current duties materially affect her ability to appear and (b) stating a date when she can appear; and (2) a letter or other communication from the servicemember’s commanding officer saying that (a) the servicemember is unable to appear due to military duty and (b) is not currently authorized for military leave.¹⁷ If these two documents are provided, the court must grant a minimum ninety-day stay of the proceedings.¹⁸

The servicemember may apply for an additional stay either at the time of the initial application or when it becomes apparent that she will still be unable to appear at the end of the

¹³50 U.S.C. App. § 521(d) (2000 & Supp. 2004).

¹⁴50 U.S.C. App. § 521(g)(1) (2000 & Supp. 2004).

¹⁵50 U.S.C. App. § 521(g)(2) (2000 & Supp. 2004).

¹⁶50 U.S.C. App. § 521(g)(1) (2000 & Supp. 2004).

¹⁷50 U.S.C. App. § 522(b)(2) (2000 & Supp. 2004).

¹⁸Presumably, the servicemember’s commanding officer could provide the four required statements in one document, rather than the two described in § 522, and still be sufficient.

first ninety days.¹⁹ In the application for an additional stay, the servicemember must provide the same information required for the initial stay.²⁰ The additional stay is discretionary but if an application is denied, the court must appoint counsel to represent the servicemember.²¹ Under the prior SSCRA, if counsel was able to show that the servicemember's ability to defend herself was materially affected, the court had to grant a stay until the material affect was removed.²² While this policy is not explicit in the SCRA, it is likely to continue.²³

The SCRA seems to be fairly straightforward but it becomes less clear when applied in conjunction with family law. Now that the SCRA framework is in place, the discussion of the problem Substitute for S.B. 32 seeks to correct will shift to an example of a military child custody case from Kansas before turning to examine the confusion and conflict inherent in this and other cases.

B. A "Typical" Military Child Custody Case: In re Marriage of Bradley

When Marine Corporal Levi Bradley was deployed to Iraq, he left his young son, Tyler, in the care of Bradley's mother pursuant to an agreed order and parenting plan signed by Amber, Bradley's ex-wife.²⁴ A month later, while Bradley was stationed in Fallujah,²⁵ Amber tried to

¹⁹50 U.S.C. App. § 522(d)(1) (2000 & Supp. 2004).

²⁰*Id.*

²¹50 U.S.C. App. § 522(d)(2) (2000 & Supp. 2004).

²²Sullivan, *supra* note 4, at 4.

²³*Id.*

²⁴Pauline Arrillaga, *Deployed Troops Battle for Custody of Children*, USA TODAY, May 5, 2007, available at http://www.usatoday.com/news/nation/2007-05-05-parentswar_N.htm. See also *In re Marriage of Bradley*, 137 P.3d 1030, 1032 (Kan. 2006).

²⁵Arrillaga, *supra* note 25.

void the agreement and gain custody of Tyler stating that she did not have counsel when she signed the agreement and “did not fully understand what she was agreeing to.”²⁶ In response, Bradley’s lawyer requested a stay of the proceedings under the SCRA.²⁷

At a hearing on the motion to modify the order, the judge stated that the SCRA would keep him from issuing a judgment *against* Bradley but would not keep him from addressing a temporary order in the best interests of the child. He cited the court’s ongoing obligation to act in the best interests of the child as the source of his authority.²⁸ At the close of the hearing, the court gave custody of Tyler to Amber.²⁹ Bradley filed a motion to reconsider and amend the order, reapplied for a stay in the proceedings, and requested that the question of whether the SCRA bars the district court judge from issuing a temporary order be certified for an interlocutory appeal.³⁰ The court denied Bradley’s second application for a stay and upheld the order, but agreed to certify the question for appeal. The case was then transferred from the Kansas Court of Appeals to the Kansas Supreme Court.³¹

The Kansas Supreme Court declined to address the issue of whether the SCRA would have kept the district court from entering the temporary order and decided the case on an issue that some would consider a technicality, Bradley’s application for a stay. As described in the previous section, the SCRA required Bradley to show four things in his request for a stay: (1)

²⁶*In re* Marriage of Bradley, 137 P.3d 1030, 1032 (Kan. 2006).

