

SILENT PARTNER

Defending Against SBP in Divorce

INTRODUCTION: SILENT PARTNER is a lawyer-to-lawyer resource for military family law issues. Comments, corrections and suggestions should be sent to the address at the end of the last page.

Introduction

In many military divorce cases, the servicemember (SM) or retiree does not want the former spouse to have SBP coverage. The reasons vary, depending on the facts, finances and circumstances of the case.

- It might involve the cost of the Survivor Benefit Plan – former spouse coverage costs 6.5% of the selected base amount in active-duty cases. It is approximately 10% of the base in the case of a member of the RC (Reserve Component, or Guard/Reserve).
- The reason might involve the belief that the former spouse (FS) isn't entitled to it, due to the short term of the marriage, the financial self-sufficiency of the FS, or the circumstances leading up to separation and divorce.
- Or the reason might be a disagreement over the benefit (55% of the base amount) in comparison to the pension share of the former spouse (almost always less than 50% of the pension).

In the sections below, we try to help John Doe, a SM or retiree, from providing coverage under the Survivor Benefit Plan (SBP) for Mary Doe, his soon-to-be ex-wife. Here are the strategies.

I. "Don't Shout – Leave It Out"

If no one says anything about SBP, then it will be lost at divorce. While a spouse is covered automatically before and after the SM's retirement (in active duty cases), former spouses are not. The divorce terminates SBP coverage.

There are several cases holding that "silence is golden" in a settlement, and the FS doesn't get a survivor annuity if the agreement doesn't mention it.¹ These cases show the importance of stating that the

¹ Two non-military cases from New York are *McCoy v. Feinman*, 99 N.Y.2d 295, 755 N.Y.S.2d 693, 785 N.E.2d 714 (2002) (malpractice case) and *Kazel v. Kazel*, 3 N.Y.3d 331, 786 N.Y.S.2d 420, 819 N.E.2d 1036 (2004). There are several military cases involving the survivor Benefit Plan. These include *Padot v. Padot*, 891 So. 2d 1079 (Fla. Dist. Ct. App. 2004); *In re Marriage of Lipkin*, 208 Ill. App. 3d 214, 566 N.E.2d 972 (App. Ct. 1991) (court specified that SBP is a separate and distinct property interest); and *In the Interest of A.E.R.*, 2006 WL 349695 (Tex. App.–Fort Worth) (not reported) (settlement failed to mention SBP, and court held that SBP is an additional benefit other than the bargained-for receipt of a percentage of the ex-husband's retired pay). In *Williams v. Williams*, 37 So.3d 1171, 2010 Miss. LEXIS 315 (2010), an agreement stating that the wife was to have "all survivors' benefits otherwise accorded to her by law..." did *not* mean, according to the appellate court, that she was entitled to Survivor Benefit Plan coverage, since SBP is a personal choice, and it is not mandated by law. The chancellor erred in requiring SBP coverage for wife since the agreement of the parties did not entitle wife to coverage. In *Creech v. Creech*, 2010 Ky. App. Unpub. LEXIS 194, the parties had agreed to the wife getting 50% of the marital share of pension. The agreement was not reduced to writing but was dictated into the record. Later the wife filed a motion later to get SBP, the judge denied her motion and the Court of Appeals upheld the judge's order, stating that the wife cannot get what she failed to mention in her settlement. In *Morris v. Morris*, 2011 Iowa App. LEXIS 736, the appellate court found that "half of husband's military retirement" doesn't mean SBP coverage; in this case, the husband provided life insurance of \$350,000 in the settlement, which didn't mention SBP. The ex-wife also lost out in *Kuba v. Kuba*, 2013 Mo. App. LEXIS 745, a case involving a 2008 divorce decree, followed three years later by a motion made by the former spouse to include the Survivor Benefit Plan in an order dividing military retired pay which had already been submitted in 2008 to DFAS. The trial court denied relief to her, and the appellate court affirmed that decision.

former spouse is entitled to SBP coverage clearly and promptly. In *In re Marriage of Hayes v. Hayes*,² the Oregon Court of Appeals confronted a pension division settlement containing a generally worded clause that gave the wife half of the marital share of the pension of the husband. It was silent as to SBP, death benefits, or a survivor annuity. The Court stated:

Wife, meanwhile, contends that, under the terms of the dissolution judgment, the trial court retained jurisdiction “of the division of the retirement benefits described herein so it can make any modifications to this judgment which may be necessary to accomplish the goals stated herein relating to the division of said benefits.” In her view, “the inclusion of a survivor benefit in the DRO does nothing more than ensure that Wife receives her appropriate marital share of his retirement, regardless of the possible death of [husband].”

