

# Military Divorce & Survivor Benefit Plan (SBP)



Presentation to  
SABA FAMILY LAW SECTION  
17 November 2015

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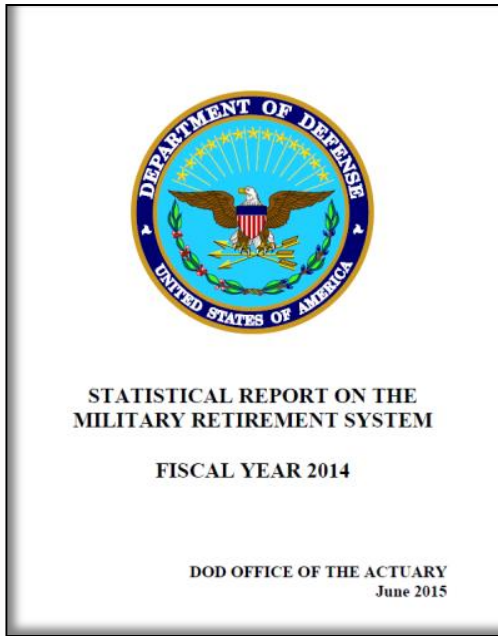


# Agenda / Take-Aways

- Framing the Issue: military retiree population
- SBP Basics
- Take-aways: tips & traps
  - 1) No auto-conversion of “spouse” coverage
  - 2) Early bird gets the (whole) worm
  - 3) No second bite at the apple
  - 4) FS SBP not in decree, then it might not make it in the DRO
  - 5) FS doesn’t “have” to pay the SBP premium
  - 6) If FS pays the premium, ensure they don’t overpay
  - 7) FS SBP awarded at maximum entitlement allowed by law  
ALWAYS results in a “death windfall”
  - 8) How to avoid the “death windfall”
  - 9) Time to File Matters

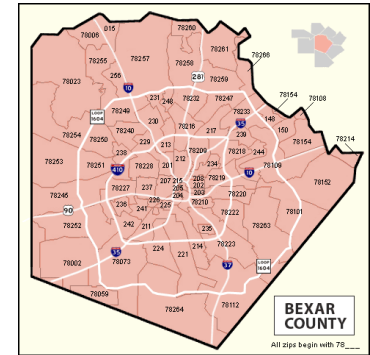


# Framing the Issue



**SBP participation rates:**

- DOD: 78%**
- Officers: 81%**
- Enlisted: 77%**

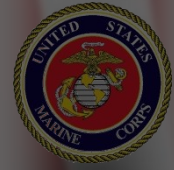


	U.S.	Texas	782XX Zip Code
Retirees	1.97M	201.7K (10.1% of US)	37K (18.3% of TX)
Total Expenditures	\$55B <i>per year</i>	\$429.9M <i>each month!</i>	\$78.7M <i>each Month!</i>



**Military Retired Pay**

# Framing the Issue



STATISTICAL REPORT ON THE  
MILITARY RETIREMENT SYSTEM

FISCAL YEAR 2014

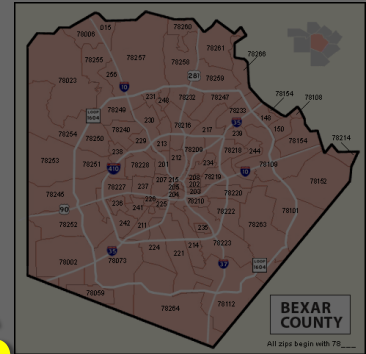
DOD OFFICE OF THE ACTING  
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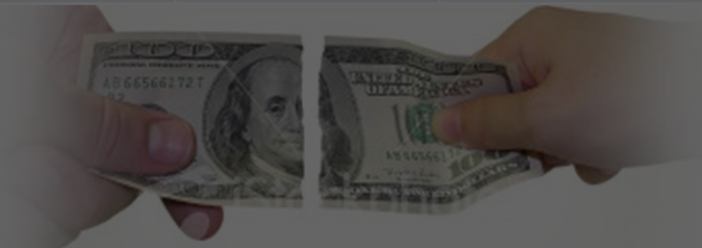
Officers: 81%

