

# ROLL CALL

Newsletter of the Military Committee, ABA Family Law Section

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## Greetings from the Chair

In this issue of **Roll Call**, Georgia attorney John Camp explains the ins and outs of military medical care coverage when a spouse or former spouse is not entitled to 20/20/20 coverage (20 years of marriage, 20 years of service, and an overlap of 20 years). John specializes in military divorce cases, and he spent many hours researching this topic to give us a thorough summary of this little-known aspect of family support in military divorce cases.

The issue's editor, Scott Merrifield, is an Army Reserve judge advocate who was called up to active duty at the time that **Roll Call** was "going to press." He's in Iraq right now, and we wish him well and a speedy return. The next few issues, in his absence, will be edited by Henry DeWoskin, a Missouri attorney and (what else?) a judge advocate in the Army Reserve.

The next issue will cover military custody legislation in the 50 states, an immensely important issue these days when visiting and custodial parents are being deployed (when on active duty) and mobilized (Guard/Reserve).

If you have any questions or comments about **Roll Call**, a suggestion for the Committee, an issue you'd like to see profiled here, or an article you would like to write for us, please send them to me at [papy@parasapvreiss.com](mailto:papy@parasapvreiss.com).

Patricia Apy, Chair  
Military Committee

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## THE CONTINUATION OF HEALTH CARE BENEFITS PROGRAM (CHCBP) AS A LONG-TERM HEALTH CARE OPTION FOR FORMER MILITARY SPOUSES

by **Wm. John Camp**  
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**SCENARIO:** LTC Jones' wife has had a significant history of mental and physical problems during their turbulent 11-year marriage. As LTC Jones nears the end of his 20-year military career, he decides it is time to divorce Mrs. Jones. LTC Jones first offers to pay her alimony, and perhaps a share of his future military retired pay. However, he is adamant that he will not agree to former spouse coverage for Mrs. Jones under the Survivor Benefit Plan, claiming that term life insurance is a much better deal, and that he will share the premiums 50-50 with her. Mrs. Jones perks up with the mention of alimony but, upon learning for the first time that she will be losing her TRICARE health coverage, she drifts into panic over the thought of not having any health insurance after their divorce. She complains she has not worked outside the home, she has numerous pre-existing medical and mental conditions, and all of her "good years" have been spent making LTC Jones successful in his

career. She fears that, in her sickly and emotionally broken condition, she is not likely to find anyone to remarry. Mrs. Jones is not just asking, she is demanding that her husband provide health insurance *for the rest of her life*. You are her family law attorney in the case. **YOUR CHALLENGE:** *"Is there a way to arrange lifetime health coverage for Mrs. Jones without breaking the bank on a commercial health insurance policy?"*

**DISCUSSION:** Some attorneys are aware of the TRICARE health care options for "20/20/20 former spouses" under 10 USC §1072(2)(F), and "20/20/15 former spouses," found at 10 USC §1072(2)(G) and (H). These two groups of "military former spouses" have continuing coverage under the TRICARE system if they have been married at least 20 years to a servicemember(SM) who has served at least 20 years, with an overlap of at least 20 (or, for some, 15) years. But they forfeit the coverage if they remarry at any time or become covered under an employer-sponsored health insurance plan. Most family law attorneys are also aware that one can obtain up to 36 months of temporary health care coverage through the Continuation of Health Care Benefits Program (CHCBP), found at 10 USC §1078a. For those not familiar with these former spouse health care options, there is an excellent discussion of "Military Medical Benefits for the Spouse or Former Spouse" at pp. 4-5 of *Roll Call*, Vol. 2003-1, July 2003, located at the website of the ABA Family Law Section's Military Committee: [http://meetings.abanet.org/webupload/commupload/FL115277/newsletterpubs/rc\\_aug03.pdf](http://meetings.abanet.org/webupload/commupload/FL115277/newsletterpubs/rc_aug03.pdf).

Is there anything else you can suggest as an option to satisfy the long-term health care demand by Mrs. Jones? You might hear from the TRICARE Service Center that your client should enroll in CHCBP after the divorce, but then you think, "Well, that is awfully expensive, and the longest Mrs. Jones can be covered is 36 months, provided she can afford it."

When Congress created CHCBP, it gave all former spouses of military personnel a *temporary* health care coverage option under 10 USC §1078a(a) that was similar to that provided to former spouses of federal civilian employees under 5 USC §8905a. (The latter is called Temporary Continuation of Coverage (TCC) under the Federal Employee Health Benefits (FEHB) plan). But as an extension of the transitional military coverage, Congress also created an *unlimited* CHCBP coverage option that could provide certain military former spouses with a long-term health care coverage option similar to the OPM Spouse Equity Coverage under the FEHB plan for former spouses of federal civilian employees. See 10 USC §1078a(g)(4), and *compare to* 5 USC §8901(10) and §8905(c)(1).

Recognizing that many lawyers are not aware of the unlimited CHCBP coverage option available to military former spouses, this article will focus generally on how CHCBP works and how it can offer first *transitional* (i.e., 36 months) and then *long-term* (i.e., indefinite) health care coverage for those

qualifying former spouses of members of the armed forces.

**RESEARCH:** There is little literature or previous research on the use of the CHCBP as a long-term health care option. Some of the information comes from a critical review of the enabling statute, 10 USC §1078a(g)(4), the Department of Defense (DoD) implementing regulation, 32 CFR §199.20, and the available literature for administering CHCBP (the *CHCBP Handbook* from Humana). Also helpful were personal discussions with individuals in the Office of the Assistant Secretary of Defense for Health Affairs, discussions with a Senior Health Care Analyst Team Leader for TRICARE, and discussions with several Customer Service Representatives at the CHCBP Office in Louisville, KY (800-444-5445). The author also talked with the Director of a TRICARE Customer Service Center at a military medical facility and had discussions with several clients who have “navigated” the course to arrange their long-term health care coverage under CHCBP.

