Military Custody and Federal Law

This is an interview by Assistant Editor Max Rodden with Raleigh practitioner Mark Sullivan, a retired Army Reserve JAG colonel. This article appeared in the September 2010 issue of Family Forum*, the newsletter of the North Carolina Bar Section of Family Law. Reprinted with permission.*

Did you even think that Congress would one day be deciding your client's custody right? Well, that day might be just around the corner if Rep. Mike Turner of Ohio has his way. His proposal regarding military custody issues, H.R. 4469, has passed the House of Representatives for three years in a row. If it makes it through the Senate, it'll be law in 2011.

Family law practitioners may not be fully familiar with the proposed federal child custody legislation. So we've asked Mark Sullivan, a widely known expert in military divorce law who has testified in Congress and before state legislatures on military custody, to answer some questions about the ramifications of having a federal statute on child custody.

Q. Mark, what's your background in military divorce law?
A. I am the author of *The Military Divorce Handbook* (American Bar Association 2006). I have practiced in Raleigh for almost 40 years, and much of my work involves military divorce issues. I have been active with the American Bar Association on military custody and visitation matters for over ten years, and in the North Carolina State Bar for 30 years. I have chaired the American Bar Association's Standing Committee on Legal Assistance for Military Personnel, the Military Committee of the ABA Family Law Section, and the military committee of the North Carolina State Bar.

Q. Have you been involved in drafting legislation on military custody and visitation rights?
A. I've helped state legislatures and bar associations with military custody and visitation bills in the states of Alaska, Hawaii, Louisiana, Washington, New Mexico, Iowa, Kansas, Ohio, Indiana, Mississippi, Alabama, Virginia, Vermont, Georgia, New Jersey and Rhode Island. I served on the ABA Special Committee on Protecting the Rights of Servicemembers, and I am now a liaison to the National Conference of Commissioners on Uniform State Laws on military custody and visitation legislation.

Q. What does H.R. 4469, sponsored by Rep. Mike Turner of Ohio, provide?
A. This radical revision of the Servicemembers Civil Relief Act (SCRA), which would apply only to the small number of single military parents who have custody of a child, would:

- preclude courts from permanently changing custody while a military parent is deployed;
- require resumption of custody upon the servicemember's return from deployment, unless the reinstatement of custody is not in the best interest of the child; and
- bar courts from considering a military parent's deployment or possibility of deployment as a basis for determining the best interest of the child in custody modification cases.

Q. So what do <u>you</u> say to Mr. Turner's claim that a national military require a national standard for custody?
A. This simplified statement betrays a fundamental misunderstanding of the nature of our republic – 50 states with their own laws, and a federal government for those powers set out in the Constitution. If the "national military – national standard" argument contained any truth, then we'd have a national set of laws for servicemembers on drivers' licenses, voting requirements, the age of majority, and a host of other issues. The truth of the matter is that Congress has always deferred to the governments of the 50 states to enact and apply appropriately crafted legislation in the area of domestic relations, even when it affects military personnel. There are 50 different laws on child support for military personnel. Pension division upon divorce is a 50-state affair as well; the rules differ from one state to another. The rules also vary among the states as to what the courts may do with Survivor Benefit Plan coverage, alimony and child visitation upon divorce. States have always been solely responsible for the subject of custody and visitation in cases involving military parents.

Q. What have the state legislatures done to address the policy concerns this federal legislation is intended to address?
A. Most of the states already have legislation to protect military custody rights. Our own North Carolina statute, Section 50-13.7A of our General Statutes, provides these and more protections for military members. It's there because of our efforts in the state legislature, and because that's where it belongs – in a state statute, not in the federal code. Rep. Mike Turner's heart may be in the right place; his custody bill is not. Passage of H.R. 4469 would create serious and expensive trouble for troops, for children, for ex-spouses – all in the name of a principle to which we all subscribe, namely, protecting the rights of servicemembers and their children during deployment, mobilization and other military absences.

Congress should *not* be directing our courts, whether state or federal, on how to look after the best interest of a child, and yet this is exactly what the proposed legislation does. The United States Supreme Court stated:

> *The issuance of [custody] decrees . . . not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals of the past century and a half....*

Ankenbrandt v. Richards, 504 U.S. 689, 703-704 (1992)

Were the states failing to act in this area to protect the rights of servicemembers and their children, it would rightfully raise the ire of those in Congress, as well as the citizens who elect state and Congressional representatives. That is not the case, however. The states can – and *are* – acting creatively to protect the custody rights of our mothers and fathers in uniform. Today more than two-thirds of the state – 37 in all – have passed legislation with significant protections for the rights of military personnel who have custody, all of them more extensive than the terms of H.R. 4469. A table showing the status of each state is attached at Appendix A to this article.

