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Yes, the SCRA Applies to Child Custody Proceedings

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4.3—SCRA Right to a Continuance and Protection Against Default Judgment
5.2—Military Service and Child Matters

Wood v. Woeste, 461 S.W.3d 778 (Kentucky Court of Appeals 2015).[3]

Jesse A. Wood, IV and Aliza Hunter divorced in 2005, while living in Cincinnati, Ohio. Pursuant to an agreed parenting plan, they agreed to shared joint custody, with an alternating schedule, for their son L.A.W.,[4] who was then an infant. In 2009, after the mother (Hunter) moved to Montana, she and Wood (father) agreed to a modified court order making father the primary

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[1]I 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.

[2]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.

[3]This is a decision by a three-judge panel of Kentucky's intermediate appellate court, above the trial court and below the Kentucky Supreme Court. The citation means that you can find this decision in Volume 461 of *Southwestern Reporter Third Series,* and the decision starts on page 778. The three judges are Judge Allison Jones, Judge Kelly Thompson, and Judge Irv Maze. Judge Thompson wrote the majority decision, and Judge Jones joined. Judge Maze dissented.

[4]It is customary in child custody cases for the child to be referred to with initials or a pseudonym.

residential custodian of L.A.W. (son) for school purposes, with mother exercising timesharing during the son's summer vacation and other school breaks.

In 2012, father and son moved to Kentucky and began living with father's girlfriend (Jill Markum) and her children. In 2013, mother violated the timesharing court order by failing to return son to father at the conclusion of her summer visitation period. Father filed a motion in the Family Court in Campbell County, Kentucky, asking that court to enforce the Ohio custody orders. The court granted father an ex parte[5] court order commanding mother to return son to father, which she did.

After son returned to father in Kentucky, both father and mother moved the Family Court to alter their custody and timesharing arrangements, asserting that the current arrangement was not in son's best interest. On 4/18/2014, the Family Court upheld the existing arrangements.

> Father is a member of the Air National Guard (ANG), and in September 2014 he was given short notice that he was to be called to active duty and deployed to Afghanistan for 180 days. Son remained in Kentucky in the care of Ms. Markum (his father's girlfriend) and father's parents. It was wrong for father to make these substitute custody arrangements without input from mother or a revised court order. It is unfortunate that father did not read Law Review 09051 (August 2009), by Colonel John S. Odom, Jr. and me. In that article, we dealt with a situation that was almost identical to the Wood-Hunter situation, except that it was the mother who was the deploying service member who wanted to give temporary custody of the child to her parents, during her deployment. Colonel Odom and I wrote:
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> We think that you are going about this the wrong way. You need to inform the boy's father as soon as the mobilization is reasonably certain. If the father does not agree to the plan of having the maternal grandparents take custody, you will need to go back to the court that granted you custody and get the court to order an appropriate custodial arrangement for the child during your deployment.
>
> The court made the finding that giving you custody was in the best interests of the child. The court retains jurisdiction to make redeterminations about the best interests of the child whenever there is a material change in circumstances. Your upcoming deployment to Afghanistan is most certainly a material change in circumstances.
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> Your ex-husband is the other parent of the child. His position is likely to be, "Hey, give me my kid. When my ex-wife gets back from war, we can sort all this out, but for now I am the other parent and I want custody." The court is quite likely to go along with this pitch, in the absence of clear evidence of child abuse by your ex-husband.

[5]Ex parte means that only one party (father) participated in the hearing. Ordinarily. Both parties must participate , but in an emergency a court can award a party relief without the presence of the other party.

> The court gave you custody of the boy, but the court did not and cannot delegate to you the authority to determine an alternative custody arrangement if for any reason you will not be able to exercise custody of the child for an extended period. You simply do not have the legal power or right to turn the child over to your parents upon your deployment.

