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# Health Care Options for Former Military Spouses: Tricare and the Continued Health Care Benefit Program (CHCBP)

WILLIAM J. CAMP*

## I. Introduction

Family law attorneys familiar with representing the nonmilitary spouse know the Tenth Commandment of a military divorce is "Thou Shalt Be Aware of Federal Health Benefits!"[1] After the difficult battles of custody, property division, and survivor benefits are fought and resolved, a sudden and often frightful awareness awakens in the mind of the nonmilitary spouse that the health care coverage they may have enjoyed for many years has come to an end! With that panicked expression of someone just sentenced to prison, the client will push out through tightly drawn lips, "what am I going to do without my military health-care benefits?"

All too often, the above discussion comes at the end of the attorney-client relationship or weeks after the ink has dried on the final decree. The attorney and client at this belated point in the case become suddenly aware that no thought was given toward securing a *long-term* health care option for the former spouse. Allowing former spouse health care coverage to be an "after-thought" is not only poor case management, but an invitation for a bar grievance, if not a malpractice claim! On a much more personal level for the former spouse, rights to a portion of the military pension and survivor benefits mean little if he or she does not live long enough to receive them. What could have been the final touch of care and compassion for

* William J. Camp is a family-law practitioner and a partner in the law firm of Westmoreland, Patterson, Moseley & Hinson, LLP in Warner Robins, Georgia. Mr. Camp served on active duty for twenty-two years with the Untied States Air Force as a Staff Judge Advocate and is a member of the state bars of Georgia and Florida.

1. Peter Cushing, *The Ten Commandments of Military Divorce: Representing the Nonmilitary Spouse* (pt. 2), FLA. B.J., Oct. 1995, at 84–85.

the attorney representing the nonmilitary spouse, instead becomes a disaster *that could have been avoided*. More often, neither the client nor the attorney knew enough about the options for postdivorce military health care, *or even who to ask*, so that the former spouse could weigh options or make informed and intelligent decisions.

This article will show that through the maze of federal statutes and Department of Defense (DoD) regulations, paths and options exist that provide some type of health care coverage for *every* former military spouse. In almost *every* case, where at the time of divorce the former military spouse was then covered under a DoD health care plan, at least thirty-six months of transitional health coverage is available. In many others a long-term health care option *will exist* or *can be created* if the attorney representing the former spouse knows what to obtain in the settlement or trial of the case.

Since not all former military spouses are treated the same in terms of their eligibility for postdivorce health care, their options are different. To more easily discuss their options, this author will first divide former spouse clients into two groups based upon their *eligibility* for coverage under the two available postdivorce health care programs, (I) Tricare and (II) the Continued Health Care Benefit Program, or "CHCBP." Within those two eligibility groups, former military spouses are further discussed, based upon the length of time they are eligible for their postdivorce health care coverage.

I. Tricare Eligible Group of Unremarried Former Spouses:
   a. The 20/20/20 Former Spouse (lifetime coverage),
   b. The 20/20/15 Former Spouse (one year coverage).

II. CHCBP Eligible Group of Unremarried Former Spouses:
   a. The *Transitional* Former Spouse (thirty-six months coverage),
   b. The *Unlimited* Former Spouse (coverage for as long as it is requested).

This article will explain how, through a program called "CHAMPUS" (Civilian Health and Medical Program of the Uniformed Services), Congress and the Department of Defense (DoD) provide comprehensive health care benefits for those who have retired from the uniformed services, the eligible dependents of active duty and retired members, and certain unremarried former spouses.[2] What CHAMPUS provides is *not health insurance*, but rather *a managed health care program* that includes military treatment facilities, uniformed health care providers, and com-

2. 10 U.S.C. § 1071 (2008) states, "The purpose of this chapter is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and of their dependents."

petitively selected civilian contractors.[3] The word "Tricare" is used to refer to the *delivery system* for this military-managed health care system.[4] In the referenced materials, CHAMPUS is the legal term of art found in the statutes and regulations. By comparison, Tricare is the CHAMPUS delivery system for those eligible by law for CHAMPUS benefits. The two terms are often used interchangeably, but there is a legal distinction.[5]

As will be seen, the most attractive feature of Tricare is that it provides comprehensive health care coverage and is either free or very affordable. There are many Tricare plans[6] that allow beneficiaries to add flexibility in choosing their health-care provider at the expense of higher co-pays and deductibles.[7] By comparison to commercial and employer-sponsored health insurance plans, the premiums for all Tricare former spouse options are refreshingly inexpensive and range from no premium for Tricare Standard to $230 per year for Tricare Prime coverage.[8] As the scope of this article will be to focus upon the *eligibility* criteria for unremarried former military spouses to enroll in Tricare, this author will not attempt to suggest which *type* of Tricare plan is best suited for the individual client.[9] There is but one plan available to those unremarried former military spouses eligible for the CHCBP.

The second part of this article will address the health care options available for those former spouses who cannot satisfy the eligibility requirements for Tricare coverage. This article will discuss how Congress and the DoD has further created a *transitional* health care program called the CHCBP, which provides both a *transitional* and *unlimited* option to unremarried former military spouses.

Unlike Tricare, the CHCBP is a premium-based program that functions

3. 10 U.S.C. §§ 1072(4), (7) (2008).

4. *Id.* at § 1072(7).

5. *Id.*

6. Generally, the major plans are Tricare Prime, Tricare Standard, Tricare Select, and Tricare Extra. Within each of these plans are still more sub-options. A Tricare website offers a Plan Wizard for helping individuals select the option that best suits their health care needs. Tricare, http://www.tricare.mil/mybenefit/home/overview/Plans (last visited May 22, 2009).

7. Another wizard allows comparison of the various Tricare plans to help determine which one is most appropriate to the beneficiary. Retired Servicemember, http://www.tricare.mil/mybenefit/home/overview/ComparePlans?country=United+States&zipCode=31201&plan=TRICARE+Prime&status=Retired+Service+Member (last visited May 22, 2009).

8. Enrollment fees vary by foreign country and regions within the United States. Practitioners may determine enrollment fees for specific clients under various Tricare plans by accessing the following website and menu options. Enrollment Fees, http://www.tricare.mil/mybenefit/ home/overview/Enrollment/EnrollmentFees? (last visited on May 22, 2009).

9. See the three preceding footnotes for directions to websites to assist unremarried former spouses to make their personal selection of which Tricare plan best suits their needs and budget. Customer service representatives at Tricare service centers are also available to advise clients on choosing a Tricare option that is best for them.

much in the same manner as a commercial health insurance plan. For former military spouses determined eligible under the CHCBP, no coverage is available under any of the Tricare plans, but health care is provided under a plan identical to Tricare Standard and with the same terms of coverage. Those who come under the CHCBP will not have access to military hospitals, uniformed health-care providers, or military pharmacies. The CHCBP beneficiaries may, however, use the Tricare network of civilian hospitals and contract health-care providers and the retail Tricare pharmacy program. In other words, the former military spouse enrolled under the CHBCP will receive all health care and drug benefits off-site of the military installation and through *only* civilian providers.

When weighing health care options, cost of the coverage is always a primary consideration. As compared to Tricare Standard, which has no monthly premiums, there is a much higher *quarterly* premium for reenrollment in the CHCBP, which is $933 for *individual* coverage.[10] While a CHCBP Family Plan exists for $1,996 per quarter, unremarried former military spouses are limited by law to enrollment only for individual coverage.[11] Like Tricare Standard, the CHCBP carries a $150 annual outpatient deductible,[12] 25% co-pays for most services,[13] and a $3,000 annual catastrophic cap.[14] Other than not being able to use military pharmacies, the Tricare and CHCBP pharmacy benefit is the same. There is an extensive formulary offering $3 (Generic), $9 (Brand Name), and $22 (Nonformulary) co-pays for prescriptions.[15] A Tricare Mail Order Pharmacy,[16] through Express Scripts,[17] offers an additional option on cost savings for drugs.

The gateway for Tricare eligibility determination rests with the uniformed services and is overseen by the Defense Enrollment Eligibility

10. CHCBP enrollment fees are posted online. Continued Health Care Benefits Program Enrollment and Coverage, http://www.humana-military.com/south/bene/TRICAREPrograms/chcbp-enrollment.asp (last visited May 25, 2009).

11. 10 U.S.C. § 1078a(e) (2008).

12. Humana Military, http://www.humana-military.com/south/bene/tools-resources/handbooks/cost-summary/std-and-extra.asp (last visited June 2, 2009).

13. *Id.*

14. Catastrophic Cap, http://www.humana-military.com/south/bene/tools-resources/handbooks/cost-summary/cat-cap.asp (last visited June 2, 2009).

15. Tricare Pharmacy Program Costs, http://www.humana-military.com/south/bene/tools-resources/handbooks/cost-summary/pharmacy.asp (last visited June 2, 2009).

16. Tricare Mail Order Pharmacy, http://www.tricare.mil/mybenefit/ProfileFilter.do;jsessionid=Kl4J61yhnyKKYzhPN0XT5bbvDrd2GlSmtT3Kysx4JjLsqhkTK4k0!1696767524?puri=%2Fhome%2FPrescriptions%2FFillingPrescriptions%2FTMOP (last visited June 2, 2009).

17. Express Scripts, http://member.express-scripts.com/dodCustom/welcome.do (last visited June 2, 2009).

Reporting System, known by the acronym, DEERS.[18] By comparison, for those seeking enrollment under the CHCBP, the Program's Administrator[19] will determine eligibility and for how long coverage *(*i.e.*, transitional* or *unlimited*) will be available.

This article will discuss how the length of marriage to the military sponsor during his or her career is critical in determining Tricare eligibility for unremarried former spouses. The Tricare criteria are tied solely to the length of time the military spouse (often referred to as "sponsor") and the former spouse were married *concurrent* with military service. By comparison, for determining CHCBP eligibility for coverage, the length of the marriage, or when it occurred in the sponsor's military career, is not essential to eligibility for coverage. However, what is important is whether the former spouse was covered under a Tricare plan *at the time of divorce, dissolution, or annulmen*t. The criteria for *unlimited* CHCBP coverage will also depend upon whether the unremarried former spouse receives a portion of the military pension and is to receive *former spouse* beneficiary status under the Survivor Benefit Plan.

The entitlement of an unremarried former spouse to receive health benefits under either Tricare or the CHCBP is determined *solely* by meeting the statutory *eligibility* requirements, and such coverage may *not* be granted either by agreement of the parties or from a state court's order. This article will, however, show how the family law practitioner *can* ensure their former military spouse client *optimize* his or her chances of meeting the criteria for either Tricare or the CHCBP by: (1) the selection of the form of

18. DEERS is a Department of Defense database that contains the names, Social Security numbers, addresses, and eligibility category of anyone who is eligible to receive Tricare benefits. Information on eligible participants can be verified by contacting DEERS (http://www.humana-military.com/south/bene/tools-resources/handbooks/Std-Extra/updating-DEERS.asp), a regional Tricare managed-care support contractor (http:// www.tricare.mil/contactus/), a Tricare Service Center located at most major military installations; or the nearest uniformed services personnel office (ID card facility). While Tricare beneficiaries may make address changes, in order to add, delete, or change the *status* of a Tricare beneficiary, the military sponsor may need to submit proper documents, such as a marriage certificate, divorce decree, and/or birth certificate. Additional avenues in determining DEERS status or to update information, see below:

1. Visit a local uniformed services personnel office. RAPIDS Site Locator, http://www.dmdc.osd.mil/rsl (last visited May 25, 2009).
2. Contact the Defense Manpower Data Center Support Office (DSO) at 1-800-538-9552.
3. Fax address changes to DEERS at 1-831-655-8317.
4. Mail the address change to the Defense Manpower Data Center Support Office, Attn: COA, 400 Gigling Road, Seaside, CA 93955-6771.
5. DEERS, http://www.tricare.osd.mil/deers (last visited May 25, 2009).

19. The CHCBP is managed by a DoD Contractor, Humana Military Health Care Services, Inc., Attn: CHCBP, PO Box 740072, Louisville, KY 40201. Its toll-free number is 1-800-444-5445. More contact information about the CHCBP is available through the website at www.humana-military.com.

action they choose (i.e., divorce vs. legal separation); (2) the timing of when to bring the action (i.e., after the 20/20/20 or 20/20/15 rules is satisfied); and (3) what is obtained by the former spouse as his or her equitable, or community, share of military retirement and survivor's benefits.

This article will also discuss the consequences of a former spouse's remarriage on either satisfying the eligibility criteria for Tricare or CHCBP, and that it may cause forfeiture of coverage. *As a general rule, remarriage will cause a former military spouse to forfeit his or her eligibility under either Tricare or CHCBP*. There is only a narrow exception for the former spouse who can qualify for *unlimited* CHCBP coverage, which allows for remarriage *after* age fifty-five.

A similar caution is made about the unremarried former spouse enrolling in an employer-provided health care plan. As it relates to Tricare eligibility, doing so will cause a former spouse to lose his or her Tricare coverage. However, as will be explained later in the discussion of "dual coverage," under the CHCBP, it may be possible, even advisable, for a former spouse to have both the CHCBP and enroll in another health care plan. Being alert to this difference between Tricare and the CHCBP will assist the attorney and client in making more knowledgeable decisions for transitional or long-term health care that is tailored to the former military spouse's needs.

In military health care, *medical* and preventive *dental* benefits are not provided under the same plan. Neither Tricare nor CHCBP provide for a routine or preventive *dental* benefit for unremarried former military spouses. While dental insurance programs are available for both active duty[20] and retired military[21] personnel and their dependents (including current spouses), *former* spouses are excluded from coverage under these statutes.[22] Certain *abused* spouses and *abused* former spouses may be eligible for either *transitional* health and dental benefits or for Tricare and Tricare Retiree Dental Insurance.

In this article, the term "divorce" is used to describe the termination of a marital relationship between a spouse and a military member. However, under the referenced federal statutes and regulations, the term "divorce" is synonymous with "dissolution" or "annulment." Since the term "legal separation" or "separate maintenance" *does not* bring about the cessation

20. 10 U.S.C. § 1076a(k) (2008).

21. 10 U.S.C. §§ 1076c(b), (j)(1).

22. Neither 10 U.S.C. § 1076a nor § 1076c specifically provide for former spouse *dental* coverage. Both statutes, § 1076a(k) and § 1076c(b), (j)(1), refer back to 10 U.S.C. § 1072(2) for the definition of "dependent," but specifically *omit* reference to §§ 1072(2) (F)–(H) within that definition. Notable is that § 1072(2)(F)–(H) are the definitions of *former spouses* who are eligible for postdivorce Tricare benefits.

of the legal state of marriage, those two terms are distinguished from the term "divorce."

Three appendices appear at the end. The appendices may be enlarged to 8½" x 11" on a standard copier for easier reading. Appendix 1 is a CHCBP flowchart to help determine who is eligible for coverage and for how long. Appendix 2 is a reference table of health care options for former spouses, and discusses when Tricare or the CHCBP is available. Properly advising clients on their health care options and helping them make wise choices should be the goal of any family law practitioner. Appendix 3 is an Attorney Advisory Letter that should be provided to any client who wants to waive a claim to former spouse survivor benefits or to receiving a portion of military retired pay, as by doing so will prevent them from seeking *unlimited* coverage under the CHCBP.

Integrating military medical benefits into a comprehensive divorce plan should never be an afterthought in case management. Three fellow members of the ABA Section of Family Law Military Law Committee have blazed the way with landmark articles and publications for assisting family law practitioners in managing their military divorce cases. Peter Cushing's, *The Ten Commandments of Military Divorce: Representing the Nonmilitary Spouse, parts one*[23] *and two*[24] offer a concise treatment of the ten most important issues to remember in handling a military divorce case. Marshal Willick's *Military Retirement Benefits in Divorce*[25] and Mark Sullivan's *The Military Divorce Handbook*[26] provide excellent in-depth treatments of military divorce issues, negotiating strategies, and sample clauses for agreements and court orders.

## II. Tricare Options for Unremarried Former Spouses

### *A. A Short History on Military Health Care for Family Members and Former Spouses*

Until the later part of the nineteenth century in America, the War Department's medical resources existed solely for providing care for soldiers, sailors, and marines. Few family members accompanied servicemembers on their assignments (called postings), and their medical care was essentially given as a professional courtesy by military surgeons and doctors on a space-available basis. It was not until 1884 that military med-

23. Peter Cushing, *The Ten Commandments of Military Divorce: Representing the Nonmilitary Spouse* (pt.1), FLA. B.J. Jul.–Aug. 1995, at 66.

24. Cushing, *supra* note 1, at 84.

25. MARSHAL S. WILLICK, MILITARY RETIREMENT BENEFITS IN DIVORCE: A LAWYER'S GUIDE TO VALUATION AND DISTRIBUTION 133–140 (1998).

26. MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK, A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES 236–249, 522 (2006).

ical care became an *entitlement* for family members, when Congress directed that the "medical officers of the Army and contract surgeons *shall whenever possible* attend to the families of the officers and soldiers free of charge."[27] World War II created an influx of young male draftees with wives of childbearing age. The military medical-care system, which was already on a wartime footing, simply could not handle the large number of births and care of very young children. In 1943, Congress authorized the Emergency Maternal and Infant Care Program (EMIC). It provided for maternity care through the various states' health departments and allowed for follow-on care for infants for up to one year after birth. Only the lowest four enlisted pay grades (E-1 through E-4) were allowed this benefit, and noncommissioned and commissioned officers were left to provide health care to their families at their own expense.

The Korean Conflict further strained the capabilities of the military health care system; and, on December 7, 1956, the Dependents Medical Care Act was signed into law. The 1966 amendments to this Act created what would be known as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). This legislation brought military retirees, their family members, and certain surviving family members of deceased military sponsors under an *established* and *funded* Department of Defense health-care system. In 1988, the CHAMPUS Reform Initiative (CRI) led to military family members being afforded a greater choice of plans in which they might better use their military health care benefits. Due to the size of the contract and the dispersed customer base of the active-duty dependents and military retirees and their families, the Tricare program was implemented on a regional basis across the United States. Today 9.4 million beneficiaries receive their health care under various Tricare programs.[28]

The evolvement of medical benefits for *former military spouses* traces its roots to the landmark United States Supreme Court's decision in *McCarty v. McCarty.*[29] While the *McCarty* decision preempted state courts from dividing military retired pay upon divorce, it provided the catalyst to awaken the nation to the significant contributions by the nonmilitary spouse and the hardships they too suffer during service to the country. Congress responded to *McCarty* with passage of the Uniformed

27. This short history of the development of military health care for families is taken from the Tricare website. History of Tricare, http://www.tricare.mil/mybenefit/ProfileFilter. do;jsessionid=KFKR4rZPxjgh3LrS71nBTVHG2xVv320SG9yFJqXdvr2K5QyT1qT7!1229555621?country=United+States&zipCOde=85050&plan=TRICARE+Prime&status=Retired+Service+Member&puri=%2Fhome%2Foverview%2FWhatIsTRICARE%2FHistory (last visited May 25, 2009).

28. *Id.*

29. 453 U.S. 210 (1981).

Services Former Spouses Protection Act.[30] Within months of the *McCarty* decision, Congress set about examining and developing a comprehensive set of protections that afforded former spouses greater protections not just for their right to claim a portion of military retired pay as marital (community) property, but also to afford access to military health benefits. Congress was at the time considering thresholds for determining which former military spouses should receive a share of the military pension or other military benefits. Creditable service of at least twenty years was the minimum needed for the military sponsor to retire with a pension and also to receive postretirement access to CHAMPUS health benefits. Congress, therefore, required former spouses to have been married to their military sponsor for a similar length of time that was also *concurrent* with twenty years of military service.[31] Within the military community, the pairing of these three thresholds was reduced to the acronym of being qualified as a "20/20/20 spouse," thus signifying that all three thresholds were satisfied. This would become the origin of the 20/20/20 rule.[32]

Within two years of providing former spouses access to military health care, Congress was flooded with sad stories of the inequities of many other former military spouses who had lengthy and often difficult marriages to their military sponsors. These spouses were, however, left out of the entitlement to postdivorce health care, often because they were a few days or months short of qualifying under the 20/20/20 rule. So in 1984, Congress lowered the threshold for former spouses to be eligible for CHAMPUS benefits to fifteen years of marriage that is concurrent with military service. The threshold was set so that only those unremarried former spouses who were married for at least fifteen years of the military sponsor's twenty years of creditable service and were divorced *prior* to April 1, 1985, from a marriage of at least twenty years, could receive the same health care entitlements as had been reserved for the 20/20/20 former spouses.[33] There would be a transition period, but eventually those unremarried 20/20/15 former spouses who divorced *on or after* April 1, 1985, would have only *one year* of access to CHAMPUS benefits.[34] So now there was the 20/20/15 rule to also apply. The breakpoint for the 20/20/15 spouse who divorced on or *after* April 1, 1985, was enormous. It essentially meant the difference between *long-term* health care and instead having only *one year* of *transitional* coverage to make alternative health-care arrangements.

30. 10 U.S.C. § 1408 (2008).

31. H.R. Rep. No. 97-749, at 165–166 (1982) (Conf. Rep.), *reprinted in* 1982 U.S.C.C.A.N. 1569–1571.

32. 10 U.S.C. § 1072(2)(F).

33. *Id.* at § 1072(2)(G).

34. *Id.* at § 1072(2)(H).

The one-year versus lifetime disparity brought about by the application of the 20/20/20 and 20/20/15 rules still created too much disparity in the treatment of former spouses. Congress wanted to provide better transitional health benefits to the 20/20/15 former spouses.

As will be seen later in this article, the 20/20/15 unremarried former spouse who divorced *after* April 1, 1985, will also be eligible for enrollment in the CHCBP after the end of the one-year period of Tricare coverage. This transition from Tricare to CHCBP affords the 20/20/15 spouse with a minimum of forty-eight months of health care coverage between these two programs.[35] And there is even more good news if the 20/20/15 unremarried former spouse also happened to receive any portion of the military member's retirement pension or was made a former spouse beneficiary under the Survivor Benefit Plan. For these 20/20/15 former spouses, a long-term health care option will be available under the CHCBP and its *unlimited* coverage provision.[36]

### *B. What Is Tricare and What Does It Offer Military Family Members?*

"As a major component of the Military Health Care System, Tricare brings together the health care resources of the uniformed services and supplements them with a broad network of civilian health care professionals, hospitals, clinics, and pharmacies to provide access to high-quality health care services while maintaining the capability to support military operations."[37] Tricare serves to integrate sixty-three major military hospitals and 413 medical clinics with a nationwide network of civilian health care providers, hospitals, and urgent care facilities.[38] Essentially everything from preventive medicine and immunology to major hospitalization and specialized care is available under the Tricare umbrella of plans and programs.[39] Other than their quarterly premiums, co-pays, and

35. Such 20/20/15 unremarried former spouses cannot be enrolled in both Tricare and CHCBP. (See 10 U.S.C. § 1078a(b)(3)(C) and 32 C.F.R. § 199.20(d)(1)(iii)(C) (2009) for eligibility for enrollment.) Once the one-year period of Tricare coverage ends under § 1072(2)(G), then a 20/20/15 former spouse may enroll in the CHCBP under 10 U.S.C. § 1078a (g)(1)(C) and 32 C.F.R. § 199.20(d)(4)(i)(C), provided it is done within sixty days of the end of his or her Tricare coverage.

36. 10 U.S.C. § 1078a(g)(4); 32 C.F.R. § 199.20(d)(6)(iv).

37. What is Tricare?, http://tricare.mil/mybenefit/ProfileFilter.do;jsessionid=KbCFDfsTvmQq3nKQh94q6QJ2s3vyvQQT9LT2qhJn7Tcz756kfQpW!1696767524?puri=%2Fhome%2Foverview%2FWhatIsTRICARE (last visited May 25, 2009).