Case law involving CHCBP is almost non-existent. Only one reported case contained a fact pattern of two parties attempting to arrange for long-term health care of a former spouse by using CHCBP. *Lowe v. Swartz*, 738 N.W.2d 63, (S.D., 2007). A search on Westlaw did not reveal any federal cases or other legal precedent on this subject.

It would appear that the U.S. Court of Federal Claims (<http://www.uscfc.uscourts.gov/>) is the federal court most likely to have jurisdiction to decide litigated cases on this issue, and there were no reported cases. Administratively, the Defense Office of Hearings and Appeals (DOHA) (<http://www.dod.mil/dodgc/doha/>) has a Memorandum of Understanding (<http://www.dod.mil/dodgc/doha/tricare.html>) with the TRICARE Support Office to adjudicate all administrative claims by beneficiaries as to coverage under TRICARE, which would presumably include denial of coverage under CHCBP. There were no reported cases accessible at the DOHA website.

The statutory authority for CHCBP is 10 USC §1078a, with implementing regulations at 32 CFR §199.20. A word of caution is offered that neither the statute or the regulation is understandable upon a first reading. Be prepared for confusing references to other subsections, different statutes and CFR citations. As you first read 32 CFR §199.20, it is worthwhile to take a moment to circle (and isolate) the 19 major paragraphs, (a) through (s), in §199.20 and note their headings. Notice that Paragraph (d), “Eligibility and Enrollment,” and subparagraph (d)(6), “Period of Coverage,” contain most of the critical information on “former spouse” and “unlimited coverage”. There is a clearer explanation on the details of CHCBP at the TRICARE website, <http://www.humana-military.com/chcbp/main.htm>. There you will find a link to the *CHCBP Handbook*, or you can go directly to it at <http://www.humana-military.com/CHCBP/handbooktoc.htm>. In talking with TRICARE Service Centers and the CHCBP Customer Service Center in Louisville, KY, this author found that the *CHCBP Handbook* seems to be what everyone uses as their “ready reference” for administering the Program. It provides in a comprehensible format essential information on enrollment, cost, coverage, and claims filing. For initial enrollment into CHCBP, a client can go to a TRICARE Service

Center or simply complete DD Form 2837 (CHCBP Application), which is available both at the CHCBP website and from <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2837.pdf>. The enrollment form also has a good basic discussion of the CHCBP.

#### **THE CHCBP CONTRACT ADMINISTRATOR:**

The DoD contractor is Humana Military Healthcare Services, Inc., Attn: CHCBP, P.O. Box 740072, Louisville, KY 40201. It publishes the *CHCBP Handbook* and maintains the CHCBP website. With luck, perseverance and a tireless finger to select “phone options” when you phone in, you can eventually speak with a Customer Service Representative at 1-800-444-5445. This author found that by using the Menu Option for “Enrollment Eligibility,” after making a few initial entries, one can access a “real person” by touching “0.” (Note: Former spouses who call in may no longer be in D.E.E.R.S., and they should use their former sponsor’s Social Security Number when asking for initial assistance. Once enrolled in CHCBP, an entry is made in the former military sponsor’s D.E.E.R.S. concerning the former spouse’s CHCBP coverage. *CHCBP Handbook*, p. 20.) This author found the CHCBP Customer Service Representatives helpful, but they were often unable to answer technical questions on some of the “eligibility” and “period of coverage” nuances in CHCBP. When they reached the point they could not answer the question by referring to the *CHCBP Handbook*, they would ask the caller to submit a request in writing. So either they didn’t know the answer or it was “company policy” to get rid of the call. Polite persistence seemed to pay off, and a request to be referred to someone who could answer the question often led to supervisors and answers.

**MISINFORMATION GALORE:** CHCBP can be confusing. Some former spouses may think that their enrollment in CHCBP is enrollment in TRICARE. It is important to advise the client that CHCBP is *not* TRICARE (32 CFR §199-20(a)). CHCBP beneficiaries are also not enrolled in D.E.E.R.S. and they will not continue to have a Military ID Card. They should be advised that they *may not* obtain their health care at military medical facilities or have their drug prescriptions filled at military pharmacies. However, the TRICARE Network of Civilian Providers and TRICARE Civilian Pharmacies are available to them under the same co-pays and with similar drug formularies as for TRICARE Standard. Former spouse CHCBP beneficiaries receive a “CHCBP Insurance Card,” and their claims are processed by the same DoD Contractor that handles TRICARE claims. 32 CFR §199-20 (e) thru (s) explains other provisions of TRICARE applicable to the CHCBP beneficiary.

Clients may also be confused over eligibility for CHCBP due to the length of the marriage. Unlike former spouses who must qualify under 10 USC §§1072(2)(F), (G) and (H) as either a 20/20/20 or 20/20/15 former spouse, those who obtain CHCBP former spouse coverage instead fall under 10 USC §1078a, which does not have the lengthy “marriage concurrent with military service” requirement. As will be discussed later in this article, upon satisfying the criteria for “eligibility” and “period of coverage,” a military former spouse could qualify for the 36 months of CHCBP coverage after having been married to the military sponsor for *just one day*. For unlimited CHCBP coverage, the marriage could be *as short as 18*

months. So every military divorce case will involve a former spouse entitled to at least 36 months of CHCBP coverage, and former spouses who managed to stay married for 18 months may be eligible for unlimited coverage.