On 12/1/2014, mother filed a motion for temporary primary residential custody in the Campbell County Family Court, arguing that the father's deployment constituted a substantial change in circumstances and the care arrangement made for the son in the father's absence seriously endangered the son's physical, mental, moral or emotional health. Mother requested that she be given immediate primary residential custody for the remainder of the school year.

On 12/9/2014, father filed (through counsel that he had retained long distance) a motion to stay the proceedings for 90 days, pursuant to the federal Servicemembers Civil Relief Act (SCRA). The pertinent SCRA provision is as follows:

> **(a)** Applicability of section. This section applies to any civil action or proceeding, *including any child custody proceeding*, in which the plaintiff or defendant at the time of filing an application under this section--
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> **(1)** is in military service or is within 90 days after termination of or release from military service; and
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> **(2)** has received notice of the action or proceeding. **(b)** Stay of proceedings.
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> **(1)** Authority for stay. At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, *the court* may on its own motion and *shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.*
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> **(2)** Conditions for stay. An application for a stay under paragraph (1) shall include the following:
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> **(A)** A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
>
> **(B)** A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.
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> **(c)** Application not a waiver of defenses. An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a

waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).

(d) Additional stay.

(1) Application. A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b)(2) shall be included in an application under this subsection.

(2) Appointment of counsel when additional stay refused. If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.

(e) Coordination with section 201. A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 201.

(f) Inapplicability to section 301. The protections of this section do not apply to section 301.[6]

Together with his motion for a 90-day stay of the proceedings in the Family Court, father attached exhibits, including proof that he was serving on active duty in the Air Force as of 12/4/2014 and a letter from his Commanding Officer stating that father was involuntarily called to active duty on 10/6/2014 and would be unavailable for any court proceedings for a period of 180 days from that date, not to include travel or reconstitution. Father thus met the requirements of 50 U.S.C. 3932(b), and under these circumstances the 90-day stay should have been considered mandatory and automatic.

In accordance with standard procedure in child custody proceedings, the court appointed a Guardian ad Litem (GAL) to represent the interests of the son. The GAL pointed out to the court that Kentucky law mandates that any court-ordered modification of timesharing due in part or in whole to a parent's military deployment outside the United States shall be temporary and shall revert back to the previous schedule at the end of the deployment.[7] The GAL urged the court to consider whether it would be in the best interest of the son to disrupt his current schedule and require him to adjust to a new school mid-year in another state (Montana) when

[6] 50 U.S.C. § 3932 (emphasis supplied).

[7] Kentucky Revised Statutes section 403.320(4)(a). The SCRA does not preempt a state law that *supplements* the SCRA by granting the service member *greater or additional rights,* but the SCRA preempts a state law that conflicts with the SCRA or that purports to limit rights granted to the service member by the service member.

at the conclusion of father's deployment (scheduled for April 2015) he would be returned to his father's custody and would need to complete the school year in Kentucky.

On 12/19/2014, after a hearing when father was not present but was represented by counsel, the Family Court denied the father's motion for a 90-day stay. The court determined that father would not be prejudiced by proceeding and indicated that modification (giving temporary custody to mother) would be granted unless it was proven that granting mother temporary custody would seriously endanger son.

On 1/5/2015, the Family Court heard the mother's motion to award her temporary physical custody of the son during the father's deployment. That same day, father and son (through his GAL) filed a joint petition for a writ of prohibition and/or mandamus in Kentucky's intermediate appellate court. The Family Court acknowledged receipt of the petition for a writ but held that in the absence of an order from the appellate court it was obligated to proceed with the hearing and adjudicate the matter. The very next day, the Family Court ordered that the son live with mother and designated her as the temporary residential custodian until father's return from deployment. Based on this court order, mother took son to live with her in Montana, during father's deployment.

