

**SB**

**210**

<target><bill>SB 210</bill><subject>SB  
210</subject><comm>SFIN26</comm></target>

# ALASKA STATE LEGISLATURE

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## Charlie Huggins Senator

### Sponsor Statement SB 210

"An Act establishing child custody, modification, and visitation standards for a military parent who is deployed; and amending Rule 99, Alaska Rules of Civil Procedure."

For nearly a decade, the War on Terror has required Alaska to frequently deploy our active military, reserve, and National Guard troops. This high deployment tempo is putting even more pressure on our already strained military families. Children who are already in unusual circumstances due to their parents' military careers are being put in the situation of having to deal with a deployed parent. It is no wonder that the divorce rate for members in the military has been steadily rising for the past decade.

However, while the travesty of divorce is hard enough on all members of a family, the court system is also finding it difficult to balance the issues of deployment with child custody issues. A deploying family member now must fight a battle on two fronts, the one in the Middle East, and the one at home. SB 210 ensures that the court system has clear directive as to how it should deal with a deploying military member if they should find themselves in the midst of a child custody battle. It affords them the right to an expedited hearing so that matters can be taken care of before deployment, if necessary, and it also allows the member to delegate their visitation rights to another family member in order for the child to maintain all familial connections. Most importantly, SB 210 requires that a court *not* use deployment as the sole reason for a change in a child custody order. Our men and women are sacrificing enough for our country, their military service should not be a reason in itself for them to lose custody of their children.

In 2009, because of the potential for conflict with current states child custody laws, congress deemed military child custody to be the responsibility of individual states.

SB 210 includes the following items and restrictions:

- A definition of a military absence.
- Assurance that military duties cannot be the sole reason for a permanent change of custody.
- Allowance of expedited hearings with restrictions.
- The right to delegate visitation to another family member.
- Allowance of electronic testimony.
- Limitations on temporary custody orders.

In recognizing that the federal government should not legislate a Military Child Custody statute, that Alaska has many service-members, that the United States military currently has a high rate of deployment, and that military divorce rates continue to rise, now is a good time for the Alaska Legislature to address military child custody.

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**Charlie Huggins**  
Senator

**Sectional**  
**SB 210**

**"An Act establishing child custody, modification, and visitation standards for a military parent; and amending Rule 99, Alaska Rules of Civil Procedure."**

**Section 1:** AS 25.20 adds a new section:

**Sec. 25.20.095. Custody and visitation proceedings involving a military parent.**

(a) Military service cannot be a factor in granting or denying a petition for custody or visitation.

(b) – (e) Upon receiving deployment orders a military parent shall receive an expedited hearing and the parent can delegate visitation rights to a family member if doing so is within a child's best interests. Any petition for custody or visitation will be given the same protections as afforded under the SCRA. Additionally, rights or protections regarding custody or visitation can only be waived writing

(f) A court order entered under this section must require

- (1) a child be made reasonably available during periods of leave
- (2) the facilitation of written and electronic contact between the deployed parent and the child, preferably electronic contact with a video image
- (3) the deployed parent provide timely leave information

(g) Factors in determining a child's best interests. Cross reference to AS 25.24.150(c) and AS 25.24.150(g)

(h) Definition of "deployment," "family member," and "military service"

**Section 2:** AS 25.20.110 is amended by adding new subsection to read:

(d) Except as provided in (e) – (h) military service cannot be a factor in finding a change of circumstances on a motion to modify child custody or visitation

(e) A court may provide for a temporary modification of a custody or visitation order to make reasonable accommodation for a deployment. The temporary order must include provisions for

(1) custody or visitation during periods of leave if doing so is within the child's best interests.

(2) termination of the temporary order within 10 days of notification of the deployed parent's ability to resume custody if doing so is within the child's best interests. The non-deployed parent shall bear the burden of proof.

(3) a hearing if a child of a deployed parent moved out of state and the non-deployed parent files a motion that alleges that resumption of the permanent custody order will result in immediate danger of irreparable harm to the child or that the presumption under AS 25.24.150(g) exists

(4) delegation of the deployed parent's visitation rights to a family member if doing so is within the child's best interests.

(5) immediate notification from the non-deployed parent of a change of address or contact information.