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.* at 1031.

how his military duties materially affected his ability to appear, (2) a date when he would be available to appear, (3) that his military duties prevented his appearance, and (4) that he was currently not authorized for military leave.³²

The court stated that Bradley's request was incomplete and went on to point out that while the SCRA requires the court to grant a stay if the statutory requirements are met, the SCRA does not state what standard a court should apply when the application does not meet the requirements.³³ After looking at Kansas case law, the court determined that the decision to grant a stay is largely discretionary and decided that because Bradley had not met the requirements, the district court was within its discretion to determine whether to grant the stay.³⁴

In deciding whether the district court had abused its discretion by denying the stay, the supreme court looked at the fact that Amber did not have representation at the time she signed the agreement.³⁵ Similarly, it acknowledged that without the agreement allowing Tyler to remain with his grandmother in Bradley's absence, Amber's claim to custody was superior to that of Bradley's mother.³⁶ The court therefore held that the district court had not abused its discretion, even though it had decided the case "upon the wrong ground."³⁷

³²*Id.* at 1033 (citing 50 U.S.C. App. § 522(b)(2)).

³³*Id.* at 1034.

³⁴*Id.* (citing *Henry v. Stewart*, 454 P.2d 7 (1969)).

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

C. Confusion and Conflict in Military Custody and Visitation Cases

While there is no “typical” military custody and visitation case,³⁸ *Bradley* is a good example of two consistent factors in these cases: (1) confusion about the SCRA, its intent, and when it should be applied, and similarly, (2) the conflict that judges face in balancing the right of military parents to receive a procedural stay and the best interests of the child.

1. CONFUSION

The law governing military custody and visitation cases has developed, for the most part, over the last five years, since the passage of the SCRA. As new as this body of law is, however, this body of law is also tremendously complicated and rapidly changing. It incorporates family law, which is generally governed by the states, and military law, which is largely federal law. Additionally, as the scenario previously described becomes increasingly common, many state legislatures and the United States Congress have made an effort to address the problem.³⁹ In handling these cases, lawyers and judges must therefore not only become familiar with two vast bodies of law, family and military law, but also try to stay current on recent legislative

³⁸For additional cases applying the SCRA in military child custody and visitation cases, compare, e.g., *Lenser v. McGowan*, 191 S.W.3d 506 (Ark. 2004); *Shelor v. Shelor*, 38 S.E.2d 895, (Ga. 1989); *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005); *In re Marriage of Thomas*, 2004 WL 48890 (Kan. Ct. App., 2004); *Lebo v. Lebo*, 886 So. 2d 491 (La. Ct. App. 2004); and *Diffin v. Towne*, 2004 WL 1218792 (N.Y. Fam. Ct. 2004), with, e.g., *In re Marriage of DePalma*, 176 P.3d 829 (Colo. Ct. App. 2007); *Webb v. Webb*, 148 P.3d 1267 (Idaho 2006); and *In re Marriage of Rayman*, 47 P.3d 413 (Kan., 2002).

³⁹The following states currently have legislation in effect related to this issue: Arizona (ARIZ. REV. STAT. ANN. § 25-411 (2007).); Arkansas (ARK. CODE ANN. § 9-13-110 (West Supp. 2007).); California (CAL. FAM. CODE § 3047 (West 2005).); Idaho (IDAHO CODE ANN. § 32-717 (2006).); Kentucky (KY. REV. STAT. ANN. § 403.340 (West 1999).); Michigan (MICH. COMP. LAWS ANN. § 722.27 (West 2005).); Nebraska (NEB. REV. STAT. § 43-2923 (West Supp. 2007).); North Carolina (N.C. GEN. STAT. § 50-13.7A)(2007).); Ohio (OHIO REV. CODE ANN. § 3109.04 (West Supp. 2008).); Oklahoma (OKLA. STAT. ANN. 43 § 112 (West Supp. 2008).); and Oregon (OR. REV. STAT. ANN. § 107.135 (West 2007).).

developments. Given these two facts, it is not surprising that there is so much confusion about how all the pieces fit together.

Bradley is an excellent example of this uncertainty. While the district court judge decided, perhaps erroneously, that he was not bound by federal law in issuing a temporary order, the case was decided by the Kansas Supreme Court on what could be called a technicality, *Bradley's* incomplete application for a stay. It seems *Bradley's* lawyer could have taken more care to ensure that his application for a stay would not be rejected. Some might speculate, however, that the supreme court was reluctant to address the issue of whether the SCRA would have kept the district court from granting the temporary order, and if the application had been sufficient, may have found another technicality to avoid making a decision on that issue.

If the application was sufficient and the supreme court upheld the temporary order, it risked being overturned on appeal for failing to recognize the supremacy of federal law. The district court argued that it has the authority to enter the temporary order because it is being done in consideration of the child's best interests rather than against the servicemember, which would be prohibited by the SCRA. The SCRA, however, was meant to allow servicemembers to focus on their military duties and to prevent proceedings that would "adversely affect" them.⁴⁰ Furthermore, Congress amended the SCRA to plainly show that it was meant to apply in child custody cases.⁴¹ Because of these two things, the district court's argument could easily be dismissed since losing custody of one's child could clearly be seen as an "adverse" effect.