Moreover, the continued efforts of the states should not be stifled by the application of rigid federal rules nationwide for cases which are always unique on their own facts. The passage of an overarching gridwork of federal law in a field which has always been reserved for the states will completely destroy the initiative of those states which are considering initial legislation or thinking about improving their current laws to protect military members and their children. "Why bother?" they'll say. "Why make the effort, when Congress has already told us what the outcome must be, each and every time? We know what Congress wants, it's already in the federal code, why should we do *anything more* for military parents?"

Q. How do the protections afforded by state legislation compare to that of the federal legislation?
A. They are significantly better for servicemembers and their children than the terms of H.R. 4469, providing (for example) –

- The use of electronic means of testimony for servicemembers who cannot appear in person at hearings.
- Expedited dockets for those who wish to put their affairs in order before deployment.
- Coverage and protection for Guard and Reserve personnel, as well as those who are on temporary duty (TDY) when these situations mean an unaccompanied tour of duty.

- Coverage for all forms of active duty, including humanitarian missions and remote tours of duty, not just "contingency operations," as is mentioned in H.R. 4469.
- Access to the child or children for visitation during periods of leave for servicemembers.

And – most significantly – these state statutes and bills deal with the issue of visitation for servicemembers who *do not have custody*. H.R. 4469 is completely silent on this. It's left out of the bill, as if the drafters were not even aware that - of those servicemembers who have minor children – most are *not* custodial parents. The demands of military life generally require release of custody into the hands of the non-military parent. By an overwhelming majority, the usual arrangement for single parents in the armed forces is visitation rights, *not custody*. According to Defense Department regulations, first-term single enlisted parents cannot have legal custody of a minor child. The states are well aware of these facts; many states have already passed legislation to let the judge delegate the visitation rights of a parent in uniform to a close family member if this is in the best interest of the child. There are no rights for military parents with visitation rights in H.R. 4469.

Q. Who are some noteworthy opponents of the proposed legislation?
A. The states are universally opposed to such legislation. The Conference of Chief Justices and the Conference of State Court Administrators, at their joint July 29, 2010 meeting, adopted a resolution opposing H.R. 4469. And resolutions of opposition have also been passed by the Adjutants General Association of the United States, and the National Governors Association. No one with an interest in state custody laws wants a federal statute which dictates custody outcomes.

Senator John McCain – a staunch supporter of the rights of servicemembers - has led the way in refusing to sign on to the idea of changing the Servicemembers Civil Relief Act in so radical a way. In a letter of July 28, 2009 to Rep. Turner, Senator McCain noted that:

> **Child custody laws and litigation, as you know, have traditionally been the province of the States. I suggest that we need to proceed with care in considering federal legislation that would preempt the States in their approaches to the child custody issues you have identified. I have been informed, for example, that 29 States have enacted laws providing guidance and direction to their own State courts about what standards to apply in cases involving military parents. I'm not convinced at this point that there needs to be a nationwide standard in view of the historical federal deference to the State legislatures and the obvious concern that the States have shown about this issue.**
>
> **I also have some concerns about the opposition that has been raised to your proposal from Associations with expertise in this area. The Senate Veterans' Committee, the committee with jurisdiction over the Servicemembers' Civil Relief Act, has opposed the legislation you have advanced. In addition, the American Bar Association, led by its Standing Committee on Legal Assistance for Military Personnel, issued a resolution in February 2009 that opposed modifying the SCRA in the way you have suggested.**

The Department of Defense, also a strong advocate of protecting the rights of military personnel, has likewise stood up to H.R. 4469 in its previous versions. Secretary Robert Gates, in a letter to Rep. Turner dated September 25, 2009, emphasized the positive actions which could be taken, and the lack of need for an amendment to the SCRA:

> Our General Counsel has reviewed the various state law protections for Service members. We find that, at present, some level of protection for Service members facing child custody issues exists in approximately 28 states, but the states' approaches to the issue vary widely. Many of these variances no doubt reflect different societal dimensions of the problem in different communities across the

country. Thus, we have concluded that it would be unwise to push for federal legislation in an area that is typically a matter of state law concern.

