

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 February 2024

DOCKET NUMBER: AR20230005815

APPLICANT REQUESTS: through counsel, correction of her former husband's records to show he made a timely election to change his SBP coverage to "Former Spouse" within 1 year of their divorce in accordance with their divorce decree.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Counsel's Memorandum in Support of DD Form 149, 8 March 2023, with supporting documents –
  - Attachment 1 –
    - Superior Court Decree of Dissolution of Marriage, filed 1 July 1998
    - Defense Finance and Accounting Service (DFAS) Form (illegible, presumed to be DD Form 2293 (Application for Former Spouse Payments from Retired Pay), undated (front page only)
  - Attachment 2 – Son's [REDACTED] State Certificate of Live Birth, issued 23 September 2022, with State Department of Health – Affidavit for Correction (blank)
  - Attachment 3 – Applicant's Medical Documents (approximately 105 pages)
  - Attachment 4 – SM's Certificate of Death, issued [REDACTED]
  - Attachment 5 –
    - DFAS Letter to Counsel, 18 December 2020
    - DFAS Letter to Counsel, 4 January 2021
  - Attachment 6 – Financial Documents
  - Attachment 7 – Letter of Support, 1 December 2022
  - Attachment 8 – four Army Board for Correction of Military Records (ABCMR) Records of Proceedings for Other Applicants

FACTS:

1. The applicant, the former spouse of the deceased retired service member (SM), states her former husband's records need to be corrected to show a timely election for "former spouse" SBP coverage within 1 year of their divorce.
2. Counsel's memorandum, 8 March 2023, states:
  - a. The applicant and her former spouse, the deceased SM, were married on 10 October 1973 and divorced on 1 July 1998. They were married for about 19 years and were married for 11 years during the SM's active service with the Army. The divorce decree awarded her former spouse SBP coverage. The decree also awarded her a portion of his military pension as property division (see attachment 1). After the date of divorce, they remained friendly and communicated regularly for the benefit of their son (see attachment 2) who is now a commissioned officer in the U.S. Army.
  - b. In 2004, the SM underwent cardiac quadruple bypass surgery and the applicant cared for him in the hospital, visiting him every day until he was released from the hospital, and providing at-home care for him in his home. She drove him to medical appointments, ran his personal errands, maintained his medications, and purchased household goods and supplies. As a result of her care, he had a full and successful recovery.
  - c. Unfortunately, she was not without her own health issues and had emergency surgery to install a colostomy bag in 2014. She was in the hospital for about 2 months. She went on to have multiple surgeries in 2014 and 2015. After the surgeries, the physicians would not clear her to work full time. She received medical assistance, food stamps, and social security disability compensation. She was lucky enough to have a friend care for her. In 2016, she returned to work against medical advice to make ends meet (see attachment 3).
  - d. She had a lot going on for a few years with severe and debilitating medical issues, all while struggling to make ends meet. She would later learn that her former husband passed away in January 2016. She did not find out about his passing until much later and thus did not realize she should have been receiving the SBP annuity (see attachment 4). When she learned of the error, she immediately contacted her divorce attorney and submitted a request to DFAS in December 2020. DFAS responded and indicated there was no request for SBP on file (see attachment 5).
  - e. The SM's military service took her and her family from [REDACTED] and later to [REDACTED]. These major moves prevented her from seeking meaningful employment or a career while fully supporting him. As a result, she does not have any retirement benefits of her own and fully counted on her share of his pension and the

SBP. When they divorced, she understood she would receive these benefits for the rest of her life as her divorce decree contemplates.

f. She is currently employed as a food service provider at local school. Her job pays \$26,124.00 per year and she receives social security benefits in the amount of \$840.00 per month. She works full time with debilitating pain. She received no retirement and no other benefits through her employment (see attachment 6). She is 70 years old and she deserves to slow down. The SBP annuity would enable her to enjoy the rest of her life without having to continuously work in pain.

