EXTRACTS FROM *DIVORCING THE MILITARY*[1] AS TO CHOOSING A SURVIVOR BENEFICIARY[2]

i. Why it Might Be Appropriate to Re-allocate the SBP Premium – and Who Should Pay for it

As explained elsewhere in these materials, the military system does not permit the creation of a divided interest to the spouse, but only a divided payment stream. As detailed in the section immediately below, there is an automatic reversion of the spousal share of those payments to the member, should the spouse die first.

In other words, the member essentially has an automatic, cost-free, survivorship benefit built into the law that automatically restores to him the ***full amount of the spouse's share*** of the lifetime benefit if she should die before him. No matter what any court might order, if the former spouse dies first, the member not only continues to get ***his*** share of the benefits, but he will ***also*** get ***her*** share, for as long as he lives.

There is little case law guidance as to what would be an appropriate weighing of risks and burdens, or why. Several courts have ruled that the SBP be kept in effect for protection of the former spouse's interest, using one theory or another, but their reasoning has often been sketchy, or faulty.

One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in *In re Marriage of Payne*.[3] The court held that ordering the member to pay for the wife's SBP gave the wife a right already enjoyed by husband, that is "the right to receive her share of the marital property awarded to her." The court adopted the "default" position for distribution of the premiums (discussed in the next section), observing that:

> The cost of the Survivor Benefit Plan is deducted from the husband-retiree's gross pension income of $2200 per month before the net remainder is divided between the parties pursuant to the permanent orders. Thus, the expense is shared equally by both parties.[4]

The military member had appealed in *Payne*, claiming that the SBP should be funded solely by the former spouse because it is "a court-created asset for her benefit alone." The appellate court rejected that argument, holding instead that the SBP is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the military pension."[5] Several other courts have

---

[1] Marshal Willick, *Divorcing the Military: How to Attack; How to Defend*, posted at http://www.willicklawgroup.com/military_retirement_benefits.

[2] These sections were subsection 8-11 set ouit at pages 80-90, with one irrelevant subsection deleted.

[3] 897 P.2d 888, 889 (Colo. App. 1995).

[4] *Id*.

[5] *Id*.

reached the same conclusion, but most of the decisions so holding did not fully discuss the math involved in the text of their decisions, or explain the policy choices for who should bear what expense.[6]

The courts holding that the SBP should be maintained seem to impliedly realize, but not explicitly state, that the members' survivorship interest in the former spouse's benefits is automatic and free, while the spousal survivorship in the member's benefits requires payment of a premium. None of the decisions goes into detail, comparing what the member or the spouse would actually receive in the event of the death of the other, or whether the results fit into the theory of equitable or community property and debt division.

The ***only*** person for whom a survivorship interest has any cost is that of the former spouse. If both parties are to share benefits, and burdens, of the assets and liabilities distributed, they must equally (or as equally as possible) bear this cost as well, just as they share the zero cost of the member's survivorship interest in the spouse's life. Otherwise one of them gets a survivorship benefit for free, and the other gets a survivorship benefit at significant cost – which would appear to violate the law all States having divorce law requiring the presumptively equal division of property.

Unless one believes that upon divorce one party is entitled to a greater share of the benefits, and a lesser share of the burdens, accrued during marriage, then it is necessary to deal with the structure of any retirement system so that the parties benefit, and are burdened, as nearly equally as may be made true.

In the military system, that would seem to require dividing the burden of the only survivorship benefit that ***has*** a cost – the one for the benefit of the spouse – between the parties, either equally, or per the default percentage-of-lifetime benefit method built into the system.

It cannot be said that even the default approach is inequitable, at least until the lifetime spousal share is less than 25%. This is so because the member has a far superior survivorship benefit, without cost, automatically, and for 100% of the spousal share. So if the member pays a greater percentage

