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THE MISSING ANNUITY MYSTERY: PROVIDING  
PROTECTION FOR THE FORMER SPOUSE OF  
SERVICEMEMBERS AND RETIREES

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## ABSTRACT

*The Survivor Benefit Plan is available to all retirement-eligible members of the armed services. It allows them to provide for continued income for a surviving spouse, since military retired pay ends at the death of the retiree. But the rules are difficult to understand and to implement. This article explores issues which arise in the complex and challenging area of death and divorce for those who have retired from the military and those who are still serving.*

## INTRODUCTION

When Hannelore Ellison finished reading the contents of the envelope from the Army, she knew she had two deaths to deal with, not just one. When her ex-husband died, she had applied to the Army Board for the Correction of Military Records (ABCMR) because his death ended her share of the military pension and she was left with no income since he had failed to make an election for former-spouse Survivor Benefit Plan (SBP) coverage for herself. Her request to the ABCMR was a last-ditch attempt to retrieve the coverage, since the deadline for her “deemed election” – one year from the date of the SBP order – had long since expired. The Army letter, however, informed her that the Board had dealt her application a death blow. Since she had failed to join the former spouse (now the widow) of her ex-husband as a party in her civil court case, the Board dismissed her request.

Armed for an uphill battle, Ms. Ellison requested reconsideration from the Board so she could join the widow as a party and obtain (once again) an order designating her as the SBP beneficiary. Her request was granted.

There’s no question that Ms. Ellison deserved SBP coverage. Married for 34 years, she was “the military spouse;” that is, the one who usually moves from base to base with her husband every three or four years, and whose mobility usually makes it impossible to retain a job that provides good earnings and a retirement plan. In such cases, it is very important for the former spouse to insist on SBP as a part of a military divorce. In contrast, Mr. Ellison’s widow had been married to him for less than two years.<sup>1</sup>

This article explores what SBP is, how much it costs, who pays for it, and how to protect the non-military spouse. It also covers the rules on dead-

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<sup>1</sup> See generally *Ellison v. Ellison*, 776 S.E.2d 522 (N.C. Ct. App. 2015) (giving the full story of how Ms. Ellison claimed her SBP coverage against the efforts of Mr. Ellison’s widow).

line and elections, how to use a court-ordered election, how to register the court order and remedies for the wronged spouse.<sup>2</sup>

### I. BASIC TRAINING – THE SURVIVOR BENEFIT PLAN

Because death ends military pension payments, lawyers and clients need to be familiar with the Survivor Benefit Plan (SBP).<sup>3</sup> SBP allows retired and retirement-eligible servicemembers (SMs), both active-duty and Guard/Reserve, to provide at death a source of income to beneficiaries. The premium is deducted from the retiree's paycheck. The designated survivor receives a lifetime annuity at 55% of the selected base amount.<sup>4</sup> The SM may choose coverage for a spouse or former spouse, plus other options such as spouse/former spouse and qualifying children, or children only.

The cost of SBP varies depending on coverage selected and base amount. The premium for spouse or former-spouse coverage in active-duty cases is 6.5% of the base.<sup>5</sup> The cost is about 10% for Guard or Reserve members, who may participate as soon as they attain twenty years of creditable service.<sup>6</sup>

To illustrate, if John Doe is retiring from active duty and his total military retired pay (before pension division) is \$4,000 a month, he might select the full amount of his retired pay as the base amount for Mrs. Doe's benefit. The maximum SBP payment for Mary Doe would be \$2,200 per month (55% of retired pay), with a monthly premium of \$260 (6.5% of retired pay).<sup>7</sup>

Whenever counsel or the court is dividing a military pension in a divorce, the lawyer for the former spouse (FS) should seriously consider SBP coverage, since it allows continued payments if the FS survives the SM. Without SBP, payments end at the death of the SM/retiree.