Conversely, if the application was sufficient, overturning the district court might be interpreted as saying that contrary to the district court's argument, a temporary order in the best

⁴⁰50 U.S.C. App. § 501 (2000 & Supp. 2004).

⁴¹Pub. L. No. 110-181, § 584, 122 Stat. 3, 128 (2008).

interests of the child can still be seen as an order against the servicemember and thereby be barred by the SCRA. This suggests that there are circumstances in which a parent's interests might trump her child's interests, which conflicts with the generally accepted principle that a child's best interests are paramount. Given the possible negative outcomes in each scenario, it is clear why the court might want to avoid deciding the issue if possible.

2. CONFLICT

This leads the discussion to the second factor consistent in child custody and visitation cases: conflict about which comes first, the rights of the parent or the rights of the child. On one side of the argument are military parents who feel betrayed by the court and their country. When they go overseas they risk losing both their lives and their children. Ultimately, they may ask whether serving their country is worth those risks. On the other side of the argument are judges who are torn between protecting the rights of servicemembers by applying the stay in their favor and protecting the rights of children by acting promptly.

A quote from Lieutenant Eva Crouch of the Kentucky National Guard is emblematic of the sentiments of servicemembers who must choose between serving their country and preserving their families: “I can’t leave my child again – regardless of whether I know when I come home, she comes home. Still, I can’t.”⁴² Lieutenant Crouch was mobilized and left her daughter with her ex-husband, who had promised to return to the original custody arrangement upon Crouch’s return.⁴³ When she did return, however, her ex-husband informed her that she would not be picking up their daughter without a court order.⁴⁴ After a long legal battle she

⁴²Arrillaga, *supra* note 25 (quoting Lieutenant Eva Crouch).

⁴³*Id.*

⁴⁴*Id.*

regained custody, but she knows she may be mobilized again, and says serving her country is no longer worth losing her daughter.⁴⁵

Conversely, the judiciary in its role as *parens patriae*,⁴⁶ must be attentive to the best interests of the child. In military custody cases, judges struggle with

the reconciliation of conflicting interests such as the need for an immediate decision on care of a child (when the custodial parent is absent) and the need to stay proceedings when the nonmoving party is in the military and unavailable. Judges find supporting a stay of proceedings under [the] SCRA difficult, regardless of how ‘unfair’ it might seem to have the hearing without the [servicemember] present, when the alternative is to defer, delay, or deny the decision on what happens to the child when the parent with legal custody is not present.⁴⁷

Because many family law codes state that the discretionary judicial standard of the best interests of the child is key in a legal proceeding, some argue that the task of resolving this conflict lies with the legislative branch. Some states, including Kansas, have accepted this challenge. Even in the legislative process, however, a solution that protects the rights of both parents and children is clouded by confusion about current law and competing interests. This begs the question of whether legislation will be sufficient to address the problem.

III. The Proposed Solution: Legislative Action and Substitute for S.B. 32

A. The Origin of H.B. 2621

Army Reserve First Lieutenant Tira Bolder wanted to transfer custody of her son to her mother while on duty in Iraq.⁴⁸ Her ex-husband, with whom she shared custody, wanted their

⁴⁵*Id.*

⁴⁶Black’s Law Dictionary defines “*parens patriae*” as “the state in its capacity as provider of protection to those unable to care for themselves.” BLACKS LAW DICTIONARY 1144 (8th ed. 2004).

⁴⁷Mark E. Sullivan, *Military Custody Twists & Turns*, 28 FAM. ADVOC. 23, 24 (Fall 2005).

son to stay with him.⁴⁹ They finally agreed that their son would stay with his father, but Tira was still concerned that her ex-husband would try to make the change permanent in her absence.⁵⁰ Troubled by that possibility, Tira began contacting her elected officials to clarify her rights.⁵¹

A few months later, the Special Committee on Judiciary was assigned to study “child care custody issues as they impact those persons deployed for military service” during the interim of the 2007-2008 legislative session.⁵² On November 8, 2007, it heard testimony from proponent Stacey Adair, Tira’s brother, who told the committee about his sister’s experience and spoke on the insufficiency of the SCRA and the need for additional measures.⁵³ The committee members also received a copy of a North Carolina law recently enacted on the issue. In the committee’s report to the 2008 Kansas Legislature, it announced that a bill would be introduced in the Kansas House of Representatives based on the North Carolina legislation.⁵⁴

⁴⁸ Tim Potter, *Parents at War Fear Losing Kids, Custody Can Change if a Parent Deploys*, WICHITA EAGLE, June 2, 2007, at 1A.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²*2007 Interim Topics as Approved by the Legislative Coordinating Council 5*, <http://skyways.lib.ks.us/ksleg/KLRD/2007Interim/2007InterimTopics.pdf>.

