

DIVORCE AND THE COLLAPSE OF THE THREE-LEGGED STOOL: SETTING SERVICEMEMBERS UP FOR SUCCESS IN THE AGE OF BRS AND COVID-19

SAMUEL KAN, CFP®[†]

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[†] Assistant Professor of Law, Barry University School of Law. Special thanks to Barry University School of Law for financially supporting the writing of this Article; Kiara Laguerre, Amal Aoun, and Carlos Rocha, his research assistants at Barry University School of Law and the Wayne Law Review editors who helped polish this Article; Professors Lee Schinasi (COL, Ret.), Eang Ngov, and Patrick Tolan (Lt. Col., Ret.) for their guidance in the writing and publication process; and Thomas K. Emswiler (SES), Mark Sullivan (COL, Ret.), Patrick Kusiak (CDR, Ret.), Jamie Porterfield, MAJ John Goodell, and Kris Hilscher for their practical family, tax, and military law insights, which have been incorporated into this Article to assist practitioners in helping the military community address these complex issues.

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I. INTRODUCTION

Divorce has significantly affected the military community as physical separations and financial pressures have put a tremendous strain on the ability of military families to stay together.¹ To help military marriage partners thrive despite these pressures, financial retirement experts have encouraged couples to build numerous streams of income² similar to a

1. Kari Paul, *Americans in This Field Have the Highest Rate of Divorce by Age 30*, MARKETWATCH (Feb. 25, 2018), <https://on.mktw.net/2XEDOQ1> [<http://web.archive.org/web/20200924005239/https://www.marketwatch.com/story/employees-in-this-field-have-the-highest-rate-of-divorce-2017-07-13>] (explaining the high rate of divorce for servicemembers, especially for first-line enlisted supervisors).

2. See generally *How Many Streams of Income Should You Have?*, PASSIVE INCOME M.D. (May 30, 2020), <https://passiveincomemd.com/many-streams-income/> [<https://perma.cc/9V25-DRML>] (last visited June 6, 2020) (explaining that to accelerate growth towards financial freedom, individuals should build numerous streams of income, such as earned income, business income, interest income, dividend income, rental income, capital gains, and royalties/licensing); Bobby Hoyt, *10 Powerful Reasons Why You Need Multiple Income Streams*, MILLENNIAL MONEY MAN (Oct. 25, 2018), <https://millennialmoneyman.com/10-powerful-reasons-why-you-need-multiple-income-streams/> [<https://perma.cc/QW9U-4JSY>] (explaining that individuals must build multiple streams of income, because “no job is safe[.]” “[p]ensions are a thing of the past[.]” and “Social

“three-legged stool: a pension, Social Security, and personal savings.”³ However, this retirement paradigm has collapsed as fewer employees have pensions,⁴ there is a lot of uncertainty “about the financial stability of Social Security,”⁵ and “nearly [eighty] percent”⁶ of Americans are living paycheck to paycheck.

Over the past few years, many monumental tax and benefit law changes have created a need to re-evaluate the problem of divorce and retirement in the military community. This need has become vital because the military has transitioned from the legacy retirement system⁷ to the Blended Retirement System (BRS).⁸ To a certain degree, this retirement model shifts a portion of the financial risk to servicemembers and their family members, as they will need to make their own investment decisions in an uncertain economic market to protect assets in their defined contribution plans.⁹ In addition, significant threats to the overall economy

Security may not last”); Moolanomy, *10 Reasons to Have Multiple Income Streams*, U.S. NEWS & WORLD REP. (Nov. 3, 2010, 2:45 PM), <https://money.usnews.com/money/blogs/my-money/2010/11/03/10-reasons-to-have-multiple-income-streams> [<https://perma.cc/Y3NX-ZLXF>] (explaining that building multiple income streams is no longer a luxury but is now a necessity due to rising health care costs, unemployment, and a host of other factors).

3. Michelle Singletary, *Forget What You've Heard. Here Are the New Rules for Post-Pandemic Retirement*, WASH. POST (May 8, 2020), <https://www.msn.com/en-us/money/retirement/forget-what-you-ve-heard-here-are-the-new-rules-for-post-pandemic-retirement/ar-BB13zmyl?li=BBnbfcN> [<https://perma.cc/V7S4-SV9A>].

4. Christian Weller, *How the Decline of Pensions Furthered the Racial Wealth Gap*, FORBES (July 24, 2019), <https://www.forbes.com/sites/christianweller/2019/07/24/how-the-decline-of-pensions-furthered-the-racial-wealth-gap/#17f2cd7c1ada> [<https://perma.cc/6HSG-2UYM>] (comparing 1989, when forty percent of all non-retired households had a defined benefit pension plan, with 2016, when only 23.2 percent had a defined benefit pension plan).

5. Singletary, *supra* note 3.

6. *How Can I Save When I'm Living Paycheck to Paycheck?*, EQUIFAX, <https://www.equifax.com/personal/education/covid-19/how-save-money-escape-paycheck-to-paycheck/> [<https://perma.cc/B2QG-K4Q8>] (last visited May 10, 2020).

7. See 10 U.S.C. § 1406 (2019) (establishing the retired base pay for servicemembers who entered service before September 8, 1980, which has been dubbed “final pay”); 10 U.S.C. § 1407 (2019) (establishing the retired base pay for servicemembers who entered service after September 7, 1980, which has been dubbed “high-three”); 10 U.S.C. § 1409(b)(1)–(3) (2019) (establishing the applicable retired pay multiplier).

8. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 631–635, 129 Stat. 726, 842–52 (2016), <https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf> [<https://perma.cc/G3KB-LC6J>].

9. See THRIFT SAV. PLAN, SUMMARY OF THE THRIFT SAVINGS PLAN 11 (2019), <https://www.tsp.gov/publications/tspb08.pdf> [<https://perma.cc/E3NG-F3SH>] (providing an overview of the TSP funds). To protect themselves from turmoil in the market, servicemembers have the ability to shift their assets in their Thrift Savings Plan (TSP) accounts to the Government Securities Investment (G) Fund that “gives . . . the opportunity

posed by disasters—such as the exponential spread of Novel Coronavirus Disease 2019 (COVID-19), which increased by a million cases in the United States in less than one week¹⁰—have created increasing unemployment and the need to rely more heavily on health care and Social Security support structures.¹¹

to earn rates of interest similar to those of long-term government securities with no risk of loss of principal” since “[p]ayment of principal and interest is guaranteed by the U.S. government.” *See generally Interfund Transfers*, TSP.GOV, <https://www.tsp.gov/PlanParticipation/AccountManagement/IFTs.html> [<https://perma.cc/N8JJ-WGLK>] (last visited June 4, 2020) (explaining how to perform interfund transfers as well as their limitations). This is important because there can be large fluctuations in the market. *See generally* Henry Blodget, *Is This a Classic ‘Bear-Market Trap’ . . . or a New Bull Market?*, BUS. INSIDER (June 2, 2020), https://www.businessinsider.com/is-stock-market-rise-bear-market-trap-new-bull-market-2020-6?utm_campaign=sf-bi-main&utm_medium=social&utm_source=facebook.com [<https://perma.cc/H23U-K8HU>] (explaining that a temporary strong recovery after an initial market plunge can delude investors into thinking the worst is over and have them fall victim to “a long, brutal decline that lasts for a year or more and takes the market far below the depths of the initial plunge” and encouraging investors to pursue diversification depending on their risk tolerance and time horizon, because “[n]o one knows the future, . . . so [we need to] build our portfolio[s] so that we will be and feel OK no matter what happens.”).

10. *See* John Hopkins Univ. of Med., Coronavirus Resource Center, *COVID-19 Dashboard by the Center for Systems Science and Engineering*, <https://coronavirus.jhu.edu/map.html>

[<https://web.archive.org/web/20201121212319/https://coronavirus.jhu.edu/map.html>] [hereinafter *COVID-19 Dashboard*] (last visited Nov. 20, 2020) (documenting that the number of COVID-19 cases increased from ten to eleven million cases in one week and exceeded 11.7 million cases in the U.S. and 57.1 million cases globally as of November 20, 2020). *See* Marco Della Cava & Jorge L. Ortiz, *US Hits 3M Coronavirus Cases – About a Quarter of the World’s Total. What Number Will Spark Societal Changes to Slow Exponential Rise?*, USA TODAY (July 8, 2020), <https://www.usatoday.com/story/news/nation/2020/07/08/coronavirus-us-surpasses-3-m-cases-quarter-world-total/5393245002/> [<https://perma.cc/4YEW-3WX5>] (last updated July 9, 2020) (documenting the exponential growth of COVID-19). The article states, “It took the USA a little more than three months to hit [one] million cases on April 28. It took about half that time, [forty-four] days, to get to [two] million on June 11 and only [twenty-six] days to reach [three] million on July 8.” *Id.* *See* Melina Delkic, *COVID-19: U.S. Surpasses 10 Million Coronavirus Cases as Global Cases Top 50 Million*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/live/2020/11/08/world/covid19-coronavirus-live-updates> [<https://web.archive.org/web/20201121212748/https://www.nytimes.com/live/2020/11/08/world/covid19-coronavirus-live-updates>] (explaining that it took just over two weeks in the United States to go from eight to nine million cases and ten days to go from nine to ten million cases).

11. *See* Paul Davidson, *Unemployment Soars to 14.7%, Job Losses Reach 20.5 Million in April as Coronavirus Pandemic Spreads*, USA TODAY (May 8, 2020), <https://www.usatoday.com/story/money/2020/05/08/april-jobs-reports-20-5-m-become-unemployed-covid-19-spreads/3090664001/> [<https://perma.cc/MXF5-CNXL>] (explaining that in about one month, “the historically dismal [economic] performance abruptly wiped away nearly all the nation’s job gains since the Great Recession of 2007-09” and that the

This Article argues that military marriage partners need to learn to function efficiently within this new and more fragile economic paradigm to ensure that their families are financially self-sufficient even if the partners divorce. In addition, as some servicemembers may fail to take action to provide for their intended surviving beneficiaries in the event of their divorces and subsequent deaths, the federal government should take action to effectuate the likely intent of these servicemembers at the time of their deaths. Furthermore, the federal government should act to increase the economic sustainability of Social Security, which military marriage partners may need to rely upon after divorce as many may struggle financially to support separate households.

First, due to the high probability¹² of divorce and since older couples are divorcing in increasing rates, partners in a dissolving military marriage need to take ownership of their financial future by becoming familiar with the tax and benefit laws surrounding divorce.¹³ To assist both military marriage partners and their advisors in becoming more financially literate and preparing for potential property and alimony settlements, Part II of this Article provides a brief history and current summary of the tax and benefit laws surrounding divorce in the military.¹⁴ Specifically, it addresses the impacts of BRS and the Tax Cuts and Jobs Act of 2017¹⁵ on property settlements, alimony, child support, and other benefits. It also

“[u]nemployment rate jump[ed] to 14.7” percent, the “highest since [the] Great Depression of [the] 1930s”).

12. NAT'L MARRIAGE PROJECT & INST. FOR AM. VALUES, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2012: THE PRESIDENT'S MARRIAGE AGENDA 67 (2012), <http://nationalmarriageproject.org/wp-content/uploads/2012/12/SOOU2012.pdf> [<https://web.archive.org/web/20200912050721/http://nationalmarriageproject.org/wp-content/uploads/2012/12/SOOU2012.pdf>]; see also Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 91 (2015); 32 *Shocking Divorce Statistics*, MCKINLEY IRVIN FAM. L. BLOG (Oct. 30, 2012, 11:06 AM), https://www.mckinleyirvin.com/family-law-blog/2012/october/32-shocking-divorce-statistics/?mod=article_inline [<https://perma.cc/RMF2-KL8U>] (explaining that in the United States, approximately forty-two to forty-five percent of first marriages end in divorce, sixty percent of second marriages end in divorce, and seventy-three percent of third marriages end in divorce).

13. See Mary F. Radford, Ga. State Univ. Coll. of Law, *Our Clients Are Living Longer but Their Marriages Are Not: The Intersection of Estate Planning and the Gray Divorce*, 54th Annual Heckerling Institute on Estate Planning, Univ. of Miami Sch. of Law (Jan. 16, 2020) (providing numerous sources of divorce statistics); see also Renee Stepler, *Led by Baby Boomers, Divorce Rates Climb for America's 50+ Population*, PEW RSCH. CTR. (Mar. 9, 2017), <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population/> [<https://perma.cc/3D9M-DPS7>] (explaining the Gray Divorce phenomenon, wherein the “divorce rate for adults ages fifty and older roughly doubled in the past [twenty-five] years”).

14. See *infra* Part II.

15. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

discusses the government's struggles with balancing the protections of servicemembers and their spouses in the event of divorce.¹⁶

Second, in light of this new and more fragile economic environment, military marriage partners should take measures to avoid an unnecessary depletion of their financial resources and develop additional streams of income. Part III of this Article addresses actions to take prior to marriage, including the proper structuring of prenuptial agreements and trusts, as well as the building of financial portfolios.¹⁷ Part III also discusses actions to take during marriage in anticipation of divorce, as well as during or after divorce, such as rebalancing financial portfolios and updating wills, trusts, and life insurance beneficiary designations.

Third, the federal government should take action to help servicemembers provide for their intended surviving beneficiaries in the event of their divorces and subsequent deaths. To this end, Part IV of this Article advocates that Congress should amend federal statutes governing Servicemembers' Group Life Insurance (SGLI),¹⁸ which provides up to \$400,000 of term life insurance and covers deaths in combat, unlike typical life insurance policies.¹⁹ In addition, Congress should amend federal statutes governing the Thrift Savings Plan (TSP), which provides a defined contribution plan for purposes of retirement.²⁰

Specifically, Congress should amend 38 U.S.C. § 1970(a)²¹ and 5 U.S.C. § 8424(d)²² to mirror state statutes where divorce automatically revokes beneficiary designations made prior to divorce.²³ These changes will protect the likely intent of servicemembers at the time of their deaths to designate current family members rather than former spouses as surviving beneficiaries. This is important because former spouses have time to protect their interests through property and alimony settlements

16. *See, e.g.*, 10 U.S.C. § 1408 (2018); *Howell v. Howell*, 137 S. Ct. 1400 (2017) (denying indemnification for the loss in the divorced spouse's portion of the veteran's retired pay caused by the veteran's waiver of retired pay to receive service-related disability benefits).

17. *See infra* Part III.

18. 38 U.S.C. § 1970(a) (2018).

19. *See infra* Part IV; *see also* *Servicemembers' Group Life Insurance (SGLI)*, VA.GOV, <https://www.va.gov/life-insurance/options-eligibility/sgli/> [<https://perma.cc/9AF8-BAX5>] (last visited July 28, 2020) (explaining eligibility for SGLI, premiums, and coverage amounts).

20. *See infra* app. 1, at pp. 477–80 (showing the value of government contributions and their growth over time).

21. 38 U.S.C. § 1970(a).

22. 5 U.S.C. § 8424(d) (2009).

23. *See, e.g.*, FLA. STAT. § 732.703(2)–(3) (2013) (voiding interests by treating former spouses as if they had predeceased decedents, where the decedents had made spousal designations using wills, life insurance policies, pay-on-death accounts, and other mechanisms prior to a divorce).

while represented by counsel during lengthy divorce proceedings. In contrast, current spouses will likely not have similar robust protections.

Furthermore, since divorced couples will likely need to rely more heavily on other sources of income as they struggle financially to support multiple households, Congress should amend the Social Security Act and the Internal Revenue Code to ensure Social Security's long-term economic sustainability. By taking these measures, military marriage partners can be efficiently and effectively set up for financial success even in the event of divorce.

II. THE TAX AND BENEFIT LAWS SURROUNDING DIVORCE

Military marriage partners need to understand the tax and benefit laws surrounding divorce because the laws affect property settlements, alimony, and child support. Unfortunately, many servicemembers and their spouses struggle with financial literacy and may make decisions that are neither tax efficient nor financially optimal.²⁴

A. Property Settlements Considering Income Streams and Other Assets

Military marriage partners must first understand the tax and benefit laws affecting the division of assets in property settlements, which often vary based on state law. State law also governs divorce²⁵ and the jurisdiction of the presiding court through an individual's domicile, residency, and consent, as well as the physical location of property.²⁶

24. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-631, MILITARY PENSIONS: SERVICEMEMBERS NEED BETTER INFORMATION TO SUPPORT RETIREMENT SAVINGS DECISIONS 21 (2019), <https://www.gao.gov/assets/710/701524.pdf> [<https://perma.cc/3KH8-5TP3>] [hereinafter 2019 GAO].

25. See generally Linda D. Elrod & Robert G. Spector, *Review of the Year 2017–2018 in Family Law: Courts Tackle Immigration, Jurisdiction and the Usual Family Law Disputes*, 52 FAM. L.Q. 519 (2019) (providing an overview of the diverse divorce laws across the fifty U.S. states and including numerous detailed charts incorporating specific state statutes summarizing the positions across the jurisdictions).

26. See, e.g., *In re Marriage of Williams*, 417 P.3d 1033, 1037, 1040 (Kan. 2018) (holding that the servicemember consented to jurisdiction because, at trial, he did not object to the court's jurisdiction to divide his military retirement benefits and holding that the Uniformed Services Former Spouses' Protection Act (USFSPA) limits state courts' personal but not subject matter jurisdiction). See generally ADMIN. & CIVIL DEP'T, U.S. ARMY JUDGE ADVOCATE GEN.'S SCH., 54TH GRADUATE COURSE FAMILY LAW ELECTIVE DESKBOOK, ESTATE PLANNING ELECTIVE C-5 (2006) (providing a broad overview of family law, including property division and jurisdiction issues).

1. Real and Personal Property

In general, state law systems of equitable distribution or community property govern the division of property, including real property such as homes, personal property such as vehicles, and debt such as mortgages and student loans. Equitable distribution systems distinguish separate and marital property. Within equitable distribution systems, a majority of states, including Florida²⁷ and New York,²⁸ follow a dual property system where each spouse receives his or her separate property and courts divide marital property. Other states, such as South Dakota²⁹ and Michigan,³⁰ are sometimes referred to as “all property” states because they allow courts to award separate property to the other spouse, in addition to marital property.

In contrast, community property systems distinguish separate and community property. Within community property systems, most states, such as Texas³¹ and California,³² allow the division of only community

27. See FLA. STAT. § 61.075(1) (2018) (providing that “the court shall set apart to each spouse that spouse’s nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal”).

28. See N.Y. DOM. REL. LAW § 236(B)(5)(a)–(b) (Consol. 2020), <https://www.nysenate.gov/legislation/laws/DOM/236> [<https://perma.cc/PQ54-55Q4>] (providing that separate property “shall remain such” while marital property “shall be distributed equitably between the parties”).

29. See, e.g., *Ahrendt v. Chamberlain*, 910 N.W.2d 913, 918–19 (S.D. 2018) (affirming court below, which “classif[ied] separately held assets as marital property” and divided property equitably); *Osdoba v. Kelley-Osdoba*, 913 N.W.2d 496, 506–07 (S.D. 2018) (treating pre-marital student debt of one party as marital property where the couple chose not to pay off the debt “in order to increase the value of other accounts” where the other spouse benefitted from the decision).

30. See MICH. COMP. LAWS § 552.23(1) (2010) (providing that “if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care of custody of either party,” the court has discretion to “award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable”). In short, the court can award separate property to the other spouse if the spouse can show that they contributed to the property’s acquisition or improvement or that the failure to divide separate property would result in a marital estate that is insufficient to provide for their support. *Id.*

31. See TEX. FAM. CODE ANN. § 7.001 (West 2005) (providing the rules governing the award of marital property); TEX. FAM. CODE ANN. § 3.001 (West 2005) (defining separate property).

32. See CAL. FAM. CODE § 2550 (West 2019) (providing that, aside from a few enumerated exceptions, the court shall “divide the community estate of the parties equally”).

property, while other states do not limit division to only community property, such as Washington³³ and Arizona.³⁴

2. Retired Pay and Similar Sources of Income

Besides their homes and vehicles, servicemembers' largest assets often are their defined benefit and defined contribution plans.³⁵ As a result, it is not surprising that there have been numerous cases and statutes addressing retirement assets. For example, in 1981, in *McCarty v. McCarty*, the Supreme Court determined that Congress had "enacted a military retirement system designed . . . to provide for the retired service member, and to meet the personnel management needs of the active military forces."³⁶ Since the state's community property division of retired pay had "the potential to frustrate" these objectives, the court held that former spouses could not share the servicemember's military pay upon divorce.³⁷

a. The Uniformed Services Former Spouses' Protection Act (USFSPA)

To meet the need for clear rules as to the division of military retired pay and to balance the needs and interests of partners in a dissolving military marriage, Congress passed USFSPA.³⁸ USFSPA allowed states to

33. See WASH. REV. CODE § 26.09.080 (2008), <https://app.leg.wa.gov/RCW/default.aspx?cite=26.09.080> [<http://web.archive.org/web/20180830070850/http://app.leg.wa.gov/rcw/default.aspx?cite=26.09.080>] (providing that the court shall "make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable").

34. See, e.g., ARIZ. REV. STAT. ANN. § 25-318 (2016) (allowing the court to impress a lien on the separate property of either party in order to secure the payment of "[c]ommunity debts that the court has ordered to be paid by the parties"); see also Linda D. Elrod & Robert G. Spector, *Review of the Year in Family Law 2011–2012: Challenges Hit Federal Courts and Abduction Cases Increase*, 46:4 FAM. L.Q. 471, 534–36 (2013), <https://www.actec.org/assets/1/6/Survey-of-Equitable-Distribution-Statutes.pdf> [<https://perma.cc/B2C6-PMTU>] (last visited Mar. 29, 2020) (providing a survey of equitable distribution statutes across the fifty U.S. states).

35. Cf. Kristen MH Coyne, Darren Myers, & Susan H. Witting, *The SCRA and Family Law: More Than Just Stays and Delays*, 43 FAM. L.Q. 315, 327 (2009) (noting that "the unfortunate truth is that, in most military families, the most valuable asset is retirement").

36. *McCarty v. McCarty*, 453 U.S. 210, 235–36 (1981), *superseded by statute*, 10 U.S.C. § 1408 (2000), *as recognized in* *Howell v. Howell*, 137 S. Ct. 1400 (2017).

37. *Id.* at 233 (holding that "[s]tate courts are not free to reduce the amounts that Congress has determined are necessary for the retired member.>").

38. Pub. L. No. 97-252, § 1001, 96 Stat. 718, 730–35 (codified as 10 U.S.C. § 1408 (2018)); see also S. REP. NO. 97-502, at 1–12 (1982) (discussing the problems created by

treat “disposable” military retired pay³⁹ as marital or community property upon a divorce of a servicemember.⁴⁰ USFSPA also established limits on division, including the requirements that no more than fifty percent of pay would be divisible; that no benefit would pass to the former spouse that could be subsequently transferred; and that courts could not force servicemembers to retire at a certain time.⁴¹ In addition, USFSPA allowed

McCarty, the desire to provide protections for military spouses, and the intent to return division of retired military pay to state courts’ discretion).

39. See 10 U.S.C. § 1408(a)(4)(A). Disposable retired pay is defined as:

the total monthly retired pay to which a member is entitled less amounts which—

- (i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
- (ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
- (iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired (or the date on which the member’s name was placed on the temporary disability retired list); or
- (iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member’s retired pay is being made pursuant to a court order under this section.

Id. When USFSPA was originally enacted, the definition of ‘disposable retired pay’ was remarkably similar to the definition of disposable retired pay for purposes of garnishing retired pay for unpaid debts; that definition included reductions for withheld income taxes and fines from courts-martial. See *id.* (discussing History, Ancillary Laws and Directives, which explain the history of the statute, including the numerous amendments over time). Some retirees took actions to increase their federal income tax withholding to reduce disposable retired pay, and as a result, the Comptroller General issued an opinion determining the amount of permissible withholding. See *Matter of Uniformed Services Former Spouses’ Protection Act*, 63 COMP. GEN. 322 (1984) (concluding that it was impermissible for a retired colonel “to have nearly all of his retired pay withheld for federal income taxes thus reducing the amount of retired pay available for apportionment between him and his former spouse under the Uniformed Services Former Spouses’ Protection Act”). The definition of ‘disposable retired pay’ has since been amended numerous times for reasons including to better align with the amount of a retiree’s entitlement to retired pay.

