

## **The Armed Forces Survivor Benefit Plan: Can I Be a Beneficiary and Why Do I Care?**

by  
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Many practitioners recognize military divorce as a unique sub-specialty of family law. This is because military divorce blends state domestic law with several federal statutes, applicable only to military servicemembers.<sup>1</sup> The Armed Forces Survivor Benefit Plan (“SBP” or “the Plan”) is an example of this amalgamation.<sup>2</sup> SBP is probably the most overlooked (and most dangerous to overlook) aspect of a military retirement division case. For simplicity, references to “divorce” also include dissolution and annulment proceedings, as contemplated by the Plan.<sup>3</sup>

The purpose of this article is to provide family law practitioners with a practical guide to the SBP. SBP is one of the most convoluted and overlooked aspects of military retirement/divorce planning. Its long storied and often amended benefits can play a significant role in the case and support of the former spouses and/or beneficiaries of servicemembers. The use of SBP requires an understanding of an intricate system that has changed and morphed in both benefits and intent since its inception in 1972. The practitioner should use this article as a resource for understanding the SBP, effectively drafting and electing SBP coverage and creating solutions for clients who have lost SBP coverage. Sections I, II, and III explain the basics of the SBP

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<sup>1</sup> Steven P. Shewmaker, *A Ripple in the Pond: Congress Fiddles with the Military Retirement System*. (unpublished manuscript) (on file with author).

<sup>2</sup> The Survivor Benefit Plan, 10 U.S.C. §§ 1147-1455 (2015).

<sup>3</sup> “[C]ourt order” means a court’s final decree of divorce, dissolution, or annulment or a court ordered, ratified, or approved property settlement incident to such a decree, or legal separation.” 10 U.S.C. § 1447(13)(A).

annuity, including its benefits and shortcomings, so that the practitioner can assist his or her client in making an educated decision on whether to elect coverage. Sections IV, V, and VI discuss the nuances of SBP coverage including how it is paid, who may receive the coverage and how it may be terminated, respectively. Section VII highlights the dangers associated with failure to properly perfect SBP coverage and includes possible solutions for a client who has lost coverage. Lastly, Sections VIII and IX provide a practical resource for practitioners by suggesting language to be used in consent orders and summarizing the article's most important tips for properly electing coverage. So, to avoid malpractice take a closer look at SBP.

## **I. The Armed Forces Survivor Benefit Plan**

When military retirees pass away, their pensions automatically stop. Without a plan to replace this lost income, a former spouse's quality of life could definitely be at risk. SBP is a form of military life insurance to cover that contingency. The Plan allows servicemembers to financially provide for certain beneficiaries by purchasing an annuity that pays a defined monthly benefit upon the servicemember's death.<sup>4</sup> Or stated another way, SBP was created to provide specific financial benefits (a fixed monthly annuity) for the survivors of active duty and reserve-component military personnel (RC-SBP) upon the servicemember's death. The annuity plans were designed to replace military pension income once a military retiree passes.

The Defense Finance and Accounting Service ("DFAS") administers the provisions of SBP for "the Secretary concerned."<sup>5</sup> Thus, SBP can be a fundamental part of post-military retirement planning.

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<sup>4</sup> 10 U.S.C. § 1451.

<sup>5</sup> U.S. DEP'T OF DEFENSE, INSTR. 1332.42, SURVIVOR ANNUITY PROGRAM ADMINISTRATION (June 23, 2009) (Enclosure 2, paragraph 4). The address to which an SBP election form (DD-2656-1 or 2656-10) must be submitted is: US Military Annuitant Pay, P.O. Box 7131, London, KY 40742-7131. The best practice is to submit the proper DD form and a recently (i.e. within 90 days of submission) certified copy of the court order by certified mail, return receipt requested, immediately following the finality of the court order (which often is the divorce decree), but in no event, later than one year from the date the court order is signed. 10 U.S.C. § 1448(b)(3)(A)(iii).

## II. History

The most current “version” of SBP was enacted September 21, 1972 with the passage of Public Law 92-425.<sup>6</sup> It has frequently been amended and supplemented since that time.<sup>7</sup>

For example, in 1981, SBP coverage was extended to former spouses (at the election of the servicemember),<sup>8</sup> in conjunction with the passage of the Uniformed Services Former Spouse Protection Act (“USFSPA”).<sup>9</sup> In 1983, members already retired were permitted to cover their former spouses during an open enrollment. As of 1984, court orders noting a voluntary election by a servicemember to make a former spouse the SBP beneficiary were made enforceable.<sup>10</sup> In 1985, the cost of former spouse coverage was made identical to present spouse coverage, and coverage for children by a former spouse was also made possible. In the November 14, 1986 amendments that were part of the NDAA of 1987<sup>11</sup> state courts were allowed to order that former spouses be the servicemember’s beneficiaries under SBP. Never-

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<sup>6</sup> For an excellent discussion of the history of the original military member’s survivorship plan (Uniformed Services Contingencies Option Act of 1953—called the Contingency Option Plan) and subsequent Retired Serviceman’s Family Protection Plan enacted in 1961 and its subsequent modifications prior to the creation of the 1972 SPB, see James N. Higdon, *The Armed Forces Survivor Benefit Plan: Its History, Idiosyncrasies, Coverages, Cost and Applications*, 43 FAM. L. Q. 439, 439-88 (2009).