⁵³*Minutes: Nov. 8, 2007 Hearing on Interim Topic No. 15, Child Care Custody-Military Deployment Before the Spec. Comm. on Judiciary*, 2007 Interim, 2007-2008 Legis. Sess. 3 (Kan. 2007), http://www.kslegislature.org/committeeminutes/07-08/interim_joint/special/spJudiciary2007110809.pdf.

⁵⁴*Report of the Special Committee on Judiciary to the 2008 Kansas Legislature 32*, <http://skyways.lib.ks.us/ksleg/KLRD/2007CommRpts/judiciary.pdf>. For more information on the North Carolina law, see Mark E. Sullivan, *New Tools for Military Custody and Visitation Cases*, <http://www.ncfamilylaw.com/GeneralAssembly.htm>.

The North Carolina law’s purpose is 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.”⁵⁵ The law causes a temporary custody order to end no later than ten days after the deployed parent returns from military duty but allows the court to conduct a hearing for emergency custody when there is a risk of an “immediate danger of irreparable harm to the child.”⁵⁶ It also states that the parent’s absence due to military service “shall not be a factor in a determination of change of circumstances if a motion is filed to transfer custody from the [servicemember].”⁵⁷ Finally, it allows parents with rights to custody or visitation to delegate those rights to a “family member with a close and substantial relationship” to the child while the parent is away.⁵⁸

The Special Committee on Judiciary reported that in addition to the provisions in the North Carolina legislation, the bill it would offer, H.B. 2621, adds a requirement that permanent parenting plans include a provision that addresses deployment and creates a presumption that the agreement is in the best interests of the child.⁵⁹ The bill also provides for Kansas to maintain jurisdiction unless the parents agree otherwise.⁶⁰

⁵⁵N.C. GEN. STAT. § 50-13.7A(a) (2007).

⁵⁶N.C. GEN. STAT. § 50-13.7A(c)(1) (2007).

⁵⁷N.C. GEN. STAT. § 50-13.7A(c)(2) (2007).

⁵⁸N.C. GEN. STAT. § 50-13.7A(d) (2007).

⁵⁹*Report of the Special Committee on Judiciary* 33, *supra* note 58.

⁶⁰*Id.*

B. The Next Step: The House and Senate Judiciary Hearings

H.B. 2621 was introduced and assigned to the House Judiciary Committee soon after the 2008 session began.⁶¹ On January 23, 2008 that committee held a hearing on the bill,⁶² and on February 15, the House of Representatives voted on H.B. 2621 and passed it by a vote of one hundred twenty-two to zero.⁶³ On the same day, the bill was sent to the Senate⁶⁴ and, on February 15, was assigned to the Senate Judiciary Committee.⁶⁵ That committee held a hearing on the bill on March 4, where it heard testimony from opponent Ronald Nelson.⁶⁶ Mr. Nelson stated that the proposed legislation merely complicated and compounded the problem and listed what he identified as the most serious of the bills flaws.⁶⁷ Among them was the fact that the

⁶¹*H. Journal, Jan. 14, 2008*, 2007-2008 Legis. Sess. 1286 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert “January 14, 2008” and select “House” in Journals search form and select “Get Journal”).

⁶²*Minutes: Jan. 23, 2008 Hearing on H.B. 2621 Before the H. Judiciary Comm.*, 2007-2008 Legis. Sess. 1-2 (Kan. 2008), <http://www.kslegislature.org/committeeminutes/07-08/house/hjud/20080123hJud.pdf>.

⁶³*H. Journal, Feb. 14, 2008*, 2007-2008 Legis. Sess. 1380 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert “February 14, 2008” and select “House” in Journals search form and select “Get Journal”).

⁶⁴*S. Journal, Feb. 14, 2008*, 2007-2008 Legis. Sess. 1295 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert “February 14, 2008” and select “Senate” in Journals search form and select “Get Journal”).

⁶⁵*S. Journal, Feb. 15, 2008*, 2007-2008 Legis. Sess. 1304 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert “February 15, 2008” and select “Senate” in Journals search form and select “Get Journal”).