(f) A court shall expedite a hearing to modify custody or visitation on a motion made by a parent who is subject to deployment.

(g) Factors in determining a child's best interests. Cross reference to AS 25.24.150(c) and AS 25.24.150(g)

(h) Definition of "deployment," "family member," and "military service." Cross reference to AS 25.20.095

**Section 3:** AS 25.24.150 is amended by adding new subsection to read:

(l) Except as provided in AS 25.20.095 and 25.20.110 military service cannot be a factor in determining the best interest of the child under (c) of this section.

**Section 4:** The uncodified law of the State of Alaska is amended by adding a new section to read:

(a) Authorization for Telephonic, Video, or Internet Participation.

The court shall allow video or Internet testimony if the hearing or deposition involves the custody or visitation of a child of a parent who is deployed, as that term is defined in AS 25.20.095, at the request of the deployed parent.



SECRETARY OF DEFENSE  
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WASHINGTON, DC 20301-1000

OFFICE OF THE GOVERNOR  
MAILROOM

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The Honorable Sean Parnell  
Governor of Alaska  
State Capitol  
P.O. Box 110001  
Juneau, AK 99811-0001

Dear Governor Parnell:

I am writing to you about a matter that is of critical concern to me - the support of our Service members and their families in child custody disputes. I am deeply committed to preventing any inequitable treatment our deployed soldiers, sailors, airmen, and Marines may face in child custody disputes as a result of their service to the Nation.

I ask that you consider how your state can address the special difficulties facing military parents who must balance the demands of military service with the equally compelling demands of parenthood. These demands are often felt most acutely when military members must deploy and either lose visitation time or face challenges to existing custody orders by a parent to whom the military member is not married.

To date, thirty states have passed laws that address some aspect of the difficulties facing parents who must temporarily give up custody of their children or who must forgo visitation when called to take up the burdens of the nation. One possible legislative response could include the presumption that the prior custody agreement be restored upon the military member's return from deployment. Another legislative response could be to allow a parent with visitation rights the ability to delegate those rights to a third party during the deployment. I note that Alaska has not passed legislation to address military and visitation issues.

The Department recognizes the complexities of such cases and the difficulties in balancing the interests of the Service member against the best interests of the child. The Department also believes that the States are in the best position to balance the needs of both within the context of existing domestic relations laws.

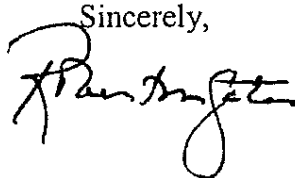
Because of the potential impact this could have on the full spectrum of our



military families, I am writing you directly to let you know that we stand ready to assist you with any additional information that you may need to address this issue. Mr. Ed Kringer, my staff contact, can provide a more detailed description about how other states have approached this issue. Your staff can contact him at 703-602-4949, ext. 114, or at ed.kringer@osd.mil.

Thank you for all you do for our Service members and their families. Helping them with this extremely important family concern would provide a great service to our men and women in uniform, as well as to your State and the nation as a whole.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed Kringer". The signature is written in a cursive style with a large initial "E" and a long, sweeping underline.

NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT ONLY THE VIEWS OF THE SECTION OR COMMITTEE SUBMITTING THEM.

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**AMERICAN BAR ASSOCIATION**

**SECTION OF FAMILY LAW  
STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL  
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association opposes the enactment of federal  
2 legislation that would:

3  
4 (a) create federal-question jurisdiction in child custody cases, including cases  
5 involving servicemember-parents;

6  
7 (b) dictate case outcomes or impose evidentiary burdens in state child-custody  
8 matters involving servicemember-parents;

9  
10 (c) co-opt the discretionary authority of state courts, in cases involving  
11 servicemember-parents, to determine the best interests of the child and award custody  
12 accordingly; and

13  
14 (d) pre-empt the growing body of state laws that comprehensively address  
15 servicemember domestic relations matters, including child custody.

16  
17 FURTHER RESOLVED, That the American Bar Association urges states to enact  
18 legislation prohibiting denial of child custody to a servicemember based solely on absence due  
19 to military deployment.

