



**CUI//SP-MIL/SP-PRVCY**

**UNITED STATES AIR FORCE  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2019-03062

*Work-Product*

**COUNSEL:** *Work-Product*

*Work-Product*

**HEARING REQUESTED:** YES

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**APPLICANT'S REQUEST**

The deceased service member's record be changed to show he made a timely election for former spouse coverage under the Survivor Benefit Plan (SBP).

**APPLICANT'S CONTENTIONS**

Through counsel, the applicant contends the decedent affirmed that she was to be the beneficiary of his SBP. She and the decedent had a wonderful post-divorce relationship and routinely communicated about their children. On more than one occasion, they communicated about the SBP coverage for her and on each occasion, he assured her all paperwork had been completed. He apparently assumed this was the case because, even though the Defense Finance and Accounting Service (DFAS) was aware of their divorce, the payment of his SBP premiums never stopped, a fact she genuinely believes was what he thought was his continuing SBP coverage for her. In their correspondence, the decedent indicated his former spouse (wife #2) and his spouse at the time (wife #3) married him knowing he would be unable to provide any support for them other than health benefits and that the SBP benefit would pass to her (applicant, wife #1), of course. It was his intention as a good person, as well as a legal obligation, to ensure the SBP annuity payments would be paid to her. His death was a shock, and she was surprised that the paperwork had not been completed and properly submitted.

In a supplemental brief, counsel contends the contents of the divorce decree clearly show the intent of the Court and both parties was for the applicant to receive the SBP benefits. Moreover, the decedent reaffirmed his intent that the applicant would receive SBP benefits, as evidenced by correspondence they exchanged. Although the AFBCMR sent a "Survivor Benefit Program Release of Benefits" form to the applicant, that form has not been completed as she has no ability to force the current recipient to sign the form. The form is unnecessary in light of the overwhelming weight of the evidence provided, all of which supports the conclusion that the only equitable result is to grant the applicant the SBP benefits she seeks.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is the former spouse of a deceased retired Air Force major (O-4).

On 4 Jun 64, according to a Certificate of Marriage, the applicant and the service member married.

On 1 Jul 85, according to Special Order *Work-Product*, dated 14 Jun 85, the service member retired from the Regular Air Force.

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On 4 Jan 88, according to a Divorce Decree, the applicant and the service member divorced. The Decree of Divorce and Division of Military Retirement Benefits required the service member make an SBP election and it be maintained in full force naming his former spouse (applicant) as the beneficiary and that it should not be altered, revoked, or withdrawn by the service member during his lifetime. However, the service member did not file a change to his SBP election under Title 10 United States Code, Section 1448(b)(3)(A)(iii) (10 U.S.C. § 1448(b)(3)(A)(iii)), nor did the applicant file a deemed election under 10 U.S.C. § 1450(f)(3)(C).

On 8 Aug 02, according to DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, provided by the applicant, she applied for a portion of the service member's retired pay. On 14 Sep 02, DFAS notified the applicant they received her application, and advised her that if the divorce decree specifies that she is to be designated as a former spouse beneficiary for SBP, she was required to make a "deemed election" for SBP coverage within one year of the date of divorce directly to the Retired Pay Office.

On 30 May 14, according to information from the Defense Enrollment Eligibility Reporting System, the service member remarried a second time.

On 30 Mar 17, according to a Certificate of Death, provided by the applicant, the service member passed away.

On 18 Apr 17, according to DD Form 2656-7, *Verification for Survivor Annuity*, provided by the applicant, she submitted a claim for SBP annuity payments. On 25 Apr 17, DFAS denied the applicant's claim based on the fact the former service member did not make an election for former spouse coverage, nor did the applicant file a deemed election within one year of the date of the order granting former spouse coverage for SBP. DFAS also noted that a divorce decree alone does not constitute a deemed election.

On 9 Jul 19, the Board sent the applicant the following standard forms, in order to establish whether there are persons with competing interests in the case or who should receive notice of the requested correction to the record: SBP Marital Status Affidavit (Former Spouse) and SBP Release of Benefits Affidavit (Arrears of Pay). The applicant did not return the affidavits.

For more information, see the excerpt of the deceased service member's record at Exhibit B and the advisory at Exhibit D.

**APPLICABLE AUTHORITY**

SAF/GCM (Secretary of the Air Force General Counsel) Legal Opinion, dated 18 Oct 06. The Secretary of the Air Force General Counsel's office has advised the Board to exercise prudence when correcting a record that may be unfavorable to a person other than the applicant. This is called a competing interest. While there is no strict statutory prohibition, there is a strong presumption that no record correction should be made if the result would be unfavorable to another person eligible to seek relief from the Board. For this reason, in SBP cases, the Board insists on receiving affidavits or notarized statements of consent from all parties, including the current spouse, the former spouse, eligible children, and the service member. In the absence of such affidavits, the Board typically denies relief.