---

[6] *Marriage of Smith* 148 Cal. App. 4th 1115, 1123, 56 Cal. Rptr. 3d 341 (2007) (trial court had jurisdiction to order the husband to elect a survivor benefit plan for the wife's benefit); *Potts v. Potts*, 790 A.2d 703 (Md. Ct. Spec. App. 2002) (survivorship interest falls within the definition of marital property); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Zito v. Zito*, 969 P.2d 1144 (Alaska 1998) (""Barring an express understanding to the contrary, an agreement for equitable division of retirement benefits earned during a marriage presumptively encompasses survivor benefits"); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993) (affirming award of SBP, reasoning that requiring the purchase of an SBP "gives the division of a nondisability military pension more of the attributes of a true property division"); *Smith v. Smith*, 438 S.E.2d 582 (W. Va. 1993) (ordering husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife's receiving nothing if husband predeceases her); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts have discretion to order spouse to maintain annuity for former spouse under SBP); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (court recognized that "to terminate [wife's] survivor's benefits jeopardizes her 29 year investment in the marital estate"); *Matthews v. Matthews*, 647 A.2d 812 (Md. 1994) (court order requiring party to designate a former spouse as a plan beneficiary does not constitute a transfer of property); *In re Marriage of Lipkin*, 566 N.E.2d 972 (Ill. App. Ct. 1991) (survivor's benefit is a separate and distinct property interest).

of the premium during the parties' mutual lifetimes, the member receives a superior benefit in return for that cost.

For those that can't see justification of an increased cost to the member to compensate for that superior, bumped-up survivorship benefit, it is possible to adjust the math (as detailed in the following section) to make sure the parties effectively bear any premiums equally.

Mathematically, the "default" position discussed in the following section distributes the premium debt proportionally to the parties' respective shares of the benefits taken – ***not*** equally, as some of the courts say they do.

Having the member bear the entire premium would only appear to be a correct result if the court determined, based on the entirety of the parties' economic positions, that the result was mandated as a matter of disparity of income. Similarly, it would be improper to have the former spouse bear the entirety of the SBP premiums, at least in those States in which the courts are required to equally distribute marital property and debts, because the benefit being accorded to the member in the event of the spouse's death is ***greater***, and there is no cost to that survivorship interest.

As a matter of logic and math, where the member has a ***free*** survivorship interest in the spouse's life, in addition to his own benefits, it seems most appropriate to either have the parties equally divide the premium, or adopt the default position for proportional payments toward that premium.

ii. How to Allocate the SBP Premium – Cost-Shifting

If the former spouse dies first, then the member automatically gets back the entirety of the monthly spousal share, for the rest of his life. There are nine basic possibilities, however, as to what the ***spouse*** should receive in the event that the ***member*** dies first. Each carries with it a different weighing of equities, rights, and responsibilities.[7]

First, there could be no SBP award to the former spouse. The lifetime benefit stream will be divided as the court indicates, but the parties will be left in an unequal position as to ***risk***, because if the member dies, the former spouse gets nothing, but if the former spouse dies, the member gets his share of the benefits, plus hers.

Second, there is the "default" – what would happen if the court deemed the former spouse to be the SBP beneficiary, at the full base amount, but took no steps to alter the ramifications of that election.

---

[7] To make this somewhat easier to visualize, I've set out nine flowcharts illustrating the math done at each step of the following nine scenarios; they are posted under the heading "Exhibits to Death and Related Subjects of Cheer" at http://www.willicklawgroup.com/military_retirement_benefits. Each presumes the division is done in a State following the "time rule," and presumes a ten-year marriage during service, out of a 20-year military career, yielding a presumptive spousal share would be 25%. The scenarios presume that the military retired pay is exactly $1,000.

The spouse would be "over-secured," to a greater or lesser extent.[8] The smaller the lifetime interest of the former spouse happened to be, the larger the share of the premium that the member would pay.[9] If the member died first, payments to the spouse would increase from $233.75 to $550. If the spouse died first, payments to the member would increase from $701.25 to $1,000.

The third scenario would have the former spouse pay the entire SBP premium. Using the same hypothetical facts, reducing the spousal share from 25% to 19.7861% would free the member from paying any portion of the premium, directly or indirectly.[10] The former spouse is still over-secured, as in the prior scenario, and the parties are still left in an unequal position regarding risks and burdens, since the member still has an entirely free survivorship interest on the spouse's life, and she is paying the entire premium for the survivorship interest on the member's life.

The fourth scenario imposes the SBP premium payment entirely on the member, by increasing the spousal share to 26.7380%.[11] The former spouse remains over-secured, as above. The entire premium falls to the member, who still has the free survivorship on the spouse's life. Shifting the premium in this way is analogous to making a spousal support award.

