

## Military Spouse Residency Relief Act—Part 2

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

4.5—SCRA Protection from State/Local Tax Authorities

5.5—Other Military Service and Family Obligations

7.2—Service member or military spouse voting and domicile

**Q: I am married to an active duty Air Force Airman. My husband was born in 1981, and I was born in 1982. He graduated from high school in 2000, and I graduated a year later. Both of us enlisted in the Air Force in 2001, but we did not meet until 2003, in Germany, where both of us were serving on active duty at the time.**

**I was born in Ohio and spent the first 19 years of my life there, and I was living there when I went on active duty in 2001. I have always considered myself an Ohioan. I voted in Ohio, by absentee ballot, in 2002, 2004, 2006, 2008, 2010, and 2012. While I was on active duty, I paid Ohio state income tax, through withholding from my Air Force salary.**

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup>BA 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 (VRRRA—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 VRRRA 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 VRRRA 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](mailto:SWright@roa.org).

My husband was born in Wisconsin and spent the first 18 years of his life there and was living there when he enlisted in the Air Force in 2001. He has been on active duty continuously since June 2001 and will likely remain on active duty at least until July 2019, to qualify for his military retirement. My husband considers himself to be domiciled in Wisconsin. He has been paying Wisconsin state income tax, through withholding from his Air Force salary, and he files a Wisconsin state income tax return each year. He has voted by absentee ballot in Wisconsin in most major elections since he entered active duty.

My husband and I got married in Germany in 2003. In 2005, we were both transferred to the same Air Force base in Georgia. Since 2005, we have lived together in a home we purchased off base but near the main gate of the Air Force base. In 2006, I completed my initial active duty obligation and chose not to reenlist. I left active duty in 2006 and chose not to affiliate with the Air Force Reserve or Air National Guard. In 2009, when I completed my initial military obligation, under my 2001 enlistment contract, the Air Force mailed me my honorable discharge.

I have not worked outside the home since I left active duty in 2006, but now that our two children have started school I took a new civilian job, working for a major national tax preparation company. As a new employee, I must complete tax forms for withholding of federal and state income tax from my income. The question has arisen—what is my state of domicile for state income tax purposes?

I think of myself as an Ohioan—I have been voting there since shortly after I entered active duty in 2001, first as an active duty Airman and then as the wife of an active duty Airman. I think that I should list Ohio as my state of domicile on the tax forms, and I think that I should pay Ohio state income tax on my salary at the tax preparation company.

A person holding an authoritative position told me that once I left active duty in 2006 I became a domiciliary of Wisconsin, based on my husband's Wisconsin domicile. This person claimed that the domicile of the husband controls the domicile of the wife, and that so long as my husband remains on active duty and is domiciled in Wisconsin that I am domiciled in Wisconsin, although I have never lived in Wisconsin and have only visited the state once, in 2005, shortly after the wedding, to meet his parents.

I contacted the Georgia Department of Revenue (GDR), and they told me that I need to list Georgia as my domicile on the tax forms and that I must pay Georgia state income tax on my salary, regardless of where I consider myself to be domiciled, and regardless of whether I vote in Georgia, or in Ohio, or in Wisconsin, or do not vote at all. The GDR supervisor told me that a federal law called the Servicemembers Civil Relief Act (SCRA) precludes Georgia from taxing my husband's military income, so long as he remains on active duty and physically resides in Georgia only because his Air Force duties require his presence here. The GDR representative told me that the SCRA does not apply to my non-military income. She said that Georgia will sue me to collect Georgia state income tax on my salary even if I have already paid state income tax on that salary to another state, like Ohio or Wisconsin. I am concerned

about the possibility of paying state income tax to two states on the same income, with no offset.

I am in a quandary. Do I list Georgia as my domicile on the tax form? Or Ohio? Or Wisconsin? By doing an Internet search, I found your Law Review 0959, about the Military Spouse Residency Relief Act (MSRRA). What do you think?

I am interested in this question with respect to my own family situation but also with respect to the clients of our tax preparation company. Our tax preparation office is located just outside the major Air Force base where my husband serves. Most of the people who come to us for tax preparation are either active duty service members or spouses of active duty service members, and I think that it is very important that we give them correct advice about where they are to file state income tax returns.

A: I think that the GDR representative was correct when she told you that the SCRA does not protect you from having to pay Georgia state income tax on your civilian salary, regardless of where you consider yourself to be domiciled and without regard to where you vote or do not vote. I think that you need to list Georgia on the tax forms and that you need to pay Georgia state income tax. I also suggest that you should register to vote in Georgia and vote there going forward. I think that you have been a Georgia domiciliary since you left active duty in 2006, although you have not considered yourself to be one.

Every human being has one and only one domicile, for all legal purposes. An individual cannot be domiciled in Florida for tax purposes but in Georgia for voting purposes. The Maryland Court of Appeals<sup>3</sup> has held: "Evidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue." *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973).

