

ADMINISTRATIVE AND CIVIL LAW DEPARTMENT



2012 ESTATE PLANNING DESKBOOK

Volume 1

The Judge Advocate General's School

United States Army

FEBRUARY 2012

ESTATE PLANNING DESKBOOK VOLUME 1

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Tax Law Note

2010-2012 Tax Update

*Lieutenant Colonel Samuel W. Kan**

Kicking the can down the road. [President] Barack Obama and the Republican leadership reach a deal on taxes that leaves leftist Democrats and tea-partiers fuming. And the deficit keeps growing.¹

I. Introduction

Astute legal assistance attorneys and estate planners waited for the sunset of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) to see what would become of the federal transfer tax system and the expiring “Bush Tax Cuts.”² Despite years of waiting, due to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act (i.e., Tax Relief Act) of 2010, they will need to wait for another two years.³ Fortunately, there will be some degree of tax certainty during that time. With this in mind, legal assistance attorneys and estate planners should stay abreast of the fluid tax landscape by monitoring the constantly changing laws.⁴

II. Income Tax Update

The Tax Relief Act of 2010, along with other tax legislation and related events, has created numerous income tax changes for the 2010 tax year and beyond.⁵ For example, due to Emancipation Day in Washington D.C., the due date to file federal income tax returns has been extended to 18 April 2011, rather than 15 April 2011.⁶ In addition, due to the Tax Relief Act of 2010, there will be no personal exemption income phaseouts through 2012.⁷ As a result, both lower and higher income taxpayers will be able to benefit from the full personal and dependent exemption amount valued at \$3,650 per person in 2010.⁸ Further, more taxpayers may be eligible to take advantage of Volunteer Income Tax Assistance (VITA) and get their tax returns prepared for free. Specifically, VITAs can help prepare tax returns of certain taxpayers filing a Schedule C who meet specific requirements.⁹ Taxpayers may now also use their

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¹ *Kicking the Can Down the Road*, THE ECONOMIST (Dec. 9, 2010) [hereinafter *Kicking the Can Down the Road*, THE ECONOMIST], available at <http://www.economist.com/node/17677736>.

² See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in 26 U.S.C. (2006)) (establishing numerous temporary tax cuts through 31 December 2010, at which time the tax system would revert to what it was like in 2001). See generally Major Samuel Kan, *Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, ARMY LAW., Jan. 2010 at 52 (providing background on the unified federal transfer tax system and the impacts of the Economic Growth and Tax Relief Reconciliation Act).

³ See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (extending the “Bush Tax Cuts” for another two years).

⁴ Individuals may sign up on numerous websites to receive e-mail tax updates keeping taxpayers abreast of the changing tax laws. See, e.g., IRS website, at https://service.govdelivery.com/service/multi_subscribe.html?code=USIRS (providing free IRS Tax Tips and other tax updates); CCH website at <http://tax.cchgroup.com/NewsHeadlines/default.htm?cookie%5Ftest=1> (providing free federal and state tax updates); and BNA website at, <http://0-news.bna.com/jag.iii.com/dtln/> (providing extremely useful tax updates, case law updates, and BNA tax publications to paying BNA Daily Tax Report subscribers). In addition, those tax return preparers working at Volunteer Income Tax Assistance (VITA) offices can receive Volunteer Tax Alerts and Quality Site Requirement Alerts through their designated IRS Stakeholder Partnerships, Education, and Communication (SPEC) representative.

⁵ See, e.g., U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4491-X, VITA/TCE TRAINING SUPPLEMENT 5 (2011) [hereinafter PUB. 4491-X] (listing numerous tax provisions that were extended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010).

⁶ See U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 1 (2010) [hereinafter PUB. 17] (explaining that the due date for filing IRS Form 1040 is 18 April 2011, because of the Emancipation Day holiday in the District of Columbia).

⁷ I.R.C. § 151(d)(3) (2006) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296) (extending the repeal of the personal exemption phaseouts for another two years). See also PUB. 17, *supra* note 6, at 24. Phaseouts are specified reductions of benefits that occur once the income (normally adjusted gross income) of taxpayers exceed certain thresholds. Thresholds are certain amounts of income that are normally established based on the filing status of taxpayers. For example, see *infra* notes 17 and 18.

⁸ See Rev. Proc. 2009-50, 2009-45 § 3.19, I.R.B. 617. See PUB. 17, *supra* note 6, at 24. See U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4012, VOLUNTEER RESOURCE GUIDE, at C-1 to C-7 (2010) [hereinafter PUB. 4012] (providing a very useful quick resource guide to identify personal and dependent exemption requirements).

⁹ See U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4491, VITA/TCE TRAINING GUIDE 9-1 to 9-2 (2010) [hereinafter PUB. 4491] (listing the requirements to qualify for VITA assistance, to include having business expenses under \$10,000, having no employees, operating only one business as a sole proprietor during the tax year, using the cash method of accounting, not having inventory at any time during the year, not having a net loss from the business, and not deducting expenses for the business use of a home).

tax refunds to purchase up to three U.S. Series I Savings Bonds by filing an IRS Form 8888, Allocation of Refund.¹⁰

A. Income

In addition to these changes, the individual income tax rates of 10, 15, 25, 28, 33, and 35% have been extended through 2012, as shown in Appendix A.¹¹ Additionally, through 2012, the maximum capital gain rate for capital assets held longer than one year will continue to be 15%,¹² and qualified dividends will be taxed at a maximum capital gain rate of 15%.¹³

B. Adjustments (“Above the Line Deductions”)

Along with these more favorable tax rates, for two more years, qualifying taxpayers are entitled to take numerous

¹⁰ See *id.* at 3.

¹¹ See Rev. Proc. 2009-50, 2009-45 I.R.B. 617. See also Rev. Proc. 2010-24, 2010-25 I.R.B. 764. See also Rev. Proc. 2010-35, 2010-42 I.R.B. 438. See also I.R.C. § 1 (as amended by the Tax Relief of 2010, Pub. L. No. 111-312, §101, 124 Stat. 3296). See generally TOP FEDERAL TAX ISSUES FOR 2010, CPE COURSE 4.2 (CCH Editorial Staff Publication) (explaining that “EGTRRA [the Economic Growth and Tax Relief Reconciliation Act of 2001] should not be confused with JGTRRA, which is short for the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA). Basically, JGTRRA did for the capital gains tax rates what EGTRRA did for the individual income tax brackets: lower them significantly. JGTRRA reduced the maximum rate on net capital gains and taxed qualifying dividends at that same low rate.”). It is important to note that these individual tax rates and the applicable tax brackets reflect a two year extension of marriage penalty relief. “A marriage penalty exists when the tax on the combined income of a married couple exceeds the sum of the taxes that would be imposed if each spouse filed a separate return as a single person. This occurs most often when both spouses have income.” See 2010 TAX LEGISLATION, TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010, RIC MODERNIZATION ACT OF 2010, AND OTHER RECENT TAX ACTS ¶ 310 (CCH Editorial Staff Publication) [hereinafter “CCH 2010 TAX LEGISLATION”]. In short, not only for 2010, but also for 2011 and 2012, “the size of the 15-percent rate bracket for joint returns will remain twice the size of the corresponding rate bracket for single returns.” See *id.* However, unless Congress acts, in 2013, “the 15-percent tax bracket for joint filers will be less than the combined 15-percent tax bracket of two single filers and married taxpayers may have more of their taxable income pushed into a higher marginal tax bracket than their unmarried counterparts.” See *id.*

¹² See I.R.C. § 55(b)(3) (West 2010). See I.R.C. 1(h)(1) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). See PUB. 17, *supra* note 6, at 114 tbl.16-1 (explaining that if the regular tax rate is lower than 25%, then the maximum capital gain rate is 0%, while if the regular tax rate is 25% or higher, the maximum capital gain rate is 15%; contrasting that the maximum capital gain rate on collectibles is 28%, while the maximum capital gain rate on an unrecaptured § 1250 gain is 25%; explaining that unrecaptured § 1250 gain can result from selling real property that was previously depreciated).

¹³ I.R.C. § 55(b)(3) (West 2010). See also I.R.C. 1(h)(1) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). See PUB. 17, *supra* note 6, at 63 (explaining that qualified dividends are shown in box 1b of the IRS Form 1099-DIV; explaining that qualified dividends are subject to the 15% rate if the regular tax rate is 25% or higher, and subject to the 0% rate if the regular rate is lower than 25%).

adjustments, which will reduce taxpayers’ gross income to determine their adjusted gross income (AGI).¹⁴ For example, the Tax Relief Act of 2010 extended the educator expense deduction through 2011.¹⁵ This allows teachers to take an adjustment of up to \$250 for qualified expenses, rather than taking a miscellaneous itemized deduction subject to numerous limitations that would constructively reduce or even eliminate the benefit.¹⁶ Through 2012, the Act also increases the modified adjusted gross income (MAGI) phaseout to \$75,000 (\$150,000 for joint returns) for taxpayers to take the student loan interest deduction, valued at up to \$2,500 per tax return.¹⁷ In addition, the Act extends the qualified tuition and fees adjustment, valued at up to \$4,000 per tax return, through 2011.¹⁸

C. Deductions

After accounting for these adjustments, taxpayers can take certain deductions. Specifically, taxpayers can choose to take standard deductions or to itemize their deductions. The standard deductions for 2010 are listed in Appendix B. Taxpayers whose expenses exceed the standard deduction will want to itemize their deductions. Through 2012, there will be no income phaseouts for taxpayers who itemize their deductions.¹⁹ In addition, through 2011, taxpayers will be

¹⁴ See PUB. 4491, *supra* note 9, at 17-1.

¹⁵ I.R.C. § 62(a)(2)(D) (West 2010).

¹⁶ *Id.* § 62(a)(2)(D). See also PUB. 4491-X, *supra* note 5 (supplementing IRS Publication 4491 to take account of the tax changes created by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010).

¹⁷ See Rev. Proc. 2009-50, 2009-45 § 3.23 I.R.B. 617. See also I.R.C. § 221 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 345 (explaining that if not for the Tax Relief Act of 2010, the phaseout increase would have expired after 2010). See generally PUB. 4012, *supra* note 8, at E-3 (explaining that taxpayers filing joint returns in 2010 will have their student loan interest deduction reduced once their modified adjusted gross income (MAGI) reaches \$120,000 and eliminated once their MAGI reaches \$150,000; other taxpayers will experience a reduction once their MAGI reaches \$60,000 and an elimination once their MAGI reaches \$75,000).

¹⁸ I.R.C. § 222 (West 2010) (establishing that taxpayers with an AGI between \$65,001 and \$80,000 (between \$130,001 and \$160,000 for joint returns) will be limited to a \$2,000 adjustment; those with an AGI over these amounts will not receive any adjustment). See also U.S. Dep’t of the Treasury, Internal Revenue Service, Form 1040, U.S. Individual Tax Return (2010) and U.S. DEP’T OF THE TREASURY, INTERNAL REVENUE SERVICE, FORM 1040, INSTRUCTIONS (2010). See generally CCH 2010 TAX LEGISLATION ¶ 350 (describing under what circumstances taking the adjustment might be better than taking the corresponding educational credit such as when a taxpayer has a high marginal tax rate and the adjustment will lower the taxpayer’s adjusted gross income).

¹⁹ See I.R.C. § 68 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296) (extending 2001 tax relief temporarily until 2012). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 320 (providing tax tips regarding taking itemized deductions as the law limiting deductions changes over time). See generally PUB. 17, *supra* note 6, at 201 (explaining that the limit on taking itemized deductions expired in 2010 and would have resumed in 2011, if not for the Tax Relief Act of 2010).

able to continue to deduct state and local general sales taxes in lieu of state and local income taxes.²⁰ Furthermore, through 2011, taxpayers can also deduct qualified mortgage insurance premiums.²¹

D. Credits

After accounting for these deductions, taxpayers may be able to take numerous credits. The Tax Relief Act of 2010 has extended many of these tax credits. First, the American Opportunity credit, valued at up to \$2,500 per student, is extended through 2012.²² Second, the increased earned income credit, valued at up to \$5,666 for taxpayers with three or more qualifying children, and the increased applicable income phaseouts, have been extended through 2012.²³ Third, the child tax credit, valued at up to \$1,000 per qualifying child under the age of seventeen, and the earned income refundable component have been extended through 2012.²⁴ Fourth, the child and dependent care credit dependent care expense limits and increased credit percentages have been extended through 2012.²⁵ Fifth, the nonbusiness energy property credit, valued at up to \$1,500 in 2010 and \$500 in 2011, has been extended through 2011.²⁶

Servicemembers may also benefit from two recent provisions on purchasing a principal residence. First, most civilians have to repay the government for the first-time homebuyer's credit if they purchased a home after 31 December 2008, and failed to stay in the home for thirty-six

months.²⁷ However, servicemembers do not have to repay the government if they claimed the first-time homebuyer's credit and later sold their home after 31 December 2008, as long as the servicemember is on government orders for qualified extended duty service at least fifty miles away from the home.²⁸ Second, servicemembers may qualify for a military extension to purchase a home and claim the first time homebuyer's credit on homes purchased as late as 1 July 2011, if the home is placed under a binding contract before 1 May 2011.²⁹

In addition, other legislative acts have expanded and increased certain credits. For example, the Patient Protection and Affordable Care Act of 2010 extended and increased the adoption tax credit, making it fully refundable in the year claimed.³⁰ Although the credit in 2010 begins to phaseout for taxpayers with a modified AGI of more than \$182,520, the credit is extremely valuable because expenses of up to \$13,170 can be claimed.³¹

E. Other Tax and Related Issues

In addition to these numerous changes to both tax deductions and tax credits, many additional changes affect the 2010, 2011, and 2012 tax years. First, the alternative minimum tax rates (AMT) exemption amounts have been increased through 2011, as shown in Appendix C. This welcome change for the middle class provides some degree of temporary relief. Second, in 2011, employee payroll taxes will be reduced by two percentage points to 4.2%.³² Third, unemployment benefits have been extended through 2012.³³ Fourth, Coverdale education savings accounts contributions have been increased from \$500 to \$2,000 through 2012.³⁴

²⁰ I.R.C. § 164(b)(5)(I) (West 2010).

²¹ *Id.* § 163(h)(3)(E) (West 2010).

²² *Id.* § 25A.

²³ *Id.* § 32(b)(3). See also PUB. 4491, *supra* note 9, at 2 and 30-1 (explaining the maximum credits available for those with no qualifying children to those with three or more qualifying children).

²⁴ I.R.C. § 24(a). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 360 (explaining that by "keeping the earned income threshold at \$3,000 for computing the earned income refundable child tax credit, more low-income taxpayers will continue to be eligible for the refundable child tax credit.") Refundable credits are defined as credits that are applied against any tax owed, with the remainder refunded to the taxpayer. See PUB. 4491, *supra* note 9, at 29-4. Examples of refundable credits include the making work pay credit and the earned income credit. See *id.* at 29-4 and 30-1. In contrast, a nonrefundable credit is a dollar-for dollar reduction of a taxpayer's tax liability and thus can only reduce the tax liability to zero. See *id.* at 23-1. Examples of nonrefundable credits include the retirement savings contribution credit and the residential energy credit, which includes the nonbusiness energy property credit and the residential energy-efficient property credit. See *id.* at 27-2 and 27-5.

²⁵ I.R.C. § 21 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296).

²⁶ *Id.* § 25C (West 2010). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 372 (explaining the limitations of the credit including that the "maximum credit allowable" is measured over the lifetime of the taxpayer). See also PUB. 4491, *supra* note 9, at 27-6 (explaining that if a taxpayer "claimed a \$1,000 credit in 2009, the taxpayer could only claim up to a \$500 credit in 2010").

²⁷ See I.R.C. § 36(f)(4)(D) (West 2010).

²⁸ See *id.* § 36(f)(4)(E)(i). However, servicemembers who purchased a home in 2008 and later sold their homes before 31 December 2008, would not be able to claim the credit. See *id.* § 36(d)(2).

²⁹ *Id.* § 36(h)(3) (establishing that servicemembers who served on qualified official extended duty outside the United States for at least ninety days during the period beginning after 31 December 2008, and ending before 1 May 2010, may claim the first-time homebuyer credit on a purchase made before 1 May 2011, or on a purchase made before 1 July 2011, if the property was placed under a binding contract before 1 May 2011.)

³⁰ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10909, 124 Stat. 119. See also PUB. 4491, *supra* note 9, at 5.

³¹ See *id.*

³² I.R.C. § 3101(a) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 601(a)(2), 124 Stat. 3296).

³³ See Supplemental Appropriations Act of 2008, Pub. L. No. 110-252, § 4007, 122 Stat. 2323, 26 U.S.C. § 3304 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 501, 124 Stat. 3296) (extending assorted unemployment benefits through assorted dates in 2012).

³⁴ See I.R.C. § 530 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 330.

In addition to these anticipated changes, there are some surprising potential changes on the horizon. Specifically, two tax cases are pending in the Second Circuit that challenge the IRS's position on tax benefits for same-sex marriages.³⁵ One case challenges the ability "to obtain a refund of the federal marital deduction as a surviving spouse in an estate where two women had a marriage recognized in New York" while the other case challenges "the application of IRS rules to obtaining medical subsidy spousal benefits in a state pension plan for same-sex couples in New Hampshire."³⁶ More importantly the Department of Justice has stated that it will not defend the constitutionality of Section 3 of the Defense of Marriage Act (DOMA) as applied to same-sex married couples in these cases.³⁷ This announcement may indicate a significant possible legal change on the horizon, especially in light of the repeal of the military's "Don't Ask, Don't Tell" policy.³⁸

III. Gift Tax Update

There are also significant federal gift tax changes taking place over the next few years. Specifically, in 2010 and 2011, transferors will be able to transfer a total of five million dollars of taxable gifts during their lifetime that is not subject to any federal gift tax.³⁹ Taxable gifts over five million dollars in 2010 and 2011 will be subject to a 35% tax rate, as shown in Appendices D and E.⁴⁰

Similarly, in 2012, transferors will also be able to transfer a total of five million dollars worth of taxable gifts during their lifetime free of gift tax.⁴¹ However, in 2012, the five million dollar exemption will be subject to an inflation adjustment,⁴² and taxable gifts over that amount will be subject to a 35% tax rate.⁴³ However, on the last day of 2012, the act will sunset.⁴⁴ Unless Congress acts prior to the end of 2012, beginning in 2013, transferors will only be able to transfer a total of one million dollars of taxable gifts during their lifetime free of gift tax.⁴⁵ In 2013, taxable gifts over that amount will be subject to a 55% tax rate.⁴⁶

Knowing these rules, individuals may consider making large gifts over the next two years even if the value of the gifts exceeds the annual exclusion amount.⁴⁷ This would allow them to take full advantage of the larger but temporary unified credit. In this manner, even though the individuals would be making taxable gifts, no federal gift tax would be due as long as the transferor did not transfer gifts worth more than five million dollars during his life (Appendix E). If Congress does not act and the resulting unified credit becomes one million dollars in 2013, the transferor would have saved approximately \$2.2 million (i.e., .55 x \$4 million) by making the gifts in 2011 and 2012. Despite this advantage, transferors should realize that the assets transferred to young children may generate "kiddie tax"⁴⁸ issues if the assets generate unearned income.

³⁵ See *Windsor v. United States*, No. 1:10cv-8435, S.D.N.Y. See *Pederson v. OPM*, No. 3:10-cv-1750, D. Conn.

³⁶ *Justice Department Will No Longer Defend Constitutionality of Law Defining Marriage*, BNA DAILY TAX REP. (BNA) No. 37, at K-4 (Feb. 23, 2011), available at http://0-news.bna.com/jag.iii.com/dtln/display/batch_print_display.adp (last visited Mar. 7, 2011).

³⁷ See Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/print/PrintOut2.jsp>. See also Letter from Attorney General Eric H. Holder, Jr., to Speaker of the House John A. Boehner, Defense of Marriage Act (Feb. 23, 2011), available at [http://op.bna.com/gr.nsf/id/1lbe-8ecsa5\\$File/Holder%20Letter.pdf](http://op.bna.com/gr.nsf/id/1lbe-8ecsa5$File/Holder%20Letter.pdf). But see Speaker of the House John Boehner, Statement Regarding the Defense of Marriage Act (Mar. 9, 2011), available at <http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539> (last visited Mar. 22, 2011) (announcing that House Speaker John Boehner convened a Bipartisan Legal Advisory Group which directed the House General Counsel to initiate a legal defense of DOMA; under house rules, the advisory group has the authority to instruct the House General Counsel to take legal action on behalf of the House of Representatives).

³⁸ See Memorandum from Sec'y of Def. Robert M. Gates, for Under Sec'y of Def. (Pers. and Readiness) (Jan. 28, 2011) (on file with author). See also Memorandum from Under Sec'y of Def. Clifford L. Stanley, for Sec'y of the Military Dep'ts (Jan. 28, 2011), available at http://armypubs.army.mil/epubs/pdf/ad2011_01.pdf.

³⁹ See I.R.C. § 2505 (West 2011). See also *id.* § 2010(c).

⁴⁰ See *id.* § 2502 (establishing that the rate of federal gift tax will be the same rate as that against the federal estate tax under IRC § 2001(c)). See also *id.* § 2001(c).

⁴¹ See *id.* § 2505. See also *id.* § 2010(c).

⁴² See *id.* § 2505 (establishing that the unified credit against the federal gift tax will be the same as the unified credit against the federal estate tax). See *id.* § 2010(c)(3)(B) (establishing an inflation adjustment for the unified credit against the federal estate tax rounded to the nearest multiple of \$10,000).

⁴³ See *id.* § 2502 (West 2011) (establishing that the rate of federal gift tax will be the same rate as that against the federal estate tax under IRC § 2001(c)). See also *id.* § 2001(c) (West 2010).

⁴⁴ See Tax Relief Act, Pub. L. No. 111-312 §§ 101, 302, 124 Stat 3296.

⁴⁵ See *id.* § 101, 124 Stat 3296. See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 715 (explaining the possibility of a return to the 2001 lower exclusion amounts and higher tax rates if Congress does not act before 1 January 2013).

⁴⁶ See CCH 2010 Tax Legislation, *supra* note 11, ¶ 715.

⁴⁷ See Rev. Proc. 2010-40, § 3.21, 2010-46, I.R.B. 663 (establishing that the annual exclusion for gifts in 2011 is \$13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2011 is \$136,000). The annual exclusion amount is an amount indexed to inflation.

⁴⁸ I.R.C. § 1(g). See also 2011 U.S. MASTER TAX GUIDE ¶ 103 (CCH Editorial Staff Publication 2010) (explaining that although ordinarily, "a child's tax liability is computed in the same manner as any other taxpayer after taking into account the limits on the personal exemption and standard deduction, if applicable . . . certain children with investment income may be subject to tax on that income at the parent's top marginal rate if this results in a higher tax than would apply at the child's rate."). In short, the "kiddie tax" helps prevent the shifting of income from higher income taxpayers to lower income taxpayers for the purpose of reducing taxes. See *infra* note 69 and accompanying text (discussing the standard deduction for individuals who can be claimed by other taxpayers).

IV. Estate Tax Update

A. Taxpayers Dying in 2010

In addition to these federal gift tax changes, there are numerous federal estate tax changes contingent upon when a taxpayer passes away. If an individual died in 2010, the personal representative administering the estate can either choose the estate tax or elect for a carryover basis regime to apply.⁴⁹

First, if the decedent had left an extremely large gross estate in 2010, the personal representative may want to elect for a carryover basis regime to apply. With this election, no federal estate taxes would be due, even if the decedent's gross estate was worth billions of dollars. However, the beneficiaries would not receive a stepped-up basis (i.e., a basis equal to the asset's fair market value on the day of the transferor's death) in the assets they receive. Instead, the beneficiaries would receive a carryover basis and the personal representative would have the ability to allocate a limited step-up in basis by filing IRS Form 8939.

The amount of assets that could be stepped-up depends on whether the assets pass to a surviving spouse. If there was no surviving spouse, the personal representative could only allocate up to \$1.3 million dollars to step up the basis of designated assets.⁵⁰ However, if there was a surviving spouse, the personal representative could allocate up to \$3 million dollars to step up the basis of assets passing to the spouse, plus an additional \$1.3 million dollars to step up the basis of assets passing to anyone else, including additional assets passing to the same surviving spouse.⁵¹ For example, if the decedent devised real estate to his surviving spouse that he previously had acquired for \$1 million but had since increased in value to \$5.3 million at his death, his surviving spouse could take the asset with a stepped-up basis equal to the asset's date of value of \$5.3 million. After receiving the property, she could immediately sell the property for \$5.3 million and pay no income taxes on the gain. If the stepped-

⁴⁹ See Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296. Basis is defined as the "value assigned to a taxpayer's investment in property and used primarily for computing gain or loss from a transfer of the property. Basis is usu. the total cost of acquiring the asset, including the purchase price plus commissions and other related expenses, less depreciation and other adjustments." BLACK'S LAW DICTIONARY 171 (9th ed. 2009). Carryover basis is defined as the "recipient's basis in property transferred by gift or in trust, equaling the transferor's basis." See *id.* at 172. In contrast, stepped-up basis is defined as the "beneficiary's basis in property transferred by inheritance, equaling the fair market value of the property on the date of the decedent's death or on the alternate valuation date." See *id.* at 172. Alternate valuation date is defined as the "date six months after a decedent's death. Generally, the estate can elect to appraise the decedent's property either as of the date of the decedent's death or as of the alternate valuation date." See *id.* at 91.

⁵⁰ See I.R.C. § 1022 (West 2010). See Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296.

⁵¹ See I.R.C. § 1022 (West 2010). See Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296.

up basis had not been so allocated (e.g., the basis was allocated to other property) and the surviving spouse had sold the property with a carryover basis of only \$1 million, the surviving spouse would be liable for taxes on the \$4.3 million of gain.

Second, if the decedent left an estate of approximately \$5 million in 2010, the personal representative would probably choose for the estate tax to apply rather than electing for a carryover basis regime, because amounts under \$5 million would pass free of federal estate tax due to the \$5 million exemption.⁵² Sums over that amount would pass free of estate taxes if the unlimited marital deduction, charitable deduction, or other applicable deduction applied (Appendix F).⁵³ The amount of the gross estate over \$5 million and not entitled to a deduction would be subject to a 35% federal estate tax.⁵⁴

B. Taxpayers Dying After 2010

In comparison to individuals whose deaths occur in 2010, individuals who pass away after 31 December 2010 and leave behind an estate in 2011 or 2012 do not have a choice between an estate tax and a carryover basis regime. Instead, the estate will be subject to the federal estate tax with an exemption amount of \$5 million, subject to an inflation adjustment in 2012.⁵⁵ If an individual dies after 2010 but before 2013 and does not use his full exemption, his surviving spouse could use the remaining exemption, as well as her own exemption, if she dies after her spouse in 2011 or 2012 (Appendix F).⁵⁶ However, unless Congress acts, a person who passes away in 2013 will be subject to the

⁵² See I.R.C. § 2010(c)(3) (West 2010).

⁵³ See, e.g., I.R.C. §§ 2053 (providing a deduction for funeral and administrative expenses), 2054 (providing a deduction for casualty losses), 2055 (providing a deduction for charitable contributions), 2056 (providing a potential unlimited marital deduction for transfers to surviving spouses who are U.S. citizens), and 2058 (providing a deduction for state death taxes paid).

⁵⁴ See *id.* § 2001 (West 2010).

⁵⁵ See *id.* 2010(c)(3)(B) (West 2010).

⁵⁶ See *id.* § 2010(c)(4). See Tax Relief Act, Pub. L. No. 111-312, § 303, 124 Stat. 3296 (establishing that the surviving spouse's exclusion amount will be increased by the unused exclusion amount of the deceased spouse who dies after 2010 but before 2013, if the executor of the estate of the deceased spouse files a timely estate tax return and makes an election). "Thus presumably those who do not file an estate [tax] return because they are below the filing threshold . . . will not benefit from the portability rule [because they will not have made a timely election]." JANE G. GRAVELLE, CONG. RESEARCH SERV., R41203, ESTATE TAX OPTIONS (Dec. 23, 2010) available at http://0-news.bna.com/jag.iii.com/dtln/DTLNWB/split_display.adp?fedfid=18905621&vname=dtmot&wsn=499616500&searched=13646497&doctypeid=1&type=date&mode=doc&split=0&scm=DTLNWB&pg=1. It is important to note that at the time this article was published the IRS had neither released the IRS Form 8939 nor established the form's filing due date.

federal estate tax with only a one million dollar exemption.⁵⁷ Additionally, any unused exemption will not be able to be used by a surviving spouse.

C. Drafting Testamentary Documents in Light of the Tax Law Changes

Understanding the changing federal transfer tax system, legal assistance attorneys and estate planners should not conclude that estate planning is no longer necessary for smaller estates due to increased exemption amounts and the ease in carrying over unused exemption amounts in the short term. Specifically, estate planners should not rely on the ability to carry over the exemption amount of the first spouse to die, since the ability to do so is currently limited in its applicability. First, how can it be determined if the surviving spouse will pass away in 2011 or 2012? Second, how would one know that the executor of the estate of the first spouse to die would timely file an estate tax return and make the requisite election?⁵⁸ Third, if the second spouse dies after 2012, how would one know if the ability to carry over the exemption will be extended by Congress?

Since it is impossible to know the future, estate planners should draft their testamentary instruments to account for the numerous possibilities and to ensure the use of both spouses' exemptions. One way to accomplish this task is to draft testamentary instruments that establish trusts funded with self adjusting formula clauses. Specifically, attorneys can draft wills that set up both credit shelter and marital deduction trusts, such as qualified terminable interest property (QTIP) trusts. Military attorneys can accomplish this task using DL Wills.⁵⁹ Military attorneys that use DL Wills should ensure that they keep the software program updated by downloading the latest updates incorporating the latest changes in federal and state law.⁶⁰ Furthermore, to ensure that spouses are properly provided for, clients can acquire non-probate assets such as life insurance or pay on death accounts with spouses designated as beneficiaries.

⁵⁷ See Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010).

⁵⁸ See I.R.C. § 2010(c)(4). See Tax Relief Act, Pub. L. No. 111-312, § 303, 124 Stat 3296. See *supra* note 56 and its accompanying text.

⁵⁹ See Drafting Libraries (Wills Software), available at <https://www.draftinglib.com/> (last visited Feb. 24, 2011) (providing information on how to acquire the software and internet links to update the software).

⁶⁰ See *id.* For example, the most current edition of DL Wills at the time this article was published was DL Wills Version 10, supplemented as of 14 March 2011.

V. Generation Skipping Transfer Tax Update

In addition to these federal estate tax changes, there are numerous Generation Skipping Transfer (GST) tax changes taking place over the next few years. In 2010, although there is a federal GST tax, the tax rate is 0%.⁶¹ As a result, individuals who made large taxable transfers to skip persons such as grandchildren in 2010 successfully avoided the costly tax.

To contrast, in 2011, taxpayers will be able to transfer a total of five million dollars of taxable gifts during their lifetime or bequests at their death to skip persons and avoid the GST tax due to the \$5 million GST tax exemption.⁶² Sums over that amount and not subject to a deduction will be subject to a 35% tax rate in addition to any applicable federal gift or estate taxes.⁶³

Similarly, in 2012, the same rules for 2011 will apply, except that the five million dollar GST tax exemption may be adjusted for inflation.⁶⁴ However, unless Congress acts prior to the end of 2012, only a one million dollar GST tax exemption will apply in 2013.⁶⁵ Sums over that amount and not eligible for a deduction will be subject to a 55% tax rate in addition to any applicable federal gift and estate taxes.⁶⁶

⁶¹ Tax Relief Act, Pub. L. No. 111-312, § 302(c), 124 Stat. 3296 (establishing the 2010 GST tax rate as zero).

⁶² See I.R.C. § 2631 (West 2010) (establishing that the GST exemption amount will be the same as the federal estate tax exemption amount under IRC § 2010(c)). A skip person is defined as a "beneficiary who is more than one generation removed from the transferor and to whom assets are conveyed in a generation-skipping transfer." BLACK'S LAW DICTIONARY, *supra* note 49, at 1514.

⁶³ See *id.* § 2641 (establishing that the federal GST tax rate is equal to the maximum federal estate tax rate imposed by IRC § 2001 multiplied by the inclusion ratio with respect to the transfer). See *id.* § 2642(a) (defining the inclusion ratio as one minus the applicable fraction; defining the applicable fraction as a fraction with the numerator equal to the GST exemption allocated to the trust or property transferred, and the denominator equal to the value of the property transferred reduced by the sum of certain taxes and charitable deductions allowed with respect to such property). See also *id.* § 2001(c) (establishing that the maximum federal estate tax rate for 2010 through 2012 is 35%).

⁶⁴ See *id.* § 2631(c) (West 2010) (establishing that the federal GST exclusion amount will be equal to the federal estate tax exclusion amount). See *id.* § 2001(c)(3) (West 2010) (establishing that the federal estate tax exclusion amount will be subject to an inflation adjustment in 2012).

⁶⁵ See Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010).

⁶⁶ See Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010). See also I.R.C. § 2001(c) (establishing the maximum federal estate tax rate).

VI. Conclusion

Legal assistance attorneys and estate planners need to understand the tax law changes that occur from year to year so that they can properly advise their clients, prepare tax returns, and draft appropriate testamentary documents. An attorney's failure to understand these tax law changes and

properly advise their clients to plan and execute an appropriate estate plan can result in their clients needlessly paying significantly more federal gift, estate, and generation skipping transfer taxes. Similarly, if clients are not properly advised, they may pay more federal income taxes than their legal liability, and not take advantage of the government's intent, to stimulate the economy.⁶⁷

⁶⁷ See *Kicking the Can Down the Road*, THE ECONOMIST, *supra* note 1. However, the long-term cost of the short-term stimulus may be significant. See *id.*

Appendix A

The Marginal Tax Brackets for the 2010 Tax Year⁶⁸

1. Single Individuals (other than Surviving Spouses and Heads of Households):

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,375	0	+ 10% of amount over \$0
8,375	34,000	\$838	+ 15% of amount over \$8,375
34,000	82,400	\$4,681	+ 25% of amount over \$34,000
82,400	171,850	\$16,781	+ 28% of amount over \$82,400
171,850	373,650	\$41,827	+ 33% of amount over \$171,850
373,650		\$108,421	+ 35% of amount over \$373,650

2. Married Individuals Filing Joint Returns and Surviving Spouses:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	16,750	0	+ 10% of amount over \$0
16,750	68,000	\$1,675	+ 15% of amount over \$16,750
68,000	137,300	\$9,363	+ 25% of amount over \$68,000
137,300	209,250	\$26,688	+ 28% of amount over \$137,300
209,250	373,650	\$46,834	+ 33% of amount over \$209,250
373,650		\$101,086	+ 35% of amount over \$373,650

3. Heads of Households:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	11,950	0	+ 10% of amount over \$0
11,950	45,550	\$1,195	+ 15% of amount over \$11,950
45,550	117,650	\$6,235	+ 25% of amount over \$45,550
117,650	190,550	\$24,260	+ 28% of amount over \$117,650
190,550	373,650	\$44,672	+ 33% of amount over \$190,550
373,650		\$105,095	+ 35% of amount over \$373,650

4. Married Individuals Filing Separate Returns:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,375	0	+ 10% of amount over \$0
8,375	34,000	\$838	+ 15% of amount over \$8,375
34,000	68,650	\$4,681	+ 25% of amount over \$34,000
68,650	104,625	\$13,344	+ 28% of amount over \$68,650
104,625	186,825	\$23,417	+ 33% of amount over \$104,625
186,825		\$50,543	+ 35% of amount over \$186,825

⁶⁸ See Rev. Proc. 2009-50, 2009-45 I.R.B. 617, Rev. Proc. 2010-24, 2010-25 I.R.B. 764, and Rev. Proc. 2010-35, 2010-42 I.R.B. 438. See also I.R.C. § 1 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 2496).

5. Estates and Trusts:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	2,300	0	+ 15% of amount over \$0
2,300	5,350	\$345	+ 25% of amount over \$2,300
5,350	8,200	\$1,108	+ 28% of amount over \$5,350
8,200	11,200	\$1,906	+ 33% of amount over \$8,200
11,200		\$2,896	+ 35% of amount over \$11,200

Appendix B

2010 Standard Deductions⁶⁹

Filing Status	Standard Deduction	If Over Age 65 (Add Per Taxpayer)	If Blind (Add Per Taxpayer)
Married Filing Jointly or Qualifying Widow(er)	\$11,400	+ \$1,100	+ \$1,100
Head of Household	\$8,400	+ \$1,400	+ \$1,400
Single	\$5,700	+ \$1,400	+ \$1,400
Married Filing Separately	\$5,700	+ \$1,100	+ \$1,100

⁶⁹ See Rev Proc 2009-50, 2009-45 I.R.B. 617. See also I.R.C. § 63(c)(2). See generally PUB. 17, *supra* note 6, at 138–39 (providing a worksheet to calculate the 2010 standard deduction; explaining that individuals for whom an exemption can be claimed on another person’s tax return is generally limited to the greater of \$950, or the individual’s earned income + \$300 for a total value up to \$5,700, the 2010 regular standard deduction amount). See *supra* note 48 and accompanying text (discussing the “kiddie tax”).

Appendix C

2010 and 2011 Alternative Minimum Tax Rates⁷⁰

Filing Status	2010 AMT Exemption	2011 AMT Exemption
Married Filing Jointly and Surviving Spouses	\$72,450	\$74,450
Single and Head of Household	\$47,450	\$48,450
Married Filing Separately	\$36,225	\$37,225

⁷⁰ I.R.C. 55(d)(1) (West 2010).

Appendix D

Exclusions, Exemptions, and Gift / Estate / GST Tax Rates⁷¹

Year	Annual Gift Exclusion ⁷²	Estate / GST Exclusion ⁷³	Gift Tax Exclusion ⁷⁴	Highest Gift, Estate, and GST Tax Rate ⁷⁵
2002	\$11,000	\$1 Million	\$1 Million	50%
2003	\$11,000	\$1 Million	\$1 Million	49%
2004	\$11,000	\$1.5 Million	\$1 Million	48%
2005	\$11,000	\$1.5 Million	\$1 Million	47%
2006	\$12,000	\$2 Million	\$1 Million	46%
2007	\$12,000	\$2 Million	\$1 Million	45%
2008	\$12,000	\$2 Million	\$1 Million	45%
2009	\$13,000	\$3.5 Million	\$1 Million	45%
2010	\$13,000	\$5 Million ⁷⁶	\$5 Million	35% ⁷⁷ (but the GST Tax Rate is 0%) ⁷⁸
2011	\$13,000	\$5 Million	\$5 Million	35%
2012	To be Determined	\$5 Million + ⁷⁹	\$5 Million + ⁸⁰	35%
2013	To be Determined	\$1 Million	\$1 Million	55%

⁷¹ See JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-108-07, at 11, 14 (2007) available at www.jct.gov/x-108-07.pdf (last visited Mar. 17, 2011) (showing similar tables). See also CCH 2010 Tax Legislation, *supra* note 11, ¶705 (providing an in-depth explanation of the gift, estate, and GST taxes, as well as how the Tax Relief Act of 2010 impacts these taxes).

⁷² See § I.R.C. 2503 (Jan. 1, 1998) (establishing the \$10,000 annual exclusion with an inflation adjustment). See also Rev. Proc. 2010-40, § 3.21, 2010-46, I.R.B. 663 (establishing that the annual exclusion for gifts in 2011 is \$13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2011 is \$136,000).

⁷³ See I.R.C. §§ 2010 and 2631 (West 2010).

⁷⁴ See *id.* § 2505 (West 2011). See also I.R.C. § 2010 (West 2010).

⁷⁵ See I.R.C. §§ 2001 and 2502 (West 2011). See I.R.C. §§ 2601 and 2602 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296) (discussing the taxes imposed by the GST tax).

⁷⁶ See CCH 2010 Tax Legislation, *supra* note 11, ¶ 705 (explaining that the \$5 million GST tax exemption is available in 2010 even if the executor of a decedent in 2010 elects for the estate tax not to apply).

⁷⁷ But see Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296 (establishing that in 2010, the personal representative may elect a carryover basis regime to apply; if the administrator so elects, the estate tax would not be applicable, but the beneficiaries would only be allowed to take a limited step-up in basis depending on how the administrator chooses to allocate the \$1.3 million or up to \$4.3 million if the property is allocated to a surviving spouse).

⁷⁸ Tax Relief Act, Pub. L. No. 111-312, § 302(c), 124 Stat. 3296 (establishing the 2010 GST tax rate as zero). See also I.R.C. § 2641 (defining the applicable rate (i.e., the tax rate) with respect to the GST tax as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer).

⁷⁹ See I.R.C. § 2010(c)(3)(B) (West 2010) (establishing that in 2012 the exemption amount will be subject to an inflation adjustment rounded to the nearest \$10,000).

⁸⁰ See *id.* § 2505(a) (West 2011) (establishing that the federal gift tax exclusion amount will be equal to the federal estate tax exclusion amount). See *id.* § 2001(c)(3) (West 2010) (establishing that the federal estate tax exclusion amount will be subject to an inflation adjustment in 2012).

Appendix E

Federal Gift Tax Computation Examples

2009: Mr. Smith, who has previously never made any taxable gifts to anyone, gives his son \$688,000. Due to the \$13,000 annual exclusion and \$1 million federal gift tax exemption, no federal gift tax is due.

2010: Mr. Smith gives his son another \$3,338,000. Due to the \$13,000 annual exclusion and \$5 million federal gift tax exemption, no federal gift tax is due.

2011: Mr. Smith gives his son another \$1,113,000. Since the value of his lifetime gifts has exceeded both the \$13,000 annual exclusion and \$5 million federal gift tax exemption, federal gift tax is due at a 35% tax rate.

	2009	2010	2011
Gift	\$688,000	\$3,338,000	\$1,113,000
- Annual Exclusion	<u>- 13,000</u>	<u>-\$13,000</u>	<u>-\$13,000</u>
= Taxable Gift	= \$675,000	\$3,325,000	\$1,100,000
Taxable Gift	\$675,000	\$3,325,000	\$1,100,000
+ Prior Taxable Gifts	<u>- 0</u>	<u>+675,000</u>	<u>+4,000,000</u>
= Total Taxable Gifts	= \$675,000	=\$4,000,000	=5,100,000
Tax of Total Gifts under I.R.C. § 2502(a)	\$220,550 ⁸¹	\$1,330,800 ⁸²	\$1,765,800 ⁸³
- Tax from Gifts made in Prior Years	<u>- 0</u>	<u>- 0</u>	<u>- 0</u>
= Gift Tax in Current Year	= \$220,550	= \$1,330,800	= \$1,765,800
Gift Tax in Current Year	\$220,550	\$1,330,800	\$1,765,800
- Federal Gift Tax Credit (Unified Credit) ⁸⁴	<u>- 220,550</u>	<u>-1,330,800</u>	<u>-1,730,800</u>
= Gift Tax Owed	= \$0	= \$0	= \$35,000

⁸¹ See *id.* § 2502(a) (LEXIS 2009) (applying gift rates under I.R.C. § 2001(c) for gifts made *prior to* 31 December 2009). For example, tax on taxable gifts of \$675,000 = 155,800 + .37 x (675,000 – 500,000) = \$220,550.

⁸² See *id.* § 2502(a)(2) (West 2011) (applying gift rates for gifts made *after* 31 December 2009 *but before* 1 January 2013). For example, tax on taxable gifts of \$4,000,000 = 155,800 + .35 x (4,000,000 – 500,000) = \$1,330,800.

⁸³ See *id.* § 2502(a)(2) (West 2011) (applying gift rates for gifts made *after* 31 December 2009 *but before* 1 January 2013). For example, tax on taxable gifts of \$5,100,000 = 155,800 + .35 x (5,100,000 – 500,000) = \$1,765,800.

⁸⁴ See *id.* §§ 2505(a) and 2510(c) (West 2011) (setting the federal gift credit for gift taxes imposed by I.R.C., § 2501). For example, the maximum credit for lifetime taxable gifts = \$155,800 + .35 x (5,000,000 – 500,000) = \$1,730,800.

Appendix F

Outline for Calculating Federal Estate Tax⁸⁵

IRC Section Property Covered

- §2033 Property Owned at Death
- + §2035 Certain Transfers Within Three Years of Death
- + §2036 Transfers with Retained Life Estate or Retained Control
- + §2037 Transfers Taking Effect at Death
- + §2038 Revocable Transfers
- + §2039 Annuities and Employee Death Benefits
- + §2040 Property Passing by Rights of Survivorship
- + §2041 General Powers of Appointment
- + §2042 Life Insurance Proceeds (Where Decedent Held Incidents of Ownership)
- + §2043 Transfers for Partial Consideration
- + §2044 QTIP Transfers for which Marital Deduction was Previously Allowed
- = **Gross Estate (GE)**

Type of Deduction

- §2053 Deduction for Administrative and Funeral Expenses, as well as Debts
- §2054 Deduction for Casualty Losses
- §2055 Charitable Deduction
- §2056 Marital Deduction
- §2058 Deduction for State Death Taxes Paid (dying between 1 Jan. 2005– 31 Dec. 2012)
- = **Taxable Estate**

- + Adjusted Taxable Gifts Taxable Gifts Made After 1976 not Otherwise Includable in GE
- = **Tentative Estate Tax Base**

x §2001 Estate Tax Rate Schedule

- = **Tentative Estate Tax**

Type of Credit

- Gift Taxes Paid on Taxable Gifts Made After 1976
- §2010 Estate Tax Unified Credit
This may include the Deceased Spouse's Unused Exclusion Amount (for surviving spouses dying in 2011 and 2012)
- §2011 Credit for State Death Taxes (decedents dying after 31 Dec. 2012)
- §2012 Credit for pre-1977 Gift Taxes on Property Included in Gross Estate
- §2013 Credit for Taxes on Prior Transfers to Decedent (i.e., prior inclusion in a GE)
- §2014 Credit for Foreign Death Taxes
- = **Federal Estate Tax**

⁸⁵ See JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN, AND ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 869-870 (7th ed. 2005) (showing a similar outline). See also G. VICTOR HALLMAN & JERRY S. BLOOM, PERSONAL FINANCIAL PLANNING 472 (7th ed. 2003) (showing a more general outline).

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Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis

Major Samuel W. Kan*

[People] make a lot of pocketbook decisions every day that have an impact on the health of the economy, such as whether to take on a particular mortgage, how much to save and invest, whether to lease or buy a car, and how to manage credit cards. . . . The choices we make as individuals . . . are linked to the broader economy in ways that we don't always appreciate. However, one thing is certain—we make better decisions if we are better informed, and the whole economy benefits.¹

Failures don't plan to fail, they fail to plan—Plan and succeed.²

I. Introduction

In times of increasing financial uncertainty, servicemembers must consider the extent of their financial planning. Current economic conditions have transformed the way people plan for themselves and their families. While, prior to the financial crisis that began in 2007 the average American considered financial planning in terms of building wealth, modern times have forced Americans to focus on providing for their own subsistence and maintaining enough resources to outlast the next financial crisis.³ This article is the second installment of a 2006 military financial planning resource.⁴ While the first article addressed planning considerations for the average military member considering the purchase of a home, this article considers the unique issues facing servicemembers who have substantial assets, who want to provide for non-citizen dependents, and who desire to make unusual conveyances in their wills. These issues are addressed in a manner that is sensitive to the unique challenges of the contemporary financial operating environment.

To avoid financial ruin in times of increased financial risk, all servicemembers should have a process in place for evaluating their current and future needs, including the period after their death. At the simplest level, prudent financial planning is encapsulated in a four-step process. First, servicemembers should understand that estate planning is appropriate for almost everyone. Therefore, they should pursue legal measures, such as preparing a will and power of attorney. Second, servicemembers should become familiar with the tax system so that they can make informed tax decisions and minimize the negative consequences of uninformed legal and financial choices. Third, servicemembers should build and hold assets in a calculated manner to build wealth while accounting for risk. Fourth, servicemembers should make appropriate arrangements during life and at death to ensure that their designated beneficiaries reap the maximum rewards of their lifetime efforts. While most servicemembers will not have to complete the full four-step analysis,⁵ servicemembers should become familiar with broader tax concepts so that they can accomplish their lifelong objectives and minimize negative tax and estate planning consequences.

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¹ Frederic S. Mishkin, Governor, Fed. Reserve Sys., The Importance of Economic Education and Financial Literacy, Speech at the Third National Summit on Economic and Financial Literacy (Feb. 27, 2008), available at <http://www.federalreserve.gov/newsevents/speech/mishkin20080227a.htm> (last visited Jan. 28, 2010).

² John Alquist, Failures *Don't Plan to Fail, They Fail to Plan—Plan and Succeed*, EZINE ARTICLES, Sept. 13, 2007, <http://ezinearticles.com/?Failures-Dont-Plan-to-Fail,-They-Fail-To-Plan---Plan-And-Succeed&id=730076>.

³ See, e.g., Daniel K. Tarullo, Governor, Fed. Reserve Sys., In the Wake of the Crisis, Speech at the Phoenix Metropolitan Area Community Leader's Luncheon (Oct. 8, 2009), available at <http://www.federalreserve.gov/newsevents/speech/tarullo20091008a.htm> (last visited Feb. 1, 2010) (pointing out that the economy has been losing about a quarter of a million jobs every month and that uncertainty has made financial planning much more difficult).

⁴ Major Samuel W. Kan, *Setting Servicemembers Up for Success: Buying a Home, a Legal and Financial Analysis*, ARMY LAW., Nov. 2006, at 1.

⁵ See generally JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-108-07, at 1, 29 (2007), available at www.jct.gov/x-108-07.pdf (last visited Apr. 21, 2009) [hereinafter JOINT COMMITTEE] (explaining that in 2004, only 19,294 estate tax returns in the United States reported some tax liability; forecasting that only 3.42% of deaths will result in a taxable estate in 2016).

II. Step One: The Need for Servicemembers to use the Estate Planning Process

At present, it is not uncommon to encounter military members who have deployed five times since 11 September 2001.⁶ Many servicemembers have been exposed to combat and the dangers of combat environments during recent conflicts.⁷ This increased exposure to danger necessitates both financial and estate planning in the military more than civilian occupations. Getting one's affairs in order may involve no more than executing a will and creating a power of attorney. To this end, even if servicemembers have few assets and no dependents, preparing these basic documents can minimize costs on their survivors and make it easier to attain personal objectives. Effective planning, may, however, require far more in other circumstances, which the following sections explore in detail.

A. Powers of Attorney and Advanced Medical Directives (i.e., Living Wills)

Research has shown that the Iraq and Afghanistan campaigns are different from prior conflicts. Medical and technological advances have improved the quality of healthcare, increasing the chances that American servicemembers will survive even the most horrendous types of injuries.⁸ With improvised explosive devices—the “signature” weapon of modern campaigns—accounting for a majority of injuries sustained, servicemembers face complicated medical situations, such as vegetative states and severe neurological impairments. Dependents often must assume the roles of daytime care providers in the most basic activities, struggling with the financial consequences of these injuries.⁹ These situations, where round-the-clock care is often required, emphasize the need for serious planning considerations, not only for supplemental income but also for end-of-life decision-making.¹⁰

Servicemembers may create different types of powers of attorney for different purposes, such as handling financial affairs and making health care decisions. General powers of attorney enable individuals to empower agents to handle all of their legal and financial affairs. Although servicemembers should try to ensure that their powers of attorney comply with state law, federal law protects military powers of attorney even if they might otherwise fail under state law.¹¹ Unfortunately, many third parties may be unfamiliar with federal law and may initially refuse to honor military powers of attorney that do not comply with state law. Additionally, agents, particularly those acting under the broad authority of general powers of attorney, may abuse their powers or mismanage servicemembers' affairs. Because of these uncertainties, third parties, such as banks, may be reluctant to honor general powers of attorney and may insist on the use of their own forms, which often limit agents' authority to specific types of transactions. Since third parties are not forced to honor powers of attorney, refusals by third parties may create complications for servicemembers.

Special powers of attorney, which give agents specified, limited powers, such as the power to pay taxes, sell property, make gifts, sign leases, or access health records, can protect servicemembers from the risk of refusal. Like general powers of attorney, special powers of attorney offer servicemembers the convenience of allowing someone else to carry on their personal and legal affairs if they are unavailable due to temporary duty or deployments. Additionally, special powers of attorney are more likely to be honored by third parties because of their specificity. Nevertheless, some third parties, such as hospital records rooms, may still prefer the use of their own forms to ensure their own compliance with applicable laws.¹² To ensure third parties honor servicemembers' instructions, servicemembers should coordinate with potential third parties in advance to determine whether their powers of attorney will be honored. In some cases, the use of specific, third-party forms, such as bank or hospital forms, up front will facilitate certain transactions and forgo the need to go to a legal office to have a special power of attorney drafted.

⁶ Laura Savitsky et al., *Civilian Social Work: Serving the Military and Veteran Populations*, 54 *SOCIAL WORK* 327, 327 (2009).

⁷ Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 *NEW ENG. J. MED.* 13, 18 tbl. 2 (2004).

⁸ J.C. Van Lierop III, Note, *Post-9/11 Army Disability Decisions: Reinforcing Administrative Law Principles in Fitness and Disability Rating Determinations*, 61 *FLA. L. REV.* 639, 640 (2009) (observing that “a much higher percentage of troops survive battlefield injuries today compared to only a few decades ago”).

⁹ E.g., Clayton Taylor, *Wounded Vets Need Help*, *COURIER-J.* (Louisville, Ky.), Nov. 11, 2009, at 11A.

¹⁰ E.g., *id.* (describing how “[t]ypically, with such catastrophic injuries, a parent or spouse is forced to leave the workforce to care for their loved one”).

¹¹ See generally 10 U.S.C. § 1044b (2006) (giving legal effect to notarized military powers of attorney without regard to compliance with state law requirements as to form, substance, formality, or recording).

¹² See, e.g., Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. § 1320d (2006) (regulating the disclosure of health information and records); Standards for Privacy of Individually Identifiable Health Information, 65 *Fed. Reg.* 82, 462 (Westlaw 2010) (codified at 45 C.F.R. § 160–164 (same)).

Despite these complications, powers of attorney can be extremely useful, especially if tailored appropriately. For example, depending on state law and the servicemember's intent, powers of attorney can be durable or springing.¹³ Durable powers of attorney remain in effect even if a servicemember becomes disabled and loses the capacity to make decisions. To draft a durable power of attorney, attorneys should include language such as, that the powers granted continue to be effective even if the servicemember becomes disabled or incompetent.¹⁴ In this example, disabilities should be stated broadly enough to encompass both physical limitations as well as neurological or psychological conditions. By contrast, springing powers of attorney become effective upon the occurrence of a specified event, such as a servicemember becoming incapacitated. To draft a springing power of attorney, attorneys should include language such as, that the powers may only be used after certification that the servicemember has become disabled, incapacitated, or incompetent.¹⁵ Springing powers of attorney may be more complicated and time consuming for agents to operate under because the specified event (e.g., the occurrence of the servicemember's incapacity) may require proof in the form of a physician's written certification or other tangible evidence.

In addition to general and special powers of attorney for legal and financial affairs, a health care power of attorney allows a servicemember to designate an agent to make health care decisions in the event of the servicemember's incapacitation. For example, if a servicemember becomes disabled and cannot explain his current desires, a previously designated agent, acting under a health care power of attorney, can ensure the servicemember's wishes with regard to health care (e.g., to be admitted to a hospital, to employ a health care provider, or to consent to certain types of surgery) are carried out. Attorneys in the U.S. Army currently use a software program, DL Wills, to draft state specific health care powers of attorney, wills, and advanced medical directives.¹⁶

To ensure proper planning for "end-of-life medical treatment,"¹⁷ servicemembers should consider completing an advanced medical directive or "living will."¹⁸ In the absence of contrary guidance, the default medical option is to prolong the lives of those who are incapacitated. Servicemembers who do not wish to be kept on life support when they have no reasonable expectation of recovery can specify their wish to be disconnected from life support in an advanced medical directive. Military directives have special value because Federal law protects military advanced medical directives that might otherwise fail under state law.¹⁹

In any of the above examples, the few hours required to research and develop special healthcare plans can have lifelong benefits. The costs of ignorance in this area are simply far too great.

B. Wills

Similar to an advanced medical directive, a last will and testament can be used to make a servicemember's intent clear on a range of issues, from the disposition of property and the payment of taxes to the identification of the servicemember's state of domicile²⁰ and the appointment of guardians.²¹ By expressing their desires in a will, servicemembers can avoid the default intestacy laws of states, which may direct the disposal of property contrary to a servicemember's wishes. To facilitate the recognition of servicemembers' wills, federal law requires that courts give military testamentary instruments legal effect,

¹³ See generally ADMINISTRATIVE & CIVIL DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., 54TH GRADUATE COURSE DESKBOOK, ESTATE PLANNING ELECTIVE P-50 to P55 (2006) (listing each state code with commentary indicating whether a given state recognizes durable and springing/contingent powers of attorney) [hereinafter DESKBOOK 2006].

¹⁴ See, e.g., Drafting Libraries [Will Software], available at <http://www.draftinglib.com> (last visited Jan. 28, 2010) (providing appropriate language).

¹⁵ See e.g., *id.*

¹⁶ See *id.* (providing information on how to acquire DL Wills software and the latest supplement updates to the software).

¹⁷ Captain Thaddeus A. Hoffmeister, *The Growing Importance of Advanced Medical Directives*, 177 MIL. L. REV. 110, 111 (2003) (providing a detailed discussion of advanced medical directives and their interaction with powers of attorney for health care, which together may form a single legal instrument).

¹⁸ See generally *id.* at 110–132 (explaining the need of AMDs in light of Terri Schiavo).

¹⁹ See generally 10 U.S.C. § 1044c (2006) (giving legal effect to military advanced medical directives without regard to compliance with state law requirements as to form, substance, formality, or recording).

²⁰ Because the state law where servicemembers are domiciled can control the disposition of a will, servicemembers can "select" the applicable state law by establishing domicile in a state and declaring their domicile in a will. See *infra* notes 45–49 and accompanying text (discussing the concept of domicile and how to establish domicile).

²¹ See generally TAX MANAGEMENT INC., TAX MANAGEMENT; ESTATES, GIFTS, AND TRUSTS PORTFOLIOS; ESTATE PLANNING, at A-28 TO A35 (2006) [hereinafter T.M. ESTATE PLANNING] (discussing the purpose, basic structure, and components of a will).

regardless of state law requirements, as long as they are executed by a competent testator eligible for military legal assistance in the presence of a military legal assistance counsel and at least two disinterested witnesses.²²

III. Step Two: Understanding the Tax System and The Wisdom of Tax Planning

Executing powers of attorney, advanced medical directives, and wills represent an important first step in the estate planning process. However, in order to meet current and future financial needs, servicemembers should also engage in basic tax planning. Understanding the multilayered and multidimensional tax system is crucial to building wealth. Forgoing basic tax planning can result in unintended and significant depletions of a taxpayer's income and, ultimately, a decedent's estate.

The law treats servicemembers like every other individual taxpayer, except that servicemembers receive extra tax benefits and considerations. For example, unlike other taxpayers, servicemembers can receive a tax-free housing allowance that they can use to generate mortgage interest tax deductions on their homes.²³ Despite these benefits, servicemembers, like all other taxpayers, face income, gift, estate, and generation skipping transfer taxes at both state and federal levels. Similarly, servicemembers must pay property, sales, use, and other types of taxes at the state and local government levels.²⁴

A. Income Tax Considerations

1. Federal Income Tax

To reduce their federal income taxes, servicemembers must first understand the six steps required to calculate the Federal Income Tax.²⁵ First, the taxpayer must calculate gross income, which includes numerous items such as compensation for services (e.g., military and non-military pay), interest, rents, and pensions.²⁶ Second, the taxpayer must calculate adjusted gross income by deducting adjustments (i.e., "above the line deductions"), such as expenses of producing rents and certain individual retirement account (IRA) contributions. Third, the taxpayer must calculate taxable income by deducting personal exemptions and the greater of the standard deduction or itemized deductions. Fourth, the taxpayer must look up the tax due based on taxable income.²⁷ Fifth, from this amount, the taxpayer must calculate the net tax due (i.e., "total tax") by deducting applicable credits, such as the credit for child and dependent care, educational credits, the child tax credit, and, if applicable, by adding in other taxes such as the self-employment tax.²⁸ Sixth, the taxpayer must calculate "total payments," which include federal income taxes withheld and credits, such as the earned income credit²⁹ and the additional child tax credit. If the taxpayer's "total payments" exceed the "total tax," the taxpayer can file for a tax refund. In contrast, if the "total tax" exceeds the "total payments," the taxpayer will owe taxes.

Taxpayers should be familiar with how important characteristics of the federal income tax system may affect their own tax liability. First, a taxpayer's filing status can provide significant benefits. For example, in general, married taxpayers filing joint returns pay less taxes and can qualify for the earned income credit, while married taxpayers filing separate returns

²² See 10 U.S.C. § 1044d (giving legal effect to military testamentary instruments without regard to state law requirements on form, formality, or recording).

²³ See, e.g., Treas. Reg. 1.61-2(b) (establishing that military housing allowances received by servicemembers are excludable from gross income). See also, I.R.C. § 265(a)(6) (allowing a servicemember to deduct mortgage interest on a home even though the servicemember receives a military housing allowance that is excludable from gross income). See *infra* note 32 and accompanying text.

²⁴ See generally Retirement Living Information Ctr., Inc., Taxes by State, available at <http://www.retirementliving.com/RLtaxes.html> (last visited Feb. 16, 2009) [hereinafter Retirement Living] (explaining the numerous types of taxes and the rates applied by each state including property, sales, fuel, cigarette, and other types of taxes, and providing links to official state tax websites); CCH, 2010 U.S. STATE TAX HANDBOOK (2009) (providing a quick-reference guide for state tax issues); OFFICE OF THE JUDGE ADVOCATE GENERAL, CODE 16, STATE TAX GUIDE (Jan. 31, 2010), available at <http://www.jag.navy.mil/organization/documents/tax/2009StateTaxGuide.pdf> (last visited Feb. 18, 2010) (providing a very useful quick reference guide for state income tax issues).

²⁵ See, e.g., INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, FORM 1040 INSTRUCTIONS (2009) [hereinafter FORM 1040 INSTRUCTIONS]; G. VICTOR HALLMAN & JERRY S. ROSENBLUM, PERSONAL FINANCIAL PLANNING 257-259 (7th ed. 2003) (describing, in general, how to calculate the federal income tax).

²⁶ See I.R.C. § 61(a) (2009) (defining the numerous components of gross income).

