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The Survivor Benefit Plan: Its History, Idiosyncrasies, Coverages, Cost, and Applications

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I. What Is It?

The Armed Services Survivor Benefit Plan is just that, a plan enacted by Congress to provide for the survivors of active duty and reserve-component military personnel upon the death of a servicemember.[1] The original survivorship plan for military members was created by Congress in the Uniformed Services Contingencies Option Act of 1953, which became law on August 8, 1953. The Contingencies Option Plan was amended on October 4, 1961, and thereafter called the Retired Serviceman's Family Protection Plan (RSFPP). This survivorship program was further amended with the passage of Public Law 92-425 on September 21, 1972, and is now known as the Survivor Benefit Plan (SBP). Although almost all servicemembers today who participate in a survivor benefit program do so through the Survivor Benefit Plan, nevertheless, there are still retired members who signed up for and have maintained their status all these years as participants in the Retired Serviceman's Family Protection Plan, and, for some, in the Survivor Benefit Plan as well.

II. Uniformed Services Contingencies Option Plan

The federal government's first effort to provide survivorship benefits for military members was embodied in the Uniformed Services Contingencies

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1. Because Congress has created a new word to refer to "service members" in its enactment of the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501, *et seq.*, the term "servicemember(s)" will be used.

Option Act of 1953 (Pub. L. 83-239), which allowed servicemembers to voluntarily elect to provide survivorship benefits for those remaining behind upon their deaths. The Contingency Option Plan (COP), as it was called, permitted an active-duty military member to elect an annuity for a surviving spouse and/or children for the first time. Former spouse coverage was not an authorized election, however. The plan, as enacted, was actuarially self-supporting, that is, there was no government subsidy to offset part of the cost of the plan annuity. The servicemember, to participate in the COP, was required to make that participation election *prior to* the eighteenth year of service.

III. Retired Serviceman's Family Protection Plan

The Retired Serviceman's Family Protection Plan (RSFPP) replaced the COP when it was enacted on October 4, 1961, by Public Law 87-381 as part of Chapter 73 of Title 10 and is codified at 10 U.S.C. §§ 1431–1446. The plan was implemented by Department of Defense Directive 1332.17, which was entitled "Retired Serviceman's Family Protection Plan." The RSFPP improved the flexibility of election options and increased the cost to the participating member to 23.5 cents per dollar of coverage. The RFSPP was amended by Public Law 89-365 on March 8, 1966, the import of which allowed the premiums paid by the servicemember to be tax exempt for the first time. When the RSFPP was subsequently replaced by the Survivor Benefit Plan (SBP) on September 21, 1972, a member could no longer choose to participate in the RSFPP. Thus, after September 20, 1972, a member could no longer establish RSFPP coverage. During the SBP initial enrollment period from September 21, 1972, to March 20, 1974, members who had elected RSFPP coverage could terminate that coverage and elect SBP coverage, or could choose to keep their RSFPP coverage in addition to electing SBP coverage.[2]

A. Available Coverages Under the RSFPP

There were basically three coverage options available to the member under the RSFPP: Option one: spouse only; option two: child only; and Option three: Spouse and child. Servicemembers electing option three were permitted to choose between a single annuity that would be paid to the surviving spouse until their death or remarriage, and, thereafter, would be paid to eligible dependent children in equal shares, or servicemembers were permitted to elect two separate annuities that were a combination of option one and option two annuities. *There was no provision under the RSFPP for any kind of former spouse coverage.*

2. MacConnell v. United States, 217 Ct. Cl. 33, 36 (1978); 10 U.S.C. § 1455(3)(b) (2006) *available at* www.dtic.mil/whs/directives/corres/html/133217.htm.

There was also a fourth choice, option four, which, if elected in conjunction with one of the other three, carried an additional cost, but its election permitted the RSFPP participant to terminate, withdraw, or reduce participation. A member who retired before August 13, 1968, had to specifically select option four in order to thereafter be able to terminate, withdraw, or reduce RSFPP coverage. Thus, if the member did not elect option four and the member's selected beneficiaries died or otherwise became ineligible before the member's death, the member would, nevertheless, be required to continue to pay the monthly premium for the coverage option chosen, even though the member had no eligible beneficiaries and could not name any new ones. But seeing the error of its ways, at least in part, Congress modified the program such that each member who retired on or after August 13, 1968, was automatically provided option four at no additional cost. In any event, the program coverage and its options had to be elected/selected by the member *at least two years prior to retirement.*

The RSFPP did have its coverage limitations, however, because only the member's spouse and eligible dependent children *on the date of the member's retirement* could be and/or were covered. The member had no ability, if becoming a widow(er) and/or divorcee and subsequently remarrying after retirement, to add a new spouse or child that was acquired *after* retirement. Additionally, although the RSFPP premiums did not increase once established, neither did the annuity paid to the beneficiary; that is, neither the premiums nor the annuity were subject to cost-of-living adjustments (COLAs), although the annuity of a beneficiary whose sponsor died on or before March 20, 1974, was adjusted proportionately by the COLAs applied to military retired pay. The annuity for the survivor of a participant whose death occurred on or after March 21, 1974, was a fixed percentage of the member's retired pay on retirement and was not increased by COLAs.

Like SBP premiums today, RSFPP premiums were (and are) deducted from the member's monthly retired pay and were not subject to federal income tax (after March 8, 1966). The annuity, however, was subject to federal income tax, just as SBP annuity payments are today.

There were also more egregious eligibility provisions under the RSFPP than under the SBP. A covered spouse was an eligible RSFPP annuitant for life or until remarriage *before age sixty*. The annuity terminated if the annuitant remarried before age sixty, and she could not have her annuity status reinstated for any reason other than an annulment or judicial decree that voided the subsequent marriage. Even then, the widow(er)–former annuitant's coverage would only be reinstated if the appropriate military finance office was provided with a certified copy of the annulment decree

or court order declaring the marriage void. Marriage after age sixty by the annuitant, however, was not an annuity termination event, and the member's widow(er) would continue receiving the monthly annuity.

Unmarried children were considered eligible beneficiaries until age eighteen if the member retired before November 1, 1968. If the member retired on or after November 1, 1968, the unmarried children were eligible beneficiaries until age eighteen, and thereafter until age twenty-three if they were attending school full time. *Unmarried* mentally or physically incapacitated children were eligible beneficiaries for life if the disabling condition rendered them incapable of self-support and the incapacitating condition existed before they reached age eighteen.

If the member had selected option four or if it was automatically elected for him or her on or after August 13, 1968, upon the occurrence of a termination event (divorce, death of a beneficiary, children no longer qualified), it was the member's responsibility to send a termination request to the finance office, along with substantiating documentation (such as a copy of divorce decree or death certificate), to terminate the coverage and stop the premium deductions. No refund was allowed for any premiums collected before receipt of the termination notice. Option four retirees with existing eligible beneficiaries could withdraw from the RSFPP, but they had to submit a withdrawal request to the finance agency or their service branch manager of this program. The costs and coverage would then cease effective the first day of the seventh month after the application was received.

An RSFPP retiree was also permitted to submit a request to reduce the survivor annuity to an amount not less than 12.5% of the member's retired pay, provided the resultant monthly annuity was at least $25. Such a reduction, however, would only be effective on the first day of the seventh month following the month in which the request was received.[3]

B. Only Incapacitated Children Are Now Beneficiaries

Since all other eligible beneficiaries are now deceased or no longer in the field of coverage, the RSFPP annuity is now payable only to unmarried incapacitated children over age eighteen and then only if the following conditions exist:

1. The child was born before the member retired.

3. The foregoing RSFPP information was largely based upon information the reader can find at the Department of the Air Force website, http://www.retirees.af.mil/factsheets/factsheet.asp?id=11695, titled "Air Force Retiree Services: Retired Serviceman's Family Protection Plan."

2. The child is incapable of self-support because of a physical or mental disability, which existed before the child's eighteenth birthday.
3. The child is unmarried.
4. The incapacity has been substantiated by a current medical report.
5. If the medical report certifies the disability is permanent, the annuity is payable for the lifetime of the annuitant.
6. If the disability is not permanent, medical certification must be sent every two years for continuous annuity payments.
7. If the annuitant recovers from the incapacity and becomes capable of self-support, the annuity will stop.
8. If the annuitant is unable to manage his or her financial affairs, either a guardian can be appointed by a court or a representative payee can be appointed pursuant to 10 U.S.C. § 1455. Upon receipt by the Defense Finance and Accounting Service (DFAS) of the guardianship or representative payee appointment, the annuity will be paid.

When qualifying incapacitated children are named as the beneficiaries of an RSFPP annuity (or a SBP annuity), the annuity is distributed as follows:

1. When there is only one surviving eligible child, the full amount of the annuity is paid to that child.
2. When there are two or more surviving eligible children, the annuity will be paid in equal shares. As a child becomes ineligible, his or her share is then paid to the remaining eligible children in equal portions. When there are no longer any eligible children, the RSFPP annuity will cease.
3. The annuity is payable to the custodian, guardian, or representative payee of the minor children. The custodian must be a parent by birth or adoption of the children. The annuity can be paid directly to a child annuitant when the child is considered an adult according to the laws of the child's state of residence on the age of his or her majority.[4]

Information on incapacitated beneficiaries can be found at the Defense

4. The foregoing rules and criteria for payment of annuities to incapacitated RSFPP beneficiaries are the same for incapacitated SBP beneficiaries and will not be repeated under the discussion of the SBP later in this article.

Finance and Accounting Service (DFAS) website.[5]

C. RSFPP Annuity and Its Interplay with Other Federal Benefits

An RSFPP annuity is not reduced by a surviving spouse's entitlement to Dependency and Indemnity Compensation (DIC). As an exception, the survivor of a member retired for physical disability with less than nineteen years of service (eighteen years of service before 1968) may not be paid an RSFPP annuity if the survivor is also entitled to and receiving compensation from the Department of Veterans Affairs. In this case, the survivor will be refunded all the premiums paid by the member for the RSFPP annuity, but no interest will be paid on the premiums. Additionally, and unlike SBP, before April 1, 2008, the RSFPP annuity is not subject to an age sixty-two Social Security offset. Further, and again unlike SBP, there is no conflict between civil service survivorship payments and receipt of a RSFPP annuity; the beneficiary may receive both of these benefits even though the survivor waived military retired pay for civil service retirement and elected survivorship coverage under the civil service retirement program. A retiree RSFPP participant who waived military retired pay for civil service retirement credit, however, is required to remit RSFPP premiums directly to DFAS since he or she is not in receipt of retired pay from which the DFAS can withhold and/or deduct the premiums.

As part of Public Law 106-65, which was signed into law October 5, 1999, active RSFPP participants were, just like SBP participants, allowed to be considered as paid-up participants as far as premiums are concerned. Effective October 1, 2008, again, as with SBP participants, no reduction may be made in the retired pay of an RSFPP participant for any month after the 360th month of retired pay reduction *and* the month during which the participant attains age seventy. As a practical matter, since all RSFPP participants have been in the program for at least thirty years and are all over seventy years of age, the members are all, therefore, now exempt from payment of RSFPP premiums.

D. No Policies Evidencing Participation in RSFPP Issued

Finally, as with SBP, neither the DFAS nor any service branch issues a certificate or policy evidencing RSFPP participation. The DFAS sends a retiree pay statement (presently called a Retiree Account Statement (RAS)) each time there is a change to the retired pay, usually only once each year in December. The member's RSFPP participation and partici-

5. DFAs, Retired and Annuitant Pay: Survivor Benefits, http://www.dfas.mil/retiredpay/survivorbenefits/retiredservicemansfamilyprotectionplanrsfpp annuity-childbeneficiaries.html.

pation category is noted on each RAS and can be verified thereby. Each RAS a participating member receives also identifies the member's elected beneficiaries).

IV. Armed Forces Survivor Benefit Plan

All provisions related to the SBP are located in Title 10 of the United States Code. References to "divorce" shall, for simplicity, also include dissolution and annulment proceedings as contemplated by the Act. Where the Act otherwise states "the Secretary concerned," this article uses "the DFAS," a reference to the Defense Finance and Accounting Service, since the DFAS administers the provisions of these statutes for "the Secretary concerned."

The statutory basis for the SBP (including the Reserve Component SBP (RC-SBP) is found in 10 U.S.C. §§ 1447–1455. Although some sections have been repealed, all SBP provisions (e.g., creation of the plan, its application, the qualification of beneficiaries, the guidelines for payment to beneficiaries, the funding of the plan, the appeal of the denial of benefits, the limitations on time to apply, etc.) are all found within this spread of section numbers.[6]

A. History of the SBP Enabling Legislation

The RSFPP was amended and superseded with the passage of Public Law 92-425 on September 21, 1972, with the result being the SBP substantially as we know it today. As originally enacted, it completely supplanted the RFSPP as far as new enrollments. The highlights of the new plan were that the government was now to subsidize part of the program costs; provided for an automatic enrollment at the maximum level of coverage, which was set at 55% of the base amount; commenced the use of COLAs to increase the monthly annuities on an annual basis at the same rate as retired pay was increased; created a Social Security offset that would reduce all annuities paid to annuitants age sixty-two and older; and instituted a one-year open season for new enrollments.[7]

In 1981, in conjunction with the passage of the Uniformed Services Former Spouse Protection Act (USFSPA), 10 U.S.C. §1408, et seq., Public Law 97-35 also created another "open season" for enrollments from October 1, 1981, to September 30, 1982. The SBP was again changed as

6. Although one place to start a discussion of the SBP is to examine the purpose and/or provisions of each of the applicable sections, such a discussion would unduly lengthen this article. I have summarized each of the statutory provisions governing the SBP, which should provide practitioners with a reference tool and a better understanding of the significance of each section and how they all interrelate. See www.hhzlaw.com under the title "SBP Statute Summaries."

7. 10 U.S.C. § 1445 (3)(b).

part of the amendments made to the USFSPA in the 1984 Defense Authorization Act, Public Law 98-94. These amendments, *for the first time*, allowed a former spouse to be designated as a "former spouse beneficiary" of the plan, but only if the servicemember *voluntarily* elected to cover the former spouse as a beneficiary.

The amendments that occurred with the passage of the Defense Authorization Act of 1986, Public Law 99-145, eliminated the Social Security offset for members retiring after October 1, 1985, but established a "two-tiered" system of SBP annuity payments, with annuitants under age sixty-two receiving 55% of the base annuity amount, while those age sixty-two and older, who were then ostensibly entitled to receive Social Security payments, had their SBP annuity payments reduced to 35%. The assumption was that those over age sixty-two would be "double dipping" if allowed to receive the full 55% of the annuity and their Social Security benefit payment as well.