Wife’s argument notwithstanding, nothing in the language of the 1998 judgment suggests that the court retained authority to award wife survivor benefits. Rather, the judgment provides that the court retained jurisdiction to effect the “division of the retirement benefits.” Moreover, there is no indication in the record that the parties ever contemplated that wife, as part of the dissolution proceeding, would receive a death benefit—a property interest discrete from her interest in husband’s military retired pay. Thus, to the extent that the DRO [domestic relations order] awarded wife benefits that were not part of the original property division, it erred. . . . For that reason, we reverse and remand with instructions to delete that provision of the DRO.³

Make sure that the settlement "closes the door" on any other benefits or entitlements for Mary Doe, so that she doesn't come back later claiming, "We meant for that to be in our settlement too!" There are several appellate cases in which the omission of SBP coverage has not impaired the former spouse’s attempts to demand survivor annuity coverage later on. When writing the settlement, speak broadly of “all military retirement benefits” instead of just “retired pay,” which leaves one wondering what else might there be to divide. Closing the door to other benefits means stating that “This is all she wrote” – there’s nothing else to distribute. A sample clause might read,

This is the full, final and entire distribution of John Doe’s retirement benefits that the parties have made. It covers all benefits and, whether within or outside this settlement, there is nothing else to divide or which they intend to divide or allocate.

Making sure that the settlement is silent regarding SBP is not enough. Use the “belt and suspenders” approach to ensure that the door is not only closed, but also locked and bolted.

II. "Get a Life" (Life Insurance, That Is)

Another approach is to offer to let Mary get a life insurance policy on John Doe to replace the SBP.⁴ The advantages of life insurance, as an alternative death benefit, are -

- > It gives Mary a lump sum in hand at the time John dies (unlike SBP, which is doled out month-by-month by DFAS (the Defense Finance and Accounting Service);
- > It is non-taxable (unlike monthly SBP payments); and

² 228 Or. App. 555, 2009 208 P. 3d 1046 (Ct. App. 2009)

³ 228 Or. App. at 567-568, 2009 208 P. 3d at 22–23 [citations omitted]. See also *Potts v. Potts*, 142 Md. App. 448, 790 A.2d 703 (Ct. Spec. App. 2002) and *Dziamko v. Chuhaj*, 2010 Md. App. LEXIS 94.

⁴ *Gurnell v. Gurnell*, 2011 Cal. App. Unpub. LEXIS 6643 (judge required ex-husband to provide \$100,000 term life insurance for FS at her cost, appellate court affirmed).

> It isn't affected by the remarriage of the FS (compared to SBP, which is suspended if Mary Doe remarries before age 55).

The issue which remains is "Who pays for it?" Traditionally, the argument for John would be that Mary needs to pay, since it is solely for her benefit. The SBP is worthless for a SM (servicemember) or retiree. John has to be *dead* for it to come into existence, so why should he want it? Why should he have to pay for it or for life insurance, its substitute? The life insurance should be funded by monthly payments by Mary Doe; all John needs to do is show up for a physical.

If Mary rejects this and insists on John's paying, then make sure that his payments are tax-deductible. This is possible, even if the obligation is not called "alimony," so long as:

- > the parties are not living in the same household;
- > the obligation is pursuant to a written instrument;
- > it is not designated as child support; and
- > payments do not last beyond the death of the payee.

Such payments are deductible by the payor under Section 215 of the Internal Revenue Code, and they are included in the taxable income of the recipient under IRC Section 61 and/or 71.

III. Put a Price Tag on It

When the former spouse, having been given these settlement options, rejects them all and demands SBP coverage, John's strategy starts with valuation of the asset.⁵ Under the law of most states, every asset acquired, or partially acquired, during the marriage is marital or community property. Get an expert witness to "price the SBP" so that Mary Doe is charged with that value is the grand scheme of things, as part of the division of their marital or community property items.⁶ If Mary is faced with the cost of this benefit, which may be \$50,000, \$100,000 or even more, she may be forced to rethink that simple approach of "I demand it." She will have to start thinking about a new issue: "If you want to buy it, then you'll be charged with the price on the tag" for the present value. In other words, "There's no such thing as a free lunch."⁷

Failure to value the SBP can be a fatal flaw. Some courts have held that the lack of a value placed on a marital asset means that the asset cannot be divided.⁸ The burden is on the party who wants to include the asset in the marital estate or the community for division by the court.

IV. Put a Price Tag on It – An Example

A 1998 Pennsylvania case, *Palladino v. Palladino*, shows the importance of insisting on valuation of the survivor annuity in a pension division case. In a divorce case, the Common Pleas Court judge found that the wife had requested that the husband elect survivor annuity (SA) coverage to continue payments to her if he died before she did. The Husband's expert valued the survivor annuity at about

⁵ *IRMO Lipkin*, 566 N.E. 972 (Ill. App. '91) (survivor annuity is a distinct property interest within the pension plan, it needs to be distributed at divorce; it has a determinable value, computed by using life expectancy tables).