²⁷ See Internal Revenue Serv., U.S. Dep't of the Treasury, Form 1040: U.S. Individual Income Tax Return (2009) [hereinafter FORM 1040].

²⁸ See *id.* (describing how to calculate the "total tax" or net tax due). See *infra* note 37.

²⁹ See I.R.C. § 32(a) (defining the earned income credit and establishing its limitations).

pay more taxes and cannot qualify for the earned income credit.³⁰ Second, as individuals earn more taxable income, the Government taxes that income at gradually increasing rates.³¹ Third, the Government taxes different types of income at different rates, while excluding certain types of income from taxation, such as military housing allowances³² and combat pay.³³ Fourth, while the Government allows deductions, exemptions, and adjustments to reduce taxable income, these benefits have limits.³⁴ For example, if a taxpayer had an adjusted gross income (AGI) of \$100,000 in 2009, the taxpayer's first \$7,500 of unreimbursed medical and dental expenses incurred would not be deductible due to a 7.5% AGI threshold limitation.³⁵ Fifth, while the Government allows credits to offset taxes due, all credits are not created equal.³⁶ For example, if the credit is "nonrefundable" like the child and dependent care credit³⁷ and the credit is larger than the tax owed, tax refunds will be limited to the amount of the tax owed.³⁸ In contrast, if the credit is "refundable," like the earned income credit, taxpayers will receive a full refund for the credit even though the credit exceeds the tax due.³⁹

Ultimately, servicemembers should understand that, despite the existence of programs designed to reduce taxes, the Federal Government created the Alternative Minimum Tax (AMT) to ensure taxpayers pay a minimum amount of tax, regardless of deductions, exemptions, and credits.⁴⁰ To this end, the more income a taxpayer makes, the greater the possibility that the taxpayer will be covered by the AMT.⁴¹

2. State Income Tax

As states increasingly face "devastating" deficits,⁴² the state taxing authorities have increasingly become concerned with residents who have neither filed nor paid state income tax.⁴³ On one hand, military members who are ordered to move to a

³⁰ See INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. 4012, VOLUNTEER RESOURCE GUIDE, at H-2 (2009) [hereinafter PUB. 4012] (providing a very useful quick resource guide to identify the Earned Income Credit's qualification requirements).

³¹ See e.g., FORM 1040 INSTRUCTIONS, *supra* note 25 (Establishing six individual tax brackets for 2009: 10%, 15%, 25%, 28%, 33%, and 35%). For example, in 2009, married taxpayers filing jointly would have a 15% marginal tax rate if they had taxable income between \$16,700 and \$67,900, but would have a 28% marginal tax rate if they had taxable income between \$137,050 and \$208,850. *Id.*

³² See, e.g., Treas. Reg. 1.61-2(b) (establishing that military housing allowances received by servicemembers are excludable from gross income). See also, I.R.C. § 265(a)(6) (allowing a servicemember to deduct mortgage interest on a home even though the servicemember receives a military housing allowance that is excludable from gross income). See also, Rev. Rul. 61-5 (establishing that military housing and cost-of-living allowances received by servicemembers while stationed outside the United States are excludable from gross income). See generally Kan, *supra* note 4, at 2 (discussing military housing allowances, their non-taxability, and the broader consequences of receiving such allowances).

³³ See, e.g., I.R.C. § 112 (excluding certain combat zone compensation from gross income). See also, Treas. Reg. § 1.112-1(f) (2010) (providing examples excluding certain combat zone compensation from gross income). See also U.S. DEP'T OF DEFENSE FINANCIAL MANAGEMENT REG. 7000.14-R, DOD, vol. 7A, ch. 44, at 15-16 (July 2009) [hereinafter DOD FMR] (discussing combat zone tax relief areas for personnel in direct support of a combat zone). *But see* I.R.C. §§ 32(c)(2)(B)(vi) & 219(f)(7) (allowing combat pay to be included in earned income for purposes of the earned income tax credit and for purposes of making deductible IRA contributions).

³⁴ See generally INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 26-38, 121-140, 141-208 (2009) [hereinafter PUB. 17] (explaining personal and dependent exemptions, available adjustments to income; and available deductions).

³⁵ See I.R.C. § 213(a).

³⁶ See generally PUB. 17, *supra* note 34, at 209-263 (explaining available credits).

³⁷ See I.R.C. § 21 (establishing a credit for taxpayers who incur dependent care service expenses to allow them to have gainful employment).

³⁸ See INTERNAL REVENUE SERV., PUB. 4491, VITA/TCE-2008 STUDENT TRAINING GUIDE 8-3 (2008) [hereinafter PUB. 4491 (2008)].

³⁹ See *id.* See *supra* note 29.

⁴⁰ See The President's Advisory Panel on Federal Tax Reform, *America Needs a Better Tax System: Statement by the Members of the President's Advisory Panel on Federal Tax Reform* (Apr. 13, 2005), available at <http://www.taxreformpanel.gov/04132005.pdf> (last visited Jan. 28, 2010). By 2015, the AMT is estimated to apply to approximately fifty-two million taxpayers. *Id.* *But see* THE PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, REPORT OF THE PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 5 (2005), available at http://www.taxreformpanel.gov/final-report/TaxReform_Intro.pdf (recommending the elimination of the AMT).

⁴¹ See generally PUB. 17, *supra* note 34, at 210 (explaining the 2009 income tax limits which may result in the need to pay the AMT). See generally GEORGE G. JONES, TOP FEDERAL TAX ISSUES FOR 2009 CPE COURSE 1.20-1.24 (2008) (discussing the history of the AMT, and the current AMT patch created by the Emergency Economic Stabilization Act of 2008). To determine whether the AMT applies, taxpayers should fill out the AMT Worksheet. See generally FORM 1040 INSTRUCTIONS, *supra* note 25, at 41. If applicable, taxpayers should fill out IRS form 6251 according to its instructions. See generally INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, FORM 6251 INSTRUCTIONS: ALTERNATIVE MINIMUM TAX—INDIVIDUALS (2009).

⁴² See, e.g., Ryan Kost, Oregon State Deficit Could Grow by \$1 Billion, available at <http://www.katu.com/news/local/37747104.html> (last visited Jan. 28, 2010).

⁴³ See e.g., Carr v. Dep't of Revenue, 2005 WL 3047252 (Or. Tax Nov. 4, 2005) (holding a servicemember liable for state income taxes in Oregon, even though the servicemember claimed to be from Nevada, a state without a state income tax).

new state may establish sufficient connections to the new state to justify the imposition of that state's income tax. On the other hand, military members who had a prior connection with a state before entering active duty service may appear to have neglected the payment of state tax, when, in fact, these servicemembers legally changed their state of domicile. In short, military members must be vigilant in understanding the meaning of domicile⁴⁴ and documenting the factors that prove their domicile. This section explores the fundamental distinctions.

a. Military Pay

In addition to paying federal income tax, many servicemembers must consider state income taxes, depending on their state of domicile.⁴⁵ A servicemember can establish a state as their domicile based on their physical presence in the state and their intent to make the state their permanent home.⁴⁶ Servicemembers may reap significant tax benefits based on the tax laws of their state of domicile because some states, like Texas, Nevada, and Florida, have no state income tax. In addition, other states exclude some or all military pay from income tax (see Appendix E).⁴⁷

To establish and maintain domicile, servicemembers must take specific steps to demonstrate their intent to make a state their permanent home rather than engaging in subterfuge to avoid paying state income tax.⁴⁸ First, after establishing physical presence in the state, servicemembers should visit their local finance office and fill out appropriate paperwork, such as the DD Form 2058, *State of Legal Residence Certificate*.⁴⁹ Second, servicemembers should establish as many ties as possible to the state, such as registering to vote, purchasing real property, and obtaining professional and driver's licenses within the state. Third, servicemembers should express their desire to make the state their permanent home by telling others, such as friends and family, about their intent.

Servicemembers must exercise caution due to the variations in state law⁵⁰ and level of aggressive enforcement by state revenue collection authorities. For example, in *Carr v. Dep't of Revenue*, the court held that a servicemember had no connection to Nevada, his claimed state of domicile, but had sufficient nexus⁵¹ to the State of Oregon even though he was not registered to vote in Oregon, had no Oregon driver's license, and had no intent to remain in Oregon once his military obligation was completed.⁵² As a result of his connections to Oregon, including the purchase of a home and registering vehicles in Oregon, and, more importantly, his lack of current connections to Nevada, the court held that the servicemember was liable for paying Oregon's state income tax on his military income.⁵³

⁴⁴ Domicile is defined as “[t]he place at which a person is physically present and that the person regards as home; a person’s true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.” BLACKS LAW DICTIONARY 501 (7th ed. 1999).

⁴⁵ See generally Retirement Living, *supra* note 24 (providing various resources relating to individual state requirements).

⁴⁶ See generally Major Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 MIL. L. REV. 49, 52 (2003) (explaining the requirements of establishing domicile).

⁴⁷ See *id.* at 102–09 (describing the extent to which each state includes or excludes military pay and military retirement pay). See also Major Richard W. Rousseau, *Update: Tax Benefits for Military Personnel in a Combat Zone or Qualified Hazardous Duty Area*, ARMY LAW., Dec. 1999, at 1, 15–29 (describing the extent to which each state taxes combat pay).

⁴⁸ See, e.g., *Texas v. Florida*, 306 U.S. 398 (1939) (discussing subterfuge situations).

⁴⁹ U.S. Dept. of Defense, DD Form 2058, *State of Legal Residence Certificate* (Feb. 1977), available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2058.pdf> (last visited on Jan. 28, 2010).

⁵⁰ See e.g., *In re Gatchell* (N.Y. Tax Comm. 1984), available at http://www.nysdta.org/STC/Personal/1984/a_10170.pdf (last visited Jan. 27, 2010) (establishing that a servicemember who lives in a military barracks does not have a permanent place of abode and thus is not exempt from New York state income tax).

⁵¹ Nexus is defined as “[a] connection or link” BLACKS LAW DICTIONARY, *supra* note 44, at 1066.

⁵² See, e.g., *Carr v. Dep't of Revenue*, 2005 WL 3047252 (Or. Tax Nov. 4, 2005) (holding a servicemember liable for state income taxes in Oregon, even though the servicemember claimed to be from Nevada, a state without a state income tax).

⁵³ See e.g., *id.* The court noted that if the taxpayers had “owned property in Nevada, had Nevada driver’s licenses, voted in Nevada, registered their vehicles in Nevada, or spoke convincingly of an intention to return to Nevada, their case would be stronger.” *Id.*

b. Non-Military (i.e., Civilian) Income

Although military income may not be subject to state income tax in certain states, non-military income of servicemembers and their spouses may be subject to state income tax based on the location where the income is earned. For example, if a servicemember owns rental property in a state that imposes state income tax, the servicemember may be obligated to file a non-resident income tax return for the state in which the rental income was earned. Similarly, if the servicemember receives compensation from a non-military job, the servicemember may need to file a state income tax return.

In a very important statutory development, civilian spouses who meet the domicile test of physical presence and the intent to make a state their permanent home can now receive protections similar to servicemembers due to the Military Spouses Residency Relief Act (MSRRA).⁵⁴ As a result of this Act, as of 2009, if military members and their spouses each separately establish and maintain domicile in the same state, they can keep this domicile even though they later move together upon the receipt of military orders to a new state.

For example, a servicemember and a civilian spouse may establish Texas as their domicile if both are physically present in Texas, express the intent to make Texas their domicile, and establish their own contacts to Texas, such as purchasing real property, voting, and becoming licensed in Texas. If the servicemember receives orders to move to Virginia and the spouse moves with the servicemember solely to be together, both can maintain Texas as their domicile. If the servicemember's spouse gets a civilian job in Virginia, the spouse can assert the MSRRA claiming Texas as the state where the spouse established and maintains domicile. By asserting and providing appropriate substantiation to this claim, the spouse's civilian pay would not be subject to taxation by Virginia. This result may seem unfair because the civilian pay of a servicemember who obtains civilian employment in Virginia would be subject to Virginia's income tax.

Servicemembers and their spouses should exercise caution because the Act may be interpreted differently by each state as the states react to the new federal legislation. Servicemembers and their spouses should be prepared to provide to their employers, as well as to the state taxing authorities, substantial evidence that they properly established and currently maintain a specific state as their domicile. If the claimed state of domicile has a state income tax, servicemembers and their spouses should ensure that their employers properly withhold the appropriate state's income tax.

B. The "Unified" Federal Transfer Tax System and "The Unified Credit"

In addition to taxing income, the Government designed a "unified" federal transfer tax system which incorporates the gift tax, the estate tax, and the generation skipping transfer tax to tax the transfer of wealth from one generation to the next.⁵⁵ The unified system targets individuals who fall into higher tax brackets and who possess more substantial assets. The gift tax covers lifetime transfers by gift; the estate tax applies to transfers at death; and the generation skipping transfer tax addresses "transfers designed to skip generations."⁵⁶ Career military members who have invested over time, built successful businesses during their service, or who have, themselves, inherited sizeable estates may be found throughout the active military.⁵⁷ They face unique concerns that are not normally capable of being addressed during the course of a brief meeting with an attorney, such as what occurs at a Soldier Readiness Processing (SRP) station preparing servicemembers to deploy to combat zones.

Although the Government designed a "unified credit" to allow for the tax-free transfer of a limited amount of wealth, the amount of the unified credit has diverged over time due to changes in tax law (see Appendix A). For example, in 2002, the

⁵⁴ 50 App. U.S.C. § 571. The Act, which amended the Servicemembers Civil Relief Act, states:

A spouse of a servicemembers shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse. . . . Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouses is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.

Id.

⁵⁵ See HALLMAN & ROSENBLOOM, *supra* note 25, at 462.

⁵⁶ *Id.*

⁵⁷ *E.g.*, Editorial, *Augusta Soldier Wins \$1 Million in Lottery*, FLA. TIMES-UNION (Jacksonville), June 1, 2005, at B-4 (describing the lottery winnings of a Fort Gordon sergeant first class who chose to remain in the Army).

unified credit allowed a transferor to transfer up to \$1 million tax free through lifetime taxable gifts, bequests at death, or a combination thereof. Specifically, if a transferor previously gave \$400,000 of taxable lifetime gifts, he would only be able to transfer an additional \$600,000 tax free through bequests at his death in 2002. While the transfers would be “taxable,” the unified credit would prevent any tax from being payable. While the gift tax exclusion amount has remained and will continue to remain at \$1 million, the applicable exclusion amount for the federal estate and generation skipping transfer tax has increased gradually up to \$3.5 million in 2009. As a result, a transferor could have given \$1 million of lifetime taxable gifts tax free and still transferred an additional \$2.5 million tax free through bequests at his death in 2009.

However, in 2010, the federal estate and generation skipping transfer taxes have been temporarily repealed, with a reinstatement date of 2011.⁵⁸ In 2011, the top marginal tax rate for transfers will be 55% and the “unified credit” will shelter \$1 million in transfers. Although numerous bills⁵⁹ are pending in Congress to change the status quo, no bill has been successful as of the date of this article.⁶⁰

C. The Gift Tax

1. The Federal Gift Tax

In the terminology of tax law, a “gift” is merely a voluntary lifetime transfer of property by one person to another, where the value of the property transferred exceeds any consideration received.⁶¹ Unlike the estate and generation skipping transfer taxes that may disappear for one year in 2010, the gift tax will remain in place for certain lifetime transfers to others.⁶² Fortunately, the Government excludes some transfers from taxation under the gift tax, such as medical payments made directly to medical service providers and tuition payments paid directly to an educational organization.⁶³ Other transfers meeting the criteria of “non-taxable gifts” are excluded from taxation,⁶⁴ as are small monetary gifts meeting the threshold for annual de minimis gift amounts.⁶⁵ Some gifts exceeding the de minimis threshold may still be transferred as tax-free lifetime gifts as a result of the unified credit.⁶⁶ Finally, the Government allows for an unlimited marital deduction for lifetime gifts between U.S. citizen spouses.⁶⁷ Servicemembers should study the factors that distinguish between taxable and non-taxable gifts under the Federal gift tax as a hallmark of effective financial planning.

To calculate the gift tax due during a particular year, a servicemember must account for the total amount of lifetime gifts made in previous years. First, the servicemember must add the taxable gifts made in the current year with the gifts made in all previous years; then, the servicemember must calculate the tax on the sum of the lifetime gifts. Next, the servicemember must subtract the gift tax paid in prior years from the previously calculated tax on the total of the lifetime gifts; the remainder

⁵⁸ See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat 38 (codified as amended in 26 U.S.C.). The Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001 sunsets on 31 Dec. 2010, restoring the tax status quo as of 2001.

⁵⁹ For the text of specific acts, visit The Library of Congress: Thomas, available at <http://www.thomas.gov> (last visited Jan. 29, 2010) (search for S. 722, H.R. 2023, H.R. 436, H.R. 498, and H.R. 4154 in the textbox marked “Search Bill Summary & Status”).

⁶⁰ See CCH, CCH Tax Briefing: Federal Estate Tax (H.R. 4154), Estate Tax Extension Passes House, Fails in Senate; Carryover Basis Effective January 1, 2010, available at <http://tax.cchgroup.com/legislation/HouseEstateTax.pdf> (last visited Jan. 29, 2010) (providing an information paper on the current status of the bill). “On December 3 [2009], the House approved the Permanent Estate Tax Relief for Families, Farmers and Small Businesses Bill of 2009 (H.R. 4154), which would permanently extend the top federal estate tax rate of 45 percent with a \$3.5 million exclusion. . . . [However,] the bill failed to win support in the Senate, as did a temporary stop-gap measure to extend the 2009 estate tax regime through March 2010.” *Id.* See generally CCH, available at <http://tax.cchgroup.com/news/legislation/default.asp> (last visited Jan. 29, 2010) (providing the latest legislative tax updates).

⁶¹ See generally CCH, 2010 U.S. MASTER ESTATE AND GIFT TAX GUIDE 353 (2009). An inter vivos gift is defined as, “A gift made during the donor’s lifetime and delivered with the intention of irrevocably surrendering control over the property.” BLACKS LAW DICTIONARY, *supra* note 44, at 697.

⁶² See generally I.R.C. §§ 2501 to 2524 (covering all applicable code sections of the federal gift tax). See generally RICHARD B. STEPHENS ET AL., FEDERAL ESTATE & GIFT TAXATION 9–5 (8th ed. 2002) (discussing the imposition of the gift tax).

⁶³ See I.R.C. § 2503(e) (excluding qualified transfers for tuition and medical expenses paid on behalf of an individual directly to an educational organization or medical service provider).

⁶⁴ See, e.g., *id.* § 2501(a)(4) (excluding transfers to political organizations for gift tax purposes). See generally STEPHENS, *supra* note 62, at 9-7, 9-43 to 9-44 (discussing transfers to political organizations; explaining transfers for medical and tuition expenses).

⁶⁵ See I.R.C. § 2503(b). See generally STEPHENS, *supra* note 62, at 9-14 (discussing inflation adjustments). In 2010, the annual exclusion equals \$13,000. See Rev. Proc. 2009-50 § 2523 (see cost of living adjustments for 2010, Section 3.30(2)).

⁶⁶ See I.R.C. § 2505(a). In 2010, due to the federal gift tax (“unified”) credit, \$1 million of lifetime taxable gifts could be made before incurring gift tax.

⁶⁷ See *id.* § 2523. However, the unlimited marital deduction does not apply to gifts to foreign spouses. In 2010, taxpayers could transfer up to \$134,000 tax free to a noncitizen spouse. See Rev. Proc. 2009-50 § 2523 (see cost of living adjustments for 2010, Section 3.30(2)).

will be the amount of gift tax due in the current year. Finally, the servicemember must subtract the unified gift tax credit from the gift tax due to calculate any gift tax owed. For example, independently wealthy Colonel Brad Smith gave his niece a \$688,000 home in 2009 (see Appendix B) and later gives his nephew a \$500,000 vacation condominium in 2010. Since the annual exclusion covering *deminimis* gifts was \$13,000 in 2009 and 2010, the taxable value of the gifts in 2009 and 2010 were \$675,000 and \$487,000, respectively. When applying the gift tax law to this scenario, Colonel Smith should add \$487,000 to \$675,000 for a total of \$1,162,000. Assuming he gave no other taxable gifts previously, he would then calculate the gift tax due on the \$1,162,000. The unified credit would exclude \$1 million of the transfer and expose the remaining \$162,000 to gift tax. At a gift tax rate of 35%, Colonel Smith would be liable for \$56,700 (i.e., .35 x \$162,000) in gift tax.

Although taxpayers making taxable gifts must pay the gift taxes owed, they may still enjoy certain tangible benefits. By making taxable gifts, donors can remove the gifted property from their gross estates at a relatively low cost compared to incurring estate taxes, because the gift tax is tax exclusive while the estate tax is tax inclusive (i.e., unlike the gift tax, the estate tax taxes the amount of money used to pay the tax). For example, assume a taxpayer in the 45% gift tax bracket who had already used the unified credit and annual exclusion, made a gift of \$1,000,000 of Microsoft stock to his son in 2009. He would incur a \$450,000 gift tax for a total transfer cost of \$1,450,000.⁶⁸ In addition, because the taxpayer made a completed transfer for gift tax purposes, neither the taxpayer nor his estate would be subsequently liable for any future taxes on the property and the property's post-transfer appreciation. If, after the transfer, the stock's value increased by \$100,000 and the son sold the stock, the son (i.e., not the father) would be liable for paying tax on that gain.

As a result, for those planning to transfer property and deplete their estates, taxpayers should consider giving others items they expect will appreciate over time. Meanwhile, recipients of these gifts should understand that they will take the donor's basis in the assets and potentially pay greater taxes upon sale of the assets.⁶⁹ In addition, special provisions account for taxpayers who die within three years of paying gift taxes. For such taxpayers, the Government includes gift taxes paid in the taxpayer's gross estate.⁷⁰ As the next section explains, these taxes may only be the beginning. Specifically, once a servicemember has considered the federal gift tax, the financial analysis may continue forward to the state gift tax.

2. The State Gift Tax

Depending on a servicemember's domicile, state governments may also apply a state gift tax. For example, while most states do not impose a gift tax, states like Connecticut and Tennessee tax gift transfers.⁷¹ The extent to which state gift statutes resemble the federal gift tax vary greatly and hinge on issues such as lifetime exemption amounts and annual exclusions (see Appendix F).⁷² For instance, Connecticut imposes a gift tax on the aggregated amount of gifts over \$3.5 million made after 1 January 2010, at graduated tax rates as high as 12%.⁷³ In comparison, Tennessee applies gift rates and exemption amounts depending on the status of donees.⁷⁴ Due to the variance in state gift tax statutes, servicemembers must pay close attention to their state's specific gift tax laws in addition to Federal ones. Furthermore, lifetime gift taxes at either level should not be confused with estate taxes, which concern themselves with taxing the transfer of wealth at death.

⁶⁸ See I.R.C. § 2001(c) (establishing the maximum gift and estate tax brackets in 2009 as 45%). In contrast, a bequest of only \$797,500 would be possible with estate assets worth \$1,450,000 under the same circumstances as this gift example. See *infra* note 76 and its accompanying text.

⁶⁹ See I.R.C. § 1015(a) (establishing that the gift's basis in the hands of the recipient is equal to the donor's basis). Taxpayers should contrast the treatment of gifts with the treatment of bequests regarding basis. Taxpayers acquiring property from a decedent dying before 31 December 2009 received a basis equal to the fair market value at the time of death (i.e., a "stepped up basis"). See *id.* § 1014(a)(1). But see *id.* §§ 1014(f) and 1022 (limiting the step up in basis for property acquired from a decedent dying after 31 December 2009, to an aggregate amount of \$1.3 million, with an additional \$3 million dollars if the qualified spousal property is acquired by a surviving spouse).

⁷⁰ See *id.* § 2035. Gross estate is defined as "The total value of a decedent's property without any deductions." BLACKS LAW DICTIONARY, *supra* note 44, at 568. See *supra* notes 77, 84–92, and accompanying text.

⁷¹ See generally 4 RESEARCH INSTITUTE OF AMERICA, INC., ESTATE PLANNING & TAXATION COORDINATOR: FEDERAL ESTATE & GIFT TAXATION 53,001–53,004 (2008) [hereinafter TAXATION COORDINATOR] (discussing the implications of state gift taxation; pointing out that only one-third of the states have enacted gift tax statutes; elaborating that many of these states such as North and South Carolina no longer tax current gift transfers).

⁷² See *id.* at 53,003.

⁷³ See *id.* at 56,014–56,015.

⁷⁴ See *id.* at 56,112.

D. The Estate Tax

1. The Federal Estate Tax

Even though most servicemembers do not have the luxury of being able to make large gifts of property during their lifetime, most servicemembers should engage in some degree of estate-planning to maximize the property they can pass at their death. Even with no prior planning, estate taxes may be at issue if property is ultimately inherited by one other than the Government. In short, in addition to facing the income and gift taxes, servicemembers may also be subject to the federal estate tax upon their death, unless they die in 2010.⁷⁵ While the gift tax applies to property transfers during one's life, estate tax applies to transfers of property at one's death. When compared to the federal gift tax, the federal estate tax can be costlier. Specifically, the estate tax is tax inclusive like the income tax, because the amounts used to pay the tax are themselves subject to tax. Assuming the unified credit and annual exclusion did not apply, if a servicemember in the 45% estate tax bracket died in 2009 attempting to leave \$1,450,000 to his son, he would incur an estate tax of \$652,500 (i.e., 0.45 x \$1,450,000), leaving only \$797,500 (i.e., \$1,450,000 – \$652,500) of the original amount to his son.⁷⁶ Had the servicemember transferred these funds to his son as a gift during his lifetime, the gift tax would have been \$450,000, ultimately providing his son with \$1,000,000. Simply by making a lifetime gift, the servicemember would have been able to make his son \$202,500 richer, demonstrating the value of proper advance planning.

To further minimize federal estate taxes, servicemembers should understand how to calculate the estate tax due in a comprehensive manner consisting of five steps (see Appendix C). By using fair market value principles, the taxpayer first identifies and determines the value of all the property in the decedent's gross estate, including the value of all the property owned or controlled by the decedent at death.⁷⁷ Second, the taxpayer determines the decedent's taxable estate by subtracting applicable deductions—such as reasonable funeral expenses,⁷⁸ state death taxes paid,⁷⁹ charitable deductions,⁸⁰ and the marital deduction—from the decedent's gross estate.⁸¹ Third, the taxpayer determines the tentative estate tax base by adding adjusted taxable gifts made during the decedent's lifetime to the decedent's taxable estate. Fourth, the taxpayer calculates the tentative estate tax by multiplying the tentative estate tax base by the applicable estate tax rate.⁸² Fifth, the taxpayer calculates the federal estate tax by subtracting from the tentative tax applicable credits, such as the unified credit, and gift taxes paid on taxable gifts.⁸³

Even with these five steps in mind, determining the estate tax is not as simple as it may appear; the property included in a decedent's gross estate is far from intuitive. As just one example, the gross estate includes any illegal property in which the decedent had an interest.⁸⁴ As another example, the gross estate also includes property that is not physically owned by the decedent but still under his "dominion and control"⁸⁵ such as an irrevocable transfer to a trust in which the decedent retained the power to alter the time when the trust's beneficiary will receive the interest. This property would, no doubt, remain in the decedent's gross estate for tax purposes.⁸⁶ Even an irrevocable transfer to a trust with the power to add or change the beneficiaries would fall under the decedent's gross estate based on the same principle.⁸⁷

⁷⁵ See I.R.C. §§ 2001–2210 (2009) (covering all applications code sections of the federal estate tax). See generally STEPHENS, *supra* note 62, at 2-2 (discussing the federal estate tax and the method of computation). There is currently no federal estate tax in 2010. However, legislation in Congress is currently pending, and if the legislation passes, a federal estate tax may apply to 2010 retroactively. See *supra* notes 59 and 60 and accompanying text.

⁷⁶ See I.R.C. §§ 2001-2210. Taxpayers should compare the consequences of the gift tax. See *supra* note 68 and its accompanying text.

⁷⁷ See *id.* §§ 2001, 2031, and 2033.

⁷⁸ See *id.* § 2053.

⁷⁹ See *id.* § 2038.

⁸⁰ See *id.* § 2055.

⁸¹ See *id.* § 2056.

⁸² See *id.* § 2001.

⁸³ See *id.* § 2010.

⁸⁴ See *id.* §§ 2033. For example, illegal drugs would be includable in the gross estate even though no deduction would be allowed for its confiscation.

⁸⁵ See *id.* §§ 2035–2038.

⁸⁶ See *id.* § 2038.

⁸⁷ See *id.*

The gross estate also includes specific types of property the decedent may have irrevocably transferred with no remaining powers exercised if the property was transferred within three years of the decedent's death,⁸⁸ such as a servicemember's transfer of a life insurance policy to another less than three years prior to his death.⁸⁹ Similarly, if the servicemember makes a taxable gift, pays the gift tax, and then dies within three years, the gift tax paid (but not the value of the gift itself) reverts back into the gross estate for estate tax purposes.⁹⁰ Yet another consideration revealing the complexity of these issues involves accounts created by the servicemember under the provisions of the Uniform Gifts to Minors Act (UGMA) or Uniform Transfers to Minors Act (UTMA).⁹¹ The death of a servicemember serving as a trustee for such accounts before the minor beneficiary reaches the age of majority also results in reversion of the funds into the decedent's gross estate.⁹²

Even when estate taxes rise due to the inclusion of property in the gross estate, beneficiaries can still realize positive consequences relating to tax basis, such as a stepped up basis in the property received.⁹³ This higher basis can reduce income taxes due when the beneficiary later sells the property.

2. State Death Taxation

In addition to the federal estate tax, the District of Columbia and many states, such as New York, impose a state estate tax. Like state gift taxes, state law varies greatly with regard to state estate taxes. For example, New York imposes a state estate tax equal to the maximum 1998 federal estate tax credit⁹⁴ while the District of Columbia has a credit of \$385,800 for individuals who died on or after 1 January 2003, allowing for the tax-free transfer of estate assets worth \$1 million.⁹⁵ Complicating the analysis, the Internal Revenue Code temporarily replaced the previous federal estate tax credit for state death taxes with a deduction⁹⁶ "for death taxes actually paid to any state . . . with respect to property included in the decedent's gross estate."⁹⁷

Some states also impose inheritance taxes, which are not necessarily the same as estate taxes.⁹⁸ In general, while an estate tax covers the "transfer of property by a decedent," an inheritance tax usually applies to "the taking of property by a beneficiary."⁹⁹ As an example of the great variances in state tax law, states such as Texas and Maryland impose different types of inheritance taxes (see Appendix G). Texas imposes an inheritance tax based entirely upon the federal estate tax and thus is closer to an estate tax than an inheritance tax.¹⁰⁰ In addition, Texas treats residents, non-residents, and aliens

⁸⁸ See *id.* § 203.

⁸⁹ See *id.* §§ 2035 & 2042.

⁹⁰ See *id.* § 2035. The gift tax paid includes all gift taxes paid even if the gift was a split gift where the decedent paid the gift taxes.

⁹¹ See T.M. ESTATE PLANNING, *supra* note 21, at A-94 (explaining that UTMA and UGMA accounts are custodial accounts that can be used for the support, maintenance, education, and benefit of the minor; explains that the minor takes legal ownership of the property once the minor reaches the age of legal capacity). See also ADMINISTRATIVE & CIVIL DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., 57TH GRADUATE COURSE DESKBOOK, ESTATE PLANNING ELECTIVE L-51 (2009) (discussing UTMA and UGMA accounts) [hereinafter DESKBOOK 2009].

⁹² See I.R.C. § 2035.

⁹³ See *id.* § 1014(a)(1) (establishing that taxpayers acquiring property from a decedent dying before 31 December 2009, received a basis equal to the fair market value at the time of death (i.e., a "stepped up basis"). But see *id.* §§ 1014(f) & 1022 (limiting the step up in basis for property acquired from a decedent dying after 31 December 2009, to an aggregate amount of \$1.3 million, with an additional \$3 million dollars if the qualified spousal property is acquired by a surviving spouse).

⁹⁴ See N.Y. TAX LAW § 952(a) (McKinney 2009). See generally TAXATION COORDINATOR, *supra* note 74, at 56,088 (explaining the New York estate tax). Basically, New York's state estate tax is a "fixed" "soak up" tax meant to reap the maximum revenue benefits from the federal law, as of 1998. While some states peg their statutes to a fixed time (i.e., "fixed" systems), other states have "floating" systems which automatically adopt federal law as federal law changes over time. While having a floating system may be easier for states to administer, states take the risk of making federal law state law without the advance opportunity to make adjustments. See *id.* See also MARTIN NISSENBAUM ET AL., ERNST & YOUNG'S PERSONAL FINANCIAL PLANNING GUIDE 339 (5th ed. 2004) (distinguishing states that have "soak-up" type taxes from states that have "decoupled" from the federal estate tax system).

⁹⁵ See D.C. CODE ANN. §§ 47-3701(4)(C)(ii) & 47-3702 (LexisNexis 2009). See generally TAXATION COORDINATOR, *supra* note 71, at 56,019.

⁹⁶ See I.R.C. § 2058 (providing a deduction for estates of decedents dying before 31 December 2010). See JOINT COMMITTEE, *supra* note 5, at 17 (explaining that the state death tax credit will be reinstated for decedents dying after 31 December 2010).

⁹⁷ STEPHENS, *supra* note 62, at 5-261.

⁹⁸ See TAXATION COORDINATOR, *supra* note 71, at 52,001 (discussing typical patterns of state death taxation). See generally Retirement Living, *supra* note 24 (providing numerous links and resources).

⁹⁹ TAXATION COORDINATOR, *supra* note 71, at 52,001.

¹⁰⁰ See, e.g., *id.* at 56,123; TEX. TAX CODE ANN. §§ 211.051–211.053 (Vernon 2009) (discussing the tax treatment of residents, nonresidents, and aliens).

differently for tax purposes.¹⁰¹ In contrast, Maryland “imposes an inheritance tax on the privilege of receiving property that passes from a decedent that has a taxable situs in Maryland” and the person who distributes the property is liable for the tax.¹⁰²

All of these differences, especially the different federal and state exclusion amounts, may force some taxpayers to either forgo their full federal exclusion amount or to pay state estate taxes. Due to the complexities of local law, servicemembers should seek out legal counsel familiar with the peculiarities of their state’s specific laws.¹⁰³ For servicemembers, this necessary task may be extremely difficult, if not impossible, due to the obstacles of assignments, deployments, or temporary duty to remote areas where meetings with legal assistance attorneys are an uncommon luxury.

E. The Daunting Nature of the Generation Skipping Transfer Tax

1. The Federal Generation Skipping Transfer Tax

The Internal Revenue Code anticipates that tax savvy earners will inevitably search for loopholes that allow them to convey property in a tax evading manner. To address the efforts of the wealthy to avoid the imposition of successive estate taxes or reward grandchildren with expensive new cars as college graduation gifts, the Code instituted the generation skipping transfer (GST) tax, with the objective of assessing transfer taxes at each generation of donee.¹⁰⁴ Four common scenarios may trigger the GST tax: (1) the giving of direct gifts to grandchildren or great grandchildren (i.e., inter vivos direct skips);¹⁰⁵ (2) the existence of bequests to grandchildren made in a will (i.e., testamentary direct skips); (3) the creation of testamentary trusts for children and grandchildren in which the trustee retains the power to make distributions to grandchildren (i.e., taxable distributions);¹⁰⁶ and (4) the existence of testamentary trusts for children and grandchildren when the children subsequently die leaving only “skip person”¹⁰⁷ grandchildren as beneficiaries (i.e., taxable terminations).¹⁰⁸ In each of these situations, donors may inadvertently trigger the heavy-handed GST tax, which is limited only by the federal GST exemption,¹⁰⁹ annual exclusions, and gift-splitting measures. Unaffected by the GST tax, however, are transfers directly to educational and medical service providers for tuition and health care, which donors may use freely much like they do with the gift tax.¹¹⁰ Donors have great incentive to give gifts crossing numerous generations in 2010, as the Internal Revenue Code exempts this year from GST tax coverage.

Where taxes must be paid and the GST exemption and annual exclusions do not apply, the federal transfer tax implications can be quite severe. The first common scenario that may trigger the GST tax is called the “the inter vivos direct skip” scenario, in which a servicemember in the 50% gift, estate, and GST tax brackets plans to transfer \$100,000 to his grandchild.¹¹¹ As a result of the GST tax, the donor would actually have to expend \$225,000 to effectuate the \$100,000 transfer, at the loss of a whopping \$125,000. Three steps will determine the funds needed to transfer \$100,000 under the

¹⁰¹ See, e.g., TAXATION COORDINATOR, *supra* note 71, at 56,123; TEX. TAX CODE ANN. §§ 211.051–211.053 (Vernon 2009) (discussing the tax treatment of residents, nonresidents, and aliens).

¹⁰² E.g., TAXATION COORDINATOR, *supra* note 71, at 56,051. See also M.D. CODE ANN., TAX-GEN. § 7-202 (LexisNexis 2009).

¹⁰³ For example, a servicemember stationed in Iraq and interested in drafting a Louisiana will may be able to visit his local legal assistance office, which may be able to work with licensed Louisiana attorneys at Fort Polk, to draft the will, giving appropriate consideration to the appropriate state law issues rooted in French civil law.

¹⁰⁴ See I.R.C. §§ 2601-2664. See also Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended beginning at 26 U.S.C. § 1) (enacting the current form of the generation skipping transfer tax). See generally ELLEN K. HARISON, GENERATION-SKIPPING TRANSFER TAX PLANNING 9-1 to 9-71 (2009) (discussing an overview of the generation-skipping transfer tax).

¹⁰⁵ See I.R.C. § 2612(c).

¹⁰⁶ See *id.* § 2612(b).

¹⁰⁷ See *id.* § 2613(a) (defining “skip persons” as persons assigned to a generation which is two or more generations below the transferor’s generation, or a trust where either all interests are held by skip persons or no person holds an interest in the trust and no distribution may be made to a non-skip person).

¹⁰⁸ See *id.* § 2612(a).

¹⁰⁹ See *id.* § 2631(c) (2009).

¹¹⁰ See *id.* § 2611(b).

¹¹¹ See T.M. ESTATE PLANNING, *supra* note 21, at A-146 (showing similar examples). The author chose the year 2002 in the example as the year of transfer, because the 50% gift, estate, and GST tax brackets existing at that time simplify calculations and make the analysis easier to follow.

current GST regime. In the first step, the transferor¹¹² should use the amount “received” as the basis for the tax assessment, which is \$100,000 (see Appendix D).¹¹³ Second, the transferor should consider the gift tax amount on \$100,000, which is \$50,000 (i.e., 0.5 x \$100,000). Third, because the transferor must pay the GST tax, the \$50,000 GST tax paid constitutes a taxable gift to the grandchild, which is subject to an additional \$25,000 gift tax (i.e., 0.5 x \$50,000).¹¹⁴ Although, by definition, direct skip gift transfers are tax exclusive because the GST tax base for a direct skip transfer “does not include the amount of any federal estate or gift tax payable with respect to the generation-skipping transfer,”¹¹⁵ direct skip transfers are “not entirely tax exclusive”¹¹⁶ because federal gift tax is imposed on the federal GST tax paid. Even with multiple layers of taxation, the direct skip transfer is still more advantageous tax-wise than a direct skip bequest (the second common scenario), which would require \$300,000 (i.e., including \$150,000 in estate taxes and \$50,000 in GST taxes) in order to complete the transfer of \$100,000 to a grandchild. Notably, in a direct skip gift transfer scenario, if the transferor dies within three years of paying the gift taxes, the gift taxes paid are included in the transferor’s gross estate for estate tax purposes.¹¹⁷

While the direct skip transfer and bequest scenarios may seem heavy-handed and prohibitive to the transferor/testator, scenarios involving the creation of testamentary trusts are more severe because they are more tax inclusive. In situations involving taxable distributions and taxable terminations, a servicemember would have to leave \$400,000 in a testamentary trust in 2002 in order to transfer \$100,000 to a grandchild later that year. Under the operation of the GST regime, the \$400,000 bequest to the trust would first be subject to a \$200,000 Federal estate tax. Next, in the taxable distribution scenario, the \$200,000 would be distributed to the grandchild who would have to use \$100,000 of it to pay¹¹⁸ the GST tax.¹¹⁹ Similarly, in the taxable termination scenario, the trustee¹²⁰ would have to use \$100,000 to pay the GST tax on the \$100,000 transfer to the grandchild.¹²¹ In either case, the grandchild would only receive \$100,000, while \$300,000 would go directly to Federal transfer taxes.

These examples show how proper planning and structuring of generation skipping transfers ensure the minimization of taxes and the accomplishment of servicemembers’ goals.¹²² If servicemembers cannot avoid transfers subject to GST tax, they should strive to make the best use of their GST exemptions and annual exclusions. Exemptions should be aimed at transfers to grandchildren and other skip person beneficiaries. Here, servicemembers should allocate their GST exemption in order to produce a “dynasty trust”¹²³ with an “inclusion ratio”¹²⁴ of zero and thus an effective tax rate of zero, for the exclusive benefit of skip persons (e.g., grandchildren and subsequent generations). Simultaneously, servicemembers should ensure that no GST exemption is allocated to trusts (i.e., producing an inclusion ratio of one and exposing the entire transfer

¹¹² I.R.C. § 2603(a)(3). In contrast to direct skip transfers, taxable distributions impose the tax on the transferee while taxable terminations impose the tax on the trustee. *See id.* § 2603(a).

¹¹³ *Id.* § 2623.

¹¹⁴ *See id.* § 2515 (2009).

¹¹⁵ *See* T.M. ESTATE PLANNING, *supra* note 21, at A-146.

¹¹⁶ E-mail from Ellen Harrison, Adjunct Professor, Georgetown University Law Center, to author (Mar. 29, 2009, 10:22) (on file with author). “I would argue that it is correct to say that the GST tax is computed on a tax exclusive basis because the GST tax is not in the tax base. However, it is true that because there is gift tax on GST tax, the tax on direct skips is not entirely tax exclusive.” *Id.*

¹¹⁷ *See* I.R.C. § 2035(b) (including gift taxes on gifts made during three years before the decedent’s death in the decedent’s gross estate). One benefit of gross estate inclusion is that the transferee will receive a stepped-up basis in the property (except if the transferor dies in 2010).

¹¹⁸ *See id.* § 2603(a)(1) (imposing the liability to pay the GST tax on the transferee).

¹¹⁹ *See id.* § 2621(a) (subjecting the amount received by the transferee minus expenses incurred to the GST tax). For example, because \$200,000 was received by the grandchild, 50% of \$200,000 = \$100,000 GST tax owed.

¹²⁰ *See id.* § 2603(a)(2) (2009) (imposing the liability to pay the GST tax on the trustee).

¹²¹ *See id.* § 2622 (subjecting the value of *all property* with respect to which the taxable termination has occurred minus certain deductions to the GST tax). For example, since \$200,000 was the value of the property to which the termination occurred, 50% of \$200,000 = \$100,000 GST tax owed.

¹²² *See generally* HARISON, *supra* note 104, at 9-2 to 9-14 (discussing the differences between tax exclusive I.R.C. § 2623 direct skips, and tax inclusive I.R.C. § 2621 taxable distributions and I.R.C. § 2622 taxable terminations; explaining the importance of structuring transactions to ensure either an inclusion ratio of 1 or 0, and thus avoiding a mixed inclusion ratio).

¹²³ *See* T.M. ESTATE PLANNING, *supra* note 21, at A-38 (discussing the “dynasty trust” concept, a trust that can exist for an extended period of time that is potentially able to pass property free of GST tax liability).

¹²⁴ *See* I.R.C. § 2642(a) (defining the inclusion ratio as one minus the applicable fraction; defining the applicable fraction as a fraction with the numerator equal to the GST exemption allocated to the trust or property transferred, and the denominator equal to the value of the property transferred reduced by the sum of certain taxes and charitable deductions allowed with respect to such property). *See also* T.M. ESTATE PLANNING, *supra* note 21, at A-148 (discussing the GST planning concept of layering trusts)

to GST tax) for the exclusive benefit of non-skip persons¹²⁵ (e.g., children). Additional considerations arise in the form of automatic allocations that may occur “under certain statutorily prescribed circumstances,”¹²⁶ such as lifetime direct skip transfers (e.g., giving a grandchild a car as a college graduation gift). By purposefully allocating their GST exemption and avoiding mixed inclusion ratios (i.e., ratios between zero and one), servicemembers can ensure that their GST exemption will not be squandered on transfers to children, but rather preserved for transfers to grandchildren that might otherwise be subject to GST tax.

2. The State Generation Skipping Transfer Tax

In addition to the federal GST tax, about half the states, including New York and Texas, have a state GST tax.¹²⁷ As with the state gift, estate, and inheritance taxes, the state GST tax statutes vary greatly. On the one hand, New York imposes a GST tax equal to the 1998 federal GST maximum tax credit (i.e., a “fixed” system), multiplied by the amount of New York property transferred, divided by the all the property transferred.¹²⁸ On the other hand, Texas imposes a GST tax equal to the federal GST exemption (i.e., a “floating” system), multiplied by the value of Texas property transferred, divided by all the property transferred.¹²⁹ As a result of such variance, servicemembers should seek guidance from local counsel familiar with the laws of their particular state.

IV. Step Three: Building an Estate and Holding Assets

Despite the existence of a more challenging economy, there are several avenues for servicemembers to invest and establish assets. Some may even argue that the economic downturn has created additional opportunities to profit.¹³⁰ With the constraints of the tax system in mind, servicemembers should develop estate plans that minimize taxes, facilitate liquidity in the allocation of resources, and prevent the unnecessary depletion of the estate for the benefit of future beneficiaries. These objectives are attainable when servicemembers account for the property they own, properly assess risk, and accumulate assets that will best preserve their wealth.

A. Holding Assets

Servicemembers hold property in different ways depending on the nature and location of the property, as well as the nature of their marital status. For example, a married servicemember who purchases a home in a community property state may be determined to have made a gift to his spouse worth the value of one-half of the home. This may become an issue if there is a divorce or death later in the marriage. Because several standards may apply to different types of property simultaneously, servicemembers should adopt a standard evaluative approach.

Servicemembers should begin by determining the type of legal system that governs the property: Is it a community property law system, a common law system, or a combination of both? In many common law states, the nature of the title to property often dictates ownership of the property. In contrast, in many community property states, courts often presume that

¹²⁵ See I.R.C. § 2613(b) (defining non-skip persons as persons who are not skip persons).

¹²⁶ T.M. ESTATE PLANNING, *supra* note 21, at A-147. Servicemembers may elect out of automatic allocations by filing IRS Form 709 and paying applicable GSTs on direct skip transfers. See I.R.C. § 2632 (discussing deemed allocation and how to elect out).

¹²⁷ See TAXATION COORDINATOR, *supra* note 71, at 52501 (discussing the implications of state generation skipping taxation by approximately one-half of all the states).

¹²⁸ See N.Y. TAX LAW § 1022 (McKinney 2009). See generally TAXATION COORDINATOR, *supra* note 71, at 56,090 (explaining the NY GST).

¹²⁹ TEX. TAX CODE ANN. § 211.054 (Vernon 2009). See generally TAXATION COORDINATOR, *supra* note 71, at 56,131 (explaining the Texas GST).

¹³⁰ See, e.g., Warren E. Buffet, *Buy American. I Am*, N.Y. TIMES, Oct. 16, 2008, available at <http://www.nytimes.com/2008/10/17/opinion/17buffett.html> (last visited Feb. 1, 2010).

A simple rule dictates my buying: Be fearful when others are greedy, and be greedy when others are fearful. And most certainly, fear is now widespread, gripping even seasoned investors. . . . But fears regarding the long-term prosperity of the nation’s many sound companies make no sense. These businesses will indeed suffer earnings hiccups, as they always have. But most major companies will be setting new profit records 5, 10 and 20 years from now.

Id.

property is community property,¹³¹ unless the owner can rebut the presumption by demonstrating that the property is separate property.¹³²

After determining what system applies, servicemembers should next determine the property that will pass under the servicemember's will, versus property that will bypass the probate process. Servicemembers can best clarify their intentions for the transfer of property by executing a will that clearly disposes of their probate assets and explicitly designates their domicile (i.e., which may determine which state's law applies). Aside from the will, servicemembers should simultaneously designate beneficiaries on appropriate beneficiary designation forms for their non-probate assets, such as life insurance and pay-on-death bank accounts. The sections below provide more detailed guidance for the conscientious financial planner.

1. Who Owns the Property? Community Property Versus Common Law Property

For single servicemembers, the difference between community property and common law systems may be irrelevant because joint ownership of accumulated property is not normally at issue. However, for servicemembers who marry and amass property while stationed in different states during their careers, the nature of the property ownership system can ultimately determine who owns certain property in the event of the servicemember's divorce or death. While most states have adopted a common law system for the disposition of property, "Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin" operate under community property regimes.¹³³ Because major military bases are located in both common law and community property states, servicemembers may pass through both legal systems during the course of their military service. Conscientious servicemembers must therefore keep tabs on the legal regime that applies to property transfers made at all times during their life and also those which are likely to occur at the time of their death.

Transfers of property during one's life differ significantly between community property and common law regimes because these systems operate under completely different rationales. In general, community property law treats marriage as an equal partnership and thus presumes equal ownership over property acquired during the course of the marriage.¹³⁴ Consequently, even where property is titled in one spouse's name, the law nevertheless presumes it to be jointly owned community property.¹³⁵ Under such a presumption, servicemembers who give third parties gifts like cars, which were acquired during the marriage, may find such gifts classified as split gifts (i.e., a gift of equal amounts given by each spouse).¹³⁶ Similarly, if a portion of the servicemember's salary (presumed community property if earned during marriage) is used to acquire and pay premiums on one's own life insurance policy, at the time of the servicemember's death, half of any insurance proceeds paid to the children may be included in the servicemember's gross estate with the other half determined to be a deemed gift from the surviving spouse.¹³⁷

¹³¹ Community property is defined as, "Property owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or gift to one spouse, each spouse holding a one-half interest in the property. . . . [States with community property systems include] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin." BLACKS LAW DICTIONARY, *supra* note 44, at 412.

¹³² Separate Property is defined as,

[Property in a community-property state] that a spouse owned before marriage or acquired during marriage by inheritance or by gift from a third party, or property acquired during marriage but after the spouses have entered into a separation agreement and have begun living apart . . . [and property in some common-law states that is] titled to one spouse or acquired by one spouse individually during marriage.

Id. at 1369.

¹³³ See T.M. ESTATE PLANNING, *supra* note 21, at A-155 (explaining that, while some states like California and Texas have established community property law systems, other states, like Alaska, have an elective community property system, while states like Wisconsin implement community property law principles).

¹³⁴ See *id.*

¹³⁵ See *id.* at A-155 to A-156 (explaining that property acquired through gift, devise, or descent is treated as separate property; explaining that property acquired through the use of separate property should be considered separate property, applying the inception of title doctrine). Servicemembers can use prenuptial agreements to clarify whether property will be considered separate or community property.

¹³⁶ See *id.* at A-158. If the gift is over the annual exclusion (e.g., \$13,000 for 2010), the taxpayers must file split gift tax returns.

¹³⁷ See *id.* at A-156 to A-157 (explaining the differences between state laws and the importance of the facts and circumstances of the case, such as whether the spouse had previously agreed to the beneficiary designation).

As a significant benefit, community property law states allow decedents to include only half the value of community property in their gross estates, even though the estates benefit from a step-up in basis to the full market value of the property.¹³⁸ For example, if a servicemember purchased a home for \$100,000 during marriage and the home appreciates to a value of \$300,000 at the servicemember's death, only \$150,000 would be included in the servicemember's gross estate (i.e., 0.5 x \$300,000), while the recipient of the home would benefit from a \$200,000 stepped-up basis in the property (i.e., \$300,000 – \$100,000). Due to the stepped-up basis, if the beneficiary of the home later sold the property for \$550,000, the beneficiary would only recognize \$250,000 of gain (i.e., \$550,000 – \$300,000), which itself may be nontaxable.¹³⁹ Spouses in common law states that do not recognize community property principles face far fewer complications in the determination of property ownership. However, to minimize potential issues, servicemembers considering marriage may want to consider prenuptial agreements that clarify property ownership.

2. Probate Property Versus Non-Probate Property

After determining whether common law or community property law governs transferred or transferable property, servicemembers should decide whether to hold the property in a probate or non-probate status. While probate property, such as a home or car held in the testator's name "is subject to the will provisions and to the probate jurisdiction of the local court," non-probate property will bypass local probate administration unaffected "by the existence (or nonexistence) of a valid last will" and testament.¹⁴⁰ Examples of non-probate property include life insurance policies, pay-on-death bank accounts, transfer-on-death securities, property held in trust, and jointly-held property passing under the right of survivorship.¹⁴¹ Despite the distinction between probate and non-probate property, both categories will ultimately be included in their gross estate at death, even though only their probate property (i.e., their probate estate) will be subject to probate.

The holding of probate versus non-probate property should not be guided by the desire to save taxes on property transfers. It should, instead, depend on the desire to avoid publicity and the supervision of a probate court and other more nuanced benefits. Holding non-probate assets in a trust is particularly useful in maximizing privacy, minimizing the potential for challenges to the servicemember's capacity, and facilitating the administration of property when a servicemember owns real estate in different states. To gain these advantages, the servicemember must be willing to invest the time and money to transfer assets into a trust. Furthermore, trustees must ensure that they administer the trust properly. With non-probate property, such as life insurance and pay-on-death accounts, servicemembers must regularly monitor their assets and ensure beneficiary designation forms are kept current to avoid unintended transfers, such as the transfer of wealth to a former spouse at death.

3. Intestacy

Servicemembers who die without a will or an invalid will become subject to the mercies of state intestacy statutes.¹⁴² Servicemembers may intentionally elect this route in an effort to avoid probate or as the result of a common belief that dying without a last will and testament somehow facilitates a fair distribution of their estate upon their death. Commonly, a servicemember decides not to execute a will after consultation with legal counsel because he is insolvent and his only family members are his happily-married parents who do not require additional income. Contrary to these beliefs, reliance on state intestate succession statutes or holding only non-probate property can markedly frustrate the administration of an estate.¹⁴³ Furthermore, servicemembers face situations that change rapidly, such as winning the lottery, having a child out of wedlock, or becoming incapacitated. To meet the ever-changing demands of life with a degree of certainty and the minimization of

¹³⁸ See I.R.C. § 1014(b)(6). However, the stepped-up basis advantage may be limited and the estate tax itself may not be applicable for deaths in 2010.

¹³⁹ See *e.g.*, *id.* § 121 (establishing that if the recipient lived in the property for two out of the previous five years, the \$250,000 of gain would not be taxable).

¹⁴⁰ T.M. ESTATE PLANNING, *supra* note 21, at A-27.

¹⁴¹ See *generally id.* at A-28 and A-151 (explaining that if property is held as a joint tenancy with right of survivorship (JTWROS), the joint owners hold concurrent ownership, but the survivor of the joint tenants succeed to the entire property interest pursuant to the contractual arrangement; contrasting JTWROS with property held as a tenancy in common where owners possess a proportionate interest in the property that may be alienated, devised, or inherited under local law).

¹⁴² See *generally* National Conference of Commissioners on Uniform State Laws, Uniform Probate Code § 2-101 (rev. 2006 rev.), available at <http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm> (last visited Jan. 26, 2010) (discussing a model intestate succession statute, which many states have adopted in full or in part).

¹⁴³ See *id.* § 2-101 to 2-114 (discussing a model intestate succession statute, which many states have adopted in full or in part).

costs, servicemembers should specify in advance who they wish to appoint as executors and guardians and to whom property should be left at their death.

B. Building an Estate

The development of a well-balanced portfolio will assist servicemembers in withstanding the booms and busts of the modern economy. It may ultimately provide for their needs and the needs of their beneficiaries. This process begins with an investment in one's education, the acquisition of marketable skills, and the disciplined practice of cutting unnecessary expenses. It also includes the creation of a realistic budget and the establishment of a liquid financial reserve fund for genuine emergencies. Beyond these fundamentals, servicemembers should focus on building a well-balanced portfolio, which include life insurance, real estate, retirement and survivor benefits, and other prudent financial investments, all of which are described below.

1. Life Insurance

Servicemembers have many reasons to acquire life insurance.¹⁴⁴ For example, ownership of life insurance within one's taxable estate can provide for surviving family members or other beneficiaries in the event of the servicemember's death. It also provides liquidity to pay taxes and other expenses at the time of their death.¹⁴⁵ In addition, ownership of life insurance outside one's taxable estate provides a means to transfer substantial assets to younger generations with minimal tax consequences. These benefits make life insurance an indispensable option in addition to other types of insurance such as liability insurance, property insurance, and disability insurance. Considering the possibility of natural disasters and tort litigation, flood and umbrella policy insurance may also be of great benefit. Because life insurance has many different forms, some of which may produce income during the course of the owner's life, the following section describes the most common issues.

a. Forms of Life Insurance

Life insurance policies available through dependable insurers commonly include term or permanent/cash value policies.¹⁴⁶ While term insurance generally protects an insured individual for a specific period of time, has no cash value, and charges increasingly higher premiums as the policyholder ages, permanent/cash value life insurance generally accumulates up cash value over time,¹⁴⁷ offers investment-type options, and costs more.¹⁴⁸ Types of permanent policies include traditional fixed premium policies, such as whole life insurance, flexible-premium policies, such as universal life insurance, and variable policies, such as variable life insurance.¹⁴⁹ In contrast to whole and universal life insurance, variable life insurance imposes more risk on the insured because the policyholder generally has the ability to allocate premiums among investment sub-accounts that are "distinct from the insurer's general investment portfolio."¹⁵⁰ These term and cash value life insurance policies may be individual or joint policies, where a death benefit is paid on the death of the survivor.¹⁵¹ Joint/survivorship policies may be especially useful where one of the insured might not otherwise be insurable or where individual policies may be too expensive.

¹⁴⁴ See I.R.C. § 7702 (defining life insurance contracts). See also *Helvering v. LeGierse*, 312 U.S. 531 (1941) (defining life insurance's historic and essential characteristic of risk shifting and risk distribution).

¹⁴⁵ See T.M. ESTATE PLANNING, *supra* note 21, at A-162.

¹⁴⁶ See HALLMAN & ROSENBLOOM, *supra* note 25, at 30-33, & 43 (describing the financial ratings and other considerations involved in selecting an insurer; distinguishing the general types of insurance available for consumers).

¹⁴⁷ See *id.* at 43-45.

¹⁴⁸ See *id.* For example, available options may include a guaranteed minimum return, the ability to change premium payments, and/or the ability to borrow or even withdraw from the policy.

¹⁴⁹ See *id.* at 43. See also T.M. ESTATE PLANNING, *supra* note 21, at A-163 (describing the different types of insurance policies available).

¹⁵⁰ HALLMAN & ROSENBLOOM, *supra* note 25, at 50.

¹⁵¹ *Id.* at 53.

For most servicemembers, Servicemember's Group Life Insurance (SGLI)¹⁵² and Family Servicemember's Group Life Insurance (FSGLI)¹⁵³ automatically cover servicemembers and their insurable dependents, unless a servicemember elects in writing not to be covered. As a type of group term life insurance policy, SGLI provides life insurance protection at a relatively low cost because it is a group policy partially subsidized by Congress.¹⁵⁴ One undesirable aspect of SGLI coverage is its termination after the completion of the policyholder's military service. At such time, former servicemembers may convert their SGLI policies into Veterans Group Life Insurance policies, while spouses may convert their FSGLI policies into commercial policies provided by participating life insurance companies.¹⁵⁵ Fortunately, these follow-on policies do not require proof of good health, provided the insured meets certain procedural requirements.¹⁵⁶

b. Proceeds of Insurance and Ensuring a Smooth Process

To ensure an efficient transfer of wealth at the time of their passing, servicemembers should properly designate beneficiaries and account for tax consequences ahead of time. Specifically, servicemembers should coordinate their will and trust instruments with their life insurance beneficiary designation forms to minimize any potential inconsistencies or conflicts between the legal documents, especially when servicemembers want to designate ex-spouses, stepchildren, illegitimate children, non-Family members, or minor biological children as their beneficiaries.¹⁵⁷ Failure to coordinate and plan accordingly can result in unintended consequences. For example, if a servicemember fails to designate SGLI beneficiaries or the designation of SGLI beneficiaries otherwise fails, the SGLI proceeds will be distributed according to federal law, which may exclude intended beneficiaries or result in the distribution of funds to beneficiaries who are not mature enough to handle the responsibility of a sudden financial windfall.

Servicemembers can provide for minors using SGLI proceeds while ensuring beneficiaries do not receive funds too early by establishing a testamentary trust in their will for the benefit of their minor children and by making appropriate designations on their SGLI beneficiary form.¹⁵⁸ Those who believe the oversight provided by a trust is not necessary or is not worth the administration costs may instead designate a custodian of an UGMA or UTMA account for the benefit of their minor children.¹⁵⁹ Another important planning precaution is to account for the tax consequences of life insurance policies. To this end, owners of life insurance policies should understand that life insurance proceeds are generally not subject to income tax¹⁶⁰ but are included in the gross estate.¹⁶¹ To ensure that life insurance proceeds are not included in the gross estate, an individual must neither own the policy nor retain incidents of ownership in the policy. This can be accomplished by establishing an irrevocable life insurance trust (ILIT) that could purchase and own the policy for the benefit of the insured's beneficiaries. Servicemembers who already own a commercial life insurance policy can transfer their policy to an ILIT, but, if they die within three years of the transfer, the value of the proceeds would be included in their gross estate.¹⁶²

¹⁵² 38 U.S.C. § 1967. Servicemember's Group Life Insurance also automatically covers servicemembers who suffer traumatic injuries (i.e., Traumatic SGLI). See *id.* § 1980A (2006). See generally Captain Wojciech Z. Kornacki, *What Every Soldier and Legal Assistance Attorney Should Know about Servicemembers Group Life Insurance*, ARMY LAW., Nov. 2006, at 42, 42–52 (explaining the history of SGLI, the designation of beneficiaries, and the distribution of SGLI proceeds).

¹⁵³ See generally U.S. Dep't of Veterans Affairs, *Servicemembers' & Veterans' Group Life Insurance*, available at <http://www.insurance.va.gov/sgliSITE/FSGLI/sglifam.htm> (last visited Jan. 21, 2010) [hereinafter *Veterans SGLI*] (discussing the policies and procedures of how insurable dependants are insured by FSGLI; including web links to premium rates).

