

The Court *Must* Grant a 90-day Continuance to the Absent Service Member Who Applies for a Stay and Meets the Statutory Conditions

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

4.3—SCRA Right to a Continuance and Protection Against Default Judgment

5.2—Military Service and Child Matters

In the Interest of H.S.J., 2010 Tex. App. LEXIS 9208 (Court of Appeals of Texas, Third District, Nov. 16, 2010).³

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 (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.

³This is a decision of the Texas Court of Appeals for the Third District. Texas has 14 intermediate appellate courts, above the state trial courts and below the Texas Supreme Court (on the civil side) and the Texas Court of Criminal Appeals (on the criminal side). Each intermediate appellate court hears appeals from state trial courts, in both civil and criminal cases, for a group of contiguous counties. The Third District Court of Appeals sits in Austin and hears appeals from trial courts in Travis County and 23 other counties in central Texas. This appellate court consists of a Chief Justice and five Justices. Cases are normally decided by a panel of three of these Justices. This case was referred to a panel consisting of Chief Justice Jones, Justice Patterson, and Justice Henson.

Stephanie Smith and Deron Jannicke are both on active duty in the United States Army. They were married to each other until they divorced in November 2006. In the divorce decree, Jannicke was named the joint managing conservator with the exclusive right to designate the primary residence of the couple's child, H.S.J.,⁴ without regard to geographic location. Smith (the mother) subsequently filed a petition to modify the parent-child relationship. In July 2008, after Jannicke's April 2008 deployment to Afghanistan, Smith and Jannicke agreed to temporary orders granting Smith the right to designate the child's primary residence within Bell or Coryell County (the vicinity of Fort Hood) in Texas.

In September 2008, while Jannicke was still in Afghanistan, Smith was deployed to Germany, and the couple agreed to further temporary orders granting Smith the right to designate the child's residence without regard to geographic location. The September 2008 agreed orders also required Smith to "return the child to Bell County, Texas, within 30 days of Jannicke's return from deployment for the purpose of a final hearing" and that the matter was to be set for a hearing within 30 days after Jannicke's return from Afghanistan.

Smith returned to Texas on 7/26/2009 and remained in the state until 8/9/2009, when she needed to return to Germany at the end of the leave that the Army had granted her. The child custody hearing was scheduled for 8/5/2009, but for reasons that are not entirely clear the judge was unable to conduct the hearing during Smith's visit to Texas. The judge reset the hearing for 8/19/2009, but Smith was unable to extend her leave or get another leave to return to Texas yet again.

On 8/10/2009, immediately after she returned to duty in Germany, filed a motion for a continuance and a request for a stay of the proceedings, in accordance with the Servicemembers Civil Relief Act (SCRA), which provides:

(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--

(1) is in military service or is within 90 days after termination of or release from military service; and

(2) has received notice of the action or proceeding. **(b)** Stay of proceedings.

(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.*

⁴In child custody cases, it is customary to refer to the child with initials or a pseudonym.

(2) Conditions for stay. An application for a stay under paragraph (1) shall include the following:

(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.

(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 effect 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 301.⁵

Smith's motion included a statement that she had been given leave to attend the hearing scheduled for 8/5/2009 but was currently serving on active duty in Germany and was unable to return for the hearing on the rescheduled date of 8/19/2009. She requested that the court stay the proceedings until she was able to return from her deployment to Germany. She attached a copy of her deployment orders and a letter signed by her commanding officer stating that, although she had been made available to attend the hearing scheduled from 8/5/2009 and had

⁵50 U.S.C. § 3932 (emphasis supplied).

returned to Texas for that purpose, she was scheduled to return to duty in Germany on 8/10/2009 and was unable to return to Texas for the rescheduled hearing on 8/19/2009, because of mission requirements.

Smith's motion for a stay substantially complied with the requirements of 50 U.S.C. 3932(b)(2).⁶ The three-judge panel of the Court of Appeals unanimously and correctly held that section 3932 *requires* a trial judge to grant of continuance for at least 90 days if the service member's application for a stay meets the requirements of section 3932(b)(2).⁷

The trial judge never explicitly ruled on Smith's application for a stay but ruling on Jannicke's request for temporary orders on 8/19/2009 amounted to an implicit denial of the stay. The judge ordered Smith to return the child to Jannicke until the trial, which was held on 9/21/2009. Smith got more leave from the Army and participated in the trial on that date. After three days of testimony, the jury held that the order granting Jannicke the exclusive right to designate the child's primary residence should not be modified, and this appeal followed.

The only issue on appeal was the propriety of the trial judge's implicit denial of Smith's motion for a 90-day stay. The appellate court held that the denial was erroneous and that the denial prejudiced Smith's rights. Accordingly, the appellate court reversed the district court's order and remanded the case to the district court for further proceedings.

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⁶In one respect, Smith's application was technically insufficient, in that she did not provide a date when she would be available to attend a hearing in Texas. The panel of the Court of Appeals held: "... relying on the plain language of the Act [SCRA] and construing it liberally, and in light of Smith's appearance on the scheduled trial date, we conclude that Smith's request that the proceedings be stayed until she was able to return from deployment was sufficient to meet the requirements of section 522(b)(2)."

⁷Please see Law Review 19012

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