### II. BENEFITS AND DISADVANTAGES OF SBP

Should Mary Doe request SBP coverage? There is no simple answer; too much depends on conditions which are unique to the marriage. If Mrs. Doe has a well-paid job and little need for immediate security upon the death of

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<sup>2</sup> See also Ashley L. Oldham and Phillip J. Tucker, *The Armed Forces Survivor Benefit Plan: Can I Be a Beneficiary and Why Do I Care?*, 29 J. AM. ACAD. MATRIM. LAW. 149 (2016).

<sup>3</sup> Survivor Benefit Plan, 10 U.S.C. § 1447-1455 (2012).

<sup>4</sup> *Id.* at § 1451(a)(1)(A).

<sup>5</sup> *Id.* at § 1452(a)(1)(A)(iii)-(iv).

<sup>6</sup> *Id.* at § 1452(a)(1)(B)(ii).

<sup>7</sup> *Id.* at § 1451(a)(1)(A).

her husband (or ex-husband), she might decide to forego SBP coverage. Should she have no job outside the home and small children to raise, her needs for an immediate “death benefit” are obvious.

Before making a decision, the client and her attorney need to know the basics. This includes advantages and disadvantages for SBP coverage. The pros and cons are set out below:

CHECKLIST FOR SBP: PRO’S AND CONS	
✓	Advantages of the Survivor Benefit Plan
	<u>Security</u> : There is no “qualification” required; unlike commercial health insurance, no physical exam is required for the SM and coverage cannot be refused or lapse while premiums are being paid. The SM/retiree cannot terminate coverage if established by court order served on the retired pay center.
	<u>Life Payments</u> : The beneficiary, will receive payments for the rest of her life upon the retiree’s death (unless she remarries before age 55, which stops benefits so long as she is married).
	<u>Tax-Free Premiums</u> : Deductions from the retiree’s pay for SBP premiums are excluded from his gross retired pay and thus reduce his pension income (and the FS’s share of it) for tax purposes.
	<u>Inflation-Proof</u> : Payments are increased regularly by cost-of-living adjustments to keep up with inflation.
✓	Disadvantages of the Survivor Benefit Plan
	<u>Expense</u> : Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive, as compared to term life insurance, and premiums do go up.
	<u>Inflexible</u> : As a general rule, once SBP is chosen, it cannot be canceled.
	<u>No Cash Value</u> : Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Roberts dies before her husband.
	<u>Not Divisible</u> : SBP is a unitary benefit, and it cannot be divided between a current spouse and a former spouse.

### III. ELECTION OPTIONS

For an SM on active duty who is married or has a dependent child, the election for SBP must be made at retirement.<sup>8</sup> An active duty SM who is entitled to retired pay is *automatically* enrolled in SBP at the maximum authorized level of coverage unless he or she – before retirement – declines to be covered or else chooses coverage at a lower level. If the SM is married, the spouse must consent to this choice.<sup>9</sup> Members of the Guard and Reserves can make the election upon completion of 20 years of creditable service; if they decline initially to participate, they will have a second chance

<sup>8</sup> 10 U.S.C. § 1448(a)(2)(A) (2015).

<sup>9</sup> 10 U.S.C. § 1448(a)(3) (2015).

to elect SBP coverage upon reaching age 60.<sup>10</sup> They can also decide to participate upon attainment of age 60.

Divorce terminates SBP coverage for a spouse and the law contains no provision making FS coverage automatic. This asset is distinct from the military pension, and if the spouse wants coverage then it must be requested.<sup>11</sup> The only way for a former spouse to get a survivor annuity is if *former-spouse coverage* is properly elected by the SM or ordered by the court.<sup>12</sup>

#### IV. DEALING WITH DEADLINES

An SM on active duty may elect former spouse coverage at divorce.<sup>13</sup> Military retirees may elect former spouse coverage for a spouse who was a beneficiary under the Plan when divorce occurs after retirement.<sup>14</sup> The election must be made by the SM/retiree *within one year of the divorce decree*.<sup>15</sup> An election filed by the retiree is effective upon receipt by the retired pay center.<sup>16</sup>

If the SM was required to provide such coverage and later refuses or fails to make the election, the FS can still get the required coverage by serving on the retired pay center an executed copy of DD Form 2656-10 along with certified copies of the divorce decree and the court decree granting SBP coverage.<sup>17</sup> These must be received by the center *within one year of the order providing for SBP coverage*.<sup>18</sup> This is called a “deemed election.”