38. *Id.*

39. To see what types of medical services are covered under Tricare, go to the Tricare website, which offers an "A-Z Index" of covered medical services available to Tricare beneficiaries. Covered Services, http://tricare.mil/mybenefit/home/Medical/IsItCovered.jsp (last visited May 25, 2009).

deductibles, those eligible unremarried former spouses who enroll in Tricare Prime and utilize a military medical facility and pharmacy can obtain essentially all of their health care with very minimal out-of-pocket expenses. For anyone covered under Tricare, there also exists an annual catastrophic cap of $3,000 for out-of-pocket expenses, which protects an eligible former spouse from financially devastating health-care costs.

Given that military family health care has now been around for almost four decades, it is easy to see why military spouses have grown to rely extensively on Tricare for their medical care. For the military spouse who has been married to a military sponsor long enough for the servicemember to retire, Tricare may very well be the *only* medical system that he or she has ever known. Considering the high cost of alternative private health care insurance, including the CHCBP, whenever possible, the family-law practitioner should make it a high priority to ensure continued Tricare coverage for former military spouse clients.

### *C. Is Tricare a Benefit That Can Be Arranged by Agreement or Court Order?*

Many family law practitioners mistakenly believe that state courts have the authority to order the military sponsor to arrange for a former spouse to continue to receive Tricare coverage. After all, the same state court judges can divide military pensions and award survivor benefits. Congress *has* authorized state courts to divide military retired pay[40] or to order former spouse beneficiary status under the DoD Survivor Benefit Plan[41] as part of a divorce, annulment, or legal separation. However, Congress has *not* delegated similar authority to state courts to *order* continued coverage under either the Tricare or CHCBP programs. Instead, the legal authority authorizing former spouse benefits under either Tricare[42] or CHCBP[43] is solely found in each enabling statute and implementing regulation. So even by agreement, or court order, a military former spouse cannot be made eligible for Tricare or CHCBP enrollment unless he or she first meets the statutory and regulatory criteria.

For an unremarried military former spouse to *remain eligible* for Tricare upon divorce, there are some immediate questions the family law practitioner should ask the client to determine if postdivorce coverage will be available:

1. Is the spouse currently enrolled in the DEERS database system and

40. 10 U.S.C. § 1408(c).
41. 10 U.S.C. §§ 1448, 1450.
42. 10 U.S.C. § 1072(2)(F)–(H) (2008); 32 C.F.R. § 199.3 (2007).
43. 10 U.S.C. § 1078a (2008); 32 C.F.R. § 199.20.

does he or she have a *military dependent identification card*?

2. For how long has the spouse been enrolled in Tricare before the final decree is likely to be entered?
3. Is the spouse also enrolled in an employer-provided or sponsored health care plan, and has the spouse evaluated that plan against Tricare to determine which will be most advantageous?
4. Has the marriage to the military sponsor been for at least twenty full years as measured from the date of the parties' marriage certificate through the likely date of entry of a final decree of divorce, dissolution, or annulment?
5. Has the military member served at least twenty years of creditable military service for retirement so that he or she may be eligible for a regular (active duty) or nonregular (reserve component) retirement?
6. How much of the client's marriage was *concurrent* with the military member performing his or her *creditable service* so as to make him or her eligible for a regular or nonregular retirement?

With the answers to these six questions, the family law practitioner can next determine if the military former spouse can satisfy one of two rules for Tricare coverage upon divorce from the military sponsor.

### *D. The 20/20/20 and 20/20/15 Rules for Former Spouse Tricare Coverage*

*The 20/20/20 Former Spouse Rule:* Earlier in this article we learned the evolvement of health care for military dependents and how certain former spouses of members of the uniformed services were made eligible for post-divorce health care coverage proximate to the passage of the Uniformed Services Former Spouses Protection Act. Within the military community, a term has been coined to describe a former spouse who has *satisfied all of the criteria* so as to allow him or her upon divorce to continue to receive essentially the same military health care benefits (exclusive of dental care) as was enjoyed during the marriage to the military member. This term is called the "*20/20/20 Former Spouse*." In the world of military divorces, it is the Holy Grail for former spouses to achieve. The term arose out of how Congress established *three* thresholds for determining eligibility for Tricare coverage if divorce occurred. As an *initial* threshold, Congress required that the former spouse's marriage to the military sponsor must have been for at least twenty full years. A *second* threshold was that the military member's creditable service for determining retirement also had to have been for at least twenty years. The *third* threshold concerns how many of the years of marriage and such creditable military service was concurrent with one another. Congress decided that

if at least twenty years of marriage and military service were concurrent over a twenty-year career, then the former spouse should have the same Tricare health benefits as did the military member.[44] Thus a former spouse who cleared all three thresholds can be anointed a "20/20/20 Former Spouse." As long as they do not remarry or enroll in an employer-provided health care program, the unremarried former spouse's Tricare benefits are identical to the military sponsor.

*The 20/20/15 Former Spouse Rule*: The term "20/20/15 Spouse" is similarly used to describe a former spouse whose *concurrent period of a twenty-year marriage and military service* was *less* than 20, but still at *least* fifteen years. For those former spouses who divorced *prior to April 1, 1985*, Congress afforded then the same Tricare coverage as was afforded a 20/20/20 former spouse, provided they too did not remarry or enroll in an employer-sponsored health care plan.[45] For those 20/20/15 former spouses who divorced on or *after April 1, 1985*,[46] Congress provided for Tricare coverage for only *one year* commencing with the day after the entry of a final decree of divorce, dissolution, or annulment.[47] Once again the 20/20/15 former spouse, who divorced *after* April 1, 1985, will lose

44. 10 U.S.C. § 1072(2)(F); 32 C.F.R. § 199.3(b)(2)(i)(F)(1).

45. 10 U.S.C. § 1072(2)(G); 32 C.F.R. § 199.3(b)(2)(i)(F)(2)(i).

46. 10 U.S.C. § 1072(2)(H); 32 C.F.R. § 199.3(b)(2)(i)(F)(2)(ii) & (iii).

47. There is a confusing era (January 1, 1985, to September 29, 1988) for determining how long 20/20/15 former spouses would be allowed Tricare under 10 U.S.C. §§ 1072(2)(G)–(H). Under §§ 1072(2)(G)–(H) the break-point used for making this determination was whether the final decree of divorce, dissolution, or annulment occurred *before* April 1, 1985. If the 20/20/15 rule could be satisfied in a divorce that occurred *prior to April 1, 1985*, then the 20/20/15 former spouse would be treated identically to a 20/20/20 former spouse. For those 20/20/15 spouses with final decrees *occurring on or after April 1, 1985*, Congress allowed for a phase-out of former spouses medical benefits that were provided before September 29, 1988. For example, a 20/20/15 former spouse whose decree of divorce was entered on or *after* April 1, 1985, but *before* September 29, 1985, was allowed Tricare coverage until December 31, 1988, or for two years from the date of the divorce, whichever was later. *See* 32 C.F.R. § 199.3(b)(2) (i)(F)(2)(ii). Congress further required DoD under 10 U.S.C. § 1086a to provide for a *conversion health policy* to be made available to those 20/20/15 former spouses, who would no longer receive Tricare coverage because their final decree occurred on or after April 1, 1985. Later, and after the CHCBP became available for 20/20/15 former spouses, Congress by section 4408(c) of Pub. L. 102-484 prohibited any eligible 20/20/15 former spouse from being covered under both a § 1086a "conversion policy" and the CHCBP under 10 U.S.C. § 1078a. Even though the transition period for the 20/20/15 former spouses have now long passed by more than twenty years, the transition-era provisions still appear in 32 C.F.R. § 199.3(b)(i) and often confuse former spouses, family-law practitioners, and Tricare administrators. It remains important, however, to be able to determine whether a 20/20/15 former spouse meets the criteria for 10 U.S.C. § 1072(2)(G) or is more properly to be placed under 10 U.S.C. § 1072(2)(H) as those former spouses, who are § 1072(2)(G) spouses, will also qualify for Tricare for Life when he or she becomes eligible for Medicare, Part A, at age sixty-five. (See subsequent discussion of Tricare for Life in this article.) As many of those former spouses who were divorced before April 1, 1985, and during that transition era of two decades ago are only now becoming of Medicare age, it is necessary to inform them they may also now be eligible for Tricare for Life.

Tricare benefits if he or she remarries or enrolls in an employer-provided health care plan during their 365 days of Tricare coverage. As will be discussed later concerning the CHCBP, a follow-on option is available for the 20/20/15 former spouse (divorced on or after April 1, 1985) to couple the twelve months of Tricare eligibility with the thirty-six months of CHCBP *transitional* coverage; and, thus, extend the availability of health care to forty-eight months of coverage (i.e., one year of Tricare coverage plus thirty-six months of CHCBP coverage). As will be discussed later, these forty-eight months of combined coverage may be further extended *for as long as requested* if the 20/20/15 (who divorced on or after April 1, 1985) can meet the additional criteria for *unlimited* CHCBP coverage.

*Reoccurring Questions When Attempting to Apply the 20/20/20 and 20/20/15 rules*: As simple as these two rules may appear, they can be the devil to apply in real life. Having had considerable experience in this area, both as a military attorney and later as a family-law practitioner, this author will share some observations of real-world practice with interpreting and applying the two rules and their statute, 10 U.S.C. § 1072(2)(F), (G), (H) (2008):

1. Attorneys and their clients typically wait until the end of the case to see how these rules apply. In practice, the rules should be considered *from the very start* so that case management and strategy can satisfy the rules at the conclusion of the case. The attorney representing the nonmilitary spouse must insist that his or her client's health care after the divorce be made a high priority, and the subject should be brought up frequently at settlement discussions, mediation, and at the time the case is tried.
2. The family-law practitioner should tactically consider whether delaying a divorce action or, alternatively, instituting a separate maintenance (or legal separation) action is advisable in order to keep the nonmilitary spouse eligible for Tricare coverage until either the 20/20/20 or 20/20/15 rules can be satisfied.[48] For example, an action for *separate maintenance* or *legal separation* (where state law will allow) may serve to resolve all custody, support, alimony, property division, etc., issues between the parties, *but still leave the legal status of marriage intact*. Often the parties may be just a few months away from satisfying any one, or all, of the components of the 20/20/20 or 20/20/15 rules at the time the divorce action is foolishly made final. Thinking health care coverage through can make a difference. Simply by postponing *entry* of the final decree until either of the rules' criteria is satisfied or a medical condition has been addressed

48. This strategy is discussed in detail in WILLICK, *supra* note 25, at 137–38.

can result in a huge health care benefit to the former spouse.[49]

3. Sometimes the parties will see an incentive to cooperate to ensure the former military spouse is made eligible for Tricare coverage. This situation can very often lead to some creative bargaining opportunities in the settlement process. For instance, say the nonmilitary spouse is one year shy of being able to satisfy one or all of the components of the 20/20/20 rule. In negotiations, he or she demands alimony to help pay for the CHCBP premiums that will need to be paid after the one year of Tricare coverage has ended. The military spouse could counter by agreeing to stay on active duty or postpone the taking of a final decree by however many months is necessary for the nonmilitary spouse to satisfy the 20/20/20 rule. In return, the military member wants to set a date prior to entry of a final decree as the *valuation date* the parties will use in dividing the military retirement. Another opportunity might arise in a reservist or National Guardsman agreeing to perform a period of active duty sufficient to allow the nonmilitary spouse to be covered under Tricare, and then time the divorce so that he or she is made eligible to enroll in the CHCBP. Assuming the nonmilitary spouse can satisfy the 20/20/20 rule, it may allow for the CHCBP coverage to be extended (under the *unlimited* coverage provision) until the former spouse is again eligible for Tricare coverage at the time the military sponsor starts drawing retired pay at age sixty. The attorney representing the nonmilitary spouse must be ever alert to bargaining away the former spouse's beneficiary status under the Survivor Benefit Plan (SBP). The SBP premiums are substantial, and the military sponsor usually wants to avoid this hefty deduction from his or her retired pay. Great care should be applied in allowing the former spouse to waive such coverage because it may later be a necessary qualifier for him or her to receive *unlimited* CHCBP coverage. Instead of negotiating away the former spouse's SBP coverage, consider bargaining to reduce the SBP Base Amount, which can also serve to reduce the costs of coverage and still qualify the former spouse for the CHCBP. There is simply no substitute for the attorneys and client "doing the math" to

49. For example, even a spouse who is pregnant at the time of a divorce loses her maternity care as of midnight on the date a final decree of divorce is entered. Why not consider extending the case through an interlocutory order? At least within the Department of the Navy, its regulations reference that health care to a spouse will continue, even in Navy military treatment facilities for a spouse who may be under an interlocutory order or decree of separate maintenance. Simply delaying entry of a final decree until after the birth of the child would ensure the nonmilitary spouse had no break in her maternity care. *See* 32 C.F.R. § 728.31(c)(4). By analogy, this would also apply to treatment of far more serious illnesses, such as cancer, heart conditions, or other life-threatening diseases or illnesses.

see how a nonmilitary spouse's eligibility for 20/20/20 or 20/20/15 status or for *unlimited* CHCBP coverage might translate into huge savings and preclude the need to pay commercial health-care premiums. Achieving such objectives may be well worth the concessions required in other areas of the settlement process.

4. Who determines if either the 20/20/20 or 20/20/15 rules are satisfied in any given case? The short answer is that 32 C.F.R. § 199.3(h) (2007) provides the decision will be made by the uniformed service to which the military sponsor is assigned. The director of the office that oversees CHAMPUS may review the status of an individual who is granted, or denied, Tricare eligibility under this regulation. In practice, the person who will most likely determine if the 20/20/20 or 20/20/15 rule is satisfied by the facts in a given case is an administrative person who is not an attorney. Typically his or her level of understanding of either rule's criteria is "hit or miss." Here is the real-world scenario. Upon divorce, either or both of the parties will typically go to the nearest military installation to update the military sponsor's DEERS database. With a copy of the divorce decree, marriage certificate, and some basic information about the military member, the party will be interviewed by a lower-ranking enlisted person and, most often, a customer service representative. They will then attempt to determine the number of years of marriage, years of creditable service for retirement, and how many years of the marriage were concurrent with that service. Only infrequently is an attorney from the staff judge advocate's office asked to determine if either one of the rules can be satisfied. In most cases, it is simply an administrative "up or down decision" that is made by an often inexperienced person. From that decision, either the former spouse is granted Tricare coverage or is denied it.[50] So, obviously, it is advisable for the attorney representing the former military spouse to do everything ethically possible to ensure a favorable decision at this initial step. Within the bounds of advocacy for a family law attorney, it is always advisable to have a *special finding of fact* stated in the final decree that "the court has considered and determined that the 20/20/20 (or 20/20/15) rule under 10 U.S.C. § 1072 and 32 C.F.R. § 199.3 had been satisfied in the case." Often such an entry may be instrumental in convincing the administrative person in making the initial decision that the rule is satisfied and that the DEERS database

50. See 10 U.S.C. § 1084 (providing that an administrative determination by the administering Secretary of the Uniformed Service as to *eligibility* for medical benefits is *conclusive* and may be changed only because of new evidence, for good cause, or fraud).

may be appropriately updated for the former spouse. However, the attorney and the client must always remember that either the DEERS or the director of CHAMPUS can require documentation to be submitted to review the eligibility of the unremarried former spouse for Tricare coverage. Any health care expenses that have been paid by the U.S. Government, based upon a false or fraudulent entry, can be recovered from the former spouse. In appropriate cases, the matter can be referred to the local U.S. attorney for review to initiate a criminal prosecution for fraud or making a false statement.[51]

5. The family-law practitioner should be keenly aware that there is all manner of confusion among clients, attorneys, and even Tricare advisors about the individual components of the 20/20/20 and 20/20/15 rules, and what it may take to satisfy those rules. The most common error is an assumption that simply because the marriage lasted for fifteen or twenty years, the spouse qualifies for Tricare coverage. That is far from the case and very often leads to some dangerous and costly assumptions. As the saying goes, "the devil is in the details!" The 20/20/20 and 20/20/15 rules appear simple enough on their face, but their application confuses even the most seasoned of family-law practitioners. Consider these situations and examples:
   a. *Length of Marriage*: It is simple enough to determine the *inception date* of a marriage based on the record date of the marriage certificate. Likewise, the *termination date* is the filing date of the final decree. But what happens in a common-law marriage (for which there is no clear inception date) that was later solemnized with a legal marriage, for which there is a marriage certificate? (Is the time spent in the common-law marriage simply ignored under the 20/20/20 or 20/20/15 rules?) What about multiple divorces and remarriages between the *same* parties, which *individually* do not satisfy the twenty-year threshold but *cumulatively* do satisfy the twenty-year requirements? What happens if a nonmilitary former spouse satisfies the 20/20/20 rule at the time of the first divorce, but then remarries the former military sponsor, only to later divorce for a second time? Will the nonmilitary former spouse be able to then re-satisfy the 20/20/20 rule upon the second divorce, even though the second marriage (considered alone) would not satisfy any of the components of the 20/20/20 rule?[52] What if the parties marry, or enter into a *civil union,* in a foreign country and then (without divorcing) they married one another

51. *See* 18 U.S.C. § 1001 (2008).
52. There appears to be no support for the argument that a former spouse could qualify

again, this time in the United States? Will the inception date be that of their foreign marriage or will it be the date of the marriage that occurred in the United States?[53] What if the parties stipulate to a date much earlier than entry of a final decree for use as the *valuation date* in dividing military retired pay? Does that earlier date shorten the period of the parties' *actual* marriage for determining Tricare eligibility?[54] Remember that beyond an administrative review of a marriage certificate and the final decree to determine what is the *coverture* period of the marriage, the administrators in the Tricare or DEERS system, who apply the 20/20/20 and 20/20/15 rules, lack the knowledge or means of determining the length of a "marriage" if that information exists outside of the four corners of the legal documents. The family law practitioner is well advised not to chance this *finding of fact* to anyone other than the state court judge in the case, who can enter a special finding of fact in the decree as to when the parties were

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under the 20/20/20 or 20/20/15 rules by "tacking" the periods of two or more marriages to *different* military sponsors in order to qualify. However, there is certainly an equitable argument that a former spouse should be allowed to tack two or more marriages to the *same* military sponsor in order to qualify under the 20/20/20 or 20/20/15 rules. Neither the statute, 10 U.S.C. § 1072(2)(F)–(H) nor regulations, 32 C.F.R. § 199.3(b)(i), address this situation either way. Certainly if it were to occur, and no doubt it has, the attorney representing the nonmilitary former spouse should ensure the final decree has a special finding of fact that judicially couples the two periods of the two marriages and declares that the parties are to be considered as married for the total time of their multiple engagements. Otherwise, the attorney will by default defer that conclusion to an administrative person, who may see no basis in the statute or the regulations to couple the two periods.

53. Considering that members of the uniformed services are stationed all over the world, it is a common occurrence that soldiers, sailors, airmen, and marines take local foreign wives during their overseas assignments. Some leave them (often without benefit of divorce) at the time they are reassigned, and others take their foreign spouses to their next assignment. Some will enroll the foreign spouse into the DEERS system, whereas others will never let the military know of their local marriage, despite regulations and orders to the contrary. Bigamy among members of the uniformed services is much less than it once was, but the offense regularly arises as a military justice matter. Because of translation and acceptance issues with foreign marriages and civil certificates, many servicemembers will opt to have another "state side" wedding that provides them a more acceptable document to present to government agencies. It is, however, a *second marriage*, and now the military sponsor has been married twice, even if to the *same* servicemember. For the family-law practitioner, the problem becomes which of the marriage inception dates will be offered as the date from which the 20/20/20 or 20/20/15 rules will be used to qualify under the thresholds? Once again, this is where the final decree can solve that question very easily by a special finding of fact as to the inception date of the marriage and the period of time it has covered.

54. In practice, do not confuse an administrative staffer reviewing the final decree by using the *valuation* date in place of the *legal* date of divorce. Whenever a valuation date is earlier than the actual entry of a final decree of divorce, make it clear that the valuation date is only being used to determined marital property issues and should not be used by any person or agency in determining eligibility for former spouse benefits.

considered *legally married* and for how long they were considered *legally married*. Rare indeed is the occasion that anyone in the uniformed services, at CHAMPUS or at DEERS will refuse to accept a judicial finding of fact that appears in the decree. Family-law practitioners must remember his or her ethical obligations and not allow such a special finding to be entered that is unsupported by the facts in the case.

*b. Length of Creditable Service for Retirement*: There are several types of military retirement and different methods for determining how time served in a particular capacity will be credited toward that retirement.[55] Therefore, confusion often arises on determining what is creditable service. Generally speaking, the term *creditable military service* means "*service that is counted toward the entitlement to receive military retired pay*."[56] For those military members attempting to qualify for a *regular (*i.e.*, active duty) retirement*, the former spouse need only determine the number of months of active duty the member has performed. But what happens if the active duty service has not been continuous? There are often breaks in service where the military member may have gotten out and then returned to active duty such that his or her service has not been continuous.[57] For those seeking a *nonregular* retirement by serving in a Reserve Component (i.e.*,* reserves or National Guard), a year of creditable service would be one in which at least fifty Reserve Credit Points have been earned, making that a "good year" for qualifying for nonregular retirement.[58]

55. See 10 U.S.C. subtitle A, pt. II, ch. 71 for various statutes used to determine *regular* military retired pay, and 10 U.S.C. subtitle E, pt. II, ch. 1223 for *nonregular* (e.g.*,* reserve or National Guard) military retirement. Outside a very small number of military retirement personnel specialists and a very few federal attorneys, the knowledge, experience, and skills are not readily available to accurately determine what is creditable service, especially in cases where a servicemember has gone back and forth in pursuing a regular versus a nonregular retirement.

56. 32 C.F.R. § 199.3(b)(2)(i)(C); U.S. DEP'T OF DEF., FIN. MGMT. REG. 7000.14-R, vol. 7B, ch. 29, § 290205, FORMER SPOUSE PAYMENTS FROM RETIRED PAY (2009), http://www.defenselink.mil/comptroller/fmr/07b/07b_29.pdf. For *regular retirements*, which is the usual retirement of servicemembers with twenty or more years of *active duty service*, "creditable years of service" are determined under 10 U.S.C. § 1405. For *nonregular retirement*, which is the typical retirement of members of the Reserve Component (reserves or National Guard), "years of creditable service" is determined under 10 U.S.C. § 12732, and is based upon how many Reserve Credit Points are earned during their military career. *See* DEP'T OF DEF., INSTR. 1215.07, SERVICE CREDIT FOR RESERVE RETIREMENT (2005).

57. A useful document for the family law practitioner to obtain by discovery is the servicemember's DD Form 215, "Discharge Certificate from the Armed Forces." This single document will provide the recorded dates of creditable service of the military member for determining regular retirement.

58. *See* 10 U.S.C. § 12732(a)(2) (2008).

But what happens if the military member did not earn at least fifty credit points in a given year, such that the year will not be "creditable towards retirement"?[59] Like the previously mentioned break in service, a year with *less than* fifty Reserve Credit Points earned will not be counted for the former spouse to satisfy the 20/20/20 or 20/20/15 rules. Now consider how difficult the 20/20/20 and 20/20/15 rules are to apply in a marriage where the military member shifts back and forth between pursuing a *nonregular* and *regular retirement*. The problem for the nonmilitary former spouse will be that even "good years" for determining *nonregular* retirement may not be considered as creditable years of service in determining the military sponsor's eligibility for a *regular* retirement.[60] Stated a little differently, the military member may have twenty *combined* years in the Reserve Component while serving on active duty, but will not be *eligible* to retire under either a *regular* or *nonregular* retirement. A special finding of fact included in a court order stating that *twenty years of creditable service had occurred during the marriage*, which is substantiated with either a DD Form 214, Certificate of Discharge from the Armed Forces, or military service records, may be sufficient to convince a Tricare or DEERS representative that the nonmilitary former spouse satisfies each component of the 20/20/20 or 20/20/15 rule.

c. *Time the Marriage Was Concurrent with Military Service That Is also Creditable for Retirement*: Consider that the esoteric problems discussed in subparagraphs a. and b. above remain just as

59. Another useful document for the family law practitioner to obtain during discovery is the "Reserve Point Summary Sheet," which is an official record of the Reserve Component member's personnel file that shows "year by year" how many points were earned. This document is somewhat analogous to the DD Form 214, "Discharge Certificate from the Armed Forces," for the servicemember pursuing a *regular* retirement. For an excellent and detailed discussion of the National Guard and reserve retirements see SULLIVAN, *supra* note 26, § 8.03, at 415–18.

