A COVENANT WITH DEATH AND AN AGREEMENT WITH HELL[1]: SURVIVOR BENEFITS IN PUBLIC AND PRIVATE PLANS

by

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December 5, 2019

[1] A.H. Grimke, *William Lloyd Garrison* (1891), ch. 16, recounting the resolution adopted by the Massachusetts Anti-Slavery Society on January 27, 1843: "The compact which exists between the North and the South is 'a covenant with death and an agreement with hell.'" The author readily concedes that this quote has been taken entirely out of context and has nothing whatsoever to do with the topic of these materials, but it made such an engaging title that it seemed obligatory to use it anyway.

TABLE OF CONTENTS

I. INTRODUCTION

A. The Big Picture and Why This is a Concern

No one likes to think about it much, but from all appearances, whether life is approached optimistically[2] or pessimistically,[3] and irrespective of willingness,[4] it appears that death is inevitable.[5]

Probably the best we can do as divorce practitioners is to acknowledge that the death of everyone involved in a divorce is certain, but of unpredictable order and timing,[6] and use that knowledge to attempt to structure our orders and decrees in such a way that as little harm as possible will befall the interests we have been employed to create or protect, and (perhaps most of all) fully inform our clients of the financial effects that will flow from the death of one party or the other.

Providing for benefits past the death of one party or the other is an essential concept which practitioners ignore at their considerable peril in malpractice.[7] Some courts have held that the scope of damages that are at stake is the value of whatever benefit the client lost – which could be the entire retirement benefits otherwise payable to the client.[8] Attorneys practicing

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[2] "Always look on the bright side of life . . . ." Monty Python, *Life of Brien* (sung during closing credits).

[3] "Life is divided into the horrible and the miserable." Woody Allen.

[4] "Down, down, down
into the darkness of the grave
Gently they go,
the beautiful, the tender, the kind;
Quietly they go,
the intelligent, the witty, the brave.
I know.
But I do not approve.
And I am not resigned."
Edna St. Vincent Millay, from *Dirge Without Music*

[5] "In this world nothing can be said to be certain, except death and taxes." Benjamin Franklin, Letter to Jean Baptiste Le Roy, 13 November 1789, in *Works* (1817), ch. 6.

[6] "Eat, Drink, and be merry, for tomorrow we die!" Common amalgam of Ecclesiastes ch. 8, v. 15, Isaiah, ch. 22, v. 13, and St. Luke, ch. 12, v. 19.

[7] For some time, courts have held attorneys handling divorces to knowledge of the intricacies of the retirement system involved in their cases. *See Aloy v. Mash*, 696 P.2d 656 (Cal. 1985).

[8] *See Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000 malpractice award against trial attorney for not knowing that he could seek division of military retirement after change in the law; attorney's original advice was correct (the retirement was non-divisible under *McCarty*), but when USFSPA passed just days before the separation agreement was signed, he missed it).

divorce law must accept that they may be held responsible for knowing about the existence, value, and methodology of division of whatever actual or potential retirement (and survivor's) benefits might exist. The potential losses to the client are catastrophic, and the resulting risks to counsel are enormous.[9]

Perhaps most unsettling, from a malpractice perspective, is the length of time such a claim can lay dormant. Several courts have adopted a "discovery rule" for attorney malpractice cases.[10] In other words, divorces involving pensions, but in which no provision was made for survivorship interests, are malpractice land mines, lying dormant for perhaps many years until the right combination of events sets them off.

There is really no question that the omission of providing for survivorship interests could come back to haunt the practitioner in the form of a malpractice action, many years after the divorce in question was concluded. The rest of these materials therefore deal with exactly what benefits are in issue, identifies the ways in which the major retirement systems in the United States might deal with those benefits, and makes some suggestions for dealing with these assets before they become liabilities.

B. Overview and Basic Mechanics of Survivorship Interests

From a retirement benefits point of view, the death of one party or the other is merely another "value-altering possibility" to be anticipated and structured into the disposition of the retirement benefits upon divorce.

These materials are intended to sketch out the effects upon the benefits flowing from public (military, Civil Service, and Nevada State PERS) and private (ERISA[11]-governed) retirement systems that should be expected upon the death of either the plan member/participant[12] or the

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[9] I have been hired as an expert witness in several such cases in the past several years, in which liability was sought against practitioners who did not properly see to securing survivorship benefits for a spouse. Now retired Edwin Schilling, Esq., of Aurora, Colorado, once estimated that 90% of his malpractice consultations involve failure to address survivor beneficiary issues. Lawyer's Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956).

[10] *See Petersen v. Bruen*, 106 Nev. 271, 792 P.2d 18 (1990); *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988).

[11] "The Employee Retirement Income Security Act" of 1974, the federal law (along with the 1984 "Retirement Equity Act," or "REA") that created "QDROs," is by its own terms inapplicable to any governmental plans, including civil service, military, or state retirement plans. 29 U.S.C. §§ 1003(b)(1) & 1051. It largely controls by federal preemption the disposition of retirement and survivorship interests of those employed in the private sector.

[12] Referred to in the various plans and materials as the employee, the member, or the participant.

non-member/participant spouse,[13] and to show what, if anything, can be done by the practitioner to alter those effects.

As a general rule, the payment of defined-benefit ***retirement*** benefits, *per se*, end with the life of the person in whose name the benefits were earned. For a spouse – or former spouse – to continue receiving money after death of the plan member or participant, there generally must be some specific provision made for payments after the death of the named retiree.

Basically, the two ways of doing this are to divide the retirement benefits themselves (for the kinds of plans that permit that to be done), or to provide a separate, survivorship interest payable to the beneficiary upon the death of the person who earned the retirement (for the kinds of plans that cannot be divided into two separate retirements, and for which only a single payment stream is divisible).

For an ERISA-based defined benefit plan which is divided before actual retirement of the employee, it is usually possible to divide the benefit into two essentially separate retirements – one for each spouse, so that each can be unconcerned with the life, or death, of the other, and "survivor's benefits" become a nonsequitur.

For most ***public*** plans, however, including the military, PERS, and the Civil Service, only the payment stream (but not the retirement itself) can be divided. The payment of all ***retirement*** benefits, *per se*, ends with the life of the person in whose name the benefits were earned. It is critical to realize that in those retirement systems, the effects of the death of one party are not symmetrical to the effects of the death of the other.

The structure of the plan determines what happens to the ***spousal*** portion of the payment stream if the spouse dies first. For military and PERS cases, for example, the spousal share of the lifetime benefits revert to the employee, as detailed below.

What may happen if the ***employee*** dies first is much more potentially variable, and complex. For a spouse – or former spouse – to continue receiving money after death of the employee, there must be specific provision made for payments after the death of the employee, by way of a separate, survivorship interest payable to the former spouse upon the death of the employee.[14]

It is worth pausing to note that the various different retirement schemes, public and private, have a dizzying array of survivorship vehicles, which range from going into effect

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[13] Usually referred to as the spouse, former spouse, non-employee, or alternate payee.

[14] *See*, *e.g.*, *Smith v. Smith*, 438 S.E.2d 582, 584 (W. Va. 1993) ("The survivor benefit plan is designed to provide financial security to a designated beneficiary of a military member, payable only upon the member's death in the form of an annuity. Upon the death of the member, all pension rights are extinguished, and the only means of support available to survivors is in the form of the survivor benefit plan").

automatically unless specific steps are timely taken to prevent it,[15] to being lost forever by silence unless very specific steps are timely taken to preserve them.[16] There is no automatic statutory entitlement to a survivor's benefit in the military system; the USFSPA is essentially an "enabling statute," requiring an agreement or order for a former spouse to have survivorship benefits.[17]

Yet even within that analytical framework, courts have come to curiously illogical conclusions as to the interplay between the SBP statutory scheme and "normal" State divorce law. One court ignored most of the statutory language indicating that the SBP can be ordered to be provided to a former spouse, overriding a divorce decree so providing in order to permit the member to alter the beneficiary designation to his later "surviving spouse."[18]

Yet another court used exactly the same statutory authority to override a State statute and overturn a trial court's finding that the former spouse's right to be the beneficiary of the SBP lapsed permanently when she had remarried to another before the age of 55, but later divorced that person, since the federal statute permits the former spouse in such circumstances to be reinstated as the SBP beneficiary.[19]

There are similarly large disparities in how the cost of survivorship benefits is paid. Some retirement plans, like the Civil Service system, allow one party or the other,[20] or both parties

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[15] For example, the standard death benefit payable after retirement and after the death of the employee in an ERISA-governed plan is a "qualified joint and survivor annuity," or (unpronounceably) "QJSA." *See*, *e.g.*, Marvin Snyder, VALUE OF PENSIONS IN DIVORCE (3d. ed., Panel Publishers 1999), at 22.

[16] In military cases, to initiate a "deemed election" of the Survivor's Benefit Plan, the former spouse must file a request on the correct form with the appropriate Service Secretary requesting that the election be deemed to have been made within one year of the date of the court order. 10 U.S.C. § 1450(f)(3)(C).

[17] *See*, *e.g.*, *Williams v. Williams*, 37 So. 3d 1171 (Miss. 2010) (a decree providing that the wife would receive "all survivor's benefits otherwise accorded to her by law" provided no benefits at all since SBP had not been elected by agreement or court order).

[18] *Dugan v. Childers*, 539 S.E.2d 723 (Va. 2001) (citing federal preemption as the reason 10 U.S.C. § 1450 prevented a former spouse from imposing a constructive trust on sums paid to a later spouse, despite the agreement in the divorce decree to do so); *King v. King*, 483 S.E.2d 379 (Ga. Ct. App. 1997).

[19] *Smith v. McIntosh*, ___ S.3d ___ (2011 WL 1205670, Ala. Civ. App., Apr. 1, 2011) (holding that the former spouse was not barred from being made the SBP beneficiary, but remanding for a determination of whether the former spouse or current spouse should actually be the named beneficiary).

[20] If the intent is to have the former spouse only pay the premium, then the OPM should be directed to divide the "self only" annuity, defined as the total monthly benefit before deduction of any survivorship premium, and deduct the entire premium from the former spouse's share.

together,[21] to bear the cost of the survivorship benefits, so long as they are paid by way of reduction in the monthly retirement payments.[22] Other plans, like those governed by ERISA, give no real choice in the matter; if the benefits are not waived by the spouse, then the sum payable during life is actuarially adjusted to compensate for the cost of the survivorship interest.

Whether a survivorship interest for the non-employee spouse is in place – and who pays for it – has a major impact on the net benefits flowing to each of the parties to a divorce involving any form of retirement benefit.

II. DEATH BENEFITS IN THE MILITARY RETIREMENT SYSTEM – THE SURVIVOR BENEFIT PLAN ("SBP")

A. Introduction

Arguably, the military retirement system provides the most arcane, convoluted, and illogical of the death and survivorship interests of any major retirement system. These materials deal with what benefits are in issue, sketches how they work, and makes some suggestions for dealing with those assets before they become liabilities, specifically addressing how the practitioner can achieve cost-shifting in one direction or the other as might be appropriate in a given case.

The military retirement system is one of those in which the payments (but not the retirement itself) can be divided. Unless a survivorship benefit ("SBP") is in place, all benefits to the former spouse end if the member dies. If the former spouse dies first, however, whatever she was receiving during life reverts automatically and is paid to the member for the rest of his life.

Yet even within that analytical framework, courts have come to curiously illogical conclusions as to the interplay between the SBP statutory scheme and "normal" State divorce law. One court ignored most of the statutory language indicating that the SBP can be ordered to be provided to a former spouse, overriding a divorce decree so providing in order to permit the member to alter the beneficiary designation to his later "surviving spouse."[23]

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[21] If the intent is to have the parties both pay part of the premium, the OPM should be directed to divide the "gross" annuity, defined as the total monthly benefit after deduction of any survivorship premium.

[22] 5 C.F.R. § 838.807.

[23] *Dugan v. Childers*, 539 S.E.2d 723 (Va. 2001) (citing federal preemption as the reason 10 U.S.C. § 1450 prevented a former spouse from imposing a constructive trust on sums paid to a later spouse, despite the agreement in the divorce decree to do so); *King v. King*, 483 S.E.2d 379 (Ga. Ct. App. 1997).

Yet another court used exactly the same statutory authority to override a State statute and overturn a trial court's finding that the former spouse's right to be the beneficiary of the SBP lapsed permanently when she had remarried to another before the age of 55, but later divorced that person, since the federal statute permits the former spouse in such circumstances to be reinstated as the SBP beneficiary.[24]

B. History of SBP Elections, and Mechanics of Election of Beneficiary by the Member and "Deemed Election" of the Former Spouse

Former spouse coverage was not possible before 1983, and has evolved considerably over the years, as it was made no more expensive than current spouse coverage, and then stipulations to provide such coverage were made enforceable.

