Military Stories: Tax and Legal Issues for Military Families

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INTRODUCTION

Members of the military make many sacrifices for their country. On average, a member of the military moves every three years. Together with their family, military members will pack up their home and say good bye to family and friends multiple times over the course of their career. All members of the military have a high likelihood of serving in a combat zone, irrespective if they work in a noncombat role, like finance. When deploying to a combat role, they leave behind their immediate families, they face heightened risks of injury and death, and may have to live in spartan conditions. For all the sacrifices these men and women make, Congress has afforded them tax protections.\(^2\) While death may be inevitable, taxes do not have to be.

The purpose of this article is to help tax professionals’ better assist the unique needs of military families. Part I will discuss how domicile is determined and a state’s ability to challenge it. It will examine the Servicemembers Civil Relief Act (SCRA)\(^3\) and the 2009 Military Spouses Residence Relief (MSRRA); both help to alleviate some of the tax burden on military families. It will also address how MSRRA impacts same sex couples. Part II will highlights the benefits of combat pay and Part III will look at estate planning tools for military families.

\(^2\) Servicemember Civil Relief Act, 50 U.S.C.S. Appx. § 571 (2014). The statute refers to servicemeber as one word; this paper will do the same.
\(^3\) Id.
I. STATE INCOME TAXES

A. THE STATE IN WHICH INCOME TAX IS OWED

From January to September 2012, Maria, a single non-service member, domiciled in Ohio, but worked in Kentucky. From October 2012 to December 2012, she lived and worked in Florida. In what state does Maria have a personal income tax liability?

Answer: Maria is required to file a state income tax return as a nonresident in Kentucky, paying taxes on earned income in Kentucky while domiciled in Ohio. As a domiciled resident of Ohio, Maria also is required to file a state income tax return in Ohio, but is permitted to claim a credit for taxes paid in Kentucky for January to September 2012. If upon moving to Florida, and provided Maria also changes her domicile she will not have a state income tax liability for the remainder of the year, because Florida does not have an individual state income tax.

As a general rule, individuals owe income tax to the state in which they are domiciled and also to the state in which the income is earned. States commonly give a credit on their state tax return for taxes on earned income paid to another state. Because the state of domicile has the right to tax income earned by an individual, it is important to understand how to determine one’s domicile. First, domicile is not synonymous with residence. A domicile is “presumed to continue until it is shown to have been changed,” and mere absence from a fixed home, however long, does not destroy one’s domicile. One can establish a new domicile by (1) physical

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4 Federal individual income taxes are beyond the scope of this paper.
5 OHIO REV. CODE ANN. § 5747.05 (LEXISNEXIS 2014).
8 Mitchell v. United States, 88 U.S. 350, 352 (1874); Texas v. Florida, 306 U.S. 398, 413 (1982) (“The common law rule that when one has once acquired a domicile in one place he does not lose it by mere residence elsewhere without the intention to make the new place of residence a domicile in the sense of a permanent home.”).
9 Id. 353 (finding Mitchell domiciled in a “loyal state” during the civil war and not the Confederate States even though he had been in the Confederate States from shortly after the war started to shortly before the war ended); see also Mississippi Band of Choctaw Indians, 490 at 48 (“One can reside in one place but be domiciled in another.”).
presence in a state and (2) a demonstrated intent to remain in the state,\textsuperscript{10} for an indefinite time, a time that one does not contemplate to end.\textsuperscript{11} Intent cannot merely be stated; it must be demonstrated.\textsuperscript{12} So, Maria may say that she intends for her second home in Florida to be her principal residence and domicile, but she must actually demonstrate that she is domiciled in Florida.\textsuperscript{13} If someone has sufficient contacts to establish domicile in more than one state, state revenue agencies typically consider multiple factors to determine where the person is domiciled. For example Minnesota has list of over twenty factors the state revenue agency uses to determine domicile.\textsuperscript{14} A court will examine a person’s life using these factors and make a domicile determination based on their actions.\textsuperscript{15} Factors typically considered include home ownership in a state, maintaining a driver’s license in a state, being a registered voter in a state; actual voting in a state, the billing address used for credit cards, the amount of time in a state, and registration of a car in a state. For example if Maria decided to change her domicile from Minnesota to Florida,