<sup>7</sup> The most recent amendments to SBP occurred in December 2015 when President Barack Obama signed the National Defense Authorization Act for Fiscal Year 2015 (“FY15 NDAA”), Pub. L. No. 113-291 (2014). For example, in Title VI, Part II, § 641, a new sub-section 7 to 10 U.S.C. § 1448(B) was created which clarifies that death of a former spouse, who was elected the beneficiary of an SBP annuity, terminates his/her participation in the Plan and now authorizes the retiree to elect a new spouse beneficiary “within one year after the date of death of the former spouse beneficiary.” 10 U.S.C. § 1448(b)(7)(B)(i). Further, Congress created an add-on election allowing benefits for a disabled dependent child to be paid directly into a Special Needs Trust (“SNT”). 10 U.S.C. § 1448(f)(2).

<sup>8</sup> See 10 U.S.C. § 1448(b)(2)(A).

<sup>9</sup> 10 U.S.C. §§ 1408 - 1446.

<sup>10</sup> Department of Defense Authorization Act for 1984, Pub. L. No. 98-94, 97 Stat. 614 (1983).

<sup>11</sup> National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986).

theless, there was still the one year window to register the designation with DFAS, a continuing trap for many a practitioner.<sup>12</sup>

### III. Deciding on the Election

Because each family law case has unique facts, there is no simple answer to whether SBP coverage is a litigation issue or not. For example, assume the wife is the servicemember. If the husband has a well-paying job and little need for a continuation of an income stream upon the death of his wife, he may choose to forego the benefit at all or perhaps look to private life insurance for coverage. However, if the husband has no employment outside the home and/or small children to raise, then his need for the immediate security of a continued income stream (which SBP would provide) is obvious. Likewise, if the husband is on fixed income – a significant portion of which is retirement revenue from the wife’s military retirement division – then replacement of that income upon the wife’s death is equally essential.

As discussed below, SBP coverage is suspended if the former spouse (the husband in the above example) remarries before age 55.<sup>13</sup> In the event the former spouse is considerably younger than 55 years (even if the servicemember is near retirement) and likely to remarry before age 55, you may want to give some thought to *not* having him designated as a former spouse beneficiary under SBP and look to some other form of security for the loss of the retire pay upon the wife’s (servicemember’s) death, because the benefit will not be available.<sup>14</sup>

SBP coverage has advantages over private insurance. First is availability. SBP does not require a person to “qualify” for cov-

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<sup>12</sup> Section 1448(b)(3)(A)(iii) provides that “[a]ny such election must be written, signed by the person making the election, and received by the Secretary concerned [DFAS] *within one year* after the date of the decree of divorce, dissolution or annulment.” 10 U.S.C. § 1448(b)(3)(A)(iii) (emphasis added). “Received” date does not mean sent date or post-marked date. Do not wait until the last minute!

<sup>13</sup> Section 1450(b)(2) provides: “Termination of spouse annuity upon death or remarriage before age 55. .An annuity for a surviving spouse or former spouse shall be paid to the surviving spouse or former spouse while the surviving spouse or former spouse is living or, if the surviving spouse or former spouse remarries before reaching age 55, until the surviving spouse or former spouse remarries.” 10 U.S.C. § 1450(b)(2).

<sup>14</sup> See *Hipps v. Hipps*, 597 S.E.2d 359 (Ga. 2004).

erage.<sup>15</sup> Neither party must undergo a physical examination. This is certainly important for older parties, who may not qualify for private insurance coverage due to age or excluding health factors. Second, it is secure. The Plan is a U.S. government benefit. Therefore, it is not likely to be extinguished by bankruptcy or the closing of a private insurance provider. Once coverage is elected, it generally cannot be terminated by the servicemember.<sup>16</sup>

Another reason for choosing SBP can be cost. The premium expense for SBP is deducted from the servicemember's *gross* retired pay.<sup>17</sup> Further, payments are periodically increased by cost-of-living adjustments ("COLAs") to keep step with inflation.<sup>18</sup>

Private insurance coverage (either term or whole life) may have certain advantages to a client regarding cost, cash accumulation, etc. When considering a private insurance option, be sure to think about who is the owner of the policy, who is making the payments, and whether a client has an "insurable interest" in the other spouse. A key practice tip is to obtain the input of a life insurance agent who is knowledgeable about SBP to help inform and assess the best outcome for your client.

Finally, do not use Servicemen's Group Life Insurance ("SGLI") as a work around for SBP coverage. The Supreme Court of the United States in the case of *Ridgway v. Ridgway*,<sup>19</sup> made it clear that a state court cannot order a servicemember to keep in force the SGLI policies on his life for the benefit of a third party (in the *Ridgway* case, the servicemember's children). The *Ridgway* Court held that the insured servicemember "possesses the right freely to designate the beneficiary and to alter

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<sup>15</sup> MARK E. SULLIVAN, *THE MILITARY DIVORCE HANDBOOK*, § 8.15, 575 (2d ed. 2011).

<sup>16</sup> SBP coverage can be terminated by consent of the parties and SBP coverage terminates "if the surviving spouse or former spouse remarries before reaching age 55." 10 U.S.C. § 1450(b)(2).

<sup>17</sup> A retiree's net disposable pay is divided by a Military Pension Division Order. Therefore, payment of SBP premiums reduces pension income for income tax purposes.

<sup>18</sup> As Colonel Sullivan notes: "While cost might be an advantage in one sense, it also is among the disadvantages for SBP – [T]he coverage is relative expensive as compared to term life insurance, and premiums increase over time." SULLIVAN, *supra* note 15, at 576. An analysis and comparison of insurance benefits (SBP versus private coverage) is often recommended.