The November 14, 1986, amendments that were part of the Defense Authorization Act of 1987, Public Law 99-661, for the first time declared that a state court's rendering of an annulment or a divorce was now allowed to *order* a servicemember to designate the nonmember spouse as a "former spouse" beneficiary of the SBP. Although the servicemember could still voluntarily designate a former spouse as a former spouse beneficiary, now the member could be compelled to do so. Nevertheless, there was still the one-year window to register the designation with the DFAS, a trap for many practitioners. These amendments also allowed a surviving spouse and/or a former spouse to remarry at or after age fifty-five and still be entitled to continue receiving the SBP annuity.

With the enactment of Public Law 101-189, the Defense Authorization Act of 1990/1991, the premium for SBP coverage was set at 6.5% of the base amount, the base amount usually being the amount of the retired member's gross retired pay. Previously the cost had been 10% of the gross retired pay. The Act also established a Supplemental Survivor Benefit Plan (SSBP) to compensate for the age sixty-two "Social Security receipt" reduction from 55% to 35%. This plan, however, was never favored by retirees and was subsequently repealed. Another benefit of this Act was another open season for enrollment in the SBP that ran from October 1, 1991, to September 30, 1992.

With the advent of the Global War on Terror (GWOT) after September 11, 2001, Congress created for the first time the opportunity for servicemembers' survivors to receive SBP even if the member was not retirement-eligible. The effective date was September 10, 2001, so that Congress, in the passage of the Defense Authorization Act, FY 2002, Public Law 107-107, was able to provide some measure of financial relief and support of

the survivors of servicemembers who died in the line of duty prior to becoming eligible to retire. This "implied participation" applied to active-duty servicemembers as well as members of the reserves and the National Guard who were on active duty in federal service at the time of their death.[8]

In 2003, with the passage of the Defense Authorization Act of 2004, Public Law 108-136, Congress established SBP coverage for the survivors of National Guard and reserve members who die on *inactive duty training*, that is, when on "weekend drills," as opposed to being in an active duty status. This amendment also allowed the Service Secretaries to pay the SBP annuity to the surviving children of the member rather than to the surviving spouse "for good cause shown."

The most recent amendment to the SBP occurred with the enactment of the Defense Authorization Act for Fiscal Year 2005, Public Law 108-375. Its import was to eliminate the Social Security offset at age sixty-two in staggered increments with the full 55% SBP annuity being restored as of April 1, 2008. It also established the most recent open enrollment season that ran from October 1, 2005, to September 30, 2006.[9]

B. Only One Class of Beneficiaries

As noted in the discussion of the RSFPP, there has always been only one class of beneficiaries that a SBP participant could elect. The present version of the SBP recognizes six classes of beneficiaries: (1) spouse, (2) spouse and children, (3) children, (4) former spouse, (5) former spouse and children, and (6) person with an insurable interest.[10] None of the cases discuss all of the beneficiary options available to the servicemember since such a discussion would be *dicta* at best. However, one Texas case actually discusses the "insurable interest" option in finding that the former spouse could be designated, "out of time," that is, beyond the statutory deadlines for a former spouse designation, as an insurable interest beneficiary, which, for all practical purposes, the former spouse is.[11] This Texas decision, although directing the trial court to order the servicemember to designate the former spouse as either a former spouse beneficiary or an insurable interest beneficiary, does not tell "the rest of the story." It is unknown from the opinion whether the DFAS honored the servicemember's compliance with the court's order, the "election" necessarily being

8. 10 U.S.C. § 1448(d) (2006).

9. This historical overview of the SBP was based upon information the author found (and reader can find) at the Military Officers Association of America (MOAA) website, http://www.moaa.org/lac/lac_resources/lac_resources_fam/lac_resources_sbp_history.htm, in its article entitled "Legislative History of SBP."

10. 10 U.S.C. §§ 1434, 1435, 1448.

11. MacMillan v. MacMillan, 751 S.W.2d 302, 303–04 (Tex. App. 1988).

substantially "out of time," or more than one year after entry of the final decree of divorce.

Other than electing the children of a spouse or former spouse, there are only "single annuity" beneficiaries of the SBP program.[12] Election of a spouse or former-spouse-*and*-children class covers all eligible children of the servicemember, not just those the member had with the designated spouse or former spouse beneficiary.

Although there can only be one class of beneficiary, there can also only be "one beneficiary" at a time. Thus, it stands to reason that, based upon the DFAS's history of the "first in time" treatment of retired pay, alimony and/or child support garnishments, if more than one former spouse is "deemed," the former spouse whose designation is timely and the first received, that former spouse will take precedence over a subsequently "deemed" former spouse beneficiary registration filing. Similarly, it would also stand to reason that upon the "first former spouse beneficiary" dying and thus being terminated as an eligible beneficiary, the "next in line" former spouse beneficiary who has "timely" attempted to be designated as a former spouse beneficiary, might be the recipient of the SBP annuity upon the servicemember's death. This is certainly something to consider if you have a former spouse client that may be such an eligible beneficiary.

C. Courts Could Not Order Deemed Election Prior to November 14, 1986

Prior to November 14, 1986, courts *were not permitted* to order a servicemember to designate a then-current spouse as a former spouse beneficiary under the SBP. The servicemember could voluntarily designate his soon to be ex-spouse as a former spouse beneficiary voluntarily, but the court's authority to order him to do so was preempted by federal law prior to that time.[13] Thus, the courts, prior to the effective date of Public Law 99-661, November 14, 1986, did not have the authority to order a servicemember to elect specific beneficiaries, such as the then-spouse or children.[14] After the November 14, 1986, amendment to §1450 (f)(2), state divorce courts were authorized to order the servicemember to retain the spouse as a SBP beneficiary by redesignating her or him as a "former

12. 10 U.S.C. § 1450(f)(3).

13. Dep't of Def. Authorization Act of 1984, Pub. L. 98–94, 97 Stat. 614 (1983).

14. 10 U.S.C. § 1450(f)(3). *In re* Marriage of Morton, 726 P.2d 297–300 (Kan. Ct. App. 1986); Barros v. Barros, 660 P.2d 770, 772 (Wash. Ct. App. 1983), *rev. denied*; Paul v. Paul, 410 N.W.2d 329, 333 (Minn. Ct. App. 1987); *In re* Marriage of Williams, 692 P.2d 885, 886–87 (Wash. Ct. App. 1984).

spouse beneficiary."[15]

If a retirement-eligible member is on active duty, the spouse is automatically covered unless the spouse declines the coverage. That is, upon retirement, the servicemember has no choice but to designate full coverage unless the spouse cooperates and "signs off," agreeing to less than full coverage or no coverage at all. If the spouse does not agree to less than full coverage, then, in that event, the DFAS infers an election of full SBP coverage for that spouse.

If the servicemember is retirement-eligible, but still on active duty, no designation will be made if a divorce is effected *prior to* the servicemember's actual retirement. In this event, the court must order former spouse SBP coverage for the then-spouse if the spouse desires the coverage after the divorce. If there is no court order to that effect, and absent the servicemember's designating the spouse for "former spouse" coverage within the one-year after the divorce decree is filed, the former spouse will not be entitled to SBP coverage.

Servicemembers on active duty may only designate a SBP beneficiary immediately prior to retirement.[16] A member of the reserves or National Guard, on the other hand, *is required* to make a designation of a SBP beneficiary within ninety days of the receipt of the notice of eligibility letter that confirms that he/she has completed the minimum requirements for entitlement to receipt of retired pay at age sixty, that is, has completed twenty "good years" of active and reserve participation.[17] The Reserve Component–Survivor Benefit Plan (RC-SBP) will be discussed in more detail later in this article, although most limitations that affect SBP also affect RC-SBP.[18]

D. Election of Less Than Full SBP Coverage

The DFAS assumes that an election of SBP coverage, whether spouse or former spouse, is for full coverage. This means that the 55% annuity, and the premiums to pay for it, will be based upon the member's gross retired pay entitlement. If the goal of the decree or agreement incident to divorce is to have the former spouse, postdivorce, to be entitled to only receive a SBP annuity upon the member's death that is equal to the same amount that former spouse will be entitled to receive as her/his share of the servicemember's retired pay, then this *must be specifically stated* in the order and/or agreement that designates the former spouse as a former

15. *See* Morris v. Morris, 894 S.W.2d 859, 864–65 (Tex. App. 1995) *no writ* (upholding the trial court's order prohibiting servicemember from changing his SBP beneficiary).

16. 10 U.S.C. § 1448(a)(2)(A).

17. 10 U.S.C. §§ 1448(a)(3)(B), 1448(e).

18. *See infra* Part V, *Reserve Component Survivor Benefit Plan (RC-SBP).*

spouse beneficiary.[19] Assume, for example, that the member's gross retired pay upon divorce is $2,200, but the member's disposable retired pay (DRP) is $1,210, and that the former spouse's share of the DRP is twenty-five percent, which is equal to $302.50, and that it is the parties' and/or the court's intent to ensure that, upon the member's death, the former spouse will continue to receive in SBP annuity payments the same amount as was previously being received as the former spouse's share of the retired pay ($302.50). To do this, the base amount of the SBP coverage must be set at $550.00. The formula for calculating this "base amount" is as follows:

$302.50 (Dollar value of DRP entitlement)
55% (SBP annuity percentage) =
SBP Base Amount
That is, $550.00

Stated another way: Pension share for former spouse/0.55 =
Target base annuity amount. That is, $550/0.55 = $302.50.

The only time the use or implementation of this formula is necessary is *if* the former spouse is to receive *less than* full SBP annuity coverage (e.g., base amount is gross retired pay). The result of using a base amount that is less than full coverage is that the monthly premium will be less. The premium is set by statute at 6.5% of the base amount for an active-duty SBP entitlement.[20] Thus, the premium in this example should be approximately $35.75 (6.5% x $550.00) rather than $143.00 for full coverage (6.5% x $2,200.00). The base amount and the concomitant premium will increase over time, after the election, due to the effect of COLAs on the retired pay. Every time the retired pay increases with a COLA, so does the SBP premium, and, of course, the resultant annuity entitlement. SBP premiums are not taxable. Thus, the fact that SBP coverage is in effect reduces the taxable retired pay income for both the member and the former spouse.

Finally, as the example shows, if the former spouse is receiving any percentage less than 50% of the member's retired pay, which is the norm, the member will be paying more of the SBP monthly premium than the former spouse, who is the only one to benefit from the coverage.[21] Thus, if it is intended that the base amount be less than full coverage, the language of the order and/or agreement must say so *specifically* so that there will be no

19. *See, e.g.*, Blythe v. Blythe, No. 03CA8, 2004 WL 237958, *2–3 (Ohio Ct. App. Feb. 4, 2004); MacMillan v. MacMillan, 751 S.W.2d 302, 303–304 (Tex. App. 1988).

20. 10 U.S.C. § 1452(a)(1)(A)(iii) (2006).

21. *See infra* Part IV.L., *Service Member and Former Spouse Share Monthly Premium Cost.*

question, especially for the DFAS, as to what the parties intended or the court ordered. If the order does not specify a reduced base amount, the DFAS will assume and charge premiums for the full amount. At that point, the decree will have become a final unappealed and unmodifiable judgment in most jurisdictions, and then it is too late to make it "correctly reflect the parties' intent." To address this reduced base amount issue, one might consider the following language from a Connecticut case:

> Defendant shall have the right to select the Survivor's Benefit Plan (SBP) as a former spouse up to the base amount of her interest in plaintiff's retirement/ retainer pay [here 25%], and *the parties shall share equally the cost of said premium*.[22]

Although the Connecticut court ordered that the servicemember and the former spouse "shall share equally the cost of said premium," the reality is that, since the former spouse is only entitled to 25% of the servicemember's retired pay, the servicemember will be paying 75% of the SBP premium cost unless language is included in the order compelling the former spouse to reimburse the servicemember for the payment differential. The DFAS will not honor an order that attempts to allocate SBP costs. Such reimbursement language, however, is not in the Connecticut court's order. The fact that a court is entering such an order in 2008 indicates that at least this court does not understand how SBP premiums are paid under federal law. This outcome in court only reinforces the necessity for *the servicemember's attorney to educate the trial court* on the manner in which SBP premiums are "paid" and the fact that, when faced with a similar fact pattern, the former spouse and the servicemember will not "*share equally the cost of said premium*," but that the cost will be *disproportionately borne by the servicemember*.[23]

E. Award of SBP Not Inherent with Award of Retired Pay

The practitioner should also remember that the award of SBP is not automatic under federal law, with the former spouse always receiving a survivor's annuity based on the servicemember's retired pay. Thus, the award in the decree of a percentage or other share of the servicemember's retired pay is not necessarily also an award of the survivorship interest in the member's SBP under the rules and case law of all states. The designation of the spouse as a *former spouse beneficiary should always be expressly ordered or awarded in the decree* or accompanying domestic relations order signed in conjunction with, and incorporated by reference in, the

22. Morgan v. Morgan, No KNOFA084108711S, 2008 WL 5540447, *6 (Conn. Super. Ct. Dec. 18, 2008) (emphasis added).

23. *See infra* Part IV.L.

divorce decree. If it is not specifically ordered, the servicemember can, upon retirement, designate his or her then-spouse and/or children as beneficiaries, thereby foreclosing any ability on the part of the former spouse to resurrect SBP former spouse coverage. If the member is retired at the time of the divorce and the then-spouse is designated as a spouse beneficiary, but is not ordered to be redesignated as a former spouse beneficiary, then the retired servicemember may request that the DFAS delete the SBP coverage to stop the premium payments upon the filing of the divorce decree. Further, note that the designation of the former spouse as a former spouse beneficiary of the servicemember's SBP is permissive.[24]

F. Former Spouse Designation—the One-Year Deadlines

Once a court has filed an order providing for the designation of the former spouse as "a former spouse beneficiary," the servicemember or retiree must tender the election to the DFAS in London, Kentucky, within one year of the date of the divorce.[25] This registration deadline is a malpractice trap that is inherent in any case in which the *servicemember is ordered* to designate the then-spouse as a former spouse SBP beneficiary.[26] Neither the former spouse nor her or his attorney should ever rely on the servicemember or his or her attorney to comply. The servicemember's failure to get the designation registered does not, in the long run, adversely affect him or her, but it very definitely does affect the former spouse. Thus, it is the former spouse and her or his attorney who should ensure that the SBP designation is properly effected, since the former spouse is the only one to benefit from such a *former spouse beneficiary* designation. *The former spouse's attorney must assume the responsibility* for ensuring that the "deemed election" is made with DFAS. This deemed election must be made within a one-year period from the date the order providing SBP coverage is filed.[27] Otherwise, the former spouse's attorney has committed legal malpractice![28]

The author has handled countless requests from former spouses to correct this type of error—failure to timely register former spouse beneficia-

24. *See* Paulson v. Paulson, 682 So. 2d 1060, 1063 (Ala. Civ. App. 1996) (holding that, although it is *permissible* for a trial court to order one spouse to provide the other with a survivor's annuity, a trial court also has discretion to not make such an award); *see also* Schado v. Schado, 648 So. 2d 1169, 1171–72 (Ala. Civ. App. 1994).