## REPORT

We Americans owe many things to those who disproportionately bear the burden of national sacrifice, but bad law is not one of them. Today as always, the American Bar Association is as resolutely committed to the legal rights of American military members as it is to those of America's children. Yet there can be no Solomon-like splitting of interests when it comes to legislation that, in the name of deployed servicemembers' parental rights, would create a federal child custody law that usurps the historic primacy of the states in domestic relations law and relegates the best interests of the child to a secondary consideration in custody disputes.

Such legislation was kept out of the Fiscal Year 2009 National Defense Authorization Act at the eleventh hour. Similar measures had been introduced in prior sessions of Congress, and there is every reason to believe that this measure will keep resurfacing until either passed, or finally dispatched after a full vetting. Should such a measure re-surface, the ABA urges Congress to reject in its entirety this unsound incursion into the realm of the states, however well-intentioned its proponents, with the understanding that the rights of servicemembers and their children are best served within the existing framework of state laws and court-integrated social services, and the formidable procedural protections already built into the federal Servicemembers Civil Relief Act (SCRA).

### The Recent Legislation

The latest iteration of the opposed legislation, section 4510 of H.R. 5658, 110th Congress, would have amended 50 U.S.C. App. § 521, the SCRA, by adding language dictating outcomes in child custody cases, where a servicemember parent had legal custody of the child at the time the parent was deployed to a contingency operation such as Iraq or Afghanistan. The bill would have compelled courts to restore custody of the child to the servicemember parent upon his or her return home post-deployment, unless it could be demonstrated by "clear and convincing evidence" that it was not in the child's best interest to have custody restored to the returning servicemember parent. The bill also would have prohibited a court, in deciding the child's interests, from considering how a servicemember's extended absence due to deployment may have affected those interests. The bill further would have prohibited change in child custody while a servicemember was deployed, through modification of a child custody arrangement that existed at the time of deployment, absent clear and convincing evidence that the change was in the child's best interests.

### The Threat to Existing, Effective Legal Mechanisms

On its face, the proposition that an American servicemember must not lose custody of his or her child by virtue of service to our country in distant danger zones seems unassailable. On the other hand, is it ever reasonable to suggest that a court, in deciding a child's best interest, be prohibited from even considering how a parent's prolonged military deployment, *among other factors*, might affect the child's-best-interests analysis? The reality is that conflicting interests within separated families do not lend themselves to inflexible legal prescriptions. Such matters must be

decided on a case-by-case basis, always focusing on the best interest of the child as the primary factor.

Wielding the club of a federal child-custody law that pre-ordains pro-servicemember outcomes in these cases would compromise the generally-accepted "best interests of the child" standard governing custody decisions.

- A. Creating a Federal Law of Child Custody for These Servicemember-Parent Cases Would Invade the Province of State Courts and Disrupt Existing, *Effective Legal Frameworks for Resolving Child Custody Disputes.*

Child Custody Is Not a Federal Question.

The opposed legislation would create a new substantive legal interest in restored child-custody rights, under the SCRA. It would thus create federal-question jurisdiction over covered child custody cases, forcing federal judges to venture into the *terra incognita* of child custody jurisprudence when a covered case is originally filed in federal court pursuant to 28 U.S.C. §1331 or removed to federal court pursuant to 28 U.S.C. §1446.

Such an outcome would run counter to a long and unbroken history of federal deference to state courts on subject matters not expressly reserved to federal judicial authority. In particular, federal courts have not entertained claims addressing child custody or visitation, or other "adjustments to family status." See *Ankenbrandt v. Richards and Kessler*, 504 U.S. 689 (1992); *Thompson v. Thompson*, 798 F.2d 1547 (9th Cir. 1986), *aff'd* 484 U.S. 174 (1988); *Cole v. Cole*, 693 F.2d 1083 (4th Cir. 1980); *Doe v. Doe*, 660 F.2d 101 (4th Cir. 1981). In *Ankenbrandt*, the Supreme Court observed:

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 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. 504 U.S. at 703-04.

The same reasoning must guide Congress in consideration of the next bill purporting to create a federal law of child custody.

Such Legislation Would Tie the Hands of Judges.

Whether these matters are decided in federal or state court, the opposed legislation would tie the hands of judges by mandating a particular result in favor of the servicemember parent returning from deployment. It would mandate automatic restoration of custody to the returning parent, provided that he or she had custody of the child at the time of deployment. In forcing that decision, the opposed rule would bar a court from even considering the effect of prolonged parental absence, due to deployment, on the child's best interests. The court would have no discretion in these custody decisions, absent a showing by "clear and convincing" evidence that the child should not resume residence with that parent.

