

**LAW REVIEW<sup>1</sup> 17108**

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**School Principal and School District Violate SCRA in their Treatment of Deployed Service Member regarding School Registration**

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**Q: I am a Major in the Army Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**I have two six-year-old children (twins), and I have principal custody of them. My ex-wife has visitation rights. I enrolled the two children in kindergarten in our local school district in**

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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 (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](mailto:SWright@roa.org).

August 2016, and shortly thereafter I was called to active duty for one year. I spent most of that time in Afghanistan.

While I was on active duty and deployed, the children went to live with their mother. She lives nearby, but not in the same school district. On several occasions during the 2016-17 school year, the nosy principal followed my children home from school, to their mother's house in the neighboring school district. She also staked out my house and spoke to several of my neighbors, asking about my whereabouts. My next-door neighbor told her that I had been called to active duty in the Army and that I was in Afghanistan, but she said that did not matter]. Because I was not physically residing in the school district with the children during the school year I was not eligible (she claimed) for a free public education for my children in that school district. In December 2016, near the end of the fall semester, my two kindergarteners were forced to leave their neighborhood school near our home and to enroll in a school in their mother's school district.

I returned home and left active duty at the end of September 2017. In August, in anticipation of my imminent return home, I tried to enroll my children in first grade in the school near my home, but I was told that they are not eligible because I do not "reside" in the school district. In early October, after I was back in my home and after my children moved back into my home, I renewed my request to re-enroll my children in their neighborhood school near my house. The registration department of the school district told me that I am not eligible for free public education in that school district unless I can *prove* that I really do live full-time in the district and unless I can provide assurance that I won't be leaving again to "play soldier."

#### **Have my USERRA rights been violated?**

**A:** USERRA does not apply to this situation, because it is unrelated to your civilian employment. This situation is governed by an equally important federal law, the Servicemembers Civil Relief Act (SCRA).

Congress enacted the SCRA in 2003, as a long-overdue rewrite and update of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted more than a century ago, shortly after our country entered World War I in April 1917. The SCRA is codified in title 50 of the United States Code, at sections 3901 through 4043.<sup>3</sup>

Three SCRA sections are especially pertinent to your situation, and I have copied them here:

#### **Child custody protection**

- **(a)** Duration of temporary custody order based on certain deployments. If a court renders a temporary order for custodial responsibility for a child based solely on a deployment or anticipated deployment of a parent who is a servicemember, the court

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<sup>3</sup>50 U.S.C. §§ 3901-4043.

shall require that the temporary order shall expire not later than the period justified by the deployment of the servicemember.

- **(b)** Limitation on consideration of member's deployment in determination of child's best interest. If a motion or a petition is filed seeking a permanent order to modify the custody of the child of a servicemember, no court may consider the absence of the servicemember by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child.
- **(c)** No Federal jurisdiction or right of action or removal. Nothing in this section shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal.
- **(d)** Preemption. In any case where State law applicable to a child custody proceeding involving a temporary order as contemplated in this section provides a higher standard of protection to the rights of the parent who is a deploying servicemember than the rights provided under this section with respect to such temporary order, the appropriate court shall apply the higher State standard.
- **(e)** Deployment defined. In this section, the term "deployment" means the movement or mobilization of a servicemember to a location for a period of longer than 60 days and not longer than 540 days pursuant to temporary or permanent official orders—
  - **(1)** that are designated as unaccompanied;
  - **(2)** for which dependent travel is not authorized; or
  - **(3)** that otherwise do not permit the movement of family members to that location.<sup>4</sup>

#### Residence for tax purposes

- **(a)** Residence or domicile.
  - **(1)** In general. 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 servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.
  - **(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.
- **(b)** Military service compensation. Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.

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<sup>4</sup> 50 U.S.C. § 3938.