<sup>19</sup> 454 U.S. 46, 62-63 (1981).

that choice at any time by communicating the decision in writing to the proper office.”<sup>20</sup> Here, as there, it appropriately may be said: “Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.”<sup>21</sup> Therefore, it is a false promise for the servicemember to be ordered in the divorce to keep the former spouse as a beneficiary on Servicemen’s Group Life Insurance in exchange for SBP coverage.

#### **IV. Payment of Annuity Costs**

Under SBP, the servicemember pays a certain percentage of retired pay (currently capped at 6.5%) in exchange for the right for dependents to receive up to 55% of the servicemember’s retirement pay, if the servicemember dies before the beneficiary.<sup>22</sup> For example, if the servicemember has \$1,000 per month in retired pay, he or she pays \$65 per month for SBP coverage. When the servicemember dies, the designated beneficiary receives \$550 per month (55% of the retired pay) for the remainder of the designated beneficiary’s life. After 360 months of SBP premium payments *and* the servicemember reaching the age of 70, then the servicemember is considered “paid up” and there is no additional cost for coverage.

Please be aware of some hard points. First, payment of SBP premiums are taken “off the top” of the servicemember’s gross retired pay by DFAS. This is not negotiable. Attorneys or servicemembers can submit as many orders as they desire to DFAS directing them to allocate the cost of SBP premiums to one party or the other. They will all be ignored by DFAS because Congress, in the definition of net or “disposable retired pay” for servicemembers, excluded SBP premiums.<sup>23</sup> Federal preemption applies when state courts are dealing with USFSPA, as well as

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<sup>20</sup> *Id.* at 55.

<sup>21</sup> *Id.*

<sup>22</sup> 10 U.S.C. § 1451(a)(1)(A).

<sup>23</sup> “The term ‘disposable retired pay’ means the total monthly retired pay to which a member is entitled less amounts which—(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member’s retired pay is being made pursuant to a court order under this section.” 10 U.S.C. § 1408(a)(4).

with SBP provisions.<sup>24</sup> DFAS is going to deduct SBP premiums from the servicemember's gross retired pay. Left alone this results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself.<sup>25</sup>

The second point is not so much a hard point, but a base assumption: DFAS assumes that an election of SBP coverage, whether for a spouse or a former spouse, is for full coverage (i.e. a 55% annuity) and the premiums are calculated accordingly. However, the servicemember can elect a reduced or lower level of SBP coverage. This amount can be as low as \$300.00. So, for example if the servicemember is to receive \$1,000.00 of retired pay each month. Under full SBP coverage, the cost for this election would be \$65.00 each month, which would provide a 55% annuity benefit of \$550.00 per month to the SBP beneficiary upon death of the retiree. However, the servicemember could elect reduced SBP coverage to \$700.00 of that pay. In that case, DFAS would calculate 6.5% of \$700.00 making the monthly cost of SBP coverage \$45.50, which would produce a monthly annuity benefit upon the servicemember's death of \$385.00 per month (which is 55% of \$700.00).<sup>26</sup>

Often in settlement discussions, the servicemember feels her ex-husband should receive the same amount whether she is dead or alive. In other words, the retiree wants the death benefit to mirror the lifetime benefit.<sup>27</sup> This outcome can be accomplished by doing the following steps:

1. Determine the dollar amount that the former spouse will receive each month as a share of the pension division. This is usually the spouse's percentage times disposable retired pay.

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<sup>24</sup> *McCarty v. McCarty*, 453 U.S. 210, 221 (1981). *See also* *Matter of Marriage of Morton*, 726 P.2d 297 (Kan. Ct. App. 986); *Paul v. Paul*, 410 N.W.2d 329 (Minn. App. 1987); *In re Marriage of Williams*, 692 P.2d 885 (Wash. Ct. App. 1984); *Barros v. Barros*, 660 P.2d 770 (Wash Ct. App. 1983).

<sup>25</sup> For example, if a military retirement is being split 50/50, then the parties equally share the cost of the SBP premium; but, if the former spouse is entitled to only 25% of the monthly retired pay, then the servicemember effectively pays 75% of the SBP premium.

<sup>26</sup> Note, there is no longer an offset for Social Security at age 65.

<sup>27</sup> *See Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Kiser & Kiser*, 32 P.3d 244 (Or. Ct. App. 2001); SULLIVAN, *supra* note 15, at 610-12.

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2. Divide that amount by .55 (SBP is always 55% of the base amount chosen for former spouse coverage).
3. The result is the “target base amount” to be chosen by the servicemember upon retirement (with written spousal concurrence).

However, as Colonel Sullivan noted:

[t]here is no mathematical formula that will yield this result if the servicemember is not retired or about to retire or if the state law, as in the majority of the states, does not fix the spouse’s benefit but rather applies a formula (with an unknown denominator, total years of military service) to the final retired pay of the servicemember (which is also unknown).<sup>28</sup>

In those cases, the best one can do is clearly state in the order and/or agreement that designates the former spouse as a former spouse SBP beneficiary that the former spouse is only entitled to receive that percentage entitlement of the SBP annuity upon the servicemember’s death that the former spouse will receive as his or her share of the servicemember’s retired pay. If it is intended that the base amount of SBP coverage be less than full coverage, the language of the order or agreement must say so specifically so there will be no question in anyone’s mind afterwards, but especially at DFAS, as to what the parties intended. If there is a failure to specify a reduced base amount in the order or agreement, DFAS will assume and charge premiums for the full amount.

