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Seven Myths about the Military Survivor Benefit Plan

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5.4—Survivor Benefit Plan.

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INTRODUCTION

The Survivor Benefit Plan, or SBP, is an important benefit for the spouse or former spouse of a servicemember or military retiree (hereafter “member”). SBP coverage for the former spouse in a divorce case ensures a continued stream of income for the beneficiary upon the

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses’ Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

death of the member. In a hypothetical divorce case, it provides Jane Doe – the former spouse – with monthly payments of 55% of the selected base amount if her husband or ex-husband dies before her. This base amount is often the full retired pay of the member, John Doe. And the former spouse will continue to receive these payments for the rest of her life. The monthly payments are taxable income, but they are adjusted by inflation through COLAs (cost-of-living adjustments).

Because SBP coverage is a valuable death benefit protection for “Jane Doe,” it is important for servicemembers, retirees, spouses, former spouses, and lawyers to know what mistakes to avoid, what “urban legends” to ignore, and what problems to put aside when settling or trying a military divorce case. Here are seven of the myths that are frequently associated with this survivor annuity.

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LET THE MYTHS BEGIN!

Myth #1 - As long as you say that the former spouse, Jane Doe, gets her proper share of the military retirement benefits of her ex-husband, John Doe, you’ve gotten the death benefit for her.

Response: Words matter, and the proper phrasing of the SBP clause can avoid the receipt of a rejection letter from the government. If you want Jane to be covered, you’d say “The member, John Doe, will promptly elect the former spouse, Jane Doe, for former-spouse Survivor Benefit Plan coverage.” When maximum coverage is intended, you’d add: “The member will elect *full retired pay* as the SBP base amount upon applying for the start of retired pay.”

* * *

Myth #2 – You have to have SBP since it goes with military pension division.

Response: The Survivor Benefit Plan is distinct from military retired pay. Military pensions are authorized at Title 10, U.S. Code, Chapter 71 (for those retiring from active duty) and Chapter 1223 (for Guard/Reserve retirements). The legislative authorization for SBP coverage, costs and eligibility is found in Chapter 73 of Title 10. In short, the court can award SBP without dividing the pension, and it can divide the military retired pay without allocating former-spouse SBP coverage in a divorce. They are not linked.

* * *

Myth #3 – The SBP premium is always paid by the retiree out of his (or her) pension; there's no way of making the former spouse shoulder the cost.

Response: It's true that the cost of SBP is deducted from the military member's retired pay before division of the pension. 10 U.S.C. §1408 (a)(4)(A)(iv). But the SBP premium is not paid solely by the retiree. The requirement that it be deducted "off the top" means that the cost is shared between the parties in the same ratio as they share the military pension. If Jane Doe gets 30% of the pension and John Doe receives 70%, then she's paying 30% of the premium and he is bearing 70% of the cost.

To shift the cost to Jane, the court order could state that the ex-spouse will reimburse the retiree each month for his share of the deduction associated with her SBP coverage. Another approach would be to reduce Jane's share of the pension to account for her bearing the entire cost of SBP coverage. In active-duty cases (i.e., a regular retirement), the reduction in her share is about 4-4.5%. The way to do the calculations is shown in the Silent Partner infoletter, *Military Pension Division: The Servicemember's Strategy*. This and over sixty other infoletters on military family law and divorce may be found at the

website of the N.C. State Bar's military committee, www.nclamp.gov > Publications.

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Myth #4 – One year from the divorce is the deadline for obtaining SBP coverage. If you miss the date, you've lost the option.

Response: There are three deadlines for locking in SBP coverage. The first is one year from the divorce date. The parties must sign and submit DD Form 2656-1 with a certified copy of the divorce decree to the retired pay center.

The second deadline is for the former spouse. Jane Doe must sign and submit her "deemed election" within one year of the court order requiring SBP coverage. The form to use is DD Form 2656-10.