<sup>10</sup> *Id.* at § 1448(a)(2)(B).

<sup>11</sup> *Kuba v. Kuba*, 400 S.W.2d 869, 877 (Mo. App. 2013); *Hicks v. Hicks*, 348 S.W.3d 281, 288 (Tex. App. 2011); *Dziamko v. Chuhaj*, 996 A.2d 893, 905 (Md. Ct. Spec. App. 2010); *Cox v. Cox*, 644 N.Y.S.2d 77, 78 (N.Y. App. Div. 1996).

<sup>12</sup> *See Barber v. Barber*, 738 S.E.2d 845, 846 (S.C. Ct. App. 2013) (including citation to federal law provisions regarding SBP).

<sup>13</sup> 10 U.S.C. § 1448(b)(3)(A)(iii) (2015).

<sup>14</sup> 10 U.S.C. § 1448(b)(4) (2015).

<sup>15</sup> *Id.* at § 1448(b)(3)(A)(iii).

<sup>16</sup> *Id.* at § 1448(b)(3)(E); Mark Sullivan, “*The Clock is Ticking*”—*Dates and Deadlines in the Military Divorce Cases*, SILENT PARTNER (A.B.A./Fam. L. Sec.: Mil. Comm., Chicago, Ill.), [http://www.americanbar.org/content/dam/aba/administrative/family\\_law/committees/clock.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/family_law/committees/clock.authcheckdam.pdf) (last modified Mar. 29, 2017). For the Army, Navy, Air Force and Marine Corps, the retired pay center is known as the Defense Finance and Accounting Service (DFAS). For members of the Coast Guard, and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration, the agency is the Coast Guard Pay and Personnel Center.

<sup>17</sup> 10 U.S.C. § 1450(f)(3)(A) (2014); Sullivan, *supra* note 16.

<sup>18</sup> 10 U.S.C. § 1450(f)(3)(C) (2014).

A court can order SBP coverage,<sup>19</sup> but a court decree cannot in itself *create coverage*. The SM or former spouse must serve a signed election request on the retired pay center to effectuate coverage.

The importance of prompt and effective service of a valid election was discovered the hard way in a Virginia case, *Dugan v. Childers*.<sup>20</sup> A retiree had named his wife as his SBP beneficiary and when the parties divorced, the judge ordered him to name her as his SBP beneficiary.<sup>21</sup> He failed to do so and, after his remarriage, he made his new wife the beneficiary instead.<sup>22</sup> He was held in civil contempt by the judge and once again was ordered to effectuate the designation.<sup>23</sup> He died soon thereafter, still having not made the election.<sup>24</sup>

The ex-wife attempted to obtain the imposition of a constructive trust on the SBP benefits which had been gone to the widow.<sup>25</sup> The judge refused, and the Virginia Supreme Court affirmed, saying that the ex-wife did not notify DFAS within the specified period for her SBP election and, because she missed the deadline, she was barred from collecting SBP by reason of federal law and preemption.<sup>26</sup> The lesson is that when Congress decides that there is one specific way for the SM or the ex-wife to ensure coverage (i.e., the application process and time limits set out above), that procedure must be followed.<sup>27</sup>

#### V. ENDING AND CHANGING SBP COVERAGE

SBP payments stop if the FS remarries before age 55, but coverage will be reinstated if that marriage ends due to death, divorce or annulment.<sup>28</sup> A valid former spouse election terminates any existing “spouse coverage,”<sup>29</sup> but, unlike other annuities, former spouse coverage may not be shared with a current spouse to provide protection for both; there can be only one adult SBP beneficiary.

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<sup>19</sup> *Id.* at § 1450(f)(4).

<sup>20</sup> *Dugan v. Childers*, 539 S.E.2d 723 (2001).

<sup>21</sup> *Id.* at 723.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 724.

<sup>25</sup> *Dugan*, 539 S.E.2d at 724.

<sup>26</sup> *Id.* at 725-26.

