

LAW REVIEW¹ 19007

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You Need a Military Power of Attorney

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5.2—Military Service and Child Matters

5.5—Other Military Service and Family Obligations

Q: I am a Sergeant in the Army Reserve and a member of the Reserve Organization of America.³ I am also a single mother with a daughter who is five. I am being called to active duty

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.

³At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

soon, and I will be deploying to a classified location in Southwest Asia. I plan to turn over my daughter to my mother, who lives in a distant state, and she will care for the child during my deployment, which is expected to last about one year.⁴

I have been told that I need to have a judge advocate draft a “power of attorney” giving my mother the authority to make decisions about my daughter’s education and medical care during my absence. My mother may also need to make decisions about some of my business matters, and those matters arise in four different states, not including the state where my mother resides. How do I get a power of attorney that will work in all four states?

A: You need to get a military legal assistance attorney to draft for you a *military power of attorney*. Such a power of attorney is valid in all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, without regard to state or territorial laws that have different requirements. Title 10 of the United States Code provides:

(a) Instruments to be given legal effect without regard to State law. A military power of attorney--

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and

(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

(b) Military power of attorney. For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law.

(c) Statement to be included.

(1) Under regulations prescribed by the Secretary concerned, each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

⁴The child’s father also has a right to be heard from in decisions about the custody of the child, regardless of whether you were ever married to him. If the custody arrangement for the child is to change because of your impending deployment or for any other reason, you must get the father’s approval of the change or you must go to court for approval of the custody change. Please see by John S. Odom, Jr. & Samuel F. Wright, *What Happens to the Child When I Get Mobilized*, Law Review 09051 (September 2009).

(d) State defined. In this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.⁵

Section 1044b was enacted as part of the National Defense Authorization Act (NDAA) for Fiscal Year 1994.⁶ The House Armed Services Committee explained the purpose and intended effect of this section as follows:

The past experience of service members and their dependents who executed powers of attorney in advance of recent military operations has shown that some states and territories have refused to honor these powers of attorney because they were not executed in accordance with state and territorial legal requirements. The failure to honor these documents has created substantial hardships for military families. This section would provide that a power of attorney signed by a person authorized to receive [military] legal assistance and notarized by a person authorized under section 1044a of title 10, United States Code, to perform notarial acts shall be recognized as valid and given full effect by those to whom such a power of attorney is presented.⁷

A military power of attorney, executed under federal law, will be effective in each of the four states where you anticipate that it may be needed, or in any other state or territory of the United States. If you hire a civilian attorney in one of those four states to draft a power of attorney, it will meet the requirements of that state but may not meet the requirements in the other three states. That is the advantage of a military power of attorney, as compared with a power of attorney drafted by a civilian lawyer.

Q: I have seen references to a “limited power of attorney” and a “general power of attorney.” What is the difference? Which kind do I need?

A: A limited power of attorney gives your “attorney in fact” (the person to whom you have given the power of attorney) the authority to take certain enumerated actions or to make certain enumerated decisions for you. For example, you could give your mother a limited power of attorney to make decisions about medical care and education for your daughter.

If you need your mother to make decisions about more than just your daughter, you will need a general power of attorney, giving your mother the authority to make any decision or to take any action that you could make or take if you were present. For example, the standard military general power of attorney form includes the following language:

Giving and granting unto my said attorney full power and authority to do and perform all and every act, deed, matter, and thing whatsoever in and about my estate, property, and affairs as

⁵10 U.S.C. 1044b (emphasis supplied). The citation refers to section 1044b of title 10 of the United States Code. Section 1044b should not be confused with section 1044(b), which is subsection (b) of section 1044. Section 1044a and 1044b are separate sections that come after section 1044 and before section 1045.

⁶Section 547, Public Law 103-160, 107 Stat. 1547 (1993).

⁷H.R. Rep. No. 103-200, at page 286 (1993).

fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present.

Of course, with such a broad grant of authority, your mother might decide something or take an action that will displease you when you return home and learn of it. But since you will likely be out of pocket for weeks or months at a time, and since decisions will need to be made, you may find it necessary to take that risk and give your mother a general power of attorney.

Q: As a reservist not presently on active duty, am I eligible for military legal assistance?

A: Unfortunately, no. Reserve and National Guard members are eligible for military legal assistance only when on active duty and, under special circumstances, for a period after release from an involuntary call to active duty. The period of eligibility after release from active duty extends for a period not to exceed twice the involuntary active duty period.⁸

A reservist or National Guard member who is not on active duty but who is expecting to be called to active duty soon is not eligible for military legal assistance, but arrangements are sometimes made for reserve or active duty judge advocates to assist those who are being called to active duty, especially for drafting wills and powers of attorney.

Q: How do I find a military legal assistance attorney?

If you need assistance regarding this area of law or any other laws, you should start the process by making an appointment with a legal assistance attorney. Go to <http://legalassistance.law.af.mil>. The service is operated by the Air Force, but it includes legal assistance offices for all the services, even the Coast Guard. The website will show you, from your zip code, the nearest military legal assistance offices. You must call and make an appointment, because military legal assistance attorneys will not provide legal assistance by telephone. You can make an appointment at the office that is most convenient for you, even if is of a different service.

Military legal assistance attorneys are active duty judge advocates and civilian lawyers working for one of the service Judge Advocate General offices, and they are specifically assigned to assist service members and military family members with civilian legal problems. Most active duty judge advocates are assigned to other duties and are not available to provide legal assistance, but perhaps they can help you find a nearby legal assistance attorney.

You will need to make an appointment and visit a military legal assistance attorney in person. As a matter of strict policy, these attorneys do not provide legal advice by telephone or e-mail.

Q: How many military power-of-attorney forms will my mother need during the year that I am on active duty?

⁸10 U.S.C. 1044(a)(4).

A: I suggest that when you visit a military legal assistance attorney you obtain ten or more signed and notarized powers of attorney, because the United States Court of Appeals for the 6th Circuit⁹ has held that a government official is not required to accept a photocopy of the signed and notarized form.¹⁰

Please join or support ROA

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.

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 eight¹¹ 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

⁹The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee/

¹⁰See *Bartholomew v. Blevins*, 679 F.3d 497 (6th Cir. 2012). I discuss the case in detail in Law Review 12053 (May 2012).

¹¹Congress recently established the United States Space Force as the 8th uniformed service.