This holding has been cited with approval and upheld in eight later Maryland Court of Appeals decisions: *Reeder v. Board of Supervisors of Elections of Queen Anne's County*, 269 Md. 261, 305 A.2d 132 (1973); *Knapp v. Comptroller of the Treasury*, 269 Md. 697, 309 A. 2d 635 (1973); *Bartell v. Bartell*, 278 Md. 12, 357 A.2d 343 (1976); *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979); *Wamsley v. Wamsley*, 333 Md. 454, 635 A.2d 1322 (1994); *Roberts v. Lakin*, 340 Md. 147, 665 A.2d 1024 (1995); *Blount v. Boston*, 351 Md. 360, 718 A.2d 1111 (1998); and *Oglesby v. Williams*, 372 Md. 360, 812 A.2d 1061 (2002).

The Oklahoma Supreme Court has also cited *Lenderking* with approval and has followed it. See *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315 (1979).

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<sup>3</sup>In Maryland, unlike most states, the state's highest court is called the Court of Appeals, rather than the Supreme Court.

Accordingly, it is important that you register to vote and vote in Georgia, not Ohio, going forward. If you continue to vote in Ohio by absentee ballot, Ohio may be able to sue you for state income tax and prevail, based on your having voted by absentee ballot in Ohio.<sup>4</sup>

When a civilian moves from one state to another (except for a temporary purpose measured in weeks or perhaps months), the individual immediately loses the domicile in the first state and becomes a domiciliary of the second state, without regard to intent or preference. *Active duty* service members are exempted from this general rule, under the SCRA. When an active duty service member moves from State A to State B, pursuant to military orders, the service member does not automatically lose his or her domicile in State A or become a domiciliary of State B.

Active duty service members are treated differently from civilians because service members do not get to choose where to live—they must go where the service orders them to go. When the Air Force transferred you and your husband from Germany to Georgia, you did not have the choice to disobey the order. Failure to go to the new appointed place of duty would amount to the military criminal offense of *unauthorized absence*.

Civilians sometimes get transferred by their employers, but a civilian can always quit his or her job. When the Air Force transferred you and your husband in 2005, you did not have the option to quit, until the end of your enlistment or obligated period of service. This explains why the SCRA (a federal statute that trumps conflicting state laws) treats active duty military personnel differently from civilians.

I invite your attention to my Law Review 1298 (October 2012). That article deals with a Regular Army Colonel who was on active duty for 29 years, until he retired and left active duty on September 30, 2012. His last active duty assignment was at the Pentagon, and he lived in a house in Arlington, Virginia, near his Pentagon assignment. The Colonel entered active duty in 1983 while living in Florida, and he maintained his Florida domicile throughout his 29-year military career.

When he left active duty at midnight on September 30, he remained in the same Arlington house, and he continued to commute to the Pentagon every business day, for his new civilian job for a Department of Defense contractor. Because he was no longer on active duty, he became a Virginia domiciliary, by operation of law, as of 12:01 a.m. on October 1, 2012. In the article, I told him that he needed to register to vote in Virginia by the October 15 deadline if he wanted to vote in the general election held on November 6, 2012. As of October 1, he was no longer on active duty, meaning that he was no longer covered by the SCRA. That means that he was no longer domiciled in Florida and was no longer eligible to vote in Florida by absentee ballot.

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<sup>4</sup>The question of your domicile between 2006, when you left active duty and late 2012, when you started the new civilian job at the tax preparation company, is essentially moot, because you did not work outside the home or have any income of your own during that period of more than six years.

Applying this logic to your situation, I think that you became a Georgian in 2006, on the day after you left active duty. Although you considered yourself to be an Ohioan, and you continued to vote by absentee ballot in Ohio, you were in fact domiciled in Georgia as of the day after you left active duty.

The MSRRA did not apply to you in 2006, because that federal law was not enacted until three years later. The enactment of the MSRRA in 2009 did not help you to become a domiciliary of Wisconsin, a state where you have never lived.

The pertinent SCRA section, as amended by the MSRRA in 2009, is as follows: "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. App. 571(a)(2) (emphasis supplied).

In 2009, when the MSRRA was enacted, you and your husband *were not domiciled in the same state*. You were domiciled in Georgia, although you incorrectly believed that you were domiciled in Ohio at the time. Your husband was domiciled in Wisconsin, because that is where he was domiciled at the time he entered active duty in 2000, and because he had remained on active duty continuously since 2000 and had not established a new *domicile of choice* at any of the places where he has been serving since 2000. Because you and your husband have never been domiciled in the same state, in your eight-plus years of marriage or at any earlier time, section 571(a)(2) does not apply to your situation at all.

Many civilians have a difficult time understanding the concept that a husband and wife can live together in the same house or apartment but be domiciled in different states. This situation is not only possible but is indeed very common in military families. This applies both to member-member marriages (where both husband and wife are on active duty) and to the more common situation where one marriage partner (usually but not always the husband) is on active duty and the other partner is not. Any person advising active duty service members and their spouses about filing state income tax returns needs to understand and abide by this concept.