25. 10 U.S.C. § 1448(b)(3)(A)(iii). *Cf.* King v. United States, 65 Fed. Cl. 385, 388 (2005); Battle v. U.S. Navy Bd. for Cor. of Naval Records, No. Civ. 04-388 (SBC) 2005 WL 975634 (D. D.C. Apr. 25, 2005).

26. 10 U.S.C. §1448(a)(3)(A)(iii).

27. *Id.*

28. *See, e.g.*, People v. Fisher, 203 P.3d 1192 (Colo. O.P.D.J. 2007) (sanctioning attorney for failure to register SBP coverage with DFAS for former spouse client).

ry coverage—after the servicemember is deceased. At this point it is clearly too late. Even while the servicemember is still alive, the window of opportunity has closed if one year from date of divorce (or SBP order) has long ago come and gone.

There is a possibility that were a practitioner to file a request for a modification of the final divorce decree and restate the commitment of the servicemember to carry out the duty and deem the former spouse as beneficiary anew, the DFAS might, if it has not in the past, recognize and honor these clearly out-of-time orders. There is no guarantee, however, that DFAS would honor the order. It might be worth a try because the answer to an unasked question is always "no." At least ask the question by getting and submitting such an order. The practitioner must remind the client, however, that the applicable statute clearly says "Any such election must be written, signed by the person making the election, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment."[29] If the lawyer is successful, the lawyer will be a hero.

G. Registration of SBP-Deemed Election Coverage

Ordinarily, an active-duty servicemember cannot elect SBP coverage until the member is eligible to and does retire. Then, the member has a one-year period in which to designate one of the coverage options under SBP. Furthermore, the servicemember must either agree to designate the then-spouse as a former spouse beneficiary or be ordered by the court to do so. Therefore, if the practitioner represents the former spouse and has had the servicemember ordered to designate the then-spouse client as a *former spouse beneficiary*, then, even if the servicemember is ordered to do it, the former spouse's attorney must file, or "register," the divorce decree with the DFAS and inform it that the divorce decree is being filed to activate a "deemed election" at the time of the servicemember's retirement! The address to which this deemed election letter must be sent is U.S. Military Annuitant Pay, P.O. Box 7131, London, KY 40742-7131.

Since October 1, 2008, the only acceptable form to effect the former spouse's deemed election is DD Form 2656-10.[30] The deemed election is

29. 10 U.S.C. § 1448(a)(3)(A)(iii). Some of the cases addressing the importance and finality of the one-year registration requirement are Dugan v. Childers, 539 S.E.2d 723 (Va. 2001); Silva v. Silva, 509 S.E.2d 483 (S.C. 1998); Dean v. Dean, No. 07-CA-04, 2008 WL 498476 (Ohio Ct. App. Feb. 22, 2008); People v. Fisher, 203 P.3d 1192 (Colo. O.P.D.J. 2007); King v. United States, 65 Fed. Cl. at 385, 388; and the state case, King v. King, 483 S.E.2d 379 (Ga. Ct. App. 1997).

30. Google DD Form 2656-10 or find it online as a "fileable form" at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-10.pdf.

complete when a certified copy of the order for SBP coverage (or a certified copy of the divorce decree if addressed therein) is tendered within one year to the DFAS in London, Kentucky, along with this form. All of the other relevant SBP forms in the DD Form 2656 series are listed and described in Appendix A.

If registration of a client's SBP deemed election as a former spouse beneficiary is not filed with the DFAS within one year of the date the divorce decree is filed, the only possible recourse, and it is virtually a "slim to none" choice, will be to try to compel the servicemember to carry out his responsibilities under the divorce decree at the time of the member's retirement by designating the former spouse as a former spouse beneficiary as a "person with an insurable interest."[31] Filing the divorce decree or military retirement order with the DFAS to effect the deemed election will prevent the servicemember from failing to carry out his or her responsibilities under the decree at the time of retirement by then designating the former spouse as a *former spouse beneficiary.* It will also defuse, at the outset, a malpractice time bomb that will otherwise be waiting for the right time—the servicemember's death—to explode and ruin one's day—possibly the lawyer's own retirement.[32]

The servicemember, even if ordered by the decree to designate the spouse as a former spouse beneficiary, can decide to do nothing. And if he does not effect a former spouse election within one year of the divorce, and the former spouse fails to make a deemed election within one year of the SBP order, then the parties will be foreclosed from designating the former spouse as a former spouse beneficiary. The former spouse will be foreclosed from effecting SBP coverage after the two one-year periods have expired unless, perhaps, she can obtain former spouse coverage during a subsequent congressionally mandated "open season." However, none of these open seasons have thus far included former spouse deemed elections as part of the authorization.

A common mistake is submitting one decree to the DFAS to initiate the payment of retired pay and for SBP coverage for the former spouse. This approach is insufficient to effect a deemed election of the former spouse as an SBP beneficiary. This is true even if the decree provides that the former spouse is to be designated, upon divorce, as a *former spouse beneficiary*. The DFAS will, upon receipt of the retired pay registration request, in its receipt acknowledgement letter, advise that a SBP election must be tendered separately to the DFAS office in London, Kentucky. Thus, a

31. *Cf.* MacMillan v. MacMillan, 751 S.W.2d 302, 304 (Tex. App. 1988).

32. *See, e.g.*, People v. Fisher, 203 P.3d 1192. *Cf.* King v. United States, 65 Fed. Cl. 385 (2005).

double request cannot be done in the same correspondence. It must be done in two separate requests to the DFAS, one for the retired pay (Cleveland, OH), and one for the deemed election of the former spouse as a *former spouse SBP beneficiary* (London, KY).

Remember, there is only a one-year window from the date the order containing the deemed election is filed to get a former spouse client registered with the DFAS as a deemed former spouse SBP beneficiary, and it must be submitted on DD Form 2656-10. The prudent attorney will make the task of properly serving these SBP documents part of the responsibilities on closing the file, just like transferring the title to the car or the house. Failure to complete this task, however, may have a far greater monetary penalty for the attorney than the failure to transfer a car title or a deed to the house.

H. Election of Former Spouse Beneficiary by Agreement

Although the most common way for a divorced spouse to become a former spouse beneficiary is by deemed election through a court order, as part of the process, the servicemember can "agree" to name the former spouse as a former spouse beneficiary. All of the same rules apply to registration within one year to DFAS (London, KY), but the form used to accomplish the task is different. In this case, the parties should use a DD Form 2656-1.[33]

I. No Policies Evidencing Participation in SBP Issued

As with RSFPP, neither the DFAS, nor any service branch, issues certificates or policies evidencing SBP participation. The DFAS sends the retiree a Retiree Account Statement (RAS) each time there is a change in retired pay, and any SBP participation is noted there. It can be verified in at least two places on the RAS: on the left side of the "pay column" where the deduction for the premium from gross retired pay is shown and on the lower middle part of the front side, where the kind of coverage and the beneficiary's birth date are shown. The latter does not list the name of the SBP beneficiary, only the beneficiary's date of birth. Also identified there is the type of coverage in effect (e.g., "spouse only," or "former spouse only"). So, if the RAS lists coverage as "spouse only," but the client is no longer married to the servicemember and is, thus, a "former spouse," the former spouse client is not the beneficiary, regardless of whether the client's birth date is listed on the RAS or not. It is incumbent on the former spouse's attorney to get this coverage designation corrected, if possi-

33. DD Form 2656-1 in a fillable format can be downloaded at http://www.dtic.mil/whs/directives/ infomgt/forms/eforms/dd2656-1.pdf.

ble, since once out of the "one-year registration window," the chances of successfully correcting the designation gets smaller and smaller, especially if the servicemember has remarried in the interim and actually has a "spouse" to take as the "spouse beneficiary." In such an instance, and it occurs frequently, the "spouse beneficiary" will be the SBP annuitant, regardless of the fact that "his or her birth date" is not the one listed on the RAS.

J. Election as SBP Beneficiary Previously Refused by Then-Spouse

If the servicemember is married at the time of his retirement (or at the time the member must make an election, if a reservist, and the member has completed twenty good years for retirement purposes) and the member's then-spouse *participates in the decision to decline spouse SBP coverage*, even if the court were to order the member to participate in electing to designate the spouse as a "former spouse beneficiary" of the member's SBP or orders that it be "deemed," DFAS will not recognize the court's order or the attempted designation.

The corollary to such a declination election should be that, after declining coverage, if, still during the parties' marriage, an open season for making and/or upgrading SBP designations occurs and the member and spouse then elect to participate in the SBP program, such that, upon divorce, the spouse is then a "spouse beneficiary," that spouse should be authorized to be designated and the court authorized to order that the spouse be deemed a *former spouse beneficiary* of the servicemember's SBP. The author, however, knows of no "authority" for this "corollary," but it logically follows from the DFAS position on "declination of coverage by a spouse" and "court-ordered deemed elections." It should be noted, however, that none of the congressional "open seasons" have allowed a servicemember to add as a beneficiary a "former spouse," nor to reduce the coverage previously elected. They have only allowed servicemembers to elect to establish or increase coverage.[34]

K. Effect of Remarriage Before Age Fifty-Five

In the event that the former spouse is considerably under the age of fifty-five, even if the servicemember is near retirement, give thought to *not* having her or him designated as a former spouse beneficiary and providing some other form of security for the loss of retired pay if the member or retiree dies first. This is because, if the former spouse remarries before she/he reaches age fifty-five, the coverage will be suspended dur-

34. See *infra* Part IV. V. for discussion of open seasons under "*Open Seasons" for SBP Enrollment/ Benefits Upgrade.*

ing the period of the "remarriage" since the statute bars the former spouse from receiving the annuity in this eventuality.[35] So, it is incumbent upon the member, upon learning about the former spouse's remarriage before age fifty-five (as well as the former spouse) to provide the DFAS with a copy of the former spouse's divorce decree or the death certificate of the person to whom the former spouse was married.

If either of the above scenarios occurs and the SBP goes into suspended coverage, the DFAS will not reimburse either the servicemember or the former spouse any premiums paid *prior to* the member (or the former spouse) gives the DFAS notice of there being no beneficiary within the zone of coverage. It is, therefore, incumbent and important that the former spouse notify the servicemember and/or the DFAS of the remarriage and the necessarily suspended coverage in order that the premium payments will be suspended. Of course, since the servicemember is usually paying more for the premium than the former spouse, the member has a strong interest in suspending the coverage and the attendant payments, and the member should send his or her own suspension notice with some evidence of the remarriage to inform the DFAS to stop deducting the SBP premiums. Duplication on the suspension notice in this situation is a good idea. This is the best way to ensure that the DFAS is, in fact, notified to cease making a monthly premium deduction. Otherwise, the DFAS will continue to deduct premiums, even though the coverage is, as a matter of law, suspended upon and/or during the former spouse's subsequent nonqualifying marriage.

In the event that the former-spouse coverage and premiums were suspended as a result of the former spouse's remarriage prior to age fifty-five, and the remarriage terminates, the former spouse can apply to the DFAS for reinstatement of that suspended former-spouse coverage and, upon its receipt of proof of the termination of the remarriage, the former-spouse coverage will be reinstated the day after the date of the termination of the remarriage, and costs for former-spouse coverage are reinstated effective the first day of the month after the date the former spouse's remarriage terminates.[36] The former spouse whose annuity and/or annuity entitlement has been suspended because of a remarriage before age fifty-five must, therefore, be expedient in providing the DFAS with a copy of the former spouse's divorce decree or the death certificate of the person to whom the former spouse was married to be entitled to reinstatement of the former-spouse annuity coverage and/or annuity payment.

35. 10 U.S.C. § 1450(b)(2). *See* Hipps v. Hipps, 597 S.E.2d 359, 360–61 (Ga. 2004).

36. Air Force Retiree Services, Former Spouse and Child SBP Coverage, http://www.retirees.af.mil/factsheets/factsheet.asp?id=11580.

If the member dies during the period the former-spouse coverage is suspended because of the former spouse's remarriage before age fifty-five, the annuity would be payable to any eligible children of the servicemember. The former spouse would be, however, eligible for the annuity in the event the remarriage subsequently terminated.[37]

L. Servicemember and Former Spouse Share Monthly Premium Cost

Another consideration of which the servicemember's attorney should apprise his client, but more especially the court, is the fact that the monthly premium for the SBP coverage "comes off the top" before the application of the percentage that goes to the servicemember's former spouse.[38] Thus, unless there is an adjustment in the percentage awarded the former spouse to account for the premium's cost, the servicemember will be paying 50% or more of the cost of the SBP coverage, the specific amount varying with the percentage of retired pay awarded to the former spouse. For instance, as was the case in *Schneider v. Schneider*,[39] the former spouse was awarded 31.9% of the servicemember's retired pay. The former spouse wanted to be covered as an SBP former spouse beneficiary and agreed to pay 100% of the cost of the monthly premium. In this case, she began reimbursing the retiree for the full amount of the monthly premium until she realized that she was actually paying 131.9% of the premium cost. She then reduced her monthly payment to the servicemember to 68.1% of the premium cost because she was already paying 31.9% of the premium cost, which DFAS was "automatically" deducting from her share of disposable retired pay.[40] Appendix B is the respondent's trial exhibit, which was actually introduced into evidence to explain this fact to the trial court.

In another case, the former spouse had agreed to pay 100% of the cost of maintaining herself as the plan beneficiary. Their 1995 divorce decree provided that the DFAS was to withhold 100% of the cost of the SBP premiums solely from her share of the retired pay. Naturally, the DFAS did not do so. In this, the third appeal from some aspect of the divorce decree dealing with the military retired pay and the SBP premiums, the appeals court remanded for proceedings to determine how the servicemember's share of the SBP premiums would be paid by the former spouse.[41]

37. *Id.*

38. 10 U.S.C. § 1408(a)(4)(D); *see* Nichols v. Nichols, 87 P.3d 375 (Kan. Ct. App. 2004).