The fifth scenario presumes that the court wants to "equally divide" the premium, which would be accomplished by decreasing the spousal share to 23.2620%.[12] This requires decreasing the spousal share somewhat from the default, and increasing the member's share somewhat, to cause a sufficient dollar adjustment so that each pays exactly the same amount toward the premium cost that the military will take "off the top." There is some equitable logic in this idea, although it still leaves the former spouse over-secured, in that the possible survivorship that each party might receive is maximized, and they equally share both the cost of the survivorship benefit that the member has on

---

[8] Since the SBP program pays 55% of the base amount, and the maximum spousal share is 50%, the spouse would receive at least ***some*** more money in SBP than her lifetime share. If the marriage did not completely overlap the service time, then under any "time rule" formula, the spousal interest would be ***less*** than 50%. In the hypothetical 10 year marriage out of a 20-year military career, if the SBP was in place at the maximum base amount, then the death of the member would cause a jump in payments to the former spouse from 25% to 55%.

[9] In the hypothetical case where the marriage exactly overlapped the last 10 years of a 20-year career, and the gross retirement was exactly $1,000, the 6.5% SBP premium would be $65. After taking it "off the top," the military pay center would divide the remaining $935 in "disposable retired pay" 75% ($701.25) to the member, and 25% ($233.75) to the spouse. The member would effectively pay $48.75 of the premium, and the spouse would effectively pay $16.25.

[10] The 6.5% SBP premium would still be $65. After taking it "off the top," the military pay center would divide the remaining $935 in "disposable retired pay" 80.2139% ($750) to the member, and 19.7861% ($185) to the spouse. The member would effectively pay nothing, and the spouse would effectively pay $65.

[11] Again, the 6.5% SBP premium would be $65. After taking it "off the top," the military pay center would divide the remaining $935 in "disposable retired pay" 73.2620% ($685) to the member, and 26.7380% ($250) to the spouse. The member would effectively pay $65, and the spouse would effectively pay nothing.

[12] The 6.5% SBP premium is, of course, still $65. After taking it "off the top," the military pay center would divide the remaining $935 in "disposable retired pay" 76.7380% ($717.50) to the member, and 23.2620% ($217.50) to the spouse. The member would effectively pay $32.50, and the spouse would effectively pay $32.50.

the spouse's life (i.e., none), ***and*** the cost of the survivorship benefit that the spouse has on the member (the only survivorship benefit that has a cost associated with it).

As discussed above, it ***is*** possible to restrict the SBP to ***only*** secure the former spouse's lifetime interest – i.e., to arrange things so that she would get the same amount if the member died that she received while he remained alive. Notably, it is ***not*** possible to similarly restrict the ***member's*** interest; no matter what the court does, the member will retain an automatic reversion of all the money paid to the former spouse, if she dies first.[13] In the next four scenarios, then, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits.

Scenario six therefore is the same "default" as set out in scenario two, the only difference being that the base amount is lowered, from the entire retirement benefit, to only that portion of which 55% would equal the former spouse's lifetime interest, in this hypothetical case, $454.55.[14] Since the 6.5% premium is reduced to only $29.55, the member's 75% of the $970.45 of remaining "disposable retired pay" yields $727.84, and the spouse's 25% yields $242.61. The member effectively pays $22.16 toward the premium cost, and the spouse pays $7.39.

Scenario seven shifts that reduced SBP premium to the spouse by reducing her percentage of the lifetime benefit.[15]

Scenario eight shifts the reduced premium the other way, to the member, for the same reasons, and to the same effect, as set out in scenario four, but with smaller totals, since the spousal survivorship interest has been reduced.[16]

And in scenario nine, the reduced burden is equally divided between the parties, for the same reasons as set out in scenario five, but without over-securing the former spouse.[17]

Again, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits. Under 10 U.S.C. §

---

[13] There have been several cases of members taking action to accelerate that reversion by trying to kill former spouses.

[14] This is because 55% of $454.55 would be $250 – the sum awarded to the spouse.

[15] To 22.7163%, so that she receives $220.45. The member's share, increased to 77.2837%, yields the full $750 that he would have received if there had been no SBP, and the spouse thus effectively pays the entire $29.55 SBP premium.