If there is an attempt to shift the SBP premium all onto the former spouse, then there are two “backdoor” options to accomplish this outcome. The first would be for the former spouse to reimburse, by direct pay, the servicemember for her payment portion of the SBP benefit. This is a simple approach; but can be problematic in compliance. The second option is to change (i.e. lower) the pension percentage of the former spouse to account for all of the SBP premium payments. This approach is more complicated; however, it does not involve cooperation (or contact) between the former spouses.<sup>29</sup> And, of course, there is

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<sup>28</sup> SULLIVAN, *supra* note 15, at 612-13.

<sup>29</sup> An online calculator of SBP premium shifting in both Excel (Microsoft) and Quatro Pro (Corel) can be found at the WILLYCK LAW GROUP, <http://www.willicklawgroup.com/military-retirement-benefits/> (last visited Sept. 26, 2016). *See also* SULLIVAN, *supra* note 15, at 614-15 (CD Appendix).



nothing wrong with the servicemember seeking the best of both worlds, i.e. a shifting of the premium and a mirror SBP award.<sup>30</sup>

## V. Beneficiaries

Section 1450 lists who can be a SBP beneficiary. The categories or classes of persons eligible for coverage are:

- (1) Spouse - 10 U.S.C. § 1450(a)(1);
- (2) Spouse and children (the surviving dependent children in equal shares, if the eligible surviving spouse is dead) - 10 U.S.C. § 1450(a)(2);
- (3) Children only (in equal shares) - 10 U.S.C. § 1450(a)(3);
- (4) Former spouse - 10 U.S.C. § 1450(a)(1);
- (5) Former spouse and children (the surviving dependent children in equal shares, if the eligible former spouse is dead) - 10 U.S.C. § 1450(a)(3); or
- (6) Persons with an insurable interest - 10 U.S.C. § 1450(a)(4).<sup>31</sup>

SBP coverage does have limitations created by Congress. A significant limitation has always been there is only one class of beneficiaries that a servicemember/SBP participant could elect for coverage at retirement. In other words, SBP is a unitary benefit. It cannot be subdivided. It is the property of a single category of person(s) eligible for coverage.<sup>32</sup> And, until recently, the retiree had no ability, if becoming a widow(er) and/or divorcee and subsequently remarrying after retirement, to add a new spouse or child who was acquired after retirement. Now with the most recent amendments to SBP which occurred with the passage of FY15 NDAA, a new sub-section was created in FY15 NDAA, section 641 to 10 U.S.C. § 1448(B), which clarifies that death of a former spouse, who was elected the beneficiary of an SBP annuity, terminates his or her participation in the Plan and now authorizes the retiree to elect a new spouse beneficiary “within one year after the date of death of the former spouse beneficiary.”<sup>33</sup>

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<sup>30</sup> For a more detailed discussion of servicemember and former spouse strategies on this point, see SULLIVAN, *supra* note 15, at 609-18.

<sup>31</sup> 10 U.S.C. § 1540.

<sup>32</sup> This concept is often described as “your EX or your NEXT.” SBP is either the property of the servicemember’s former spouse or current spouse.

<sup>33</sup> 10 U.S.C. § 1448(b)(7)(B)(i).

Further, with the June 26, 2013 ruling in *United States v. Windsor*,<sup>34</sup> the U.S. Supreme Court held that by restricting U.S. federal interpretation of “marriage” and “spouse” to apply only to heterosexual unions, Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional under the Due Process Clause of the Fifth Amendment. With this decision, military retirees who were married to a same-sex spouse on or before June 26, 2013 could now have spouse coverage (and former spouse coverage for divorce after that date) in the Survivor Benefit Plan. The Department of Defense promulgated its *Memorandum* to provide guidance for interpreting entitlement to and enrollment eligibility in the SPB program for same-sex married couples. Now any person who is married to a same-sex partner may participate in the SBP in the same manner as any other married person.<sup>35</sup>

Section 1448(b)(1)(A) provides that a person who is not married and does not have a dependent child upon becoming eligible to retire (i.e. “participate in the Plan”) may elect to provide an annuity under the Plan to a natural person with an “insurable interest” in the retiree.<sup>36</sup> In *MacMillan v. MacMillan*,<sup>37</sup> the Court of Appeals of Texas discussed the “insurable interest” option in finding that the former spouse could be designated, outside of the one year time limitation, as an insurable interest beneficiary. This appellate decision, in directing the trial court to order the servicemember to designate the former spouse as either a former spouse beneficiary or an insurable interest beneficiary, does not tell the “rest of the story.” It is unknown if DFAS honored the servicemember’s compliance with the court’s order, since the “election” was substantially “out of time,” i.e. more than one year past entry of the parties’ divorce decree.

Lastly, FY15 NDAA amended 10 U.S.C. §§ 1148, 1450, and 1455 to give servicemembers and retirees the option of direct payment of the SBP annuity for a dependent child to a Special Needs Trust (“SNT”). To be eligible to elect this new option to cover the SNT under SBP, the retiree must have previously

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<sup>34</sup> 570 U.S. 12 (2013).

<sup>35</sup> See DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS) <http://www.dfas.mil/retiredmilitary/newsevents/newsletter/sbpforsamesexspss.html> (last visited Sept. 26, 2016).

