

LAW REVIEW¹ 09051

What Happens to the Child When I Mobilized?

By Colonel John S. Odom, Jr., USAF (Ret.) & Captain Samuel F. Wright, JAGC, USN (Ret.)²

4.3 – Right to Continuance and Protection Against Default Judgment

5.2 – Military Service and Child Matters

Q: I am a Captain in the Army Reserve and the single mother of a four-year-old son. I went through a very contentious divorce with my ex-husband, and I was awarded sole custody of the boy. Now, I have been notified that I will likely be called to active duty in about five months. I have a family care plan, approved by my commanding officer. My son will live with my parents, and they are willing and able to care for him until I return from Afghanistan. I don't want to tell my ex-husband about my mobilization until it has started. What do you think?³

A: We think that you are going about this the wrong way. You need to inform the boy's father as soon as the mobilization is reasonably certain. If the father does not agree to the plan of

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³This factual situation is an amalgam of several reservists we have heard from. These specific facts do not all apply to any one reservist.

having the maternal grandparents take custody, you will need to go back to the court that granted you custody and get the court to order an appropriate custodial arrangement for the child during your deployment.

The court made a finding that giving you custody was in the best interests of the child. The court retains jurisdiction to make redeterminations about the best interests of the child whenever there is a material change in circumstances. Your upcoming deployment to Afghanistan is most certainly a material change in circumstances.

Your ex-husband is the other parent of the child. His position is likely to be, "Hey, give me my kid. When my ex-wife gets back from war, we can sort all this out, but for now I am the other parent and I want custody." The court is quite likely to go along with that pitch, in the absence of clear evidence of child abuse by your ex-husband.

The court gave you custody of the boy, but the court did not and cannot delegate to you the authority to determine an alternative custodial arrangement if for any reason you will not be able to exercise custody of the child for an extended period. You simply do not have the legal power or right to turn the child over to your parents upon your deployment.

Q: I think that the Servicemembers' Civil Relief Act (SCRA) should protect my rights in this instance. Is an SCRA amendment necessary?

A: The SCRA does give you rights in this matter, if your active duty service prevents you from appearing in court and giving your side of the story. You have the right to a continuance and to protection against a default judgment being entered against you if your service prevents you from filing a timely answer to a civil action filed against you. We invite your attention to 50 U.S.C. App. 521, 522. In this instance, you have five months of advance notice of your likely mobilization, so now is the time to go to court to resolve this matter, while you are still available to participate and testify (assuming that your ex-husband and you cannot agree on the custodial arrangements during your deployment).

In this country, family law (including child custody) has always been a matter of state law for the state courts, not federal law for the federal courts. We believe that this should continue to be the case, even in those child custody cases where one of the parents is a member of the National Guard or Reserve and has been called to the colors. Putting these cases in federal court would not serve the interests of Reserve Component members. If you think that child custody litigation is expensive in state court, just wait until petitions for removal to federal court and remand petitions (trying to get cases back to state court) begin to be filed.

ROA and the Servicemembers' Law Center seek to educate family court judges about the special considerations that apply when a deployed servicemember has been the custodial parent. The best interest of the child must always be the prime consideration in all matters pertaining to children, but we contend that the fact of mobilization should never be the cause of a *permanent* change in child custody arrangements. The non-custodial parent will likely take

custody when the custodial parent is deployed, but when the custodial parent returns from service he or she should normally resume primary custody of the child.

Representative Michael R. Turner of Ohio has pushed proposed federal legislation on this issue. His approach is included in section 584 of H.R. 2647, the version of the National Defense Authorization Act (NDAA) for Fiscal Year 2010 that has passed the House of Representatives. This language is not contained in S. 1390, the NDAA version that has passed the Senate. We agree with the National Military Family Association, the American Bar Association, and the Department of Defense that the language contained in section 584 of the House-passed NDAA version would not be helpful and might do great harm.

The biggest problem that we have with Representative Turner's proposed amendment is that it may actually narrow and potentially lessen the scope of protections offered by the SCRA. The SCRA as currently written is broad enough to cover these cases. The "horror story" cases that Representative Turner has quoted to the press do not involve situations that his proposed amendment would cover.

Update – April 2022

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCRA by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.⁴ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections.

The relevant section cited throughout the article can be found as followed:

50 U.S.C. App. § 521 discussing the protection of servicemembers against default judgements can now be found at 50 U.S.C. § 3931

50 U.S.C. App. § 522 discussing stay of proceedings when servicemember has notice can now be found at 50 U.S.C. § 3932.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁵

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This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

⁴*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited Mar. 10, 2022).

⁵Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight⁶ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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⁶Congress recently established the United States Space Force as the 8th uniformed service.