

ARTICLE - November, 2016

TO: Ally McAndrews, M.Ed.

FROM: Anthony L. Marone, Esquire

RE: The Military Survivor Benefits Plan and Special Needs Trusts

Military pay, including active duty pay and allowances and retired pay, stops upon a Serviceperson's death. The Survivor Benefit Plan (SBP) is a program through which the Department of Defense provides monthly, cost-of-living-adjusted income to the certain members of the Serviceperson's family in the form of an annuity. The Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015, Public Law 113-291, amended the laws governing the SBP to permit the income to be paid directly to a Special Needs Trust established for the sole benefit of the Serviceperson's child with disabilities. The NDAA has, therefore, given the Serviceperson an opportunity to shelter SBP annuity income payable to his or her child with disabilities, which will potentially ease that child's ability to access needs-based government benefits.

The Survivor Benefits Plan and the Income Problem.

The Survivor Benefit Plan (SBP) is a benefit available to a Serviceperson who elects to participate in the program. A Serviceperson in the Active Component, such as a Regular Army Soldier, is covered under the SBP at no cost during his or her service on Active Duty. Upon retirement, the Serviceperson may choose to continue in the SBP by electing to provide an annuity of up to 55% of the Serviceperson's full retired pay to an "eligible survivor." The family members who are considered "eligible survivors" for the SBP are the Serviceperson's spouse, former spouse, dependent child(ren), or the spouse or former spouse and dependent child(ren). To pay for the SBP annuity, the Serviceperson forfeits a portion of his or her retired pay. Therefore, a Serviceperson may elect to receive a reduced military pension to provide an annuity to his or her family members when the Serviceperson is deceased.

The SBP is not limited to retired Active Component Servicepersons. A Serviceperson in the Reserve Component, such as a National Guard Soldier and Reservist, will also have the option of participating in the Reserve Component Survivor Benefit Plan (RC-SBP) when he or she receives his or her 20 Year Letter. To participate in the RC-SBP, the Serviceperson must choose a retirement option where the RC-SBP annuity pays to eligible survivors if the Serviceperson dies after age 60 (Retirement Option B) or at any time after he or she receives his 20 Year Letter (Retirement Option C). Also, a Serviceperson killed on Federal Active Duty in the Line of Duty, whether a member of the Active Component or the Reserve Component, is eligible for the SBP.

The obvious purpose of the SBP is to provide much needed income to the family members of a deceased Serviceperson. The SBP annuity would make up a portion of the Serviceperson's pay to help support his or her spouse or child. The annuity would be paid directly to the spouse and/or child, thus increasing his, her, or their income. While replacing a portion of a deceased Serviceperson's income would normally have a positive effect the

Serviceperson's family, the SBP income paid outright to a disabled child would have a negative effect on that child's eligibility for needs-based government benefits.

Needs-based government benefits, such as Medicaid or Supplemental Security Income (SSI), have strict eligibility criteria depending on the monthly gross income and net resources of the person with disabilities. The SSI program provides an amount of monthly income to certain persons with disabilities who have countable monthly income less than \$733.00 for 2016. The SBP annuity would be considered countable, unearned income and could easily exceed the limit imposed by the SSI program. Pennsylvania's Medical Assistance program provides medical insurance and home and community based (also called "Waiver") services for persons with disabilities. If a person with disabilities has gross monthly income in excess of \$2,199.00, he or she cannot access Waiver benefits without doing a complex and draconian income spend-down, which would require spending all income in excess of \$450.00 per month on medical expenses.

For a person with disabilities, SSI and Medical Assistance may be his or her only source of income, medical insurance, or support in the community. Since SSI and Medical Assistance have strict income limits, a Serviceperson's child with disabilities could receive the SBP annuity and lose his or her SSI income, medical insurance, and home and community based services. Considering the high cost of these benefits, it is likely that the child would not be able to purchase similar medical insurance or replace SSI income with monies received through the SBP annuity.