⁶⁶*Minutes: Mar. 4, 2008 Hearing on H.B. 2621 Before the S. Judiciary Comm.*, 2007-2008 Legis. Sess. 1-2 (Kan. 2008), <http://www.kslegislature.org/committeeminutes/07-08/senate/sjudiciary/20080304sJudiciary.pdf>. In addition to the official minutes of the hearing, unofficial notes of the proceeding and written testimony of the opponents are on file with the author.

⁶⁷*Id.* at 1.

bill's provision granting continuing jurisdiction to Kansas courts conflicted with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).⁶⁸

Additionally, he stated that the requirement that the temporary custody order end within ten days of the servicemember's return overlooks circumstances in which it might be detrimental for the child to be moved so suddenly, such as if the child were in the middle of a school year or had become active in extracurricular activities from which she did not want to be removed.⁶⁹ While moving the child may cause some harm, it would probably not meet the threshold for an emergency order.⁷⁰

Furthermore, he pointed out that the bill's provision allowing parents to delegate their parenting time to third parties may conflict with *Troxel v. Granville*, a U.S. Supreme Court decision that found a Washington state statute unconstitutional as applied.⁷¹ The statute allowed third parties to petition for visitation rights at any time, interfering with "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."⁷² This interference was therefore found to violate the substantive due process rights of the mother.⁷³

⁶⁸ *Id.* (referencing the UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997) (limiting child custody jurisdiction to one state, avoiding competing orders, and providing enforcement provisions for child custody orders) <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.pdf>).

⁶⁹ *Written Statement of Opponent Ronald Nelson, Attorney, Law Offices of Nelson & Booth: Hearing on H.B. 2621 Before the S. Judiciary Comm., 2007-2008 Legis. Sess. 2-3 (Kan. 2008).*

⁷⁰ *Id.* at 3.

⁷¹ *Id.* (citing *Troxel v. Granville*, 530 U.S. 57, 68 (2000)).

⁷² *Troxel*, 530 U.S. at 66.

⁷³ *Id.* at 68.

Finally, Mr. Nelson suggested a bill from the Virginia legislature as a substitute. It offers many of the same protections as H.B. 2621 but gives more discretion to the judge.⁷⁴ For example, the bill requires a hearing on changing custody within thirty days of the servicemember filing a motion to amend the temporary order, rather than ending the custody order within ten days of return, and places the burden on the nondeployed parent to show that the change would not be in the best interests of the child.⁷⁵

Washburn University School of Law professor, Linda Elrod, also spoke briefly to the committee, voicing similar concerns.⁷⁶ Particularly, Professor Elrod, who participated in the composition of the UCCJEA, emphasized that forty-six states have adopted the UCCJEA, and that it is important to preserve uniformity among state laws. Because this bill would disrupt that uniformity, she opposed the bill.⁷⁷ She also noted the possible conflict with *Troxel* and pointed out that the bill should apply to more than just servicemembers as many independent contractors are stationed overseas to assist the military and face similar situations.⁷⁸

C. The Plot Thickens: H.B. 2621 is Transplanted

⁷⁴*Written Statement of Opponent Ronald Nelson, Attorney, Law Offices of Nelson & Booth: Hearing on H.B. 2621 Before the S. Judiciary Comm., 2007-2008 Legis. Sess. 4-6 (Kan. 2008) (referencing S.B. 188, 2008 Legis. Sess. (Va. 2008).)*

⁷⁵S.B. 188 § 20-124.8(C), 2008 Legis. Sess. (Va. 2008). Since the Senate Judiciary hearing, the Virginia bill has been enacted and is currently available in 2008 Va. Acts chapter 750. When codified, the bill will be known as VA. CODE ANN. § 20-124.7 – 124.10. All future references will be to the bill as it was presented to the Senate Judiciary Committee.

⁷⁶*Minutes: Mar. 4, 2008 Hearing on H.B. 2621 Before the S. Judiciary Comm., 2007-2008 Legis. Sess. 1 (Kan. 2008), <http://www.kslegislature.org/committeeminutes/07-08/senate/sjudiciary/20080304sJudiciary.pdf>.*

⁷⁷*Id.*

⁷⁸*Id.*

After that hearing, the Senate Judiciary Committee took no further action on the bill. With an important legislative deadline fast approaching,⁷⁹ the House Judiciary Committee revived the bill by striking the text of a bill assigned to the House Judiciary Committee, S.B. 32,⁸⁰ and inserting the contents of H.B. 2621.⁸¹ On March 27, the House of Representatives voted on the bill under its new title, Substitute for S.B. 32, and it passed on a vote of one hundred twenty-three to zero.⁸² The following day, the Senate nonconcurred on Substitute for S.B. 32 and a conference committee was requested to try to reach a compromise on the bill.⁸³ The House of Representatives acceded to the request for a conference committee on March 31.⁸⁴

