

LAW REVIEW¹ 09059
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Congress Enacts New Provision for Military Spouse Voting and Taxation

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4.5—Protection from State/Local Tax Authorities

7.2—Service member or military spouse voting and domicile

President Obama has signed S. 475, the “Military Spouses Residency Relief Act.” This is now Public Law 111-97. This new law amends two sections of the Servicemembers Civil Relief Act (SCRA) and adds new provisions governing the determination of the domicile (legal residence) of the spouse of an active duty servicemember, for both voting and taxation purposes. As a result of this new law, it will be necessary to amend some of what I wrote about military spouse voting in Law Review 144 (Oct. 2004), Law Review 204 (Nov. 2005), Law Review 0603 (Feb. 2006), and Law Review 0618 (June 2006).

This new law amends section 705 of the SCRA (50 U.S.C. App. 595) by adding a new subsection, which reads as follows:

“(b) Spouses—For the purposes of voting for any Federal office ... or a State or local office, a person who is absent from a State because the person is accompanying the person’s

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.

spouse *who is absent from that same State* in compliance with military or naval orders shall not, solely by reason of that absence—

- (1) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;
- (2) be deemed to have acquired a residence or domicile in any other State; or
- (3) be deemed to have become a resident in or a resident of any other State.”

50 U.S.C. App. 595(b) (emphasis supplied).

It is clear that Congress intended this provision to apply prospectively and not retroactively:

“Subsection (b) of section 705 of such Act (50 U.S.C. App. 595), as added by subsection (a) of this section, shall apply with respect to absences from States described in subsection (b) on or after the date of enactment of this Act, regardless of the date of the military or naval order concerned.”

The new law also amends section 511 of the SCRA (50 U.S.C. App. 571) by adding a new subsection (2) to subsection (a), as follows:

“(2) Spouses—A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember’s military orders *if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.*”

50 U.S.C. 571(a)(2) (emphasis supplied).

The new law also adds a new subsection (c) to section 571 of the SCRA, as follows:

“(c) Income of a Military Spouse—Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.”

To understand what has changed and what has not changed due to the enactment of this new law, let us discuss three hypothetical but realistic scenarios.

Scenario One:

Joe Smith graduated from high school in Montgomery County, Texas in May 2009. A month later, he married his high school sweetheart, Mary Jones. Joe and Mary live in the garage apartment of the house belonging to Joe’s parents, until Joe reports to boot camp. Joe enlists in the Navy and reports to boot camp in November 2009. He reenlists repeatedly and remains on active duty for 26 years, until he retires as a Master Chief Petty Officer in 2035. He remains married to Mary that whole time and beyond.

During his 26-year career, Joe has five different duty stations within the United States and three overseas, and also five overseas or shipboard deployments. Mary accompanies Joe on each Permanent Change of Station (PCS) move to a new duty station. When Joe deploys, Mary stays behind to run the household and care for the kids. Mary also works outside the home during most of Joe's Navy career.

Texas is an attractive state for career service members, because Texas has no state income tax. For purposes of this scenario, we are assuming that Texas remains without a state income tax until well past 2035.

Joe maintains his domicile in Montgomery County, Texas throughout his long Navy career. He votes by absentee ballot in Montgomery County in almost every election. He does not vote or register to vote in any of the places where he is stationed—he does not consider those places his home. He only lives there because he must live in a place that is a reasonable commuting distance from his assigned place of duty. Joe's parents move away in 2020 and pass away in 2025 and 2027. The house is torn down in 2030 to make way for a new commercial development. None of that matters. Joe's domicile is the place where he was domiciled in 2009, just before he reported to active duty. It is not necessary that Joe have relatives living at that address or be able to receive mail at that address. Over the course of his 26-year Navy career, maintaining his Texas domicile saves Joe tens of thousands (perhaps hundreds of thousands) of dollars in state income tax that he might otherwise have to pay to some of the high-tax states where the Navy assigns him for duty.

Because of this new law, Mary is also able to maintain her domicile in Montgomery County, Texas, at the home of Joe's parents, where she lived and was domiciled after marrying Joe and before she moved out in July 2010 to move in with Joe at his first duty station (after his initial military training). Mary would not have been able to do this prior to the enactment of this new law, so the new law is great news for somebody like Mary.

Scenario Two:

Roberta Williams graduated from high school in June 1999 in Hillsborough County, Florida. She married her high school sweetheart, Bob Adams, a month later. She enlisted in the Army and reported to boot camp in November 1999. Roberta and Bob shared a small apartment in Tampa until Mary reported to boot camp in November. Bob remained in the apartment until July 2000, when he traveled to live with Roberta at her first duty station. Roberta reenlisted in the Army, and remains on active duty until 2025, when she retires as a Sergeant Major. Bob and Roberta remain married through her entire career and beyond.