Clients should be warned about misinformation they may receive from TRICARE Service Centers about the availability of coverage under CHCBP *beyond 36 months*. Callers are often told that “36 months is the *maximum period of coverage*” available to a former spouse. Technically this is for divorced military spouses seeking *transitional coverage*. This author found, however, that the TRICARE Service Centers were not at all familiar with the statute allowing unlimited CHCBP coverage for certain “qualifying former spouses.” This could arise from the fact that even in the *CHCBP Handbook*, there is no listing for “unlimited coverage” in the Table of Contents. One must read virtually the entire *Handbook* to find a discussion (at pages 23-24) of this provision. (Note: The same discussion of unlimited coverage found in the *CHCBP Handbook* is also available at the Humana-Military website, <http://www.humana-military.com/CHCBP/coverage.htm>.

**ENROLLING WITHIN 60 DAYS OF LOSS OF TRICARE COVERAGE:** It is essential to advise the client that *initial enrollment in CHCBP must be made within 60 days of the date the former spouse lost his/her eligibility for TRICARE coverage*. If the client has missed the 60-day “window,” there may be a second chance to enroll if the client did not receive notification of the CHCBP option at the time she lost her TRICARE eligibility. There is a “Notification of Eligibility” requirement imposed on DoD under 32 CFR §199.20(d)(3). Most former spouses will receive their notification at the time they are “dropped” from D.E.E.R.S. if they visit a Military Personnel Office. But as family law attorneys well know, it is typically the military sponsor who is “doing the updating” in D.E.E.R.S., they often are not out to do any favors for the former spouse, and they may simply “forget” to notify the former spouse of the 60-day requirement to enroll in CHCBP. Military family law attorneys should usually advise eligible former spouse clients in writing of their need to seek enrollment in CHCBP within 60 days of their divorce from the military sponsor or, in the case of a 20/20/15 spouse, within 60 days of their losing their one-year TRICARE coverage under 32 CFR §199.20(d)(4)(i)(C). When working with someone who has missed enrolling during the 60-day window, consider pleading “lack of notification” to the CHCBP Customer Service Center and see if they will accept a late application.

**WHO IS ELIGIBLE?** There are several categories of spouses and former spouses who can enroll in CHCBP. The different categories and their respective qualifying criteria are outlined in the *CHCBP Handbook*. At the end of this article is a useful flow-chart on “Health Care Coverage for Spouses and Former Spouses” (Appendix 1) prepared by Attorney Mark Sullivan of Raleigh. By starting at the top of the page, anyone can trace eligibility for CHCBP coverage.

**PAY OR “GO NAKED”:** In the past, the CHCBP option was often rejected due to its premium cost. Unlike TRICARE, which is substantially underwritten by DoD, CHCBP is a premium-based health insurance plan based generally upon the rates for the FEHB plan for federal employees. The type of

health benefits that are provided is intended to mirror TRICARE Standard coverage. 32 CFR §199.20(a). Humana Military Healthcare Service, Inc, is the DoD Contractor which manages the CHCBP.

There are two levels of coverage under the CHCBP, “family” and “individual.” Individual coverage is presently \$933 *per quarter*, and family coverage is \$1996 *per quarter*. The premium for CHCBP is equal to the cost of the federal employee premium, plus the federal agency’s premium, plus 10% for overhead expenses. For clients accustomed to getting health care for free, these *quarterly* premiums may appear high. However, when considered as a *monthly* premium (\$311 for individual, and \$665 for a family), and when compared to current commercial health insurance plans, the cost and benefits of CHCBP are quite reasonable in today’s health insurance market. This is attractive for the former spouse without prospects of employment which would offer employer-sponsored insurance. It is also attractive for those who have significant pre-existing medical conditions which would prevent them from obtaining private health insurance without “exclusion of pre-existing conditions” clauses. CHCBP is certainly better than “going naked” on health insurance altogether. If the monthly premiums will be a significant problem for the former spouse, in an appropriate case the military family law attorney can arrange for a cost-sharing of the CHCBP premiums through an alimony award (or an additional portion of military retired pay) to assist the former spouse in paying the premiums. Selling this to the military member involves pointing out that such periodic payments would qualify for tax treatment as alimony under Sections 215 and 71 of the Internal Revenue Code so long as the termination of such payments is tied to the death of the payee former spouse.

There is but one method for paying the CHCBP premiums. Whether CHCBP Family or Individual Coverage is involved, the premiums must be paid quarterly, not monthly. Also, default in making the payments leads to permanent disenrollment from CHCBP under 32 CFR §199-20(q) (1) and (2).

**THE TRANSITION FROM “TEMPORARY” TO “UNLIMITED” COVERAGE:** When a qualified former spouse applies for CHCBP coverage, she does not automatically go into “unlimited CHCBP coverage.” For example, a 20/20/15 *former spouse* must first use one year of TRICARE eligibility under 10 USC §1072(2)(G), then use her regular 36 months of CHCBP coverage; and then they apply for “unlimited coverage” with each renewal period thereafter. Other former spouses must first enroll in the 36 months of “temporary” CHCBP coverage, and they later apply for “unlimited coverage” upon each renewal period thereafter.

**CRITERIA FOR “TEMPORARY” AND “UNLIMITED” COVERAGE:** Attorneys should recognize there are different criteria for eligibility for *enrollment* in CHCBP and for determining *length of coverage*. Military family law attorneys should advise clients that they must first be *eligible to enroll* in CHCBP, and thereafter meet additional criteria to determine *how long* they will be covered in CHCBP.