D. Some Final Changes: The Conference Committee

⁷⁹Deadlines are set for when bills can be considered in the second house. In this case, that deadline was April 2 so if the Senate Judiciary Committee failed to act on the bill before that date, it could no longer be considered on the floor of the Senate and would have no chance of becoming law this year. *Joint Rules of the Senate and House of Representatives*, 2007-2008 Legis. Sess. 9 (Kan. 2007), http://www.kslegislature.org/house/secretary/joint_rules.pdf

⁸⁰S.B. 32, 2007-2008 Legis. Sess. (Kan. 2007).

⁸¹*Minutes: Mar. 18, 2008 Discussion of Amendments to S.B. 32 Before the House Judiciary Committee*, 2007-2008 Legis. Sess. 2 (Kan. 2008), <http://www.kslegislature.org/committeeminutes/07-08/house/hjud/20080318hJud.pdf>.

⁸²*H. Journal, Mar. 27, 2008*, 2007-2008 Legis. Sess. 1750 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert “March 27, 2008” and select “House” in Journals search form and select “Get Journal”).

⁸³*S. Journal, Mar. 28, 2008*, 2007-2008 Legis. Sess. 1677 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert “March 28, 2008” and select “Senate” in Journals search form and select “Get Journal”).

⁸⁴*H. Journal, Mar. 31, 2008*, 2007-2008 Legis. Sess. 1820 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert “March 31, 2008” and select “House” in Journals search form and select “Get Journal”).

On April 4, the six-member conference committee agreed to strike much of the original text of the bill and to replace it with language based on Virginia Senate Bill 188 (S.B. 188), as suggested at the Senate Judiciary Committee hearing.⁸⁵ It also agreed to retain the provision on delegating parenting time to third parties and the provision requiring permanent parenting plans to address custody and parenting time if a parent is deployed.

The Virginia bill is similar to the Kansas legislation in that it recognizes the temporary order as one meant to be in effect only during the servicemember's absence.⁸⁶ Instead of ending the order within ten days of the parent's return, however, the Virginia bill requires that when the parent returns, the court must hold a hearing within thirty days of the deployed parents' motion to amend the temporary order.⁸⁷ Additionally, it places a burden on the nondeploying parent to show that amending the order would negatively affect the child.⁸⁸ The bill also requires that the deployed parent offer timely information concerning her leave schedule to the nondeploying parent and that in return, the nondeployed parent must make reasonable accommodations of that schedule.⁸⁹ Finally, the nondeployed parent must ensure that the deployed parent is able to communicate with her child or children via telephone and email while she is away.⁹⁰

⁸⁵ *Written Statement of Opponent Ronald Nelson, Attorney, Law Offices of Nelson & Booth: Hearing on H.B. 2621 Before the S. Judiciary Comm., 2007-2008 Legis. Sess. (Kan. 2008).*

⁸⁶S.B. 188 § 20-124.8(A), 2008 Legis. Sess. (Va. 2008).

⁸⁷S.B. 188 § 20-124.8(B), 2008 Legis. Sess. (Va. 2008).

⁸⁸*Id.*

⁸⁹S.B. 188 § 20-124.10(i), (iii), 2008 Legis. Sess. (Va. 2008).

⁹⁰S.B. 188 § 20-124.10(ii), 2008 Legis. Sess. (Va. 2008).

The House and Senate unanimously approved the changes made to the bill by the conference committee.⁹¹ On May 6, the bill was presented to the governor, and was signed on May 14. It will become effective on publication in the Kansas register.⁹²

IV. The Potential Impact of the Bill

A. The Bill's Strengths

Substitute for S.B. 32 has evolved a great deal since its inception and as a result, it is a stronger bill. It no longer conflicts with the UCCJEA, avoiding a possible contest between a state validly claiming jurisdiction under the UCCJEA and a Kansas court acting under the authority of this law. It provides some assurance that the servicemember will be able to regain custody after returning from active duty by placing the burden on the nondeployed parent to show that doing so would be contrary to the best interests of the child.⁹³ Additionally, the hearing held within thirty days of the servicemember's motion for the temporary order to be amended provides a slower transition for the child and gives the court more discretion than the previous ten-day time limit, which was only subject to change in case of an emergency.⁹⁴ It ensures that family members who play a substantial role in the children's lives will continue to

⁹¹ In the House, the vote was one hundred twenty-three to zero. *H. Journal, Apr. 30, 2008*, 2007-2008 Legis. Sess. 2365 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert "April 30, 2008" and select "House" in Journals search form and select "Get Journal"). In the Senate, the vote was forty to zero. *S. Journal, May 1, 2008*, 2007-2008 Legis. Sess. 2049 (Kan. 2008), <http://www.kslegislature.org/legsrv-journals/index.do> (insert "May 1, 2008" and select "Senate" in Journals search form and select "Get Journal").