⁶ *Burt v. Burt*, 799 P. 2d 1166 (Utah App. 1990) (court may fix value of government survivor annuity and consider that sum in distribution scheme).

⁷ *See, e.g., In re Marriage of Forney*, Ore. App. 405, 244 P. 2d 849 (2010) (court ruled that the Survivor Benefit Plan, even though earned by pre-marriage service, had to be valued; the trial judge had disregarded a value placed on it of \$84,000 by the husband's expert).

⁸ *See, e.g., Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752 (1997), disc. rev. den. 487 S.E.2d 545, 346 N.C. 278 (1997).

\$57,000, and he also testified that the value of the pension with the SA was about \$93,000, and the value without the SA was about \$108,000.

The court found that the survivor annuity, which derived from the husband's pension, has a value independent of the pension's value. Since the wife elected to get the survivor annuity, she needed to be charged with the value of the annuity in equitable distribution. The monthly cost of the survivor annuity was about \$84.

The court decided that \$57,000 was the proper value of the survivor annuity, and this ought to be charged to the wife, based on the value of a single-premium annuity to purchase the equivalent survivor annuity payable to the wife. The judge refused to value the survivor annuity as the difference between the value of the pension WITH the survivor annuity and the pension WITHOUT the annuity - a differential of roughly \$15,000. The judge found that the survivor annuity was marital property and charged the wife with its value (\$57,000).

The Superior Court, in an opinion by Judge Patrick R. Tamilla, affirmed the trial court's decision. This meant that the wife did not get any of the husband's pension. She only received the survivor annuity, which she had requested.

Of significance to the trial judge many have been the fact that the wife was younger - by many years - than the husband, thus improving greatly the chances of her getting payments under the survivor annuity option. Thus the husband received a fair distribution (not a windfall) regarding his pension; he kept the entire amount of his retired pay, simply because his ex-wife insisted on getting the survivor annuity. His monthly pension was cut by around \$80 monthly, but the wife was not entitled to receive any of his pension during his life. Since the trial court's decision was appealed to - and affirmed by - the Superior Court of Pennsylvania and it was not appealed further, this case represents the state of the law (as of 1998) in Pennsylvania.⁹

V. Give the Judge an Education

Make sure that the judge knows “the facts of life” when counsel for the FS tries to claim that this is a mandatory and integral part of the military retirement program. John Doe's attorney will want to make the following argument when faced with a claim for SBP as an afterthought or an entitlement by the former spouse:

- The Survivor Benefit Plan is not a pension. A pension is earned by the employee for services rendered during his or her career, and it is a form of deferred compensation. SBP is not compensation, and it was never earned by the former spouse.
- Instead, the Survivor Benefit Plan is an annuity. It may – or may not – be chosen at the time of retirement or allocated at dissolution, depending on the intentions and plans of either or both of the parties.
- SBP doesn't come automatically with the military pension. It must be elected, or—when the matter is before the court—adjudicated through a court order.
- The Survivor Benefit Plan is not even found in those sections of Title 10, U.S. Code, which deal with regular and non-regular (i.e., Guard/Reserve) retirement, or the section dealing with military pension division (the Uniformed Services Former Spouses' Protection Act), 10 U.S.C. § 1408. It is located in an entirely different section. The provisions for SBP are found at 10 U.S.C. § 1447-1455.
- It cannot be said that Congress intended for spouses and former spouses to receive SBP coverage as part of the division of servicemembers' military pensions, since the USFSPA is not a substantive law allocating rights to the parties in a divorce proceeding. Rather, it is an enabling act, making provision for the courts of the states to divide—or not divide—military pensions as

⁹ *Palladino v. Palladino*, 713 A.2d 676 (Pa. Super. 1998).

they see fit. It contains no reservation of rights and no set of spousal entitlements.

Too few judges understand that SBP is a survivor annuity which is optional. It may be elected or waived. It is usually purchased when the non-military spouse wants to continue payments after the SM/retiree dies. The SBP sections of the U.S. Code were enacted at different times over the years, and they were intended to be useful options for the military member who is planning for death and dependents, not a requirement for the SM/retiree. It is not an obligation, it is an option.

VI. Shift the Premium

Another way of "raising the price tag" for SBP is to argue to the judge (or to opposing counsel during negotiations) that Mary Doe should pay ALL of the premium associated with the SBP.¹⁰ As it is, the cost of SBP is taken out of John's retired paycheck before the division of the pension between the parties. This effectively means that the premium, 6.5% of the selected base amount in retirements from active duty, is shared between the parties in the same ratio as the underlying pension, such as 50-50 or 70-30. Mary can and should be ordered to pay the full cost of the premium.