40. 10 U.S.C. § 1408; see also 32 C.F.R. § 63.6 (1997), <https://www.govinfo.gov/conent/pkg/CFR-2001-title32-vol1/pdf/CFR-2001-title32-vol1-sec63-6.pdf> [<https://perma.cc/QR7Q-JVKS>]; U.S. DEP’T. OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 7B, ch. 29, § 2908 (July 2019) [hereinafter 2019 FMR], https://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/07b_29.pdf [<https://perma.cc/LR6H-C73M>].

41. U.S. DEP’T OF DEF., MILITARY COMPENSATION BACKGROUND PAPERS 1, 861 (8th ed. 2018), https://www.loc.gov/rr/frd/pdf-files/Military_Comp-2018.pdf

the “designated agent”⁴² to make direct payment to former spouses if they had been married to the servicemember for at least ten years, concurrent with military service creditable toward retirement, at the time of the divorce.⁴³ Furthermore, Congress continued to make important amendments to USFSPA. For example, in the National Defense Authorization Act for Fiscal Year 2017, Congress established that in a division of property involving disposable retired pay, courts shall use the member’s current pay grade and years of service as well as retired pay cost-of-living adjustments rather than the servicemember’s final retired pay grade and years of service.⁴⁴ Generally, this change has encouraged servicemembers to continue to serve in the military after a divorce, since they generally keep greater shares of their military retirement benefits.

[<https://perma.cc/U9Q5-UXN8>] [hereinafter MILITARY COMPENSATION BACKGROUND PAPERS].

42. The designated agent depends on the applicable service. *See* 2019 FMR, *supra* note 40, §§ 2902, 2904. The designated agent for the Army, Navy, Air Force, and Marine Corps is the Defense Finance and Accounting Service (DFAS), while the designated agent for the Coast Guard, the commissioned corps of the National Oceanic and Atmospheric Administration, and the Public Health Service is the Pay and Personnel Center. *Id.* §2904.

43. *Id.* § 2908.

44. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 641, 130 Stat. 2000, 2164 (2016). The NDAA states:

(a) IN GENERAL.—Section 1408(a)(4) of title 10, United States Code, is amended—

(1) by redesignating subparagraphs (A), (B), (C), (D) as clauses (i), (ii), (iii), (iv), respectively;

(2) by inserting “(A)” after “(4)”;

(3) in subparagraph (A), as designated by paragraph (2), by inserting “(as determined pursuant to subparagraph (B))” after “member is entitled”; and

(4) by adding at the end the following new subparagraph:

“(B) For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be—

“(i) the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by

“(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”

(b) APPLICATION OF AMENDMENTS.—The amendments made by subsection (a) shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act.

Id. (emphasis added).

b. The Legacy Retirement System and Disability Benefits

To sustain a sufficient and competitive force structure and to reward those who answered the call to serve their nation, the government built a defined benefit plan through which servicemembers who served at least twenty years on active duty would be eligible to receive retired pay immediately upon their retirement.⁴⁵ Active duty members who entered service after September 7, 1980 receive an amount equal to the monthly average of their highest thirty-six months of basic pay times 2.5 percent times the number of years they served in the military.⁴⁶ Reserve component members (i.e., members of the National Guard and Reserves) receive a similar benefit but generally need to wait until reaching age sixty before they may begin collecting retired pay.⁴⁷ This defined benefit plan is extremely valuable, especially in times of uncertainty, because it provides a reliable source of inflation-adjusted monthly income.⁴⁸ In

45. U.S. DEP'T OF DEF., THE UNIFORMED SERVICES BLENDED RETIREMENT SYSTEM 12 (2018), <https://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/BRS%20Frequently%20Asked%20Questions%2003282018.pdf?ver=2018-03-28-235150-797> [<http://web.archive.org/web/20200927192758/https://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/BRS%20Frequently%20Asked%20Questions%2003282018.pdf?ver=2018-03-28-235150-797>] (“[R]etired pay generally begins the first day of the first month following [the servicemember’s] retirement.”). See generally *Computing Retired Military Pay*, MILITARY.COM, <https://www.military.com/benefits/military-pay/computing-retired-military-pay.html> [<https://perma.cc/4VH4-TUMW>] (last visited Mar. 10, 2020).

46. Thus, this retirement system was dubbed “High-3” since it averaged the monthly pay of servicemembers’ highest three years of service. In contrast, retirees who entered service before September 8, 1980, received retired pay based on their Final Pay rather than their High-3. See *Estimate Your Retired Pay*, U.S. DEP’T DEF., <https://www.dfas.mil/retiredmilitary/plan/estimate/> [<http://web.archive.org/web/20200606231003/https://www.dfas.mil/retiredmilitary/plan/estimate/>] (last visited Apr. 16, 2020).

47. 10 U.S.C. § 12731(f)(1) (2018); see *Reserve Retirement*, U.S. DEP’T DEF., <https://militarypay.defense.gov/Pay/Retirement/Reserve.aspx> [<https://perma.cc/KEB9-SRXZ>] (last visited Mar. 22, 2020) (providing an explanation of the reserve retirement system, including a discussion of the retirement points system). See generally Major Jennifer R. Cave, *Making Money out of Thin Air: Wealth Management for the Reserve Soldier*, ARMY L. 15, 17–18 (Apr. 2017), <https://www.loc.gov/law/mlr/pdf/04-2017.pdf> [<http://web.archive.org/web/20201004223354/https://www.loc.gov/law/mlr/pdf/04-2017.pdf>] (discussing defined benefit plan limitations and retirement strategies).

48. See SHANE OSTROM, UNDERSTANDING YOUR FUTURE RETIREMENT BENEFITS UNDER THE BLENDED RETIREMENT SYSTEM 6 (2016), https://www.moaa.org/uploadedfiles/content/benefits_and_discounts/pay_and_benefits/military_pay_issues/new-retire-program-april16.pdf [http://web.archive.org/web/20201004123006/https://www.moaa.org/uploadedfiles/content/benefits_and_discounts/pay_and_benefits/military_pay_issues/new-retire-program-april16.pdf] (forecasting that the legacy retirement plan’s defined benefit for an E-7 with

contrast, those who leave the military early without vesting in the defined benefit plan are at the mercy of the unpredictable job market and the possible negative ramifications.⁴⁹ Considering that high unemployment rates can occur at any point in time, such as during global pandemics, the military's defined benefit plan shows its tremendous value in peace of mind alone.⁵⁰

It is important to note that servicemembers who have been rated as partially disabled by the U.S. Department of Veterans Affairs may choose to receive disability compensation and have their retired pay offset by the amount of disability compensation received.⁵¹ The disability

twenty years of service would have a lifetime value of approximately \$2.6 million and that an O-5 with twenty years of service would have a lifetime value of approximately \$4.9 million, assuming the servicemembers lived for an additional fifty years and benefited from a 2.5 percent cost of living adjustment); *infra* app. 1, at pp. 477–80 (showing a similar analysis making slightly different assumptions such as a different life expectancy); *see also* Allison Schrager, *Only One in Five People Take up This Incredibly Generous Pension to Retire at 40*, QUARTZ (Mar. 14, 2017), <https://qz.com/929153/only-one-in-five-people-take-up-this-incredibly-generous-pension-to-retire-at-40/> [<http://web.archive.org/web/20201004123828/https://qz.com/929153/only-one-in-five-people-take-up-this-incredibly-generous-pension-to-retire-at-40/>].

49. *See, e.g., Background and Statistics*, NAT'L COALITION FOR HOMELESS VETERANS, http://nchv.org/index.php/news/media/background_and_statistics/ [<https://perma.cc/L6XX-LUJH>] (last visited Apr. 19, 2020) (explaining that approximately eleven percent of homeless adults are veterans and that “[a]bout 1.4 million other veterans . . . are considered at risk of homelessness due to poverty”).

50. Lisa Beilfuss, *Job-Loss Forecasts Are Growing More Dire. Fed's Bullard Says Unemployment Could Hit 30%*, BARRON'S (Mar. 23, 2020), <https://www.barrons.com/articles/job-loss-forecasts-coronavirus-economy-bullard-51584979822> [<http://web.archive.org/web/20201004124018/https://www.barrons.com/articles/job-loss-forecasts-coronavirus-economy-bullard-51584979822>] (explaining St. Louis Federal Reserve President James Bullard's warning that unemployment due to COVID-19 could hit thirty percent in 2020 and that the gross domestic product could drop fifty percent); *see also* Kyle Swenson, *Ten Bucks Left, No Place to Go: How the Pandemic and a Broken Unemployment System Are Upending People's Lives*, WASH. POST (Aug. 1, 2020), <https://wapo.st/2QctJ9E> [<https://perma.cc/8LG8-QUE6>] (explaining the struggles of unemployment applicants during COVID-19); Ryan Browne, *Trump Opens the Door to Calling up Former Active Service Members for Coronavirus Fight*, CNN (Mar. 28, 2020), <https://cnn.it/3evpYGp> [<https://perma.cc/76SL-U5NC>] (quoting President Trump after he signed an executive order allowing the recall of former military members when he stated, “This will allow [us to] mobilize medical disaster and emergency response personnel to help wage our battle against the virus by activating thousands of experienced service members including retirees.”). Being retired from the military may have an additional benefit, including the possibility to return to active duty in times of great national need. *See id.*; 10 U.S.C. § 688 (2018).

51. *See* Office of Pub. & Intergovernmental Affairs, *Federal Benefits for Veterans, Dependents and Survivors*, U.S. DEP'T VETERAN AFF., https://www.va.gov/opa/publications/benefits_book/benefits_chap02.asp

compensation from the U.S. Department of Veterans Affairs, unlike retired pay, is neither taxable nor subject to division upon divorce. In *Mansell v. Mansell*,⁵² the U.S. Supreme Court held that USFSPA prohibited states from dividing the value of disability benefits received by waiving military retired pay because those benefits received did not qualify as disposable retired pay.⁵³

This decision led to a split in the jurisdictions as some states attempted to take this waiver of military pay into account in property and alimony settlements by using indemnity provisions, contract theories, and constructive trusts.⁵⁴ In 2017, the Supreme Court provided predictability in *Howell v. Howell*⁵⁵ by affirming the *Mansell* decision and reducing the ability of states to find creative ways to address the reduction in divisible retired pay when a retiree elects to receive disability compensation from the Department of Veterans Affairs or Combat Related Special Compensation (CRSC) from the Department of Defense.⁵⁶

[http://web.archive.org/web/20200809163802/https://www.va.gov/opa/publications/benefits_book/benefits_chap02.asp].

52. *Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989).

53. See 10 U.S.C. § 1408(a)(4) (2018). All retirees with qualifying years of service for retired pay and a service-connected disability rating of fifty percent or higher qualify for concurrent retirement pay (unless they decide to apply for and receive Combat Related Special Compensation (CRSC)) and disability pay where there is no offset of their retirement pay for receiving compensation from the Department of Veterans Affairs. See 10 U.S.C. § 1414 (providing member's eligibility for Concurrent Retirement and Disability Pay (CRDP)); see also 38 C.F.R. § 3.750 (2019). See generally *Concurrent Retirement and Disability Pay (CRDP)*, DEF. FIN. & ACCT. SERVS., <https://www.dfas.mil/retiredmilitary/disability/crdp/> [<https://perma.cc/ACM3-S8BX>] (last visited Apr. 16, 2020) (providing an explanation of CRDP with hyperlinks to other sources). In these cases, disposable retired pay would not be reduced.

54. See *Howell v. Howell*, 137 S. Ct. 1400, 1404–05 (2017) (discussing the different conclusions reached by numerous states including Alaska, Massachusetts, Tennessee, Mississippi, and Vermont, along with a request from the Office of the Solicitor General to provide clarity, resulting in the U.S. Supreme Court accepting certiorari).

55. *Id.* at 1402.

56. See 10 U.S.C. § 1413a (providing eligibility for Combat-Related Special Compensation (CRSC)); U.S. DEP'T OF DEF., COMBAT-RELATED SPECIAL COMPENSATION GUIDANCE (Jan. 1, 2004), https://militarypay.defense.gov/Portals/3/Documents/CRSC_Guidance_104.pdf [<https://perma.cc/CP5C-5SSU>] (providing in-depth guidance concerning CRSC). See generally U.S. ARMY JUDGE ADVOCATE GEN.'S SCH., ADMINISTRATIVE AND CIVIL LAW CLIENT SERVICES DESKBOOK, CHAPTER K: UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (2018) [hereinafter 2018 DESKBOOK], https://militarypay.defense.gov/Portals/3/Documents/CRSC_Guidance_104.pdf [<https://perma.cc/S729-B6FA>]. Although states cannot order indemnification in contested cases where there is no indemnification clause in a divorce settlement, states may still be creative by using tactics such as express contractual indemnification clauses and *res judicata*.

c. The Blended Retirement System (BRS)

Although the legacy retirement system provided a significant and reliable income stream to recipients, most servicemembers left the military without retirement benefits because they did not serve long enough for their defined benefit plan to vest. For example, only nineteen percent of active duty servicemembers who entered in fiscal year 2013 were estimated to complete the necessary twenty years of service to qualify for the defined benefit system.⁵⁷

To rectify this situation, Congress designed BRS⁵⁸ to increase the number of servicemembers who would receive retirement benefits upon leaving service.⁵⁹ Simultaneously, Congress built BRS to maintain a competitive force structure to defend the nation while sustaining the Military Retirement Fund (MRF) for future generations.⁶⁰

To achieve these objectives, BRS includes four principal components. First, BRS retains the legacy retirement system's defined benefit plan. However, it achieves cost savings by reducing the multiplier from 2.5 percent to two percent for each year of service and redirecting some of the savings into a portable, 401(k) type of retirement plan.⁶¹ Primarily as a result of reducing the multiplier, full implementation of BRS is estimated to reduce the Department of Defense's *annual* budget costs by

57. OFFICE OF THE ACTUARY, U.S. DEP'T OF DEF., VALUATION OF THE MILITARY RETIREMENT SYSTEM: SEPT. 30, 2012 24 (Apr. 2014), https://actuary.defense.gov/Portals/15/Documents/MRF_ValRpt2_2012.pdf [<https://perma.cc/UG9B-NNMB>].

58. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 631–635, 129 Stat. 726, 842–52 (2016), <https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf> [<https://perma.cc/G3KB-LC6J>].

59. 10 U.S.C. § 1409(b)(4) (2018); *see also* MILITARY COMP. & RET. MODERNIZATION COMM'N, FINAL REPORT 3 (2015), <https://docs.house.gov/meetings/AS/AS00/20150204/102859/HHRG-114-AS00-20150204-SD001.pdf> [<http://web.archive.org/web/20201003171302/https://docs.house.gov/meetings/AS/AS00/20150204/102859/HHRG-114-AS00-20150204-SD001.pdf>] (explaining that while the military's retirement system involves cliff vesting at twenty years of service, private sector plans are generally required by the Employee Retirement Income Security Act (ERISA) to vest its employees in company-provided defined benefit plans within five years of employment or to gradually vest employees during a period of seven years; similarly, private sector plans need to allow their employees to earn full benefits in their defined contribution plan at a specific date within three years of employment or to gradually earn increasing benefits in their defined contribution plan within six years).

60. *Id.* at 159–60 (providing recommendations to modernize the military's retirement and health care systems, as well as to improve numerous quality of life issues); *see also* U.S. DEP'T OF DEF., MILITARY RETIREMENT FUND AUDITED FINANCIAL REPORT (2015), https://comptroller.defense.gov/Portals/45/documents/cfs/fy2015/13_Military_Retirement_Fund/2015_MRF_AFR_Final_20151110.pdf [<https://perma.cc/7WF8-UJP6>] (providing extensive details on the financial status of the military retirement fund).

61. 10 U.S.C. § 1409(b)(4) (2018).

approximately \$1.4 billion compared to the legacy retirement system, in 2016 dollars.⁶²

However, servicemembers will receive twenty percent less under this BRS defined benefit plan than they would under the legacy retirement system due to the reduced multiplier.⁶³ For example, if a servicemember's monthly High-3 basic pay was \$10,000, under the legacy retirement system the servicemember would receive \$10,000 (monthly basic pay) x 2.5 percent (multiplier) x twenty years of service = \$5,000 a month retired pay.⁶⁴ However, under BRS, the servicemember would receive \$10,000 (monthly basic pay) x two percent (multiplier) x twenty years of service = \$4,000 a month retired pay.⁶⁵ In short, the amount of the defined-benefit portion received under BRS would be \$4,000 a month, which is only eighty percent of \$5,000 (\$5,000 x 0.8 = \$4,000), the amount the servicemember would have received under the legacy retirement system.⁶⁶

Although this difference may not appear to be significant, the difference over a lifetime could be tremendous as shown in Appendix 1 to this Article. For example, the lifetime value of the defined benefit plan under BRS for an enlisted servicemember with an E-7 rank who entered service in 2017, served for twenty years before retiring, and lived to the age of eighty-five would be approximately \$3.1 million, while the lifetime value of the defined benefit plan under the legacy retirement system would be approximately \$3.8 million.⁶⁷ Similarly, the lifetime value of the

62. See 2019 GAO, *supra* note 24, at 1–2 (emphasis added). The annual accrual costs for military retirement were not originally part of cost accounting for military retirement—unlike the ERISA rules for private sector retirement, which require accrual accounting. See also *Gastronomical Workers Union Local 610 & Metro. Hotel Ass'n Pension Fund v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 64 (1st Cir. 2010). Congress funded military retirement as a “pay-as-you-go basis[.]” which “did not hold policymakers fiscally responsible for today’s decisions affecting the size of the future retirement bill.” William M. Hix & William W. Taylor, *Funding Military Requirements*, RAND CORP. (1997), https://www.rand.org/pubs/research_briefs/RB3005.html [<https://perma.cc/RG36-223P>]. Consequently, any savings by modifying retirement for new entrants would not have a budget impact until years later; Congress recognized this problem and in 1984, “directed a switch to an accrual method of funding retirement.” *Id.* As a result, changes to military retirement for new entrants now result in “budgetary consequences . . . immediately.” *Id.*

63. See generally *Computing Retired Military Pay*, *supra* note 45.

64. *Id.*

65. *Id.*

66. *Id.*

67. See *infra* app. 1, at pp. 477–80 (using the Department of Defense Military Compensation retirement calculator to estimate values of military retirement benefits); *Blended Retirement Comparison Calculator*, U.S. DEP'T DEF., <https://militarypay.defense.gov/Calculators/BRS/> [<https://web.archive.org/web/20200916181708/https://militarypay.defense.gov/Calculator/s/BRS/>] (last visited July 15, 2020); see also OSTROM, *supra* note 48, at 6 (showing a similar analysis using slightly different assumptions, such as a different life expectancy).

defined benefit plan under BRS for an officer with an O-5 rank who entered service in 2017, served for twenty years before retiring, and lived to the age of eighty-five would be approximately \$5.8 million, while the lifetime value of the defined benefit plan under the legacy retirement system would be approximately \$7.3 million.⁶⁸ In short, over a lifetime, this 0.5 percentage point change could amount to over a half-million dollar difference for an E-7 and over a million dollar difference for an O-5.

Second, to supplement the reduced retired annuity that servicemembers would receive under BRS's defined benefit plan, BRS added automatic and matching contributions by the government to servicemember's defined contribution plan, the Thrift Savings Plan (TSP). It is important to note that under the legacy retirement system, TSP was not officially part of the military's retirement plan as servicemembers only began to be able to participate in 2000, and there were neither automatic nor matching TSP contributions.⁶⁹

The defined contribution provisions of BRS largely mirror the design of the defined contribution portion for the Federal Employees Retirement System (FERS), the primary retirement plan for civilian federal workers, with a few key differences.⁷⁰ Under FERS, civilian federal workers receive automatic and matching employer contributions immediately, vest in matching employer contributions immediately, and vest in employer automatic contributions after three years of service. In contrast, under BRS, servicemembers must wait sixty days for automatic contributions to begin, and two years for automatic DOD contributions to vest and

68. See *infra* app. 1, at pp. 477–80; see also OSTROM, *supra* note 48, at 6 (showing a similar analysis using slightly different assumptions, such as a different life expectancy).

69. MILITARY COMP. & RET. MODERNIZATION COMM'N, *supra* note 59, at 19–41 (providing extensive rationale behind BRS).

70. 2019 GAO, *supra* note 24, at 6 n.14. FERS was enacted as a cost-saving measure to cover employees who entered service on or after January 1, 1987. See U.S. Office of Pers. Mgmt., *Retirement Services: CSRS Information*, <https://www.opm.gov/retirement-services/csrs-information> [<https://perma.cc/3DYH-9ZWT>] (last visited Apr. 16, 2020). Before then, federal civilian employees were covered by the Civil Service Retirement System (CSRS), which became effective on August 1, 1920. See *id.* Under that system, federal civilian retirees would receive a defined annuity benefit. However, in general, CSRS employees contributed between seven to eight percent of their salaries and paid Medicare tax; however, they were not subject to the Social Security Old-Age, Survivors, and Disability Insurance (OASDI) tax and thus were not eligible for Social Security benefits upon retirement. See U.S. OFFICE OF PERS. MGMT., RI-83-19, RETIREMENT FACTS 13: CSRS OFFSET RETIREMENT (1998), <https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri83-19.pdf> [<https://web.archive.org/web/20190502013050/https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri83-19.pdf>] (last visited Apr. 16, 2020). In addition, there was an offset for Social Security benefits if employees, typically older federal civilian employees, received retirement from employment that was not covered. *Id.*

matching contributions to begin.⁷¹ Appendix 1 shows the amount of these government contributions, the increased value at retirement due to market growth, and the expected value over the expected lifetime of servicemembers.⁷² For example, assuming a five percent TSP contribution rate, an E-7 entering service in 2017 and serving twenty years until retirement would receive government contributions of approximately \$54,000 that would grow to approximately \$90,000 at retirement.⁷³ This amount would grow further and produce approximately \$624,000 over the servicemember's expected lifetime assuming a seven percent rate of return, three percent withdrawal rate starting at age sixty-seven, and a life expectancy of eighty-five.⁷⁴

Third, to ensure that key servicemembers agree to additional service obligations at certain career retention points to maintain an adequate force structure, BRS offers continuation pay to servicemembers between eight to twelve years of service.⁷⁵ The amounts servicemembers receive depend on numerous factors, such as the need for the member's specific skill set. The amounts for active duty members range from 2.5 to thirteen times their monthly basic pay, while amounts for reserve component members range from 0.5 to six times their monthly basic pay.⁷⁶

Fourth, for those who complete at least twenty years of service, BRS offers the option to take some of their defined benefit annuity as an upfront lump-sum payment, which is either twenty-five percent or fifty percent of the discounted present value of retired pay entitlement for the time period between the date of retirement and the date the servicemember becomes eligible for Social Security.⁷⁷ As a result of taking a lump-sum option, servicemembers would receive either seventy-five percent or fifty percent of their annuity income stream under BRS's defined benefit plan. The lump-sum option is made possible by discounting the lump-sum amount received in advance.⁷⁸ It is important to note that BRS has higher

71. 2019 GAO, *supra* note 24, at 6 n.14.

72. *See infra* app. 1, at pp. 477–80.

73. *See infra* app. 1, at pp. 477–80 (using the Department of Defense Military Compensation retirement calculator to estimate values of military retirement benefits); *Blended Retirement Comparison Calculator*, *supra* note 67.

74. *See infra* app. 1, at pp. 477–80 (using the Department of Defense Military Compensation retirement calculator to estimate values of military retirement benefits); *see Blended Retirement Comparison Calculator*, *supra* note 67.

75. 37 U.S.C. § 356(a)(1) (2018).

76. 37 U.S.C. § 356(b) (2018).