- (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.
- (d) Personal property.
  - (1) Relief from personal property taxes. The personal property of a servicemember or the spouse of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders.
  - (2) Exception for property within member's domicile or residence. This subsection applies to personal property or its use within any tax jurisdiction other than the servicemember's or the spouse's domicile or residence.
  - (3) Exception for property used in trade or business. This section does not prevent taxation by a tax jurisdiction with respect to personal property used in or arising from a trade or business, if it has jurisdiction.
  - (4) Relationship to law of state of domicile. Eligibility for relief from personal property taxes under this subsection is not contingent on whether or not such taxes are paid to the State of domicile.
- (e) Increase of tax liability. A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.
- (f) Federal Indian reservation. An Indian servicemember whose legal residence or domicile is a Federal Indian reservation shall be taxed by the laws applicable to Federal Indian reservation and not the State where the reservation is located.
- (g) Definitions. For purposes of this section:
  - (1) Personal property. The term "personal property" means intangible and tangible property (including motor vehicles).
  - (2) taxation. The term "taxation" includes licenses, fees, or excises imposed with respect to motor vehicles and their use, if the license, fee, or excise is paid by the servicemember in the servicemember's State of domicile or residence.
- (3) Tax jurisdiction. The term "tax jurisdiction" means a State or a political subdivision of a State.<sup>5</sup>

#### **Guarantee of residency for military personnel and spouses of military personnel**

- In general. For the purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)) or a State or local office, a person who is absent from a State in compliance with military or naval orders shall not, solely by reason of that absence—

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<sup>5</sup>50 U.S.C. § 4001.

- (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.
- (b) Spouses. For the purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) or a State or local office, a person who is absent from a State because the person is accompanying the person's 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.<sup>6</sup>

While you were away from your home for a year of active duty, from October 2016 through September 2017, your domicile (legal residence) did not change—it remained at your home. You certainly were not domiciled in Afghanistan. This preservation-of-domicile rule applies to your right to vote and to the treatment of your military income and personal property (vehicle, etc.) for state and local tax purposes while you are on active duty and away from your domicile because of your military duties. I think that it is fair to conclude that this rule also applies to your right to free public education for your children. The school principal and the school district have violated your SCRA rights.

**Q: The school district's lawyer has claimed that giving me the right to free public education for my children while I live somewhere else, like in Afghanistan, violates state law and the state constitution. What do you say about that?**

**A:** State laws and the state constitution cannot override your rights under a federal statute like the SCRA. The “Supremacy Clause” of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>7</sup>

The Supremacy Clause means that a federal statute like the SCRA trumps a conflicting state statute or constitution. State and local government officials sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

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<sup>6</sup>50 U.S.C. § 4025.

<sup>7</sup>U.S. Const., art. VI, cl. 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

The United States Supreme Court has held that the SSCRA means what it says about exemption from state and local taxes on personal property, that this federal statute overrides conflicting state laws, and that this federal statute is not unconstitutional.<sup>8</sup>

### **The larger context of this issue**

It has now been more than 44 years since Congress abolished the draft and established the All-Volunteer Military in 1973. Even more each year, the folks who run things have never served in the military, and no one in their families has served and none of their close friends have served. They are clueless as to military matters. This observation applies to school principals, school district officials, and their lawyers. The purpose of the “Law Review” column is to inform state and local government officials, employers, attorneys, judges, and others about the special circumstances faced by that tiny sliver of our country’s population who serve in uniform, and by their families, and about their rights under laws like the SCRA and USERRA. This is an ongoing effort.

For many years, ROA has been active in educating local schools and school districts about the special circumstances faced by the children of military personnel, especially Reserve and National Guard personnel who have been called to the colors for the Global War on Terrorism. Principals and school district officials in places like Harker Heights, Texas (near Fort Hood) know all about military children. In the rest of the country, local school district officials know little and care less, all too often.

### **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.

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

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<sup>8</sup>See *Dameron v. Brodhead*, 345 U.S. 322 (1953). The citation means that this decision can be found in Volume 345 of *United States Reports*, starting on page 322. I discuss *Dameron* in detail in Law Review 09017 (April 2009).

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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