<sup>36</sup> 10 U.S.C. § 1448(b)(1)(A).

<sup>37</sup> 751 S.W.2d 302, 303 (Tex. App. 4th 1988).

elected spouse (or former spouse) and children or children only coverage for a disabled child under the SBP. There must also be an established and certified SNT. The election to make payment to the SNT on behalf of a disabled SBP beneficiary is irrevocable and must include the dependent child's name and tax ID number.

## VI. Effect of Remarriage Before Age 55

Section 1450(b)(2) provides another limitation on SBP coverage by providing that termination of eligibility for an SBP award ("annuity") occurs if a former spouse "remarries before reaching age 55" ("non-qualifying remarriage").<sup>38</sup> The effect is that upon DFAS being made aware of the non-qualifying remarriage, SBP benefits are suspended. However, the suspension of benefits due to the non-qualifying remarriage before age 55 can be resumed if that subsequent marriage is "terminated by death, annulment or divorce."<sup>39</sup> While the SBP annuity goes into suspended coverage due to the non-qualifying remarriage, the premium payment is not suspended until DFAS is notified of the remarriage.<sup>40</sup>

While it certainly seems unjust for the remarriage of a former spouse to cause a suspension of SBP benefits, yet not for the servicemember/retiree, the answer to this "life is not fair" inquiry is simple. Congress said so.

## VII. SBP Election

An active duty military retiree or retirement-eligible Guard or Reserve member can make an SBP election at the time of retirement using DD form 2656 (Data for Payment of Retired Personnel).<sup>41</sup> If a former spouse or former spouse and child cate-

<sup>38</sup> 10 U.S.C. § 1450(b)(2). *See also* Higgs v. Higgs, 597 S.E.2d 359 (Ga. 2004).

<sup>39</sup> 10 U.S.C. § 1450(b)(3).

<sup>40</sup> An important drafting consideration may be to place notification requirements on the former spouse to remarriage before age 55, so that a suspension notice can be provided to DFAS to stop the deduction of SBP premiums and provide for indemnification of loss if such notice is not timely provided.

<sup>41</sup> *See* U.S. Dep't of Defense, DD Form 2656, Section IX - SURVIVOR BENEFIT PLAN (SBP) ELECTION (Apr. 2009) (setting out the beneficiary categories and level of coverage).

gory is selected, then the retiree will also need to complete DD Form 2656-1.

The spouse of an active duty military retiree has SBP coverage.<sup>42</sup> The spouse of a Guard or Reserve member (if he or she is retirement-eligible, i.e. received an NOE - notice of eligibility) has SBP coverage.<sup>43</sup> A “separated spouse” of an active duty military retiree or eligible Guard or Reserve member has SBP coverage. Separated spouses are covered the same as spouses (in the absence of a legal decree of separation).<sup>44</sup> However, divorce ends spousal coverage unless:

(1) the servicemember/retiree elects former spouse coverage with DFAS (DD Form 2656-1) within one year of the date the divorce order was signed, or

(2) the former spouse submits the Court Order for SBP coverage to DFAS or other uniformed service pay center within a year of the date the order was signed, along with DD Form 2656-10 (deemed election).

The designation must be made, i.e. registered with DFAS (in London, Kentucky) within one year (365 days) from the date of the divorce or it is forever barred!<sup>45</sup> The address to which an SBP election form (DD-2656-1 or 2656-10) must be submitted is: US Military Annuitant Pay, P.O. Box 7131, London, KY 40742-7131. The best practice is to submit the proper DD form and a recently (i.e. within 90 days of submission to DFAS) certified copy of the court order by certified mail, return receipt requested, immediately following the finality of the court order (which often is the divorce decree), but in no event, later than one year from the date the court order is signed.

## **VIII. Failure to Specify Coverage**

### *A. Failure to Specify Coverage*

There is no provision in federal law making former spouse coverage an automatic benefit. If SBP coverage is to be provided to a former spouse, counsel for the spouse must ensure that the settlement documents include specific reference to “former

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<sup>42</sup> 10 U.S.C. § 1450(a)(1).

<sup>43</sup> 10 U.S.C. § 1448(a)(2)(B).

<sup>44</sup> 10 U.S.C. § 1448.

<sup>45</sup> 10 U.S.C. § 1448(b)(3)(A)(iii).

spouse coverage” under the servicemember’s Survivor Benefit Plan. Cases around the country have made clear that in the absence of a state statute or case providing survivor benefits, an agreement to division of a pension (or of “retired pay” or “military retired benefits”) alone will not extend the protection of a survivor annuity to the spouse.<sup>46</sup>

In the 2004 New York case *Kazel v. Kazel*,<sup>47</sup> the court found that the failure of the divorce decree to award survivor benefits to a former spouse meant that she could not later obtain those benefits. Although the *Kazel* case did not involve a military pension, the court made clear that pension benefits and death benefits are two distinct matters. Because they are treated separately in the federal statutes, reference to a pension plan or to pension benefits does not include death benefits. That same year, in *Padot v. Padot*,<sup>48</sup> a Florida appellate court directly addressed a military pension provision that was silent on SBP and held that the SBP was not encompassed in the terms “retainer pay, retired pay, deferred compensation, or other military benefit.”<sup>49</sup> These cases caution counsel for the spouse to be vigilant to avoid the loss of survivor benefits due to poor drafting. An award of SBP is not inherent with an award of retired pay.

