

Divorce and the Military Member

The Survivor Benefit Plan and Ancillary Benefits; Part Three of a Three-Part Article

By Evan B. Brandes

Normally, the death of a military retiree terminates all pension payments. The Survivor Benefit Plan (SBP) is an annuity that allows retired military members from both active duty and the reserves to provide continued income to specified beneficiaries when the retiree dies. 10 U.S.C. § 1447-55. See *also* 10 U.S.C. § 1448. The SBP is funded by premium payments from the retiree's paycheck and reduces the amount of the Disposable Retired Pay. With it, the designated survivor receives a lifetime annuity of up to 55% of the retired member's pay. In addition to spouses and former spouses, coverage is also available for a child, so long as the child is from the marriage of the service member and the former spouse. See 10 USC § 1448.

For married persons on active duty, the election for the SBP must be made before or at retirement. 10 U.S.C. § 1448(a)(2)(A). A spouse loses eligibility as an SBP beneficiary upon divorce. The only way by which a divorced spouse may receive a survivorship annuity is if the former spouse's coverage is elected. A court order cannot, by itself, be used to create coverage; a signed election request must be submitted by the service member or, in some cases, the former spouse, before coverage can be established. Reservists can make the election upon completion of 20 years of creditable service, and can also elect SBP coverage upon reaching age 60. 10 U.S.C. § 1448(a)(2)(B).

When divorce occurs after retirement, military retirees may elect former spouse coverage for a spouse who was a beneficiary under the SBP. Retirees participating in the SBP may elect former spouse coverage within 1 year after the divorce becomes final. A retiree who elects to provide an annuity to a former spouse must, at the time of making this election, provide a statement that the election is being made pursuant to a court order or pursuant to a written agreement previously entered into voluntarily by the retiree as part of, or incident to, a divorce proceeding; and if this is the case, whether such written agreement has been incorporated in, ratified, or approved by a court order. An election filed by the retiree is effective upon receipt by the Defense Finance and Accounting Service. Moreover, the election must be filed after the divorce becomes final. See 10 U.S.C. § 1448.

If the service member is required by a court order to provide annuity coverage, and he or she then fails or refuses to make the required election, that member is deemed to have made such an election if the Defense Finance and Accounting Service receives a written request from the former spouse asking for implementation of the election and a certified copy of the appropriate court order. The request must be signed by the former spouse and received by the Defense Finance and Accounting Service within 1 year from the date of the judgment. There is no specified form for a deemed election request.

The annuity entitlement stops when the former spouse remarries, if the remarriage occurs before he or she reaches the age of 55. (The annuity entitlement is retained if the former spouse is age 55 or older at the time of remarriage.) However, the annuity entitlement will be reinstated if the former spouse's marriage is terminated.

Receipt of a valid former spouse election terminates any existing SBP coverage the retiree might previously have had, and it should be noted that a former spouse's coverage cannot be combined with the coverage of a current spouse. An election of coverage for the former spouse is irrevocable and a service member may not terminate the SBP participation once elected. However, the law allows the member to request a change in annuity coverage if he

or she remarries, or acquires a dependent child, and complies with the requirements for making a valid option change. Such a request must be made within one year from the date of marriage or the child's birth. See *Id.*

If a copy of the final divorce decree has not been sent to the Defense Finance and Accounting Service, one should be submitted. A copy of the final judgment is required before any adjustment to the service member's SBP can be completed.

If military members reach retirement age but do not retire, they are automatically covered by the SBP without cost for the remainder of the time they serve on active duty. If an active duty service member who is eligible for retirement has designated his spouse as the SBP beneficiary, the member must re-designate the spouse as the beneficiary within 1 year of the dissolution of marriage or the SBP election of the now *former* spouse will automatically lapse.