Also opposed is the American Bar Association. In Resolution 106, passed in February 2009, the ABA went on record as rejecting the ill-conceived ideas previous set out in H.R. 5658 in the 110th Congress, because this would –

- allow federal courts to exercise jurisdiction in child custody cases, including matters which involve military parents
- dictate case outcomes in state child-custody cases
- run roughshod over the powers of state courts in custody cases involving servicemember-parents, and
- pre-empt the growing body of state laws which comprehensively address servicemembers' needs in the child custody area.

And finally, the bill is opposed by the National Military Family Association. For over 40 years, the NMFA has been the only national military organization that has represented officers, enlisted personnel and their family members from all branches of the armed forces. Its sole focus is the military family, and its goal is to create and support policies that will improve the lives of families in the military services. Why has amending the SCRA in this way generated opposition from even the NMFA, if its purpose is *purely beneficial*? The NMFA, in a letter dated July 21, 2009 to Senators Benjamin Nelson and Lindsey Graham of the Senate Armed Services Committee, stated that

> We would also like to urge your support of the American Bar Association's (ABA) Resolution 106 concerning child custody and servicemember-parents. Based on our experience, we agree with the ABA that federal intervention in what has traditionally been a state matter would be burdensome to the states and stifle the efforts they have already made to address this issue. Educating state and local judges would also go a long way in alleviating confusion and misconceptions about the Servicemembers Civil Relief Act.

Q. Why do you oppose this legislation?
A. The worst of dire consequences is litigation of military custody in federal court. Imagine what would happen if litigants in military custody cases had *another door* open to them, namely, federal courts. All of a sudden, *making a federal case out of it* becomes a real option, not merely a throw-away phrase.

Do we want federal judges trying custody cases? Or federal marshals sent to retrieve children from school to testify in court? What kind of budget would a servicemember (or a former spouse) need for federal custody litigation? Who will represent these servicemembers? They are not entitled to legal representation in court by military attorneys, so this will require them to hire additional lawyers for complex litigation in multiple courts and perhaps in multiple states. The increased workload for our federal trial-level judges and marshals is hard to imagine. The increased cost for military single parents is obvious. If you think that these cases are expensive now, wait till you start talking to constituents who've been told by their domestic attorneys, "Now we're in federal court!"

It is well-settled that, where there is a specific remedy enumerated and prescribed by federal statute, the litigant has the right to have that issue determined in the federal courts. *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 53 S.Ct. 477, 77 L.Ed. 903 (1933): "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under federal statute." *Id.* at 483. The federal rights set out in H.R. 4469 will lead directly to federal court involvement in military custody cases.

Of course, some say that the bill is buttoned up and bulletproof on federal litigation, since it contains a clause, Sec. 208(d), which asserts that "Nothing in this section shall create a Federal right of action." Unfortunately, little thought went into the implications of opening up new federal rights while trying to close the door on federal remedies. The statement about not creating a federal right of action means little, since there are several other ways that creative counsel can get a case involving *federal rights* into the *federal courts*.

For example, if counsel wants to avoid unpleasant results in state court, the procedure of removal to federal court is the logical next step. While H.R. 4469 doesn't *create* a federal right of action, it says nothing about the existing remedy of removal under 28 U.S.C. 1441. Such a transfer will add months and months onto the custody litigation, while a federal judge decides whether to take the case or remand it back to state court. That's months and months of time ticking against the servicemember who thought that H.R. 4469 was there to *help* him or her; now it's the sole reason why counsel fees are spiraling out of controls at the rate of $5-10,000 a month. How does that protect Sergeant Jane Doe's custody rights when she returns from deployment? How will she afford litigation in two courts instead of just one? Why would we want to open the door of federal rights when it's clear that a federal remedy must be given to those who are protected by this law? It's simple: there's nothing in H.R. 4469 which bars removal to federal court.

