Introduction: 

Silent Partner is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association’s Family Law Section. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many Silent Partner infoletters on military pension division, the survivor Benefit Plan and other aspects of military divorce. Just go to www.abanet.org/family/military (the website of the above committee) or www.nclamp.gov (the website of the military committee, N.C. State Bar).

The Survivor Benefit Plan (SBP) is the survivor annuity associated with military retired pay. If the servicemember (SM) or retiree dies first, the spouse or former spouse survivor is eligible to receive 55% of the selected base amount (usually the full pension) for life. Here are the most important points to remember when handling a divorce involving SBP coverage.

1. **Specifically Address SBP Coverage At Divorce.** If you’re representing the spouse of the SM or retiree in a divorce, don’t just say that the FS (former spouse) is entitled to receive SBP coverage as a former spouse. Be sure that the judgment, order or incorporated settlement document states that the SM or retiree must elect former-spouse SBP coverage. This requirement to make an election is the best way to protect the flow of income that starts with the share of the pension. If the SM or retiree fails to elect former spouse coverage, the pension payments stop when the pensioner dies. Remember “LIFE and DEATH.” Protect your client for both of these contingencies – a share of the pension during life, and SBP coverage in the event of the SM or retiree’s death.

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1 See 10 U.S.C. § 1447-1455. If the divorce follows the retirement of the servicemember, then SBP had to be selected at retirement for it to be available at the time of divorce. Without the selection of SBP coverage at retirement, or if the choice of less than full coverage, both of which require the written consent of the spouse, the former spouse’s SBP eligibility at divorce is limited by that previous decision.

2 A servicemember may also elect coverage for a spouse and children, for a former spouse and children, or child coverage at the time of retirement.
retiree’s death. And do it right away – don’t put it off for “down the road” when everyone has a chance to breathe. Many problems arise from reserving SBP until later on.

If, on the other hand, you represent the SM/retiree and you do not want SBP coverage for the former spouse, then write the settlement or final court order to say so. If you don’t want to “tip your hand” by talking about SBP, then do it the subtle way: “The parties stipulate and agree that the Husband, John Doe, is be entitled to certain retirement benefits under Title 10, U.S. Code since his retirement from the U.S. Army in 2016, that his military retirement is partly marital, and that the Wife is entitled to 43% of the retired pay as her one-half share of the marital portion upon execution of this agreement. All the rest of Husband’s pension and retirement benefits shall be his sole and separate property, free and clear of any claim by the Wife.”

2. Meet the Election Deadline. To effectuate coverage, the SM or retiree needs to transmit the election form to the retired pay center. This must be done within one year of the divorce. The election for former spouse coverage is made on DD Form 2656-1 for the Army, Navy, Air Force and Marine Corps; Coast Guard Form 4700 is used by the Coast Guard and the commissioned corps of NOAA and the PHS. The forms are available on-line in fillable PDF format. You need to mark that deadline on your docket control system and make sure you meet it.

3. Watch Your Wording. If the SM/retiree fails or refuses to make the election within a year of the divorce, the former spouse can submit a deemed election to get SBP coverage. DD Form 2656-10 is used for this. When you represent the former spouse of the SM or retiree, make sure that the language used in the SBP clause of the divorce judgment imposes a duty on the SM or retiree to make the former-spouse election. If your wording begins “Jane Doe may choose to receive…” or “The Army will provide…” you’ve missed the boat. Such phrases do not impose an affirmative duty on John Doe, the former husband, and your client won’t be able to take advantage of the “belt and suspenders” protection provided to former spouses by a deemed election. See the APPENDIX below for examples of faulty phrasing and defective language. The attorney should also be sure to undertake the submission of the SBP package as part of the divorce representation. The work

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3 For other techniques to use in avoiding SBP, see the Silent Partner info-letter, “Defending Against SBP,” at www.nclamp.gov > For Lawyers > Silent Partner. The Silent Partner series is published by the North Carolina State Bar’s military committee in conjunction with the Military Committee of the American Bar Association’s Section of Family Law.