39. 5 S.W.3d 925 (Tex. App. 1999).

40. *Id.*

41. Noone v. Noone, No. 04-05-00680-CV, 2006 WL 927335 (Tex. App. Apr. 12, 2006), *no pet.* (unpublished).

Since the servicemember always pays an equal or larger percentage of the premium, the percentage of retired pay awarded to the former spouse can be reduced to have her bear the full cost of the SBP premium. This is a relatively easy mathematical computation to make, but the member's attorney should have such a calculation prepared as a trial exhibit to demonstrate to opposing counsel and the court the adjustment that needs to be made.[42]

The practitioner should also be cognizant of the SBP discussion and holding in *Limbaugh v. Limbaugh.*[43] In a direct appeal of the divorce decree, the servicemember asserted that his payment of any part of the SBP premium, something that only benefited his former spouse, was error "because such order improperly requires 'a permanent, and for a period of time double, monthly maintenance payment'" in contravention of the Texas maintenance statute.[44] The marriage was very long, and the former spouse was a minimum-wage employee. The *Limbaugh* court stated the following:

> However, a divorce court may order a spouse to make post-decree payments for the benefit of his former spouse for life if such payments "are directly referable to the rights and equities of the parties in community property at the time of divorce.". . . Because the monthly payment for the survivor benefit annuity is "directly referable" to this community asset, we conclude that the court did not abuse its discretion by ordering Leland to continue making this payment.[45]

The trial court and court of appeals appear to have bent the available law to reach the result they wanted. SBP premiums are only indirectly referable, at best, and then only to the extent that the premium payments are determined and paid as a percentage of the servicemember's gross retired pay. Although the entitlement to designate a SBP beneficiary accrued and/or was earned during the parties' marriage and may, from that standpoint, be "a marital or community asset," the right to be designated as a SBP beneficiary is not truly a marital asset but, at best, is the equivalent of being a beneficiary of a term life insurance policy that has no cash value. Neither one survives a divorce unless the spouse wanting the coverage pays for it. Typically, a term life policy is only awarded to the non-owner/beneficiary if that party chooses to pay the premium for the coverage and entitlement to be a beneficiary of the policy. However, as occurred in *Limbaugh* and other cases, the servicemember, due to specific action/order of the court, or, worse yet, the inaction of the court, must often pay the reciprocal of the retired pay percentage awarded to the for-

42. *See generally id. see also* Appendix B.
43. 71 S.W.3d 1 (Tex. App. 2002), *no pet*.
44. Limbaugh v. Limbaugh, 71 S.W.3d at 1, 15 (Tex. App. 2002).
45. *Id.* at 15–16 (internal citations omitted).

mer spouse of the SBP premium. The *Limbaugh* court was presented with "a poor and pitiful wife" fact situation, refused to follow the Texas maintenance statute's provisions, and chose "old bad law" to reach its desired result to provide for and protect the former spouse. So, if the reader is looking for a case to convince a court to have the servicemember pay one-half or more of the SBP premium—although the servicemember will always pay at least one-half of it, *Limbaugh* is it.[46]

Courts have held that ordering the servicemember to "pay for the SBP coverage," that is, pay the bulk of the monthly premium cost, is not an abuse of discretion by the trial court.[47] Many states, however, find it appropriate to order the coverage, but give no consideration to who is paying the lion's share of the monthly cost, much less that cost over time, largely due to the failure of the servicemember's attorney to properly educate the court as to the enormity of the cost over time. The member's attorney should come to that trial/hearing armed with an exhibit similar to Appendix B at a minimum. Failure of the servicemember's attorney to educate the trial court of the cost and how much of that cost the member, his or her client, is paying, may constitute *professional negligence.* Additionally, failure to create a trial court record will leave nothing about which to complain on appeal of the trial court's action or inaction and will leave nothing for an appellate lawyer to work with to win the case at the appellate level.

M. The Court Is Awarding the Former Spouse Alimony

As a corollary to the previous discussion, if the practitioner represents the servicemember and believes that the court may or will order the designation of the former spouse as a SBP "former spouse beneficiary," the lawyer should be prepared to make the court aware that, unless some provision is made for the former spouse to pay that portion of the premium costs automatically being paid by the servicemember, the court will be, in this instance, ordering the servicemember to pay court-ordered alimony for and on behalf of the former spouse. Further, since the election, once made and registered, is irrevocable,[48] this court-ordered "alimony award" is a lifetime award. In the majority of states that allow the award of open-ended alimony, this is not a problem, although this cost should be factored into any alimony award the member may otherwise be ordered to pay. If, on the other hand, the state in which the case is pending only has a "reha-

46. *Cf.* Schneider v. Schneider, 5 S.W.3d 925, 930–31 (Tex. App. 1999), *no pet*.

47. *See*, *e.g.*, *In re* Smith, 56 Cal. Rptr. 3d 341, 350 (Ct. App. 2007); Leonard v. Leonard, 877 N.E.2d 896, 900-01 (Ind. Ct. App. 2007); *Limbaugh*, 71 S.W.3d at 15–16.

48. *See* 10 U.S.C. § 1448(a)(4) (2006).

bilitative" maintenance or alimony statute, such as Hawaii or Texas, for instance, the permanency of the contemplated "SBP premium alimony award" should be argued.[49]

N. SBP as a Life Insurance Policy—Security for Retired Pay and/or for Alimony Award

Some state courts have held that requiring the servicemember to provide the SBP benefit to the former spouse provides the former spouse with exactly the same thing that the servicemember is entitled to receive: a retirement income for life. That may sound rational and just, but the reality is that such an award is anything but rational or just. In *Harris v. Harris*,[50] a servicemember had designated his former spouse as a spouse beneficiary of his SBP at the time of his retirement, and the payments for the premiums were coming out of his retired pay. He did not contest her being appointed as a former spouse beneficiary, but did contest being ordered to pay the cost of the premiums. The Nebraska Supreme Court, citing Nebraska precedent in addition to that from other states, affirmed that,

> [W]ithout the SBP payments, if a soldier died prematurely, his or her spouse would be deprived of *the ownership of this marital asset*. If the soldier purchased a SBP, however, "benefits can continue to be paid to the beneficiary, including a former spouse." . . . [R]equiring the purchase of an *[SBP]* "gives the division of a nondisability military pension more of the attributes of a true property division."[51]

Thus, the court basically held that *the SBP was insurance purchased* to ensure that the wife would continue to receive "her share of the retired pay" for the rest of her life. The wife was some fifteen years younger and less educated than the member and had, for the most part, been a stay-at-home mom. It would appear that the justices were ensuring that "justice," at least for the wife, was done. Reading the opinion, one might believe that the servicemember's complaint was that "he was paying all of the SBP premium cost." However, the court opinion did not specifically address premium "cost sharing."

In *Hipps v. Hipps*,[52] the trial court awarded the former spouse alimony and ordered the servicemember to designate the former spouse as a former

49. *Cf.* Francis v. Francis, 412 S.W.2d 29, 31–32 (Tex. 1967) (not allowing permanent court-ordered alimony, although the effect of this holding has been overruled to the extent spousal maintenance has been authorized by TEX. FAM. CODE § 3.9601 *et seq.*).

50. 621 N.W.2d 491 (Neb. 2001).

51. *Id.* at 498 (citing Kramer v. Kramer, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993)) (emphasis added).

52. 597 S.E.2d 359 (Ga. 2004).

spouse beneficiary and pay the premiums. It appears that the servicemember was awarded all of the retired pay. The servicemember appealed the requirement to designate the former spouse as a SBP beneficiary and pay the cost. The Georgia Supreme Court concluded that "a court order requiring a party to designate a former spouse as a plan beneficiary does not constitute a transfer of property" and that "the [SBP] provides benefits to the spouse upon the military member's death and is essentially a *life insurance policy unrelated to the military member's pension.*"[53] The court expressly found that if the former spouse remarried, the survivor benefits would cease.[54]

In *Kramer v. Kramer*,[55] upon servicemember's appeal of the award to former spouse of alimony and a portion of his retired pay, former spouse cross-appealed claiming error in the failure of the trial court to *provide security for the award of her retired pay benefit*, and requesting that she be designated as a SBP beneficiary. The appellate court held, as to the SBP, that the trial court *erred in failing to designate former spouse as a SBP beneficiary* since, in not doing so, it "clearly [deprived former spouse] of a just and equitable result, as she would be deprived of one of the most valuable attributes of complete ownership of property."[56] Should servicemember prematurely die, former spouse's "interest in the most important material asset of the marriage would simply evaporate" and the court opined that the basic Nebraska statute dealing with property division and alimony provides that "[r]easonable security for payment may be required by the court."[57] Upon remand, the trial court was to order the servicemember to designate the former spouse as the SBP beneficiary.

In the first appeal of a Florida case,[58] the servicemember complained that the trial court erred in ordering him to maintain former spouse as a beneficiary of his SBP and the appellate court agreed with him and reversed the case. After it was remanded, the case came back up due to the former spouse's complaint that the trial court did have jurisdiction to compel servicemember to designate her as a former spouse beneficiary. In the second appeal, the appellate court noted that its prior opinion was based upon its failure to know that the SBP statute had been amended to give trial courts the authority to order the servicemember to designate the former spouse as a former spouse beneficiary.[59] The servicemember died

53. *Id.* at 361 (citing Smith v. Smith, 438 S.E.2d 582, 584 (W. Va. 1993)) (emphasis added).
54. *Id.* at 362.
55. 510 N.W.2d 351 (Neb. Ct. App. 1993).
56. *Hipps*, 597 S.E.2d at 361.
57. *Id.*
58. Heldmyer v. Heldmyer, 509 So. 2d 1310 (Fla. Dist. Ct. App. 1987).
59. Heldmyer v. Heldmyer, 555 So. 2d 1324, 1325 (Fla. Dist. Ct. App. 1990).

during the pendency of the second appeal, having previously designated his new wife as a "spouse beneficiary." The appellate court issued an order directing the trial court to order the servicemember to designate his former spouse as the SBP beneficiary, but recalled that order upon learning of servicemember's death. To correct what the court found to be the inequitable result from the holding of the first appeal, the trial court was given the latitude on remand to redistribute assets to compensate for the loss to the former spouse of the opportunity to be appointed as the SBP beneficiary and be the one receiving the annuity payments. Apparently, the Florida Court of Appeals did not believe its order to have the former spouse appointed/designated as the former spouse beneficiary would overturn the servicemember's designation of his wife at the SBP beneficiary with the DFAS, even though this was a direct appeal. In hindsight, it is probable that the Florida court's order would have been accepted by the DFAS since this was still the original divorce decree, even though it had been to the court of appeals twice.

In all of the foregoing cases, the orders of the trial and/or the appellate courts were to provide the former spouse with a form of *security* for the potential loss of either the alimony awarded or the military retired pay awarded in the event the former spouse outlived the servicemember, or, in any event, holding that the trial court had the discretion to do so.[60] Providing security for the former spouse's share of the retired pay is certainly a laudable goal, provided that the cost of the "asset" being awarded is balanced in the scales as well, since maintaining the SBP coverage is not inexpensive and, in most cases, the servicemember will be paying the lion's share of the monthly premiums for a very long time. So, if practicing in one of the states issuing the above opinions or in one having similar laws, and that state's courts can order permanent alimony, make sure the monthly cost of the SBP premium payments is factored into the trial court's fair and equitable division and/or alimony award.

Several of the cases noted that the servicemember being ordered to cover former spouse as a beneficiary of the SBP was not a transfer of property and that the "asset," that is, the SBP, was still "owned" by the

60. *See* McDougal v. Lumpkin, 11 P.3d 990, 996 (Alaska 2000) (abuse of discretion to not require the servicemember to insure "his military retirement account," and "an agreement for equitable division of retirement benefits earned during marriage presumptively encompasses survivor benefits."); *In re* Marriage of Smith, 56 Cal. Rptr. 3d 341, 350 (Ct. App. 2007) (since servicemember has a right to receive retired pay payments for his lifetime, having former spouse as the SBP beneficiary is a way to make it "equal" for the former spouse by allowing her an equal right to receive payments over her lifetime, i.e., by purchasing the SBP); *In re* Marriage of Payne, 897 P.2d 888, 889–90 (Colo. Ct. App. 1995); Haydu v. Haydu, 591 So. 2d 655, 657 (Fla. Dist. Ct. App. 1991); *In re* Marriage of Bowman, 734 P.2d 197, 202–03 (Mont. 1987).

servicemember.[61] If that is the case, then it would seem inequitable for the servicemember to be ordered to pay for an asset when the only person to receive any benefit from it is the former spouse.

O. Premium Payments by Former Spouse

If the former spouse is awarded SBP coverage conditioned on the former spouse paying all of the premium costs, and/or the former spouse is ordered to pay or reimburse the servicemember for that portion of the SBP premium being paid by the servicemember, there is no point in putting language in the order which forfeits the election if the former spouse fails to pay all of the premium costs each month since the election is irrevocable once made. The only sure way to protect the servicemember in this situation is to *reduce the percentage being paid* to the former spouse as the former spouse's share of the retired pay to compensate or cover the cost of the SBP premium the former spouse should be paying. One could argue that since the former spouse is the only one who will benefit from being designated as the SBP former spouse beneficiary, the former spouse should be the only one paying for that benefit.[62]

Failing to address this cost-sharing at the time of the divorce, can result in a malpractice claim for the servicemember's attorney since, after the evidence is closed at the trial, it is usually too late to address the issue; *res judicata* will bar any attempt to readdress the issue after the fact.[63] Failure to alert the trial court regarding the cost-sharing and failure to make a record for an appellate attorney to have the opportunity to fairly present the issue to an appellate court may be professional negligence. Thus, a record should always be made to ensure enough in that record to be able to prevail on appeal.

An alternative to reducing the percentage to "recoup" the servicemember's share of the SBP premium being withheld from his/her share of the retired pay by the DFAS would be for the former spouse to be ordered to repay that share of the premium being paid by the servicemember on some agreed or court-ordered schedule, that is, on a monthly, quarterly, semi-annual or annual basis. This is a weak alternative if the former spouse chooses to ignore the reimbursement requirement since the servicemember's only recourse to enforce the reimbursement of payments is to file a

61. *See, e.g.,* Hipps v. Hipps, 597 S.E. 2d 359, 360–61 (Ga. 2004); *Payne*, 897 P.2d at 889; Matthews v. Matthews, 647 A.2d 812, 817–18 (Md. 1994).