**Q: My mentor insists that the domicile of the husband controls the domicile of the wife. Is that not correct?**

**A:** The Georgia Code did indeed once say that, but that provision was declared unconstitutional 40 years ago. "The joint operation of Georgia Code Sections 79-403, 79-407, and 34-632, insofar as it establishes an irrebuttable presumption that the domicile and residence of a married woman is that of her husband, and thereby prevents her from registering to vote in Georgia, violates the 19th amendment of the Constitution of the United States." *Kane v. Fortson*, 369 F. Supp. 1342, 1343 (N.D. Ga. 1973). The 19th Amendment (ratified in 1920) guarantees women the right to vote.

**Q: Many of my husband's colleagues, in his Air Force unit, are exempt from having to pay state income tax because they claim domicile or legal residence in a state that has no state income tax (Texas, Florida, Alaska, etc.). Is it possible for my husband to become a domiciliary of one of these no-tax states?**

**A:** No, at least not at this time.

Your husband is domiciled in Wisconsin—that is his *domicile of origin*. He lived in Wisconsin and was domiciled there at the time he entered active duty in 2000. He can maintain that domicile of origin in Wisconsin until he leaves active duty (by retirement or otherwise) or until he establishes a new *domicile of choice* in some other state, whichever comes first.

To establish a new domicile of choice in a state other than Wisconsin, your husband needs *both* a physical presence (for a significant time) in the state to which he wishes to change his domicile and the *intent* to make that place his home. He needs to have both elements *simultaneously*. Your husband cannot establish a Texas domicile while serving in Georgia.

If he wishes to do so, your husband can establish a domicile of choice in Georgia, while he is serving there. He already has the physical presence for a significant time, and he can establish the intent. There should be evidence of the intent, such as registering to vote and voting in Georgia. You should compare the Wisconsin tax rate with the Georgia tax rate to determine if your husband would benefit by becoming a Georgia domiciliary.

Let us assume that your husband is transferred to Fort Hood (Texas) in 2014 and serves there until 2017, when he transfers to Virginia for his last two years of active duty before retiring in 2019. Your husband can establish a Texas domicile *while serving in Texas* and then can maintain his Texas domicile during the 2017-19 time period, while he is serving on active duty in Virginia. In this scenario, the SCRA will preclude Virginia from taxing your husband's military income while he is on active duty and physically residing in Virginia only because his Air Force duties require his presence there.

But your husband's domicile does not control yours, or vice versa. While you are living in Georgia you must pay Georgia state income tax on your non-military salary. During the 2014-17 time period, when you accompany your husband to Fort Hood, you will not have to pay state income tax because Texas has no state income tax. During the 2017-19 time period, when you accompany your husband to his final duty station in Virginia, you will have to pay Virginia state income tax on your non-military income, if you work outside the home during that time period.

In summary, this issue is complicated, and each family's situation will be different. The major tax preparation company that employs you needs to research these issues and provide accurate and timely information for tax preparers, especially those who work near major military bases.

### **Update – March 2022<sup>5</sup>**

On December 21, 2018, President Trump signed into law the Veterans Benefit and Transition Act of 2018.<sup>6</sup> Section 302(a) of the Act adds to the SCRA to allow spouses of a servicemember to use the same residence for purposes of taxation as the servicemember regardless of when they were married.<sup>7</sup> The provision is codified in 50 U.S.C. § 4001(a)(2)(B) as follows:

For any taxable year of the marriage, the spouse of a servicemember may elect to use the same residence for purposes of taxation as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

Therefore, you may change your domicile to Wisconsin, even though you have never lived in Wisconsin because your husband is a domiciliary of Wisconsin. If you choose to change your domicile to Wisconsin, you will also need to register to vote and vote in Wisconsin.

Let's also consider the hypothetical where your husband is transferred to Fort Hood in 2014 and serves there until he is transferred to Virginia in 2017. Not only can your husband establish his domicile in Texas from 2014 until the end of his military career, but so can you. It would be beneficial for you because Texas has no state income tax. In this instance, you will also need to register to vote and vote in Texas.<sup>8</sup>

### **Please join or support ROA**

This article is one of 1800-plus "Law Review" articles available at <https://www.roa.org/page/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.

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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<sup>5</sup>Update by Second Lieutenant Lauren Walker, USMC.

<sup>6</sup>Veterans Benefits and Transition Act of 2018, Pub. L. NO. 115-407. 132 Stat. 5367. *See also The Veterans Benefits and Transition Act*, MILITARY BENEFITS, <https://militarybenefits.info/veterans-benefits-transition-act/> (last visited Mar. 18, 2022).

<sup>7</sup>Veterans Benefits and Transition Act § 302(a).

<sup>8</sup>*See Samuel F. Wright, SCRA Amended regarding Voting Rights of Military Spouses*, ROA LAW REVIEW 19020 (Feb. 2019) (further discussing the Veterans Benefits and Transition Act of 2018 and how it affects spouses of service members).

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

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.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://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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