¹⁵⁴ See S. REP. NO. 91-398, at 2 (1969). "The low cost to individuals is made possible by insuring all members of the uniformed services under a single group insurance master contract, and by the government bearing the cost of the extra hazard attributable to military service." *Id.*

¹⁵⁵ See, e.g., 38 U.S.C. § 1968(b)(1)(B); *id.* § 1977(e).

¹⁵⁶ See 38 U.S.C.A. § 1977(e) (LexisNexis 2010).

¹⁵⁷ See *Ridgway v. Ridgway*, 454 U.S. 46, 52 (1981) (holding that a servicemember has the right to freely designate his SGLI beneficiaries and to alter that choice at any time; holding that the designated beneficiary will take the life insurance proceeds despite contrary state law due to the supremacy clause).

¹⁵⁸ See *DESKBOOK 2009*, *supra* note 91, at L-51 (on file with author) (suggesting appropriate language and procedures to follow in filling out SGLI beneficiary designation forms). For example, on the SGLV Form 8236, servicemembers can designate their beneficiaries as follows: "To my 'trustee to fund a trust established for the benefit of my children under my will.'" *Id.*

¹⁵⁹ See *id.* at L-51 (on file with author). For example, on the SGLV Form 8236, servicemembers can designate their beneficiaries as follows: "To '(Name of custodian), as custodian for each of my children, pursuant to the UGMA/UTMA of the state of (name of state), with distribution to each minor when that minor reaches age (desired age)'" *Id.* See also *supra* note 91 and accompanying text (discussing UTMA and UGMA).

¹⁶⁰ See I.R.C. § 101(a)(1).

¹⁶¹ See *id.* § 2042 (establishing the inclusion of life insurance proceeds in the gross estate). See also *id.* § 2035(a) (establishing the inclusion of life insurance proceeds in the gross estate if the decedent transferred the policy within three years of his death).

¹⁶² See *id.* § 2035.

2. Real Estate

For many servicemembers, the greatest asset they own, other than life insurance, is real estate purchased as a principal residence and, potentially, used later as a rental property. By holding properties for longer periods of time, servicemembers can build wealth by paying down mortgages, experiencing tax savings, and benefitting from appreciation. Because they move frequently, servicemembers often find it difficult to keep their homes, unless they rent out the properties after moving to new duty stations. As a result, prior to buying a home, servicemembers should anticipate the rental cash flows that a property may generate to ensure that the income will sufficiently cover the mortgage, taxes, and other property expenses, such as management fees and repairs.¹⁶³

Servicemembers who choose to be landlords must understand that their ability to deduct possible losses on their income tax returns may be limited by certain legal rules.¹⁶⁴ This is especially important during challenging economic times when properties may remain vacant for months or even years, resulting in significant rental losses. Fortunately, rental real estate qualifies for an exception to the rules that would otherwise limit a taxpayer's ability to deduct rental losses.¹⁶⁵ As long as individuals "actively participate" in the real estate activity, they can reduce their non-passive income (e.g., a salary) by up to \$25,000 of rental real estate losses.¹⁶⁶ Assume that a taxpayer has salary income of \$70,000, passive activity income of \$10,000, active participation rental property income of \$22,000, and active participation rental property losses of \$60,000.¹⁶⁷ The taxpayer can offset \$32,000 of the \$60,000 losses against the \$10,000 passive activity and \$22,000 active participation rental property income. On these facts, the \$25,000 "ceiling" limitation will limit the taxpayer's offset to only \$25,000 of the remaining \$28,000 (i.e., \$60,000 – \$32,000) worth of losses against his non-passive salary income. The remaining \$3,000 of losses must be carried over to later years.¹⁶⁸ Although these provisions can be advantageous, servicemembers need to understand the difficulty of establishing that they qualify for active participation under a given set of circumstances.

As a related consideration, servicemembers who experience significant rental losses over time may struggle to make mortgage payments and ultimately may be unable to sell the property. As a result, they may encounter mortgage workouts, foreclosure, or even bankruptcy. Under prior law, if lenders forgave mortgage debt, the taxpayer could experience taxable income. However, due to recent tax code changes, individuals will face less threat of such cancellation of indebtedness income. The law provides that the discharge of indebtedness from a qualified principal residence will be excluded from the definition of gross income.¹⁶⁹ Furthermore, servicemembers who eventually rent their principal residence and later sell the property for a gain may be able to exclude some of that gain,¹⁷⁰ while those who rent property and sell at a loss may be able to offset that loss against other income.¹⁷¹

¹⁶³ See generally Kan, *supra* note 4, at 8 (explaining the legal and financial analysis servicemembers should conduct prior to buying a home).

¹⁶⁴ See I.R.C. § 465 (limiting deductions of losses to the amount an individual has at risk in an activity). See generally BORIS BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS, at 19-20 to 19-30 (3d ed. 2002) (discussing how to identify and compute the at-risk amount). See I.R.C. § 469 (limiting passive activity losses and credits; defining "passive activity" as any activity which involves the conduct of a trade or business and in which the taxpayer does not materially participate). See generally BITTKER, *supra*, at 19-30 to 19-58 (discussing degrees of participation, types of activities, and the interaction between active and passive income and losses).

¹⁶⁵ See I.R.C. § 469(h) (defining "material participation" as an activity where the taxpayer is involved in the operations of the activity on a basis which is regular, continuous, and substantial). See generally BITTKER, *supra* note 164, at 19-50 to 19-53 (discussing I.R.C. § 469(i)'s relaxation of the passive activity rules to rental real estate).

¹⁶⁶ See BITTKER, *supra* note 164, at 19-50 to 19-52 (describing "active participation" as a less stringent standard than "material participation" that can be met if the taxpayer has a significant and bona fide role in management; explaining that the participation of a spouse is taken into consideration by attribution so that the nonparticipating spouse is deemed to "actively participate" if her spouse "actively participates"). See I.R.C. § 469(i). But there are phase-out limitations that apply for those taxpayers with adjusted gross income over \$100,000. See *id.* § 469(i)(3).

¹⁶⁷ See BITTKER, *supra* note 164, at 19-51 (showing the same example).

¹⁶⁸ See I.R.C. § 469(b).

¹⁶⁹ See *id.* § 108(a)(1)(E). Gross income also does not include the discharge of indebtedness due to the taxpayer's insolvency. See *id.* § 108(a)(1)(B). See also Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803. See generally Note, *Update for 2007 Federal Income Tax Returns*, ARMY LAW., Dec. 2007, at 60, 71 (explaining the implications of amending I.R.C. § 108(a)). See generally JONES, *supra* note 41, at 2.5 (discussing the principal residence exclusion provision's extension until December 31, 2012 due to the Emergency Economic Stabilization Act of 2008).

¹⁷⁰ See I.R.C. § 121 (2010) (establishing the exclusion of gain from the sale of a principal residence and the significance of nonqualified use of the residence). See generally Major Patricia K. Hinshaw, *Tax Primer for Servicemembers with Residential Rental Property*, ARMY LAW., Nov. 2009, at 1, 10–11 (explaining the exclusion of gain under I.R.C. § 121 and the limitations concerning qualified and non-qualified use of the property after 1 January 2009). See generally Kan, *supra* note 4, at 23–25 (contrasting the ability to sell rental properties and take losses, with the ability to sell personal residences and exclude income even though the servicemember rented the property out and did not live in the property due to periods of qualified extended duty).

¹⁷¹ See I.R.C. § 165(c) (discussing losses). However, if their homes are not rented out and treated as rental properties, taxpayers cannot deduct the loss upon sale of their homes. See INTERNAL REVENUE SERV., PUB. 523, SELLING YOUR HOME 4 (2008); see also 26 C.F.R. §§ 1.165-9 (2010) (discussing losses). In

Fortunately, the Homeowner Assistance Program (HAP), administered by the U.S. Corps of Engineers, may cushion the financial blow for servicemembers, certain civilian employees, and surviving spouses who sold their homes at a loss or were unable to sell their homes due to the recent mortgage crisis or a base closure.¹⁷² Those who qualify for the program¹⁷³ may get reimbursed for allowable closing costs of the sale of their home plus the difference between the sales price and an applicable percentage of their original purchase price.¹⁷⁴ If qualifying members cannot sell their homes, the Government can acquire the home for an applicable percentage of the prior fair market value.¹⁷⁵ In addition, the benefits accorded by HAP are excludable from federal income tax.¹⁷⁶

3. Retirement and Survivorship Planning

a. Individual Retirement Accounts

In addition to real estate investments, servicemembers should strongly consider contributing to traditional¹⁷⁷ and Roth¹⁷⁸ individual retirement accounts (IRA) as part of a diversified portfolio.¹⁷⁹ While traditional IRAs allow servicemembers to make deductible contributions, which grow on a tax deferred basis, lower income phase-out amounts,¹⁸⁰ age, and other limitations may significantly restrict potential benefits from traditional IRAs.¹⁸¹ In contrast, Roth IRAs do not allow servicemembers to make deductible contributions,¹⁸² but allow qualified distributions to be made tax free.¹⁸³ Roth IRAs are not limited by the numerous restrictions imposed by traditional IRAs. For example, unlike traditional IRAs, the phase-out

addition, if their homes are not rented for profit, taxpayers can deduct rental expenses only up to the amount of the rental income. See INTERNAL REVENUE SERV., PUB. 527, RESIDENTIAL RENTAL PROPERTY 5 (2008).

¹⁷² See Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, §§ 101–114, 80 Stat. 1255 (codified as amended at 42 U.S.C. § 3301–3313 (1968) (establishing HAP). See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 1001 (expanding HAP). See 32 C.F.R. § 239 (authorizing HAP).

¹⁷³ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 1001 [hereinafter ARRA]. In general, to qualify for the program, individuals must fall into one of three categories: (1) A servicemember or DOD or non-appropriated funds (NAF) civilian employee who purchased a primary residence before 1 July 2006, at or near a military installation that has been ordered to be closed, who sold the property between 1 July 2006 and 30 September 2012, and who did not previously benefit from HAP; (2) A servicemember or DoD/U.S. Guard civilian employee who was wounded or became ill in the line of duty during a deployment (for civilian employees the deployment must have been on or after 11 September 2001), or their surviving spouse if the member died in the line of duty or as a result of a wound, injury, or illness incurred in the line of duty during a deployment on or after 11 September 2001, and the spouse relocates within two years of the member's death; (3) A servicemember who purchased a primary residence before 1 July 2006, who was reassigned between 1 February 2006 and 30 September 2012, to an installation more than fifty miles from his previous installation, and who did not previously benefit from HAP. See *id.* See 32 C.F.R. § 239.6.

¹⁷⁴ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 1001. See 32 C.F.R. § 239.5(a)(2). Under current implementing policy, the applicable percentage is 95% if the applicant is a Wounded Warrior or civilian, or a Surviving Spouse, and 90% for other applicants. See 32 C.F.R. § 239.5(a)(4). See generally U.S. Dep't of Defense—Homeowners Assistance Program, Benefits, available at <http://hap.usace.army.mil/Benefits.html> (last visited Jan. 21, 2010) [hereinafter Assistance Program].

¹⁷⁵ See ARRA of 2009, *supra* note 173, § 1001. The Government may purchase the primary residence for the greater of the applicable percentage of the prior fair market value (i.e., usually the purchase price) of the residence or the total amount of the eligible mortgage that remains outstanding. See 32 C.F.R. § 239.5(a). Under current implementing policy, the applicable percent is 95% if the applicant is a Wounded Warrior or civilian, or a Surviving Spouse, and 75% for other applicants (in addition, other applicants do not receive closing costs). See *id.* § 239.5(a)(4).

¹⁷⁶ See I.R.C. § 132(n) (2010). See also INTERNAL REVENUE SERV., PUB.4491-X, SUPP., NEW TAX LEGISLATION & OTHER UPDATES TO VITA/TCE TRAINING PRODUCTS 5 (2009) [hereinafter PUB. 4491-X].

¹⁷⁷ I.R.C. § 408 (2009).

¹⁷⁸ *Id.* § 408A.

¹⁷⁹ See generally Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, ARMY LAW., Nov. 1999, at 1, 8 (explaining the difference between traditional and Roth IRAs).

¹⁸⁰ See I.R.C. § 219(g). For example, for the 2009 tax year, the IRA deduction for single and head of household taxpayers who are active participants in employer's retirement plans begin to be phased-out when their modified adjusted gross income (MAGI) reaches \$55,000, and are completely phased-out when their MAGI reaches \$65,000. See CCH, 2010 U.S. MASTER TAX GUIDE 687 (2009) [hereinafter 2010 U.S. MASTER TAX GUIDE]. For married filing joint return taxpayers, the phase-out amounts are \$89,000 and \$109,000 respectively. See *id.* at 688. In contrast, for the 2009 tax year, "the maximum yearly contribution that can be made to a Roth IRA is phased out for a single individual with modified AGI between \$105,000 and \$120,000, [and] for joint filers with modified AGI between \$166,000 and 176,000. . . ." *Id.* at 693.

¹⁸¹ See I.R.C. § 219. See also DESKBOOK 2006, *supra* note 13, at S-6 to S-12 (on file with author) (explaining the numerous restrictions of traditional IRAs).

¹⁸² See I.R.C. § 408A(c)(1) (2009).

¹⁸³ See *id.* § 408A(d)(1). Roth IRA qualified distributions should be contrasted with traditional IRA distributions which are generally includable in gross income. See *id.* § 408(d).

amounts for Roth IRA contributions are higher,¹⁸⁴ individuals may make contributions after reaching age seventy-and-a-half,¹⁸⁵ and Roth IRAs are not subject to the required minimum distribution rules.¹⁸⁶

The benefits of Roth IRAs may appeal to servicemembers, especially if servicemembers earn income that is above the phase-out levels for traditional IRAs and can only make nondeductible contributions.¹⁸⁷ If servicemembers believe they will occupy a higher income tax bracket when they receive IRA distributions, they may want to consider converting their traditional IRAs to Roth IRAs now that the Internal Revenue Code has eliminated the \$100,000 adjusted gross income limit for conversions in tax years after 2009.¹⁸⁸ Not only can taxpayers earning taxable income contribute to their own IRAs, but they can also contribute to spousal IRAs, even if their spouses do not earn income.¹⁸⁹ Furthermore, in situations where contributors have deployed, servicemembers can still participate in IRAs even though they do not earn taxable income, as they may have received only tax-free combat pay due to continual deployment throughout the tax year.¹⁹⁰

b. The Thrift Savings Plan

Participation in the Thrift Savings Plan (TSP),¹⁹¹ a defined contribution plan similar to a 401(k)¹⁹² plan, may be advantageous for servicemembers.¹⁹³ The primary benefits of contributing to the TSP are the tax deferral of income, ease of making contributions, and extremely low fund maintenance costs.¹⁹⁴ In 2011, the TSP will begin to offer the significant new benefit of a Roth 401(k) feature.¹⁹⁵ For 2009 and 2010, servicemembers can make contributions up to \$16,500, and up to \$49,000 if they are in a combat zone.¹⁹⁶ The TSP offers several investment funds with varied rates of return,¹⁹⁷ including lifecycle funds, a government securities fund, a fixed income index fund, a common stock index fund, a small capitalization stock index fund, and an international stock index fund.¹⁹⁸ Unfortunately, while civilian employers often match employee

¹⁸⁴ See generally HALLMAN & ROSENBLOOM, *supra* note 25, at 364 (contrasting traditional IRAs with Roth IRAs that are not affected by coverage under employer retirement plans). For example, in 2009, “the maximum yearly contribution that can be made to a Roth IRA is phased out for a single individual with modified AGI between \$105,000 and \$120,000, [and] for joint filers with modified AGI between \$166,000 and 176,000” 2010 U.S. MASTER TAX GUIDE, *supra* note 180, at 693. The phase-out amounts for a single and a joint filer who are active participants in employer’s retirement plans are \$55,000–\$65,000, and \$89,000–\$109,000 respectively. See *id.* at 688.

¹⁸⁵ See I.R.C. § 408A(c)(4).

¹⁸⁶ See *id.* § 408A(c)(5).

¹⁸⁷ See generally HALLMAN & ROSENBLOOM, *supra* note 25, at 367 (describing that the only real tax advantage of making non deductible IRA contributions is that the investment income and capital gains will accumulate in the IRA without current income taxation).

¹⁸⁸ See I.R.C. § 408A(c)(3)(B).

¹⁸⁹ See generally HALLMAN & ROSENBLOOM, *supra* note 25, at 370 (describing spousal IRAs).

¹⁹⁰ See I.R.C. § 219(f)(7). See generally TJAGLCS Practice Note: *Update for 2006 Federal Income Tax Returns*, ARMY LAW., Dec. 2006, at 51, 51 (explaining the implications of the Heroes Earned Retirement Opportunities (HERO) Act which allowed tax-free combat zone pay to be considered for purposes of determining qualification for IRA contributions).

¹⁹¹ 5 U.S.C. §§ 8431–8840 (2006). See Thrift Savings Plan, *available at* <http://www.tsp.gov> (last visited Apr. 12, 2009) (providing a wealth of information regarding the Thrift Savings Plan including applicable forms and publications as well as historical rates of returns for each type of TSP fund). See generally Captain Anita J. Fitch, *Thrift Savings Plan Update*, ARMY LAW., Dec. 2005, at 70, 70–71 (explaining changes to the TSP enrollment procedures and changes through the selection of asset allocations).

¹⁹² I.R.C. § 401(k).

¹⁹³ See generally MAJOR DAVID TRYBULA & LIEUTENANT COLONEL RICHARD HEWITT, ARMED FORCES GUIDE TO PERSONAL FINANCIAL PLANNING 278–80 (5th ed. 2002) (evaluating the advantages and disadvantages of the TSP, including the Government’s failure to provide matching contributions for servicemembers).

¹⁹⁴ See generally Thrift Savings Plan, *supra* note 191. For example, servicemembers can have contributions taken directly from their pay without the high minimum initial investments typical of many mutual funds.

¹⁹⁵ See 5 U.S.C. § 8432(d). See Thrift Savings Plan, *Is the TSP Offering a Roth 401(k) Feature?*, *available at* <http://www.tsp.gov/forms/oc06-5.pdf> (last visited Jan. 25, 2010).

¹⁹⁶ See I.R.C. § 402(g) (2010) (limiting income exclusions for elective deferrals). See *id.* § 415(c) (allowing contributions of more than the I.R.C. § 402(g) elective deferral limit to servicemembers in combat zones). See Thrift Savings Plan, *Summary of the Thrift Savings Plan 5*, *available at* <http://www.tsp.gov/forms/tspb08.pdf> (last visited Jan. 25, 2010).

¹⁹⁷ See Thrift Savings Plan, *TSP Individual Funds Historical Rates*, *available at* <http://www.tsp.gov/rates/history-summary.html> (last visited Apr. 12, 2009) (showing that ten year compounded rates of return from 1999 to 2008 ranged from a negative 1.4% for the common stock index fund to a positive 5.7% for the fixed income index fund).

¹⁹⁸ See Thrift Savings Plan, *Thrift Saving Plan Fund Information*, March 2008, *available at* <http://www.tsp.gov/forms/fundsheets-all.pdf> (last visited Apr. 12, 2009).

contributions to 401(k) plans as a significant incentive to encourage contributions, the Government currently does not match the contributions of military TSP participants.¹⁹⁹ This and other TSP limitations, may motivate servicemembers to maximize their own Roth IRA and their spouse's 401(k) to the extent of employer matching contributions before contributing to the TSP.²⁰⁰

*c. Retirement and Survivor Benefits*²⁰¹

Servicemembers who are eligible for retirement may take advantage of one of the few remaining defined benefit retirement plans without the need to financially invest in defined contribution plans like their civilian counterparts. Although most retired servicemembers must wait before eventually receiving social security benefits,²⁰² they enjoy the luxury of immediately drawing a reliable monthly government paycheck without the necessity of a single financial contribution.²⁰³ Retired servicemembers also qualify for numerous additional benefits, including post-exchange and commissary privileges, reduced medical costs, and free space-available travel.²⁰⁴

Retirees may also benefit from the Survivor Benefit Plan (SBP), a program that provides a potential lifetime annuity to beneficiaries at the retiree's death.²⁰⁵ The SBP automatically covers all active duty servicemembers once they become retirement eligible.²⁰⁶ However, in general, those who do not want to participate, or want less than spousal SBP coverage based on full retired pay once they retire, must get their spouse's written consent and must submit their election not to fully participate before they retire.²⁰⁷ Retirees participating in SBP experience a reduction in their retirement pay to cover the costs of premiums, but their survivors will benefit from an annuity paid upon their death.²⁰⁸ Like regular annuities that allow the decedent to designate beneficiaries, the SBP annuity distributed to survivors is taxable as ordinary income to the beneficiaries, and includable in the retiree's gross estate.²⁰⁹

¹⁹⁹ See MARGARET H. BELKNAP & F. MICHAEL MARTY, ARMED FORCES GUIDE TO PERSONAL FINANCIAL PLANNING 210 (6th ed. 2007). Although the statute authorizes matching contributions, the service secretaries are not currently authorizing matching servicemember contributions. See Thrift Savings Plan, Summary of the Thrift Savings Plan 4, available at <http://www.tsp.gov/forms/tspbk08.pdf> (last visited Jan. 25, 2010).

²⁰⁰ See BELKNAP & MARTY, *supra* note 199, at 199 (recommending a specific retirement savings priority list with a servicemember's Roth IRA as the highest priority).

²⁰¹ See generally Cole, *supra* note 179, at 1–8 (explaining the numerous government survivor benefits available to servicemembers).

²⁰² See generally BELKNAP & MARTY, *supra* note 199, at 275–84 (discussing eligibility and the benefits of social security). See U.S. Social Security Administration, <http://www.ssa.gov> (last visited Apr. 12, 2009) (providing a wealth of information on social security).

²⁰³ See generally BELKNAP & MARTY, *supra* note 199, at 285 (discussing the three military retirement systems).

²⁰⁴ See generally SPACE-A TRAVEL.COM, WORLDWIDE SPACE-A TRAVEL HANDBOOK & RV CAMPING GUIDE (13th ed. 2002) (offering an indispensable and, by far, the most useful guidebook for servicemembers regarding free space-A travel; providing domestic and international travel policies, major flight routes and schedules, phone and fax numbers to installations worldwide, and useful maps and descriptions of each base to facilitate travel and lodging).

²⁰⁵ See 10 U.S.C. § 1447 (2006) (defining SBP terms). See generally TRYBULA & HEWITT, *supra* note 193, at 355–66 (describing SBP and evaluating it financially compared to life insurance; concluding that SBP is an excellent program that guarantees a secure income for a surviving spouse and dependent children that cannot be eroded by inflation due to cost of living allowances). See generally BELKNAP & MARTY, *supra* note 199, at 290 (listing the advantages and disadvantages of participating in SBP). See generally My Army Benefits, available at <http://myarmybenefits.us.army.mil/EN/default.aspx> (last visited Aug. 24, 2009) [hereinafter My Army Benefits] (calculating available benefits).

²⁰⁶ See 10 U.S.C. § 1448(d).

²⁰⁷ See DOD FMR, *supra* note 33, at vol. 7B, ch. 43, para. 430101 & 430303 (June 2008), available at http://comptroller.defense.gov/fmr/07b/07b_43.pdf (last visited Feb 2, 2010). Elections that do not comply with all the requirements, such as having the spouse's consent witnessed by at least one person, will be disregarded and the retiree will be enrolled for the full amount of SBP coverage. See *id.* See 10 U.S.C. § 1448(a)(2). See also Dept. of Health and Human Services, Form PHS-5150: Survivor Benefit Plan (SBP) Election Certificate, available at http://dcp.psc.gov/PDF_docs/phs5150.pdf (last visited Feb 2, 2010) (providing a form to make an SBP election).

²⁰⁸ See MyArmyBenefits, MyArmyBenefits Survivorship Calculator, available at <https://myarmybenefits.us.army.mil/PreBuilt/customapps/Survivorship/Instructions.aspx> (last visited Jan. 25, 2010) [hereinafter Survivorship Calculator] (last visited Jan. 25, 2010). See Dept. of Defense Office of the Actuary, SBP Program Premium, available at <http://actuary.defense.gov/> (last visited Feb. 2, 2010) (providing a calculator to determine the cost of active duty retiree SBP premiums and a probability estimator to compute the probability that a retiree's spouse will outlive the servicemember and benefit from SBP). U.S. Army Human Resources Command, Calculate Survivor Benefit Plan Application, available at <https://www.hrc.army.mil/site/reserve/soldierservices/retirement/survivorbenefitpaycalc.asp> (last visited Feb. 2, 2010) (providing those with AKO access a calculator to calculate the premiums and benefits of SBP for reserve servicemembers).

²⁰⁹ See DOD FMR, *supra* note 33, at vol. 7B, ch. 46, para. 461401 & 461405 (Dec. 2009), available at http://comptroller.defense.gov/fmr/07b/07b_46.pdf (explaining that SBP monthly annuity amounts received by beneficiaries are subject to federal income tax; recommending that executors handling the estates of servicemembers should contact the General Actuarial Branch of the IRS to compute the value of the SBP annuity for federal estate tax purposes). See also DESKBOOK 2009, *supra* note 91, at L-18 and G-51, app. C (on file with author) (showing a calculation of the estate tax value of the SBP upon the death of a retired military member).

For those servicemembers who die on active duty in the line of duty,²¹⁰ their eligible survivor beneficiaries qualify for numerous benefits, including SBP,²¹¹ dependency and indemnity compensation (DIC),²¹² dependents educational assistance (DEA),²¹³ social security, death gratuities,²¹⁴ the Marine Gunnery Sergeant John David Fry Scholarship,²¹⁵ and other benefits.²¹⁶ Many benefits, including DIC and the death gratuity, are neither includable in the decedent's gross estate nor taxable to the recipient.²¹⁷ Despite these tax savings, servicemembers must be concerned that their conduct (e.g., a finding that their conduct was not in the line of duty) may cause their families to lose many of these benefits.

In addition, servicemembers and their families should be prepared for their government benefits to decrease in the future, such as when dependent children reach the age of 18 and social security drops to zero (until the surviving spouse reaches age 62).²¹⁸ Furthermore, servicemembers and their family members must stay alert as the available federal and state benefits frequently and continually change each year. As a result, servicemembers must plan their financial affairs appropriately so that their beneficiaries are financially supported in the event of their untimely death. A balanced financial portfolio will help accomplish this objective.

4. Financial Investments

A well-balanced financial portfolio includes not only life insurance, real estate, and a retirement plan, but also a calculated asset mixture including investments such as stocks, bonds, precious metals, treasuries, and cash. Servicemembers can build a balanced portfolio by using asset allocation models, which attempt to reduce risk through diversification among several asset classes.²¹⁹ Diversifying between equity, fixed income, growth, value, short-, and long-term investments can

²¹⁰ See DoD FMR, *supra* note 33, vol. 7B, ch. 46, para. 460204 (Dec. 2009), available at http://comptroller.defense.gov/fmr/07b/07b_46.pdf (explaining that a servicemember's death will generally be considered to be in the line of duty unless the death occurred under one of the following conditions: (1) the death occurred while the servicemember was not serving on active duty; (2) the death resulted from the servicemember's own intentional misconduct or willful negligence; or (3) the death occurred during a period of unauthorized absence).

²¹¹ See 10 U.S.C. § 1448(d)(1)(B) (establishing automatic SBP benefits for servicemembers who die in the line of duty while on active duty). See DOD FMR, *supra* note 33, at vol. 7B, ch. 46, para. 460201 (Dec. 2009), available at http://comptroller.defense.gov/fmr/07b/07b_46.pdf (establishing the active duty death requirements to qualify for SBP).

²¹² See 38 U.S.C. §§ 1301–1322. Surviving spouses who receive both DIC and SBP, have their SBP annuity amount “offset by DIC, unless the eligible surviving spouse remarries after age 57, and thereby, retains entitlement to DIC. A surviving spouse who receives DIC due to remarriage after age 57 becomes entitled to the full SBP annuity unreduced by DIC, as well as the full DIC amount.” DoD FMR, *supra* note 33, at vol. 7B, para. 460401. See also *Sharp v. United States*, 580 F.3d 1234 (Fed. Cir. 2009) (holding that surviving spouses who remarried after the age of 57 were entitled to SBP payments unreduced by any offset for DIC payments). Surviving spouses who have their SBP annuity amount offset by DIC may qualify for Special Survivor Indemnity Allowance (SSIA), a monthly amount which increases from \$60 in 2010 to \$310 in 2017. See 10 U.S.C. § 1450(m). Because government benefits change constantly, servicemembers, family members, and financial advisors must stay attuned to current developments. One way to see the most current benefits is to visit the MyArmyBenefits website. See *My Army Benefits*, *supra* note 208. Those who do not stay current and abide by appropriate timelines may experience financial loss. For example, surviving family members who do not file DIC applications within one year of the servicemember's death will only receive DIC payments as of the date the Veterans Administration receives the claim. See 38 C.F.R. § 3.400 (Westlaw 2010).

²¹³ See 38 U.S.C. §§ 3500–3566 (2006).

²¹⁴ See 10 U.S.C. § 1475.

²¹⁵ See 38 U.S.C. § 3311 (entitling children of servicemembers who die in the line of duty on or after 11 September 2001, to Post 9/11 Educational Assistance). See generally Veterans Administration, Post 9/11 GI Bill: Marine Gunnery Sergeant John David Fry Scholarship, available at http://www.gibill.va.gov/documents/Fry_Scholarship.pdf (last visited Jan. 27, 2010) (providing an information paper on who is eligible for the scholarship and how the benefits will be paid).

²¹⁶ See, e.g., 10 U.S.C. § 1482 (establishing burial benefits). See e.g., DESKBOOK 2009, *supra* note 91, at L-43 to L-45 (on file with author) (listing benefits such as the shipment of household goods, the temporary allowance to live in military housing or receive basic allowance for housing, commissary and post-exchange privileges, and the right to medical care and legal assistance). Surviving family members who would like free professional assistance attaining all the benefits to which they are entitled, as well as, managing their financial assets should see advisors at FinancialPoint and the Armed Forces Services Corporation. See generally U.S. Dept. of Veterans Affairs, Free Financial Counseling Service, available at <http://www.insurance.va.gov/SGLISITE/BFCS.htm> (last visited Feb. 2, 2010) (providing information about free financial counseling services provided by FinancialPoint). See generally Armed Forces Services Corporation, Member Services, available at http://www.afsc-usa.com/services_to_members.html (last visited Feb. 2, 2010) (providing commission free referrals concerning financial decisions).

²¹⁷ See I.R.C. § 134(b)(3)(C). See generally 10 U.S.C §§ 1448(d). See generally Major Dana J. Chase, *Survivors Benefit Update*, ARMY LAW., Dec. 2008, at 20, 23 (describing changes to the taxability of survivor benefits due to the Heroes Earnings Assistance and Relief Tax Act of 2008 and The National Defense Authorization Acts for Fiscal Years 2007–2009).

²¹⁸ See e.g., Survivorship Calculator, *supra* note 208 (showing that many benefits such as social security, SSIA, and even SBP may decrease to zero depending on the circumstances) (last visited Jan. 25, 2010).

²¹⁹ See HALLMAN & ROSENBLUM, *supra* note 25, at 233 (describing asset allocation strategies and models).

achieve liquidity and reduce overall financial risk.²²⁰ Investors can maintain liquidity by “laddering” assets, whereby investors invest amounts that mature in different years over time.²²¹ By “laddering” fixed income investments, such as certificates of deposits (CDs) insured by the Federal Deposit Insurance Corporation (FDIC), servicemembers can guard against interest rate fluctuations and the loss of capital, provide liquidity as assets become available over time, and benefit from higher interest rates compared to investing only in shorter-term investments.²²² As the CDs mature, servicemembers can use the funds to meet expenses or reinvest. Other beneficial fixed income investments include U.S. savings bonds, which provide tax advantages such as the exclusion of savings bond interest from income taxes when taxpayers use Series EE bonds to pay college tuition and fees.²²³

While fixed income investments provide liquidity and protect assets against interest rate fluctuations—as well as outright loss of one’s investment principal—equity investments protect against inflation and often generate significant financial gains during economic booms. Investors can achieve broad diversification in equities through mutual funds and exchange traded funds (ETFs). When investing in equities, servicemembers can invest a fixed dollar amount in mutual funds every month in a strategy commonly known as “dollar cost averaging.” This practice can be used in all different types of mutual funds such as those that focus on growth, value, precious metals, or international exposure.²²⁴ Dollar cost averaging forces the investor to invest in both good and bad economic times, which can result in the purchase of a greater number of shares at lower prices and benefit from rising prices, assuming the market improves over time.²²⁵ Those who believe they can identify market bottoms when they can purchase a large number of shares at discount prices, might rather invest in a few ETFs to save on fund maintenance costs.²²⁶ ETFs also tend to generate fewer capital gains in addition to saving costs because most ETFs are index funds that experience a lower turnover of securities.²²⁷

Digesting all of these investment opportunities within the current challenging economic environment can be overwhelming to a servicemember. As a result, servicemembers should develop a methodical strategy to deal with these issues by properly positioning themselves through regular investing, rebalancing portfolios, diversifying their assets, and applying the investment principles of the time value of money and compound interest. Essentially, to maximize their future financial growth potential, servicemember must pay themselves by saving and investing first, and then by paying bills second. Paying oneself first, by automatically investing funds directly out of one’s pay or bank accounts, allows investors to invest early in their careers and thus compound their earnings over time. More important, paying oneself first forces investors to live on less while retaining the flexibility to splurge (e.g., cut back on one’s savings) if emergencies arise.

V. Step Four: Transferring Assets Out of the Gross Estate and Related Tax Consequences

As servicemembers acquire wealth, they may become subject to the estate tax or GST tax, especially in light of possible reductions in the unified credit. As a result, these individuals should plan ahead to avoid the unnecessary taxes that would otherwise deplete their assets at a significant cost to their beneficiaries. Those who remain unaffected by the estate tax may also plan accordingly to ensure that any lifetime transfers they might make will be subject to only minimal income and gift tax consequences. Legal and financial guidance from qualified experts is necessary before investors decide how to proceed on these complex issues. The following sections explore the tax consequences of one’s active measures to minimize taxation.

²²⁰ See *id.* at 234–35.

²²¹ See *id.* at 135.

²²² See *id.* at 202.

²²³ See I.R.C. § 135 (excluding U.S. savings bonds income from the definition of gross income if the redeemed funds are used for higher education expenses, certain modified adjusted gross income amounts are not exceeded, the bonds were issued after 1989, and the bonds were issued to someone over the age of twenty-four before the date of issuance). See HALLMAN & ROSENBLOOM, *supra* note 25, at 198.

²²⁴ See HALLMAN & ROSENBLOOM, *supra* note 25, at 215–16 (explaining that growth funds target capital appreciation in companies while precious metal funds are surrogates for holding gold or other precious metals directly).

²²⁵ See *id.* at 158–59 (providing an example of dollar cost averaging in table 9.1). Dollar cost averaging “normally results in a lower average cost per share than the average market price per share during the period in question, because the investor buys more shares with the fixed amount of money when the stock is low in price than when it is high.” *Id.*

²²⁶ See BELKNAP & MARTY, *supra* note 199, at 168 (discussing that mutual funds are best for more frequent purchases of shares, while ETFs are best for large dollar-amount purchases, because mutual funds avoid brokerage fees for multiple-share purchases while ETFs charge brokerage fees for each transaction). See generally HALLMAN & ROSENBLOOM, *supra* note 25, at 230 (discussing the differences between mutual funds and ETFs such as that ETFs are traded on an organized exchange and bought and sold through brokerage firms, and that ETFs can be traded through limit orders, sold short, and purchased on margin).

²²⁷ See BELKNAP & MARTY, *supra* note 199, at 167.

A. Minimizing Taxation Before Death: Lifetime Gifts

Although the future of the federal estate and GST taxes remain uncertain, the gift tax will remain in full force. The federal gift tax provides a limited unified credit²²⁸ for lifetime gifts before taxpayers must pay gift tax. To maximize the value of this credit, servicemembers should fully disclose the value of gifts in timely-filed gift tax returns. This precaution fixes the value of the transfers and starts the statute of limitations for gifts whose value may later be challenged by the Internal Revenue Service during an audit.²²⁹ Such disclosure is especially important for transfers of property that have the potential to realize substantial appreciation over time. By transferring such property, taxpayers can remove substantially appreciating assets from their estates while paying gift tax on the transfers to reduce the value of their gross estates.

Considering the Government allows only a limited gift tax credit, servicemembers should take full advantage of strategies that avoid using the credit, such as the annual exclusion, the marital deduction, the charitable deduction, and financial principals that maximize the use of these transfers (e.g., leverage, discounts, and the time value of money). Servicemembers should also use nontaxable gifts, such as direct transfers to educational institutions for tuition and to medical service providers for health services and long term care.²³⁰ The effective use of all these tools during one's lifetime can enable many servicemembers to deplete their estates and totally avoid estate and generation skipping transfer taxes.

1. Annual Exclusions

Using annual exclusions is one of the easiest ways to deplete an estate free of tax consequences. Specifically, the Government allows a donor to make a certain dollar amount of tax-free gifts (other than gifts of future interests) to any person in a given year.²³¹ Servicemembers may double the amount that they can transfer tax free by making split gifts with their spouses and filing applicable gift tax returns. By making split gifts, each spouse is treated as the donor of half the gift, which uses the annual exclusion of both spouses.²³² Taxpayers can further increase the amount that they can transfer in a single calendar year using annual exclusions by contributing to certain plans (e.g., 529 plans) for the purpose of paying a beneficiary's future qualified higher education expenses.²³³ This transfer not only qualifies as a completed gift in the year of transfer (i.e., not as a gift of a future interest), it also allows for the consideration of any amount contributed over the annual exclusion ratably over five years, beginning with the year of the transfer.²³⁴ The operation of this provision permits individuals to frontload up to ten annual exclusions in a single year, if their spouses make split gifts to such plans.

²²⁸ See I.R.C. § 2505(a) (2010). The federal gift tax credit is currently \$1 million. As a result, taxpayers can make \$1 million of taxable gifts before they must begin paying gift tax.

²²⁹ See *id.* § 6501(a) (providing a three year statute of limitations for the IRS to assess and challenge gift valuations). This is especially important, because the value of these lifetime taxable gifts will be considered when calculating estate taxes, which incorporates the value of adjusted taxable gifts. See *id.* § 2001(f). In general, if the Government unsuccessfully attempts to collect a tax, interest, or penalty, and it cannot establish that its position was substantially justified, taxpayers may be able to be awarded a judgment for reasonable administrative and litigation costs incurred. See *id.* § 7430.

²³⁰ See *id.* § 2503(e) (excluding certain transfers for educational and medical expenses from treatment as transfers of property by gift for purposes of Chapter 12 of the gift tax).

²³¹ See *id.* § 2503(b) (establishing an annual exclusion of \$10,000 and adjusting the amount each year for inflation). In 2009 and 2010, the annual exclusion was \$13,000. See *id.*

²³² See *id.* § 2513(a) (considering spousal gifts to third parties as made one-half by each spouse). Individuals making split gifts must file IRS Form 709. Once spouses make the gift splitting election, gift splitting will apply to "all such gifts made during the calendar year by either [spouse] while married to the other." See *id.*

²³³ *Id.* § 529. See generally Lieutenant Colonel Craig D. Bell & Maureen C. Ackerly, *A Primer: Section 529 Plans, Coverdell Education Savings Accounts (Education IRAs), and Other Tax-Smart Ways to Save for College*, ARMY LAW., Apr. 2004, at 28, 28–44 (discussing the use of 529 plans and other ways to save for college and, as a result, deplete a taxpayer's gross estate). In addition, servicemembers can save for college and reduce the money needed to pay educational expenses by taking advantage of opportunities to pay in-state tuition at public institutions of higher education. For example,

In the case of a member of the armed forces who is on active duty for a period of more than 30 days and whose domicile or permanent duty station is in a State that receives assistance under this chapter, such State shall not charge such member (or the spouse or dependent child of such member) tuition for attendance at a public institution of higher education in the State at a rate that is greater than the rate charged for residents of the State.

²³⁴ 20 U.S.C.A. § 1015d(a) (Westlaw 2010).

²³⁴ I.R.C. § 529(c)(2).

The use of other, more sophisticated, leveraging tools, including Crummey²³⁵ powers, life insurance trusts, and split gifts, can further maximize annual exclusions when used in conjunction. For example, if a transferor contributes the annual exclusion amount every year to an irrevocable trust for the benefit of a beneficiary, the beneficiary can be given the power to withdraw the amount for a period of thirty days after the contribution (i.e., Crummey powers) to ensure the amount qualifies for the annual exclusion as a gift of a present interest. If the beneficiary is provided adequate notice of his right to withdraw and voluntarily chooses not to withdraw the funds, the trust can use the funds to purchase life insurance on the transferor's life²³⁶ and pay the required premiums.²³⁷ Since the trust would own the life insurance policy, the life insurance proceeds would not be included in the servicemember's gross estate at his death. Those interested in even more sophisticated techniques should seek the advice of an experienced estate planner to discuss the numerous possibilities available.²³⁸

2. Spousal Gifts and Limitations to Foreign Spouses

Servicemembers can also deplete their estates by making lifetime gifts to spouses. In general, lifetime gifts to U.S. citizen spouses qualify for the unlimited marital deduction.²³⁹ However, gifts to non-U.S. citizen spouses do not qualify in the same manner.²⁴⁰ Instead, gifts that "would have qualified for the marital deduction had the donee spouse been a U.S. citizen" can be given tax-free, as long as the gift's value falls within a maximum amount established by law, indexed for inflation.²⁴¹ For example, in 2010, a spousal donor could gift a non-U.S. citizen spouse up to \$134,000 tax-free.²⁴²

3. Charitable Gifts

Contributions to charity allow servicemembers to take advantage of both income tax and gift tax charitable deductions²⁴³ while simultaneously achieving their charitable objectives at a significantly reduced "net real cost."²⁴⁴ For example, a taxpayer in the 45% gift tax bracket could effectively transfer \$14,500 to a public charity at the same cost as transferring \$10,000 to a non-charitable beneficiary (assuming annual exclusions did not apply) and paying the resulting \$4,500 in gift taxes (i.e., $0.45 \times \$10,000 = \$4,500$). In addition to taking gift tax charitable deductions and efficiently removing property

²³⁵ *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968). See generally STEPHENS, *supra* note 62, at 9-29 to 9-34 (discussing how Crummey powers can be used to qualify for the annual exclusion and avoid the problems created by a transfer of future interests). As an alternative to using Crummey powers, transferors could establish defective grantor trusts for income tax purposes, to buy insurance on the transferor's life.

²³⁶ To buy life insurance, there must be an insurable interest. The general principal behind requiring an insurable interest is to allow only those who will be hurt by the insured's death to purchase a policy on the insured's life.

²³⁷ The trust may take advantage of the "5 & 5 rule" and include "hanging powers," a controversial technique that the IRS does not believe works, to prevent a gift from being made from the beneficiary to the trust. Using these powers, the right to withdraw would lapse every year to the extent of the greater of \$5,000 or 5% of the trust's corpus, while the remaining amount would "hang" in the balance and lapse in subsequent years as the corpus of the trust grows.

²³⁸ See generally T.M., ESTATE PLANNING, *supra* note 21, at A106 to A107 (providing a useful discussion of the use of defective grantor trusts). See generally Rev. Rul. 2004-64 (establishing the ability of owners of defective grantor trusts to pay the income taxes of the trust without being treated as making gifts to the trust beneficiaries). See generally Samuel A. Donaldson, Fundamentals of Grantor Trusts 242-44 (June 18-23, 2006), available at http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CL092_chapter_03_thumb.pdf (last visited Apr. 22, 2009) (discussing the use of Crummey powers in defective grantor trusts; explaining that many practitioners do not give Crummey powers to beneficiaries of defective grantor trusts due to the uncertainties involved). See generally HOWARD M. ZARITSKY, GRANTOR TRUSTS: SECTIONS 671-679 (2d Portfolio 858) (Tax Mgmt. Inc. 2001) (discussing the numerous aspects of grantor trusts).

²³⁹ See I.R.C. § 2523(a) (2010). See generally T.M. ESTATE PLANNING, *supra* note 21, at A-88 (explaining the gift tax marital deduction). But see I.R.C. § 2523(b) (denying an unlimited deduction for gifts of terminable interests).

²⁴⁰ I.R.C. § 2523(i). See generally T.M. ESTATE PLANNING, *supra* note 21, at A-88 (explaining the tax implications of gifts to non-U.S. citizen spouses).

²⁴¹ T.M. ESTATE PLANNING, *supra* note 21, at A-88.

²⁴² See Rev. Proc. 2009-50, sec. 3, para. 30 (2009) (establishing the cost-of-living adjustments for 2010).

²⁴³ See I.R.C. § 170 (outlining the income tax charitable deduction). See *id.* § 2522 (outlining the gift tax charitable deduction). See generally T.M. ESTATE PLANNING, *supra* note 21, at A-175 to A-186 (explaining the tax implications of charitable transfers). STEPHENS, *supra* note 62, at 11-3. In contrast, I.R.C. § 2055(c) reduces the estate tax charitable deduction for estate taxes paid from the charitable bequest, while I.R.C. § 642(g) preclude double deductions under the estate tax for charitable bequests. See *id.* at 5-62 to 5-63. Specifically, under § 642(g), the estate tax charitable deduction is reduced by administrative expense deductions taken under § 2053 and losses taken under § 2054. See *id.* at 5-62 to 5-63. See I.R.C. §§ 642(g) and 2055(c). As a result, servicemember may want to make only charitable gifts rather than charitable bequests to maximize the beneficial tax savings effect. For those who want to make charitable bequests, servicemembers may want to consider specifying in their will that taxes will be paid out of other funds rather than out of the charitable bequest pro rata, to ensure that the charitable estate tax deduction is not reduced under I.R.C. § 2055(c).

²⁴⁴ T.M. ESTATE PLANNING, *supra* note 21, at A-176.

from their gross estates, taxpayers could take income tax deductions for charitable contributions, although the deductions may be limited by factors such as the donor's adjusted gross income and the specific status of the charitable recipients.²⁴⁵

To increase the benefits of charitable deductions, instead of contributing cash, servicemembers can donate appreciated tangible personal property, such as a valuable painting to an art museum. Where there is clearly "related use" between the contributed property and the public charity (e.g., the museum will display the donated painting for the public's pleasure rather than selling it to generate income to feed the homeless), the taxpayer will be entitled to a charitable deduction equal to the painting's full fair market value, even though the gain resulting from the painting's appreciation is not included in the taxpayer's gross income.²⁴⁶

4. Premiums, Discounts, and other Valuation Issues

To maximize gift transfers while minimizing tax implications, servicemembers can also take advantage of valuation issues. Servicemembers who own a family business can use minority interest, lack of marketability, and fractional interest discounts to transfer property to others at a tax value that is a fraction of its inherent value.²⁴⁷ Furthermore, due to historically low interest levels, taxpayers may take advantage of more advanced instruments, such as short-term rolling grantor retained annuity trusts (GRATs).²⁴⁸ "Zeroing out" the GRATs, taxpayers can make tax-free transfers of assets that are expected to appreciate substantially while retaining an income interest for the term of the GRAT equal to the value of the original transfer.²⁴⁹ Reliance on historically low interest rates (i.e., "the hurdle rate") often prompts GRAT assets to outperform the interest rate, producing a significant remainder for tax-free transfer.²⁵⁰ At the expiration of the short-term GRAT, servicemembers can create another GRAT (hence the term "short-term rolling GRATs"), creating further opportunities to outperform the "hurdle rate" and make tax-free transfers of remainder interests. Where the servicemember dies during the term of the GRAT, the Internal Revenue Code includes the entire amount, including any appreciation, in the servicemember's gross estate.²⁵¹

B. Minimizing Taxation at Death: Using Available Credits and Deductions

To minimize the overall tax effect on a family and maximize the funds available for transfer to beneficiaries, taxpayers should structure their estate planning documents and transactions to take advantage of both spouses' federal estate and GST tax exemptions and available deductions, such as the marital and charitable deductions. Specifically, servicemembers who want to provide for their spouses by deferring tax should ensure that their estate planning documents include appropriate formula clauses that allow them to fall back on the unlimited marital deduction after using their exemptions.²⁵² The most

²⁴⁵ See I.R.C. § 170(b). For example, the income tax deduction for a cash contribution to a public charity is limited to 50% of the taxpayer's adjusted gross income. See *id.* § 170(b)(1)(A). In contrast, the income tax deduction for a cash contribution to certain non operating private foundations (e.g., a foundation that just makes grants) is limited to 30% of the taxpayer's adjusted gross income. See *id.* § 170(b)(1)(D)(i)(II). Fortunately, excess contributions can be carried over for five years. See *id.* § 170(b).

²⁴⁶ See *id.* § 170(e)(1)(B)(i)(I). See T.M. ESTATE PLANNING, *supra* note 21, at A-177.

²⁴⁷ See generally STEPHENS, *supra* note 62, at 10-56 to 10-66 (explaining available premiums and discounts with regard to transfers of interests in property). It is important to understand that discounts are layered and not cumulative. For example, if a taxpayer has a 20% lack of marketability discount and a 40% other type of discount, the taxpayer only has a 52% discount (i.e., 20% + (80% x 40%)) rather than a 60% discount. See *Estate of Bailey v. Comm'r*, 83 T.C.M. (C.C.H.) 1862 (2002). In addition, servicemembers, especially those interested in shifting effective control in a family business to younger generations, need to ensure they do not inadvertently run afoul of the special valuation rules of Chapter 14 of the Internal Revenue Code. See I.R.C. §§ 2701-2704. See generally T.M. ESTATE PLANNING, *supra* note 21, at A-191 to A-209 (explaining the complicated provisions and almost punitive effects of Chapter 14).

²⁴⁸ See I.R.C. § 2702 (2010). In general, to qualify for a GRAT, there must be a fixed annuity amount paid at least annually without the possibility of commutation or payment via a note. See generally Treas. Reg. § 25.2702-3(b) & (d) (2009) (establishing the requirements and limitations of GRATs).

²⁴⁹ See *Walton v. Comm'r*, 115 T.C. 589 (2000).

²⁵⁰ See I.R.C. § 7520 (establishing the applicable interest rates which change monthly (e.g., March 2009 had a rate of 2.4%)).

²⁵¹ See *id.* § 2036(a).

²⁵² See *id.* § 2056. In general, to qualify for the marital deduction for bequests, etc., to the surviving spouse, the decedent must have been survived by his spouse, the value of the interest deductible must be includible in the decedent's gross estate, the interest must pass from the decedent to the surviving spouse, and the interest must not be a nondeductible terminable interest. See *id.* Some examples of exceptions to these general requirements to qualify for the unlimited marital deduction include marital deduction and QTIP trusts, as well as, transfers to non US citizen spouses. See generally T.M. ESTATE PLANNING, *supra* note 21, at A-48 to A-77 (explaining the estate tax marital deduction).

effective clauses leave spouses with assets in a marital deduction trust²⁵³ in an amount determined by a formula.²⁵⁴ Such a clause will ensure that servicemembers use their full exemption, leaving the maximum amount to their beneficiaries in a credit shelter or bypass trust, free of federal estate and GST taxes. Additionally, any estate assets over the full exemption amount would pass to the surviving spouse and be protected by the unlimited marital deduction, ultimately deferring taxes due until the surviving spouse's death.

Servicemembers who want to provide for a surviving spouse and defer taxes while maintaining control of the ultimate disposition of funds should consider establishing a qualified termination of interest property (QTIP) trust.²⁵⁵ The unlimited marital deduction clause in a QTIP trust must provide all income (except stub income) to the spouse, at least annually, and disallow any other permissible beneficiary during the spouse's lifetime.²⁵⁶ In addition, the executor must make an irrevocable QTIP election on the decedent's estate tax return. Depending on the circumstances, an executor may make either a full or partial QTIP election²⁵⁷ to minimize taxes. The flexibility of the election itself and the ability to make the election as late as fifteen months after the decedent's death²⁵⁸ gives the executor the ability to do significant postmortem estate planning.²⁵⁹

For servicemembers with non-U.S. citizen spouses, a qualified domestic trust²⁶⁰ (QDOT) can accomplish some of the same objectives as a QTIP trust, including the deferment of estate taxes. To ensure the property transferred does not escape U.S. estate taxation, the law requires that at least one trustee be either a U.S. citizen or a U.S. corporation (unless the Department of the Treasury waives the requirement), and that no distributions, other than of income, be made unless the trustee has the power to withhold applicable taxes.²⁶¹ In contrast to a QTIP trust, a QDOT can still qualify for the marital

²⁵³ I.R.C. § 2056(b)(5). In general, to qualify for the unlimited marital deduction under § 2056(b)(5), the trust must pay all income (except stub income) to the surviving spouse at least annually and give the spouse a general power of appointment that is "exercisable by such spouse alone and in all events." *Id.* See also Regs. 20.2056(b)-7(d)(4) (specifying that stub income, income between the last distribution date and the date of the surviving spouse's death, need not be paid to the surviving spouse or to the surviving spouse's estate).

²⁵⁴ See, e.g., STANLEY JOHANSON, WILLS & ESTATES FALL SEMESTER 1999 SUPPLEMENTAL MATERIALS, pt. VI, at 65 (1999). As an example, a formula clause could include the following language:

If my wife survives me, I give to [my wife] [the trustee of a marital deduction trust] a cash legacy in an amount which, when added to the value for federal estate tax purposes of all items in my gross estate which qualify for the marital deduction and which pass or have passed to my wife in a form qualifying for the marital deduction otherwise than under this . . . [bequest], produces the *smallest marital deduction* (and thus the *largest taxable estate*) that will result in no federal estate tax being payable by my estate, after allowing for the . . . [estate tax] credit against the federal estate tax and all other factors that affect my estate's federal estate tax liability. In making this computation, values as finally determined for federal estate tax purposes should be used. If no federal estate tax would be payable by my estate even if no gift were made by this paragraph, this gift shall not be made.

Id.

²⁵⁵ I.R.C. § 2056(b)(7). See also Regs. 20.2056(b)-7(d)(4) (specifying that stub income, income between the last distribution date and the date of the surviving spouse's death, need not be paid to the surviving spouse or to the surviving spouse's estate). See generally T.M. ESTATE PLANNING, *supra* note 21, at A-58 to A-62 (explaining QTIPs and their requirements; warning of the dangers associated with the estate making a QTIP election that was not necessary to reduce estate tax liability and the corresponding possible relief available for a surviving spouse under Rev. Proc. 2001-38).

²⁵⁶ See I.R.C. § 2056(b)(7).

²⁵⁷ See, e.g., JOHANSON, *supra* note 254, pt. VI, at 103 (on file with author). As an example, a partial QTIP election might include the following formula language:

I elect qualified terminable interest property treatment for the following fractional share of the residuary trust created by . . . the decedent's will: The numerator of the fraction shall be an amount which, when added to the value for federal estate tax purposes of all items in the decedent's gross estate which qualify for the marital deduction and which pass or have passed to the decedent's spouse in a form qualifying for the marital deduction otherwise than under this trust, produces the smallest marital deduction (and thus the largest taxable estate) that will result in no federal estate tax being payable by the decedent's estate, after allowing for the . . . [estate tax] credit against the federal estate tax and all other factors that affect my estate's federal estate tax liability. The denominator of the fraction shall be the value of the corpus of the residuary trust. In making this computation, values as finally determined for federal estate tax purposes shall be used.

Id. The elected portion would be includable in the spouse's gross estate under §2044 while the unelected portion would bypass the spouse's estate. *Id.* Pt. VI, at 104.

²⁵⁸ Nine months to file the federal estate tax return plus six months if the estate gets an extension.

²⁵⁹ See I.R.C. § 2056(b)(7) (2010).

²⁶⁰ *Id.* § 2056A. See generally T.M. ESTATE PLANNING, *supra* note 21, at A50 and A-74 to A-75 (explaining the history and requirements of the QDOT; discussing how to conduct marital deduction transfers to non-U.S. citizens surviving spouses).

²⁶¹ See T.M. ESTATE PLANNING, *supra* note 21, at A-74. The U.S. trustee is personally liable for the taxes if they are not paid.

deduction even though there is no requirement to pay the surviving spouse all the income at least annually.²⁶² In addition, unlike a QTIP trust, lifetime distributions from a QDOT other than distributions of income will be subject to estate tax when made, and any property remaining will be subject to the estate tax at the surviving spouse's death.²⁶³

C. Minimizing Taxation After Death: Postmortem Planning

After a servicemember's death, executors and beneficiaries can still conduct postmortem estate planning using various mechanisms, such as using an alternate valuation date²⁶⁴ if the decedent's gross estate depreciates after the decedent's death,²⁶⁵ and selecting an estate's accounting year²⁶⁶ if the estate's income can be spread out more evenly. In addition, servicemembers can use three powerful postmortem planning techniques including QTIP elections, qualified disclaimers, and the choice of where and when to take deductions. For example, by making a QTIP election after the decedent's death, the executor can modify the use of the marital deduction and ensure the full use of the decedent's unified credit.²⁶⁷

A beneficiary can accomplish similar results by making a qualified disclaimer.²⁶⁸ By making an "irrevocable and unqualified refusal"²⁶⁹ to accept the property transferred, the property will bypass the beneficiary, as if the beneficiary died before the decedent. This technique can be extremely useful in cases where the use of the marital deduction "overfunds" the marital transfer.²⁷⁰ For instance, if a taxpayer with a \$4.5 million gross estate died in 2009 leaving his entire estate to his independently wealthy spouse, the taxpayer would overfund the marital transfer wasting the unified credit. To resolve this error, the surviving spouse could disclaim \$3.5 million of assets.²⁷¹ As a result, the disclaimed \$3.5 million of assets could pass tax-free to their children. Furthermore, if the taxpayer had not previously used his GST exemption and the children to whom the assets would pass were themselves wealthy, the children could make a qualified disclaimer,²⁷² passing the property to their children (i.e., the taxpayer's grandchildren) free of federal estate and GST taxes. In short, while \$1 million would pass to the surviving spouse tax-free under the unlimited marital deduction, \$3.5 million could escape both the federal estate and GST taxes.

Executors can engage in further postmortem planning by selecting whether and when to take funeral, administrative, and medical expenses²⁷³ on either the decedent's last income tax return, the estate's income tax return, or the estate's estate tax return.²⁷⁴ If estate taxes are not due as a result of the unified credit and marital deduction, executors may choose to deduct an

²⁶² See I.R.C. § 2056A(a)(2); T.M. ESTATE PLANNING, *supra* note 21, at A-75 (explaining that the Revenue Reconciliation Act of 1989 deleted the requirement of former § 2056A(a)(2) requiring current income distributions).

²⁶³ See I.R.C. § 2056A(b)(1).

²⁶⁴ See *id.* § 2032.

²⁶⁵ See T.M. ESTATE PLANNING, *supra* note 21, at A-253 (explaining that the alternate valuation date is six months after death, unless the property was distributed, sold, exchanged, or otherwise disposed at an earlier date, in which case that earlier date would be applicable date).

²⁶⁶ See *id.* at A-241 (describing the advantages of having the estate select either a fiscal or calendar year such as the deferral of taxes through staggered fiscal years).

²⁶⁷ See generally STEPHENS, *supra* note 62, at 5-174 (discussing the advantages of allowing the executor to make a QTIP election as a method of post mortem planning; describing how to make a QTIP election).

²⁶⁸ See I.R.C. § 2046 (referencing the uniform disclaimer rules of § 2518 which also apply for purposes of the estate tax). See *id.* § 2518 (defining qualified disclaimers and explaining the implications of making qualified disclaimers). See generally STEPHENS, *supra* note 62, at 10-108 (discussing disclaimers).

²⁶⁹ See I.R.C. § 2518(b). To qualify as a qualified disclaimer, (1) the refusal must be in writing and received by the transferor not later than nine months after the interest's creation (i.e., the testator's death) or the beneficiary's 21st birthday, (2) the beneficiary must not accept the property nor any of its benefits, and (3) as a result of the refusal, the property must pass without any direction on the part of the beneficiary to the spouse of the decedent or to a person other than the person making the disclaimer. *Id.* As a result, "[t]o minimize complications, wills or trusts should have an express provisions as to what will happen if a property interest is disclaimed." HALLMAN & ROSENBLOOM, *supra* note 25, at 523. See generally STEPHENS, *supra* note 62, at 10-118 (discussing that a resident's use of residential property held in joint tenancy or as community property, is not acceptance of the property).

²⁷⁰ T.M. ESTATE PLANNING, *supra* note 21, at A-75.

²⁷¹ See generally HALLMAN & ROSENBLOOM, *supra* note 25, at 523-24 (showing a similar example from a decedent dying in 2002). The unified credit in 2009 would protect the transfer of \$3.5 million.

²⁷² See generally STEPHENS, *supra* note 62, at 10-108 (discussing timely disclaimers). It is important to note that a "person who receives an interest in property as a result of a qualified disclaimer of the interest must also disclaim the previously disclaimed interest no later than nine months after the date of the taxable transfer creating the interest." *Id.* In short, if the property is left by will, all parties over the age of twenty-one must disclaim within nine months of the decedent's death. See *id.* at 10-116.

²⁷³ See I.R.C. § 2053.

²⁷⁴ See generally T.M. ESTATE PLANNING, *supra* note 21, at A-239 (discussing post-mortem planning techniques).

administrative expense on the estate's income tax return. In contrast, if both income and estate tax is due, executors may choose to deduct the expenses on the estate tax return as it will generally be "more valuable"²⁷⁵ as a estate tax deduction. However, if both income and estate taxes are due and the executor takes deductions on the estate's income tax return, rather than the estate's estate tax return, the estate tax will increase to the detriment of the remainder beneficiaries while the income tax will decrease to the benefit of the income beneficiaries.²⁷⁶ If the remainder and income beneficiaries are not the same people, these issues may create conflicts.

VI. Conclusion

The current unpredictable economic climate has created substantial challenges for servicemembers seeking to build wealth and provide for beneficiaries after death. While proper financial planning requires substantial energy and intense thought, it is essential. Servicemembers should be especially cautious of estate planning ramifications and tax consequences of investments and property transfers. Any effort at tax and estate planning should begin with the guidance of a knowledgeable and trained professional. After servicemembers have executed a will and power of attorney, they should strive to become better informed about the tax system so that they can use the system to their advantage.