77. John Goodell, *Survivor Benefit Plan Series Part II: Lump Sum DL w/ BRS & SBP*, HIGH GROUND PLANNING (Mar. 12, 2020), <https://highgroundplanning.com/articles/survivor-benefit-plan-series-part-ii-lump-sum-brs-sbp> [<https://perma.cc/E4SY-NCAU>].

78. *See* Major Courtney M. Cohen, *The Blended Retirement System: What Leaders Need to Know*, 4 ARMY L. 21, 23 (2019), <https://www.loc.gov/law/mlr/pdf/04-2019.pdf>

discount rates⁷⁹ than private sector pensions.⁸⁰ As a result, servicemembers would receive less under BRS than under a similar civilian plan if they chose to take a lump-sum option.

The reduced defined benefit plan and enhanced defined contribution plan shift financial risks to servicemembers to make “their own financial decisions, including how much to contribute to their TSP account, how to invest their TSP balance, and how to manage their savings upon military retirement.”⁸¹ These issues are especially important in the event of divorce since issues will arise as to how to divide TSP assets between the parties. Given this importance, “concerns exist about whether servicemembers are able to make the informed decisions about their retirement required by BRS” since many struggle with financial literacy.⁸²

It is important to note that although the Employee Retirement Income Security Act of 1974 (ERISA)⁸³ governs private sector plans, it does not govern TSP. Instead, title 5 U.S.C. sections 8351 and 8401 through 8479 govern TSP.⁸⁴ Sections 8435 and 8445 address the rights of spouses and former spouses, and section 8435 provides that servicemembers “may make an election or change . . . [if servicemembers and their spouses] jointly waive by written election, any right which the spouse may have had to a survivor annuity”⁸⁵ In addition, regarding the division of TSP assets in a divorce, qualified domestic relation orders (QDROs) do not apply to federal retirement programs authorized by Congress.⁸⁶

[<https://perma.cc/VG6Z-3949>] (explaining that the discount rate was 6.81 percent for 2019 and 6.75 percent for 2020). See generally *Blended Retirement Comparison Calculator*, *supra* note 67 (explaining terms such as GDR, COLA, etc.).

79. 2019 GAO, *supra* note 24, at 28 (explaining that the government discount rate (GDR) of 6.81 percent would be approximately equivalent to a nominal discount rate of 9.37 percent).

80. *Id.* (explaining that private sector plans have discount rates of 2.5–4.9 percent).

81. *Id.* at 2.

82. *Id.*

83. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

84. Thomas K. Emswiler, *Statement Before the Employee Benefits Security Administration* 1 (Aug. 28, 2013), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2013-locating-missing-and-lost-participants-emswiler-08-28.pdf> [<https://perma.cc/K83Q-BEVY>] (dealing with handling lost TSP participants).

85. 5 U.S.C. § 8435 (2018).

86. THRIFT SAV. PLAN, COURT ORDERS AND POWERS OF ATTORNEY 4 (2014), <https://www.tsp.gov/publications/tspb11.pdf> [<http://web.archive.org/web/20201004183140/https://www.tsp.gov/publications/tspb11.pdf>]; 5 C.F.R. § 1653.2 (2019), <https://www.govinfo.gov/content/pkg/CFR-2012-title5-vol3/pdf/CFR-2012-title5-vol3-sec1653-2.pdf> [<http://web.archive.org/web/20201004183443/https://www.govinfo.gov/content/pkg/CFR-2012-title5-vol3/pdf/CFR-2012-title5-vol3-sec1653-2.pdf>].

d. Career Status Bonus (CSB) and Voluntary Separation Incentive (VSI)

Similar to retired pay, courts have found other benefits, such as CSB⁸⁷ and VSI,⁸⁸ to be subject to division upon divorce.⁸⁹ Under CSB/Redux, servicemembers who entered service between August 1, 1986 and December 31, 2017, could receive a \$30,000 cash bonus when they reach their fifteenth year of active service, but the retirement multiplier of their defined benefit plan was reduced by one percentage point for each year of service under thirty years, and their cost of living adjustment (COLA) was also reduced by one percentage point.⁹⁰ Once the servicemember reached the age of sixty-two, the servicemember's retired pay was restored to the same amount as it would have been, including all full COLA increases, if the member had remained under the legacy retirement system. Thereafter, the applicable COLA was "applied at the reduced rate each year following."⁹¹

e. Individual Retirement Accounts (IRA) and 401(k) Plans

Generally, states consider civilian retirement plans acquired during marriage, such as individual retirement accounts and 401(k) plans, as marital property and thus valuable assets subject to division.⁹² Servicemembers and spouses who wish to protect pre-marital accounts need to ensure they take appropriate action, such as ensuring against the commingling of funds.⁹³ For example, in *Flesch v. Flesch*, the court stated:

87. See *Boedeker v. Larson*, 605 S.E.2d 764, 773 (Va. Ct. App. 2004). See generally *CSB/Redux*, DEP'T. DEF., DEF. FIN. & ACCT. SERV. <https://www.dfas.mil/RetiredMilitary/plan/estimate/csbredux/> [<https://perma.cc/D9LA-MFTG>] (last visited Mar. 22, 2020) (providing an explanation of CSB/Redux).

88. See, e.g., *In re Marriage of Menard*, 42 P.3d 359, 364–65 (Or. Ct. App. 2002).

89. See generally ADMIN. & CIVIL DEP'T, U.S. ARMY JUDGE ADVOC. GEN.'S SCH., 54TH GRADUATE COURSE FAMILY LAW ELECTIVE DESKBOOK, ESTATE PLANNING ELECTIVE C-11 (2006).

90. See generally *CSB/Redux*, *supra* note 87 (providing an explanation of CSB/Redux); *Computing Retired Military Pay*, *supra* note 45.

91. *CSB/Redux*, *supra* note 87 (providing an explanation of CSB/Redux).

92. See, e.g., *Shyue v. Tarn*, 775 N.Y.S. 2d 342, 342–43 (App. Div. 2nd Dep't 2004); *In re Donnelly*, 151 B.R. 787, 788–89 (Bankr. S.D. Ohio 1992) (holding that although the IRA was owned solely by the debtor in a bankruptcy proceeding, it was subject to division by the court as a marital asset in divorce proceedings).

93. See, e.g., *Flesch v. Flesch*, 804 S.E.2d 67, 68 (Ga. 2017) (holding that since the wife had placed marital assets into the retirement account she opened prior to the marriage, the account could be divided as marital property).

While there is evidence in the record establishing that the account predated the marriage, the same cannot be said of the entirety of the funds included therein . . . Wife, who is herself an attorney, explicitly acknowledged under oath that she had placed marital assets in the premarital account, and this fact remains undisputed. Accordingly, there is no evidence to support the trial court's finding that the Vanguard account is entirely Wife's separate, premarital property, and, thus, the finding was reversible error; this case is remanded for the trial court to determine what portion of the Vanguard retirement account is marital property . . . and to equitably divide that portion of the account.⁹⁴

In short, failure to take appropriate action, such as keeping accounts completely separate, including funds added to such accounts, can have disastrous effects for the original owner of the accounts.

f. Survivor Benefit Plan (SBP)

As another valuable asset, SBP can provide servicemembers' surviving beneficiaries with a potential lifetime income stream representing a portion of their military retired pay.⁹⁵ SBP automatically covers servicemembers while they serve in the military and provides their family members with an annuity if servicemembers die in the line of duty.⁹⁶ However, after they retire from the military, servicemembers must pay premiums if they want coverage.⁹⁷

Over time, Congress has changed SBP, affecting servicemembers and potential beneficiaries. For example, in 1986, Congress allowed servicemembers to designate former spouses as SBP beneficiaries.⁹⁸ Then,

94. *Id.* at 69.

95. See, e.g., *Survivor Benefits Calculator*, MY ARMY BENEFITS (May 31, 2020) <https://myarmybenefits.us.army.mil/Benefit-Calculators/Survivor-Benefits> [https://perma.cc/S4E6-8BQW] (last visited May 31, 2020) (calculating SBP and other available benefits). See generally Major Samuel W. Kan, *Setting Servicemembers up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, ARMY L. 73 (Jan. 2010), https://www.loc.gov/rr/frd/Military_Law/pdf/Setting-Servicemembers-2.pdf [https://perma.cc/M6WT-4HYY].

96. 10 U.S.C. §§ 1447, 1448(d) (2018).

97. 10 U.S.C. § 1448 (2018).

98. See National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 641, 100 Stat. 3816 (1986) (amending 10 U.S.C. § 1450 to allow courts to require servicemembers to elect to provide an annuity to a former spouse (or to both a former spouse and child)); see also 10 U.S.C. § 1450(a)(1) (2018).

in 2014, Congress gave servicemembers the ability to designate special needs trusts as beneficiaries.⁹⁹

Adding another level of complexity, due to BRS, servicemembers now have the option of taking lump-sum retirement benefits. However, servicemembers need to understand that while taking a lump sum does not affect the amount of SBP benefits survivors receive, servicemembers receive a smaller monthly-retired pay annuity amount under BRS. As a result, the SBP premium that servicemembers pay will be a larger percentage of income. This reality may discourage participation in SBP for those who choose to take the lump sum.¹⁰⁰ However, since taxable retired pay excludes SBP premiums paid, servicemembers still have an incentive to participate in SBP even though the benefits paid are taxable to the recipient.¹⁰¹

g. Social Security

Couples should also consider their future Social Security benefits, another valuable income stream, in analyzing how courts may address property and alimony settlements. The amount of Social Security benefits received¹⁰² depends on numerous factors, including the amount of taxes

99. See National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 624, 128 Stat. 3292 (2014) (amending 10 U.S.C. §§ 1448, 1450, and 1455); 10 U.S.C. § 1450(a)(4) (2018); *see also* Memorandum from Stephanie Barna, Principal Deputy Assistant Sec'y of Def. for Manpower and Reserve Affairs on Enabling Payment of Survivor Benefit Plan Annuities to a Special Needs Trust (Dec. 31, 2015), <https://thearcofnovatrust.org/content/uploads/sites/16/2016/04/DFAS-Military-SBP-and-SNT-Policy-Final-31-Dec-15.pdf> [<https://perma.cc/V37J-MJ5X>] (implementing the Congressional legislation that allowed servicemembers to designate special needs trusts as SBP beneficiaries).

100. Goodell, *supra* note 77; *see also* *The Blended Retirement System: Lump Sum Option*, U.S. DEP'T DEF., [https://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/Fact%20Sheet-Lump%20Sum.pdf?ver=2017-12-08-134755-853](https://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/Fact%20Sheet-Lump%20Sum.pdf?ver=2017-12-08-134755-853#:~:text=The%20lump%20sum%20option%20is,service%20members%20choices%20of%20retirement.&text=Monthly%20retired%20pay%20returns%20to,for%20most%20is%20age%2067) [<http://web.archive.org/web/20201004192734/https://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/Fact%20Sheet-Lump%20Sum.pdf?ver=2017-12-08-134755-853>].

101. See I.R.C. § 122 (2018).

102. See *OASDI and SSI Program Rates & Limits, 2020*, SSA.GOV (2019), https://www.ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2020.html [http://web.archive.org/web/20201004194123/https://www.ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2020.html] (providing that the maximum monthly Social Security benefit for workers retiring at the full retirement age of sixty-six was \$3,011 in 2020).

paid and the national average wage index.¹⁰³ To fund Social Security, the government taxes the income of individuals up to the contribution and benefits base,¹⁰⁴ which was \$137,700 in 2020.¹⁰⁵ As a result, “earnings above that amount would not be subject to the Social Security tax[,]”¹⁰⁶ which is 6.2 percent for employees¹⁰⁷ and another 6.2 percent for employers.¹⁰⁸

The program requires that an individual reach up to the age of “[sixty-seven], depending on an individual’s birth” year, to receive full Social

103. See *National Average Wage Index*, SSA.GOV (2020), <https://www.ssa.gov/OACT/COLA/AWI.html> [<https://perma.cc/L9LX-GEPB>] (providing the national average wage index from 1951 to 2018 and including that the national wage index for 2018 and 1992 was \$52,145.80 and \$22,935.42, respectively).

104. 42 U.S.C. § 430(b) (1994) (establishing the formula for calculating the contribution and benefits base). The statute determines the amount as follows:

(b) Determination of amount. The amount of such contribution and benefit base shall (subject to subsection (c)) be the amount of the contribution and benefit base in effect in the year in which the determination is made or, if larger, the product of—

(1) \$60,600, and

(2) the ratio of (A) the national average wage index (as defined in section 409(k)(1) of this title) for the calendar year before the calendar year in which the determination under subsection (a) is made to (B) the national average wage index (as so defined) for 1992,

with such product, if not a multiple of \$300, being rounded to the next higher multiple of \$300 where such product is a multiple of \$150 but not of \$300 and to the nearest multiple of \$300 in any other case.

Id. For example, since the national average wage index for 2018 and 1992 was \$52,145.80 and \$22,935.42, respectively, one can calculate the contribution and benefits base for 2020 as follows: $\$60,600 \times (\$52,145.80 / \$22,935.42) = \$137,780$, which is rounded to \$137,700 as the nearest multiple of \$300 ($\$300 \times 459 = \$137,700$).

105. See *Contribution and Benefit Base*, SSA.GOV (2020), <https://www.ssa.gov/OACT/COLA/cbb.html> [<https://perma.cc/52BG-CVSA>] (providing the tax rate and the gradually increasing contribution and benefit base amounts from 1937 to 2020). Since the OASDI tax rate was 6.2 percent and the contribution and benefit base was \$137,700 in 2020, “an individual with wages equal to or larger than \$137,700 would contribute \$8,537.40 to the OASDI program in 2020, and his or her employer would contribute the same amount.” *Id.*

106. See Michelle Singletary, *Social Security Needs a Fix. Here’s How the 2020 Presidential Candidates Would Resolve the Looming Crisis*, WASH. POST (Jan. 20, 2020), <https://wapo.st/2B3NwDF>

[http://web.archive.org/web/20201004200022if_/https://www.washingtonpost.com/business/2020/01/20/social-security-needs-fix-heres-how-2020-presidential-candidates-would-resolve-looming-crisis/] [hereinafter *Social Security Needs a Fix.*].

107. I.R.C. § 3101(a) (2018) (establishing the Old-Age, Survivors, and Disability Insurance rate of tax on *employees* for the wages they receive with respect to their employment).

108. I.R.C. § 3111(a) (2018) (establishing the Old-Age, Survivors, and Disability Insurance rate of tax on *employers* for the wages they pay employees for purposes of employment).

Security benefits.¹⁰⁹ Individuals can choose to take Social Security benefits at an earlier age, resulting in reduced benefits, or can choose to delay receiving benefits until a later age, resulting in increased benefits.¹¹⁰ For those working individuals born in 1943 or later, Social Security adds eight percent to one's benefit for each full year the individual delays receiving Social Security benefits beyond his or her full retirement age up

109. Lorie Konish, *The Social Security Retirement Age Could Go up. Here's Why That Change Won't Be Easy*, CNBC (Nov. 13, 2019), <https://www.cnbc.com/2019/11/13/why-raising-social-securitys-full-retirement-age-wont-be-easy.html> [<http://web.archive.org/web/20201004200849/https://www.cnbc.com/2019/11/13/why-raising-social-securitys-full-retirement-age-wont-be-easy.html>].

110. Selena Maranjian, *3 Great Reasons to Take Social Security Benefits at 62*, MOTLEY FOOL (May 13, 2020), <https://www.fool.com/retirement/2020/05/13/3-great-reasons-to-take-social-security-benefits-a.aspx> [<http://web.archive.org/web/20201004201038/https://www.fool.com/retirement/2020/05/13/3-great-reasons-to-take-social-security-benefits-a.aspx>] (explaining why individuals may choose to take Social Security benefits early even though they will face negative financial repercussions and discussing strategies for maximizing the receipt of benefits, such as having the lower income spouse take benefits early and allowing the higher income spouse to delay receiving benefits to increase the benefits ultimately received). As shown in the table below, choosing to take Social Security benefits early can result in receiving as little as seventy percent of benefits, while delaying the receipt of benefits can result in receiving as much as 132 percent of benefits:

Start Collecting at	Full Retirement Age of 66	Full Retirement Age of 67
62	75%	70%
63	80%	75%
64	86.7%	80%
65	93.3%	86.7%
66	100%	93.3%
67	108%	100%
68	116%	108%
69	124%	116%
70	132%	124%

Id. In the event that individuals feel pressured to take Social Security benefits early due to experiencing difficult economic times, they may decide to take increased distributions from their 401(k) plans to allow them to delay taking Social Security benefits, since distributions after age 59 ½ would not be subject to the ten percent early withdrawal penalty. *See* I.R.C. § 72(t) (2018). On a separate note, for those under the age of 59 ½, due to the CARES Act, the ten percent penalty was lifted for COVID-19 related distributions of up to \$100,000. *See* CARES Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [<http://web.archive.org/web/20201012034655/https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>] (providing that the ten percent penalty does not apply to COVID-19 related distributions and allowing for increased loan amounts from qualified plans).

to the age of seventy.¹¹¹ To maximize Social Security benefits, individuals born before January 2, 1954, who are at least full retirement age, and who qualify for their own retirement as well as spousal benefits “can choose to apply for one of the benefits, and delay applying for the other until a later date.”¹¹² In contrast, individuals born on or after January 2, 1954, who qualify for retirement and spousal benefits must apply for both benefits, and a “deemed filing” for both occurs if individuals attempt to file for only one benefit.¹¹³

Individuals may also choose to continue working and simultaneously collect Social Security benefits.¹¹⁴ However, individuals who are younger than full retirement age and who collect Social Security will have their benefits reduced. For example, individuals who are younger than their full retirement age during all of 2020 will have their benefits reduced \$1 for every \$2 they earn above \$18,240.¹¹⁵ To help individuals assess when they

111. SOC. SEC. ADMIN., RETIREMENT BENEFITS, PUB. NO. 05-10035 5 (2020), <https://www.ssa.gov/pubs/EN-05-10035.pdf> [<http://web.archive.org/web/20201010175244/https://www.ssa.gov/pubs/EN-05-10035.pdf>].

112. *Id.* at 8.

113. *Id.*

114. SOC. SEC. ADMIN., HOW WORK AFFECTS YOUR BENEFITS, PUB. NO. 05-10069 1 (Mar. 2020), <https://www.ssa.gov/pubs/EN-05-10069.pdf> [<https://web.archive.org/web/20201112011156/https://www.ssa.gov/pubs/EN-05-10069.pdf>] (last visited Nov. 13, 2020) (explaining that, “You can get Social Security retirement or survivors benefits and work at the same time. But, if you’re younger than full retirement age, and earn more than certain amounts, your benefits will be reduced. The amount that your benefits are reduced, however, isn’t truly lost. Your benefit will increase at your full retirement age to account for benefits withheld due to earlier earnings.”). For example:

Let’s say that you file for Social Security benefits at age [sixty-two] in January 2020 and your payment will be \$600 per month (\$7,200 for the year). During 2020, you plan to work and earn \$23,200 (\$4,960 above the \$18,240 limit). We would withhold \$2,480 of your Social Security benefits (\$1 for every \$2 you earn over the limit). To do this, we would withhold all benefit payments from January 2020 through May 2020. Beginning in June 2020, you would receive your \$600 benefit and this amount would be paid to you each month for the remainder of the year. In 2021, we would pay you the additional \$520 we withheld in May 2020.

Id. at 2.

115. *Id.* The following chart shows the Social Security benefits received for the year 2020 based on monthly benefits and estimated earnings for individuals who claim benefits and are younger than the full retirement age during the whole year:

If your monthly Social Security benefit is	And you earn	You’ll receive yearly benefits of
\$700	\$18,240 or less	\$8,400
\$700	\$20,000	\$7,520
\$700	\$22,000	\$6,520

should take Social Security benefits as well as how long they should work, the Social Security Administration has provided numerous resources, including an online calculator¹¹⁶ and a website where individuals can create accounts and generate more personalized retirement benefit estimates.¹¹⁷

In addition, divorcees should understand that if they were married for at least ten years, they may be eligible for a former spouse Social Security benefit equal to approximately one-half of the ex-spouse's full retirement amount.¹¹⁸ To qualify, the divorcee must be unmarried and age sixty-two or older.¹¹⁹ In addition, the ex-spouse must be entitled to Social Security retirement or disability benefits, and the benefit of the divorcee's own work must be less than the Social Security benefit they would receive based on the ex-spouse's work.¹²⁰ If there are multiple ten-year former spouses and a current spouse, each has entitlement to a Social Security benefit based on the earning of the former/current spouse. In short, if the individuals "meet the qualifications, [they] . . . get the benefit, regardless of what another ex-spouse has or hasn't done"; however, "they can't collect multiple benefits on the records of multiple ex-spouses. Just one."¹²¹

\$900	\$18,240 or less	\$10,800
\$900	\$20,000	\$9,920
\$900	\$22,000	\$8,920
\$1,100	\$18,240 or less	\$13,200
\$1,100	\$20,000	\$12,320
\$1,100	\$22,000	\$11,320

Id.

116. See *Early or Late Retirement?*, SSA: OFF. CHIEF ACTUARY, https://www.ssa.gov/OACT/quickcalc/early_late.html [http://web.archive.org/web/20201004205614/https://www.ssa.gov/OACT/quickcalc/early_late.html] (last visited May 23, 2020).

117. See *Create Your Personal My Social Security Account Today*, SSA.GOV, <https://www.ssa.gov/myaccount/> [<http://web.archive.org/web/20201012193318/https://www.ssa.gov/myaccount/>] (last visited May 23, 2020) (allowing individuals to input their Social Security numbers into the database and to generate Social Security statements that estimate benefits that would be paid at specified ages based on the individuals' thirty-year earning history and assumptions regarding future earnings and allowing individuals to apply for Social Security benefits as well as to request replacement Social Security cards).

118. *Benefits Planner: Retirement*, SSA.GOV, <https://www.ssa.gov/benefits/retirement/planner/applying7.html> [<http://web.archive.org/web/20201004205951/https://www.ssa.gov/benefits/retirement/planner/applying7.html>] (last visited Apr. 16, 2020).

119. *Id.*

120. *Id.*

121. Stan Hinden, *Divorce and Social Security Spousal Benefits*, AARP, <https://www.aarp.org/retirement/social-security/info-2016/divorced-social-security-benefits.html>

Once couples determine the amount of their potential Social Security benefits, they may be more capable of estimating the possible consequences of divorce. For example, in *Dunmore v. Dunmore*, the Alaska Supreme Court held that courts in its jurisdiction could consider the husband's current—and wife's reasonably anticipated—future Social Security benefits as evidence of their financial condition when equitably dividing marital property.¹²² However, in the case of *In re Marriage of Crook*, the court held that the value of Social Security benefit payments were not a proper factor for determining division of the parties' marital assets.¹²³

3. Health Care

One of the most significant retirement benefits in addition to retired pay and income from similar vehicles like SBP and Social Security is access to health care under the military's TRICARE system.¹²⁴ Servicemembers and their spouses should strongly consider the implications of divorce on their health care coverage just as much as they may consider them for purposes of valuing marital property as part of property settlements.¹²⁵ This consideration is especially important in light of COVID-19 since most workers "have health insurance coverage through their jobs or through a spouse's employer" and many employers are laying off employees who may then lose their health insurance coverage when they need it most, during a global pandemic.¹²⁶

[<http://web.archive.org/web/20201004210141/https://www.aarp.org/retirement/social-security/info-2016/divorced-social-security-benefits.html>] (last visited Apr. 16, 2020); see also SOC. SEC. ADMIN., WHAT EVERY WOMAN SHOULD KNOW, PUB. NO. 05-10127 16, 17 (2018), <https://www.ssa.gov/pubs/EN-05-10127.pdf> [<http://web.archive.org/web/20201004210413/https://www.ssa.gov/pubs/EN-05-10127.pdf>] (last visited Apr. 16, 2020).

122. *Dunmore v. Dunmore*, 420 P.3d 1187, 1193 (Alaska 2018).

123. *In re Marriage of Crook*, 813 N.E.2d 198, 205 (Ill. 2004).

124. 10 U.S.C. §§ 1072, 1078, 1086 (2018).