Even where it could be proven by a preponderance of the evidence that the child's best interests lay with a grant of custody to the other parent, the court would be forced to restore the child to the custody of the returning servicemember, unless the more stringent "clear and convincing" threshold could be met.

The States Are Making Rapid Progress in Addressing These Matters.

The states have moved rapidly and responsibly to address the extraordinarily complex set of family law and other legal issues confronting this generation of servicemembers and their families, of whom so much has been demanded. Nine states have enacted legislation squarely addressing the child custody circumstances at issue in the opposed legislation: Arizona, California, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Carolina and Virginia. More than 20 states have adopted legislation acknowledging the potentially competing interests of the child and custodial servicemember and seeking to balance those interests within the framework of the individual states family service systems. These recent state statutes provide, or will provide, broad protections of family member interests, addressing not only restoration of custody but representation of the servicemember's interests in state proceedings and incorporation of mental health and other state support services.

The typical emergent state statute goes much further than the opposed federal bill in protecting servicemembers' interests. For example, it provides for electronic testimony by deployed servicemembers and expedited dockets for those wishing to organize their affairs in advance of deployment.

Importantly, many of the new comprehensive state laws, unlike the proposed federal legislation, also address child-visitation for servicemembers who do *not* have custody. Most active-duty servicemembers who have minor children are not custodial parents. Department of Defense regulations generally prohibit first-term single parents from having legal custody of a minor child. Moreover, the military lifestyle often compels the servicemember parent to relinquish custody to the non-servicemember parent.

These state-law solutions, tailored to and consonant with particular state social service systems and the broad array of servicemember parental interests, represent by far the better and more effective remedy.

The U.S. Department of Defense strongly opposes the type of legislation at issue -- the department has urged in its position statement on point:

The progress with which the states have embraced the military-specific issues has been phenomenal and shows no indication of waning. Five military custody bills became law in just the first six months of 2008. It would be a mistake to intrude on the significant protections and creativity demonstrated by the states.

The opposed bill would do substantial damage to this significant new line of state-based protections, as federal law would be pre-emptive on the burden of proof question and, in a radical and unprecedented departure from the long history of state dominion over family relations disputes, would mandate custody-dispute outcomes from afar without due consideration of the child's best interests. It must be recognized that, at the end of the day, the creative servicemember-parent protections offered by the new and growing array of state statutes are significantly stronger than those contained in this misguided proposal.

B. This Legislation Would Undermine and Misuse  
The Servicemembers Civil Relief Act.

The opposed bill would compromise the purpose and effect of the SCRA by converting it into a results-driven hammer for forcing particular outcomes in child custody cases. Such a misuse of this far-reaching legal shield for American servicemembers and their families would destroy its procedural focus, as it applies to courts and litigation, with its provisions for issuing automatic stays, vacating default judgments and appointing counsel for servicemembers.

As the Department of Defense noted in its opposition:

The SCRA . . . currently provides powerful rights to mobilized custodial caregivers. A number of high-visibility custody cases have resulted in custody decisions adverse to deployed servicemembers; however, in many of these cases the basic and generally easily met prerequisites for automatic 90-day stays under the SCRA were not followed. In other cases, judges simply ignored the SCRA. This indicates a problem of a lack of education about the effect and use of the SCRA rather than a problem with its substantive limitations.

The opposed initiative would also introduce a real risk of dilution of important protections already found in the SCRA, by creating the possibility of a legal inference that those protections *only* apply to the particular child custody circumstances addressed by the bill, (i.e., the custody rights of servicemembers who had custody pre-deployment and are returning from deployment.)

The Department of Defense also points out that passage of the proposal could leave "other types of domestic cases vulnerable to arguments that the failure to explicitly address them indicates a legislative intent to exclude them" from SCRA procedural protections."

The SCRA, as it is written, provides clear protections for civil litigants in uniform, including deployed servicemembers in child custody matters, and it means what it says. Doubt as to the scope and reach of this seminal statute's array of servicemember protections must not be legislatively introduced, where no such doubt currently exists.