62. *Cf.* Schneider v. Schneider, 5 S.W.3d 925 (Tex. App. 1999), *no pet*. *See also In re* Marriage of Hunt, 909 P.2d 525, 542–43 (Colo. 1995).

63. *Cf.* Soice v. Soice, No. 2002-CA-002207-MR, 2004 WL 259257 (Ky. Ct. App. Feb. 13, 2004) (servicemember unsuccessfully sought to readjust the percentage he was paying after the agreed divorce was final).

contempt motion or else to initiate a lawsuit within the applicable statute of limitations to reduce to judgment that portion of the premiums that have been deducted from the member's share of the retired pay and have not been reimbursed. If the statute issuing the order, and, more especially, if the issuing state is not the state in which the former spouse resides—the latter of which will be the state of ultimate enforcement of the "enforcement judgment in such cases—does not allow "jail time" for contempt to ensure and enforce the payment of such fiduciary debts, the former spouse, other than defending such a collection suit, has very little to lose in such a situation since, once the election to cover her as a *former spouse beneficiary* has been made, the election is irrevocable, and frequently the former spouse is "judgment-proof."

Irrespective of the above comments, since some attorneys try to require the former spouse to reimburse the servicemember for the SBP premiums, and since some courts order the servicemember to maintain the former spouse as a *former spouse beneficiary*, but order the former spouse to pay to the servicemember the cost of the premiums for the coverage, "contempt language" should be include in the order to assist the servicemember in collecting such unreimbursed premium payments. If this is the case, make sure to designate the former spouse as a fiduciary, that is, a constructive trustee, of these unreimbursed premium payments, although some states have statutes that create an "automatic fiduciary designation" in this kind of circumstance, even if not specifically stated in the order.[64] Otherwise, the payments are merely in the nature of a debt, and contempt may not be available in some states. As the servicemember's attorney, a failure to adequately protect the client may result in the member's attorney being the recipient of a lawsuit as well. Certainly, the servicemember should be counseled in this regard, and the servicemember's attorney should maintain written confirmation of the counseling.

Thus, discuss this issue fully with the servicemember, who should make all decisions, unless the requirement to designate the former spouse as a *former spouse beneficiary* is court-ordered. The servicemember's attorney must make the court aware of *all* ramifications of any order to designate the current spouse as a *former spouse beneficiary* of the SBP, since most of the judiciary know very little about the SBP or the ramifications of ordering the "former spouse" to pay the monthly cost of being designated as a *former spouse beneficiary*.

64. *See*, *e.g.*, TEX. FAM. CODE § 9.011(b) (1997) ("The subsequent actual receipt by the nonowning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.").

P. SBP Costs to Cover New Wife/Child Are Not Assessable Against Former Spouse

Consider the scenario in which the servicemember and the first spouse were not married long enough for that former spouse to be entitled to direct pay by the DFAS and, after the divorce, the servicemember remarries and designates the new spouse and the new family's child as an SBP beneficiary. In so doing, the servicemember has effected a reduction in his/her retired pay to pay for the annuity that provides for the new family's security upon his/her death. The servicemember, in determining the former spouse's share of the disposable retired pay, deducts the cost of the premium that pays for the new family's SBP annuity. Doing so will be contrary to the governing statute,[65] since the SBP premium is a valid deduction in determining the disposable retired pay *only* as to a retired pay payee who is the SBP beneficiary. Otherwise, instead of the servicemember paying for a percentage of the former spouse's annuity benefit as is customarily the case, the former spouse will be paying a percentage of an annuity that only benefits the servicemember's new spouse.[66]

Is this allowable? Should the former spouse have to pay part of the SBP premium to cover the new wife and/or child? The answer is "no" in both cases.[67] The USFSPA defines what is to be deducted from gross retired pay to reach and/or determine disposable retired pay. Subpart (D) of §10408(a)(4) provides a reduction in the gross retired pay in determining disposable retired pay for payments that:

> are deducted because of an election under chapter 73 [Survivor Benefit Plan] of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

In *Fricks v. Fricks*,[68] the former spouse had filed a suit before the servicemember's sixtieth birthday to partition his military retired pay. (Apparently the servicemember was a reservist and not entitled to retired pay until age sixty.) During the discussion of how former spouse's share of the retired pay was to be determined, servicemember maintained that the SBP premium to insure his then-wife and child should be deducted to determine the divisible disposable retired pay, payable to his former spouse, largely because it was shown as a deduction on his Retiree Account Statement (RAS). Former spouse, on the other hand, saw no rea-

65. 10 U.S.C. § 1408(c)(4)(D) (2006).

66. *See* U.S. DEP'T OF DEF. FIN. MGMT. REG. §§ 290701(A)(4)–(5) & (B)(4).

67. 10 U.S.C. § 1408(a)(4)(D). *See also* 7B U.S. DEP'T OF DEF. FIN. MGMT. REG. §§ 290701(A)(4)–(5) & (B)(4).

68. 771 So. 2d 790 (La. Ct. App. 2000).

son why she should have to pay any part of the premium to insure servicemember's family. The *Fricks* court agreed, citing § 1408(a)(4)(D) as its authority.

Apparently, neither of the parties understood the statute or, former spouse had not been married to servicemember for ten or more qualifying years to be entitled to direct pay by DFAS. In any event, the jurisprudence has been clarified, and in *Fricks*, the servicemember had to pay (or reimburse) the former spouse the amount being deducted from her share of the gross retired pay to provide the SBP benefit to servicemember's new family. So, the DFAS, upon receipt of a qualifying order, will not deduct the cost of the SBP premium in determining the former spouse's share of the retired pay unless the former spouse is the SBP beneficiary for whom the payments are being deducted.[69]

In the *Schneider* case, the reverse situation was presented, the SBP beneficiary, as the former spouse, and the DFAS did deduct the SBP premium from the retired pay before determining and paying the former spouse her share of the retired pay, in this case, 31.9%.[70]

Q. Imposition of Constructive Trust on Annuity Proceeds

Several other courts have been presented with the issue of whether the court had the power to impose a constructive trust on SBP annuity proceeds. The "after death of the member" constructive trusts have uniformly been brought, as expected, by disgruntled former spouses who, upon the death of the servicemember, expected or not, having realized that her/his receipt of retired pay has now stopped, have brought suit to attempt to achieve some recompense for her or his loss. There are at least five cases spanning the time period 1983 to 2001 that have addressed the issue of constructive trusts.

In *Barros v. Barros*,[71] the court was presented with a claim by a former spouse that she was entitled to a constructive trust of the SBP annuity payments being received by servicemember's widow as his SBP beneficiary. The former spouse alleged that the benefits were an undivided asset of the parties' marriage and should be treated as if it was an undivided insurance policy paid for with community funds. The former spouse and servicemember had been married from 1955 to 1973. Their divorce decree stipulated that the retirement fund was community property, and the trial judge's oral opinion awarded the military benefits to servicemember, but, the divorce decree did not reflect this oral opinion and made no disposi-

69. 10 U.S.C. § 1408(a)(4)(D).
70. Schneider v. Schneider, 5 S.W.3d 925, 927–28 (Tex. App. 1999), *no pet.*
71. 660 P.2d 770 (Wash. Ct. App. 1983), *rev. denied.*

tion of the retirement fund. Servicemember, after the divorce, married a new spouse on March 6, 1973, and was married to her until his death on July 29, 1976. Former spouse sought the imposition of the constructive trust on the SBP annuity payments being paid to new spouse, alleging that the benefits were an undivided asset of the parties' marriage—even though the record reflected that "the retirement benefits" were awarded to the servicemember—and that the SBP annuity should be treated as if it was an undivided insurance policy acquired and paid for with community/marital funds.

The Washington appellate court held that, even though it was an undivided asset, federal preemption barred her claim because *McCarty v. McCarty*[72] specifically addressed the issue of SBP. Although the USFSPA made disposable retired pay divisible, it did not alter the provision of § 1450 that then provided that *the only way* a person could be a beneficiary of the servicemember's SBP *was if the servicemember voluntarily designated someone* in the coverage window. The legislative history made clear that Congress did not intend to change the effect of *McCarty* on the SBP or to allow states to apply community property laws to the distribution of SBP annuities. The Act also does not allow states to apply community property law to the SBP. An annuity under either plan (RSFPP or SBP) is not "assignable or subject to execution, levy, attachment, garnishment, or other legal process."[73]

In another case, where the former spouse sued the widow for the imposition of a constructive trust, the former spouse, who was divorced from servicemember, an Air Force retiree, in 1985, brought suit against servicemember's widow, seeking the imposition of a constructive trust over the SBP annuity benefits being paid to widow.[74] Former spouse alleged that she was the proper beneficiary of the SBP annuity benefits since the benefits were expressly awarded to her in the 1985 divorce decree, which incorporated a written agreement between servicemember and former spouse, providing that former spouse would receive the annuity paid pursuant to the SBP. After the divorce, however, neither servicemember nor former spouse made the election within the one-year window to do so. Apparently, neither was ordered to effect the parties' agreement. The trial court, nevertheless, imposed the requested constructive trust and ordered the widow to pay the monthly benefits to the former spouse. The appellate

72. 453 U.S. 210, 221 (1981).

73. *See Barros*, 660 P.2d at 772–73 (citing § 1440 and § 1450(i) and discussing Wissner v. Wissner, 338 U.S. 655 (1949)). *See also* Dugan v. Childers, 539 S.E. 2d 723, 725 (Va. 2001) (which also finds federal preemption); *In re* Marriage of Morton, 726 P.2d 297, 299–300 (Kan. Ct. App. 1986).

74. King v. King, 483 S.E.2d 379 (Ga. Ct. App. 1997).

court held that former spouse's claims were preempted by the Act and its specific provisions, including the Congress's declaration that an annuity under the SBP "is not assignable or subject to execution, levy, attachment, garnishment, or other legal process."[75]

In a similar case, *Silva v. Silva*,[76] the former spouse, who was servicemember's second wife, brought this action against servicemember's third wife/widow asking the court to impose a constructive trust on the SBP annuity being paid to servicemember's widow. In the parties' 1985 divorce decree, servicemember agreed to designate former spouse as the post-divorce beneficiary of his military SBP and, although servicemember was specifically and exclusively assigned that responsibility, he failed to do so. Servicemember then married his third wife, now widow. Former spouse thereafter learned servicemember had not designated her as a former spouse beneficiary although he allegedly made many representations that he had done so, and former spouse finally filed suit to compel him to do so in 1992, but allowed the suit to be dismissed when she learned he was suffering and would soon die from cancer. Servicemember did die and, since he had failed to complete the paperwork to establish his former spouse as his SBP beneficiary, his "spouse beneficiary," his widow, began to receive the SBP annuity according the SBP's default provisions. The court found that neither servicemember nor former spouse filed the required paperwork to designate former spouse as the SBP former spouse beneficiary within one year of the parties' divorce as required by the Act. Additionally, since a SBP annuity "is not assignable or subject to execution, levy, attachment, garnishment, or other legal process," the appellate court held that it and the trial court lacked the authority to grant a constructive trust, citing federal preemption of their authority to do so.[77]

In a case with facts similar to *Silva*, the former spouse in *Dugan v. Childers*,[78] brought suit against servicemember to hold him in contempt of court for failing to discharge his duty to name former spouse as a former spouse beneficiary. The trial court granted her request, but, shortly thereafter, before servicemember could attempt to comply with the trial court's order, he became sick and died. Servicemember's widow began receiving SBP benefits, and former spouse sued to have her appointed a constructive trustee of "former spouse's share" of the monthly annuity payment. The trial court and the appellate court held that federal law expressed in § 1450 preempts state law on the subject of a former spouse's entitlement to the survivor benefits of a military retiree and that former spouse's fail-

75. 10 U.S.C. § 1450(i). McCarty v. McCarty, 453 U.S. at 226 n.18.
76. 509 S.E.2d 483 (S.C. Ct. App. 1998).
77. *Id.* at 485 (discussing King v. King case).
78. 539 S.E.2d 723 (Va. 2001).

ure to timely request a deemed election barred her recovery on a theory of constructive trust. Finally, as alleged by the widow, the court held that the nonalienation provision of § 1450(i) alone was sufficient to require a finding of preemption in this case.

Another constructive trust case, *Schneider v. Schneider*[79] differs from the foregoing cases and was one of the author's. Here, the protagonist, a servicemember, sought to have a constructive trust imposed on the former spouse. In the Schneiders' divorce, the former spouse was awarded 31.9% of servicemember's retired pay and the same percentage of his SBP, of which former spouse was appointed and "deemed" a former spouse beneficiary; former spouse was also ordered to pay 100% of the monthly SBP premium. Former spouse initially began paying 131.9% of the monthly premiums until the DFAS advised her that she was paying more than 100%, since she was already paying 31.9% of the premium "off the top" before she was paid her share of the monthly retired pay. She was also, by virtue of her designation and the specific language of the decree, the beneficiary of 100% of the annuity, rather than just 31.9%. Servicemember filed a motion to compel former spouse to pay "100% of the premium" as he saw it [that is, 131.9%] and to impose a constructive trust on 68.1% of the SBP annuity upon his death for the benefit of his then-wife. The trial court denied his motion, finding that the former spouse, paying 39.1% of the premium, as withheld by the DFAS from her share of the retired pay, and paying servicemember directly 68.9% of the monthly premium cost, was paying 100% of the SBP premium cost and also found it could not impose the constructive trust requested by servicemember. The appellate court found that the trial court relied on § 1448(b)(2)(B), which provides that ". . . [i]n the case of a person with a [current] spouse or a dependent child, such an election [of a former spouse] prevents payment of an annuity to that [current] spouse or child. . . ."[80] The appellate court reasoned that federal law preempted such a trust, and, even if it was within the trial court's discretion to impose a constructive trust, it was not an abuse of discretion for the trial court to refuse to impose a constructive trust on the SBP annuity under the facts in the record.[81]

R. Inalienable by Legal Process

As discussed earlier, SBP annuities are not assignable or subject to execution, levy, attachment, garnishment, or other legal process. The Act addresses this issue in 10 U.S.C. §§ 1440 and 1450(i). This has been a part of the federal law at least since the RSFPP was enacted in 1961, if not

79. *Supra, rev. denied.*
80. *Id*. at 929.
81. *See id*. at 930.

before. Thus, the federal preemption of the SBP provisions, except where waived, such as in the 1986 amendments that allowed state courts the discretion to order servicemembers to designate their then-spouses to be former spouses upon the entry of the divorce decree, is of long standing. This, of course, has spawned other litigation over the failure of the servicemember to actually carry out his or her court-ordered duty to register the former spouse as a postdivorce former spouse beneficiary.