125. See, e.g., *Horning v. Horning*, 389 P.3d 61 (Alaska 2017) (holding that the husband's post-retirement TRICARE benefits were marital property to the extent that they were earned during the marriage and the wife's health care benefits were separate property since they were earned prior to the marriage and vacating and remanding the case for further proceedings consistent with the holding).

126. Anuj Gangopadhyaya & Bowen Garrett, *Unemployment, Health Insurance, and the COVID-19 Recession*, URBAN INST. 1 (Apr. 2020), https://www.urban.org/sites/default/files/publication/101946/unemployment-health-insurance-and-the-covid-19-recession_1.pdf [<https://perma.cc/F2RL-UVM8>] (explaining health insurance options, such as individual health insurance, and Medicaid). For example:

Workers who lose their jobs may be able to retain coverage through the Consolidated Omnibus Budget Reconciliation Act (COBRA), but that requires

Fortunately, former spouses who were married to servicemembers for at least twenty years where there was a twenty-year overlap between the marriage and the servicemember's military service ("20/20/20 spouses") qualify for full medical coverage under the government's TRICARE program if they do not remarry.¹²⁷ In contrast, former spouses who were married to servicemembers for at least twenty years where there was a fifteen-year overlap between the marriage and the servicemember's twenty or more years of military service ("20/20/15 spouses") qualify for transitional health care for one year after divorce with possible limited coverage for an additional year.¹²⁸

Thus, there is a clear incentive for spouses to achieve 20/20/20 status to ensure that they qualify for full medical coverage under TRICARE prior to divorce. This could be a significant negotiating factor for the parties by having the couple simply take steps to time the divorce proceedings. For example, parties who anticipate divorce may agree to remain married for another year to ensure that health benefits vest. For soon-to-be former spouses who cannot negotiate a longer marriage that qualifies for full medical coverage provided by the federal government under TRICARE, they still have the option of paying premiums under the Continued Health Care Benefit Program (CHCBP).¹²⁹

All of these options provide levels of potentially significant benefits when compared to the cost premiums and out-of-pocket costs of health care options only available to civilians who do not have a military

former employees to pay the full premium (including their employer's prior contribution toward the premium) and a [two] percent administration fee, which is very expensive and unaffordable for many given their reduced income.

Id.

127. See generally MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 41, at 861; 2018 DESKBOOK, *supra* note 56. "20/20/20 spouses" stands for twenty years of creditable service by the member, twenty years of marriage, and twenty years of overlap between the marriage and the member's credible service. See *Plans: Former Spouses*, TRICARE, <https://www.tricare.mil/Plans/Eligibility/FormerSpouses> [<https://web.archive.org/web/2020111231017/https://www.tricare.mil/Plans/Eligibility/FormerSpouses>] (last visited Nov. 10, 2020).

128. See generally MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 41, at 861; 2018 DESKBOOK, *supra* note 56. "20/20/15 spouses" stands for twenty years of creditable service by the member, twenty years of marriage, and fifteen years of overlap between the marriage and the member's credible service. See *Plans: Former Spouses*, TRICARE, <https://www.tricare.mil/Plans/Eligibility/FormerSpouses> [<https://web.archive.org/web/2020111231017/https://www.tricare.mil/Plans/Eligibility/FormerSpouses>] (last visited Nov. 10, 2020).

129. William J. Camp, *Health Care Options for Former Military Spouses: Tricare and the Continued Health Care Benefit Program* (CHCBP), 43:2 FAM. L.Q. 227 (2009) (providing detailed information about the CHCBP and how up to thirty-six months of transitional health care may be available).

connection.¹³⁰ When considering these other options, such as employer health plans, marketplace health plans, Medicare, and Medicaid, individuals need to consider the changing rules of each program to maximize their coverage while minimizing health care costs.

4. Other Possible Benefits and Income Streams

Other corollary benefits servicemembers and their spouses should consider include access to the Post Exchange,¹³¹ the Commissary,¹³² free Legal Assistance,¹³³ Dependent Educational Assistance,¹³⁴ and GI Bill educational benefits.¹³⁵ In addition, leading up to divorce, spouses generally are able to receive spousal support.¹³⁶

Furthermore, in cases where servicemembers die during divorce proceedings but before the process is complete, surviving spouses may qualify for non-taxable Dependency and Indemnity Compensation (DIC)

130. Major Jodie L. Grimm, *Tricare: Another Reason to Stay*, 2 ARMY L. 18, 18 (2019), <https://www.loc.gov/law/mlr/pdf/02-2019.pdf> [<http://web.archive.org/web/20201004213645/https://www.loc.gov/law/mlr/pdf/02-2019.pdf>].

131. See, e.g., *Authorized Patrons*, ARMY & AIR FORCE EXCHANGE SERVS., <https://www.aafes.com/exchange-stores/patrons-merchandise/patrons.htm> [<https://perma.cc/BK7N-W6AM>] (last visited July 28, 2020); *Navy Exchange Authorized Patrons*, NAVY EXCHANGE, <https://www.mynavyexchange.com/nex/customer-service/authorized-patrons> [<http://web.archive.org/web/20201004215620/https://www.mynavyexchange.com/nex/customer-service/authorized-patrons>] (last visited July 28, 2020).

132. See U.S. Dep't of Def., Instruction 1330.17, DoD Commissary Program (June 2014), <https://www.cac.mil/Portals/53/Documents/DODI-1330.17.pdf> [<https://perma.cc/N9XB-HYUP>].

133. See, e.g., *Legal Assistance Services*, MY ARMY BENEFITS, <https://myarmybenefits.us.army.mil/Benefit-Library/Federal-Benefits/Legal-Assistance-Services> [<https://perma.cc/8WDT-4TN7>] (last visited July 28, 2020) (explaining eligibility for services and the type of legal services provided).

134. See 38 U.S.C. §§ 3500–3566 (2000). See generally Major Samuel W. Kan, *Servicemember Education Benefits: Using Government Sponsored Programs to Help Lower or Eliminate Higher Education Costs*, ARMY L. (Dec. 1, 2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635454 [http://web.archive.org/web/20201004222930/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635454].

135. See *Post-9/11 GI Bill*, U.S. DEP'T VETERANS AFF., <https://www.va.gov/education/about-gi-bill-benefits/post-9-11/> [<https://perma.cc/8LG8-Z26P>] (last visited July 28, 2020) (explaining eligibility and benefits available).

136. Major Kathy T. Denehy, *Non-Support Complaints: A Judge Advocate's Guide to Helping Commanders Respond*, ARMY L. 30, 30–31 (Apr. 2017), <https://www.loc.gov/law/mlr/pdf/04-2017.pdf> [<http://web.archive.org/web/20201004223354/https://www.loc.gov/law/mlr/pdf/04-2017.pdf>].

benefits payable by the Department of Veterans Affairs.¹³⁷ DIC provides a financial benefit to survivors that may offset SBP amounts received. However, the National Defense Authorization Act (NDAA) for Fiscal Year 2020 phases out the reduction of SBP by DIC benefits “beginning on January 1, 2021 . . . culminating with elimination of the offset . . . on January 1, 2023.”¹³⁸ These benefits may help civilian spouses recover if their active duty spouses suddenly and unexpectedly die from events, such as the COVID-19 pandemic, before completing their divorce proceedings.¹³⁹ Since surviving spouses can potentially receive DIC indefinitely, the program can provide time and resources necessary to acquire marketable skills to re-enter the civilian workforce in cases where they left the workforce to raise their children during the marriage.¹⁴⁰

5. Trusts

Wealthier families of servicemembers may have established trusts for numerous reasons, including providing an additional income stream to beneficiaries while protecting assets in the event of a beneficiary’s possible divorce. However, even trusts may not be sufficient to shield assets in divorce. For example, in *Levitan v. Rosen*, the Appeals Court of Massachusetts determined that a beneficiary’s interest in a third-party trust established by the beneficiary’s father and governed under Florida law was a marital asset and subject to equitable distribution.¹⁴¹ Remanding the case to the lower court, the Appeals Court of Massachusetts determined, however, that due to the trust’s spendthrift provision, the lower court could only distribute the trust assets to the wife while the remaining marital assets were left to the judge’s discretion.¹⁴²

B. Alimony and Child Support

Married partners in the military going through divorce should also view alimony and child support as possible income streams. Couples going

137. 38 U.S.C. § 1310 (2018).

138. See *SBP-DIC Offset Phased Elimination News*, U.S. DEP’T DEF., DEF. FIN. & ACCT. SERV. (Feb. 2020), [https://www.dfas.mil/RetiredMilitary/survivors/SBP-DIC-News/\[https://perma.cc/HVH9-VMTR\]](https://www.dfas.mil/RetiredMilitary/survivors/SBP-DIC-News/[https://perma.cc/HVH9-VMTR]) (explaining what to expect during the phase out of the SBP-DIC benefit and providing answers to frequently asked questions).

139. See, e.g., *COVID-19 Dashboard*, *supra* note 10.

140. See 38 U.S.C. §§ 103, 1311 (2018).

141. *Levitan v. Rosen*, 124 N.E.3d 148, 155 (Mass. App. Ct. 2019) (holding that the wife’s share of the trust assets valued at over \$1.67 million was subject to equitable distribution as marital property).

142. *Id.* at 151.

through divorce should balance property settlements, alimony, and child support to optimize their financial situations. They should consider factors that the court may use to establish awards of alimony and child support, such as assets, capacity to work,¹⁴³ cohabitation,¹⁴⁴ and changing circumstances.¹⁴⁵ For example, higher earning parents may find themselves liable for child support when they make “substantially more than the other parent” with whom they share parenting time, even if the higher-earning parents are the custodial parents of the child.¹⁴⁶

In addition, individuals should consider the need to seek court orders in a timely manner when circumstances change that may justify a reduction or increase in alimony and child support.¹⁴⁷ Couples should also evaluate assets, such as Social Security¹⁴⁸ and investment portfolios,¹⁴⁹ for their potential impact on alimony and child support. Furthermore, due to recent changes, such as the elimination of the alimony deduction, couples may want to restructure their plans for balancing property and alimony settlements.

143. See, e.g., *Connolly v. Connolly*, 907 N.W.2d 693 (Neb. 2018) (holding that the wife’s increased costs and her disabled condition due to being in two car accidents should be considered for purposes of awarding alimony).

144. See, e.g., *Onstot v. Onstot*, 906 N.W.2d 300, 309 (Neb. 2018) (holding that the trial court “cannot condition the termination of spousal support upon cohabitation with another person, because such matters are public policy issues for the Legislature,” but cohabitation with another could be a factor showing improved financial condition warranting a modification of spousal support).

145. See, e.g., *In re Hoyt & Hoyt*, 171 N.H. 373, 380 (N.H. 2018) (affirming an upward revision in support due to the youngest child’s schooling).

146. See, e.g., *Matter of Conway v. Gartmond*, 41 N.Y.S.3d 90, 91 (App. Div. 2016). See generally *In re C.J.N.-S.*, 540 S.W.3d 589 (Tex. 2018) (holding that a noncustodial parent who supports another could receive child support where an adult child required substantial care due to a disability).

147. See, e.g., *Higgins v. Wood*, 189 A.3d 724, 735, 739 (Me. 2018) (holding that a new court order was needed to show changed circumstances resulting in reduced child support payments because the existing order lacked a self-effectuating provision, which would have immediately reduced child support payments when the oldest child reached age eighteen).

148. See, e.g., *In re Walsh v. Walsh*, 61 N.Y.S.3d 673, 675 (App. Div. 2d Dep’t 2017) (holding that receipt of Social Security benefits, which increased the husband’s income by more than fifteen percent, warranted an upward modification of child support without a showing of substantial change in circumstances); see also, e.g., *Harris v. Harris*, 241 So. 3d 622, 624, 628 (Miss. 2018) (overruling *Spalding v. Spalding*, 691 So. 2d 435 (Miss. 1997) and holding that receipt of Social Security by the wife was foreseeable and thus did not automatically reduce the alimony she received).

149. See, e.g., *Dare v. Frost*, 540 S.W.3d 281, 285 (Ark. 2018) (holding that the increase in the value of a stock portfolio could not be considered for a child support modification order because the gains were not yet realized nor disbursed, and thus, there was no income).

1. *A Brief History of the Tax Implications of Alimony*

In 1917, in *Gould v. Gould*, the U.S. Supreme Court held that spousal support payments made directly to a former spouse pursuant to a court decree were not taxable as income.¹⁵⁰ However, in the Revenue Act of 1942, Congress utilized Internal Revenue Code section 71¹⁵¹ to reverse the decision in *Gould v. Gould*.¹⁵² Subsequently, in 2017, Congress reversed direction by enacting the Tax Cut and Jobs Act, which effectively reinstated the holding in *Gould*.¹⁵³

2. *Impacts of the Tax Cuts and Jobs Act of 2017*

The Tax Cuts and Jobs Act of 2017 (TCJA)¹⁵⁴ repealed Internal Revenue Code sections 71 and 215.¹⁵⁵ As a result, divorce or separation instruments executed after December 31, 2018, as well as instruments executed before then but modified after December 13, 2018 now result in alimony being neither taxable to the recipient nor deductible by the payor.

a. Alimony No Longer Deductible or Includable as Income

The Tax Cut and Jobs Act of 2017 made numerous changes to the tax code, including increasing the standard deduction and eliminating the deductibility of alimony paid, the taxability of alimony received, personal exemptions, and miscellaneous itemized (tier two) deductions that were subject to a two percent adjusted gross income floor.¹⁵⁶ While Congress made some of these changes permanent, such as the treatment of alimony, Congress made other changes temporary, and those will sunset in 2025.¹⁵⁷ Overall, these changes have had dramatic impacts on servicemembers and

150. *Gould v. Gould*, 245 U.S. 151, 154 (1917).

151. I.R.C. § 71(a) (repealed in 2017). The statute provided that, “Gross income includes amounts received as alimony or separate maintenance payments.” *Id.*

152. *Gould*, 245 U.S. at 154.

153. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11051, 131 Stat. 2054, 2089 (2017), <https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf> [<https://perma.cc/YBU2-KLEG>].

154. *See id.*; *see also* Karen Brown, *Divorce and Separation (Portfolio 515-3rd)*, BLOOMBERG TAX & ACCT. (2019).

155. I.R.C. § 215(a) (repealed in 2017). The statute provided, “In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable year.” *Id.*

156. Justin T. Miller, *Tax Reform Could Make Divorce a Whole Lot More Taxing*, 52 FAM. L.Q. 303, 305 (2018).

157. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11051, 131 Stat. 2054, 208 (2017), <https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf> [<https://perma.cc/YBU2-KLEG>].

their former spouses by significantly increasing the costs of divorce as they lose the ability to shift income to the lower-income spouse in divorce settlements. For example, an alimony income stream of \$10,000 a month in 2018 might only be equivalent to an alimony income stream of \$5,000 a month in 2019 since the higher income taxpayer would pay a higher tax rate, thus eliminating the “divorce subsidy.”¹⁵⁸ Also, due to the loss of tier two deductions that previously covered expenses “in connection with the determination, collection, or refund of any tax[.]” such as attorney fees and tax preparation fees related to obtaining alimony, taxpayers experience fewer deductions to offset their taxable incomes.¹⁵⁹ In addition, after divorce, single parent households suffer more if they itemize deductions. For example:

[T]he maximum benefit from the . . . 2018 tax brackets that a single parent can get from having primary custody of the children would be \$1,391.50 per year if itemizing deductions. As a comparison, prior to the TCJA, the inflation-adjusted tax brackets for the 2017 tax year provided up to a \$4,910.65 benefit for a head of household parent versus a single parent without primary custody.¹⁶⁰

In short, until applicable portions of the Tax Cut and Job Act sunset in 2025, the head of household filing status loses its tax preference after reaching \$51,800 of income, adjusted for inflation, if taxpayers itemize their deductions, since they lose the benefit of a higher standard deduction and the ability to deduct personal and dependent exemptions.¹⁶¹

b. Trust Assets Available for Alimony

In determining alimony, the wealthier spouse paying alimony may have previously established discretionary trusts with spendthrift clauses to attempt to protect assets in the event of divorce. In addition, trustees and

158. Miller, *supra* note 156, at 314.

159. *Id.* at 303.

160. *Id.* at 305.

161. See I.R.C. § 1(j)(2)(B) (2018). For taxpayers filing under the head of household filing status, income over \$13,600 and up to \$51,800 would be subject to a marginal tax rate of twelve percent, and income over \$51,800 and up to \$82,500 would be subject to a marginal tax rate of twenty-two percent. *Id.* For taxpayers filing as unmarried individuals (single taxpayers) other than surviving spouses and heads of households, income over \$38,700 and up to \$82,500 would be subject to a marginal tax rate of twenty-two percent. I.R.C. § 1(j)(2)(C). In short, at \$51,800 of income, the federal income tax system would treat head of household taxpayers and single taxpayers similarly since both would be subject to a marginal tax rate of twenty-two percent.

parents who previously set up trusts for the benefit of their adult children who are now going through divorce may want to consider decanting¹⁶² the trust's assets so that assets are not unnecessarily exposed and used as a factor in determining assets available for paying alimony. The application of decanting to shift trust corpus from one instrument to another can seem almost limitless as it can:

[A]chieve certain tax objectives, change trust situs, expand or limit trustee powers, restrict beneficiaries' rights to information, provide better asset protection by modifying spendthrift provisions, correct drafting errors, split or consolidate trusts, change beneficiaries through powers of appointment, provide nonjudicial avenues for ensuring trustee succession over time, and alter distributions to include special needs provisions.¹⁶³

It is also important to understand that Congress permanently repealed Internal Revenue Code section 682,¹⁶⁴ which provided that income distributed from a previously created¹⁶⁵ grantor trust "to a spouse after a divorce [was] taxable to the recipient."¹⁶⁶ As a result, "the grantor spouse

162. See generally JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 742 (10th ed. 2017) (defining "trust decanting" as a situation where a trustee "has a discretionary power over distribution [and] uses that power to distribute the trust property to a new trust (the second trust) with updated provisions, leaving behind the sediment of the first trust's stale provisions").

163. Amy J. Fanzlaw, *New Opportunities to Decant in Florida, Part I: Recent Changes to the Trust Decanting Statute*, 93 FLA. B.J. 31 (2019), <https://www.floridabar.org/the-florida-bar-journal/new-opportunities-to-decant-in-florida-part-i-recent-changes-to-the-trust-decanting-statute/> [<https://perma.cc/3WKX-GF4Q>]; see, e.g., FLA. STAT § 736.04117 (2019) (authorizing decanting in the state of Florida). But see Amy J. Fanzlaw, *New Opportunities to Decant in Florida, Part II: Successful Execution of Trust Decanting*, 93 FLA. B.J. 22 (2019), <https://www.floridabar.org/the-florida-bar-journal/new-opportunities-to-decant-in-florida-part-ii/> [<https://perma.cc/3ABH-RYYN>] (explaining common obstacles to decanting, such as the trust expressly prohibiting it).

164. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(b)(1)(C), 131 Stat. 2054, 2089 (2017), <https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf> [<https://perma.cc/YBU2-KLEG>] (amending the Internal Revenue Code by striking section 682). See generally Miller, *supra* note 156, at 318.

165. See I.R.C. § 672(e)(1) (2018) (providing that "a grantor shall be treated as holding any power or interest held by—(A) any individual who was the spouse of the grantor at the time of the creation of such power or interest").

166. SHARON KLEIN, *DIVORCE: WHAT PROFESSIONAL ADVISORS MUST KNOW* 4 (2020), <https://www.wilmingtontrust.com/repositories/ebook/divorce-ebook-2020/index.html#p=4> [<https://perma.cc/DQH8-WHQH>]; see also I.R.C. § 677(a) (2018), which provides:

The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the

[was] liable to pay the income tax on trust income from grantor trusts potentially created years before a divorce, even though the ex-spouse [was] receiving that income.”¹⁶⁷ However, couples may be able to avoid this issue by creating trusts incident to, but after, a divorce, since Internal Revenue Code section 1041(a) provides that “no gain or loss . . . [is] recognized on a transfer of property from an individual to (or in trust for the benefit of) . . . a spouse, or . . . a former spouse . . . if the transfer is incident to the divorce.”¹⁶⁸

c. Some Tax Benefits of Divorce

While there are few tax benefits of divorce, taxpayers who get divorced and have separate homes may be able to take advantage of two state and local tax deductions worth up to \$10,000 each, as well as two deductions for mortgage debts of \$750,000 on separately filed tax returns. In contrast, previously married couples would only be allowed one state and local tax deduction¹⁶⁹ and one deduction for interest on mortgage debt.¹⁷⁰

III. STEPS SERVICEMEMBERS AND THEIR SPOUSES SHOULD TAKE

Although divorce is not what anyone likely desires when considering marriage, servicemembers and their fiancés should recognize the realistic possibility of divorce and take appropriate preventive measures, including preparing enforceable prenuptial agreements. Similarly, married couples who determine that divorce is likely, as well as those who later become divorced, should take appropriate action, such as updating life insurance

approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be—

(1) distributed to the grantor or the grantor’s spouse.

167. KLEIN, *supra* note 166, at 4.

168. *Id.* The e-book explained that:

A transfer of property is incident to the divorce if the transfer: (1) Occurs within [one] year after the date on which the marriage ceases, or (2) Is related to the cessation of the marriage (IRC § 1041(a)(2)) [and] A transfer of property is treated as related to the cessation of the marriage if the transfer: (1) Is pursuant to a divorce or separation instrument, and (2) Occurs not more than [six] years after the date on which the marriage ceases (Temp. Reg §1.1041-1T(b)). *Id.*

Id. See also I.R.C. § 1041(a)(2)); 26 C.F.R. § 1.1041-1T.

169. See Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11042, 131 Stat. 2054, 2085 (2017), <https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf> [<https://perma.cc/YBU2-KLEG>].

170. See *id.* § 11043.

beneficiary documents, wills, and trusts to minimize the negative financial consequences of divorce.

A. Before Marriage

Couples considering marriage should ensure that they prepare accordingly and should visit their local legal assistance office for legal guidance similar to guidance received during Soldier Readiness Programs in preparation of deployment.¹⁷¹ This action is especially important for those who were previously married and who may have children from a prior marriage, where a new marriage would result in a blended family. Part of proper preparation includes taking anticipatory measures, such as establishing prenuptial agreements as well as drafting trusts to protect assets.

1. Prenuptial Agreements

Servicemembers and their fiancés may consider beginning with a solid prenuptial agreement. They may want to take special efforts to make sure that the agreement is fair,¹⁷² that assets are fully disclosed,¹⁷³ and that both parties are advised by independent counsel¹⁷⁴ to avoid courts later not enforcing the agreement on public policy or other grounds. The wealthier spouse should also consider providing the less wealthy spouse with

171. See, e.g., I Corps Reg. 600-8-101, Soldier Readiness Program (SRP) 21, https://home.army.mil/lewis-mcchord/application/files/8614/9063/4761/ICR_600-8-101_SRP_201601.pdf [<https://perma.cc/VGV9-GS9W>] (addressing legal issues, such as drafting wills and powers of attorney prior to deployment).

172. See, e.g., *Sanderson v. Sanderson*, 245 So. 3d 421, 424, 431 (Miss. 2018) (holding that the prenuptial agreement must be fair “at the time the contract is made” and affirming the chancellor’s holding that “the prenuptial agreement—in addition to being procedurally conscionable—was substantively conscionable as well.”).

173. See, e.g., *Gomer v. Gomer*, 86 N.E.3d 920, 926 (Ohio Ct. App. 2017) (holding the prenuptial agreement invalid because there was not full disclosure of assets since the husband did not include that “he had between \$40,000 and \$45,000 in his bank accounts at the time” of the agreement and the wife was not represented by independent counsel).