In 1986, Congress amended the USFSPA so that State courts could ***order*** that former spouses be members' beneficiaries.[25] If a member elects, or is "deemed" by a court to have elected, to provide the SBP to a ***former*** spouse, the member's current spouse and children of that spouse cannot be beneficiaries.[26] Generally, an election to make a former spouse an SBP beneficiary is not revocable; if the election was pursuant to court order, a superseding court order is necessary to change it.[27]

To initiate a "deemed election," a former spouse was previously required to file a written request with the appropriate Service Secretary within one year of the date of the court order requesting that the election be deemed to have been made.[28] As of September 30, 2008, the election was required to be made, not just in writing, but on the DD-2656-10 form to be a valid election.[29] There are various other technical requirements.

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[24] *Smith v. McIntosh*, ___ S.3d ___ (2011 WL 1205670, Ala. Civ. App., Apr. 1, 2011) (holding that the former spouse was not barred from being made the SBP beneficiary, but remanding for a determination of whether the former spouse or current spouse should actually be the named beneficiary).

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

[26] 10 U.S.C. § 1448(b)(2). The Finance Center will notify the member's spouse of the election to make the member's former spouse the SBP beneficiary, but the current spouse's consent is not required. 10 U.S.C. § 1448(b)(3)(D).

[27] 10 U.S.C. § 1450(f)(1)-(2).

[28] 10 U.S.C. § 1450(f)(3)(B).

[29] Memorandum dated May 30, 2008, from Michael L. Dominguez, Principal Deputy, Office of Under Secretary of Defense, on file with the author.

It should be noted that the ***amount*** of the survivorship interest is variable, and provides planning opportunities for counsel. The maximum SBP is selected if the entire retired pay is selected as the "base amount." The smaller the base amount selected, the smaller the survivor annuity – and the smaller the lifetime premium paid to supply it. Whatever the base amount selected, cost of living adjustments increase a base amount so as to keep it proportionally the same as the amount initially selected.

No matter what any court orders, the military pay center can ***only*** take the premium "off the top" of the monthly payments of the regular retirement.[30] Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member effectively pays 75% of the SBP premium.

It ***is*** possible to effectively cause the member, or the spouse, to bear the full financial burden of the SBP premium, but doing so requires indirectly adjusting the percentage of the monthly lifetime benefits each party receives. An explanation of why such shifting might be appropriate, and how to actually do so, is set out below.

If the designation of a former spouse as beneficiary is made by a member, it technically is to be written, signed by the member, and received by the Defense Finance and Accounting Service within one year after the date of the decree of divorce, dissolution, or annulment.[31] But, as a practical matter, this has not been nearly so much a bright line test as might be thought.

At the time of the election, the member must submit a written statement to the appropriate Service Secretary. The statement must be signed by both the former spouse and the member, and state whether the election is being made pursuant to the requirements of a court order or a written voluntary agreement previously entered into by the member as a part of or incident to a divorce, dissolution, or annulment proceeding. If pursuant to a written agreement, the statement must state whether such a voluntary agreement was incorporated in, ratified or approved by a court order.[32]

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[30] The Department of Defense also asked Congress to change ***this*** aspect of the SBP program, requesting that court orders, or stipulations, could specify who was to pay the premium. Department of Defense, A Report to Congress Concerning Federal Former Spouse Protection Laws at 23 (2001). Congress has not acted.

[31] 10 U.S.C. § 1448(b)(3)(A).

[32] 10 U.S.C. § 1448(b)(5).

Anecdotal accounts, however, suggest that, informally, DFAS has adopted the position that a member divorced prior to retiring ***actually*** is to be provided the opportunity to name a former spouse as the SBP beneficiary until the last day of military service within which to name his former spouse as the beneficiary, even if that last date of service is years after the date of divorce.

The Services, additionally, have sometimes been quite liberal in granting "administrative corrections" at the requests of members, even years after a divorce, when spouse coverage was in effect rather than "former spouse" coverage, but premiums were paid and the members claimed that they "mistakenly assumed that [the former spouse] remained the covered beneficiary following the divorce since SBP costs continued to be withheld."[33]

At other times, however, the technical requirements can defeat "expressions of intent, however clear," to name a former spouse as SBP beneficiary, because such expressions "do not constitute substantial compliance with specific statutory and regulatory requirements."[34]

The situation is quite different when the former spouse sends in a "deemed election" after a court orders the beneficiary designation, but without the active cooperation of the member. In fact, the matter of "deemed elections" and former spouse eligibility for SBP payments presents the single biggest malpractice trap in this area, at least when it is attempted without the member's cooperation.

For many years, it was widely believed that the one-year period in which a former spouse must request a deemed election ran concurrently with the one-year period in which a member

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[33] *See*, *e.g.*, Memorandum dated February 20, 1997, from Gary F. Smith, Chief, Army Retirement Services, on behalf of the Secretary of the Army, to Director, DFAS, re: "Administrative Correction of SBP Election – Johnson, Alfred H. III" (on file with author) noting a 1994 divorce decree requiring him to maintain coverage for his former spouse and the member's 1997 request for a change in the SBP election from "spouse" to "former spouse," and directing collection of the cost refund that was paid to the member be collected, and that the records be corrected to show former spouse coverage.

[34] *Bonewell v. U.S.*, 111 Fed. Cl. 129 (Fed. Cl. 2013) (affirming Secretary of the Air Force refusal to grant correction of military records deeming former spouse the SBP beneficiary where the member had submitted a DD Form 2558 (Permission to Start, Stop Or Change An Allotment) not a DD Form 2656 (Survivor Benefit Plan (SBP) Election Statement For Former Spouse) because it did not "substantially comply with the requirement" of 10 U.S.C. § 1448(b). Stating that the role of the AFBCMR was not to construe or enforce court orders, reconcile conflicting court orders and statutes, or decide, in effect, claims disputes between two or more private parties, it held that no "injustice" would normally be found when providing the SBP to one person meant removing it from another, despite its finding that "There is no doubt that plaintiff has suffered, and continues to suffer, from the operation of a statutory scheme that punishes former spouses who are entitled to a SBP annuity pursuant to a divorce decree and, due to the amicable nature of the divorce and the repeated assurances of the retiree, have no reason to suspect that the retiree did not file the proper paperwork. While the SBP statute allows individuals like plaintiff to protect themselves by seeking a deemed election of former spouse coverage, there is no mechanism for advising them of this right, even if the relevant military service has been made aware of the divorce through other means.")

must make the election after the divorce. It was therefore thought that the former spouse simply lost the SBP designation entirely if he or she waited until the member's one-year election period ended.

Because the rules for members' designation of beneficiaries, and former spouse ***deemed*** elections are provided by different sections of law enacted at different times, however,[35] the prior "common knowledge" is not correct; the actual rules are slightly more flexible, much more complicated, and a bit illogical in application.

If the original divorce decree is silent as to the SBP (or perhaps just so unclear as to make the original order unworkable), the spouse might be able to extend the period within which he or she can request a deemed election by returning to court after the divorce and obtaining an order stating that the spouse is to be deemed the SBP beneficiary. This is because the ***member*** is obliged to make the election "within one year after the date of the decree of divorce, dissolution, or annulment,"[36] whereas the ***former spouse*** must make the request "within one year of the date of the court order or filing involved."[37]

Thus, if there was ***no*** previous order giving a right to the former spouse to be the SBP beneficiary, the one-year deemed election period runs from the date of a post-divorce order concerning the SBP.[38] This is true for orders that issued prior to the effective date of the SBP deemed beneficiary law, as well as orders that inadequately attempted to provide for the SBP, or omitted all mention of the benefit.[39]

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[35] *Cf*. 10 U.S.C. § 1448 *with* 10 U.S.C. § 1450.

[36] 10 U.S.C. § 1448(b)(3)(A).

[37] 10 U.S.C. § 1450(f)(3)(B); Claims Case No. 99102801 (July 21, 2000, *aff'd*, Dept. of Defense Deputy Gen'l Counsel, March 8, 2002, http://www.dod.mil/dodgc/doha/claims/military/99102801.html. Apparently, decisions previously made by the Comptroller General's Office were deferred to the Department of Defense, Defense Office of Hearings and Appeals ("DOHA").

[38] *See*, *e.g.*, Comp. Gen. B-232319 (*In re Minier*, Mar. 23, 1990), 1990 U.S. Comp. Gen. Lexis 319; Comp. Gen. B-226563 (*In re Early*, Mar. 2, 1990), 1990 U.S. Comp. Gen. Lexis 449; Comp. Gen. B-247508 (Sept. 2, 1992).

[39] As an aside, this is true even when the divorce court is unsure how to characterize the benefit. In one case, the court made a point of saying that it could not tell if the 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, even though she did not qualify to receive a portion of the military retirement benefits themselves because the marriage at issue did not overlap the military service. *See Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994).

However, once a valid court order is issued requiring coverage, the one year period begins to run, and any subsequent court order that merely reiterates, restates, or confirms the right of coverage as SBP beneficiary cannot be used to start a new one-year election period.[40]

This is where the complications and illogic come in. Presume three identical divorces on the same day. In the first case, the attorney, who knew almost nothing about military retirement benefits law, did not even know there was an SBP to allocate. The second knew that something had to be done, and so put a statement in the Order verifying that the former spouse was to be the beneficiary. The third not only knew to secure the right, but knew about the deemed election procedure, sent the required notice in, etc.

One year and one day after the divorce, the ***third*** former spouse's rights would be secure. The ***first*** former spouse could go back to court at any time (prior to the member's death) to get a valid order for SBP beneficiary status, and then serve the pay center. The ***second*** former spouse, however, whose rights were supposed to be "secured" by the judgment, would be entirely without a remedy (except a malpractice claim against the divorce attorney).

It makes little sense for the law to protect the putative rights of those who do not even try to secure rights upon divorce, while denying any protection to those who believe they have already litigated and received a valid court order protecting those same rights, but that is the bottom line of the law as it now stands.[41] Even the Department of Defense has recognized the unnecessarily harsh results that are produced by the current law,[42] but Congress has not yet taken any action to correct the situation.

In addition to the conditions and difficulties mentioned above, practitioners should keep in mind (and advise their clients) when dealing with the SBP, that an annuity payable to a widow, widower, or former spouse is "suspended" if the beneficiary remarries before age 55.[43]

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[40] Comp. Gen. B-244101 (*In re: Driggers*, Aug. 3, 1992); 71 Comp. Gen. 475, 478 (1992). The current regulations say that a "modification" order must actually change something before the one-year period will start over from the date of the modification order. DoDFMR 7000.14-R, Vol. 7B., Chap 43, 430504.C.

[41] "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* (1881).

[42] *See A Report to Congress*, *supra* (recommending repeal of the one-year limitation). This is not a new position. A memorandum to Congress in 1991 recommended extending the period in which application could be made from one year to five. *See* "DoD Report on The Survivor Benefit Plan, August, 1991," under cover entitled "A Review of the Uniformed Services Survivor Benefit Plan (SBP) and Report on the Pending Supplemental Plan and Open Enrollment Period, Prepared by Department of Defense, October, 1991," in turn attached to correspondence dated October 1, 1991, from Christopher Jehn, Assistant Secretary of Defense, to Hon. Les Aspin, Chairman, House Armed Services Committee. Congress took no action then, either.

[43] 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

At first blush, this would have counsel advise former spouse clients to ***not*** remarry prior to the relevant age, unless willing to forgo continuing payment of the SBP benefits.[44] However, as discussed more thoroughly below, there may be a counterintuitive benefit to both the member and the former spouse to doing precisely the opposite, and encouraging former spouse remarriage before age 55.

Notably, none of the various time limits and statutes of limitations appear to be applicable to proceedings in the Board for Correction of Military Records, which has "broad remedial and discretionary powers to correct records."[45]

There appear to be five separate possible effects of a death on a couple in which one party is or was a member of the armed forces, depending upon whether death is before or after retirement, and before or after divorce, and which of the parties has died. Nothing stated below has any effect on service life insurance, which is a separate topic discussed below.

C. Death of Member Before Retirement and Before Divorce

Whether everyone is living happily together or not, if the member dies before a divorce is final,[46] the spouse is the recipient of certain benefits made available for the survivors of active duty military personnel, under 38 U.S.C. § 1311(a), which created a program called Dependency and Indemnity Compensation ("DIC"). DIC payments have been payable to the survivors of any veteran who died after December 31, 1956, from a service-connected or compensable disability.[47] DIC payments are not made to persons divorced from members.[48]

If a person happens to be a recipient of both DIC payments and payments under the Survivor's Benefit Plan ("SBP") explained below, all DIC payments are subtracted from the

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[44] This is strictly a legal analysis, and I take no position herein on the moral or other ramifications of cohabitation, unlike some pundits: "A fate worse than marriage. A sort of eternal engagement." Alan Ayckbourn, *Living Together* (1975).

[45] *Bates v. United States*, 453 F.2d 1382 (Ct. Cl. 1972), *citing* 10 U.S.C. § 1552(b); *Pride v. United States*, ___ Fed. Cl. ___ (No. 97-394C, May 18, 1998) (time period for widow of member to apply for correction of records to name her as SBP beneficiary did not run from the member's death in 1979, but from 15 years later when benefits payable to the children stopped and she obtained an order correcting designation to name her as beneficiary, when she had not been notified of member's failure to name her upon retirement).