<sup>27</sup> See *Silva v. Silva*, 509 S.E.2d 483, 485 (S.C. Ct. App. 1998); *King v. King*, 483 S.E.2d 379, 383 (Ga. Ct. App. 1997).

<sup>28</sup> 10 U.S.C. § 1450(b)(2)–(3) (2012).

<sup>29</sup> MARK E. SULLIVAN, *THE MILITARY DIVORCE HANDBOOK* 482 (2006).

An election of former spouse coverage is basically irrevocable. However, the law allows the SM to request a change in SBP coverage (if not barred by court order) if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change.

When there is former spouse coverage pursuant to an order, a further order is required to allow discontinuation of participation.<sup>30</sup> The window for such a choice is the one-year period following the second anniversary of the start of retired pay.<sup>31</sup>

The retired pay center requires a copy of the final decree of divorce or dissolution before making any adjustment to the SM's SBP. For Guard/Reserve members who are not yet receiving retired pay (i.e., in most cases under age 60), the election must be sent to the address shown on DD Form 2656-5.<sup>32</sup> For all other cases, the address to use is shown on DD Form 2656-1 (for the member/retiree) or 2656-10 (for the former spouse).<sup>33</sup> These forms can be found easily by entering the form number in any internet search engine.

State courts may order SMs to participate in SBP and to designate their spouses or former spouses as beneficiaries.<sup>34</sup> A current spouse will be notified of the election to provide coverage for a SM's former spouse, but there is no veto power over it.<sup>35</sup>

The rules can be particularly harsh for a FS when an SM has elected SBP spouse coverage at retirement and later divorces and then dies, if the SM has not elected former spouse coverage. An individual who is covered as a spouse will not be covered once the divorce is granted unless former spouse coverage is selected. Without an effective former spouse election filed at DFAS, SBP benefits will remain payable to the spouse and will go to the widow or widower, if any.

It is clear that "pension division" doesn't mean "SBP allocation." The Survivor Benefit Plan is not the military pension.<sup>36</sup> It is a survivor annuity meant to create a continued flow of income to replace the pension (or a

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<sup>30</sup> 10 U.S.C. § 1450(f)(2)(A) (2012).

<sup>31</sup> *Id.* at § 1448a(a).

<sup>32</sup> U.S. DEPT. OF DEF., RESERVE COMPONENT SURVIVOR BENEFIT PLAN (RCSBP) ELECTION CERTIFICATE, Form DD 2656-5, <http://www.dtic.mil/whs/directives/forms/eforms/dd2656-5.pdf> (last visited Mar. 12, 2017).

<sup>33</sup> U.S. DEPT. OF DEF., SURVIVOR BENEFIT PLAN (SBP) / RESERVE COMPONENT (RC) SBP REQUEST FOR DEEMED ELECTION, Form DD 2656-10, <http://www.dtic.mil/whs/directives/forms/eforms/dd2656-10.pdf> (last visited Mar. 12, 2017).

<sup>34</sup> 10 U.S.C. § 1450(f)(4) (2012).

<sup>35</sup> *Id.* at § 1448(b)(3)(D).

<sup>36</sup> *Kuba*, 400 S.W. 2d at 880; *Dziamko*, 996 A.2d at 905.

share of the pension) upon the death of the SM. Counsel for the spouse or FS must always preserve SBP coverage by specifically requesting it. Without a specific and express designation of SBP for the former spouse, it will be lost.<sup>37</sup>

Especially with a long-term marriage, counsel for the former spouse should argue that a pension division settlement should not only provide for lifetime pension-share payments, but also a death benefit. The SBP clause should state that the member or retiree must make the election, *e.g.*: “John Doe, the defendant, will immediately elect former spouse coverage under the Survivor Benefit Plan for Mary Doe, the plaintiff, with defendant’s retired pay as the base amount.” Even omission of the specified base amount isn’t critical for Mrs. Doe, since the retired pay center will use that as the default when no base amount is stated in the order.

To forego participation in SBP when retirement time arrives, an active-duty SM must do so in writing and – if married – with spousal consent.<sup>38</sup> Once made, this decision is usually irrevocable. The same is true for Reserve Component members.