174. See, e.g., *Kremer v. Kremer*, 912 N.W.2d 617, 628 (Minn. 2018) (holding that the prenuptial agreement was unfair because the wife did not have an adequate opportunity to consult with counsel).

valuable consideration¹⁷⁵ and include a no-contest clause provision to protect the prenuptial agreement from later challenges.¹⁷⁶

Courts may evaluate numerous factors in determining the validity of a prenuptial agreement. These factors include: whether the agreement was voluntary and not a product of fraud, duress, coercion, or overreaching; whether the agreement was unconscionable when it was executed; and whether the former spouse will become dependent on public assistance, in which case, the court may require the other party to provide support.¹⁷⁷ For example, in *Bassler v. Bassler*, the court held the premarital agreement was unenforceable where the wife waived “every right whatsoever which she might have or acquire by law by such marriage in any and all property of every kind and character . . . now owned or which may hereafter be acquired by” her husband.¹⁷⁸ The court reasoned that “at the time of the hearing” the wife “was receiving public assistance . . . [while the husband] always had sufficient means to meet his desires and needs. Under these circumstances . . . [the court had] no hesitation in holding, as a matter of law, that the antenuptial agreement violate[d] public policy and should not be enforced.”¹⁷⁹ In short, where property disposition provisions are so

175. Christine Fletcher, *10 Things You Need to Know About Prenups*, FORBES (Sept. 18, 2018), <https://www.forbes.com/sites/christinefletcher/2018/09/18/10-things-you-need-to-know-about-prenups/#47ea3ba962ba> [<http://web.archive.org/web/20200924195441/https://www.forbes.com/sites/christinefletcher/2018/09/18/10-things-you-need-to-know-about-prenups/>] (defining “consideration” as “something of value that one party gives to the other to induce him or her to sign the agreement. That could be cash, real estate, stock, or other assets.”).

176. See, e.g., *In re Marriage of I.C. & Q.C.*, 551 S.W.3d 119, 120 (Tex. 2018) (holding that the wife, by challenging the prenuptial agreement due to the agreement’s no-contest provision, forfeited a five million dollar lump-sum payment that she would have been due, according to the agreement’s terms). The no-contest, or forfeiture clause, stated:

If either party brings an action or other proceeding to enforce this Agreement or to enforce any judgment, decree, or order made by a court in connection with this . . . Agreement, the prevailing party shall be entitled to reasonable attorney’s fees and other necessary costs from the other party. If either party seeks to invalidate some or all of this Agreement, or seeks to recover property in a manner at variance with this Agreement, then such party shall be liable to the other party for all reasonable and necessary attorney’s fees and costs incurred by such other party in defending . . . this Agreement. In addition, if . . . [the wife] seeks to invalidate some or all of this Agreement or seeks to recover property in a manner at variance with this Agreement, then [the wife] . . . shall forfeit the cash payment set forth in Section 13(h) [which was five million dollars that she would otherwise have been due].

Id. at 120–21. By including such forfeiture provisions, drafters of instruments force potential challengers to think twice before litigating and giving up a guaranteed award in search of a potentially greater jackpot.

177. See, e.g., FLA. STAT. § 61.079(7) (2019).

178. *Bassler v. Bassler*, 593 A.2d 82, 84, 88 (Vt. 1991).

179. *Id.* at 88.

unconscionable that they leave a spouse as a public charge, courts may not enforce the prenuptial agreement.¹⁸⁰

In addition, when having their prenuptial agreements prepared, servicemembers and their fiancés should make sure not only to consider addressing the division of property, but also the amount and duration of support after divorce as well as health care expenses.¹⁸¹ That said, it is also important to understand that some states do not enforce alimony waivers in premarital agreements.¹⁸² Other issues to consider include addressing the sale or buyout of the primary home, legal fees in divorce litigation, and the choice of law—servicemembers are highly mobile, as they move every few years when they receive military orders.

2. *The Use of Trusts*

In addition to servicemembers considering prenuptial agreements, wealthier parents of servicemembers or their fiancés may want to consider using trusts with spendthrift¹⁸³ clauses and, more importantly, assigning trustees who have the authority to make discretionary distributions rather than mandatory distributions. By giving trustees the power to make discretionary distributions, future creditors of beneficiaries, such as a future ex-spouse, may be prevented from making claims against the trust

180. See Jonathan G. Blattmachr, Pioneer Wealth Partners, LLC, Peripatetic Clients: No, It's Not an Illness, But They Need Your Constant Care, 54th Annual Heckerling Institute on Estate Planning, Univ. of Miami Sch. of Law (Jan. 14, 2020); see also Louis Mezzullo, *The Mobile Client: Tax, Community Property, and Other Considerations (Portfolio 803-4th)*, BLOOMBERG TAX & ACCT. (2020).

181. Linda J. Ravdin, Pasternak & Fidis, P.C., Our Clients Are Living Longer but Their Marriages Are Not: The Intersection of Estate Planning and the Gray Divorce, 54th Annual Heckerling Institute on Estate Planning, Univ. of Miami Sch. of Law (Jan. 15, 2020).

182. See generally LINDA J. RAVDIN, *PREMARITAL AGREEMENTS: DRAFTING AND NEGOTIATION* (2d ed. 2017) (explaining that states such as New Mexico, Iowa, South Dakota, and Mississippi do not enforce alimony waivers in premarital agreements and providing a state law summary in an appendix).

183. *Spendthrift Clause*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/spendthrift_clause [http://web.archive.org/web/20201004234500/https://www.law.cornell.edu/wex/spendthrift_clause] (last visited Apr. 20, 2020) The site defined “spendthrift clause” as:

A provision in a trust that restricts a beneficiary's ability to transfer rights to future payments of income or capital under the trust to a third party. In effect, the clause prevents “spendthrift” beneficiaries from squandering an inheritance before they receive it and it also protects a beneficiary's inheritance from creditors.

Id.

for alimony,¹⁸⁴ since the beneficiaries would not have legally enforceable interests in the trust.¹⁸⁵

For example, in *Pfannenstiehl v. Pfannenstiehl*, prior to the wealthier spouse filing for divorce, the less wealthy spouse left the military at eighteen years of service, two years shy of having her defined benefit plan vest, in order to take care of her child suffering from Down syndrome.¹⁸⁶ The Massachusetts Supreme Judicial Court held that the discretionary trusts at issue were too remote for inclusion as a marital asset.¹⁸⁷ However, on remand, the trial court was allowed to reconsider whether alimony was appropriate.¹⁸⁸

One technique to mitigate the risk of these types of issues might be to draft discretionary trusts that restrict the benefits of beneficiaries in the event they become married.¹⁸⁹ By preventing beneficiaries from having a fixed and enforceable right unless the beneficiary's spouse waives all future rights to the trust's assets, grantors of trusts may feel more secure that their assets may not be seized by future creditors, such as former spouses of designated beneficiaries.¹⁹⁰

3. Building and Diversifying Financial Portfolios

In addition, servicemembers and their fiancés should work to build diversified retirement and non-retirement financial portfolios using asset allocation strategies to prepare for their retirements and to provide a bulwark against unexpected financial challenges.¹⁹¹ These challenges can result from unexpected divorces, periods of unemployment of a civilian

184. See Bruce M. Stone, Goldman Felcoski & Stone, P.A., *Our Clients Are Living Longer but Their Marriages Are Not: The Intersection of Estate Planning and the Gray Divorce*, 54th Annual Heckerling Institute on Estate Planning, Univ. of Miami School of Law (Jan. 15, 2020).

185. See, e.g., FLA. STAT. § 736.0504 (2019) (establishing the effects of discretionary trusts, such as preventing a beneficiary's creditors from being able to reach trust assets and not making exceptions for children, spouses, and former spouses.).

186. See *Pfannenstiehl v. Pfannenstiehl*, 55 N.E.3d 933, 936 (Mass. 2016).

187. See *id.* at 942.

188. See *id.* at 937 n.13.

189. See Stone, *supra* note 184.

190. See *id.*

191. See U.S. SEC. & EXCH. COMM'N (SEC), *Beginners' Guide to Asset Allocation, Diversification, and Rebalancing*, INVESTOR.GOV, <https://www.investor.gov/additional-resources/general-resources/publications-research/info-sheets/beginners-guide-asset> [<https://perma.cc/3F3D-7LUV>] (last visited July 17, 2020) (explaining concepts, including asset allocation, risk tolerance, time horizon, risk versus reward, and investment choices).

spouse caused by a military move, birth of a child, need to care for a dependent, or economic recession.¹⁹²

First, they should build an emergency fund¹⁹³ and then start contributing to both of their IRA and TSP/401(k) accounts. To ensure that they maintain the necessary long-term financial discipline to be successful, they should set up their contributions so that they occur automatically through monthly allotments or other regular banking mechanisms. One advantage to this strategy is that it ensures “a mathematically favorable average price” for investments by dollar-cost averaging.¹⁹⁴ Furthermore, by investing early and often, they will benefit from the time value of money as shown in the tables in Appendix 2.¹⁹⁵ In addition, for those participating in BRS or who have civilian 401(k) plans, they may be able

192. See, e.g., C. Todd Lopez, *Persistent Spouse Unemployment Affects Military Families*, U.S. DEP’T DEF. (Oct. 21, 2019), <https://www.defense.gov/Explore/News/Article/Article/1994434/persistent-spouse-unemployment-affects-military-families/> [<https://perma.cc/7BZJ-BUY2>] (explaining that “[f]or many families, a dual-income household is needed to get by, but that [is] a challenge” for military families as civilian spouses have faced unemployment rates of approximately thirty percent); see also Harriet Torry, *U.S. Economy Contracted at Record Rate Last Quarter; Jobless Claims Rise to 1.43 Million*, WALL ST. J. (July 30, 2020, 3:21 PM), <https://www.wsj.com/articles/us-economy-gdp-report-second-quarter-coronavirus-11596061406> [<https://web.archive.org/web/20201121220957/https://www.wsj.com/articles/us-economy-gdp-report-second-quarter-coronavirus-11596061406>] (explaining that the Commerce Department made an initial estimate that the “U.S. gross domestic product [GDP] in the second quarter [had] the steepest drop in more than [seventy] years” while initial unemployment benefit applications rose by 1.43 million in the week ending July 25, 2020); BUREAU OF ECON. ANALYSIS, U.S. DEP’T OF COMMERCE, GROSS DOMESTIC PRODUCT, 2ND QUARTER 2020 (ADVANCE ESTIMATE) AND ANNUAL UPDATE (July 30, 2020), <https://www.bea.gov/news/2020/gross-domestic-product-2nd-quarter-2020-advance-estimate-and-annual-update> [<https://perma.cc/K3W3-WX6R>] (last visited July 30, 2020) (explaining that U.S. GDP decreased by an annual rate of 32.9 percent in the second quarter of 2020).

193. See, e.g., *Emergency Fund: Why You Need One*, VANGUARD, <https://investor.vanguard.com/emergency-fund/> [<http://web.archive.org/web/20201005000136/https://investor.vanguard.com/emergency-fund/>] (last visited July 30, 2020) (explaining the importance of building an emergency fund that can cover three to six months of expenses to help deal with an unexpected job loss or other emergencies).

194. Matthew Frankel, *Dollar-Cost Averaging: What Investors Need to Know*, MOTLEY FOOL (Aug. 5, 2019), <https://www.fool.com/investing/dollar-cost-averaging-what-investors-need-to-know.aspx> [<http://web.archive.org/web/20201005000354/https://www.fool.com/investing/dollar-cost-averaging-what-investors-need-to-know.aspx>].

195. See *infra* app. 2, at pp. 480–82 (showing the growth of IRA and TSP/401(k) contributions and the importance of starting as early as possible to allow for compound growth).

to qualify for employer matching contributions to their defined contribution plans.¹⁹⁶

To maximize the power of compounding, servicemembers and their fiancés should make significant efforts to increase their contributions over time and produce strong financial portfolios capable of generating valuable income streams upon retirement. They should plan for additional income so that they avoid “lifestyle creep.”¹⁹⁷ Specifically, they should set up allotments in advance to divert additional income into retirement accounts automatically and avoid the wealth effect of having increasing checking account balances that may encourage them to spend rather than save.¹⁹⁸

Servicemembers and their fiancés should increase their contributions over time by taking numerous steps. First, although they may only be capable of saving a small amount each month at the beginning of their careers, they can contribute half of each of their pay raises to their retirement accounts, since they have not yet become accustomed to the higher level of income. By spending half and investing half of their pay raises, servicemembers and their fiancés can increase their standard of living while painlessly saving for the future. Second, when they pay off debt, such as auto and student loans, they should redirect those payments into their investment accounts. Third, those with high interest rate mortgages, can increase their credit scores¹⁹⁹ over time, and prepare to

196. See, e.g., *infra* app. 1, at pp. 477–80 (showing government TSP contributions and their growth over time).

197. Camilo Maldonado, *The Slippery Slope of Lifestyle Creep and How to Avoid It*, FORBES (Aug. 23, 2018), <https://www.forbes.com/sites/camilomaldonado/2018/08/23/slippery-slope-lifestyle-creep/#74f4a4854576> [<http://web.archive.org/web/20201005000654/https://www.forbes.com/sites/camilomaldonado/2018/08/23/slippery-slope-lifestyle-creep/>] (defining “lifestyle creep” as “the gradual increase of your spending as your wage increases”).

198. See *id.*

199. Jim Akin, *What Are the Different Credit Scoring Ranges?*, EXPERIAN (June 23, 2020), <https://www.experian.com/blogs/ask-experian/infographic-what-are-the-different-scoring-ranges/> [<https://perma.cc/93D6-Q77T>] (explaining the difference between high and low credit scores, the factors that influence credit scores such as payment history, and the consequences of different scores such as the amount of interest a borrower would need to pay).

refinance their mortgages when mortgage rates drop.²⁰⁰ They should then redirect their savings²⁰¹ into their retirement accounts each month.

By taking these actions, servicemembers and their fiancés will eventually be able to max out both of their IRA and TSP/401(k) annual contribution limits and then expand to non-retirement investment accounts. In 2020, servicemembers and their fiancés could each contribute \$6,000 to their IRAs and \$19,500 to their TSP/401(k) accounts for a total of \$25,500, or a monthly amount of \$2,125.²⁰² Those fifty-years and older could make additional catch-up contributions of \$1,000 to their IRA and \$6,500 to their TSP/401(k) accounts.²⁰³ Servicemembers deployed to combat zones can contribute even greater amounts.²⁰⁴ In addition, by

200. Susan Tompor, *Refinancing Boom Continues in 2020 as Rates Remain Low*, USA TODAY (Nov. 7, 2020), <https://www.usatoday.com/story/money/2020/11/07/refinancing-mortgage-2020-low-interest/6188970002/> [<https://perma.cc/2P64-TBXQ>] (explaining that the “30-year fixed-rate mortgage fell to another record low for the week that ended Nov. 5, hitting 2.78%, according to Freddie Mac . . . down significantly from 3.69% for the same time a year ago” and that homeowners could save hundreds of dollars each month by refinancing mortgages with high interest rates due to rates dropping to historic lows).

201. See, e.g., *Refinance Calculator*, ZILLOW, <https://www.zillow.com/mortgage-calculator/refinance-calculator/> [<https://perma.cc/N9GA-JNG2>] (last visited Nov. 13, 2020) (providing a calculator to estimate savings each month and the break-even point based on variables such as interest rates, origination costs, and mortgage term). For example, using the calculator provided, a \$400,000 thirty-year mortgage refinanced from four percent to three percent would result in approximately a \$223 per month savings, and the borrower would break even after incurring \$6,000 of refinance fees after twenty-seven months. *Id.* If the original mortgage rate was five percent rather than four percent, the savings would be \$461 per month, with a break-even point of only fourteen months. *Id.* Prospective borrowers should shop around for the best deal since there is a significant difference between what competing lenders charge with regards to interest rates, points, and refinance fees, which may include loan origination costs, appraisal fees, credit report fees, flood certification fees, recording fees, title insurance, and transfer taxes.

202. See INTERNAL REVENUE SERV. (IRS), NOTICE 2019-59, <https://www.irs.gov/pub/irs-drop/n-19-59.pdf> [<https://perma.cc/SFN9-CGS8>].

203. See *401(k) Contribution Limit Increases to \$19,500 for 2020; Catch-Up Limit Rises to \$6,500*, IRS (Nov. 6, 2019), <https://www.irs.gov/newsroom/401k-contribution-limit-increases-to-19500-for-2020-catch-up-limit-rises-to-6500#:~:text=Highlights%20of%20changes%20for%202020,increased%20from%20%2419%2C000%20to%20%2419%2C500> [<https://web.archive.org/web/2020112024845/https://www.irs.gov/newsroom/401k-contribution-limit-increases-to-19500-for-2020-catch-up-limit-rises-to-6500>]. See *IRA FAQ's Contributions*, IRS, <https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-iras-contributions#:~:text=The%20annual%20contribution%20limit%20for,your%20filing%20status%20and%20income> [<https://web.archive.org/web/20201121221425/https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-iras-contributions>].

204. See Jim Absher, *TSP Contribution Limits Are Increasing for 2020*, MIL. OFFICERS ASS'N AM. (Nov. 14, 2019), <https://www.moaa.org/content/publications-and-media/news-articles/2019-news-articles/tsp-contribution-limits-are-increasing-for-2020/>

making Roth contributions, they will be able to avoid income taxes on their significant gains at the time of withdrawal. Furthermore, those with income over the Roth IRA contribution thresholds can make non-deductible traditional IRA contributions and then convert them into Roth IRAs.²⁰⁵

Building large retirement and non-retirement financial portfolios in this manner may be especially helpful in the event of divorce since the divorcing parties will likely need to divide the assets. In essence, divorcing military marriage partners will each have much smaller portfolios after they split the assets, and they incur greater living expenses due to the need to support separate households.

B. In Anticipation of Divorce and After Divorce

If military marriage partners begin to suspect that divorce is inevitable, they may consider taking preventive action, such as visiting their local legal assistance office for guidance, updating life insurance beneficiary designations, and drafting new wills to minimize possible negative financial repercussions, such as the passing of life insurance proceeds to an ex-spouse rather than to a current spouse. Supervisors and commanding officers of servicemembers going through these family challenges should ensure that they give servicemembers the time necessary to address these important issues and should encourage them to take the time to resolve the issues in a timely manner. This action is especially important if servicemembers expect future changes in their family structures, such as remarriage, birth of a child, or becoming a blended family. If servicemembers are not able to complete these actions prior to a divorce, they and their former spouses should consider taking these same steps after a divorce is finalized.

[<https://perma.cc/96C5-5M5L>] (explaining that those deployed to combat zones could contribute up to \$57,000 in 2020); see also *Know Your Limits*, TSP.GOV, <https://www.tsp.gov/making-contributions/contribution-limits/> [<https://perma.cc/4KZB-8PZW>] (last visited July 20, 2020) (explaining the contribution limits based on the situation of servicemembers).

205. See *Roth IRA Income Limits: Your Compensation Counts*, VANGUARD, <https://vgi.vg/2PjSsbv> [<https://perma.cc/Y3MP-MCJJ>] (last visited July 20, 2020) (explaining the Roth IRA phase-out ranges as well as the ability to do a “backdoor” contribution); see also Elizabeth MacBride, *Backdoor Roth IRA*, INVESTOPEDIA (Apr. 28, 2020), <https://www.investopedia.com/terms/b/backdoor-roth-ira.asp> [<https://perma.cc/TUM8-6CZA>] (explaining that non-deductible traditional IRAs do not have income limits, and thus, individuals can initially make such contributions and then convert them into Roth IRA contributions).

1. Updating Documents

Military marriage partners need to ensure that they update all of their documents addressing both probate and non-probate assets. Most servicemembers and spouses may recognize the need to change their life insurance beneficiary designations, but some may not recognize the urgency of taking timely action. For example, servicemembers may get divorced and then remarry, but forget to update their Servicemember Group Life Insurance (SGLI) beneficiary designations. To facilitate this process, most servicemembers can update their designations using the SGLI Online Enrollment System (SOES).²⁰⁶ If they pass away prior to updating their beneficiary designations, their SGLI proceeds will pass to their former spouses instead of their current spouses.

Some states have tried to address these issues using state laws to revoke such beneficiary designations, but their efforts failed due to federal preemption in cases dealing with SGLI.²⁰⁷ However, beneficiary designations of former spouses in other life insurance policies as well as bequests to former spouses in wills created before divorce may be revoked by operation of state law or the establishment of constructive trusts for the benefit of current spouses.²⁰⁸

Rather than relying on state laws to address this issue, servicemembers and former spouses would be wise to update their beneficiary designations. To accomplish this objective efficiently, they should understand that

206. See *Life Insurance, SGLI Online Enrollment System (SOES)*, U.S. DEP'T VETERANS AFF., <https://www.benefits.va.gov/INSURANCE/SOES.asp> [<https://perma.cc/DA3E-EEA4>] (last visited July 4, 2020) (allowing servicemembers, including Coast Guard and National Oceanic and Atmospheric Administration (NOAA) members, to increase/reduce/cancel SGLI coverage, add beneficiaries, edit beneficiary information, and view/save/print/e-mail SGLI coverage certificates; however, Public Health Service, and Reserve and National Guard members with part-time coverage must continue to make SGLI elections using paper SGLV 8286 forms).

207. See, e.g., *Ridgway v. Ridgway*, 454 U.S. 46, 47, 59 (1981) (evaluating “whether an insured serviceman’s beneficiary designation under a life policy issued pursuant to the Servicemen’s Group Life Insurance Act of 1965 (SGLIA), Pub. L. No. 89-214, 79 Stat. 880, prevails over a constructive trust imposed upon the policy proceeds by a state-court decree” and holding that “Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence It remains effective until legislation providing otherwise is enacted.”).

208. See, e.g., FLA. STAT. § 732.703(2)-(3) (2019) (voiding interests by treating former spouses as if they had predeceased decedents, where the decedents had made spousal designations using wills, life insurance policies, pay-on-death accounts, and other mechanisms prior to a divorce).

certain forms have special requirements, such as the notarization of signatures of servicemembers' spouses.²⁰⁹

Making this updating process easier, servicemembers and their spouses should be aware of the rise of electronic wills,²¹⁰ remote notarization,²¹¹ and even remote witness possibilities in certain states that may be extremely helpful in light of shelter in place orders²¹² due to COVID-19.²¹³ Servicemembers and former spouses also need to ensure that they operate in compliance with court orders, such as designating ex-

209. See, e.g., *DD Form 2656*, DEF. FIN. & ACCT. SERV., <https://www.dfas.mil/RetiredMilitary/forms/> [<https://perma.cc/2NGK-PWKX>] (mandating notarizations of signatures of servicemembers' spouses in Part V—Spouse SBP Concurrence under certain conditions; providing that 10 U.S.C. § 1448 requires that “an otherwise eligible spouse concur if the member declines to elect SBP coverage, elects less than maximum coverage, or elects child-only coverage”); *DD Form 137-3, Dependency Statement – Parent*, DEF. FIN. & ACCT. SERV., <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0137-3.pdf> [<https://web.archive.org/web/20201023235315/https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0137-3.pdf>] (requiring notarization of the form used to determine the relationship and dependency of claimed dependents and the member's entitlement of authorized benefits). *But see* Federal Retirement Thrift Investment Board 5 CFR Part 1650 Temporary Waiver of Notarization Requirement for Spousal Consent, 85 Fed. Reg. 21,311 (Apr. 17, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-04-17/pdf/2020-07734.pdf> [<https://perma.cc/L26C-BL3X>] (temporarily waiving the requirement to notarize a spouse's signature on withdrawal election forms due to the emergency stay-at-home orders caused by COVID-19).

210. See, e.g., FLA. STAT. § 732.521 (2019) (allowing electronic wills executed by electronic signatures, effective January 2020). The statute defines an “electronic will” as:
 [A] testamentary instrument, including a codicil, executed with an electronic signature by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or guardian or revokes or revises another will.

Id.

211. See, e.g., Sarah S. Butters & Jenna G. Rubin, *Danger Will Robinson: The New Frontier of Remote Online Notarization and Electronic Wills*, 93 FLA. B.J. 30 (2019), <https://www.floridabar.org/the-florida-bar-journal/danger-will-robinson-the-new-frontier-of-remote-online-notarization-and-electronic-wills/> [<https://perma.cc/3ZPC-Q3BH>] (discussing the rise of online notarization in Florida, including “the recording requirement, electronic journaling, witnessing electronic documents, and security and storage of electronic documents by qualified custodians.”).

