

SILENT PARTNER

Mirror, Mirror, On the Wall – Survivor Benefit, Part or All?

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.

Life and Death

It was late in the day and Lester Lawyer was about ready to pack up and head home when he heard a commotion in the waiting room; one of his clients was asking to be seen right away. Ace Barker, a sergeant major in the Army, was already heading down to his office when Lester realized that he'd have "one more appointment" before this day was through.

"It's all about the divorce and my Survivor Benefit Plan," SGM Barker explained after the initial pleasantries were exchanged. "I just found out that Gladys wants the whole thing – the big enchilada! She wants to have her SBP based on my full retired pay, even though we've only been married for ten years and I might stay in the Army 30. That's just not right, Lester!"

"What do you mean?" asked Lester.

"Here's what I'm talking about," responded Barker. "Suppose that my wife, Gladys, is awarded SBP coverage by the judge. That means she'd get 55% of my retired pay if I die before her. Now those ten years of marriage mean that she only gets 25% of my pension if I retire at 20 years of service, and she only gets 1/6 of my pension if I push it out to 30 years. But she gets 55% of the pension if I die first. Lester – we have to do something! She should only get *part* of the SBP, not all of it."

"It sounds like you're worth more dead than alive," commented Lester. "But it's not easy to make the death benefit match the life share, Ace."

Lester went on to explain why it's so hard to make the SBP payment for a former spouse (FS) proportionate to the military pension share which she will be getting when the servicemember (SM) retires. Here's a summary.

Variables

The mirror-share difficulty involves the variables which go into figuring out Gladys Barker's share of the pension in the first place. Here are the basics:

> SBP (the Survivor Benefit Plan) is anchored to a *base amount*, and the payment to a former spouse is always 55% of that base.

>The 55% is fixed – it can never vary. But that's not true when it comes to the base amount, which is usually specified in dollars. It can be full retired pay down to \$300 a month.

> The base can also be specified as a percentage of retired pay (e.g., 30% of retired pay, which means that the SBP payment would be 16.5% of retired pay, since 30% of 55% is 16.5%).

> If no dollar amount is specified, then the military member is defaulted into "full retired pay" as the base. And if he is married at the time of retirement, his spouse must consent in writing to any option short of "full retired pay" as the base.

To get the "right base amount," that is, the figure which - times 55% - would yield an amount that is the same as the FS's share of the retired pay, Lester Lawyer would have to know his client's retired pay. That's where the problems begin.

Amount of Retired Pay

It's first necessary to set out some "facts of life" about servicemembers (SMs) and how their retired pay is calculated.

> It's a fact of life that no SM knows his retired pay, except for those who are in the "retirement zone" (i.e., the period of about 6 months before active-duty retirement).

> Except for these "select few" in the retirement zone, no SM knows when he or she will retire, and years of creditable service is a factor in determining what the retired pay will be. Even with the best of plans, there are sometimes "StopLoss Orders" which bar retirement for certain individuals when their services are necessary for national defense.

> No one knows what Congress will do regarding military pay in the future, and this is another factor in determining how much a SM is paid at retirement. Usually retired pay is based on the individual's "high-3" – the average pay for the highest three continuous years of compensation during his career. "High-3" pay can't be known in mid-career.

> In fact, many SMs cannot even predict what rank they will be when they retire, and this is yet another factor which determines the "high-3" amount.

Rules in Divorce Court

Here are some important divorce rules:

> Most states divide pensions, including military retired pay, using the "time rule" when the individual is still serving toward the pension (on active duty, in SGM Barker's case). This means that the FS, upon the SM's retirement, gets a pension award expressed in a formula, which is usually: $FS = 50\% \times (\text{years of marriage during service}) \div (\text{years of total service}) \times \text{final retired pay}$. So one must know the "service fraction" to find out what portion of his retired pay that the ex-wife will get, and that will not be known until retirement. It could be 50% times 10/30 if Barker were married for 10 years and served a full 30 while on active duty. Or it might be 50% times 10/20 if he were married for 10 years during a 20-year active duty career. So the marital fraction isn't known (and one's retired pay is likewise unknown) unless the SM is on the threshold of retirement.

What Is Known, and the Numbers Needed

This means that a SM will know only at retirement the exact value of two numbers - the marital fraction (or portion of the pension earned during marriage which is to be split with the FS) and the pension amount. It's only at that time when the choice can be made to zero in on a proportionate share or "mirror award." At any other time it's just plain guesswork, which no one likes, most ex-spouses won't agree to, and most judges don't even understand (unless they have a good background in pension division or military service). It is only the SM who is in "the retirement zone" who has full control over creating an SBP structure which allows the pension share for the former spouse to be the same as what she will receive in monthly SBP payments when the retiree dies before the former spouse. This situation involves:

- a) knowing the marital fraction or percentage that the former spouse will get;
- b) knowing the final retired pay of the SM;
- c) using those to calculate the amount of the pension share due to the former spouse; and
- d) dividing that amount due to the former spouse by .55 to arrive at the base amount which is to be chosen.

