

SILENT PARTNER

SBP Update: Special Needs, New Spouses

Introduction: Silent Partner is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the military committee, N.C. State Bar, and the military committee, Family Law Section, American Bar Association. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many Silent Partner infoletters on military pension division, the Survivor Benefit Plan and other aspects of military divorce. Just go to www.abanet.org/family/military or www.nclamp.gov > Silent Partner.

Introduction

Congress made two important revisions to the military Survivor Benefit Plan (SBP) in the last days of 2015. The first dealt with SBP payments to a *Special Needs Trust* for children who are incapable of self-support.

Special Needs Trust and SBP Payments

The National Defense Authorization Act (NDAA) of 2015 amended Title 10, U.S. Code, §§ 1448, 1450 and 1455 to allow a person who has established a Special Needs Trust (SNT) to specify payment of a dependent-child SBP annuity directly to the Trust. An active-duty servicemember (or a military retiree) may, during his or hers life, irrevocably substitute a self-settled SNT created for the benefit of a child with a disability as the SBP beneficiary rather than having the SBP annuity payments made directly to the disabled dependent child.¹ Since generally a member entitled to receive military retired pay makes an election as to SBP beneficiaries which is irrevocable, the Defense Department describes this as “an add-on election” to the election of a servicemember or retiree regarding SBP coverage for a dependent child.

Previously servicemembers and military retirees could not designate a Special Needs Trust as the beneficiary for the SBP. Retirees have been hesitant to elect a disabled adult child as SBP beneficiary out of concern that additional income would disqualify the child from receiving other government benefits, assistance and subsidies for disabled adults, such as housing assistance and Medicaid.

SNT Rules

There are specific terms about the Trust which must be followed. Here are the primary points for eligibility to elect the SNT option:

- First of all, the member or retiree must have previously elected *Spouse and Child* or *Child Only* coverage for a disabled child under the SBP.
- Second, the SNT must be in compliance with certain provisions of federal law.²
- Next, according to the Department of Defense (DoD) guidance memorandum of 12/31/2015, such an election must be made by the member’s or retiree’s written

¹ The SNT is a document specifically designed for the benefit of a person with a disability by providing a set of instructions for managing money set aside to help the one with a disability. Trusts are generally drafted and implemented pursuant to state law.

² The relevant statute is 42 U.S.C. §1396p(d)(4)(A) or (C).

statement which clearly says that future SBP annuity payments are to be made to the SNT instead of being made to the disabled dependent child directly.³

- A "dependent child" is defined in 10 U.S.C. § 1447(11). The dependent child must also be "disabled"⁴ (that is, unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months). Thus a "disabled dependent child" means a child who is a dependent child pursuant to 10 U.S.C. 1447(11) and "disabled" pursuant 42 U.S.C. § 1382c(a)(3).
- For the SNT to qualify as an SBP recipient, the DoD memorandum requires that the election statement include (i) the name of the trust, (ii) its Tax Identification Number and (iii) a licensed attorney's statement that the trust satisfies the requirements of a self-settled special needs trust pursuant to federal and state law. As an alternative, there can be submitted a certification from the Social Security Administration that the trust qualifies as a Special Needs Trust pursuant to Title 42, U.S. Code.
- This decision may be made ordinarily during the life of the servicemember or retiree through a written statement that designates future SBP payments to the SNT. The decision must be irrevocable, and this also applies to the trust.
- However, when a servicemember dies in the line of duty or at any time prior to assigning the SBP benefits to a qualifying SNT, the surviving parent, a grandparent, or a court-appointed guardian may file the election in certain circumstances.
- Terms for setting up the Special Needs Trust are specified at Sections 2.a.-c. in the DoD memorandum with regard to establishment upon the death of the retiree, the death of a member on active duty (in the line of duty), and the death of a servicemember during "inactive duty training" (that is, as a member of the National Guard or Reserves).

All of this is very important for a dependent child with a disability. If military SBP benefits are paid directly to a dependent child with a disability, whether the child is an adult or a minor at the time, those payments may have a negative impact regarding that dependent's access to public benefits. Note that Medicaid is the key benefit required in order to access many services needed for any level of independence as an adult.

SNT: Final Notes

The federal statute does not authorize the use of special needs trusts for disabled spouses. More information can be found at the DFAS (Defense Finance and Accounting Service) website, www.dfas.mil > Provide for Loved Ones > Survivor Benefit Plan > Special Needs Trust. Customer Service at DFAS can answer specific questions about the SBP/SNT issue: <http://www.dfas.mil/retiredmilitary/about/aboutus/customer-service.html>

³ The memo is titled "SUBJECT: Enabling Payment of Survivor Benefit Plan Annuities to a Special Needs Trust," and this document is available at: www.moaa.org/uploadedFiles/Content/Take_Action/Top_Issues/Spouse_and_Family/SNTPolicyFinal31Dec15.pdf. Note that the memorandum does not create a new form for making the election. Instead the memo refers members and retirees to *DD Form 2656* and its *Section X (Remarks)*. Separate statements, though, attached to DD Form 2656, will likely be the better practice because of the information that the election statement must contain (see below).