212. See, e.g., Holly Secon, *An Interactive Map of the US Cities and States Still Under Lockdown — and Those That Are Reopening*, BUS. INSIDER (June 3, 2020), <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3> [<https://perma.cc/EYM2-VKRJ>] (providing that at the end of March 2020, ninety-four percent of the U.S. population was under stay-at-home orders).

213. See, e.g., *COVID-19 Dashboard*, *supra* note 10 (documenting the growth of COVID-19 that infected over 11.7 million people in the United States and produced over a quarter million deaths as of November 20, 2020).

spouses as beneficiaries of life insurance policies and/or SBP.²¹⁴ In addition, considering that death or incapacity may unexpectedly occur during the process of attaining a divorce, it may be wise for potentially affected parties to take action to prevent future ex-spouses from serving as personal representatives in wills and as attorneys in fact in health care powers of attorney.²¹⁵

Similar to life insurance, IRAs and retirement vehicles, such as 401(k) plans, provide owners with the ability to designate beneficiaries. Many states have taken action to protect decedents by effectively revoking transfers to former spouses where the beneficiary designations were made prior to divorce. To accomplish this objective, some states have imposed constructive trusts for the benefit of current family members. However, cases, such as *Egelhoff v. Egelhoff*,²¹⁶ have held that state statutes that impacted qualified retirement benefits and employer sponsored life insurance were preempted by ERISA, and a designated former spouse would not be treated as predeceasing a decedent for purposes of beneficiary designation.²¹⁷ Similarly, the court in *Hillman v. Maretta*, which dealt with the Federal Employees' Groups Life Insurance Act and

214. See 10 U.S.C. § 1448(d)(3) (2018) (establishing a mandatory former spouse annuity when servicemembers die on active duty); 10 U.S.C. § 1450(f)(3) (2018) (establishing deemed elections for former spouses). Specifically, deemed elections can occur upon the request by a former spouse as follows:

If a person . . . is required . . . to elect under section 1448(b) of this title to provide an annuity to a former spouse and such person then fails or refuses to make such an election, such person shall be deemed to have made such an election if the Secretary concerned receives the following:

- (i) Request from former spouse.—A written request, in such manner as the Secretary shall prescribe, from the former spouse concerned requesting that such an election be deemed to have been made.
- (ii) Copy of court order or other official statement.—Either—
 - (I) a copy of the court order, regular on its face, which requires such election or incorporates, ratifies, or approves the written agreement of such person; or
 - (II) a statement from the clerk of the court (or other appropriate official) that such agreement has been filed with the court in accordance with applicable State law.

Id. See also *SBP Beneficiary – Former Spouse Deemed Election*, U.S. U.S. DEP'T DEF., DEF. FIN. & ACCT. SERV., <https://www.dfas.mil/Garnishment/FormerSpouseSBPDeemedElection/>

[<http://web.archive.org/web/20201005160702/https://www.dfas.mil/Garnishment/FormerSpouseSBPDeemedElection/>] (last visited Apr. 16, 2020) (establishing procedures to make deemed elections, including the need to submit a completed DD Form 2656-10 within one year of when the court order was issued).

215. Turney P. Berry et al., *Recent Developments 2019*, 54th Annual Heckerling Institute on Estate Planning, Univ. of Miami Sch. of Law (Jan. 13, 2020).

216. *Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001).

217. Berry, *supra* note 215, at 179.

not a qualified plan subject to ERISA, expressly rejected a constructive trust approach.²¹⁸

That said, a waiver of rights pursuant to a divorce decree may allow the decedent's estate or its beneficiaries to compel distribution of the proceeds by the former spouse as the designated beneficiary to those rightful takers. For example, in *Hebert v. Cunningham*, the parties waived "all property rights and claims which [the parties now have] . . . or may hereafter have" in their settlement agreement, which was incorporated into the divorce decree.²¹⁹ The court held that the "overwhelmingly broad language" of the waiver "terminated" the ex-wife's interest in the 401(k) account proceeds, independent of ERISA.²²⁰ Thus, parties and their counsel might find this case useful as a model for drafting property settlement agreements that courts may incorporate into divorce decrees.²²¹ In short, advocates may argue that this case shows that there is an exception to the *Hillman* holding that the beneficiary designation controls despite state law, where "the designation is in conflict with [a] court order, annulment, or legal separation."²²²

Although it is best to change one's beneficiary designations in anticipation of, as well as upon divorce, it may also be wise "to provide for a different distribution in a decree of divorce or legal separation."²²³ Specifically, "one way to prevent the named beneficiary from taking insurance or retirement benefits that are subject to a federal preemption regime is to provide for a different distribution in a decree of divorce, annulment, or legal separation."²²⁴ Suicide may not even be effective to avoid a transfer to a former spouse as suicide has been determined to be a breach of a marital agreement.²²⁵

Furthermore, stakeholders should also be aware of *Howell v. Howell*.²²⁶ In that case, the U.S. Supreme Court ruled that state court

218. *Hillman v. Maretta*, 569 U.S. 483, 483 (2013).

219. *Hebert v. Cunningham*, 129 N.E.3d 539, 544 (Ill. App. Ct. 2018) (holding that the parties' settlement agreement was incorporated into the divorce decree and that the included waiver provision applied to the decedent's 401(k) account even though the decedent named his spouse as his beneficiary prior to the divorce and failed to change the beneficiary designation prior to his death).

220. *Id.* at 551 (holding that based "on the clear and explicit waiver language of the divorce decree . . . it terminated [the ex-spouse's] . . . interest in the 401(k) account proceeds" and the appellate court affirmed the holding of the trial court upon that "sole contractual basis").

221. Berry, *supra* note 215, at 182.

222. *Id.*

223. *Id.*

224. *Id.* See also *Cunningham*, 129 N.E.3d at 539.

225. See, e.g., *Woytas v. Greenwood Tree Experts, Inc.*, 206 A.3d 386, 393 (N.J. 2019).

226. *Howell v. Howell*, 137 S. Ct. 1400, 1405 (2017).

judges cannot subsequently increase, pro rata, the amount a divorced spouse receives each month from a veteran's retired pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver of retired pay in order to receive disability compensation from the Department of Veterans Affairs or Combat Related Special Compensation from the Department of Defense.²²⁷

2. *Modifying Assets*

In addition, couples may need to modify certain assets to account for changes in recent law. For example, the Setting Every Community Up for Retirement Enhancement Act of 2019 (The Secure Act),²²⁸ which became law on December 20, 2019, largely eliminated the "Stretch IRA" that allowed IRA beneficiaries "to stretch distributions from an inherited IRA over their lifetimes."²²⁹ It also created the new limiting concept of qualified designated beneficiaries.²³⁰ As a result, previous lifetime payouts would only qualify for payouts over a shorter ten-year period and would prevent beneficiaries from deferring taxes effectively. Thus, owners of IRAs, who had designated beneficiaries who previously qualified for lifetime payouts, may need to make new beneficiary designations and acquire other assets, such as separate life insurance policies or separate annuities, to ensure that needy beneficiaries receive income over their full life expectancies.

227. *Id.* See also *In re Tozer*, 410 P.3d 835, 838 (Colo. App. 2017) (holding that the *Howell* decision made clear that "[m]ilitary retirement disability benefits may not be divided as marital property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are pre-empted.").

228. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. O, 133 Stat. 2534, 3137-82 (2020), <https://www.congress.gov/116/bills/hr1865/BILLS-116hr1865enr.pdf> [<http://web.archive.org/web/20201005162617/https://www.congress.gov/116/bills/hr1865/BILLS-116hr1865enr.pdf>].

229. Ed Slott, *Did the Secure Act Kill the Stretch IRA*, AARP (Feb. 27, 2020), <https://www.aarp.org/retirement/planning-for-retirement/info-2020/secure-act-changes-stretch-ira-rules.html> [<http://web.archive.org/web/20201005162713/https://www.aarp.org/retirement/planning-for-retirement/info-2020/secure-act-changes-stretch-ira-rules.html>] (describing how a stretch IRA could be used, such as where "a 30-year old beneficiary would be allowed to stretch distributions over 53.3 years, according to IRS life expectancy tables").

230. Natalie Choate, Nutter McClennen & Fish, *Can You Roll Over in Your Grave? What Executors, Trustees, and Beneficiaries Must Know About Inherited Retirement Benefits*, 54th Annual Heckerling Institute on Estate Planning, Univ. of Miami Sch. of Law (Jan. 16, 2020).

Furthermore, where appropriate, trustees may need to decant trust assets to newly established trusts with updated provisions to protect assets.²³¹ For example, in *Powell-Ferri v. Ferri*, the trustees “decanted a substantial portion of the assets” in a trust created by the husband’s father in 1983 to a new trust created in 2011, keeping the husband as the sole beneficiary.²³² Despite the fact that this action took place “while the underlying dissolution [of marriage] action was pending,” the proactive action prevented the assets in the 2011 trust from being considered as a marital asset, although the assets were still considered for purposes of alimony.²³³ This case demonstrates that trustees might have good reasons to decant trusts to place assets beyond the reach of a future ex-spouse even though the Uniform Trust Decanting Act states that the trustee has no duty to decant.²³⁴

Servicemembers and their spouses should also pay attention to other actions that might affect property and alimony settlements. For example, the simple act of re-financing a home may open the door to having their future ex-spouse later claim that the action transmuted separate property into marital property where the husband used his military retirement funds to pay the mortgage but the civilian spouse’s contributions to the household expenses allowed him to pay the mortgage.²³⁵

3. Allocating Assets

Since alimony is generally no longer includable in or deductible from gross income, divorcing spouses have a greater incentive to allocate assets under property settlements that shift assets with taxable income to spouses in lower income tax brackets. For example, couples should allocate assets

231. See generally *DUKEMINIER, supra* note 162, at 742 (defining “trust decanting” as a situation where a trustee “has a discretionary power over distribution [and] uses that power to distribute the trust property to a new trust (the second trust) with updated provisions, leaving behind the sediment of the first trust’s stale provisions.”).

232. *Powell-Ferri v. Ferri*, 165 A.3d. 1124, 1127 (Conn. 2017).

233. *Id.*

234. UNIFORM TRUST DECANTING ACT § 4(b) (UNIF. LAW COMM’N 2018), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d1bed9bb-7882-6b4a-2c23-916d4b28536d&forceDialog=0> [<http://web.archive.org/web/20200929212939/https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d1bed9bb-7882-6b4a-2c23-916d4b28536d&forceDialog=0>] (providing that the act “does not create or imply a duty to exercise the decanting power”).

235. See, e.g., *Rufsholm v. Rufsholm*, No. M2016-02404-COA-R3-CV, 2018 WL 4181476 (Tenn. Ct. App. Aug. 30, 2018) (holding that the husband’s separate property, which was owned prior to marriage, remained separate property but considered that the “refinancing of the residence tend[ed] to support a finding of transmutation or commingling”).

with pretax contributions in traditional IRA and TSP accounts to spouses with lower taxable income. Simultaneously, they should distribute assets, such as Roth IRA and TSP accounts, with after-tax contributions to spouses with higher taxable income. In this manner, the government will be able to consume fewer assets, and there will be more assets for the couple to divide.²³⁶

In addition, to save resources, servicemembers may try to separate their retirement assets outside of court orders, without involving attorneys or tax accountants. However, this action may result in numerous complications, such as the possible imposition of tax penalties where taxpayers use typical distributions to split assets in qualified retirement accounts²³⁷ rather than using qualifying divorce or separation instruments²³⁸ that provide protection under Internal Revenue Code section 1041.²³⁹

236. See generally Kate Stalter, *Divorce Planning: What You Need to Know as a Financial Advisor*, U.S. NEWS & WORLD REP. (May 26, 2020), <https://money.usnews.com/financial-advisors/articles/divorce-planning-what-you-need-to-know-as-financial-advisor> [<https://perma.cc/ZD99-CFZB>] (discussing ways to increase the marital pot and stressing the importance of focusing on liquidity since ignoring financial liquidity is “the most common mistake” of divorcing clients).

237. See, e.g., *Summers v. Comm’r of Internal Revenue*, 113 T.C.M. (CCH) 1554 (2017), <https://www.ustaxcourt.gov/UstcInOp2/OpinionViewer.aspx?ID=11306> [<https://perma.cc/D2XU-ZRUU>]. The court held that despite the husband’s “well intention[ed] decision to divide the IRA with [his spouse] . . . a month before the divorce decree was entered[.]” he effectively made an early distribution with no known exception from a qualified retirement plan resulting in a ten percent additional tax penalty. *Id.* (emphasis added). I.R.C. § 408(d) (2018) (establishing the tax treatment of distributions from individual retirement accounts). Specifically:

The transfer of an individual’s interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse *under a divorce or separation instrument described in clause (i) of section 121(d)(3)(C)* is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse.

I.R.C. § 408(d)(6) (2018) (emphasis added).

238. I.R.C. § 121(d)(3)(C) (2018). Specifically, divorce or separation instruments are defined as:

(i) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (ii) a written separation agreement, or (iii) a decree (not described in clause (i)) requiring a spouse to make payments for the support or maintenance of the other spouse.

Id.

239. See I.R.C. § 1041 (2018) (allowing no gain or loss to “be recognized on a transfer of property from an individual to . . . a spouse or former spouse, but only if the transfer is

Similarly, complications can arise with funding the education of children of divorce.²⁴⁰ Custodial accounts and trusts may be useful vehicles to further these objectives by maximizing the use of annual exclusions and balancing the need for flexibility and control.²⁴¹

4. Taking Specific Action in Light of BRS and COVID-19

In light of BRS, servicemembers and their spouses going through divorces need to address additional complications. For example, they will need to address continuation pay as well as the possibility of taking lump sums in separation agreements and divorce decrees. Furthermore, spouses may want to consider adding provisions into agreements to allow courts to retain jurisdiction.²⁴² They may also want to structure their settlements to

incident to the divorce”); Karen Brown, *Divorce and Separation (Portfolio 515-3rd)*, BLOOMBERG TAX & ACCT. 1, 74–75 (2019). The Portfolio provides the following example:

H and W own a marital home with a basis of \$150,000 and fair market value of \$180,000. The home is community property. H has an IRA (funded entirely with pre-tax dollars) worth \$30,000, which is also community property. On July 1, 2015, H and W separate. On December 1, 2015, the parties *execute a settlement agreement* under which H conveys his interest in the home to W and W waives her interest in H’s IRA. The agreement is subsequently incorporated in the divorce decree entered January 2, 2016. Section 1041 applies to the transfer of H’s interest in the marital home to W because it occurs during the marriage. H recognizes no gain on transfer of the property to W and he is deemed to make a gift to W. Because W’s waiver of her community property interest in H’s IRA is *pursuant to a written instrument incident to a decree under . . . [§121(d)(3)(C)], §408(d)(6) applies. Accordingly, under §408(d)(6), W recognizes no gain on the transfer of her interest in the IRA to H.* W takes a basis of \$150,000 in the marital home (the total of her \$75,000 basis in her one-half interest in the home and H’s \$75,000 basis in his one-half interest) and H has a basis of \$0 in the IRA [because the IRA was entirely funded with pre-tax dollars].

Id. (emphasis added). In short, by ensuring that actions are pursuant to a written instrument incident to a divorce, transfers of IRA assets from one spouse (the wife in the example above) to the other spouse can result in no taxable gain.

240. See generally Major Kyle V. Burgamy, *College for Under \$10K A Guide to Using the Post-9/11 GI Bill for Your Kids’ Tuition*, 3 ARMY L. 23 (2019), <https://www.loc.gov/law/mlr/pdf/03-2019.pdf> [<http://web.archive.org/web/20201005152101/https://www.loc.gov/law/mlr/pdf/03-2019.pdf>].

241. See generally Major Samuel W. Kan, *Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment – A Tax and Estate Planning Analysis*, ARMY L. 52, 76 (Jan. 2010), <https://www.loc.gov/law/mlr/pdf/01-2010.pdf> [<https://perma.cc/UZ7P-S9QH>] (discussing the use of annual exclusions and powerful techniques, such as splitting gifts to avoid gift and generation skipping transfer taxes while maximizing the ability to fund trusts and 529 plans to further the education of children and grandchildren).

242. Major Amelia Kays & Colonel Mark E. Sullivan, *Silent Partner: The Blended Retirement System and Divorce*, STATESIDE LEGAL (Feb. 21, 2016), <https://statesidelegal.com>.

provide them maximum flexibility for income in the future. For example, a civilian spouse may want to ensure that there is some award of alimony in the original divorce decree. That way, they may be able to modify the order in the future if the military spouse's retirement is effectively eliminated or is reduced due to the waiver of military retired pay in order to receive disability compensation from the Department of Veterans Affairs.²⁴³

Furthermore, in light of COVID-19, servicemembers and their spouses experiencing divorce need to pay attention to the "K-shaped" recovery phenomenon where those with the skills to safely work from home thrive, in part due to:

[P]andemic-induced policies by the Federal Reserve that have buoyed the stock market and fueled industries such as real estate with record-low interest rates . . . [while millions of others struggle including] hotel workers, retail clerks, waiters, bartenders, airline employees and other service workers [who] have lost jobs as COVID-19 fears crushed consumer demand.²⁴⁴

This dynamic has created an incentive for servicemembers and their spouses to acquire "work from home" skill sets so that they can take advantage of the opportunity to work fully remotely in the event they need

org/silent-partner-blended-retirement-system-and-divorce [https://perma.cc/T39S-Q6TG].

243. See, e.g., *Lockamy v. Lockamy*, 805 S.E.2d 5, 6 (Ga. 2017) (holding that the court was unable to award permanent periodic alimony when the military spouse's retirement was effectively eliminated due to the payments being classified as non-divisible disability pay because alimony was not initially awarded in the original divorce decree, which awarded her forty percent of her husband's military retirement payments as part of an equitable division of marital property and holding that the civilian spouse failed to timely move to set aside the judgment within three years from the date of the entry of judgment).

244. Michelle Conlin, *The Great Divergence: U.S. COVID-19 Economy Has Delivered Luxury Homes for Some, Evictions for Others*, REUTERS (Oct. 31, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-inequality-ins-idUSKBN27G0H7>

[<https://web.archive.org/web/20201121221700/https://www.reuters.com/article/us-health-coronavirus-usa-inequality-ins-idUSKBN27G0H7>]; see also Cyrus Farivar, *Silicon Valley's Blue-Collar Workers Remain on Edge Months into Pandemic*, NBC NEWS (Nov. 12, 2020), <https://www.nbcnews.com/business/business-news/silicon-valley-s-blue-collar-workers-remain-edge-months-pandemic-n1247444>

[<https://web.archive.org/web/20201121221824/https://www.nbcnews.com/business/business-news/silicon-valley-s-blue-collar-workers-remain-edge-months-pandemic-n1247444>] (explaining that while many white-collar employees may be able to work from home indefinitely, many blue-collar workers are being laid off and have "few alternatives if their jobs go away[,] especially if their jobs carry benefits).

to transition to or remain in the civilian workforce. This opportunity is extremely valuable for military spouses as it can provide job stability, allowing them “to stay with a company or a business longer” and helping them vest in the company’s employee based retirement program so that they can build “long-term retirement security.”²⁴⁵ This is especially important since COVID-19 shows no sign of slowing down, infecting more than 184,000 people in the United States in a single day on November 14, 2020,²⁴⁶ causing a new record high of over 65,000 hospitalizations,²⁴⁷ and leading to lockdowns in the immediate future.²⁴⁸

245. Michelle Fox, *Many Military Families Are Struggling in the Era of COVID*, CNBC (Nov. 11, 2020), <https://www.cnbc.com/2020/11/11/many-military-families-are-struggling-in-the-era-of-covid.html> [<https://perma.cc/MT8B-2LFP>] (addressing the struggles of military couples, including a pre-COVID high spousal unemployment rate of twenty-four percent).

246. Matthew S. Schwartz, *U.S. Adds 184,000 Coronavirus Cases in 1 Day, With No End in Sight*, NPR (Nov. 14, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/11/14/934973850/u-s-adds-184-000-coronavirus-cases-in-one-day-with-no-end-in-sight> [<https://web.archive.org/web/20201121221935/https://www.npr.org/sections/coronavirus-live-updates/2020/11/14/934973850/u-s-adds-184-000-coronavirus-cases-in-one-day-with-no-end-in-sight>] (explaining that the U.S. continues to set new records for daily infections, surpassing a seven-day moving average of over 150,000 cases a day and leading the world as a country with over 244,000 COVID-19 related deaths); *see also* Will Stone, *The Pandemic is Entering a Dangerous New Chapter. Here Are the Week’s Big Takeaways*, NPR (Nov. 13, 2020), <https://www.npr.org/sections/health-shots/2020/11/13/934566781/the-pandemic-this-week-8-things-to-know-about-the-surge> [<https://perma.cc/2HBV-JTS8>] (explaining that, “Daily cases have gone up more than [seventy percent] nationwide, since the beginning of November.”).

247. Eliza Barclay & Dylan Scott, *The Disturbing Surge in COVID-19 Hospitalizations, in One Chart*, VOX (Nov. 13, 2020), <https://www.vox.com/2020/11/12/21560902/covid-19-risk-hospitalizations-chart-texas-illinois> [<https://web.archive.org/web/20201121222024/https://www.vox.com/2020/11/12/21560902/covid-19-risk-hospitalizations-chart-texas-illinois>] (explaining that hospitals are running out of staff and beds for COVID-19 patients).

248. *See, e.g.*, Grace Hauck & Chris Woodyard, *COVID-19 Infections Are Soaring. Lockdowns Could be Coming. A List of Restrictions in Your State*, USA TODAY (Nov. 13, 2020), <https://www.usatoday.com/story/news/nation/2020/11/13/covid-restrictions-state-list-orders-lockdowns/3761230001/> [<https://perma.cc/SQH6-3PHC>] (explaining that several states “are putting limits on social gatherings, adding states to travel quarantine lists, mandating face masks and encouraging residents to stay home, as many did in the spring. Others are restricting business hours of operation and limiting restaurant capacity.”); *see also* Emma Reynolds, Eva Tapiero, & Amy Cassidy, *London and Paris Bring in Strict New Rules as Cases Surge Across Europe*, CNN (Oct. 15, 2020), <https://www.cnn.com/2020/10/15/europe/europe-coronavirus-paris-curfew-intl/index.html> [<https://perma.cc/SKG2-9BD5>] (explaining the steps that Europe’s biggest capitals are taking to stem the spread of COVID-19, such as establishing curfews, banning different households from meeting indoors, and fining violators \$1,760 for a repeat curfew violation).

In addition to acquiring marketable skill sets that will provide them the flexibility to work from home in the event they need to transition to or remain in the civilian workforce, servicemembers and their spouses need to ensure that they take care of their physical and mental health²⁴⁹ by exercising regularly, getting plenty of sleep, and connecting safely with others using online platforms, such as FaceTime, Zoom, Webex, WhatsApp, or Skype.²⁵⁰ It is no surprise that “U.S. adults reported considerably elevated adverse mental health conditions associated with COVID-19 . . . [where younger] adults, racial/ethnic minorities, essential workers, and unpaid adult caregivers reported having experienced disproportionately worse mental health outcomes, increased substance use, and elevated suicidal ideation.”²⁵¹ For those going through divorce during COVID-19, the stress levels and the associated risks are likely only higher.

5. *Minimizing Taxes*

Servicemembers and their spouses should also ensure that courts consider the tax implications of their property and alimony settlements as well as other relevant tax issues.²⁵² For example, individuals may be able to exclude income from taxability if they are qualified individuals earning

249. See, e.g., Terri Moon Cronk, *Military Medical Experts Explore Psychological Impacts of COVID-19*, DoD NEWS (May 28, 2020), <https://www.defense.gov/Explore/News/Article/Article/2200525/military-medical-experts-explore-psychological-impacts-of-covid-19/> [https://perma.cc/5BKW-MJPZ] (explaining that military medical experts expect the need for mental health care to increase because of stress, anxiety, and other psychological symptoms as the number of COVID-19 cases increase and people continue to take precautions).