While we're talking about removal, why not look into a specific basis for removal jurisdiction? It's found in Title 28 of the U.S. Code, Section 1442a. The statute provides:

> *A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims a ny right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final he aring thereof be rem oved for trial into the district court of the Unite d States for the district where it is pending i n the manner prescribed by law, and it s hall thereupon be entered on the docket of the district court, which shall proceed as if the cause had b een originally commenced therein and shal l have full power to hear and determine the cause.*

Does this apply where a servicemember is sued for a change of custody? Let's set out the elements and analyze it:

- Sergeant Jane Doe has been sued in "a court of a State" regarding custody.
- She is "a member of the armed forces of the United States."
- There is a case against her and it is a "civil prosecution."
- And she would be relying on the rights prescribed for her; those rights, if H.R. 4469 were passed, would be in the Servicemembers Civil Relief Act.
- These rights are "under a law of the United States respecting the armed forces thereof," since the Servicemembers Civil Relief Act is, of course, such a law.
- And thus the state court case may be removed into federal district court, where the federal judge would have full power to hear and determine the cause.

So we're in federal court, trying a custody case! All as a result of H.R. 4469.

When a servicemember's case may be decided contrary to H.R. 4469, there is another remedy – a declaratory judgment suit in federal court. Such an action is brought under 28 U.S.C. 2201-2202. It involves these elements: 1) a contested case, 2) within the jurisdiction of the federal district court, 3) involving a declaration of the rights and other legal relations of any interest party, and 4) whether or not further relief is

sought. This is another pathway to federal court which H.R. 4469 would not limit. Perhaps the proponents of this bill didn't think of that either.

Yet another portal of entry into the federal courthouse is a civil rights action. When a client believes that his or her civil rights have been violated by the other party in regard to the terms set out in H.R. 4469, a good lawyer would recommend suing in federal court for a civil rights violation. Such an action would be brought under 42 U.S.C. 1983. Once again, the bill would open the door to such a filing, based on the federal "rights" granted in H.R. 4469. But no one thought about that either.

Q. That's amazing! What were they thinking of when they drafted this? Did they just come back from a "three-martini lunch" on Capitol Hill?
A. Beats me. These problems and omissions in H.R. 4469 show clearly the error in trying to insert into the U.S. Code a set of rules for state custody cases when these issues should properly be left for state decisions; state lawmakers have far more knowledge about these matters than members of Congress, who have never before enacted substantive custody rules and placed them into federal law. This bill represents a huge expansion of the limited grant of authority to Article III courts under the Constitution, which restricts federal judicial power to specified subjects such as interstate commerce, national defense and international matters. This is a respectful acknowledgment of state laws and courts, which have preeminent powers and expertise in the remaining areas of litigation.

Q. Are there any further flaws in the bill?
A. Yes - there are numerous other errors or limitations in H.R. 4469 which have been poorly thought through.

- Contingency operations are covered. What about humanitarian missions? Why should the troops involved in these be treated differently than those who are on contingency missions?
- What about temporary duty, or TDY? Why the different treatment of these troops? Why are they not covered?
- And what about remote or any other unaccompanied tours of duty? These troops should receive the same protections. Why did the proponents of this bill ignore them?
- Why is there no coverage for mobilization of Reservists in support of a deployment ("back-fill"), taking these parents far from the children's homes, but yet not sending them on a deployment?

Q. But aren't there lots of cases where servicemembers have lost custody because of deployment?
A. That's what we call these days "an urban legend." Where are the cases which would be "correctly decided" if H.R. 4469 had been enacted four years ago? Or even last year? What decisions would have gone the other way? Too often supporters of this bill have given in to faddish pessimism and media-driven doubt, relying on unsupported claims rather than doing their homework. It's time to hit the "pause button" for a few moments. What's really happening "on the ground" and why do we need such a bill? Where's the problem?

There's a saying, "When your favorite tool is a hammer, all your problems begin to look like nails." That aptly describes the theory of H.R. 4469 – create a solution, then search for a problem that needs such a remedy. The Department of Defense Report on military custody and deployment, found aunder RESOURCES at http://www.abanet.org/legalservices/lamp/home.html, states that in not ONE case was custody removed from a military parent due solely to deployment.

Q. What is the status of the proposed legislation?
A. It's made its way through the House again, passed unanimously. It'll be taken up by the Conference Committee in October for the National Defense Authorization Act of 2011.

Q. What is the most effective way for family law practitioners to express our support of or opposition to the proposed legislation?

A. Write immediately to Senators Burr and Hagan, telling them your position and reasons for support or opposition. Give them details and examples from your own experience to back up your thoughts. As family law practitioners, I think that we ought to let the Senate hear our voices in this critical area.