[16] To 25.7613% of the $970.45 remaining "disposable retired pay" after deduction of the SBP premium, in this scenario, so that she continues to receive $250. The member's share, decreased to 74.2387%, yields $720.45, so that he effectively pays the entire $29.55 SBP premium.

[17] Making the spousal interest 24.2382% yields $235.22; increasing the member's share to 75.7618% increases his share to $735.23. Both parties pay $14.77 (actually, there is an odd penny, which for no good reason I allocated to the former spouse, who pays $14.78).

1408(e)(1), it is not possible to directly pay the former spouse more than 50% of the monthly lifetime military retired pay. Thus, if it is intended that the former spouse receive more than about 46 percent, and that the member is to pay the SBP premium, some mechanism other than the cost-shifting set forth above will be needed to effect that end.

The math looks harder than it really is. For those who wish to shift the premium between member and former spouse in any way, we have designed, and posted, a simple-to-operate calculator that allows the operator to calculate what the lifetime percentages of retired pay should be to effectuate any intended distribution of the premium cost, at any intended level of SBP benefit for the former spouse.[18]

iii. Choosing Between A Spouse and A Former Spouse as the Proper Beneficiary of the SBP

The United States Congress determined that as of November 14, 1986, a court with jurisdiction is explicitly empowered to order members to elect to provide SBP annuities to former spouses, irrespective of the date of divorce, or retirement.[19] The only limitation is that if the member refuses to submit the required paperwork, the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made. The written request must be filed within one year of the date of the court order.[20]

While courts have been uncertain how to characterize the nature of the SBP,[21] those squarely addressing the question have concluded that a spouse is "to be awarded a proper share of ***both*** the former husband's military retirement plan and the survivor benefit plan," because of the "'potential unfairness' to the wife should her former husband predecease her, thereby extinguishing pension rights."[22]

As detailed above, a military member has no risk of loss in a division of military retirement benefits, because the member enjoys a built-in survivorship interest in the former spouse's life – if the former spouse dies first, her entire interest reverts to him automatically. The former spouse has no such protection – she stands to lose the entire flow of benefits if he should predecease her, unless the SBP

---

[18] *See* "Universal SBP Premium-Shifting Calculator," posted for free public access and use at http://www.willicklawgroup.com/military_retirement_benefits.

[19] Pub. L. No. 99-661 (Nov. 14, 1986).

[20] 10 U.S.C. § 1450(f)(3)(B).

[21] *See Matthews v. Matthews*, *supra*, 647 A.2d 812 (Md. Ct. App.1994) (divorce court could not tell if SBP was a property right, an alimony allocation, or some kind of insurance, but in any event it was valuable, and the benefit was to be secured to the former spouse).

[22] *Johnson v. Johnson*, 602 So. 2d 1348, 1350 (Fla. Dist. Ct. App. 1992) (emphasis added); *Matthews*, *supra*.

is in place.[23] Many courts have recognized that survivorship interests accrued during marriage are a valuable property right that are part of the pension to be divided.[24]

If the parties divorce ***after*** retirement, the spouse is still generally secured, because the SBP will have gone into effect automatically; for it to ***not*** go into effect, a specific waiver of the SBP must be signed by the non-member spouse.[25] In such cases, the SBP must merely change form from "spouse" to "former spouse." Where fully-informed counsel negotiate the matter in good faith at the time of divorce, this is a straight-forward matter to negotiate, or litigate. Usually, the SBP is left in place for the soon-to-be former spouse; if the member wishes to name some other as beneficiary, some other provision is typically made to secure her insurable interest.

When the parties divorce while the member is still on active duty, however, they do so prior to the time of making an election regarding the SBP. If the matter remains unaddressed at divorce – by the machinations of the member-spouse, or innocently,[26] the now-former spouse does not have the waiver right of a current spouse. It is therefore possible for the member to cancel the SBP entirely, or to name some third party (usually, a later-acquired spouse) as beneficiary.

That is the set-up for the kind of dispute discussed here.[27] As a technical matter, a divorce court

---

[23] *See*, *e.g.*, *In Re Payne*, *supra*, 897 P.2d 888 (Colo. Ct. App. 1995) (Divorce court did not err when, after awarding wife 48% of military retirement, it adopted "default" position and had premiums deducted from gross before disposable pay was divided. The court rejected the husband's position that the SBP should be funded solely by the wife because it is "a court-created asset for her benefit alone." The court stated that SBP is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the military pension").