60. Compare how "years of service" under 10 U.S.C. § 1405 are figured for determining eligibility for a *regular* retirement with how *nonregular* retirement is determined for members of the Reserve Components under 10 U.S.C. § 12733. Generally speaking, periods of time a Reserve Component servicemember spends on active duty can be converted to "creditable service" for determining eligibility for a *nonregular* retirement; however, time spent in the Reserve Component that was not considered "active duty" may not be considered in determining *eligibility* for a *regular* retirement. In the case of the Reserve Component member seeking to qualify for a *regular* retirement, the Reserve Credit Points will only be used to determine the number of years of service for determining military retired pay as well as years for longevity of service for determining their monthly retirement benefit. On the other hand, for a nonregular retirement, time spent on active duty by a reservist will convert to points and can be used to determine a creditable year of service in the reserves for purposes of determining retirement eligibility.

troublesome in determining this component of the 20/20/20 and 20/20/15 rules. Generally for the family-law practitioner, it is a matter of examining the period of the marriage (subparagraph a. above) *against* the time of creditable service (subparagraph b. above) to determine if there are 240 months of *concurrent* time between the two periods. Certainly, the longer the marriage or the longer the military member's service, the easier it is to show the *minimum* 240 months of concurrent time in qualifying for either *nonregular* or *regular* retirement. Once again, if supported by the facts and the law, a special finding of fact made by a state court judge that shows this component of the 20/20/20 or 20/20/15 rules have been satisfied, may be sufficient to persuade the individual who will be updating the DEERS database to show the former spouse is eligible for Tricare.

6. Former spouse's remarriage: The enabling statute is clear that remarriage will disqualify the former spouse from Tricare.[61] But what if the second (i.e., disqualifying) marriage terminates by divorce or by the death of the subsequent spouse? Neither the divorce nor the death of the second spouse serves to invalidate the second marriage such that Tricare eligibility could be restored. What if the second (disqualifying) marriage was to the same person that qualified the former spouse for Tricare in the first place (i.e., what if the military couple divorced but then remarried)? What happens if their second attempt at marriage fails and they divorce again? Will the now "second time" former spouse be requalified for Tricare coverage?[62] Certainly an equitable argument can be made that, on the second-go-round, the former spouse should have no less of a right to Tricare than upon the first divorce. This author could find no loophole with-

61. 10 U.S.C. §§ 1072(2)(F)–(H) (2008).

62. *See id.*; 32 C.F.R. § 199.3(b)(2)(i) (2007). There appears to be no exception for the former military spouse who upon a first divorce qualifies under the 20/20/20 or 20/20/15 rules, *but then remarries the original military sponsor*. Note that upon the event of their second marriage, the DEERS enrollment would change from an *unremarried former spouse* under §§ 1072(2)(F)–(H) to a *spouse* under § 1072(2)(A). DEERS would apply the 20/20/20 or 20/20/15 rules, effective as of the second marriage date, and most likely the former spouse would then not be eligible for Tricare coverage as a qualified spouse under §§ 1072(2)(F)–(H). Obviously, a strong equitable case can be made to DEERS and Tricare that the former spouse should receive the same health care benefits upon the second divorce as he or she received upon the first. However, the issue of entitlement to a federal benefit is a *legal* issue, not an *equitable* one, and federal statutes are often applied literally by the government and courts. As previously suggested, a special finding of fact that the nonmilitary spouse was married to the military sponsor for a combined period of twenty years, and of which twenty of those years were concurrent with creditable military service may aid the former spouse in recapturing his or her Tricare coverage upon the second divorce from the military sponsor.

in the statute or other precedent that would allow for *reinstatement* of Tricare eligibility to a former spouse upon remarriage to the spouse who first qualified him or her for Tricare. Would the argument improve if the subsequent (i.e., disqualifying) marriage ended not by divorce or dissolution, but rather by *annulment*? Could Tricare eligibility then be reinstated because an *annulment* vacates the marriage back to the date of its inception and treats it as if it never *legally* occurred? The statute and implementing regulations offer no suggestion that an annulment would be treated any differently than a divorce;[63] there are no administrative rulings or other precedent published on this issue. Only one source has opined,[64] but without reference to any legal authority, that an *annulment* of the second *disqualifying* marriage would serve to restore those Tricare benefits to the former spouse.

7. Former Spouse Enrollment in an Employer-Provided Health Care Plan: Note, there is a difference between an unremarried former spouse having *available* an employer-sponsored health care plan and actual *enrollment* for coverage under the employer's plan. It is *enrollment* by the former spouse in the employer-sponsored health care plan that serves to terminate Tricare eligibility.[65] But once enrolled in the employer plan, can the former spouse seek reinstatement under Tricare if he or she loses coverage under the employer's plan, whether the disenrollment is voluntarily or involuntarily? While the implementing regulation to the enabling statute does *not* suggest reinstatement is available for loss of employer-provided health care coverage,[66] one expert in the area of military divorce law has opined that a former spouse could regain Tricare coverage if the employer-provided health care plan was no longer available.[67] At a minimum, any former spouse who has Tricare eligibility should remember that, once he or she leaves Tricare coverage, there is gen-

63. 10 U.S.C. §§ 1072(2)(F)–(H) (2008). There is nothing in either this statute or the implementing regulation, 32 C.F.R. § 199.3, that suggests an "annulment" will allow for reinstatement of Tricare eligibility for a previously qualified former spouse. There is a subsection of the regulations, at 32 C.F.R. § 199.3(g), which discusses reinstatement of CHAMPUS eligibility, but there is no mention of "annulment" in that subsection. Under both the enabling statute and implementing regulations, the legal terms "divorce," "dissolution," and "annulment" are all treated the same.

64. ADMIN. & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GEN'S LEGAL CTR. & SCH., U.S. ARMY, UNIFORMED SERVICES FORMER SPOUSE'S PROTECTION ACT GUIDE 24 (2005), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA452505&Location=U2&doc=GetTRDoc.pdf.

65. 10 U.S.C. §§ 1072(2)(F)–(H) (2008).

66. *See* 32 C.F.R. § 199.3(g).

67. *See* WILLICK, *supra* note 25, at 137.

erally no coming back. Therefore, the client should make a wise and informed decision before abandoning Tricare coverage to enroll in an employer-provided health care plan.

8. How Do the 20/20/20 and 20/20/15 rules Apply to Former Spouses of Members of the Reserve Components? The rules of eligibility for unremarried former spouses to Tricare[68] apply equally to *nonregular* (i.e., Reserve Component) retirement sponsors as they do to those military sponsors who had a *regular* (i.e., active duty) retirement. The most significant difference for nonregular retirements is that access to Tricare for either the military member or the former spouse does not occur until the military member has achieved his or her sixtieth birthday or has commenced receiving retired (sometimes called "retainer") pay.[69] Once *nonregular* retirees have commenced receiving retired pay, their military benefits are the same as those who received a *regular* retirement. For determining if each of the components of the 20/20/20 and 20/20/15 rules have been met, the analysis is as follows: (1) For the first component (i.e., determining years of marriage) everything previously discussed for a *regular* retirement is equally applicable for a *nonregular* retirement; (2) for the second component (i.e., concerning years of creditable service for retirement) the task is to determine for which years did the military member achieve *at least* fifty Reserve Retirement Credit Points, thereby making it a "good year" for purposes of determining retirement eligibility for nonregular retirement;[70] and (3) for the years of marriage concurrent with creditable service, it becomes again a task of counting those years of marriage that were concurrent with a year

68. 10 U.S.C. §§ 1072(2)(F)–(H) (2008).

69. There is legislation before the U.S. Senate to allow members of the Reserve Component who have satisfied their twenty years of creditable service, but are not yet age sixty, and, thus, eligible to draw their retired pay and enroll in Tricare coverage, to be allowed to enroll in Tricare Standard for a premium as soon as they satisfy their twenty-year requirement. Such reservists and National Guardsmen are referred to as "gray area reservists," and there are approximately 225,000 Reserve Component members who would be affected by the legislation. The legislation is Senate bill S. 731 and is being sponsored by Senator E. Benjamin Nelson (D-NE). Presently it has twenty cosponsors in the Senate, including Senator Lindsey Graham (R-SC), who is the ranking Republican on the Senate Armed Services Committee. It also has the support of many special-interest military organizations, including the Military Officers Association of America (MOAA). *See* MOAA, http://capwiz.com/moaa/issues/bills/ (last visited May 26, 2009). The legislation was reported in the Air Force Times as being likely to pass and become part of the 2010 Defense Authorization Act. A.F. TIMES, APR. 27, 2009, at 6. Status of the legislation, including the text of the bill is available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2647. Unfortunately, the legislation in its present form *excludes unremarried former spouses* as it does not include subsections (F), (G), or (H) of 10 U.S.C. § 1072(2) in defining the term "dependents."

70. 10 U.S.C. § 12733 (2008).

of creditable service for retirement.[71] Family-law practitioners should realize that for *nonregular* retirees who divorce *after* age sixty, a former spouse can immediately utilize his or her 365 days of Tricare coverage. But, if the divorce occurs during the "gray area" for the reservist, meaning the period *after* the military member has *qualified* for *nonregular* retirement but before he or she reaches age sixty[72] or draws retired pay, then the one year of Tricare eligibility for the 20/20/15 former spouse will essentially be unavailable because the military member is not yet eligible for Tricare.[73] Thus, if the time that must pass until the military sponsor is age sixty is considerable (or whenever he or she commences to draw retired pay), and the former spouse can only satisfy the 20/20/15 rule, the significance of securing Tricare coverage for the former spouse is greatly diminished because it is a military benefit that is essentially unachievable.[74] It may be much better for such 20/20/15 former spouses to negotiate qualifications for eligibility under the CHCBP. As will be discussed later in this article, a 20/20/20 or 20/20/15 former military spouse could be made eligible for the CHCBP by being enrolled in DEERS for Tricare *immediately before the divorce*, and then using the CHCBP *transitional* and *unlimited* coverage until the

71. Perhaps the easiest method of applying the 20/20/20 and 20/20/15 rules for members of the Reserve Component is to obtain the most recent copy of their Reserve Credit Point Summary Sheet, which lists the years of service in the uniformed services and what points, if any, were earned for each year of participation. Simply overlay the months of marriage that are concurrent with those years of service and determine how many months/years of the marriage did occur for each of the military sponsor's "good years" (i.e., creditable years) of service. As long as there are 240 months, or twenty years, of marriage concurrent with those "good years," then the nonmilitary spouse can claim them as qualifying under the 20/20/20 rule. The same analysis would apply to a case under the 20/20/15 rule, except that fifteen years, or 180 months, of marriage would need to be found as concurrent with any of the twenty "good years" of service.

72. A "Gray Area Reservists" is a term used to describe a member of the Reserve Component (reserves or National Guard) who has received notification that he or she has satisfied the minimum twenty years of creditable service to qualify for a nonregular military retirement, but who has not yet reached age sixty in order to commence receiving retired pay. The "gray area" is, therefore, the period between the issuance of the "20 Year Letter" from the military member's reserve personnel headquarters and when the military member has his or her sixtieth birthday or starts to draw retired pay. The military member may continue to accumulate additional creditable years of service well after the issuance of the "20 Year Letter." Once again, this ability to achieve additional years of service for retirement at the time the parties are contemplating divorce may open the possibility of negotiating the deferment of entering a final decree or choosing to pursue an action that will not result in terminating the marriage.

73. By law, the one year of Tricare coverage available to the 20/20/15 former military spouse who divorced on or after April 1, 1985, must be used *within one year of the entry of the final decree*. *See* 10 U.S.C. § 1072(2)(H) (2008); 32 C.F.R. § 199.3(b)(2)(i)(F)(2)(iii) (2009).

74. This could change for the 20/20/15 former spouse if Senate bill S. 731, discussed earlier, is changed to allow unremarried former spouses to also become eligible for Tricare Standard.

military sponsor reaches age sixty and becomes eligible for Tricare coverage.[75]

9. Tricare Eligibility Generally Ends at Age Sixty-Five Upon the Beneficiary's Becoming Eligible for Medicare: Once a Tricare beneficiary becomes eligible for Medicare Part A at age sixty-five, entitlement to Tricare will usually cease.[76] Provided, however, that the Tricare beneficiary is a military retiree, the current spouse of a retiree, *or a 20/20/20 former spouse*, upon becoming eligible for Medicare Part A, he or she may then enroll in Medicare Part B and, thus, become eligible for Tricare for Life (TFL).

### *E. Tricare for Life (TFL)*

Many World War II and Korean conflict veterans who served in the uniformed services long enough to become entitled to military retired pay believed that they and their dependents had been promised life-time health care as a benefit of their career service to the country. Unfortunately, the

75. For example: a forty-five-year-old Reserve Lieutenant Colonel (0-5) received his 20 Year Letter, signifying that he has achieved his twenty years of creditable service to qualify for a *nonregular* retirement. His forty-four-year-old wife, whom he married right out of high school, will easily satisfy the 20/20/20 rule and be able to receive Tricare, *but only when her military sponsor reaches age sixty*. The parties desire an amicable divorce, but the wife has no available health care to bridge the next fifteen years until she can benefit from Tricare. Prior to the entry of a final decree of divorce, the military sponsor could volunteer to serve a period of at least thirty days of active duty, and thereby allow for the soon-to-be former spouse to be enrolled in DEERS and thus covered under Tricare for at least one day of his service. (Under 10 U.S.C. §§ 1076 and 1077, a dependent becomes entitled to Tricare after the military sponsor has served thirty days of active duty.) If the timing of the entry of a final decree can occur while the military sponsor is serving the period of active duty, then the former spouse could qualify for the CHCBP *transitional* coverage. If the former spouse also receives a portion of the Reserve Retired Pay or has former spouse beneficiary status under the SBP, then he or she will also be eligible for *unlimited* CHCBP coverage. The former spouse can then use the CHCBP to provide "bridge" health care coverage until the sponsor reaches age sixty, when she can enroll for Tricare coverage as a 20/20/20 former spouse. It is significant that the former spouse will also later be eligible at age sixty-five for Tricare for Life (TFL). The same would apply to the 20/20/15 former military spouse, except that he or she would not be able to change to Tricare when the military sponsor reached age sixty, but could continue coverage under the CHCBP for as long as requested. The former spouse must remember that remarriage *at any age* will make him or her *ineligible* for Tricare. Conversely, the 20/20/20 and 20/20/15 former military spouse may continue to qualify for unlimited coverage under the CHCBP, *provided the remarriage occurred after the former spouse reached age fifty-five*.

76. *See* 32 C.F.R. § 199.3(b)(2)(i)(D). Medicare eligibility does not always mean beneficiaries lose their eligibility for Tricare coverage. The following three examples are taken from a website sponsored by the Department of the Army, stating when a Tricare beneficiary can have *dual* Tricare and Medicare eligibility:

1. Beneficiaries who become *eligible* for Medicare Part A on the basis of age sixty-five and *enroll* in Medicare Part B continue to be eligible for Tricare, secondary to Medicare (e.g., Tricare for Life).
2. Family members of active-duty servicemembers who are also eligible for Medicare, for

interplay of Tricare and Medicare was evolving during the early 1990s, and no special provision was made for continuing these veterans' Tricare coverage beyond age sixty-five. Essentially when Veterans became age sixty-five and thus *eligible* for Medicare Part A, they lost their Tricare and were treated no better for health care than if they had never served a day on active duty.[77] Many of these military veteran-retirees believed the loss of their Tricare eligibility and being forced to seek their health care solely under Medicare was a solemn promise broken by national leaders. The battle was fought heatedly both in Congress[78] and in the federal courts.[79] The veterans' allegations were that the country had breached its promise of free lifetime access to health care for military retirees and a denial of due process.

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any reason, retain eligibility for Tricare Prime, Extra, or Standard, whether or not they purchase Medicare Part B. However, the purchase of Medicare Part B, in this instance, is recommended. If they do not enroll in Medicare Part B as soon as they are eligible, the cost of Medicare Part B may increase ten percent for each twelve-month period that they could have been enrolled but were not. Please contact Medicare for more information on Part B enrollment.

3. Beneficiaries under age sixty-five who are entitled to Medicare Part A because of disability or end-stage renal disease and have purchased Medicare Part B retain their eligibility for Tricare Prime, Extra, or Standard until they turn sixty-five, when they become only eligible for Tricare for Life. Beneficiaries should notify their military personnel office or DEERS if they become eligible for Medicare due to a disability or end-stage renal disease.

Tricare Eligibility, http://www.hooah4health.com/deployment/benefits/tricare.htm (last visited May 26, 2009).

Medicare coverage begins on the first day of the month in which beneficiaries become eligible. However, if the sixty-fifth birthday falls on the first day of the month, then Medicare Part A eligibility begins on the first day of the preceding month—and eligibility for Tricare Prime, Extra, or Standard ends. If beneficiaries are not eligible for Medicare Part A when they turn sixty-five, a Social Security Administration "Notice of Disallowance" must be submitted to the uniformed services responsible for issuance of identification cards so that a new ID card showing Tricare eligibility can be issued. Please visit www.medicare.gov or call the Social Security Administration at 1-800-772-1213 (TTY/TDD: 1-800-325-0778) for more information about Medicare Parts A and B.

77. PGBA, LLC v. United States, 389 F.3d 1219, 1221 (2004).

78. In 1997, Congress authorized a pilot program, referred to as Tricare Senior Prime (Pub. L. 105-33, § 4015(a), 111 Stat. 337), which was codified at 42 U.S.C. § 1395ggg under the title, "Medicare Subvention Demonstration Project for Military Retirees." In 1999, the "Keep Our Promise to America's Military Retirees Act" was introduced as H.R. 2966 into the U.S. House of Representatives, which (if passed) would have allowed military retirees an option to enroll in the Federal Health Care Benefits Plan, or alternatively continue to have access to Tricare, which would become a second payer to Medicare. This legislation did not pass. Later in 2002, Tricare for Life was enacted as part of the 2001 National Defense Authorization Act, and the authority for the earlier Senior Tricare Prime demonstration project was repealed by Pub. L. 107-314, § 713, 116 Stat. 2589 (2002).

79. In *Schism v. U.S.*, 19 F. Supp. 2d 1287 (N.D. Fla. 1998), two military retirees filed suit against the United States alleging breach of promise for being denied free access to lifetime health care and for denial of due process. The case was decided in the district court by granting

To provide a remedy to these veterans, on October 30, 2000, Tricare for Life was enacted as part of the 2001 National Defense Authorization Act.[80] The legislation included a number of health care provisions which collectively allowed for military retirees, *when they became eligible for Medicare Part A*, to continue to use their Tricare benefits as a "golden supplement" if they also *enrolled* in Medicare Part B.[81] While it did not provide for *free* lifetime health care as had been sought by the veteran-retirees and their dependents, it did offer a significant lifetime financial and medical benefit to those eligible. At the time of the legislation being passed, Tom Philpott, a syndicated columnist on military benefit issues, wrote about the new Tricare for Life benefit: "Combined, the [Tricare Senior Pharmacy and Tricare for Life] programs have the potential to turn the health benefits package of 1.4 million military elderly into one of the best [health care programs] in the country. In fact, [the two programs] will require an increase in spending on military health care of roughly $60 billion over the next decade."[82] As TFL has no monthly premiums, the recurring cost is typically the Medicare Part B premiums, co-pays, and deductibles[83] It is perhaps the best supplemental Medicare arrangement[84] available for those who can qualify.[85] As eligibility for Tricare also makes available the Military Pharmacies and Tricare Retail Pharmacy Network, including Express Scripts, they are much better off than being enrolled in Medicare Part D and having to select a drug plan as do other seniors.

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the defendant's motion for summary judgment. It was then appealed to the U.S. Court of Appeals for the Federal Circuit, and was there reversed and remanded. 239 F.3d 1280 (Fed. Cir. 2001). The United States filed to have the Federal Circuit Court of Appeals withdraw its earlier opinion, which was granted. 252 F.3d 1354 (Fed. Cir. 2001). Upon a rehearing *en banc*, the Federal Circuit Court of Appeals issued a forty-eight-page opinion affirming the district court's grant of summary judgment to the United States. 316 F.3d 1259 (Fed. Cir. 2002). The plaintiff's *writ for certiorari* in the United States Supreme Court was denied. 539 U.S. 910 (2003).

80. Pub. L. No. 106-398, § 712, 114 Stat. 1654 (2000).

81. For details on Tricare for Life and what it offers as a Medicare supplement, please visit Tricare For Life, http://www.tricare.mil/mybenefit/ProfileFilter.do;jsessionid=KL1DxWyFlNPKx8rKjT0k4BJLZlmQvX5Gt2nGXfyv1HdfDT3G0wGG!268511270?&puri=%2Fhome%2Foverview%2FPlans%2FForLife.

82. Tom Philpott, *Here Comes Tricare for Life*, A.F. MAG., Apr. 2001, at 38.

83. For example, in 2009 the Medicare Part B premium is $96.40 per month for those making under $85,000 (single) or $170,000 (married couple). Center for Medicare Advocacy, Inc., http://www.medicareadvocacy.org/FAQ_MedicareSummary.htm#B (last visited May 26, 2009). There is also the $3,000 catastrophic cap that Tricare offers, which will serve to pay all out-of-pocket expenses above that level that occur each year.

84. Humana-Military, http://www.humana-military.com/south/bene/tools-resources/handbooks/cost-summary/tfl.asp (last visited on June 2, 2009).

85. There is an excellent Tricare for Life slideshow available at the Navy Medical Center, Portsmouth, VA. NCMP, http://www-nmcp.med.navy.mil/Tricare/NMCP-Tricare-For-Life-Brief.ppt. The presentation provides the basics of TFL coverage and how Tricare and Medicare, Part B are used to supplement one another.

An unremarried 20/20/20 former spouse can receive the same Tricare medical benefits as does a military retiree counterpart. Thus, the former spouse is eligible for Tricare for Life as long as he or she continue to satisfy the eligibility requirements for Tricare enrollment.[86] Likewise an unremarried 20/20/15 former spouse who divorced his or her military sponsor *prior* to April 1, 1985, will be eligible for TFL for as long as he or she satisfies the criteria.[87] For any unremarried 20/20/15 former spouse who divorced *after* April 1, 1985, and was age sixty-five or older at the time of the divorce, he or she too could be entitled to up to one year of TFL coverage that commences with the day following the entry of a final decree.[88]

The TFL benefit would be available to the qualifying former spouse of a military sponsor, regardless of whether a *regular* or *nonregular* retirement is involved. Since Reserve Component retirees become eligible for Tricare upon achieving their sixtieth birthday, or in some instances earlier, they and their qualifying former spouses will be eligible for TFL at age sixty-five and upon enrolling in Medicare Part B.

Preserving Tricare eligibility after a divorce so that TFL can be used should remain a high priority for family law practitioners in prosecuting a military divorce. The older the client, the more significant becomes continued access to affordable health care, especially if a client has significant health issues that might preclude insurability.