250. See, e.g., *Coping With Stress*, CDC (July 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html> [https://web.archive.org/web/20201121222121/https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html] (last visited Nov. 14, 2020) (explaining ways to cope with stress and to get mental health assistance).

251. Mark É. Czeisler et al., *MMWR: Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States, June 24–30, 2020*, CDC (Aug. 14, 2020), <http://dx.doi.org/10.15585/mmwr.mm6932a1> [https://web.archive.org/web/20201120155235/https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm?s_cid=mm6932a1_w].

252. See, e.g., *Rodrigue v. Rodrigue*, 270 So. 3d 933, 936 (Miss. Ct. App. 2018) (holding that the chancellor should have considered the “proper income-tax consequences that flow[ed] from the payment of the mortgage”); *In re Marriage of Broesder*, 402 P.3d 1193, 1195 (Mont. 2017) (providing that the applicable statute and public policy demanded “an equitable distribution of the marital estate, including tax liability” and holding that “the Standing Master erred as a matter of law by failing to consider the tax consequences of the likely result that the ranch would be sold to satisfy the judgment, and the District Court erred in adopting this conclusion.”).

income in a foreign country.²⁵³ For example, in *Linde v. Commissioner of Internal Revenue*, the taxpayer successfully argued that his home was in Iraq, that he was a bona fide resident of Iraq, and that he qualified for the foreign earned income exclusion.²⁵⁴

6. Rebuilding and Rebalancing Financial Portfolios

Servicemembers and their former spouses who experience divorce will need to rebuild and rebalance their portfolios.²⁵⁵ To perform this task proficiently, servicemembers and their former spouses should consider numerous factors, including the shortfalls between current savings rates and ultimate retirement goals, optimal asset allocation, risk tolerance, expenses, reserve funds available for emergencies, potential medical expenses, and Social Security.²⁵⁶ Furthermore, rebalancing financial portfolios²⁵⁷ is especially important after market crashes caused by events

253. See I.R.C. § 911 (2018). The code defines “qualified individual” as an individual whose tax home is in a foreign country and who is:

- (A) a citizen of the United States and establishes to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, or
- (B) a citizen or resident of the United States and who, during any period of [twelve] consecutive months, is present in a foreign country or countries during at least 330 full days in such period.

Id.

254. *Linde v. Comm’r*, 114 T.C.M. (CCH) 134 (2017), <https://www.ustaxcourt.gov/UstcInOp2/opinionviewer.aspx?ID=11408> [<http://web.archive.org/web/20201004222014/https://www.ustaxcourt.gov/UstcInOp2/opinionviewer.aspx?ID=11408>] (finding that Mr. Linde had stronger ties to Iraq than he did to the United States, and that his abode was not in the United States); see also 26 I.R.C. § 911(a) (2018); Lieutenant Colonel David Dulaney & Major John Goodell, *Beyond the Reach: Understanding When a Civilian Contractor’s Income Is Excluded from Federal Taxation Due to Residing Abroad*, ARMY LAW. 45 (Sept. 2017), https://www.loc.gov/r/r/frd/Military_Law/pdf/09-2017.pdf [<https://perma.cc/Y2AD-2XHX>].

255. See, e.g., Matthew Frankel, *How and When You Should Rebalance Your Portfolio*, MOTLEY FOOL (Aug. 16, 2019), [https://www.fool.com/investing/how-and-when-you-should-rebalance-your-portfolio.aspx%20\(last%20visited%20July%202017,%202020\)](https://www.fool.com/investing/how-and-when-you-should-rebalance-your-portfolio.aspx%20(last%20visited%20July%202017,%202020)) [<http://web.archive.org/web/20201004222251/https://www.fool.com/investing/how-and-when-you-should-rebalance-your-portfolio.aspx%20%28last%20visited%20July%202017,%202020%29>] (explaining the importance of rebalancing portfolios and how investors can accomplish this objective).

256. See Rebecca Lake, *4 Tips for Retooling Your Retirement Plan After Divorce*, U.S. NEWS & WORLD REP. (Nov. 6, 2016), <https://money.usnews.com/investing/articles/2016-11-08/4-tips-for-retooling-your-retirement-plan-after-divorce> [<https://web.archive.org/web/20201109200604/https://money.usnews.com/investing/articles/2016-11-08/4-tips-for-retooling-your-retirement-plan-after-divorce>].

257. See, e.g., Coryanne Hicks, *How to Recover After Stock Market Losses*, U.S. NEWS & WORLD REP. (July 6, 2020), <https://money.usnews.com/investing/investing->

such as the COVID-19 pandemic,²⁵⁸ or new legislation that provides unexpected financial opportunities.²⁵⁹ Although it may be difficult to perform these tasks during market crashes, investors must avoid becoming “paralyzed and not taking prudent action” in a timely manner.²⁶⁰

IV. RECOMMENDATIONS FOR REFORM IN THE TAX AND BENEFITS ARENA

Although it would be ideal if all military marriage partners planned and took appropriate action, the reality is that some servicemembers will fail to take timely action and their intended surviving beneficiaries will suffer hardship.²⁶¹ In short, “insurance proceeds have been paid to ex-spouses when the insured person was remarried but failed to update their

101/articles/how-to-recover-after-loss-in-the-stock-market [https://perma.cc/E54M-V3WM] (explaining how to recover from stock market losses, including using dollar cost averaging as a psychological way to take the emotion and fear out of investing).

258. See Dan Caplinger, *If You Need to Protect Your Portfolio, Do This Now*, MOTLEY FOOL (June 7, 2020), <https://www.fool.com/investing/2020/06/07/if-you-need-to-protect-your-portfolio-do-this-now.aspx> [https://web.archive.org/web/20201121222543/https://www.fool.com/investing/2020/06/07/if-you-need-to-protect-your-portfolio-do-this-now.aspx] (explaining that COVID-19 “led to one of the fastest bear markets in history” and that it could serve as a wake-up call to reassess risk and adjust the asset allocation of financial portfolios).

259. See, e.g., Mark Stein, *A Great Year for a Roth Conversion*, KIPLINGER (June 17, 2020), <https://www.kiplinger.com/article/retirement/t046-c000-s004-a-great-year-for-a-roth-conversion.html> [https://perma.cc/G25J-UT3X] (explaining that the CARES Act, which allowed for the waiver of required minimum distributions (RMDs) in 2020, combined with the crashing stock market due to COVID-19, created an ideal time to convert a traditional IRA into a Roth IRA and significantly reduce one’s taxes in the process). With the stock market down significantly in early 2020, “a shrunken retirement savings portfolio has less to tax.” *Id.* Additionally, Stein explained:

For retirees with other sources of income, there’s the added bonus of skipping a 2020 required minimum distribution, an option the CARES Act allows only for this year. The waiver applies to RMDs from all traditional individual retirement accounts, including inherited IRAs, as well as defined contribution plans such as 401(k)s. In any other year, those distributions, which are mandatory at age [seventy-two] and taxed as ordinary income, would only add to your tax burden. Retirees who don’t need their 2020 RMD should consider converting to a Roth an amount equal to that waived distribution.

Id.

260. Hicks, *supra* note 257.

261. See, e.g., E. Stephanie Hebert, *Who Receives Your SGLI Proceeds – Your Spouse or Your Former Spouse?*, JOINT BASE SAN ANTONIO (July 16, 2014), <https://www.jbsa.mil/News/News/Article/598953/who-receives-your-sgli-proceeds-your-spouse-or-your-former-spouse/> [https://perma.cc/A3VX-CFHC] (explaining the consequences when servicemembers die before changing their SGLI beneficiary designations to name their current spouses).

beneficiary designation.”²⁶² As a result, decedents can leave their current spouses behind to care for dependent children, without the assistance of life insurance proceeds. To help ameliorate this issue, Congress should amend the federal statutes governing SGLI and TSP to further the likely intent of decedents at the times of their deaths and minimize conflicts with state laws. In addition, Congress should amend the Social Security Act and the Internal Revenue Code to ensure the long-term fiscal sustainability of Social Security since military partners who become divorced will likely need to rely more heavily on the program for income to support separate households.

A. Amending Federal Statutes

First, Congress should follow the actions of many states in furthering the likely intent of decedents at the times of their deaths by revoking pre-divorce beneficiary designations of former spouses by operation of law.²⁶³ Under applicable federal statutes, servicemembers who make SGLI (SGLV 8286 or SOES) and TSP (TSP-3) beneficiary designations will have those earlier designations control regardless of subsequent events, such as a divorce.²⁶⁴ Absent servicemembers making SGLI²⁶⁵ and TSP

262. See, e.g., Karen Jowers, *Here's Why You Need to Think About Military Life Insurance*, MIL. TIMES (Mar. 10, 2020), <https://www.militarytimes.com/pay-benefits/2020/03/11/heres-why-you-need-to-think-about-military-life-insurance/> [<https://perma.cc/USK9-DAJ9>] (explaining that servicemembers often make decisions long before their deaths and fail to update beneficiary designations after marriages, divorces, births, or other life-changing events). Bonnie Carroll, the president and founder of Tragedy Assistance Program for Survivors, stated, “I could give you a thousand examples of where it’s just been a mess.” *Id.*

263. See, e.g., FLA. STAT. § 732.703(2), (3) (2019) (voiding interests by treating former spouses as if they had predeceased decedents, where the decedents had made spousal designations using wills, life insurance policies, pay-on-death accounts, and other mechanisms prior to a divorce).

264. See *Form TSP-3: Designation of Beneficiary*, TSP.GOV (May 2017), <https://www.tsp.gov/forms/tsp-3.pdf> [<https://web.archive.org/web/20200930213601/https://www.tsp.gov/forms/tsp-3.pdf>] (last visited May 29, 2020) (explaining that by law, “the TSP must pay your properly designated beneficiary under all circumstances. For example, if you designate your spouse as a beneficiary of your TSP account, that spouse will be entitled to death benefits, even if you are separated or divorced from that spouse and have remarried”).

265. 38 U.S.C. § 1970(a) (2018); see, e.g., *Ridgway v. Ridgway*, 454 U.S. 46, 48–49 (1981); Prudential Office of Servicemembers’ Grp. Life Ins., *Form SGLV 8286*, BENEFITS.VA.GOV (Oct. 2017), https://www.benefits.va.gov/INSURANCE/forms/SGLV_8286_ed2017-10.pdf [http://web.archive.org/web/20201004132903/https://www.benefits.va.gov/INSURANCE/forms/SGLV_8286_ed2017-10.pdf] (providing a form to designate beneficiaries and

beneficiary designations, federal statute controls disposition in the following order: the surviving spouse, children, parents, administrator of the estate, and next of kin.²⁶⁶ However, problems arise when a servicemember designates a spouse as a beneficiary, gets divorced, remarries someone else, and fails to update beneficiary designations. Under these circumstances, the designated ex-spouse would take the SGLI and TSP proceeds regardless of conflicting prenuptial agreements, separation agreements, wills, court orders, or state law.²⁶⁷

Congress should therefore amend the statutes governing SGLI²⁶⁸ and TSP.²⁶⁹ Specifically, Congress should amend 38 U.S.C. section 1970(a) by adding the following matters in italics so that it reads as follows:

(a) Any amount of insurance under this subchapter in force on any member of former member on the date of the insured's death shall be paid, upon the establishment of a valid claim therefore, to the person or persons surviving at the date of the insured's death, in the following order of precedence:

First, to the beneficiary or beneficiaries as the member or former member may have designated [*via the Servicemembers' Online Enrollment System or*] by a writing received prior to death (1) in the uniformed services if insured under Servicemembers' Group Life Insurance, or (2) in the administrative office established under section 1966(b) of this title if separated or released from service, or if assigned to the Retired Reserve, and insured under Servicemembers' Group Life Insurance, or if insured under Veterans' Group Life Insurance . . . [*except that if the designated beneficiary is a former spouse of the member or former member*

informing servicemembers of numerous provisions, including that a spouse may be notified if the spouse is not named as the designated beneficiary of SGLI proceeds).

266. 5 U.S.C. § 8424(d) (2018).

267. See THRIFT SAV. PLAN, DEATH BENEFITS INFORMATION FOR PARTICIPANTS AND BENEFICIARIES 4 (Jan. 2019), <https://www.tsp.gov/publications/tspb31.pdf> [<https://web.archive.org/web/20200930215623/https://www.tsp.gov/publications/tspb31.pdf>] (explaining the TSP benefit payment process, such as the need for the beneficiary to submit a Form TSP-17, Information Relating to Deceased Participant, along with a copy of the certified death certificate citing the final cause of death); see also *Designating Beneficiaries*, TSP.GOV, <https://www.tsp.gov/account-basics/designating-beneficiaries/> [<https://web.archive.org/web/20200930220043/https://www.tsp.gov/account-basics/designating-beneficiaries/>] (last visited Mar. 28, 2020) (explaining the TSP beneficiary designation process).

268. 38 U.S.C. § 1970 (2018).

269. 5 U.S.C. §§ 8351, 8401–8479 (2018). See generally Emswiler, *supra* note 84, at 1 (dealing with handling lost TSP participants).

as of the death of the member or former member, the designation shall be invalid unless the designation was made by the member or former member after the date of the applicable divorce.]²⁷⁰

This change would more closely mirror the statutes of numerous states where divorce automatically revokes previous beneficiary designations made in civilian life insurance policies, trusts, wills, and certain retirement assets.²⁷¹

Congress should also amend 5 U.S.C. section 8424(d), which addresses the designation and order of precedence of beneficiaries, by adding the following matters in italics so that it reads as follows:

(d) Lump-sum benefits authorized by subsection (e) through (g) shall be paid to the individual or individuals surviving the employee or Member and alive at the date title to the payment arises in the following order of precedence, and the payment bars recovery by any other individual:

First, to the beneficiary or beneficiaries designated by the employee or Member in a signed and witnessed writing received in the Office before the death of such employee or Member. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect . . . [*and a designation of a person who as of the death of the employee or Member is a former spouse of the employee or Member shall have no force or effect unless the designation was made by the employee or Member after the date of the applicable divorce.*]²⁷²

270. 38 U.S.C. § 1970.

271. See, e.g., FLA. STAT. § 732.703(2)–(3) (2019) (voiding interests by treating former spouses as if they had predeceased decedents, where the decedents had made spousal designations using wills, life insurance policies, pay-on-death accounts, and other mechanisms prior to a divorce); Lisa Soronen, *Supreme Court Revocation-on-Divorce Ruling to Affect Majority of States*, NAT'L CONF. ST. LEGISLATURES (June 12, 2018), <https://www.ncsl.org/blog/2018/06/12/supreme-court-revocation-on-divorce-ruling-to-affect-majority-of-states.aspx> [<https://web.archive.org/web/20201121222647/https://www.ncsl.org/blog/2018/06/12/supreme-court-revocation-on-divorce-ruling-to-affect-majority-of-states.aspx>] (explaining that twenty-six states have adopted revocation-on-divorce statutes like Minnesota's and discussing the effects of *Sveen v. Melin*, 138 S. Ct. 1815, which held that "applying Minnesota's revocation-on-divorce statute to a life insurance beneficiary designation made before the statute's enactment [did] not violate the Constitution's Contracts Clause.").

272. 5 U.S.C. § 8424(d) (2018); see also 5 U.S.C. § 8433(e)(1) (2019) (establishing that an employee or Member (or former employee or Member) who dies without making a

This change would eliminate preemption issues and more closely honor the likely intent of decedents, such as providing for current rather than former spouses. This change would also provide predictability and reduce litigation, because states would not have to use constructive trusts and other mechanisms to provide for servicemembers' current spouses and dependent children.

B. Reforming Social Security

Servicemembers and their spouses going through divorce will have fewer financial resources and, thus, will likely need to rely much more heavily on Social Security.²⁷³ Although financial retirement experts used to refer to “retirement being based on a three-legged stool: a pension, Social Security, and personal savings,”²⁷⁴ the dynamic has changed as fewer employees have pensions,²⁷⁵ “nearly [eighty] percent”²⁷⁶ of Americans are living paycheck to paycheck, and there is a lot of uncertainty “about the financial stability of Social Security.”²⁷⁷ Specifically, Social Security is not on a financially sustainable path due to numerous factors, including the dropping birth rate, resulting in fewer workers supporting Social Security beneficiaries.²⁷⁸ As a result, military

withdrawal election shall be paid in a manner consistent with 5 U.S.C. § 8424(d)). Although 5 U.S.C. Chapter 84, Subchapter III addresses TSP, 5 U.S.C. § 8433(e)(1) cites Subchapter II, 5 U.S.C. § 8424(d), which addresses Basic Annuity, Lump-sum benefits, designation of beneficiary, and order of precedence. *See id.*

273. *See, e.g.,* Henry J. Aaron, *Social Security Reform*, BROOKINGS (July 23, 1998), <https://brook.gs/3gDVxiU> [<https://perma.cc/6LX8-HZ92>] (showing that experts had identified the projected serious Social Security funding deficit many years ago, as well as the reliance of most Americans on Social Security, as it provided “more than half of the income for roughly two-thirds of American retirees.”).

274. Singletary, *supra* note 3.

275. Weller, *supra* note 4 (comparing 1989, when forty percent of all non-retired households had a defined benefit pension plan with 2016, when only 23.2 percent had a defined benefit pension plan).

276. *How Can I Save When I'm Living Paycheck to Paycheck?*, *supra* note 6.

277. Singletary, *supra* note 3; *see also* Sophie Shin & Yan He, *The Impact of the Coronavirus Pandemic on Social Security's Finances*, PENN WHARTON BUDGET MODEL (May 28, 2020), <https://whr.tn/2UhYWKL> [<https://perma.cc/KD8B-2NDQ>] (projecting that COVID-19 will reduce “the OASDI trust fund depletion date by four years from 2036 to 2032” if there is a U-shaped recovery and will reduce the trust fund depletion date by two years from 2036 to 2034 if there is a V-shaped recovery).

278. Stephen C. Goss, *The Future Financial Status of the Social Security Program*, 70 SOC. SECURITY BULL., no. 4, at 111, 124 (2010), <https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p111.pdf> [<https://perma.cc/23Y2-GKPP>] (explaining that in 2030, the ratio will be two workers supporting each beneficiary in contrast to the past thirty-five years, where there were about 3.3 workers supporting each beneficiary). *See generally* Peter Coy,

couples who become divorced may find themselves in serious peril if they intend to rely on Social Security for income to meet their financial needs.²⁷⁹

Realizing that as “time goes by, the urgency of the Social Security problem grows and the choices available to fix it become more limited[.]”²⁸⁰ Congress should amend the Social Security Act and the Internal Revenue Code to ensure Social Security’s fiscal sustainability by boldly taking action now to increase revenue²⁸¹ while simultaneously reducing benefits. Such action should include, gradually: (1) increasing

Americans Aren’t Making Babies, and That’s Bad for the Economy, BLOOMBERG BUSINESSWEEK (July 29, 2020), https://www.bloomberg.com/news/articles/2020-07-29/coronavirus-pandemic-americans-aren-t-making-babies-in-crisis?utm_campaign=news&utm_medium=bd&utm_source=applenews [http://web.archive.org/web/20200820133403/https://www.bloomberg.com/news/articles/2020-07-29/coronavirus-pandemic-americans-aren-t-making-babies-in-crisis?utm_campaign=news&utm_medium=bd&utm_source=applenews] (explaining that the COVID-19 pandemic has caused thirty-four percent of American women to want to delay pregnancy or have fewer children and “that many, if not most, of the births that are delayed will never be made up[.]” placing a bigger burden on a smaller number of future workers to support future retirees).

279. See Megan Brenan, *More Nonretired Americans Expect Comfortable Retirement*, GALLUP (June 18, 2019), <https://news.gallup.com/poll/258320/nonretired-americans-expect-comfortable-retirement.aspx?version=print> [<https://perma.cc/CP8L-3LZC>] (explaining that fifty-seven percent of retirees rely on Social Security as a major source of income and that forty-six percent of adults are financially unprepared for retirement; providing a table breaking down the expected financial sources of income for retirees and non-retirees); see also Justin McCarthy, *Adults Nearing Retirement Worry Most About Social Security*, GALLUP (Apr. 6, 2018), <https://news.gallup.com/poll/232172/adults-nearing-retirement-worry-social-security.aspx> [<https://perma.cc/H2H9-N2BC>] (explaining that fifty-one percent of those aged fifty to sixty-four years old worry a “great deal” about the sustainability of Social Security). See generally Paul Brandus, *Opinion: Millions More Seniors Are Likely to Fall into Poverty*, MARKETWATCH (May 28, 2020), <https://www.marketwatch.com/story/millions-more-seniors-are-likely-to-fall-into-poverty-2020-05-19> [<https://web.archive.org/web/20200607200849/https://www.marketwatch.com/story/millions-more-seniors-are-likely-to-fall-into-poverty-2020-05-19>] (discussing the likely explosion in the number of older Americans that will live in poverty).

280. SOC. SEC. ADVISORY BD., *SOCIAL SECURITY: WHY ACTION SHOULD BE TAKEN SOON* 14 (2010), <https://bit.ly/36H790h> [<https://perma.cc/DV4D-U27U>] (discussing numerous courses of action to address the solvency of Social Security, but not recommending any specific proposal in order to present the options in a bipartisan manner).

281. See, e.g., Social Security 2100 Act, H.R. 860, 116th Cong. (2019–2020), <https://www.congress.gov/116/bills/hr860/BILLS-116hr860ih.pdf> [<https://web.archive.org/web/20201121222846/https://www.congress.gov/116/bills/hr860/BILLS-116hr860ih.pdf>] (proposing the Social Security 2100 Act, which would raise revenue by increasing payroll tax rates and applying payroll taxes to wages over \$400,000, although it would also increase benefits, which could make the process of passing the legislation easier).

the payroll tax rate,²⁸² (2) raising the retirement age based on increasing life expectancies,²⁸³ and (3) eliminating the taxable earnings base for the Social Security tax.²⁸⁴

First, Congress should begin to close the funding gap by enacting legislation that would gradually increase the Old-Age, Survivors, and Disability Insurance (OASDI; Social Security) payroll tax rate.²⁸⁵ For example, increasing the rate from 12.4 percent to thirteen percent over a period of five years is estimated by the Social Security Office of the Chief Actuary to “reduce the long-range OASDI actuarial deficit by 0.56 percent of taxable payroll and would reduce the annual deficit for the seventy-fifth projection year (2093) by 0.60 percent of payroll.”²⁸⁶

282. See *Social Security Needs a Fix*, *supra* note 106 (explaining the positions of the presidential candidates regarding ensuring the solvency of Social Security and providing disturbing forecasts, including that the “total annual costs of the Old-Age and Survivors Insurance Trust Fund[,] . . . which pays retirement and survivor benefits, and the Disability Insurance Trust Fund is projected to exceed total annual income [in 2020] . . . for the first time since 1982.”); see also Michael Hiltzik, *How the Rich Get an Undeserved Windfall from Social Security*, L.A. TIMES (Dec. 3, 2019), <https://www.latimes.com/business/story/2019-12-03/social-security-wealthy-benefits> [<https://web.archive.org/web/20201004133759/https://www.latimes.com/business/story/2019-12-03/social-security-wealthy-benefits>].

283. See Konish, *supra* note 109 (quoting Heritage Foundation research fellow Rachel Greszler, who stated that when “Social Security first started, the average life expectancy was [seventeen] years lower than it is today . . . [and] yet, the retirement age has only increased by two years.”). But see ROBERT M. BEUERLEIN, 2019 TECHNICAL PANEL ON ASSUMPTIONS AND METHODS, REPORT TO THE SOCIAL SECURITY ADVISORY BOARD: EXECUTIVE SUMMARY 6 (2019), https://www.ssab.gov/wp-content/uploads/2020/04/TPAM-2019-FINAL-REPORT_Executive-Summary.pdf [https://web.archive.org/web/20201001160513/https://www.ssab.gov/wp-content/uploads/2020/04/TPAM-2019-FINAL-REPORT_Executive-Summary.pdf] (showing that the United States has, in the short term, recently “seen a striking reversal of progress in life expectancy, with the last [three] years all showing life expectancy at birth falling” due to numerous social issues, including “drug overdoses, obesity and suicide along with several severe flu seasons”).