**FORMER SPOUSE ELIGIBILITY FOR CHCBP COVERAGE:** The following is an extract from pages 14-15 of

the *CHCBP Handbook*. “Enrollment in the CHCBP is open to...

3. A person who:

- a. Is an “un-remarried” former spouse of a member or former member of the uniformed services; and,
- b. On the day before the date of the final decree of divorce, dissolution, or annulment was covered under a health plan under TRICARE or TAMP (Transitional Assistance Management Program) as a dependent of the member or former member; and,
- c. Is not eligible for TRICARE as a 20/20/20, or 20/20/15 former spouse of a member or former member.”

This is the qualifying criteria applied by Humana Military Healthcare Services, Inc., which administers CHCBP, to determine if a former spouse is eligible for coverage. Once one has been determined eligible, then the question becomes, “For how long?” The following is how the booklet explains this.

**LENGTH OF FORMER SPOUSE CHCBP COVERAGE:** There are two periods of coverage that are available to a former spouse, 36 months and unlimited. Any former spouses who *continuously* meets the above eligibility criteria may have up to 36 months of CHCBP coverage. The 36-month period commences on the latter :

- a. The date of the final decree of divorce, dissolution, or annulment; OR
- b. The date which is one year after the date of the divorce, dissolution, or annulment, if the former spouse is eligible for one-year transitional coverage under TRICARE (i.e., the 20/20/15 former spouse); OR
- c. The date the military sponsor became ineligible for medical or dental care under a military health care plan as an active-duty member. (Comment: Consult page 23 of the *CHCBP Handbook* as the above is an abstract of a lengthy paragraph. This apparently is to cover those who leave military service prior to retirement, or who are ending their coverage under TAMP).

As previously discussed, the 20/20/15 spouse can have actually 48 months of *transitional* health insurance coverage simply by not remarrying within that period or enrolling in an employer-provided health insurance plan (i.e., twelve months of TRICARE coverage under 10 USC §1072(2)(G), and another 36 months of CHCBP under 10 USC §1078a).

However, the former spouse *who meets the following additional criteria* may have upon request *unlimited* (i.e., indefinite) CHCBP coverage under 10 USC §1078a(g)(4) and 32 CFR §199.20(d)(6)(iv), which state that the limitations for an un-remarried former spouse do not apply and the length of coverage can be for an unlimited period of time, if the former spouse:

- a. Has not remarried before the age of 55; AND,

- b. Was enrolled in CHCBP or TRICARE as the dependant of an involuntarily separated member during the 18-month period before the date of the divorce, dissolution, or annulment (Comment: Don’t be thrown off by the phrase “involuntarily separated member.” Separation for reasons of retirement also satisfies this criteria. (10 USC §1078a(g)(4)(B)); AND,
- c. Is receiving any portion of the retired or retainer pay of the member, or former member, OR an [SBP] annuity based on the retired or retainer pay of the member; OR,
- d. Has a court order for the payment of any portion of the retired or retainer pay; OR,
- e. Has a written agreement (whether voluntary or pursuant to a court order) which provides for an election by the military member or former member to provide an [SBP] annuity to the former spouse.

**CRITERIA FOR CHCBP ELIGIBILITY COMPARED TO UNLIMITED COVERAGE:** There are several issues that military family law attorneys should know in advising former spouses about arranging “unlimited CHCBP coverage.” There are no complete or authoritative answers to many of the nuances simply because there are no “open sources” or legal precedents to cite as authority, other than the enabling statute and the Code of Federal Regulations. Practically speaking, most clients must convince the DoD contractor (Humana Military Healthcare Services, Inc.) of the merits of their position if they are caught in one of the following situations:

1. **QUESTION:** “*How long must a spouse or former spouse have been covered under TRICARE to be eligible for coverage under CHCBP?*” Note that the general *eligibility* criteria for CHCBP coverage is that the individual need only to have been covered under TRICARE for *one day* before the divorce, dissolution or annulment. However, the criteria for “unlimited coverage” requires *18 months* of TRICARE coverage before the final decree of divorce, dissolution or annulment. Thus, a former spouse who had only a few months of TRICARE coverage before the divorce would not thereafter be able to obtain the necessary 18 months of TRICARE coverage to qualify for “unlimited coverage” while she was using the 36 months of CHCBP coverage. To be eligible for TRICARE coverage, a dependent must be enrolled in D.E.E.R.S. as a person entitled to receive TRICARE, and a military sponsor who allows a *lapse* of D.E.E.R.S. enrollment could effectively disqualify the former spouse from being eligible for post-divorce coverage.

2. **QUESTION:** “*What are the consequences of remarriage?*” For 20/20/20 and 20/20/15 former spouses to remain eligible for TRICARE coverage under 10 USC §1072(2)(F),(G) and (H), *remarriage at any time, or at any age ends coverage*. The requirement to remain unmarried also is part of the eligibility criteria to enroll in CHCBP. But compare the criteria for *enrollment* to that for *unlimited coverage*, which apparently provides that remarriage is not a disqualifier if it occurs *after* the former spouse was achieves his/her 55<sup>th</sup> birthday.