### *F. Uniformed Services Family Health Plan*

For unremarried former military spouses of *any* age who can otherwise satisfy the 20/20/20 and 20/20/15 rules for Tricare eligibility, there are six areas[89] around the United States that offer a Tricare Prime option for comprehensive health care through a not-for-profit system called the Uniformed Services Family Health Plan, or USFHP.[90] For these specified areas, the Department of Defense has essentially created its own network of Military Treatment Facilities (MTFs) and civilian providers to give Tricare Prime services for eligible beneficiaries.

86. 10 U.S.C. § 1072(2)(F) (2008).

87. *Id.* at § 1072(2)(G).

88. *Id.* at § 1072(2)(H).

89. The six areas are (1) Massachusetts, Rhode Island, and portions of northern Connecticut; (2) southeast Texas and Louisiana; (3) Maryland, Washington, D.C., and parts of Virginia, West Virginia, and Pennsylvania; (4) Maine, New Hampshire, Vermont, and northeastern New York; (5) the Puget Sound area of Washington; and (6) New York City, New Jersey, southeastern Pennsylvania, and western Connecticut. USFHP, http://www.usfhp.com (last visited May 26, 2009).

90. *Id.*

Those who enroll in the USFHP receive all of the benefits of Tricare Prime plus premium advantages and other features at no extra cost. These include pharmacy services and prescription drug coverage and a comprehensive program of coordinated and managed health care. *When properly used, the USFHP provides all health care at either no cost, or very little cost, to the beneficiary.*

USFHP is unique to Tricare for Life in that a Tricare eligible unremarried former spouse, who elects to enroll in the USFHP, can remain enrolled in Tricare even *after* he or she achieves age sixty-five. The former spouse simply enrolls in Medicare Part A when eligible, but *does not* enroll in Medicare Part B. By not enrolling in Medicare Part B, the former spouse will still pay only the Tricare Prime (USFHP) enrollment fee, co-pays, and deductibles. Alternatively, he or she may elect to enroll in Medicare Part B, but pay no USFHP enrollment fees, co-pays, or deductibles; the USFHP acts much like Tricare for Life. If an unremarried former military spouse lives in one of the six USFHP areas and wants to *significantly minimize* the costs of health care for the rest of his or her life, this option offers the best combination of comprehensive medical services at the very lowest price.

### *G. Eligible 20/20/20 and 20/20/15 Unremarried Former Spouses May Elect Either Tricare or CHCBP Coverage*

Tricare certainly offers the most advantageous health care coverage and has the Tricare for Life option available to a qualifying unremarried former spouse. However, nothing in the Tricare or CHCBP statutes prevent the former spouse from forgoing Tricare coverage and opting instead to enroll directly in the CHCBP. True, the CHCBP has a significantly higher premium and does not qualify the former spouse for Tricare for Life. But, the notable advantage of the CHCBP over Tricare is that it can allow for *unlimited* coverage, even *upon remarriage* if the former spouse (1) does not remarry until after age fifty-five, and (2) is eligible to receive a portion of retired pay or is eligible for SBP coverage.[91]

Another advantage for the 20/20/20 former spouse under the CHCBP, which does not exist under Tricare, is that enrollment in the CHCBP allows for double insurance coverage—for instance, under an employer-provided health plan. A former spouse may wish to transition into an employer-provided health care plan but may be faced with a pre-existing medical-condition exclusion under the employer's plan. If the 20/20/20 former spouse selected Tricare, he or she would lose the coverage upon enrollment in the employer's plan, regardless of any pre-existing condi-

91. 10 U.S.C. §§ 1078a(b)(3), (g)(4) (2008); 32 C.F.R. §§ 199.20(d)(1)(iii), (6)(iv) (2009).

tion.[92] If the 20/20/20 former spouse was instead covered under the CHCBP, he or she could have double coverage under both the CHCBP and the employer-sponsored plan.[93]

If a 20/20/20 or 20/20/15 former spouse wishes to decline Tricare and enroll instead in the CHCBP, he or she simply needs to avoid an update of the DEERS database[94] By forgoing Tricare enrollment altogether and enrolling in the *transitional* CHCBP, the former spouse could ask for *unlimited* CHCBP at the end of the thirty-six months of *transitional* coverage. By not updating DEERS status, it should be noted that the former spouse may also unintentionally forgo the commissary, base exchange, and other privileges.

After Tricare, the next most significant health care option is the Continued Health Care Benefits Program, or CHCBP. The family law attorney must always remember to distinguish between the two, because the CHCBP is not Tricare, and the two are *not* interchangeable. The former military spouse can only be covered by one of these health care programs at a time.

## III. Continued Health Care Benefit Program (CHCBP)

### *A. Overview of CHCBP*

The 20/20/20 and 20/20/15 Tricare eligibility rules are often impossible for many former military spouses to satisfy. The CHCBP is a "COBRA like" counterpart for former military spouses when they cannot satisfy the 20/20/20 and 20/20/15 rules, discussed earlier. The statute creating the CHCBP states that its legislative purpose is to provide to former military spouses temporary health care benefits, similar to those afforded to former federal civilian employees,[95] including those who were married

92. See 10 U.S.C. §§ 1072(2)(F)(ii), (G)(ii), which provides that coverage under Tricare is not available to such former spouse if he or she is enrolled in an employer-sponsored health care plan.

93. See 32 C.F.R. § 199.20(h) and 32 C.F.R. § 199.8, which makes the CHCBP the *secondary payer* for claims if another policy exists to provide coverage. Thus the CHCBP would pay for claims that involved the excluded medical condition, and the other plan would "first pay" for all other claims. A former spouse should be aware that under no circumstances would the CHCBP pay for a course of treatment, hospital visit, or other claim if it would not have honored the claim as the only insurance coverage involved.

94. Note that 20/20/20 and 20/20/15 former spouses identified as Tricare *eligible* under 10 U.S.C. §§ 1072(2)(F)–(H) are not eligible for CHCBP under 10 U.S.C. § 1078a(b)(3)(C).

95. 10 U.S.C. § 1078a(a) states:

> The Secretary of Defense shall implement and carry out a program of continued health benefits coverage in accordance with this section to provide persons described in subsection (b) with temporary health benefits comparable to the health benefits provided for former civilian employees of the Federal Government and other persons under section 8905a of title 5.

to federal civilian employees.[96]

The CHCBP came at a time when Congress saw the need to provide *transitional* health insurance coverage to accommodate the drawdown of military personnel after the Gulf War in the early 1990s.[97] This coverage was also made available to those 20/20/15 former spouses who were divorced on or *after* April 1, 1985, and previously had been afforded a conversion policy to allow for up to thirty-six months of coverage.[98] The CHCBP began accepting enrollments of eligible beneficiaries effective October 1, 1994, and provided for a transition out of those covered under the conversion health program.[99]

### *B. CHCBP Offers Unremarried Former Military Spouses a Transitional and Long-Term Health Care Option with Fewer Qualifications Than Tricare*

Like COBRA health insurance coverage for civilians, CHCBP comes with a much higher premium cost for the beneficiary. The eligibility requirements for *transitional* CHCBP are easy to meet, and the plan covers any former spouse who was married to a servicemember on active duty or retired from military service. It offers a premium-based health insurance policy for *any* former military spouse who was covered by Tricare *on the day before entry of a final decree of divorce, dissolution, or annulment*.[100] There is no threshold for length of marriage or requirement that *any* of the marriage was concurrent with military service for *any* period or any threshold regarding years of creditable military service by the military sponsor.[101] The CHCBP *transitional* health care coverage is intended to mimic the Temporary Continuation of Coverage offered to federal civilian employees and their dependents through the Federal Employees Health Benefit (FEHB) plan.[102]

By enacting the CHCBP, Congress intended to provide *all former spouses of military personnel* with at least a temporary health care option under 10 U.S.C. § 1078a(a), which was similar to that provided to former

96. 5 U.S.C. § 8905a (2008). Note that § 8905a at (f)(1) refers to 5 U.S.C. § 8901(10) for the definition of a "Former Spouse." There is a striking similarity between the scope of coverage and eligibility for former spouse coverage under 5 U.S.C. § 8905a and 10 U.S.C. § 1078a(b)(3).

97. National Defense Authorization Act of 1993, 10 U.S.C. § 1078a.

98. Prior to the CHCBP, Congress had provided for a Conversion Health Policy. 10 U.S.C. § 1086a. 10 U.S.C. § 1078a repealed the Conversion Health Polices in favor of the Continued Health Care Benefits Program under 10 U.S.C. § 1078a, which began on October 1, 1994.

99. 32 C.F.R. § 199.20(r).

100. 10 U.S.C. § 1078a(b)(3)(B) (2008); 32 C.F.R. § 199.20(d)(1)(iii) (2009).

101. 10 U.S.C. § 1078a(g)(1)(C); 32 C.F.R. § 199.20(d)(6)(iii).

102. *See* 10 U.S.C. § 1078a(a).

spouses of federal civilian employees under 5 U.S.C. § 8905a. Congress even created an *unlimited* CHCBP coverage option that provides an avenue for certain former military spouses to have a long-term health care coverage option *beyond* thirty-six months. The *unlimited* CHCBP coverage operates similar to the Spouse Equity Coverage available under the Federal Employees Health Benefit (FEHB) plan for former spouses of federal civilian employees.[103]

Even in those communities with a significant active duty and retired military population, few family law practitioners are aware of the CHCBP and fewer know of the *unlimited* CHCBP coverage option available to certain former military spouses. This article will discuss generally how CHCBP operates and how it can offer first *transitional* (i.e., thirty-six months) and then *long-term* (i.e., indefinite, or *unlimited*) health care coverage for those qualifying former spouses of members of the uniformed services.

### *C. Getting Smart on the CHCBP*

Since the CHCBP first became available in 1994, the few articles that discussed the CHCBP only explored its *transitional* coverage. None of the articles picked up on the available long-term (*unlimited*) coverage option that would transform its "COBRA" type coverage into what federal civilian employee former spouses had in their Spouse Equity Coverage.[104]

The legislative history for the public law,[105] which created the CHCBP as well as the several technical amendments passed since 1993, is buried in the House of Representatives reports to various years' Defense Authorization acts. Only one of the House reports gives any insight into

103. *Compare with* 5 U.S.C. § 8901(10) *and* § 5 U.S.C. 8905(c)(1), 10 U.S.C. § 1078a(g)(4).

104. *See generally* Cushing, *supra* notes 1, 24; WILLICK, *supra* note 25; SULLIVAN, *supra* note 26. A survey of various articles and CLE presentations were made by the author in preparing this article. *See* MICHAEL R. WALSH, FLORIDA PROCEEDINGS AFTER DISSOLUTION OF MARRIAGE § 3.80 (8th ed. 2007); Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40, 68 nn.143, 144 (2001); Evan B. Brandes, *Divorce and the Military Member: The Survivor Benefit Plan and Ancillary Benefits*, 7 NO. 12 N.Y. FAM. L. MONTHLY 3 (2006); Melissa DeLacerda, *Oklahoma Family Law*, 4 OKLA. PRAC. OKLA. FAM. L. 16:7, § 1 (2009); Dalma Grandjean, *Enforcement Options, Collecting an Awarded Share of the Pension*, 28 FAM. ADVOC. 36, 39 (Fall 2005); Dalma C. Grandjean & Karen Riestenberg Brinkman, *Fair and Equitable Asset and Liability,* 38118 NBI-CLE 41, 74–75 (2007); C. Page Hamrick III, *Failure to Secure Adequate Legal Assistance in Handling Qualified Domestic Relations Orders*, 33787 NBI-CLE 171, 192 (2006); C. Page Hamrick III, *Fairly Divide Assets and Liabilities*, 27459 NBI-CLE 90, 126 (2005); Mark Sullivan, *Questions Abound on Military Pensions,* 24 FAM. ADVOC 44, 46 (Fall 2001); Paul C. Taylor & Laura J. Taylor, *Evaluating the Financial Cost of an Involuntary Military Separation*, J. LEGAL ECON., 1, 12–14 (Feb. 2007).

105. National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, § 4408, 106 Stat. 2315, 2708 (1992).

the intended coverage for former spouses of military members.[106] The House of Representatives Report on the National Defense Authorization Act of 1993[107] made clear the intent of the legislation was to provide those separating members of the uniformed services, their dependents, *and long-term former spouses* with *transitional* health benefits equal to those provided to citizens under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), and which mirrored those provided to federal employees, their dependents, and long-term former spouses. That legislative intent is now found in the codified statute at 10 U.S.C. § 1078a(a). On determining the legislative intent of Congress, it is worthy to note that those subsections of the enabling statute that extended *transitional* and *unlimited* coverage to former spouses all appeared in the *original* public law and have not been amended or limited by subsequent amendments.

Typically after studying the legislative history of a statute, lawyers next turn to decided cases to help understand the purpose and scope of the law. For the CHCBP, there are no reported cases that have judicially interpreted the CHCBP statute or implementing regulations. There is only one state case[108] that had any discussion of the CHCBP, and it was merely to summarize one of the party's rationale for bringing the action. The U.S. Court of Federal Claims[109] is the federal appellate court with jurisdiction to decide any litigated case involving the right of a former spouse to health care under the CHCBP. However, there were no reported cases involving the CHCBP in the court's researchable reported options. Administratively, the Defense Office of Hearings and Appeals[110] (DOHA) operates under a memorandum of understanding with the Tricare Support Office to adjudicate all administrative claims by beneficiaries as to coverage issues under Tricare.[111] This agency would presumably include any case involving a denial of coverage under CHCBP. Once again there are

106. H.R. Rep. No. 102-527 (1992), at 245–246, *reprinted in* 1992 U.S.C.C.A.N. 1636, 1669–1670.

107. *Id.*

108. Lowe v. Schwartz, 738 N.W.2d 63 (S.D. 2007). This case involved two parties attempting to arrange for the former spouse's long-term health care by using the CHCBP. The former spouse wanted to modify an earlier award in the divorce so as to obtain a survivor's annuity in order to further qualify her for unlimited CHCBP coverage. The decision offered some discussion of the CHCBP and what was necessary to qualify a former spouse for unlimited coverage. Ultimately the case was decided on procedural issues and did not resolve any of the factual or legal questions about how the former spouse could be qualified for unlimited coverage under the CHCBP.

109. U.S. Court of Federal Claims Home Page, http://www.uscfc.uscourts.gov.

110. Defense Office of Hearings and Appeals Home Page, http://www.dod.mil/dodgc/doha.

111. Defense Office of Hearings and Appeals, Tricare/CHAMPUS (1997), http://www.dod.mil/dodgc/doha/tricare.html.

no reported cases accessible at the DOHA website to help define the issues of CHCBP.

The information for this article therefore came from a critical review of the enabling statute,[112] the Department of Defense (DoD) implementing regulation,[113] and the available customer literature for the CHCBP (the *CHCBP Handbook*) offered by the CHCBP Administrator.[114] What is *on paper* and what is *in practice* are often oceans apart. So this author attempted to investigate the administration of the CHCBP from the local Tricare Customer Service Center to the Office of the Assistant Secretary of Defense, who oversees Tricare and the CHCBP. These conversations included discussions with a senior staff attorney in the Office of the Assistant Secretary of Defense for Health Affairs,[115] discussions with a senior health-care analyst team leader in the Customer Communications Division for the Tricare Management Activity,[116] and discussions with several customer service representatives[117] at the CHCBP office in Louisville, Kentucky (800-444-5445).[118] The author also talked with the

112. See 10 U.S.C. § 1078a(g)(4).

113. See 32 C.F.R. § 199.20.

114. See Continued Health Care Benefit Program, http://www.humana-military.com/south/bene/TricarePrograms/chcbp.asp (last visited May 26, 2009); Humana Military Healthcare Services CHCBP Period of Coverage, http://www.humana-military.com/chcbp/coverage.htm (last visited May 26, 2009).

115. The conversation occurred on July 10, 2007; however, as a condition to discussing the availability of the CHCBP to provide long-term-care coverage to a former spouse, the staff attorney requested nonattribution. The staff attorney offered that it was not his responsibility to advise any entity or person other than the assistant secretary of defense for health affairs and his staff. In referring to the enabling statute (10 U.S.C. § 1078a(g)(4)) and the implementing regulations (32 C.F.R. § 199.20(6)(iv)), the staff attorney made this comment: "The statute and the regulation speak for themselves and are sufficiently clear concerning unlimited coverage. For those qualified former spouses who meet the statutory criteria to request unlimited CHCBP coverage, it is to be made available to them for as long as it is requested." (Source not disclosed due to promise of nonattribution.)

116. The conversation occurred with this author on July 23, 2007, and nonattribution was once again requested as a precondition to a discussion of "unlimited" former spouse coverage under the CHCBP. The team leader generally acknowledged that the open source Tricare literature focused more on the *transitional* coverage aspects of the CHCBP and that the handbook did not encourage qualified individuals to seek *unlimited* coverage. This author directly asked if there was "any policy or other prohibition on allowing a qualified former spouse to use the *unlimited* CHCBP coverage as their long-term health care?" The answer was somewhat indirect, but ended in a reaffirmation that "the statute and regulations allow for coverage for certain qualifying former spouses for as long as it is requested." This author sensed some reluctance in the team leader wanting to use "long term" in the same sentence with "CHCBP," but eventually there was agreement that the statute clearly made for that possibility.

117. The referenced discussions occurred over the period of June through August 2007, and on May 28, 2009. For any question beyond what was in the *CHCBP Handbook*, this author was instructed to submit a request in writing.

118. With any customer service call center, knowledge and accurate advice is often "hit and miss," depending upon with whom you might speak at the time. Calling the CHCBP adminis-

director of a Tricare customer service center at a military medical facility,[119] and with several former clients who had "navigated" the course through the CHCBP to arrange for their long-term health care coverage.[120] Finding knowledgeable sources willing to allow attribution to their statements was difficult. Everyone on the administration side of the CHCBP was willing to discuss the *transitional* (thirty-six months) coverage, but only policy level and experienced supervisors seemed to have any awareness of the *unlimited* CHCBP coverage. Those who would speak off-the-record about the CHCBP wanted to caveat their statements with a reminder that the CHCBP was intended to provide *transitional* health care. However, the sources would acknowledge that long-term care was available under the *unlimited* coverage provision to qualifying former spouses and that the enabling statute and implementing regulations allowed for such an arrangement. This author speculates there may be some concern that the CHCBP could become overwhelmed and its availability threatened if it became burdened with too many former spouses using it for long-term care under its *unlimited* coverage. It was certainly evident to this author that the *unlimited* coverage available under the CHCBP was neither publicized nor encouraged at any level in the administration of the program.

As a caution, the Internet offers a lot of information about the

trator is no different, and politeness and perseverance allows for a handsome payback in getting credible information. This author extends grateful and sincere appreciation to Ms. Lana Mattingly, a senior customer service supervisor for the CHCBP administrator, who graciously provided information and answered many questions about the CHCBP. So this author's best advice is to be polite, keep asking the hard questions, and politely ask to speak with someone knowledgeable and experienced in how the CHCBP works in the *unlimited* coverage mode!

119. This source is a personal acquaintance and former client of this author for over sixteen years. She has provided Tricare advice and counseling to thousands of individuals, including many former military spouses. She confessed that very little is known in the field about the CHCBP, beyond what appears in the *CHCBP Handbook*. She had not been provided more information about the *unlimited* CHCBP coverage for former spouses, other than what appears in the handbook. She pointed out that there was nothing in the handbook's table of contents or index about *unlimited* coverage, and unless you knew what you were looking for, most likely you would never find it. She advised that former spouses are generally told their CHCBP coverage is limited to thirty-six months of transitional coverage. No one is specifically informed about the availability of *unlimited* CHCBP coverage or what is required to qualify for it.

120. This author has assisted three former spouse clients since 2005 to extend their CHCBP coverage beyond their thirty-six months of *transitional* coverage to the *unlimited* coverage. Each has been required to document additional criteria for *unlimited* coverage and on occasion why coverage is still needed. On one occasion, this author assisted the client in responding to such an inquiry, and the client's letter pointed out that the statute (10 U.S.C. § 1078a(g)(4)(A)) simply allowed a qualified former spouse to "continue such coverage for as long as the former spouse may request." There is nothing in the statute or in the regulations that requires a qualified former spouse to do anything more than "request" that coverage continue. Providing a justification of why a former spouse might require or desire coverage does not appear in the statute or regulations.

CHCBP—some good, some misleading. Simply typing "CHCBP" into any search engine will provide hundreds of leads to websites with information. A survey of the websites conducted on May 20–28, 2009, revealed only discussions of the *transitional* coverage available under CHCBP. Only one[121] mentioned *unlimited* CHCBP coverage.

The easiest way for any one to understand the CHCBP is to first visit the CHCBP website[122] and review the synopsis of the program. Then download the *CHCBP Handbook*[123] and read it several times to acquire familiarity with the CHCBP terms and qualifying criteria for *transitional* and *unlimited* coverage. When this author spoke with a director of a Tricare service center and, again, on several occasions with the CHCBP customer service center in Louisville, Kentucky, the *CHCBP Handbook* was the most often referenced document for determining eligibility for coverage under the CHCBP. The handbook has information on enrollment, cost, coverage, and claims filing. There is, however, only a brief reference to *unlimited* CHCBP coverage,[124] which essentially quotes the criteria from the federal regulation. Once comfortable with the *CHCBP Handbook*, it is time to digest the enabling statute and implementing regulations.

Certainly, the statute and associated regulations are the most authoritative sources for CHCBP.[125] However, a word of professional caution: both the statute and regulation are horrifically confusing, and a rudimentary understanding may require *several* (if not more) intense readings. Be prepared for multiple references to other subsections of the statute and regulation, references to other associated federal statutes, and, then, still more references to other federal regulations. This author found it useful to identify the nineteen major paragraphs ((a) through (s)) in 32 C.F.R. § 199.20 and carefully note their headings. Of particular importance to understanding the *unlimited* coverage option are paragraph (d), "Eligibility and Enrollment," and subparagraph (d)(6), "Period of Coverage." These two subparagraphs contain most of the critical information on former spouse *unlimited* coverage.

### *D. Getting a Client Enrolled in the CHCBP*

For initial enrollment into the CHCBP, a client can simply go to a Tricare service center or download and complete DD Form 2837 (CHCBP

121. Humana Military Healthcare Services CHCBP Period of Coverage, http://www.humana-military.com/chcbp/coverage.htm (last visited May 27, 2009).

122. Continued Health Care Benefit Program, http://www.humana-military.com/chcbp/main.htm (last visited May 28, 2009).

123. Humana Military Healthcare Services CHCBP, http://www.humana-military.com/CHCBP/handbooktoc.htm (last visited May 28, 2009).

124. *See id.*

125. 10 U.S.C. § 1078a (2008); 32 C.F.R. § 199.20 (2009).

Application).[126] The instructions to the enrollment form have a good basic discussion of the CHCBP, and have useful information on where to submit claims, call for customer assistance, and other details of the program.

### *E. The CHCBP Contract Administrator*

The DoD contractor for the CHCBP is Humana Military Healthcare Services, Inc., Attn: CHCBP, P.O. Box 740072, Louisville, KY 40201. Humana publishes the *CHCBP Handbook* and maintains the CHCBP website. With luck, perseverance, and a tireless finger to select "phone options," a client can contact their customer service center toll-free (1-800-444-5445). For CHCBP questions, you will not hear a specific menu option, so wait until you can *eventually* speak with a live representative. This author found that by using the menu option for "Enrollment Eligibility," after making a few initial entries, a caller could then access a "real person" by touching "0." (Note: Former spouses who call in may no longer be in DEERS, and they should have their former sponsor's Social Security number available when asking for initial assistance. Once enrolled in CHCBP, an entry is made in the former military sponsor's DEERS account concerning the former spouse's CHCBP coverage.[127])

This author found the CHCBP customer service representatives were pleasant and, generally, could answer most of the basic questions about eligibility, enrollment, and coverage. On the more technical issues (i.e., delayed enrollment, CHCBP interface with Medicare, *unlimited* coverage), it was best to ask to speak with a more experienced supervisor. Polite persistence generally got caller to a knowledgeable person who had fielded similar questions, and provided answers in the past. It is wise to keep a detailed memorandum of the call.