If the service member dies while on active duty during this election period, and he/she has not designated the former spouse as the beneficiary in accordance with court orders, the former spouse will have priority over other claimants (such as a new spouse) and will be considered the beneficiary of the SBP annuity. Thus, if the service member had re-designated his SBP beneficiary to be his new wife, contrary to court order, the former spouse can override the service member's election if the member died during the 1-year election period after the divorce. See *Id.*

The former spouse can protect her SBP interest by requesting the Defense Finance and Accounting Service to make a "deemed election" by submitting a written request to change the member's SBP from spouse coverage to former spouse coverage and by providing a certified copy of the court order. If neither the spouse nor the service member recertifies the SBP election in the proper fashion, the spouse will be ineligible for SBP coverage. See *Id.* In the event that this is not done, the spouse can petition for a modification of the divorce judgment. Such a modification or clarification can start another year during which the former spouse can seek a "deemed election." See *Id.*

States do not have the authority to order the military to initiate the SBP on behalf of the service member for the benefit of his spouse. The court order should require proof of compliance if the divorce judgment includes an order to maintain the SBP for the benefit of the spouse.

Military members can re-specify the amount of Survivor Benefit Plan coverage until the member begins receiving Retired Pay. See Department of Defense Appropriations Act of 1990, Pub.L. No. 101-189, 1404, 103 Stat. 1579 (1990); Department of Defense Authorization Act for Fiscal Year 1991, Pub.L. No. 101-501, 631, 104 Stat. 1485 (1991) (delaying implementation of the open enrollment period from Oct. 1, 1991 until April 1, 1992). Therefore, court orders must specify the degree of required coverage to be maintained by the member.

Medical Benefits and Commissary Privileges

If the former spouse was married to a member or former member for at least 20 years during which he or she performed at least 20 years of creditable service — also called "20/20/20" spouses — then the former spouse is entitled to full military medical care, including the civilian Health and Medical Program of the Uniformed Services if not enrolled in an employer-sponsored health plan. He or she is also entitled to commissary and exchange privileges.

If the former spouse was married to a member or former member for at least 20 years during which the member or former member performed at least 15 years of creditable service — also called "20/20/15" — and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that the former spouse is entitled to full military medical care, including the civilian Health and Medical Program of the Uniformed Services, depends upon the date of the divorce, dissolution, or annulment. No other benefits or privileges are available.

If the date of the final judgment of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long

as he or she does not remarry. If the date of the decree is on or after April 1, 1985, then the former spouse is entitled to full military medical care, including the civilian Health and Medical Program of the Uniformed Services, for a period of two years from the date of the divorce, dissolution, or annulment.

If the former spouse, for some reason, loses eligibility for medical care, he or she may purchase a "conversion health policy" (a health insurance plan with a private insurer, developed through negotiations between the Secretary of Defense and a private insurer) within the 60-day period beginning on the later of the date that the former spouse ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense prescribes. Upon purchase of this policy, the former spouse is entitled, upon request, to medical care until the date that is 36 months after: 1) the date on which the final decree of divorce, dissolution, or annulment occurs; or 2) the date the 1-year extension of dependency under 10 U.S.C. 1072(2)(H) (1996) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.

Spouses who do not fall under the 20/20/20 or 20/20/15 rule and who lose TRICARE eligibility or other coverage under the Military Health System are eligible for temporary health care coverage in the Continued Health Care Benefit Program (CHCBP). This is not part of TRICARE, but provides similar benefits and operates under most of the rules of TRICARE. To obtain this coverage, the spouse must enroll in CHCBP within 60 days after separation from active duty or loss of eligibility for military health care.

A former spouse who qualifies for any of these benefits may apply for an ID card at any military identification card facility. He or she will be required to complete a DD Form 1172, also known as the "Application for Uniformed Services Identification and Privilege Card." The former spouse should present a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available), and a statement that he or she has not remarried and is not participating in an employer-sponsored health-care plan.

Conclusion

Although the law of military benefits is a mystery area to most matrimonial lawyers in New York, attorneys who find themselves representing a spouse who seeks an equitable distribution of military benefits will find they want a crash course. It just would not do to assume that, like other assets, a military pension could be equitably distributed pursuant to "Majauskas", "rolled over" or divided by a qualified domestic relations order. Of course, if they are lucky, attorneys faced with this scenario will find someone to learn from who has handled these kinds of cases before. If that cannot be arranged, the competent attorney will learn exactly what these benefits are and make sure his or her client receives them.

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