What happens when someone wants a higher level of coverage later on? In general, the SBP coverage level cannot be modified. Once a member has chosen a reduced base amount for spousal SBP coverage, the retired pay center lacks the authority to increase the coverage later, regardless of whether this election originates with the member, the FS or the judge. A court order cannot require any SBP election which could not be done voluntarily by the SM. If a prior election is irrevocable, it remains irrevocable regardless of what the judge decides. All SBP elections are irrevocable unless a change is specifically authorized by law. In general, if the proposed change involves a change in cost, it is probably not authorized. Beneficiary changes which are the result of remarriage, children, divorce, or marriage, are allowed.<sup>39</sup> Changes may not, however, affect the level of coverage.<sup>40</sup>

## VI. REMEDIES FOR THE WRONGED FORMER SPOUSE

In general, filing an election for former spouse coverage with the retired pay center is the exclusive manner of changing spouse coverage to former

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<sup>37</sup> See, *e.g.*, *Kuba*, 400 S.W. 2d at 878; *Dziamko*, 996 A.2d at 905; *Hicks*, 348 S.W.3d at 288; *Cox*, 644 N.Y.S.2d at 78.

<sup>38</sup> 10 U.S.C. § 1448(a) (2012).

<sup>39</sup> *Id.* at § 1448(g).

<sup>40</sup> See U.S. DEP’T OF DEF., OFFICE OF UNDER SEC. OF DEF. (COMPTROLLER), FINANCIAL MANAGEMENT REGULATIONS 7000.14-R, vol. 7B, ch. 42 (May 2015) (summarizing changes to SBP); *id.* at ch. 54 (summarizing changes to Reserve Component SBPs).

spouse coverage. If a party misses the deadline for former spouse coverage, it cannot be corrected by simply submitting another court order to the pay center to “restart the clock.” DFAS has already anticipated this in its regulation for SBP elections:

If an 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. A subsequent court order holding a member in contempt of court for failing to fulfill the prior agreement is not the type of court order that can be used to begin a new 1-year period to deem an election.<sup>41</sup>

When the FS learns of the lack of timely filing after the one-year deadlines have passed but before the SM’s death, then an application should be made to the appropriate Board for the Correction of Military Records. These Boards have been established for each of the armed services to grant a remedy in the case of an error or an injustice.<sup>42</sup> Relief may be obtained, given the right facts, so long as the SM or retiree has not remarried. If there is a new spouse, then he or she must provide written consent to the application, unless the new spouse is joined in the court case (as with in Hanelore Ellison’s case at the start of this article) and the court rules that he or she has no legitimate claim to survivor benefits under the SBP.<sup>43</sup>

Applications for correction of a military record are made on DD Form 149; the online version is in fillable PDF format.<sup>44</sup> The application must be served upon the Board within three years of discovery of the alleged error or injustice. However, the Board may excuse failure to file within the deadline if an extension would be in the interest of justice.<sup>45</sup>

A few appellate decisions have sought solutions for the former spouse in such cases. In *Wise v. Wise*,<sup>46</sup> the Florida Court of Appeals was confronted with the inability of the SM to obtain former spouse coverage; the member had elected “child coverage” during the marriage, which amounted to a breach of the parties’ settlement. After pointing out that the statute did not allow a change from child coverage to former spouse coverage, the Court remanded the case, stating that the remedy was based on the part that a survivor annuity plays in the entire structure of equitable distribution. The Court of Appeals stated that the former spouse received the survivor annui-

<sup>41</sup> *Id.* at ch. 43 § 430503(C)(2) (Apr. 2015).

<sup>42</sup> *See* 10 U.S.C. § 1552(a)(1) (2012).

<sup>43</sup> *See Ellison*, 776 S.E.2d at 524.

<sup>44</sup> U.S. DEPT. OF DEF., APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552, Form DD 149, <http://www.dtic.mil/whs/directives/forms/eforms/dd0149.pdf> (last visited Apr. 10, 2017).

<sup>45</sup> 10 U.S.C. § 1552(b) (2012).