### *F. Getting Good Information About the CHCBP and "Unlimited Coverage" for Former Spouses*

Without a doubt, the CHCBP can be confusing to attorneys and clients. Perhaps the most common *misunderstanding* is that enrollment in CHCBP is an enrollment in Tricare. *It is important to advise the client that CHCBP is not Tricare*.[128] CHCBP beneficiaries are also not enrolled in DEERS and they will not continue to have a military ID card. They may not obtain their care at military treatment facilities or fill their drug prescriptions at military

126. The CHCBP enrollment form is available both at the CHCBP website and directly from: http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2837.pdf.

127. Humana Military Healthcare Services CHCBP, http://www.humana-military.com/CHCBP/handbooktoc.htm (last visited May 28, 2009).

128. 32 C.F.R. § 199.20(a).

pharmacies. However, the Tricare network of civilian providers and Tricare civilian pharmacies, including Express Scripts,[129] are available under the same copays and with similar drug formularies as exist for Tricare. Former spouse CHCBP beneficiaries receive a "CHCBP insurance card," and their claims are processed by the same DoD contractor that handles Tricare claims.[130]

Be prepared for clients who have been confused with information from military legal-assistance attorneys and even at Tricare service centers. It seems difficult for these offices to keep straight that one set of criteria applies to Tricare 20/20/20 and 20/20/15 former spouses, and that another set apply to the CHCBP former spouses. Typically, the 20/20/20 and 20/20/15 rules are applied to everyone asking about postdivorce health care, and the CHCBP former spouse is simply advised that he or she does not qualify for any Tricare coverage, which is true. But unlike former spouses who must qualify for Tricare under 10 U.S.C. sections 1072(2)(F), (G), and (H), as either a 20/20/20 or 20/20/15 former spouse must, *those who request CHCBP former spouse coverage instead fall under 10 U.S.C. § 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 CHCBP eligibility, almost any former military spouse will qualify for the thirty-six months of *transitional* CHCBP coverage after having been married to the military sponsor *for just one day*. Then, almost anyone who can qualify for the *transitional* coverage may qualify for *unlimited* coverage by satisfying the additional criteria.[131] For the CHCBP former military spouse, the period of marriage does not have to be concurrent with military service that is considered creditable for retirement. Rather, the marriage needs only to have been *during a period when the former spouse was covered under Tricare.*

Clients and attorneys should also be careful about misinformation from Tricare service centers about the availability of CHCBP coverage beyond thirty-six months. The most common misunderstanding is that thirty-six months is the *maximum* coverage under the CHCBP available to *any* for-

129. Tricare Express Scripts is a mail-order pharmacy that can significantly reduce out-of-pocket prescription drug expenses. Tricare Mail-Order Pharmacy (TMOP) program, http://member.express-scripts.com/dodCustom/welcome.do (last visited May 28, 2009).

130. 32 C.F.R. § 199.20 (e)–(s) explains other provisions of Tricare that are applicable to the CHCBP beneficiary.

131. Upon an initial reading of the statute, there appears to be an eighteen month marriage requirement for *unlimited* CHCBP coverage. What the statute actually requires is that the former spouse was covered under Tricare at *any time* during the eighteen months before the date of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1078a(g)(4)(B)(ii); 32 C.F.R. § 199.20 (d)(6)(iv)(B) (emphasis added). Note, as well, that no period of the marriage must be concurrent with military service of the sponsor.

mer spouse. While this may be technically correct when the divorced military spouse is seeking only *transitional* coverage,[132] it is clearly not correct for the former spouse who satisfies the additional criteria for *unlimited coverage*.[133] This author found that Tricare service centers were unfamiliar with the statute allowing for *unlimited* CHCBP coverage for certain qualifying former spouses. Perhaps the misunderstanding arises from there being no direct reference to *unlimited coverage* in the table of contents to the *CHCBP Handbook*. The reference to *unlimited* coverage is actually found under the heading of "Period of Coverage" in the *CHCBP Handbook* at pages 23–24.[134]

### *G. It Is Important to Get Enrolled in the CHCBP Within Sixty Days of Losing Tricare Coverage*

It is essential to advise the client that *initial enrollment* in the CHCBP must be made *within sixty days* of the date the former spouse lost his or her eligibility for Tricare coverage.[135] Under the enabling statute, the DoD is to develop procedures for notifying those individuals who are eligible for CHCBP coverage.[136] If the client has missed the sixty-day window through no fault of their own, there may be a plea to allow late enrollment if the client did not receive notification of the CHCBP option at the time he or she lost Tricare eligibility. Most military former spouses will receive their notification at the time they are "dropped" from the DEERS database, assuming this is done during a visit to a military personnel office. But, as family-law practitioners well know, typically it is the military sponsor who does the updating in DEERS, and often he or she is not out to do any favors for the former spouse. Whether it is convenient loss of memory or simple spite, there is often a failure to notify the former spouse of the sixty-day CHCBP enrollment requirement.

So, what happens if the military sponsor simply does not update the

132. 32 C.F.R. § 199.20(d)(6)(iii).

133. *Id.* at § 199.20(d)(6)(iv).

134. The same discussion of unlimited coverage found in the *CHCBP Handbook* (pp. 23-24) is also posted at the Humana Military website, http://www.humana-military.com/CHCBP/coverage.htm. (last visited May 28, 2009).

135. 10 U.S.C. § 1078a(d); 32 C.F.R. § 199.20(d)(4).

136. 10 U.S.C. § 1078a(c). Under subparagraph (c)(4), the statute provides, "In the case of a former spouse of a member or former member who becomes eligible for continued coverage under subsection (b)(3), the regulations shall provide appropriate notification provisions and a sixty-day election period under subsection (d)(3)." At 32 C.F.R. § 199.20(d)(3)(iv), it provides:

> In the case of a former spouse of a member or former member who becomes eligible for continued coverage, the Third Party Administrator will notify the individual of eligibility for CHCBP when he or she declares the change in marital status to a military personnel office.

DEERS database upon divorce and the former spouse never receives notification of eligibility to enroll in the CHCBP? Out of ignorance, the former military spouse simply continues to use his or her Tricare benefits after the divorce, thinking it is okay to do so.[137] Under Tricare regulations,[138] eligibility terminates at 12:01 a.m. on the day following the entry of a final decree of divorce, dissolution, or annulment. After that, the former spouse is not entitled to any health care services, prescription drugs, or other care under Tricare. The best scenario is that the former spouse will stay healthy and not use any health care benefits or purchase any drugs. But, more likely, he or she will make doctor visits, have prescriptions filled, and suffer accidents (sometimes bad ones), all causing Tricare claims to be filed. If Tricare rejects these claims due to lack of coverage, then the former spouse is *personally* responsible for his or her medical bills. If Tricare fraudulently pays the claims *upon a misrepresentation of dependency status*, then the former spouse is personally liable for these medical bills if the fraud is discovered. Not good results either way. So what does the attorney or client do?

If Tricare coverage is lost and there is no enrollment in the CHCBP, the CHCBP administrator will consider a delayed request for enrollment after the sixty-day period. There are, however, some conditions. *First*, through no fault of his or her own, the former spouse did not receive notification of eligibility to enroll in the CHCBP; *second*, the former spouse must still satisfy the other criteria to enroll in CHCBP at the time of the delayed

137. This scenario is all too common in military divorces as there is no incentive on the part of the military sponsor to update the DEERS upon divorce. Generally, the incentive arises only when the military sponsor remarries and a new military spouse enrolls in DEERS. At that point, to enroll the "new" spouse in the system, the military sponsor must produce evidence of the divorce from the previous spouse. It becomes obvious the former spouse has been receiving Tricare benefits since the divorce, to which he or she was not legally entitled. Active duty and retired members must periodically update and verify their dependents enrolled in DEERS, which most commonly occurs with the renewal of their dependent's military ID cards. If a dependent's military ID card has expired, it is subject to seizure at time of entry onto a military installation. This will typically result in the military sponsor being contacted and questioned as to whether the person with the ID card is a *bona fide* dependent or otherwise. Certainly a divorced military couple could collude to defraud and mislead the DoD by continuing to represent the *former spouse* as a *current spouse* and thus eligible for Tricare. In reality, they are "living on borrowed time." A few may slip past the gate, but, at some point, ugly things begin to happen. The cost of health care is expensive, and fraudulently obtaining health care can have the following results: (a) court-martial action of the military sponsor; or (b) prosecution by the U.S. attorney of either or both for conspiracy to defraud the government; (c) civil suits initiated to recover the costs of medical services provided to the former spouse; or (d) both the military sponsor (if retired) and the former spouse being barred from the military installation. These are not happy experiences and create an incredible burden on the former spouse. *See* DEP'T OF DEF., INSTR. NO. 1000.24, CONFISCATION OF FRAUDULENT IDENTIFICATION (ID) CARDS AT MILITARY TREATMENT FACILITIES (2003).

138. 32 C.F.R. § 199.3(f) (2007).

enrollment; and *third*, all CHCBP premiums must be paid retroactive to the day after the former spouse first lost his or her Tricare eligibility. The period of eligibility for coverage (i.e., thirty-six months of *transitional* coverage) will date from the day after the first loss of Tricare eligibility. If late enrollment in CHCBP is granted, then any claim filed from the date of loss of Tricare eligibility will be adjudicated under the CHCBP (i.e., Tricare Standard) procedures, even if they had, in the interim, been adjudicated under Tricare Prime. In other words, everything is made retroactive back to one minute after midnight of the day after the final decree of divorce.

It is good practice for family law practitioners representing military clients to advise eligible former spouses, *in writing*, to enroll in the CHCBP within sixty days of their divorce from the military sponsor or, in the case of a 20/20/15 spouse, within sixty days of losing the one-year of Tricare coverage.[139] Appendix 3 is a sample letter to the client with appropriate language.

### *H. Pay or "Go Naked"*

The former military spouse always has the option of simply not being covered by health insurance, that is, "going naked . . . without coverage." The associated risks are, for some clients, simply unacceptable. A lapse in health care coverage can prevent the former spouse from later having insurance that will cover pre-existing medical conditions for twelve to thirty-six months, and in some instances, permanent exclusion from health insurance. Even for those who can qualify for Medicare, many fail to consider the gaps in coverage that can force a former spouse into bankruptcy. Most notable of these Medicare "gaps" is the "doughnut hole" in Medicare Part D (prescription drugs), which can result in much higher out-of-pocket expenses than those incurred under CHCBP with the Tricare pharmacy benefit.[140]

139. *Id.* at § 199.20(d)(4)(i)(C).

140. Estimates are that over 27 million Medicare Part D beneficiaries fall into the "Doughnut Hole." A cute name, but a horrible position to be in if one is poor and in desperate need of medications to cope with a serious medical condition. Upon reaching the Medicare Part D coverage limit of currently $2,700, Medicare stops paying until the beneficiary incurs $4,350 in out-of-pocket costs for covered drugs on the Part D formulary. The cost can be considerable as there is an initial $250 annual deductible, a twenty-five percent co-pay on the first $2,700 of formulary drugs that are dispensed, followed by a $4,350 exclusion where Medicare will *not pay anything*. By the time Part D starts paying again for *catastrophic coverage* (which will still require a five percent co-pay), the beneficiary has paid well over $5,275 out of pocket. Medicare Part D—Calculating the Doughnut Hole, http://www.medicareadvocacy.org/PartD_DoughnutHole.htm (last visited June 1, 2009). Compare this to what would have been the client's annual CHCBP premiums of $3,732 ($933 x 4), and he or she would have saved over $1,500 *just on their Part D drug coverage* by having used their CHCBP prescription drug benefit instead of enrolling for Part D coverage, or alternatively using it as a supplement to Medicare. Those for-

Why do former spouses decline the CHCBP coverage? The most common reason is that there is a hefty quarterly premium for a health insurance plan they previously had access to for free. By comparison to the Tricare benefits they had enjoyed during the marriage, which are substantially underwritten by DoD, the CHCBP is a premium-based health insurance program with its premiums based upon the full costs of the Federal Employee Health Benefit plans for federal employees.[141] The level and categories of health benefits that are provided under the CHCBP are intended to mirror Tricare Standard coverage.[142] Since Tricare Standard coverage is available *without a premium* for those on active duty or who are retired, former spouses are often angered that *now* that they are divorced they will have to *pay* a reasonable premium for essentially the same (formerly free) coverage. What former military spouses fail to grasp is that this is the same treatment of former spouses to federal civilian employees, and those who must take COBRA coverage from a private health insurance plan. Maybe the client should ask "is this CHCBP thing a good deal—is it worth it?"

Family-law practitioners well know it is often a leap to get a client to pay for something that previously was free of charge. To those accustomed to getting health care for free, the CHCBP quarterly premiums may appear shockingly high. However, when considered as a monthly premium and compared to current commercial and employer-provided health insurance plans, the cost and benefits of CHCBP are quite reasonable in today's health insurance market. The attractiveness of the CHCBP may become even more obvious to the former spouse who is without prospects of employer-sponsored health insurance. Then there are those who would love to pay *any* premium if only they could obtain health insurance to cover their pre-existing medical conditions without a lengthy exclusion.

There is but one way to pay for CHCBP premiums, and that is done on a quarterly basis. Any default in payments leads to permanent disenrollment from CHCBP.[143] Humana Military Healthcare Service, Inc, as the DoD contractor who manages the CHCBP, collects the enrollment premiums. Clients who will be making their CHCBP payments on a regular basis may authorize a debit of a bank account or arrange payment through a credit card.

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mer military spouses, who have also been determined by the Social Security Administration as being disabled, may continue to receive double coverage under Medicare and the CHCBP, just like they could do under Tricare. *See* 32 C.F.R. § 199.20(h) (relating to "Double Coverage"); 32 C.F.R. § 199.8(d) (relating to the interfacing of Medicare and Tricare.)

141. 10 U.S.C. § 1078a(f); 32 C.F.R. § 199.20(q).

142. 32 C.F.R. § 199.20(a); Tricare Standard and Extra, http://www.humana-military.com/south/bene/TRICAREPrograms/standard-extra.asp (last visited June 1, 2009).

143. 32 C.F.R. § 199.20(q)(1), (2).

How can the former military spouse cope with the higher cost of the CHCBP coverage upon divorce? The family law practitioner can do some skillful negotiating to help cover the higher cost for the former military spouse enrolling in the CHCBP. If paying the monthly premiums will be a significant hurdle for the former spouse, in an appropriate case, the family law practitioner can arrange for a cost-sharing of the CHCBP premiums through an alimony award, or in justifying an additional portion of military retired pay to assist the former spouse in paying the premiums. Colleague Mark Sullivan, in his *Military Divorce Handbook*,[144] offers a method of valuing the military member's health care benefit. This can provide some useful numbers in support of the argument on behalf of the former spouse, that the loss of health care benefits should be offset by a postdivorce contribution from the military sponsor. Selling this to the military member involves pointing out that such periodic payments could be written to 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.

What can be done about health insurance for other members of the former spouse's family? Some clients may have custody of children from another relationship or even their dependent parents. When the former spouse was married to the military sponsor and all were in the same household, dependent stepchildren and dependent parents-in-law living in the home had derivative Tricare coverage from the military sponsor. Now that divorce has cleaved the family, is there a family health care option available to the former military spouse that will also provide coverage to other members of the household? The CHCBP offers both a *family* and *individual* plan option. Individual coverage is presently $933 *per quarter* and family coverage is $1,996 *per quarter*. However, former military *spouses* are only allowed to enroll in the individual plan,[145] whether they qualify for *transitional* or *unlimited* coverage. The former spouse's children of prior relationships, who were entitled to derivative Tricare coverage as a stepchild[146] of the military sponsor during the marriage, *may* be eligible for transitional enrollment in the CHCBP by virtue of having lost their Tricare coverage due to the parents' divorce.[147] Former *parents-in-law* to the mil-

144. SULLIVAN, *supra* note 26, at 522.

145. 10 U.S.C. § 1078a(e) (2008).

146. The enabling statute is clear that a military sponsor's *stepchild living in the home* is eligible for Tricare benefits under 10 U.S.C. §§ 1072(2)(D), (6)(C) (2008).

147. It is not clear whether a *former stepchild* would be eligible for *transitional* coverage under the CHCBP once that child no longer resides in the military sponsor's household. This would certainly be the case in the event of a divorce, annulment, or dissolution. It would also be the case if it was an action for separate maintenance (i.e., where no divorce is granted), and the military sponsor and the nonmilitary spouse (and presumably his or her children from a prior

itary sponsor are not eligible for even transitional CHCBP coverage and may only have Tricare coverage if they were considered the sponsor's dependent at the time of the military member's death.[148]

### *I. Are You Confused in Determining Which Spouses and Unremarried Former Military Spouses Are Eligible for CHCBP and for How Long They May Be Covered? There Exists a Flowchart to Help!*

Appendix 1 offers a useful flowchart on "Health Care Coverage for Spouses and Former Spouses" prepared by Mark Sullivan of Raleigh, North Carolina.[149] A client need only start at the top of the CHCBP Flowchart and trace *eligibility* for CHCBP coverage. The analysis starts with the "first tier" criteria concerning *who makes the cut to be eligible for CHCBP.* Answers to the "second tier" criteria will determine *the period of coverage for CHCBP*. The "second tier" has two sets of criteria: *one* for determining the thirty-six months *transitiona*l CHCBP coverage and a *second* for determining who may then further qualify for *unlimited* CHCBP coverage. While these criteria may be confusing, viewing the CHCBP flowchart while reading about the criteria will make them easier to understand.

The following paragraphs will explore each of the criteria for the first and second tiers, and then the two sets of criteria that allow for *transitional* and *unlimited* CHCBP coverage for former military spouses.

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relationship) no longer live in the same home. The argument that a *former stepchild* should be eligible for *transitional* enrollment in the CHCBP can be found at 32 C.F.R. § 199.20(d)(1)(ii). First, notice that the definition of *child* under 10 U.S.C. § 1072(2)(D) is further defined at § 1072(6)(C), and such definition *does not distinguish a stepchild from any other child of the military sponsor*. This statute serves to make any stepchild of the military sponsor, just like any other children of the marriage, eligible for Tricare coverage as long as the child resides in the household. When a divorce occurs and the stepchild is removed from the military sponsor's household, the operation of 32 C.F.R. § 199.3(b)(2)(ii)(C) or (F) terminates the stepchild's eligibility for Tricare coverage, but 32 C.F.R. § 199.20(d)(1)(ii) immediately makes that child eligible for *transitional* coverage under the CHCBP as the regulation *does not specify* what event ends Tricare coverage for that dependent. Certainly divorce serves to end the dependency relationship between the military sponsor and stepchild, and because that event causes the loss of Tricare coverage, the *former dependent stepchild* is then made eligible for enrollment in *transitional* CHCBP coverage. Perhaps because other less expensive health care is available to stepchildren, either through that child's noncustodial parent or by state-sponsored health care programs, the issue of coverage under the CHCBP does not often arise. But, in the event it does, and especially if more than one stepchild is involved, the former military spouse might request the CHCBP administrator to allow coverage under a CHCBP family plan policy. It would be sensible to certainly have one CHCBP family plan enrollment rather than multiple enrollments. Administratively, it would also be easier for the administrator to handle claims and payments.

148. 10 U.S.C. § 1072(2)(E).

149. Grateful appreciation is given to Mark E. Sullivan for allowing the CHCBP flowchart to be included in this article.

### *J. Former Spouse Eligibility for CHCBP Coverage*

The *first tier* of criteria is used to determine which former spouses are *eligible* for any level of coverage under the CHCBP. Essentially the *first tier* criteria may be satisfied by almost any unremarried former military spouse seeking CHCBP coverage. The following is an extract from pages 14–15 of the *CHCBP Handbook*, but the same eligibility criteria is also found in the enabling statute[150] and implementing regulations.[151]

Enrollment in the CHCBP is open to . . .

iii. 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 (he or she) was covered under a health benefits 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.[152]

Once *eligibility* for the CHCBP enrollment is determined, then the next question becomes *for how long can CHCBP coverage be given*?

### *K. Criteria for Temporary and Unlimited CHCBP Coverage*

In the second tier of criteria, it is important for attorneys and clients to remain alert to the fact that there are two different criteria for how long CHCBP *coverage may last*. The *transitional coverage* is for a maximum of *thirty-six months.*[153] The criteria for this coverage can be satisfied by just about any unremarried former military spouse. However, the second level of *unlimited* coverage[154] requires additional criteria. Keep in mind

150. 10 U.S.C. § 1078a(b)(3).

151. 32 C.F.R. § 199.20(d)(1)(iii).

152. Recall the earlier discussion of a 20/20/20 or 20/20/15 former military spouse electing to waive coverage under Tricare and alternatively seeking coverage under the CHCBP. (It was an option that a former spouse client might wish to pursue to avoid the forfeiture provisions for remarriage (at any age) or for enrollment in double-coverage employer health care.) It was the purpose of the CHCBP enabling statute to provide health care coverage for former military spouses who were not already covered, and those who were already covered under 10 U.S.C. §§ 1072(2)(F)–(H) were written out of the CHCBP statute. However, this author believes what was actually intended was that a former military spouse should not have *simultaneous double-coverage* under both the Tricare and CHCBP statutes. So perhaps the better choice of words would have been "enrolled" and not "eligible" for this leg of the CHCBP criteria. This author recommends that a former military spouse wanting to forego Tricare benefits so as to be allowed to enroll in the CHCBP should submit the request in writing to the CHCBP administrator in order to receive a reliable response.

153. 32 C.F.R. § 199.20(d)(6)(iii).

154. 32 C.F.R. § 199.20(d)(6)(iv).

that *cost* and *benefits* under the CHCBP are identical for both *transitional* and *unlimited* coverage.

The following is how the *CHCBP Handbook* at page 23–24 explains the *second tier* criteria for determining length of coverage under the CHCBP:

(1) *Temporary CHCBP Coverage:* Any un-remarried former spouse who *continuously* meets the first tier *eligibility* criteria may then have up to 36 months of CHCBP *transitional coverage*. The CHCBP Handbook at page 23 states that the 36 months *commences on the later of*:

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);[155] 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 or the date the member first ceases to be eligible for care under TAMP (Transitional Assistance Management Program), whichever is later, if the former spouse first meets the requirements for being considered an un-remarried former spouse during a period of continued coverage of the military sponsor for self and dependents.[156]

(2) *The Transition from Temporary to Unlimited CHCBP Coverage:* After an un-remarried former military spouse has used his or her available Tricare benefits, *followed* by any CHCBP *transitional* coverage, then they approach the second tier's additional criteria for *unlimited* CHCBP coverage. For example, before going into *unlimited* CHCBP coverage, a 20/20/15 former spouse must first use the one year of Tricare eligibility under 10 U.S.C. § 1072(2)(G) and then must exhaust his or her 36 months of *transitional* CHCBP coverage. At that point the former military spouse must determine if he or she can satisfy the remaining criteria for "*unlimited coverage*" with each renewal period thereafter. Other former spouses who cannot satisfy the 20/20/15 rule must first enroll in the 36 months of *transitional* CHCBP coverage and then at the end of the thirty-six months apply for "*unlimited coverage*" upon each renewal period thereafter.

155. Those 20/20/15 former spouses who qualify for one year (365 days) of Tricare coverage after divorce under 10 U.S.C. § 1072(2)(H) are then further eligible for up to thirty-six additional months of CHCBP coverage under 10 U.S.C. § 1078a(g)(1)(C)(ii), thus allowing for transitional health care benefits for up to forty-eight months. Of course, the first year will be under Tricare, and the following thirty-six months under the CHCBP with its much higher quarterly premiums.