\begin{itemize}
  \item \textsuperscript{10} \textit{Mississippi Band of Choctaw Indians}, 490 at 48.
  \item \textsuperscript{11} \textit{Williamson v. Osenton}, 232 U.S. 619, 625 (1914).
  \item \textsuperscript{12} \textit{Mitchell v. United States}, 88 U.S. 350, 357 (1874).
  \item Maria’s motive for change in domicile is not material only that this motive is for an indefinite time; a time which she does not contemplate an end. It would be immaterial if Maria’s motive was to domicile herself in a state that has no individual income tax liability. \textit{See generally Williamson v. Osenton}, 232 U.S. 619, 625 (1914).
  \item \textsuperscript{14} \textit{see MINN. R. 8001.0300 subp. 3 (2014) listing 24 factors: (1) location of domicile for prior years; (2) where the person votes or is registered to vote; (3) status as a student; (4) classification of employment as temporary or permanent; (5) location of employment; (6) location of newly acquired living quarters whether owned or rented (7) present status of the former living quarters; (8) whether homestead status has been requested; (9) ownership of real property; (10) jurisdiction in which a valid driver’s license was issued; (11) jurisdiction from which any professional license were issued; (12) location of person’s union membership; (13) jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles; (14) whether resident or nonresident fishing or hunting license purchased; (15) whether an income tax return has been filed as a resident or nonresident; (16) whether the person has fulfilled the tax obligations required of a resident; (17) location of any bank accounts, especially the location of the most active checking account; (17) location of other transactions with financial institutions; (18) location of the place of worship at which the person is a member; (19) location of business relationship and the place where business is transacted; (20) location of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member; (21) address where mail is received; (22) percentage of time that the person is physically present in Minnesota and the percentage of time that the person is physically present in each jurisdiction other than Minnesota; (23) location of schools at which the person or the person’s spouse or children attend, and whether resident or nonresident tuition was charged; and (24) statements made to an insurance company, concerning persons residence.
  \item \textsuperscript{15} \textit{Texas v. Florida}, 306 U.S. 398, 425-26 (1982).
\end{itemize}
Minnesota could challenge her intent based on their 26 factors. Maria would then bear the burden of proving that her true attitude reflected that Florida was her domicile.\textsuperscript{16}

It is relatively common for people to have multiple residences and also seek to minimize or avoid paying personal income taxes, and historically, states have challenged a person’s claimed domicile. Edward Green a wealthy heir maintained homes in Massachusetts, Florida, New York and Texas.\textsuperscript{17} He died in 1936 and each of the four states claimed the right to tax his estate. The Supreme Court of the United States appointed a Special Masters to determine the state that was Edward Green’s domicile.\textsuperscript{18} The Court reviewed the findings of the Special Master and determined that his “real attitude” reflected Massachusetts was his domicile.\textsuperscript{19} The Court found the statements he made claiming Texas as his domicile were done in an attempt to evade Massachusetts state taxes.\textsuperscript{20} The Court used the following factors: “[1] its physical characteristics; [2] the time one spends there; [3] the things one does there; [4] the persons and things there; [5] one’s mental attitude towards the place; [6] one’s intention when absent to return to the place [and 7] elements of other dwelling-places of the person concerned.”\textsuperscript{21} From 1917 to 1921, Mr. Green spent the majority of him time in Massachusetts and developed a family estate.\textsuperscript{22} He had special furniture designed for the home, family paintings were hung, and a vault was made in the basement to house his jewelry collection.\textsuperscript{23} The Court declared his Florida home was consistent with a winter vacation home.\textsuperscript{24} His New York home had only a few

\textsuperscript{16} Mauer v. Comm’r of Revenue, 829 N.W.2d 59, 68 (Minn. 2013).
\textsuperscript{17} Texas, 306 U.S. 398 at 402.
\textsuperscript{18} Id. at 40.
\textsuperscript{19} Mitchell, 88 U.S. at 416.
\textsuperscript{20} Id. at 411.
\textsuperscript{21} Id. at 414.
\textsuperscript{22} Id. at 420.
\textsuperscript{23} Id. at 420-21.
\textsuperscript{24} Id. at 422-23.
belonging, and he had moved his personal belongings out of Texas around 1911. 25 It was Edward Green’s attitude that demonstrated domicile not his statements: Massachusetts was his principle home, as it was the center of all activities related to his chief interests. 26 It is important to declare one’s domicile; however one’s actions must be consistent with that declaration, and Mr. Greens were not.

More recently, in 2013, Minnesota challenged an NBA referee’s assertion that he had changed his domicile from Minnesota to Florida. 27 Minnesota conducted fact intensive inquiry to which it later applied its domicile factors. 28 Minnesota determined he was still domiciled in Minnesota even though the taxpayer had obtained a Florida driver’s license; opened a Florida bank account, and registered to vote in Florida. 29 In addition, taxpayer received advice from his tax account who had advised him to spend less than 50 percent of his time in Minnesota. 30 In making the determination the court looked at the fact that the taxpayer had grown up in Minnesota and had a 10,600 square foot home in Minnesota. 31 He spent more time in Minnesota, wrote more checks out of his Minnesota bank account, was traveling to NBA games out of Minnesota, and refereeing Minnesota high school basketball games. 32 The taxpayer’s actions made clear that his intent established Minnesota as his home, and the other steps were

