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Under the SCRA, a Military Spouse Can Select the Husband's (or Wife's) Domicile for State Income Tax Purposes.

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4.5—SCRA protection against state and local tax authorities.

6.0—Military service and tax laws.

7.2—Service member or military spouse voting and domicile.

Q: I am an attorney and the managing partner of the Washington, DC office of a major nationwide law firm—let us call it Dewey Cheatham & Howe or DCH. Last year, on 7/1/2023, I married a Marine Corps officer—let us call him Colonel Chesty Puller V, USMC. My husband and I live together in a luxurious condominium in the Rosslyn section

¹ I invite the reader's attention to 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.

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 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 (VRRRA—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 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 <mailto:swright@roa.org>.

of Arlington, Virginia, a short Metro ride from my office on K Street in the District of Columbia and his office in the Pentagon. My husband was born and raised in Houston, Texas. He graduated from high school in June 1995 and shortly afterwards reported to the United States Naval Academy for Plebe Summer. Four years later, he graduated from the Naval Academy and was commissioned a Second Lieutenant in the Marine Corps.

My new husband has remained on active duty continuously and has retained his domicile in Houston, using as his “permanent home address” the house where he lived with his parents and siblings when he graduated from high school in 1995. He has voted in Houston by absentee ballot in each major election in the last 29 years, and he has never voted or registered to vote in any of the places where the Marine Corps has stationed him in all this time. By maintaining his domicile in Texas, which has no state income tax, he has saved tens of thousands of dollars of state income tax that he might otherwise have been required to pay.

I have read with great interest your Law Review 20011 (January 2020), and Law Review 24008 (January 2024). Is it correct to say that I can change my domicile to Texas, to match my husband’s domicile, and avoid having to pay Virginia state income tax after 7/1/2023 (the date of my marriage)?

A: Yes, under section 4025 of title 50 of the United States Code, which provides as follows:

(a) In general. For the purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) [52 USCS § 30101]) or a State or local office, a

person who is absent from a State in compliance with military or naval orders shall not, solely by reason of that absence—

(1) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;

(2) be deemed to have acquired a residence or domicile in any other State; or

(3) be deemed to have become a resident in or a resident of any other State.

(b) Spouses. For the purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 [52 USCS § 30101])) or a State or local office—

(1) a person who is absent from a State because the person is accompanying the person's spouse who is absent from that same State in compliance with military or naval orders shall not, solely by reason of that absence—

(A) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;

(B) be deemed to have acquired a residence or domicile in any other State; or

(C) be deemed to have become a resident in or a resident of any other State; and

(2) the spouse of a servicemember may elect to use the same residence as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.³

In Law Review 20011 (January 2020), I wrote:

How this provision works

To understand how this provision works, let us consider a hypothetical but realistic scenario. Joe Smith was born in May 1971 in Miami, Florida. He lived in Miami, with his parents and siblings, until he graduated from high school in May 1989. Within a month after he graduated, he reported to the United States Naval Academy (USNA) in Annapolis, Maryland for “plebe summer.” Four years later, in May 1993, he graduated and was commissioned a Second Lieutenant in the Marine Corps.

Joe has remained on active duty continuously and is now a full Colonel, stationed at the Pentagon in Arlington, Virginia. In each major election since May 1989, Joe has voted by absentee ballot in Miami, Florida. He uses as his “permanent home address” on each absentee ballot application form the address of the house in Miami where he lived with his parents and siblings for the first 18 years of his life. It does not matter that his father died in 1999 and his mother sold the house and now lives in California. Joe has never registered to vote or voted in any of the places where he has been stationed by the Marine Corps. His domicile remains at the address where he lived just before he reported to active duty in 1989.

³ 50 U.S.C. § 4025 (emphasis supplied).

In 2018, shortly after he transferred to the Pentagon, Joe met the love of his life, Mary Jones, and they married in 2019. Mary has lived in Arlington for her entire life, except when she was away from home for college and law school. She is not Floridian, and she has never been to Florida. Mary is the Managing Partner of Dewey Cheatham & Howe (DCH), a major DC law firm. Her DCH compensation is an order of magnitude greater than Joe's salary as a Colonel in the Marine Corps. After the marriage, Joe and Mary purchased a condominium in the Rosslyn section of Arlington, Virginia. They live in the condominium because it is an easy commute to Joe's assignment at the Pentagon and the DCH office on K Street in the District of Columbia.

Under the new section 707 of the SCRA, Mary can "elect" to become a domiciliary of Florida, and she need not move to Florida to do so. Changing her domicile to Florida will save Mary tens of thousands of dollars of state income tax that she would otherwise be required to pay to Virginia, because Florida is one of nine states without a broad state income tax.⁴

States will challenge the constitutionality of this new provision.

I predict that Virginia and similarly situated states will be upset about losing the opportunity to tax the substantial non-military income of Mary Jones and others like her. I predict that Virginia will challenge the constitutionality of this new SCRA provision, but

⁴ The other eight states are Alaska, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. See <https://www.bing.com/search?q=states+with+no+income+tax&form=EDGSPH&mkt=en-us&httpsmsn=1&msnews=1&plvar=0&refiq=84e6835fbcfb4d109aace46788a7c596&sp=1&qhc=:>

I also predict that Virginia will lose that challenge, based on a Supreme Court case that was decided when I was two years old:

The constitutionality of federal legislation exempting servicemen from the substantial burden of seriate taxation by the states in which they may be required to be present, by virtue of their service, cannot be doubted. Generally similar relief has been accorded to other types of federal operations or functions. And we [the Supreme Court] have upheld the validity of such enactments. ...Nor do we see any distinction between those cases and this. ... We have, in fact, generally recognized the especial burdens of required service with the armed forces in discussing the compensating benefits Congress provides. ...Petitioner's [Dameron's] duties are directly related to an activity which the Constitution delegated to the National Government [national defense]. ... Since this is so, congressional exercise of a "necessary and proper" supplementary power such as this statute must be upheld.⁵

