

Domicile and Residence for Tax Purposes of the Spouse of the Active Duty Service Member

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

4.5—SCRA Protection Against State and Local Tax Authorities

7.2—Service member or military spouse voting and domicile

Q: I am married to an active duty Marine Corps Colonel who is currently serving at the Pentagon.³ My circumstances are almost identical to the circumstances you addressed in Law Reviews 19019 and 19020 (February 2019).

I have lived in Virginia, mostly in Arlington, for my entire life. I am a lawyer and the managing partner of a major law firm in Washington, DC. My husband and I got married fairly recently, in 2015. We live together in the same Arlington condominium, but we are domiciled in different states, or at least we were until recently.

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.

³The facts in this article are hypothetical but realistic.

My husband grew up in Houston and reported to the United States Naval Academy (Annapolis, MD) in June 1992. Four years later, in 1996, he graduated and was commissioned a Second Lieutenant. He has remained on active duty ever since. He has 23 years of service, not including his time as a Naval Academy Midshipman, so he can retire any time now, but he does not want to retire and still hopes to be promoted to the General officer ranks.

My husband has maintained his domicile in Houston, using the address where he lived with his parents and siblings from 1982, when his parents bought the house, until 1992, when he graduated from high school and left home to report to the Naval Academy for Plebe Summer. My husband has voted by absentee ballot in every major election since 1992, and he has used as his “permanent home address” the Houston home where he lived from age 8 to age 18.

My husband’s father died in 1999. His mother has remarried, and she sold the Houston house in 2003. She now lives in a retirement community in Florida. The house, along with other houses in the same neighborhood, was torn down in 2014, to make way for a new commercial development. But his childhood address is still his domicile, as you have described in Law Reviews 19019 and 19020 and other articles.

My husband has saved tens of thousands of dollars in state income tax by maintaining his domicile in Texas, which has no state income tax.⁴ He has never registered to vote or voted in any of the places where he has lived just because he needed to sleep in places that were within reasonable commuting distances of his Marine Corps assignments. Whenever he is asked for his “domicile” or his “permanent home address” he has always provided the address of the Houston home where he lived from age 8 to age 18.

My husband continues to claim that Texas (not Virginia) is his domicile and that a federal law called the Servicemembers Civil Relief Act (SCRA) exempts him from having to pay Virginia state income tax on his Marine Corps salary. I have had several conversations with my husband, in which that I have said that I wished that I could also be exempt from having to pay Virginia state income tax on my law firm compensation, which is substantially greater than my husband’s Marine Corps salary.

Then, in February 2019, I read with great interest your Law Reviews 19019 and 19020, about the changes in federal law made at the very end of 2018. Based on your article, I declined to file a Virginia state income tax return for 2018. Instead, I sent a detailed letter to the Virginia Department of Revenue (VDOR), and I sent them a copy of your articles. I told the VDOR that I have the right to elect to use the same “residence for purposes of taxation” that my husband uses, and that my husband is domiciled in Texas, which has no state income tax.

⁴The nine states that do not tax salary or wage income are Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.

As you predicted in Law Reviews 19019 and 19020, Virginia has threatened to sue me to collect Virginia state income tax on my 2018 earnings. They said that my claiming Texas as my residence for tax purposes is contrary to state law and will not be tolerated.

Please reiterate what you wrote in Law Reviews 19019 and 19020.

A: On 12/31/2018, President Trump signed into law the Veterans Benefits and Transition Act of 2018 (VBTA).⁵ Section 302(a) of the VBTA amends section 4001(a)(2)(B) of title 50 of the United States Code to read as follows: “For any taxable year of the marriage, the spouse of a servicemember [on active duty] 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.⁶

Section 302(b) of the VBTA provides: “The amendments made by subsection (a) shall apply to any return of State or local income tax filed for any taxable year *beginning with the taxable year that includes the date of enactment of this Act.*”⁷ Since President Trump signed the VBTA on 12/31/2018, this amended provision applies to state income tax on your income during 2018 and in any subsequent year while you are still married to your husband and he is still on active duty.

In Law Reviews 19019 and 19020, I predicted that Virginia and other affected states would challenge the constitutionality of the recent amendment to the SCRA. I predict that their challenge will fail, based on a Supreme Court case that was decided when I was two years old.⁸

It does not matter that exempting you from having to pay Virginia state income tax is contrary to Virginia law. Under the Supremacy Clause of the United States Constitution, a federal statute like the SCRA trumps a conflicting state statute or even a state constitution. The Supremacy Clause 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

⁵Public Law 115-407, 132 Stat. 5368.

⁶50 U.S.C. § 4001(a)(2)(B) (emphasis supplied).

⁷VBTA, section 302(b) (emphasis supplied).

⁸*Dameron v. Brodhead*, 345 U.S. 322 (1953). I discuss *Dameron* in detail in Law Review 09017 (April 2009). The Supreme Court reversed the Supreme Court of Colorado and upheld the constitutionality of the Soldiers’ and Sailors’ Civil Relief Act (SSCRA) provision that forbids the states to tax the personal (moveable) property of active duty service members who are in the state only because their military duties require their presence there and who are not domiciled in the state. In 2003, Congress enacted the SCRA as a long-overdue update and rewrite of the SSCRA.

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁹

Q: My good friend is running for a seat in the lower house of the Virginia state legislature, and my husband and I have made significant financial contributions to her campaign. I want to vote for her, and I am a registered voter in Arlington, Virginia. But I have elected to be a resident of Texas (not Virginia) for state income tax purposes. Is it lawful for me to vote in Virginia in November 2019 and in subsequent elections?

A: In my opinion, no.

The 2018 amendment does not change what I have written in several articles about having only one domicile for all legal purposes. Every human being has one and only one domicile, even if it is a legal fiction. Service members and military spouses are not exempted from this rule, but under the SCRA the rules for determining the domicile of the service member or military spouse are different from the general rules that apply to persons generally.

To take advantage of this 2018 amendment, for both voting and tax purposes, you need to cancel your voter registration in Arlington and register to vote in Texas, using your husband's home address. You need to cease voting in Arlington and start voting by absentee ballot in Texas. Your domicile for state income tax purposes is inextricably linked to her domicile for voting purposes. You cannot become a Texan for state income tax purposes, and thus avoid having to pay Virginia state income tax, while continuing to vote in Virginia.¹⁰

Q: My husband wants to register to vote in Virginia, so he can vote for our friend the legislative candidate. What do you think of that?

A: *That is a terrible idea.* If your husband registers to vote or votes in Virginia, he will lose his SCRA exemption from having to pay Virginia state income tax, and if he loses his you lose yours.¹¹ For the active duty service member, his or her *domicile* is inextricably linked with his or her *residence for tax purposes*, and the 2018 amendment did not change that.

⁹U.S. CONST., art. VI, Cl. 2. Yes, it is capitalized just that way, in the style of the late 18th Century. Virginia officials sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

¹⁰See *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973). See also Law Review 11112 (December 2011) and Law Review 18092 (September 2018).

¹¹*Comptroller of Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973). Please see Law Review 18092 (September 2018).