Damage to the purpose and function of this pre-eminent servicemember-protection statute was a primary consideration of an original sponsoring entity of the instant resolution, the Standing Committee on Legal Assistance for Military Personnel (LAMP), in its decision to strongly oppose the legislative proposal at issue here. LAMP exists to serve and support American servicemembers and their families. While on its face the offending legislation purports to support servicemember parents, the LAMP Committee has concluded that this support is largely illusory, as the bill would do irreparable harm to state-law-based servicemember protections, which are rapidly improving, and upset the well-established legal-social framework for managing child custody cases affecting military and civilian families alike.

C. The Best Interests of the Child Standard Must be Preserved in Custody Cases.

The opposed bill would compromise the best interest of the child standard in custody decisions. To be sure, in fairness to those who leave home to answer their country's call to arms, the mere fact of deployment of a custodial caregiver, standing alone, cannot constitute legal grounds for depriving a servicemember parent of custody. But the proposal in question veers off to the opposite extreme, making restoration of pre-deployment custody *automatic* and relegating the child's interests to a secondary consideration, unless it can be shown by "clear and convincing" evidence that restoring custody to that servicemember-parent would be against the child's best interests. In the murky world of most family relationships, proving anything to a "clear and convincing" certainty is a tall order indeed. The proposed standard thus would turn on its head the generally-accepted "best interests" standard, a deviation that would represent a dangerous precedent that ultimately serves no one's interests, including those of servicemembers or their families.

Additional Considerations

The proposal is also unworkable to the extent that it would only create custody rights in cases involving the actual deployment of a servicemember to a "contingency operation," which means a designated conflict zone such as Iraq or Afghanistan. As the Department of Defense noted, this introduces

another arbitrarily created distinction between those involved in a contingency operation and those who must be absent from their child for other military-directed reasons. Why should the deployment of a servicemember in support of a humanitarian operation, as opposed to a peacekeeping operation, be forced to operate under different laws and perhaps different courts? Few other provisions of the SCRA turn on such arbitrarily imposed distinctions.

Likewise, no protections would be afforded servicemembers who are called up to replace those mobilized and who take their places, yet are not on a humanitarian mission, and those who face military absence due to the nature of the mission – an “unaccompanied tour.” There is no reason why these members of the military should face disparate treatment.

On a separate point, all of the service branches (Army, Navy, Air Force, Coast Guard and Marine Corps) have been developing new Family Care Plan instructions designed to encourage servicemembers to create explicit plans for the handling of child custody issues and other family matters in the event of deployment. Going forward, the revised Family Care Plan instructions, once completed by all the services, should prevent a number of these custody disputes from arising, further obviating a statutory fix that would be far worse than the problem.

Respectfully submitted by:

Anita M. Ventrelli, Chair, Section of Family Law

Donald J. Guter, Chair, Standing Committee on Legal Assistance for Military Personnel

February 2009

GENERAL INFORMATION FORM

Submitting Entities: ABA Section of Family Law  
 ABA Standing Committee on Legal Assistance for Military Personnel

Submitted By: Anita M. Ventrelli, Chair, Section of Family Law  
 Donald J. Guter, Chair, Standing Committee on Legal Assistance for  
 Military Personnel

1. Summary of Recommendation(s).

The Section of Family Law and the Standing Committee on Legal Assistance for Military Personnel (LAMP) of the American Bar Association recommend to the ABA House of Delegates that the ABA urge Congress to oppose any federal legislation that would create a new federal law of child custody controlling resolution of child-custody disputes involving the custodial rights of servicemember-parents. They recommend opposition to such legislation to the extent that it would: create federal-question jurisdiction over these child custody cases; threaten existing procedural protections for American servicemembers found in the Servicemembers Civil Relief Act; co-opt the growing body of state laws that comprehensively address the domestic relations interests of servicemembers; and legislatively dictate outcomes and evidentiary burdens in child-custody cases, while compromising the best-interests-of-the-child standard.

2. Approval by Submitting Entity.

This Recommendation was approved by the Council of the Section of Family Law on October 2, 2008 and by the LAMP Committee on November 14, 2008.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

This Recommendation is consistent with the American Bar Association's 1984 policy urging the legal profession to direct attention to issues affecting children, including the preservation of children's legal rights; the 1995 policy urging respect of the rights of all children in the United States; and the 1993 policy urging amendment of the former Soldiers' and Sailors' Civil Relief Act to clarify and modernize the Act's protections of American servicemembers.