The final election deadline is when the servicemember, John Doe, applies for retired pay. He must complete, sign, and submit "Data for Payment of Retired Personnel" (DD Form 2656). At the end of the form (currently Items 36-37) is the place where he can designate A) the SBP beneficiary, and B) the SBP base amount.

[Note: For division of retired pay involving the Army, Navy, Air Force, Marine Corps or Space Force, the retired pay center is the Defense Finance and Accounting Service, or DFAS. Retired pay division for members of the Coast Guard and for commissioned officers in the Public Health Service and the National Oceanic and Atmospheric Administration is handled by the Coast Guard Pay & Personnel Center.]

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Myth #5 – The former spouse always gets 55% of the retiree's military pension as her SBP amount.

Response: The SBP benefit is 55% of the selected base amount. That can be one's full retired pay, or a minimum of \$300 per month, or any figure in between those two. The election is made, as pointed out above, on DD Form 2656 when one applies for the start of retired pay.

* * *

Myth #6 – Once it's lost, SBP coverage for the former spouse cannot be retrieved - - and once it's obtained, it cannot be relinquished.

Response: Retrieval of "lost SBP" can be difficult, but it's not impossible. The answer lies in a little-known administrative agency for each of the military services, the Board for Correction of Military Records. With the help of a savvy and experienced lawyer, the former spouse and/or the member can make the application (using DD Form 149), attach the necessary records, and make a persuasive argument that loss of former-spouse SBP coverage would be unfair and "an injustice." The service Boards, pursuant to 10 U.S.C. § 1552, are permitted to recommend the correction of a member's records to correct errors and remedy injustices.

Can SBP be relinquished? A retiree *can* exit the Survivor Benefit Plan if he or she takes action in the one-year period starting 24 months after the beginning of the retired pay. The spouse or former spouse must consent, and the decision cannot be reversed.

* * *

Myth #7 – Electing SBP is a great idea; the court should always order coverage.

Response: SBP is generally a good plan, and it is heavily subsidized to make it attractive for servicemembers and retirees. But there are some

situations in which it may not be the smartest or most economical option for a death benefit:

- The minimum SBP plan premium for \$300 per month as the base amount is cheaper than almost every private insurance policy, but the benefit (55% of \$300, or \$165 per month) is pretty small. In other words, *you get what you pay for*.
- When one's full retired pay is the base amount, however, SBP coverage will probably be much more expensive than life insurance, which can provide better or cheaper protection for a younger surviving spouse.
- The beneficiary can never outlive SBP, which will be paid each month, even if the spouse or former spouse lives to be 102 or beyond, with annual cost-of-living adjustments (COLAs) when they apply.
- When a divorce is pending and the member's spouse is several years older than the member, SBP coverage may not be advisable; the spouse may not outlive the member.
- If the marriage is of relatively short duration, it doesn't make sense in most cases to consume the entire SBP, at 55% of the member's full monthly pension. Some lawyers call this "excess survivorship." Either forego the SBP in favor of life insurance, or else select a modest base amount instead of full retired pay.
- A former spouse who remarries before age 55 will be suspended from SBP eligibility; there's no "remarriage penalty" with life insurance, which comes to the beneficiary tax-free (unlike the taxable payments from SBP).
- The SBP is a unitary benefit. It can only go to one adult beneficiary. When discussing this issue with a servicemember or retiree, sometimes the lawyer will say, "Your EX or your NEXT – take your pick."

- SBP is a lifetime annuity and it will never become “too expensive,” as might be the case with life insurance and rising premiums.

For SBP comparison information, check out the list of Survivor Benefit Plan advantages and disadvantages on the DFAS website: <https://www.dfas.mil/retiredmilitary/provide/sbp/advantages/>.

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ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).²

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² See <https://crsreports.congress.gov/product/pdf/IF/IF10540>. These are the authorized figures as of 9/30/2022.

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³ Congress recently established the United States Space Force as the eighth uniformed service.

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