<sup>46</sup> *Wise v. Wise*, 765 So. 2d 898, 899–901 (Fla. Dist. Ct. App. 2000).

ty “as part of the overall scheme of equitable distribution in the final judgment. Accordingly, the lower court has authority to revisit the equitable distribution in this case or otherwise effect the terms of the dissolution judgment.”<sup>47</sup>

In another Florida appellate decision, the SM died during the appellate process, making impossible the designation of his former spouse as his SBP beneficiary. In that case the Court of Appeals sent the matter back to the trial court with the following instructions:

To compensate Nancy [the FS] for this loss, we remand to the trial court for a determination of the valuation of Nancy’s portion of the military pension, and for a full and complete reevaluation of the property distribution of the parties as of the date of the original judgment of dissolution. Nancy is to be compensated for the loss of her portion of the pension from property awarded to Harry [the retiree]. If the value of marital property is insufficient to compensate Nancy for her loss of the pension, the trial court may enter a judgment for the balance, enforceable against Harry’s non-marital assets, now a part of Harry’s estate.<sup>48</sup>

Finally, courts may employ their equitable powers to require the creation of trusts or funding of commercial annuities to replace an SBP benefit which has been lost. In *Johnson v. Pogue*, the Mississippi Court of Appeals dealt with the impossibility of giving SBP protection to the FS since the member had missed the one-year statutory deadline after divorce for the election. There the Court required the retiree to purchase an equivalent annuity for the ex-wife.<sup>49</sup>

In an Illinois case, *In re Marriage of Lipkin*, the parties were divorced after false representations by the ex-husband as to the wife’s SBP coverage being irrevocable.<sup>50</sup> The ex-wife later discovered this fabrication. The Court of Appeals affirmed a trial court judgment which required the retired SM to (1) somehow reinstate SBP coverage, (2) purchase a private annuity with identical benefits for the ex-wife, or (3) create and fund an irrevocable trust providing her with identical benefits to the lacking SBP coverage.<sup>51</sup>

Applying this same logic, it might be expected that courts would allow a claim against the estate of the SM for an amount equal to the lost SBP payments. The only flaw in this remedy is the fact that many SMs die with little money and few assets in their estates. When the estate is insolvent, this remedy is an empty promise.

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<sup>47</sup> *Id.* at 901.

<sup>48</sup> *Heldmyer v. Heldmyer*, 555 So. 2d 1324, 1326 (Fla. Dist. Ct. App. 1990) (citation omitted).

<sup>49</sup> *Johnson v. Pogue*, 716 So. 2d 1123, 1131 (Miss. Ct. App. 1998).

<sup>50</sup> *In re Marriage of Lipkin*, 566 N.E.2d 972, 974 (Ill. App. Ct. 1991).

<sup>51</sup> *Id.* at 974–76.

A better choice, based on the rationale of *Johnson v. Pogue*, is to require the SM or retiree to obtain a life insurance policy with a death benefit that is equivalent to the missed SBP payments.<sup>52</sup> The services of an expert may be necessary to value the SBP benefit foregone and to measure the statistical life expectancy of the retiree or SM. Use of life insurance as a substitute for SBP coverage will be explained below. The Alaska Supreme Court proposed the life insurance option in a non-military case dealing with omission of survivor annuity coverage in a settlement. In *McDougall v. Lumpkin*, that Court stated that the spouse should either be awarded life insurance to protect her interest in the civilian retirement benefits of the pensioner or else should be provided survivor annuity coverage in the QDRO (qualified domestic relations order).<sup>53</sup>

The spouse's consent must accompany an SM's decision at retirement to forego SBP participation; this is usually irrevocable. However, Congress sometimes enacts an "open enrollment" to let nonparticipants get coverage and allow participants with a reduced base amount to increase the base. This, however, is an expensive option; all previous SBP premium payments back to the date of initial eligibility (usually the date of retirement) must be caught up.