#### B. *Failure to Elect Coverage*

It is not enough, however, that counsel for the spouse merely includes the SBP coverage in the settlement documents. Counsel for the spouse must also be educated on how to properly perfect an award of SBP. Generally speaking, the timely submission of the proper Department of Defense forms to the Defense Finance and Accounting Service (DFAS) is the sole and exclusive method of electing former spouse SBP coverage. If neither the servicemember nor the former spouse submit timely requests, the lost coverage cannot be revived by asking the court to issue a subsequent order for coverage. As set forth in the Department of Defense Financial Management Regulations (DoDFMR): “If

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<sup>46</sup> Potts v. Potts, 790 A.2d 703 (Md. Ct. Spec. App. 2002); McCoy v. Feinman, 785 N.E.2d 714 (N.Y. 2002); *In re Marriage of Hayes v. Hayes*, 208 P.3d 1046 (Or. Ct. App. 2009).

<sup>47</sup> *Kazel v. Kazel*, 819 N.E.2d 1036 (N.Y. 2004).

<sup>48</sup> *Padot v. Padot*, 891 So.2d 1079 (Fla. Dist. Ct. App. 2004).

<sup>49</sup> *Id.*

an election of former spouse coverage was agreed to or ordered by an earlier court order, then a subsequent order or modification that merely restates the previous provision and imposes no new obligation on the member does not begin a new 1 year period.”<sup>50</sup>

A 1992 Comptroller General Opinion interpreted this provision of the DoDFMR. In *Matter of: Master Sergeant George M. McClain*,<sup>51</sup> the divorce decree provided that Master Sergeant McClain’s former spouse Mary Smith McClain was to be the former spouse beneficiary under McClain’s Survivor Benefit Plan. Following entry of the decree; however, McClain did not make a former spouse election within one year of the date of the divorce decree as required by 10 U.S.C. §1448(b)(3)(A) nor did Mary Smith McClain request a “deemed election” within one year of the issuance of the decree as required by 10 U.S.C. §§ 1450(f)(3)(A) and (B).

More than four years after entry of the decree, Mary Smith McClain discovered she was not covered as the beneficiary and sought a court order to remedy situation. The same court that issued the divorce decree found Master Sergeant McClain in contempt for failing to make the election and issued a new order requiring him to make the election. McClain attempted to take remedial action by requesting that DFAS effectuate coverage and executing a last will and testament in which he bequeathed his SBP annuity to Mary Smith McClain.

DFAS ultimately denied coverage for Mary Smith McClain despite the subsequent court order, the contempt order, and the provision in McClain’s will. DFAS claimed that the subsequent court order was a mere restatement of the original obligation to provide coverage and therefore not the type of order that can begin a one-year period to deem an election. The Comptroller General’s opinion stated:

Our office has recently decided several cases involving the effect of the issuance of subsequent court orders on the ability of former spouses to file for elections after the initial 1-year period has passed. In *Nawanna Driggers*, B-244101, Aug. 3, 1992, we concluded that an order that merely reiterated an earlier order that SBP be elected for a

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<sup>50</sup> Dep’t of Def. Fin. Mgmt. Reg., DoDFMR Vol. 7B, Ch. 43, § 430503.C.2. Sept. 1999.

<sup>51</sup> B-232319, Sept. 16, 1992.

former spouse did not begin a new 1-year period for electing coverage. The critical element for the election of the coverage is when the substantive obligation to make such an election was imposed. If the election of former spouse coverage was agreed to or ordered by an earlier court order, a subsequent order or modification that merely restates the previous provision and imposes no new obligation on the member does not begin a new 1-year period. See also, *Constance L. Posner*, B-245295.2, Aug. 3, 1992.<sup>52</sup>

Regarding the provision in Master Sergeant McClain's will, the opinion held that amounts payable from federal funds under federal law to the survivors of deceased servicemembers are not assets of the members' estates and therefore cannot be disposed of by will or other testamentary instrument. Thus, even despite the subsequent court orders and the desires of the parties involved, the strict SBP election deadlines prevented Mary Smith McClain from receiving former spouse coverage under Master Sergeant McClain's survivor benefit plan.

### C. Retrieval Options for Lost SBP

#### 1. New or Amended Court Order

While it is clear that a court order that simply restates the first order's provisions will not be sufficient to effectuate coverage, DFAS has allowed a subsequent court order to restart the one-year election window when the first order was insufficient to award coverage. In a 2000 Claims Appeals Board (CAB) decision, DFAS and the CAB addressed a situation where the parties' original settlement documents were insufficient to award SBP coverage and the parties later sought to obtain coverage several years following the divorce.<sup>53</sup>

In the 2000 CAB case, the parties entered a separation agreement providing SBP coverage for the wife but the SBP portion of the agreement was not incorporated into the 1989 divorce decree. Although the servicemember claimed he attempted to elect coverage for his former spouse, DFAS had no record of these attempts and did not become aware of the divorce until 1993 when the servicemember elected coverage for his new spouse.

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<sup>52</sup> *Id.*

<sup>53</sup> In re [Redacted], Claims Case No. 99102801, July 21, 2000.

Upon learning that she was not covered under the servicemember's SBP, the former spouse sought to compel coverage. Although the servicemember, his current spouse, and his former spouse all requested that SBP coverage be transferred to the former spouse, DFAS maintained that since neither the member nor his former spouse had acted within one year of their divorce, DFAS was precluded from establishing coverage for the former spouse. In analyzing the decision, the CAB recognized that the original divorce decree was silent on SBP as the SBP provision was only contained in the separation agreement. Thus, a new or modifying order which granted the former spouse a right to SBP coverage, would be the first court order awarding coverage and therefore give rise to a new one-year period during which an election could be made. The former spouse was ultimately able to secure a new one-year election period by an amended court order because the first order was insufficient to grant her SBP coverage.