25 Id. at 419-420.
26 Id. at 425.
27 Mauer, 829 N.W.2d at 63.
28 The court used the following factors: (1) present status of the former living quarters; (2) jurisdiction from which any motor vehicle license was issued and physical location of the vehicles; (3) location of bank accounts, especially the location of the most active checking account; (4) location of business relationships and place where business is transacted; (5) location of employment; (6) location of the place of worship; and (7) percentage of time the person is physically present in Minnesota. Id. at 70-72.
29 Id. at 64-65.
30 Mauer, 829 N.W.2d at 64 (The Court noted that in the timeframe disputed the taxpayer spent 49.5 percent of his time in Minnesota, 17.5 percent of his time in Florida, and 33.1 percent of his time in other locations).
31 Id.
32 Id.
taken in an attempt to evade Minnesota personal state income tax. It also did not help his case that he had a previous conviction for violation of federal tax laws.\textsuperscript{33}

Like the NBA referee, several individuals work in one state, but live in another, or have income that is earned in multiple states. It is also common that multiple jurisdictions will want to tax the income earned across the multiple states. The domicile state will often provide a limited credit for taxes paid in other states.\textsuperscript{34} The credit is typically limited for income earned for personal services performed in the other jurisdiction.\textsuperscript{35} The credit does not extend to income earned on intangibles, such as capital gains from the sale of stock.\textsuperscript{36} In conclusion, a person can only have one domicile and it then is important to understand what constitutes a person’s domicile for tax purposes. It is important to advise clients that want to change their domicile, that their actions must match their stated intent. Therefore, when someone wants to change their domicile to the new state, it is important to know the factors that each state considers in determining domicile.

**B. SERVICEMEMBER EXCLUSION TO INCOME TAX IN STATE EARNED**

Now we will look at the fact that servicemembers do not have to pay income tax in the state earned. Members of the military are exempted from paying state income to the state in which the income is earned, but instead pay personal income taxes to the state where they are domiciled. If Maria were a servicemember stationed in North Carolina she would not have an individual tax liability there, it would instead be owed to the state she is domiciled in. If Maria

\begin{itemize}
\item \textsuperscript{33} Id.
\item \textsuperscript{34} “Provide a credit paid to others states. However, Credits tend to be limited to the tax on income earned through compensation for personal services performed by the resident of one taxing jurisdiction in another taxing jurisdiction, income from a business, trade or profession carried on in the other jurisdiction and income from rear or tangible property in the other jurisdiction . . . credits are not available for intangible income because such income is generally not considered derived, at least directly, from the taxpayers efforts in any jurisdiction outside the state of residence.” BLOOMBURG BNA, BNA TAX MGMT. PORTFOLIOS – U.S. INCOME SERIES, (2014).
\item \textsuperscript{35} BLOOMBURG BNA, BNA TAX MGMT. PORTFOLIOS – U.S. INCOME SERIES, (2014).
\item \textsuperscript{36} Marissa R. Arrache, Comment: Factor Representation in the apportionment of income intangibles, 36 Santa Clara L. Rev. 485, 490 (1996).
\end{itemize}
was domiciled in Florida, a state with no personal income tax, she would have no state individual tax liability.

For the purpose of strengthening the military, Congress enacted the Servicemembers Civil Relief Act (SCRA) which provides “suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.”³⁷ The United States Supreme Court held that the SCRA should be read “with an eye friendly to those who dropped their affairs to answer their country’s calls.”³⁸ SCRA provides that “compensation of a service member for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction,”³⁹ unless the service member is domiciled in that jurisdiction.⁴⁰

SCRA specifically exempts “compensation for military service,” and does not provide an exception for income that is earned for nonmilitary services. So if Maria, like many Americans, took a secondary job to help support her family, that income would be fully taxable in the state in which the income is earned. Maria would need to file a state income tax return in the state the nonmilitary compensation was earned in addition to her state of domicile, if the state of domicile has an individual income tax. In determining her tax liability for the nonmilitary compensation the state cannot use the military compensation to determine her tax base.⁴¹ Thus, only the nonmilitary income can be considered to determine the rate at which to tax. This provides a substantial benefit because it could significantly lower the tax liability on the nonmilitary tax compensation.

³⁸ Le Maistre v. Leffers, 333 U.S. 1, 6 (1948) (quoting Boone v. Lightner, 319 U.S. 561, 575 (1943)).
³⁹ 50 U.S.C.A. § 571(b).
⁴⁰ Id.
In addition to state individual income tax, personal property of a service member cannot be taxed, unless it is taxed in the domiciled jurisdiction.\textsuperscript{42} It is not relevant that the servicemember’s home state does not impose the specific tax.\textsuperscript{43} Congress construed the statute broadly in “freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders.”\textsuperscript{44}