g. Neither she nor the SM knew about the requirement for an SM to make an election for former-spouse SBP coverage or for a former-spouse to make a deemed election within the 1-year deadline. She is requesting reinstatement of the SM's SBP, as both she and the SM agreed would be the case in their divorce decree. She provided a character reference in support (see attachment 7).

h. The lack of a timely election of SBP coverage by divorcing parties is a common pattern in SBP cases. It is probably one of the most frequent reasons for submission of applications for correction to any service Board for Correction of Military Records. This Board has not hesitated to correct the records of a retiree when the facts show that justice requires the correction so as to make a proper designation of the intended SBP beneficiary. He has attached several ABCMR decisions in which the Board corrected military records to reflect a timely election for conversion from spouse to former-spouse coverage, some due to a prior court order or agreement, and one due to the parties' intent to maintain coverage (see attachment 8).

3. After having enlisted service in the U.S. Marine Corps and Reserve, the SM enlisted in the [REDACTED] Army National Guard ([REDACTED] ARNG) on 14 July 1965.

4. Office of the Adjutant General, State of [REDACTED] Special Orders Number 148, 29 September 1965, honorably discharged him from the [REDACTED] ARNG and as a Reserve of the Army effective 29 September 1965 by reason of having moved out of the state.

5. The SM's National Guard Bureau Form 22 (Report of Separation and Record of Service) shows he was honorably discharged from the [REDACTED] ARNG and as a Reserve of the Army effective 29 September 1965. He completed 2 months and 16 days of service during this period and 6 years, 8 months, and 12 days of total service for pay purposes. His highest grade held was specialist four/E-4.

6. The SM and the applicant married on 10 October 1973.

7. The SM's limited records do not contain any enlistment/reenlistment documents showing continued service in an Army component; however, his Standard Form 180

(Request Pertaining to Military Records), 6 November 1987, shows he requested his military records for the purpose of retirement. He stated he was assigned to the U.S. Army Reserve from 1966 to 1972 and to the Regular Army from 31 May 1974 through present (6 November 1987).

8. The Superior Court Decree of Dissolution of Marriage shows the applicant and the SM were granted a divorce on [REDACTED]. The Decree of Dissolution of Marriage notes in:

a. Paragraph 3.3 (Property to be Awarded to the Wife), in part:

\$200 per month interest in respondent's [SM's] military pension. Respondent [SM] will tender \$200 per month, directly to petitioner [applicant], until the military makes payments;

Survivor benefit plan annuity from respondent's [SM's] military pension;

b. Paragraph 3.12 (Military Retirement):

The respondent [SM] shall be required to pay directly to the petitioner [applicant] \$200 of his retirement pay until such time as the payments are made directly by the Army Finance Center.

The respondent [SM] shall be required to continue to name the petitioner [applicant] as the irrevocable beneficiary of his survivor benefit plan. The premium amount for such annuity shall be deducted before the distributions are made to the parties. In the event that the respondent [SM] has removed the petitioner [applicant] as the beneficiary of said plan, respondent [SM] shall be required to reinstate the petitioner [applicant] as said beneficiary, and shall be required to continue to designate the petitioner [applicant] as his survivor benefit plan.

Information required by Spouses Equity Act:

3.12e. Amount of payment to Spouse: \$200 per month

3.12f. The Soldiers' and Sailors' Civil Relief Act of 1940 has been complied with herein.

3.12g. The court has jurisdiction of the parties because both are residents and domiciliaries of the state of [REDACTED].

3.12h. The parties herein were married for more than 12 years during which the member [SM] performed more than ten years creditable service.

3.12i. The monthly payments shall be paid as long as the member [SM] has the right to receive the retired or retainer pay and shall cease at the death of either party, subject to the survivor benefit plan. The former spouse [applicant] agrees that any future overpayment to her are recoverable and subject to her estate. The former spouse [applicant] agrees further to notify the United States Army about any changes in this agreement or the order affecting these provisions of it, or in the eligibility of any recipient's benefits pursuant to it.