Building wealth and providing for future generations requires diversification of assets and commitment of funds in a manner that does not expose assets to excessive risk. The acquisition of life and property insurance serve as a productive starting point, but servicemembers can reap significant benefits from regular investments in financial assets such as a Roth IRA diversified mutual fund that facilitates tax savings, dollar cost averaging, the compounding of funds, and the exploitation of the time value of money. Exposure to both fixed income and equity investments can also benefit servicemembers. While fixed income investments, such as "laddered" CDs and savings bonds, protect against the loss of capital in economic busts, equity investments allow servicemembers to benefit from economic booms. In addition, those wishing to reap potentially huge benefits from owning real property should consider purchasing well-located properties that will sustain themselves with positive rental cash flows when the property no longer serves as a principal residence.

In order to generate funds for investment, maintain liquid financial reserves, and sustain a diversified, balanced portfolio, servicemembers must be prepared to live beneath their means. They may begin by cutting expenses and taking advantage of numerous military benefits, such as free education and space available travel, as well as, reduced on-post housing costs and utility fees. Automatically investing one's annual pay raises and tax refunds can also increase the availability of funds by preventing servicemembers from continually increasing their living standards every time their wealth increases. Servicemembers who elect to work after achieving retirement from the military can invest their military retirement pay check while paying monthly bills with their civilian employment's earnings. However, the best way to reduce expenses is for servicemembers and retirees simply to distinguish their needs from their wants. By focusing on actual needs, such as basic food, clothing, and shelter, servicemembers can steer clear of the dangers of keeping up with their neighbors and can expedite their journey to financial freedom and success.

A final step to attaining financial security and building wealth for oneself and for one's family is the establishment of a comprehensive plan to transfer wealth to beneficiaries in a tax-efficient manner. By taking advantage of annual exclusions, direct tuition payments to schools, direct payments to medical providers, the unified credit, charitable deductions, and the marital deduction, servicemembers can set themselves and their beneficiaries up for success. In short, conscientious legal and financial planning combined with a diversified investment strategy will help servicemembers build and keep the wealth they have earned through a lifetime of work. These measures will also allow servicemembers to pass more of that wealth to future generations with minimal losses to taxes.

²⁷⁵ *Id.* at A-239.

²⁷⁶ *See id.* at A-242.

Appendix A

Exclusions, Exemptions, and Gift / Estate / GST Tax Rates²⁷⁷

Year	Annual Gift Exclusion	Estate / GST Exclusion	Gift Tax Exclusion	Highest Estate & Gift Tax Rate
2002	\$11,000	\$1 Million	\$1 Million	50%
2003	\$11,000	\$1 Million	\$1 Million	49%
2004	\$11,000	\$1.5 Million	\$1 Million	48%
2005	\$11,000	\$1.5 Million	\$1 Million	47%
2006	\$12,000	\$2 Million	\$1 Million	46%
2007	\$12,000	\$2 Million	\$1 Million	45%
2008	\$12,000	\$2 Million	\$1 Million	45%
2009	\$13,000	\$3.5 Million	\$1 Million	45%
2010	\$13,000	(Taxes Repealed)	\$1 Million	35%
2011	To be Determined	\$1 Million	\$1 Million	55% (EGTRRA Sunsets)

²⁷⁷ See JOINT COMMITTEE, *supra* note 5, at 11 and 14 (showing similar tables). See DESKBOOK 2006, *supra* note 13, at G-5 (on file with author) (showing a similar table). See JOINT COMMITTEE, *supra* note 5, at 11 and 14 (showing similar tables). See *supra* note 58 and accompanying text (explaining that EGTRRA sunsets on 31 December 2010).

Appendix B

Federal Gift Tax Computation Examples²⁷⁸

Hypo A: Colonel Smith, who has previously never made any taxable gifts to anyone, gave his niece a home worth \$688,000 in 2009 and gave his nephew a condominium worth \$338,000 in 2010.

Hypo B: The same as Hypo A, except Colonel Smith's gift of the condominium to his nephew in 2010 is worth \$500,000.

	2009	(Hypo A) 2010	(Hypo B) 2010
Gift	\$688,000	\$338,000	\$500,000
- Annual Exclusion	- 13,000	-\$13,000	-\$13,000
= Taxable Gift	= \$675,000	\$325,000	\$487,000
Taxable Gift	\$675,000	\$325,000	\$487,000
+ Prior Taxable Gifts	- 0	+675,000	+675,000
= Total Taxable Gifts	= \$675,000	=\$1,000,000	=1,162,000
Tax of Total Gifts under I.R.C. § 2502(a)	\$220,550 ²⁷⁹	\$330,800 ²⁸⁰	\$387,500 ²⁸¹
- Tax from Gifts made in Prior Years	- 0	- 0	- 0
= Gift Tax in Current Year	= \$220,550	= \$330,800	= \$387,500
Gift Tax in Current Year	\$220,550	\$330,800	\$387,500
- Federal Gift Tax Credit (Unified Credit) ²⁸²	- 220,550	-330,800 ²⁸³	-330,800
= Gift Tax Owed	= \$0	= \$0	= \$56,700

²⁷⁸ See DESKBOOK 2006, *supra* note 13, at G-12 (on file with author) (showing a similar example).

²⁷⁹ See I.R.C. § 2502(a) (2009) (applying gift rates under I.R.C. § 2001(c) for gifts made *prior to* 31 December 2009). For example, tax on taxable gifts of \$675,000 = 155,800 + .37 x (675,000 – 500,000) = \$220,550.

²⁸⁰ See *id.* § 2502(a)(2) (applying gift rates for gifts made *after* 31 December 2009). For example, tax on taxable gifts of \$1,000,000 = 155,800 + .35 x (1,000,000 – 500,000) = \$330,800.

²⁸¹ See *id.* § 2502(a)(2) (applying gift rates for gifts made *after* 31 December 2009). For example, tax on taxable gifts of \$1,162,000 = 155,800 + .35 x (1,162,000 – 500,000) = \$387,500.

²⁸² See *id.* § 2505(a) (setting the federal gift credit imposed for gift taxes imposed by I.R.C., § 2501).

²⁸³ See *id.* § 2505(a) (setting the federal gift credit imposed for gift taxes imposed by I.R.C., § 2501). For example, the maximum credit for lifetime gifts = \$155,880 + .35 x (1,000,000 – 500,000) = \$330,800.

Appendix C

Outline for Calculating Federal Estate Tax²⁸⁴

IRC Section Property Covered

- §2033 Property Owned at Death
- + §2035 Certain Transfers Within Three Years of Death
- + §2036 Transfers with Retained Life Estate or Retained Control
- + §2037 Transfers Taking Effect at Death
- + §2038 Revocable Transfers
- + §2039 Annuities and Employee Death Benefits
- + §2040 Property Passing by Rights of Survivorship
- + §2041 General Powers of Appointment
- + §2042 Life Insurance Proceeds (Where Decedent Held Incidents of Ownership)
- + §2043 Transfers for Partial Consideration
- + §2044 QTIP Transfers for which Marital Deduction was Previously Allowed
- = **Gross Estate (GE)**

Type of Deduction

- §2053 Deduction for Administrative and Funeral Expenses, as well as Debts
- §2054 Deduction for Casualty Losses
- §2055 Charitable Deduction
- §2056 Marital Deduction
- §2058 Deduction for State Death Taxes Paid (dying between 1 JAN 05 - 31 DEC 09)
- = **Taxable Estate**

- + Adjusted Taxable Gifts Taxable Gifts Made After 1976 not Otherwise Includable in GE
- = **Tentative Estate Tax Base**

- x §2001 Estate Tax Rate Schedule
- = **Tentative Estate Tax**

Type of Credit

- Gift Taxes Paid on Taxable Gifts Made After 1976
- §2010 Estate Tax Unified Credit
- §2011 Credit for State Death Taxes (decedents dying after 31 DEC 10)
- §2012 Credit for pre-1977 Gift Taxes on Property Included in Gross Estate
- §2013 Credit for Taxes on Prior Transfers to Decedent (i.e., prior inclusion in a GE)
- §2014 Credit for Foreign Death Taxes
- = **Federal Estate Tax**

²⁸⁴ See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 869–70 (7th ed. 2005) (showing a similar outline). See also HALLMAN & ROSENBLOOM, *supra* note 25, at 472 (showing a more general outline).

Appendix D

Federal GST Tax Calculation Examples²⁸⁵

Task: Ensure that skip person grandchild receives \$100,000 in 2002.

Conditions: Servicemember Transferor is in the 50% gift, estate, and GST tax brackets. Neither the unified credit nor annual exclusions are available.

Standard: Incur the least federal transfer taxes by comparing the alternatives.

Alternative 1: Inter Vivos Direct Skip to Grandchild (This is the Best Alternative)

Amount Received by Grandchild	\$100,000
+ GST Tax on Gift	+ 50,000
+ Federal Gift Tax on Gift	+ 50,000
+ <u>Federal Gift Tax on GST Tax Paid</u>	+ <u>25,000</u>
= Total Funds Needed for Transfer	= \$225,000

Alternative 2: Testamentary Direct Skip Transfer to Grandchild (i.e., A Bequest)

Funds Necessary for Bequest	\$300,000
- Federal Estate Tax on Funds	- 150,000
- <u>GST Tax on Bequest</u>	- <u>50,000</u>
= Amount Received by Grandchild	= \$100,000

Alternatives 3 and 4: Transfer to Grandchild from Testamentary Trust (e.g., Taxable Distribution and Taxable Termination)

Funds for Bequest to Testamentary Trust	\$400,000
- Federal Estate Tax on Funds	- 200,000
- <u>GST Tax Paid by Grandchild or Trustee</u>	- <u>100,000</u>
= Amount Received by Grandchild	= \$100,000

²⁸⁵ See T.M., ESTATE PLANNING, *supra* note 21, at A-146 (showing a similar example). The year 2002 was chosen in the example as the year of transfer, because the 50% gift, estate, and GST tax brackets existing at that time simplify calculations.

Appendix E

State Income Tax (A Quick Reference Guide)

STATE	MILITARY PAY EXCLUDED?	MIL. RETIREMENT PAY EXCLUDED?	CITATION
Alabama	No	Yes	ALA. CODE § 40-18-3 (LexisNexis 2009), ALA. CODE § 40-18-20 (LexisNexis 2009)
Alaska	No State Income Tax	No State Income Tax	ALASKA STAT. § 43.20.010 (2009)
Arizona	Yes ²⁸⁶	Partial ²⁸⁷	ARIZ. REV. STAT. § 43-1022 (LexisNexis 2008)
Arkansas	Partial ²⁸⁸	Partial ²⁸⁹	ARK. CODE ANN. § 26-51-306 (2008), ARK. CODE ANN. 26-51-307 (2008)
California	Yes ²⁹⁰	No	CAL. REV. & TAX. CODE § 17140.5 (Deering 2009)
Colorado	No ²⁹¹	Partial ²⁹²	COLO. REV. STAT. § 39-22-103 (2008), COLO. REV. STAT. § 39-22-112 (2008), COLO. REV. STAT. § 39-22-104 (2008)
Connecticut	Yes ²⁹³	No	CONN. GEN. STAT. § 12-701 (2008)
Delaware	No	Partial ²⁹⁴	DEL. CODE ANN. tit. 30, § 1121 (2009), DEL. CODE ANN. tit. 30, § 1106 (2009)
Florida	No State Income Tax	No State Income Tax	FLA. STAT. ANN. § 220.02 (LexisNexis 2009)
Georgia	No	Partial ²⁹⁵	GA. CODE ANN. § 48-7-27 (2009)
Hawaii	No	Yes	HAW. REV. STAT. § 235-2.3 (2009); HAW. REV. STAT. § 235-7 (2009)

²⁸⁶ ARIZ. REV. STAT. § 43-1022 (Westlaw 2010). Excluded from Arizona state tax is “compensation received for active service as a member of the reserves, the national guard or the armed forces of the United States.”

²⁸⁷ ARIZ. REV. STAT. § 43-1022 (Westlaw 2010). Up to \$2500 in military retirement benefits may be excluded for Arizona state tax purposes.

²⁸⁸ ARK. CODE ANN. § 26-51-306 (Westlaw 2010). Only the first \$9000 of active duty pay is exempt.

²⁸⁹ ARK. CODE ANN. § 26-51-307 (Westlaw 2010). Up to \$6000 of pension is excluded.

²⁹⁰ CAL. REV. & TAX. CODE § 17140.5 (Deering 2009). An individual domiciled in California when entering the military is considered to be a nonresident while stationed outside of California on PCS orders. See STATE OF CALIFORNIA FRANCHISE TAX BOARD, FTB PUB. 1032 TAX INFORMATION FOR MILITARY PERSONNEL (2009), available at http://www.ftb.ca.gov/forms/2009/09_1032.pdf (last visited Feb. 12, 2010).

²⁹¹ COLO. REV. STAT. § 39-22-103 (Westlaw 2010). An individual domiciled in Colorado who is absent from the state for a period of at least three hundred five days of the tax year and is stationed outside of the United States of America for active military duty may file as a non-resident.

²⁹² COLO. REV. STAT. § 39-22-104 (Westlaw 2010). Servicemembers age fifty-five to sixty-four may exclude up to \$20,000 of their military retirement benefits. Servicemembers age sixty-five and up may exclude up to \$24,000.

²⁹³ CONN. GEN. STAT. § 12-701 (Westlaw 2010). A servicemember domiciled in Connecticut may qualify as a non-resident for tax purposes if he meets either of the following requirements: (A) 1. Maintains no permanent place of abode in CT. 2. Maintains a permanent place of abode elsewhere. 3. Spends no more than thirty days of the taxable year in CT. or (B) 1. Within any period of 548 consecutive days, he is not present in the state for more than 90 days and does not maintain a permanent place of abode in CT [with some exceptions].

²⁹⁴ DEL. CODE ANN. tit. 30, § 1106 (Westlaw 2010). Servicemembers under age sixty may exclude up to \$2000 of their pension. Those age sixty and over may exclude up to \$12,500.

²⁹⁵ GA. CODE ANN. § 48-7-27 (Westlaw 2010). For taxable years beginning on or after 1 January 2008, Georgia allows a retirement exclusion of up to \$35,000 for individuals age sixty-two or over.

Idaho	Yes ²⁹⁶	Partial ²⁹⁷	IDAHO CODE ANN. § 63-3013 (2008), IDAHO CODE ANN. §63-3022A (2008)
Illinois	Yes	Yes	35 ILL. COMP. STAT. ANN. 5/203 (LexisNexis 2009)
Indiana	No	Partial	IND. CODE ANN. § 6-3-2-1 (LexisNexis 2009), IND. CODE ANN. § 6-3-2-3.7 (LexisNexis 2009)
Iowa	No	Partial	IOWA CODE § 422.9 (2008)
Kansas	No	Yes	KAN. STAT. ANN. § 79-32,117 (2008)
Kentucky	Yes ²⁹⁸	Partial	Joe Biesk, <i>Income Tax Exemption to Benefit Military Personnel</i> , DAILY INDEP., July 3, 2009, KY. REV. STAT. ANN. § 141.021 (LexisNexis 2009)
Louisiana	Partial ²⁹⁹	Yes	LA. REV. STAT. ANN. § 47:293 (2009), LA. REV. STAT. ANN. § 47:44.2 (2009)
Maine	No	Partial ³⁰⁰	ME. REV. STAT. ANN. tit. 36, § 5122 (2009)
Maryland	No	Partial ³⁰¹	MD. CODE ANN., TAX-GEN. § 10-207 (2009)
Massachusetts	No	Yes	MASS. ANN. LAWS ch. 62, § 2 (LexisNexis 2009)
Michigan	Yes	Yes	MICH. COMP. LAWS SERV. § 206.30 (LexisNexis 2009)
Minnesota	Yes ³⁰²	No	MINN. STAT. § 290.01 (2008)
Mississippi	No	Yes	MISS. CODE ANN. § 27-7-15 (2008)
Missouri	Yes ³⁰³	Partial ³⁰⁴	MO. REV. STAT. § 143.041 (2009), MO. REV. STAT. § 143.123 (2009)
Montana	No	Partial ³⁰⁵	MONT. ADMIN. R. 42.15.219 (2009)
Nebraska	No	No	NEB. REV. STAT. ANN. § 77-2716 (LexisNexis 2009), NEBRASKA DEPT. OF REVENUE, NEBRASKA INCOME TAX FOR MILITARY SERVICE MEMBERS AND CIVILIANS WORKING WITH U.S. FORCES IN COMBAT ZONES 1 (2009), <i>available at</i> http://www.revenue.ne.gov/info/8-364.pdf . (last visited Jul. 20, 2009)
Nevada	No State Income Tax	No State Income Tax	Nevada Dept. of Taxation, <i>available at</i> http://tax.state.nv.us (last visited Jul. 20, 2009).

²⁹⁶ IDAHO CODE ANN. § 63-3013 (Westlaw 2010). Servicemembers who are absent from the state for at least 445 days in a fifteen-month period are not considered residents and do not have to file an Idaho income tax return. This classification does not apply to servicemembers who (1) have a permanent home where their spouses or minor children live for more than sixty days in any calendar year or (2) claim Idaho as their tax home for Federal Income Tax purposes. Servicemembers regain their resident status when they spend more than sixty days in Idaho in any calendar year.

²⁹⁷ IDAHO CODE ANN. §63-3022A (Westlaw 2010). Retirement pay is excluded once servicemember reaches age of sixty-five, or sixty-two if disabled.

²⁹⁸ Joe Biesk, *Income Tax Exemption to Benefit Military Personnel*, DAILY INDEP., July 3, 2009, http://www.dailyindependent.com/statenews/local_story_184083714.html/resources_printstory. Active duty military pay is exempt for Kentucky state tax purposes starting January 2010.

²⁹⁹ LA. REV. STAT. ANN. § 293(9)(e) (Westlaw 2010) (“[I]n the case of an individual who is on active duty as a member of the armed forces of the United States, which full-time duty is or will be continuous and uninterrupted for one hundred twenty consecutive days or more, total compensation paid for services performed outside this state by the armed forces of the United States of up to thirty thousand dollars shall be excluded from “tax table income” and is hereby declared exempt from state income taxation.”).

³⁰⁰ ME. REV. STAT. ANN. tit. 36, § 5122 (Westlaw 2010). Servicemembers may deduct up to \$6000 of their military pensions.

³⁰¹ MD. CODE ANN., TAX-GEN. § 10-207 (Westlaw 2010). The first \$5000 of military retired pay may be excluded.

³⁰² MINN. STAT. § 290.01 (Westlaw 2010). Members of U.S. Armed Forces stationed outside the state are not considered residents for tax purposes.

³⁰³ MO. REV. STAT. § 143.041 (Westlaw 2010). Military pay is not subject to Missouri tax if servicemember is considered a non-resident for tax purposes. He or she must spend less than 30 days in Missouri and not maintain permanent living quarters.

³⁰⁴ MO. REV. STAT. § 143.123 (Westlaw 2010). Up to \$6000 of retirement pay may be excluded.

³⁰⁵ MONT. ADMIN. R. 42.15.219 (Westlaw 2010). There is a \$3600 exclusion, if adjusted gross income is less than \$30,000.

New Hampshire	No State Income Tax	No State Income Tax	New Hampshire Dept. of Revenue Administration Taxpayer Assistance, <i>available at</i> http://www.nh.gov/revenue/faq/gti-rev.htm (last visited Jul. 20, 2009).
New Jersey	Yes	Yes	N.J. REV. STAT. § 54A:6-26 (2009)
New Mexico	No	No	N.M. ADMIN. CODE § 3.3.4.1-12 (2009), N.M. ADMIN. CODE § 3.3.11.13 (2009)
New York	Yes ³⁰⁶	Yes	N.Y. TAX LAW § 605 (Consol. 2009), N.Y. TAX LAW § 612 (Consol. 2009)
North Carolina	No	Partial ³⁰⁷	N.C. GEN. STAT. §105-134.6 (2009)
North Dakota	Partial ³⁰⁸	Partial ³⁰⁹	CORY FONG, TAX COMMISSIONER, INCOME TAX TREATMENT OF MILITARY PERSONNEL 5 (n.d.), <i>available at</i> http://www.nd.gov/tax/indincome/pubs/guide/gl-28243.pdf (last visited Feb. 4, 2010)
Ohio	Yes ³¹⁰	Yes ³¹¹	OHIO REV. CODE ANN. § 5747.01(24) (LexisNexis 2009); OHIO REV. CODE ANN. § 5747.01(26) (LexisNexis 2009)
Oklahoma	Yes ³¹²	Partial	S.B. 881, 52nd Legis. Sess., 1st Sess. (Okla. 2009); OKLA. STAT. tit. 68, § 2358 (2009)
Oregon	Partial	Partial	OR. REV. STAT. § 316.791 (2007), Oregon Department of Revenue, Military Personnel Filing Information 150-101-657 (Rev. Jan. 2010), <i>available at</i> http://egov.oregon.gov/DOR/PERTAX/docs/101-657.pdf (last visited Feb. 22, 2010)
Pennsylvania	Partial	Yes	72 PA. CONS. STAT. § 3402-303 (2009), Pennsylvania Department of Revenue, PA-40 Pennsylvania Personal Income Tax Return 2009, <i>available at</i> http://www.portal.state.pa.us/portal/server.pt/community/personal_income_tax/14692 (last visited Feb. 22, 2010)
Rhode Island	No	No	R.I. GEN. LAWS § 44-30-2.6 (2009)

³⁰⁶ N.Y. TAX LAW § 605 (Consol. 2009). Servicemembers are considered non-residents for tax purposes if they fall into either of two groups. Group A: (1) they do not maintain a permanent home in New York, (2) They maintain a permanent home outside New York, and (3) They did not spend more than 30 days in New York during the tax year. Group B: (1) They were in a foreign country for at least 450 out of 548 consecutive days, and (2) spent less than 90 days in a permanent home in New York during that time.

³⁰⁷ N.C. GEN. STAT. §105-134.6 (Westlaw 2010). Retirees may deduct up to \$4,000 depending on their circumstance.

³⁰⁸ CORY FONG, TAX COMMISSIONER, INCOME TAX TREATMENT OF MILITARY PERSONNEL 5 (n.d.), *available at* <http://www.nd.gov/tax/indincome/pubs/guide/gl-28243.pdf>. If resident servicemembers use form ND-2, they may exclude up to \$1,000 of military pay. Additionally, they may exclude \$300 per month for each month they served overseas.

³⁰⁹ *Id.* Retirees who are at least fifty years old may exclude up to \$5000 of retirement pay.

³¹⁰ OHIO REV. CODE ANN. § 5747.01(24) (Westlaw 2010).

Deduct, to the extent included in federal adjusted gross income and not otherwise allowable as a deduction or exclusion in computing federal or Ohio adjusted gross income for the taxable year, military pay and allowances received by the taxpayer during the taxable year for active duty service in the United States army, air force, navy, marine corps, or coast guard or reserve components thereof or the national guard. The deduction may not be claimed for military pay and allowances received by the taxpayer while the taxpayer is stationed in this state.

³¹¹ *Id.*

Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, amounts received by the taxpayer as retired military personnel pay for service in the United States Army, Navy, Air Force, Coast Guard, or Marine Corps or reserve components thereof, or the national guard, or received by the surviving spouse or former spouse of such a taxpayer under the survivor benefit plan on account of such a taxpayer's death.

³¹² S.B. 881, 52nd Legis. Sess., 1st Sess. (Okla. 2009). Oklahoma State Senate Bill 881 passed in May 2009. Active duty military pay is exempt for state tax purposes beginning 1 July 2010.

South Carolina	No	Partial ³¹³	S.C. CODE ANN. § 12-6-1170 (2008)
South Dakota	No State Income Tax	No State Income Tax	South Dakota Department of Revenue & Regulation, http://www.state.sd.us/drr2 (last visited Jul. 20, 2009)
Tennessee	No State Income Tax	No State Income Tax	Tennessee Dept. of Revenue Frequently Asked Questions, <i>available at</i> http://www.tennessee.gov/revenue/faqs/indincome.htm#3 (last visited Jul. 20, 2009)
Texas	No State Income Tax	No State Income Tax	Comptroller of Public Accounts Windows on State Government, <i>available at</i> http://www.window.state.tx.us/taxes/ (last visited Jul. 20, 2009)
Utah	No	No ³¹⁴	UTAH CODE ANN. § 59-10-1019 (2009)
Vermont	Partial	No ³¹⁵	VT. STAT. ANN. tit. 32, § 5823 (2009), VT. STAT. ANN. tit. 32, § 5824 (2009)
Virginia	Partial ³¹⁶	Partial ³¹⁷	VA. CODE ANN. § 58.1-322 (2009)
Washington	No State Income Tax	No State Income Tax	Dept. of Revenue Income Tax, <i>available at</i> http://dor.wa.gov/content/FindTaxesAndRates/IncomeTax/ (last visited Jul. 20, 2009)
West Virginia	Yes ³¹⁸	Partial ³¹⁹	W. VA. CODE § 11-21-7 (2009), W. VA. CODE § 11-21-12 (2009)
Wisconsin	No	Yes	WIS. STAT. § 71.05 (2008)
Wyoming	No State Income Tax	No State Income Tax	Wyoming Dept. of Revenue, <i>available at</i> http://revenue.state.wy.us/ (last visited Jul. 20, 2009)

³¹³ S.C. CODE ANN. § 12-6-1170 (Westlaw 2010). An individual taxpayer who is the original owner of a qualified retirement account is allowed an annual deduction from South Carolina taxable income of not more than three thousand dollars of retirement income received. Beginning in the year in which the taxpayer reaches age sixty-five, the taxpayer may deduct not more than ten thousand dollars of retirement income that is included in South Carolina taxable income.

³¹⁴ UTAH CODE ANN. § 59-10-1019 (Westlaw 2010). Starting in 2008, Utah retirees can no longer exclude retirement income. Retirees sixty-five and over may claim tax credit of \$450. Retirees under sixty-five may claim a credit the greater of 6% of retirement income or \$288.

³¹⁵ VT. STAT. ANN. tit. 32, § 5824 (Westlaw 2010). Vermont follows federal tax rules for retirement pay.

³¹⁶ VA. CODE ANN. § 58.1-322 (Westlaw 2010) (“\$15,000 of military basic pay for military service personnel on extended active duty for periods in excess of 90 days; however, the subtraction amount shall be reduced dollar-for-dollar by the amount which the taxpayer’s military basic pay exceeds \$ 15,000 and shall be reduced to zero if such military basic pay amount is equal to or exceeds \$30,000.”).

³¹⁷ *Id.* Retirees may deduct up to \$12,000, depending upon age and amount of income.

³¹⁸ W. VA. CODE § 11-21-7 (Westlaw 2010). A servicemember is considered a non-resident for tax purposes if “he maintains no permanent place of abode in [the] state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in [the] state, or (2) . . . is not domiciled in [the] state but maintains a permanent place of abode in [the] state and spends in the aggregate more than one hundred eighty-three days of the taxable year in [the] state.” *Id.*

³¹⁹ W. VA. CODE § 11-21-12 (Westlaw 2010). The first \$20,000 of military retirement pay may be excluded.

Appendix F

State Gift Tax (A Quick Reference Guide)

STATE	STATE GIFT TAX?	CITATION
Alabama	No.	<i>See</i> Alabama Dept. of Revenue, <i>Alabama Estate and Inheritance Tax</i> , available at http://www.ador.state.al.us/incometax/Estate&Inh.htm (last visited Jul. 20, 2009). <i>See generally</i> ALA. CODE tit. 40 (LexisNexis 2009)
Alaska	No.	<i>See</i> Alaska Dept. of Revenue, <i>Tax Division Programs</i> , available at http://www.tax.alaska.gov/programs/index.aspx (last visited Jul. 20, 2009). <i>See generally</i> ALASKA STAT. tit. 43 (2009)
Arizona	No.	<i>See</i> Arizona Dept. of Revenue, <i>Estate Tax</i> , available at http://www.azdor.gov/brochure/900.pdf (last visited Jul. 20, 2009). <i>See generally</i> ARIZ. REV. STAT. tit. 42 (LexisNexis 2009).
Arkansas	No.	<i>See</i> Arkansas Dept. of Finance & Administration, <i>Taxes Overview</i> , available at http://www.state.ar.us/dfa/dfa_taxes.html (last visited Jul. 20, 2009). <i>See generally</i> ARK. CODE ANN. tit. 26 (2009).
California	No.	<i>See generally</i> CAL. CODE REGS. tit. 18, § 13301 (2009)
Colorado	No.	<i>See generally</i> COLO. REV. STAT. tit. 39 (2008)
Connecticut	Yes. ³²⁰	CONN. GEN. STAT. § 12-640 (2008)
Delaware	No.	<i>See generally</i> DEL. CODE ANN. tit. 30 (2009)
Florida	No.	<i>See generally</i> FLA. STAT. ANN. tit. 14 (2009)
Georgia	No.	<i>See</i> Georgia Dept. of Revenue, <i>Estate Tax</i> , available at https://etax.dor.ga.gov/inctax/estatetax/index.aspx (last visited Jul. 20, 2009). <i>See generally</i> GA. CODE ANN. tit. 48 (2009)
Hawaii	No.	<i>See generally</i> HAW. REV. STAT. tit. 14 (LexisNexis 2009)
Idaho	No.	<i>See generally</i> IDAHO CODE ANN. tit. 63 (LexisNexis 2009)
Illinois	No.	<i>See generally</i> 36 ILL. COMP. STAT. ANN. (LexisNexis 2009)
Indiana	No.	<i>See generally</i> IND. CODE ANN. tit. 6 (LexisNexis 2009)
Iowa	No.	<i>See generally</i> IOWA CODE tit. 10 (2008)
Kansas	No.	<i>See generally</i> KAN. STAT. ANN. ch. 79 (2008)
Kentucky	No.	<i>See generally</i> KY. REV. STAT. ANN. tit. 11 (LexisNexis 2009)
Louisiana	No.	<i>See generally</i> LA. REV. STAT. ANN. tit. 47 (2009)
Maine	No.	<i>See generally</i> ME. REV. STAT. ANN. tit. 36 (2009)
Maryland	No.	<i>See generally</i> MD. CODE ANN., TAX-GEN. (LexisNexis 2009)
Massachusetts	No.	<i>See generally</i> MASS. ANN. LAWS tit. 9 (LexisNexis 2009)
Michigan	No.	<i>See generally</i> MICH. COMP. LAWS SERV. ch. 205 (LexisNexis 2009)
Minnesota	No.	<i>See</i> MINN. STAT. ch. 292 (2008)
Mississippi	No.	<i>See generally</i> MISS. CODE ANN. tit. 27 (2008)
Missouri	No.	<i>See generally</i> MO. REV. STAT. tit. 10 (2009)
Montana	No.	<i>See generally</i> MONT. CODE ANN. tit. 15 (2008)
Nebraska	No.	<i>See generally</i> NEB. REV. STAT. ANN. ch. 77 (LexisNexis 2009)
Nevada	No.	<i>See generally</i> NEV. REV. STAT. ANN. tit. 32 (LexisNexis 2009)
New Hampshire	No.	<i>See generally</i> N.H. REV. STAT. ANN. tit. 5 (LexisNexis 2009)
New Jersey	No.	<i>See generally</i> N.J. STAT. ANN. tit. 54 (2009)
New Mexico	No.	<i>See generally</i> N.M. STAT. ANN. ch. 7 (LexisNexis 2008)
New York	No.	<i>See generally</i> N.Y. TAX LAW (Consol. 2009)
North Carolina	No.	N.C. GEN. STAT. § 105-188 (2009)

³²⁰ CONN. GEN. STAT. §12-640 (Westlaw 2010). Connecticut imposes a gift tax on property transfers at a rate according to a chart in § 12-642.

North Dakota	No.	<i>See generally</i> N.D. CENT. CODE tit. 57 (2009)
Ohio	No.	<i>See generally</i> OHIO REV. CODE ANN. tit. 57 (2009)
Oklahoma	No.	<i>See generally</i> OKLA. STAT. tit. 68 (2009)
Oregon	No.	<i>See generally</i> OR. REV. STAT. tit. 29 (2009)
Pennsylvania	No.	<i>See generally</i> PA. STAT. ANN. tit 72 (2009)
Rhode Island	No.	<i>See generally</i> R.I. GEN. LAWS tit. 44 (2009)
South Carolina	No.	<i>See generally</i> S.C. CODE ANN. tit. 12 (2008)
South Dakota	No.	<i>See generally</i> S.D. CODIFIED LAWS tit. 10 (2009)
Tennessee	Yes. ³²¹	TENN. CODE ANN. § 67-8-101
Texas	No.	<i>See generally</i> TEX. TAX CODE ANN. tit. 2 (2009)
Utah	No.	<i>See generally</i> UTAH CODE ANN. tit. 59 (2009)
Vermont	No.	<i>See generally</i> VT. STAT. ANN. tit. 32 (2009)

³²¹ TENN. CODE ANN. § 67-8-102 & 106(b) (Westlaw 2010).

The following named donees shall be included in:

(1) Class A: Husband, wife, son, daughter, lineal ancestor, lineal descendant, brother, sister, stepchild, son-in-law or daughter-in-law. If a person has no child or grandchild, a niece or nephew of such person and the issue of such niece or nephew shall be a donee within this class. For the purposes of this part, a person who is related to the donor as a result of legal adoption shall be considered to have the same relationship as a natural lineal ancestor, lineal descendant, brother, sister or stepchild; and

(2) Class B: Any other relative, person, association or corporation not specifically designated in Class A

Tax Rates on Gifts made before 1984

CLASS A

- 1.4 % on amounts from \$10,000 to \$25,000;
- 2 % on the next \$25,000 or part thereof;
- 4 % on the next \$50,000 or part thereof;
- 5.5 % on the next \$200,000 or part thereof;
- 6.5 % on the next \$200,000 or part thereof;
- 9.5 % on the excess over \$500,000.

CLASS B

- 6.5 % on amounts from \$5000 to \$50,000;
- 9.5 % on the next \$50,000 or part thereof;
- 12 % on the next \$50,000 or part thereof;
- 13.5 % on the next \$50,000 or part thereof;
- 16 % on the next \$50,000 or part thereof;
- 20 % on the excess over \$250,000.

Tax Rates on Gifts made after 1983

CLASS A

- 5.5 % on the amount of net taxable gifts up to \$40,000;
- 6.5 % on the next \$200,000 or part thereof;
- 7.5 % on the next \$200,000 or part thereof;
- 9.5 % on the excess over \$440,000.

CLASS B

- 6.5 % on the amount of net taxable gifts up to \$50,000;
- 9.5 % on the next \$50,000 or part thereof;
- 12 % on the next \$50,000 or part thereof;
- 13.5 % on the next \$50,000 or part thereof;
- 16 % on the excess over \$200,000.

Virginia	No.	<i>See generally</i> VA. CODE ANN. tit. 58.1 (2009)
Washington	No.	<i>See generally</i> WASH. REV. CODE tit. 83 (2009)
West Virginia	No.	<i>See generally</i> W. VA. CODE ANN. ch. 11 (LexisNexis 2009)
Wisconsin	No.	<i>See generally</i> WIS. STAT. ch. 72 (2009)
Wyoming	No.	<i>See generally</i> WYO. STAT. ANN. tit 39 (2009)

Appendix G

State Estate Tax (A Quick Reference Guide)

STATE	ESTATE TAX?	CITATION
Alabama	No.	<i>See</i> ALA. CODE § 40-15-2 (LexisNexis 2009); Alabama Dept. of Revenue, <i>Alabama Estate and Inheritance Tax</i> , available at http://www.ador.state.al.us/incometax/Estate&Inh.htm (last visited Jul. 20, 2009)
Alaska	No.	<i>See</i> ALASKA STAT. § 43.31.011 (2009).
Arizona	No.	<i>See</i> ARIZ. REV. STAT. §§ 42-4001, 4051 (LexisNexis 2009)
Arkansas	No.	<i>See</i> ARK. CODE ANN. §§ 26-59-103, 106, 109 (2009)
California	No.	<i>See</i> CAL. REV. & TAX. CODE §§ 13302, 13411 (Deering 2009)
Colorado	No.	<i>See</i> COLO. REV. STAT. §§ 39-23.5-102, 103 (2008)
Connecticut	Yes. ³²²	CONN. GEN. STAT. § 12-391 (2008)
Delaware	Pick-up only.	<i>See</i> DEL. CODE ANN. tit. 30, § 1502 (2009)
Florida	No.	<i>See</i> FLA. STAT. ANN. § 198.02 (2009)
Georgia	No.	<i>See</i> GA. CODE ANN § 48-12-2 (2009)
Hawaii	No.	<i>See</i> HAW. REV. STAT. ANN. § 236D-2, 3 (LexisNexis 2009)
Idaho	No.	<i>See</i> IDAHO CODE ANN. §§ 14-403, 63-3004 (LexisNexis 2009)
Illinois	Pick-up only.	<i>See</i> 35 ILL. COMP. STAT. ANN. § 405/2-3 (LexisNexis 2009)
Indiana	Inheritance tax.	<i>See</i> IND. CODE ANN. §§ 6-4.1-1-4, 6-4.1-11-2 (LexisNexis 2009)
Iowa	Inheritance tax.	<i>See</i> IOWA CODE §§ 451.13, 451.2 (2008)
Kansas	Yes. ³²³	<i>See</i> KAN. STAT. ANN. § 79-15 (2008)
Kentucky	Inheritance tax.	<i>See</i> KY. REV. STAT. ANN. § 140.130 (LexisNexis 2009)
Louisiana	No.	<i>See</i> LA. REV. STAT. ANN. §§ 47:2431, 2432, 2434 (2009)
Maine	Pick-up only.	<i>See</i> ME. REV. STAT. ANN. tit. 36, § 4062 (2009)
Maryland	Yes	<i>See</i> MD. CODE ANN., TAX-GEN §§ 7-304, 309 (LexisNexis 2009)
Massachusetts	Pick-up only.	<i>See</i> MASS. ANN. LAWS ch. 65C, § 2A (LexisNexis 2009)
Michigan	No.	<i>See</i> MICH. COMP. LAWS SERV. §§ 205.232, 205.256 (LexisNexis 2009)
Minnesota	Pick-up only.	<i>See</i> MINN. STAT. § 291.005, 291.03 (2008)
Mississippi	No.	<i>See</i> MISS. CODE ANN. § 27-9-5 (2008).
Missouri	No.	<i>See</i> MO. REV. STAT. §§ 145.011, 145.091 (2009)
Montana	No.	<i>See</i> MONT. CODE ANN. §§ 72-16-904, 905 (2008)

³²² CONN. GEN. STAT. § 12-391 (Westlaw 2010). Connecticut has a separate estate tax with a \$2 million exemption.

³²³ *See* KAN. STAT. ANN. § 79-15 (Westlaw 2010). In addition to a pick-up tax, Kansas has an estate tax effective 1 January 2007 through 31 December 2009.

Nebraska	Inheritance tax. ³²⁴	<i>See</i> NEB. REV. STAT. ANN. § 77-2102.01 (LexisNexis 2009)
Nevada	No.	<i>See</i> NEV. REV. STAT. ANN. §§375A.025, 375A.100 (LexisNexis 2009)
New Hampshire	No.	<i>See</i> N.H. REV. STAT. ANN. § 87:1, 87:7 (LexisNexis 2009)
New Jersey	Pick-up and inheritance tax.	<i>See</i> N.J. STAT. ANN. §54:38 (2009)
New Mexico	No.	<i>See</i> N.M. STAT. ANN. §§ 7-7-2, 7-7-3 (LexisNexis 2008)
New York	Pick-up only.	<i>See</i> N.Y. TAX LAW §§ 951, 952 (Consol. 2009)
North Carolina	Pick-up only.	<i>See</i> N.C. GEN. STAT. §§ 105-32.1, 105-32.2, 105-228.90 (2009)
North Dakota	No.	<i>See</i> N.D. CENT. CODE § 57-37.1-04 (2009)
Ohio	Separate estate tax.	<i>See</i> OHIO REV. CODE ANN. § 5731.02 (2009)
Oklahoma	Separate estate tax.	<i>See</i> OKLA. STAT. tit. 68, §§ 804, 809 (2009)
Oregon	Pick-up only.	<i>See</i> OR. REV. STAT. § 118.010 (2009)
Pennsylvania	Inheritance.	<i>See</i> 72 PA. STAT. ANN. § 9117 (2009)
Rhode Island	Pick-up only.	<i>See</i> R.I. GEN. LAWS §44-22-1.1 (2009)
South Carolina	No.	<i>See</i> S.C. CODE ANN. §§ 12-6-40, 12-16-20, 12-16-510 (2008)
South Dakota	No.	<i>See</i> S.D. CODIFIED LAWS §§ 10-40A-1, 10-40A-3 (2009)
Tennessee	Inheritance.	<i>See</i> TENN. CODE ANN. § 67-8-202, 67-8-203 (2009).
Texas	Inheritance.	<i>See</i> TEX. TAX CODE ANN. §§ 211.001, 211.003, 211.051 (2009)
Utah	No.	<i>See</i> UTAH CODE ANN. § 59-11-102, 59-11-103 (2009)
Vermont	Pick-up only.	<i>See</i> VT. STAT. ANN. tit. 32, §§ 7402(8), 7442a, 7475 (2009)
Virginia	Pick-up only.	<i>See</i> VA. CODE ANN. §§ 58.1-901, 58.1-902 (2009)
Washington	Separate estate tax.	<i>See</i> WASH. REV. CODE §§ 83.100.020, 83.100.040. (2009)
West Virginia	No.	<i>See</i> W. VA. CODE ANN. § 11-11-3 (LexisNexis 2009)
Wisconsin	No.	<i>See</i> WIS. STAT. §§ 72.01, 72.02 (2009)
Wyoming	No.	<i>See</i> WYO. STAT. ANN. §§ 39-19-103, 39-19-104 (2009)

³²⁴ *See* NEB. REV. STAT. ANN. § 77-2102.01 (Westlaw 2010). Nebraska counties have separate inheritance taxes.

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CLIENT INFORMATION:

Your Full Name (first, middle, last): _____, Rank: _____, *SSN: _____
Present Address: _____
____ Male, ____ Female; U.S. citizen? ____ Yes ____ No; State of Legal Residence: _____
*Unit of Service Member: _____
Duty Phone: _____, Home or Cell Phone: _____, *ETS: _____, *PCS: _____
(If You Have a Prior Will or Estate Plan, Check This Block [])

MARITAL STATUS (select the most appropriate):

- A. ____ Married once, and my spouse is alive.
B. ____ Married and spouse is alive, but were married before (a prior spouse died or was divorced)
C. ____ Widow/ widower.
D. ____ Previously married, but now divorced and single.
E. ____ Single, never married.
Spouse's full name: _____ SSN: _____ Is spouse a U.S. citizen? ____ Yes ____ No

CHILDREN: ____ Yes ____ No; If yes, is any child a minor (under 18 years)? ____ Yes, ____ No;
If no, are you expecting a child? ____ Yes, ____ No
Please list your children's full names, ages, sex, and their relation to you, i.e., whether they are your biological, adopted, or stepchild:

- 1. NAME: _____ AGE: _____ SEX: _____ RELATION: _____
2. NAME: _____ AGE: _____ SEX: _____ RELATION: _____
3. NAME: _____ AGE: _____ SEX: _____ RELATION: _____
4. NAME: _____ AGE: _____ SEX: _____ RELATION: _____

Is any biological child from a previous relationship? ____ Yes ____ No. Does any child have special needs? ____ Yes ____ No
If you have adopted children or stepchildren, do you wish to treat them the same as your natural children? ____ Yes ____ No

VALUE OF ESTATE: To determine what type of will is appropriate for you, we need an estimate of the value of your estate.
Include the value of all of the property you own in your name, and if married, the value of your spouse's property.
Approximate value of your estate (not including life insurance): \$ _____ Value of life insurance (self): \$ _____

DO YOU OWN A FAMILY FARM/FAMILY-OWNED BUSINESS: ____ Yes ____ No

DO YOU OWN ANY REAL ESTATE ____ Yes ____ No (If no, skip to next section); If yes, what is its value? _____
If yes, who do you own it with? NAME: _____ RELATION: _____
In what state is the real property located? _____
To whom do you want to give the real estate:
A. ____ All to the spouse, if he/she survives
B. ____ to one or more different beneficiaries.
NAME: _____ RELATION: _____
NAME: _____ RELATION: _____
C. ____ all real estate is to pass as part of the residuary estate, rather than being separately devised
D. ____ just the Testator's home to the wife (with other real estate passing as part of the residuary estate)
E. ____ the wife is to have a life estate.

GIVING AWAY YOUR PROPERTY

PERSONAL EFFECTS AND TANGIBLE PERSONAL PROPERTY: How do you wish to give your personal property?
SELECT ONE ONLY
A. ____ All to my spouse (If you wish to give everything to your spouse, OR to disinherit spouse check (D))
B. ____ As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to spouse).
C. ____ As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to residuary estate)
D. ____ As provided with regard to the residuary estate - SELECT THIS IF SINGLE.

RESIDUARY ESTATE: Your residuary estate is whatever property remains after paying debts and expenses of administration, and any specific bequests.
A. ____ All to my spouse if he/she survives me, and if not, then to my children and issue.
B. ____ A marital deduction trust f/b/o the spouse (or if she predeceases, to the child and issue)
C. ____ A minimum bequest to my spouse, (disinheriting them to the fullest extent of the law, with the remainder going to child(ren) or other person(s).
D. ____ Various other types of dispositions listed on top of back (check D if you are single and see selections top of back).

- A. All to one specific beneficiary. NAME: _____ RELATION: _____
- B. To more than one beneficiary. If you have more than one beneficiary, are they:
1. Specific people who are to share equally. NAME: _____ RELATION: _____
NAME: _____ RELATION: _____
 2. A group of people described as a class (e.g., "my brothers and sisters") who are to share equally.
Explain: _____
 3. Some other unequal division between the beneficiaries (e.g., 50% to one beneficiary and 25% each to two others). Explain: _____
 4. Other. Explain: _____

MINORS: If **any** of your beneficiaries is a minor, at what age do you want them to receive their gift? 18; 21; 1/2 @ 21 and 1/2 @ 25; 1/3 @ 21, 1/3 @ 25, 1/3 @ 30; Some other age: _____ (please indicate the age) (NOTE: Selecting an age greater than 21 will likely require a trust, which may cause your estate to incur additional expenses for the administration of the trust. These would lower the amount available for your beneficiaries. Please **READ LEAVING PROPERTY TO MINORS** below.)

SECONDARY/CONTINGENT BENEFICIARIES: If all of the beneficiaries you designated above (spouse, children) die before you, to whom do you wish to leave your estate?

- 1st Contingent-NAME: _____ RELATION: _____ %
NAME: _____ RELATION: _____ %
- 2nd Contingent-NAME: _____ RELATION: _____
- Last Resort- NAME: _____ RELATION: _____

GRANDCHILDREN: If you had grandchildren would you want them to receive your child's share if your child did not survive you?
 Yes No

EXECUTOR: Your Executor (or "personal representative") ensures your estate is settled upon your death. This ordinarily involves going through "probate", a court-administered procedure for settling an estate as provided in your will or under State law. Whom do you wish to have as your executor (cannot name a minor)? (CHECK ONE and follow instructions)

- A. My spouse. NO NEED TO LIST SPOUSE'S NAME.
- B. My spouse and a co-executor. Name co-executor below.
- C. My spouse and a successor executor. Name successor executor below.
- D. One executor other than my spouse. Name executor below.
- E. Two co-executors, neither of whom are my spouse. Name two co-executors below.
- F. One executor and a successor executor, neither of whom are my spouse. Name one executor and a successor below.

NAME: _____ RELATION: _____
NAME: _____ RELATION: _____

GUARDIAN: Do you wish to appoint a legal guardian for a minor child **other** than the child's other natural parent?

- A. One guardian for any child when I die. NAME: _____ RELATION: _____
- B. One guardian and a successor guardian. NAME: _____ RELATION: _____
SUCCESSOR NAME: _____ RELATION: _____
- C. Two co-guardians. Co #1 NAME: _____ RELATION: _____
Co #2 NAME: _____ RELATION: _____

CUSTODIAN OF PROPERTY: Would you like the child's guardian, regardless of who it is, to be the custodian of the child's property? YES NO. If no, who: NAME: _____ RELATION: _____

LEAVING PROPERTY TO MINORS: Instead of giving your estate directly to a MINOR beneficiary, you may give it to a Trustee, IN TRUST, for the benefit of the minor until they reach the age you designate. The trustee will manage the trust under court supervision. Although the trustee's primary purpose is to safeguard the inheritance, the money can also be used for any minor's health, education, welfare, or maintenance, at the trustee's discretion. For many people, a trust is unnecessary because, under the Uniform Gifts to Minors Act (UGMA/UTMA) language in your will, gifts to beneficiaries under 18 (or, if you prefer, 21) will be controlled by your executor initially, and guardian after probate, without establishing a trust. The executor and/or guardian can still use the minor's inheritance for the benefit of the minor, and this is ordinarily less complicated and less expensive than a trust. Unless you have children from a prior marriage, disabled children, or a very large estate, you might prefer not to use a trust. One disadvantage, however, to the UGMA is that your estate will be divided in as many equal shares as there are minor beneficiaries designated; each minor will receive the remainder of their share as they turn 18 or 21, at your option. A trust may be more appropriate if you do not want your child to get property until after age 21.

Do you want a trust? Yes No. (If yes, would this be: One trust for the benefit of all beneficiaries ("pooled" trust), or Individual trusts for each of the beneficiaries. NOTE: Individual trusts can be very expensive.)

IF YES WHO DO YOU WANT AS TRUSTEE? (Please list name and relationship):

- A. One trustee. NAME: _____ RELATION: _____
- B. Two co-trustees. NAMES: _____ RELATION: _____
RELATION: _____
- C. One trustee and a successor. NAME: _____ RELATION: _____
NAME: _____ RELATION: _____
- D. One trustee and a co-trustee who is to be later appointed by the executor.
NAME: _____ RELATION: _____

OFFICE USE ONLY

Date Briefed: _____, **Briefed by:** _____, **Location** _____; **Attorney:** _____; **Date:** _____
Mode: CS (SRPC); CD(Demob); CL(Reg.Appt.); CE (ERDE); CN (NEO); CM (Mob Depl Read Ex); CP (Premob); **Case:** WW (Will), WA (AMD), WS (SGLI); **Services:** SW(Will prep); ST (Will w-trust/guardian); SV (AMD); SC (Counsel)

ESTATE PLANNING DOCUMENTS PART II SCREENING QUESTIONNAIRE (2 MAR 11)

Questions are asked about your spouse to remind YOU to coordinate your estate plan with your spouse's estate plan.

PERSONAL INFORMATION

DATE: _____

1. Marital Status				
<input type="checkbox"/> Married	<input type="checkbox"/> Single	<input type="checkbox"/> Widowed	<input type="checkbox"/> Divorced	<input type="checkbox"/> Separated or about to divorce
2. Your Name (First, Middle, Last)		Soc. Sec. No.	Date of Birth	
3. Spouse's Name (First, Middle, Last)		Soc. Sec. No.	Date of Birth	
4. Home Address (Number, Street)		City	State	Zip
5. Mailing Address If Different From Above (Number, Street)		City	State	Zip
6. Home Phone ()		Your Work Phone ()	Spouse's Work Phone ()	
7. Your Command/Employer		Your Rank/Grade	Your Occupation	
8. Spouse's Command/Employer		Spouses Rank/Grade	Spouse's Occupation	

Circle or fill in your answers	You	Your Spouse
1. Are you a U.S. citizen?	Yes No	Yes No
2. Do you have a will or trust now?	Yes No	Yes No
3. Are you expecting to receive property or money from (circle all that apply):..... If so, approximately how much?.....	Gift Inheritance Lawsuit - Other \$	Gift Inheritance Lawsuit - Other \$
4. How many living children do you have?.....		
5. Are all your children legally yours (natural or legally adopted)?	Yes No	Yes No
6. How many stepchildren do you have?		
7. In which state do you vote?		
8. Which state issued your driver's license ?		
9. In which state is your car registered?		
10. In which state(s) do you own real estate?.....		
11. Do you pay state income tax? If yes to which state?.....		
12. In which state do you plan to retire/live permanently?		
13. Have you ever lived in a Community Property State? (AZ,CA,ID,LA,NV,NM,TX,WA,WI & PR)	Yes No	Yes No
14. Do you have a pre-nuptial or post-nuptial agreement?.....	Yes No	Yes No
15. Do you have a divorce decree affecting your pension or other property rights?.....	Yes No	Yes No
<i>If "yes" to questions 2, 14 or 15, you must bring these documents to your appointment</i>		

FINANCIAL INFORMATION

1. Do you own a home or any other real estate? Indicate which is your residence/homestead.

Description and Location	Titled in whose name Indicate if Joint or Beneficiary and name	Purchase Price	Market Value	Mortgage	Market Value - Mortgage Equity
Total Net Value					

2. Do you own any other titled property such as a car, boat, etc.?

Description	Titled in whose name Indicate if Joint or Beneficiary and name	Market Value	Less Mortgage	Equity
Total Net Value				

3. Do you have any checking accounts?

Name of Bank	Titled in whose name Indicate if Joint or Beneficiary and name	Approx. Balance
Total Value		

4. Do you have any interest bearing accounts (savings, money market) and/or CD's?

Name of Bank	Titled in whose name Indicate if Joint or Beneficiary and name	Approx. Balance
Total Value		

5. Do you own any stocks, bonds or mutual funds (including company stock)?

Number Shares	Name of Security	Titled in Whose Name Indicate if Joint or Beneficiary and name	Purchase Price	Current Value
Total Value				

6. Do you have any profit sharing, IRAs or pension plans?

Description/Location	Beneficiary	Current Value
Total Value		

7. Do you have any life insurance policies and/or annuities?

Name of Company	Insured	Policy Owner	1 st Beneficiary	2 nd Beneficiary	Death Benefit
SGLI					
Total Value					

8. Does anyone owe you money?

Description	Approx. Value
Total Net Value	

9. Do you have any special items of value such as coin collections, antiques, jewelry, etc.?

Description	Approx. Value
Total Net Value	

10. What is the approximate total value of all your remaining personal property--whatever you own that has not been included above? (clothes, furniture, etc.) Just estimate.....\$ _____

11. Do you have any debts other than mortgage(s) and loans listed above (credit cards, personal loans, etc.)?

Description	Amount Owed
Total Debt	

12. Total value of everything you (and your spouse) own (add totals of line 1 thru line 10 above) \$ _____

13. Total amount you (and your spouse) owe (total of line 11 above) \$ _____

14. Subtract line 13 from line 12. **TOTAL NET ESTATE VALUE**

Location	Titled in whose name

MANAGEMENT DECISIONS: YOUR ESTATE MANAGEMENT TEAM

1. Personal Representative/Executor: Manages the probate and settlement of your estate. Can be your spouse, adult children, trusted friends, and/or a corporate fiduciary.

For You

For Your Spouse

Name: _____

Name: _____

2. Successor Personal Representative: Back-up Manager-Steps in after your first personal representative dies/resigns; in the case of a living trust at your death or disability. Can be your adult children, trusted friends, and/or a corporate fiduciary.

For You

For Your Spouse

1st Successor: Name: _____

Name: _____

Address: _____

Address: _____

2nd Successor: Name: _____

Name: _____

Address: _____

Address: _____

3. Trustee: Manages the administration and investments in your trust. Should be someone with financial responsibility and experience. If you are creating a trust of which your spouse is to be both the beneficiary and trustee (e.g. a tax saving Credit Shelter Trust (B Trust) you **should** also name a co-trustee to make discretionary decisions.

For You

For Your Spouse

Name: _____

Name: _____

4. Successor Trustee (or Co Trustee): Back-up Manager-Steps in after your first Trustee dies/resigns. Can be your adult children, trusted friends, and/or a corporate fiduciary.

For You

For Your Spouse

1st Successor: Name: _____

Name: _____

Address: _____

Address: _____

2nd Successor: Name: _____

Name: _____

Address: _____

Address: _____

You may provide that the Personal Representatives and/or Trustees be insured, or bonded, to protect the beneficiaries:
 The Personal Representative should be bonded Yes No The Trustee should be bonded Yes No

5. Guardians For Minor Children: Responsible adult who will raise your children if something happens to you.

For You

For Your Spouse

#1 Choice: Name: _____

Name: _____

Address: _____

Address: _____

#2 Choice: Name: _____

Name: _____

Address: _____

Address: _____

#3 Choice: Name: _____

Name: _____

Address: _____

Address: _____

BENEFICIARIES

1. Special Gifts To Organizations

Do you want to make a gift (cash or a specific item) to a charity, foundation, religious or fraternal organization?

Name of Organization	Description of Gift	Alternate Beneficiary

2. Special Gifts To Individuals

Do you want to give any specific items or cash gifts to a family member or other individual? (For example: wedding ring to your daughter, gun collection to a son or nephew, etc.)

Name of Person	Description of Gift or Amount	Alternate Beneficiary

3. Beneficiaries

Who do you want to receive the rest of your estate after these special gifts have been distributed? You can designate a dollar amount or percentage, however the percentages are easier, and must add to 100 per cent.

Name of Person/Organization	Amount/Percentage	Alternate Beneficiary

4. Inheriting Instructions

List your children

Name	Address	Age	T=This Marriage P= PreviousMarriage	Married? Y or N	Number of Grandchildren

5. Do you want your children to receive their inheritance in installments, at certain ages, or all at once? In what amounts and at what age(s)? Your children's inheritance can be held in trust and managed for them until they are at any age you chose (21, 25, 30, etc) and used for their education and other needs until that time. This method waits until the children are mature enough to handle money.

6. If a child dies, do you want that child's share to go to that child's children, your grandchildren, (Per Stirpes) or do you want that child's share to be divided among *only* your other living children (Per Capita). , nothing to a grandchild whose parent died.

7. Do you want to ensure that your children from a previous marriage receive a share of your estate? **You** Yes No **Your Spouse** Yes No

8. List Dependents Who Require Special Care
Do you want to provide for "basic" care or luxuries and other extras to supplement government benefits? **Yes** **No**

9. Alternative Beneficiaries

Who do you want to receive your estate if you (and your spouse) outlive the beneficiaries you've named above?

Name of Person/Organization	Amount/Percentage

10. Disinheriting

Are there any relatives that you specifically do not want to receive anything from your estate?

SPECIAL INSTRUCTIONS FOR INCOMPETENCY

1. Keeping/Selling Assets

If necessary to pay for your care, do you want certain assets sold first? Are there potential buyers you want contacted?

2. Medical Care

Do you want to be in (or avoid) a certain hospital/nursing home? _____

A Living Will makes your wishes known to family and doctors regarding life support and the following decisions in the event you become terminally ill or injured with no hope for recovery. Do you want a living will?	You	Your Spouse
	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

Please answer the following for your Living Will:

	You	Your Spouse
If you have a terminal condition, diagnosed by two (2) doctors, do you want your life artificially prolonged by machine?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
Nutrition and Hydration (Food and Water) by tube?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
Blood Transfusions?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
Organ Transplants?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
Upon your death, do you wish to donate your organs?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
For transplants	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
For science or medical research	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
Do you wish to die at home rather than in a hospital or nursing home?	<input type="checkbox"/> At home <input type="checkbox"/> Hosp / Nur Home	<input type="checkbox"/> At home <input type="checkbox"/> Hosp / Nur Home

A **Durable Power of Attorney For Health Care** gives broader protection. Do you want to appoint someone (spouse, child, friend) to make health care decisions for you when you are unable to, but not necessarily terminal? If so provide the following:

For You

For Your Spouse

1st Choice: Name: _____

Name: _____

Address: _____

Address: _____

2nd Choice: Name: _____

Name: _____

Address: _____

Address: _____

A **Durable General Power of Attorney** appoints an agent that can make any decision and do any act that you can, and it will continue to be in force even after you become incapacitated. It is a very powerful document and should only be granted with great care, and then only to a person that you have the utmost trust in. If you wish a Durable General Power of Attorney provide the following

For You

For Your Spouse

1st Choice: Name: _____

Name: _____

Address: _____

Address: _____

2nd Choice: Name: _____

Name: _____

Address: _____

Address: _____

SPECIAL INSTRUCTIONS FOR FUNERAL/BURIAL

1. What type of service do you want, how elaborate, and where? Any special people to contact? Do you want cremation?

2. If you have a cemetery lot, where is it located?

Cemetery Name

City

State

CHAPTER D

ISSUES IN WILL DRAFTING

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C. <u>ESTATE PLANNING, TAX MANAGEMENT PORTFOLIOS 800-2ND</u> (2006).....	1
D. <u>DUKEMINER AND JOHANSON, WILLS, TRUSTS, AND ESTATES</u> , ASPEN PUBLISHERS (7 TH ED. 2005).....	1
E. <u>PETERSON, THE UNIFORM TRANSFERS TO MINORS ACT: A PRACTITIONER'S GUIDE</u> , THE ARMY LAWYER (MAY 1995).....	1
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WILL DRAFTING

Outline of Instruction

I. REFERENCES.

- A. Legal Assistance Wills Guide, JA 262 (July 2006).
- B. CCH Financial and Estate Planning Guide (2006 15th ed.).
- C. Estate Planning, Tax Management Portfolios 800-2nd (2006)
- D. Dukeminer and Johanson, Wills, Trusts, and Estates, Aspen Publishers (7th ed. 2005).
- E. Peterson, The Uniform Transfers to Minors Act: A Practitioner's Guide, The Army Lawyer (May 1995).

II. INTRODUCTION.

III. WILLS IN GENERAL.

- A. Purpose of Wills.
 - 1. To reduce the intentions of the Testator to clear, concise written form that disposes of his property after his death with the minimal amount of shrinkage to the estate.
 - 2. To provide for the care, maintenance, and support of any minor aged beneficiaries.
- B. Avoiding Probate.
 - 1. Disadvantages of Probate.
 - a. Cost. The cost of probate is state specific.

- b. Delays. The delays in processing probate can be lengthy, depending on the state.

- c. Publicity.

2. Methods of Avoiding Probate.

- a. Gifting Property: i.e., Lifetime gifts.

- b. Titling of Assets:

- (1) Living Trusts.

- (2) Titling of Assets: e.g., Joint Ownership with Right of Survivorship.

- c. Contractual arrangements:

- (1) Payment on death (POD) or transfer on death (TOD) forms of registration on personal property (e.g., Individual Retirement Arrangements and bank accounts).

- (2) Life insurance.

C. Advantages To Having a Will.

- 1. Statute of descent and distribution may not coincide with decedent's actual intent.

- a. Client may move to a state with different intestate scheme or intestacy law may change before client dies.

- b. Property owned in more than one state may be subject to different intestate schemes.