The Howard P. "Buck" McKeon National Defense Authorization Act and Special Needs Trusts

Many forms of income are assignable to a Special Needs Trust. A Special Needs Trust is permitted to receive the "assets" of a beneficiary with disabilities. The term "assets" is defined as the resources and income of an individual and the individual's spouse. See State Medicaid Manual, Transmittal 64, § 3257(B)(3) and 55 Pa. Code § 178.2. The income irrevocably assigned to such a Trust will not be counted for SSI or Medical Assistance purposes when determining the eligibility of the person with disabilities. POMS SI 01120.201J(1)(d).

However, not all forms of income are assignable to a Special Needs Trust. POMS SI 01120.201J(1)(c). Whether income is assignable to trust normally depends upon laws governing the program generating the income. For example, Social Security benefits and ERISA pension payments are not assignable to a Special Needs Trust. Id.

The Defense Finance and Accounting Service (DFAS), which administers the SBP, determined that the SBP annuity could only be paid to a "person." The DFAS did not consider a Special Needs Trust a person. The law, as interpreted by DFAS, did not permit any way to shelter the SBP annuity for a Serviceperson's child with disabilities. A Serviceperson could leave the SBP annuity to his or her child with disabilities or totally exclude the child from the annuity. Therefore, a Serviceperson who had a child with disabilities was required to choose from one of two undesirable options: he or she could exclude his or her child from the SBP annuity, thus depriving the child of income, or designate his or her child as a SBP annuity beneficiary and risk that child's eligibility for SSI and Medical Assistance benefits.

The Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal

Year 2015 dealt directly with the Serviceperson's issue. The NDAA amended 10 U.S.C. § 1448, et. seq., to permit a person who established a Special Needs Trust for the sole benefit of a dependent child who is considered disabled because of mental or physical incapacity to provide the SBP annuity to that Trust. The Trust must provide for a payback to the State Medicaid Agency and be a qualifying Self-Funded Special Needs Trust or Pooled Special Needs Trust. See 42 U.S.C. § 1396p(d)(4)(A) and 42 U.S.C. § 1396p(d)(4)(C). By assigning the SBP annuity to such a Trust, the annuity would not be considered in the calculation of the Serviceperson's child's gross monthly income for purposes of Medical Assistance and SSI eligibility. Similarly, income accumulated in the Trust will not be considered a resource to the child with disabilities.

Any Serviceperson who has a child with disabilities should immediately consider assigning the SBP annuity to a Special Needs Trust for that child. At any time during his or her life, a Serviceperson may assign the SBP annuity to a Special Needs Trust for his or her child with disabilities. After the Serviceperson passes away, only a surviving parent, grandparent, or court-appointed guardian can make the assignment. A child with disabilities who does not have a surviving parent or grandparent and who does not require a guardian may not have any way to assign the SBP annuity to a Special Needs Trust.

As all military Servicepersons are aware, the paperwork is important. The Serviceperson will need to submit the Special Needs Trust to DFAS at the following address:

Defense Finance and Accounting Services
U.S. Military Retired Pay
Post Office Box 7130
London, KY 40742-7130

The Serviceperson must send a notarized statement from an active, licensed attorney certifying that the Trust is a Special Needs Trust for the sole benefit of a dependent child with disabilities and complies with applicable federal and state law. The Serviceperson must also submit the name and tax identification number for the Special Needs Trust. Finally, he or she must submit a written statement of his or her decision to assign the SBP annuity to the Special Needs Trust.

Conclusion.

Medical Assistance and SSI provide services and income to a person with disabilities that cannot easily be replaced. The income from the SBP provides a source of funds to support a person with disabilities in the community. By irrevocably assigning the SBP annuity to a Special Needs Trust, the Serviceperson's child with disabilities will be able to receive these crucial needs-based government benefits, if he or she is otherwise eligible, and have the income placed in a Trust for his or her sole benefit. The Serviceperson's child with disabilities, therefore, will receive the financial benefits of his or her parent's military service and remain eligible for vital government programs.

A Serviceperson who has a child with disabilities should consult with an experienced Special Needs Attorney to determine whether assigning the SBP annuity to a Special Needs Trust would be appropriate for his or her disabled child. The Serviceperson should act during his or her lifetime since the assignment becomes much more complicated after he or she passes away.

McAndrews Law Offices specializes in Special Needs Trust and Disability law and are readily available to assist any Serviceperson with the planning for his or her child with disabilities. For any questions, call 610-648-9300.