3.12j. The member [SM] and the former spouse [applicant] intend that this order qualify under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. §1408 [Title 10, U.S. Code, section 1408] and following. All provisions shall be interpreted to make the order qualify.

3.12k. The member [SM] agrees to cooperate with the former spouse [applicant] to prepare an application for direct payment to the former spouse [applicant] from the member's [SM's] retired or retainer pay pursuant to 10 U.S.C. §1408 [Title 10, U.S. Code, section 1408]. The member [SM] agrees to execute all documents that the United States Army may require to certify that the retired or retainer pay can be provided to the former spouse [applicant].

3.12m. The member [SM] shall not take any further action which would defeat, reduce, or limit the former spouse's [applicant's] right to receive her share of the member's [SM's] military pension benefits, including merging retired pay with other pensions or waiving any portion of retired pay in order to receive disability pay. If the member [SM] does breach this paragraph, he shall indemnify and pay directly to former spouse [applicant] any sums reduced by such action.

3.12n. The member [SM] agrees that if there is a diminution, deduction or cessation of the amount paid to the former spouse [applicant] hereunder due to an act or omission of the member, he shall personally pay to the former spouse [applicant] that amount not paid directly to her by the Finance Center and is designated as a constructive trustee in that regard.

3.12o. In the event the active member [SM] receives lump sum special separation benefit bonuses or voluntary exit bonuses, the former spouse [applicant] shall be entitled to the same proportionate share of those funds as

the former spouse [applicant] would have received from the member's [SM's] retirement benefits.

Should the military person [SM] elect a disability pay option thereby reducing the disposable earnings subject to division, the court retains jurisdiction to award the non-military person [applicant] an award of permanent non-modifiable maintenance in the amount of retirement earnings lost as the result of the military member's [SM's] election to receive a portion as disability pay. He waives the right to argue that the former spouse [applicant] is not a candidate for permanent maintenance. This provision survives the remarriage of the non-military person [applicant].

If the military member [SM] waives military pay or retirement to credit military service under the Civil Service Retirement System (CSRS) or Federal Retirement System (FRS), [SM] is eligible for retirement benefits under the CSRS or FRS based on employment with the United States Government. [Applicant] is entitled to a fraction of [SM's] gross monthly annuity under the CSRS to be computed as follows: \$200 per month. The United States Office of Personnel Management is directed to pay [Applicant's] share directly to her.

9. The applicant provided an undated DD Form 2293 requesting direct payment of the SM's retired pay for \$200 per month based on a court order.
10. The SM's available records do not contain any retirement or separation orders from the Regular Army.
11. The SM's death certificate shows he died on 21 January 2016 at age 75. His marital status is shown as "Divorced" and the applicant is shown as the informant.
12. The DFAS letter to the applicant through her counsel, 18 December 2020, states DFAS received her SBP request for a deemed election. However, DFAS could not approve her request, noting DFAS did not have an application for former spouse payments but does show a request for SBP. DFAS further noted the deemed election was not completed within 1 year of the valid court order and the applicant's name was removed as the spouse beneficiary.
13. The DFAS letter to the applicant through her counsel, 4 January 2021, states DFAS acknowledges receipt of the documents she sent but noted DFAS does not have an application for former spouse payment. DFAS further noted the deemed election was not completed within 1 year of the valid court order by the applicant or her attorney and the applicant's name was removed as the spouse beneficiary. DFAS stated she could

file an appeal through the SBP Appeal, Board of Correction, DFAS Retired and Annuitant Pay Section.

14. The applicant, through counsel, additionally provided:

- a. the applicant's and the SM's son's birth certificate (see attachment 2);
- b. approximately 105 pages of the applicant's medical documents, showing her medical conditions and treatment from 2015 through 2015 (see attachment 3);
- c. the applicant's financial documents, showing 2016 social security benefits and tax return statements for 2015 through 2020 (see attachment 6);
- d. a letter of support from a friend, 1 December 2022, noting her work ethic, character, medical issues, and the difficulties she faced over the past few years (see attachment 7); and
- e. four ABCMR records of proceedings for other applicants as examples of how the Board has corrected military records to reflect a timely election of SBP coverage from spouse to former spouse by either court orders or by the SM's intent to maintain coverage.