- c. Transitory population of the military.
 - 2. Cost of administering an intestate estate may be significantly greater.
 - a. Proceedings require court approval.
 - b. Administrator usually required to post bond.
 - c. Passing property to children may require appointment of a guardian of the property (conservator).
 - 3. Will affords a testator the opportunity to nominate a suitable executor and alternate.
 - 4. Will allows parents to make arrangements for minor children.
 - a. To appoint guardians of the persons and property of the child on the death of the surviving parent.
 - b. To select alternatives to outright bequests such as custodial accounts or testamentary trusts.
 - 5. Will allows testator to minimize federal and state estate tax liability.
- D. Obtain Data on Client and Family Circumstances.
 - 1. Use Will Questionnaire and Will Checklist (See Appendix D for Will Drafting Checklist; DL Wills Program; and questionnaires available on the JAGCNet)
 - 2. General Information.
 - a. Is client married?

- (1) Is there a pre-nuptial agreement?
 - (2) Will spouse have right of election?
 - (3) Community property issues.
 - (4) Spouse's citizenship.
- b. Has client been divorced?
- (1) Review separation agreement or divorce decree. Are there any continuing alimony, maintenance, or support obligations after death.
 - (2) Does ex-spouse have any claim to the estate?
 - (3) Has client changed insurance policies so ex-spouse is not the named beneficiary?
- c. Does the client have children?
- (1) Number of children and age.
 - (2) Do any of the children have a disability?
 - (3) Does client intend to benefit after born children?
 - (4) Are any children step-children, adopted children, or illegitimate children?
- d. Testator's Assets.

- e. Develop a complete inventory of the assets listing type of ownership, value, and probable date-of-death value.
 - f. Debts and Claims Against Estate.
 - (1) Is any property encumbered?
 - (2) Does estate have sufficient liquid assets to pay debts?
3. Coordinate Last Will and Testament with Other Non-Probate Assets.
- a. Beneficiary selection on DD Form 93.
 - b. Commercial insurance.
 - c. Property ownership.
- E. Determining an Estate's Worth.
1. Probate vs. Non-Probate Estate.
- a. Probate estate consists of property in the client's name only, with no contractual beneficiary designation, or property that would pass by intestacy if not for a will.
 - b. Non-probate estate consists of property that passes due to some sort of beneficiary designation or by operation of law.
 - (1) Jointly owned property with a right of survivorship—including bank accounts, stocks, or realty.
 - (2) Totten Trusts – ~~in~~ "trust for" bank accounts that pass to beneficiary.

- (3) Insurance proceeds.
 - (4) Employee benefits that pass to beneficiaries –IRAs, pension plans, SBP for military members.
 - (5) Property in Revocable/Irrevocable Inter Vivos Trusts.
2. Gross Estate. The gross estate is a combination of both the probate and non-probate estates. Determining the gross estate is essential to determine whether the client needs additional estate planning beyond a simple will.
3. How much is too much?
 - a. Single client. Someone with over \$1,000,000 (this amount is constantly in flux; in 2011 and 2012, the amount is \$5,000,000 but in 2013, the amount is \$1,000,000 absent congressional action) in a gross estate would benefit from additional estate tax planning.
 - b. Married client. Consider the **combined gross estate** of the married couple in figuring the \$1,000,000 limit.
 - c. Decision is the client's after full disclosure of the limitations of a simple will versus the other estate planning options. If a client wants a simple will, then consider having them sign a memo to the effect they were counseled on the limitations and agree to have you draw up a simple will.

F. Types of Wills.

1. Holographic. Completely written and signed in the handwriting of the testator.
2. Oral. Typically, must be made during last sickness. Can generally only dispose of personalty.

3. Statutory fill in the blank wills.
4. Contractual Wills.
 - a. Description. A contract between the Testator and someone else for the Testator to leave property a certain way usually in return for a promise for the other person to leave that property a certain way in their will.
 - b. Avoid contractual wills.
 - (1) Not authorized under the Legal Assistance Program.
 - (2) Most commentators think they are a bad idea.
5. Joint and Mutual Wills.
 - a. Description.
 - (1) A joint will is one will purporting to dispose of the property of two people.
 - (2) Mutual wills are two wills that virtually mirror the distribution provisions of each other.
 - b. Mere execution of joint or mutual wills does not create a presumption of a contract not to revoke the will; either may be revoked at any time.
6. Formal Wills. Every state has a statute prescribing certain formalities but generally a formal will is:
 - a. In writing;

- b. Signed by the Testator (or by another at the request of and in the presence of the Testator);
- c. Is published (declaration by the Testator that the instrument is testator's last will);
- d. Is witnessed or attested to, and
- e. All this is done in the presence of the witnesses and Testator.

7. Wills for domiciliaries of Puerto Rico and Louisiana should be prepared only by those technically competent to prepare wills for those locations (e.g., generally Fort Polk and Fort Buchanan).

G. Codicils.

- 1. A codicil may be executed to modify or add provisions to an existing will.
- 2. Must be executed with same formalities as a formal will.
- 3. It is generally preferable to execute an entirely new will instead of a codicil.

IV. TESTAMENTARY ISSUES.

A. Capacity.

- 1. Competent testator of sound mind and requisite age.
- 2. Who physically complies with state statutory requirements.
- 3. Possesses the intent to make the document his last will and testament. A testator must know and understand:

- a. The nature and extent of his property;
- b. The persons who are the natural objects of his bounty; and
- c. What disposition of his property he wants to effect.

B. Undue Influence.

1. Definition. Influence which deprives the person influenced of free agency or destroys freedom of his will and renders it more the will of another than his own.
2. Undue influence may invalidate the entire will in some jurisdictions or just the portion affected by the undue influence in jurisdictions that recognize the partial invalidity doctrine.
3. Duress and undue influence are closely associated but duress requires some unlawful threat. Undue influence is more a domination of the testator's mind.
4. Presumption of undue influence. A confidential relationship between the testator and someone who participates in the preparation of the will (even if not necessarily for their benefit) often leads to a presumption of undue influence.
 - a. The relationship of attorney and client, conservator and ward, trustee and beneficiary, doctor and patient, nurse and patient, and pastor and parishioner most courts classify as confidential.
 - b. The presumption arises when someone in this type relationship participates in preparing the will.

C. Classification of Gifts.

1. Specific Bequests.

- a. Definition: A gift of a specific article or part of a testator's estate which is identified and distinguished from all things of the same kind.
- b. Specific bequest can be useful to avoid property going to the residuary estate and possibly causing the executor to either sell or hold as non-income producing property.
- c. Reasons for making specific bequests.
 - (1) Heirlooms.
 - (2) Avoid fighting amongst beneficiaries.
 - (3) Sentiment.
 - (4) Control.
- d. Construction Problems. The wording of the specific bequest is important to classification and affecting the actual intent of the testator.
 - (1) Gifts of "~~my~~ furniture" or "~~my~~ automobile" are specific bequests but raise issues of construction regarding intent of the testator.
 - (2) Such terms should be defined where possible to account for the intent of the testator; construed at the time of execution? or time of death? Generally, courts construe such bequests as of the date of death.
- e. Change in Form of the Specific Bequest.
 - (1) Changes in form only will not generally void the bequest.

- (2) Usually arises with intangible property. For example: Testator bequests his ABC stock to Mary but after execution and before Testator's death ABC Corporation merges with XYZ Corporation and Testator's ABC stock is converted to XYZ stock. Testator never changes his will and thus dies owning XYZ stock. Mary would get that bequest because it is a change in form.

f. Alternatives to Lengthy Specific Bequests.

- (1) Incorporate a separate writing by reference in the will.
- (2) A non-binding (or binding if allowed in that state) memorandum of instruction to the executor.
- (3) In either case, the separate document or the memorandum must exist at the time of the will's execution.
- (4) Memorandum or letter of instruction as to the distribution of personal property is permitted in 27 states.
- (5) Caution: Unclear designations can give rise to litigation.

2. Demonstrative.

- a. A sum paid from a specified sum.

→give to Fred \$100 to be paid from the sale of my 1957 Chevy.”

- b. May have a problem with ademption.

3. General Bequests.

- a. Definition. A bequest which is payable out of the assets of the estate generally and does not require the delivery to the beneficiary of any specific item.
- b. Generally cash gifts but not limited to cash. Usually a stated sum of money.
- c. Classification as a general bequest places an obligation on the estate to provide that gift.

4. Conditional Bequests.

- a. Definition. A bequest which takes effect, or continues in effect, according to the happening of some future event.

“\$10,000 for tuition, provided she is accepted to law school before her 25th year.”

- b. Generally conditions are valid unless too indefinite, illegal or against public policy.
- c. Conditional bequests often lead to litigation.

5. Residuary Bequests.

- a. Definition. The property and assets remaining after debts, administrative expenses, and specific and general gifts are paid, and by its nature cannot be determined at the time of execution of the will.
- b. Usually, but not necessarily, the residuary beneficiaries are the primary objects of the testator's affection and most of the estate passes under the residuary clause.

- c. Even if the entire estate appears to be disposed of by other types of bequests/devisees, drafters should always include a residuary clause to avoid intestacy as to omitted or after acquired assets.
- d. Helpful to use percentages rather than amounts.
- e. Residuary language from DL Wills:

PARAGRAPH X: I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

- (a) If my friend, JERRY JEFF survives me, to JERRY JEFF.
- (b) If my friend, JERRY JEFF does not survive me, my residuary estate shall be paid and distributed to my sister, BETTY LOU THELMA LIZ if she shall survive me.
- (c) If none of the beneficiaries described in clauses (a) and (b) above shall survive me, then I give, devise and bequeath my residuary estate to those who would take from me as if I were then to die without a will, unmarried and the absolute owner of my residuary estate, and a resident of the State of Y .

D. Encumbered Bequests.

- 1. Generally, a beneficiary takes the gift subject to any liens or encumbrances on the property.
- 2. The Testator should specify in the will if their intent is that the estate will assume the cost of paying off any liens.

E. Disinheriting Relatives.

- 1. Spouse. Difficult to disinherit a spouse.

- a. Right of election. State statute governs what the right is but generally a spouse gets some share of the estate. The Uniform Probate Code (UPC) fixes it at 1/3 of the estate. Some states increase or decrease the elective share depending on whether there are children.
- b. Timing. The elective share is not automatic. There is usually a time limit under which the right of election must be made by the spouse or she loses her interest.
- c. Practice pointer: Sometimes spouses are inadvertently disinherited when the largest asset of the estate is put into a pre-residuary trust for minor children or someone else. For example, if a client is married and has two children and the only thing that the client really owns and is the largest asset of the estate is the \$400,000 in SGLI. If the will provides for the SGLI to go to the children of the marriage in a pre-residuary trust, the will has effectively disinherited the spouse.

2. Children and Other Relatives.

- a. Be specific in the will as to the intent to omit.
- b. Do not use precatory language to describe why the relative is disinherited.

3. DL Wills provisions disinheriting individuals.

FIFTH: I give and bequeath to XYZ the smallest portion of my estate, if any, required to be given to XYZ under applicable law, after taking into account the aggregate value of any other property passing to XYZ under this will or otherwise. It is my desire and intent that XYZ be disinherited by me to the fullest extent permitted by law. All provisions of this will, including without limitation any provisions which may refer to persons taking by intestacy, shall be construed to effectuate such disinheritance of XYZ.

OR THIS IF DISINHERITING A CHILD:

THIRD: I give and bequeath to my son BOB MARLEY, if he survives me, the smallest portion of my estate, if any, required to be given to my child under applicable law, after taking into account the aggregate value of any other property passing to my child under

this will or otherwise. It is my desire and intent that my child be disinherited by me to the fullest extent permitted by law. All provisions of this will, including without limitation any provisions which may refer to my "child", "children" or "issue", and any provisions which may refer to persons taking by intestacy, shall be construed to effectuate such disinheritance of my child.

4. Pretermitted Heirs.

- a. Most states have statutes allowing an unmentioned child to take a share of the estate.
- b. Most pretermitted heirs statutes allow an intestate share to the omitted child.
- c. State statutes differ on several points—
 - (1) Many state statutes include only children who were born after the will was executed but some are not limited.
 - (2) Most states limit their pretermitted heirs statute to children but many cover issue of deceased children.
 - (3) Some states allow extrinsic evidence of an intent to omit but most require that the intent to omit appear from the will itself.
- d. DL Wills provision to provide for unborn children in will:

FOURTH: I give, devise and bequeath all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

- (a) If my wife survives me, to my wife outright.
- (b) If my wife does not survive me, then to those of my children who survive me and to the issue who survive me of those of my children who shall not survive me, in equal shares per stirpes.

F. Distribution of Property.

1. Per Stirpes Distribution.

a. ~~Per~~ "Per Stirpes" is Latin meaning ~~by~~ "by roots". A per stirpes disposition or distribution of property is made to persons who take as issue of a deceased ancestor in the following manner:

(1) The property so passing is divided into as many equal shares as there are

(a) Surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and

(b) Deceased issue in the same generation who left surviving issue, if any.

(2) Each surviving member in such nearest generation is allocated one share.

(3) The share of a deceased issue in such nearest generation who left surviving issue shall be distributed in the same manner to such issue.

b. Thus, distribution per stirpes allows a grandchild of the testator to take by representation the share of the estate the grandchild's deceased parent would have taken.

c. There are two variations of per stirpes distribution.

(1) Strict. The survivors divide equally the share their ancestor would have taken.

(2) UPC. If all the takers are of the same generation, then they take equally.

d. A memorandum that can be printed out as part of the DL Wills Program defines per stirpes:

The term "**per stirpes**" describes the way a bequest is to be divided among a person's issue. Most people want bequests to their children to be divided equally among the children. A per stirpes distribution does this, and it also governs what happens if any child has died. If a child has died, his (or her) share is divided among his issue if he has any issue. For example, presume that you have three children (Sue, Sally and John) and that your will provides for a bequest to your children per stirpes. If all three children survive you, each would get one third of the property. If, however, John has died, his one third share would be divided among his children if he had any, or if he had no living issue his one third share would pass to Sue and Sally.

2. Per Capita Distribution.

- a. ~~Per Capita~~ is Latin meaning ~~by the heads.~~ This type of distribution allows survivors to take according to the number of individuals; share and share alike. The distribution of property is per capita when it is made to persons, each of whom is to take in his own right an equal portion of such property.
- b. ~~Issue per capita~~ can result in a slightly different distribution of property. A parent and child would receive equal shares while the parent is alive.
- c. Practice Pointer: Many clients select a per capita designation without realizing the drastic effect it may have on their grandchildren. The drafting attorney may want to add the following language to make sure the clients desire (and understanding) is clear:

~~In~~ equal shares to my children or to the survivors of them. It is my intent that should there be any grandchildren or other issue of one of my children who fails to survive me, those grandchildren or issue shall not share in any way in my estate."

3. Per Capita at each generation: A disposition or distribution of property made in the following manner to persons who take as issue of a deceased ancestor.

a. The property so passing is divided into as many equal shares as there are:

(1) Surviving issue in the generation nearest to the deceased ancestor that contains one or more surviving issue and

(2) Deceased issue in the same generation who left surviving issue if any.

b. Each surviving member in such nearest generation is allocated one share.

c. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue.

G. Charitable Bequests.

1. Check for exact name and make sure it is on the IRS list of qualified charities (IRS Pub 78).

2. Provide contingency in the will in the event the charity ceases to exist, changes name, or loses IRS qualification.

H. Funeral Arrangements and Special Instructions.

1. Funeral arrangements are best handled outside the will (See Appendix A).

2. Anatomical gifts may be made by will request.

- a. Invalidity of will does not invalidate the gift.
 - b. It is generally better for the testator to make an anatomical gift through a separate document (See sample form at Appendix B).
3. Consider making special requests by separate memorandum.

V. CHANGES AFTER EXECUTION OF THE WILL.

A. Ademption.

1. Property described in a **specific bequest** that is sold, transferred, or destroyed prior to testator's death "adeems." The estate is under no obligation to distribute another asset or pay for the failed gift.
2. For example, if a testatrix gives her son "my red car with serial number 1234567," but later sells that red car, the bequest adeems. Thus, upon her death, the son does not receive any property as a result of that specific bequest.
3. Malpractice tip: T draws will leaving realty to A; after the will is written, the attorney draftsman represents T in sale of realty, and then T dies. Court held the devise to A adeemed. Court held attorney liable in malpractice for not advising T of ademption and thwarting T's intent. Held that beneficiary T could maintain action. Schreiner v. Scoville, No. 86-521 (slip opinion), Iowa, 1987.

B. Lapse.

1. The general rule at common law is that if a beneficiary dies after the execution of a will but before the testator, a **specific bequest** fails or lapses. Unless otherwise provided, a lapsed bequest becomes part of the residuary estate.

2. Testator can anticipate the death of an intended beneficiary and provide for an alternate or place a condition of survival on the gift.
3. All states have an "anti-lapse" statute substituting intended beneficiary's issue. The degree of relationship varies from state to state (almost always children and sometimes parents and siblings). These statutes prevent the bequest from automatically lapsing (and becoming part of the residuary estate).
4. Practice Pointer: Always determine the long range plan of the client and specifically provide for bequests in the event any beneficiary predeceases the testator.

C. Abatement.

1. If there are insufficient assets in the estate to pay its obligations, legacies, administration expenses, and taxes, legacies may have to be reduced.
2. Usually a tiered plan as to priorities pursuant to state statute (12 states do not have) usual plan. General priority to cover deficiencies:
 - a. Residuary loses first;
 - b. General legacies;
 - c. Demonstrative legacies; and
 - d. Specific bequests.
3. Classification of the gift can determine abatement hierarchy.

D. Simultaneous Death.

1. The Uniform Simultaneous Death Act (USDA) provides for common disaster situations where there is no proof of survivorship. Generally, the Act presumes property owner survives intended beneficiary. Purposes of USDA:
 - a. Avoids two probate proceedings within a short time.
 - b. Testator would probably want his property to flow to his relatives, not relatives of deceased beneficiary.
 - c. Could save estate taxes by avoiding doubling of estate of spouse.
2. USDA doesn't apply if the will provides for a different presumption.
3. Testator should consider providing for survivorship for a specified period as a condition of the bequest. USDA (1991 version) incorporates 120-hour survivorship requirement.
 - a. Extended survivorship requirement serves same policies served by original USDA without risking litigation over evidence of survivorship.
 - b. If the survivorship condition for gifts to a spouse exceeds six months, however, the marital deduction will be disallowed.
4. Almost all states have enacted the USDA, except Alaska, Louisiana, Montana and Ohio.
5. Practice Pointer:
 - a. It is not only important to include USDA language in the will, but provide/explain for disposition of property should the beneficiary predecease the testator.

- b. Some estate plans may want to reverse the simultaneous death presumption in order to balance the value of the estates. Perhaps may want to have the “~~poorer~~” spouse or spouse who owns fewer assets to always survive the “~~wealthier~~” spouse to take advantage of tax saving devices.

6. DL Wills USDA provision:

TWELFTH: I direct that for purposes of this will a beneficiary shall be deemed to predecease me (or any other person upon whose death the interest of such beneficiary depends) unless such beneficiary survives me (or such other person) by more than thirty days..

VI. SGLI COUNSELING.

A. Importance of SGLI in Legal Assistance.

B. What is SGLI?

- 1. Group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.
- 2. How the SGLI Program Works.

C. Soldiers Covered.

- 1. Active Army.
 - a. Active duty soldiers are automatically insured for \$400,000 unless they opt out in writing.
 - b. Soldier can elect lower coverage or no coverage by completing VA Form SGLV-8286.

2. Reserve Component. Certain reservists are eligible for coverage.

D. Scope of Coverage.

1. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations
2. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120 day period. Soldier may convert to Veteran's Group Life Insurance (VGLI) within 120 days of separation.
3. Soldiers may lose entitlement to SGLI based on:
 - a. their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or
 - b. other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes).
4. Cause of death, however, is not relevant to the payment of SGLI proceeds.

E. Eligible Beneficiaries.

1. Any person or legal entity designated by the soldier on appropriate VA form (Active Component: VA Form SGLV-8286). SGLI Act gives service member absolute right to choose beneficiary. Ridgway v. Ridgway, 454 U.S. 46 (1981).
2. If no designation, or "By Law" designation, then proceeds are paid according to SGLI statute:
 - a. All to spouse, but if none, then

- b. All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then
 - c. All to parents (equally divided), but if none, then
 - d. All to executor of soldier's estate, but if none, then
 - e. Next of kin under state law.
3. Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. See AR 27-3, para 3-6b(1) (10 Sep 95); AR 600-8-1 (30 Apr 07).
4. SGLI definition of "parents" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(9), the term "parent" is limited to the father/mother of a legitimate child, the father/mother of an adopted child, and mother of an illegitimate child. The father of an illegitimate child is considered the parent also, but only if
- a. acknowledged in signed writing prior to death;
 - b. judicially decreed either to be the father or to provide support; or
 - c. proof of paternity is established from official records (e.g., birth, school or welfare records) which show that, with his knowledge, claimant was named father.

See Lanier v. Traub, 934 F.2d 287 (11th Cir. 1991) (Despite fact service member raised by stepfather, "by law" designation precluded stepfather from sharing in SGLI proceeds, which went to natural father and mother).

5. SGLI definition of "children" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(8) the definition of "child" is limited to a legitimate child or a legally adopted child. An illegitimate child is also included within the term if the insured is the child's mother or, if the insured is the father, the relationship meets the requirements of para. a.(1) through a.(3), above.

F. Currency of Designation.

1. Soldiers should be cautioned to keep their SGLI form updated. See Ridgway v. Ridgway, 454 U.S. 46 (1981) (A spouse was designated by name on SGLI election form. Soldier did not change election following subsequent divorce; ex-spouse was entitled to all the proceeds). See also Zawrotny v. Brewer, 978 F.2d 1204 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1418 (1993). (Oklahoma statute stated that, by operation of law, divorce causes ex-spouse to lose all entitlement to life insurance proceeds on life of previous spouse. Court of Appeals held Oklahoma statute ineffective to change ex-spouse designation on SGLI form.).

G. Minors as Beneficiaries.

1. OSGLI will not pay to a minor (except a minor spouse).
2. Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.
3. SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (see Appendix D, Survivor Benefits outline):
 - a. Testamentary Trust for Children:

(1) "My trustee to fund a trust established for the benefit of my children under my will."

(2) A soldier who wishes to designate a trustee under a trust established in a will (a testamentary trust) as a primary or contingent beneficiary will be advised that before completing the SGLV-8286, the soldier must have a will prepared that contains a trust, and the soldier must sign (execute) the will. The trust in the will may be established for minors or adults, regardless of their relationship, if any, to the soldier. The soldier will be further advised of the following--

(a) Advantages are--

(i) The need and (related expense) of maintaining a surety bond may be waived in the will.

(ii) The trustee can use the SGLI proceeds for the benefit of the minor for the period of time, and in the manner specified, in the will. Direct distribution of SGLI proceeds may be delayed beyond the 18th birthday of the minor (e.g., upon completion of college, or age 25, which ever occurs first).

(b) Disadvantages are--

(i) The will, which might not have otherwise required probate (e.g., because of the small amount of other property in the soldier's estate), will have to be probated and the court will need to appoint the trustee before the designated trustee may receive the SGLI proceeds. Court and legal expenses will have to be paid.

- (ii) The distribution of SGLI proceeds will be delayed.
 - (iii) There is no surety bond required that could protect the minor's funds from theft, fraud, waste, and other such acts by the trustee.
- b. The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb,"

VII. CLAUSES OF THE WILL.

A. The Preamble.

1. Military Testamentary Instrument Preamble (MTI). Invokes 10 U.S.C. § 1044(d) to allow probate of the will in any state. According to Army policy, do not use the MTI if you can determine the domicile of the client. It is best to use a state specific testamentary instrument.
2. Declare the proper state as testator's domicile. The declaration is evidence of domicile, but it is not irrebuttable. Domicile is not necessarily where probate will occur but may be the substantive law that applies.
 - a. Determining domicile or venue for probate.
 - (1) Vote.
 - (2) Driver's license & registration.
 - (3) Own real property.

- (4) Pay taxes.
 - (5) Membership in local organizations.
 - b. Where most likely will probate occur (or be required)?
 - c. Where best to probate?
- 3. Revoke all previous wills and codicils. In the absence of express revocation of prior wills and codicils, the new instrument revokes them only insofar as its provisions are inconsistent.
- 4. Insure client's name and social security number are accurate.
- 5. DL Wills Preamble:

I, HOMER STAR, a resident of the State of Florida, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me. I am in the military service of the United States, currently stationed at Fort TJAGSA, Virginia.

B. Selection of Personal Representatives and Trustees.

- 1. Select qualified, trustworthy, and competent fiduciaries.
 - a. Can select corporate or individual fiduciaries. Some factors to consider:
 - (1) Cost
 - (2) Security
 - (3) Permanence
 - (4) Investment experience and policy

- (5) Conflicts of interest

- b. Institutional Fiduciaries: Benefits are professional experience and perpetual nature of relationship. Drawbacks are sometimes higher commissions, impersonal, and complications relating to the size of the estate.

- c. Individual Fiduciaries: The testator must exercise due care in selection. Must be intelligent, trustworthy, and have some business sense.

- d. Compensation.
 - (1) Will fiduciaries be compensated?

 - (2) If fiduciaries will be compensated, will the testator require that they be paid pursuant to statutory commissions or other schemes?

 - (3) Bequest in lieu of commissions.

 - (4) Bequest in addition to commissions.

 - (5) Bequest payable only upon executor qualifying (treated as a gift). Bequest payable upon completion of duties is compensation and taxable income.

- e. Consider whether to appoint co-fiduciaries or a single fiduciary.

- f. Consider waiving bond for individual fiduciaries.

- g. Consider whether nonresident fiduciary can serve.

- (1) Some states prevent non-residents from being named executor. Some allow non-residents if they are related to the testator.
- (2) Non-resident executors usually have to consent to jurisdiction or appoint a local contact for purposes of service of process.
- (3) Can provide for a selection by nominated fiduciary in the will:

~~In~~ the event X does not qualify as executor of my estate due to his lack of residency in the state where this will is probated, then X shall have the power to nominate such executor.”

2. Always appoint alternate fiduciaries.

- a. Always provide for alternate or successor fiduciary if possible or the court may choose. When testator designates co-fiduciaries and one fiduciary cannot serve, the will can designate that the survivor chooses successor co-fiduciary.
- b. When drafting fiduciaries, always consider all contingencies (death, incapacity, unwillingness to act, resignation, etc..).

3. Specify fiduciary's management powers.

- a. Seventeen states and the District of Columbia have enacted statutes the same as or similar to section 3-715 of the Uniform Probate Code which grants to executors 27 stated powers, except as otherwise restricted by the will (Alaska, Arizona, Florida, Hawaii, Idaho, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, and Utah).

- b. Eight states (Arkansas, Connecticut, Georgia, Massachusetts, Nevada, North Carolina, Tennessee, and Virginia) have statutes granting a list of powers to executors and trustees that must be incorporated by reference in the governing instrument to be effective.
- c. List out or spell out the powers the fiduciary will have since not all states have fiduciary powers enumerated in statute.
 - (1) Bind client to specific state statute for fiduciary power (as specifically indicated by DL Wills), or
 - (2) Delete the reference to specific state statutes (powers listed in the will control).
- d. Does the testator want to restrict the fiduciary to certain types of investments?

—... I limit the assets in which my trustee may invest to obligations of the United States Government and/or accounts in institutions that are insured by the Federal Deposit Insurance Corporation (FDIC).”

C. Tax Apportionment.

- 1. Statutes in 22 states deal with the apportionment of estate taxes, usually apportioned by the amount.
- 2. Exercise great care in the drafting of tax apportionment clauses to insure that it is ~~clear~~ “clear and unambiguous” or susceptible to only one construction.

3. In the basic estate plan, it is usually better to have estate tax apportioned among all who take, probate and nonprobate property, by the taxable amount they receive, and not have all taxes paid by residue (Be careful with specific bequests when testator wants recipient to receive exact amount or the property with no deduction.). In DL Wills, you must select out of a basic will by selecting the highest value of an estate (regardless of its actual value) in order to see all the options and reach the apportionment choice.
4. Having marital or charitable property, usually the residue, pay the tax can have drastic effects, and in some cases can more than double the effective tax rate.
5. Do not use boilerplate language in DL Wills without reading and understanding.

D. Expense Clauses.

1. Payment of debts, funeral, and administration expenses.
 - a. Generally, personal representative required to pay expenses as a matter of state law. If assets of the estate are insufficient, statute creates a priority among creditors:
 - (1) Administrative costs
 - (2) Funeral expenses
 - (3) Debts and taxes to Federal government
 - (4) Medical expenses of last illness
 - (5) State law claims
 - (6) Others

- b. Claims against the estate must generally be filed within 4 months of notice to creditors.
 - c. Avoid requiring executor to pay "all just debts."
 - d. Grant executor the power to extend or renew indebtedness upon such terms and for such time as the executor deems appropriate.
- E. Providing for Management of Minors' Property.
- 1. Outright bequests.
 - a. Property held by guardian until child reaches age of majority.
 - (1) Guardianships involve expense and inconvenience.
 - (2) Can be a very restrictive arrangement for investments, loans, and use of funds.
 - b. Absolute ownership and control of property passes to child at age 18 or 21.
 - 2. Transfer under Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA).
 - a. What are "UGMA" and "UTMA?"
 - b. Most states permit testamentary transfers to custodians under UTMA and/or UGMA (as revised).
 - c. The guardian of the property does not have to be the other natural parent.

d. Potential Advantages.

- (1) Avoids cumbersome restrictions found in guardianship arrangements.
- (2) You (the Attorney) can understand UGMA/UTMA.
- (3) "Uniform" laws mean uniform application - even with mobile clients like those we have in the military.
- (4) UTMA allows transferor choice of law options and has clear conflicts of law provisions.
- (5) Transferor may designate a nonresident to serve as custodian.
- (6) Custodianship is not a separate taxable entity.

e. Potential Disadvantages (in comparison with trust options).

- (1) One beneficiary per custodianship. Must split assets into shares for each child.
- (2) Mandatory age of distribution to beneficiary - too early?
- (3) Less control and accountability than trusts.
- (4) No protection against spendthrifts (only a potential problem if custodianship continues into majority).

f. Practice pointer: Modification of DL wills guardian provision to create a guardian of the property:

→appoint G to be the Guardian of the person and property of any children of mine who have not attained the age of majority, ***as I believe it to be in the best interests of my children.*** [*Think about inserting other information, i.e., the*

children have bonded with G, my sister and have strong ties to her children; the children have never spent any time with their father, etc..] If G shall fail or cease to act as Guardian, I appoint G2 as Guardian. Said Guardian [may] shall act as Guardian of any property passing to my children [insert names of children from former relationship/marriage if this is a case where now remarried with children of present marriage] under this will, even if my children at any time may be living with [their father] my former husband. No Guardian shall be required to file or furnish any bond, surety, or other security in any jurisdiction. If my Trustee or any trust hereunder is the beneficiary of any life insurance policy, my Trustee shall be entitled to the insurance proceeds rather than my Guardian. [It is my direction that {insert name of father} have no control nor management of any assets passing to my children X and Y by reason of my death, whether or not passing under this will.]”

- g. See Appendix F for sample clause to use if state does not recognize testamentary transfers under UGMA.

3. Testamentary trusts for children.

a. Elements.

- (1) Settlor, Creator, Grantor: the testator
- (2) Trustee: legal title; the money manager.
- (3) Beneficiary: equitable title; the recipient.
- (4) Corpus: the value of assets in trust.
- (5) Income.
- (6) Duration: beware of the rule against perpetuities, use a saving clause, i.e., “any trust must terminate not later than 21 years after the death of the youngest beneficiary alive at my death.”

- b. Generally, for most “traditional families” the testamentary trusts for children are contingent trust or they come into being should the spouse predecease the testator.

- c. However, a testamentary trust can be a “family trust” for the benefit of the spouse and children. This type of testamentary trust is commonly used for “mixed or blended families” in second marriages (or beyond) when children of the first marriage are to receive bequests in addition to the spouse or when it is necessary to have someone other than the spouse manage the assets.

- d. Advantages.
 - (1) Court control over sales, investments, and accountings may be lessened or eliminated.
 - (2) Greater flexibility may be achieved in design of trust.
 - (3) Title to property vests in trustee. Transfers from trustee to 3d parties are not voidable.
 - (4) Testator controls age of distribution.

- e. Types of trusts.
 - (1) Unitary or Sprinkling Trust (Pooled Asset).
 - (a) One combined trust for several children. All assets held in one trust and drawn upon for the benefit of all children with no proportionate scheme required.
 - (b) Terminates when the youngest child reaches age specified by testator.
 - (c) Trustee acts as parent, distributing trust assets to beneficiary based on need.
 - (d) Less costly to administer than single trusts.

- (e) Unitary trust has certain disadvantages:
 - (i) Children not treated equally.
 - (ii) Older child may receive nothing.
- (2) Single trust (or separate trust for each child).
 - (a) Testator establishes one trust for each child.
 - (b) Typically, every child takes equal share. Testator may, however, set up trusts in unequal amounts.
 - (c) Trust(s) terminate upon age specified by testator.
 - (d) Single or separate trust has certain disadvantages:
 - (i) Separate trust may be better suited to larger estates, where the share of each child will be enough to take care of possible expenses (tuition, medical, etc.).
 - (ii) Cannot draw upon the share of one child to use for another child.
 - (iii) Added expense for separate trust administration and accounting.

f. Trust terms.

- (1) Powers and duties of the trustee. May be incorporated by reference to state statute.
- (2) Spendthrift trust provisions.

- (a) Most American jurisdictions permit a settlor to provide that any beneficial interest shall be free from anticipation or assignment and not be subject to claims of creditors.
- (b) In minority of states that do not recognize spendthrift trusts, the settlor may provide that in the event of an assignment, or attempted assignment, the interest of the beneficiary is divested.
- (3) Rule against perpetuities. Include a savings clause requiring interests to vest within 21 years of a life in being.
- (4) Provide for terminating trust when administration becomes uneconomical.
- (5) Include a last resort clause specifying alternate beneficiaries.

F. Selection of Guardian for Minor Children.

- 1. Testator should always name guardians of the person for minor children.
- 2. Guardianships terminate at local age of majority (usually 18).
- 3. Law of guardianship varies from state to state. Many will be reluctant to designate a non-resident of the state as guardian.
- 4. Guardianship provisions are even useful if parents are divorced and one parent survives the testator. The will and guardianship provisions can set out the custodial parents reasons for not wanting the other parent to be the guardian (fitness). Although courts are not required to follow the testators wishes, the test that the court will follow will be the ~~best~~ "best interest of the child."

G. The Testimonium Clause.

1. Establishes that document is intended to be testator's last will.
2. Testator's signature should be at the logical conclusion of the will.
3. Include date will was signed.

H. Attestation Clause.

1. Comply with state statutory requirements.
2. Most states do not provide any specific form.
3. Several states (e.g., California, New York, and South Dakota) specify that witnesses should give their addresses.

I. Self-Proving Affidavit.

1. Use the state specific self-proving affidavit. Only use the military self-proving affidavit if you cannot determine the client's domicile.
2. A self-proving affidavit establishes the authenticity of a will.
3. Ensure witnesses sign both the will and the self-proving affidavit.

VIII. EXECUTION OF THE WILL.

A. Will Execution Procedure (See Appendix E.)

1. Attorney must supervise entire execution ceremony in the Army under AR 27-3.

2. The attorney (draftsman) will include his name, rank, and state of admission are indicated on the document. AR 27-3, para. 3-6b(2). (The attorney may have to provide testimony in a will contest or construction proceeding.)
3. Testator should orally declare document to be last will and testament.
4. Testator should sign at the end of the will proper in front of all witnesses.
5. Execute one will (not copies) and do not permit alterations.
6. Do not ever remove staples or take apart will and re-assemble.

B. Witnesses.

1. Use at least two young, disinterested witnesses. The attorney drafting the will can be one of the witnesses.
2. Avoid mass will executions and having deploying soldiers serve as witnesses if at all possible.
3. All witnesses should sign the will and self-proving affidavit in presence of the testator and of each other in an attestation clause after the testator's signature.
4. Self-Proving Affidavits.
 - a. Only go to due execution.
 - b. They will not avoid a contest on the lack of testamentary capacity, undue influence, or fraud.
 - c. In the event testimony of witnesses will be necessary, will you be able to find the military witnesses?

C. Debriefing Clients.

1. Advise the client where to safeguard and store the will. Make it very clear to the client to not keep the will with him.
2. Explain circumstances and situations where updating the will would be beneficial.
3. Explain how to revoke the will and caution about unintentional revocation.
 - a. Revocation by Operation of Law.
 - (1) Marriage.
 - (2) Divorce.
 - (3) Birth of child.
 - b. Intentional Revocation
 - (1) Destruction with intent to revoke.
 - (2) Revocation by subsequent will or document executed with same formality as will.
 - (3) The client may not always desire to destroy a previous will when executing a new one. Can be important to show intent or plan.
4. Explain the termination of the attorney-client relationship.
5. Explain that copies are not kept in the legal assistance office.

6. Allow only executed wills to leave your office and execute only one document.

IX. CONCLUSION.

APPENDIX A
MORTUARY PLANNING SHEET

TO THE NEXT OF KIN OF: _____

This is an expression of my preferences and desires regarding the disposition of my remains and other arrangements at the time of my death. I am writing this to make things easier for you and to make my thoughts known.

I feel it would be best if preparation, casketing and transportation were handled by :

- Next of kin working with local funeral home.
- The military authorities, through their contact with a local funeral home (applicable only if on active duty).
- Next of kin working with:

(Name and address of funeral home)

At the time of death, I prefer:

- Conventional Burial. I would like to be in _____ Uniform:
- Cremation. _____ (Branch of Service)

No preference.

My preference for a burial place or disposition of ashes is:

- Private Cemetery.
(Show name and location)
- National or other Gov't Cemetery, contingent on availability of space.
(Show name and location)
- Burial at sea.
- Wherever you decide it would be easiest for you.
- Other:

In the event that my body should have to be shipped to another location, I prefer that the following funeral home be selected as "receiving" funeral home.

I desire the following religious services be conducted:

- Church services.
(Show name and location)
- Funeral home services.
- Memorial services.
- Graveside committal services.
- Other, please explain:

(More than one block may be marked)

Military honors desired if available from _____ resources.

(Service)

____ Chaplain

(Service)

(Please indicate religious preference)

____ Pallbearers.

____ Bugler.

____ Firing Party.

____ Color Guard.

____ Other, Please explain:

My preference concerning:

a. Government-furnished headstone or marker: ____ Yes ____ No

If preferred, type:

b. Clergy:

c. Flowers, memorials, agencies, contribution should be made to:

d. Favorite soloist or organist, psalms or other special requests:

e. Friends to notify:

OTHER DESIRES OR NOTES:

(SIGNATURE)

(DATE)

(A copy of this document should be given to your next of kin, executor and other close relative).

APPENDIX B - ANATOMICAL GIFT BY A LIVING DONOR

I am at least 18 years of age and make this anatomical gift to take effect upon my death. The marks in the appropriate blanks and words filled into the blanks below indicate my desires.

- 1. I give: My body _____;
Any needed organs or parts _____;
The following organs or parts:

- 2. To the following person:
_____;

To any person, tissue bank, or institution authorized by law:
_____;

To the following named physician, hospital, tissue bank or other medical institution:
_____.

- 3. For the following purposes:
Any purpose authorized by law: _____;
Transplantation: _____;
Therapy: _____;
Medical research and education _____.

Signature of Donor

Address of Donor

Date:

Signed by the Donor in the presence of the following who sign as witnesses:

Signature of Witness

Address of Witness

Signature of Witness

Address of Witness

APPENDIX C
SAMPLE DUAL REPRESENTATION LETTER FOR EXISTING ESTATE PLANNING
CLIENTS WITH SEPARATE FAMILIES

Dear _____:

This letter is written to you in order to insure, as much as can be insured, the validity and objective independence of the advice, counseling, and planning that I have given or done for each of you through the years. I have, of course, represented each of you particularly in the planning of your respective estates, which planning provides for your respective separate families.

Matters to which such representation has extended, and likely will extend, include the following:

1. Analysis of your wills, codicils, trusts, and property agreements, if any.
2. Analysis of the assets owned by each of you, including consideration of their value and the nature in which title is or should be held, and the categorization of such assets as separate or community property.
3. Discussions about the manner in which you wish to dispose of such property.
4. Analysis of the tax impact of such disposition and recommendations relative thereto.
5. Preparation of the documents necessary to accomplish the desired disposition.

We have talked from time to time about differences that may arise between you with respect to the ownership of your property and its desired disposition, particularly in view of your respective separate families. Such differences, under our ethical rules, do not prevent me from continuing to represent both of you. Of course, if conflicts of interest arise, ordinarily one lawyer cannot represent both of you, and it might be preferable for each of you to have separate independent counsel to avoid the possibility that advice to one is influenced by representation of the other. Nevertheless, as you have in the past, you have again expressed your continued interest in having me represent both of you notwithstanding the foregoing explanation.

Although it is doubtful that it will happen, if conflicts do arise of such a nature that it is impossible for me to perform my obligations to each of you, I will withdraw from continued dual representation and advise one or both of you to obtain independent counsel. It is, of course, implicit in such dual representation that there will be a complete and free disclosure and exchange of all information that I receive from either one or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you.

Assuming that you are satisfied with my continued representation of each of you and both of you, please sign the enclosed copy of this letter and return it to me for our files. A previously addressed and postmarked envelope is enclosed for your convenience. Should you have any questions concerning this letter or my representation of either of you or both of you, please feel free to call me.

Sincerely,
(Attorney's Signature Block)

I have read the foregoing letter, understand the same, consent to the disclosure and exchange of all information received by you from either one of us, with the other one of us, and consent to representing each and both of us in the aforementioned estate planning services.

Dated: _____, 20____

(Signature of husband; typed name below) (Signature of wife; typed name below)

APPENDIX D

WILL DRAFTING CHECKLIST

I. DATA ACCUMULATION.

A. Personal.

1. Names, aliases, former names, social security numbers (SSN's).
2. Dates of birth (DOB).
3. Prior divorces - date, final verified.
4. Residence.
5. Domicile.
6. Citizenship/immigration status of parties.
7. Children: Names, DOB's, SSN's
 - a. Of this marriage.
 - b. Prior marriages.
 - c. Others expected.
8. Any antenuptial contract?
9. Any property declarations or transmutation agreements?
10. Any prior marital termination contract?
 - a. This marriage.
 - b. Prior marriages.
11. Occupations of parties and children.
12. Work histories.
13. Education levels.
14. Special needs/handicaps.
15. Community property?

B. Insurance policies.

1. Name of the insurer.
2. Policy number.
3. Policy owner.
4. Type.
5. Face value.
6. Transferable?
7. Beneficiary? SGLI & Death Gratuity "By Law" designations-is there a need to revise them?

C. Assets.

1. Stocks, bonds, and notes.
 - a. Certificates? Street name?
 - b. Location of certificate/instrument.
 - c. Security perfected.

- d. Valuation; date and method used.
 - e. Income tax basis.
 - f. Form of title.
2. Tangible personal property.
- a. Automobile(s).
 - (1) Make, model, and year.
 - (2) Fair market value and method of valuation.
 - (3) Outstanding loan balance and monthly payment.
 - (4) Form of ownership.
 - b. Collectibles, furnishings, and appliances that client believes are significant.
 - (1) Describe.
 - (2) Value and method of valuation.
 - (3) Outstanding loan balances and monthly payments.
 - c. Miscellaneous items.
 - (1) Describe.
 - (2) Value and method of valuation.
 - (3) Outstanding loan balances and monthly payments.
3. Intangibles.
- a. Financial accounts.
 - (1) Type.
 - (2) Account number.
 - (3) Owner.
 - (4) Institution (name, address).
 - (5) Value.
 - b. Partnership Interests/Shelters.
 - (1) Income tax basis and date of acquisition.
 - (2) Expectancies and Non-vested Assets.
 - (a) Nature.
 - (b) Date contingency to be fulfilled.
 - (c) Controlled by whom?
4. Realty.
- a. Present occupant.
 - b. Popular description.
 - c. Legal description.
 - d. Title in whose name? Form?

- e. Encumbrance?
 - (1) Who is creditor?
 - (2) Type of security?
 - (3) Who is debtor?
 - (4) Perfected?
 - (5) Amount due? Payment rate?
 - (6) Any balloon?
 - (7) Interest rate? Fixed or Variable?
 - (8) Any unrecorded claims - i.e., amount owed to family?
 - (9) Valuation - method used.
 - f. If leased, length of lease - rental received/obligations of owner.
 - g. Basis for income tax purposes (depreciation, gain previously deferred).
- D. Debts and Claims.
- 1. General creditors.
 - a. Who are the creditors?
 - b. Type of debt (unsecured loan, revolving charge account, mortgage, etc.)
 - c. Reason for incurring the debt.
 - d. Encumbered property.
 - e. Who is obligated to pay?
 - 2. Estate Taxes.
 - a. Federal.
 - b. State.
 - 3. Death and Funeral Expenses.

II. FORMALITIES.

- A. Testamentary capacity.
 - 1. Age.
 - 2. Competent.
 - 3. U.S. citizen.
- B. Revoke prior wills.
 - 1. Codicil.
 - 2. New will.
- C. Type of will.
 - 1. Holographic.
 - 2. Oral.
 - 3. Formal.
- D. Advice to testator.
 - 1. Liquidity problems.

2. Probate avoidance vehicles.
3. Coordinate beneficiary forms on life insurance.
4. Ways to increase value of estate.

III. DRAFTING THE WILL.

- A. Preamble.
 1. Identify testator(trix).
 2. Declare domicile.
 3. Military status.
 4. Revoke prior wills.
 5. Recitals (optional).
 - a. Spouse.
 - b. Children.
- B. Funeral/Burial Desires.
 1. Left in separate memorandum?
 2. Anatomical gifts.
 3. Living will.
- C. Specific bequests.
 1. Carefully described.
 2. Ademption problems?
 3. Insurance proceeds pass with property.
 4. Property subject to encumbrance.
 5. Real estate.
 - a. Ancillary probate.
 - b. Encumbered?
 - c. Freedom to distribute.
 6. Demonstrative bequests.
 - a. Ademption problems.
 - b. True intent of testator ascertained?
 7. General bequests.
 8. Conditional bequests.
 - a. Condition clearly spelled out.
 - b. Time for performance clear.
 - c. Not expressed as a mere wish.
 9. Charitable bequests.
 - a. Organization qualifies as charity.
 - b. Organization described carefully.

10. Will testator leave a personal property letter?
 - a. Binding letter.
 - b. Incorporate by reference?
 - c. Referred to in will.
- D. Residuary Bequests.
1. Primary beneficiary(ies).
 2. Alternate beneficiary(ies).
 3. Catchall beneficiary.
 4. Property to minors.
 - a. Alternatives to guardianship (custodian account/trust).
 - b. Per stirpes/per capita?
 - c. Benefit after-born.
- E. Testamentary Trusts.
1. Type of trust.
 - a. Unitary.
 - b. Single trust.
 2. Purpose of trust.
 3. Name of trustee.
 - a. Specify alternate.
 - b. Powers.
 - c. Bond.
 - d. Compensation.
 4. Distribution.
 - a. Income.
 - b. Principal.
 - c. Age of distribution.
 5. Rule Against Perpetuities.
 6. Spendthrift trust clause.
 7. Bailout clause.
- F. Appointment of Fiduciaries
1. Primary and alternates named.
 2. Bond waived.
 3. Corporate or individual.
 4. Single individual, not co-fiduciary.
 5. Ancillary probate required.
 6. Residence of fiduciary.
 7. Compensation.

8. Powers.
 - a. Enumerated powers.
 - b. Incorporate state statutory powers.
- G. Administrative Clauses.
 1. Survivorship clause.
 - a. Simultaneous death.
 - b. Survivorship period less than 6 months.
 - c. Specified in terms of hours.
 2. Debts/apportionment clause.
 - a. Does will unnecessarily require testator to pay "all just debts"?
 - b. Clause give power to extend or renew?
 - c. Tax apportionment.
 - (1) Apportioned among all beneficiaries.
 - (2) Paid for out of residuary.
 - d. Abatement problems considered?
 3. No contest (in terrorem) clauses.
 4. Disinheritance of relative.
 - a. Omit reasons for disinheriting.
 - b. Specifically disinherit relative by name.
 5. Severability Clause.
 6. Veteran's benefits clause.
- H. Definitions.
 1. Per Stirpes (or per capita).
 2. Children.
 - a. Stepchildren.
 - b. Adopted.
 - c. After-born.
 3. Issue.
 4. Terms such as personal property and household goods.
- I. Attestation, Exordium, and Self-Proving.
 1. Contains signature for testator and witnesses.
 2. Place for date.
 3. Self-proving affidavit included for state domicile.

IV. WILL EXECUTION.

- A. Supervised by attorney.
- B. Witnesses.

- 1. At least 2 adults; 3 if required by jurisdiction controlling execution of the will.
- 2. Disinterested.
- 3. Initial pages, if required by jurisdiction controlling execution of the will.
- 4. Sign will and self-proving affidavit.
- 5. Testator.
- 6. Declare document is will.
- 7. Sign will.
- 8. Sign self-proving affidavit.

- C. Procedure.

- 1. Follow SOP.
- 2. Witnesses sign in front of each other and testator.
- 3. Execute only one will.
- 4. Don't remove staples.

V. TERMINATING RELATIONSHIP.

- A. Advice to client.

- 1. Need to revise will.
- 2. Where to keep will.
- 3. How to revoke will.

- B. Terminate attorney-client relationship.

APPENDIX E

STANDARD OPERATING PROCEDURE FOR EXECUTING WILL

The following, or a procedure covering substantially the same points, is recommended as standard operating procedure with respect to the execution of wills:

a. If the will consists of more than one page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists. This page numbering should not include the self-proving affidavit, which is not part of the will.

b. The testator should read the will in its entirety and the legal assistance attorney should ensure that the testator understands the terms of the will.

c. The testator and two persons who have no interest, vested or contingent, in the property disposed of by the testator's will or in the testator's estate in the event of intestacy, along with the legal assistance attorney supervising the execution of the will, should be in a room from which everyone else is excluded, and should remain therein until the execution is completed.

d. The legal assistance attorney supervising the execution of the will should ask the testator the following questions:

Do you (state the name of the testator) declare in the presence of (name the witnesses) that the document before you is your will, that you have read the document, that you understand the document, and that the document expresses your desires as to the disposition of the property referred to therein upon your death?" The testator should answer "yes" and the answer should be audible to the two mentioned witnesses.

Are you over the age of 18 (or the age of majority) and are you executing the document voluntarily, without any duress or coercion. The testator should again make an audible "yes" response.

e. The testator should sign his or her name at the end of the will. The three witnesses should be standing or sitting so that all can see the testator sign.

f. The legal assistance attorney supervising the execution of the will should then ask the testator the following question: "Do you request (names of witnesses) to witness the signing of your will?" Again the testator should answer "yes," and the answer should be audible to the three mentioned witnesses.

g. The legal assistance attorney should ask the witnesses if the testator appears to be of sound mind, to understand the nature of his or her actions, and to be under no duress or coercion.

h. One of the witnesses should then read aloud the attestation clause.

i. Each witness should declare that the attestation clause is a correct statement.

j. Each witness should then sign his or her name in the place provided for the signatures of the witnesses following the attestation clause. As each witness signs, the testator and the other two witnesses should be so placed that each one can see the witness sign. The witness should place his or her full address opposite the signature. If the witness is in the military service, grade should also be included opposite the signature.

APPENDIX F
CLAUSE FOR INCORPORATING UNIFORM
TRANSFERS TO MINORS ACT

DL Wills has a Uniform Transfers to Minors Act, Uniform Gifts to Minors Act clause that appears automatically in the document. If so some reason, the clause is not in the document this paragraph may be substituted.

"If any beneficiary entitled to receive distribution of property (under this will) (from this trust) is a minor at the time of distribution, I direct that my (personal representative) (trustee) deliver the property to a custodian for the beneficiary under the Uniform Transfers to Minors Act, Uniform Gifts to Minors Act, or a similar custodian law of the State of _____ or any state in which the beneficiary may then reside; and I give to my (personal representative) (trustee) the power to designate any adult person or trust company, including my (personal representative) (trustee), custodian for the property distributed to each beneficiary under such law.

"If the law of the designated state does not provide for custodianship created in this manner, the distribution shall be made to the custodian as trustee for the minor and the terms of the trust shall be the Uniform Transfers to Minor Act as promulgated by the National Conference of Commissions on Uniform State laws, with the trust to terminate when the minor is twenty-one years of age.

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ANTENUPTIAL AGREEMENT

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trust, n. 1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*). For a trust to be valid, it must involve specific property, reflect the settlor’s intent, and be created for a lawful purpose. (BLACK’S LAW DICTIONARY 1647 (9TH ed. 2009))

I. HISTORY OF TRUSTS.

- A. Trusts have an ancient and distinguished history in English common law that goes back to the Middle Ages. A trust is a right over property, either real or personal property, held by one party (the Trustee) for the benefit of the another (the Beneficiary). This concept was originally borrowed by Roman civil law, which recognized a “use” as a legally-enforceable confidence imposed upon another person, ordinarily for the disposition and management of land.

- B. Under England’s medieval feudal system, the King was entitled to collect certain taxes upon the death of a noble when the noble’s lands passed to his heir. Some clever nobles placed their lands in “uses,” thereby avoiding the royal taxes. Therefore, the use of trust arrangements to avoid inheritance taxes is almost a thousand years old. The Statute of Uses was enacted during the reign of Henry VIII in 1536 and is an early example of “loophole-closing.” By this law the King abolished the favorable tax treatment previously allowed for “uses” in avoiding the medieval land taxes. In the 20th Century, American and British attorneys use trusts to accomplish the desired disposition of property, sometimes for tax reasons and also to achieve the owner’s dispositive plans.

- C. In civil law jurisdictions, i.e. most European countries, which base their legal systems upon Roman law and the Code Napoleon, owners of real and personal property generally do not have the unrestricted right to dispose of their property at death, or to create trusts for that purpose. This continental property law can be seen in the law of Louisiana, which provides a decedent’s surviving spouse with a “usufruct,” and also confers certain rights of forced heirship on the decedent’s children.

II. WHAT IS A TRUST?

- A. **trust, n. 1.** The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose. (Black's Law Dictionary 1647 (9th ed. 2009)).
- B. A trust is a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts, section 2.
- C. Essential Elements of a Trust:
1. Trustee
 2. Beneficiary
 3. Trust Property (res)

III. HOW TRUSTS ARE CREATED.

- A. Trusts are created in several ways:
1. By Will. These trusts are known as testamentary trusts and constitute a part of the testator's Last Will and Testament. Testamentary trusts are "dormant" until the Will is probated following the testator's death. Therefore, a testamentary trust is not fully established until the date of the testator's death. Probate of the Will is a required step to make a testamentary trust operational.

2. By Agreement (or Deed) of Trust. A person (the Settlor or Grantor) who desires to create a trust that will become operational during their lifetime ordinarily does so by executing a Trust Agreement or a Deed of Trust. Such trusts are often called “inter-vivos trusts” because they are made between living persons, as opposed to the testamentary trust, which is created in the Will of a decedent.
3. By Court Action. Courts of equity have powers to impose a resulting or constructive trusts. Judges ordinarily apply this legal doctrine in order to remedy an act of fraud or misappropriation of property.

IV. COMMON FEATURES OF ALL TRUSTS.

A. All trusts will ordinarily contain all of the following elements:

1. Governing Document. The written instructions specifying the terms of the trust are contained in the Will, Trust Agreement or Court Order (in the case of a constructive trust).
2. Trust Assets. The property subject to the terms of the trust is often referred to as being the “trust principal,” “trust estate,” “corpus,” or “res.” All of these terms mean essentially the same thing and refer to the property that is the subject of the trust.
3. The Settlor. The person who, having the requisite capacity, creates the trust. Also known as grantor, donor, or trustor.
4. The Beneficiary. All trusts have one or more beneficiaries, who are the persons who are named or otherwise designated to enjoy the income and principal of the trust property. The Beneficiary is considered to be the equitable owner of the trust property.
5. Trustee(s). All trusts will have one or more Trustees, who are the legal owners of the trust property. As the legal owners the Trustees are vested with powers to manage, invest and dispose of the trust property, subject to the terms of the governing document. A trust will ordinarily continue after the death or resignation of its Trustee and another substitute or successor Trustee will be appointed to carry on the duties of the Trustee.

6. Time Period of Trust. Most trusts will have a definite beginning and ending point, ordinarily beginning at the death of the testator/settlor who created the trust and ending upon the beneficiary of the trust reaching a specified age of financial maturity. The Rule Against Perpetuities is a common law legal doctrine that limits the term of trusts to the lifetimes of beneficiaries or certain other described persons who were living when the trust was established, plus an additional period of twenty-one (21) years. The rule ordinarily limits the term of all private trusts, i.e. trusts created for the benefit of individuals. However, charitable and governmental trusts are exempt from the limits of the Rule Against Perpetuities. Delaware and some other states have repealed the common law doctrine known as the Rule Against Perpetuities, so that private trusts established in those jurisdictions may continue indefinitely.

V. COMMON TRUST PROVISIONS.

- A. Identification of Settlor, Trustee and Initial Corpus. The trust instrument should identify the settlor, the trustee and the initial corpus. The trustee and the settlor should all sign the trust agreement. If it is desirable not to disclose the initial corpus in the trust instrument, a nominal corpus should be identified in the instrument. This listing of assets is ordinarily done on a schedule or exhibit attached to the trust instrument.
- B. Identify Beneficiaries. The trust agreement or Will should identify the beneficiaries of the trust by name or description. If there are contingent beneficiaries, the conditions under which they are to receive income or principal must be set forth in detail.
- C. Powers of Trustees. (See also Section VII). The trust instrument or Will should specify the powers of the trustees (initial and successors). When drafting these fiduciary powers, the attorney should be aware of any applicable statutes and whether they need to be specifically referenced in the trust instrument in order to be applicable. The process is sometimes shortened by referring to a statute which sets forth trustee's powers (e.g., the "Colorado Fiduciaries Powers Act," C.R.S. § 15-1-801, et seq. and also § 64.1-57 of the Code of Virginia).

- D. Spendthrift Provisions. If a purpose of the trust is to safeguard trust assets from creditors, appropriate spendthrift language should be included. “Spendthrift” provisions ordinarily prohibit a beneficiary from assigning or otherwise anticipating his inheritance.
- E. Perpetuities Savings Clause. If there is even a remote possibility that the Rule Against Perpetuities may be violated, a savings clause should be considered, including provision for who takes the property when the provision is applicable.
- F. Bond. The trust instrument should specify whether the trustee is exempted from having to post bond or other security. Distinctions may be needed in the case of successor or substitute trustees.
- G. Successor Trustees. Provision should be made for the appointment of a successor trustee in the event that the initial trustee(s) cease(s) to perform for any reason. Successors may be appointed according to a list set forth in the agreement or according to instructions set forth in the agreement, or by a court.
- H. Trustee Fee. Provision should be made for a reasonable fee for the trustee, or agreement should be made with a trustee who is willing to serve without fee.
- I. Underage Beneficiaries. The trust instrument should provide continuing trust protection and management for any beneficiary who is under age 18 until a specified age of financial maturity, often age 21 or higher.

VI. DESIGNATING TRUSTEES.

- A. In General. The following factors may be helpful when the attorney assists the settlor in selecting a trustee. Generally, it is beneficial if the trustee has an understanding of the needs of the settlor and his family and possibly of the settlor's business. Individual trustees should be expected to survive the settlor. Corporate trustees should be qualified to do business in all jurisdictions where the settlor has property. The nature of the settlor's assets and businesses may sometimes require multiple trustees. In addition, when selecting trustees, consideration should be given to the following questions:

1. Does the individual or institution have the experience and specialized knowledge necessary to handle investments and administrative requirements, including knowledge about fiduciary income tax returns?
2. Can the individual or institution repay any damages if default or breach occurs?
3. What possible tax considerations attend the selection of the individual? There may be adverse income or estate tax consequences where a beneficiary is a trustee or co-trustee.

B. Corporate Trustee.

1. Advantages. Corporate trustees generally have expertise in asset management, record keeping, accounting and preparation of reports and tax returns. Also, corporate trustees have perpetual existence and when dealing with the trust and its beneficiaries can act impartially.
2. Fees. Corporate trustees require payment of fees for their expertise. It is prudent to inquire about the fee structure of a particular institution prior to naming it. Fees typically are based on a percentage of the value of assets being managed and tend to approximate 1% per annum of the principal value of the trust. In some states compensation of trustees and other fiduciaries is specified by statute.

C. Individual Trustee.

1. Advantages. The individual trustee may have a better understanding of the personal needs and values of the settlor and his family and, therefore, may be able to provide a personal touch when dealing with beneficiaries and discretionary distributions to them. Also, an individual trustee may be willing to serve without fees for his services.

2. Possible Disadvantages. An individual trustee who is unsophisticated with respect to trust management may cause trust assets to be dissipated through poor investment choices. The trust may incur tax liabilities if proper tax returns are not filed. Also, there can be estate or income tax problems where the trustee is also a beneficiary of the trust.
- D. Co-Trustees. Appointment of an individual trustee and a corporate trustee as co-trustees is a good approach because it combines the advantage of a personal touch with the expertise of professional asset management, but may also result in additional expense if both trustees are entitled to a fee. Serving as a trustee can be a heavy responsibility. For that reason it is often advisable to use a “fiduciary team” composed of two individuals or perhaps a corporate co-trustee to serve with a member of the family as the individual co-trustee.

VII. TRUSTEE’S POWERS AND ADMINISTRATIVE PROVISIONS.

- A. Trustee's Powers. The Will or trust agreement should include broad administrative powers to assure the most efficient and economical administration of the trust assets.
1. Statutory Powers. Statutory powers vary from state to state and may vary with subsequent legislation. Always check local law to determine whether specific reference to a fiduciary powers statute is required. For example, the Colorado Fiduciaries' Powers Act (C.R.S. § 15-1-801, et. seq.) confers certain powers on all fiduciaries unless the Will or trust clearly limits such powers. If in doubt, it is ordinarily best to include specifically a power that may be needed.
 2. Some Useful Powers to Give to the Trustee.
 - a. Exercise tax elections.
 - b. Apply property for the benefit of a beneficiary.
 - c. Real property management.
 - d. Settle claims.