S. Changing Beneficiary Designation for Fraud

Although the general rule is that once a beneficiary is elected and properly registered with the DFAS the election is irrevocable and the DFAS will not make a change, it would appear that the DFAS will make a change when a designation was either not made or another person was designated when there is actual fraud involved. Such was the case in *Lipkin v. Lipkin.*[82] These parties were married in 1941, and then, in 1979, they obtained a separate maintenance order, although a divorce decree was not signed until 1986. The former spouse appealed from the decree, alleging that servicemember had misrepresented the irrevocability of his designation of her as an SBP beneficiary during the tenure of the operation of the parties' separate maintenance agreement, having learned that he had cancelled the coverage. At the time of dissolution, former spouse was seventy-three, and servicemember was sixty-four. The former spouse reportedly testified that while servicemember was stationed in the Philippines and England, he was "the expert" on military pension survivor benefits. He, on the other hand, stated that he knew long before his retirement that he could revoke the annuity if he divorced, but said that he never discussed with his wife the question of whether the SBP benefit was revocable. The trial court found the servicemember knew and misrepresented the facts during the parties' divorce negotiations in 1979 and ordered servicemember to reinstate former spouse as the SBP beneficiary. The appellate court affirmed.

Although the *Lipkin* court ordered the former spouse reinstated as the beneficiary, we do not know whether the DFAS honored the court's order in this regard. Since this was a direct appeal from the divorce decree and the matter was not final, it is probably safe to assume that the DFAS did honor the court's order, especially in view of the express finding of the servicemember's fraudulent concealment of the "coverage termination." The facts in *Lipkin,* as well as its outcome, may be the very reason for the DFAS's present requirement for written spousal concurrence with the declination of SBP coverage.

82. 566 N.E.2d 972 (Ill. App. Ct. 1991).

T. What If SBP Is Not Specifically Treated in the Parties' Decree of Divorce?

When an asset is not specifically treated, questions arise as to whether it is an undivided asset. This same question has arisen in several SBP cases. Some have, in fact, treated it as an undivided asset that can be apportioned at the time it is treated and divided by the court, but others, and in the author's opinion, the more enlightened view, is that the failure to treat the "entitlement" while treating the military retired pay in any way, bars subsequent treatment/partition due to *res judicata*, collateral estoppel and/or federal preemption.[83] Specifically addressing the *res judicata* issue, *Hayes* held that since the issue of SBP was not addressed in the prior judgment (their divorce decree), it was barred by the former spouse's subsequent suit to award her this benefit as part of a clarifying DRO.[84] In *In re A.E.R.*,[85] the issue was raised in a convoluted fact situation where the former spouse sought a clarification of the military retirement apportionment language of the parties' 1992 divorce decree. Her attorney, after the trial, submitted a clarification order that addressed the issues actually presented and ruled upon by the court, but which also included language in the proposed order that ordered servicemember to cover his former spouse as a former spouse beneficiary of his SBP, even though she had neither pleaded nor offered any evidence to support the SBP relief.[86] Thus, the SBP issue was never "presented" to the trial court for consideration, even though it was included in the order the former spouse's attorney submitted to the trial court and signed.[87] Needless to say, the servicemember objected and, although the appellate court did not address the fact that under Texas law, as in most states, the judgment must reflect and be supported by the pleading filed and the case proved, it did hold that although the decree being clarified, that is, the parties' divorce decree, did not specifically mention the SBP, it did specifically provide that the entitlement to retired pay terminated upon the death of the servicemember or the former spouse.[88] As such, the appellate court held that the order did specifically treat and *did not award* former spouse a right to

83. *See, e.g., In re* Marriage of Hayes, 208 P.3d 1046 (Or. Ct. App. 2009); *In re* A.E.R., No. 2-05-057-CV, 2006 WL 349695 (Tex. App. Feb. 16, 2006) *no. pet.* (unpublished). *Cf.* Soice v. Soice, No. 2002-CA-002207-MR, 2004 WL 259257 (Ky. Ct. App. Feb. 13, 2004) (servicemember unsuccessfully sought to readjust the percentage of the premium he was paying after the agreed divorce was final); Squires v. Squires, No. C7-91-816, 1991 WL 222448 (Minn. Ct. App. Nov. 5, 1991).

84. *Hayes*, 208 P.3d at 1052–53.

85. *In re* A.E.R., 2006 WL 349695, at *3, *no. pet.*

86. *See id.*

87. *See id.* at *3.

88. *See id.*

be a former spouse beneficiary.[89] Thus, the appellate court said it was treated and not awarded to the former spouse and, thus, her claim irrespective of the fact that it was not pleaded, proven, or considered by the trial court, was barred by *res judicata* and/or collateral estoppel.[90]

Although not addressed by this Texas Court of Appeals, it could have been held to be barred by federal law since § 1448(a)(3)(A)(iii) provides that, for a former spouse beneficiary to be covered, the operative order must be served upon the DFAS within one year of the date of the order, which, in this case, would had to have been received by the DFAS sometime in 1993. Thus, the former spouse's claim was clearly barred by federal law as well. Nothing the Texas trial or appellate court could order in this case would resurrect the former spouse's entitlement to become a deemed beneficiary, now long barred as a matter of law.[91]

Two weeks before the Oregon Court of Appeals issued the *Hayes* opinion, finding that the former spouse's claim to be a former spouse beneficiary of the servicemember's SBP was barred,[92] the Washington Court of Appeals issued a completely opposite holding, finding the SBP to be an undivided omitted asset, that the former spouse was not aware of the "asset" at the time of the parties' divorce, and ordering that she be deemed as a former spouse beneficiary of the servicemember's SBP, even though there had been no mention of it in the parties' divorce decree.[93]

The bottom line is that the practitioner needs to know how the state courts will treat the issue of the failure of the parties' decree of divorce or agreement incident to divorce, incorporated in their decree, to address the servicemember's SBP. In any event, the recent *Buchanan* and *Hayes* cases emphasize the necessity of the practitioner to specifically address the SBP in the divorce decree, either awarding the former spouse the right to be named/deemed as a former spouse beneficiary or specifically finding that former spouse is *not* to be so named.

U. Life Insurance as an Alternative to SBP Coverage

If the servicemember is otherwise readily insurable, an annuity and/or life insurance policy can be purchased to provide the former spouse with a retirement income death benefit substitute. Although SBP is, overall, a good annuity for the cost, its value to the parties will depend upon the parties' respective life expectancies, their respective current and/or diagnosed

89. *Id.*

90. *Id. See also Hayes*, 208 P. 3d at 1052–53. *Cf. Soice,* 2004 WL 259257, at *2*; Squires,* 1991 WL 222448, at *1–*3.

91. 10 U.S.C. § 1448(a)(3)(A)(iii) (2006). *Cf.* Barros v. Barros*,* 660 P.2d 772–73.

92. See *Hayes*, 208 P.3d 1046.

93. *See In re* Marriage of Buchanan, 207 P.3d 478 (Wash. Ct. App. 2009).

health/medical issues, as well as the parties' respective ages at the time the decree is signed. Since the monthly premium for full coverage is 6.5% of the monthly gross retired pay, if the parties are in good health and expected to remain so, and are relatively young, each party could be paying a very great deal for a coverage that may not be realized until both parties have paid sizeable premiums for a great many years. Although Congress has now limited the premium payments to thirty years, for a premium of even $100.00 a month for those same thirty years, that is at least $36,000.00 *without factoring in the effect of applicable COLAs on the cost.* Of course, just as the servicemember is receiving COLAs on his retired pay each year, so will the cost of the SBP premium go up as well, keeping pace with his increased retired pay.

If the former spouse chooses to purchase a life insurance policy on the servicemember (the former spouse's insurable interest being the loss of the former spouse's portion of the retired pay upon the death of servicemember) rather than pay the cost of the SBP coverage, then, the servicemember should be ordered in the decree to cooperate in completing such life insurance applications and/or participating in any medical examination and/or physical required to obtain the coverage.

Further, before the entry of the divorce decree, the former spouse's attorney should ensure that the servicemember is not only insurable, but is also "economically insurable." Consider, for example, an actual case where the former spouse elected to purchase a life insurance policy on the servicemember in lieu of SBP coverage, with the servicemember being ordered to participate in completing the life insurance application and medical examination/physical required for the coverage. Much to the chagrin of the former spouse, however, the medical examination showed the servicemember to have high blood pressure (which was not previously diagnosed and may have been situational—he did not want the divorce and was emotionally affected by it), and this resulted in his being "rated" as a potential coverage risk. As a result, he no longer qualified for the "best and lowest premiums," such that the premium cost to insure the servicemember made it economically impossible for the former spouse to purchase the life insurance on the servicemember postdivorce. At that point, although she tried to revive the SBP option, she could not do postdivorce with a "motion to clarify" what she had voluntarily given up upon divorce—barred by *res judicata*.[94] *Soice* and *Squires* stand for the proposition that *res judicata* will bar a subsequent attempt to modify the parties' agreement after the judgment becomes final.

There are several cases requiring the servicemember to either elect SBP

94. *Cf. Soice,* 2004 WL 259257, at *2; *Squires*, 1991 WL 222448, at *1–*3.

or obtain a life insurance policy to cover former spouse or to discuss the issue.[95] One possibility is to enter a Qualified Domestic Relations Order (QDRO) that orders the servicemember, the policy owner, to maintain the life insurance policy. Service of such a QDRO on the insurance company is a necessity since, in doing so, the insurance company is put on notice of the QDRO's requirement, which must specifically order the servicemember *not* to change the beneficiary of the policy for so long as former spouse is entitled to receipt of a share of servicemember's retired pay, that is, for servicemember's or former spouse's life, whichever is first to die. The QDRO should also order the insurance company to notify the former spouse in the event the servicemember stops paying the policy premiums or attempts to cancel the policy. A better choice, however, when using an existing policy insuring the servicemember's life, is for the practitioner to have the former spouse own the policy, either be responsible for the premiums or have the servicemember ordered to pay them, as some form of spousal alimony or spousal maintenance.

V. "Open Seasons" for SBP Enrollment/Benefits Upgrade

The only way that a servicemember can make an election for coverage or increase the base SBP coverage amount after the lapse of one year after the date on which member (1) begins receiving retired pay (retires if active duty, turns sixty if a reservist), (2) divorces without a former spouse designation/deemed election, (3) SBP beneficiary spouse dies, or (4) remarries without naming a beneficiary, is if Congress declares an "open season" for members to make such elections. A reservist, unlike his or her active-duty counterpart, must make an election to decline SBP spouse and/or spouse and child coverage within ninety days of the member's receipt of the Notice of Eligibility for Retirement (NOE), the reserve component member's official notification that the member is now eligible for transfer to the retired reserves, or a deemed spouse election at full coverage will be made by default. The reserve component member may either initiate coverage or terminate prior coverage upon entitlement to receive retired pay at age sixty.[96] The election upon receipt of the NOE becomes final at the end of the ninety-day period and cannot be changed until age sixty and receipt of retired pay, unless some other termination event occurs in the interim. After the reserve members attains age sixty and begins receiving retired pay, he or she will have twelve months within which to initiate coverage or terminate and/or change the election that was

95. *See, e.g., In re* Marriage of Bowman, 734 P.2d 197 (Mont. 1987); McDougal v. Lumpkin, 17 P.3d 990 (Alaska 2000); *In re* Marriage of Payne, 897 P.2d 888 (Colo. Ct. App. 1985).

96. 10 U.S.C. § 1448(a)(2)(B) (2006).

made upon receipt of the NOE. If the reserve component member declines coverage at this point, he or she will still have another opportunity to elect coverage upon receipt of retired pay at age sixty, as well as upon divorce, death of covered spouse, or remarriage, as noted above for active-duty members.

Open seasons are, in general, limited to starting and/or upgrading spouse, spouse and child, or child coverage, but have not been open for servicemembers to terminate his or her coverage. Although the past open seasons have not specifically addressed one way or the other being "open" for servicemembers to correct *(or be forced to correct)* his/her failure to designate former spouse or former spouse and children court-ordered coverages, *by omission*, it is presumed that the open seasons specifically exclude such a correction to name a former spouse. However, nothing ventured, nothing gained. So, if an "open season" is declared in the future and the practitioner has a former spouse client whose beneficiary designation was not timely registered, try to force the issue by filing a motion to enforce and/or compel the servicemember to initiate such a former spouse corrective election. In doing so, realize that the expense, if the former spouse client is to pay all or part of the cost, may result in a very expensive "buy-in." The "buy-in" cost during the "open season" has generally been the amount of all of the back premiums from the date of the servicemember's retirement, *plus interest*, either as lump sum or in twenty-four monthly installments. Servicemembers (and former spouses) will also then begin paying the same respective percentage of the monthly premium that the parties' would have each been paying at the time of the "buy in" had the former spouse been enrolled in SBP when first eligible.[97] On the other hand, if the practitioner is representing the servicemember in such a case, remember to affirmatively plead the applicable statute of limitations, which may be dispositive of the issue on the servicemember's behalf.

V. Reserve Component Survivor Benefit Plan (RC-SBP)

The Reserve Component Survivor Benefit Plan (RC-SBP), also found at 10 U.S.C. § 1447 et seq., is substantially similar to the active duty plan, except that the reserve component member is required to make an election of coverage at the time he is notified of becoming retirement eligible, that is, having served twenty qualifying years ("good years") toward retirement. This notification comes in a document entitled Notification of Eligibility (NOE). If the reserve component member is married at the time the NOE is received, the member must make an election in which his

97. Survivor Benefits Plan Open Season FAQs, http://www.dfas.mil/retiredpay/frequently asked questions/survivorbenefitsplanopenseasonfaqs.html.

spouse must participate.[98] Unless both parties agree to the choice being made, the DFAS will deem that the reserve component member has elected "full coverage" for his spouse.