15. The email correspondence from a DFAS pay technician (Reply: Army Review Boards Agency Assistance), 11 January 2024, states the DFAS database does not contain any paperwork on file. DFAS shows the SM's SBP election was for "Spouse and Child" coverage at the time of his retirement. On 14 March 2017, the election was changed to "no beneficiary."

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the SM's military records, the Board found that relief was warranted. The Board through counsel carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. One potential outcome was to deny relief based on insufficient evidence showing the former service member submitted his SBP election. However, upon review through counsel of the applicant's petition and available military records, the Board determined the applicant and FSM were married in October 1973 and divorced in July 1998. The Board noted, the divorce decree designated the applicant (former spouse) Survivor Benefit Plan coverage and a portion of FSM's military pension. Evidence shows both the applicant and FSM suffered medical issues

and the FSM died in January 2016. His marital status is shown as “divorced” and applicant is shown as the informant.

2. The Board determined based on counsel that neither the applicant nor the FSM knew about the requirement of a service member to make an election for former-spouse SBP coverage or for a former-spouse to make a deemed election within the one-year deadline. Doing so would have met the obligations as outlined in the divorce decree. The Board determined that an injustice occurred and that a record correction is warranted. The Board granted relief to show the applicant made a deemed “former spouse” election within one year of the FSM and the applicant’s July 1998 divorce.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

█	:	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	█	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined that the evidence presented was sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing the applicant made a deemed “former spouse” election within one year of the FSM and the applicant’s July 1998 divorce.

2/22/2024

X █

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CHAIRPERSON

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.



REFERENCES:

1. Public Law 92-425, the SBP, enacted 21 September 1972, provided that military members could elect to have their retired pay reduced to provide for an annuity after death to surviving dependents.
2. Public Law 97-252, the Uniformed Services Former Spouses' Protection Act (USFSPA), 8 September 1982, established SBP coverage for former spouses of retiring members. Public Law 98-94, 24 September 1983, established former spouse coverage for retired members. This law also decreed that State courts could treat military retired pay as community property in divorce cases if they so choose. It established procedures by which a former spouse could receive all or a portion of that court settlement as a direct payment from the service finance center. The USFSPA contains strict jurisdictional requirements. The State court must have personal jurisdiction over the retired SM by virtue of the retired SM's residence in the State (other than pursuant to military orders), domicile in the State, or consent.
3. Public Law 99-661, 14 November 1986, permitted divorce courts to order SBP coverage without the member's agreement in those cases where the retiree had elected spouse coverage at retirement or was still serving on active duty and had not yet made an SBP election.
4. Title 10, U.S. Code, section 1448(b)(3), incorporates the provisions of the USFSPA relating to the SBP. It permits a person to elect to provide an annuity to a former spouse. Any such election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date of the decree of divorce. The member must disclose whether the election is being made pursuant to the requirements of a court order or pursuant to a written agreement previously entered into voluntarily by the member as part of a proceeding of divorce.
5. Title 10, U.S. Code, section 1450(f)(3)(A), permits a former spouse to make a written request that an SBP election of former spouse coverage be deemed to have been made when the former spouse is awarded the SBP annuity incident to a proceeding of divorce. Section 1450(f)(3)(C) provides that an election may not be deemed to have been made unless the request from the former spouse of the person is received within 1 year of the date of the court order or filing involved.
6. Title 10, U.S. Code, section 1454 (Correction of Administrative Errors), states the Secretary concerned may, under regulations prescribed under section 1455 of this title, correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error.

7. Title 10, U.S. Code, section 1552 (Correction of Military Records: Claims Incident Thereto), states the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

//NOTHING FOLLOWS//