284. See, e.g., *The Biden Plan for Older Americans*, JOEBIDEN.COM <https://joebiden.com/older-americans/> [<https://perma.cc/N6FV-B4LN>] (last visited Nov. 14, 2020) (explaining President-Elect Biden’s plan to ensure the sustainability of Social Security by “asking Americans with especially high wages to pay the same taxes on those earnings that middle-class families pay”).

285. See, e.g., H.R. 860, 116th Cong. § 203 (2019–2020), <https://www.congress.gov/116/bills/hr860/BILLS-116hr860ih.pdf> [<https://web.archive.org/web/20201121222846/https://www.congress.gov/116/bills/hr860/BILLS-116hr860ih.pdf>] (proposing gradually raising both the employee and employer tax rates from 6.2 percent each before 2020 to 7.4 percent each after 2042).

286. Letter from Stephen C. Goss, Chief Actuary, Soc. Sec. Admin., to U.S. Rep. Gwen Moore 7 (Dec. 11, 2019), https://www.ssa.gov/OACT/solvency/GMoore_20191211.pdf [https://web.archive.org/web/20201018174617/https://www.ssa.gov/oact/solvency/GMoore_20191211.pdf].

Second, Congress should decrease benefits by gradually increasing the full retirement age²⁸⁷ past age sixty-seven and the early retirement age past age sixty-two. For example, Congress could amend 42 U.S.C. section 416(l)²⁸⁸ by indexing the full retirement age “to longevity by increasing it

re_20191211.pdf] (providing an extensive explanation by the Social Security Office of the Chief Actuary of potential ways to ensure the sustainability of Social Security).

287. See SOC. SEC. ADMIN., PUB. NO. 05-10035, RETIREMENT BENEFITS (2020), <https://www.ssa.gov/pubs/EN-05-10035.pdf>

[<http://web.archive.org/web/20200919131155/https://www.ssa.gov/pubs/EN-05-10035.pdf>] (showing the applicable full retirement ages based on the individual’s year of birth). The source provides the following table to determine the age that an individual must reach to receive full Social Security benefits, with those born on January 1 of any year referring to the previous year:

Year of birth	Full retirement age
1943–1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

Id. at 3. For example, if a person was born on January 2, 1960, the person’s full retirement age would be sixty-seven since the person would attain the early retirement age of sixty-two after December 31, 2021 ($1960 + 62 = 2022$). See 42 U.S.C. § 416(l) (E), (2) (2018).

288. 42 U.S.C. § 416(l) (2018). The statute established that:

(1) The term “retirement age” means—

(A) with respect to an individual who attains early retirement age (as defined in paragraph (2)) before January 1, 2000, [sixty-five] years of age;

(B) with respect to an individual who attains early retirement age after December 31, 1999, and before January 1, 2005, [sixty-five] years of age plus the number of months in the age increase factor (as determined under paragraph (3)) for the calendar year in which such individual attains early retirement age;

(C) with respect to an individual who attains early retirement age after December 31, 2004, and before January 1, 2017, [sixty-six] years of age;

(D) with respect to an individual who attains early retirement age after December 31, 2016, and before January 1, 2022, [sixty-six] years of age plus the number of months in the age increase factor (as determined under paragraph (3)) for the calendar year in which such individual attains early retirement age; and

(E) with respect to an individual who attains early retirement age after December 31, 2021, [sixty-seven] years of age.

[one] month every [two] years” and could raise the early retirement age by the same increments as the full retirement age.²⁸⁹ To prevent the unintentional awarding of some beneficiaries with increasing benefits,²⁹⁰ Congress could amend 42 U.S.C. section 1382(b) to cap benefits to those available under the current program.²⁹¹ Although amending 42 U.S.C.

(2) The term “early retirement age” means age [sixty-two] in the case of an old-age, wife’s, or husband’s insurance benefit, and age [sixty] in the case of a widow’s or widower’s insurance benefit.

(3) The age increase factor for any individual who attains early retirement age in a calendar year within the period to which subparagraph (B) or (D) of paragraph (1) applies shall be determined as follows:

(A) With respect to an individual who attains early retirement age in the 5-year period consisting of the calendar years 2000 through 2004, the age increase factor shall be equal to two-twelfths of the number of months in the period beginning with January 2000 and ending with December of the year in which the individual attains early retirement age.

(B) With respect to an individual who attains early retirement age in the [five]-year period consisting of the calendar years 2017 through 2021, the age increase factor shall be equal to two-twelfths of the number of months in the period beginning with January 2017 and ending with December of the year in which the individual attains early retirement age.

Id.

289. See, e.g., Anya Olsen, *Mind the Gap: The Distributional Effects of Raising the Early Eligibility Age and Full Retirement Age*, 72 SOC. SECURITY BULL., no. 4, at 37, 38 (2012), <https://www.ssa.gov/policy/docs/ssb/v72n4/ssb-v72n4.pdf>

[<https://perma.cc/65K8-P89G>]; see also SOC. SEC. ADVISORY Bd., *supra* note 280, at 31 (providing a course of action entitled “Option 20,” which would have increased the earliest eligibility age, along with the full retirement age, beginning in 2012 and reduced “both the [seventy-five] year actuarial deficit and the [seventy-fifth] year’s deficit by [twenty-eight] percent”). This proposal “could induce workers to extend their careers or to accumulate additional resources to cover their income needs in the years prior to Social Security eligibility. . . .” *Id.*

290. Olsen, *supra* note 289 (showing that the “gap-4 option” would result in increased “benefits for [twenty-eight] percent of beneficiaries in 2070 compared with scheduled benefits”).

291. 42 U.S.C. § 1382(b) (2018). The statute provides:

(1) The benefit under this subchapter for an individual who does not have an eligible spouse shall be payable at the rate of \$1,752 (or, if greater, the amount determined under section 1382f of this title) for the calendar year 1974 and any calendar year thereafter, reduced by the amount of income, not excluded pursuant to section 1382a(b) of this title, of such individual.

(2) The benefit under this subchapter for an individual who has an eligible spouse shall be payable at the rate of \$2,628 (or, if greater, the amount determined under section 1382f of this title) for the calendar year 1974 and any calendar year thereafter, reduced by the amount of income, not excluded pursuant to section 1382a(b) of this title, of such individual and spouse.

Id.

section 416(l)²⁹² to increase the full retirement age and early eligibility age would reduce benefits in the near term, taking the necessary action now would help ensure the long-term solvency of Social Security and allow beneficiaries to have a support program they could rely upon in the future.

Third, Congress should raise revenue by gradually eliminating the taxable earnings base for OASDI. Specifically, Congress should amend the Internal Revenue Code²⁹³ as it relates to 42 U.S.C. § 430²⁹⁴ similar to, but more gradually than, how Congress eliminated the taxable earnings base for Hospital Insurance (HI; Medicare) in 1993.²⁹⁵ For example, Congress should gradually expose more income of taxpayers to Social

However, to cap benefits, the statute could be amended by adding a paragraph (3) with language such as:

(3) The benefit under this subchapter for an individual shall be payable at a rate no greater than the amount that would have been payable under the applicable law as enacted immediately before [insert the effective date of the legislation indexing the full retirement age and early eligibility age of Social Security].

292. 42 U.S.C. § 416(l).

293. I.R.C. § 3121 (2018).

294. 42 U.S.C. § 430 (2018); *see, e.g.*, Protecting and Preserving Social Security Act, H.R. 2302, 116th Cong. § 201 (2019), <https://bit.ly/2UmMoSB> [<https://perma.cc/48PP-7F64>] (gradually eliminating the cap on compensation subject to Social Security taxation).

295. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467–68 (1993) (repealing the limitation on the amount of wages subject to the Health Insurance Employment Tax). The section provides as follows:

(a) HOSPITAL INSURANCE TAX.—

(1) Paragraph (1) of section 3121(a) (defining wages) is amended—

(A) by inserting “in the case of the taxes imposed by sections 3101(a) and 3111(a)” after “(1)”,

(B) by striking “applicable contribution base (as determined under subsection (x))” each place it appears and inserting “contribution and benefit base (as determined under section 230 of the Social Security Act)”, and

(C) by striking “such applicable contribution base” and inserting “such contribution and benefit base”.

(2) Section 3121 is amended by striking subsection (x).

Id. *See also* *OASDI and SSI Program Rates & Limits*, *supra* note 102 (providing the applicable program rates and limits for 2020, including that both employers and employees had a tax rate of 6.2 percent for OASDI and 1.45 percent for HI (with an additional .9 percent in Medicare taxes for certain high-income taxpayers) and that the maximum taxable earnings limit for Social Security was \$137,700 while Medicare had no limit).

Security taxes²⁹⁶ by amending Internal Revenue Code section 3121(a)(1)²⁹⁷ with the following matters in italics so that it reads:

(a) Wages. For purposes of this chapter, the term “wages” means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include-

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a)[, amounts in excess of the product of the amount determined in 42 U.S.C. section 430(b) and the factor specified below:

(A) In the case of calendar year 2021, a factor of one,

(B) In the case of calendar year 2022, a factor of two,

(C) In the case of calendar year 2023, a factor of three,

(D) In the case of calendar year 2024, a factor of four,

Except that this paragraph will be repealed in 2025, and the taxable earnings base for the Social Security OASDI payroll tax will be eliminated permanently.]

By gradually eliminating the taxable earnings base for OASDI, Congress could “increase the long-term revenue of Social Security trust funds” and eliminate a large percentage of the shortfall.²⁹⁸ By taking this action, Congress could reverse the disturbing trend of covering a constantly

296. See, e.g., Fair Adjustment and Income Revenue for Social Security Act, H.R. 1984, 114th Cong. (Aug. 23, 2015), <https://www.congress.gov/114/bills/hr1984/BILLS-114hr1984ih.pdf>

[<https://web.archive.org/web/20201121223145/https://www.congress.gov/114/bills/hr1984/BILLS-114hr1984ih.pdf>] (repealing the cap on compensation subject to the Federal Insurance Contributions Act and thus eliminating the taxable earnings base immediately).

297. I.R.C. § 3121(a)(1) (2018) (defining wages).

298. CONG. RES. SERV., RL32896, SOCIAL SECURITY: RAISING OR ELIMINATING THE TAXABLE EARNINGS BASE 17 (2019), <https://fas.org/sgp/crs/misc/RL32896.pdf> [<https://perma.cc/N4KL-A6B9>].

decreasing percentage of aggregate earnings that are taxable, as earnings inequality increases across society.²⁹⁹

In contrast, without taking these politically difficult³⁰⁰ but financially necessary reforms, the future of retirees is grim:

[T]he safety net for retirees will have enough continuing tax income by 2034 to meet only [seventy-seven] percent of scheduled benefit payments . . . [and the] Disability Insurance Trust Fund . . . will have enough money coming in to cover only [ninety-one] percent of scheduled benefits when its reserves are depleted in 2052.³⁰¹

In light of an increasing federal deficit and the need to pay for the stimulus used to combat COVID-19, economic conditions may not become much more favorable in the near future.³⁰² As a result, even if Congress can only take small steps due to the difficult political environment, Congress should address these serious shortcomings to reduce the need to take more painful and drastic action in the future.

V. CONCLUSION

Military marriage partners must adapt to the new tax and benefit environment of tremendous economic uncertainty in the era of BRS and

299. See *id.* at 6 (showing that “the percentage of aggregate covered earnings that is taxable has decreased from [ninety percent] in 1982 to [eighty-three percent] in 2017”).

300. See Konish, *supra* note 109 (pointing out that many people are unprepared for retirement and cannot “hold out to claim Social Security at their full retirement age, either because of no employment or poor health”); see also H.R. 860, 116th Cong. (2019–2020) (proposing the Social Security 2100 Act, which would increase Social Security benefits and offset this cost by raising revenue by increasing payroll tax rates and applying payroll taxes to wages over \$400,000); Lorie Konish, *Mitt Romney Pushes New Plan to Fix Social Security. Critics Say It Isn’t a Solution*, CNBC (Oct. 31, 2019), <https://www.cnbc.com/2019/10/31/mitt-romneys-new-plan-to-fix-social-security-draws-critics.html> [<https://perma.cc/JBN4-QQ7Q>] (highlighting the difficulty of achieving Social Security reform as different legislative proposals have been introduced to address the solvency of the program, including Senator Romney’s Time to Rescue United States’ Trusts Act (TRUSTS), and a Democratic legislative initiative, the Social Security 2100 Act); see also TRUST Act, S. 2733, 116th Cong. (2019).

301. *Social Security Needs a Fix*, *supra* note 106; see also Goss, *supra* note 278 (explaining the reasons behind the Social Security funding shortfall, including that “birth rates dropped from three to two children per woman”).

302. See *Deficit Tracker*, BIPARTISAN POL’Y CTR. (Sept. 10, 2020), <https://bipartisanpolicy.org/report/deficit-tracker/> [<https://web.archive.org/web/20200919205841/https://bipartisanpolicy.org/report/deficit-tracker/>] (showing a CBO projected end-of-year FY 2020 total deficit of “\$3.3 trillion, more than triple last year’s and the largest deficit as a share of the economy since 1945.”).

COVID-19 in order to ensure that their families remain self-sufficient economically even in the event of divorce. In addition, the federal government should take action to help servicemembers provide for their intended surviving beneficiaries in the event of their divorces and subsequent deaths. Furthermore, the federal government should take action to increase the economic sustainability of Social Security that many military marriage partners may need to rely upon after divorce as they struggle financially to support separate households.

However, even where the future remains nebulous and where Social Security may not be financially sustainable, military marriage partners must focus their efforts on what is in their ability to control. Specifically, they must take ownership of their futures by becoming financially literate, building retirement and non-retirement financial portfolios, enhancing marketable skill sets for future employment in the civilian sector, minimizing unnecessary taxes, legally shifting income to lower income parties, and reducing the possibility of negative financial outcomes. To achieve these strategic objectives, they should take preventive steps, including preparing solid prenuptial agreements, updating beneficiary designations, preventing the commingling of funds, properly using trusts, building numerous reliable streams of income, and rebalancing their financial portfolios.

Military marriage partners can plan accordingly and take these proactive steps to minimize the possibility of financial disaster and over reliance on public assistance in the face of divorce and the fiscal uncertainty of Social Security. By taking timely action and proper ownership of their long-term futures, they can set themselves up to be financially self-sufficient as they move on to the next chapter of their lives, even in a world of significant economic uncertainty.

APPENDIX 1. THE VALUE OF DEFINED BENEFIT PLANS

The chart below shows estimates of the value of the legacy defined benefit plan for those servicemembers retiring in 2020, using the Department of Defense military pay calculator.³⁰³

Rank	Years of Service as of Retirement (Active Component)	Retirement Date	Date Born	Pay Entry	Total Legacy System Defined Benefit Amount Paid over the life of the Retiree (assuming a life expectancy of 85)	Present Value of Payments as of the year of retirement
E-7	20	Aug-20	Aug-78	Aug-00	\$2,157,741	\$805,875
E-8	25	Aug-20	Aug-73	Aug-95	\$2,756,485	\$1,135,010
E-9	30	Aug-20	Aug-68	Aug-90	\$3,341,594	\$1,553,427
O-5	20	Aug-20	Aug-78	Aug-00	\$4,093,125	\$1,528,704
O-6	30	Aug-20	Aug-68	Aug-90	\$5,476,648	\$2,545,964

For example, an E-7 entering service in August 2000 and retiring in August 2020 after serving twenty years in the active component would receive approximately \$2,157,741 over a lifetime, assuming an eighty-five-year life expectancy. The present value of this benefit would be approximately \$805,875 in 2020, the year of retirement.

Similarly, the chart below estimates the value of the legacy defined benefit plan for those servicemembers who entered service in 2017.³⁰⁴

Rank	Years of Service as of Retirement (Active Component)	Retirement Date	Date Born	Pay Entry	Total Legacy System Defined Benefit Amount Paid over the life of the Retiree (assuming a life expectancy of 85)	Present Value of Payments as of the year of retirement
E-7	20	Aug-37	Aug-95	Aug-17	\$3,826,808	\$1,401,989
E-8	25	Aug-42	Aug-95	Aug-17	\$5,542,501	\$2,282,179
E-9	30	Aug-47	Aug-95	Aug-17	\$7,883,962	\$3,665,067
O-5	20	Aug-37	Aug-95	Aug-17	\$7,297,324	\$2,659,548
O-6	30	Aug-47	Aug-95	Aug-17	\$12,921,355	\$6,006,831

For example, an E-7 entering service in August 2017 and retiring in August 2037 after serving twenty years in the active component would

303. See *Blended Retirement Comparison Calculator*, *supra* note 67 (providing a calculator tool to help estimate the value of military retirement benefits).

304. See *id.*

receive approximately \$3,846,808 over a lifetime, assuming an eighty-five-year life expectancy. The present value of this benefit would be approximately \$1,401,989 in 2037, the year of retirement.

In the alternative, servicemembers entering service in 2017 might select BRS. The following chart compares the legacy retirement plan with BRS.³⁰⁵

305. *See id.*

Rank	Years of Service as of Retirement (Active Component)	Retirement Date	Date Born	Pay Entry Base and Active Service Date	Total Legacy System Defined Benefit Paid over the Life of the Retiree (assuming a life expectancy of \$5)	Present Value of Payments as of the Year of Retirement	Total Blended Retirement System (BRS) Defined Benefit Paid over the Life of the Retiree (assuming a life expectancy of \$5)	Present Value of BRS Defined Benefit Payments as of the Year of Retirement	Total Government TSP Contributions (assuming 5% contribution rate)	Present Value of Government TSP Contributions and Market Growth as of the Year of Retirement	Government TSP Contributions and Market Growth (assuming 7% rate of return, 3% withdrawal rate at age 67, and life expectancy of \$5)	Total BRS Defined Benefit Plan plus TSP Government Contributions with Market Growth	Present Value of Defined Benefit Plan and Government TSP Contributions as of the Year of Retirement
E-7	20	Aug-37	Aug-95	Aug-17	\$3,846,808	\$1,401,989	\$3,077,446	\$1,121,591	\$53,748	\$89,797	\$626,406	\$3,703,852	\$1,211,388
E-8	25	Aug-42	Aug-95	Aug-17	\$5,542,501	\$2,282,179	\$4,434,001	\$1,825,743	\$88,231	\$169,896	\$845,001	\$5,279,002	\$1,995,639
E-9	30	Aug-47	Aug-95	Aug-17	\$7,883,962	\$3,665,067	\$6,307,170	\$2,932,053	\$105,973	\$258,388	\$916,278	\$7,223,448	\$3,190,441
O-5	20	Aug-37	Aug-95	Aug-17	\$7,297,324	\$2,659,548	\$5,837,869	\$2,127,638	\$101,643	\$171,906	\$1,199,183	\$7,037,042	\$2,299,544
O-6	30	Aug-47	Aug-95	Aug-17	\$12,921,355	\$6,006,831	\$10,337,084	\$4,805,465	\$187,680	\$470,569	\$1,668,702	\$12,005,786	\$5,276,034

For example, an E-7 entering service in August 2017, selecting BRS, and retiring in August 2037 after serving twenty years in the active component would receive approximately \$3,077,446 over a lifetime from the defined benefit plan, assuming an eighty-five-year life expectancy. The present value of this benefit would be approximately \$1,121,591 in 2037, the year of retirement.

In addition to this smaller BRS defined benefit as compared to the legacy plan, the E-7 would receive approximately \$53,748 in government TSP contributions, assuming a five percent TSP contribution rate. This would grow to approximately \$89,797 in 2037, the year of retirement. Assuming a seven percent growth rate, three percent withdrawal rate at age sixty-seven, and life expectancy of eighty-five years, the servicemember would ultimately receive approximately \$626,406.

In short, the TSP government contributions and their growth may make up for a significant portion of the smaller BRS defined benefit plan. For example, while E-7s retiring in 2037 with twenty years of service under the legacy retirement system would receive \$3,846,808 over their expected lifetimes, that amount would be only \$142,956 more than under BRS ($\$3,846,808 - (\$3,077,446 + \$626,406)$) after accounting for the sum of the BRS reduced defined benefit plan (\$3,077,446) plus the government TSP contributions and their growth (\$626,406). This difference between the amounts received under the legacy retirement system and BRS would be even smaller if servicemembers invested their continuation pay received under BRS and allowed for its compounded growth over time.

APPENDIX 2. THE POWER OF COMPOUNDING: INVESTING EARLY AND OFTEN IN IRAS AND TSP/401(K) PLANS

The following chart shows the growth of combined monthly IRA and TSP/401(k) employee and employer contributions using Microsoft Excel and the U.S. Securities and Exchange Commission's compound interest calculator.³⁰⁶

306. See SEC. & EXCH. COMM'N (SEC), *Compound Interest Calculator*, INVESTOR.COM, <https://www.investor.gov/financial-tools-calculators/calculators/compound-interest-calculator> [<https://perma.cc/MF6C-7SBK>] (last visited July 16, 2020) (providing a calculator to compute the value of investments based on numerous variables, including the expected interest rate, compounding frequency, initial investments, and monthly contributions).

Combined Monthly IRA and 401(k) Contributions	Value after 10 years	Value after 20 years	Value after 30 years	Value after 40 years
\$50	\$8,290	\$24,597	\$56,676	\$119,781
\$100	\$16,580	\$49,195	\$113,353	\$239,562
\$200	\$33,159	\$98,389	\$226,706	\$479,124
\$300	\$49,739	\$147,584	\$340,059	\$718,686
\$400	\$66,319	\$196,778	\$453,412	\$958,249
\$500	\$82,899	\$245,973	\$566,765	\$1,197,811
\$1,000	\$165,797	\$491,946	\$1,133,529	\$2,395,621
\$1,500	\$248,696	\$737,919	\$1,700,294	\$3,593,432
\$2,000	\$331,595	\$983,892	\$2,267,059	\$4,791,243

For example, servicemembers who make a combined contribution of \$50 every month for ten years would produce \$8,290, assuming a seven percent rate of interest rate and annual compounding. If servicemembers continue to contribute in a similar manner for a total of forty years, their accounts would grow to approximately \$119,781.

In addition, servicemembers who start investing early will benefit from the time value of money as shown in the following chart.³⁰⁷

	Value of investments after 30 years of starting employment if investing the specified monthly amount each month	
	For 10 years	For 20 years
Monthly amount invested	Starting immediately after beginning employment and continuing only to the 10th year after employment	Starting the 11th year after beginning employment and continuing to invest the same monthly amount through the 30th year after beginning investment
\$50	\$32,079	\$24,597
\$100	\$64,158	\$49,195
\$200	\$128,317	\$98,389
\$300	\$192,475	\$147,584
\$400	\$256,633	\$196,778
\$500	\$320,792	\$245,973
\$1,000	\$641,584	\$491,946
\$1,500	\$962,375	\$737,919
\$2,000	\$1,283,167	\$983,892

307. See *id.* (providing a calculator to compute the value of investments based on numerous variables including the expected interest rate, compounding frequency, initial investments, and monthly contributions).

For example, servicemembers who invest \$50 a month every month for the first ten years after beginning employment in 2020 would contribute \$6,000 and produce a \$32,079 portfolio by 2050. If servicemembers waited ten years before beginning to invest, and then contributed \$50 a month for the next twenty years starting in 2030, they would invest \$12,000 yet produce only a \$24,597 portfolio by 2050. This example shows the tremendous power of compounding and the importance of starting to invest as early as possible in one's career.³⁰⁸

308. See Robert Exley Jr. & MacKenzie Sigalos, *How Much You'll Have for Retirement if You Invest \$50 a Month*, CNBC (July 31, 2020), <https://www.cnbc.com/video/2020/07/31/how-much-youll-have-for-retirement-if-you-invest-50-a-month.html> [<https://perma.cc/7GDP-TLD5>] (providing a video showing the exponential growth of investments over time and the importance of starting early; making assumptions including a four percent rate of return and different stages of investment periods).