Will this present a “Catch-22” for the former spouse who elects to remarry after age 55? That is, to enroll in CHCBP one cannot be *remarried*, but one can have *unlimited coverage* by

postponing the remarriage until after age 55. Would one fail to meet the criteria to *enroll* in CHCBP, but still meet the criteria for *unlimited coverage*? This confusion in the statute may have come from an attempt by Congress to make the “unlimited CHCBP coverage” mirror the Spouse Equity Coverage for former spouses of federal employees offered through the Office of Personnel Management. (*Compare* the legislative purpose of 10 USC 1078a(a) *and* the criteria found in 10 USC §1078a(g)((4) *with* the criteria for former spouses of federal employees at 5 USC §8901(10) and §8905(c)(1)). The “no remarriage before age 55” requirement seems to be tied to the loss of survivor annuity coverage that exists in both the military SBP (Survivor Benefit Plan) and Federal Civil Service survivor annuity. It appears that so long as the former spouse seeking to retain her CHCBP coverage does not remarry until after age 55, she would not jeopardize her ability to enroll in CHCBP. However, as a “preferred practice” for military family law attorneys advising a client who needs to retain her eligibility for CHCBP, it is highly recommended to seek an advisory opinion from the CHCBP Customer Service Office to verify that the ability of the client to enroll or retain CHCBP coverage, especially “unlimited coverage,” would not be compromised due to the remarriage.

3. **QUESTION:** “*Can a 20/20/20 spouse who lost her TRICARE coverage due to remarriage nevertheless then qualify for “unlimited CHCBP coverage” if the remarriage occurred after age 55?*” Would a 20/20/20 former spouse (with TRICARE coverage under 10 USC §1072(2)(F)) who didn’t remarry until *after age 55* and who otherwise met the criteria for “unlimited CHCBP coverage” qualify for CHCBP? Again, the impact of remarriage on CHCBP eligibility comes into play even before we can reach the issue of “period of coverage” for the former spouse who remarries after age 55. Note that such a “20/20/20, over 55, now-remarried” former spouse must first satisfy the CHCBP *enrollment eligibility* criteria, which clearly states that the applicant must be “unmarried.” 10 USC §1078a(b)(3). But it would certainly seem an injustice that a 20/20/20 former spouse could not qualify for CHCBP because of her remarriage after age 55, while someone who was married just 18 months to a military sponsor (and perhaps none of it occurring during active duty) could remarry after age 55 and still qualify for CHCBP. Once again, the military family law attorney who is faced with advising a 20/20/20 former spouse client who must retain her DoD health care coverage should seek an advisory opinion- from the CHCBP Customer Service Office prior to the marriage taking place.

4. **QUESTION:** “*What about loss by the former spouse of SBP coverage or not receiving a portion of military retired pay?*”

- a. What would happen in the case of the former spouse who is basing her CHCBP “unlimited coverage” upon only receipt of a portion of retired/retainer pay, if the military member happened to predecease her? Would the former spouse no longer satisfy the CHCBP criteria for “unlimited coverage” since she was no longer *receiving* a portion of military retired/retainer pay, even with a court order saying that she was entitled to receive it? Recall that death ends the right to receive a

military pension. Therefore how could a court order satisfy the criteria if there was no pension to receive? Obviously, a back-up entitlement to former-spouse SBP coverage could serve as the second basis for satisfying the criteria for unlimited CHCBP coverage. But former spouse SBP is not always awarded as part of a divorce, and it may not be available as “back-up” if it was waived at the time the military member retired.

- b. What happens in the event of a waiver of military retired pay to receive some other form of compensation? Suppose the military member waived his/her military retired pay to receive VA disability compensation or used active military service to obtain an enhanced Civil Service Retirement? Would the fact the military member was then no longer receiving military retired pay, even with the former spouse entitled to receive a portion of the retired pay by court order, prevent the former spouse from being eligible for unlimited CHCBP coverage?
- c. What if the former spouse could not satisfy the “10/10 Rule” at the time of divorce and DFAS was not making direct payments to the former spouse under 10 USC §1408 (USFSPA)? Suppose that the military member was making alimony payments (in place of pension share payments) to the former spouse? Would receiving alimony be a “legal substitute” under 10 USC §1078a(g)(4)(B)(iii) for receiving a “portion of military retired pay”? What if the alimony was being paid directly by DFAS from the military member’s retired pay?
- d. What if the former spouse has a court order for Survivor Benefit Plan coverage, but then did not timely file a “Deemed Election?” Would the court order, by itself, be sufficient to satisfy the criteria even if no SBP benefit could be paid?

Examining the statute (10 USC §1078a(g)(4)(B)(iii) (I) and (II) will answer some of the above questions. Notice that these two subsections of the statute are joined by “or,” and thus must be interpreted to mean that either “*actually receiving* a portion of retired pay or an SBP Annuity” or “*having the court ordered right* to receive such payments” should satisfy the criteria. However, nowhere is *alimony* mentioned in the criteria, even if it had been used to divide the military retirement (as might have been the case if the “10/10 Rule” could not be satisfied). Thus, where no portion of retired/retainer pay is being received (only alimony), this criteria for “unlimited CHCBP coverage” may not be met by the former spouse.

There are no federal cases or administrative law decisions to help answer these hypothetical questions. The only reported case is *Lowe v. Swartz*, 738 N.W.2d 63 (S. D., 2007). It

seems to suggest that “receiving only a portion of military retired pay” was insufficient to allow a former spouse seeking to qualify for the “unlimited CHCBP coverage,” and that it was essential for the former spouse to also have SBP coverage. It is worth noting that in the *Lowe* case, it was part of the argument of the former spouse that in order to continue to maintain her eligibility for CHCBP, she had to have *both* a portion of the military member’s retired pay *and* former spouse coverage under the SBP. Was the former spouse really needing the SBP coverage, as she maintained, or was it simply an attempt to obtain an additional benefit out of the divorce under the ruse of needing it to maintain her CHCBP coverage? Her appeal to the South Dakota Supreme Court was upon her attempt to “reopen” the divorce judgment in order to amend the judgment and additionally to obtain former spouse coverage under the military member’s SBP. The *Lowe* case does not serve as useful precedent concerning CHCBP issues, but it might serve as a caution that having *both* a portion of military retired pay and former spouse coverage under the SBP is a wise move.