Kentucky law provides that an appellate court may grant an extraordinary writ, as father and son sought here, upon a showing that "the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted."[8] The appellate court majority held: "Father has made such a showing to merit granting the petition for a writ of prohibition."[9] The majority decision of the intermediate appellate court held:

> [B]ecause father fully complied with the [SCRA] requirements for a stay, the family court erred in failing to grant it.
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> The injury in this case is real and irreparable. First, son is being relocated during a school year without consideration of whether a move to a distant state is in the son's best interest. A future appeal cannot possibly rectify any damage caused to son by the court's order.
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> Likewise, father's injuries are irreparable. While serving his country, father was unable to appear and oppose mother's motion. The purpose of the SCRA is to permit service members to "devote their entire energy to the defense needs of the Nation" by temporarily suspending judicial proceedings, including custody proceedings. ... Holding a custody hearing in father's absence after he properly filed a motion for an automatic stay directly contravenes the stated purpose of the SCRA. Even if father will ultimately resume his role as residential custodian, the violation of the SCRA has already caused

[8] *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).
[9] *Wood*, 461 S.W.3d at 782.

> the harm sought to be prevented by its enactment which cannot be remedied on appeal.[10]

The majority decision ends as follows:

> The petitioners having filed a petition for writ of prohibition; IT IS HEREBY ORDERED the petition for writ of prohibition is hereby GRANTED. The motions for emergency relief are hereby denied as moot.[11]

The intermediate appellate court granted the writ of prohibition, but granting the writ had no practical effect because the court took too long to decide this case. By the time the intermediate appellate court rendered its decision on 5/1/2015, father had returned home from his 180-day deployment to Afghanistan and had resumed his role as the primary custodian of son during the school year, and only then was son returned to Kentucky from Montana. Nonetheless, this decision will be helpful as a precedent when this issue arises again in Kentucky or another state, and it is almost certain that the issue will arise again.

In his dissent, Judge Maze noted:

> The Family Court made two significant findings in its January 6, 2015 order: (1) The Father's unilateral designation of the paternal grandfather as caretaker of the child cannot defeat Mother's joint custodial status and (2) the Father simply cannot be the physical custodian of the child while he is deployed.[12]

I entirely agree with these two observations by Judge Maze and the trial judge, but these two statements do not change the fact that the federal statute (the SCRA) is binding on state courts under the Supremacy Clause of the United States Constitution.[13]

In his dissent, Judge Maze pointed out that the United States Supreme Court had held that the corresponding provision of the Soldiers' and Sailors' Civil Relief Act (SSCRA) left a trial court some discretion to deny a service member's motion for a stay of proceedings.[14] As Colonel Mark E. Sullivan, USA (Ret.) explained in Law Review 116 (March 2004), Congress enacted and

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[10] *Id.* at 783.
[11] *Id.*
[12] *Id.* at 786.
[13] Article VI, Clause 2 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." Yes, it is capitalized just that way, in the style of the late 18th Century. The long, bloody argument about the supremacy of federal law over state law ended 4/9/1865, when General Robert E. Lee surrendered to General Ulysses S. Grant at Appomattox Courthouse, Virginia.
[14] *See Boone v. Lightner*, 319 U.S. 561, 568 (1943), cited in *Wood* , 461 S.W.3d at 785.

President George W. Bush signed the SCRA in December 2003, as a long-overdue update and rewrite of the SSCRA, which was originally enacted in 1917.

The SSCRA provision gave a trial court some discretion to deny an absent service member's motion for a continuance. Under the SCRA, no such discretion is permitted. If the absent service member's motion for a 90-day continuance meets the SCRA requirements, as Wood's motion did, the trial court is *required* to grant a continuance of at least 90 days.

Conclusion

Child custody disputes are often difficult and heart-wrenching, even under the best of circumstances. When one or both parents serve our nation in the armed forces, Active Component or Reserve Component, a difficult situation can become well-nigh impossible. I call upon feuding ex-spouses to set aside your long-term, irrational peeing contest at least long enough to focus on the best interest of the child, especially when the custodial parent is called to the colors and deployed, as in this case.

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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.

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[15]Congress recently established the United States Space Force as the 8th uniformed service.

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