

LAW REVIEW¹ 10099

Law Review 1008 Reconsidered

By William S. Aramony² and Captain Samuel F. Wright, JAGC, USN (Ret.)³

5.4— Survivor Benefit Plan

Q: I am concerned about your Law Review 1008 (February 2010). Like the officer who wrote to you then, I am a Coast Guard Reserve officer. I was commissioned an Ensign in 1982, and I received my Notice of Eligibility (NOE) in 2002, after having achieved 20 “good years” for Reserve Component (RC) retirement purposes.

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.

²William S. Aramony (703-299-8496) is a Captain in the Navy Reserve Judge Advocate General's Corps and a member of ROA. He represents military personnel and federal employees in employment matters. His military affiliation and practice areas are shown for information purposes. The views expressed in this article are those of the authors and should not be attributed to the Department of the Navy, the Department of Defense, or the U.S. Government. This article is for educational purposes and should not be considered to be legal advice or relied upon to make decisions. Each matter is different and each person is different and legal answers may vary according to the circumstances of each matter. The factual scenario presented in this article is fictitious and does not relate to any one specific individual.

³BA 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.

When I received the NOE in 2002, I was not married and had never been married, and I had no children. I chose not to participate in the RC Survivor Benefit Plan (RCSBP) at the time, because I had no obvious beneficiary for RCSBP benefits after my death.

I met the love of my life in 2005 and we got married in 2006. I notified the Coast Guard of the marriage during my first drill weekend after the wedding. I asked the personnel officer to give me all the forms that I needed to complete to inform the Coast Guard of my recent marriage, and he gave me several forms to complete. I completed all those forms and returned them to the personnel officer, and then I asked again if there were any other forms that I needed to complete. The personnel officer assured me that I had completed all the necessary forms.

In late 2009, I learned that an RC member who had no spouse upon receiving the NOE but who later married was eligible to sign up for the RCSBP after the marriage. I tried to enroll in the RCSBP and to select my wife as the beneficiary. The Coast Guard told me that I was too late— that I had missed out on the opportunity to enroll in the RCSBP because I did not enroll within one year after the marriage.

I think that it is fundamentally unfair to punish me, and my wife, for the personnel officer's negligence and ignorance. I asked him twice if there were any other forms that I needed to complete on account of my marriage, and he assured me that I had completed all the necessary forms.

Applying what you wrote in Law Review 1008 to my situation, it seems that the Coast Guard was correct when it said that I had lost out by letting the year go by, after my marriage, before trying to enroll in the RCSBP. This just is not fair. Please reconsider.

A: Pursuant to your request, I (Samuel F. Wright) have reconsidered. I also consulted with William S. Aramony, an attorney who represents people on such matters, and he and I collaborated on this article.

While we found no specific regulation or directive on point, we reread the statute as it may apply to your situation. The law governing the RCSBP provides, in pertinent part, as follows: "A married person who is eligible to provide a reserve-component annuity may not without the concurrence of the person's spouse elect—(i) not to participate in the Plan; (ii) to designate under subsection (e)(2) the effective date for commencement of annuity payments under the Plan in the event that the member dies before becoming 60 years of age to be the 60th anniversary of the member's birth (rather than the day after the date of the member's death); (iii) to provide an annuity for the person's spouse at less than the maximum level; or (iv) to provide an annuity for a dependent child but not for the person's spouse." 10 U.S.C. 1448(a)(3)(B). Congress added this provision in 2001. We noticed that the law reads "eligible to provide," not "eligible to receive."

A married service member may provide a RCSBP when vested in retirement at 20-years upon receiving the Notice of Eligibility (NOE). If unmarried at the time of the NOE and later marrying

after 2001, then the service member may elect a RCSBP. Other RCSBP designations may occur at other times, such as to former spouses, but that is beyond the scope of this answer.

Thus, in 2002 when you received your NOE if you had been married, then a default election would have taken place to provide full RCSBP coverage with an annuity to your spouse, due the day after your death, unless you provided within 90-days of receiving your NOE your spouse's written concurrence to decline coverage or elect less than full coverage. E.g., see Coast Guard Reserve Component Survivor Beneficiary Guide and CG Form 11221
(https://www.dcms.uscg.mil/Portals/10/CG-1/PPC/FORMS/CG_11221.pdf)

In other words, inaction by the service member at the time of the NOE results in full RCSPB coverage. A question in your situation is whether inaction by the service member who later marries also causes the default of full RCSPB coverage or in equity should it cause the default?

Coast Guard and other RCSBP directives we read are not clear on this issue. They provide that the member "may elect" the new spouse for RCSBP within one year of marriage. It is not clear that the member is subject to a default election. We also recognize differing viewpoints contrary to your (and our) view.

For example, the Coast Guard may argue that it did not have an opportunity to make such a default election on your behalf, because you did not tell them of the marriage using the appropriate RCSBP form, e.g., CG- 11221. Your response is that you informed the Coast Guard of the marriage in other contexts, such as by enrolling her in DEERS (Defense Enrollment Eligibility Reporting System) and obtaining a dependent ID card for her. Additionally, several decisions by Boards for Correction of Military Records, with some exceptions, are that the requirement to elect SBP or RCSBP should be strictly enforced and that a failure to elect coverage (absent the default coverage) means no coverage.

We also acknowledge that policy rationales underlie the myriad amendments and protections of spouses and former spouses in RCSBP statutes. The default election did not exist until Congress wrote it in 2001. These protections of spouses and former spouses are written into the statute for a reason. Statutes may seem black and white until you delve into the intersecting provisions and promulgating directives and regulations, legislative intent, and policies. The service member may seem to have an uphill battle particularly in the "good order and discipline" military where military views on personnel matters receive deference by courts.

However, we continue to reread the text of a statute which may not make distinctions between a person married at the time of the NOE and one later married. And we are cognizant of the potential inequity and injustice to the spouse who has no responsibility or fault for the failure to elect.

A forum for you and your wife is the Coast Guard Board for the Correction of Military Records (CGBCMR). The CGBCMR has authority to recommend corrections of inequities and injustice in military records. To petition the CGBCMR, a member needs to submit, within three years, the

form DD 149. The member also should provide documentary evidence and reasons in support of the request for relief. Court is another option to make legal arguments or to review a CGBCMR decision. Timely petitioning CGBCMR, however, does not stop the court statute of limitations for *de novo* review from running and the court's standards of review are limited.

Let us reemphasize to readers the advice Captain Wright stated in Law Review 1008. In both your military and civilian careers, it is important that you understand the laws and regulations that apply and that you take timely action to protect your legal rights. You cannot depend upon a military or civilian personnel office to understand all these laws and regulations, to explain them to you, and to protect your legal rights. You should consider consulting, and if necessary retaining, an attorney who is familiar with this specialized area of law. Your situation is an example of personnel not knowing to advise you of the pitfalls and requirements of electing a newly married spouse for RCSBP coverage.