In 2020, unlike in 1953, no one is *required* to perform military service. In 1973, almost two generations ago, Congress abolished the draft and established the All-Volunteer Military. But the fact that today's service members were not drafted in no way detracts from the need for statutes like the SCRA and the Uniformed Services Employment and Reemployment Rights Act (USERRA). Quite the contrary—without these laws the services would not be able to recruit and retain the necessary quality and quantity of

⁵ *Dameron v. Brodhead*, 345 U.S. 322, 324-25 (1953). I discuss *Dameron* in detail in Law Review 09017 (April 2009). See also *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). I discuss *Rumsfeld* in Law Review 06012 (2006).

young men and women to defend our country. Yes, laws like the SCRA and USERRA put some burdens on third parties like state tax authorities, banks, landlords, employers, etc. Those burdens are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who enlist in our country's armed forces.⁶

In 2020, much more than in 1953, most service members are married and have families. To persuade the service member to reenlist and serve for a full career of 20 years or more, on active duty or in a Reserve Component, it is necessary to persuade the spouse and the whole family, as well as the service member. Congress reasonably concluded that it was necessary to extend the SCRA protection of the service member from state income taxation of his or her military salary and benefits to include the spouses of active duty service members as well. I predict that the courts (including the Supreme Court, if the challenge gets that far) will uphold this extension as a necessary and proper exercise of Congress' power to provide for the national defense.⁷

Congress has not repealed the common law rule that every human being has one and only one domicile, for all legal purposes.

Maryland's high court has held: "Evidence that a person registered to vote or voted is admissible and ordinarily persuasive

⁶ Please see Law Review 17055 (June 2017).

⁷ Article I, Section 8 of the United States Constitution provides for the powers of Congress, and sections 11-16 of that Section provide multiple powers related to war and national defense. Section 18 authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested in this Constitution in the Government of the United States, or in any Department or Officer thereof." Yes, it is capitalized just that way, in the style of the late 18th Century.

when the question of domicile is at issue.”⁸ This common-sense statement is universally accepted among the 50 states.

Mary Jones (the law firm partner who married Colonel Joe Smith) cannot have it both ways. She cannot become a Florida domiciliary (to avoid paying Virginia state income tax on her law firm compensation) while maintaining her domicile in Virginia for voting purposes. She will need to give up her Virginia voter registration and start voting by absentee ballot in Miami, Florida.⁹

Conclusion

For well over a decade, military spouses and organizations like the National Military Family Association¹⁰ have sought to expand the SCRA protection of the service member’s military income from state income taxation by a non-domicile state to include the non-military income of the spouse of the active duty service member.¹¹ While I was originally ambivalent about this effort, I am pleased that the effort has finally succeeded. This change in the SCRA will benefit thousands of spouses of active duty service members, and it will help the services in their recruiting and retention efforts. While the constitutionality of this change will likely be challenged, I predict that the constitutionality will be upheld.

⁸ *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973).

⁹ When she applies for an absentee ballot, using the Federal Post Card Application as a military spouse, she will need to use as her “permanent home address” the house in Miami where husband Joe lived with his parents and siblings for the first 18 years of his life, before he reported to the United States Naval Academy in 1989. It does not matter that Mary has never been to Florida, much less lived in that house.

¹⁰ See <https://www.militaryfamily.org>.

¹¹ When an active duty service member is married to a person who is not on active duty, it is by no means always the case that the spouse who is not on active duty is the wife. I know several female service members who have civilian husbands.

I adhere to what I wrote in January 2020. We will keep the readers informed of developments on this important issue.

Q: My husband was commissioned a Second Lieutenant in June 1999, when he graduated from the Naval Academy. Unless he is promoted to Brigadier General, which is possible but not likely, he will need to retire by June 2029 (30 years of commissioned service as an O-6). It is likely that my husband will leave active duty by retirement in June 2029 and that we will remain in the condominium in the Rosslyn section of Arlington, Virginia, and I will remain as a partner at the DC law firm and my husband will find a civilian job in the DC metropolitan area. What happens to the special SCRA rules for determination of domicile and for liability to pay state income tax after my husband retires from the Marine Corps?

A: The SCRA applies to *active-duty* service members and their spouses, not to military retirees and their spouses. Let us assume that your husband leaves active duty by retirement on 6/30/2029 and the two of you remain in the Arlington condominium. Starting at 12:01 am on 7/1/2029, you and your husband will be considered to be domiciliaries of Arlington, Virginia and you will be required to pay Virginia state income tax on your law firm income and any other income that you have. Your husband will have to pay Virginia income tax on his Marine Corps retired pay¹² and also on any civilian salary or wages that he earns.

¹² Virginia has a partial exemption for military retired pay received by retirees living in Virginia. "Starting in 2022, Virginia is making up to \$10,000 in military retirement pay tax-free for those ages 55 and older. The state income tax deduction will increase by \$10,000 each year until 2025, when up to \$40,000 will be exempt." <https://www.wric.com/news/politics/capitol-connection/virginia-cuts-tax-on-military-retirement-pay-but-several-states-go-further/>.

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This article is one of 2,100-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. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹³

ROA is more than a century old. On 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 more than 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.

¹³ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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 eight¹⁴ 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 <https://www.roa.org/page/memberoptions>. 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 20002¹⁵

¹⁴ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁵ You can also contribute on-line at www.roa.org.