- e. Allocate receipts between income and principal.
- f. Retain original property, regardless of its type or investment suitability.
- g. Broad investment authority.
- h. Sale and lease.
- i. Use of nominee form for registration of securities.
- j. Lend and borrow.
- k. Employ agents and attorneys.
- l. Delegate powers to other trustees.
- m. Consent to corporate changes.
- n. Rights and voting proxies.
- o. Continuation of business.
- p. Partnership interests.
- q. Manage oil and gas interests.
- r. Distribute assets in kind.
- s. Purchase assets from the estate of the settlor.
- t. Abandon property.
- u. Consolidate multiple trusts.

- v. Terminate the trust if its administration is uneconomical.
3. Consider a Limitation on the Powers of any Interested Trustee.
 - a. Since In re Wall Estate, 101 T.C. 300 (1993), the Internal Revenue Service has given up trying to assert that the power to remove a trustee can cause the holder of that removal power to be subject to estate tax as the owner of the trust corpus. Nevertheless, caution remains advisable in naming a beneficiary as a trustee or co-trustee.
 - b. The following protective provision (taken from a Will produced using DL) may reduce the risk of causing a removal power to cause the assets of the trust to become subject to estate or gift tax with respect to the holder of the power.

Notwithstanding anything to the contrary contained in this will, during such time as any current or possible future beneficiary of any trust created hereunder may be acting as a Trustee hereunder, such person shall be disqualified from exercising any power to make any discretionary distributions of income or principal to himself or herself or to satisfy any of his or her legal obligations, or to make discretionary allocations of receipts or disbursements as between income and principal. Such powers shall be exercisable, if at all, only by the other Trustee acting at the time with such beneficiary. No Trustee who is a current or possible future beneficiary of any trust hereunder shall participate in the exercise of any powers of my Trustees which would cause such beneficiary to be treated as the owner of trust property for tax purposes.

B. Administrative Provisions.

1. Incorporation by Reference. The trust should provide for the incorporation of the appropriate fiduciaries' powers act, or other state law applicable, to be effective with respect to administration of the trust estate.
2. Release of Power. All administrative powers and powers to designate fiduciaries should be releasable in whole or in part, temporarily or irrevocably, by written instrument delivered to the trustee or filed in the records of the trust.

3. Reports. The trustee should be required to render reports, at least annually, to the beneficiaries, showing the assets held as principal of the trust and all receipts, disbursements and distributions. The records of the trustee with respect to the trust should be open to inspection by the beneficiaries.
4. Advisory Standards. Advisory standards can be listed to guide the trustee in exercising his discretionary powers. These standards can include the purposes of the trust, investment criteria and other provisions the settlor would like to include concerning the treatment of beneficiaries, management of trust assets and distributions of income and principal.
5. Power to Terminate Early. It is advisable to give the trustee the power to terminate the trust early if it is no longer economically viable to continue the trust.

VIII. SIMPLE WILLS WITHOUT TRUSTS.

- A. Some individuals and married couples may have situations that are sufficiently simple to avoid the use of any trust provisions. Under current federal estate tax law this would include an individual or married couple with a combined gross estate of \$10,000,000 or less (assuming death occurs in 2010-2012; in 2013, unless Congress acts, the amount goes down to \$1,000,000 per decedent). Estates under this level may not need to use trust provisions if all of the persons named in the will to inherit property are over age 18 and do not have “special needs.” Special needs would include disabled or incapacitated persons who may require long-term medical or custodial care due to mental or physical disability.
- B. However, since the estate tax is in flux (i.e., subject to change), it is advisable to consider using trusts for clients with potential gross estates over \$1,000,000.

IX. NON-TAX USES OF TRUSTS IN WILLS.

- A. Testamentary Trusts.
 1. A testamentary trust is one created by a Will, as part of the Will.

2. It becomes both effective and irrevocable at the time of death.
3. It is funded with all or a part of the decedent's assets.

B. Primary Uses of Testamentary Trusts.

1. Contingent Trusts for Minors or Other Beneficiaries.
 - a. Allows the testator to name a trustee to manage assets for minor children in the event of a common accident or death of the surviving spouse.
 - b. Normally used to manage assets at least until the minor reaches the age of majority (ordinarily age 18), often to age 21 or older.
 - c. Avoids the possible need for a court-supervised guardianship or conservatorship of property if the children - beneficiaries are minors and no trust was provided in the Will.
 - d. DL Wills allows the creation of multiple trusts through both the creation of pre-residuary trusts and residuary trusts for multiple children or blended families.
 - e. Determination of Shares. There are basically two methods used to determine the shares provided for minor children or other beneficiaries, as follows:
 - (1) Separate Shares Upon Testator's Death. In most cases, the testator's Will directs that the inheritance for his children will be divided into equal shares, as of the date of the testator's death. The DL software provides a screen where this decision is made by the drafting attorney.

- (2) Disadvantage of Separate Shares Upon Testator's Death. Creation of separate shares upon the testator's death can have an adverse impact upon the testator's younger children, if the younger children are also specified to receive shares equal to those of their older siblings. An older child who has already graduated from college will be able to use and enjoy virtually all of his inheritance. In contrast, support and education expenses of younger beneficiaries will consume a great deal of their inheritance if the separate share drafting approach is used.

- (3) Unitary or "Sprinkling" (Pooled Asset) Trust Followed By Separate Shares. Where the testator has children (or other beneficiaries) whose ages vary greatly, the best approach is often to use a pooled trust, where the funds are held in one combined trust fund. Using a pooled trust, the portion of the estate designated for the testator's children is held in one combined trust fund until the youngest child reaches a specified age, perhaps age 21 or 25. In this way, the trustee manages all of the decedent's trust funds for the common benefit of the testator's children, until all children have reached the minimum age specified by the testator. At that point, the pooled trust is ordinarily divided into equal shares, and each child then receives outright distribution of his respective equal share.

2. Special Needs Trusts.

- a. "Special Needs" trusts allow the testator to place assets in trust for a disabled person, such as a retarded child, so that those assets will continue to benefit the handicapped person after the testator's death. These trusts are ordinarily designed to supplement benefits provided through Medicaid or other governmental assistance.

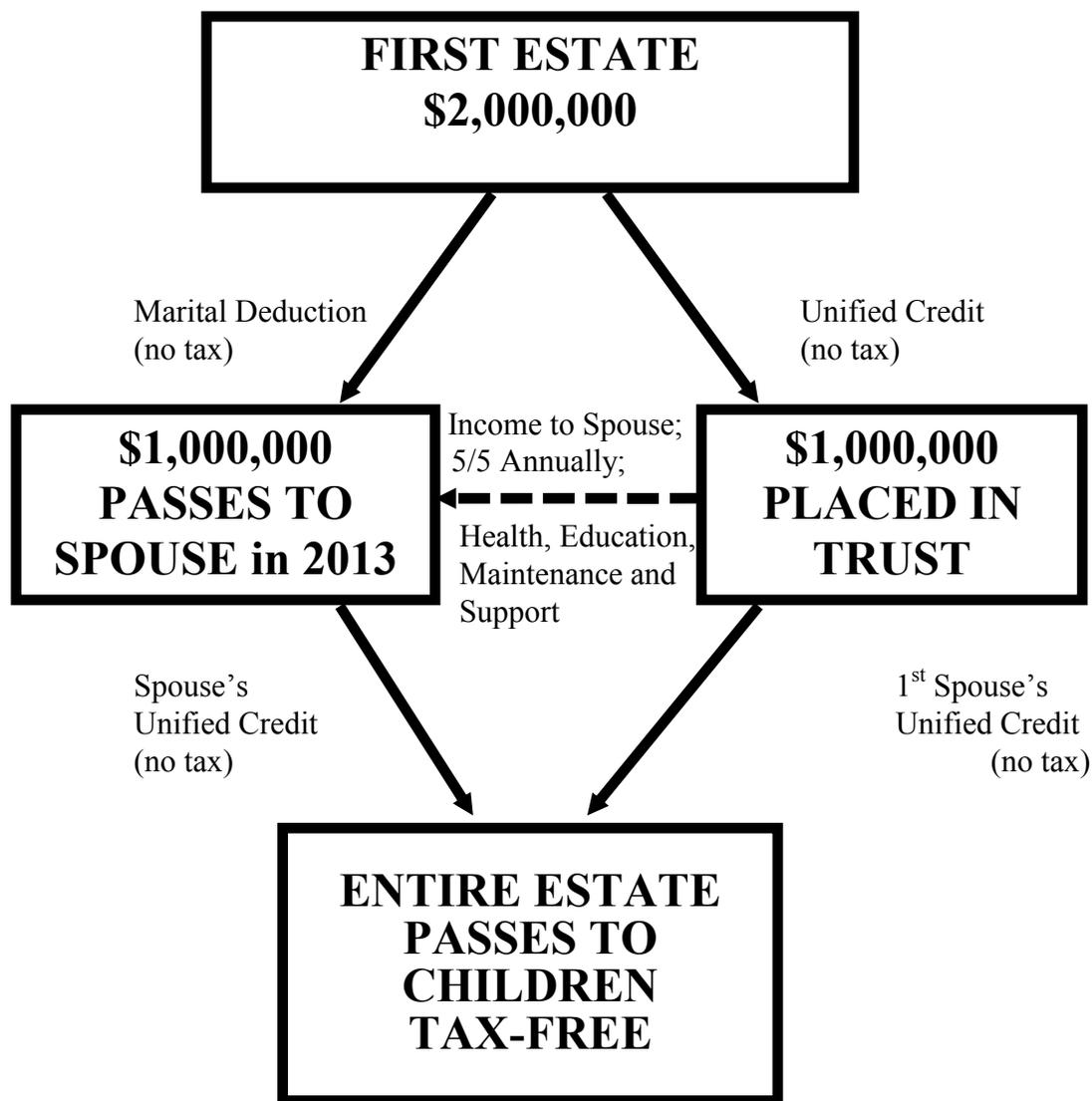
- b. The "Special Needs" trust is a management tool and includes a spendthrift provision and other strict limits on distributions so that the disabled person does not lose Medicaid benefits or eligibility.

3. For Control of Asset Disposition.
 - a. Commonly used when one or more of the spouses have children by former marriage, or when the testator is concerned about the possibility of the surviving spouse remarrying or disinheriting the children.
 - b. Use of an independent trustee or co-trustees is advisable and should be considered.

X. ESTATE PLANNING FOR SERVICE MEMBERS.

- A. When is more detailed estate planning necessary?
 1. Gross estate > unified credit.
 2. Non U.S. spouse.
 3. “Mixed or blended” families.
 4. Minor children or a disabled child.

- B. Effective Use of the Unified Credit if death occurs in 2013 (assuming Congress does not act before 2013 when the unified credit will otherwise become \$1,000,000).



The key to maximizing the effective use of the unified credit is to have a measured amount of the estate go to a "credit shelter" trust. This trust is taxed at the first spouse's death, with the tax being paid by the deceased's unused unified transfer credit. This "bypass trust" may provide a life income interest to the surviving spouse as represented above by the dotted line.

The same estate without estate tax planning would result in a federal tax liability of approximately \$550,000 at the death of the second spouse (in 2013, unless Congress acts, a 55% federal estate tax will potentially apply to gross estates over \$1,000,000).

C. Methods using the Unlimited Marital Deduction.

1. Outright gift of qualifying property.
2. Trusts.
 - a. Estate Trust - distributes to surviving spouse's (SS) probate estate at death, for estate tax and probate purposes. Not favored except where important to have income accumulated in trust and not paid out during SS's life. This is only type of marital deduction trust that allows income accumulation. All assets in this trust are in SS's estate for estate tax purposes and are subject to probate.
 - b. Marital Trust – (sometimes referred to as an “A Trust”) Spouse has the right to all income plus the right to say during life and / or at death who receives the remaining principal.
 - c. Qualified Terminable Interest Property (QTIP) Trust (Appendix B) - Spouse has the right to all income during life. No one else can benefit from the principal, but the donor (or decedent) can direct who will get the principal at the surviving spouse's death.

D. Methods using the Marital Deduction and Unified Credit.

1. Credit Shelter Trust (a.k.a. “By-Pass Trust” or “Exemption Trust”)
 - a. The credit shelter trust or A-B trust is designed to make certain that the unified credit of each spouse is used, while allowing the surviving spouse to have the use of the deceased spouse's assets during the remainder of his or her lifetime.

- b. A decedent can pass any size estate to his/her spouse without concern for the federal estate tax because of the unlimited marital deduction. However, when the surviving spouse later dies and passes the combined estate to his/her heirs, there is only the surviving spouse's unified credit to reduce the estate tax. This results in the first spouses unified credit amount being wasted.
- c. Because of tax deferral of the unlimited marital deduction, the taxation occurs at the death of the second spouse (if estate exceeds unified credit).
- d. To preserve the unified credit of the first spouse to die, many couples use a credit shelter trust. When the first spouse dies, an amount equal to (or less than) the unified credit is placed in the credit shelter trust. This trust is not taxed at that time or later at death of the surviving spouse, even though it may appreciate greatly in value.
- e. The surviving spouse can have access to the income from the credit shelter trust for life, and can use the principal if necessary for health, education, support and maintenance.
- f. Result:
 - (1) At the death of the surviving spouse the amount in the credit shelter trust is not included in the estate of the second spouse to die. The second spouse to die can then pass an estate to his/her beneficiaries up to their unified credit amount with any estate taxation.
 - (2) The credit shelter trust (Trust B) is generally not taxed at the death of either spouse. The marital share (Share A) is generally taxed when the surviving spouse later dies, but an estate less than the unified credit will result in no estate taxes payable.

2. Disclaimers (I.R.C. § 2518).
 - a. Can be used as an after-death planning tool. Can be used to shift property to a younger generation while avoiding a gift tax liability to the disclaiming party.
 - b. Beneficiaries are not forced to take what is coming to them under another person's will. The beneficiary disclaims a bequest.
 - c. If a qualified disclaimer is made by someone who does not wish to accept an interest in property, the interest disclaimed will be treated for federal tax purposes as if it had never been transferred to that person, and he / she will not be treated as having made a gift, for either gift or estate tax purposes, to the person to whom the interest passes by reason of the disclaimer.
 - d. A surviving spouse can make a valid disclaimer even though the property disclaimed goes to a trust in which he / she has an income interest, so long as this result is without the surviving spouse's direction. As a result, a provision is included in the decedent's will directing the disposition of any disclaimed property.
 - e. Mechanics of disclaimers.
 - (1) To be effective for tax purposes, a disclaimer must be qualified. A qualified disclaimer is an irrevocable and unqualified refusal to accept an interest in property.
 - (2) A qualified disclaimer must satisfy four requirements:
 - (a) The refusal must be in writing;
 - (b) The refusal must be received by the transferor, his or her legal representative, or the holder of legal title to the property not later than nine months after the day on which the transfer is made;

- (c) The person who disclaims must not have accepted the interest or any of its benefits before making the disclaimer; and
 - (d) The interest disclaimed must pass to someone other than the person making the disclaimer without any direction on the part of the person making the disclaimer.
- f. Both state and federal law applies to disclaimers.
 - (1) State law determines ownership.
 - (a) The extent to which disclaimers are effective for nonprobate transfers is unclear in many jurisdictions.
 - (b) Both the UPC and the tax law recognize disclaimers of nonprobate transfers. UPC § 2-801; Treas. Reg. § 25.2518-2(c)(4).
 - (2) Federal law determines tax consequences.
- g. Disclaimers and Joint Tenancy Interests.
 - (1) In general, an individual must make a qualified disclaimer of the interest to which the disclaimant succeeds upon creation of the joint tenancy within nine months after the creation of the tenancy. Treas. Reg. § 25.2518-2(c)(4)(i).

(2) However, a qualified disclaimer of the survivorship interest must be made no later than nine months after the death of the first joint tenant to die. The timing for disclaiming the survivorship interest is not affected by the power of the disclaimant to unilaterally sever the tenancy under local law. *P.M. Kennedy*, CA-7, 86-2 USTC, rev'g TC, 51 TCM 232, CCH Dec. 42,804, TC Memo. 1986-3. Similarly, *J.S. Dancy Est.*, CA-4, 89-1 USTC, rev'g TC, 89 TC 550, CCH Dec. 44,184; *G.L. McDonald*, CA-8, 88-2, USTC, rev'g TC, 89 TC 293, CCH Dec. 44,118, cert denied.

(3) Special rules apply to disclaimers of joint tenancy interest in bank, brokerage, and investment accounts. The transfer creating the survivorship interest in a cotenant's contributions occurs on the death of the cotenant only if the cotenant possessed the right to unilaterally regain sole possession of the contributions. In such case, the surviving cotenant may make a qualified disclaimer within nine months of the deceased cotenant's death. Treas. Reg. § 25.2518-2(c)(4)(iii). In addition, a joint tenant may not make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that tenant.

h. For a good analysis of the law and case law of disclaimers, see, *Disclaimers: New Developments, Opportunities, and Unsettled Areas*, by Virginia F. Coleman, ALI-ABA Course of Study Materials, Advanced Estate Planning Techniques, Volume I, February 1999.

3. Credit Shelter or By-Pass Disclaimer Trust.

a. The will first makes an outright gift of all the desired property to the surviving spouse followed by an express provision that any property that the surviving spouse disclaims passes into a bypass trust for the surviving spouse's benefit.

b. The benefit for the bypass disclaimer trust is that the surviving spouse can examine the actual situation at the time of the deceased spouse's death and make the best decision.

4. Qualified Terminable Interest Property Trust (QTIP Trust) (a.k.a. “A-B-C Type Trust”) (I.R.C. § 2056(b), see Appendix B).
 - a. Sometimes a third trust is added to the A-B Trust called a QTIP trust.
 - b. The QTIP allows the first spouse to die to give lifetime benefits (like income earned on the trust assets) to his / her spouse, while still retaining the right to name the persons who will ultimately receive the trust assets.
 - c. Useful in protecting children of a prior marriage from being cut off by the surviving stepparent.
 - d. Reduces the possibility of estate passing to a subsequent marriage partner or “close friend” of the surviving spouse.

5. Qualified Domestic Trust (QDOT) (I.R.C. § 2056A).
 - a. Transfers at death to a non-citizen spouse will not qualify for the unlimited marital deduction unless the assets pass to a QDOT.
 - b. If a QDOT is not used, then all assets above the decedent’s unified credit amount are taxable upon transfer to a non-citizen spouse.
 - c. The QDOT rules require a U.S. Trustee and other measures that help ensure collection of estate tax at the surviving non-citizen spouse’s later demise.
 - d. Gift Tax Note: Can gift up to \$100,000 (indexed to inflation) per year to non-citizen spouse during life. (\$136,000 in 2011).

- e. QDOT Requirements:
- (1) Essentially a QTIP with QDOT language established in the will;
 - (2) At least one trustee us s U.S. citizen / domestic corporation;
 - (3) Any distribution of corpus is subject to estate taxation while income is not;
 - (4) Trustee must make irrevocable election on estate tax return;
 - (5) If the trust assets are over \$2 million certain security arrangements required.

XI. TRUSTS FOR FEDERAL ESTATE TAX PLANNING

- A. To reduce or eliminate the impact of the federal estate tax, several different types of trusts are often used. Under current law the exemption is \$5,000,000 for 2010 to 2012. Unless Congress acts, it will return to \$1,000,000 in 2013.
1. Bypass Trusts. These are sometimes called “credit shelter trusts” or “family trusts.” This type of tax-saving trust is designed to take advantage of the decedent’s federal estate tax exemption (\$1,000,000 for 2013). Assets held in a Bypass Trust avoid federal estate tax upon the death of the surviving spouse, even though the surviving spouse and children ordinarily receive income and discretionary principal benefits from the Bypass Trust during the widowhood of the surviving spouse. In this way, the assets of the Bypass Trust are not included in the gross estate of the surviving spouse at the time of her subsequent death. This arrangement permits a married couple to pass as much as \$2,000,000 (assuming death of both spouses in 2013) by taking maximum separate advantage of the \$1,000,000 exemptions available to each spouse.

2. Marital Trusts. Unlike a Bypass Trust, which avoids federal estate tax through use of the decedent's exemption, a Marital Trust merely postpones federal estate tax during the lifetime of the surviving spouse. Marital Trusts that meet certain requirements at the first death qualify for the marital deduction, which defers the federal estate tax on the property of the Marital Trust until the death of the surviving spouse. To qualify for the federal estate tax marital deduction the Marital Trust must be subject to federal estate tax at the death of the surviving spouse. Traditionally, this was accomplished by giving the surviving spouse a general power of appointment, which is the unrestricted power to direct the disposition of the property at the second death, or by directing that the property of the Marital Trust be added to the probate estate of the surviving spouse at the time of her death. However, this approach had little appeal for spouses in second marriages, where the first-to-die husband ordinarily wished to benefit his children from his first marriage, following the death of his second wife. In the past decade or so, so-called "QTIP" Trusts (qualified terminable interest property trusts) will now qualify for the marital deduction provided that the executor makes the "QTIP election" at the first death. In this way, the surviving spouse receives the sole income and principal benefits of the QTIP Trust during her lifetime. At the second death the property of the QTIP Trust passes as specified in the Will or trust agreement of the first spouse to die.

3. Annual Gift Trusts. Under § 2503 of the Internal Revenue Code of 1986, gifts of up to \$13,000 per donee (in 2011; amount is subject to an inflation adjustment), per calendar year, are exempt from the federal gift tax. Irrevocable trusts that are funded using this "loophole" are often used in order to accumulate funds for children or other beneficiaries. Even more frequently, such trusts are used to acquire and hold life insurance policies on the life of the settlor. In this way, the life insurance death benefits can avoid being taxed in the settlor's federal gross estate (assuming that the insurance was acquired initially by the trust, or that more than three years have passed since the settlor irrevocably transferred ownership and control of the life insurance to the irrevocable trust).

4. Generation-Skipping Trusts. Trusts that are designed to avoid the federal estate tax upon the death of the trust beneficiary are generally called “generation-skipping.” For persons with large estates whose children also expect to be wealthy in their own right, such generation-skipping trusts are used to protect the trust assets from federal estate tax upon the subsequent death of the child/ beneficiary. To curb the use of this technique, the Congress enacted a special generation-skipping transfer tax, which has the effect of imposing a 55% excise tax on such trusts in 2013. However, there is a \$1,000,000 (per donor) lifetime exemption from this tax in 2013. This exemption can be allocated on the donor’s federal gift tax return to exempt all or part of a trust from the imposition of the generation-skipping transfer tax. In 2010, the GST maximum tax rate was 0%. In 2011 and 2012, the GST tax maximum tax rate is 35%. (caution: this is an oversimplification of the GST tax, which is extremely complex; a thorough understanding of the GST tax is outside the scope of this course).

XII. NON-TAX USES OF INTER-VIVOS TRUSTS.

- A. Offshore Asset Protection Trusts. While there are virtually no U.S. tax benefits for a U.S. citizen who establishes a trust in a foreign jurisdiction, such trusts are nevertheless beneficial to U.S. persons who desire to shield their assets from creditors, including estranged or former spouses and others. Many former British colonies and other countries having a British common law heritage recognize the legal use of a trust for the management and ownership of property. Many of these “tax haven” jurisdictions have made a special effort to enact laws that make it extremely difficult for foreign creditors to enforce judgments against trust assets under any circumstances. Some of the more popular offshore jurisdictions include the Cayman Islands, Gibraltar, and the Cook Islands (near New Zealand). U.S. citizens and aliens who have the right of permanent residence in the U.S. (i.e., “green card” holders) should be advised that all income from foreign sources, including income from foreign trusts and bank accounts, is subject to U.S. income taxation under most circumstances.
- B. Revocable or “Living” Trusts.
 1. Used as a probate-avoidance mechanism.
 2. Used to plan for the eventual incapacity of the Grantor.

3. Used to provide current management of assets by a qualified person or institution.

XIII. “LIVING” TRUSTS V. TESTAMENTARY TRUSTS.

A. Introduction. Consider state law probate procedures and costs. Community property law in certain states may make it necessary to use a revocable trust in those jurisdictions in order to accomplish federal estate tax planning.

B. Characteristics of Revocable Trusts.

1. Definition.

- a. A revocable trust, sometimes called a “living trust,” is a trust created during the grantor's life by a lifetime transfer of property into a trust over which the grantor retains a power to revoke.
- b. Upon the grantor's death, the trust becomes irrevocable, and the beneficiaries change from the grantor to his intended beneficiaries, usually the spouse and children or other descendants.
- c. The revocable trust agreement ordinarily provides for the management and disposition of property, both during the grantor’s lifetime and after his death.
- d. A pour-over Will is utilized in conjunction with the revocable trust agreement in order to add the residue of the grantor’s probate assets, if any, to the trust.

2. Structure of the Revocable Trust.

- a. The grantor, and sometimes the grantor's spouse as well, is the income beneficiary of the trust during his or her lifetime.

- b. The grantor is often the Trustee, either alone, or with an independent party or spouse as Co-Trustee.
 - (1) The grantor may act as sole Trustee as long as he or she is not also the sole beneficiary of the trust, in which case merger of the legal and equitable interests in the trust property may be deemed to have occurred.
 - (2) The grantor expressly retains the power to amend or revoke the trust at any time, making it a “grantor trust” under § 676 of the Internal Revenue Code of 1986 (“IRC”). Under federal income tax law all income of a “grantor trust” is reported on the grantor’s Form 1040.
3. Power to Revoke and Amend.
- a. The retention of the power to revoke and amend must be made expressly in the trust agreement.
 - b. The grantor may retain the power to revoke alone, with the consent of another, or may vest the power entirely in a third party.
 - (1) Requiring the consent of a third party will not affect the trust's classification as a “grantor trust” under IRC § 676 and the trust assets will still be included in the grantor's gross estate as a revocable transfer under IRC § 2038.
 - (2) The trust will no longer be a grantor trust under IRC § 676, however, if the consent required is from a party whose interest is adverse to the power to revoke.
 - (3) If a third party has the exclusive power to revoke, then the trust is still a grantor trust under IRC § 676(a) as long as the party does not have an adverse interest to the power to revoke, and the trust is considered a revocable trust under IRC § 2038. Treas. Reg. § 20-2038(a)(3).

- (4) Unless otherwise expressly provided, all of the trust property will typically revert back to the grantor upon exercise of the power to revoke.

C. Truths and Misconceptions Surrounding Revocable Trusts.

1. Avoiding Probate.

a. Cost of Probate.

- (1) Probate costs typically include filing fees, attorney fees, and fees for the executor or personal representative. However, the attorney and fiduciary fees will often be comparable even when a revocable trust is used because much of the work involved is for preparing the various tax returns, which are required regardless of whether a living trust is used.
- (2) Probate expenses, in most instances, are tax-deductible.
- (3) Probate fees are ordinarily small in contrast to the value of the supervisory role which the court provides during the estate's settlement.

b. Delays and Hassles of Probate.

(1) Probating a Will.

- (a) Depending upon state law and procedure, probate of a Will that is properly executed usually takes only a few days or weeks to accomplish.
- (b) In estates large enough to require a federal estate tax return, costs and delay more often emanate from the federal estate tax filing rather than from the probate process itself.

- (2) Distribution of Assets. Depending upon state law, a revocable trust does not necessarily expedite the distribution of assets upon death.
- (a) Once a Will is admitted to probate, the estate's assets are ordinarily available for distribution, at the discretion/risk of the executor.
 - (b) After death, certain assets, such as life insurance, may take time to process and collect, which will delay the distribution of those assets the same for the trust beneficiaries as for the estate's beneficiaries. Funding the revocable trust with liquid assets, however, may be advantageous if such assets will be needed by the family immediately after death.
 - (c) Even though the Trustee of a living trust is not required to file an inventory of assets as is an Executor, it will probably still be necessary to inventory the decedent's probate assets as they are collected.
 - (d) The length of post-mortem estate administration is mostly attributable to the collection of information necessary for the death tax returns, preparation of those returns, and then waiting for the federal and state governments to review those returns. Death tax returns are usually due within nine months of death, and review of those returns can take between six to 18 months after that, explaining the length of probate. The federal estate tax return filing requirement is not eliminated merely because the assets are held in a revocable living trust at the grantor's death.

- (i) Ancillary Probate. The transfer of real property into a living trust will generally avoid the need for an ancillary probate proceeding where the property is located in a state outside of the decedent's domicile. Senior v. Braden, 295 U.S. 422 (1935); Scott on Trusts § 130 (1939). Interests in foreign real and tangible property held in a living trust may be converted into intangible trust interests, but they do not avoid estate taxation by the state where the real estate is situated.

2. Protecting the Grantor's Assets.

- a. Avoiding Creditors. Generally, a living trust will not protect the grantor's assets from claims by creditors, because the grantor is deemed to be the owner of the trust's assets by virtue of the right of revocation.
 - (1) Some states will also not allow the Trustee to defeat claims of creditors by distributing assets upon the grantor's death. Matter of Granwell, 281 N.Y.S.2d 783, 228 N.E.2d 779 (1967).
 - (2) The Trustee of a living trust is personally liable for any federal estate taxes attributable to trust property. IRC § 6324(a)(2). Although the Trustee can apply to be discharged from personal liability under IRC § 2204, the discharge will only be granted after the estate's Executor has been discharged under IRC § 2204(a).
 - (3) Statutory period for presentation of claims and barring claims not timely presented is not available to protect Trustees of a living trust as it is for Executors.

- b. Avoiding the Spousal Elective Share. In some states, it may be possible to defeat a spouse's statutory right to a portion of the decedent's estate by funding a revocable trust during the grantor's lifetime. In a case where the decedent transferred assets to a revocable trust excluding his surviving spouse as a beneficiary, Connecticut has held that the transferred assets were excluded from the probate estate and not subject to the spouse's right of election. Cherniack v. Home National Bank and Trust Co. of Meriden, 151 Conn. 367, 198 A.2d 58 (1964).

3. Management of Assets.

- a. During the Grantor's Lifetime. It is appropriate and desirable to establish a revocable living trust for a client if he or she intends the Trustee to manage his or her assets.
 - (1) A professional Trustee may be advisable for someone who is inexperienced in investment decisions.
 - (2) However, many clients do not want to lose control over their assets and are fully capable of managing them.
 - (a) Upon the Grantor's Incapacity. The living trust is a useful tool for the management of assets upon the grantor's incapacity since it provides continuity and avoids the need for a court-appointed conservator or guardian for the management of property.
 - (i) A durable power of attorney may also avoid the need for a conservatorship or guardianship proceeding upon incapacity. The power of attorney may authorize funding of the revocable trust.
 - (ii) For older clients with an increased probability of incapacity, a fully funded revocable trust may make more sense than for younger, healthier clients.

4. Avoidance of Probate Contests. The validity of a living trust can be subject to challenge as well as a Will.
5. Privacy. The contents of a Will are made public record when the Will is admitted to probate, while the provisions of a living trust are often less subject to public scrutiny.
6. No Tax Savings. Revocable trusts do not save any income or estate taxes that are not otherwise available through proper drafting of the decedent's Will.

D. Tax Consequences.

1. During the Grantor's Lifetime.

a. Federal Income Taxes.

(1) A living trust is not a separate taxable entity for income tax purposes.

(a) Income, including capital gain income, is taxed to the grantor under the grantor trust rules. IRC § 671-677.

(i) Power to revoke. IRC § 676.

(ii) Power to control beneficial enjoyment of trust property. IRC § 674.

(iii) Right to receive income for life. IRC § 677.

(a) All of the trust's income and deductions are reported by the grantor on his or her personal income tax return as if the property had never been transferred to the trust.

- (i) Generally, the transfer of assets to a revocable trust will not trigger the imposition of gift taxes, since the grantor's power to revoke the trust renders the gift incomplete. Treas. Reg. § 25.2511-2.

2. Upon the Grantor's Death.

- a. Federal Income Taxes. At the grantor's death, the revocable trust becomes irrevocable and is treated as a separate entity for income tax purposes.

- (1) Fiscal Year. In general, under provision of IRC § 645, all trusts, except trusts exempt from tax and charitable trusts, shall use the calendar year as their fiscal year, whereas the decedent's estate may select its own fiscal year. It is possible to elect to include the income of the trust in the estate's fiduciary income tax return for the first two years post-mortem.
- (2) Personal Exemption. Under IRC § 642(b), a trust has a \$100 exemption if it is a complex trust and a \$300 exemption if it is a simple trust, whereas an estate has an exemption of \$600.
- (3) Upon the grantor's death, there is a "stepped up" basis attributed to any assets transferred to the trust during the grantor's life or "poured over" from the grantor's estate upon his or her death. IRC § 1014.
- (4) The trust is entitled to the same reprieve from filing estimated tax payments for the first two tax years ending after the grantor's death as is the decedent's estate under IRC § 6654(1), as long as it also fulfills one of the following:
 - (a) the decedent's residuary estate "pours over" into the trust; or

- (b) where no Will has been admitted to probate, the trust pays all debts, taxes and expenses of administration. IRC § 6654(1)(2)(B).
- (5) Depreciated Assets. If a Trustee sells assets to a beneficiary at a price less than the asset's basis, such loss is disallowed to the trust. IRC § 267(b)(6). Losses between Executor and beneficiary, however, are allowed. Likewise for deemed sales under IRC § 643(e)(3).
- (6) Charitable "Set Aside." Trusts, unlike estates, are not entitled to deductions for amounts "set aside" for charity. IRC § 642(c)(2).

E. Funding the Revocable Living Trust.

1. Questionable Assets to Transfer:

a. S Corporation Stock.

(1) Estates are allowed to be S Corporation shareholders until completion of estate administration. IRC § 1361(b)(1)(B).

(2) Revocable trusts may also hold S corporation stock, but only for two years after the grantor's death. IRC § 1361(c)(2)(A)(ii).

(a) This time limit will not apply if the trust is a qualified Subchapter S trust ("QSST"). (IRC § 1361(d)).

b. Passive Activities. As discussed above, assets which generate passive activity losses and are transferred to a revocable trust are not eligible for the IRC § 469(i) \$25,000 deduction for rental real property losses as well as the IRC § 469(g) ability to treat a passive loss as an ordinary loss.

- c. Small Business Stock. Small business stock may lose ordinary loss treatment if transferred to a revocable trust. IRC § 1244(d)(4).
 - d. Stock Options. Restricted or qualified stock options, or stock acquired by exercising options during the holding period, lose their tax benefits if transferred to a revocable trust. Treas. Reg. § 1.425-1(c).
2. Registration of Assets.
- a. Stocks and Registered Bonds.
 - (1) Stock certificates and bonds should be delivered to the grantor's stockbroker, who will obtain reissued stock certificates and bonds registered as follows:
 - (a) "The John Doe Revocable Trust, dated March 7, 1998, John Doe and Jane Doe, Trustees."
 - (b) Unregistered (Bearer) Bonds.
 - (i) With unregistered bonds, it is best to open a safe deposit box in the trust's name, put the bonds in an envelope marked in the trust's name, and place the envelope in the box.
 - b. Certificates of Deposit and Savings Accounts.
 - (1) Existing certificates and accounts should be transferred into the trust and new accounts should be opened, or certificates purchased, by the trust.
 - (2) To accomplish registration of these items, the trust should be brought to the financial institution where these accounts are held, or where the accounts are to be opened.

- c. Insurance Policies. If the trust is to receive proceeds from any insurance policy, then a change of beneficiary form should be obtained and the trust designated as beneficiary.

XIV. CONCLUSION

APPENDIX A

QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP)

The unlimited marital deduction is not available for property passing to the surviving spouse if the interest will terminate or fail because of a lapse of time or the occurrence of an event or the failure of an event to occur and then pass to some other person (I.R.C. § 2056(b)). If the surviving spouse's interest will terminate upon his/her death or remarriage, the interest is terminable and does not qualify for the marital deduction. It will not be included in the surviving spouse's estate. This terminable interest rule ensures that property escaping estate tax on the death of the decedent spouse will be subject to tax on the subsequent death of the surviving spouse.

For decedents dying after 1981, The Economic Recovery Tax Act of 1981 introduced the QTIP concept. Under this concept, if the bequest passes to a QTIP trust and the decedent's executor elects QTIP treatment, taking the marital deduction, such deduction will be allowed. To qualify, the surviving spouse must be entitled to receive all the income from the trust, payable at least annually, for life, and no one may have the power to appoint the property to any third person during the surviving spouse's lifetime. Because this type of bequest does not require the surviving spouse to have the ultimate power of disposition over the trust assets, many estate owners prefer it to the outright bequest. By using a QTIP trust, the decedent can leave the surviving spouse the income only during the survivor's life and the remainder to the children on the surviving spouse's death. This device enables the decedent to defer the estate tax until the surviving spouse's death, without giving the surviving spouse control over the ultimate disposition of the marital deduction bequest.

The value of the bequest to a QTIP trust qualifies for the marital deduction only if the decedent's executor elects to take it on a timely filed federal estate tax return. The election is irrevocable (I.R.C. § 2056(b)(7)(B)(v)). It may not always be beneficial to make the QTIP election, because the assets in the QTIP trust will be includable in the surviving spouse's estate (I.R.C. § 2044).

Consider a situation where Husband's will divides his \$2,000,000 estate into two trusts (assuming his death in 2013 and assuming Congress does not act to change the law): \$1,000,000 in a QTIP trust; \$1,000,000 in a left over or residuary trust. The provisions of both trusts are identical: income to Wife for life, principal to Children upon Wife's death. Wife has no other powers over, or interests in, either trust. When Husband dies, his executor elects to have the QTIP trust qualify for the marital deduction. Husband's estate pays no tax (\$1,000,000 marital deduction and \$1,000,000 exemption). When Wife dies, while the value of the QTIP trust is taxed in Wife's estate because of the election made by Husband's executor. The wife may recover any increase in her estate tax from the rest of the QTIP Trust. However, this inclusion may also fall with the Wife's own unified credit.

APPENDIX B

BASIC FORMS OF GIFTS TO MINORS COMPARED

Item Compared	Outright Gift	Custodianship	Guardianship	Trusts		
				Regular	Sec 2503(b)	Sec 2503(c)
Use of income for minor	Generally, no	Yes	Yes	Trust controls	Mandatory Distribution	Discretionary
Use of principal for minor	Generally, no	Yes	Yes	Trust controls	Trust controls	Discretionary
Close judicial supervision	No	No	Yes	No	No	No
Accounting	No	Record kept; possible accounting	Yes	Generally, only private records kept		
Investments	Unlimited	Limited	Generally, unlimited	Generally, unlimited--within donor's control		
Minor gets title when:	Immediately			On termination or earlier distribution of income or principal		
Minor gets possession when:	Immediately	Age of majority		Trust controls		Generally, age of majority
Minor can dispose of gift property	Generally, at majority; younger for money	Age of majority		Trust controls		
Fiduciary's death	No fiduciary	Possible inclusion of fund in fiduciary's estate	No effect, except on successor appointment	No effect, generally, if trust is irrevocable and settlor retains no interest; otherwise includable in settlor's estate		
Minor's death	Heirs of minor take unless minor has will effective under local law			Trust controls		Estate of minor or appointees
Tax liability-distributed income	Minor*	Minor is generally taxable except as it is used to discharge parent's obligation of support (then taxable to parent)				
Tax liability-undistributed income	Minor*			Trust	Must distribute	Trust
Gift tax annual exclusion	Yes	Yes	Yes	If present income interest	Yes	Yes
Exclusion of gift from donor's estate	Yes	Yes, except if donor is custodian	Yes	Yes, except if settlor dies possessing forbidden powers or rights		Yes
Cost	None or minimal	None or minimal	Legal fees, bonding costs, possible guardian fees	Legal fees varying with complexity, size of trust and other factors, possible trustee fees		

* Unearned income of a minor under the age of 18 in excess of \$1,800 annually is taxed at the parent's top rate, assuming the parent's rate is higher than that of the child.

APPENDIX C

COMMON TRUST TYPES - BENEFITS & TAXATION

Trust Type	Characteristics	Nontax Benefits	Tax Treatment		
			Income	Estate	
Irrevocable Living	Settlor gives up property forever.	Supervised control & investment; avoids probate.	Currently distributed. Taxed to Bs. Accumulated first to trust, then to B on dist.	Not in settlor's estate unless life ins. on life transferred within 3 years of death.	Taxable to settlor. Annual exclusion available for present gift of income interest, not remainder.
Revocable Living	Settlor can revoke. May be funded or unfunded.	Same as above.	Taxable to settlor.	Includable in settlor's estate.	No liability.
Testamentary	Created by will.	Supervised control & investment.	Same as for irrevocable living trust.	Includable in creator's estate. Can avoid tax on death of life B.	No liability.
Grantor Retained Interest Trust (GRIT), GRAT, GRUT	Grantor reserves a qualified term interest in the form of an annuity or unitrust under I.R.C. § 2702, after which principal passes to remaindermen.	Often negligible.	Taxable to settlor (grantor).	Not taxable in grantor's estate unless grantor dies w/in reserved income term, subject to special rules under I.R.C. § 2702.	Tax based on value of remainder at time of creation of trust.
Standby	Generally revocable, but may be irrevocable on settlor's permanent disability.	Supervised control and investment on settlor's disability or absence.	Taxable to settlor.	Includable in settlor's estate.	No liability.
Pourover	Living trust, revocable or irrevocable, funded or unfunded.	Receiptacle for employee benefits, life ins. proceeds, estate assets.	Taxable to settlor.	Same as irrevocable or revocable trust depending on revocability.	No liability.

GRAT, Grantor retained annuity trust: a trust to which the grantor transfers income-producing property in exchange for the right to receive a fixed cash annuity for a specified term of years or for the grantor's life (the grantor's retained interest).

GRUT, Grantor retained unitrust: identical to the GRAT, except that, the grantor retains the right to receive a fixed percentage of trust value annually.

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DISCLAIMER

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LAST WILL AND TESTAMENT
OF
TESTATOR

Dated: _____, 2011

Prepared by:

LTC Samuel Kan
Member of the State Bar of Texas
Pursuant to 10 USC § 1044
The Judge Advocate General's Legal Center and School
600 Massie Road; Charlottesville, VA 22903
434-971-1234

LAST WILL AND TESTAMENT

OF

TESTATOR

EXORDIUM

I, **Testator**, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me. I am in the military service of the United States, currently stationed at [Name & Location, City & State, of Installation “Fort Bragg, North Carolina”].

DEBTS, EXPENSES AND TAX APPORTIONMENT

FIRST: I direct that the expenses of my last illness and funeral and the expenses of the administration of my estate shall be paid from my residuary estate without apportionment. I direct that all estate, inheritance and similar taxes payable with respect to property included in my estate, whether or not passing under this will, and any interest or penalties thereon, shall be apportioned among the people interested in my estate in the manner provided by law in the absence of a contrary direction in this will.

SPECIFIC BEQUEST OF TANGIBLE PERSONAL PROPERTY

SECOND: I give my sports equipment to Child1 and Child2, in equal shares, or to the survivor of them.[may have to edit in will]

GENERAL BEQUEST OF TANGIBLE PERS. PROPERTY TO SPOUSE

All other tangible personal property is given to my wife Wife, or if she does not survive me, to those of my children (Child3 and Child4 and any other children which I hereafter may have) who survive me, in substantially equal shares, to be divided among them as they shall agree, or if they cannot agree, or if any of them shall be under the age of twenty-one (21) years, as my personal representative shall determine. If any of said children shall be under the age of twenty-one (21) years at my death, my personal representative may sell any property bequeathed to said child under this Article SECOND, as my personal representative may deem appropriate, or my personal representative may hold such property or any proceeds thereof, without bond, surety or other security, until said child attains said age or such earlier time as my personal representative may deem proper to deliver any such property or proceeds to said child, or to said child's guardian or any person with whom said child resides for the use of said child, or, if there is a trust for the benefit of said child, to my trustee to be administered as a part of said trust. All costs incurred by my personal representative in connection with obtaining possession, appraising, safeguarding, delivering or selling such property shall be paid as expenses of administering my estate.

GENERAL LEGACY

THIRD: I give the sum of One Thousand Dollars (\$1,000.00) to ____ upon appointment as Guardian, if she survives me.

PRE-RESIDUARY TRUST

FOURTH: SGLI Trust. If upon my death there are any life insurance policies on my life which name the trust under this Article FOURTH as the beneficiary, I give the proceeds of such insurance to be held and disposed of for the benefit of Child1 and Child2 (hereinafter referred to as the “Beneficiaries”) in accordance with the following provisions:

If all of the Beneficiaries are the age of twenty-five (25) years or older at the time of my death the insurance proceeds shall be paid and distributed to the then living Beneficiaries in equal shares free of trust.

If any Beneficiary is under the age of twenty-five (25) years at the time of my death the insurance proceeds shall not vest in any of said Beneficiaries but instead shall be given to my trustee, **IN TRUST**, as a single trust for the benefit of said Beneficiaries. My trustee shall hold, manage, invest and reinvest the trust assets, shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, may pay to, or for the benefit of, any one or more of the Beneficiaries, at any time and from time to time, all or any part of the net income and/or principal of this trust as my trustee shall deem advisable, in the absolute discretion of my trustee, without requirement of equality. Any income not so paid or applied shall be accumulated and added to the principal of this trust at least annually.

When all of the Beneficiaries are the age of twenty-five (25) years or older the trust assets then remaining, if any, shall be paid and distributed to the Beneficiaries in equal shares free of trust and without adjustment for amounts previous distributed to each Beneficiary.

RESIDUARY

FIFTH: I give all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my “residuary estate”), as follows:

- (a) If my wife Wife survives me, to my wife outright.

CONTINGENT CHILDREN’S TRUST

- (b) If my wife does not survive me, then to those of *Child 3 and Child4, and any afterborn children* who survive me and to the issue who survive me of those of my children, *Child 3 and Child4, and any afterborn children, (hereinafter referred to as “Beneficiaries”)* who shall not survive me, per stirpes; **PROVIDED, HOWEVER**, that if any *beneficiaries* shall be under the age of twenty-five (25) years at my death, my residuary estate shall not vest in said

beneficiaries but instead shall be given to my trustee and held by my trustee, **IN TRUST**, as a single trust for the benefit of my children and more remote issue, as hereinafter provided. My trustee may pay all or any part of the net income and principal of this trust to, or for the benefit of, any one or more of said group, for their health, education, maintenance and support, as determined in the absolute discretion of my trustee, without any requirement of equality. Whenever all of my children shall attain the age of twenty-five (25) years, or shall have died prior to said age, all remaining income and principal (without adjustment for amounts previously paid) shall be paid and distributed to my then living issue, per stirpes.

ALTERNATE RESIDUARY BENEFICIARIES

(c) If my wife does not survive me and there shall be *none of Child 3 and Child4, and any afterborn children, or their issue* then living, my residuary estate shall be paid and distributed to those of Child1 and Child2 who survive me, in equal shares. If none of the aforesaid beneficiaries of my residuary estate shall survive me, my residuary estate shall be paid and distributed to fifty percent (50%) to my parents, A and B, jointly or to the survivor of them, or to their issue if they fail to survive me, per stirpes; and fifty percent (50%) to my wife's parents, C and D, jointly or to the survivor of them, or to their issue if they fail to survive me, per stirpes.

(d) If none of the beneficiaries described above shall survive me, then I give my residuary estate to those who would take from me as if I were then to die without a will, unmarried and the absolute owner of my residuary estate.

GENERAL POWER TO DISCLAIM

SIXTH: I authorize my personal representative, in addition to any rights conferred by law and in the absolute discretion of my personal representative, and without the consent of any court having jurisdiction over my estate, to disclaim or renounce, in whole or in part or with respect to specific amounts, parts, fractional shares or assets, any legacy, devise, or interest in or privilege or power over any trust or other disposition provided for my benefit under the will or other instrument of any person at any time within nine months after the date of the transfer (whether by reason of such person's death or otherwise) which created an interest in me.

I authorize any person, in addition to any rights conferred by law, at any time within nine months after my death, to disclaim or renounce, in whole or in part or with respect to specific amounts, parts, fractional shares or assets, any devise, legacy, interest, right, privilege, or power granted to that person by this will. Any such disclaimer or renunciation shall be made by a duly acknowledged, irrevocable, written instrument executed by that person or by his or her conservator, guardian, committee, personal representative, executor, or administrator, delivered to my personal representative and filed in accordance with any requirements of applicable law.

SPECIFIC DISCLAIMER FOR SPOUSE

If my wife shall disclaim or renounce all or any part of any bequest to her under this will, or of any property passing to her outside this will, by operation of law, beneficiary designation, or otherwise, I direct that such property shall be disposed of in accordance with the provisions of clause (b) of Article FIFTH above. ***OR IF TAX SAVING WILL, TO ...***

DECISION OF TRUSTEE BINDING

SEVENTH: The determination of my trustee as to the amount or advisability of any discretionary payment shall be final and conclusive on all persons, whether or not then in being, having or claiming any interest in such trust.

SPENDTHRIFT PROTECTION

No disposition, charge or encumbrance on any income or principal of any trust hereunder by any beneficiary thereof shall be valid or binding upon my trustee. No beneficiary shall have the right to assign, transfer, encumber or otherwise dispose of any such income or principal until the same shall be paid to such beneficiary by my trustee. No such income or principal shall be subject in any manner to any claim of any creditor of any beneficiary. The right of any beneficiary to any income or principal hereunder shall be subject to all charges or deductions which my personal representative or trustee may make under law or any provision of this will. Upon making any payment of income or principal from any trust hereunder, my trustee shall be released fully from all further liability therefor.

POWER IN TRUST AND UTMA

EIGHTH: If any principal or income of my estate or any trust hereunder vests in absolute ownership (free of trust hereunder) in a minor or incompetent, my personal representative or trustee, at any time and without court authorization, may: distribute the whole or any part of such property to the beneficiary; or use the whole or any part for the health, education, maintenance and support of the beneficiary; or distribute the whole or any part to a guardian, committee or other legal representative of the beneficiary, ***or to a custodian for the beneficiary (including a custodian appointed by my personal representative or trustee without court order) under any gifts to minors or transfers to minors act***, or to the person or persons with whom the beneficiary resides. Evidence of any such distribution or the receipt therefor executed by the person to whom the distribution is made shall be a full discharge of my personal representative and trustee from any liability with respect thereto, even though my personal representative or trustee may be such person.

If such beneficiary is a minor, my personal representative or trustee may defer the distribution of the whole or any part of such property until the beneficiary attains the age of twenty-one (21) years, and may hold the same as a separate fund for the beneficiary with all of the powers described in Article NINTH hereof. If the beneficiary dies before attaining said age, any balance shall be paid and distributed to the estate of the beneficiary.

The word “minor”, wherever used in this Article EIGHTH, shall mean any person who shall be under the age of twenty-one (21) years.

FIDUCIARY POWERS

NINTH: My personal representative and trustee shall have all of the powers conferred by law upon fiduciaries in every jurisdiction in which my personal representative and trustee may act. In addition, the following powers are conferred upon both my personal representative and trustee, exercisable in the absolute discretion of my personal representative and trustee, as the case may be:

(a) ***To retain and hold*** any property for any period, whether or not the property is of the character permissible for investment by fiduciaries under any applicable law, and without regard to the effect the retention may have upon diversification of investments.

(b) ***To sell***, exchange, grant options on, transfer or otherwise dispose of any property, real or personal, at public or private sale, for cash or on credit, secured or unsecured, at such time or times, in such manner and upon such terms and conditions as my personal representative or trustee shall deem advisable.

(c) ***To invest and reinvest*** in common or preferred stocks, bonds, securities, mortgages, investment trusts, common trust funds, mutual funds, regulated investment companies, evidences of rights or interests, and other property, real or personal, domestic or foreign, ***whether or not the investments are permissible for fiduciaries under any applicable law and without regard to diversification.***

(d) ***To render liquid*** my estate or any trust in whole or in part, at any time and from time to time, and to hold cash or readily marketable securities of little or no yield for such periods as my personal representative or trustee shall deem advisable.

(e) ***To manage, maintain, repair, alter, improve, insure, partition, subdivide, lease*** for any term (whether or not beyond any period fixed by statute for leases made by fiduciaries or beyond the term of any trust created hereunder), mortgage, encumber, grant security interests in, or otherwise purchase, dispose of, or deal with any real or personal property, as my personal representative or trustee shall deem advisable.

(f) ***To abandon any*** property which my personal representative or trustee shall deem ***worthless or not of sufficient value*** to warrant keeping or protecting; to abstain from the payment of taxes, assessments, repairs, maintenance or other upkeep therefor; to permit any property to be lost by tax sale or other proceedings or to convey any such property for no or a nominal consideration.

(g) ***To form one or more corporations or limited liability companies***, alone or with any person, in any jurisdiction, and to transfer assets of my estate or any trust

to any new or existing corporation or limited liability company in exchange for stock or membership interests; to form one or more partnerships with any person in any jurisdiction, to have my estate, any trust or a nominee be a general or limited partner, and to transfer assets of my estate or any trust to any new or existing partnership as a capital contribution; to enter into one or more joint ventures or associations with any person in any jurisdiction, and to commit assets of my estate or any trust to the purposes of those ventures or associations; and to retain as an investment for any period any securities, partnership interests or other assets resulting from any such actions.

(h) To enter into, modify or terminate agreements with any person regarding voting rights, management, operation, retention or disposition of interests in corporations, partnerships, joint ventures, associations or other businesses of my estate or any trust, regardless of whether any agreement is in effect when that business interest is received by my personal representative or trustee; to retain and continue to operate, or permit the operation of, any business, on the terms which governed when received by my personal representative or trustee or on different terms; to invest additional sums in any business, even to the extent that my estate or any trust may be invested entirely in any business, without liability for any loss resulting from lack of diversification; to act as or select other persons (including any beneficiary) to act as directors, officers, managers or employees of any business, with reasonable compensation without regard to their being a fiduciary or beneficiary and, in the case of my personal representative or trustee, without regard to the commissions allowed by law; to discontinue any business or sell or otherwise dispose of any interest therein on such terms and conditions as my personal representative or trustee shall deem advisable; and to make such other arrangements with respect to any business as my personal representative or trustee shall deem advisable. I exonerate my personal representative and trustee from any loss resulting from the retention or operation of any business or any depreciation in the value thereof, unless such loss shall result from the gross negligence or willful misconduct of my personal representative or trustee.

(i) To vote, in person or by general or limited proxy, any shares of stock or other securities; to exercise or dispose of any options, subscription or conversion rights, or other privileges or rights of any other nature; to become a party to, or deposit securities or other property under, or accept securities issued under any voting trust or similar agreement; to assent to or participate in any reorganization, readjustment, recapitalization, consolidation, merger, dissolution, liquidation, sale or purchase of assets, lease, mortgage, election, contract, agreement, or other action or proceeding by any corporation; to deposit securities or other property under, or become a party to, any agreement or plan for any such action or proceeding or for the protection of holders of securities; to subscribe to new securities or exchange property in connection with the foregoing; to delegate discretionary powers to any reorganization, creditors, stockholders or similar committee or protective group; and to pay any assessments or expenses in connection with the foregoing.

(j) ***To drill, test, explore, maintain, develop and otherwise exploit***, either alone or jointly with others, any and all property in which my estate or any trust hereunder may have any rights or interests of whatsoever kind or nature with respect to oil, gas, minerals, timber or other natural resources, whether originally a part of my estate or such trust or subsequently acquired, and to pay the costs and expenses thereof, together with all delay rentals, bonuses, royalties, overriding royalties, drilling and operating expenses, taxes, assessments and other charges and burdens in connection therewith; to enter into operation, farm-out, pooling or utilization agreements in connection with any and all of such rights and interests; and to extract, remove, process, convert, retain, store, lease, sell or exchange such rights and interests and the production therefrom, all in such manner, to such extent, on such terms and for such consideration as my personal representative or trustee may deem advisable.

(k) ***To pay, collect, adjust, compromise, settle or refer to arbitration any claim*** in favor of or against my estate or any trust, and to institute, prosecute or defend such legal proceedings as my personal representative or trustee shall deem advisable.

(l) ***To foreclose mortgages and bid for property under foreclosure or take title by conveyance in lieu of foreclosure***; to continue investments after maturity; to modify, renew or extend any note, bond, mortgage, security agreement or similar instrument upon such terms and conditions as my personal representative or trustee shall deem advisable; to release obligors or guarantors or refrain from instituting suits or actions for deficiencies; and to expend any sums or use any property as my personal representative or trustee shall deem advisable for the protection of any property or interest therein.

(m) ***To borrow money or assets for any purpose, without personal liability*** therefor, from any person including my personal representative or trustee, and to secure repayment by mortgage or pledge of any property.

(n) ***To lend assets to any person, including a beneficiary, the estate of a deceased beneficiary, or an estate or other trust in which a beneficiary has an interest***, upon any terms and conditions, with or without security, for any purpose which may or will benefit my estate, any trust or any beneficiary.

(o) ***To exercise, at such times and in such manner as my personal representative or trustee shall deem advisable, any right of election or other rights which from time to time may be available under the Internal Revenue Code or any other tax law***, and to make such other decisions as my personal representative or trustee may deem appropriate with respect to expenses or deductions for estate or income tax purposes, the valuation of assets, the filing of any joint or other income, gift or other tax returns and the apportionment of any joint tax liability, and the payment of any tax or collection of any refund,

regardless of the effect of any such action on the interest of any beneficiary of my estate and without the necessity of making adjustments or reimbursements between principal and income or among the beneficiaries of my estate.

(p) ***To employ and pay the compensation of accountants, attorneys, experts, investment counselors, custodians, agents and other persons or firms providing services or advice, irrespective of whether my personal representative or trustee may be associated therewith; to delegate discretionary powers to such persons or firms; and to rely upon information or advice furnished thereby or to ignore the same, as my personal representative or trustee shall deem advisable.***

(q) ***To pay any and all costs, charges, fees, taxes, interest, penalties or other expenses of the administration*** of my estate, in installments with interest if desired, and except as expressly provided in Article FIRST hereof or elsewhere herein, to charge the same against the income or principal, or partly against each, of my estate or any trust.

(r) ***To hold property in their names as personal representative or trustee, or in their names without designation of any fiduciary capacity, or in the name of a nominee or nominees, or unregistered, or in bearer form;*** to deposit property with a custodian or depository; and to remove property from the State of Florida and keep property in other jurisdictions, without bond, surety or other security.

(s) ***To pay any legacy or distribute, divide or partition property in cash or in kind, or partly in kind, and to allocate different kinds of property, disproportionate amounts of property and undivided interests in property among any trusts, parts, funds or shares, and to determine the fair valuation of the property so allocated, with or without regard to tax basis; to distribute directly from my estate to beneficiaries of any trust hereunder whether or not such trust has been funded; to hold the principal of separate trusts (including trusts established under the last will and testament of my wife) in a consolidated fund and to invest the same as a single fund; to split trusts for purposes of allocating generation-skipping transfer tax exemptions (within the meaning of Section 2642(a) of the Internal Revenue Code); and to merge any trusts (including trusts established under the last will and testament of my wife) which have substantially identical terms and beneficiaries, and to hold them as a single trust. Notwithstanding anything to the contrary contained in this will, if the value of any trust under this will is less than Two Thousand Five Hundred Dollars (\$2,500.00), as of the date on which it is to be fully funded or at any time thereafter, my personal representative or trustee may terminate the trust and distribute the trust assets to the income beneficiaries thereof or to the guardian, committee, custodian or other legal representative of the income beneficiaries.***

(t) ***To act or refrain from acting in all respects as if financially uninvolved, regardless of any connection with or investment in any business or any conflict of interest between any fiduciary hereunder and my estate or any trust. No***

personal representative or trustee shall be disqualified or barred from exercising any power or discretion conferred by law or under this will because such fiduciary may be a shareholder, officer, director, member, partner or person in any way interested in a corporation, partnership or other person or entity affected by the exercise of such power or discretion. My personal representative or trustee may contract, in any manner that my personal representative or trustee shall deem advisable, with any such corporation, partnership, person or entity.

(u) *To change the situs and/or governing law of any trust hereunder to any State* my personal representative or trustee from time to time may deem desirable, and to take such further actions, including without limitation the amendment to the terms of the trust, as may be necessary or advisable to effectuate such change.

(v) *To do all acts and execute and deliver all instruments as my personal representative or trustee may deem necessary or advisable to carry out any of the foregoing powers.*

EXCULPATION

No fiduciary shall be liable for acts or omissions in administering my estate or any trust created under this will, except for that fiduciary's own actual fraud, gross negligence or willful misconduct. If any fiduciary becomes liable as fiduciary to any other person who is not a beneficiary in connection with any matter not within the fiduciary's control and not due to the fiduciary's actual fraud, gross negligence or willful misconduct, such fiduciary shall be fully indemnified and held harmless by my estate or by the trust created hereunder giving rise to such liability, as the case may be, from and against any liability, claim, loss, damage or expense, including reasonable attorneys' fees, that such fiduciary may sustain.

No person who deals with any fiduciary hereunder shall be bound to see to the application of any asset delivered to such fiduciary, or to inquire into the authority for, or propriety of, any action taken or not taken by such fiduciary.

TENTH: In addition to the other powers granted hereunder, my personal representative and trustee shall be entitled to determine the following:

PRINCIPAL & INCOME

(a) Except as otherwise provided herein, my personal representative or trustee may determine, when there is reasonable doubt or uncertainty as to the applicable law or the relevant facts, which receipts of money or other assets should be credited to income or principal, and which disbursements, commissions, assessments, fees, taxes (except as provided in Article FIRST hereof), and other expenses should be charged to income or principal.

(b) Any distributions or dividends payable in the stock of a corporation, and rights to subscribe to securities or rights other than cash declared or issued by a corporation, shall be dealt with as principal.

(c) The proceeds from the sale, redemption or other disposition, whether at a profit or loss, and regardless of the tax treatment thereof, of any property constituting principal, including mortgages and real estate acquired through foreclosure or otherwise, shall normally be dealt with as principal, but my personal representative or trustee, except as otherwise provided herein, may allocate a portion of any such proceeds to income if the property disposed of produced no income or substantially less than the current rate of return on trust investments, or if my personal representative or trustee shall deem such action advisable for any other reason.

(d) The preceding provisions of this Article TENTH shall not be deemed to authorize any act by my personal representative or trustee which may be a violation of any law prohibiting the accumulation of income.

SURVIVORSHIP

ELEVENTH: I direct that for purposes of this will a beneficiary shall be deemed to predecease me (or any other person upon whose death the interest of such beneficiary depends) unless such beneficiary survives me (or such other person) by more than thirty days.