C. MILITARY SPOUSE EXCEPTION TO PAYING INCOME TAXES IN STATE EARNED

In 2009, the 111th Congress amended the SCRA to include the “Military Spouses Residence Relief Act” (MSRRA).\textsuperscript{45} Section 571 of SCRA was amended to extend to military spouses the physical presence exception for income tax purposes.\textsuperscript{46} Income of a spouse earned in a tax jurisdiction is not income for that jurisdiction if (1) the spouse is not a resident or domiciliary of the jurisdiction and (2) the spouse is in the jurisdiction to be with the service member, who is serving in compliance with military orders.\textsuperscript{47} The exemption also extends to personal property taxes of the spouse.\textsuperscript{48} Counsel to military personnel clients should review state revenue rulings to determine how they have interpreted MSRRA’s requirements. For example, the state of Virginia has interpreted 50 U.S.C.S. § 571 to require that the servicemember and spouse to have the same domicile for the spouse to qualify for a tax exemption.\textsuperscript{49}

An ideal time for a state revenue department to review a military family’s domicile is when a spouse requests a state income tax refund. A military couple stationed in Virginia found

\begin{small}
\textsuperscript{42} Id. App. § 571(D)(1),(2) (2014).
\textsuperscript{43} Dameron v. Brodhead, 345 U.S. 322, 326 (1953).
\textsuperscript{44} Id.
\textsuperscript{46} Captian Dean W. Korsak, The Hunt for Home: Every Military Family’s Battle with State Domicile Law, supra, at 273.
\textsuperscript{47} Id. 50 U.S.C.S. App. § 571(A)(2), (c) (2014).
\textsuperscript{48} Id. 50 U.S.C.S. App. § 571(D)(1)(2014).
\textsuperscript{49} Department of Taxation, Commonwealth of Virginia Policy Decisions: PD 10-220 (September 16 2010).
\end{small}
In the state of Virginia, a military spouse requested a refund under MSRRA, the state denied the military spouse her request, and determined the military servicemember was domiciled in Virginia. Virginia required the servicemember to pay taxes for the 2005 through 2009 taxable years.\(^{50}\) The Virginia Department of Taxation used the following factors:

1. Whether the person claiming the exemption is married to a service member who is present in the state pursuant to military orders.
2. The service member’s domicile.
3. The spouse’s domicile and the circumstances in which it was established.
4. The extent to which the spouse has maintained contacts with the domicile.
5. Whether the spouse has taken any action in Virginia that is inconsistent with maintaining a domicile elsewhere.\(^{51}\)

In the instant case the couple moved to Virginia in 1998, the husband registered to vote in Virginia in 2005, obtained a Virginia driver’s license in 2007 and registered a vehicle in Virginia in 2009.\(^{52}\) When the servicemember’s initial home of record is one of the states that don’t impose an individual income tax,\(^{53}\) this type of ruling would have a profound financial impact on the military family.

A service member must have sufficient contacts with the state that they want to remain domiciled in. These contacts become important when a state challenges their domicile and wants to assess an individual income tax against the servicemember. The United States District Court for the District of Minnesota held that a state may consider factors to determine if a servicemember is domiciled in that state.\(^{54}\) The court reviewed a claim of twelve officers of the Public Health Service, who also qualified for the exemption.\(^{55}\) The court determined that

\(^{50}\) Id. at 10-237.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Alaska, Florida, Nevada, South Dakota, Texas, Washington, Wyoming


\(^{55}\) Id. 50 U.S.C.S. app. § 511(1)(2014); 10 U.S.C.S. § 101(a)(5)(C)(2014) (LexisNexis 2012) (The term “servicemember” means a member of the uniformed services as that term is defined in section 101(a)(5) of title 10 United States Code which includes commissioned corps of the Public Health Service).
legislation did not guarantee that a serviceperson’s domicile could not change.\textsuperscript{56} The Court used Minnesota’s domicile factors to evaluate domicile for the servicemembers.\textsuperscript{57} Some of the factors used were: where a person is registered to vote, whether homestead status has been requested and/or obtained for property tax purposes, jurisdiction in which a valid driver’s license was issued, jurisdiction in which any professional licenses was issued, jurisdiction in which vehicles are registered, if a resident or nonresident fishing or hunting license is purchased, and if a spouse or child attending school is paying resident or nonresident tuition.\textsuperscript{58}

The state of Oregon also has held a member of the Public Health Service owed Oregon state income tax for 2004 through 2006.\textsuperscript{59} The court held that the servicemember’s retention of a Washington driver’s license and voter registration was designed to “apply the veneer of Washington residence over the base of an Oregon domicile.”\textsuperscript{60} The court reviewed the totality of the facts. The serviceman used Oregon to calculate his housing allowance; had a dental license in Oregon; he purchased an unimproved lot in Oregon (on which he and his wife talked about building a house on); that when assigned outside of Washington the servicemember closed his Washington bank account; he enlisted into the service while living in Oregon; and he retired from the service in Oregon; the court found these were much more indicative of his intent to have Oregon as his domicile.\textsuperscript{61}

These cases illustrate states will challenge a service members domicile and conduct a fact intensive inquiry. It is important to counsel servicemembers that they need to take steps to protect their domicile. In the state they want to be domiciled in they should maintain a driver’s