If married, the reserve component member, upon receipt of the NOE, must make one of three choices and within ninety days of receipt of the NOE or a default election will be made for the member. The three choices are

> **Option A:** *Declined Coverage*. To decline coverage until age sixty, but in doing so, there will be no coverage for the intervening years between becoming eligible for retirement and reaching age sixty. As noted above, the spouse's written concurrence is required to "elect" Option A coverage, thereby declining to have coverage afforded by Option B or Option C, that is, some form of SBP annuity coverage in the event that the member dies before reaching age sixty and having the opportunity to elect coverage at that time.[99]
>
> **Option B:** *Deferred Coverage*. Under this option, the RC-SBP annuity is payable upon the reserve component member's death before age sixty on the date the member would have reached age sixty, or on the member's death if after age sixty, whichever is the later event. This option will pay the annuity to a spouse or former spouse if the member dies some time after making the election, but before age sixty, but not until the member would have reached age sixty. If the member lives to age sixty or older. It still pays the spouse or former spouse the annuity, but in this eventuality, the annuity would commence immediately. The deferred coverage only applies if the member dies before reaching age sixty.[100]
>
> **Option C:** *Immediate Coverage*. This option is similar to Option B, except that if the member dies before age sixty, the annuity for the spouse or former spouse survivor will commence immediately on the day after the member's death. This is the default coverage option and, if there is no election within the ninety-day window to make the election, Option C will be elected for the reserve component member and spouse.[101]

The reserve component member usually obtains retirement eligibility prior to reaching age sixty. Upon the election of one of the spouse coverages and upon the death of the servicemember before age sixty, depending upon the election made, the former spouse will be entitled to reduced benefits either immediately, if that election was made, or when the servicemember would have reached age sixty.[102] "Full coverage," however, means, in this context, an entitlement to receipt of the annuity immediately upon the servicemember's death, regardless of whether or not he is

98. *See* 10 U.S.C. § 1448(a)(3)(B) (2006).
99. *See* U.S.C. § 1448(a)(3)(B)(i).
100. 10 U.S.C. § 1448 (a)(3)(B)(ii), 1448(e)(2).
101. 10 U.S.C. §§ 1448(a)(3)(B), 1448(e)(1).
102. 10 U.S.C. § 1448(e).

sixty years old. Thus, if the member waits until age sixty and the receipt of retired pay before electing RC-SBP coverage, the monthly premium will be much less than if "full coverage" had been elected upon receipt of the NOE, since there is an extra charge for the reserve component member who elected immediate coverage. Additionally, if the member receives the NOE and dies before making an election, that is, dies within ninety days from receipt of the NOE, the spouse or former spouse, as applicable, will be entitled to immediate and full coverage under the RC-SBP annuity.

If the reserve component member marries after becoming retirement eligible, the member can elect to cover a new spouse, provided an election to do so is made within one year of the date of the marriage. On the other hand, the reserve component member can also change his or her election if the spouse or former spouse beneficiary dies. The reserve component member also has the option to elect coverage for a spouse at the time the reserve component member begins receiving retired pay at age sixty.[103] Once the reserve component member begins receiving retired pay at age sixty and does not change the election or, not having made an election, fails to make an election at that point, the election or "non-election" is irrevocable after one year from the date of first receiving retired pay.

Although the reserve component member is treated just like the active duty member as far as a paid-up SBP annuity entitlement at age seventy, *and* having paid SBP monthly premiums for 360 months,[104] it is, in general, not the norm for the reserve component servicemember to live long enough to enjoy this paid-up benefit. That said, assuming a reserve component member is seventy years old and has paid into the plan for 360 months on or after October 1, 2008, the member will receive a letter from the DFAS indicating that he/she is "paid-up" and that no further premiums for the SBP will be deducted from his/her retired pay.

In this regard, the DFAS has modified Retiree Account Statements (RAS) to include a "premium counter." Its purpose is to track the number of months of paid premiums credited to a retiree's account. The premium counter should automatically increase each month that a full premium payment is made. Each time a retiree receives a RAS, which, for most retirees, is annually in December, the statement will display the current number of monthly premium payments toward paid-up SBP coverage. This should help a retiree monitor his or her eligibility status for the paid-up coverage. A RAS is not issued monthly, but is only issued whenever a pay change occurs. The premium counter, although it was started in

103. 10 U.S.C. § 1448(a)(2).
104. 10 U.S.C. § 1436a.

October 2008, was not seen by most retirees until the annual RAS that was mailed to them or that he or she accessed online in December 2008.

A. Reimbursement for Paid-up Coverage Overpayments

If a servicemember, whether active duty retired or reserve component retired, believes he/she qualifies for the paid-up coverage, that is, he or she is seventy-years of age and has paid monthly premiums for 360 or more months as of October 1, 2008, and his or her RAS still shows deductions being taken out for SBP premiums, he or she should begin the dispute process by downloading DD Form 2656-11.[105] Complete all fields of the form that apply and submit the completed form to DFAS, U.S. Military Retired Pay, P.O. Box 7190, Attn: 2656-11, London, KY 40742-7190, or fax it to 1-800-469-6559.[106]

B. Never Give Up

It pays to keep trying. The practitioner should be encouraged by the outcome of Ms. Martine Cuisenaire's case to achieve "justice" and be awarded SBP former spouse beneficiary designation by the DFAS. She and Mr. Mason were married in Belgium while he was stationed there with the U.S. Air Force. They were married for some eleven years and had a child. Mason filed for divorce while stationed in North Carolina where he and Cuisenaire were living with their daughter. The North Carolina trial court granted the parties an absolute divorce on September 9, 1999, awarded custody of the daughter to Cuisenaire, allowing her to return with the child to Belgium, but affording Mason with possession of the child each summer. The divorce judgment "also stated that 'there are no pending claims for post-separation support, alimony, or equitable distribution.'"[107] Mason was later transferred to Nellis AFB at Las Vegas, Nevada. At the end of the summer in 2000, Mason, refused to return the child to Cuisenaire as the judgment instructed. Cuisenaire, then filed suit in the Nevada federal district court under the Hague Convention and the International Child Abduction Remedies Act, which ordered Mason to return the child to Cuisenaire in Belgium.

Cuisenaire then filed suit in Nevada state district court for postdecree child support, alimony, division of assets, and attorney's fees.[108] Although

105. DD Form 2656-11 is *available at* http://www.dfas.mil/retiredpay/paid-upsurvivor-benefitpaymentsbp/dd2656-11.pdf

106. Additional information on this process can be located at http://www.dfas.mil/retiredpay.html. *See also* David M. Bradley, *Survivor Benefit Plan*, NAT'L RESERVE ASS'N NEWS, No. 4 at 26 (Apr. 2009).

107. Mason v. Cuisenaire, 128 P.3d 446, 447 (Nev. 2006).

108. *See id*. at 448.

the Nevada court found jurisdiction and awarded child support retroactively for four years, it also found that there were assets that the North Carolina court did not divide, including Mason's military retirement benefits and the SBP. The Nevada court awarded Cuisenaire a portion of Mason's military retired pay, denied her request for alimony, and set an evidentiary hearing to address the allocation of the parties' debts, as well as the survivor benefits issue, that is, whether Cuisenaire should be appointed as a former spouse beneficiary.[109]

Mason appealed the trial court's ruling before the evidentiary hearing, and the trial court suspended that hearing pending the outcome of the appeal. Mason died during the appeal, and his wife, Jennifer Mae Mason, was appointed the executrix of Mason's estate and was substituted as a party in her representative capacity. When before the state supreme court, both appellant and appellee believed the SBP benefit entitlement to be a moot issue due to Mason's not being retirement eligible.[110] However, Jennifer Mae, as Mason's survivor, became entitled to SBP benefits pursuant to § 1448(d), which Congress passed as part of the National Defense Authorization Act, FY 2002,[111] which provided coverage for the survivors of servicemembers who died in the line of duty prior to becoming eligible to retire, Mason's exact situation. On remand, the Nevada Supreme Court ordered the district court to conduct its "evidentiary hearing and determine the extent that survivor benefits apply to the parties."[112]

Here the story would be lost, and the outcome unknown, but for the action of the DFAS in its letter determination of Cuisenaire's claim to be the former spouse beneficiary. The letter, Appendix C, details some of the history of this case. At that time, Cuisenaire, as far as the DFAS was concerned, was involved. However, Mr. Lafferty's letter reflects that Cuisenaire was "deemed" a former spouse beneficiary of Mason's SBP, even after his death, since the evidentiary hearing had not occurred until after he died and the Nevada Supreme Court had remanded the case.

The bottom line is that Cuisenaire, due to the dedication and determination of her attorney, prevailed. The DFAS ordered her to be the SBP annuitant, supplanting Jennifer Mae, ordering that Cuisenaire be paid all payments otherwise made to Jennifer Mae, and ordering Jennifer Mae to reimburse all monies paid her.[113]

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109. *See id.*

110. Although the opinion does not say, the author has verified with Cuisenaire's attorney that Mason, at the time of his death, was several months short of the twenty years he needed for retirement from the U.S. Air Force.

111. National Defense Authorization Act, FY 2002, Pub. L. No. 107–107.

112. *Mason*, 128 P.3d at 452.

113. *See* Appendix C for Mr. Lafferty's well-written description of the facts and the DFAS

VI. Conclusion

In summary, the family law practitioner representing a military member or his or her spouse in divorce proceeding, as well as representing a member or his or her former spouses in postdivorce clarification suits involving retired pay and/or SBP issues, but more especially SBP issues for the purpose of this article, should be well versed in the following bulleted items more particularly discussed above:

1. *Always make a record* of the evidence in a military divorce, if not all divorces, to preserve the retired pay and, in this instance, the SBP issues for reconsideration, if necessary, by an appellate court.

2. The SBP is a retired pay benefit that should—if not must—be specifically treated during the divorce and, more especially, in the parties' divorce decree. If it is not specifically awarded to the former spouse, it should be specifically awarded to the servicemember in the order.[114]

3. A court, since November 14, 1986, has the power to order a servicemember, whether active duty, reserve component, or National Guard member, to designate his/her spouse as a "former spouse beneficiary" of the member's SBP. If the spouse is already designated as a "spouse beneficiary," then the order should "redesignate" the "spouse beneficiary" as a "former spouse beneficiary." The designation of the children needs to be considered as well at that time. However, there can be only one class of beneficiaries designated at any one time.

4. If the coverage agreed upon and/or ordered is less than full coverage, that is, coverage to match the percentage of retired pay being awarded, the language of the divorce decree should specifically set forth the elected "base amount" less than full coverage. If a specific "reduced base amount" is not stated, the DFAS will assume full coverage entitlement and the premium will be set and deducted accordingly.

5. The cost of the monthly premium must be considered and the necessary "cost sharing" explained to the court, via an explanatory exhibit, such as that at Appendix B, if appropriate and/or necessary.

6. If the former spouse is to pay one-hundred percent of the SBP premium, either make a mathematic reduction of her percentage to accomplish this or include specific language that can be enforced by contempt that orders former spouse to pay the servicemember that percentage of the cost being paid monthly from the member's retired pay. The member will, in any event, initially be paying at least the reciprocal of the percentage of the disposable retired pay awarded the former spouse. Thus, the necessity for the reimbursement language in the divorce decree. If it is not addressed at the time of the divorce, it will be too late

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result in Ms. Cuisenaire's favor. Determined dedication breeds success. At least it did for Ms. Cuisenaire.

114. *See In re* Marriage of Hayes, 208 P.3d at 1052–1053; *In re* A.E.R, No. 2-05-057-CV, 2006 WL 349695 (Tex. App. 2006), at *3. *Cf.* Soice v. Soice, No. 2002-CA-002207-MR, 2004 WL 259257, at *2; Squires v. Squires, No. C7-91-816, 1991 WL 222448, at *1–*3. *See also* 10 U.S.C. § 1448(a)(3)(A)(iii).

and *res judicata* will prevail in any attempt to readdress the issue after the fact.

7. Do not forget to consider life insurance as an alternative to SBP coverage. It may, in the long run, be much less expensive than the cost of SBP coverage, especially if the former spouse client is to pay one-hundered percent of the premium costs. Of course, also consider how close to a paid-up coverage the parties are; that is, how close to 360 monthly premium payments and the servicemember is to being seventy years old.

8. The former spouse's attorney must take responsibility for completing the appropriate DD Form 2656-1 or -10 form, along with its submission by certified mail, return receipt requested, to the DFAS London, KY address to register the former spouse, independent of the registration for direct payment of retired pay, *immediately* following the finality of the divorce decree, but, in no event, later than one year from the date the decree of divorce is signed. Failure to do so is malpractice and will forever bar the former spouse from SBP coverage entitlement. The address to which SBP election form and letter must be sent is: U.S. Military Annuitant Pay, P.O. Box 7131, London, KY 40742-7131.

9. The former spouse must be told that remarriage following divorce prior to age fifty-five will suspend and may terminate the entitlement she/he will have paid for during the marriage and, most certainly following the parties' divorce. All of those premiums will have been for naught and will be forfeited.

10. The former spouse should be told to notify the DFAS and provide it with evidence of her/his remarriage to suspend the deduction from the retired pay of the SBP premiums.

11. The former spouse should be told to immediately reapply to the DFAS for SBP former spouse beneficiary reinstatement if his or her marriage is terminated by divorce, annulment and/or the death of a new spouse.

12. After the one-year window has come and gone, the former spouse will not be able to resurrect the failure to have been designated as a former spouse SBP beneficiary, and, even if the facts appear to justify the creation of a constructive trust of the annuity proceeds, it is well settled that constructive trusts in this situation are preempted by federal law.[115]

13. If the former spouse client has missed the filing deadline, watch for future "open seasons" for a possible opportunity to cure the defect. It is unlikely, however, that the "open season" will allow the tardy designation of a former spouse beneficiary.

14. Finally, if the former spouse client is in a situation like that presented in *Mason v. Cuisenaire*,[116] pursue "correcting the injustice" and never give up. That case may just be the one to make new law and, more especially, right a wrong for the former spouse client.

115. 10 U.S.C. §§ 1440, 1448(b)(2)(B), 1450(i).
116. 128 P.3d 446 (Nev. 2006).

Appendix A
DD Form 2656 Series Forms

DD Form 2656, Apr. 2009—Data for Payment of Retired Personnel—For the servicemember to use at the time of retirement application and processing; servicemember has opportunity, at this time, to designate an eligible person to be an SBP beneficiary as part of the process of applying for receipt of retired pay. This form can be accessed online at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656.pdf.

DD Form 2656-1, Apr. 2009—Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage—For retired personnel **only** to make a change in annuity beneficiary coverage from spouse to former spouse upon qualifying event, i.e., divorce. This form can be accessed online at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd 2656-1.pdf.