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**FS Retired Pay Terminates  
with SM's Death!**

	US	Texas	782XX Zip Code
Retirees	2.9M	201.7K (10.1% of US)	37K (18.3% of TX)
Total Expenditures	\$55B <i>per year</i>	\$429.9M <i>each month!</i>	\$78.7M <i>each Month!</i>



**Military Retired Pay**



# SBP Basics: Authority

- SBP is an **annuity program** defined in [10 U.S.C. § 1447-55](#)
- Dep't of Defense Financial Management Regulation (DODFMR) 700.14-R, Vol 7B, “Military Pay Policies—Retired Pay”
  - Chapter 29, “Former Spouse Payments From Retired Pay”
  - Chapter 42, “SBP—Application of the Plan”
  - Chapter 43, “SBP—Elections and Election Changes”
  - Chapter 44, “SBP—Beneficiaries”
  - Chapter 45, “SBP—Premiums”
  - Chapter 46, “SBP—Annuities”



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- DFAS MUST deduct the SBP premium from SM’s gross retired pay
- Gross retired pay less SBP premium is one component of “disposable retired pay (DRP)”



# SBP Basics: Example

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# SBP Basics: Example

- Eligibility for FS SBP is suspended if FS remarries prior to age 55
- Eligibility for FS SBP reinstated if FS' subsequent marriage terminates by
  - Death
  - Divorce
  - Annulment





# SBP Basics: Example

- Base amount / SM's gross retired pay = **\$4,000** per month
- SBP premium = **\$260** per month (i.e. \$4K x 6.5%)
- DRP = **\$3,740** per month (i.e. \$4K per month - \$260 per month)
- FS award of DRP in FDD/DRO = 40%
- FS military retired pay as separate property = **\$1,496** per month (i.e. \$3,740 x 40%)

**Base Amount, SBP Premium, and  
SBP Annuity adjusted annually  
equal to COLA**





# Take-Aways: Tips & Traps #1

## No Auto-Conversion of “Spouse” Coverage

- If SM retired at time of divorce and “Spouse” coverage exists, it is terminated at divorce
- For SBP protection to be preserved, FS SBP MUST be ordered in the FDD/DRO



# Take-Aways: Tips & Traps #2

## Early Bird Gets the (Whole) Worm

- If FS SBP awarded in prior divorce, then FS SBP is not available in subsequent divorce



# Take-Aways: Tips & Traps #2

## Early Bird Gets the (Whole) Worm

- If FS SBP awarded in prior divorce, then FS SBP is not available in subsequent divorce
- Don't bother trying to have SM ordered to make second FS beneficiary of SGLI or VGLI since any such order is preempted by Fed law
  - *38 U.S.C. Sec. 1970(g)*
  - *See Ridgway v. Ridgway*, 454 U.S. 46 (1981)



# Take-Aways: Tips & Traps #3

## No Second Bite At the Apple

- If SM retired at time of divorce and SBP declined at time of retirement\*, then FS SBP cannot be awarded in divorce

RETIREE ACCOUNT STATEMENT					
STATEMENT EFFECTIVE DATE MAR 23, 2015		NEW PAY DUE AS OF APR 01, 2015		SSN *** [REDACTED]	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES  [REDACTED]				DFAS-CL POINTS OF CONTACT  DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIREMENT PAY PO BOX 7130 LONDON KY 40742-7130  COMMERCIAL (216) 522-5955 TOLL FREE 1-800-321-1080 TOLL FREE FAX 1-800-469-6559  myPay <a href="https://myPay.dfas.mil">https://myPay.dfas.mil</a>	
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	.00	4,772.00	ALLOTMENTS/BONDS	.00	104.54
VA WAIVER	.00	1,578.00	GARNISHMENT DED	.00	530.00
			NET PAY	.00	2,559.46
PAYMENT ADDRESS			YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)		
DIRECT DEPOSIT					
TAXES					
YOU HAVE BEEN EXEMPTED FROM TAXES DUE TO YOUR DISABILITY STATUS.					
SURVIVOR BENEFIT PLAN (SBP) COVERAGE					
NO SBP ELECTION IS REFLECTED ON YOUR ACCOUNT.					