## VII. STRATEGIES FOR THE SERVICEMEMBER

The SM or retiree wishing to avoid SBP obligations has a simple strategy: "Say nothing." If John Doe remains silent about SBP, then perhaps the other side will not mention that issue in settlement discussions, and he will escape the duty to elect coverage for Mrs. Doe. This will save him money since there will be no deduction for coverage from his retired pay. And since there is no way of dividing the SBP between successive spouses, he benefits from having available coverage for a remarriage and a new wife, if that is in the future for him.

If the Survivor Benefit Plan is discussed, John will need to deflect the discussion into *death benefits in general*, with life insurance as the obvious choice. Many forms of life insurance for Mary Doe will be less expensive than SBP. Life insurance also has the advantage of paying Mary in a lump-sum (and non-taxable) amount at John's death, rather than doling out monthly payments to her, and there is no suspension of coverage if remarriage before age 55 occurs. If upping the ante is necessary, John could propose dividing the cost of life insurance with Mrs. Doe, with each paying

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<sup>52</sup> *Johnson*, 716 So. 2d at 1130–31.

<sup>53</sup> *McDougall v. Lumpkin*, 11 P.3d 990, 996 (Alaska 2000).

one-half the premium, or John could pay the entire premium as tax-deductible alimony.

### VIII. VALUATION OF SBP

John Doe could also decide to address the issue head-on regarding the fair market value of the SBP. “Sure – you can have the coverage,” John might say, “but we will have to place the present fair market value of SBP coverage in your column as an asset of the marriage, and that would mean you get less of the other marital property.” Because Congress underwrites much of the cost of the Plan, the *value* of SBP is higher than the *cost*, that is, the sum of the premiums. Let a CPA do the math and produce a present value for SBP coverage. The price will probably be high enough to cause serious second thoughts for the spouse in regard to electing SBP coverage.<sup>54</sup>

### IX. WHO PAYS THE PREMIUM?

The servicemember may ask, “Why do I have to pay for this? Why shouldn’t the beneficiary bear the cost of SBP? After all, she asked for coverage; I will be dead when she starts getting payments.” While that may sound eminently fair, the retired pay center will not honor a request to have the premium shifted over to the beneficiary of SBP. The Uniformed Services Former Spouses’ Protection Act, or USFSPA<sup>55</sup> requires that the premium be deducted from gross retired pay; it comes “off the top” before determining disposable retired pay.<sup>56</sup> The result is that both parties are effectively paying the SBP premium in the same ratio as the pension division.

However, even if John Doe’s “Plan A” won’t work, he may still be able to implement a “Plan B” (and even a “Plan C” if necessary). One of the alternatives involves direct reimbursement and the other involves changing the pension percentage of the former spouse. There is no bar to the entry of an agreement or court order which would make Mrs. Doe responsible for premiums through reimbursement to John each month for the premium which is deducted from the military pension. Since such an agreement doesn’t involve the retired pay center, the center cannot object or refuse to honor an order because such a clause is in it. The agreement might require Mary Doe to write a check or authorize a direct debit from her bank account each month. And the money comes to John Doe after taxes, which is another

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<sup>54</sup> See, e.g., *Forney v. Forney*, 244 P.3d 849, 851–852 (Or. Ct. App. 2010).

<sup>55</sup> See generally 10 U.S.C. § 1408 (2012).

<sup>56</sup> *Id.* at § 1408(a)(4).

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er benefit. In order to effectuate this option, the appropriate clause might read:

Mary Doe spouse will reimburse John Doe for the cost of the SBP premium by paying to him each month the full cost thereof by [certified check] [money order] [automatic bank debit from her account to his at XYZ Savings Bank, Apex Heights, Virginia, Acct. #12345] no later than the fifth day of each month.

#### X. PENSION SHARE ADJUSTMENT

The same result may be accomplished by altering the pension percentage that Mrs. Doe receives from DFAS. To shift the SBP premium to her, one can make a downward adjustment of her pension share, and the result will be her payment of the entire SBP premium.<sup>57</sup>

Assume the following facts: John Doe retires from active duty on the day of divorce with a pension of \$4,000 a month. The parties were married for half the length of John Doe's military service, which makes Mary Doe's share 25%. As mentioned previously, under the heading, "Basic Training – The Survivor Benefit Plan," the SBP premium is \$260, or 6.5% of the pension. That is the only deduction from John's retired pay, which makes his disposable retired pay \$3,740 (\$4,000 - \$260). It turns out that, by reducing Mrs. Doe's share of the pension from 25% to 19.79%, she will bear the full cost of the SBP premium. This is a savings of \$195 per month for John Doe.