\textsuperscript{56} U.S. v. Minn., 97 F. Supp. 2d at 984.
\textsuperscript{57} Id. at 983.
\textsuperscript{58} M N N. R. 8001.0300 subp. 3 (2014).
\textsuperscript{59} Palandech v. Dep’t of Revenue, No. TC-MD 100015C, 2011 WL 1045641, at *10 (Or. T.C. Mar. 23, 2011).
\textsuperscript{60} Id. at *9.
\textsuperscript{61} Id.
license, voter registration, vehicle registration, and maintain a bank account. In addition they should not establish ties in a jurisdiction they do not want an income taxed assessed against them; such as claiming a homestead tax exemption, obtaining a resident license versus a nonresident license, taking advantage of in-state tuition, register to vote, or registering a vehicle. Couples who have blurred the lines of residency should understand the practical effects of requesting a MSRRA exception from a state. A review of factors that the particular state uses to determine domicile should be used in conducting a risk benefit analysis.

D. NOT ALL SAME SEX COUPLES CAN TAKE ADVANTAGE OF MSRRA

Same sex couples are seeing the landscape of how they file income taxes change. In United States v. Windsor, the Supreme Court held that a federal statute defining the word “spouse” referring only to persons of opposite sex violates the Due Process and Equal Protection clauses of Fifth Amendment. The Court indicated that the “principle effect is to identify a subset of state-sanction marriages and make them unequal.” The statute in question having no legitimate purpose, and the effect was to “disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” Windsor specifically left the definition of marriage to the states and did not mandate that states recognize same sex marriage; only that the Federal Government cannot deny marital rights to couples whose states recognize the marriage.

In response to Windsor the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17 stating that same sex couples can file a married tax form if (1) the individuals are lawfully married under state law and (2) the term “marriage” includes such marriage between individuals

63 Id. at 2694, 186 L. Ed. 2d at 828, 186 L. Ed. 2d 808.
64 Id. at ___, 186 L. Ed. 2d at 2689, 186 L. Ed. 2d 808.
of the same sex.\textsuperscript{65} The IRS indicated that the terms “husband” and “wife” should be interpreted to include same-sex spouses and that “applying gender-neutral reading of the Code fosters fairness by ensuring that the Service treats same-sex couples in the same manner as similarly situated opposite-sex couples.”\textsuperscript{66} The IRS finds that for Federal tax purposes the validity of a same-sex marriage is based on the state in which it was entered into without regard to where the couple is domiciled.\textsuperscript{67} The IRS has long held that a rule “under which a couple’s marital status could change simply by moving from one state to another would be prohibitively difficult and costly for the Service to administer.”\textsuperscript{68} So if Maria was legally married to Amy in Minnesota, where same sex marriage is recognized,\textsuperscript{69} but lived in Georgia, where it is not,\textsuperscript{70} they would have to file married at the federal level and single at the state level. Couples who have a different filing status at the federal and state level will likely have additional filing fees.

Where states recognize same sex marriages couples will be able to have the same tax advantages that married heterosexual couples are afforded. Currently the District of Columbia\textsuperscript{71} and the following states recognize same sex marriages: Massachusetts,\textsuperscript{72} California,\textsuperscript{73} Connecticut,\textsuperscript{74} Iowa,\textsuperscript{75} Vermont,\textsuperscript{76} New Hampshire,\textsuperscript{77} New York,\textsuperscript{78} Washington,\textsuperscript{79} Maine.\textsuperscript{80}

\textsuperscript{65} Mauer, 829 N.W.2d 59.
\textsuperscript{67} Id.
\textsuperscript{68} Rev. Rul. 2013-17 August 30, 2013.
\textsuperscript{69} MINN. STAT. § 517.01(2014) (MARRIAGE IS “A CIVIL CONTRACT BETWEEN TO PERSONS”).
\textsuperscript{72} Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (holding “that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”).
\textsuperscript{73} In Perry v. Schwarzenegger, the Northern District Court of California held that Proposition 8, which reserved marriage between a man and woman, was unconstitutional and “failed to advance any rational basis in singling out gay men and lesbians, for denial of a marriage license. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 999, 1003 (N.D. Cal. 2010). The case was appealed to the United States Supreme Court in Hollingsworth v. Perry and the Court held that the petitioners did not have standing to appeal. __ U.S. __, Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).
\textsuperscript{74} CONN. GEN. STAT. ANN. § 1-1M (WEST 2014).
\textsuperscript{75} Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) (holding that the exclusion of gay and lesbian people from the institution of civil marriage violates the Iowa Constitution).
Maryland, Rhode Island, Delaware, Minnesota, New Jersey, Hawaii, Illinois, and New Mexico. Other states have active litigation on state bans of same sex couples. The United States District Court of Utah struck down Utah’s ban on same sex marriage; however the ruling was stayed by the United States Supreme Court pending the appeal. Based on the United States Supreme Court stay issued for the Utah case other states have issued similar stays after striking down statutes that prohibit same sex marriages. These states include: Oklahoma, Virginia, Texas, and Michigan.