DD Form 2656-2, Apr. 2009—Survivor Benefit Plan (SBP) Termination Request—Used to terminate spouse, former spouse, or other SBP annuity election. This is a request and is subject to approval by the DFAS. If designation as beneficiary put in place pursuant to a court order, i.e., Former Spouse Deemed Election, it is recommended, and may be required by DFAS, that a court order terminating the coverage be entered and submitted along with this form. This form can be accessed online at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-2.pdf.

DD Form 2656-3—Survivor Benefit Plan (SBP) and Reserve Component Survivor Benefit Plan (RC-SBP) Open Enrollment Election—Application form for open enrollment period that ran from October 1, 1999, to September 30, 2000—Obsolete.

DD Form 2656-4—Verification for Annuity—Obsolete—Replaced by DD Form 2656-7.

DD Form 2656-5, Apr. 2009—Reserve Component Survivor Benefit Plan (RC-SBP) Election Certificate—Form to be used and completed by reserve/National Guard component members within the ninety-day period of receiving the Notice of Eligibility (NOE) of their qualification for receipt of retired pay (completion of twenty good years) to cover "a beneficiary," usually the current spouse and/or children, during the period from receipt of the NOE and servicemember's actual receipt of retired pay (currently at sixty years of age). This form can be accessed online at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd 2656-5.pdf. The servicemember, with his then-spouse's concurrence, **can elect for no "gray area" coverage** at that time, and still elect SBP coverage at the time of receipt of retired pay since there will be a new election opportunity at that time. The window for making the election at age sixty lasts for a period of twelve months from the date of the commencement of the receipt retired pay.

DD Form 2656-6, Apr. 2009—Survivor Benefit Plan Election Change Certificate—For use by the servicemember to make a coverage change upon qualifying event, such as death of spouse/children, divorce, marriage, remarriage, etc. The window for making this change lasts for a period of twelve months from the date of the qualifying event.

DD Form 2656-7, Apr. 2009—Verfication of Survivor Annuity—Form to be used by surviving spouses, dependent children, surviving former spouses, and natural interest persons to apply for payment of the SBP annuity upon the death of the servicemember. This form can be found online at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-7.pdf.

DD Form 2656-8, Apr. 2009—Survivor Benefit Plan Automatic Coverage Fact Sheet—Used by DFAS to put servicemember on notice that he/she may "automatically" have covered a spouse if no clarifying election form is submitted and to verify who potential SBP annuitants in the servicemember's family might be. This form can be accessed at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-8.pdf.

DD Form 2656-9—Survivor Benefit Plan (SBP) and Reserve Component Survivor Benefit Plan (RC-SBP) Open Enrollment Election—Application form for open enrollment period that ran from October 1, 2005, to September 30, 2006—Obsolete.

DD Form 2656-10—Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election—This is the form that must be completed by divorced nonmember spouse (former spouse). Submit along with a certified copy of the operative order (decree of divorce and/or DRO) in order to be "deemed" as a former spouse beneficiary when servicemember refuses to sign and/or the court does not compel the servicemember to sign a DD Form 2656-1. The form can be accessed at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-10.pdf.

DD Form 2656-11—Statement Certifying Number of Months of Survivor Benefit Plan (SBP) Premiums Paid—This is the form for claiming overpayments after attaining paid-up coverage of at least 360 months of premium payments ***and*** having attained seventy years of age as of October 1, 2008, or after. The form can be accessed at http://www.dfas.mil/retiredpay/paid-upsurvivorbenefitpaymentsbp/dd2656-11.pdf.

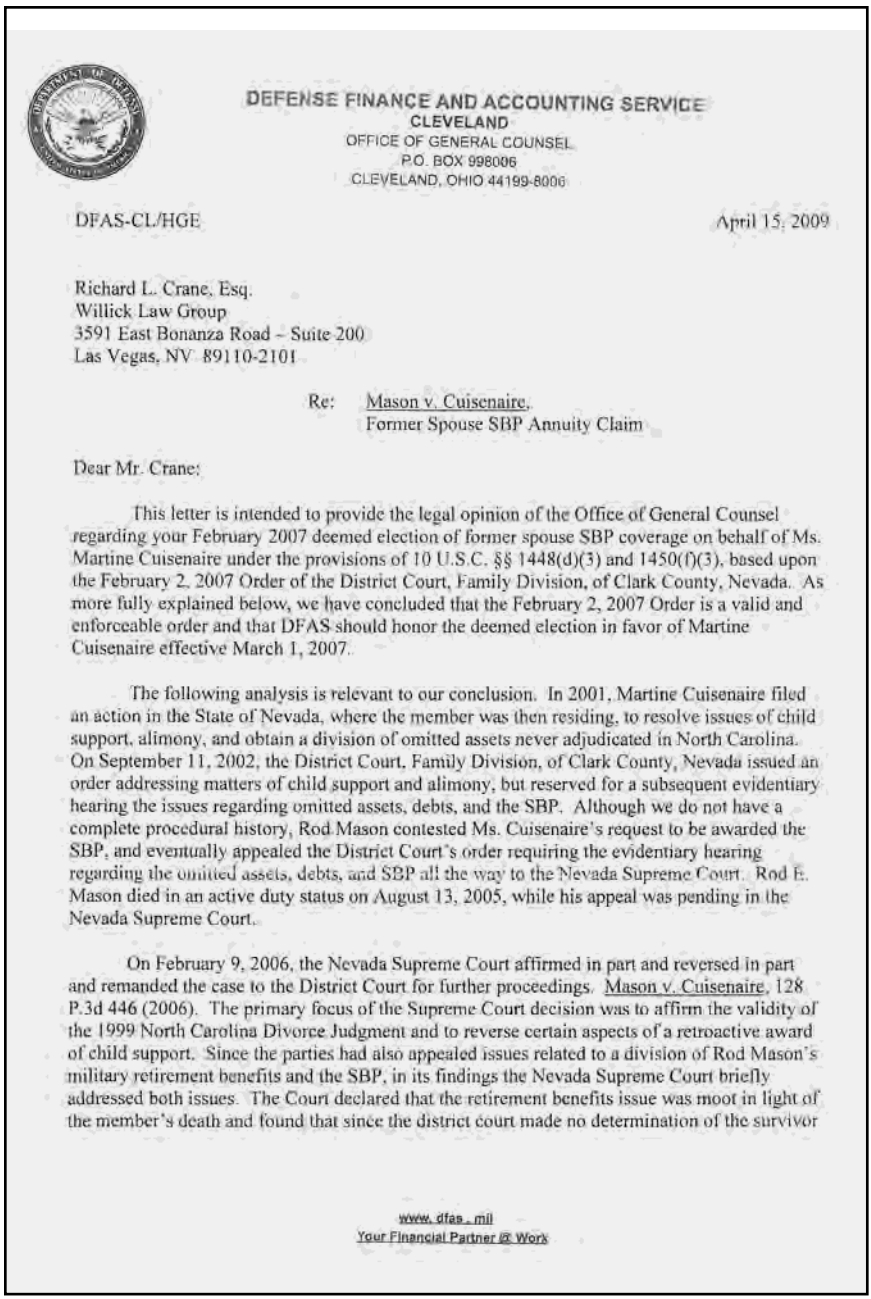
Appendix B

Respondent's Exhibit A

1. Gross Retired Pay	$2,000.00
SBP Premium	- 130.00
Disposable Retired Pay	$1,870.00
Former Spouse's Percentage Share	x .15
Former Spouse's 15% Share	$ 280.50
2. Gross Retired Pay	$2,000.00
Former Spouse's Percentage Share	x .15
Former Spouse's Share of Gross	$ 300.00
3. Former Spouse's Share of Gross	$ 300.00
Former Spouse's Share of Disposable Pay	- 280.50
SBP Paid by Former Spouse	$ 19.50
4. SBP Premium	$ 130.00
SBP Premium Share Paid by Former Spouse	- 19.50
SBP Premium Share Paid by Service Member	$ 110.50

5. $\frac{\$\ 110.50}{\$\ 130.00} = 85\%$ $\frac{\$\ 19.50}{\$\ 130.00} = 15\%$

Appendix C



DEFENSE FINANCE AND ACCOUNTING SERVICE
CLEVELAND
OFFICE OF GENERAL COUNSEL
P.O. BOX 998006
CLEVELAND, OHIO 44199-8006

DFAS-CL/HGE

April 15, 2009

Richard L. Crane, Esq.
Willick Law Group
3591 East Bonanza Road – Suite 200
Las Vegas, NV 89110-2101

Re: Mason v. Cuisenaire,
Former Spouse SBP Annuity Claim

Dear Mr. Crane:

This letter is intended to provide the legal opinion of the Office of General Counsel regarding your February 2007 deemed election of former spouse SBP coverage on behalf of Ms. Martine Cuisenaire under the provisions of 10 U.S.C. §§ 1448(d)(3) and 1450(f)(3), based upon the February 2, 2007 Order of the District Court, Family Division, of Clark County, Nevada. As more fully explained below, we have concluded that the February 2, 2007 Order is a valid and enforceable order and that DFAS should honor the deemed election in favor of Martine Cuisenaire effective March 1, 2007.

The following analysis is relevant to our conclusion. In 2001, Martine Cuisenaire filed an action in the State of Nevada, where the member was then residing, to resolve issues of child support, alimony, and obtain a division of omitted assets never adjudicated in North Carolina. On September 11, 2002, the District Court, Family Division, of Clark County, Nevada issued an order addressing matters of child support and alimony, but reserved for a subsequent evidentiary hearing the issues regarding omitted assets, debts, and the SBP. Although we do not have a complete procedural history, Rod Mason contested Ms. Cuisenaire's request to be awarded the SBP, and eventually appealed the District Court's order requiring the evidentiary hearing regarding the omitted assets, debts, and SBP all the way to the Nevada Supreme Court. Rod E. Mason died in an active duty status on August 13, 2005, while his appeal was pending in the Nevada Supreme Court.

On February 9, 2006, the Nevada Supreme Court affirmed in part and reversed in part and remanded the case to the District Court for further proceedings. Mason v. Cuisenaire, 128 P.3d 446 (2006). The primary focus of the Supreme Court decision was to affirm the validity of the 1999 North Carolina Divorce Judgment and to reverse certain aspects of a retroactive award of child support. Since the parties had also appealed issues related to a division of Rod Mason's military retirement benefits and the SBP, in its findings the Nevada Supreme Court briefly addressed both issues. The Court declared that the retirement benefits issue was moot in light of the member's death and found that since the district court made no determination of the survivor

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benefits issue, having reserved the matter for consideration during the evidentiary hearing, the district court should conduct an evidentiary hearing and determine the survivor benefits.

On February 2, 2007, the District Court issued its final Order, which directed that Martine be "deemed the "Mandatory Former Spouse" for Survivor's Benefit Plan (SBP) annuity payments." By a letter dated February 7, 2007, Mr. Willick submitted a deemed election for former spouse SBP coverage on behalf of Martine. DFAS denied the deemed election request on August 28, 2007, on grounds that the February 2, 2007 Order was issued after the member's death and therefore, could not be honored under the SBP law, 10 U.S.C. § 1448(d)(3).

After further legal review, it is our opinion that, under the circumstances of the present case, it is appropriate to recognize the February 2, 2007 Order of the District Court of Clark County, Nevada as a valid and enforceable order for purposes of requiring former spouse SBP and that Martine Cuisenaire submitted a timely deemed election on or about February 7, 2007.

In reaching this conclusion, it is significant to note that in 2001 Ms. Cuisenaire took appropriate legal action to address the omissions of the North Carolina divorce judgment regarding marital property and the SBP, by filing a petition in Nevada, where the member resided, requesting resolution of child support and marital property claims. Despite the district court having set an evidentiary hearing in September 2002 to address issues including the SBP, the member's appeal of the September 2002 Order was still pending almost 3 years later when the member died in August 2005. Accordingly, the former spouse properly sought to secure her SBP claim before the member became eligible to participate in the SBP. Moreover, the Court specifically found that the member's actions throughout this litigation were unreasonable and an abuse of the judicial process unnecessarily delaying the final outcome.

Therefore, in light of the particular circumstances of the domestic relations proceedings between Rod E. Mason and Martine Cuisenaire in Nevada and the explicit findings of the District Court of Clark County, Nevada contained in the final Order of February 2, 2007, DFAS should honor the deemed election request for former spouse SBP coverage submitted on behalf of Ms. Cuisenaire, on or about February 7, 2007.

Before we can fully implement this opinion, we must obtain several items. First, in light of the July 31, 2008 District Court order requiring the member's surviving spouse, Jennifer, to repay the annuity previously received, plus interest, for a total of $36,228.37, and to pay all future SBP payments received by Jennifer or her children to Martine Cuisenaire through your office, we require a formal statement acknowledged by Jennifer Mason of all amounts paid to Ms Cuisenaire or your office in compliance with the Court's July 31st Order. Secondly, we must receive a new DD Form 2656-7, Verification for Survivor Annuity, signed by Ms. Cuisenaire and, if at all possible, authorization for direct deposit of the monthly annuity payments. To simplify transmission of this form to Ms. Cuisenaire, it is available electronically at the following link: http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-7.pdf. Finally because Ms. Cuisenaire is a Belgian citizen, we must receive an IRS Form W-8BEN signed by Martine to avoid assessing a 30% federal income tax withholding rate on the annuity payments.

Since DFAS has already paid Martine Cuisenaire the one-third child annuity interest of her daughter Audrey, the retroactive annuity payment to Martine Cuisenaire must take into account the payments Martine has received on behalf of her daughter for the period March 1, 2007 and after, because there is no authority for duplicate annuity payments for the same period of time. The portion of the child annuity payments that represent Audrey's share through February 28, 2007 are proper, since under the provisions of 10 U.S.C. § 1450(f)(3)(D), the former spouse deemed election would become effective March 1, 2007.

Finally, by virtue of authorizing Martine to receive former spouse annuity payments accruing after March 1, 2007, the child annuity payments made to Jennifer Mason after that date on behalf of her children, Marion G. and Eric H. Mason, will become erroneous, subject to a possible request for waiver of the indebtedness. DFAS will separately notify Jennifer Mason regarding the impact of our final decision to honor your client's deemed election for former spouse SBP coverage and any claim for erroneous annuity payments on behalf of her children.

Please contact the undersigned if you have any further questions regarding this matter, at (216) 204-7432.

Sincerely,

Scott Lafferty

Scott Lafferty
Assistant Counsel
Military and Civilian Pay Law