Putting Off the Decision

Ace Barker, listening to this explanation, still wasn't satisfied. "Well then, why don't we just write up the consent order, agreement or divorce decree to say that we won't make a decision on SBP and the base amount for "former spouse coverage" till I retire? That would solve the problem, right?"

Lester explained that this wouldn't work. "The failure to make an SBP election now means that, if you were to die before retirement, there is NO coverage for your ex-wife. Your election of former spouse coverage must be done within one year of your divorce decree. It's unlikely – nay, *inconceivable* – that Gladys would agree to "no coverage now" in order to obtain *a proportionate amount* at your retirement. Why would she want to gamble like that?"

Issues for Retirees

Ace Barker exhaled audibly. "Whew... I've already got 2 ½ Excedrin headaches, and I'm not even a lawyer! What about those who are divorcing when they're already retired – is it easier for them? Or for my friends in the Guard or Reserve?"

Lester patiently explained that military retirees are also in a difficult situation. In their case, the decision on SBP has already been made – either for full coverage for a spouse or, with written consent, for lesser coverage (that is, a base amount which is less than full retired pay). Once the base amount has been chosen, it generally cannot be changed. They are left with the decision that they have made, and they cannot alter the amount of the base to effect a mirror image between the pension payment and the SBP payment. It's already been "cast in concrete," so to speak.

Guard and Reserve Members

“Concrete overshoes” similarly describes those in the Guard or Reserve, also known as members of the Reserve Component (RC). At the 20-year mark, an RC member (i.e., a member of the Guard or Reserve) is sent a form on which to choose the appropriate SBP election for the member and, if married, the spouse. There are three options and a default.

The form, which is called DD Form 2656-5, allows as Option A the postponement of the decision until the individual reaches "pay status," usually age 60. If the divorce happens to occur at this point, in the zone of several months before age 60, then it's possible to "make a match," since one can calculate the member's retired pay, the share which the former spouse will receive, and the base which is to be chosen to accomplish a *mirror award* of SBP. The latter is done with calculations similar to those shown in a) - d) at the above section.¹

That is ordinarily not the case, however, and the other alternatives for an RC member will not allow a match. Option B on DD Form 2656-5 involves the election of SBP coverage, to be effective for the surviving spouse only when the member turns age 60 (or, if dead, would have turned 60). This option is chosen at the 20-year mark, that is, when the RC member has 20 "good years" of service. Any selection of a lower base amount must be made then, even though the member and his spouse cannot know what the member's final retired pay will be.²

The reason for this is as follows. Even if the member requests (at the 20-year point) approval for immediate placement in the Retired Reserve or its equivalent, the rate of pay upon which his retirement amount is based will not be known till he turns 60. This is the active duty pay rate for all ranks and it's set each year by Congress. No one can possibly know that in advance of age 60 or thereabouts.³

There is a third option for RC members. It's Option C, called “RCSBP,” or the Reserve Component Survivor Benefit Plan. It entitles the member to immediate coverage of a spouse or former spouse, even if the RC member dies a week or a month after the selection. The member doesn't have to have reached 60 to reap coverage benefits under this option; the SBP payments start at the member's death. There is also a default provision – if the RC member fails to make an election, then he or she is defaulted into Option C.

But Option C won't work in effecting a proportionate share either. The choice is made, whether it's full retired pay as the base or a lower amount (with written spousal concurrence) at the 20-year mark. Once again, there is no way of knowing at the 20-year point what one's retired pay will be at "pay status," usually age 60, if the individual chooses transfer to the Retired Reserve. And the marital fraction in the formula which is generally used, made up of marital retirement points over total retirement points, is impossible to determine since the denominator keeps on growing with each creditable year of Guard or Reserve service. These two variables make it just as impossible to create a "mirror award" with Option C as they do with Option B for the Guard or Reserve member.

Conclusion

Thus seeking the “mirror award” is almost always chasing after an illusion. The conditions necessary to create it – divorce at the time of choosing what SBP benefit will apply and knowing what one’s retired pay will be – virtually never occur. Often this results in a spouse or former spouse receiving *too much* in terms of a death benefit. That benefit does not come close to matching the pension share which she or he had been getting until the death of the SM/retiree. Unless a reasonable means of sharing or shifting the cost of SBP is negotiated, the former spouse will be unnecessarily enriched.

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SILENT PARTNER is prepared by Mark E. Sullivan, a retired Army Reserve JAG colonel and the author of *The Military Divorce Handbook* (American Bar Association, 2d Edition, Aug 2011) For revisions, comments or corrections, contact him at Sullivan & Tanner, P.A., 5511 Capital Center Drive, Suite 320, Raleigh, N.C. 27606 (919-832-8507); E-mail – mark.sullivan@ncfamilylaw.com.

¹ Option A requires written consent of one’s spouse.

² Spousal concurrence in writing is also required for Option B.

³ If the RC member didn’t choose “immediate application for retirement” when responding to the 20-year letter, then there is yet another variable to throw into the mixture. The “marital fraction” – made up of retirement points gained during the marriage, divided by total career retirement points – cannot be known until the RC member decides to apply for retirement. If that is not at the 20-year mark, then there will be additional retirement points which accumulate and there's no way of figuring the value of a fraction when the denominator keeps on increasing by 50 or more points each year.