The MSRRA statute does not define spouse. Several of the other terms have been defined such as “servicemember”, active duty and servicemember’s child. MSRRA was

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78 N.Y. Matrimonial and Family Law § 10-a (McKinney 2011) (“A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”).
83 2013 Del. HB 75 (removed the language which restricted marriages to persons of the same gender).
84 Minn. Stat. § 517.01(2014) (MARRIAGE IS “A CIVIL CONTRACT BETWEEN PERSONS”).
85 Garden State Equal. V. Dow, 216 N.J. 31 (2013) (“state officials shall therefore permit same-sex couples…to enter into civil marriage”).
87 Lee v. Orr, No. 13-cv-8719, 2014 WL 683680, at *2 (N.D. Ill. 2014) (Holding that defining marriage between a man and a women violates Equal Protection Clause by discriminating against individuals on their sexual orientation). The ruling in Orr applies only to Cook County. Effective June 1, 2014 the legislature will recognize same sex marriage across the state. 2013 Ill. H.B. 110.
88 Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2014) (Holding civil marriage to mean the “voluntary union of two people to the exclusion) of all others”).
91 Bishop v. United States ex rel. Holder, 962 F.Supp. 2d 1252, 1296 (N.D. Okla. 2014) (Court declared prohibiting same-sex couples from marrying violates the Equal Protection Clause of the fourteenth Amendment and staying case until any appeal to the Tenth Circuit Court of Appeals).
enacted in 2009 prior to the repeal of “Don’t Ask Don’t Tell,”\textsuperscript{96} and prior to the definition in Defense of Marriage Act (DOMA), defining “spouse” as “meaning only a legal union between one man and one woman as husband and wife,”\textsuperscript{97} being ruled unconstitutional. Without MSRRA including a specific definition of spouse it is clear that Congress did not intend to afford same sex couples the tax advantages in MSRRA. DOMA was to be the comprehensive definition of marriage for the purpose of all federal statutes.\textsuperscript{98} However, with the ruling in \textit{Windsor}, that it is unconstitutional for the federal government to deny same sex couples benefits afforded to couples of the opposite sex;\textsuperscript{99} same sex couples will be able to take advantage of MSRRA in states that recognize same sex marriage. If, however, a same sex military couple stationed in a state that does not recognize same sex marriage will be required to pay individual income tax to the state in which it was earned.

Though not all same-sex couples are able to realize the benefits of married tax rates it is likely that will. The Supreme Court in \textit{Windsor} left it to the states to define marriage finding that each state has a sovereign “right and legitimate concern in the marital status of persons domiciled within its borders.”\textsuperscript{100} This power is not unlimited and cannot violate protections that are guaranteed by the United States Constitution.\textsuperscript{101} The Court went on to explain that DOMA placed same sex couples in a second-tier marriage that demeans the couple “whose moral and sexual choices the constitution protects.”\textsuperscript{102} The Court found the federal statute had no legitimate

\begin{footnotes}
\item[98] \textit{Id.}, ___ U.S. at ___, 133 S. Ct. at 2683, 186 L. Ed. 2dd at 816.
\item[99] \textit{Id.}, ___ U.S. at ___, 133 S. Ct. at 2689, 186 L. Ed. 2dd at 808.
\item[100] \textit{Id.}, ___ U.S. at ___, 133 S. Ct. at 2691, 186 L. Ed. 2dd at 825.
\item[101] \textit{Id.}, ___ U.S. at ___, 133 S. Ct. at 2692, 186 L. Ed. 2dd at 826 (states interest in defining marriage is subject to constitutional guarantees).
\item[102] \textit{Id.}, ___ U.S. at ___, 133 S. Ct. at 2694, 186 L. Ed. 2dd at 828. citing \textit{Lawrence v. Texas}, 569 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
\end{footnotes}
purpose and its effect was to disparage and injure.\textsuperscript{103} Previously, the Court held that a “desire to harm a politically unpopular group cannot constitute a legitimate government interest.”\textsuperscript{104} Without a legitimate government interest states cannot deny same sex couples equal protection under the law. The rulings in Utah, Virginia, Oklahoma, Texas and Michigan all found such statutes prohibiting same sex marriage violate the Fourteenth Amendment to the United States Constitution.\textsuperscript{105}