156. This paragraph in the handbook is unnecessarily confusing. The actual implementing regulation at 32 C.F.R. § 199.20(d)(6)(iii) is much easier to comprehend and apply. If the military sponsor is serving on active duty, then the thirty-six months of transitional coverage could be measured from the date the military sponsor departed service. The confusing language actually has very limited application and would pertain to an unremarried former spouse who divorced a military sponsor still on active duty, and still covered under TAMP. In such a case, the thirty-six months would be measured from the later of the date the military sponsor left active duty, or upon his or her losing TAMP coverage.

(3) *Criteria for Obtaining Unlimited CHCBP Coverage:* If one cannot be a 20/20/20 former spouse and qualify for Tricare coverage, then the next best thing is for the former military spouse to qualify for *unlimited* enrollment under the CHCBP. The former military spouse, who can satisfy the following additional criteria, may have *upon their request unlimited* (i.e.*, indefinite)* CHCBP coverage. The enabling statute and implementing regulations[157] specifically provide that the limitation for an un-remarried former spouse to only receive thirty-six months of *transitional* CHCBP coverage *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 fifty-five*; AND

b. Was *enrolled* in CHCBP or Tricare[158] as the dependant of an involuntar-

157. 10 U.S.C. § 1078a(g)(4) (2008); 32 C.F.R. § 199.20(d)(6)(iv) (2009).

158. The CHCBP Handbook at 23–24, the statute at 10 (2009) U.S.C. § 1078a(g)(4)(B)(ii), and implementing regulation at 32 C.F.R. § 199.20(6)(iv)(B), do not track one another as to what type (i.e., Tricare versus CHCBP) of health care coverage the former spouse had to have been under in the eighteen-month period preceding the divorce. The statute provides that it is only necessary for the former spouse to have been covered under *any* "health benefits plan" under (Title 10 United States Code, Subtitle A Part II,) *Chapter 55*, which is essentially any health care benefits plan offered by the Department of Defense for dependents of active duty and retired military sponsors. The implementing regulation is considerably more restrictive and requires that the former spouse have been "enrolled *in the CHCBP* and only *as a dependent of an involuntarily separated member*." The criteria set out in the *CHCBP Handbook* falls somewhere in the middle of the statute and regulation, and requires the former spouse to have been "enrolled in *either* the CHCBP or Tricare" during the eighteen-month period before the divorce. This author believes the reason behind this disconnect is that Congress intended to provide a means for former spouses to have a transitional health care plan that was equal to that afforded to former spouses of federal civilian employees; whereas, the DoD was more attuned to providing only for transitional health care for servicemembers being forced out of the military due to the reduction in force after the build-up of forces during the Cold War era and operations Desert Storm and Desert Shield. The *CHCBP Handbook*, which is not in any way a legal authority, appears to take a middle ground that so happens to also expand its base of possible customers for the CHCBP. In practice, and since most of the management and oversight of the CHCBP is by the administrator, it is reasonable to assume that the criteria for unlimited coverage will be satisfied if the former spouse has been covered under *either* Tricare or the CHCBP during the eighteen months before the divorce, dissolution, or annulment.

ily separated member (or military retiree)[159] (at some time)[160] during the

159. Do not be confused by the phrase "involuntarily separated member." Separation for reasons of *retirement* from military service also satisfies these criteria. *See* 10 U.S.C. § 1078a(g)(4)(B). Once again confusion arises over how the class of eligible former spouses is defined by differences in the language found in the statute, implementing regulations, and the *CHCBP Handbook*. The statute at 10 U.S.C. § 1078a(g)(4) contains no language or reference requiring the former spouse to be one of "an involuntarily separated servicemember," but does at subsection (4)(B) indicate that former spouses of those *retired* from service are certainly part of the intended group to be allowed *unlimited* coverage. The implementing regulation (32 C.F.R. § 199.20(d)(6)(iv)(B)) and *CHCBP Handbook* (page 24) have essentially identical language and restrictively limit the class of eligible former spouses by requiring the former spouse to have been "the dependent of an involuntarily separated member during the eighteen months before the date of the divorce, dissolution, or annulment." Under the most *conservative* interpretation of the three sources, a former military spouse, otherwise eligible for transitional CHCBP coverage and meeting the other criteria for *unlimited* coverage, would satisfy the criteria if their military sponsor was either *retired* or *retirement eligible* at the time of the divorce, or was *involuntarily separated* from service. This author believes the statute would cover former military spouses of: (a) an active duty sponsor who was eligible for retirement but not yet retired; (b) the "gray area reservists" (i.e., those who had accumulated at least twenty years of creditable service for retirement, but were not yet eligible to receive military retired pay due to age); (c) those who took a Voluntary Separation Incentive (VSI) (under 10 U.S.C. § 1175); (d) those who took a Special Separation Benefit (SSB) (under 10 U.S.C. § 1174(a); (e) those who are on the Temporary Disability Retirement List (TDRL); or (f) those who were medically retired under Chapter 61 of Title 10 United States Code. In practice, the CHCBP administrator appears to go by the broader definition of the class for eligible former spouses as determined by the enabling statute (as opposed to the more restrictive implementing regulation) and will authorize *unlimited* CHCBP coverage for former spouses of those military sponsor's *who are retired or eligible to retire*. In case no one has noticed, there is still a "very large elephant in the room!" What of the former spouses of those servicemembers *still serving on active duty* or those actively *participating in the Reserve Components* and who are neither retired nor "involuntarily separated" when they divorce from their nonmilitary spouses? Once again, the enabling statute at 10 U.S.C. § 1078a(g)(4) contains no language whatsoever that excludes former spouses of servicemembers *still on active duty* or who are married to a Reserve Component member serving a period of active duty. To exclude this group of former spouses from *unlimited* CHCBP coverage would mean that the former spouse of an involuntarily separated servicemember, who had been on active duty for just five years, would be eligible for *unlimited* CHCBP coverage; whereas, a former spouse married for nineteen years to a military sponsor who had served for nineteen years and eleven months would be denied *unlimited* CHCBP. This author believes that Congress certainly intended to include former spouses of those military sponsors still on active duty, provided they otherwise satisfied the second-tier criteria. At present the CHCBP administrator appears to include them in the authorized group of those eligible for *unlimited* CHCBP.

160. Once again the language in the enabling statute (10 U.S.C. § 1078a(g)(4)(B)(ii)) legislating the period of time the former spouse was to have been covered under Tricare (or the CHCBP) is not the same as what appears in the implementing regulation (32 C.F.R. § 199.20(d)(6)((iv)(B)) or *CHCBP Handbook* (page 24). The statutory language only requires the former spouse to have been covered under a Chapter 55 health benefits plan "*at any time*" during the eighteen months under the CHCBP (or Tricare) before the divorce; whereas, the regulation and *CHCBP Handbook* require the former spouse to have been covered *for the full eighteen months* before the divorce. Obviously the regulation is far more restrictive than the statute. But, in *real world* practice, it should not present a significant problem for the former spouse to meet the "eighteen months of coverage" requirement. Not many divorces occur within the first eighteen months of marriage, and for those who do file within that period of time it usually is easy for the former spouse to postpone taking a final decree in order to satisfy the eighteen months of coverage criteria.

eighteen-month period before the date of the divorce, dissolution, or annulment; AND[161]

c. Is receiving *any* portion of the retired or retainer pay of the member, or former member, OR an [Survivor Benefit Plan, (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.

So, for the former spouse to qualify for *unlimited* coverage under the CHCBP, he or she must (1) not remarry prior to age fifty-five, (2) have been enrolled in Tricare or the CHCBP at some point during the eighteen months preceding the divorce, (3) be receiving or at some point be *entitled to receive* a portion of military retired pay, or, be receiving a survivor's annuity or entitled to receive a survivor's annuity by either a court order or agreement.

As it so happens, *all of the above* are common-place property division issues in a military divorce. In most military divorce cases, the nonmilitary spouse will certainly seek some portion of the retired pay of the military sponsor as an equitable division of marital or community property. Under the Uniformed Services Former Spouses Protection Act,[162] which is the federal statute that allows state courts to divide military retired pay, virtually *every* divorce involving a servicemember or military retiree will allow for some division of military retired pay, regardless of how small it may be. Likewise, it is common for a former spouse to want to protect his or her right to receive a portion of the military pension (which otherwise ends upon the military member's death) through being awarded beneficiary status under the Survivor Benefit Plan (SBP).[163] An interesting difference between the application of equitable division and community property laws to pensions and survivor benefits is that former spouse survivor benefits may be awarded even though the marriage did not occur at a time when the military sponsor was in military service and earning retirement benefits.[164]

161. This particular leg of the qualifying criteria for *unlimited* CHCBP coverage is confusing and made even more so as the statute, implementing regulation, and *CHCBP Handbook* significantly differ in what is required to qualify the former spouse for *unlimited* coverage. Because of the confusing nature of the three sources of CHCBP information, this author has attempted to point out the differences and explain their consequences in the following extended footnotes. The family practice attorney and client should pay close attention to the following footnotes to be alert to these differences and how they may impact the facts in a particular case.

162. 10 U.S.C. § 1408(c)(1) (2008).

163. 10 U.S.C. §§ 1447–1455 (2008); SULLIVAN, *supra* note 26, at § 8.15, 474–91.

164. *See* Hipps v. Hipps, 597 S.E.2d 359 (Ga. 2004). In *Hipps*, the military sponsor's serv-

### *L. Likely Questions and Issues Arising from the Application of the Criteria for Transitional and Unlimited CHCBP Coverage*

The absence of researchable and reliable sources of information makes difficult the task of interpreting the CHCBP statute, regulation, or even to apply the *CHCBP Handbook* to a given client's situation. In doubtful cases of eligibility, the former military spouse client can attempt to obtain informal guidance from the CHCBP customer service officer or at the Tricare service center. Unfortunately, this may not be reassuring to an anxious client if securing postdivorce health care is of great importance. Certainly the former military spouse or the family law practitioner could write the CHCBP administrator requesting a formal opinion; however, it may significantly delay the completion of the case. Family law attorneys will often find themselves in the position of having to provide the client at least some assurance of their coverage under the CHCBP. In the event the client is denied CHCBP coverage, the attorney must be able to cite appropriate authority from either the statute or regulations in seeking a reconsideration or reversal of an adverse decision. If reconsideration is denied, the attorney and client may then be faced with pursuing an appeal to the Defense Office of Hearings and Appeals, where referencing authority will be essential to that effort.

The following are some issues and corresponding legal analysis that may be useful to the family law practitioner in advising the client about CHCBP coverage:

1. *How long must a former spouse be covered under a DoD health benefits program to be eligible for coverage under CHCBP?*

Note that for *eligibility* for *transitional* CHCBP coverage, the former spouse need only to have been covered under Tricare *on the day before* the decree of divorce, dissolution, or annulment is entered.[165] So, technically, only *one day* of Tricare coverage is required, and as long as that one day is the "day before" the final decree is entered, the criteria is satisfied. Hypothetically, a person could marry military sponsor on Monday and divorce the following Wednesday and be *eligible* for thirty-six months of

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ice had occurred completely outside of the marriage; however, the nonmilitary spouse had been named the spouse beneficiary of the SBP. Upon the couple's divorce, the nonmilitary spouse wanted to continue her coverage under the military sponsor's SBP. The military retiree (husband) opposed the ex-wife continuing her SBP coverage by claiming the right to name the plan's beneficiary was a premarital and separate asset of the military sponsor. The Georgia Supreme Court ruled that the nonmilitary spouse could be awarded former spouse coverage under the SBP *as an alimony award,* even if it were considered the military sponsor's separate property.

165. 10 U.S.C. § 1078a(b)(3)(B); 32 C.F.R. § 199.20(d)(1)(iii).

*transitional* CHCBP coverage. Since Tricare is also available to those who are retired from service, a former spouse could be eligible for the CHCBP without having ever been married to the military sponsor during any period of active duty service.

The criteria for how long the former spouse must have been covered under Tricare or the CHCBP to qualify for *unlimited* CHCBP coverage are more confusing. Recall that the former military spouse must exhaust his or her *transitional* coverage before requesting unlimited coverage. So, when the statute and regulations[166] state the former spouse must have been covered under "an approved health benefits plan under Title 10, Chapter 55," this would mean *either* Tricare or CHCBP coverage, which occurred during the eighteen months *before* the final decree of divorce, dissolution, or annulment. The enabling statute and implementing regulation are confusing as to whether the former spouse must have been "covered for eighteen months" or simply "covered *at some point during* the eighteen month period" before the entry of the final decree. The statute provides that the former spouse need only have been covered under *any* Title 10, Chapter 55 health care plan and for *any period* during the eighteen months before the divorce; whereas, the regulation[167] states that he or she must have been enrolled *in the CHCBP for the eighteen months before the divorce*.

In the author's attempt to clarify this confusion, the CHCBP administrator has orally advised that the former spouse could be covered under *either* Tricare or the *transitional* CHCBP for *any day* (i.e., anytime) during the eighteen months preceding the final decree of divorce, and qualify for *unlimited* CHCBP coverage. Thus, a former spouse who was never covered under Tricare at any time during the marriage, but did happen to be covered at some point during the eighteen-month period by the CHCBP, would still qualify for *unlimited* coverage.

Why is understanding this subtle difference this important to the attorney or the client? There are instances where the former spouse may not have been covered under Tricare for the full eighteen months, but could show coverage at least at some point during the eighteen months before the marriage ended. This is because the DEERS database is not always current on information about the marital status of a spouse. Since the DEERS database is what is referenced to determine eligibility, it may be much easier to prove one day of coverage during an eighteen-month period than to show coverage on the day before the divorce.

Very often out of purpose or spite, the military sponsor may not update DEERS with the spouse's information or will simply allow the spouse's

166. 10 U.S.C. § 1078a(g)(4)(B)(ii); 32 C.F.R. § 199.20(d)(96)(iv).
167. 32 C.F.R. § 199.20(d)(6)(iv)(B).

DEERS enrollment to lapse. Unless the client has been denied some military dependent benefit, he or she may not know to inquire about DEERS status. The obvious *bad* result is that the client does not appear in DEERS and is effectively disqualified from either *transitional* or *unlimited* CHCBP coverage. Because the CHCBP administrator will query DEERS to determine the client's eligibility for CHCBP, if the former spouse does not show up in that database, he or she will then be denied enrollment.

The practitioner and client should never take DEERS status for granted. The practitioner must be alert to checking the DEERS status of the nonmilitary client and should even consider postponing a final decree until it can be verified that the client is in the DEERS database. The fallback alternative may be to show some evidence of coverage under either Tricare or CHCBP during that requisite eighteen months *before the final decree is entered*. Copies of a Tricare or CHCBP Explanation of Benefits (E.O.B.) showing an approved claim for medical care or treatment may serve this purpose.

2. *What are the consequences of remarriage for the former spouse under CHCBP?*

Recall that for the 20/20/20 and 20/20/15 former spouses to remain eligible for Tricare coverage under 10 U.S.C. §§ 1072(2)(F),(G), and (H), *remarriage at any time, or at any age, ends the coverage.* The requirement to remain unmarried also is part of the eligibility criteria to enroll in *transitional* CHCBP. But, compare the criteria for *transitional* enrollment to that for *unlimited* coverage, which provides that remarriage is *not* a disqualifier if it occurs *after* the former spouse achieves his or her fifty-fifth birthday. Will this present a "Catch-22" for the former military spouse who elects to remarry after age fifty-five? That is, to *enroll* in CHCBP one cannot be remarried, but one can have *unlimited coverage* by postponing the remarriage until after age fifty-five. By example, would a fifty-six-year-old nonmilitary spouse who divorced a military sponsor and immediately remarried, therefore, fail to meet the criteria to *enroll* in *transitional* CHCBP, even though he or she was nevertheless eligible for *unlimited* coverage? This confusion in the statute may have arisen from an attempt by Congress to make the *unlimited* CHCBP coverage mirror the Spouse Equity Coverage available to former spouses of federal civilian employees offered through the Office of Personnel Management.[168] The "no remarriage before age fifty-five" requirement is tied to the loss of former spouse survivor annuity coverage that exists in both the military

168. Compare the legislative purpose of 10 U.S.C. § 1078a(a) and the criteria found in 10 U.S.C. § 1078a(g)(4) with the criteria for former spouses of federal employees at 5 U.S.C. § 8901(10) and 5 U.S.C. § 8905(c)(1).

Survivor Benefit Plan and Federal Civil Service Survivor Annuity. It appears that so long as the former spouse seeking to qualify for CHCBP coverage, whether *transitional* or *unlimited*, does not remarry until after age fifty-five, he or she would remain eligible to enroll in CHCBP because his or her remarriage would not have caused forfeiture of the beneficiary status of survivor benefits.

What if the CHCBP administrator denies the over-fifty-five former spouse *transitional* coverage, because one of the criteria is that he or she must be unremarried, and eligibility for transitional coverage is a prerequisite for unlimited CHCBP coverage? In asking for reconsideration, it may be useful to point out that under the enabling statute, the over-fifty-five former spouse would nevertheless qualify for *unlimited* CHCBP *at any time*, so long as he or she were covered under any Title 10, Chapter 55 health care plan *at any time* during the eighteen months preceding the divorce. Thus, Tricare coverage during the marriage would satisfy the statute every bit as much as the former spouse being covered first under *transitional* CHCBP. So, one could argue that under the statute such a former military spouse could even "skip" *transitional* CHCBP coverage and actually go directly to the *unlimited* CHCBP coverage.[169] However, as a "preferred practice" for family law practitioners, this author highly recommends advising the client that before remarrying, *at any age*, the client should seek an advisory opinion from the CHCBP customer service office on the consequences to CHCBP coverage.

3. *Can a 20/20/20 spouse who lost Tricare coverage due to remarriage, nevertheless qualify for "unlimited CHCBP coverage" if the remarriage occurred after age fifty-five?*

Note that, by law, a 20/20/20 former spouse forfeits Tricare coverage if he or she remarries at *any time*.[170] Further note that a CHCBP former spouse can remarry and still retain *unlimited* CHCBP coverage, as long as remarriage occurs after the former spouse's fifty-fifth birthday.[171] So, is there a way to make the 20/20/20 former spouse, who had been covered by Tricare, eligible for *follow-on* coverage under CHCBP, considering the remarriage occurred *after age fifty-five*? The most probable immediate

169. This author's discussions with a senior CHCBP administrator confirmed that as long as the former spouse can document that the remarriage occurred *after* the fifty-fifth birthday, his or her eligibility for CHCBP coverage would be unaffected. (Certified copies of birth and marriage certificates should suffice.) However, that same individual stated that any Tricare or CHCBP customer service representative who was unfamiliar with the *unlimited* coverage criteria could very easily give incorrect information about the consequence of a remarriage upon eligibility for CHCBP coverage.

170. 10 U.S.C. § 1072(2)(F) (2008).

171. *See* 10 U.S.C. § 1078a(g)(4)(B)(i) (2008).

response is to deny eligibility for follow-on CHCBP. However, on a closer analysis and application of the CHCBP criteria, a very strong case can be made that he or she qualifies for both *transitional* and *unlimited* coverage. To come up with that conclusion, the CHCBP statute as a whole must be considered and not just an isolated portion. First, consider the statute (10 U.S.C. §§ 1072(2)(F)–(G)), which makes a 20/20/20 former spouse eligible for Tricare, also makes him or her *ineligible* upon remarriage at any time. So not withstanding 20/20/20 status, the former spouse loses eligibility for Tricare at one minute after midnight on the day following the remarriage.[172] Now, at that very moment, apply the eligibility criteria for the CHCBP coverage, especially unlimited coverage, and that 20/20/20 former spouse appears immediately eligible for the CHCBP. Be alert to a portion of the CHCBP enabling statute that appears to exclude *any* 20/20/20 former spouses from coverage under the CHCBP. That would be the case if *not for the remarriage*.[173]

It is interesting that Congress specifically allowed for certain 20/20/15 former spouses[174] (i.e., those who divorced after April 1, 1985) who were eligible for only one year of Tricare coverage, to be subject to the same *forfeiture upon remarriage* provision as the 20/20/20 former spouse. However, they were allowed to transition into the CHCBP coverage after the end of one year of Tricare coverage.[175] Is it not clearly reasonable that if a 20/20/15 former spouse can remarry after age fifty-five and have follow-on coverage under the CHCBP, a 20/20/20 former spouse should be allowed to do the same? Note, the attorney for the "20/20/20, fifty-five-plus-year-old former spouse who wants to remarry" could argue that the CHCBP statute did not specifically exclude such a group from eligibility for coverage. Rather, the statute only intended to prevent them from being *simultaneously* eligible for coverage under Tricare and the CHCBP.

That argument (or analysis) starts with a reference to that portion of the CHCBP statute that provides that *any* 20/20/20 and 20/20/15 former spouse is *excluded* from CHCBP coverage under 10 U.S.C. § 1078a(b)(3)(C) as meaning *only the former spouse is eligible for and covered under Tricare and not to apply if he or she is either not eligible or not covered under Tricare*. It would seem far from the intent of Congress to allow a less deserving 20/20/15 former spouse to have follow-on coverage under the CHCBP and deny it to an equally, or perhaps, more deserving 20/20/20 former spouse. And no, the later subsection[176] of the CHCBP

172. 32 C.F.R. § 199.3(f).
173. *See* 10 U.S.C. § 1078a(b)(3)(C).
174. 10 U.S.C. § 1078a(b)(3)(C); 32 C.F.R. § 199.20(d)(1)(iii)(C).
175. 10 U.S.C. § 1078a(c)(4), (g)(1)(C)(ii); 32 C.F.R. § 199.20(6)(iii)(B).
176. 10 U.S.C. § 1078a(c)(4).

statute that appears to favor the 20/20/15 spouse has only to do with *notification* of eligibility for coverage. It has nothing to do with *making him or her eligible* for coverage under the statute.

The argument can also be strengthened by reference to that portion of the CHCBP statute[177] allowing for continued coverage on an *unlimited* basis for former spouses, wherein it does not limit the term "former spouse" as defined in the CHCBP statute or by reference to any other part of the CHCBP statute outside of § 1078a(g)(4). The pleas and summation of the argument are that a 20/20/20 former spouse who spent at least two decades with a military sponsor and who happens to decide to remarry after age fifty-five *should not* be treated less favorably than a former spouse who was only married for as little as *one day* to a military member, especially when it is under a statute *intended to provide for the health care needs of former dependents who, for whatever reason, lose their Tricare coverage.* Once again, the family-law practitioner faced with advising a 20/20/20 former spouse who wishes to remarry and needs to retain DoD health care coverage should advise that client to seek an advisory opinion from the CHCBP customer service office *prior to the remarriage*.

4. *Must a former spouse receive* both *a portion of retired pay* and *survivor benefit coverage to qualify for unlimited CHCBP coverage? If only one of the two can be obtained, which is more likely to ensure the former spouse has unlimited CHCBP coverage?*

Although the second-tier criteria for unlimited CHCBP coverage are joined by the connector "or" (suggesting "either"), it is a much safer and preferred practice to qualify the former spouse by arranging for *both*. The *Lowe* case, which happens to be the single litigated and reported case involving a CHCBP eligibility issue discussed only this issue and provided no useful precedent.[178] The problem with qualifying a former spouse for the CHCBP by requiring only receipt of, or entitlement to receive, military retired pay is that such coverage is subject to being lost if the military sponsor predeceases the former spouse. The right of a former spouse to receive a portion of military retired pay by law terminates upon the death of the military sponsor.[179]

A former spouse who is basing eligibility for *unlimited* CHCBP cover-

177. *Id*. at (g)(4).

178. *Lowe,* 738 N.W.2d 63, is discussed in greater detail at note 108 and accompanying an earlier segment of this article. . The case does not provide any legal precedent, but it does suggest that considerable future litigation can be avoided by qualifying the former spouse to receive *both* a portion of retired pay and survivor benefit plan coverage.