APPOINTMENT OF FIDUCIARIES

TWELFTH: I appoint my wife Wife to be my personal representative. If my wife does not survive me, or shall fail to qualify for any reason as my personal representative, or having qualified shall die, resign or cease to act for any reason as my personal representative, I appoint SPR1 as my personal representative. If SPR1 shall fail to qualify for any reason as my personal representative, or having qualified shall die, resign or cease to act for any reason as my personal representative, I appoint SPR2 as my personal representative.

I appoint Trustee1 to be my trustee. If Trustee1 shall fail to qualify for any reason as my trustee, or having qualified shall die, resign or cease to act for any reason as my trustee, I appoint Trustee2 as my trustee.

DIFFERENT TRUSTEES

Notwithstanding the foregoing, I wish to appoint a different trustee for the following trust: SGLI Trust [edit in will]. With regard to that trust I appoint SGLI Trustee to be my trustee. If SGLI Trustee shall fail to qualify for any reason as my trustee, or having qualified shall die, resign or cease to act for any reason as my trustee, I appoint SGLI Trustee2 as my trustee.

WAIVER OF BOND

I direct that no personal representative or trustee shall be required to file or furnish any bond, surety or other security in any jurisdiction.

INSTITUTIONAL FIDUCIARY'S FEES BY SCHEDULE

Any bank, trust company or similar institution at any time serving as personal representative or trustee hereunder shall be entitled to receive compensation for its services in accordance with its standard schedule of compensation in effect when such compensation is payable.

CONFLICT OF INTEREST WHEN TRUSTEE IS BENEFICIARY

Notwithstanding anything to the contrary contained in this will, during such time as any current or possible future beneficiary of any trust created hereunder may be acting as a trustee hereunder, such person shall be disqualified from exercising any power to make any discretionary distributions of income or principal to himself or herself (unless the discretion to make such distributions is limited by an ascertainable standard within the meaning of Section 2041(b)(1)(A) of the Internal Revenue Code), or to satisfy any of his or her legal obligations, or to make discretionary allocations of receipts or disbursements as between income and principal. No trustee who is a current or possible future beneficiary of any trust hereunder shall participate in the exercise of any powers of my trustee which would cause such beneficiary to be treated as the owner of trust property for tax purposes.

RIGHT OF FIDUCIARY TO RESIGN

Any personal representative or trustee, subject to the judicial or non-judicial settlement of the accounts of such personal representative or trustee, may resign at any time by an instrument in writing, signed and acknowledged in duplicate, one counterpart of which shall be delivered to the court in which this will is admitted to probate and the other counterpart of which shall be delivered to the successor personal representative or the successor trustee, as the case may be.

DEFINITIONS

The term "personal representative" wherever used herein shall mean the personal representatives, executors, executor, executrix or administrator in office from time to time. The term "trustee" wherever used herein shall mean the trustees or trustee in office from time to time. Each personal representative and trustee shall have the same rights, powers, duties, authority and privileges, whether or not discretionary, as if originally appointed hereunder.

The terms "child" and "children", wherever used in this will, include not only the child and children (whether heretofore or hereafter born) of the person designated, but also the legally adopted child and children of such person. The term "issue" includes not only the children and other issue (whether heretofore or hereafter born) of the person designated, but also the legally adopted children and issue of such person. The terms "child", "children" and "issue" of the Testator shall include any stepchild of the Testator.

Any provision herein which refers to a statute, rule, regulation or other specific legal reference which is no longer in effect at the time said provision is to be applied shall be deemed to refer to the successor, replacement or amendment to such statute, rule, regulation or

other reference, if any, and shall be interpreted in such a manner so as to carry out the original intent of said provision.

Wherever used in this will and the context so requires, the masculine includes the feminine and the singular includes the plural, and vice versa.

PERPETUITIES SAVINGS CLAUSE

THIRTEENTH: Notwithstanding anything to the contrary contained in this will, if under any of the provisions of this will any portion of the trust assets would be held in trust beyond a date twenty-one years after the death of the last survivor of my wife, my issue and the other beneficiaries of this will in being upon my death; then, upon such date, the trust of such portion shall terminate and the principal, and any unpaid income thereof, shall be paid and distributed to the person or persons then living who would have been entitled to receive the income therefrom had the trust continued, in the proportions to which they would have been so entitled.

APPOINTMENT OF GUARDIAN OF PERSON

FOURTEENTH: I appoint _____ to be the guardian of Child1 and Child2, the children of my previous marriage [may have to edit in will], if under the age of majority or adjudged to be incapacitated. If _____ shall fail or cease to act as guardian, I appoint _____ as guardian.

If my wife shall not survive me or is adjudged to be incapacitated, I appoint _____ to be the guardian of Child3, the child of my present marriage, and Child4, my wife's child from a previous marriage [may have to edit in will], if under the age of majority or adjudged to be incapacitated. If _____ shall fail or cease to act as guardian, I appoint _____ as guardian.

Any guardian appointed hereunder shall have the rights and responsibilities of a parent regarding the health, education, maintenance and support of the ward, but shall not be liable to third persons by reason of the relationship for acts of the ward.

APPOINTMENT OF GUARDIAN OF THE PROPERTY

I appoint GPROP1 to be the guardian of the property in connection with the estate and affairs of Child1 and Child2, the children of my previous marriage [may have to edit in will] if under the age of majority or under a disability. If _____ shall fail or cease to act as guardian of the property, I appoint _____ as guardian of the property.

If my wife shall not survive me or is adjudged to be incapacitated, I appoint _____ to be the guardian of the property of Child3, the child of my present marriage, and Child4, my wife's child from a previous marriage [may have to edit in will] if under the age of majority or adjudged to be incapacitated. If _____ shall fail or cease to act as guardian of the property, I appoint _____ as guardian of the property.

As used herein, a child who is “incapacitated” shall mean a child who is or becomes impaired by reason of mental illness or deficiency, physical illness or disability, mental or physical infirmities accompanying advanced age, chronic drug abuse or chronic intoxication, or other cause to the extent of lacking sufficient understanding or capacity to make or communicate reasonable decisions. As used herein, a child who is under a “disability” shall mean a child who is unable to manage property and business affairs effectively by reason of mental illness or deficiency, physical illness or disability, mental or physical infirmities accompanying advanced age, chronic drug abuse or chronic intoxication, confinement, detention by a foreign power, or disappearance.

BOND IF FORMER SPOUSE APPOINTED

It is my direction that my former spouse, _____ and my wife's former spouse, _____ [edit in will] not be appointed as a guardian or guardian of the property. However, if for any reason my former spouse, _____ and my wife's former spouse, _____ [edit in will] shall be appointed as a guardian or guardian of the property, it is my desire that my former spouse, _____ and my wife's former spouse, _____ [edit in will] shall be required to furnish a bond, surety or other security with the court where the Will is probated. No other guardian or guardian of the property shall be required to file or furnish any bond, surety or other security in any jurisdiction. No guardian or guardian of the property other than my former spouse, _____ and my wife's former spouse, _____ [edit in will] shall be required to file an inventory or account in any jurisdiction, or to obtain the approval of any court before exercising any power or discretion granted hereunder or by applicable law. The guardian or guardian of the property shall be entitled to reasonable compensation for services rendered in such capacity.

Any trustee hereunder may, but shall not be required to, make payments directly to the guardian or guardian of the property. If my trustee or any trust hereunder is the beneficiary of any life insurance policy, my trustee shall be entitled to the insurance proceeds rather than the guardian or guardian of the property.

FIFTEENTH: I have served in the Armed Forces of the United States. I therefore request that my personal representative make appropriate inquiries to ascertain whether there are any benefits to which I, my dependents or my heirs may be entitled by virtue of any military affiliation. I specifically request that my personal representative consult with a retired affairs officer at the nearest military installation, the Department of Veterans Affairs, and the Social Security Administration.

TESTIMONIUM

IN WITNESS WHEREOF, I, Testator, sign my name and publish and declare this instrument as my last will and testament this ____ day of _____, 2011.

Testator

ATTESTATION

The foregoing instrument was signed, published and declared by Testator, the above-named Testator, to be his last will and testament in our presence, all being present at the same time, and we, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses on the date above written.

having an address at:
Attorney's Office (Command) Name
Office City, etc

having an address at:
Attorney's Office (Command) Name
Office City, etc

AFFIDAVIT

WITH THE UNITED STATES ARMED FORCES
AT [NAME & LOCATION, CITY & STATE, OF INSTALLATION "FORT BRAGG, NORTH
CAROLINA"]

We, Testator and the witnesses respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator, Testator, signed and executed said instrument as his last will and testament in the presence and hearing of the witnesses, and that he had signed willingly, and that he executed it as his free and voluntary act and deed for the purposes therein expressed, and that each of the witnesses at the request of the Testator, in the presence and hearing of the Testator and each other, signed the will as witness, and that to the best of his or her knowledge the Testator was at the time at least eighteen years of age, of sound mind and under no constraint, duress, fraud or undue influence.

Testator
Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by the said Testator, Testator,
who is personally known to me or produced as identification
and subscribed and sworn to before me by the said _____ and
as witnesses, who are personally known to me or produced as identification
this ____ day of _____, 2011.

print:
Notary Public

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The Judge Advocate General’s School

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CHAPTER G

ADVANCED MEDICAL DIRECTIVES AND MOTURARY PLANNING

Outline of Instruction

I. REFERENCES:

- A. Army Regulation 27-26, Legal Services, Rules of Professional Conduct for Lawyers (1 May 1992).
- B. Army Regulation 27-3, Legal Services, Legal Assistance (21 February 1996).
- C. Army Regulation 40-3, Medical Dental, and Veterinary Care (22 February 2008).
- D. DOD Directive 6000.14, Patient Bill of Rights and Responsibilities in the Military Health System, 5 September 2007.
- E. 10 U.S.C. § 1044c (1996), Advanced Medical Directives of Members and Dependents: Requirement for Recognition by States.
- F. Public Law 101-508 §§ 4206, 4751 (1990), *codified at*, 42 U.S.C.A. § 1395cc(f) (West 1999), Patient Self-Determination Act.
- G. Public Law 104-191 §§ 216-264 (1996), *codified at*, 42 U.S.C. § 1301 et seq, Health Insurance Portability and Accountability Act of 1996.
- H. CDR Randy C. Bryan, JAGC, USN, Presentation on Powers of Attorney and Advance Directives, (2007).
- I. Major Stephen M. Parke, *Death and Dying in Army Hospitals: The Past and Future Roles of Advanced Medical Directives*, ARMY LAW., August 1994, at 3.
- J. Colonel (USAR) Gene S. Silverblatt & Lieutenant Colonel (Ret.) Linda K. Webster, *Legal Assistance Issues for Retirees: A Counseling Primer on Old Age, Disability, and Death Issues*, ARMY LAW., August 2004, at 19.

- K. Captain Thaddeus A. Hoffmeister, *The Fourth Legal Assistance Symposium: Article for the Legal Assistance Practitioner: The Growing Importance of Advance Medical Directives*, 117 MIL. L. REV. 110 (2003).
- L. Bretton J. Horttor, *A Survey of Living Will and Health Care Directives*, 74 N.D.L. Rev. 233 (1998).

II. HISTORY:

- A. Karen A. Quinlan. *In re Quinlan*, 70 N.J. 10, 355 A. 2d 647, cert. denied, 429 U.S. 922 (1976).
- B. Martha Tune. *Tune v. Walter Reed Medical Center*, 602 F. Supp. 1452 (D.D.C. 1985).
- C. Nancy Cruzan. *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841 (1990).
- D. Terri Schiavo, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. Fla. 2005), *reh'g denied* 404 F.3d 1272 (11th Cir. Fla., Mar. 30, 2005).
- E. *Gonzalez v. Oregon*, 126 S. Ct. 904, 2006 U.S. LEXIS 767 (2006).
- F. Uniform Rights of the Terminally Ill Act (1985 and 1989).
- G. Uniform Health Care Decisions Act, §1-19, 9 U.L.A. 236-64 (West Sup. 1997).
- H. Patient Self-Determination Act. 42 U.S.C. § 1395cc(f)(1)(A)(i). (caution: see Florida ex rel. Bondi v. U.S. Dept of Health and Human Services, F. Supp. 2d, 2011 WL 285683, N.D. Fla. 2011)
 - 1. Requires all hospitals that accept Medicare and Medicaid to provide information to in-patients regarding the existence of advanced medical directives under their state's laws.

2. Military complies as a function of accreditation by Joint Commission of Accreditation of Healthcare Organizations (JCAHO).
3. Patient Self Determination Act (PSDA) is not an advanced medical directive itself.

III. ADVANCED MEDICAL DIRECTIVES (A.K.A. LIVING WILL).

- A. Advance Medical Directives (AMDs) are legal documents that state a person's decisions about health care treatment to be performed for the person in the future in the event the person is unable to make those decisions for him or herself.
- B. The AMD or living will is prepared by a person when the person is competent that instructs physicians and health care workers to administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition. It is designed to help a person communicate his or her wishes about medical treatment at some time in the future when the person is unable to make his or her wishes known because of illness or injury.
- C. The living will does not go into effect until the person is suffering from a terminal or irreversible condition diagnosed and certified in writing by an attending physician, and the person is unable to make medical decisions for him or herself. In essence a living will is effective when: (1) the patient is no longer capable of making decisions; (2) the patient is in a condition covered by the living will; and (3) a decision that is covered by the living will is called for.
- D. Advance planning through AMDs or living wills has three significant benefits.
 1. First, it allows a person to exercise control and autonomy over his or her life even after losing the ability to directly participate in the decision-making process.
 2. Second, advance planning diminishes the anxiety and confusion surrounding choices to be made by family and friends of the incapacitated loved one when a clear indication of that loved one's wishes are expressed. There are a number of options that allow a person to decide, *while capacity is intact*, who will make decisions and what those decisions will be should incapacity occur.

3. Finally, AMDs and living wills allow patients to tailor their care by informing health care providers about what type of medical care the patient wants withheld or administered.

E. Definitions.

1. Abatement order. A written order for DNR (Do-Not-Resuscitate or no code) or to withdraw or withhold life-sustaining treatment.
2. Artificial Nutrition and Hydration. Food and fluids administered intravenously or through a tube directly into the stomach.
3. Comfort Care. Care for the alleviation of pain, typically not life-sustaining.
4. DNR Order. ~~Order~~ suspending the otherwise automatic initiation of cardiopulmonary resuscitation” AR 40-3 Army regulations also refer to such orders as ~~abatement orders.~~”
5. Life-Sustaining Treatment. Generally does not include medical treatment for the alleviation of pain or the normal consumption of food and water.
6. Persistent Vegetative State/ Permanent Unconscious Condition. Condition of permanent non-responsiveness even with medical treatment. State laws differ as to who makes this determination.
7. Terminal Condition. Injury or illness that has no cure and will cause death even with medical care. State laws differ as to who may make this determination.
8. End-stage condition. A condition that is caused by injury, disease, or illness which has resulted in severe and permanent deterioration, indicated by incapacity and complete physical dependency, and for which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective. Fla. Stat. § 765.101.

F. Responsibilities:

a. Physicians. AR 40-3, Ch. 2., DODD 6000.14, 30 July 1998, § 4.4.2 –Providers should discuss the use of advance directive – both living wills and durable powers of attorney – with patients and their designated representative, and should abide by all decisions made by their patients and/or their designated representatives. A provider who disagrees with a patient’s wishes as a matter of conscience should arrange for transfer of care to another qualified provider willing to proceed according to the patient’s wishes within the limits of the law and medical ethics. Signed advanced directives shall become part of the medical record.”

b. Attorneys. AR 27-3, para. 3-6b. Legal assistance will be provided for estate planning including the preparation of AMDs and anatomical gift designations.

G. Execution:

a. Competent Adult

b. Conditional Requirement

(a) Terminally Ill

(b) Persistent Vegetative State

(c) End State

c. Witnesses. Generally not:

(a) Interested parties.

(b) Hospital employees.

(c) Blood relatives.

(d) Person(s) Financially Responsible for Patient

H. Revocation.

a. Oral or Written.

b. Physically Destroyed.

c. Army Policy – Abatement orders will stand unless rescinded either by the attending physician (verbal orders will be accepted) or at any time when a patient with decision making capacity or the surrogate makes this request known to any health care provider responsible for the patient’s care. AR 40-3, para. 2-5.

(1) Patients with Capacity. AR 40-3, para. 2-6.

(i) Voluntary choice of capable and informed patient will be undertaken.

(ii) Patient given opportunity to prepare advanced directive.

(iii) AMD placed in medical records after discussion and assessment with physician.

(iv) Patient determines whether family is informed of decision.

(2) Patients without Capacity. AR 40-3, para. 2-7.

(i) Explicit verbal and written directives will be honored.

(ii) Such directives should be discussed with the agent.

(3) Ethics Committee. AR 40-3, para. 2-7b and d.

- (i) If there is no AMD and no agent the ethics committee should be consulted if the treating staff feels an abatement order is proper.
- (ii) If the agent and the attending physician disagree, care should be review by an ethics committee or other mechanism defined by the local MTF commander.

I. Drafting a Living Will using DL Wills program:

1. Option to prepare living will and/or a durable POA for health care.
2. DL produces state specific living wills with the military preamble.
3. DL Wills Living Wills options:
 - a. Is the living will to authorize the donation of organs for transplant?
 - b. Is the authority to donate organs to include not just transplants but also the donation of organs and tissue for other medical, educational or scientific purposes?
 - c. Is the living will to express a desire by the client to die at home rather than in a hospital?
4. The DL Wills software program produces a basic boilerplate living will for the selected state.
 - a. The document produced includes all the standard provisions for the selected state.
 - b. The software program will not specifically ask the drafting attorney whether to include each optional provision in the living will. The drafting attorney will have to remove provisions using word processing that are not desired by the client, or the client will have to —line through” the provisions not desired.

- c. Some state living wills produced by the DL Wills software will generate “blank” sections of the will where the drafting attorney will have to insert information in the word processing format or have the client write the information in the form by hand.
- d. Practice Pointer: The drafting attorney and the client need to carefully review the document produced to make sure it meets the desires of the client and that all information is included in the document.
- e. Practice Pointer: If using an old version of DL Wills, you may need to delete the language discussing imminent death retirement (if the language is present) as it is no longer authorized. The language may appear after the definition paragraphs. It reads: *If I am on active duty in the military, I encourage my next of kin to determine, before this document is used to end my life, whether or not there is an advantage to my being medically retired from the military, rather than to die on active duty. If there is a significant advantage, I encourage my next of kin to try to secure such a retirement for me.*
- f. Practice Pointer: When a client is selecting an agent make sure the client understands that they should communicate with the agent selected. Documents provide some protection, but is not always enough. Can the agent selected act and are they willing to act? Do they know what the client wants with regard to medical care? Are there any successor agents? Do they have the same understanding as the first agent with regard to the client’s wishes?

IV. DURABLE POWER OF ATTORNEY FOR HEALTH CARE (A.K.A. HEALTH CARE POWER OF ATTORNEY).

- A. A DPOAHC is a document that allows a person to name an individual to act as the person's agent with authority to make health care decisions for the person in accordance with the person's wishes, including religious and moral beliefs, when the person is no longer capable of making the decisions.
- B. Because "health care" includes any treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition, the agent has the power to make a broad range of health care decisions on the person's behalf.

- C. The agent may consent, refuse to consent, or withdraw consent to medical treatment. The agent may also make decisions about withdrawing or withholding life-sustaining treatment.

- D. Two types.
 - 1. Springing: Effective upon meeting certain condition. Not authorized in every state.

 - 2. Durable: Effective immediately and remains in effect until revocation or death of principal.

- E. Health Care Representative/Agent/Proxy. Overrides the statutory presumptions of authority to act. Effective upon disability of the patient.

- F. Multiple Agents.
 - a. Acting Jointly

 - b. Alternate Agent

- G. Health Care Surrogate. UHCDA § 5
 - 1. Appointed at law.

 - 2. Preference:
 - a. Spouse,

 - b. Adult child - if more than one - majority rules,

 - c. Parents,

 - d. Adult siblings,

- e. Another adult ~~who~~ who has exhibited special care and concern for the patient....”

- H. Even after a person has executed a DPOAHC, the person has the right to make health care decisions on his or her behalf as long as he or she is competent to do so.
 - 1. The agent's authority begins when the person's attending physician certifies in writing and places in the person's medical record that, based on the attending physician's reasonable medical judgment, the person lacks competence to make health care decisions on his or her own behalf.
 - 2. Then the agent steps into the person's shoes and makes health care decisions on behalf of the person as a surrogate decision-maker. After consultation with the attending physician and other health care providers, the agent named in the DPOAHC shall make a health care decision:
 - a. according to the agent's knowledge of the person's wishes, including the person's religious and moral beliefs; or
 - b. if the agent does not know the person's wishes, according to the agent's assessment of the person's best interests.

- I. Restrictions. Some states restrict the power of the health care representative in certain circumstances. For example Florida does not allow for a representative to remove life support for a pregnant woman without a court order.

- J. HIPAA and DPOAHC
 - 1. HIPAA’s Privacy Rule at 45 CFR 164.524 allows the agent the right access the medical records of the patient. However, in order for the DPOAHC to be a valid authorization under HIPAA there must be an expiration date or expiration event related to the patient or the purpose of the use or disclosure. HIPAA 45 CFR 164.502(c)(v).

2. Practice Pointer: Issues with the law of agency concerning whether the access to protected health information (PHI) will extend beyond death. Recall a DPOAHC only lasts until the death of the principal. Consider a separate document, a stand-alone HIPAA authorization that will be immediately effective upon signing like the DPOAHC and providing a date beyond the date of death.
3. Practice Pointer: If there are concerns about having access to PHI without a finding of incapacity consider adding the following language to the DPOAHC: *Notwithstanding anything in this document to the contrary, it is my intent that the powers granted in this paragraph shall be effective immediately upon signing this document and my agent's authority to act under these provisions shall not be preconditioned by my mental incapacity.*
4. Practice Pointer: Ensure you are using at least version 8.0 or higher in DL for the DPOAHC as it provides boilerplate language for HIPAA.

K. Drafting a Durable POA for health care using DL Wills program:

1. DL produces state specific DPOAHC with the military preamble.
2. DL Wills DPOAHC options:
 - a. Is the living will to authorize the donation of organs for transplant?
 - b. Is the authority to donate organs to include not just transplants but also the donation of organs and tissue for other medical, educational or scientific purposes?
 - c. Is the living will to express a desire by the client to die at home rather than in a hospital?
3. Options for appointment of attorney-in-fact:
 - a. Name only one agent or attorney-in-fact.

- b. Name a second attorney-in-fact, and either attorney-in-fact can act separately.
 - c. Name a second attorney-in-fact, and both agents must act jointly unless one is incapacitated.
 - d. Name a second attorney-in-fact, but the second agent can only act if the first is incapacitated.
4. The DL Wills software program produces a basic boilerplate DPOA for the selected state.
- a. The document produced includes all the standard provisions for the selected state.
 - b. The software program will not specifically ask the drafting attorney whether to include each optional provision in the DPOAHC. The drafting attorney will have to remove provisions using word processing that are not desired by the client, or the client will have to “line through” the provisions not desired.
 - c. Some state DPOAHC produced by the DL Wills software will generate “blank” sections in the DPOAHC where the drafting attorney will have to insert information in the word processing format or have the client write the information in the form by hand.
 - d. Practice Pointer: The drafting attorney and the client need to carefully review the document produced to make sure it meets the desires of the client and that all information is included in the document.

V. PRACTICAL APPLICATIONS FOR ADVANCE MEDICAL DIRECTIVES (LIVING WILLS & DPOAHC)

- A. 10 U.S.C. § 1044c (1996) requires States to recognize Advanced Medical Directives (AMDs) of military members, dependents and retirees.
- B. DL Wills.

1. State specific document with military preamble from 10 U.S.C. 1044(c).
 - a. State recognition?
 - b. Preemption?
2. OCONUS.
 - a. Recognition by foreign country?
 - b. Military medical facility.
 - (1) State specific document or ~~generic~~ "generic" AMD?
 - (2) Does a state specific AMD produced under DL Wills unnecessarily restrict the options for provisions in the AMD?
 - (3) Where should a service member file or place the AMD?

C. Joint Commission on Accreditation of Healthcare Organizations (JCAHO) Requirements.

1. Military medical facilities must meet JCAHO standards with regard to AMDs.
2. JCAHO standards for AMDs are under patient's rights standards and include the following:
 - a. The patient's right to be involved in all aspects of their care.
 - b. The patient's right to informed consent.
 - c. Family participation in care decisions, unless the patient excludes any or all family members.

- d. The hospital must address advance directives by determining whether the patient has one and if not, whether the patient wishes to implement one.

VI. ORGANIZATION OF PERSONAL AFFAIRS.

- A. Many survivors encounter problems in locating documents, and information on assets, bank accounts, etc.
- B. Appendix D contains a Personal Affairs Workbook that can be used organized personal affairs.

VII. CHOICES REGARDING DISPOSITION OF THE BODY.

- A. Preplanning for Interment or Cremation.
 1. The right to control disposition of the body of a decedent vests in next of kin absent other arrangements.
 2. Client may make pre-mortem decisions:
 - a. Avoid including funeral desires in a will.
 - b. Prepare memorandum (or letter of instruction) to leave with next of kin.
 - c. May make arrangements directly with funeral home/cemetery.
- B. Donation of Body Organs.
 1. All states have adopted the Uniform Anatomical Gift Act (See 8A U.L.A. 20 (1993)).
 - a. Competent adults may make anatomical gift by signing card, having it witnessed and carrying it.

- b. May make gift by signing a witnessed statement.
 - c. Gift can also be made by will direction. Gift is valid even if will is invalid.
2. Eligible receivers of donations.
- a. Hospitals.
 - b. Accredited medical or dental schools.
 - c. Medical bank or storage facility.
 - d. Specific individual.
3. Revocation.
- a. Physical destruction of will or card.
 - b. Delivery of revocation to person holding signed will or card.
 - c. A signed statement of revocation.
 - d. A statement of revocation to a health care provider.
4. Consequences of body part donation.
- a. If body part is donated, most recipients will not accept a gift of the entire body.
 - b. If body parts are donated, (usually) there will still be a funeral/memorial service.
5. The QuickScribe program assists in the preparation of an Organ Donation Instruction. An example of the QuickScribe form is at Appendix E.

C. Mortuary planning sheet.

1. Funeral arrangements.
2. Burial arrangements.
3. See Appendix F for an example.

D. Person Authorized to Direct Disposition (PADD) 10 U.S.C. § 1482(c)

1. Service member designates the spouse or blood relative to direct disposition over the service member's remains. The designation is reflected on DD Form 93, Block 13. See MILPER Message 06-020, Appendix G.
2. If the person designated by the service member declines to direct disposition over the remains or predeceases the service member then the remains will be given to the following in order of precedence:
 - a. Surviving spouse.
 - b. Sons or daughters if age of majority and if more than one child, the most senior.
 - c. Parents in order of seniority, unless only one had legal custody of the deceased service member.
 - d. Another relative that had legal custody over the service member.
 - e. Siblings. Full siblings by seniority; if none, then half-siblings by seniority.

- f. Practice Pointer: DL wills allows service members to draft a PADD memo. However, G-1 will follow DD Form 93. Recommend only using the DD Form 93. If the service member wants to have the DL PADD memo as well, they should be counseled on which one takes precedence and ensure both have the same individual named as PADD.

VIII. ASSISTED SUICIDE

- A. Oregon's "Death with Dignity Act." Upheld by the Supreme Court in an opinion released January, 17, 2006. *See, Gonzalez v. Oregon*, 126 S. Ct. 904, 2006 U.S. LEXIS 767 (2006).
 - 1. Prescription but not administration of lethal doses of drugs.
 - 2. Two Doctors Certify
 - a. Terminally ill with less than six months to live.
 - b. Patient is mentally competent.
 - c. Voluntary decision.
- B. Assisted Suicide Funding Restriction Act of 1997, 42 U.S.C. §§ 14401-08.
 - 1. Restricted Funding for "Active" Assisted Suicide.
 - 2. Does not apply to "Passive" Assisted Suicide (Advance Directives withholding or withdrawing life support).
 - 3. Restricts federally employed physicians from actively assisting in suicide.

IX. CONCLUSION

APPENDIX A

TITLE 10. ARMED FORCES SUBTITLE A. GENERAL MILITARY LAW PART II. PERSONNEL

CHAPTER 53. MISCELLANEOUS RIGHTS AND BENEFITS

10 USCS § 1044c (1999)

§ 1044c. Advance medical directives of members and dependents: requirement for recognition by States

(a) Instruments to be given legal effect without regard to State law. An advance medical directive executed by a person eligible for legal assistance--

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for advance medical directives under the laws of a State; and

(2) shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned.

(b) Advance medical directives. For purposes of this section, an advance medical directive is any written declaration that--

(1) sets forth directions regarding the provision, withdrawal, or withholding of life-prolonging procedures, including hydration and sustenance, for the declarant whenever the declarant has a terminal physical condition or is in a persistent vegetative state; or

(2) authorizes another person to make health care decisions for the declarant, under circumstances stated in the declaration, whenever the declarant is incapable of making informed health care decisions.

(c) Statement to be included.

(1) Under regulations prescribed by the Secretary concerned, an advance medical directive prepared by an attorney authorized to provide legal assistance shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to an advance medical directive that does not include a statement described in that paragraph.

(d) States not recognizing advance medical directives. Subsection (a) does not make an advance medical directive enforceable in a State that does not otherwise recognize and enforce advance medical directives under the laws of the State.

(e) Definitions. In this section:

(1) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

(2) The term "person eligible for legal assistance" means a person who is eligible for legal assistance under section 1044 of this title.

(3) The term "legal assistance" means legal services authorized under section 1044 of this title.

HISTORY:

(Added Feb. 10, 1996, P.L. 104-106, Div A, Title VII, Subtitle E, § 749(a)(1), 110 Stat. 388.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section became effective upon enactment pursuant to § 749(b) of Act Feb. 10, 1996, P.L. 104-106, which appears as a note to this section.

Other provisions:

Effective date and applicability of section. Act Feb. 10, 1996, P.L. 104-106, Div A, Title VII, Subtitle E, § 749(b), 110 Stat. 389, provides: "Section 1044c of title 10, United States Code, shall take effect on the date of the enactment of this Act and shall apply to advance medical directives referred to in that section that are executed before, on, or after that date."

APPENDIX B

Advance Medical Directive

THIS IS A MILITARY ADVANCE MEDICAL DIRECTIVE PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, Sec. 1044c AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS DOCUMENT FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY, OR RECORDING THAT IS PRESCRIBED FOR SIMILAR DOCUMENTS UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. UNDER FEDERAL LAW, THIS DIRECTIVE SHALL BE GIVEN THE SAME LEGAL EFFECT AS A SIMILAR DIRECTIVE PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

I, [Name] _____, Social Security Number _____, of [State of Residence] _____, [Initial one appropriate status choice below]:

_____ a member of the United States Armed Forces, currently in [Location] _____, pursuant to military orders, [OR]

_____ a spouse of a member of the United States Armed Forces, currently in [Location] _____, [OR]

_____ a person authorized to receive legal assistance from the military services, being of sound mind and eighteen (18) years of age or older, willfully and voluntarily make known my desire by these instructions that my life shall not be artificially prolonged under the circumstances set forth below. I want this to be legally binding. If I cannot make or communicate decisions about my medical care, those around me should rely on this document for my instructions. I do hereby declare:

I. ADVANCE MEDICAL CARE DIRECTIVE

a. If my attending physician and another physician determine that I am no longer able to make decisions regarding my medical treatment, I direct my attending physician and other health care providers, pursuant to 10 U.S.C. Sec. 1044c, to withhold or withdraw treatment from me under the circumstances I have indicated below by my signature. I understand that I will be given treatment that is necessary for my comfort or to alleviate my pain.

b. If I have a terminal condition:

(1) I direct that life-sustaining treatment shall be withheld or withdrawn if such treatment would only prolong my process of dying, and if my attending physician and another physician determine that I have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months. _____ [Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) that will only prolong the process of dying from an incurable and irreversible condition is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition and hydration will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition (food) and hydration (water). _____ [Signature]

(3) I direct that [Add Other Medical Directives, If Any]

_____ [Signature]

(4) I direct that treatment be limited to measures to keep me comfortable and to relieve pain, including any pain that might occur by withholding or withdrawing life-sustaining treatment. In addition, if I am in the condition described above, I feel especially strong about the following forms of treatment [Initial Your Choices]:

I () do () do not want cardiac resuscitation.

I () do () do not want mechanical respiration.

I () do () do not want tube feeding or any other artificial or invasive form of nutrition (food) or hydration (water).

I () do () do not want blood or blood products.

I () do () do not want any form of surgery or invasive diagnostic tests.

I () do () do not want Kidney dialysis.

I () do () do not want antibiotics.

I realize that if I do not specifically indicate my preference regarding any of the forms of treatment listed above, I may receive that form of treatment.

c. If I am persistently unconscious:

(1) I direct that life-sustaining treatment be withheld or withdrawn if such treatment will only serve to maintain me in an irreversible condition, as determined by my attending physician and another physician, in which thought and awareness of self and environment are absent. _____ [Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) for individuals who have become persistently unconscious is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition and hydration will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition (food) and hydration (water). _____ [Signature]

(3) I direct that [Add Other Medical Directives, If Any]

_____ [Signature]

[Option] II. HEALTH CARE PROXY APPOINTMENT

a. If my attending physician and another physician determine that I am no longer able to make decisions regarding my medical treatment, I direct my attending physician and other health care providers pursuant to 10 U.S.C. Sec. 1044c to follow the instructions of [Appoint a Person You Trust Who Will Respect Your Decisions. Do Not Appoint Employees of a Hospital, Clinic, Nursing Home, Rest Home, or Other Licensed Health Care Facility.] _____, whom I appoint as my health care proxy. If my health care proxy is unable or unwilling to serve, I appoint _____ as my alternate health care proxy with the same authority. My proxy will decide any questions about how to interpret or when to apply my Advance Medical Care Directive, including Part I above. My health care proxy is authorized to make whatever medical treatment decisions I could make if I were able, except that decisions regarding life-sustaining treatment must be made by my health care proxy or alternate health care proxy consistent with my desires indicated in the following sections.

b. If I have a terminal condition:

(1) I authorize my health care proxy to direct that life-sustaining treatment be withheld or withdrawn if such treatment would only prolong my process of dying and if my attending physician and another physician determine that I have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months. _____ [Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition (food) or hydration (water) will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition and hydration. _____ [Signature]

(3) I authorize my health care proxy to [Add Other Medical Directives, If Any]

_____ [Signature]

c. If I am persistently unconscious:

(1) I authorize my health care proxy to direct that life-sustaining treatment be withheld or withdrawn if such treatment will only serve to maintain me in an irreversible condition, as determined by my attending physician and another physician, in which thought and awareness of self and environment are absent. _____
[Signature]

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition (food) and hydration (water) will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding and withdrawal of artificially administered nutrition and hydration. _____
[Signature]

(3) I authorize my health care proxy to [Add Other Medical Directives, If Any]

_____ [Signature]

d. My agent shall be guided by my medical diagnosis and prognosis and any information provided by my physicians as to the intrusiveness, pain, risks, and side effects associated with treatment or nontreatment. My agent shall not authorize a course of treatment which he knows, or upon reasonable inquiry ought to know, is contrary to my religious beliefs or my basic values, whether expressed orally or in writing. If my agent cannot determine what treatment choices I would have made on my own behalf, then my agent shall make a choice for me based upon what he believes to be in my best interest.

III. CONFLICTING PROVISION

I understand that if I have completed both an advance medical care directive and have appointed a health care proxy; and if there is a conflict between my health care proxy's decision and my advance medical care directive, my directive shall take precedence unless I indicate otherwise. [Option]

IV. ANATOMICAL GIFTS

[You May Make a Gift of All or Part of Your Body to a Hospital Organ Bank or Storage Facility, Physician or Medical or Dental School for Transplantation, Therapy, Medical or Dental Evaluation or Research or for the Advancement of Medical or Dental Science. You May Also Authorize Your Agent to Do So or a Member of Your Family May Make a Gift Unless You Give Them Notice That You Do Not Want a Gift Made. Indicate Your Choice(s) in the Space below. Complete Only Item 1, 2, or 3.]. I make this anatomical gift to take effect upon my death as indicated:

1. I give:

a. My body _____;

Any needed organs or parts _____ ;

The following organs or parts:

_____.

b. To the following person:

_____;

To any person, tissue bank, or institution authorized by law: _____;

To the following named physician, hospital, tissue bank or other medical institution: _____

_____.

c. For the following purpose(s):

Any purpose authorized by law: _____ ;

Transplantation: _____ ;

Therapy: _____ ;

Medical research and education _____.

2. I authorize my agent for health care decisions appointed earlier in this document to make any decision on organ donation.

_____ [Signature]

3. I do not want to make an organ or tissue donation and I do not want my agent of family to do so.
_____ [Signature]

V. OTHER PROVISIONS

a. I understand that if I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this advance directive shall have no force or effect during the course of my pregnancy.

b. In the absence of my ability to give directions regarding the use of life-sustaining procedures, it is my intention that this advance directive shall be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment including, but not limited to, the administration of any life-sustaining procedures, and I accept the consequences of such refusal.

c. This advance directive shall be in effect until it is revoked.

d. I understand that I may revoke this advance directive at any time.

e. I understand and agree that if I have any prior directives, and if I sign this advance directive, my prior advance directives are revoked.

f. I understand the full importance of this advance directive and I am emotionally and mentally competent to make this advance directive.

g. If a locality or medical treatment facility fails to recognize the validity of this declaration and refuses to comply with the terms of this declaration, then it is my intention that my body be transferred to a locality that recognizes and will carry out my intentions as set forth herein.

h. The determination that I am incapable of making an informed decision shall be made by my attending physician and a second physician or licensed clinical psychologist after a personal examination of me and shall be certified in writing. Such certification shall be required before treatment is withheld or withdrawn, and before, or as soon as reasonably practicable after, treatment is provided, and every 180 days thereafter while the treatment continues.

i. This advance directive shall not terminate in the event of my disability and I specifically desire it remain effective even if I am in a coma or have Alzheimer's disease or suffer some other mental disability.

VI. NOTICE

This is an important legal document. Before signing it, you should know these important facts:

(a) This document gives your health care providers and/or your designated proxy the power and guidance to make health care decisions according to your wishes when you cannot do so. This document may include what kind of treatment you want or do not want and under what circumstances you want these decisions to be made.

(b) If you named a health care proxy [Part II] in this document and that person agrees to serve as your proxy, that person has a duty to act consistently with your wishes. If the proxy does not know your wishes, the proxy has the duty to act in your best interests. If you do not name a proxy, your health care providers have a duty to act consistently with your instructions or tell you that they are unwilling to do so.

(c) Review this document periodically to make sure it continues to reflect your preferences. You may amend or revoke the declaration at any time. If you decide to revoke it, you should notify any proxy you appointed, recover any copies you gave to anyone, and notify your health care provider. You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

(d) Your named proxy has the same right as you have to examine your medical records and to consent to their disclosure for purposes related to your health care or insurance unless you limit this right in this document.

(e) If there is anything in this document that you do not understand, you should ask for professional help to have it explained to you.

(f) Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision.

(g) If you choose not to have this document notarized, you should carefully read and follow the optional witnessing procedure described at the end of this form. This document will not be valid unless your signature is properly notarized or witnessed.

(h) Your agent may need this document immediately in case of an emergency that requires a decision concerning your health care. Either keep this document where it is immediately available to your agent and alternate agents, if any, or give each of them a signed copy of this document. You should give your doctor a signed copy of this document and request that a copy be filed in your health and medical records.

[This Directive Will Not Be Valid Unless it Is Notarized or Signed by Two Qualified Witnesses Who Are Present When You Sign or Acknowledge Your Signature].

By signing below, I indicate that I am emotionally and mentally competent to make this advance directive and that I understand its purposes.

Signature: _____ Print Name _____

Date: _____ Social Security No. _____

NOTARY

IN WITNESS WHEREOF, I have hereunto set my hand and affix my official seal on _____, 200__.

Notary Public

My Commission Expires: _____

[Military Notary--Service member on Active Duty]

Subscribed, sworn to and acknowledged before me on _____, 200__ by the declarant, who is known to me to be a member of the Armed Forces of the United States serving on Active Duty. This acknowledgment is executed in my official capacity under the authority granted by Title 10, United States Code, Sec. 1044a, which also states that no seal is required on this acknowledgment.

(Sign) _____

(Print) _____

RANK/COMPONENT _____

OFFICIAL CAPACITY _____

Subscribed, sworn to and acknowledged before me on _____, 200__ by the declarant, who is known to me to be eligible for Legal Assistance under the provisions of 10 U.S.C. Sec. 1044a or regulations of the Department of Defense. This acknowledgment is executed in my official capacity under the authority granted by Title 10, United States Code, Sec. 1044a, which also states that no seal is required on this acknowledgment.

(Sign) _____

(Print) _____

RANK/COMPONENT _____

OFFICIAL CAPACITY _____

[Option] STATEMENT OF WITNESSES

[Instead of having this directive notarized, I understand two qualified adult witnesses must see me sign this directive. The following individuals are not qualified witnesses: your health care proxy (or alternate), your physician or health care provider; your spouse; a blood relative; an heir; or any person who has, at the time you sign this document, any claim against your estate].

I declare under penalty of perjury that the person who signed or acknowledged this document is personally known to me to be the principal, that the principal signed or acknowledged this directive in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as proxy by this document, and that I am not the principal's physician or health care provider; the principal's spouse; a person related to the principal by blood or adoption; a person entitled to inherit any part of the principal's estate upon death; nor a person who has, at the time of executing this document, any claim against the principal's estate.

Signature: _____ Signature: _____

Print Name: _____ Print Name: _____

Date: _____ Date: _____

Social Security No. _____ Social Security No. _____

[Option] ACCEPTANCE OF PROXY APPOINTMENT

I accept this appointment and agree to serve as agent for health care decisions. I understand I have a duty to act consistently with the desires of the principal as expressed in this appointment. I understand that this document gives me authority over health care decisions for the principal. I understand that I must act in good faith in exercising my authority under this power of attorney. I understand that the principal may revoke this power of attorney at any time in any manner.

If I choose to withdraw during the time the principal is competent I must notify the principal of my decision. If I choose to withdraw when the principal is incapable of making the principal's health care decisions, I must notify the principal's physician.

Signature: _____ Print Name: _____

Date: _____ Social Security No. _____

APPENDIX C

Personal Letter Of Instruction To Be Read Upon My Death

FROM:

TO:

1. Upon my death, please contact the following persons:

NAME	ADDRESS	PHONE NUMBER
------	---------	--------------

- 1.
- 2.
- 3.
- 4.
- 5.

2. The following papers are located in the following locations:

TYPE OF PAPERS	LOCATION
----------------	----------

1. Family Papers
2. Insurance Policies
3. Income Tax Data (Past & Present)
4. Automobile Papers
5. Real Estate (Home) Papers
6. Other Long Term Debts
7. Stocks or Other Investments
- 8.
- 9.
- 10.

3. I have the following bank accounts:

TYPE OF ACCOUNT	ACCOUNT#	LOCATION
1. Checking		
2. Savings		
3.		
4.		

4. It is my desire that my funeral arrangements be handled in the following manner:

5. My family lawyer is _____
located at _____

6. My safe deposit box is located at _____
_____ (If none, so state).

7. The following is a list of my credit cards and other accounts:

<u>NAME</u>	<u>LOCATION OF ACCOUNT</u>
1.	
2.	
3.	
4.	
5.	
6.	
7.	

8. My original Last Will and Testament is located at

9. It is my understanding that my estate can expect the following survivor benefits from the following employers:

EMPLOYER	LOCATION
1.	
2.	
3.	
4.	

10. Additional information that should be contained in this letter is as follows:

CLIENT SIGNATURE

DATE

APPENDIX D
(REPRINTED WITH PERMISSION OF THE RETIRED OFFICERS ASSOCIATION)

The Retired Officers Association Personal Affairs Workbook

My Record of Personal Affairs

.....

(First) (Middle) (Last)

(Retired grade) (Service) (Social Security number)

(Street address) (City and state) (ZIP code)

(Service number) (VA claim number, if applicable)

Date and type of retirement:

(Date)

(Signature)

..... (Attach separate sheets as necessary)

PERSONAL RECORD:

1. Place and date of birth

..... (Town) (State) (Month, day, year)

2. Naturalization (if applicable)

by

..... (Designation and location of court granting naturalization)

3. Parents' names: Father

..... (First) (Middle) (Last)

Date and place of birth

Mother

(First)

(Middle) (Last)

Date and place of birth

4. Your marriage(s): To whom

..... (First)..... (Middle)..... (Last)

Place and date

..... (Town)..... (State)..... (Month, day, year)

If terminated, show reason, place and date

To whom

..... (First)..... (Middle)..... (Last)

Place and date

..... (Town)..... (State)..... (Month, day, year)

If terminated, show reason, place and date

5. Children (full name, place and date of birth; if living apart from parent, list address—minors indicate name of guardian)

6. Name and address of personal lawyer or trusted friend who may be consulted in regard to my personal or business affairs

(Name)

(Street)..... (Town)..... (State)..... (Telephone)

FAMILY RECORDS LOCATION:

1. Birth certificates or other proof of date of birth of self and each member of immediate family

2. Adoption papers

3. Naturalization papers (if applicable)

4. Marriage certificate

5. Divorce decree, death certificates or certified copies thereof (in case of either spouse)

MILITARY SERVICE PERSONAL FILE LOCATION:

Retirement order, separation papers, awards and decorations, personal medical records, etc.

OTHER IMPORTANT PAPERS:

1. Will: I have (have not) executed a will. (a) Will located at

(b) Executor's name and address

(c) Lawyer's name and address

2. Power of attorney: I have (have not) executed a power of attorney, dated

..... (Month, day, year)

naming

..... (Agent or attorney in fact) (Address)

3. Income tax: Copies of my federal and state income tax returns and related papers are located at

4. Other taxes: Copies of _____ tax returns and related papers are located at

..... (Property etc.)

BANK ACCOUNTS: (Include Credit Union, Savings & Loan Association, IRA and 401k)

1. Type of account

..... (Checking or savings: joint or individual) (Name and location of bank)

..... (Checking or savings: joint or individual) (Name and location of bank)

..... (Checking or savings: joint or individual) (Name and location of bank)

2. Location of passbooks for savings accounts

3. Location of statements and canceled checks for checking accounts

CHARGE ACCOUNTS AND CREDIT CARDS: (Include account numbers).....

SAFETY DEPOSIT BOX:

1. Name of bank or trust company

Address

2. Location of key

UNITED STATES SAVINGS BONDS:

1. Where kept

2. Approximate value (attach listing or serial numbers and denominations, if desired)

STOCKS, BONDS AND SECURITIES OWNED:

PROPERTY OWNERSHIP OR INTEREST:

Real estate located at

The property is encumbered by a

.....(Mortgage, trust, deed etc.).....(Held by)

The property is insured with

.....(Insurance company)

Policy no.

The papers are located at

.....(Location of deed, abstract, mortgage, insurance, contracts and other papers)

LIFE INSURANCE:

1. I have the following types of life insurance:Government..... Commercial Both

2. Insurance company.....Policy number..... Face value Payment options

3. The policies are located at

.....

OTHER INSURANCE:

1. I have the following health, property, accident, liability or other insurance coverage:

2. Insurance company.....Type of coverage..... Policy number Amount

3. The policies are located at

.....

ANNUITIES: SURVIVOR BENEFIT PLAN (SBP), RETIRED SERVICEMAN'S FAMILY PROTECTION PLAN (RSFPP), CIVIL SERVICE ETC.

1. Annuities are payable as follows:.....Government Commercial Both

2. SBP payable to

Address

Current amount \$ _____ per month (increased whenever retired pay is raised)

3. RSFPP payable to

Amount payable \$ _____ per month (fixed amount)

4. Other annuities

Payable to
Address

5. Annuity papers located at

EMPLOYER:

.....(Employer)(Address).....(Telephone)
Survivor benefits

MILITARY RETIRED PAY:

1. Defense Finance and Accounting Service Center that pays my military retired pay

2. Retired pay now being sent to

.....(Indicate home address, bank etc.)
3. If you have waived all or part of your military retired pay in favor of Department of Veterans Affairs (VA) disability compensation or combined civil service payment, list these offices below.

(VA claim number)..... (VA office address)

(CSA number)..... (Civil service address)

4. The following deductions (payments of insurance premiums etc.) are currently made from my military retired pay:
..... Amount Purpose

5. I have designated the following person as beneficiary of any unpaid retired pay at the time of my death:

(Name, relationship and address)

MEMBERSHIP IN PRIVATE ASSOCIATIONS AND ORGANIZATIONS:
You may be a member of several associations or organizations that might be helpful to your spouse. We suggest that you list them below and indicate what assistance, if any, your spouse may expect. Even if you are not a member, some veterans organizations might be of help. List, in particular, such organizations as The Retired Officers Association, a local TROA chapter, military aid societies, American Legion, Veterans of Foreign Wars, American Red Cross, state veterans departments and so forth.

..... Name Address

NAMES, ADDRESSES AND TELEPHONE NUMBERS OF FRIENDS OR BUSINESS ASSOCIATES WHO MAY BE HELPFUL:

..... Name..... Address Phone

SURVIVOR ASSISTANCE OFFICE—Nearest Military Installation:

Whenever possible, the military departments will designate an officer to assist the surviving spouse in funeral and burial arrangements, and to advise and assist in applying to the various government agencies for benefits that might be payable. In some installations, the offices that render assistance might be referred to as the casualty assistance office, survivor assistance office, personal affairs office or retirement services office. At any rate, you should know what office (if any) to consult. Find out the telephone number and list it below and also in the following section, "What to do when the emergency comes." If appointed, a survivor assistance officer usually will take care of many of the items discussed in this and the following section.

.....(Name of installation)(Survivor assistance office)(Telephone)

IDENTIFICATION CARDS:

Your spouse should turn in all military ID cards. The survivor assistance officer mentioned above will help obtain a new card for your spouse and any eligible children. If your spouse is not near a military base, application forms and instructions for getting new cards can be obtained from TROA headquarters.

DEPARTMENT OF VETERANS AFFAIRS: (VA)

1. As explained in Part I, your surviving spouse might be eligible for Dependency and Indemnity Compensation (DIC), or, if not, he or she might qualify for a small non-service-connected death pension. However, even if your surviving spouse is not eligible, your dependent children might well qualify for benefits. Consequently, it is important that your surviving spouse consult the VA to determine possible eligibility.
2. Even if a surviving spouse is not eligible for DIC or a death pension, burial allowances as described in Part I will be payable. As a general rule, the funeral director will assist in claiming this benefit.

3. My VA claim number (if any) is _____

4. Location of my personal papers _____

5. Nearest VA office _____

(Name and address)..... (Telephone)

SOCIAL SECURITY ADMINISTRATION:

1. Benefits are discussed in Part I. If there are dependent children, your spouse will be entitled to survivor benefits regardless of age. If there are no dependent children, your spouse will be eligible for benefits at age 60 (50 if disabled). A burial allowance up to \$255 is payable. These benefits are, of course, dependent on your entitlement to Social Security benefits. Your spouse should contact the nearest office and file an application. The Social Security Administration will determine eligibility.

2. My Social Security number is _____

3. Location of my personal Social Security papers _____

4. Social Security Office _____

.....(Address)(Telephone)

FUNERAL AND BURIAL ARRANGEMENTS:

1. The funeral director, apart from the unique and indispensable services performed, is usually well-informed regarding the administrative details of a military retiree's death. A careful choice is in order, and emotions must be held in check with respect to funeral expenses. Dignity, simplicity and economy in funeral arrangements are important. Much can be done by intelligent planning. One approach to this is through one of the many funeral and memorial societies. For information on the society near you, write to the Funeral & Memorial Societies of America, P.O. Box 10, Hinesburg, VT 05461.

2. Name of funeral director

.....(Name)(Address)(Telephone)

3. If cremation is desired, consult you funeral director for instructions. Requests for cremation vary from state to state, and some require a letter of authority signed by the deceased. Such a letter should be filed with your personal papers. If burial at sea is desired, a letter so stipulating should be prepared and filed with your personal papers.

4. Church and clergy. Depending on religious preference or affiliation, a clergyman may be either essential, or merely of assistance. Families with strong religious ties should consult their clergyman before making funeral arrangements.

.....(Clergyman)(Telephone—church)

.....(Address)(Telephone—home)

5. If burial will be in a national cemetery, list the following information to expedite verification of entitlement:

.....(Retired grade)(Date of birth)(Military service—Army, Navy etc.)

.....(Social Security number)(Date of last active duty)(Type of retirement—service disability, reserve age 60 etc.)

6. We suggest you fill in the following: This is not intended as a legal document. But, within the terms of my will or the applicable laws, I suggest the following be done by my executor and/or next of kin.

Funeral service and arrangements _____

Name of cemetery _____

(Telephone)

Military ceremony and honors _____

Uniform _____

Hymns, Psalms, scripture, special requests _____

Pallbearers _____

Flowers (in lieu of flowers) _____

7. Obituary notice. A biographical sketch will be helpful in preparing the obituary news story. A photo should be attached. We suggest you include this at the end of this section. Doing this now will save time and confusion when the emergency comes.

8. Memorials and remembrances _____

PERSONAL EFFECTS:

At the discretion of my executor, next of kin or beneficiaries, I suggest that a suitable disposition of my special effects, not otherwise legally specified, might be as follows:

Clothing _____

Firearms _____

Medals _____

Books _____

Special equipment _____

Jewelry

Sword _____

Plaques and awards

Collections

Works or Art

Stamps/coin collections

Others:

OTHER:
Enter any additional data.

What to Do When the Emergency Comes

In case of serious illness, call 911 or a doctor as quickly as possible.

1. Record these phone numbers below, but also have them listed in the telephone directory near your phone.

(Name of doctor)

(Telephone)

2. Call a relative or friend who can immediately assist you in handling some of the details listed below.

(Name)

(Telephone)

3. Call a clergyman (if desired).

(Name)

(Telephone)

4. Call a funeral director.

(Name)

(Telephone)

5. Call the nearest military installation that has a survivor assistance office.

(Name of installation)

(Telephone)

6. Newspapers in which the obituary notices should be published.

(Name of newspaper)

(Address)

(Name of newspaper)

(Address)

The funeral director generally assumes the responsibility for the death notice, for which there is a charge. You also may want to submit an obituary news story with a photograph. Also consider out-of-town newspaper notifications.

7. After funeral arrangements and other priority matters are completed, take care of the following:

If a local military survivor assistance officer is not available, notify the military department from which your spouse was retired. Instructions begin in the next section.

You will need death certificates—have about 15 copies made.

Notify your spouse’s employer, insurance companies, associations, banks and other institutions listed in Part III.

If all or part of your spouse’s retired pay was waived in favor of a VA or civil service payment, notify those agencies.

Visit or call:

Your local VA office

(Address)

(Telephone)

(VA claim number)

Your local Social Security office

(Social Security number)

(Address)

(Telephone)

Office of Personnel Management

(CSA number)

(Address)

(Telephone)

This Personal Affairs Workbook was a product of The Retired Officers Association (TROA) and was titled *Help Your Surviving Spouse-Now! (Note: The Retired Officers Association is now the Military Officers Association of America or MOAA and the publication is now the Personal Affairs Handbook)*

Notification of Death

It is important that your military department receives prompt notification of your death. This will expedite final settlement of retired pay. Prompt notification, including a copy of the death certificate, will also set in motion annuities that may be payable under the Retired Serviceman's Family Protection Plan or the Survivor Benefit Plan. If a military base is nearby and a survivor assistance officer is appointed, that person probably will take care of these notifications. However, if such an officer is not available, the instructions and form letters that follow will be helpful.

TROA's membership includes all seven uniformed services. Although death reporting procedures may vary from one service to another, the form letters that follow have been adapted to take care of all notifications. This should make it a simple matter for all military departments to be properly notified.

The required form letters are shown below. Your surviving spouse can simply fill in the required information, attach a copy of the death certificate and mail them. The letters should be sent to the military department from which the military member retired. Please note that the Navy, Coast Guard, National Oceanic and Atmospheric Administration (NOAA) and the Public Health Service require only one letter while the Army, Air Force and Marine Corps require two.

As discussed previously, certain letters of notification are required. Appendix A includes letters for the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service and NOAA. Appendix B includes letters for the Army, Air Force and Marine Corps.

REQUIRED BY ALL UNIFORMED SERVICES

NOTIFICATION OF DEATH OF RETIRED MEMBER

FROM:

.....(Full name of surviving spouse, next of kin or executor)

.....(Mailing address—street)

.....(City, state, ZIP code)

(Date)

TO:

1. This is to inform you that

.....(Last).....(First).....(Middle)

(Grade).....(Service number).....(Social Security number)
died on

.....(Date)

2. Copy of death certificate enclosed

3. I am the surviving spouse, child, executor or other (explain)

4. My Social Security number is

5. My telephone number is

.....
.....Sincerely,

Enclosure

(Signature)

Use appropriate address below:

Army
Department of the Army
Headquarters - PERSCOM
ATTN: DAPC-PEC
2461 Eisenhower Ave.
Alexandria, VA 22331-0481
(703) 325-7990 (call collect)

Navy
Defense Finance and Accounting Center
Cleveland Center
Retired Pay Department (JRP)
Cleveland, OH 44199-2058
1-800-321-1080
(216)522-5495
1-800-269-5170 (Casualty number only)

Marine Corps
Headquarters
United States Marine Corps

Attn: MHP-10
2 Navy Annex
Washington, DC 20380-1775
(703)696-2070

Coast Guard
Commanding Officer
(RPD)
United States Coast Guard
Pay and Personnel Center
444 S.E. Quincy Street
Topeka, KS 66683-3591
1-800-772-8724
(913)295-2661

Public Health Service
U.S. Public Health Service
Division of Commissioned Personnel, ODB
Attn: Survivor Assistance Officer
Room 4A 18
5600 Fishers Lane
Rockville, MD 20857
1-800-638-8744
(301)594-3389

NOAA
NOAA
Commissioned Personnel Center
1315 East-West Highway
SSMC3, Station 12121
Silver Spring, MD 20910-3233
1-800-224-NOAA or (301)713-3453

Air Force
HQ: AFPC/DPWCS
550 C St. West, Suite 14
Randolph AFB
TX 78150-4716
1-800-433-0048

NOTE: For the telephone
number of the Army, Air Force and Marine Corps Defense Finance and Accounting Service Center, see next page below.

REQUIRED ONLY BY ARMY, AIR FORCE, & MARINE CORPS

NOTIFICATION OF DEATH OF RETIRED MEMBER

FROM:

.....(Full name of surviving spouse, next of kin or executor)

.....(Mailing address—street)

.....(City, state, ZIP code)

(Date)

TO:

1. This is to inform you that

.....(Last).....(First).....(Middle)

(Grade).....(Service number).....(Social Security number)
died on

.....(Date)

2. Copy of death certificate enclosed

3. I am the surviving spouse, child, executor or other (explain)

4. My Social Security number is

5. My telephone number is

.....
.....Sincerely,

Enclosure

(Signature)

Air Force, Army, Marine Corps
Defense Finance and Accounting Service—Cleveland
Center/ROCAD
P. O. Box 99191
Cleveland, OH 44199-2058
1-800-321-1080
1-800-269-5170 (Casualty number only)

APPENDIX E

ORGAN DONATION INSTRUCTION

That I, CLIENT'S FULL NAME, hereinafter referred to as DONOR, a military member on active duty, give my organs, tissues, or parts as directed below. This Anatomical Gift will take effect upon my death:

___ I give: any needed organs, tissues, or parts.

___ I give my organs, tissues, or parts indicated above to be used for: the following purposes only:
transplantation
therapy
research
education.

Limitations or special wishes, if any: ENTER SPECIAL WISHES

My organs, tissues, or parts should be given to:

_____ X

_____ If the above cannot or does not accept my organs, tissues, or parts I desire that: my organs, tissues, or parts be given to any authorized donee.

I revoke any previous document or writing where I donated my organs, tissues, or parts to take effect on my death. I intend for this document to direct the removal and use of my organs, tissues, or parts at my death.

If any provision in this document is held to be invalid, such invalidity shall not affect the other provisions that can be given effect without the invalid provision.

DONOR Signature: CLIENT'S FULL NAME

Date Signed: 25 March 2011

WITNESSES

Donor signed this document in my presence. I am signing in the presence of and at the direction of the Donor and in the presence of the other witness:

Witness Signature: _____
Witness One Full Name

Witness Signature: _____
Witness Two Full Name

APPENDIX F

MORTUARY PLANNING SHEET

TO THE NEXT OF KIN OF: _____

This is an expression of my preferences and desires regarding the disposition of my remains and other arrangements at the time of my death. I am writing this to make things easier for you and to make my thoughts known.

I feel it would be best if preparation, casketing and transportation were handled by:

Next of kin working with local funeral home.

The military authorities, through their contact with a local funeral home (applicable only if on active duty).

Next of kin working with:

(Name and address of funeral home)

At the time of death, I prefer:

Conventional Burial.

I would like to be in

Cremation.

_____ Uniform:

(Branch of Service)

No preference.

My preference for a burial place or disposition of ashes is:

Private Cemetery.

(Show name and location)

National or other Gov't

Cemetery, contingent on availability of space.

(Show name and location)

Burial at sea.

Wherever you decide it would be easiest for you.

Other:

In the event that my body should have to be shipped to another location, I prefer that the following funeral home be selected as "receiving" funeral home.

I desire the following religious services be conducted:

- Church services.
(Show name and location)
- Funeral home services.
- Memorial services.
- Graveside committal services.
- Other, please explain:

(More than one block may be marked)

Military honors desired if available from _____ resources.
(Service)

- _____ Chaplain
(Service) (Please indicate religious preference)
- Pallbearers. Bugler.
- Firing Party. Color Guard.
- Other, Please explain:

My preference concerning:

- a. Government-furnished headstone or marker: Yes No
If preferred, type:
- b. Clergy:
- c. Flowers, memorials, agencies, contribution should be made to:
- d. Favorite soloist or organist, psalms or other special requests:
- e. Friends to notify:

OTHER DESIRES OR NOTES:

(SIGNATURE)

(DATE)

(A copy of this document should be given to your next of kin, executor and other close relative).

APPENDIX G
MILPER MESSAGE 06-020

MILPER Message # 06-020 MILPER MESSAGE NUMBER : 06-020

AHRC-PEC

IMPLEMENTING GUIDANCE FOR SERVICE MEMBER DESIGNATION OF A PERSON
AUTHORIZED TO

DIRECT DISPOSITION (PADD)

...Issued: [01/19/2006]...

