

**LAW REVIEW<sup>1</sup> 22064**

**October 2022**

**You Elected To Participate in the Reserve Component Survivor Benefit Plan Years Ago, and now you Are Getting Divorced. What Now?**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

**5.4—Survivor Benefit Plan**

**Q: I am a Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.**

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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 2,000 “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 Spouses’ 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

<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 45 years, I have collaborated 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 38 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 <mailto:swright@roa.org>.

<sup>3</sup> At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing business as” name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

I was born in 1975 and graduated from college in 1997. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC), and I was commissioned a Second Lieutenant upon graduation. I then served on full-time active duty for five years, from May 1997 until May 2002. After I left active duty, I affiliated with the Army Reserve, and I have earned a "good year" for Reserve Retirement purposes each year.

In 2017, 20 years after I was commissioned, I received my Notice of Eligibility (NOE), informing me that I have qualified to start receiving my Reserve Component (RC) retired pay upon my 60<sup>th</sup> birthday, or possibly sooner based on "contingency service" that I performed in Iraq.<sup>4</sup> Together with the NOE, I received the standard package of materials about the Reserve Component Survivor Benefit Plan (RCSBP). I was married at the time, so I chose to participate in the RCSBP at the full amount.

Now, five years later, our marriage is on the rocks, and my wife has sued me for divorce, and I am not in a mood to fight with her about it. I want to continue the RCSBP election, so that if I die before I start drawing my RC retired pay my ex-wife will receive the RCSBP annuity. I am confident that she will use the money for our young daughter.

If my marriage ends in divorce, and if I die before I attain the necessary age to start drawing my Reserve Retirement, will my ex-wife receive the benefit of my RCSBP election?

A: No, that will not work. Your ex-spouse is not eligible to receive RCSBP benefits *unless the divorce decree so provides and unless you and your ex-spouse, or your ex-spouse alone, have notified the "Secretary concerned" (the Secretary of the Army, in your case)*.

Here is what you need to do. First, you and your spouse, probably through your respective attorneys, need to negotiate the terms of the divorce decree, for submission to the judge for his or her approval. The decree should contain an explicit provision to the effect that you are ordered to elect RCSBP coverage for her.

Second, you and your ex-spouse, after the divorce, must jointly notify the retired pay center of the terms of the divorce decree *within one year after the divorce*. The proper way to make such a notification is by submitting a completed DD Form 2656-1, signed by both parties.<sup>5</sup>

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<sup>4</sup> Reserve Component personnel who have performed contingency service, as members of the Ready Reserve, after 1/28/2008 can qualify to start receiving Reserve Retirement pay prior to their 60<sup>th</sup> birthdays under certain circumstances. See 10 U.S.C. § 12731(f). See generally Law Review 16090 (September 2016).

<sup>5</sup> 10 U.S.C. § 1448(b)(3).

If, for any reason, you and your ex-spouse do not jointly complete and sign the DD-2656-1 within one year after the divorce decree, she can make the notification alone, using DD Form 2656-10. *The one-year deadline still applies.*<sup>6</sup>

Even in “amicable” divorces where one or both parties are not represented by lawyers, you need competent legal advice about how these documents are prepared and submitted. The retired pay center will not carry out your wishes unless you complete the necessary forms correctly and submit them in a timely manner, as required by law.

### **Please join or support ROA**

This article is one of 2,000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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 more than 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 eight<sup>7</sup> 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](http://www.roa.org) or call ROA at 800-809-9448.

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<sup>6</sup> Id.

<sup>7</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

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<sup>8</sup>

Here is a link to an excellent military.com monograph about the Reserve Component Survivor Benefit Plan: <https://www.military.com/benefits/survivor-benefits/survivor-benefit-plan-for-reserve-component.html>.

For detailed information about military family law, including the Reserve Component Survivor Benefit Plan and the Uniformed Services Former Spouses' Protection Act (USFSPA), see *The Military Divorce Handbook* (Am. Bar Assn., 3<sup>rd</sup> Ed. 2019), by Colonel Mark E. Sullivan, USA (Ret.).

Colonel Sullivan, a life member of ROA, has a nationwide law practice, headquartered in Raleigh, North Carolina. He and the attorneys in his firm work with attorneys all over the country, advising on military-related issues in divorce cases. Here is a link to the law firm website:

<https://ncfamilylaw.com/mark-e-sullivan/>. The telephone number is (919) 832-8507.

If you or your spouse are military, and if you are divorcing, you need a divorce lawyer who is familiar with military family law matters, including the USFSPA and military survivor benefit plans. To protect your interests, you need to ensure that your lawyer is familiar with these military wrinkles on family law. It may be impossible for you to find such a lawyer, especially if you are far from any major military installation. In that case, you need to retain another lawyer to advise and assist your attorney on the military aspects of the case. There are several lawyers around the country who offer this service, but you cannot do better than Colonel Sullivan and his firm.

You need competent legal representation because you only get one chance to get this right. See Law Review 13169 (December 2013), by Colonel Sullivan.

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<sup>8</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).