5. What urgency exists which requires action at this meeting of the House?

The latest iteration of the opposed legislation was introduced as part of the Fiscal Year 2009 National Defense Authorization Act. Only at the eleventh hour was this bill, along with other bills amending the Servicemembers Civil Relief Act, purged from the Defense Authorization Act. Congressional staff and observers who closely follow this subject expect the bill to be reintroduced in 2009. Action by the House at this time is necessary to have an influence on Senate and Congressional action.

6. Status of Legislation. (If applicable.)

The opposed bill, section 4510 of H.R. 5658, would have amended 50 U.S.C. App. § 521, the Servicemembers Civil Relief Act. It was introduced in the 110th Congress in 2008. It was not adopted as part of the final FY 2009 National Defense Authorization Act. It is not a currently pending bill, but is expected to be reintroduced.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

The Resolution and Report were distributed to the following ABA entities on Nov. 13, 2008, with the request for their co-sponsorship:

Standing Committee on Armed Forces Law,  
 Standing Committee on Legal Aid and Indigent Defense (SLCAID),  
 Section of Litigation,  
 Center for Children and the Law,  
 General Practice, Solo, and Small Firm Division (Military Committee),  
 Government and Public Sector Lawyers Division,  
 Judicial Division,  
 Section of Individual Rights and Responsibilities, and  
 Young Lawyers Division.

Government and Public Sector Lawyers Division is reviewing the recommendation;  
 SLCAID will vote on co-sponsorship on Nov. 22, 2008.

10. Contact Persons. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Persons. (Who will present the report to the House. Please include email address and cell phone number.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Recommendation

The Recommendation calls for the American Bar Association to urge Congress to oppose legislation that would create a federal law of child custody controlling state custody cases involving servicemember-parents. The Recommendation urges that the legislation be stopped because it would dictate court outcomes in child custody cases, even where the child's best interests do not support that outcome; create federal-question jurisdiction over child custody cases, long the province of state courts; impose federally-mandated evidentiary burdens on state courts; co-opt the growing body of state laws that comprehensively and appropriately address domestic relations matters affecting servicemembers; and cast doubt on existing servicemember protections found in the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. §§ 501-596.

### 2. Summary of the Issue that the Resolution Addresses

The issue arises from strong concern among child advocates, military legal assistance experts and others that the opposed legislation would inappropriately employ federal fiat to invade the province of the states by dictating court outcomes in child custody cases affecting deployed servicemembers. The opposed legislation provides that deployed servicemembers who had child custody at the time of their deployment would automatically have that custody restored upon their return, irrespective of other considerations affecting the best interests of the child. The opposed legislation would provide that custody could be denied to the returning servicemember in such a case only by a showing of "clear and convincing" evidence that it was not in the child's best interests. The opposed legislation improperly creates federal substantive law and evidentiary rules for custody determinations historically left to state courts. The opposed legislation would misuse the Servicemembers Civil Relief Act, the source of important procedural protections for servicemembers in litigation, to dictate substantive outcomes in custody cases. The legislation would cast doubt of the ample and adequate servicemember protections already found in the SCRA. The opposed legislation would create federal-question jurisdiction over these child custody cases, a role federal courts are ill-equipped to fulfill. The opposed legislation would pre-empt the emerging body of state laws that comprehensively and organically address servicemember domestic relations interests. The essence of the issue is that the opposed legislation is not in the interest of children or servicemembers.

### 3. Please Explain How the Proposed Policy Position will Address the Issue

The Proposed Policy would influence the United States Senate and the House of Representatives to oppose the legislation and thereby remove the threat to the interests of children and servicemembers posed thereby.

### 4. Summary of Minority Views

We are aware of no minority views within the ABA.