[46] This scenario could lead to different results in those States in which separation or the filing for divorce has a greater legal effect.

[47] 38 U.S.C. § 410(a). *See* Pub. L. No. 84-881, 70 Stat. 862, 867 (Aug 1, 1956).

[48] *See* 38 U.S.C. §1311(a)(2).

SBP payments.[49] However, certain supplements to the DIC benefits, for support of a dependent child or because of certain disabilities, do ***not*** get offset against SBP.[50] DIC payments are not taxed, and are therefore more valuable than the (taxable) SBP payments that would otherwise go the survivor.

Previously, the rule was that if the survivor remarried, DIC payments were permanently terminated,[51] even if the second marriage ended by death or divorce.[52] However, a rule effective December 16, 2003, permitted former spouses receiving DIC to retain the benefits despite their remarriage – so long as they were at least 57 years old at the time of remarriage. Those that remarried, over 57 years old but prior to December 16, 2003, could have their DIC benefits restored, so long as they applied for it by December 15, 2004.

Further, if the former spouse was receiving both DIC and SBP, and the remarriage occurred when the former spouse was over 55 years, the SBP payment is apparently increased to the full amount (in other words, the DIC offset is replaced by additional SBP dollars, leaving the only effect one of taxation).[53]

D. Death of Member Before Retirement and After Divorce

This is a most dangerous situation for a former spouse. As noted in the section above, spouses lose DIC eligibility upon divorce. And the member could name another survivor beneficiary during the period before retirement. In other words, the former spouse risks total divestment if the member dies during the period between divorce and the member's actual retirement.

The only practical method of ameliorating this risk other than having an order in place naming the former spouse as SBP beneficiary would appear to be through private insurance.[54] The problem is that few service members carry significant sums of secondary private insurance.

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[49] 10 U.S.C. § 1451(c)(2).

[50] *See* 38 U.S.C. § 411(b)-(d).

[51] Pub. L. No. 101-508, § 8004, 104 Stat. 1388-343 (Nov. 5, 1990).

[52] Remarriage has been defined as "The triumph of hope over experience." Samuel Johnson, *Life of Boswell*, vol. 2, at 128 (1770).

[53] *See*, *generally*, Benjamin Franklin, *In Praise of Older Women*.

[54] ***Not*** through SGLI, as set out in the last subsection of this section, since it is not secure.

It is worth pausing for a moment to clarify that any former spouse who will be the recipient of retirement benefit payments if her former spouse lives, but will not get such money if he dies, ***definitionally*** has an "insurable interest" in the life of the member (this is true for military or non-military cases). The matter is one of fact, not a matter of discretion, award, or debate.[55] Anecdotal accounts indicate that some insurers are reluctant to issue private policies of insurance without some court order indicating that the intended beneficiary (the former spouse) is entitled to insure the life of the other party. Attorneys for former spouses should therefore make a point of reciting the fact of such an interest on the face of the decree.

The survivor of a member who died while still on active duty is not ***necessarily*** excluded from receiving SBP benefits. The Finance Centers will honor a member's election to treat a former spouse as the SBP beneficiary if the member died after: (1) becoming eligible to receive retired pay; (2) qualifying for retired pay but not yet having applied for or been granted that pay; or (3) completing twenty years of service, but not yet completing ten years of active ***commissioned*** service needed for retirement as a commissioned officer.[56] The procedural requirements are the same as in other cases.

Additionally, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty[57] eligible to receive SBP. This has apparently created a ***pre-retirement survivor annuity***, for spouses or former spouses.

There is not yet a body of published authority dealing with the details of this benefit, but some developments indicate the contours of applying this legal change in the real world.

Theoretically, the election of the former spouse as SBP beneficiary would occur in the original divorce proceedings, and be on file during the member's lifetime. However, as discussed in the "deemed election" and "choosing between a former spouse and current spouse" sections above and below, things do not always happen in that order, or that cleanly.

It now appears that if the member dies during a time in which litigation has begun, even if it has not yet been concluded, as to who should be the SBP beneficiary, DFAS will conform

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[55] "Insurable interest" survivorship provisions are found throughout various federal regulations, as an ***alternative*** to covering a spouse or former spouse (i.e., if no such person exists); it refers to any person who has a valid financial interest in the continued life of the member. *See*, *e.g.*, 10 U.S.C. §§ 1448(b) & 1450(a)(1); 10 U.S.C. § 1450(a)(4).

[56] 10 U.S.C. § 1448(d)(1).

[57] Essentially defined as virtually any cause of death not experienced while AWOL or otherwise at odds with the military authorities.

its records to designate whichever beneficiary is ultimately named as the appropriate beneficiary by a court of competent jurisdiction.[58]

E. Death of Member After Retirement and Before Divorce

This was apparently the scenario contemplated when the SBP was created in 1972, to provide a monthly annuity to spouses and dependents of retired members of the Uniformed Services. It largely replaced an earlier survivor's plan known as the RSFPP,[59] which is of little importance here. All members entitled to retired pay are eligible to participate in the SBP,[60] under which a survivor's annuity is payable after a member's death.[61]

Some members retired ***before*** 1972 are nevertheless participants in the SBP, since Congress has provided a number of "open enrollment periods" or "open seasons" during which non-participants could join the program, and those who had selected less than the full amount of benefits could increase their level of participation. Those choosing to begin or increase their participation in the SBP program during an open season are also faced with paying an additional retroactive premium.

The SBP is not divisible. It can be made to cover more than one person in certain circumstances (as in a spouse and dependent child), but it cannot be divided between a spouse and former spouse, or between two former spouses.[62]

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[58] *See* April 15, 2009, letter from Scott Lafferty, Assistant Counsel, Military and Civilian Pay Law, DFAS Office of General Counsel, to Richard L. Crane, Esq., Willick Law Group, relating to *Mason v. Cuisenaire* Former Spouse SBP Annuity Claim, posted under the title "Letter from DFAS re: Benefits" under the *Cuisenaire* heading at http://www.willicklawgroup.com/appeals.

[59] The Retired Serviceman's Family Protection Plan (RSFPP) was originally known as the Uniformed Services Contingency Option Plan of 1953, enacted by Pub. L. No. 83-239, 67 Stat. 501 (Aug. 8, 1953). The name was changed by Pub. L. No. 87-381, 75 Stat. 810 (Oct. 4, 1961). The RSFPP is described at 10 U.S.C. § 1431, *et seq*. That program was generally considered a failure due to the very low participation rate of eligible members.

[60] 10 U.S.C. § 1448(a)(1)(A).

[61] 10 U.S.C. § 1447 *et seq*.

[62] The military retirement system has no provision for division of a survivorship interest. The absence of such a provision works hardships of unjust enrichment and dispossession. Members' political pressure groups, former spouses' political pressure groups, and the American Bar Association have all stated that this requires correction, and the Department of Defense has recommended that the SBP be made divisible among multiple beneficiaries. *See A Report to Congress Concerning Federal Former Spouse Protection Laws*, *supra*. Congress has taken no action to date.

The SBP applies automatically to a member who is married or has at least one dependent child at the time the member becomes entitled to retired pay, unless the member affirmatively elects not to participate in the SBP.[63] The member's spouse must be notified of any attempt by a member to not designate a spousal SBP interest,[64] and must consent to any election not to participate in the SBP, to provide an annuity for that spouse at less than the maximum level, or to provide an annuity for a dependent child but not for the spouse.[65]

Where the spouse did not consent to non-coverage, and no "special circumstances" are present, the spouse can petition for "instatement" of the benefits later, even after the member's death.[66] The spouse can be named SBP beneficiary even where he or she has little or no time-rule percentage of the retired pay itself.[67]

A dependent child can only be an SBP beneficiary if the child is also one of the following: (1) the child of the former spouse who is the beneficiary; or (2) the child of a current spouse who is the beneficiary, or who has consented to provide the benefit to the child only; or (3) if the previously-named former spouse beneficiary is no longer still alive.[68]

The SBP is funded by contributions taken out of the member's retired pay. For members entering service before March 1, 1990, premiums are the lesser of the amount computed by two tests. First, 2.5% of the first $572[69] of the base amount, plus 10% of the remaining base amount. Second, 6.5% of the base amount. For members entering service on or after March 1, 1990, SBP premiums are 6.5% of the base amount. Premiums continue indefinitely.

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[63] 10 U.S.C. § 1448(a)(2).

[64] Spousal notification is mandatory. *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990), *citing* 10 U.S.C. § 1448(a)(3)(A) (1976) (holding, however, that the relevant statute of limitations for making such a claim had expired). "The military's failure to notify the member's spouse voids the member's election not to participate in the SBP." *Id*., *citing Barber v. United States*, 676 F.2d 651 (Ct. Cl. 1982); *Trone v. United States*, 230 Ct. Cl. 904 (1982).

[65] 10 U.S.C. § 1448(a)(3)(A).

[66] *See McCarthy v. United States*, 10 Cl. Ct. 573 (1986), *aff'd*, 826 F.2d 1049 (Fed. Cir. 1987).

[67] *See Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994); *In re Marriage of Ziegler*, 207 Cal. App. 3d 788, 255 Cal. Rptr. 100 (1989) (spouse with no interest in the military retirement benefits could be ordered maintained as SBP beneficiary as security for member's support obligation); *Hipps v. Hipps*, 597 S.E.2d 359 (Ga. 2004) (same; Survivor's Benefit Plan served as security for alimony award in the event that husband predeceased wife).

[68] 10 U.S.C. § 1448(b)(4). In any event, for "child only" designations, the benefits continue only until the child is 18 years old (or 22, if a full-time student). 10 U.S.C. § 1447(5).

[69] Amount effective as of January 1, 2003. It is adjusted annually.

Beginning October, 2008, however, SBP premiums stop, with benefits still fully payable, once premiums have been paid for 30 years ***and*** the member reaches the age of 70.[70]

The maximum amount of the standard SBP annuity for a beneficiary under age 62 or a dependent child is 55 percent of the elected amount of the member's base retired pay[71] as adjusted from time to time for cost of living increases.[72]

Previously, SBP payments were reduced for a beneficiary who was 62 or older, although an expensive supplement was developed which, if purchased, eliminated the reduction.[73] Continued political pressure resulted in elimination of the Social Security offset, phased in over three and a half years starting in October, 2005, and ending April, 2008.[74] The SSBP premiums were phased out; at the end of the adjustment period, all SBP recipients should receive 55% of the base amount indefinitely, regardless of age.

The bottom line is that it is possible for a military member to provide for survivorship benefits for a spouse after retirement, almost automatically. This was its original purpose.

F. Death of Member After Retirement and After Divorce

This is the classic divorce scenario. Whether divorce occurs before or after retirement, it is usually expected that both parties will continue to live until after the member retires from active duty, and the SBP process structurally contemplates that beneficiary election, or deemed election, will occur promptly after a divorce.

This is where most divorce court litigation of SBP beneficiary designations should be expected to occur, with the resulting court orders determining the recipient of the survivorship interest. As explained in detail throughout the surrounding sub-sections, however, real-world events can often upset the anticipated orderly process, with a host of interesting resulting ramifications.

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[70] Pub. L. No. 105-261, § 641 ___ Stat. ___ (Oct. 17, 1998).

[71] As computed under 10 U.S.C. §§ 1401-1401a.

[72] 10 U.S.C. § 1451(a)(1)(A).

[73] Criticism of the lowering of benefits at age 62 led to the development of a "high option" supplement known as the "Supplemental Survivor Benefit Plan," or SSBP. *See* Pub. L. No. 101-189, 103 Stat. 1352 (Nov. 29, 1989). Under the supplement program, payment of additional premiums could increase the survivor's benefits by five percent for each SSBP unit purchased. Unlike the SBP itself, which the government theoretically subsidizes to the extent of 40%, the SSBP was designed to be actuarially neutral – i.e., to neither save nor cost the government any money. Thus, the increased coverage came at a significantly increased cost.

[74] Pub. L. No. 108-375 § 644, ___ Stat. ___ (2005).

G. Death of Spouse

In marked contrast to the multiple line-drawing and subtle distinctions discussed above regarding the death of a member, the death of a spouse has a very simple effect – the member is freed from all relevant restrictions, claims, and costs.

If the spouse dies before retirement (whether the parties are married or divorced), no spousal consent is needed to waive the SBP. If the spouse dies during marriage but after retirement, SBP premium deduction stops as soon as the military pay center is informed of the spouse's death.

If the former spouse dies after retirement and divorce, both the spousal share of current military retired pay and any SBP benefits in the spouse's name revert to the member – they may not be left to anyone by will or intestate succession.[75] As of 2006, Congress permitted a member to elect a new survivor beneficiary for the SBP upon the death of a current beneficiary.[76]

And, finally, if the former spouse dies after divorce, retirement, ***and*** after the death of the member, the benefits simply stop.