⁴ This is defined in 42 U.S.C. § 1382c(a)(3)

SBP – New Spouse, Former Spouse

The second change in SBP rules dealt with the issue of a new spouse, with the SBP already assigned to a former spouse who is now deceased. This is what the author calls the “Harold Brown exception.”

Flashback – World War II and the Tuskegee Airmen

A client of the author, Dr. Harold H. Brown, LtCol, USAF (Ret.), was one of the *Tuskegee Airmen* from World War II. As of 2015 he was 89 years old and was trying to obtain coverage for his wife, Marsha Bordner, under the Survivor Benefit Plan. His former wife, to whom SBP was awarded with his consent under a court order, had died. However, DFAS refused to grant new-spouse coverage, citing a DFAS legal opinion.

Dr. Brown was no late-comer to the SBP claim. He had entered flight training in January of 1943, and was graduated from the Tuskegee Institute in May 1944. He was assigned to the 332nd Fighter Group, also known as the “Red Tails.” One of the original Tuskegee pilots of World War II, he was stationed in Italy in September 1944. He was shot down twice over enemy territory, the first after being attacked by a squadron of ME 262’s, the first jet fighter. After his second shoot-down, he was interned at the notorious Moosburg POW camp, which was originally planned for 10,000 prisoners; it contained 80,000 by the end of the war. He stayed at the camp until it was liberated, when he returned to the United States and continued his service. He retired from the Air Force in May of 1965 as a lieutenant colonel. In 2007, he was part of the group of Tuskegee Airmen awarded the Congressional Gold Medal.

New Legislation

Congress was contacted about the problem Brown and others faced regarding deceased former spouses who had been awarded SBP, and the DFAS position that this prevented a current spouse from receiving SBP coverage. Section 641 of the FY 16 NDAA fixes this problem, and the law is retroactive for retirees affected by the 2013 DFAS legal opinion. Under the current legislation an individual who previously elected former-spouse coverage which is now discontinued may elect coverage for a current spouse during the limited “open season” which started 11/25/15. These would be members who are married at the time of the death of a FS (former spouse) beneficiary, and they may choose to give coverage to their current spouse if the election is received by the retired pay center⁵ within one year after the death of the FS beneficiary. In addition, a person who is not married at the time of the death of the FS beneficiary – and who later married – may elect to provide spouse SBP coverage.

Except as stated above, this open season does not apply if the member is not currently married or if the former spouse SBP coverage was discontinued for any reason other than the death of a covered former spouse. This election must be received within one year after the date on which the individual marries (or remarries).

Regardless of whether an individual’s remarriage occurred before or after the death of the FS, a military retiree whose FS dies before the effective date of the new legislation may elect

⁵ The Defense Finance and Accounting Service in Cleveland, Ohio processes pension division orders for Army, Navy, Air Force and Marine Corps cases, while the Coast Guard Pay and Personnel Office in Topeka, Kansas processes them for that service, and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration.

coverage for his or her current spouse. Once made, this election is irrevocable. Coverage may only be established at the level of coverage previously elected for the former spouse.

A member who believes that the open season may apply to him or her should contact Customer Service (see **SNT: Final Notes** above) and enclose these documents along with an expression of interest:

- Certificate of Death for the Former Spouse
- Marriage Certificate for Current Spouse
- Birth Certificate for Current Spouse
- Expression of Interest Form (get copy from Customer Service or from the DFAS website)

Once DFAS receives the inquiry with the necessary supporting documents, it will prepare an estimate of the costs associated with the coverage, and any retroactive premiums due from the effective date of the coverage. It will provide this estimate along with a blank "Final Election" form. If the member, after review of the figures, decides to elect the coverage, then he or she must complete and sign the "Final Election" form and return it. The election must be made with the form provided or in writing. For those whose retired pay is serviced by DFAS, it must be received by the Defense Finance and Accounting Service-Cleveland with a postmark on or before November 24, 2016.

When is the election effective? If the member had been married for at least one year on the former spouse's date of death, the effective date is the first day of the first month after the date of death of the former spouse. For those who were married after the former spouse's date of death (or in the one-year period preceding the date of death of the former spouse), the effective date is the first day of the first month after the first anniversary of the marriage. Retroactive premiums will be effective on the date of the election, and the member is responsible for all premiums for this time period.

The retired pay center will provide an estimate of premiums and payment options after receipt of the member's inquiry, and the member will be required to pay the premiums in either a lump-sum amount or over a period of months. All premiums must be paid within 24 months of the date of final election.

The date of enactment of this section is November 25, 2015. Further information is available through Customer Service at DFAS (see **SNT: Final Notes** above).

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