179. 10 U.S.C. § 1408(d)(4) (2008).

age, solely upon receipt of a portion of retired/retainer pay, may find that the military sponsor's death could prevent him or her from qualifying for the unlimited CHCBP at the next enrollment application. Stated directly, the former spouse would be unable to satisfy the *unlimited* CHCBP criteria because he or she was neither receiving, nor entitled to receive, a portion of the military sponsor's retired pay as the pension ended with death of the military member. A similar problem does not appear to exist in using the former spouse's coverage under the Survivor Benefit Plan (SBP) because the CHCBP statute allows the former spouse to qualify *either* upon (currently) receiving a survivor's annuity *or upon the right to receive* such an annuity in the event the military sponsor predeceased the former spouse.[180]

It is by far preferable to qualify the former military spouse in as many ways as possible, i.e., (1) obtain for the former spouse a portion of retired pay, even if it will not be paid until sometime in the future; and (2) obtain for the former spouse SBP coverage. Do not be afraid to seek a *minimal* award or coverage under *either* one, or *both*. The second-tier CHCBP criteria for *unlimited* coverage does not discriminate based on how *much* of the retired pay the former spouse receives or the base amount of the survivor's annuity. The only thing that counts under the CHCBP criteria is that the former spouse is currently receiving or has a right to receive some portion of either in the future. And, if an "either or" decision must be made by the client in the case because of having to settle for one or the other, then the most prudent course is to opt for the SBP because it is the more likely of the two to ensure *unlimited* CHCBP coverage.

As a final caution, remember that former spouse SBP coverage may not be available at the time of divorce if it had been waived at the time of the military member's retirement, and it is suspended if the former spouse remarries before age fifty-five. Always check the *status of the nonmilitary member's SBP at the beginning of the case*; and, whenever possible, ensure that beneficiary status is obtained.[181]

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180. Closely compare the language in the CHCBP statute at 10 U.S.C. § 1078a(g)(4)(B)(iii)(I) with 10 U.S.C. § 1078(g)(4)(B)(iii)(II). The *former* subsection (i.e., (g)(4)(B)(iii)(I)) discusses the *current* receipt by the former spouse of *either* a portion of retired pay or a survivor's annuity; whereas, the *later* subsection ((g)(4)(B)(iii)(II)) discusses the *right to receive* a survivor's annuity in the *future*. Thus, a former spouse attempting to qualify for *unlimited* CHCBP with SBP coverage would always be either *actually receiving* the survivor's annuity, or would be eligible to receive one *in the future* if the military sponsor predeceased him or her. Of course, if the former spouse predeceased the military sponsor, the issue of health care coverage would be moot.

181. While a detailed discussion of former spouse benefits under the SBP is beyond the scope of this article, some knowledge of it is necessary to assist the nonmilitary client in making health care decisions under the CHCBP. SBP coverage is decided at the time of retirement,

5. *What is the consequence if a former spouse has a court order providing for SBP coverage, but did not timely file a "deemed election" or take other steps to ensure SBP coverage? Would the court order, by itself, be sufficient to satisfy the criteria, even if no SBP benefit could legally be paid?*

Obviously, within one year of the divorce either the client or attorney must follow through with perfecting the former spouse's deemed election, or the military sponsor must act to change the status of the SBP coverage from *spouse* to *former spouse*. If this is not done, the former military spouse has an *imperfect claim* to being a beneficiary under the SBP and is subject to being bumped from coverage by a subsequent spouse. Worse yet, if the military sponsor has not yet retired or reached the age at which he or she must make SBP elections, without a deemed election having been filed and the military sponsor being unmarried, he or she may simply decline the SBP altogether at the time of retirement.

For the family-law practitioner, getting survivor benefits awarded as part of the divorce and then getting the former spouse's coverage perfected is an absolute must in representing the nonmilitary spouse. Generally speaking, the CHCBP administrator will make an eligibility determination simply by checking the final decree or settlement agreement to determine if the former spouse has been awarded either a portion of retired pay or former spouse SBP coverage. The administrator likely will not conduct a legal review of eligibility for either of these benefits and will defer that to the appropriate office of the Defense Finance and Accounting Service. Therefore, whether a former spouse will actually receive a portion of retired pay or survivor benefits in the future is not the focus of the CHCBP

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and may be imposed by law if the military member is not yet retired or is retirement eligible. By default, a maximum SBP is given to the spouse if it is not affirmatively waived. Often a decision is made to forgo SBP in favor of obtaining additional life insurance, so it is always a good idea to ask the nonmilitary spouse if he or she waived coverage at the time of the sponsor's retirement. There are very limited opportunities for retroactive enrollment into the SBP. For those military retirees already receiving retired pay, the existence of the SBP will appear on military retired pay statements (DFAS-CL Form 7220/148). Members of the Reserve Component actually have two opportunities to enroll in the SBP: (1) at the time they receive their twenty-Year Letter, they may enroll in the Reserve Component–Survivor Benefit Plan (RCSBP), and (2) at age sixty, they may enroll in the regular SBP. Under either RC-SBP or the standard SBP, a former spouse can be made eligible for coverage by an agreement or court order and a deemed election. It is essential to have the status of the SBP coverage changed from "spouse" to "former spouse" at the time of the divorce. When both parties are cooperative, a DD Form 2656-1 can be used to make the change. If the military sponsor is not cooperative in completing that form, a deemed election may be filed to protect a former spouse by using a DD Form 2656-10. Both forms are available on the Internet, and instructions appear on the back of the form detailing how to answer the questions and where to file the form. The main thing to remember is that the change from *spouse* to *former spouse* coverage *must be* completed within one year of the date of the divorce, dissolution, or annulment. For more information on former spouse rights under the SBP and deemed elections, see SULLIVAN, *supra* note 26, at § 8.15, 474–91.

administrator's review.[182]

6. *Will the former spouse's eligibility for CHCBP be affected should the military sponsor waive military retired pay in order to receive some other form of compensation?*

The most common instances in which the military sponsor can waive receipt of military retired pay and instead receive some other form of compensation are (1) when the military member is rated at some level of disability by the Department of Veterans Affairs (VA), and waives his or her retired pay to receive tax-free VA disability compensation; and (2) after retirement, when the military member begins a federal civil service career and converts military service to creditable civil-service time.[183] In each instance, the amount of military retired pay may be reduced or completely eliminated. Would the fact that the military member, and, in turn, the former spouse, is no longer actually *receiving* military retired pay prevent the former spouse from qualifying for *unlimited* CHCBP coverage? This author does not believe the enabling statute or implementing regulations[184] distinguish between "receiving a portion of retired pay" and the "court-ordered right to receive retired pay," such that a waiver of retired pay by the military sponsor would thereby make the former spouse ineligible for *unlimited* coverage under the CHCBP. Note that the CHCBP enabling statute for *unlimited* coverage allows for *either* the former spouse to: (I) actually be receiving retired pay OR (II) have a court order directing payment of a portion of the military sponsor's retired pay. This author believes the statute does not require *actual receipt*, if the *right to receive* is granted to the former military spouse by court order or agreement. Either will suffice to satisfy the CHCBP administrator's documentation requirement for extending unlimited CHCBP coverage to a former spouse.

182. The former military spouse should expect that when the time comes to request unlimited CHCBP coverage, he or she will be required to submit copies of certain documents to the CHCBP administrator showing that he or she satisfies the criteria. Generally speaking, these documents will be the final decree of divorce (dissolution or annulment), and any settlement agreement, military pension division order, or military retired pay or annuity statement that shows the *receipt of*, or *right to receive*, a portion of *military retired pay* or a *survivor's annuity*. In most instances, the CHCBP administrator will not go beyond the court documents themselves, but certainly may request whatever documentation is needed to confirm that eligibility criteria is satisfied. Certainly if the administrator doubted that the court documents were adequate or legally sufficient to provide a survivor annuity, he or she could request a letter from the Defense Finance and Accounting Service's Military Retired Pay Section to confirm the right of the former spouse to survivor's benefits.

183. For a more lengthy discussion of converting military service time to federal civil service retirement, see SULLIVAN, *supra* note 26, at § 8.16, 495–500.

184. 10 U.S.C. §§ 1078a(g)(4)(B)(iii)(I) & (II); 32 C.F.R. §§ 199.20(d)(6)(iv)(C)–(E).

7. *What if the former spouse is not receiving payments from military retired pay, but rather receives alimony that was ordered in lieu of a division of military retirement so as to avoid the 10/10 rule (10 U.S.C. § 1408(d)(2))?*

The key issue for the attorney to recognize in this question is that nowhere is *alimony* mentioned in the CHCBP criteria, even when it is used as the legal vehicle to divide the military retirement. Thus, when the divorce decree or settlement agreement *only* states that alimony is being received and does not specifically provide for the payment of a portion of retired/retainer pay, the criteria for *unlimited* CHCBP coverage may not be met by the former spouse. Another view of the question is, "can an alimony withholding order that is used to *garnish* the sponsor's military retired pay also suffice to satisfy the requirement under the CHCBP enabling statute[185] that the former spouse must *receive a portion of retired pay*?" Family law practitioners should know that under the Uniformed Services Former Spouses Protection Act, a 10/10 rule must be satisfied to allow for *direct payments* from retired pay to the former spouse by the Defense Finance and Accounting Service.[186] This rule only applies if the military retirement is being divided as *property* and does not apply if payments are instead in the nature of *alimony for support*.

So, where satisfaction of the 10/10 rule creates a problem, it is common practice to use an award of alimony, instead of an award of property, to create a *stream of income* for the former spouse. The play-out of the 10/10 rule and whether the payments are a *property division* or a true *alimony award* is more of a concern for the Defense Finance and Accounting Service, which is charged with enforcing the Uniformed Services Former

185. *See* 10 U.S.C. § 1078a(g)(4)(B)(iii) (2008); 32 C.F.R. §§ 199.20(d)(6)(iv)(C)–(E) (2009).

186. 10 U.S.C. § 1408(d)(2) (2008). The 10/10 rule requires that for the Defense Finance and Accounting Service to make direct payments of their portion of any court-awarded share of military retired pay, the marriage must have been for at least ten years, the military sponsor must have at least ten years of military service, and the marriage and military service must have been concurrent for at least ten years. Note that the 10/10 rule is not jurisdictional but rather administrative. A few states impose a threshold of time in the marriage concurrent with time earning pension under a defined benefit plan, but most state courts can divide military retired pay with only a very minimal amount of the marriage coexisting with military service. If the division of military retired pay is by agreement or consent order, there is no "concurrent military service and marriage" time requirement. To circumvent the Former Spouses Protection Act's 10/10 rule and obtain direct payments from the Defense Finance and Accounting Service, the court order can term the payments as *alimony*. A subsequent garnishment from military retired pay is not executed under 10 U.S.C. § 1408, but rather under 42 U.S.C. § 659. Note that garnishment under § 1408 is a *property division*, whereas the one under § 659 is a *support obligation*. Fortunately, the CHCBP statute at 10 U.S.C. § 1078a(g)(4)(B)(ii) does not specify how receipt of retired pay is to be paid (i.e., "property division" versus "alimony").

Spouses Protection Act, than it is for the CHCBP administrator, who is charged with determining if certain criteria are satisfied for former spouse health care coverage. The CHCBP administrator is unlikely to deny *unlimited* coverage simply because *alimony* was used *as the means* of obtaining a direct payment from the Defense Finance and Accounting Service. However, using alimony *could* create a problem if the payments *were not tied to the military retired pay as the source of such alimony*.[187] Once again, the confounding problem for the practitioner is that the finance center often rejects an alimony withholding order under the 10/10 rule if it appears on the face of the order to actually be a *property division* under 10 U.S.C. § 1408, as opposed to a true *family support payment* under 42 U.S.C. § 659. Within the bounds of advocacy, the family law practitioner may want to obtain a separate declaratory judgment, ruling, or written stipulation of the parties that specifically provides for the alimony payments to be taken from the military retirement and are intended by the court and parties to ensure the former spouse receives a portion of the military member's retired pay.[188] If the CHCBP administrator should challenge the alimony order as being insufficient under 10 U.S.C. § 1078a(g)(4) (B)(iii), the declaratory order can be offered to show the former spouse is receiving a *portion of military retired pay*.

8. *What should the family law practitioner advise the client concerning the consequences of his or her taking lump-sum alimony, rather than a portion of military retired pay, or waiving coverage under the SBP and instead taking life insurance?*

In advising a former spouse concerning either waiving SBP coverage (in favor of life insurance) or accepting lump-sum alimony payments

187. For example, distinguish (1) "the former spouse is awarded alimony for support in the sum of $300 per month" (from a military sponsor who happens to be entitled to retired pay); from, (2) "the former spouse is awarded *from the husband's military retired pay* the sum of $300 per month for her support." Under example (1), the payment of *alimony is not specifically tied to the husband's military retired pay*; whereas, in example (2) it is clear that *the source of alimony is the military retirement*. Even if faced with a case that has example (1) language, the alimony withholding order could be directed at the servicemember's military retired pay, and it would create the *appearance* that the former spouse is receiving a portion of retired pay. Note that a DD Form 2293, "Application for Former Spouse Payments Under the Uniformed Services Former Spouses Protection Act" can be used to get a direct payment of an *alimony* order, which can be expressed as a fixed-dollar amount or a percentage or fraction of disposable military retired pay. The DD Form 2293 is the transmittal form used to request direct payments from military retired pay for either alimony or as a property division.

188. As cautionary advice, the declaratory order or agreement sourcing the alimony from the military retired pay *should not* be sent to the Defense Finance and Accounting Service as it would jeopardize its accepting the alimony withholding order. If the Defense Finance and Accounting Service should determine the alimony order is, in fact, a property division and is not a true support order, it will be deemed a mere pretext to circumvent the 10/10 rule, and the alimony order will be rejected.

(instead of a court-ordered portion of military retired pay), the attorney *should carefully document advice to the client*, given that eligibility for "unlimited CHCBP coverage" may be forfeited by the client's decision. The results will likely limit the client's CHCBP coverage to thirty-six 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 negligence.* As a matter of professionalism, not to mention avoiding a malpractice suit, documenting the advice to the client in writing and having the client sign and acknowledge the advice is good practice. See Appendix 2 for a sample letter to a client.[189]

9. *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 former spouse annuity under the SBP is specified in the *unlimited* coverage criteria of 10 U.S.C. § 1078a(g)(4)(B)(iii) (II). 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 the minimum SBP benefit,[190] or a division of military retired pay of just $1.00 per month would technically satisfy the CHCBP criteria. This author would strongly advise obtaining 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*.)

10. *What is the consequence of seeking unlimited CHCBP coverage 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 eventually retire?*

Consider the following as an illustration of the issues presented by the

189. Grateful appreciation is extended to Lieutenant Jessica L. Pyle, Judge Advocate General's Corps, U.S. Navy, for her advice and assistance in drafting the attorney advisory letter found at Appendix 2 of this article.

190. Under the DoD's SBP, the SBP base amount can range from $300 to the full amount of retired pay. As the monthly premiums for SBP coverage are approximately 6.5% of the SBP base amount, the monthly premium cost for providing *minimum* SBP coverage to a former spouse would be ($300 x .065) $19.50. Since there can be only one SBP beneficiary under the plan (except for contingent beneficiary coverage to minor children), awarding a minimum SBP to the former spouse in order to qualify him or her for the CHCBP *unlimited* coverage would have the unintended consequence of preventing the military member from naming a subsequent spouse or children, as beneficiaries under his or her SBP.

above question. Assume an active-duty servicemember with fifteen years of creditable service has been married to the nonmilitary spouse for fourteen years. They decide to divorce, and, as part of their settlement, the former military spouse will receive forty percent of the expected military retirement and maximum coverage under the SBP. A Military Pension Division Order is prepared and served on the Defense Finance and Accounting Service, and a deemed election is used to perfect former spouse coverage under the SBP. Since the former military spouse cannot satisfy either the 20/20/20 or 20/20/15 rules for postdivorce Tricare coverage, he or she applies for *transitional* coverage under the CHCBP with the anticipation of using *unlimited* CHCBP coverage for her long-term health care. Two years after the divorce, the military sponsor decides to leave military service (short of retirement) and takes a lucrative position with a Defense Department contractor. The former spouse later attempts to enroll in *unlimited* CHCBP coverage, and uses the divorce decree and settlement agreement to show he or she is entitled to receive a portion of military retired pay and is the beneficiary of the SBP. Will the former military spouse be granted *unlimited* CHCBP coverage? The CHCBP enabling statute and implementing regulation[191] apply the eligibility criteria for both *transitional* and *unlimited* coverage under the CHCBP *to the facts that existed as of the time of the divorce, dissolution, or annulment.*

The expectancy to military retired pay or for participation in the SBP is something that a state court can divide at *any time* in the military sponsor's career or during the marriage. The statutes for neither division of military retired pay[192] nor the SBP[193] indicate any threshold "years of service" are necessary for a state court to award retirement benefits to a former spouse under a divorce, dissolution, or annulment action. Likewise, no federal statute or regulation requires that the pension entitlement be *vested* in order for a state court to divide the marital or community portion as part of a divorce, dissolution, or annulment action. Certainly *any* member of the uniformed services (regardless of how little time they may have served at the time of divorce) does, *at that point*, have

191. 10 U.S.C. §§ 1078a(b)(3), (g)(4) (2008); 32 C.F.R. §§ 199.20(d)(1)(iii), (d)(6)(iv) (2009).

192. 10 U.S.C. § 1408. Under this statute at § 1408(d)(2), there is a requirement that the marriage be concurrent with ten years of creditable military service; however, this is an *administrative* prerequisite only to require direct payments to the former spouse from the Defense Finance and Accounting Service. The family law practitioner should consult the relevant state case law and statutes to determine if any threshold period of marriage is required to divide a defined benefit plan (i.e., pension). But, as to federal law, there exists no threshold requirement of any kind in order for a state court to divide military retired pay. *See* SULLIVAN, *supra* note 26, at 505; WILLICK, *supra* note 25, at 79–86.

193. 10 U.S.C. §§ 1447–1455; SULLIVAN, *supra* note 26, at 474–91.

the *potential* for serving sufficient creditable service in order to become eligible for a regular or nonregular retirement. As discussed previously in this article, the enabling statute for the CHCBP only addresses the *eligibility* and *enrollment* criteria for former spouses, and such criteria relates only to the status of the former spouse to the military sponsor *as of the time of the divorce* and when the former spouse *first qualifies* for CHCBP. The enabling statute also speaks in terms of the nonmilitary spouse being married to a "member *or former member of the uniformed services*."[194] So it would appear that a postdivorce departure by the military sponsor from the uniformed services, regardless of whether sufficient creditable service has been performed to allow for a regular or nonregular retirement has nothing to do with the former spouse's statutory right to *unlimited* coverage under the CHCBP. As there are no open sources to research and determine how the CHCBP administrator will deal with the former spouse's request for continued coverage once the military sponsor has departed service, the family law practitioner may wish to assist the client in preparing a letter requesting reconsideration or to file an appeal of the denial of CHCBP coverage.[195] Most likely it will be the loss of status as a "member

194. 10 U.S.C. §§ 1078a(b)(3)(A), (B), (g)(4)(B); 32 C.F.R. §§ 199.20(d)(1)(iii), (d)(6)(iii) & (iv). Note the phrase "member or *former* member" of the uniformed services appears in both the statute and implementing regulations.

195. The argument for reconsideration could follow this analysis: A former spouse's eligibility for enrollment in *transitional* CHCBP is determined as of the date he or she first applies for *transitional* CHCBP coverage. It is not until the thirty-six months of *transitional* coverage has been used that the former spouse then attempts to meet the special qualifying criteria for *unlimited* coverage. Humana Military Healthcare Services CHCBP, http://www.humana-military.com/CHCBP/handbooktoc.htm (last visited May 28, 2009). Ask the CHCBP administrator to compare ¶ E.1.c.(1) (unremarried former spouse seeking thirty-six months of *transitional* CHCBP coverage) with subparagraph (2) (former spouse seeking *unlimited* coverage). Direct the administrator's attention to the fact 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 only for the "36-month CHCBP" coverage, but it does not appear in subparagraph (2) concerning *unlimited* coverage. (The language in the *CHCBP Handbook* also appears in the enabling statute at 10 U.S.C. § 1078a(g)(4); and, in the implementing regulations, 32 CFR § 199.20(d)(6)(iii), (iv)). The former spouse should point out that the CHCBP statute only requires that he or she have a "court order or agreement" that gives her or him *the right to receive a portion of retired pay or SBP coverage* and that "*actual receipt*" is not mandated under the CHCBP statute. Be prepared for the CHCBP administrator to reason that eligibility and coverage should be denied on the basis that the 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. The former spouse should counter, stating that his or her right to continued health care coverage under this federal statute is not conditioned upon what a former military sponsor decided to do and that was not concurred in by the nonmilitary former spouse. Point to both the CHCBP statute and implementing regulations, specifically using the term "or *former* member," which thus clearly intend to provide CHCBP to the former spouse of a military sponsor who no longer is in military service.

of the uniformed services" that will prevent the former spouse from accessing his or her information in the DEERS database, which will ultimately lead to a re-enrollment request being denied by the CHCBP administrator.

11. *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 20/20/15 spouses under 10 U.S.C. §§ 1072(2)(F)–(H) is lost if the former spouse *enrolls* an employer-sponsored health plan. Note that neither *eligibility* nor *enrollment* in another (non-DoD) medical insurance plan by a former spouse is a disqualifier for coverage under the CHCBP. It is clear that a spouse or former spouse cannot be concurrently enrolled in the CHCBP and *any other DoD health care program*.[196] At least for the thirty-six months of *transitional* coverage, this would be consistent with the legislative purpose of the CHCBP statute to provide *transitional health benefits*.[197] Many follow-on commercial health care plans may require an exclusionary period for certain pre-existing medical conditions before the plan will cover those medical problems. "Double coverage" under the CHCBP and another private health insurance plan might be necessary for some former spouses to ensure "full medical coverage," especially if there are significant pre-existing conditions. Double coverage under the CHCBP and another health insurance plan is specifically authorized under the CHCBP implementing regulations.[198] The effect of double coverage is that the CHCBP becomes the *secondary payor* of those claims filed by the former spouse. A more common occurrence of double coverage is when the former spouse is enrolled in *unlimited* CHCBP coverage and also becomes eligible for Medicare Parts A and B. As long as the former spouse is willing to pay the CHCBP and Medicare Part B premiums, the two plans will function much like Tricare for Life and Medicare. Family law practitioners need to be aware that health care benefits are a field that is now, and likely for many years, to remain in a state of constant flux and development. Before making any commitments to enroll in another health insurance plan, the former spouse should he or she contact the CHCBP administrator to determine the consequences to CHCBP enrollment should he or she also enroll in another health benefits plan.

196. See *CHCBP Handbook*, page 21, which states: "Disenrollment in Other Programs. In order to be eligible to enroll in the CHCBP, the beneficiary will be disenrolled from any other managed care programs established or operated under the auspices of the DoD." Humana Military Healthcare Services CHCBP, http://www.humana-military.com/CHCBP/handbook-toc.htm (last visited May 28, 2009).

197. 10 U.S.C. § 1078a(a).

198. See 32 C.F.R. § 199.20(h), which then refers to 32 C.F.R. § 199.8 ("Double Coverage").

12. *A retired military sponsor has previously elected to enroll in an employer-sponsored family health care plan at work, and is now divorcing a nonmilitary spouse. Upon divorce, will the former military spouse be eligible for Tricare or CHCBP coverage, or must he or she take the more expensive COBRA coverage offered under the employer's plan?*

This is a common occurrence where the military sponsor has taken postretirement employment with a large corporate employer or with a state or federal government agency. A "gotcha lurks in the bushes" for the former military spouse if he or she waits until after the divorce to decide what to do about postdivorce health care. If the former spouse is a 20/20/20 or 20/20/15 spouse and remains under employer-provided health care until *after the divorce is final*, he or she may be cut off from the Tricare option.[199]

The more prudent approach is to do a health care option analysis *before* the final decree of divorce is entered, and carefully weigh the cost-benefit and length of coverage aspects of taking COBRA coverage under the military sponsor's employer-provided plan and compare it to the available coverage under either Tricare or the CHCBP. If the COBRA coverage is the least desirable, then the second query should be to determine the status of the nonmilitary spouse in the DEERS database. Why? Because every person who is in the DEERS has at a least Tricare *Standard* coverage,[200] and being covered *only* under Tricare and *not* also under an employer-sponsored plan is essential to eligibility for former spouse coverage under Tricare.