5. **QUESTION:** “*Must the amount of retired pay or former spouse SBP coverage be of a “threshold amount” to satisfy the “unlimited coverage” criteria?*” No specific dollar amount of military retired pay or of SBP coverage is specified in the “unlimited coverage” criteria of 10 USC §1078a(g)(4)(B)(iii). Since CHCBP premiums are paid directly by the former spouse and need not be deducted from the military retirement (as is the case for SBP premiums), an agreement or order providing for a minimum SBP benefit or a division of military retired pay of just \$1.00 would technically satisfy the criteria. This author would strongly advise getting both a portion of the military retirement and former spouse SBP coverage, given that the entitlement to receive a portion of the retired pay terminates upon the death of the military member. Being able to also qualify with an entitlement to a survivor annuity might assist the former spouse in meeting the criteria for unlimited CHCBP coverage. (*See discussion of Lowe v. Swartz, supra.*)

6. **QUESTION:** “*What is the consequence for a former spouse who has based a claim upon a court-ordered division of retired pay, or upon a survivor’s annuity, if the military member does not retire?*” Consider our original scenario. LTC Jones agreed to share a portion of his military retirement and provide former spouse SBP coverage for Mrs. Jones. Now let us alter the facts and assume that *after* the divorce and *instead of retiring*, he receives severance pay, such as a Voluntary Separation Incentive (VSI), or a Special Separation Bonus (SSB), or he is court-martialed and discharged and gets nothing? What if the divorce had occurred much earlier in his career such as at the 10-year point and LTC Jones just decides to leave the military and go to work with the Postal Service, and then enhances his Federal Employees Retirement System (FERS) retirement by converting his active military time to civil service credit? Finally, what if LTC Jones simply leaves the military and takes a civilian job where he received *no credit* for his military service? How would these facts affect Mrs. Jones, who had been basing her CHCBP enrollment eligibility upon her husband’s eventually retiring for longevity, and her receipt of “unlimited CHCBP coverage,” if she could not now *actually receive a portion of military retired pay*? Would her former husband’s post-divorce actions divest her of access to her much-needed long-term DoD health care under CHCBP?

An argument can be made that the former spouse’s CHCBP *enrollment* eligibility and right to request “unlimited CHCBP coverage” is not dependent upon what the former sponsor does subsequent to the divorce. Rather, a former spouse’s eligibility for enrollment into CHCBP is determined the date she first applies for CHCBP benefits, and upon her otherwise meeting the special qualifying criteria for “unlimited coverage.” (*Comment:* Start with pages 23-24 of the *CHCBP Handbook*. Here compare ¶E.1.c.(1) (un-remarried former spouse seeking 36 months of CHCBP coverage) with subparagraph (2) (former spouse seeking “unlimited” coverage). Note in particular that the event of the sponsoring military member leaving active duty (and losing coverage under a DoD health or dental care plan) is tied to the eligibility criteria for the “36-month CHCBP” coverage, *but* it does not appear in subparagraph (2) dealing with “unlimited coverage.” This is consistent with the language in the corresponding provisions of 10 USC §1078a(g)(4) and 32 CFR §199.20.)

The former spouse might argue that the statute only requires that she have a “court order or agreement” that gives her *the right to receive a portion of retired pay or SBP coverage*, and that “actual receipt” is not mandated in the CHCBP statute. Still, eligibility and coverage might be denied by the CHCBP Office on the basis that military member’s leaving military service prior to retirement results in the former spouse then losing any right to receive either a portion of military retirement or to have SBP coverage regardless of what a divorce settlement agreement or domestic court order might provide. Remember as well, the D.E.E.R.S. enrollment for the military member will be closed when the sponsoring military member leaves active service prior to retirement, and the former spouse must act through the military sponsor’s D.E.E.R.S. to obtain her CHCBP coverage. The forward-thinking family law attorney must consider the possibility that the military sponsor might not eventually achieve retirement as represented during the divorce proceedings.

7. **QUESTION:** “*What should the family law attorney advise the client concerning the consequences of taking alimony rather than a portion of military retired pay or waiving SBP and taking life insurance?*” In advising a former spouse concerning either waiving SBP coverage (in favor of life insurance), or accepting alimony instead of a court-ordered portion of military retired pay, the attorney should carefully document the advice given that eligibility for “unlimited CHCBP coverage” may be lost, and that coverage may *be limited to 36 months*. Failure to advise a client properly on making the decision to waive either of these (or both), could result in a malpractice claim or, at the very least, a state bar grievance, for being negligent in advising the client. As a matter of professionalism, not to mention avoiding a malpractice suit, documenting the advice in writing and having the client sign and acknowledge the advice is a good practice pointer for the practitioner. See Appendix 2 for a sample letter to a client regarding this advice.

h. **QUESTION:** “*What is the consequence of other health insurance being available to the spouse/former spouse seeking CHCBP coverage?*” Recall that eligibility for TRICARE coverage for 20/20/20 and 20/20/25 spouses under 10 USC §§1072(2)(F) and (G) is lost if they “have medical coverage under an employer-sponsored health plan.” The *eligibility* for, or

enrollment in, another (non-DoD) medical insurance plan by a former spouse does not appear to be a disqualifier for CHCBP enrollment and coverage. (It is clear that a spouse or former spouse cannot be concurrently enrolled in CHCBP and any other DoD health care program (*CHCBP Handbook*, page 21)). At least for the temporary (i.e., 36 months) coverage, this would be consistent with the legislative purpose of the CHCBP to provide transitional health benefits. 10 USC §1078a(a). Consider that a person with a pre-existing medical condition may not have coverage until she has been under another health insurance plan long enough to meet an exclusionary period for a pre-existing condition. Dual enrollment or double coverage under CHCBP and another (private) health insurance plan might be necessary to provide “full medical coverage” for the former spouse with significant pre-existing conditions.