## *2. Appeals Within the Department of Defense*

Counsel for a spouse seeking to recover lost SBP coverage should first request a copy of the personnel file on the servicemember from DFAS. Documents evidencing coverage may be present in the records produced or secondary evidence may exist in the documents produced that suggest a valid election was made. Counsel should also re-examine the original settlement documents as well as the DFAS rejection letter setting forth the reason for denial of the claim. A closer look at these documents may reveal an agency misinterpretation regarding submission deadlines or the application of current regulations to past elections.

There are various ways within the Department of Defense to challenge a DFAS determination. When the applicant has a case supported by equitable arguments of "unfairness" and "injustice," counsel should consider an appeal to the Board for Correction of Military Records (BCMR). These Boards have been established for each of the branches of the uniformed services to correct errors or remove injustices from military records.

An examination of decisions from the various Boards suggests that a common case in which the Boards have been asked to find "unfairness" and "injustice" in military records is one in



which a former spouse was awarded former spouse coverage under the servicemember's SBP yet neither the former spouse nor the servicemember took steps to properly perfect the coverage by making an election at DFAS. While the cases vary widely in facts and results, an example of a case that might involve "unfairness" and "injustice" would be a case in which the servicemember never notifies DFAS of his divorce. As a result, the servicemember's retiree account statement (RAS) continues to reflect "spouse coverage," listing the birthdate of the former spouse who was awarded coverage in the divorce, and the servicemember continues to make monthly premium payments from his retired pay. Often this error is not discovered until the servicemember's death, sometimes twenty years following the divorce, at which time it is determined there is no SBP beneficiary because the servicemember has no "spouse" and he never applied to DFAS to change his SBP election from "spouse coverage" to "former spouse coverage." Counsel for the former spouse in this example should apply to the Board requesting a change in the servicemember's military records to reflect a proper election of "former spouse coverage" to prevent the "injustice" of years of premium payments being made for the benefit of a former spouse when no coverage ultimately exists.

Requests to the BCMR must be made using Department of Defense Form 149 and must be brought within three years of the error or discovery of the error. Relief from the Board is discretionary. Occasionally sufficient facts exist to convince the Board members that an injustice exists which should be corrected; however, if the Board is unconvinced, relief will be denied.

When the applicant has a case with legal defenses, claims, or issues requiring legal analysis, counsel should consider an appeal to the Defense Office of Hearings and Appeals (DOHA). The DOHA has jurisdiction to hear and resolve claims involving servicemembers' retired pay and survivor benefits. Appeals to DOHA must be filed within thirty days of the initial determination by DFAS. DOHA will issue a written decision affirming, reversing, or remanding the DFAS determination.<sup>54</sup>

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<sup>54</sup> DEFENSE OFFICE OF HEARINGS AND APPEALS, *Frequently Asked Questions Claims Division* (Oct. 31, 2006), <http://www.dod.mil/dodgc/doha/faq-cd.html>.

Either DFAS or the applicant may request reconsideration of the DOHA appeal decision within thirty days of the decision. Requests for reconsideration are heard by the Claims Appeals Board (CAB). The CAB consists of three attorneys from DOHA who review the claim and prior decisions, ultimately issuing a published decision that may be cited as precedent. The CAB decision on the request for reconsideration is the final Department of Defense action in the matter. Further appeals must be directed to the federal Court of Claims.

### 3. *Equitable Remedies*

When routes of appeal are exhausted or unavailable, counsel for the spouse may consider asking the court to employ its equitable powers to require the creation of a trust or the funding of a commercial annuity to replace the SBP benefit that has been lost.

In the 1991 Maine case *McNamara v. McNamara*,<sup>55</sup> the 1983 divorce judgment provided that Mr. McNamara was to assign to his former spouse, the plaintiff, one-third of all benefits from his U.S. Navy Survivors Benefit Plan. Mr. McNamara failed to comply with the divorce judgment and instead named his second wife, the defendant, the beneficiary of his SBP. Following Mr. McNamara's death in 1989, his widow, the defendant, began receiving all benefits under the SBP.

In 1990 the former spouse filed suit seeking an order (1) against the Secretary of the Navy for the payment of one-third of the SBP benefits as required under the divorce judgment; (2) against the defendant to pay amounts due to the plaintiff from the SBP; and (3) to create a constructive trust on one-third of the proceeds from the SBP for ultimate payment to the plaintiff to meet the requirements of the divorce judgment. The defendant argued that federal law preempted the state's ability to direct the distribution of federal benefits. The court applied the rule of the U.S. Supreme Court case *Rose v. Rose*<sup>56</sup> in that the determinative test is whether the state courts should be preempted from imposing a constructive trust because a constructive trust would do "major damage" to a "clear and substantial" federal interest. The court ultimately provided for the creation of a constructive

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<sup>55</sup> *McNamara v. McNamara*, No. CV-90-367, 1991 Me. Super. LEXIS 101, at \*1-16 (May 23, 1991).