If the nonmilitary spouse is a 20/20/20 or 20/20/15 rule candidate, then dropping coverage under the employer-provided family plan will maximize Tricare options. While the coverage under an employer-sponsored health care plan is not a disqualifier for eligibility under the CHCBP, it is essential that the former spouse be covered under Tricare *on the day before the divorce* for *transitional* CHCBP coverage and at *any time during the eighteen months* before the divorce for *unlimited* CHCBP coverage. Being able to show the former spouse was enrolled in the DEERS is essential for the CHCBP option to be available. If the 20/20/20 or 20/20/15 former

199. Note that the disqualifier of "covered under an employer sponsored health care plan" found in 10 U.S.C. § 1072(2)(F), (H) and at 32 C.F.R. § 199.3(b)(2)(i)(B) do not require that it be the former military spouse's employer's insurance. It can be the former military sponsor's coverage.

200. 32 C.F.R. § 199.3(b)(2)(i). Note that the limitation under Tricare for coverage of a former spouse under an employer-sponsored health care plan only serves to disqualify the *former* spouse and has no limitation on a *current* spouse. During the marriage to the military sponsor, the nonmilitary spouse can be covered under as many health care plans as desired. Tricare will always be the last to pay a claim, but it is still available for the spouse's coverage. This is not the case when a "spouse" becomes a "former spouse."

spouse was denied Tricare coverage due to coverage under the military sponsor's employer's plan, he or she would still be eligible for the *transitional* CHCBP coverage and the *unlimited* CHCBP if the spouse were in the DEERS database and met the additional second-tier criteria.

### *M. Appeals of Adverse Decisions on CHCBP Eligibility and Coverage*

One possible reason no federal cases exist concerning CHCBP is that the appeal process for CHCBP cases is so complex. A brief discussion of appeals is found at page 21 of the *CHCBP Handbook*. However, the actual regulations really bring to life the horrors of prosecuting an appeal. The CHCBP implementing regulation[201] incorporates the general appeal and hearing procedures for the Civilian Health and Medical Program of the Uniform Services (CHAMPUS) found at 32 C.F.R. § 199.10. Be certain to read 32 C.F.R. § 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 C.F.R. § 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).[202] All decisions are first reviewed by the director, OCHAMPUS, and are either "accepted or rejected" or referred to the assistant secretary of defense (Health Affairs) for a final decision. Once this rather long administrative remedy has been exhausted, then an aggrieved CHCBP beneficiary would have access to the U.S. Court of Federal Claims.

### *N. Word to the Wise, Retain All Documents and Correspondence with the CHCBP Administrator*

Dealing with CHCBP issues is much akin to "carrying Jell-O in your hands on a hot day." Certainly, you might think you have it, but sudden-

201. 32 C.F.R. § 199.20(j) (2009).

202. *See* OSDGC—Defense Office of Hearings and Appeals, http://www.dod.mil/dodgc/doha/tricare.html (last visited June 15, 2009). At this website, a notice is provided as follows:

> Chapter 10 of the CHAMPUS Regulation (title 32 Code of Federal Regulations, section 199.10) provides that administrative hearings may be held to review appeals by beneficiaries and providers of adverse decisions made by [Tricare Service Office] TSO and/or its contractors. Under a memorandum of understanding by and between the TSO and the Defense Office of Hearings and Appeals (DOHA), DOHA administrative judges, acting as hearing officers, are responsible for conducting these hearings and making recommended decisions to the director, TSO. Final decisions are made by the director, TSO, who forwards to the appealing parties copies of the recommended decisions.

*Id.*

ly it slips out of your hands and it is gone! The family law practitioner and the client should maintain *all* correspondence with the CHCBP administrator and document with a detailed memorandum any conversation they might have with a CHCBP customer service representative. Certainly, if an appeal or other postdecisional action must be pursued for the client, the more documentation and memorandums that are at the attorney's disposal to argue and present the case, the more probable is success. It is no different than any other family law litigation.

## IV. Transitional Assistance in Domestic Violence Cases

In certain instances of domestic violence[203] occurring between a military sponsor and family members, including a spouse or former spouse, Congress and the DoD have provided for temporary financial, medical, and even dental assistance to certain abused family members.[204] The temporary assistance is generally limited to those dependents of servicemembers whose military sponsors are being court-martialed or administratively separated from the armed forces. It is typically limited to twelve months, but may extend to thirty-six months, depending upon how long the military sponsor has remaining in his or her service commitment.[205] The abused spouse will continue to have access to military treatment and dental facilities and the Tricare Prime network of providers; however, care may be limited to only abuse-related treatment. At the conclusion of the transitional assistance, the spouse or former spouse may then wish to seek enrollment in the CHCBP for additional *transitional* coverage.

When the military sponsor is determined to be the abuser and also is either eligible for retirement or is then receiving military retired pay, the abused spouse or former spouse may be eligible to receive, not only a portion of the sponsor's military retired pay, but access to Tricare health benefits as well.[206] This is available even if the military member/retiree loses all of his or her military retirement benefits as a result of disciplinary or administrative action.

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203. Such crimes are generally limited to those of physical or emotional abuse of a dependent spouse or child and must result in the military sponsor being court-martialed and punitively discharged from service. 32 C.F.R. § 199.3(b)(iii)(A)(1). Generally the types of offenses that will fall into this category are incidents of sexual assault, rape, sodomy, assault and battery, murder, manslaughter, and indecent liberties.

204. *See* 10 U.S.C. § 1059; 32 C.F.R. § 199.3(b)(iii); and DEP'T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS (1995), *available at* http://www.dtic.mil/whs/directives/corres/pdf/134224p.pdf.

205. DEP'T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS ¶ 6.2.1.1 (1995).

206. 10 U.S.C. § 1408(h); 32 C.F.R. § 199.3(b)(iii)(A)(2).

If a family law practitioner has a case involving domestic violence or abuse of a military dependent, it is highly recommended that he or she contact the nearest military family advocacy representative or the victims and witness assistance officer through the nearest staff judge advocate's office.[207]

## V. Conclusion

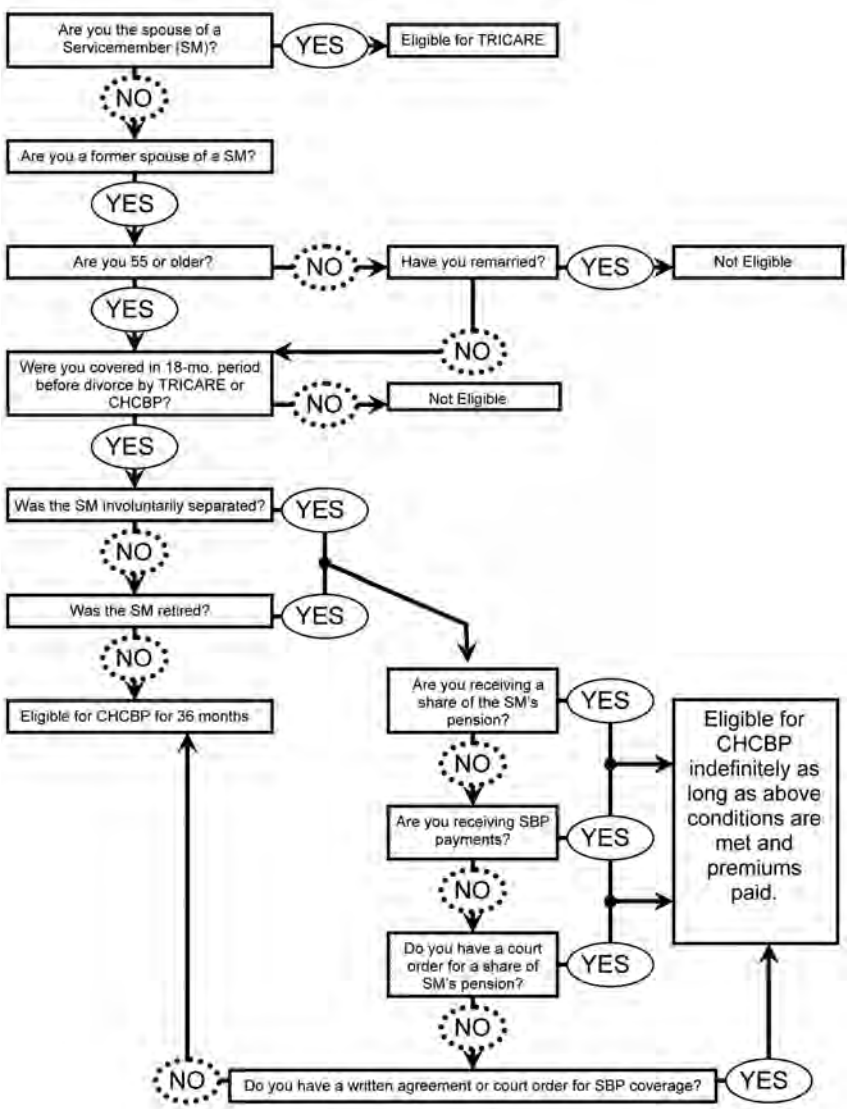
Family law practitioners should focus their clients on anticipating their postdivorce health care needs and make their continuing health care a major objective in managing the case. Knowing what is required to qualify a former military spouse for either of several Department of Defense health care plans is critical for professionally representing a client. This is true particularly in military divorces, where often a former spouse has not worked outside the home, may have significant pre-existing health issues, or has no other health care coverage available upon divorce. When representing the spouse of a member of the uniformed services, several options exist for post-divorce health care. Certain spouses with lengthy marriages to their military sponsor may be able to continue their Tricare coverage as a matter of statutory right.

All is not lost if the former spouse cannot satisfy the 20/20/20 or 20/20/15 rules for postdivorce Tricare coverage. Obtaining Tricare coverage is by far the most preferred option, but it may not be available to every former spouse. The second and often more available option is the CHCBP, which offers a premium-based government health care plan that is often preferable to employer-provided health care or costly private health insurance coverage. Generally, all former military spouses are qualified for *transitional* CHCBP health care coverage, and many can be made eligible for long-term *unlimited* CHCBP coverage.

Appendix 1 is a CHCBP flowchart to help determine who is eligible for the Continued Health Care Benefits Plan. Appendix 2 provides a sample attorney advisory letter to clients about the consequences of certain decisions in their divorce on their health care options. Appendix 3 is a ready-reference table of former military spouse health care options available upon divorce, dissolution, or annulment.

207. See SULLIVAN, *supra* note 26, at 307–31 for a more in-depth discussion of domestic violence and the military client.

## Appendix 1
## Health Care Coverage for Spouses and Former Spouses



# Appendix 2
## Summary Table of Former Military Spouse Medical Benefits

| **If Unremarried Former Spouse Can** | **Tricare COVERAGE** | **Continued Health Care Benefit Program (CHCBP)** |
|---|---|---|
| **Satisfy 20-20-20[1] rule AND has not remarried or enrolled in employer-sponsored health care plan.** | Tricare is available. Tricare for Life[2] is available. | May be available, but only if Tricare coverage is lost. (Former spouse should apply for CHCBP and see what happens.) |
| **Satisfy 20/20/15 rule & divorced *before* 4/1/85[3] AND has not remarried or enrolled in employer-sponsored health care plan.** | Tricare is available. Tricare for Life[4] is available. | May be available once Tricare coverage is lost. (Former spouse should apply for CHCBP and see what happens.) |
| **Satisfy 20/20/15 rule & divorced on or *after* 4/1/85[5] and has not remarried or enrolled in employer-sponsored health care plan.** | Tricare is available for one year from date of divorce.[6] Tricare for Life available[7] if the one year of Tricare coverage occurs after age 65. | 36 months of *transitional* CHCBP is available after the one year Tricare eligibility ends.[8] *Unlimited* CHCBP is available if client satisfies certain criteria.[9] |
| **NOT satisfy either 20/20/20 or 20/20/15 rules, but was covered under Tricare or CHCBP *on the day before* final decree entered and has not remarried.[10]** | Tricare and Tricare for Life are NOT available. | *Transitional* coverage available for a maximum of 36 months.[11] *Unlimited c*overage available if client satisfies criteria.[12] |
| **NOT satisfy the 20/20/20 or 20/20/15 rules, but was covered under either Tricare or CHCBP during the 18 months preceding the entry date of a final decree; AND has not remarried prior to age 55; AND by court order or agreement of parties *either* receives a portion of military retired pay or has former spouse coverage under Survivor Benefit Plan.[13]** | Tricare and Tricare for Life are NOT available. | *Transitional* coverage available for initial 36 months;[14] AND then *Unlimited* coverage thereafter as long as enrollment criteria is satisfied.[15]<br><br>*Unlimited* CHCBP may be able to act as supplement to Medicare Parts A & B. |

1. 10 U.S.C. § 1072(2)(F) (2008); 32 C.F.R. § 199.3(b)(i)(F)(1) (2007). Note these components of 20/20/20 rule: (1) At least 20 years of creditable military service for retirement had been performed by the servicemember as of time of divorce; and (2) the nonmilitary spouse was married to the *same* servicemember and that marriage lasted at least 20 years (i.e., 240 months); and at least 20 years (240 months) of the marriage and the creditable military service to that same servicemember were concurrent. Special rules for computing "creditable years of service" apply to members of the Reserve Component (reserves and National Guard).

2. See 32 C.F.R. § 199.3(b)(i)(D), which states that a former spouse, upon becoming eligible for Medicare Part A, is then not eligible for Tricare. However, further note that this section of the regulation references an exception found in another part of 32 C.F.R. § 199.3,

more specifically at the *note* appearing at the end of § 199.3(b)(3). The note includes unremarried former spouses eligible for Tricare under (b)(2)(F), who becomes eligible for Medicare Part A, to remain eligible for Tricare for Life if they then enroll in Medicare Part B. This exception only applies to the 20/20/20 and 20/20/15 (pre 4/1/1985) former spouses.

3. 10 U.S.C. § 1072(2)(G); 32 C.F.R. § 199.3(b)(i)(F)(2)(i). Note these components of 20/20/15 rule for divorces that occur *prior* to April 1, 1985: (1) At least 20 years of creditable military service for retirement had been performed by the servicemember as of time of divorce and before April 1, 1985; (2) the nonmilitary spouse and the *same* servicemember were for at least 20 years (i.e., 240 months) as measured before April 1, 1985; and (3) at least 15 years (180 months) of the marriage and the creditable military service, occurring before April 1, 1985, were concurrent. Special rules for computing "creditable years of service" apply to members of the Reserve Component.

4. *See* 32 C.F.R. § 199.3(b)(i)(D), which states that a former spouse upon becoming eligible for Medicare Part A is then not eligible for Tricare. However, further note that this section of the regulation references an exception found in another part of 32 C.F.R. §199.3, more specifically at the *note* appearing at the end of § 199.3(b)(3). The note includes unremarried former spouses eligible for Tricare under (b)(2)(F), who becomes eligible for Medicare Part A, to remain eligible for Tricare for Life if they then enroll in Medicare Part B. This exception only applies to the 20/20/20 and 20/20/15 (pre 4/1/1985) former spouses.

5. 10 U.S.C. § 1072(2)(H); 32 C.F.R. § 199.3(b)(i)(F)(2)(ii), (iii). Note these components of 20/20/15 rule for divorces that occur *after* April 1, 1985: (1) At least 20 years of creditable military service for retirement must have been performed by the servicemember as of time of divorce; and (2) the nonmilitary spouse was married to the same servicemember for a period of at least 20 years (i.e., 240 months); and there is at least 15 years (180 months) of the marriage and the creditable military service that were concurrent. Special rules for computing "creditable years of service" apply to members of the Reserve Component.

6. *Id.*

7. *See* 32 C.F.R. § 199.3(b)(i)(D), which states that a former spouse upon becoming eligible for Medicare Part A is then not eligible for Tricare. However, further note that this section of the regulation references an exception found in another part of 32 C.F.R. § 199.3, more specifically at the *note* appearing at the end of § 199.3(b)(3). The note includes unremarried former spouses eligible for Tricare under (b)(2)(F), who becomes eligible for Medicare Part A, to remain eligible for Tricare for Life if they then enroll in Medicare Part B. This exception only applies to the 20/20/20 and 20/20/15 (pre 4/1/1985) former spouses.

8. 10 U.S.C. § 1078a(g)(1)(C)(ii); 32 C.F.R. § 199.20(d)(4)(i)(C).

9. 10 U.S.C. § 1078a(g)(4); 32 C.F.R. § 199.20(d)(6)(iv).

10. 10 U.S.C. § 1078a(b)(2)(C), (b)(3); 32 C.F.R. § 199.20(d)(1)(iii).

11. 10 U.S.C. § 1078a(g)(1)(B); 32 C.F.R. § 199.20(d)(6)(iii).

12. 10 U.S.C. § 1078a(g)(4); 32 C.F.R. § 199.20(d)(6)(iv).

13. 10 U.S.C. § 1078a(b)(3); 32 C.F.R. § 199.20(d)(1)(iii), (d)(6)(iv).

14. 10 U.S.C. § 1078a(g)(1)(B); 32 C.F.R. § 199.20(d)(6)(iii).

15. 10 U.S.C. § 1078a(g)(4); 32 C.F.R. § 199.20(d)(6)(iv).

## Appendix
## Attorney's Letterhead

(Date)

Address to Client:

RE: Advisory to Client Concerning Health Care Options and Election to Waive Either a Portion of Military Retired Pay or Coverage Under the Survivor Benefit Plan as Preventing Eligibility for Continued Health Care Benefits Program (CHCBP)

Dear (Client):

As part of your divorce (dissolution) (annulment) from your military spouse, I have encouraged you to become more familiar with your postdivorce health care options. For your education and benefit, I am attaching to this letter a reference chart of options available to you through the U.S. Department of Defense's Tricare and the Continued Health Care Benefits Program (CHCBP). There is also a flowchart to assist in determining your eligibility under the CHCBP for thirty-six months of transitional coverage and, if you so qualify, for *unlimited* coverage. I have further advised you to seek competent advice from a Tricare service center or the CHCBP administrator if you have questions as to your options or health care benefits.

Only a select number of former spouses can satisfy the lengthy marriage and military service requirements of the 20/20/20 and 20/20/15 Tricare rules. Note that *neither* the 20/20/20 nor 20/20/15 rules for Tricare benefits *require* you to receive any portion of your military spouse's retired pay or former spouse beneficiary status under the Survivor Benefit Plan. Under the 20/20/20 or 20/20/15 rules for Tricare coverage, your eligibility *will terminate* should you remarry at any time or if you enroll in an employer-sponsored health care plan. If you are a 20/20/20 former spouse, and for some 20/20/15 former spouses, you may be eligible for Tricare for Life upon becoming age sixty-five. If you do qualify for Tricare for Life, you must enroll in Medicare Part B as soon as you become age sixty-five and are first eligible for Medicare Part A. You should contact the Social Security office for Medicare counseling and enrollment no later than three months preceding your sixty-fifth birthday.

If you cannot satisfy the 20/20/20 rule or if you are a 20/20/15 former spouse, whose divorce (dissolution) (annulment) became final *after* April 1, 1985, you may still be eligible for a premium-based health care option available under the CHCBP. The CHCBP will provide health care benefits similar to those provided under Tricare *Standard,* but there is a quarterly premium in addition to co-pays and deductibles. There are two categories of unremarried former spouse coverage under the CHCBP: (1) "*Transitional*," i.e., up to thirty-six months; and (2)

"*Unlimited*," which allows for you to continue to request CHCBP coverage for as long as you continue to meet the eligibility criteria for *transitional* coverage and then meet certain additional criteria. Two of these additional criteria are that you must be entitled to receive a portion of your military spouse's retired pay, and that you have former spouse beneficiary status under the Department of Defense Survivor Benefit Plan.

I have advised that upon your divorce (dissolution) (annulment), you will be eligible to enroll for up to thirty-six months of *transitional health care coverage* under the CHCBP. *You do not need to receive a portion of your military spouse's retired pay or be a former spouse beneficiary under the Survivor Benefit Plan to enroll in the thirty-six months of transitional CHCBP coverage*. If you wish to enroll for *transitional* coverage under the CHCBP, you must do so within sixty days of the entry of the final decree in your case.

If you are a 20/20/15 former spouse (whose divorce (dissolution) (annulment) occurred on or *after* April 1, 1985, your thirty-six months of CHCBP *transitional* coverage will commence *after* your one year of Tricare coverage has ended, and you must enroll in the CHCBP within sixty days of your loss of your Tricare coverage. The opportunity for *unlimited* coverage under the CHCBP will follow the initial thirty-six months of your *transitional* benefits and you may have a total of forty-eight months of coverage. (i.e., twelve months of Tricare and thirty-six months of *transitional* CHCBP coverage.)

In order to qualify for the *unlimited* eligibility coverage under the CHCBP, *you must either be receiving (or entitled to receive) a portion of your military spouse's retired pay and to have former spouse beneficiary status under the DoD Survivor Benefit Plan.* **If you elect to forgo, or waive, either a portion of your military spouse's retired pay or former spouse coverage under the Survivor Benefit Plan as part of your divorce (dissolution) (annulment), you WILL BE DISQUALIFIED from later enrolling for unlimited coverage in the CHCBP**.

Remarriage will also cause you to lose your coverage under either Tricare or the CHCBP. There is an exception if you qualify for *unlimited* CHCBP coverage and are at least fifty-five years old at the time you elect to remarry. I advise you that former spouse's health care options are an evolving area of the law, and remarriage is a significant threshold event that may affect your eligibility for continued coverage. I strongly advise you to seek competent legal advice and a determination from the CHCBP administrator should you consider remarrying at *any time* in the future, *whether or not you are age fifty-five*.

If you are eligible for the CHCBP, you *may* be able to have *double* enrollment in another health care plan, *provided it is not a plan sponsored by the Department of Defense*. I very strongly advise you that *prior* to enrolling in another health care plan; you should consult the CHCBP administrator for a determination of how your CHCBP coverage and benefits will be affected by your double enrollment.

If you have questions concerning your Tricare or CHCBP eligibility and coverage as a former spouse, you should consult a customer service representative at a Tricare service center or the CHCBP administrator for advice. A copy of the

*CHCBP Handbook* is available at your Tricare service center, or it may be downloaded from the following website: http://www.humana-military.com/library/pdf/chcbp-handbook.pdf

Please consider this information carefully and weigh the consequences of your choice to relinquish an interest in your spouse's military retirement or for your former spouse coverage under the Survivor Benefit Plan.

Sincerely,

Attorney

**********

Endorsement by Client:

I acknowledge receipt of this advisory letter and of the attached health care options for former military spouses and CHCBP flowchart. I understand its contents and have been afforded an opportunity to consult with my attorney and a Tricare service center or CHCBP administrator for additional advice. I understand my rights and the criteria I must satisfy to seek *transitional* and *unlimited* coverage under the CHCBP. I understand that my remarriage or enrollment in an employer-provided health care plan will cause me to lose my Tricare benefits. I understand my remarriage could also terminate my eligibility under the CHCBP. I understand my decision to waive, or forgo, a portion of my spouse's retired pay or former spouse beneficiary status under the Survivor Benefit Plan will prevent me from later seeking *unlimited* coverage under the CHCBP.

_____ _____

Client's Signature (Date)

_____ _____

Witness (Date)