4 For the Army, Navy, Air Force and Marine Corps, garnishments are handled by Garnishment Operations at DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

isn’t finished until the paperwork to implement the pension division and the Survivor Benefit Plan is submitted. Don’t leave the client in the lurch.

4. **Note the Former Spouse’s Suspense Date.** Just as the SM or retiree has a deadline, as described in Tip 2, there is a deadline for the deemed election by Jane Doe, the former spouse. The suspense date is one year from the entry of the order giving her former spouse coverage. This is often the date of the divorce; however, in some states or localities the order granting former spouse coverage may be different than the divorce date. These situations are often called “bifurcated” or “divisible” divorce; the court will sometimes sever the pension or property division claim and reserve jurisdiction to decide those issues after the divorce. In other states the court can enter property division order before the divorce is granted. The suspense date for the deemed election should also be a mandatory entry on your docket control system. Also see below as to the interaction of the member’s retirement date with the date of the SBP order.

5. **Allocate Payment for the SBP Premium.** The monthly premium for SBP coverage is 6.5% of the base amount for active-duty retirements and about 10% for Reserve Component SBP, or RCSBP cases (i.e., Guard/Reserve retirees who have chosen immediate coverage as soon as they have served 20 creditable years). Federal rules require that this premium be deducted “off the top,” that is, subtracted from the SM or retiree’s gross retired pay before the pension is divided. This has the effect of splitting the SBP premium between the SM/retiree and the former spouse in the same ratio as their shares of the pension itself. For example, if John Doe, the retiree, is awarded 60% of the pension, then he’ll wind up paying 60% of the SBP premium.

The government cannot change the premium allocation set out in the Uniformed Services Former Spouses’ Protection Act for deduction of the premium from total before arriving at disposable retired pay. The cost of SBP coverage may not be apportioned between the parties by the retired pay center. A court order can, however, require one party to reimburse the other for the cost of coverage; in this situation, if it is made clear that this is a private matter between the parties, the retired pay center will not object since it doesn’t involve changing federal rules. Additionally, you can actually shift the premium to the former spouse by reducing her nominal share of the pension, and the retired pay center will honor the order. The premium can also be shifted to the

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8 Id.
SM/retiree in a similar manner. This process is explained in the Silent Partner info-letter, “Military Pension Division: The Servicemember’s Strategy.”

6. **Don’t Try for a “Mirror Award”**. There are virtually unsurmountable problems associated with trying to create an SBP amount at the death of the SM or retiree that mirrors the former spouse’s pension award during the lifetime of the SM or retiree. If you happen to get the divorce case when the SM is just about to retire from active duty, then you might be able to crank out the numbers and make it work. Otherwise, leave it alone. No one can predict what an active duty SM’s retired pay will be. That amount in most states is based on an unknown future marital (or coverture) fraction, and on a military pay table yet to be voted on by Congress. The retired pay center will not honor an order which requires it to peg the SBP amount on the share of retired pay that the former spouse is receiving.

7. **Consider the Former Spouse’s Remarriage**. If Jane Doe, the former spouse, has any plans for remarriage, be sure to remind her about the “remarriage penalty.” Remarriage before she turns 55 suspends her SBP coverage. Coverage can be reinstated, however, if that remarriage ends in divorce, death, or annulment.

8. **Consider the SM’s Remarriage**. What if the SM or retiree remarries? If John Doe’s former-spouse beneficiary is suspended, then he may only obtain eligibility to make a new SBP election by returning to court to obtain a modification of the prior court order requiring SBP coverage, so that he may obtain SBP coverage for his present spouse. If, on the other hand, John ceases to have an eligible spouse-beneficiary and he later remarries, he may decline coverage for the subsequent spouse if he does so within the first year of marriage. When he remarries, therefore, his new spouse becomes a beneficiary unless there is a proper rejection of coverage within the first year of marriage. If there is no requirement for former spouse coverage, then John may use DD 2656-6, the change of beneficiary form, to request that his new wife be covered by his SBP. If the SM or retiree dies less than one year from the date of marriage, the new spouse will receive a refund of the premium payments. If it is longer, then she will be qualified as his surviving spouse for SBP purposes, and she will receive 55% of the selected base amount for the rest of her life, unless she remarries before age 55 (see Tip 7).