⁹²H. Sub. for S.B. 32 § 4, 2007-2008 Legis. Sess. (Kan. 2008).

⁹³H. Sub. for S.B. 32 § (1)(d), 2007-2008 Legis. Sess. (Kan. 2008).

⁹⁴H.B. 2621 § (1)(d)(1), 2007-2008 Legis. Sess. (Kan. 2008).

fill that role by allowing parents to delegate their rights to those family members.⁹⁵ It facilitates communication between servicemembers and their children while they are away⁹⁶ and it encourages parents to take precautionary measures by requiring that parenting plans include a custody arrangement that would take effect when a parent is deployed.⁹⁷

B. The Bill's Weaknesses

In spite of all these things, two of the flaws pointed out by its opponents remain. For instance, a unilateral delegation of parental rights to third parties⁹⁸ is susceptible to a judicial challenge based on the Supreme Court's decision in *Troxel*.⁹⁹ The provision allowing delegation of rights was presumably meant to ensure that nondeploying parents do not keep third parties such as grandparents or stepparents from having contact with servicemembers' children. The Supreme Court has recognized, however, that parents presumptively act in the best interests of their children. If a nondeployed parent decides to limit contact between third parties and a child, so long as that parent is fit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."¹⁰⁰

This presumption that parents act in the best interests of their children was applied in *Troxel* to allow a parent to limit contact with third parties, but it could also be used in favor of

⁹⁵H. Sub. for S.B. 32 § (1)(f), 2007-2008 Legis. Sess. (Kan. 2008).

⁹⁶H. Sub. for S.B. 32 § (1)(i)(2), 2007-2008 Legis. Sess. (Kan. 2008).

⁹⁷H. Sub. for S.B. 32 § (3)(b)(4), 2007-2008 Legis. Sess. (Kan. 2008).

⁹⁸H. Sub. for S.B. 32 § (1)(f), 2007-2008 Legis. Sess. (Kan. 2008).

⁹⁹*See Troxel v. Granville*, 530 U.S. 57, 70 (2000).

¹⁰⁰*Id.* at 68-69.

the servicemember. In many situations, servicemembers prefer to entrust their children to the primary care of third parties. In delegating this responsibility, the court could presumptively conclude that unless the servicemember was unfit, the decision to do so was in the best interests of the child.

Additionally, a Kansas Supreme Court case could be of assistance to servicemembers who wish to exercise this provision of the bill. In *Trompeter v. Trompeter*, a father was found to be exercising custody of his daughter, though she resided with a couple unrelated to either parent, because he continued to make decisions related to her education, health, and religion.¹⁰¹ Relying on another Kansas case, the court noted that the custody dispute was between two fit parents and consequently, the parental preference rule was not applicable.¹⁰² Finally, the court includes a quote that is particularly relevant to military child custody cases.

We have never held that a father whose home has been broken up and who is otherwise entitled to custody of his child can be deprived of that custody simply because the exigencies of making a living compel him to keep it in the home of his parents or that a trial court abuses its discretion when, as here, it requires him to keep it there so long as such court deems it to be to the best interest of the child that that be done.¹⁰³

If the parental preference rule is found inapplicable in a case where the parent is still in the country and yet unable to provide a home for the child, it could arguably be set aside when the “exigencies of making a living” require the parent to go overseas to defend her country.

Another issue that was raised by the bill’s opponents is whether the bill is under-inclusive for failing to include independent contractors who are stationed overseas to assist the military and, in many ways, are employed in a similar capacity as servicemembers. Mark E. Sullivan

¹⁰¹545 P.2d 297, 301 (Kan. 1976).

¹⁰²*Id.* at 300-01 (citing *Dodd v. Dodd*, 229 P.2d 761, 763 (Kan. 1951).).