[24] *See*, *e.g.*, *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). *Wolff* held that trial courts are required to balance the property and debts attributable to both spouses in making awards. 112 Nev. at 1360-61. It is impossible under the current federal set-up to precisely balance the prospective benefits and burdens imposed by the survivorship scheme – the member will always have a "better deal" than the spouse could possibly get because of the nature of the SBP program. This is one of the ways in which the military retirement system is skewed in favor of the member spouse. The closest that courts can do is elect to provide some survivorship coverage each way – with the member getting such coverage automatically, and naming the former spouse the deemed beneficiary of the SBP.

[25] *See generally* 10 U.S.C. § 1447-1450.

[26] Unless divorce counsel were alert to the existence and mechanics of the SBP, they might not address the issue at all, as a matter of mutual mistake.

[27] In legalese, it could be stated that at the time of divorce the SBP was a potential future asset, the right to which accrued during the marriage, but which had not yet matured at the time of divorce. Courts typically allow for post-divorce recovery of such unmatured assets post-divorce. *See Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990) (permitting spouse to recover a portion of the proceeds of a lawsuit that was not completed until after the parties divorced, because the facts giving rise to the suit had occurred during the marriage, making those proceeds potential property "omitted" from distribution upon divorce. This has been the holding of most, but not all, cases addressing the issue. *See*, *e.g.*, *Buchanan v. Buchanan*, 207 P. 3d 478 (Wash. Ct. App. 2009) (SBP not in original Decree is an "omitted asset" that may be awarded upon later discovery); *but see Hayes v. Hayes*, 208 P.3d 1046 (Or. Ct. App. 2009) (divorce decree silent as to survivorship benefit barred division of those benefits in enforcement action filed years later).

clearly has the authority under the USFSPA to order that the former spouse be deemed the beneficiary of the SBP.[28] The question is left to the court's discretion,[29] with the only issue being whether it ***should*** do so.

Where the member has remarried by the time the court is looking at the issue, however, there can be competing equities – protection of the former spouse from divestment, on the one hand, and the member's presumptive desire to name his later spouse, on the other. The conflict is created by the fact that there can only be a single named survivor beneficiary.

Normally, in such cases, courts are keen to determine whether the former spouse or the later-acquired spouse has the larger legitimate interest to protect. This is a simple matter of comparing the marriage/service overlap of each spouse – exactly the same analysis as is done in determining the "time rule" percentage of the retirement that would be allocated to each successive spouse.

For example, if the member was married to the former spouse for 15 out of 20 years of total service, and he married the later spouse a year after the divorce from the former spouse, then the equities would seem to clearly favor the former spouse, who would have a 75% marriage/service overlap, compared to the later spouse's 20%.

Put another way, the legitimate insurable interest to be secured is much higher for the former spouse. If the retirement was worth $1,000 per month, then the former spouse would have an insurable interest of $375 per month for her lifetime to secure, while the interest of the later spouse was only $100. It would thus be much easier for the member (and he would typically be much more inclined) to provide substitute security for the later spouse than for the former spouse.

This is a discretionary (as opposed to strictly legal) decision, but it does not seem reasonable for a trial court to get dragged into a dispute as to which of the two potential beneficiaries is most "deserving" of the SBP – a dispute that would almost certainly devolve into a conflict over the causes of the original divorce, with all of the fault-based overtones that modern divorce practice tries to avoid.

Instead, it would seem to make more sense to inquire into the economics of the question, and in the absence of some compelling reason to do otherwise, provide the insurable interest security that is the SBP to the spouse with the larger insurable interest to be secured. This serves the interest of securing to each spouse to the original divorce their respective rights to the benefit stream divided upon divorce, unaffected by decisions the other makes, whether to marry, divorce, live, or die.[30]

---

[28] Pub. Law No. 99-661 (Nov. 15, 1986).

[29] *See*, *e.g.*, *Fowler v. Fowler*, 636 So. 2d 433 (Ala. Ct. App. 1994) (lower court erred in determining that it did not have discretion to award SBP, which it termed "marital property").

[30] *See In Re Payne*, *supra*, 897 P.2d 888 (Colo. Ct. App. 1995) (seeking to "preserve an existing asset" for each party – their respective interests in the military pension).