H. Mathematical Mechanics of the SBP – Who Gets How Much If the Other Party Dies

The mathematics of what happens to one party if the other should die is actually pretty straightforward.[77]

Suppose a couple who have been married for the entire military career. Using artificial numbers, if the retirement was exactly $1,000, each party would receive $500. If there was no SBP, if the member dies, the spouse would receive nothing thereafter. If the spouse dies, though, the member would receives his $500 ***and*** her $500 – a total of $1,000 for life. This

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[75] 10 U.S.C. § 1408(c)(2).

[76] John Warner National Defense Authorization Act for Fiscal Year 2007 (H.R. 5122, 109 Cong. 2d Sess. (2006); 10 U.S.C. § 1448(b)(1). This benefit was apparently lost as of 2013 by reason of internal administrative determinations, but was restored in the 2016 Defense Authorization Act, with an open season to make new spouse designations until November 24, 2016.

[77] Some folks get lost in the math; if this happens, step through the nine flowcharts posted at http://www.willicklawgroup.com/military_retirement_benefits under the title "Exhibits to Death and Related Subjects of Cheer" and it will be rendered easy.

would clearly be an inequitable result in any property division scheme requiring an equal division of property upon divorce.

With an SBP at the full maximum amount, the total retired pay is reduced by $65. The remaining $935 would be equally divided between the parties for life ($467.50 per month per party in lifetime benefits). If the spouse dies, the premiums end, and member gets his $500, ***plus*** the full amount of the spousal share (another $500), totaling $1,000, for life. If the member dies, the spouse would receive 55% of the base amount, for life – $550. In other words, the member will ***always*** have superior rights, and a greater upside, even if the parties exactly split the premium. It is built into the system. He gets a $500 increase on her death; her maximum increase is $50.[78]

Such a retirement division would treat the parties equally, however, at least as to cost. The member's benefit is still vastly superior to that of the spouse, so while they share the cost equally, the member gets a whole lot more out of that cost than the spouse does.

The equities are not much different even where the marriage and service overlap for less than the full time of the marriage. Again, the military member ***always*** has the much better deal.

Suppose the same retirement as discussed above ($1,000), but a marriage of exactly half the length of the military career; the spousal share would be 25%, and with no SBP in effect, the former spouse would receive $250 per month out of a $1,000 total retirement.

If the former spouse predeceased the member, then the following month the member's share of the benefit would increase by one hundred percent of what the spouse was receiving, and instantly, automatically, and without the payment of any premium would gain an increase of $250 for a total of $1,000 per month, for the remainder of the member's life. This is the member's "cost free" automatic survivorship interest in the former spouse's life. It is built in to the structure of the retirement system. But on these facts, if the member died first, the former spouse would receive nothing further.

As with the prior hypothetical, during life, with an SBP at the full maximum amount, the total retired pay is reduced by $65. But since the premium is paid off the top, the parties effectively bear the premium in accordance with their lifetime share of the benefit. In this hypothetical, since the former spouse receives 25% of the lifetime benefit, she effectively pays 25% of the premium – $16.25, while the member effectively pays 75% of the premium – $48.75. They would actually respectively receive $701.25 (member) and $233.75 (spouse).

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[78] If that $50 increase to the spouse was for some reason perceived as problematic, it would be a simple matter to reduce the base amount to $909, so that 55% yielded $499.95. The member and the spouse would share in the saved $5.92 per month in premium cost during their mutual lives, and the member would still have vastly superior results if the former spouse died first (a $500 increase) while the former spouse would continue receiving exactly the same amount if the member died first.

This is the scenario focused upon by those who insist the former spouse should pay the entire SBP premium. But the math reveals that it is not really disproportionate to the benefits received, even if left to the "default" premium-payment.

Specifically, if the spouse dies, the premiums end, and the member thus gets his $701.25 increased to $750, ***plus*** the full amount of the spousal share (another $250), totaling $1,000, for life (an increase of $298.75). Whereas, if the member dies, the spouse still can only receive 55% of the base amount – $550 (an increase of $316.25). In other words, the spouse does get an increase, but the total increase the member would get for the premium paid during life is about the same size.

The actual "equity" problem in this scenario is that the parties have not been treated equally for that equal benefit to be received upon the death of the other, because the member is paying more but only getting about the same result.

But that is easily fixed (as detailed two sections below) – by simply altering the lifetime spousal share downward from 25% to 23.262%. Each party would effectively be paying $32.50 of the $65 premium, and each would get an approximately-equal several hundred dollar bump-up upon the death of the other.[79]

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 above, 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 as to the premium cost, or why. Several courts have ruled that the SBP be kept in

[79] And for those who could not accept the possibility that upon the member's death, the spouse would receive ***any*** increase (although those making that protest never seem to have a problem with the ***member*** getting an increase if the former spouse dies first), the base amount could be simply and easily lowered from $1,000 to $454.55. This would lower the premium to $29.55. If the member died first, the spousal share would remain exactly the same – $235.22. Of course, if the spouse died first, the member's share would still jump – on these facts, from $735.23 to $1,000 per month (about a $265 bump-up upon the former spouse's death).

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*.[80] The court held that ordering the member to contribute to the cost of the SBP gave the wife a right already enjoyed by the 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.[81]

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."[82] Several other courts have 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.[83]

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

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[80] *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995).

[81] *Id*.

[82] *Id*.

[83] *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. Ct. App. 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).

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 the former spouse. If both parties are to share benefits, and burdens, of the assets and liabilities distributed in a divorce, 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 of 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.

As detailed in the preceding section, 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 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.

J. 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.[84]

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. The spouse would be "over-secured," to a greater or lesser extent.[85] The smaller the lifetime interest of the former spouse happened to be, the larger the share of the premium that the member would pay.[86] If the member died first, payments to the spouse

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[84] 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.

[85] 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%.

[86] 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.

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.[87] 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%.[88] 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%.[89] 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 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

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[87] 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.

[88] 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.

[89] 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.

reversion of all the money paid to the former spouse, if she dies first.[90] 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.[91] 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.[92]

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.[93]

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.[94]

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. § 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

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[90] There have been several cases of members taking action to accelerate that reversion by trying to kill former spouses; the law relating to "slayer statute" divestiture is beyond the scope of these materials.

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

[92] 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.

[93] 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.

[94] 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).

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.[95]

K. Reserve-Component SBP

The Reserve Component Survivor Benefit Plan (RC-SBP) was established to provide annuities to beneficiaries of reservists who completed the requirements for eligibility for retired pay at age sixty but died before reaching that age.[96]

Before 1978, reservists could not elect participation in their SBP program until they were eligible to draw retired pay (that is, at age sixty). That year, legislation granted them the power to elect participation upon notification of eligibility for retirement, which generally is before they reach age sixty.[97]

There are three options available to reservists upon notification for eligibility. Option A declines coverage until age sixty; if the member dies before that age, there is no benefit. Presuming survival to that time, this option has the same costs and benefits as the active-duty SBP program.

Option B provides coverage so that payments begin on the later of (1) the date of the retiree's death, or (2) the date the retiree would have turned sixty. Benefits are actuarially reduced from the sum provided in Option A.

Option C provides coverage so that payments begin immediately after the retiree dies, regardless of age. Benefits are actuarially reduced from the sum provided in Option A.

The premiums for Option A work like normal SBP premiums, in that they come "off the top" of benefits payable. Premiums for Options B and C are paid by way of that reduction, ***plus*** an actuarial reduction in the benefits paid. This is how the system accounts for coverage being in existence years before eligibility for retirement benefits is reached.

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

[96] *See* Pub. L. No. 95-397, 92 Stat. 843 (1978).

[97] *See id.*

As of 1983, it was possible for reservists to designate former spouses as their SBP recipients,[98] and the 1986 amendments presumably gave courts the same power to deem beneficiary designations in Reservist cases as in any others. SBP benefits based on reserve-component service had a reduction similar to that for regular retirement SBP benefits after a beneficiary turns age sixty-two, which presumably was phased out on the same schedule.

The RC-SBP was amended as of January 1, 2001, to require written spouse concurrence for taking any benefit less than Option C. Thus, the order of events for retirement and divorce make a difference as to whether the former spouse will have any input into the option selected.

Actual calculation of the SBP premiums in a Reservist case can be extraordinarily complex. The RC-SBP premium consists of both an SBP portion and an RC-SBP, or reserve tack-on portion. The SBP portion is computed like any other SBP premium (6.5%) if the selected base amount is greater than $1,554 (as of 2010). However, if the selected base amount is less than $725, the SBP premium is only equivalent to 2.5% of the base amount; any amount that exceeds $725, but less than $1,553 is computed at 10%. Thus, if the selected base amount is $1,553, the first $725 is multiplied by 2.5% and the remaining $828 is multiplied by 10% resulting in an SBP premium cost of ($18.13 + $82.80 = $100.93).

The cost of the RC-SBP portion of the premium (or monthly reserve portion of the RC-SBP premium) depends on the type of beneficiary elected, the annuity option elected, and the age difference between the member and beneficiary (collectively, these are referred to as the "cost factors"). DFAS allegedly publishes these cost factor tables, which provide a decimal (or percentage that must be converted to a decimal, i.e. 0.36% to .0036) that is to be multiplied by the selected base amount, but they do not appear to be publicly accessible. The supposed links appear to be re-directions to the Office of the Actuary and then assorted useless spreadsheets.

There does appear to be a "cost factor" table on the Army Human Resources Command site,.[99] The site also has a nifty RC-SBP premium calculator which may prove helpful. Multiplying the cost factor by the selected base amount yields the reserve cost for the RC-SBP premium; adding that cost to the underlying SBP premium should yield the total SBP cost.[100]

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[98] *See* Pub. L. No. 98-94, 97 Stat. 614 (1983).

[99] www.hrc.mil/site/Reserve/soldierservices/retirement/DetailsCalcSBP.aspx.

[100] *See* Department of Defense Financial Management Regulation (DoDFMR) Volume 7B, Chapter 4, subsections 100401-100405 (Feb. 2009).

The problem appears to be that there is no to accurately estimate what the actuarial factors will be at any particular time. The actuary periodically reviews funding to determine if the premiums must be adjusted; the actuarial factors for the RC-SBP were apparently last adjusted in 2010. Inquiries to DFAS yielded a referral to the same website referenced in the footnote before last, above.

L. 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.[101] 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.[102]

Courts are divided as to whether the SBP is part of the underlying military retirement, or a separate asset, which has ramifications under the relevant State law governing "omitted" assets.[103] While courts have been uncertain how to characterize the nature of the SBP,[104] 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

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

[102] 10 U.S.C. § 1450(f)(3)(B); *see Bonewell v. U.S.* 111 Fed. Cl. 129, 131 n3 (2013) (describing deemed election procedure, in contrast to election by member).

[103] *See*, *e.g.*, *Zito v. Zito*, 969 P.2d 1144 (Alaska 1998) (in Alaska, the SBP is held to be part of the pension division and must be added to the order if it was omitted from the original order); *cited with approval*, *McDougall v. Lumpkin*, 11 P.3d 990 (Alaska 2000); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001) (same); *but see Potts v. Potts*, 790 A.2d 703 (Md. Ct. Spec. App. 2002) (survivorship interest falls within the definition of marital property) (no post-divorce order awarding survivorship interests is permitted if the decree did not expressly contemplate that award to the former spouse); *Williams v. Williams*, 37 So. 3d 1171 (Miss. 2010); *Stiel v. Stiel*, 348 S.W.2d 879 (Tenn. Ct. App. 2011). Sitting at the mid-point is the Iowa decision holding that the trial court must construe the underlying decree to determine the intention of the trial court at the time of entry of the decree in *In re Morris*, 810 N.W.2d 880 (Iowa 2012).

[104] *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).

plan," because of the "'potential unfairness' to the wife should her former husband predecease her, thereby extinguishing pension rights."[105]

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 is in place.[106] Many courts have recognized that survivorship interests accrued during marriage are a valuable property right that are part of the pension to be divided.[107]

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.[108] 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 subject 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,[109] the now-former

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

[106] *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").

[107] *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.

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

[109] 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.

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.[110] As a technical matter, a divorce court clearly has the authority under the USFSPA to order that the former spouse be deemed the beneficiary of the SBP.[111] The question is left to the court's discretion,[112] with the only issue being whether it ***should*** do so – which also is not much of an issue in any community property or equitable distribution regime that attempts to treat spouses as equally as possible as to the property acquired during marriage.

When 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

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[110] 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).

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

[112] *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").

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.[113]

M. The "Free" Survivorship Interest Available During Active Duty

As noted above, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty eligible to receive SBP. However, also as detailed above, the military system does not begin charging premiums for SBP coverage until the actual retirement of the member.[114] This provides a planning opportunity.

Specifically, it provides a means of providing SBP coverage, without cost to the member or to the former spouse, for the duration of the member's military service. Since that designation can be changed by further court order at least through the date of actual retirement, security can be provided during service even when the former spouse is not to be designated as the post-retirement SBP beneficiary, by reserving jurisdiction to alter the designation, and then getting the amended court order entered and served on DFAS before the member's retirement.

