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**The Disabled Military
Child Protection Act**

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THE DISABLED MILITARY CHILD PROTECTION ACT

I. THE PROBLEM

Tom and Linda have three adult children; one of them, Katie, has a chromosome disorder and other conditions that require significant medical treatment, 24-hour attendant care, equipment and supplies.¹ Tom has proudly served his country in the Air Force and is retiring to join a defense company in Texas. Through much effort by Linda, a full-time mother and care-giver, Katie receives SSI, Medicaid, HCS, and other Medicaid waiver services that allow her to live in the family home.

As he is filling out the paperwork to retire, Tom is asked whether he wants to provide military Survivor Benefit Plan (“SBP”) payments to Linda or Katie upon his death. He looks at the benefit and sees that it could provide several thousand dollars a month for Linda or Katie when he passes away. He knows that when he dies Linda would not be able to go back to work and earn a salary sufficient to provide for her and Katie, and pay for full-time care for Katie. Tom designates “spouse and child” to receive the SBP annuity.

Tom and Linda had been to a special needs trust attorney and had created wills and a third-party special needs trust. He knew that payments to Katie might affect her government benefits, so he asked that Katie’s special needs trust be named to receive Katie’s SBP benefit. Imagine his surprise when he is told that he can only

name a person, not a trust, to receive the annuity payments.

Tom and Linda now face a dilemma—Katie can receive either SBP or SSI/Medicaid, but not both. If they choose SBP, Katie will receive a much larger monthly payment, but she will lose all of the Medicaid services. She can still receive Tricare for basic medical coverage, but it does not pay for many of the services that are essential for Katie’s well-being. If they choose SSI/Medicaid instead of SBP, there will not be enough money to provide for Katie’s care for her lifetime.

If they choose to forego SBP, Katie will continue to receive an SSI check of \$750 per month for food and shelter. Medicaid will pay for basic medical care. Katie also receives HCS (Home and Community Based Services) and other Medicaid waiver programs. These programs may pay for a group home, or if Katie is living at home, foster and companion care, day habilitation, respite, professional therapies, and supported employment. The government programs are tremendously helpful but do not pay for everything Katie needs. Some of her doctors and providers do not accept Medicaid, and the parents private pay. Katie requires more hours of respite and attendant care than the programs provide. When the parents pass away there must be some source for these funds.

If Tom and Linda choose to forego SSI/Medicaid, Katie will receive the SBP annuity payment of perhaps \$2,600 per month, and Tricare will pay for her basic medical needs. Katie will lose, however, the housing, foster and attendant care, day habilitation and supported employment. The difference between the SBP payment and

¹ This is a hypothetical situation; real names are not used.

SSI check is insufficient to pay for these services.

Tom and Linda are frustrated. In order for Katie to live the best life possible when they pass away, she will need SSI/Medicaid plus substantial funds. They come to you, their special needs trust attorney, for advice.

You now have good news to share with Tom and Linda. Under the new Disabled Military Child Protection Act, they can establish a self-settled special needs trust for Katie, and if they follow the correct procedures, Tom can substitute Katie's new SNT to receive the annuity payments instead of Katie directly. Katie will be able to receive SSI/Medicaid as well as the SBP annuity.

II. THE SURVIVOR BENEFIT PLAN

A. The Plan

The Survivor Benefit Plan ("SBP") allows a military retiree to provide a lifetime monthly annuity for his or her dependents based on a percentage of the member's gross retired pay. When the members retire, they pay a premium for SBP coverage, and the government pays a portion of the premium. The annuity payments begin upon the death of the service member.

The benefit is similar to life insurance, with some important differences. SBP pays a monthly amount, rather than a lump sum, and the monthly payment increases annually with inflation. The premiums for SBP are subsidized by the government and may cost much less than insurance premiums.

B. The Recipients

When selecting a recipient for the SBP, the member typically will choose an annuity for

"Spouse Only," "Spouse and Child," or "Child Only." If a married military member chooses Child Only, the spouse must sign a consent.

If "Spouse and Child" is chosen, the spouse is the primary beneficiary as long as they are alive and eligible. The spouse is ineligible if they marry prior to the age of 55; however, if that marriage ends in death or divorce, the spouse will become an eligible spouse again. The child receives the annuity payments only when the spouse is no longer alive or eligible.

If a married member chooses "Child Only" with spousal consent, and the retiree later remarries, the new spouse can never be covered by SBP.

Dependent children are paid in equal shares until they are 18 years old (or 22 if they are a full-time student), but a child who is disabled receives payments for his or her entire lifetime. The member cannot designate a larger percentage to go to the child with disabilities.

A child may receive SBP payments only if they are an "eligible dependent child," which is defined as:

- Unmarried;
- Either under 18 or 22 if a full-time student, or "incapable of self-support because of physical or mental incapacity which existed before the 18th birthday (or before age 22 for a full-time student);" and
- A child of the member. This can include an adopted child, stepchild, foster or recognized natural child only if the child lived with member in a regular parent-child relationship. A grandchild is eligible only if the

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