This premium-shifting can be done by requiring her to reimburse John every month for the SBP cost. Of course, this is not likely to be attractive to John. He may feel that she will stop paying him or just forget about the reimbursements at some point. Yet DFAS will not honor an order that attempts to allocate the costs of SBP to one party or the other. So it must be done using a "back-door" approach.

The alternate approach for a transfer of payments to Mary must be done with a reduction in her percentage of the pension. Although the math is more complicated than presented here, the calculations result in a reduction of about 4% from the former spouse's share of the military pension in a retirement from active duty. Thus if Mary were originally entitled to 40% of John's retired pay, based on a 50% presumptive share, years of marital pension service, and total military pension service, her "adjusted share" of the pension might be about 36%. It is important to note that the math can only be accomplished when John has already retired. The most that can be done pre-retirement is a description of what will occur when John retires and all the numbers are finally known. At that point, Mary's share of the pension will be adjusted to effectuate payment of the entire premium out of her share by lowering the share from a "nominal amount" (what it would be without the premium shift) to an "adjusted amount," (the new percentage after the premium is taken out of her share).¹¹

Virtually no state has a statute which articulates the requirements for payment of the cost of a survivor annuity. In fact, few states have rules in case law specifying the payment duties between the parties. In those states which do have rules, the results are inconsistent; some judges order the husband to pay in full, some order the wife to pay, and some order the division to be 50-50. For these reasons, John's attorney needs to be prepared (for the mediation, the pretrial conference or the trial) with research into state law and with arguments from fairness and equity to require the transfer to Mary of the full responsibility for payment of SBP costs. The motto to use, in effect, is that you have to "pay to play."

¹⁰ *Conaway v. Conaway*, 899 S.W. 2d 574 (Mo. App. '95) (former spouse is entitled to a share of survivor annuity at her own cost to ensure against future contingencies and protect her interest in marital portion of pension); *In re Marriage of Moore*, 251 Ill. App. 3d 41, 621 N.E. 2d 239 (Ill. App. 3rd Dist. 1993) (federal civil service case, appellate court upheld trial judge's ruling that awarded survivor annuity to wife, requiring her to compensate husband for the cost, approximately \$100/mo.); *In re Marriage of Sonne*, Calif. Ct. of Appeals (6th Dist.), June 2010 (wife was awarded entire survivor annuity from husband's employment and ordered to pay entire cost); *Bienvenue v. Bienvenue*, 72 P. 3d 531 (Haw. App. 2003) (judge ruled that wife would reimburse retiree for SBP cost; neither term was in the parties' settlement and Court of Appeals approved wife's advancing cost of SBP to husband); *Rykken v. Rykken*, 2012 Neb. App. LEXIS 17 (former spouse was ordered to pay retiree \$270/mo. SBP premium from her share of the pension).

¹¹ *Weiss v. Weiss*, 702 S.W. 2d 948 (Mo. App. 1986) (husband was ordered to provide wife with federal civil service survivor annuity, but court reduced her share of his pension from 44% to 38.4% so she would bear entire cost of coverage).

VII. Other Strategies

Some courts recognize the inherent unfairness of awarding the entire annuity when there has only been a short marriage. This approach, asking the court to decline to award SBP when the marriage is relatively short, may be effective in avoiding division of John Doe's SBP.¹²

When a party fails to ask for SBP, sometimes the courts will bar award of the annuity, stating that it must be brought to the court's attention so that the judge can put a value on it and consider the survivor annuity award in the entire scheme of property division.¹³ This means that counsel for the member or retiree must be alert at the pleadings stage of the case to spot this issue.

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¹² *Pierce v. Pierce*, 42 So. 3d 658 (Miss. App. 2010) (case remanded due to insufficient findings to justify SBP award in short-term marriage).

¹³ *IRMO Griffith*, 2013 Iowa App. LEXIS 370 (Non-military case in which the majority of pension was acquired before the parties' marriage. The wife did not petition court for allocation of survivor annuity, and the appellate court agreed with the trial judge that equity does not require allocation of the survivor annuity to the wife). *Wallace v. Wallace*, 2007 Ariz. App. Unpub. LEXIS 1121 (Divorce petition filed before H's retirement, but decree granted after it. Parties were married 22 years, former spouse filed motion 11 months after divorce for allocation of SBP to her, since it was omitted from decree. Judge rejected her claim that it was community property. Court of Appeals stated that, since former spouse did not raise SBP issue during divorce proceedings, judge could not evaluate the effect of ordering SBP, and cost of SBP, on overall division of property).