In a situation where a court would have ordered the member to maintain a policy of life insurance for any reason (for example, to secure a child or spousal support award), the SBP

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[113] *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).

[114] At least in the active-duty setting. Reserve Component cases are more complex because of the actuarial reductions built into the RC-SBP system.

might be sufficient to secure all interests in question, making the purchase of separate insurance unnecessary.

This is not without risks, of course, depending on what the parties' (and court's) intentions were. If the spouse was not intended to be the post-retirement survivor beneficiary, it may not be possible to alter that designation if the member leaves service before securing the amended order.

N. The Loophole by Which Remarried Former Spouse SBP Premiums Can Be Made Apparently Cost Free

As discussed above, the SBP annuity payable to a widow, widower, or former spouse is "suspended" if the beneficiary remarries before age 55,[115] which makes the knee-jerk advice to any former spouse to not re-marry until that date. However, an odd adoption of federal laws might make it most financially advantageous for both members and their former spouses if the former spouses ***do*** remarry before age 55.

This counterintuitive result stems from the Congressional assignment of former spouse deemed election coverage under the spouse category of coverage in 10 U.S.C. § 1450, and the direction to DFAS that it cannot deduct premiums nor pay an annuity at such times that there is not an eligible SBP beneficiary.

Apparently, if a former spouse remarries before age 55, that former spouse's eligibility is "suspended," but ***not*** terminated. As the former spouse is ineligible as a beneficiary during that time, no annuity is payable to the former spouse, so no premium is due from the lifetime benefit stream being divided between the member and the former spouse – payments to both parties go up by whatever sum of SBP premium was previously being deducted to provide for the SBP benefit.

That makes sense, but the illogical part is what happens if there is a further change of status.

If the former spouse's later marriage terminates, the former spouse regains eligibility for the SBP, and the premiums then become due again; however, there is no provision in federal law for recoupment of prior premiums in this circumstance, so the period of "suspended" benefit – even if many years long, is apparently free to both parties.

And the effect is even stranger if the member dies prior to the date that the former spouse's later marriage ends. If the member is deceased, and the former spouse's later marriage ends, the former spouse resumes eligibility and can begin benefits, but since the lifetime stream

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[115] 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

of payments ended with the death of the member, no premiums can be deducted from any retirement benefits, and the SBP benefits are received without any premiums having been paid for the benefit from the date of the former spouse's remarriage until the date she begins receiving the benefit after that remarriage ends.

In other words:

- Any premiums being taken from the lifetime benefit stream (the SBP premium) cease upon the remarriage before age 55 of a former spouse SBP beneficiary.

- If the former spouse's remarriage ends (by death or divorce), the premiums re-start, but there is no recoupment of premiums that would have otherwise come due during the years it was suspended.

- If the member is deceased when the former spouse remarries before age 55, so that the SBP is in pay status, the benefit stream to the former spouse ceases upon the former spouse's remarriage.

- If the former spouse's remarriage ends (by death or divorce) thereafter, the benefits re-start, without any premiums ever being due from anyone for whatever time the former spouse's eligibility was suspended.

Given that the SBP premium is 6.5% of the selected base amount – essentially $65 per month for every $1,000 of total pension benefit being divided between the member and former spouse – this oddity of the law presents a very substantial planning opportunity, or fortuitous windfall, in appropriate cases.

If, for example, the parties had been married for 10 out of a 20 year career, and the retirement benefit was exactly $1,000, the member would receive an additional $48.75 – and the former spouse an additional $16.25 – for every month in which former spouse eligibility was suspended. This can add up to a lot of money over a period of years.

Of course, parties are not always cooperative even when it is financially advantageous to be so. Anecdotal accounts indicate that a fair amount of expensive litigation has instead occurred when members, upon their former spouse's remarriages and suspension of eligibility, have instead attempted to switch the SBP beneficiary designation to later spouses. Counsel, reviewing all possibilities, could perhaps counsel their respective clients to approach the matter more wisely.

O. The Two-Year Opt-Out Escape Provision

In a change made effective in 1998, Congress added a provision whereby a retired member participating in the SBP can elect to discontinue that participation.[116] The time period within which that election may be made is the one-year period beginning on the second anniversary on which payments of retired pay to the member began.[117]

If the member is married at the time, spousal concurrence is required, the same as it would be, and with the same very limited exceptions, for declining the SBP upon retirement.[118]

The discontinuation option is subject to: agreement of the former spouse, if the SBP is in effect because of an agreement not incorporated in a court order; or to a requirement of producing a superseding court order, if the former spouse had been named as the SBP beneficiary by way of prior court order.[119]

As a practical matter, this opt-out provision provides some greater flexibility to courts, and the opportunity for some mischief. When the divorce is occurring at the time of retirement, it allows a court to order that the SBP go into effect, knowing that the decision can be altered in the future if it is established in litigation that such a choice was inappropriate.

Where the SBP was simply in effect without court intervention, however, or where parties or counsel did not know to incorporate the SBP terms into the decree, or serve it on DFAS, it gives rise to an opportunity for a recently-divorced member to quietly divest the former spouse of survivorship benefits without her even knowing about it. For this reason, it is easy to predict that this provision will be the root cause of a number of malpractice claims.

P. Service Member's Life Insurance

A mistake frequently made in the course of negotiation or litigation is the effort to compel (or trade assets in order to receive) beneficiary status for a former spouse in a member's Veteran's Group Life Insurance (VGLI, previously known as National Service Life Insurance, or NSLI), or its active-duty counterpart, Serviceman's Group Life Insurance (SGLI).

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[116] P.L. 105-85 div. A, title VI, § 641(a)(1), 111 Stat. 1797 (Nov. 18, 1997), effective May 17, 1998.

[117] 10 U.S.C. § 1448a(a).

[118] I.e., that the spouse's whereabouts cannot be determined, or that there are such "exceptional circumstances" that requiring the member to seek the spouse's consent would otherwise be inappropriate." *See* 10 U.S.C. § 1448(a)(3)(C).

[119] 10 U.S.C. § 1448a(c); *see* 10 U.S.C. § 1450(f)(2).

This is a mistake because any such stipulation or court order is simply unenforceable – a court order compelling beneficiary status ***cannot be enforced***. Under the laws setting up these insurance plans,[120] the former spouse cannot be made the owner of the policy, and the insured has complete freedom to designate or re-designate the intended beneficiary of the program. The federal courts, early and forcefully, held that the programs were "the congressional mode of affording a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States," and the resulting benefits were therefore immune from State court division or allocation, even when community property was the source of the premiums paying for the policy.[121] A host of similar programs have been established, and expired, since 1919.

A former spouse who negotiated beneficiary status for SGLI in exchange for giving up other rights, or even obtained an order to receive beneficiary status under that plan, thus has no direct remedy if the member dies having named someone else anyway; a member is free to change beneficiaries, and such a named beneficiary is free from suits from the former spouse for a portion of the proceeds.[122]

There is apparently no prohibition, however, against a former spouse who has been thus deceived proceeding against the member (at least while everyone is still alive). Such a suit would not be interfering with the protected insurance policy, but punishing the contemptuous act of duplicity by the member. As with similar matters involved in these cases, the key is adequate vigilance, especially by the former spouse, to be sure that what was negotiated or ordered was actually put into place, and that no one attempts to fraudulently evade the orders, ***before*** anyone dies.[123]

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[120] *See* 38 U.S.C. § 1917, Pub. L. No. 85-857, 72 Stat. 1152, § 717 (Sept. 2, 1958), as amended.

[121] *See Wissner v. Wissner*, 338 U.S. 655 (1950); *see also Estate of Allie*, 50 Cal. 2d 794, 329 P.2d 903 (Cal. 1958); C.J.S. *Armed Services* § 226.

[122] The key case is *Ridgway v. Ridgway*, 454 U.S. 48 (1981). Cases since then have cited it for the proposition that there is simply nothing they can do for defrauded former spouses. *See*, *e.g.*, *Kaminski v. Kaminski*, 1995 WL 106497 (Del. Chanc. Ct. 1995). In that case, the member had promised in his stipulated divorce decree to name his daughter from his first marriage as his irrevocable beneficiary. When he died leaving his second wife as sole beneficiary, the first wife's action seeking a constructive trust for the daughter was dismissed. The court said that the "narrow exception" for fraud was restricted to "extreme factual situations" unlike simple breach of contract. The case law presents opportunities for unjust enrichment in all directions. *See Dohnalik v. Somner*, ___ F.3d ___ (5th Cir. No. 05-50072, Oct. 6, 2006) (where member died right after entry of divorce decree which purported to divest the spouse of her beneficiary interest, but he had not yet submitted the beneficiary-change form, the ex-wife got the proceeds anyway; the appellate court distinguished ERISA-based cases in which such divorce decree waivers were recognized, based on the United States Supreme Court's "clear guidance" that only the formal beneficiary designation would be followed).

[123] "Mendacity is a system that we live in.
Liquor is one way out an' death's the other."
Tennessee Williams, *Cat on a Hot Tin Roof* (1955), act 2.

Far better than trying to fix such problems would be to avoid them altogether, of course. Preferable mechanisms by which payments after the member's death could be accomplished include private life insurance (with the intended beneficiary as owner),[124] or beneficiary status under the Survivor's Benefit Plan, discussed above.

The "bottom line" to all of the cases addressing early retirement, late retirement, disability, partition, bankruptcy, and death benefits as to military benefits is that it is incumbent upon the attorneys, especially the attorney for the spouse, to anticipate post-divorce status changes and build that anticipation into the decree. Any failure to do so is an invitation to further litigation in some forum, between the parties, or directed at the attorney.

Q. The Thrift Savings Plan

As of October 8, 2001,[125] military members were authorized to begin participating in the TSP, permitting members to invest in a variety of funds.[126] Military members therefore now have both a defined benefit ***and*** a defined contribution type of retirement program, both of which should be addressed upon divorce.[127] As of 2012, a "Roth" (post-tax contributions) option was added to the TSP.

There are no "survivorship" benefits, *per se*, for a TSP account, as it is a cash plan like a 401(k). However, plan participants can and should designate beneficiaries to receive the account balance in the event of the participant's death.[128] In the absence of the form, regular intestate succession rules determine the distribution of the TSP account.

This means that, at least for the interim between divorce and actual division of the account, there is a risk of spousal divestment if the named beneficiary is anyone except the spouse, which could require a separate suit seeking a constructive trust, etc. This is one more reason why the pension division orders should be entered simultaneously with the divorce decree.

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[124] "I detest life-insurance agents; they always argue that I shall some day die, which is not so." Stephen Leacock, *Literary Lapses* (1910).

[125] Per Pub. L. No. 106-398 (Oct. 30, 2000); the regulations are found at 5 C.F.R. § 1600-1690.

[126] *See* 5 C.F.R. §§ 1600.1-1690.14.

[127] For military members, some forms of tax-exempt special compensation can be contributed, which then accrue investment returns that are also tax-exempt.

[128] By means of Form TSP-U-3 ("Designation of Beneficiary").

III. DEATH BENEFITS IN THE CSRS/FERS (FEDERAL CIVIL SERVICE) SYSTEM

By way of background, it should be noted that there is an "old" system (Civil Service Retirement System, or CSRS, for those who began service before January 1, 1984) and the "new" system (Federal Employees' Retirement System, or FERS, for those who began service on or after January 1, 1984).[129] The most obvious difference between them is that participants in CSRS do not participate in the social security program, while those in FERS do participate. Under both systems, the survivor annuity election is automatic for current spouses at retirement unless both spouses "opt out."

The two statutory schemes have independent code sections, but generally what is provided by one is provided by the other. The marriage must have lasted at least nine months for benefits to be paid to a former spouse. The former spouse's payments of a portion of the retirement benefits end when the retiree dies.

A. FERS and CSRS Survivorship Provisions

There is at least some limited form of pre-retirement survivor annuity available for a former spouse in the Civil Service System. If an employee dies while still in service, a court-ordered survivor benefit is payable to a former spouse if the employee completed at least 18 months of creditable civilian service, and dies while under the CSRS or FERS retirement coverage.

Under CSRS, a survivor annuity is payable. Under FERS, a lump sum death benefit is payable, and a survivor annuity is also payable if the employee has 10 years of creditable service.

If a separated former employee dies before retirement under CSRS, no survivor annuity can be paid to a former spouse, despite the terms of the court order. In certain limited circumstances, under FERS, a survivor annuity for a former spouse may be payable if a separated former employee dies before retirement.

5 U.S.C. § 8341(h)(1) provides that a former spouse of a deceased member of CSRS is entitled to a survivor's annuity if provided in the terms of a decree of divorce or annulment or court-approved property settlement agreement incident to such a decree. Similar language is repeated for the former spouses of FERS members in 5 U.S.C. § 8445.

[129] *See* 5 U.S.C. §§ 8331, 8401.