\section*{II. TAX BENEFITS OF COMBAT ZONES}

\textbf{A. INCOME EARNED IN COMBAT ZONE IS EXCLUDED FROM GROSS INCOME}

With the inception of modern income taxation in the United States in 1913, the Federal Government has afforded special tax benefits to individuals serving in combat as early as World War I.\textsuperscript{106} The Combat Zone Tax Exclusion (CZTE) was originally created to exempt servicemembers from paying the income tax increase that was established to finance the war.\textsuperscript{107} Congress indicated that the purpose of the CZTE was not to double burden individuals who fought the war by also making them finance the war.\textsuperscript{108} CZTE is no longer used to prevent the burden of having to finance the war but as a component of combat compensation.\textsuperscript{109} Enlisted personal are able to exclude all income earned in a CZTE from their gross income while offices

\begin{flushleft}
\textsuperscript{103} Id., ___ U.S. at __, 133 S. Ct. at 2695, 186 L. Ed. 2dd at 829.  \\
\textsuperscript{104} Romer v. Evans, 517 U.S. 620, 634, 116 S. Ct. 1620, 1628, 134 L. Ed. 2d 855, 867 (1996).  \\
\textsuperscript{108} Id.  \\
\textsuperscript{109} Id.
\end{flushleft}
can exclude up to the maximum enlisted amount received for active service.\textsuperscript{110} This is a significant amount, in 2014 officers can exclude up to $7,816.20 a month in addition to Hostile Fire Pay (HFP) and Imminent Danger Pay (IDP).\textsuperscript{111}

In order to qualify as serving in a combat zone one needs to be assigned on official temporary duty to a combat zone or qualify for HFP and IDP.\textsuperscript{112} Someone who is merely flying over the combat zone going from point A to point B will not qualify, unless they qualify for HFP and IDP pay. However, someone flying over the combat zone in a service capacity will. For example if Maria were a naval pilot based on a ship outside a CZTE but flies mission over the combat zone, she would qualify for the exclusion. The ability to exclude income from one’s gross income is not limited to the days the servicemember is in the combat zone. A servicemember can exclude from gross income any pay received for any month during which any part of the month a servicemember served in a combat zone.\textsuperscript{113} Thus Maria were to enter a combat zone on January 31, she could exclude the entire month of January from her gross income.\textsuperscript{114} A servicemember who is hospitalized from a wound, disease or injury that was incurred while serving in a combat zone can also exclude military compensation from their gross income for up two years after leaving the combat zone.\textsuperscript{115} In addition to income earned for military services a reenlistment bonus can also be excluded if the reenlistment is (1) voluntary and (2) occurs in a month that the individual served in a combat zone.\textsuperscript{116}

Currently there are several CZTE’s. A CZTE is created by an executive order or the legislator creating a “qualified hazardous duty area,” both qualify for the gross income

\begin{enumerate}
\item[112] I.R.S. Pub. 3 (as amended in 2013).
\item[114] Id.
\item[115] Id.
\item[116] I.R.S. Pub. 3 (as amended in 2013). 
\end{enumerate}
When Congress has created a “qualified hazardous duty area” they have indicated that it will cease to be such when the Department of Defense (DoD) “stops paying members either imminent danger or hostile fire pay for service in the country.”

When determining what constitutes a combat zone look to the IRS publications. For the 2013 tax year the following areas were considered a tax zone: Afghanistan area and the DoD certified the countries of Djibouti, Jordan, Kyrgyzstan, Pakistan, Somalia, Syria, Tajikistan, Uzbekistan, and Yemen, making all eligible for combat pay gross income exclusion, because of their direct support of military operations in Afghanistan.

Income earned in the Philippines could also qualify to be excluded from gross income if the servicemember was deployed in conjunction with Operation Enduring Freedom.

B. TAX EXTENSIONS

Tax filing extensions are granted to those in a combat zone under I.R.C. § 7508. The extension of time covers filing of income, estate and gift tax returns, payment of those taxes, filing a Tax Court petition to challenge an assessment of taxes or petitioning for review of a Tax Court decision, and claiming and filing suit for, and being allowed a credit or reform. The extension is valid for the time the servicemember is in the qualified zone and up to 180 days thereafter. If the servicemember is hospitalized as a result of an injury they can also receive an extension for “qualified hospitalization.” Qualified hospitalization is any hospitalization

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118 Id.
120 I.R.S. Pub. 3 (as amended in 2013).
121 I.R.S. Pub. 3 (as amended in 2013).
122 Id.
123 Id. § 7508(a) (2006).
124 Id.
outside of the United States and up to five years of state side hospitalization.\textsuperscript{125} The extension also extends to the spouse of the service member, except for state side hospitalization.\textsuperscript{126}

\textbf{III. ESTATE PLANNING OVERVIEW FOR SERVICEMEMBERS}

Not everyone who enters a combat zone comes home. This is not an aspect of life that people enjoy planning for and often avoid. It is important to ensure that there is a proper estate plan in place, because at some point everyone will pass. Estate planning is a way to ensure that those you love will be provided for when you no longer are able to. The basic of estate planning include a will, a power of attorney and living will. Proper planning assists individuals in minimizing the tax burden on the estate.

\textbf{A. POWER OF ATTORNEY}

Powers of attorney can be created for different purposes such as handling financial affairs and making health care decisions. A power of attorney is a “writing or other record that grants authority to an agent to act in place of the principal.”\textsuperscript{127} Because the agent can make decision in place of the principle it is important that the service member choses the right person. Staff Sgt. Kieser granted a power of attorney that resulted in his IRA account being drained and his house sold.\textsuperscript{128} These stories can be mitigated by limiting the amount of authority granted.\textsuperscript{129} The servicemember should take care with determining what powers to allocate to an agent and to specify when the power of attorney will expire.

