

ROA Member Writes the Definitive Treatise on Military Family Law

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

5.1—Division of Military Benefits Upon Divorce

5.2—Military Service and Child Matters

The American Bar Association (ABA) recently published the Third Edition of *The Military Divorce Handbook*, by Colonel Mark E. Sullivan, USA (Ret.), a life member of the Reserve Officers Association, doing business as the Reserve Organization of America. In the Foreword that he wrote for this treatise, Lieutenant General Jack L. Rives, USAF (Ret.), formerly the Judge Advocate General of the Air Force and now the Executive Director of the ABA, referred to this treatise as “the best single resource available to guide you to a better understanding of the unique issues involved in military divorces.” If you are involved in a military divorce, either as the service member seeking to preserve as much as possible of your military retirement and other assets or as the spouse of the service member, seeking to get your fair share, you should ensure that your lawyer has purchased *and has read* this treatise (the Third Edition, not an

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.

earlier edition). The treatise is not cheap (\$240), but it is essential to a lawyer seeking to provide competent advice and advocacy in military divorces.

Just 38 years ago, the United States Supreme Court held that the states were forbidden to treat disposable military retired pay as property and to divide it in divorce actions.³ Acting with amazing alacrity, Congress overruled *McCarty* the next year, by enacting the Uniformed Services Former Spouse Protection Act (USFSPA).⁴ This federal law *permits but does not require* the states to treat military retired pay (including retired pay that may be received in the future) as property to be divided between the spouses in marital dissolution proceedings. All 50 states, the District of Columbia, Guam, and the U.S. Virgin Islands divide military retired pay in divorce proceedings. Among the 54 U.S. jurisdictions, only the Commonwealth of Puerto Rico does not divide military retired pay. But the specific rules for dividing retired pay are a matter of state law and vary considerably among the states. You need to read Colonel Sullivan's treatise to understand the complicated interplay between federal law (the USFSPA) and state law in this field.

The division of retired pay in divorce is the "headline story" for this treatise, but Colonel Sullivan covers so much more, including the rules governing the custody of children of military parents.⁵ The divorce court's decision about the division of retired pay generally becomes final and binding at the end of the case, when the divorce is granted, but child custody decisions are never really final, because the touchstone is "the best interests of the child" and the child's interests change as the situation changes. The same is true for court orders regarding child support, which is also covered in Colonel Sullivan's book.

For example, let us assume that First Lieutenant Joe Smith and his wife Mary Smith divorce, and Lieutenant Smith is awarded custody of four-year-old Joe Smith, Jr. Three years later, Smith (by then promoted to Captain) is deployed to Southwest Asia. Captain Smith seeks to appoint his parents as the custodians of the boy during Captain Smith's deployment. *Captain Smith does not get to make that decision unilaterally.* The mother is the other parent, and she has a right to be heard. The judge who decided the divorce case, or that judge's successor if that judge has left office, will decide questions about custody of the child based on the child's best interests in this new situation.⁶ In *The Military Divorce Handbook*, Colonel Sullivan covers the issues of military custody and visitation, relocation and deployment, and the new Uniform Deployed Parents Custody and Visitation Act, presently the law in 14 states plus Guam.

If you are getting divorced in a military-heavy city, like Norfolk, Jacksonville, or San Diego, you should be able to find a family law attorney who is familiar with the USFSPA and the military-specific issues in divorces. If the divorce is elsewhere, you may find it difficult to find a lawyer who even knows how to spell USFSPA. In that case, you will want to contemplate hiring a

³*McCarty v. McCarty*, 453 U.S. 210 (1981). The citation means that you can find this decision in Volume 453 of *United States Reports*, starting on page 210.

⁴Act of September 8, 1982, Public Law 97-252, 96 Stat. 730, codified at 10 U.S.C. § 1408.

⁵Those rules apply even when the parents were never married to each other.

⁶Please see Law Review 0951, by Colonel John S. Odom, Jr. USAF (Ret.) and me.

consultant such as Colonel Sullivan to advise on the military-specific issues in your case. Bringing in a consultant will certainly add to the cost of the divorce, but you should remember that you have a lot at stake, and you need to protect your interests, and the most expensive mistake you can make is to hire a cheap lawyer or none at all!

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This article is one of 1800-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. New articles are added each month.

ROA is almost a century old—it was established in 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 many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, 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 seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. 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 or call ROA at 800-809-9448.

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:

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