After divorce, to remain eligible for survivorship benefits while the retiree is still living, the former spouse must not remarry before age 55.[130] There does not appear to be any such remarriage limitation "if the employee dies before the former spouse remarries before age 55."[131] The former spouse is required to promise, in applying for survivorship benefits, to be personally liable for any overpayments resulting from the spouse's remarriage before age 55.[132]

It should be noted that cost of living adjustments are applied to survivor annuities, which makes it slightly more complicated to determine present values.[133] Court orders which concern marriages ending on or after May 7, 1985, are acceptable for processing under the regulations.[134] Also acceptable for processing are orders awarding survivor annuities in divorces prior to that date, if the retiree was receiving a reduced annuity to benefit that spouse on May 7, 1985.[135]

The OPM considers it bad form to state that the annuity "continues after the death of the retiree" (since the benefits terminate at the death of the employee, and only ***survivor's*** benefits would be available after that date). Use of such a phrase makes the order "not a court order acceptable for processing."[136] Practitioners are advised to refrain from so stating, instead making lifetime benefit payments and survivor annuities quite distinct. Which retirement system is at issue ***must*** appear in the COAP.

If the order uses a formula, then all data necessary for applying the formula must either appear on the face of the court order, or be contained in "normal OPM files."[137] In other words, OPM will look up some data – such as the total number of months of creditable service performed by a retiree – to fill in the denominator of a time rule formulation. Note that references to statutes, or case law, are unacceptable in formulas.[138]

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[130] 5 C.F.R. § 838.732(a).

[131] 5 C.F.R. § 838.732(b).

[132] 5 U.S.C. § 838.721(b)(1)(vi)(C).

[133] *See* 5 C.F.R. § 838.735.

[134] 5 C.F.R. § 838.802(a).

[135] 5 C.F.R. § 838.802(b).

[136] 5 C.F.R. § 838.803(b).

[137] 5 C.F.R. § 838.805.

[138] 5 C.F.R. § 838.805(c).

Amendments to orders are possible, but ***not*** if they are issued after the date of retirement or death of the employee and they modify or replace first order dividing the marital property of the employee or retiree and the former spouse.[139]

In fact, any order that awards, increases, reduces, or eliminates a former spouse survivor annuity, or explains, interprets, or clarifies any such order, ***must*** be: (1) issued prior to retirement or death of an ***employee***; ***or*** (2) the first order dividing the marital property of a ***retiree*** and former spouse.[140]

How about if there was a first order, but it has been vacated or set aside? Well, it is OK, but ***not*** if: (1) it is issued after the date of retirement or death of the retiree; (2) changes any provision of a former spouse survivor annuity that was vacated, etc., and (3) ***either*** it is effective prior to its date of issuance, ***or*** the retiree and former spouse do not compensate OPM for any uncollected costs relating to the vacated, etc., order.

The regulations clearly require that the cost of a survivor annuity be paid by way of reduction in the monthly retirement payments.[141] Unlike the military system, however, it is relatively easy to have the beneficiary pay the cost of the survivorship premiums if that result is intended. If the intent is to have the parties both pay part of the premium, the OPM should be directed to divide the "gross" annuity,[142] and if the intent is to have the former spouse only pay the premium, then the OPM should be directed to divide the "self only" annuity,[143] and deduct the entire premium from the former spouse's share.

There are two types of survivor annuities, under sections 8341(h) and 8445 of title 5, United States Code.[144] The former is the default "former spouse" survivor annuity, but is subject to the remarriage-before-age-55 termination discussed above. The latter is an "insurable interest" survivor annuity, and it is not so restricted, but it costs more.

Further, the latter type has various restrictions: it may only be taken by a retiree at the time of retirement, who is in good health and not retiring for disability. Also, it is not enforceable through OPM – the face of the regulations state that such an annuity can be canceled at a

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[139] 5 C.F.R. § 838.806(a).

[140] 5 C.F.R. § 838.806(b).

[141] 5 C.F.R. § 838.807.

[142] Defined as the total monthly benefit after deduction of any survivorship premium.

[143] Defined as the total monthly benefit before deduction of any survivorship premium.

[144] 5 C.F.R. § 838.912.

later date to provide a survivor annuity for a "spouse acquired after retirement."[145] The same regulation goes on to state those situations in which it might be used: if the spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement, or if another former spouse already has a normal former spouse survivor annuity. The regulation adds, however, that "the court will have to provide its own remedy if the retiree is not eligible for or does not make the election" since "OPM cannot enforce the court order."

If no amount of the survivor annuity is stated, then the maximum possible sum (55% of the employee annuity under CSRS; 50% under FERS) is selected. However, if the employee is a FERS participant with at least 18 months of creditable service, but less than 10 years, the only death benefit payable to the former spouse is the "basic death benefit as defined in § 843.602" and no other survivor annuity.[146]

One very important distinction from the military survivorship system is that a participant can have ***multiple*** beneficiaries (although, of course, no more than the maximum survivor's benefit can be paid out among however many beneficiaries are named). The survivor annuity can be divided "pro rata," in which case each former spouse receiving a "pro rata" share will receive a portion of the survivor annuity in accordance with the time rule.[147] Unless cost of living adjustments are expressly ordered to ***not*** apply to a survivor annuity, they will apply.[148]

The regulations specifically contemplate an award of the maximum possible survivor annuity, award of the same survivor annuity that had been in effect for a spouse before a divorce to be continued at that level post-divorce, a prorata share, a fixed monthly amount (with or without cost of living adjustments), a percentage or fraction, an award based on a stated formula, and an award of a percentage, fraction, or formula applied to the maximum survivor annuity.[149] These should be sufficient to take care of most possibilities.

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[145] 5 C.F.R. § 838.912(c)(2).

[146] 5 C.F.R. § 838.921.

[147] 5 C.F.R. § 838.922(a).

[148] 5 C.F.R. § 838.923.

[149] *See* Model Paragraphs 701-12, 721-22 set out in *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program, and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement and Insurance Group, rev. ed. July, 1997) (hereafter, *Handbook*). The *Handbook* can be obtained from the Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954; its current printing is identified as "RI 83-116," and it includes all clauses on computer disk. The text and clauses can also be accessed, printed, or downloaded from the Internet, from http://www.opm.gov/retire/html/library/other.html.

It is also possible to specify that a survivor benefit payable to a former spouse be maintained at one level (for example, the maximum benefit), but can be reduced (for example, to a pro rata share) in the event that the employee remarries either before retirement, or after retirement, but the language required is different for the two possibilities.[150]

One fascinating attribute of the civil service system is what happens if the ***former spouse*** predeceases the member: the former spouse's share of the retirement benefits revert automatically to the retiree, ***unless*** the court order provides otherwise. Instead of that automatic reversion, the court ***can*** provide that the money is paid: (1) into court (presumably for further distribution upon further court order); (2) to "an officer of the court acting as a fiduciary"; (3) to the estate of the former spouse; or (4) to one or more of the retiree's children.[151] Thus, it is possible to create a heritable asset for the former spouse.

Because the possible reversion of the spousal share is avoidable, the equities discussed above as to who should pay for the premiums for a survivorship ***may*** be different for a Civil Service case. In the absence of a reversion of the spousal share to the member, a case could be made that the spouse should bear the premium cost for the survivorship benefit. The practitioner should reason out in every case who will get what if the other party dies when attempting to allocate responsibility for payment of survivorship benefit premiums.

B. The Thrift Savings Plan

A "Thrift Savings Plan" was also created by the FERS statute in 1984 (but is also available to CSRS participants). It is payable in a number of ways, but requires spousal consent if taken in any form other than a joint and survivor annuity.

As discussed above in the military section, the Thrift Savings Plan ("TSP") is expressly excluded by the regulations governing the CSRS and FERS retirement and survivorship benefits.[152] It is administered by a Board entirely separate from the OPM (the Federal Retirement Thrift Investment Board), which has its own rules for distributions.[153] There are no "survivorship" benefits, *per se*, for TSP accounts, as it is a cash plan like an IRA, but care

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[150] They are set out at Model Paragraphs 751 and 752 in the Handbook.

[151] 5 C.F.R. § 838.237.

[152] 5 C.F.R. § 838.101(d).

[153] The Thrift Savings Plan is *not* addressed in the clause set provided by Office of Personnel Management. The practitioner must find out whether a Civil Service employee is or has been a participant in the Thrift Savings Plan, and if so whether any funds have been withdrawn or borrowed from the plan. Those wishing further information on the Thrift Savings Plan can call the administering agency (Federal Retirement Thrift Investment Board) in Washington, D.C., at (202) 942-1600.

should be taken regarding beneficiary designations, and the account should be distributed contemporaneously with entry of the divorce.

IV. NEVADA PERS RETIREMENT SYSTEM

A. Background and Basic Statutory Structure

PERS provides multiple "options" under which a retiring member can give up a bit of the lifetime benefit payment stream in exchange for varying survivor's benefits to be paid to an eligible survivor beneficiary, including a spouse or former spouse.

> Options 1 is the "Unreduced" benefit, paying the largest possible lifetime sum, but providing no survivorship.[154]
>
> Option 2 provides an actuarially reduced lifetime sum, with the same amount paid to the survivor for life. This is akin to a "100% joint and survivor annuity" in the world of private pensions.
>
> Option 3 provides an actuarially reduced lifetime sum, with 50% of the lifetime sum paid to the survivor for life. This is akin to a "50% joint and survivor annuity" in the world of private pensions.
>
> Option 4 is the same as Option 2, except no benefits are payable to the survivor until that person reaches age 60.
>
> Option 5 is the same as Option 3, except no benefits are payable to the survivor until that person reaches age 60.
>
> Option 6 allows the creation of a customized survivor interest, which actuarially reduces the lifetime benefit.
>
> Option 7 is the same as Option 6, except no benefits are payable to the survivor until that person reaches age 60.

While it is apparently not published, the life table used by PERS is reported to be gender-blind.

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[154] This is for all PERS participants ***except police/fire***, who can select Option 1, get the maximum lifetime benefit, and ***also*** get a 50% survivor annuity without cost for a spouse; the benefit vests in the spouse married to the member at the moment of retirement, even if the marriage subsequently ends, as detailed below.

There are several troubling aspects of PERS' survivorship provisions. First, PERS does not require spousal consent to deprive the spouse of all survivorship interests; the member may unilaterally choose an Option providing little or no survivorship protection for the spouse.

Since 1987, PERS *has* had a rule appearing to require spousal consent to the form of retirement chosen.[155] Under that provision, however, the absence of spousal consent only prevents the member from choosing any desired retirement option for 90 days.[156] Apparently, the burden is on the spouse to get a court order prohibiting the member from choosing a different retirement option within the 90 day period. Essentially, a spouse for whom no survivor designation is made who is unhappy with that fact has 90 days to choose to divorce his or her spouse and get a court order mandating a different option.[157] Further, PERS is statutorily immune from suit for benefits paid because of a member's falsification of marital status on a retirement option selection form.[158]

Second, PERS does not provide a pre-retirement survivorship interest for the spouse.

Specifically, PERS is one of the retirement systems in which the payments (but not the retirement itself) can be divided. The structure of the plan determines what happens to the ***former spouse's*** portion of the payment stream if the spouse dies first: the payments revert to the employee.

Where the ***employee*** dies first, however, various results are possible. For a former spouse to continue receiving money after death of the employee, there must be specific provision made by way of a separate, survivorship interest payable to the former spouse upon the death of the member. Otherwise, payments being made to the former spouse simply stop; this is just one of the ways in which the employee's rights are superior to those of the non-employee, even when benefits are "equally" divided.[159]

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[155] *See* NRS 286.541.

[156] *See* NRS 286.545.

[157] There are anecdotal accounts that some judges do not believe that they have statutory authority to compel election of a survivorship option.

[158] NRS 286.541.

[159] For example, PERS provides that the option selection will be "automatically adjusted" to option one (the unmodified allowance) if a spouse or former spouse with a survivorship option predeceases the member. NRS 286.592(1). The system has no corresponding benefit to protect a former spouse – it has no "pre-retirement survivorship provision." In other words, if a former spouse is awarded a portion of the retirement benefits, but the member dies prior to retirement, the spouse will receive nothing. Prior to the member's retirement, PERS leaves the former spouse absolutely unprotected from being divested in the event of the member's death. The only apparent means of securing this risk is through private insurance.

Prior to the employee's actual retirement, the only known way to cope with this imbalance is through private insurance on the life of the employee, payable to the former spouse, and therefore provide the parties with comparable security for their respective insurable interest in the other party's life.[160]

Once the member retires, if an option was selected providing a survivorship benefit for the spouse, ***both*** parties' interests are "secured." If not, the member's interest is secured, but not that of the former spouse.

Only by securing both parties' interests can counsel – and the Court – obey the mandate of NRS 125.150 and *Blanco*[161] to equally divide the benefits and burdens of community property upon divorce. Any Decree and PERS QDRO that does not secure the spousal share both before and after the member's retirement is in violation of that statutory and case law, and subjects counsel to potential malpractice liability.