The complete SAF/GCM advisory is at Exhibit C.

10 U.S.C. § 1448(b)(3)(A)(iii). "An election to convert spouse coverage to former spouse coverage, "must be written, signed by the person making the election, and received by the

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Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment.”

10 U.S.C. § 1450(f)(3)(C). If a court has ordered a service member to elect former spouse Survivor Benefit Plan, then a former spouse can submit his or her own request to the Defense Finance and Accounting Service for former spouse Survivor Benefit Plan coverage. This is known as a “deemed election request.” There is a time limit: “An election may not be deemed to have been made ... unless the Secretary concerned receives a request from the former spouse of the person within one year of the date of the court order or filing involved.”

**AIR FORCE EVALUATION**

AFPC/DPFFF (SBP Management) makes no recommendation since it involves a competing claimant. A person’s eligibility to receive a spouse SBP annuity terminates upon divorce. However, the law provides two mechanisms for changing spouse coverage to former spouse coverage. One of the following actions must be taken within the first year following divorce: (1) the retiree files an election change using DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, or (2) the former spouse requests the retiree be deemed to have made such a change on her behalf using DD Form 2656-10, *Survivor Benefit Plan Former Spouse Request for Deemed Election*, and provide the official court-ordered divorce decree. If neither the service member nor the former spouse requests the election change during the one-year eligibility period, former spouse coverage may not be established thereafter. Even when a service member fails to notify DFAS of the divorce and continues to pay SBP premiums afterwards, the former spouse is not eligible for annuity payments upon the member’s death.

The service member and applicant were married at the time of his 1 Jul 85 retirement, and he elected spouse and child[ren] SBP coverage based on full retired pay. Children are contingent beneficiaries in the event the spouse loses eligibility prior to the dependent child turning 18 or 22 if in school full time (the member’s child aged out of eligibility). The parties divorced on 4 Jan 88 and the divorce decree reflects the applicant was awarded SBP and was to be retained as the former spouse SBP beneficiary. There is no evidence either party submitted a valid election to change the spouse coverage to former spouse coverage during the required time following their divorce. DFAS records reflect SBP premiums for spouse coverage continued to be deducted from the service member’s retired pay until his death on 30 Mar 17. However, the Defense Enrollment Eligibility Reporting System reflects the service member remarried twice after the parties divorced and was married to his widow on 30 May 14 until the date of his death. Because the category of coverage in effect on the service member’s retired pay account was spouse coverage, by law, his widow became the eligible beneficiary and is now in receipt of the SBP annuity; therefore, there is a competing claimant.

The complete advisory opinion is at Exhibit D.

**APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion and SAF/GCM legal opinion to counsel on 14 Feb 23, for comment (Exhibit E), but has received no response.

**FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice and finds a preponderance of the evidence does not substantiate the applicant's contentions. Counsel contends the applicant is the rightful SBP beneficiary; however, the evidence shows the decedent did not elect former spouse coverage, nor did the applicant request he be deemed to have made an election for former spouse coverage within one year of their divorce as required by law. The Board also notes the decedent's widow is currently receiving the decedent's SBP benefits, and the applicant did not provide the Board the SBP Release of Benefits Affidavit. The Secretary of the Air Force General Counsel's office has advised the Board to exercise prudence when correcting a record that may be unfavorable to a person other than the applicant. This is called a competing interest. While there is no strict statutory prohibition, there is a strong presumption that no record correction should be made if the result would be unfavorable to another person eligible to seek relief from the Board. For this reason, in SBP cases, the Board insists on receiving affidavits or notarized statements of consent from all parties, including the current spouse, the former spouse, eligible children, and the service member. In the absence of such affidavits, the Board typically denies relief. Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

### **RECOMMENDATION**

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

### **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2019-03062 in Executive Session on 19 Oct 23:

<i>Work-Product</i>	, Panel Chair
<i>Work-Product</i>	Panel Member
<i>Work-Product</i>	Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 16 Jan 18.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Memorandum SAF/GCM, 18 Oct 06
- Exhibit D: Advisory, AFPC/DPFFF, 8 Sep 22
- Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 14 Feb 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

11/1/2023

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*Work-Product*

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Board Operations Manager, AFBCMR

Signed by: *Work-Product*