\* Requires spouse's written consent



## Take-Aways: Tips & Traps #4

# FS SBP not in FDD, then it might not make it into the DRO

- “When signing of a DRO occurs contemporaneously with the signing of a FDD, courts construe the DRO as part of the FDD”



***Hicks v. Hicks*, 348 S.W.3d 281, 288 (Tex. App.—Houston [14th Dist.] 2011, no pet.)**

## Take-Aways: Tips & Traps #4

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- In Hicks, the Court approved the agreement of the parties ***“as contained in the FDD”***
- ***FDD made no reference to FS SPB or the DRO***; as such, COA reviewed the DRO as separate order despite fact it was signed same day as FDD



***Hicks v. Hicks*, 348 S.W.3d 281, 288 (Tex. App.—Houston [14th Dist.] 2011, no pet.)**



# Take-Aways: Tips & Traps #4

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- “When signing of a DRO occurs contemporaneously with the signing of a FDD, courts construe the DRO as part of the FDD”
- In Hicks, the Court approved the agreement of the parties *“as contained in the FDD”*
- *FDD made no reference to FS SPB or the DRO*; as such, COA reviewed the DRO as separate order despite fact it was signed same day as FDD
- FDD did **not** require H to name W as FS SBP beneficiary; the DRO, however, did
- TC erred in ordering FS SBP designation because DRO imposed additional obligation not in FDD

***Hicks v. Hicks*, 348 S.W.3d 281, 288 (Tex. App.—Houston [14th Dist.] 2011, no pet.)**





## Take-Aways: Tips & Traps #5

# FS Doesn't "Have" to Pay the SBP Premium



- Decrees ordering the SM to “maintain and continue” FS SBP, without any further limitation on what is expected of SM to perfect the disposition of FS SBP coverage, are reasonably interpreted as directing that the SM bear the full cost of the premiums
- To construe otherwise would be inconsistent with such an order because a SM who failed to pay premiums would cause the court-ordered coverage “to lapse and become a nullity”



***Griffith, v. Griffith*, 698 S.W.2d 729, 732 (Tex. App.—El Paso 1985, no writ)**





## Take-Aways: Tips & Traps #5

### FS Doesn't "Have" to Pay the SBP Premium



- "10 U.S.C. Sec 1450(f)4) provides that a divorce court may require a [SM] to elect under [SPB regulations] to provide an annuity to a former spouse"
- "[A] divorce court may order a [SM] 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***"
- "Required monthly post-divorce [SBP] premium payments ***do not constitute improper 'permanent alimony'***"



***Limbaugh v. Limbaugh*, 71 S.W.3d 1, 35 (Tex. App.—Waco 2002, no pet.)**



# Take-Aways: Tips & Traps #6

## If FS Pays the Premium, Don't Overpay



### Only Two Way for FS to Pay Premium

- 1) Direct reimbursement to SM, or
- 2) Reduction in FS percentage award of DRP





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- 2) Reduction in FS percentage award of DRP



### Quiz:

- Recall, SBP premium equals 6.5% of base amount
- How much should FS' percentage award of DRP be decreased to pay the premium in full?





# Take-Aways: Tips & Traps #6

## If FS Pays the Premium, Don't Overpay

- FS already pays a portion of SBP premium due to DRP calculation

E.g.

- \$4,000 Gross Ret. Pay x 40% = **\$1,600** per month “FS pay expectation” (if no SBP awarded)



### SBP Basics: Example

- Base amount / SM's gross retired pay = \$4,000 per month
- SBP premium = \$260 per month (i.e. \$4K x 6.5%)
- DRP = \$3,740 per month
- FS award of DRP in FDD/DRO = 40%
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**Base Amount, SBP Premium, and SBP Annuity adjusted annually equal to COLA**










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E.g.