The third problematic aspect to PERS survivorship benefits is the necessarily unequal distribution of benefits and costs, despite the mandate in NRS 125.150 that courts equally divide property upon divorce.

As discussed above in the military section, any plan with an automatic reversion of the spousal share to the member, should the spouse die first, creates a problem in States, like Nevada, in which the marriage and divorce laws provide that the parties have present, existing, and equal interests in property acquired during marriage, and that property is to be divided equally upon divorce.

Specifically, 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.

Effectively, 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. If the member dies first, however, the spouse gets nothing, unless an option is selected with a survivorship provision.

The ***only*** person for whom a survivorship interest has any cost is the former spouse. If both parties are to share benefits, and burdens, of the assets and liabilities distributed, they must

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[160] Any former spouse who will be the recipient of retirement benefit payments if her former spouse lives, but will not get such money if he dies, ***definitionally*** has an "insurable interest" in the life of the member (this is true for PERS or non-PERS cases). The matter is one of fact, not a matter of discretion, award, or debate. "Insurable interest" survivorship provisions are found throughout various federal regulations, and refer to any person who has a valid financial interest in the continued life of the member. *See*, *e.g.*, 10 U.S.C. §§ 1448(b) & 1450(a)(1); 10 U.S.C. § 1450(a)(4).

[161] *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013).

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 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 a PERS case, 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.

Fortunately, PERS contains multiple survivorship options making it relatively easy for counsel to construct an order that divides the premium cost between the employee and the non-employee, so that both pay a share of the only survivorship option carrying a premium, and both leave the marriage with a secured interest from the date of divorce forward. That comes as close as is possible, given the structure of such retirement systems, for a court to actually treat both parties "equally" when one party has benefits through PERS or any other employer with a retirement program structured that way.

Fourth, PERS survivorship interests are non-divisible between successive former spouses, or between a former spouse and a current spouse. Some creative counsel have accomplished this result anyway, by having the relevant court order call for such a division, and having PERS pay the survivorship interest (in one of the beneficiary's names) to a trustee who then divides the benefit.[162]

Finally, PERS simply refuses to abide by a specific holding of the Nevada Supreme Court as to whether the spouse's lifetime benefit stream may be left to spouse's heirs. In *Wolff*,[163] the Court affirmed the order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate, on the basis that the community interest was divided upon divorce to two sole and separate interests, so that even if her estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was entitled to the payments that she would have received if alive.[164]

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[162] The details of the arrangement are beyond the scope of these materials; we can assist practitioners who face such a situation.

[163] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

[164] In the decree, the district court provided that "[Roberta's] vested Community Interest in [Gerhard's] Retirement does not terminate upon [Roberta's] death and continues to her estate until [Gerhard's] death." Gerhard argues that this provision violates "public policy, and, more specifically, [is] in direct conflict with the Public Employees Retirement System of Nevada."

Historically, PERS not only refused to directly make payments to a spouse's estate in accordance with that holding, it reportedly refused to even accept orders submitted stating that an individual ***member*** is required to make those payments if the spouse dies first. It was apparently PERS policy to reject any proposed order reciting the Nevada Supreme Court's holding in *Wolff* on that point.[165]

In 2017, PERS agreed to accept language that requires the ***participant*** to pay the spousal share to the estate of the former spouse. This was a game changer – it altered the benefit/burden balance under NRS 125.150, by allowing counsel to make a truly permanent division of the benefits.

The relevant orders still had to select an Option providing a survivorship benefit for the former spouse if the participant died first, but for the first time it was possible to create a circumstance where the former spouse's share went to her heirs instead of ending up in the pocket of the participant. Specifically, the spousal share will still be ***paid*** to the participant, but an order could be put in place requiring him to pay it to the estate of the former spouse.

It is not mandatory, or obvious, but it does allow counsel to comply with the mandate of *Wolff* and community property theory.

B. Death Benefit

A death benefit for PERS participants, confusing *called* a survivor's benefit (but having nothing to do with the survivorship benefits discussed above) vest upon the member's eligibility for retirement, completion of ten years of service, or the member's death, whichever occurs first.[166]

> Although a former spouse's estate is not encompassed by the definition of alternate payee in NRS 286.6703(4), we conclude that Roberta's estate should be ***entitled*** to her share of Gerhard's retirement benefits upon his death. Upon divorce, the community interest that Gerhard and Roberta had in Gerhard's retirement became the separate property of each former spouse. See 15A Am. Jur.2d Community Property § 101 (1976). Consequently, Roberta's estate is ***entitled*** to her portion of Gerhard's retirement in the event that Roberta predeceases Gerhard. Accordingly, the district court did not abuse its discretion by requiring Gerhard to pay Roberta's estate her share of the retirement benefits if Roberta predeceases Gerhard.

112 Nev. 1362 (emphasis added).

[165] One such rejection received by this office flatly stated: "In the event the Alternate Payee predeceases the Participant Retired Employee, the entire benefit is then paid to the retired employee. The Alternate Payee cannot designate a beneficiary or the estate to receive his portion of the benefit."

[166] NRS 286.6793.

It is payable to a surviving spouse, or to children; only in the rarest of circumstances could a former spouse ever be a possible beneficiary of this relatively small benefit.

C. Planning Opportunities in Police and Fire-Fighter Survivorship Benefit Cases

Police and fire-fighters survivor's benefits are somewhat different than those of other PERS participants. Most employees, to get the full, unreduced amount of monthly benefits at retirement, must give up all survivor's interests. Put another way, the monthly lifetime benefit is reduced in order to pay for the survivorship benefits; the larger the benefit option selected for the former spouse, the greater the reduction in the lifetime benefits.

Police and fire-fighters, however, get both the full monthly retirement ***and*** a 50% survivorship interest, which vests in the spouse married to the member at the moment of retirement, even if the marriage subsequently ends, and is payable when the former spouse turns 50 years of age.[167] In other words, as long as those conditions are satisfied, there is ***no*** reduction in the monthly lifetime retirement benefit, and the survivor gets half the monthly sum for her life if the member dies first.

This statutory bonus of a "free" survivorship interest presents a substantial strategic planning opportunity. The usual situation is that the member divorced one spouse and married another while still employed. If the former spouse was awarded a survivorship interest (i.e., the order required an option other than option one to be selected upon retirement), it is possible to create a "win/win" situation, as long as the parties cooperate, or a court is willing to order a modification of the option selection.

Specifically, altering the option selection to option one will eliminate the premium that would otherwise be charged to fund the survivorship benefit for the former spouse. In return, the monthly benefit to be divided between the member and the former spouse will ***increase***.

While the precise dollar figure will vary from case to case, depending on the retirement payable to the member, the increased sum payable to the former spouse by elimination of the premium might be enough to fund a private insurance policy in favor of the former spouse equal or greater than the actuarial value of the survivorship benefit.[168] If it does not cover

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[167] NRS 286.667.

[168] There are two ways to calculate the amount that should be secured. Looked at one way, the only necessary amount is the difference in life expectancies between the member and former spouse, multiplied by the monthly sum payable to the former spouse, since that is the only period in which the survivorship benefits would ***probably*** be paid to the former spouse. On the other hand, it is ***possible*** that the member could die the day after the order is entered, so an argument could be made that the sum to be secured is the present value of the entire lifetime payment stream to the former spouse, since the lack of a survivorship benefit through the plan

that cost, the member could always stipulate to increase the precise time-rule fraction payable to the former spouse by an amount sufficient to cover that premium.[169] Either way, the cost to the member would be less than the cost of providing full insurance coverage for his later spouse.

V. DEATH BENEFITS IN PRIVATE (ERISA-GOVERNED) RETIREMENT PLANS

Many attorneys find the various forms of benefits available from private employers to be confusing. Generally, private plans come in two varieties – defined benefit plans[170] and defined contribution plans.[171]

Private pensions, after the Employee Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984 (REA), may only be divided by means of a Qualified Domestic Relations Order (QDRO). ***Any*** judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according to local domestic relations law is considered a "domestic relations order" under federal law.[172] It becomes a "qualified" order, or QDRO, when it creates or recognizes one of the listed classes

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puts that entire amount at risk (albeit a risk that diminishes every month that both parties remain alive).

[169] The member will have a few more dollars to allocate, of course, since his share of the monthly lifetime benefit will have also increased by the switch to option one.

[170] A defined ***benefit*** plan (often called a pension plan) is usually funded by employer contributions (although in some plans employees can contribute) and is intended to provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of $2,000.00 per month during his last years would get $1,000.00 per month (i.e., $2,000.00 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be distributed from defined benefit plans. The IRS apparently considers $3,500.00 the measure of "nominal" for this purpose.

[171] Defined ***contribution*** plans (including profit sharing and 401(k) plans) are those in which the employee has an individual account made up of contributions made by the employee (and, if any, by the employer), plus investment gains. Employers are not required by law to contribute, although many such plans contractually bind the employer to add some formula percentage of the amount the employee puts into the plan. *See* 29 U.S.C. § 1002(34). These plans come in many varieties, including profit-sharing plans (employer contributions vary according to company performance), stock bonus plans (the plan invests in the securities of the company itself), "401k" plans (employee chooses either taxable salary or nontaxable contribution to plan), and money purchase plans (like profit-sharing, but with a fixed employer contribution). The key concept for such plans is that they have a specific balance of funds belonging to each particular employee.

[172] *See* 29 U.S.C. § 414(p)(1)(B).

of persons as an "Alternate Payee" with a right to receive all or any portion of the benefits normally payable to a participant in a pension plan that is a "qualified plan."

An order is ***not*** "qualified" if it requires a plan to provide a type or form of benefit not otherwise available under the plan, or requires the plan to provide a greater (actuarially computed) sum of benefits, or requires payment of benefits to an Alternate Payee that are required to be paid to ***another*** Alternate Payee under a prior QDRO.[173]

QDROs need not necessarily be long or complex, although sometimes they are both; the question is what is sought to be accomplished, and what safeguards are reasonably necessary given the parties, the background factual situation, the kind of plan involved, and the desired distributions.[174] These materials will address only those portions of proposed QDROs going to survivorship benefits.

A. Defined Contribution Plans

Typically, such plans incorporate a specific benefit payable to a beneficiary in the event the participant dies while in active service. The usual pre-retirement survivorship award is the entire account balance in the participant's name.

The death benefit can be made payable (in whole or part) to a former spouse by simply naming the former spouse as beneficiary, or by means of a QDRO; application of the rules controlling this possibility give rise to several possibilities for dispossession or unjust enrichment.

If the now-former spouse was awarded a portion of the account balance (usually by roll-over to the spouse's IRA), but the participant does not change the beneficiary designation forms provided by the plan, the former spouse might be able to "double dip" by receiving both the spousal share of the balance at divorce ***and*** a survivorship interest in the remainder. This

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[173] *See* 29 U.S.C. § 414(p)(3), 29 U.S.C. § 1056(d)(3)(D).

[174] These materials, however, will join the near-universal chorus of those who write or lecture in this field, and stress that practitioners should ***not*** simply copy the "form" or "sample" QDROs provided by companies, especially if the intent is to adequately serve the interest of the Alternate Payee (former spouse). It is relatively easy to come with an order sufficient to pass muster under ERISA, but practitioners should not believe that the plan has any special interest in protecting the rights of a former spouse under state law or a decree of divorce. For example, the entire ***subject*** of survivor's benefits may not be in a plan's sample order; that in no way excuses the practitioner from considering survivor's benefits, addressing them in the QDRO, and ensuring they are in place for the former spouse, where appropriate under the decree.

could be true even if the participant remarries, and believes that the later spouse is the beneficiary, and even if the decree contains a general residuary, waiver or release clause.[175]

In *McMillan*, the court noted federal preemption of state laws that relate to ERISA plans, and pointed out that ERISA requires that a plan administrator discharge his duties in accordance with the documents and instruments governing the plan. In that case, the plan documents named the woman as beneficiary, and her ex-husband did not change this designation after the divorce. The court found that the "clear statutory mandate," together with the plan documents, dictated that despite the divorce settlement waiver the woman was still the beneficiary.

There was previously a great debate about whether a divorce decree waiver of a survivorship would be enforced, but a couple of federal cases have largely ended that debate. In *Kennedy*,[176] the United States Supreme Court essentially held that beneficiary designation in plan documents control over contrary statements in divorce decrees or other documents if they conflict.[177]

One of the more relevant parts of the opinion as to these materials was where the Court explicitly refused to express any view as to whether the Estate could have brought an action in state or federal court against the former spouse to obtain the benefits *after* they were distributed, noting that various courts have distinguished the Court's prior holding in *Boggs v. Boggs*, 520 U.S. 833, 853 (1997), but not otherwise commenting on those cases.[178]

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[175] *See*, *e.g.*, *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990) (woman did not give up her right to the proceeds of her now deceased former husband's vested ERISA plans, of which she was designated as beneficiary, when she signed a divorce settlement in which both spouses relinquished 'any and all' claims against the other and in which the husband was designated to receive all property not otherwise disposed of).