Dual enrollment (a.k.a. double coverage) under CHCBP and another health insurance plan is addressed at 32 CFR §199-20(h), which then refers to 32 CFR §199.8 (“Double Coverage”). The effect of double/dual coverage appears to be that CHCBP becomes the secondary payor of claims, such that any claim that could not be honored by CHCBP (were it the sole insurer) also could not be paid if it were the secondary payor of the claim. However, caution should be exercised in the case of the former spouse who qualifies for “unlimited CHCBP coverage” and also decides to seek dual enrollment or double coverage under another insurance policy. Obviously such a former spouse would not need the transitional 36-month CHCBP coverage as the exclusion period for a pre-existing condition may no longer exist. Once again it may be a wise move to first seek an advisory opinion from the CHCBP Office before advising a former spouse to enroll in another medical insurance plan.

**APPEALS:** One of the possible reasons that no federal cases exist concerning CHCBP is that the appeal process for CHCBP cases is complex. A brief discussion of appeals is found at page 21 of the *CHCBP Handbook*. However, the regulations really bring to life the horrors of prosecuting an appeal. The CHCBP implementing regulation, 32 CFR §199.20, at paragraph (j) incorporates the general appeal and hearing procedures for the Civilian Health and Medical Program of the Uniform Services (CHAMPUS) found at 32 CFR §199.10. Be certain to read 32 CFR §199-10 very carefully if an appeal is contemplated. There are strict requirements for timeliness and avenues for reconsideration, informal review, formal appeal, etc. Note that 32 CFR §199-10 provides that formal appeals and hearings are to be conducted by the Chief, Office of Appeals and Hearings, TRICARE Management Activity, 16401 East Centretech Parkway, Aurora CO 80011-9066. By memorandum of understanding, however, such appeals are instead heard by the Defense Office of Hearings and Appeals (DOHA) ([see http://www.dod.mil/dodgc/doha/tricare.html](http://www.dod.mil/dodgc/doha/tricare.html)). All decisions are reviewed by the Director, OCHAMPUS and are either “accepted or rejected,” or referred to the Assistant Secretary of Defense (Health Affairs). Once this rather long administrative remedy is exhausted, then an “aggrieved CHCBP beneficiary” would have access to the Court of Federal Claims.

**CONCLUSION:** When it comes to DoD health care options, all is not lost if the former spouse cannot satisfy the 20/20/20 Rule for TRICARE Coverage. Inexpensive government health care is certainly preferable to costly private coverage!

The availability of any DoD *long-term health insurance* option is worth understanding and considering for military family law attorneys, who must advise their clients of all of the available options. This is true particularly in military divorces, where often a former spouse has not worked outside the home, may have significant health issues, and has no health care coverage available upon divorce. The Continuation of Health Care Benefits Program can provide both temporary and unlimited CHCBP coverage to those qualifying former spouses eligible under 10 USC §1078a(g)(4). This premium-based coverage is comparable to the TRICARE health care coverage available to former spouses who satisfy the 20/20/20 Rule.

**ANSWER TO HYPOTHETICAL QUESTION:** As the military family law attorney advising Mrs. Jones, you should discuss the following avenues to providing her with a lifetime health care option:

1) Divide LTC Jones’ military retired pay as marital/community property under 10 USC §1408, and provide for payments to Mrs. Jones from DFAS. Do not agree to a proposed award of alimony in lieu of pension division. If alimony must be used as the means of the former spouse being paid, then arrange to have it paid directly by DFAS from the military member’s retired pay.

2) In addition, insist that the divorce settlement include former spouse beneficiary status under the Survivor Benefit Plan as part of the divorce settlement. The SBP base amount should be high enough that, should LTC Jones predecease Mrs. Jones, the SBP annuity would be sufficient to continue to pay her portion of the military retired pay and the CHCBP quarterly premiums after LTC Jones’ death. Do not accept life insurance as a substitute for the former spouse SBP coverage since insurance does not satisfy the criteria for “unlimited CHCBP coverage.”

3) If possible, arrange for an alimony payment (or an increase in Mrs. Jones’ share of military retired pay) sufficient to pay all (or part) of Mrs. Jones’ CHCBP quarterly premiums. It would be preferable to use a separate alimony award so that it could terminate upon any number of future events (i.e., remarriage, enrollment in a employer-sponsored health plan, etc.) It should be made modifiable only upon an increase in the CHCBP premium. In order to satisfy IRS requirements for being deductible for the payor, state that it ends no later than the payee’s death.

4) Ensure that LTC Jones may not act to re-characterize, waive, or convert his military retired pay without indemnifying and holding harmless Mrs. Jones for any loss to her, including CHCBP coverage.

5) Advise Mrs. Jones in writing that she must enroll in CHCBP within 60 days of the filing of her decree of divorce or dissolution. Provide her a copy of the DD Form 2837, “Continuation of Health Care Benefit Program (CHCBP) Application,” refer her to the TRICARE Customer Service Office, and provide her with a copy of the *CHCBP Handbook*.

6) Advise Mrs. Jones *in writing* that her remarriage prior to age 55 could forfeit her right to enroll in

CHCBP and her right to receive SBP survivor's benefits.

7) Advise Mrs. Jones *in writing* that CHCBP is not TRICARE but only "looks like TRICARE." Advise her that CHCBP is not free and that failure to pay the quarterly payments could cause her to be permanently unenrolled and to lose any health care coverage.