¹⁰³*Id.* at 301 (quoting *Dodd*, 229 P.2d at 763.).

argues, however, that the legislation cannot be made to apply to everyone.¹⁰⁴ If contractors are included, why not foreign service officers from the State Department or Peace Corp volunteers?¹⁰⁵ Additionally, he contends that if the statute bears a rational relationship to another group, it could still be applied in their favor.¹⁰⁶ Finally, he points out that while servicemembers have no choice about where they are stationed, others have some discretion in choosing their locale justifying the extra protection provided to them by this bill.¹⁰⁷

V. The Possibility That Additional Steps Will Need to Be Taken

Substitute for S.B. 32 provides more protection for the rights of military parents, while giving courts discretion to look at the best interests of the child, which is one of the best ways to reduce the conflict between the rights of parents and children. Even so, legislative efforts alone will not automatically correct the problem of confusion surrounding the law, requiring that additional steps be taken.

A. Continuing Legal Education

One necessary step is to continue to educate lawyers, judges, and members of the Judge Advocate General's (JAG) Corp., so they are more prepared to handle these cases. This would help both civil and military attorneys to advise their clients on preventative measures and once a case begins, to ensure that the full effect of the SCRA will be applied. Education for judges would give them a better understanding of how to apply the SCRA and thereby create a more accurate and consistent body of case law.

¹⁰⁴Email from Mark A. Sullivan, North Carolina Family Law Attorney, to the author (Apr. 15, 2008, 12:22 CST) (on file with the author).

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

The American Bar Association has made efforts to address the need for further instruction on the law by offering a continuing legal education (CLE) course on the topic.¹⁰⁸ The CLE entitled “Military Custody and Visitation: Twists and Turns” discussed the SCRA, questions to ask and information to gather when preparing a military custody case, ways to structure custody agreements to better protect the rights of military parents, and additional resources available to practitioners.¹⁰⁹ While variability of state law and the facts of the cases themselves would require a lawyer to do additional research, the CLE provided a thorough explanation of the law currently in effect and similar CLEs would certainly assist in reducing the confusion surrounding this body of law.

B. Preventative Measures

An additional step would be to focus on preventative measures to avoid going to court in the first place. If parents can agree on a temporary custody arrangement before the military parent deploys, rather than the military parent making a unilateral decision about who they would like to have custody, the nondeploying parent will be less likely to take legal action to remedy the situation.¹¹⁰ While the servicemember may have limited notice of when she will be deployed, if the servicemember knows that it is a possibility, she should take precautionary action.¹¹¹ Ideally, provisions relating to possible deployment would be included in a custody

¹⁰⁸Patricia Apy & Mark A. Sullivan, *American Bar Association Center for Continuing Legal Education Presentation: Military Custody and Visitation, Twists and Turns* (March 19, 2008), on file with the author.

¹⁰⁹*Id.*

¹¹⁰ Unofficial notes from *Continuing Legal Education Presentation: Military Custody and Visitation, Twists and Turns*, on file with the author.

¹¹¹*Id.*

agreement issued at the time of a divorce so the parties do not have to worry about taking additional precautions later on.¹¹²

A lawyer can do several things to help structure the plan in such a way that its intent is more likely to be carried out. If the other parent is available and fit, the plan should include that parent.¹¹³ If the other parent has not previously been involved in the child's life or is not interested in having custody, the military parent should get an affidavit or court waiver to document that fact.¹¹⁴ To help ensure that the temporary agreement is meant to remain in effect only in the military parent's absence, the agreement should specifically state this idea and set a deadline for the agreement to end.¹¹⁵ Another important precaution is to state that the agreement is satisfactory and in the best interests of the child to prevent it from being challenged later on.¹¹⁶ These precautions, supplemented by additional instruction on the law and legislation that further defines the rights of military parents, while protecting the court's discretion to act in the best interests of the child, would be the most effective means to help alleviate the problem faced by military parents.

VI. Conclusion

Parents who are deployed to serve their country in the military often run the risk of leaving the battlefield only to return to a custody battle at home, in spite of federal law that is meant to prevent this situation. Current confusion over the state of the law and the conflict

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*Id.*

judges face as they try to balance the rights of the parents and the rights of the child only complicate this situation. While the United States Congress and many state legislatures have tried to remedy this problem by revising the law, it is a complicated process to develop legislation that will best address the problem as a whole.

The Kansas legislature accepted this challenge and developed legislation, Substitute for S.B. 32, based on legislation from North Carolina and Virginia. While the bill is a good start, additional measures should be pursued to fully address the confusion and conflict in military custody cases. These measures, which include continuing instruction on the law and encouraging servicemembers to take preventative measures to avoid the legal battle altogether, in addition to legislation that further defines the rights of military parents while giving courts the discretion necessary to act in the best interests of the child, are the best way to ensure a positive outcome for servicemembers and their children.