[176] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009).

[177] There has been much written about the decision, a lot of which has been quite critical. *See*, *e.g.*, Geoff Ward, *Clear, Voluntary, and Made in Good Faith: an Alternative to the Supreme Court's Incorrect Approach to Resolving Conflicts Between Common Law Waivers and Erisa Plan Documents in Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*, 64 TAXL 1003 (Summer, 2001); Marshal Willick, *ERISA and QDROs: Some Current Issues and Concerns* (CLE, State Bar of Nevada, June 27, 2009), posted at http://willicklawgroup.com/published_works.

[178] *See Kennedy*, *supra*, at fn. 10:

> Nor do we express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed. Compare *Boggs v. Boggs*, 520 U.S. 833, 853, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) ("If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit"), with *Sweebe v. Sweebe*, 474 Mich. 151, 156-159, 712 N.W.2d 708, 712-713 (2006) (distinguishing *Boggs* and holding that "while a plan administrator must pay benefits to the named beneficiary as required by ERISA," after the benefits are distributed "the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining

Even for those plans for which beneficiary waivers are permitted under the terms of the plan, failing to do an adequate hoop-jump through the technical requirements of the plan's beneficiary designations can give rise to a holding that the waivers were inadequate and the former spouse is entitled to the proceeds.[179]

The level of technicality given "preemptive" importance can border on the ridiculous. In *Lasche*, the district court held that a former wife was entitled to the proceeds of a Merrill Lynch retirement plan in the name of her deceased husband, where she signed page five rather than page four of the plan documents for waiver of those survivor's benefits. The court found that the waiver requirements of ERISA would be "hollow protection" if not conformed to precisely, and thus that she did not "effectively" waive her rights in the plan. This conclusion was in ***spite of*** the wife's admitted signature on the waiver documents, and despite the fact that the waiver forms had been signed in accordance with a prenuptial agreement that called for that waiver to be signed. In other words, the court readily acknowledged that its result flew in the face of the parties' clear and mutual intent, and the reviewing appellate court also thought that form was more important than intent.

The key to such cases appears to be that of specificity and formality; if a participant seeks to have a former spouse waive an interest in a plan, it is necessary to be very specific about what is being waived; it is much more certain to hold water if the proper procedures are followed exactly.[180]

The takeaway point for these materials is that for a defined contribution plan, the beneficiary can be changed at any time, and the "death benefits" issues are best avoided by distributing the plan proceeds contemporaneously with the divorce decree.

B. Defined Benefit Plans

ERISA requires defined benefit plans to provide a default pre-retirement survivor benefit payable to a spouse; it may be awarded, in whole or part, to a former spouse. Ever eager for acronyms, those working in the field tend to refer to the standard death benefit payable while an employee continues to work as a "qualified pre-retirement survivor annuity," or "QPSA";

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those proceeds"); *Pardee v. Pardee*, 2005 OK CIV App. 27, ¶¶ 20, 27, 112 P.3d 308, 313-314, 315-316 (2004) (distinguishing *Boggs* and holding that ERISA did not preempt enforcement of allocation of ERISA benefits in state-court divorce decree as "the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed").

[179] *See Lasche v. George W. Lasche Basic Retirement Plan*, 870 F. Supp. 336 (D. S. Fla. 1994), *aff'd*, 111 F.3d 863 (11th Cir. 1997).

[180] *See Hurwitz v. Sher*, 982 F.2d 778 (2nd Cir. 1992), *cert. den.*, 508 U.S. 911 (1993).

the same folks refer to the standard death benefit payable after retirement and after the death of the employee as a "qualified joint and survivor annuity," or (unpronounceably) "QJSA." Basically, the amount of the benefit is either all, or half of the accrued benefit as of the last day the participant was alive and in service.

Generally, while an employee is still working, the divorce court can provide for a former spouse to receive a portion of the lifetime payment stream, and to be maintained as the survivor beneficiary, in whole or for any part of the lifetime benefit, as the case might warrant. There can be multiple survivor beneficiaries, so long as the total does not exceed the benefits available under the plan.

When the divorce is before retirement, the simplest thing is usually to divide the pension by way of a "separate interest" QDRO essentially breaking the pension into two parts, one in the name of each party, making the life or death of the other party irrelevant. While the employee is still working, ERISA and the Internal Revenue Code allow payment to a nonemployee spouse under a QDRO that provides for a separate interest for the nonemployee spouse in any form in which such benefits could have been paid under the plan to the participant (other than in the form of a joint and survivor annuity over the life of the nonemployee spouse and that person's subsequent spouse).

When a QDRO is not prepared until after the employee has retired, it is usually impossible to create "separate interests" by QDRO, as there is only a single post-retirement payment stream that can be affected. Under a "shared interest" QDRO, the participant and alternate payee "share" each of the participant's lifetime benefit payments; only the payment stream is divided. Therefore, payment to the alternate payee of a share of the participant's lifetime payments stops when the participant dies, and the question becomes whether a survivorship interest for that single payment stream is created by the order.

The same "double-dipping" possibilities exist here as with defined contribution plans, since an independent benefit can be carved out for a former spouse through a QDRO (at least where the divorce precedes retirement); if the former spouse is nevertheless retained as the survivor beneficiary, the former spouse would effectively get a double recovery. Many of the same considerations, and much the same results, have been seen in litigation concerning beneficiary designations in defined benefit plans.[181]

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[181] *See*, *e.g.*, *Trustees of Iron Workers Local 451 Annuity Fund v. O'Brien*, 937 F. Supp. 346 (D. Del. 1996) (waiver provision in a divorce stipulation purporting to release each party from present and future claims by the other did not operate to waive the wife's interest as the designated beneficiary of the husband's ERISA governed pension plan).

As with defined contribution plans, the results in these cases are not always predictable, and not always what might be expected from an examination of the probable intent and expectations of the parties.[182]

There is a lesson to be learned from these cases. The only thing likely to result from relying upon the terms of the decree alone to effect beneficiary changes is litigation, and one or more displeased litigants looking for someone to blame. It is incumbent upon divorce practitioners to advise their clients to change the beneficiary designation forms (on defined benefit ***and*** defined contribution plans) as part of the file closing procedure.

Additionally, practitioners should be aware that, no matter what one or both parties wants to happen, it may not be ***possible*** to create an award for a former spouse, and it may prove impossible to remove a beneficiary designation from a now-former spouse where ***that*** is intended.

Specifically, if the divorce occurs after retirement, then the practitioner must find out what benefits were elected at the time of retirement. If, for example, the participant had selected a "single life annuity," then the monthly benefit would be all that was before the court, and there would ***be*** no death benefits to allocate to a former spouse, even if the parties (or a court) wished to do so. Thus, no survivorship benefit would be at issue.

Some courts have taken the position that if the divorce occurs after retirement, and the spouses had selected a benefit form creating a survivor's benefit in the spouse, both parties had necessarily shared the burden of reduced monthly payments during life because of the premium therefor, and it was too late for the participant to request a change in benefit structure.[183]

Of course, it is easy to construct a situation where a different result would be warranted, such as when a short-term marriage overlaps the end of a career, and a worker makes his or her spouse the beneficiary upon retirement (since failing to name ***someone*** usually requires permanently giving up any survivorship interest).

ERISA does not speak directly to the question of waiver. Where a plan does not permit post-retirement beneficiary re-designation, it may be impossible to remove a spouse from beneficiary status, or to nominate a later spouse, directly, as a substitute survivor beneficiary.

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[182] *See*, *e.g.*, *In re Estate of Lanken*, 676 A.2d 190 (N.J. Super. 1996). There, the court held that the anti-alienation provision of ERISA applies to beneficiaries as well as plan participants, so that a woman did ***not*** waive her interest as named beneficiary of her husband's pension plan when in their divorce judgment she withdrew her "demand for support, equitable distribution, and attorneys fees," and the husband died 14 years after the divorce without having changed the beneficiary designation.

[183] *See*, *e.g.*, *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992) (now-former spouse entitled to remain the survivor beneficiary).

This state of affairs leaves the parties involved to the vagaries of lawsuits regarding waivers and seeking constructive trusts, where there was a great deal of activity until the issues were (mostly) settled by the federal courts.

he *Kennedy* holding (plan documents control over conflicting divorce decrees) was repeated in the final order entered in the also-much-cited *Carmona* case.[184] Under the interpretation of ERISA's survivorship provisions in *Carmona*, survivorship benefits in a defined benefit plan "irrevocably vest" in the spouse of the moment at the moment of retirement, so they *cannot* be waived in a divorce decree, or otherwise, unless permitted by the plan, and then only in accordance with the plan document forms permitting that waiver. No constructive trust in favor of the widow and intended recipient was allowed either, on the basis that ERISA does not permit courts to do indirectly what is explicitly prohibited from being done directly.

In other words, States are free to distribute property as they see fit, and every variety of retirement benefit is a property interest, and therefore at issue upon divorce. Sometimes, however, Congress wishes to "occupy the field" in a particular question of law, and generally, it has the power to do so, even when it results in unintended consequences of unjust enrichment and inequity, as in *Carmona*.[185]

In other words, who gets the money has less to do with the intent of the parties, or even the orders of the divorce court, than with the order in which retirement and divorce happen to occur.

C. A Brief Aside on Prenuptial Agreements

Practitioners must be at ***least*** as cautious when drafting prenuptial agreements as when negotiating divorce decrees. Counsel must be aware of the case law indicating that only

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[184] Specifically: "In *Kennedy*, the Court explicitly declined to express a view on whether an action could have been brought to obtain benefits from the former spouse after they had been distributed to her." *See Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010) (opinion on rehearing making minor corrections).

[185] *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010) (revised op'n on rehearing) (permitting a former spouse who had bargained away certain benefits for value to nevertheless make a claim to them despite her agreement, the order of the divorce court, and the wishes of the employee, due to the happenstance of the timing of divorce and retirement, and the preemptive scope of ERISA).

"spouses" can legitimately waive survivorship interests.[186] Of course, there is contrary authority.[187]

As a matter of defensive legal practice, it would be good practice to ensure that the employee/client is told to not ***only*** have a prenuptial agreement providing that the soon-to-be-spouse ***will*** sign such a waiver, but also told to ensure that the spouse ***does*** sign such a waiver after the wedding.

VI. CONCLUSIONS

There is no really short way of explaining, or understanding, the various plans, and all of the substantive and procedural tricks, traps, and intricacies inherent in them. The good news is that all of these plans are essentially statutory in nature, such that the information that must be known to master them is obtainable, if time-consuming to absorb.[188]

These plans are everywhere – they appear in a large percentage of cases, on one side or the other (or both), and a practitioner can ignore them only at his or her peril. It is a poor coping mechanism for the hazards in this field to insure against malpractice liability by hoping to die before one's clients.

The bottom line for litigators is that they must either have, learn, or hire sufficient expertise to deal competently with not only the monthly flow of benefits to be expected from public and private retirement plans, but particularly the survivorship interests that might be created under those plans. A lawyer who does not do so, and continues to handle these cases, will sooner or later make an error which cannot be corrected.

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[186] *See*, *e.g.*, *Nat'l Automobile Dealers and Assocs. Retirement. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996).

[187] *See*, *e.g.*, Linda Ravdin, MARITAL AGREEMENTS 354 (Tax Management Inc., 2002; pre-publication copy) (discussing *Critchell v. Critchell*, 746 A.2d 282 (D.C. Cir. 2000), and *Marriage of Rahn*, 914 P.2d 463 (Colo. App. 1995), while criticizing other decisions for "misreading the statute" relating to waivers by prospective spouses in prenuptial agreements).

[188] "But there, everything has its drawbacks, as the man said when his mother-in-law died, and they came down upon him for the funeral expenses." Jerome K. Jerome, *Three Men in a Boat* (1889).

APPENDIX

MISCELLANEOUS ADDITIONAL OBSERVATIONS ON LIFE AND DEATH

"Death is nature's way of telling you to slow down."
Anon., American Life Insurance Proverb, *Newsweek*, April 25, 1960, at 70.

"No arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."
Thomas Hobbs, *Leviathan*, pt. 1, ch. 11 (1651).

"Death is like sex, except you don't get sick afterwards."
Woody Allen (attrib.)

"Life's but a walking shadow, a poor player,
That struts and frets his hour upon the stage,
And then is heard no more; it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing."
William Shakespeare, *Macbeth*, act 5, sc. 5 (c. 1600)

"Be happy while y'er leevin,
For y'er a lang time deid."
Scottish motto for a house.

"He'd make a lovely corpse."
Charles Dickens, *Martin Chuzzlewit* (1844).

"Death and taxes and childbirth! There's never any convenient time for any of them."
Margaret Mitchell, *Gone With the Wind* (1936).

"I refuse to attend his funeral, but I wrote a very nice letter explaining that I approved of it."
Mark Twain (on hearing of the death of a corrupt politician), J. Munson, *The Sayings of Mark Twain* (1992).