8) Point out to Mrs. Jones (in the *CHCBP Handbook*) the CHCBP Customer Service telephone number and address: 1-800-444-5445; Humana Military Healthcare Services, Inc., ATTN: CHCBP, PO Box 740072, Louisville KY 40201.

9) Finally, in addition to all the above, advise Mrs. Jones to maintain a record of all of her calls and correspondence with the CHCBP Administrator. In particular, advise her that, should she decide to obtain "dual enrollment" with another health care insurer or to remarry, she should consult the CHCBP Administrator before doing so and request an advisory letter as to the consequences for her continued eligibility for enrollment and unlimited coverage CHCBP.

\* \* \*



## Appendix 2

Dear \_\_\_\_\_,

This letter is to confirm our conversation regarding your marital settlement agreement. Despite my advice, you have elected to waive any interest you have in your spouse's military retirement benefits. In doing so, you are not only waiving a share of retired pay and a survivor annuity, but you are also waiving certain other rights which are linked to these benefits. One of the most important of these is the right to continued medical coverage.

Certain medical benefits are unrelated to a waiver of military retirement benefits. If you have been married to your servicemember spouse for at least 20 years, with at least 20 years overlapping the period of creditable military service, you are placed in a special category of beneficiaries called "20/20/20 spouses." As a 20/20/20 spouse, you will retain most of your military benefits unless you remarry. These include commissary, exchange, medical coverage and legal assistances services. The medical benefits are extended to you at the retiree rate for life, or until you remarry. Even if you remarry and you then divorce again, all of your rights are reinstated EXCEPT your medical coverage. This benefit is yours by federal statute, regardless of the terms of your divorce.

If you have been married to your servicemember spouse for at least 20 years, and he or she has at least 20 years of creditable service but only 15 years of the marriage overlap the time in service, you are a "20/20/15 spouse." As such, you are entitled to one full year of medical coverage from the date of the divorce. If at the end of that year are not remarried or covered by an employer sponsored health care plan, you qualify for continued coverage in a DOD-sponsored health care plan for as long as you meet those requirements. Once again, the 20/20/15 benefit belongs to you under federal law, regardless of the terms of your divorce or settlement.

If, as in your case, you do not qualify as a 20/20/20 or a 20/20/15 spouse, you are still entitled to medical coverage at the retiree rate under certain circumstances. Retaining your right to a portion of your spouse's retirement benefits (either retired pay or Survivor Benefit Plan coverage, known as SBP) is *essential* to your qualifying for continued medical benefits.

Federal law guarantees the right of former military spouses to continued medical benefits when four conditions are met. First, you cannot be covered by any type of employer-sponsored medical coverage. However, you can refuse your employer-sponsored medical benefits and retain the military medical benefits. You would also be disqualified if you have individually-obtained medical insurance. Second, you cannot remarry before the age of 55. Third, you must have been enrolled in a Department of Defense (DoD) medical benefits program at any time in the 18 months prior to the divorce. Finally, you must obtain a court order showing that you have retained an interest in your spouse's military retirement (pension share or SBP). This interest in your spouse's military retirement can be as little as 1% to qualify for this important benefit.

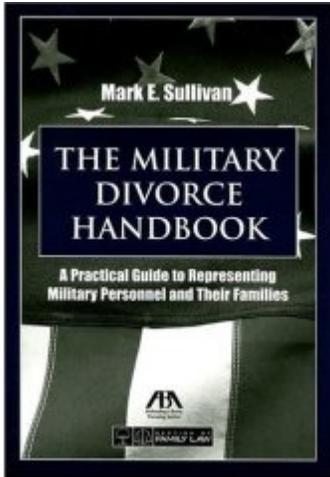
If you meet all four criteria, you may qualify for DoD-sponsored health insurance through the Continued Health Care Benefit Program (CHCBP). This medical coverage lasts as long as you wish (so long as you remain eligible) and the premiums are reasonable. Please note that this program is available to you even if your current employer offers health insurance but you prefer to continue with your DoD sponsored benefits. While CHCBP is not TRICARE and you will not be entitled to use base facilities, there is a Network of Providers available to you that will provide TRICARE-like services to meet your needs.

Please consider this information carefully and weigh the consequences of your choice to relinquish any interest in your spouse's retirement. Waiving any and all rights to your spouse's retirement benefits, as you propose to do, will disqualify you from having CHCBP available to you in the future should you need medical insurance. On the other hand, retaining a share of the military retirement rights could provide you with reasonably priced medical insurance, especially in the event that you have any pre-existing conditions.

Please sign below to acknowledge your receipt of the advice I have provided above.

\_\_\_\_\_  
Signature of client

Date: \_\_\_\_\_



***Editor's Note: Do You Have Your Own Copy of The Military Divorce Handbook?***

*The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families* by Mark E. Sullivan is a useful outline that guides the family law practitioner through the unique and difficult issues involved when a military retiree or servicemember divorces. Included in the book are a clear explanation of the Servicemembers Civil Relief Act, how to locate and serve the military member, visitation and custody, domestic violence, military tax issues, pension division, family support, medical care, and the division of military retirement benefits. The book includes a CD-ROM full of checklists, instruction sheets, forms and info-letters. *The Military Divorce Handbook* is priced at \$149.95, with a price of \$129.95 available to members of the ABA Section of Family Law. Learn more about the book and order online at <http://www.abanet.org/abastore/productpage/5130135>. To order by phone, call the ABA Service Center at 1-800-285-2221 and request product code 5130135. Orders can be faxed to 1-312-988-5568.