- \$4,000 Gross Ret. Pay x 40% = **\$1,600** per month “FS pay expectation” (if no SBP awarded)
- \$3,740 DRP x 40% = **\$1,496** FS pay per month (FS share is **\$104 less**)
- SBP premium of **\$260 - \$104** “DRP contribution” = **\$154 “due”**
- Addt'l reduction = **\$154/\$3,740 = 4.1176%**
- **(40% - 4.1176% = 35.8824% of DRP)**

### SBP Basics: Example

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Base Amount, SBP Premium, and SBP Annuity adjusted annually equal to COLA

*Schneider v. Schneider*, 5 S.W.3d 925, 930-32 (Tex. App.—Austin 1999, no pet.)



# Take-Aways: Tips & Traps #6

## If FS Pays the Premium, Don't Overpay






Recall, \$1,600 FS retired pay “expectation with no FS SBP” based on FS’ 40% award of DRP

Recall, \$4K base amount x 6.5% = **\$260** monthly FS SBP premium

\$3,470 per month DRP x **35.8824%** = \$1,342 per month FS retired pay

**\$1,600** - **\$1,342** = **\$258** (can tweak % if \$2 diff is important to SM)

↑                    ↑                    ↑  
 “Expectation”                    “FS SBP compensation”  
 “Reduced Actual”

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**Schneider v. Schneider, 5 S.W.3d 925, 930-32 (Tex. App.—Austin 1999, no pet.)**

# Take-Aways: Tips & Traps #7

## FS SBP Awarded at Max Entitlement By Law ALWAYS Results in “Death Windfall”

- Recall, SBP annuity payment is ALWAYS **55%** of base amount!
- Here,  $\$4,000 \times 55\% = \$2,200$  per month, equal to a 47% pay raise at SM's death

### SBP Basics: Example

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**Base Amount, SBP Premium, and SBP Annuity adjusted annually equal to COLA**










# Take-Aways: Tips & Traps #8

## How to Avoid the “Death Windfall”

- Divide FS sep prop share of by 55%
- E.g.\*

$$\frac{\$1,600^{**}}{.55} = \$2,909 \text{ Base Amount}$$

- \* More nuance involved—reduction in base amount leads to reduction SBP premium, which leads to increase in DRP available for FS’s share
- \*\* Arguable whether numerator should be \$1,600, \$1,496, or \$1,342 under the scenario presented. Opinion: if numerator is NOT \$1,600 (equal to FS expectation prior to SBP premium), then FS continues to “pay” premium even after death of SM (which SBP doesn’t require)

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## Take-Aways: Tips & Traps #9

### Time to file FS SB Application Matters



- If FS SBP is awarded in the FDD/DRO, the FS or her attorney MUST apply for a “deemed election” within one year of the date of divorce, otherwise DFAS will not honor the award
- Application made on DD Form 2656-10
  - SM’s signature not required
  - Certified FDD/DRO authorizing deemed election is sufficient
- If one year lapses with filing, any DRO that “clarifies” the award will be rejected to DFAS





## Take-Aways: Tips & Traps #9

### **Time to file FS SB Application Matters**

DFAS Cleveland Former Spouse SBP

1-888-332-7411

Options: 1-6-1-1-0



\* Example is for Active Duty. SBP for Guard/Reserves differs slightly.





## Take-Aways: Tips & Traps #7

### Time to file FS SB Application Matters

- **FS SBP Coverage When SM Dies While Still On Active Duty.**
  - If a deemed election is in effect, then the FS will still receive an SBP annuity should the SM be vested in retired pay but die on active duty prior to actual retirement. 10 U.S.C. Sec. 1448(d)(3).
  - This provision underscores the importance of the deemed election because income protection is afforded even though a single premium has never been paid. *See id.*



# Survivor Benefit Plan (SBP)

**BONUS**

**Reserve Corp SBP (RCSBP) has substantially different rules and options.**

**See paper on speaker's website for more information.**

**Tip: Know that "Option C" is best for FS of Reserve Corps SM**



# Review

- Framing the Issue: military retiree population
- SBP Basics
- Take-aways: tips & traps
  - 1) No auto-conversion of “spouse” coverage
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# Thank You