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9 See Note 3 above for the URL.
11 A change in the law in December 2015 makes it possible for the retiree to make an election of his new spouse upon the death of a former spouse who was the SBP beneficiary.
9. **No Subdivisions in “SBP City.”** Note that SBP is a unitary benefit. It cannot be subdivided. It’s either the property of one’s former spouse or one’s current spouse, “your EX or your NEXT.”

10. **Put a Price Tag on It.** When the SM or retiree’s spouse has rejected every divorce settlement option and still demands SBP coverage, it’s time to value the asset. Get an expert witness to "price the SBP" so that spouse is charged with the present value of this deferred annuity. If Jane Doe is faced with the cost of this benefit, which may be $50,000, $100,000, or even more, she may be forced to rethink that simple approach of "I demand it." She will have to start thinking about a new issue: "If you want to buy it, then you'll be charged with the price on the tag" for the present value.¹²

11. **If the Wording Was Flawed, Get a Clarifying Order.** When the court’s order contains faulty language (see APPENDIX below for some examples) and the submission to the retired pay center is rejected, file a motion to ask the court to amend or clarify the prior order, so that it will be honored by the government. In this situation, the FS should be able to do her “deemed election” within one year of the entry of the properly worded order.

12. **If a Deadline was Missed, Try to Correct the Military Record.** Often a party will not recognize that there is a one-year deadline to register the former spouse election for SBP. When this happens, sometimes the Board for the Correction of Military Records (BCMR) for the SM or retiree’s branch of service (e.g., Coast Guard, Air Force) can remedy the problem.¹³ The request must be made within three years of the error (that is, the entry of a divorce or pension division order without follow-up in submitting the decree to the retired pay center), or discovery of the error. Use DD Form 149 for the petition. If you’re new to this, be sure to associate competent co-counsel on the case, one who has done this kind of work previously.

13. **Survivor Benefit Plan Coverage – The Timing Trap.** Retirement can be another deadline. Sometimes the member is divorced before retirement, but the divorce decree does not contain proper terms and acceptable language requiring him or her to make a former-spouse SBP election. Perhaps the court has severed the claims and held open the issues of military pension division and SBP for a later hearing. Maybe the attorneys have agreed on SBP but put off the writing of a supplementary order. In some cases, there is an order but the SBP language is faulty. In any event, if the member retires and chooses no coverage or elects spouse (or spouse and child) coverage,

¹² For more on valuation and SBP, see the Silent Partner, “Defending Against SBP” at the website cited at Note 3 supra.

any subsequent FS SBP order will arrive too late at the retired pay center. If the member does not make the FS election by the time of retirement, then it cannot be made afterwards. The DoDFMR makes this retirement deadline clear in two sentences:

- If the former spouse is the member’s former spouse at the time the member becomes eligible to participate in SBP, an election for former spouse must take place at or before the member’s retirement.

and

- If a member has a former spouse upon becoming eligible to participate, but is not required by a court order or court-approved agreement to provide former spouse coverage, any subsequent court order that requires former spouse coverage will not be honored.  

Thus the key warning for these cases is to watch out for the divorce impact on FS SBP when the dissolution (e.g., the “status divorce”) takes place before retirement but the related issues (such as SBP) won’t be ruled upon by the court until after retirement. 

**APPENDIX - Unacceptable SBP Language**

Problems with SBP language often occur because the parties, their lawyers or the judge do not understand how the SBP works, what the benefits are, how it is paid for and what deadlines apply. The examples below represent unacceptable language which will not be honored by the retired pay center:

1. *The former spouse may receive the Survivor Benefit Plan if she is fully responsible for payments for coverage, with no liability for the Husband.*

This clause doesn’t allocate the Survivor Benefit Plan to the Wife; it makes a conditional offer to her based on her payment of the premium. The order needs to award SBP to her unconditionally.