\textsuperscript{125} \textit{Id.} § 7508(g).
\textsuperscript{126} \textit{Id.} § 7508(c)(g).
\textsuperscript{127} \textsc{Bloomburg BNA, BNA Tax Mgmt. Portfolios – Estates, Gifts & Trusts Series} (2014).
\textsuperscript{128} Michelle Tan, \textit{Staff Sgt. Gets an Unwelcome Surprise; Wife Takes Man’s Savings, While He’s in Iraq}, Army Times, May 19, 2008 at 10.
\textsuperscript{129} \textsc{Bloomburg BNA, BNA Tax Mgmt. Portfolios – Estates, Gifts & Trusts Series} (2014).
With the improvised explosive device (IED) being the “signature” weapon of modern campaigns, servicemembers face complicated medical situations.\textsuperscript{130} These can include things as severe as ending up in a vegetative state or severe neurological impairment which requires round-the-clock care.\textsuperscript{131} For this reason it important a servicemember have an advanced medical directive. Without an advanced medical directive the default treatment is to prolong those who become incapacitated.\textsuperscript{132}

\textbf{B. LAST WILL AND TESTAMENT}

Servicemembers regardless of the size of estate should execute a will. A will can assist in making sure that their desires are met, if this is not done the assets will be distributed through default intestacy statutes.\textsuperscript{133} It can also help to make known their domicile for estate tax purposes.\textsuperscript{134}

For servicemembers that have amassed wealth it is important for them to be knowledgeable of estate taxes, this will help minimize the burden on their loved ones. The federal estate tax is an excise tax imposed on a transfer of property at death.\textsuperscript{135} The amount of estate tax liability is progressive and depends on the total net value of the property that is transferred.\textsuperscript{136} The deceased, however, dose possess a right to designate who or what portion of the estate will bear the burden of taxes has always been recognized.\textsuperscript{137} The testator can allow the federal estate tax and state succession tax to go where the law has prescribed or he can shift the burden and designate the burden to whatever portion of the estate that he chooses.\textsuperscript{138}

\textsuperscript{130} Major Richard W. Rousseau, supra, note 107.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Major Richard W. Rousseau, supra, note 107.
\textsuperscript{134} Id.
\textsuperscript{135} BLOOMBURG BNA, BNA TAX MGMT. PORTFOLIOS – ESTATES, GIFTS & TRUSTS SERIES (2014).
\textsuperscript{136} Id.
\textsuperscript{137} Annotation, 69 A.L.R.3d 122, 1 (1976).
\textsuperscript{138} Id.
testator can also shift inheritance tax.\textsuperscript{139} A direction clause will have no effect on reducing the amount of tax to pay only that the testator can direct what part of the estate is to bear the burden.\textsuperscript{140} There are no specific words that are need to ensure a successful transfer of the tax burden; however a good tax clause should expressly state: “(1) What gifts or beneficiaries are freed of the burden of taxes, (2) what taxes are affected, and (3) where the burden of tax is shifted.”\textsuperscript{141} If there is ambiguity in the clause the tax burden will be left where the law places it.\textsuperscript{142} By directing what portion of the estate will bear the burden of taxes, one can eliminate burdens on individuals receiving a portion of the estate.

Few, however are affected by a federal estate tax. The basic exclusion amount is $5,000,000.\textsuperscript{143} If the taxpayer is married the entire estate can pass to the living spouse tax free, however, when that spouse dies taxes would be imposed.\textsuperscript{144} For individuals who are able to amass wealth they can help alleviate some of the burden on their estate by gifting it prior to death. This can be done using the gift tax exemption. Without tax consequences a donor can gift up to $14,000 for each donee up to an aggregate gift amount of five million dollars.\textsuperscript{145} The donee is not taxed on the gift as long as it is given with detached and disinterested generosity.\textsuperscript{146}

\textbf{CONCLUSION}

People join the military to get help paying for college, for adventure, and others join out of a sense of duty. They are soldiers, sailors, and airmen first and husbands, fathers, sons and daughters second. In return Congress has given them certain tax benefits. To make sure a

\textsuperscript{139} Id. at 4.
\textsuperscript{140} Id. at 16.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 4.
\textsuperscript{143} I.R.C. § 2010.
\textsuperscript{144} 2-51 Federal Tax Guidebook, 10 U.S.C.A. § 51.
\textsuperscript{145} Id.
\textsuperscript{146} Commissioner v. Duberstein, 363 U.S. 278, 284, 80 S. Ct. 1190, 1197, 4 L. Ed. 1218, 1224 (1960).
servicemember can realize the full extent of their benefits, it is important that they fully understand them.