## **National Association for Uniformed Services**

### **Military Divorce Rate Continues to Climb**

**The divorce rate in the armed forces continues to grow, despite efforts by the military to help struggling couples.**

**The Pentagon recently reported there were an estimated 27,312 divorces among roughly 765,000 married members of the active-duty Army, Air Force, Navy and Marine Corps in fiscal year 2009.**

**That's a divorce rate of about 3.6 percent, compared with 3.4 percent a year earlier, according to figures from the Defense Manpower Data Center. Marriages among reservists failed at a rate of 2.8 percent compared to 2.7 the previous year.**

**The reported 3.6 percent rate is a full percentage point above the 2.6 percent reported in late 2001, when the U.S. began sending troops to Afghanistan in response to the Sept 11 terrorist attacks.**

**As in previous years, women in uniform suffered much higher divorce rates than their male counterparts: 7.7 percent compared to 3 percent for men in 2009.**

**The only comparable measure for civilian divorce rates is what the Centers for Disease Control said in 2005 that 43 percent of all first marriages end in divorce within 10 years.**

**Critics believe that the divorce rate reported by the Pentagon comes nowhere close to depicting the damage done to marriages and families by the two ongoing wars.**

**The Pentagon number doesn't count veterans, who divorce after leaving the services, let alone reflect other possible wartime consequences on families, such as increases in alcoholism or the toll on orphaned or emotionally stressed children of troops.**

**In an Army battlefield survey taken in Iraq in the spring, nearly 22 percent of young combat soldiers questioned said they planned to get a divorce or separation, compared to 12.4 percent in a survey conducted in 2003.**

## For deployed Vermont military, help with child custody

By Peter Hirschfeld Vermont Press Bureau - Published: January 20, 2010

MONTPELIER – For military parents deployed to war zones overseas, the toughest battle can often be the child-custody dispute awaiting them back home.

The call to duty, family-law experts told Vermont lawmakers on Tuesday, can be used in court against military parents who split custody of their children with a former spouse or partner. And the impacts, they said, can exacerbate the intense emotional trauma that long deployments inflict on troops and their children.

"We don't have a lot of horror stories here, but boy are they out there in the rest of the country," said Patricia Benelli, a family-law attorney from Chester. "And we're trying to avoid them here."

Lt. Col. Ellen Abbott, a judge-advocate general in the Vermont National Guard, said she had to assist a Vermont soldier who returned from a long deployment to Iraq only to find that his ex-partner had been granted full custody of their child in his absence. It took months of court proceedings and \$23,000 in legal fees, Abbott said, for the man to regain custody of his child.

"It was a very difficult thing for this soldier to go through," Abbott said. "Had we had something in place to provide protections to him, it might have made things easier."

Lawmakers this session will consider a bill that supporters say would provide those protections by addressing the legal pitfalls into which at least some military parents fall. Without such reforms, Benelli said, the state risks "penalizing people in the military for serving their country."

Rep. Maxine Grad, a Waitsfield Democrat and vice-chairwoman of the House Judiciary Committee, introduced the legislation, which now has 88 co-sponsors. With more than 5,000 Vermonters serving as active members of the military, including 1,500 headed for Afghanistan next month, she said it's incumbent upon the state to protect the parental rights of servicemen and women.

When deployment orders come through, Abbott said, many military parents "are afraid to go to court because they're going to take their children away."

Indeed, legal experts said Tuesday, a military deployment can be construed by family-court judges as the "real, substantial and unanticipated change" required by Vermont statutes to amend child-custody arrangements.

Proposed legislation would prevent judges from using deployment-related separation as the sole reason for changing custody or visitation orders.

"I think this bill provides the framework to give assurances to military parents that they won't lose contact with their children either before, during or after their deployment," Abbott said.

The bill would also ensure that parents forced to cede custody or visitation during a deployment could appoint a friend or family member to assume those rights on their behalf. The measure is needed, lawyers said Tuesday, to ensure a continued bond with members of the deployed parent's family.

The legislation additionally ensures contact rights for deployed parents wishing to correspond with their children via telephone, e-mail or Web cameras. Abbott, who herself has been deployed to Iraq, said contact with children is important to sustaining soldiers' morale.

"Being over there I can tell you soldiers live for contact with their children," Abbott said. "We also have soldiers who are devastated when they get no response from their children – none whatsoever. It degrades their ability to focus on the mission and that's what we need – the ability to focus on the mission so they can come back."

The bill would also force family courts to make deployment-related custody hearings priority cases, and allow deployed soldiers to participate in those hearings via phone.