

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02113

XXXXXXXXXXXX (MEMBER)

COUNSEL: XXXXXXXXXXXX

XXXXXXXXXXXX (APPLICANT)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her former spouse's records be corrected to reflect he made a timely election for former spouse coverage under the Reserve Component Survivor Benefit Plan.

APPLICANT'S CONTENTIONS

The court ordered that she was to be the Survivor Benefit Plan beneficiary of the member as his former spouse. No one informed her or her attorney that she had to make an election for Survivor Benefit Plan and register with the Defense Finance and Accounting Service within one year of the order providing Survivor Benefit Plan. She supported the member through his Air Force career and needs Survivor Benefit Plan coverage for financial security. They agreed by stipulation that she would have this coverage.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the former spouse of a retired Air Force Reserve senior master sergeant (E-8).

On 14 Feb 03, according to a Certificate of Marriage, provided by the applicant, she married the service member.

On 26 Mar 07, ARPC/DPPR sent the service member the standard Notification of Eligibility for retired pay (20-year letter) informing him that he has completed the required years under the provisions of Title 10 United States Code, Section 12731 (10 U.S.C. § 12731) and entitled to retired pay upon application prior to age 60. In addition, he was eligible to participate in the RCSBP.

On 6 Apr 07, according to PS Form 3811, *Domestic Return Receipt*, a Reserve Component Survivor Benefit Plan package was delivered to the applicant's address and was signed.

On 31 Oct 14, according to Reserve Order **Work-Product**, dated 24 Apr 14, the service member was assigned to the Retired Reserve Section and placed on the Air Force Reserve Retired List.

On 30 Dec 15, according to a Divorce Decree, provided by the applicant, she and her former spouse divorced.

On 18 Feb 16, the applicant and her former spouse, the service member, entered the Stipulation Order for Division and Distribution of Petitioner's United States Military Reserve Retired Pay. The Superior Court Judge ordered the service member to elect the Reserve Component Benefit

Plan, naming the applicant as the former spouse beneficiary, which will remain in effect for the lifetime of the applicant.

On 31 May 18, the Defense Finance and Accounting Service Garnishment Law Division, informed the applicant's counsel they received the applicant's Survivor Benefit Plan request for Deemed Election in accordance with 10 U.S.C. § 1450(f)(3). However, the request could not be approved because the court order (18 Feb 16) submitted must be received within one year of being issued by the court.

On 15 Jun 20, the [State] Superior Court ordered, the service member's current spouse to sign and have notarized a Survivor Benefit Plan Release and Consent form within 10 days and if she fails to sign the form within 10 days of 14 Jun 20, the Clerk of the Superior Court is ordered to sign said release.

On 14 Dec 20, the Clerk of the Superior Court signed the Survivor Benefit Plan Release and Consent form, which was notarized.

On 18 Oct 21, the Board sent the applicant the following standard forms, to establish whether there are persons with competing interests in the case or who should receive notice of the requested correction to the record: Survivor Benefit Plan Marital Status Affidavit (Former Spouse); Survivor Benefit Plan Release of Benefits Affidavit (Arrears of Pay). Board staff has not received a response from the applicant.

On 27 Feb 23, the Board sent the service member the following standard forms, to establish whether there are persons with competing interests in the case or who should receive notice of the requested correction to the record: Survivor Benefit Plan Marital Status Affidavit (Retiree); Survivor Benefit Plan Release of Benefits Affidavit (Current Spouse). Board staff has not received a response from the service member.

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

APPLICABLE AUTHORITY/GUIDANCE

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 Survivor Benefit Plan 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 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

ARPC/DPTT (Transition Division) recommends granting the application. All Reserve Component Service members who are eligible to participate in the Reserve Component Survivor Benefit Plan program, but who fail to make an election in the prescribed time will by law automatically have full, immediate Reserve Component Survivor Benefit Plan coverage for their dependent spouse and/or children, based upon dependents in the member’s record in the Military Personnel Data System. The prescribed time limit for Reserve Component Survivor Benefit Plan election is before the end of the 90th day after the Service member receives notification of having completed the years of service to be eligible for non-regular retirement in accordance with 10 U.S.C. §12731.

On 6 Jan 07, the applicant completed 20 satisfactory years of service however, the Reserve Component Survivor Benefit Plan Notification of Eligibility takes approximately 120 days for members to receive as there is a delay in the Point Credit Summary to reflect the 20 satisfactory years in record. The applicant signed PS Form 3811 on 6 Apr 07 confirming receipt of their Notification of Eligibility. The member did not submit an election within the required timeframe of 90 days; therefore, he was automatically enrolled into Option C, *Immediate annuity upon death regardless of age* for spouse only coverage effective 7 Jul 07.

In accordance with Department of Defense Instruction 1332.42, *Survivor Benefit Plan*, paragraph 5.1a, a former spouse is eligible as a beneficiary if (1) member voluntarily elects them as part of, or incident to, a proceeding of divorce, dissolution, or annulment or (2) pursuant to the requirements of a court order or a written agreement after a proceeding of divorce, dissolution, or annulment. On 28 Feb 16 the applicant and her spouse’s divorce was finalized. The court order divorce decree filed 18 Feb 16, page 3, line 2 states the following, “At his retirement, [Service Member] shall elect a retirement option with the RCSBP, naming [Applicant] as irrevocable “former spouse” beneficiary for her one-half community interest in the Reserve Component Survivor Benefit Plan, and which will remain in effect for the lifetime of the [Applicant].”

The complete advisory opinion is at Exhibit D.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 18 Jan 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 the victim of an error or injustice. The divorce decree ordered the applicant’s former spouse to make a Reserve Component Survivor Benefit Plan election naming the applicant as the former spouse beneficiary, which will remain in effect for the lifetime of the applicant. The court subsequently ordered the service member’s current spouse to sign a Survivor Benefit Plan Release, which she did not comply with. Consequently, the court extinguished any Survivor Benefit claim of the

applicant's former spouse's current spouse. As such, while neither the applicant nor her former spouse provided affidavits or notarized statements of consent, the Board determined the Court records that indicate there is no competing interest in this case, and that the applicant is the only qualified Survivor Benefit Plan claimant is sufficient to grant relief. Accordingly, the Board agrees with the recommendation of ARPC/DPTT and finds a preponderance of the evidence substantiates the applicant's contentions. In view of the forgoing and to preclude an injustice, the Board recommends correcting the record as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to SERVICE MEMBER be corrected to show on 18 Feb 16, he submitted a timely and effective election for former spouse coverage under the Survivor Benefit Plan, based on full retired pay, naming FORMER SPOUSE as the eligible beneficiary.

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-2021-02113 in Executive Session on 15 Jun 23:

- , Panel Chair
- , Panel Member
- , Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 27 May 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: SAF/GCM Legal Opinion, dated 18 Oct 06.
- Exhibit D: Advisory Opinion, ARPC/DPTT, dated 3 Nov 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 18 Jan 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.