Bob tried to join the Army, but he has a disqualifying medical condition. Bob accompanies Roberta on each PCS move. When Roberta deploys overseas, Bob stays behind to manage the household and care for the children. Bob works outside the home during most of Roberta's Army career.

When Bob moved to California to be with Roberta at her first duty station, he registered to vote in California, although Roberta maintains her domicile in Tampa during her entire military career. As Roberta has PCS'ed to new duty stations, and Bob has accompanied her, he has registered to vote

and voted at each new duty station. As I explained in Law Review 144 and Law Review 204, it is entirely possible for a married couple to live together in the same house or apartment but be domiciled in different states, if one or both of them are on active duty in the armed forces.

In November 2009, when the President signed this new law, Roberta was serving at the Pentagon and living with Bob and two kids in an apartment in Arlington. Bob was domiciled and voting in Arlington, while Roberta was still domiciled and voting in Tampa. Bob was working outside the home and paying Virginia income tax on his salary, while the SCRA protects Roberta from having to pay Virginia tax on her military salary.

Like Texas, Florida is an attractive state for military personnel and family members, because it has no state income tax. For purposes of this scenario, we will assume that Florida maintains its no-tax policy through Roberta's retirement in 2025. The new law does not help Bob because, at the time of enactment, he is not a domiciliary of the same state as his active duty spouse.

Scenario Three:

Randy Moore graduated from high school in Wasilla, Alaska in May 2009 and then reported to the United States Naval Academy. He graduates in 2013 and is commissioned a Second Lieutenant in the Marine Corps. He remains on active duty until he retires as a Colonel in 2041. He maintains his Alaska domicile during his entire career. Like Texas and Florida, Alaska has no state income tax. For purposes of this scenario, we are assuming that Alaska does not enact a state income tax before 2041.

In 2019, while on active duty and stationed at Twenty-nine Palms, California, Randy meets Elizabeth Wright, who lives in the community near the Marine Corps base. Elizabeth has never been in the military and has never lived in Alaska. She does not become an Alaskan just by

marrying an Alaskan, and the new law does not change this result. She remains married to Randy during the remainder of his Marine Corps career and beyond. The Marine Corps never assigns Randy to an Alaska duty station. Elizabeth would like to become an Alaskan, to take advantage of that state's favorable tax policies, but the new law does not help her because she is not domiciled in the same state as her active duty husband.

Conclusion

The new law is good news for some military families, but because of the way that the law was drafted most military families will not benefit.

UPDATE—March 2019

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 SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on

December 1, 2015.³ 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. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant sections cited throughout the article can be found at:

50 U.S.C. App. § 571 discussing residence for tax purpose can be found at 50 U.S.C. § 4001.

50 U.S.C. App. § 595 discussing guarantee of residency for military personnel and spouses of military personnel can be found at 50 U.S.C. § 4025

On 12/31/2018, President Trump signed into law the Veterans Benefits and Transition Act of 2018. This new law amends the Servicemembers Civil Relief Act (SCRA) with respect to determining the domicile (legal residence) of the spouse of an active duty service member. Now, the spouse is permitted to select the domicile of the active duty spouse, without regard to the date of the marriage and even if the non-military spouse has never physically resided in that state. Having changed her (or his) domicile to that of the active duty spouse, the other spouse will be eligible to vote in the state where the service member votes and will be considered a domiciliary of that state for state income tax purposes.

For example, Joe Smith graduated from high school in Houston Texas in 2005 and soon thereafter enlisted in the Navy, and he has been on active duty continuously since August 2005. He is currently stationed in Norfolk, Virginia. He has maintained his domicile in Houston, at the address where he lived with his parents when he enlisted in 2005. He votes by absentee ballot in Houston in each major election. He has not voted or registered to vote in any of the places where he has been stationed in the last 14 years. Under the SCRA, Virginia is precluded from taxing Joe's military income, because he is not domiciled in Virginia. He lives in Virginia only because his military duties require his presence there.

In 2017, Joe was transferred to a Navy base in Norfolk. He met the love of his life, Mary Jones, and they married in 2018. They live together in a rented apartment near Joe's Navy assignment and Mary's civilian job. Until now, Joe has been domiciled in Texas while Mary has been domiciled in Virginia, although they live together in the same apartment. Now, as a result of the recent statutory amendment, Mary can change her domicile to Texas although she has never lived in Texas. If she changes her domicile to Texas, she will be exempt from having to pay Virginia state income tax on her civilian salary.

Please see Law Reviews 19019 and 19020, February 2019.

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³*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).

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ROA is almost a century old—it was established in 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 many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

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Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, 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 seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. 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.

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