2. *The Wife is entitled to the Spouse Benefit Protection plan.*

The language doesn’t award the Survivor Benefit Plan to the former spouse and it doesn’t require an election. If the court reviews and clarifies the language, however, then the ex-wife may be able to obtain coverage so long as the Husband is ordered to make the election for her as former spouse and the election is made before retirement.

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14 DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay, Vol. 7B, ch. 43, §430503. For a member of the Guard or Reserve, the former-spouse election must be filed within 90 days after receipt of the Notice of Eligibility, which each Guard and Reserve member receives upon attaining 20 creditable years of service (the “20-year letter). *Id.*

15 Note that, if both the divorce and a proper SBP order are obtained before retirement, the former spouse has one year from the date of the requiring court order to submit a deemed election, as set out above. Her deemed election will trump, for example, the member’s spousal election at retirement (e.g., he remarried and selected spouse coverage instead of former-spouse coverage which the court order required).
The former spouse is awarded one-half of the Husband’s military retirement benefits, including but not limited to one-half of his total retired pay, his Survivor Benefit Plan, and any other benefits due to his military service.

The phrasing is faulty since it tries to award half of the SBP. Survivor Benefit Plan coverage is “all or nothing.” It cannot be subdivided. It cannot be apportioned between successive spouses. Either the former spouse receives SBP coverage or she does not.

The former spouse is entitled to a share of the Survivor Benefit Plan. The amount that she receives will be the same as the amount which she is awarded as a share of the military pension.

While this clause appears to aim at a fair and just result (i.e., a “mirror share” for Jane Doe, giving her the same amount after the ex-husband’s death as she was receiving during his lifetime), it will not be accepted. The retired pay centers do not do calculations to effect a mirror image for life and for death of payments to the former spouse.

The former spouse is awarded the Survivor Benefit Plan, and the Husband shall make this election. She will receive 50% of the base amount (his full retired pay) if he dies before her.

The benefit for SBP is set by federal law. It’s always 55% of a designated amount or of a share of the pension. So long as the member hasn’t yet elected the base amount, which is done upon retirement, it can specify his full retired pay or a lesser amount, down to $300 a month; if he’s married at the time of designation, his spouse will need to consent to the decision. But the 55% cannot be changed, and thus the wording is flawed and unacceptable.

The former spouse is awarded SBP coverage consistent with the rules set out in the Perkins case, 140 Mo. App. 123, 44 S.W.3d 345 (1999).

The retired pay center cannot interpret or implement rules of property division in state law when they are used to award SBP coverage.

Although the Wife is entitled to 42.5% of the Husband’s military retired pay, she is ordered to receive only 36% since she will be required to pay for the Survivor Benefit Plan, which has a premium of 6.5%.

This will be rejected for two reasons. First, it does not award the Wife SBP coverage; it only says how it will be paid for.). The second reason is that it does not require the Husband to make an election for her.

In addition, note that its math is faulty. While 6.5% of the base amount is the premium (except for Reserve Component SBP cases), correct calculations do not involve subtracting 6.5% from the Wife’s share; she is already paying a portion of the SBP premium, since it’s subtracted “off the top” before arriving at disposable retired pay, which is what the retired pay center divides between the parties under
10 U.S.C. §1408(a)(4). If the goal is to reduce the Wife’s share of the pension to require her payment of the entire SBP premium, the process to be applied is found in the Silent Partner info-letter, “Military Pension Division: The Servicemember’s Strategy.”

(8) The Husband will immediately elect former-spouse coverage for Jane Doe, and the full cost of the premium will be withheld by the retired pay center so that the Husband is indemnified and held harmless as to this expense.

The retired pay center may not reject the order containing this language, but it certainly won’t enforce the premium-shifting specified in it. Federal law (that is, the Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. §1408(a)(4)) states that the SBP premium must be deducted from the gross pay of the retiree. That is, it comes “off the top” before disposable retired pay, or DRP, is attained. Since it is a mandatory deduction from total retired pay, the pay center cannot change this.

Rev. 7-6-16

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16 See Note 3 above for the URL.