One way to do the math is to take the gross amount of the pension (\$4,000) and figure the monetary value of the 25% share for Mrs. Doe (\$4,000 X .25 = \$1,000). Deduct from her share the full SBP premium, which is 6.5% (\$4,000 X .065 = \$260. \$1,000 - \$260 = \$740). Then divide Mary's adjusted share by the disposable retired pay (\$3,740) to get the adjusted share (\$740 ÷ \$3,740 = 19.79%).

#### XI. STRATEGIES FOR THE SPOUSE

Mary Doe needs to decide if she wants to discuss alternatives to SBP, such as life insurance. In some cases, life insurance may be a better alternative than SBP. When the marriage is for a short period of time, a judge may be reluctant to award SBP, which would yield 55% of the base amount chosen, since Mary Doe's share of the pension would be much smaller. Mary should consider that John might have his own reasons to re-

<sup>57</sup> Mark Sullivan, *Getting Military Pension Orders Honored By the Retired Pay Center*, SILENT PARTNER, (A.B.A./Fam. L. Sec.: Mil. Comm., Chicago, Ill.), <http://www.nclamp.gov/media/489434/Silent-Partners-WORDING.pdf> (last modified Sept. 11, 2014).

move SBP from their discussion, either because of the cost or because he wants to preserve SBP for a future wife. Mrs. Doe might be able to use this to her advantage in the negotiations by making John prove to her that his alternative is just as good as SBP.

## XII. LIFE INSURANCE ISSUES

If Mrs. Doe is considering life insurance, she should insist on a policy through a life insurance company, not Servicemen's Group Life Insurance (SGLI). According to a 1981 Supreme Court decision, *Ridgway v. Ridgway*, a judge cannot enforce a court order or separation agreement that provides for SGLI to secure the payment of a divorce settlement when the SM has chosen someone else to be his or her beneficiary.<sup>58</sup>

Another pointer regarding private life insurance is for Mary to make sure that she is the owner of the policy. Doing this means that John Doe cannot later change the beneficiary, and she must be notified if there is a lapse due to non-payment of the premium.

## XIII. OTHER SBP ISSUES

If Mrs. Doe is interested only in SBP coverage, then her lawyer needs to advise her about the arguments above regarding allocation of the premium to her. Mary's first response to premium-shifting would be that there is no good reason for shifting the cost to her. With *no* SBP, only John Doe receives a survivorship benefit. If she dies first, the entire pension is restored to him, and this costs him nothing. In light of John's no-cost survivorship benefit, why should *she* pay for SBP?

Mary Doe may, on the other hand, decide that it makes sense for her to share in some or all of the premium, or that she does not want to spend the time and money to contest her husband's arguments. In addition, if the parties agree to lower the base amount (instead of John's full retired pay), Mrs. Doe should realize that she will still obtain a slight increase in her present pension payment. This is due to the fact that a lower base amount means a lower premium for SBP. The lower SBP premium means a higher amount of DRP, which is what the retired pay center divides in order to pay her. Thus she receives a smaller share (due to SBP premium-shifting) of a larger amount of DRP.

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<sup>58</sup> *Ridgway v. Ridgway*, 454 U.S. 46, 59–60 (1981).

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## CONCLUSION

To summarize, when a case involves deferred division of the military pension, the attorney for the non-military spouse should insist on SBP coverage (or some acceptable alternative) to provide for the continued financial security of the former spouse if the SM dies first. Death planning is an important part of advising the spouse, since “the pension dies when the member dies.” There may be substitutes for the SBP coverage or ways to reduce the cost to the retiree, but these will take the time and expertise of competent counsel and will require an understanding of the costs, the calculations, and the available alternatives at each step of the negotiations.

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