<sup>56</sup> *Rose v. Rose*, 481 U.S. 619 (1987).

trust on one-third of the proceeds of the SBP benefits being received by the defendant and in doing so stated: “the SBP statute is designed to benefit the veteran and family members, including (and especially) former spouses.”<sup>57</sup>

While the Maine court supported the creation of a constructive trust, other courts have required a servicemember to purchase a private annuity with identical benefits for the former spouse.<sup>58</sup> A third option would be to require the servicemember to obtain a life insurance policy with a death benefit that is the substantial equivalent of the missed SBP payments. Counsel should retain an expert to value the lost SBP and measure the statistical life expectancy of the retiree. In considering life insurance as a replacement for SBP, counsel should be wary to avoid using Servicemembers’ Group Life Insurance (SGLI). As discussed in section III above, pursuant to the 1981 Supreme Court decision, *Ridgeway v. Ridgeway*,<sup>59</sup> a judge cannot enforce a court order or separation agreement that provides for SGLI to secure payment for a divorce settlement when the servicemember has chosen someone else to be his or her beneficiary.

Counsel for spouses seeking equitable remedies should be aware of cases concluding that the provisions of the SBP make clear Congress’s intention to occupy the field concerning the award of SBP benefits. In *Dugan v. Childers*,<sup>60</sup> the husband failed to name his former spouse as his SBP beneficiary despite court orders compelling him to do so. Following his death, the former spouse sought to impose a constructive trust on the SBP benefits that were currently being paid to the widow. The court refused to grant a constructive trust on the ground that the former spouse did not notify DFAS within the specified time limits for her SBP election, and because she did not comply with DoD regulations, she was barred from collecting SBP by reason of federal law and preemption. Because Congress has set forth the sole and exclusive means for electing SBP former spouse coverage, submitting a timely election to DFAS, the former spouse cannot evade the federal requirements by seeking a constructive trust in state court.

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<sup>57</sup> *McNamara*, No. CV-90-367, at \*11-12.

<sup>58</sup> *Johnson v. Pogue*, 716 So. 2d 1123 (Miss. Ct. App. 1998).

<sup>59</sup> 454 U.S. 46.

<sup>60</sup> *Dugan v. Childers*, 539 S.E.2d 723 (Va. 2001).

## **IX. Suggested Clauses**

When representing the former spouse of a servicemember, attorneys should focus on the language of the document, which can be critical. Counsel should avoid simply stating that the former spouse is entitled to receive SBP coverage, but rather should impose an affirmative duty on both the servicemember and the former spouse. For example:

*Defendant shall provide coverage for Plaintiff through the Survivor Benefit Plan (SBP) as follows:*

- a) Plaintiff shall be the spouse beneficiary of Defendant's SBP. Upon their divorce, the Defendant shall immediately elect the Plaintiff as "former spouse beneficiary" for SBP, with his monthly retired pay as the base amount. He shall do nothing to reduce or eliminate her benefits.*
- b) Defendant shall immediately complete DD Form 2656-1 and send the executed form to DFAS at the address shown thereon, with a copy simultaneously sent to the Plaintiff's attorney.*
- c) Plaintiff shall effectuate a deemed election for former spouse coverage within one year of the entry of this order by sending a certified copy of this order to DFAS along with a certified copy of the divorce decree and an executed DD Form 2656-10.*
- d) If Defendant takes any action that changes the former spouse election, then an amount equal to the present value of SBP coverage for Plaintiff shall, at the death of Defendant, become an obligation of his estate. In addition, Plaintiff shall be entitled to any other legal or equitable remedies for breach.*

## **X. Tips to Avoid Malpractice.**

The SBP adds a level of complexity to military divorce cases by imposing strict deadlines and technical language requirements. Family law practitioners must be familiar with the SBP and how to properly elect SBP coverage to effectively advise clients and avoid malpractice. While the intricacies of the SBP are discussed above, practitioners should keep in mind the following tips when representing a military divorce client:

A. Silence does not award SBP coverage to your client. There is no provision in federal law making former spouse coverage an automatic benefit. If SBP coverage is to be provided to a former spouse, counsel for the spouse must ensure the settlement documents include specific reference to “former spouse coverage” under the servicemember’s Survivor Benefit Plan.

B. *Watch your wording.* Be clear that your client is being awarded former spouse coverage under the Survivor Benefit Plan and use language that imposes a duty on the servicemember or retiree to make the former spouse election.

C. *Understand and docket your deadlines.* Section 1448(b)(3)(A)(iii) provides that “[a]ny such election must be written, signed by the person making the election, and received by the Secretary concerned [DFAS] *within one year* after the date of the decree of divorce, dissolution or annulment.”<sup>61</sup> This date is often the date of the divorce; however, in some states, the order granting former spouse coverage may be different than the divorce date due to bifurcated or divisible divorce proceedings. The final date for the deemed election should be a mandatory entry on your docket control system. Finally, “received” date does not mean sent date or post-marked date. Do not wait until the last minute!

D. *Make the election.* The designation must be made, i.e. registered with DFAS (London, Kentucky) within one year (365 days) from the date of the divorce or it is forever barred! The address to which an SBP election form (DD-2656-1 or 2656-10) must be submitted is: US Military Annuitant Pay, P.O. Box 7131, London, KY 40742-7131. The best practice is to submit the proper DD form and a recently (i.e. within 90 days of submission to DFAS) certified copy of the court order by certified mail, return receipt requested, immediately following the finality of the court order (which often times is the divorce decree), but in no event, later than one year from the date the court order is signed.

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<sup>61</sup> 10 U.S.C. § 1448(b)(3)(A)(iii) (emphasis added).