A. AR 638-2, DATED 22 DECEMBER 2000

B. AR 600-8-1, CHAPTER 11, SECTION I, DATED 10 OCTOBER 1994

C. OFFICE OF THE UNDER SECRETARY OF DEFENSE MEMORANDUM, DATED 14
JULY 2005

1. THIS MILPER MESSAGE WILL EXPIRE UPON COMPLETION OF NEW AR 600-8-1.

2. THIS MESSAGE ANNOUNCES AN IMPENDING CHANGE TO REGULATORY
POLICY. THIS NEW REGULATORY POLICY WILL BE INCORPORATED IN THE NEXT
AR 600-8-1 REVISION. IN THE INTERIM UTILIZE THIS GUIDANCE PER DOD'S
REQUIREMENT FOR SERVICEMEMBERS TO DESIGNATE A PERSON AUTHORIZED
TO DIRECT DISPOSITION (PADD) OF THEIR REMAINS SHOULD THEY BECOME A
CASUALTY.

3. EFFECTIVE IMMEDIATELY, ALL SOLDIERS WILL DESIGNATE IN THE REMARKS
PORTION OF THE RECORD OF EMERGENCY DATA FORM (DD FORM 93) THEIR
PADD SELECTION. ALL DEPLOYED SOLDIERS WILL BE BRIEFED ON THIS
GUIDANCE WHEN THEY UPDATE THEIR DD FORM 93.

4. IN COMPLIANCE WITH THIS DIRECTIVE AND 10 USC 1482, THE ORDER OF
PRECEDENCE FOR DETERMINING THE PADD PRESCRIBED IN AR 638-2,
PARAGRAPH 4-4 IS HEREBY AMENDED.

A. THE FIRST PERSON IN THE PADD ORDER OF PRECEDENCE FOR BOTH MARRIED
AND UNMARRIED SOLDIERS WILL BE THE PERSON DESIGNATED ON THE DD
FORM 93. THE SOLDIER CAN DESIGNATE ANY BLOOD RELATIVE OR SPOUSE (IF
MARRIED).

B. WHEN THE PERSON DESIGNATED BY THE SOLDIER DECLINES TO BE THE
PADD, OR THE DESIGNATED PERSON DOES NOT SURVIVE THE SOLDIER, THEN
THE ORDER OF PRECEDENCE PRESCRIBED BELOW WILL TAKE EFFECT.

(1) SURVIVING SPOUSE, EVEN IF A MINOR.

(2) SONS OR DAUGHTERS WHO HAVE REACHED THE AGE OF MAJORITY IN THE
ORDER OF SENIORITY (AGE).

(3) PARENTS IN ORDER OF SENIORITY (AGE) UNLESS LEGAL CUSTODY WAS
GRANTED TO ANOTHER PERSON BY REASON OF COURT DECREE OR STATUTORY
PROVISION. THE PERSON TO WHOM CUSTODY WAS GRANTED REMAINS THE
PADD DESPITE THE FACT THAT THE SOLDIER HAD REACHED THE AGE OF
MAJORITY AT THE TIME OF DEATH. STEP-PARENTS SERVE IN LOCO
PARENTIS AND ARE NOT PARENTS.

- (4) THAT BLOOD OR ADOPTIVE RELATIVE OF THE INDIVIDUAL WHO WAS GRANTED LEGAL CUSTODY OF THE INDIVIDUAL BY REASON OF A COURT DECREE OR STATUTORY PROVISION. THE PERSON TO WHOM CUSTODY WAS GRANTED REMAINS THE PADD DESPITE THE FACT THAT THE INDIVIDUAL HAD REACHED THE AGE OF MAJORITY AT THE TIME OF DEATH.
- (5) THE ELDER SIBLING WHO HAS REACHED THE AGE OF MAJORITY IN THE ORDER OF SENIORITY (AGE). WHEN THE DECEASED PERSON HAS FULL SIBLINGS, HALF-SIBLINGS, OR STEP-SIBLINGS; THE ORDER OF PRECEDENCE IS THE FULL SIBLINGS BY SENIORITY THEN THE HALF-SIBLINGS BY SENIORITY. STEP-SIBLINGS ARE NOT ELIGIBLE TO DIRECT DISPOSITION OF REMAINS. ADOPTED SIBLINGS ARE TREATED THE SAME AS FULL SIBLINGS WHEN ADOPTED BY BOTH OF THE DECEASED PERSON'S BIOLOGICAL PARENTS. ADOPTED SIBLINGS ARE CONSIDERED AS HALF-SIBLINGS WHEN ADOPTED BY ONLY ONE OF THE DECEASED PERSON'S BIOLOGICAL PARENTS.
- (6) GRANDPARENTS IN ORDER OF SENIORITY.
- (7) OTHER ADULT BLOOD RELATIVES IN ORDER OF RELATIONSHIP TO THE INDIVIDUAL UNDER THE LAWS OF THE DECEASED'S DOMICILE. WHEN TWO INDIVIDUALS ARE OF EQUAL RELATIONSHIP, PRIORITY WILL BE DETERMINED BY AGE.
- (8) REMARRIED SURVIVING SPOUSE. FOR THIS DIRECTIVE, THE REMARRIED SURVIVVNG SPOUSE IS ONE WHO WAS NOT DIVORCED FROM THE DECEASED AND HAS REMARRIED AT THE TIME DISPOSITION OF REMAINS IS TO BE MADE. THE LATTER WOULD APPLY TO THE CASE OF A SOLDIER WHO HAS BEEN DECLARED DECEASED, BODY NOT RECOVERED, AND WHOSE REMAINS ARE LATER RECOVERED AND IDENTIFIED.
- (9) PERSON IN LOCO PARENTIS.
- (10) LEGAL REPRESENTATIVE OF THE ESTATE MAY MAKE DISPOSITION OF REMAINS WHEN ALL EFFORTS TO IDENTIFY OR LOCATE A PERSON DESIGNATED IN THE DD FORM 93 OR IN CATEGORIES (1) THROUGH (9) ARE UNSUCCESSFUL. THE LEGAL REPRESENTATIVE MUST BE PROPERLY APPOINTED BY A CIVIL COURT HAVING JURISDICTION OF THE DECEDENT'S ESTATE. THE LEGAL REPRESENTATIVE OF THE ESTATE WILL SUBMIT A CLAIM TO DIRECT DISPOSITION OF THE REMAINS THROUGH THE CASUALTY ASSISTANCE CENTER TO THE CDR, AHRC (AHRC-PED-D).
- (11) PERSONAL FRIEND OF THE DECEASED WHEN THE REMAINS ARE NOT CLAIMED BY A PERSON DESIGNATED IN SOLDIER'S DD FORM 93 OR IN (1) TO (10) ABOVE. THE CDR, AHRC (AHRC-PED-D) WILL DETERMINE THE PADD WHENEVER THE PADD WILL BE SOMEONE OTHER THAN A BLOOD RELATIVE OF THE DECEDENT.
- (12) WHEN THE PERSON DESIGNATED IN SOLDIER'S DD FORM 93 AND ALL KNOWN PERSONS IN CATEGORIES (1) THROUGH (10) RELINQUISH DISPOSITION AUTHORITY OR CANNOT BE IDENTIFIED OR LOCATED, THEN DISPOSITION OF THE REMAINS WILL BE MADE BY THE ADMINISTRATIVE DETERMINATION OF CDR, AHRC (AHRC-PED-D).

C. WHEN THE PERSON DESIGNATED BY THE SOLDIER ON THEIR DD FORM 93 AND THE HIGHEST IN THE ORDER LISTED IN (1) THROUGH (9) DECLINES IN WRITING TO DIRECT THE DISPOSITION OF REMAINS (OPTION 6, DA FORM 7302), THE AUTHORITY WILL BE OFFERED TO THE NEXT PERSON IN ORDER OF PRIORITY.

5. OTHER MEMBERS OF THE DECEASED SOLDIER'S FAMILY MAY NOT NECESSARILY AGREE WITH SOLDIER'S DESIGNATED PADD. THE ARMY WILL NOT BECOME INVOLVED WITH THIS FAMILY ISSUE AND WILL COMPLY WITH THE SOLDIER'S WISHES TO THE EXTENT POSSIBLE. HOWEVER, THE ARMY WILL COMPLY WITH A CIVIL COURT ORDER ENJOINING THE ARMY FROM TRANSFERRING CUSTODY OF THE REMAINS OR GRANTING CONTROL OR CUSTODY OF THE REMAINS TO A PERSON OTHER THAN THE PERSON DESIGNATED BY THE SOLDIER.

6. PERSONNEL OFFICES ASSISTING SOLDIERS WITH THE COMPLETION OF THE DD FORM 93 WILL ENSURE SOLDIERS MAKE A PADD DESIGNATION IN THE REMARKS SECTION AND INCLUDE NAME, RELATIONSHIP, ADDRESS WITH ZIP CODE, AND TELEPHONE NUMBER FOR THE PERSON DESIGNATED AS THE PADD. WHEN A SOLDIER DESIGNATES A BLOOD RELATIVE, OTHER THAN THE SPOUSE IF MARRIED OR A PARENT IF SINGLE, SOLDIER WILL BE COUNSELED BY AN OFFICER, WARRANT OFFICER, SENIOR NCO (SFC-CSM) OR CIVILIAN (GS-9 EQUIVALENT OR HIGHER) EMPLOYEE AND COPY OF THE COUNSELING WILL BE ATTACHED TO EACH COPY OF THE DD FORM 93. IF SOLDIER INSISTS ON DESIGNATING A RELATIVE OTHER THAN THE PRIMARY NEXT OF KIN, THE COUSELOR WILL ANNOTATE THE FOLLOWING COMMENTS IN THE COUNSELING FORM: ON (DATE) THIS SOLDIER WAS COUNSELED REGARDING THIS UNUSUAL PADD DESIGNATION.

7. CURRENTLY PADD INFORMATION MAY BE ENTERED IN EMILPO UNDER THE ADDITIONAL EMERGENCY INFORMATION CATEGORY. AFTER THIS SELECTION IS MADE, THE SYSTEM WILL DISPLAY THE DATA RELATED TO THE SELECTED SOLDIER'S PADD INFORMATION. YOU MAY SELECT INDIVIDUAL AUTHORIZED TO DIRECT DISPOSITION OF SOLDIER'S REMAINS AND ENTER THE ADDRESS WITH ZIP CODE, AND TELEPHONE NUMBER IN THE GENERAL REMARKS BLOCK. THE DATA YOU PLACE IN THIS CATEGORY: ADDITIONAL EMERGENCY NOTIFICATION DATA WILL CURRENTLY PRINT IN THE CONTINUATION/REMARKS BLOCK OF THE DD FORM 93. A CHANGE TO EMILPO WILL BE MADE IN THE NEAR FUTURE TO MODIFY THE MANDATORY RECORDING OF PADD INFORMATION AND MAKE THIS INFORMATION A SEPARATE LINE ITEM.

8. POC IS LTC OBRIEN, DSN 221 OR COMMERCIAL 703-325-9201 OR MR. HARRY CAMPBELL, 703-325-7576

Use this URL to link to this document

<http://PERSCOMND04.ARMY.MIL/MILPERmsgs.nsf/All+Documents/06-020?OpenDocument>

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GIFTS

¹ Indexes prepared by Major Andrew R. Atkins, Judge Advocate, U.S. Army. Presently assigned as a student, 60th Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, VA. J.D., 2007, University of Washington School of Law, Seattle, WA; B.S., 2000, U.S. Military Academy, West Point, N.Y. Member of the Bar of Washington.

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ESTATE PLANNING DOCUMENTS PART 1: WILL WORKSHEET as of 26 AUG 09

CLIENT INFORMATION:

Your Full Name (first, middle, last): John Lucpee Card, Rank: CPT, *SSN: 123-45-6789
Present Address: 1701 Star Street, Enterprise TX 76752
X Male, Female; U.S. citizen? X Yes No; State of Legal Residence: TX
*Unit of Service Member: HHC, III Corps Fort Hood, TX
Duty Phone: Home or Cell Phone: (512) 222-2222, *ETS: *PCS:
(If You Have a Prior Will or Estate Plan, Check This Block)

MARITAL STATUS (select the most appropriate):

- A. X Married once, and my spouse is alive.
B. Married and spouse is alive, but were married before (a prior spouse died or was divorced)
C. Widow/ widower.
D. Previously married, but now divorced and single.
E. Single, never married.
Spouse's full name: Jean Gray Card SSN: 234-56-7890 Is spouse a U.S. citizen? X Yes No

CHILDREN: X Yes No; If yes, is any child a minor (under 18 years)? X Yes, No;
If no, are you expecting a child? Yes, X No
Please list your children's full names, ages, sex, and their relation to you, i.e., whether they are your biological, adopted, or stepchild:

- 1. NAME: Scott Summer Card AGE: 5 SEX: M RELATION: Son
2. NAME: Logan Wolf Card AGE: 3 SEX: M RELATION: Son
3. NAME: AGE: SEX: RELATION:
4. NAME: AGE: SEX: RELATION:

Is any biological child from a previous relationship? Yes X No. Does any child have special needs? Yes X No
If you have adopted children or stepchildren, do you wish to treat them the same as your natural children? X Yes No

VALUE OF ESTATE: To determine what type of will is appropriate for you, we need an estimate of the value of your estate.
Include the value of all of the property you own in your name, and if married, the value of your spouse's property.
Approximate value of your estate (not including life insurance): \$100K Value of life insurance (self): \$400K

DO YOU OWN A FAMILY FARM/FAMILY-OWNED BUSINESS: Yes X No

DO YOU OWN ANY REAL ESTATE X Yes No (If no, skip to next section); If yes, what is its value? 200K
If yes, who do you own it with? NAME: NA RELATION:
In what state is the real property located? TX
To whom do you want to give the real estate:

- A. X All to the spouse, if he/she survives (if no spouse, to residuary estate; pass free of mortgage)
B. to one or more different beneficiaries.
NAME: RELATION:
NAME: RELATION:
C. all real estate is to pass as part of the residuary estate, rather than being separately devised
D. just the Testator's home to the wife (with other real estate passing as part of the residuary estate)
E. the wife is to have a life estate.

GIVING AWAY YOUR PROPERTY

PERSONAL EFFECTS AND TANGIBLE PERSONAL PROPERTY: How do you wish to give your personal property?
SELECT ONE ONLY
A. All to my spouse (If you wish to give everything to your spouse, OR to disinherit spouse check (D))
B. As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to spouse).
C. X As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to residuary estate) (Star Fleet Academy Ring to Mother)
D. As provided with regard to the residuary estate - SELECT THIS IF SINGLE.

RESIDUARY ESTATE: Your residuary estate is whatever property remains after paying debts and expenses of administration, and any specific bequests.
A. X All to my spouse if he/she survives me, and if not, then to my children and issue.
B. A marital deduction trust f/b/o the spouse (or if she predeceases, to the child and issue)
C. A minimum bequest to my spouse, (disinheriting them to the fullest extent of the law, with the remainder going to child(ren) or other person(s).
D. Various other types of dispositions listed on top of back (check D if you are single and see selections top of back).

- A. All to one specific beneficiary. NAME: _____ RELATION: _____
- B. To more than one beneficiary. If you have more than one beneficiary, are they:
- Specific people who are to share equally. NAME: _____ RELATION: _____
NAME: _____ RELATION: _____
 - A group of people described as a class (e.g., "my brothers and sisters") who are to share equally.
Explain: _____
 - Some other unequal division between the beneficiaries (e.g., 50% to one beneficiary and 25% each to two others). Explain: _____
 - Other. Explain: _____

MINORS: If **any** of your beneficiaries is a minor, at what age do you want them to receive their gift? 18; 21; 1/2 @ 21 and 1/2 @ 25; 1/3 @ 21, 1/3 @ 25, 1/3 @ 30; Some other age: _____ (please indicate the age) (NOTE: Selecting an age greater than 21 will likely require a trust, which may cause your estate to incur additional expenses for the administration of the trust. These would lower the amount available for your beneficiaries. Please **READ LEAVING PROPERTY TO MINORS** below.

SECONDARY/CONTINGENT BENEFICIARIES: If all of the beneficiaries you designated above (spouse, children) die before you, to whom do you wish to leave your estate?

- 1st Contingent-NAME: Harry Pott Card RELATION: brother % 50
NAME: Miley Cirus Card RELATION: sister % 50
- 2nd Contingent-NAME: _____ RELATION: _____
- Last Resort- NAME: _____ RELATION: _____

GRANDCHILDREN: If you had grandchildren would you want them to receive your child's share if your child did not survive you?
 Yes No

EXECUTOR: Your Executor (or "personal representative") ensures your estate is settled upon your death. This ordinarily involves going through "probate", a court-administered procedure for settling an estate as provided in your will or under State law. Whom do you wish to have as your executor (cannot name a minor)? (CHECK ONE and follow instructions)

- A. My spouse. NO NEED TO LIST SPOUSE'S NAME.
- B. My spouse and a co-executor. Name co-executor below.
- C. My spouse and a successor executor. Name successor executor below.
- D. One executor other than my spouse. Name executor below.
- E. Two co-executors, neither of whom are my spouse. Name two co-executors below.
- F. One executor and a successor executor, neither of whom are my spouse. Name one executor and a successor below.

NAME: Tar Zan Card RELATION: Father
NAME: Jane Card RELATION: Mother

GUARDIAN: Do you wish to appoint a legal guardian for a minor child **other** than the child's other natural parent?

- A. One guardian for any child when I die. NAME: _____ RELATION: _____
- B. One guardian and a successor guardian. NAME: Jane Card RELATION: Mother
SUCCESSOR NAME: Harry Pott Card RELATION: Brother
- C. Two co-guardians. Co #1 NAME: _____ RELATION: _____
Co #2 NAME: _____ RELATION: _____

CUSTODIAN OF PROPERTY: Would you like the child's guardian, regardless of who it is, to be the custodian of the child's property? YES NO. If no, who: NAME: Tar Zan Card RELATION: Father

LEAVING PROPERTY TO MINORS: Instead of giving your estate directly to a MINOR beneficiary, you may give it to a Trustee, IN TRUST, for the benefit of the minor until they reach the age you designate. The trustee will manage the trust under court supervision. Although the trustee's primary purpose is to safeguard the inheritance, the money can also be used for any minor's health, education, welfare, or maintenance, at the trustee's discretion. For many people, a trust is unnecessary because, under the Uniform Gifts to Minors Act (UGMA/UTMA) language in your will, gifts to beneficiaries under 18 (or, if you prefer, 21) will be controlled by your executor initially, and guardian after probate, without establishing a trust. The executor and/or guardian can still use the minor's inheritance for the benefit of the minor, and this is ordinarily less complicated and less expensive than a trust. Unless you have children from a prior marriage, disabled children, or a very large estate, you might prefer not to use a trust. One disadvantage, however, to the UGMA is that your estate will be divided in as many equal shares as there are minor beneficiaries designated; each minor will receive the remainder of their share as they turn 18 or 21, at your option. A trust may be more appropriate if you do not want your child to get property until after age 21.

Do you want a trust? Yes No. (If yes, would this be: One trust for the benefit of all beneficiaries ("pooled" trust), or Individual trusts for each of the beneficiaries. NOTE: Individual trusts can be very expensive.

IF YES WHO DO YOU WANT AS TRUSTEE? (Please list name and relationship):

- A. One trustee. NAME: _____ RELATION: _____
- B. Two co-trustees. NAMES: _____ RELATION: _____
RELATION: _____
- C. One trustee and a successor. NAME: _____ RELATION: _____
NAME: _____ RELATION: _____
- D. One trustee and a co-trustee who is to be later appointed by the executor.
NAME: _____ RELATION: _____

OFFICE USE ONLY

Date Briefed: _____, **Briefed by:** _____, **Location** _____; **Attorney:** _____; **Date:** _____
Mode: CS (SRPC); CD (Demob); CL (Reg. Appt.); CE (ERDE); CN (NEO); CM (Mob Depl Read Ex); CP (Premob); **Case:** WW (Will), WA (AMD), WS (SGLI); **Services:** SW (Will prep); ST (Will w-trust/guardian); SV (AMD); SC (Counsel)

ESTATE PLANNING DOCUMENTS PART II SCREENING QUESTIONNAIRE

Questions are asked about your spouse to remind YOU to coordinate your estate plan with your spouse's estate plan.

PERSONAL INFORMATION

DATE: _____

1. Marital Status			
<input checked="" type="checkbox"/> Married	<input type="checkbox"/> Single	<input type="checkbox"/> Widowed	<input type="checkbox"/> Divorced
<input type="checkbox"/> Separated or about to divorce			
2. Your Name (First, Middle, Last)	Soc. Sec. No.	Date of Birth	
John Lucpee Card			
3. Spouse's Name (First, Middle, Last)	Soc. Sec. No.	Date of Birth	
4. Home Address (Number, Street)	City	State	Zip
5. Mailing Address If Different From Above (Number, Street)	City	State	Zip
6. Home Phone	Your Work Phone	Spouse's Work Phone	
()	()	()	
7. Your Command/Employer	Your Rank/Grade	Your Occupation	
8. Spouse's Command/Employer	Spouses Rank/Grade	Spouse's Occupation	

Circle or fill in your answers	You	Your Spouse
1. Are you a U.S. citizen?	X Yes No	X Yes No
2. Do you have a will or trust now?	Yes No X	Yes No X
3. Are you expecting to receive property or money from (circle all that apply):..... If so, approximately how much?.....	Gift Inheritance Lawsuit - Other \$	Gift Inheritance Lawsuit - Other \$
4. How many living children do you have?.....	2	
5. Are all your children legally yours (natural or legally adopted)?	X Yes No	Yes No
6. How many stepchildren do you have?	0	
7. In which state do you vote?	TX	
8. Which state issued your driver's license ?	TX	
9. In which state is your car registered?	TX	
10. In which state(s) do you own real estate?	TX	
11. Do you pay state income tax? If yes to which state?	NA	
12. In which state do you plan to retire/live permanently?	TX	
13. Have you ever lived in a Community Property State? (AZ,CA,ID,LA,NV,NM,TX,WA,WI & PR)	X Yes No	Yes No
14. Do you have a pre-nuptial or post-nuptial agreement?.....	Yes No X	Yes No
15. Do you have a divorce decree affecting your pension or other property rights?.....	Yes No X	Yes No
<i>If "yes" to questions 2, 14 or 15, you must bring these documents to your appointment</i>		

FINANCIAL INFORMATION

1. Do you own a home or any other real estate? Indicate which is your residence/homestead.

Description and Location	Titled in whose name Indicate if Joint or Beneficiary and name	Purchase Price	Market Value	Mortgage	Market Value - Mortgage Equity
Single Family Home, TX	Separate Property - Self	250K	200K	100K	100K
Total Net Value					

2. Do you own any other titled property such as a car, boat, etc.?

Description	Titled in whose name Indicate if Joint or Beneficiary and name	Market Value	Less Mortgage	Equity
Total Net Value				

3. Do you have any checking accounts?

Name of Bank	Titled in whose name Indicate if Joint or Beneficiary and name	Approx. Balance
Total Value		

4. Do you have any interest bearing accounts (savings, money market) and/or CD's?

Name of Bank	Titled in whose name Indicate if Joint or Beneficiary and name	Approx. Balance
Total Value		

5. Do you own any stocks, bonds or mutual funds (including company stock)?

Number Shares	Name of Security	Titled in Whose Name Indicate if Joint or Beneficiary and name	Purchase Price	Current Value
Total Value				

Location	Titled in whose name

MANAGEMENT DECISIONS: YOUR ESTATE MANAGEMENT TEAM

1. Personal Representative/Executor: Manages the probate and settlement of your estate. Can be your spouse, adult children, trusted friends, and/or a corporate fiduciary.

For You

For Your Spouse

Name: _____

Name: _____

2. Successor Personal Representative: Back-up Manager-Steps in after your first personal representative dies/resigns; in the case of a living trust at your death or disability. Can be your adult children, trusted friends, and/or a corporate fiduciary.

For You

For Your Spouse

1st Successor: Name: _____

Name: _____

Address: _____

Address: _____

2nd Successor: Name: _____

Name: _____

Address: _____

Address: _____

3. Trustee: Manages the administration and investments in your trust. Should be someone with financial responsibility and experience. If you are creating a trust of which your spouse is to be both the beneficiary and trustee (e.g. a tax saving Credit Shelter Trust (B Trust) you **should** also name a co-trustee to make discretionary decisions.

For You

For Your Spouse

Name: _____

Name: _____

4. Successor Trustee (or Co Trustee): Back-up Manager-Steps in after your first Trustee dies/resigns. Can be your adult children, trusted friends, and/or a corporate fiduciary.

For You

For Your Spouse

1st Successor: Name: _____

Name: _____

Address: _____

Address: _____

2nd Successor: Name: _____

Name: _____

Address: _____

Address: _____

You may provide that the Personal Representatives and/or Trustees be insured, or bonded, to protect the beneficiaries:
 The Personal Representative should be bonded Yes No The Trustee should be bonded Yes No

5. Guardians For Minor Children: Responsible adult who will raise your children if something happens to you.

For You

For Your Spouse

#1 Choice: Name: _____

Name: _____

Address: _____

Address: _____

#2 Choice: Name: _____

Name: _____

Address: _____

Address: _____

#3 Choice: Name: _____

Name: _____

Address: _____

Address: _____

BENEFICIARIES

1. Special Gifts To Organizations

Do you want to make a gift (cash or a specific item) to a charity, foundation, religious or fraternal organization?

Name of Organization	Description of Gift	Alternate Beneficiary
Lutheran Church of Austin Texas	\$5,000	NA

2. Special Gifts To Individuals

Do you want to give any specific items or cash gifts to a family member or other individual? (For example: wedding ring to your daughter, gun collection to a son or nephew, etc.)

Name of Person	Description of Gift or Amount	Alternate Beneficiary

3. Beneficiaries

Who do you want to receive the rest of your estate after these special gifts have been distributed? You can designate a dollar amount or percentage, however the percentages are easier, and must add to 100 per cent.

Name of Person/Organization	Amount/Percentage	Alternate Beneficiary

4. Inheriting Instructions

List your children

Name	Address	Age	T=This Marriage P= PreviousMarriage	Married? Y or N	Number of Grandchildren

5. Do you want your children to receive their inheritance in installments, at certain ages, or all at once? In what amounts and at what age(s)? Your children's inheritance can be held in trust and managed for them until they are at any age you chose (21, 25, 30, etc) and used for their education and other needs until that time. This method waits until the children are mature enough to handle money.

6. If a child dies, do you want that child's share to go to that child's children, your grandchildren, (Per Stirpes) X or do you want that child's share to be divided among *only* your other living children (Per Capita). , nothing to a grandchild whose parent died.

7. Do you want to ensure that your children from a previous marriage receive a share of your estate? **You** Yes No **Your Spouse** Yes No

8. List Dependents Who Require Special Care
Do you want to provide for "basic" care or luxuries and other extras to supplement government benefits? Yes No

9. Alternative Beneficiaries

Who do you want to receive your estate if you (and your spouse) outlive the beneficiaries you've named above?

Name of Person/Organization	Amount/Percentage

10. Disinheriting

Are there any relatives that you specifically do not want to receive anything from your estate?

SPECIAL INSTRUCTIONS FOR INCOMPETENCY

1. Keeping/Selling Assets

If necessary to pay for your care, do you want certain assets sold first? Are there potential buyers you want contacted?

2. Medical Care

Do you want to be in (or avoid) a certain hospital/nursing home? _____

A Living Will makes your wishes known to family and doctors regarding life support and the following decisions in the event you become terminally ill or injured with no hope for recovery. Do you want a living will?	You	Your Spouse
	X <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

Please answer the following for your Living Will:

	You	Your Spouse
If you have a terminal condition, diagnosed by two (2) doctors, do you want your life artificially prolonged by machine?	<input type="checkbox"/> Yes <input type="checkbox"/> No X	<input type="checkbox"/> Yes <input type="checkbox"/> No
Nutrition and Hydration (Food and Water) by tube?	<input type="checkbox"/> Yes <input type="checkbox"/> No X	<input type="checkbox"/> Yes <input type="checkbox"/> No
Blood Transfusions?	<input type="checkbox"/> Yes <input type="checkbox"/> No X	<input type="checkbox"/> Yes <input type="checkbox"/> No
Organ Transplants?	<input type="checkbox"/> Yes <input type="checkbox"/> No X	<input type="checkbox"/> Yes <input type="checkbox"/> No
Upon your death, do you wish to donate your organs?	X <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
For transplants	X <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
For science or medical research	<input type="checkbox"/> Yes <input type="checkbox"/> No X	<input type="checkbox"/> Yes <input type="checkbox"/> No
Do you wish to die at home rather than in a hospital or nursing home?	X <input type="checkbox"/> At home <input type="checkbox"/> Hosp / Nur Home	<input type="checkbox"/> At home <input type="checkbox"/> Hosp / Nur Home

A **Durable Power of Attorney For Health Care** gives broader protection. Do you want to appoint someone (spouse, child, friend) to make health care decisions for you when you are unable to, but not necessarily terminal? If so provide the following:

For You

For Your Spouse

1st Choice: Name: ___ Spouse _____ Name: _____

Address: ___ Same Address _____ Address: _____

2nd Choice: Name: Mother, Jane Card_(Only if Spouse is Incapacitated)_ Name: _____

Address: ___ 601 Massie Ave, Enterprise TX 78752 _____ Address: _____

Phone: (512) 111-1111

A **Durable General Power of Attorney** appoints an agent that can make any decision and do any act that you can, and it will continue to be in force even after you become incapacitated. It is a very powerful document and should only be granted with great care, and then only to a person that you have the utmost trust in. If you wish a Durable General Power of Attorney provide the following

For You

For Your Spouse

1st Choice: Name: _____

Name: _____

Address: _____

Address: _____

2nd Choice: Name: _____

Name: _____

Address: _____

Address: _____

SPECIAL INSTRUCTIONS FOR FUNERAL/BURIAL

1. What type of service do you want, how elaborate, and where? Any special people to contact? Do you want cremation?

_____ **Full Military Honors at Fort Sam Houston National Cemetery**

2. If you have a cemetery lot, where is it located?

Cemetery Name

City

State

CAUTION: The options in this exercise do not constitute a good estate plan. Instead, this exercise is designed only to expose you to DL Wills.

Other Instructions FOR THIS EXERCISE ONLY!

The Testator wants his Executor to have:

- Independent Executor Powers
- Power to Allocate GST Exemption

The Testator wants to have:

- Disclaimer provisions prepared for his spouse
- If his spouse predeceases him, he wants his property to go to his Children
- An UTMA/UGMA Custodial Account for Minor Children
- His Health Care Agent to Deal with his Remains
- His military service mentioned in his will as well as his Duty Station

The Testator does not want:

- His guardians to have to post a bond nor have an accounting/inventory to a ward

You will have a civilian notary public for the execution.

Note: The text file will be saved in C/DL win

CHAPTER I SURVIVOR BENEFITS

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Last Updated 24 JAN 12

SURVIVOR BENEFITS

I. REFERENCES.

- A. DFAS website at <http://www.dfas.mil/dfas/retiredmilitary/survivors/Retiree-death.html> (last visited 24 JAN 12).
- B. Army Reg. 600-8-1, Army Casualty Operations/Assistance/Insurance (30 April 2007).
- C. Army Reg. 930-4, Army Emergency Relief (22 February 2008).
- D. DA Pamphlet 360-526, Once a Veteran (1 January 1992).
- E. U.S. Army Human Resources Command, Retirement Services Office (RSO), with information available at <http://www.armygl1.army.mil/rso/PreRetirement.asp> (last visited 24 JAN 12).
- F. U.S. Army Human Resources Command—Army Reserve, with information available at <https://www.hrc.army.mil/site/reserve/soldierservices/retirement> (last visited 24 JAN 12).
- G. My Army Benefits web page:
[http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Survivor_Benefit_Plan_\(SBP\).html](http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Survivor_Benefit_Plan_(SBP).html) (last visited 24 JUN 12).
- H. Armed Forces Services Corporation, 2800 Shirlington Road, Suite #350, Arlington, VA 22206-3601. Information is available at <http://www.afsc-usa.com/societies.html> (last visited 24 JAN 12).
- I. FinancialPoint available at United States Department of Veterans Affairs website at <http://www.insurance.va.gov/SGLISITE/BFCS/BFCS.htm> (last visited 24 JAN 12).

II. THE RELEVANCE OF SURVIVOR BENEFITS.

- A. What Are Survivor Benefits?
- B. Situations Requiring an Understanding of Survivor Benefits.
 - 1. Lifetime planning.
 - a. Insurance needs.
 - b. The Survivor Benefit Plan.
 - 2. Casualty assistance.

SURVIVOR BENEFITS

<u>Monthly Payments</u>	<u>Lump Sum Payments</u>	<u>Other Benefits</u>
DIC	SGLI	BURIAL REIMBURSEMENT
SBP	TRAUMATIC INJURY PROTECTION	RELOCATION
SOCIAL SECURITY	DEATH GRATUITY	MEDICAL CARE
DEA	UNPAID PAY/ALLOWANCES	PX/COMMISSARY

III. DEPENDENCY AND INDEMNITY COMPENSATION (DIC)
(PUB. LAW. 112-53; 38 U.S.C. §§ 1301-1322; 38 C.F.R. PART 3).

A. Conditions for Payment.

1. Active Army.

- a. Death on active duty, by service-connected injury or disease, and not due to member's willful misconduct. If death occurs on active duty, a presumption arises that death was service-connected.
- b. Death after active duty from service-connected causes, not due to member's willful misconduct.
- c. Death after active duty not due to service-connected causes and not due to member's willful misconduct if decedent held a total service-connected disability rating.

2. Reserve Component.

- a. "Active Duty" includes AD, ADT, and IDT. However, if death occurs in connection with IDT, only IDT deaths due to injury (not illness) are covered; and
- b. Periods of travel to and from AD, ADT, and qualifying IDT are included, but only if travel accomplished by most direct means.

3. "Service connection." See paragraph A.1. above.

4. Death or injury cannot be due to member's "willful misconduct."
 - a. Willful misconduct involves deliberate or intentional wrongdoing with knowledge of or wanton disregard of consequences.
 - b. Requires proximate cause to injury, disease, or death to prohibit payments.
5. The Department of Veterans Affairs makes the ultimate determinations on service-connection and "willful misconduct" for purposes of DIC. Appeal is to the Court of Veterans Appeals.

B. Beneficiaries.

1. DIC to widow(er).
 - a. Spouses must have continuously cohabited since date of marriage.
 - b. Any separation not due to fault of surviving spouse; temporary separations disregarded (38 C.F.R. §§ 3.52 and 3.53).
 - c. Fraudulent marriages. Generally, for soldiers who separate from active duty, subsequently marry, and then die under circumstances described in paragraphs A.1.b. and A.1.c. above, the marriage must:
 - (1) have begun within 15 years after separation from active duty;
 - (2) have existed for at least one year; or
 - (3) produced a child (38 C.F.R. § 3.54(c)).

- d. The eligibility of certain remarried surviving spouses can be reinstated for DIC upon termination of that marriage. 38 U.S.C. § 103 and 38 U.S.C. § 1311 (comments).
 - (1) The remarriage of the surviving spouse shall not bar DIC if the remarriage is terminated by death, divorce, or annulment unless it is determined the divorce or annulment was secured through fraud or collusion.
 - (2) If the surviving spouse ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting that person DIC as the surviving spouse shall not apply.
 - (3) The first month of eligibility for DIC will be the later of the month after the month the termination of such remarriage or the month of the cessation living with another person and holding himself or herself out openly to the public as that person's spouse.
- e. Surviving spouses who remarry on or after the date they reach age 57 do not lose their entitlement to DIC and to related home loan and education benefits. 38 U.S.C. § 103(d).
- f. For deaths after January 1, 1993, the spouse DIC monthly rate in 2012 is \$1,195. It is a flat monthly payment, independent of the pay grade of the veteran.
- g. For surviving spouses with children under the age of 18, there is an increased monthly payment of \$250 per month for two years following the date of death. 38 U.S.C. § 1311(f).

2. DIC to children.

- a. Children are broadly defined: Legitimate, adopted, stepchildren in household, or even illegitimate children (38 C.F.R. § 3.57).
- b. Must be unmarried and under age 18, or under age 23 if in school.

- c. Amounts payable (children in the custody of a surviving eligible spouse).
 - (1) Under age 18 (in 2012) - \$296 per child. 38 U.S.C. § 1311(b).
 - (2) Age 18 to under age 23 (in school) (in 2012) - \$296 per child unless child is receiving Chapter 35 benefits (Dependent's Educational Benefits).
 - (3) These are the amounts payable to all children when there is a surviving spouse entitled to DIC. Payment to “all” children of the deceased veteran will be at these amounts. This includes children in the custody of former spouses or children born out of wedlock. (BVA 00-09216)

 - d. Amounts payable (if no surviving eligible spouse). DIC is calculated on the basis of the total number of eligible children.
 - (1) One child - \$505.
 - (2) Two children - \$725.
 - (3) Three children - \$947.
 - (4) Each additional child adds \$180.
3. DIC to parents (38 U.S.C. § 1315).
- a. Must have been dependent on deceased.
 - b. Parent(s) must be below income ceiling.
 - c. Amounts paid based on number of parents surviving.

C. Tax Consequences.

1. Not includable in decedent's gross estate.
2. Not taxable income to the recipient.

D. Application.

1. Apply to VA within 12 months to receive full payment from date of death (VA Form 21-534a, Application for DIC).
2. If application is received by VA more than 12 months after death, then payments are retroactive only to date of application (38 C.F.R. § 3.400(c)).

IV. SURVIVOR BENEFIT PLAN (SBP) (10 U.S.C. §§ 1447-1460B).

A. Eligibility to Participate.

1. Active duty members who die in the line of duty while on active duty. 10 U.S.C. § 1448(d).
2. Active duty retired.
3. Retired with 30% or greater disability.
4. Reservists eligible to retire (includes Army National Guard). (See Pub. L. No. 95-397, 1 Oct. 1978, extended coverage (RC-SBP) to Reserve soldiers completing 20 years, but not yet 60 years of age).

B. Eligible Beneficiaries for SBP and RC-SBP. 10 U.S.C. § 1448

1. Widow(er).

a. Defined. A spouse who survives a military retiree where the marriage either:

(1) was in effect when soldier became eligible to receive retirement pay,

(2) was in effect for at least one year immediately before retiree's death, or

(3) produced issue (i.e., children).

b. Remarriage before age 55 terminates the SBP annuity. Annuity may be reinstated if widow(er)'s second spouse dies or there is a divorce.

2. Former spouses.

3. Widow(er) and children. Full payment made to widow(er) as long as eligible; then full payment made to remaining eligible children as a group. Child eligibility:

a. Child under age 18 and unmarried.

b. Unmarried and under 22 if a full-time student.

c. Incapacitated before 18 or 22 - paid for life.

4. Children only. Usually elected when there is no eligible spouse or the surviving spouse plans on getting remarried quickly. Servicemembers E6 and below may want to select "Children only" due to the SBP/DIC offset since little to no SBP may actually be received.

5. Natural person with an insurable interest. 10 U.S.C. § 1448(b).
 - a. Any person with a financial interest in survival of the Soldier.
 - b. This option may not be elected by eligible participants who are married or have children.

C. Annuity Amount.

1. If Soldier elects to participate in SBP, Soldier then selects a "base" amount. The base amount can be anything from \$300 to the full amount of Soldier's retired pay. The Soldier also selects a beneficiary, which in most cases will be the spouse. The Soldier has a premium deducted from each retirement check, and if the Soldier dies before the spouse (or other eligible beneficiary), the beneficiary will begin receiving the monthly SBP payments.
2. Supplemental SBP (SSBP). Completed phased out as of 1 April 2008. All spouses still eligible to receive SBP are receiving 55% of the base amount.
3. Payment to all other beneficiaries (nonspouses) is at 55% of base for as long as they maintain eligibility.

D. Active Army Retiree Cost for SBP Coverage.

1. Determine desired base.
 - a. Minimum = \$300.
 - b. Maximum = full retired pay.
 - c. Any amount in between.
2. Determine type of coverage.

a. Widow(er)-only coverage.

(1) Formulas (10 USC § 1452):

(a) 2.5% of an amount as adjusted by inflation (e.g., in 1989, the amount was \$337; See 10 USC §1452(a)(1)(A)(iii)), plus 10% of selected base over that amount (OLD Formula); or

(b) Flat 6.5% rate of full base amount (NEW Formula).

(2) Example: Base Amount = \$2,000.00.

(a) Old Formula:

2.5% of an amount (e.g., \$572)	= \$ 14.30
10% of \$1,428	= \$ <u>142.80</u>
monthly cost	= \$ 157.10

(b) New Formula:

$\$2,000 \times 6.5\% = \130.00

(3) The formula producing the least amount of cost will be used. See 10 USC §1452. In the example, the new formula produces the least cost. As a rule of thumb, if the base amount exceeds \$1,225 then the new formula is used; if the base amount is less than \$1,226, the old formula is used.

(4) For those entering the service on or after March 1, 1990, only the new formula (flat 6.5% of base) will be used.

b. Widow(er) plus children coverage.

(1) Cost of widow-only coverage, plus

- (2) Actuarial amount that accounts for the difference in age between the retiree and the spouse and the age of youngest child.
 - c. Children-only coverage. Cost is based upon actuarial tables comparing the ages of the retiree and the youngest child. If married at time of election, then spouse must approve in writing.
 - d. Former spouse coverage. For former spouse elections effected on or after 1 March 1986, costs and annuities are computed by the same formula used to compute costs and annuities for spouse coverage (10 U.S.C. § 1450(a)).
 - e. Natural person with insurable interest (10 U.S.C. § 1448(b)(1)).
 - (1) By statute, this can only be elected if retiree has no spouse or dependent children (*Cf.* Comp. Gen. B-179465, 1974 WL 7682, which allowed this coverage for a child).
 - (2) Cost is 10% of base amount plus 5% of base amount for each five years beneficiary is younger than retiree (to a maximum of 40% of base amount).
 - 3. Withholding stops if the beneficiary dies or otherwise loses eligibility. Must notify finance office.
- E. Election.

1. Soldiers who are on active duty and have completed 20 years of active federal service are automatically enrolled in SBP without any affirmative election. Enrollment is at the full base amount of retired pay calculated as if the soldier had been retired on the day of death. Both widow(er) and children are covered (10 U.S.C. § 1448(d)(1) and (2)). “[T]he Secretary concerned may pay an annuity ... to the member’s dependent children... instead of paying an annuity to the surviving spouse..., if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children ... instead of an annuity for the surviving spouse....” 10 U.S.C. § 1448(d)(2)(B).
2. Active Army Retirees: Soldiers who are about to retire and who do not want to participate in SBP must make an election not to participate before they retire.
3. Reserve Component: Retirement eligible reserve component members have 90 days to elect, with the period running from receipt of their letter of notification of eligibility for retired pay at age 60 ("20-year letter"). Reserve component members can defer the election until age 60. However, if they defer the election and die before making an election to participate in SBP, their beneficiaries will not benefit from SBP.
4. **An election of no coverage, less than full coverage for a widow(er), or children-only coverage requires written spousal concurrence. The spouse’s signature must be witnessed.** 10 U.S.C. § 1448a(b)(1).

5. If a soldier is married at the time of retirement, the election made is generally irrevocable. However:
 - a. Can withdraw from the SBP between second and third anniversary from date of enrollment with concurrence of spouse and/or notification to former spouse. 10 U.S.C. § 1448a. To withdraw from SBP, the withdrawal must be done on DD Form 2656-2 (APR 2009).
 - b. An eligible participant need not continue premium payments if beneficiaries are no longer eligible.
 - c. An eligible participant who has spousal coverage and loses spouse to death or divorce may withdraw after remarrying. Finance must be notified of intent to withdraw, however, before second marriage produces issue or reaches its first anniversary.
 - d. An eligible participant who becomes permanently and totally disabled may withdraw.
 6. If beneficiary elected by the participant dies, the participant may elect a new beneficiary with an insurable interest within 180 days. This election must be done in writing. Premiums will be recalculated based upon the beneficiary selected. If the participant making the election dies within two years of the election, premiums will be paid back to the beneficiary. NDAA FY 2007, § 1448(b)(1)
 7. An unmarried soldier who retires and later marries and/or acquires dependent children may opt into the plan at that time.
- F. Reserve Component Cost for SBP (see Appendix A).

G. Spousal SBP Reduction Due to DIC Offset.

1. Any SBP or RC-SBP annuity to which surviving spouse is entitled will be reduced by amount of spousal DIC entitlement. The offset is mitigated, however, by a pro rata, lump sum return of SBP premiums paid (10 U.S.C. § 1450(e)). However, due to *Sharp v. U.S.* 580 F.3d 1234 (2009), surviving spouses who remarry after the age of 57 will not experience any offset between SBP and DIC. As a result of their full receipt of both SBP and DIC, they will not receive SSIA.
2. Any SBP or RC-SBP annuity payable to other beneficiaries (e.g., children) is not reduced, even if that beneficiary is also eligible for DIC.
3. Starting in FY09 an indemnity allowance began for those affected by the DIC offset. If the surviving spouse is receiving DIC and SBP the offset will continue, however the surviving spouse will receive additional compensation from \$50 in 2009 to \$310 in 2016.

H. SBP Tax Consequences (Federal).

1. Amounts withheld (premium payments) are not reportable as income for tax purposes (I.R.C. § 122).
2. Payments to beneficiaries are taxable as ordinary income.
3. The present value of the SBP annuity could be subject to federal estate tax in the retiree's estate.

I. Paid up coverage under SBP. (10 U.S.C.S. § 1436a).

1. 30 years of SBP premiums paid.
2. Over 70 years of age.
3. Effective date: 1 October 2008.

- J. SBP Tax Consequences (state). States could tax the payments as income to the beneficiary and tax the estate of the retiree who buys into the SBP program.
- K. Advantages of SBP (in comparison with commercial life insurance). There are basically three commercial insurance alternatives to SBP: annuities, term life insurance, and universal/whole life insurance. For various reasons, commercial insurers do not pitch annuities as replacements for SBP. Rather, they recommend term, whole life, or some combination of the two. Upon the retiree's death, the surviving spouse is supposed to collect the lump sum insurance proceeds, invest them, and draw a monthly check from the investment. There are a variety of factors that might favor SBP in such an analysis.
1. Government subsidized; no administrative costs or commissions. Premium costs for children coverage and small amounts of widow(er) coverage are particularly low. A fantastic bargain if child is incapacitated - child paid for life.
 2. SBP premiums paid for SBP coverage are not taxable income to the retiree. In other words, the money taken out of retirement pay to pay the SBP premiums reduce the taxpayer's taxable income.
 3. SBP payments to beneficiary increase with cost of living adjustments to retired pay.
 4. Guaranteed insurability.
 5. Commercial insurer more likely to go out of business than the government.
 6. Value of SBP increases when factors exist that increase the probability that the retiree will not outlive spouse. Some factors include:
 - a. Retiree is older than spouse;
 - b. Retiree has poorer health or a less healthy lifestyle than spouse (i.e., smoker); and
 - c. Retiree is male (vs. female).

- L. Disadvantages of SBP in comparison with commercial life insurance.
 - 1. SBP is subject to change by Congress.
 - 2. Factors exist that increase likelihood retiree will outlive spouse (e.g., retiree is female; younger than spouse; or spouse has a less healthy lifestyle).
 - 3. Limited revocation period. You can only withdraw from the program between the second and third anniversary from the date of your enrollment. For example, if you retired and enrolled on 1 January 2010, you will only be able to withdraw from SBP during the period from 1 January 2012 to 31 December 2012. (Note: you will stop making payments should you no longer have a covered beneficiary – i.e., divorce, death of spouse, etc.).

- M. Survivor Benefit Plan Annuities For Members Who Die While On Active Duty And In The Line Of Duty After 10 September 2001. 10 U.S.C. § 1448(d).
 - 1. Created in the National Defense Authorization Act for Fiscal Year 2002 (NDAA for FY02) (Pub.L. 107-107, December 28, 2001) and amended by the NDAA for FY04 (Pub.L. 108-136, November 24, 2003).
 - a. Makes the Survivor Benefit Plan available to service members with less than 20 years time in service, who die in the line of duty while on active duty without the benefit of being retired from active service.
 - b. The new law applies to all service members who die on active duty and not just to those who die with less than 20 years of active service.
 - c. This law only affects the SBP eligibility determination or annuity calculation in cases determined to be in the line of duty.

- (1) For cases determined to be not in the line of duty, SBP eligibility and annuity calculations remain in effect under the rules that existed prior to the effective date of the new law. That is, if the service member was not retirement eligible at the time of death, then SBP is inapplicable.
 - (2) If the service member was retirement eligible at the time of death that is determined not to be in the line of duty, then an SBP annuity will be paid to a qualified survivor, but will not be computed on the basis of a total disability retirement. Rather, the SBP base amount will be computed on the retirement for service rules that would have applied if the service member had retired at time of death.
2. Beneficiaries: The statute controls the beneficiary of the SBP annuity, not the elections of the service member. The law requires that the Secretary concerned shall pay an annuity to:
 - a. Surviving spouse
 - b. Dependent child.
 - (1) If there is no surviving spouse, or
 - (2) If the member's surviving spouse subsequently dies, or
 - (3) Optional annuity (for deaths on or after 7 October 2001) when there is an eligible surviving spouse, if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children instead of the surviving spouse. NDAA FY07, § 644.
 - c. Mandatory former spouse annuity (10 USC §1448(d)(3)). If an eligible member is required under a court order or spousal agreement to provide an annuity to a former spouse upon becoming eligible to be a participant in the Plan or has made an election under subsection (b) to provide an annuity to a former spouse, the Secretary:

- (1) May not pay an annuity to either the current surviving spouse or, if none, child(ren) of the member.
- (2) The annuity shall be paid to that former spouse as if the member had been a participant in the Plan and had made an election under subsection (b) to provide an annuity to the former spouse, or in accordance with that election, as the case may be, if the Secretary receives a written request from the former spouse concerned that the election be deemed to have been made in the same manner as provided in 10 U.S.C. § 1450(f)(3).

d. Amount:

- (1) The new law, governing death on active duty in the line of duty, changes the calculation of assumed retirement pay to presume that everyone receives 75% of their base pay or the average of the high three years (or whichever retirement system the service member is under) regardless of years in service.
- (2) The SBP annuity is calculated at 55% of that figure.
- (3) For spouse (note that this only applies to spouse, and not child, SBP), this amount is:
 - (a) Subject to DIC offset.
 - (i) DIC is advantageous to the spouse because it is a tax-free benefit.
 - (ii) However, many surviving spouses will only see that their SBP annuity is reduced and will not view that as beneficial. For many (i.e., survivors of servicemembers E6 and below) the amount of DIC equals or surpasses any benefit from SBP, so the new rules will result in no additional payment to the family members.

- (b) NDAA FY 2008 § 643. Due to the offset between DIC and SBP, amounts already paid are recouped and the amount the retiree paid in is refunded. However, § 643 NDAA FY 08 limits the recoupment amount to only the amount that exceeds the amount refunded.
 - (c) NDAA FY 2008 § 644 Special Survivor Indemnity Allowance for Persons Affected by Required Survivor Benefit Plan Annuity Offset for Dependency and Indemnity Compensation. Starting 1 October 2008, if a spouse is receiving both DIC and SBP subject to offset, the survivor spouse will receive additional compensation. The SSIA amount of additional compensation increases gradually from \$50 in 2009 to \$310 in 2016.
- 3. The NDAA for FY04 eliminates the services' imminent death procedures.
 - a. DOD policy prohibits imminent death processing.
 - b. DOD has deleted sub-paragraph E3.P1.6.4 of DODI 1332.32, *Physical Disability Evaluation*, which permitted imminent death processing for disability retirements. See memorandums from Office of the Undersecretary of Defense (Personnel and Readiness) and the Army Office of the Assistant Secretary (Manpower and Reserve Affairs), SUBJECT: Change to Imminent Death Processing Policy in DOD Instruction 1332.38, 23 December 2003 and 16 January 2004, respectively, both of which are provided at Appendix G.
- 4. Legal Assistance Pointer: Surviving spouses will need advice on whether it is more beneficial to waive the spouse SBP annuity in favor of an annuity for dependent children. Because of the DIC offset, for families with younger children, payments in earlier years would be greater; however, after the children reach age 18, the spouse would only be entitled to receive DIC. However, do not forget to calculate the tax consequences for the child recipient. See the examples in Appendix H.

V. GOVERNMENT INSURANCE PROGRAMS.

- A. Servicemen's Group Life Insurance (SGLI); 38 U.S.C. §§ 1965-1976; 38 C.F.R. Part 9; Veterans' Benefits Act of 1992, § 201. Office of SGLI (OSGLI), phone number: 1-800-419-1473.
1. Group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.
 2. Active Army.
 - a. Active duty soldiers are automatically insured for \$400,000, unless they opt out in writing. 38 U.S.C.S. § 1967.
 - b. Soldier can elect lower coverage (in \$50,000 increments) or no coverage by completing VA Form 29-8286. 38 U.S.C.S. § 1967.
 - c. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations.
 - d. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120-day period. 38 U.S.C. § 1968.
 - e. Soldiers may lose entitlement to SGLI based on:
 - (1) Their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or
 - (2) Other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes). *See* 38 U.S.C. § 1973.
 - f. Cause of death, however, is irrelevant to SGLI coverage.

b. For each month that a member is serving in a combat operation or zone of combat, the cost of \$400,000 of insurance coverage will be paid by the Department of Defense. 38 U.S.C. § 1969.

5. Eligible beneficiaries.

a. Any person designated by the soldier on appropriate SGLV Form 8286. SGLI Act gives service member absolute right to choose beneficiary.

b. If no designation, or "By Law" designation, then proceeds paid according to SGLI statute:

(1) All to spouse, but if none, then

(2) All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then

(3) All to parents (equally divided), but if none, then

(4) All to executor of soldier's estate, but if none, then

(5) Next of kin under state law.

c. Importance of proper designation.

(1) Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. Message, Total Army Personnel Command, TAPC-PEC, subject: Servicemen's Group Life Insurance (SGLI) Program Change (021131Z Mar 93).

(2) But ensure soldier keeps designation current!

- (3) Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.
6. Notice Requirements (38 U.S.C.S. § 1967(f)).
 - a. If a member with a spouse elects not to be insured or to be insured for an amount less than the maximum amount, then the spouse shall be notified.
 - b. If member who is not married elects not to be insured or to be insured in an amount less than the maximum amount, then a person designated as a beneficiary or as next-of-kin for purposes of emergency notification shall be notified of the member's insurance election.
 - c. A member with a spouse may not modify beneficiaries without providing notice of such modification to the spouse.
7. Settlement options.
 - a. Accelerated Death Benefits under SGLI/VGLI for servicemembers in terminal condition (within nine months of death). See Appendix E.
 - b. Soldier may elect lump sum or 36 monthly installments. (On Form SGLV 8286).
 - c. If no election, beneficiary may elect type of settlement.
 - d. Alliance Account & financial services.
8. Apply for Death Benefits by submitting SGLV-8283, Claim for Death Benefits, to OSGLI, 80 Livingston Avenue, Roseland, NJ 07068-1733.

- B. Veterans Group Life Insurance (VGLI) (38 U.S.C. §§ 1977-1979).
1. Renewable group term life insurance available after soldier leaves active duty. VGLI is five-year renewable term insurance.
 2. Up to \$400,000 in coverage available.
 3. Active Army soldiers should apply for VGLI within 120 days of leaving the service.
 4. Reservists are also eligible when:
 - a. Being released from AD, ADSW, or ADT under call or order specifying not less than 31 days; and
 - b. Members of the IRR and ING (i.e., Inactive National Guard).
 5. VGLI rates (see Appendix C).
 6. Certain reservists may also be eligible.
- C. Servicemembers' Group Life Insurance Family Coverage (FSGLI): The Veteran's Opportunity Act of 2001, enacted 5 June 2001, amended Title 38 United States Code, §§ 1965-1970, extending SGLI coverage to insurable dependents.
1. Eligibility: All insurable dependents of active duty and Ready Reserve members covered by SGLI are automatically covered beginning 1 November 2001.
 - a. Insurable dependents include a spouse and all unmarried dependent children under the age of 18, and those over 18 but younger than 23 who attend an accredited school.

- b. The definition of “child” includes legitimate children, adopted children, illegitimate children of female members, illegitimate children of male members if acknowledged in writing by the military member or judicially recognized, and stepchildren living in the home of the military member.

2. Spousal Coverage:

- a. A spouse is automatically eligible for \$100,000 of coverage (or to the same level as the military member’s SGLI coverage if less than \$100,000).
- b. A military member elects not to cover the spouse at all or to reduce the \$100,000 coverage in increments of \$10,000 on form SGLV 8286A (Family Coverage Election). The military member pays a premium (by automatic military pay deduction) for spousal coverage.
- c. A spousal policy terminates 120 days after:
 - (1) The military member elects, in writing, to terminate spouse coverage.
 - (2) The military member’s SGLI coverage terminates.
 - (3) The military member dies.
 - (4) The military member and spouse divorce.
 - (5) The spouse can convert the spousal SGLI policy into a commercial policy within 120 days of termination. The Office of Servicemembers’ Group Life Insurance (OSGLI) will provide a list of participating commercial companies upon request. The spouse cannot convert the SGLI to Veteran’s Group Life Insurance (VGLI).
- d. The military member is the beneficiary of the spousal SGLI policy.

- e. The spouse has no incidents of ownership over the policy.
- f. The spouse cannot change the beneficiary, name the beneficiary or contingent beneficiary, nor revoke the policy.
- g. If a spouse dies and before OSGLI pays the proceeds the military member also dies, then the spousal SGLI proceeds are paid in accordance with the military member's SGLI policy beneficiary designation.
- h. If a military member elects not to cover the spouse and later wants to provide spousal coverage, the member must complete for SGLV 8285A (Request for Family Coverage).
- i. Dual Military Couples and FSGLI.
 - (1) All Servicemembers must enroll all family members in DEERS. This includes a spouse who is also a military member, even though that spouse is already enrolled in DEERS in his or her own right as a military member. Commands will conduct 100% reviews of FSGLI status.
 - (2) DoD Reg. 7000.14-R requires both spouses to register each other in DEERS. Once a Servicemember enrolls his or her spouse in DEERS, the military pay systems will automatically begin deducting premiums from that Servicemember's pay.

3. Child Coverage.

- a. Every dependent child of the military member is automatically covered by a \$10,000 policy.
- b. There is no premium charged for a child's policy.
- c. The military member cannot decline nor reduce the child policy.
- d. Coverage for a child terminates 120 days after:

- (1) The military member's SGLI coverage terminates.
 - (2) The military member separates from service.
 - (3) The military member dies.
 - (4) The child no longer qualifies for dependent status.
- e. A child policy cannot be converted to a commercial policy at anytime.
- f. The military member is the beneficiary of the child's policy.
- g. If the child dies and before OSGLI can pay the proceeds the military member also dies, the child's policy proceeds are paid in accordance with the military member's SGLI policy beneficiary designation.
- h. A child of a dual military couple is only covered by one policy. In the event of the child's death, the proceeds of the child's policy are paid to the military member eligible for SGLI coverage the longest. If a dual military couple divorces, the proceeds of a deceased child's policy are paid to the member with custody of the child.

D. Traumatic Injury Protection Insurance Program (T-SGLI) (38 U.S.C.S. § 1980A)

1. T-SGLI was added by Pub. L. No. 109-13, § 1032, 119 Stat. 231, 257 (2005).
2. It is a rider that will be attached to SGLI coverage and will provide payments that will range from \$25,000 to \$100,000 to active duty members, reservists, funeral honors duty, and one-day muster duty members, but not to family members.

3. It has a retroactive provision for traumatic injuries suffered between October 7, 2001, and November 30, 2005, if the qualifying loss was a direct result of injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom. Furthermore, effective October 1, 2011, the injuries will not have to have been incurred in Operation Enduring or Iraqi Freedom due to the Veterans' Benefit Act of 2010, PL 111-275, § 408, 124 Stat. 2865 (2010).
4. Traumatic injuries include, but are not limited to: total and permanent loss of sight; loss of a hand or foot by severance at or above the wrist or ankle; total and permanent loss of speech; total and permanent loss of hearing in both ears; loss of thumb and index finger of the same hand by severance at or above the metacarpophalangeal joints; quadriplegia, paraplegia, or hemiplegia; burns greater than second degree, covering 30 percent of the body or 30 percent of the face; and coma or the inability to carry out the activities of daily living resulting from traumatic injury to the brain.
5. The cost for coverage will be \$1.00 per month for active duty members and reservists with full-time coverage; \$1.00 per year for reservists with part-time coverage; and no charge for those on funeral honors duty and one-day muster duty.

VI. DEPENDENTS EDUCATIONAL ASSISTANCE (DEA) (38 U.S.C. §§ 3500-3566; 38 C.F.R. PART 21).

- A. Death of member must be under same circumstances that qualify dependents for receipt of DIC. Additionally, dependents of a totally disabled, but living, veteran may qualify.
- B. School must be approved for Department of Veterans Affairs (VA) benefits (*see* 38 U.S.C. § 3523 and § 3672; 38 C.F.R. § 21.7120).
 1. Each state establishes an agency that certifies educational programs according to standards established by the VA.
 2. Generally, the VA will not allow approval of courses that are primarily vocational or recreational in nature. The statute and regulation contain a list of specific courses which are either prohibited or discouraged.

C. Eligible Recipients.

1. Surviving spouses.

- a. Period of eligibility for a spouse of a person who does not die on active duty extends to 10 years from the date of the veteran's death; extension is possible. 38 U.S.C. § 3512(b)(1)(A).
- b. The period of eligibility for a spouse of a person who is entitled to the benefit because of the death of a person on active duty extends for 20 years from the date of eligibility. 38 U.S.C. § 3512(b)(1)(C).
- c. DEA is not be reduced by DIC payments.
- d. Remarriage permanently terminates DEA payments.

2. Children.

- a. Eligibility for child ends at age 26 (unless extended under certain conditions such as the child serving on active duty with the Armed Forces).
- b. Children must elect between DEA and DIC. Election of educational benefits is irrevocable and DIC may not be received once educational benefits begin. (Can receive DIC until age 23 and educational benefits to age 26)
- c. Marriage does not bar payments.

D. Amounts Available (38 U.S.C. § 3532, effective December 22, 2006).

- 1. The VA will pay eligible recipients different amounts depending on what type of training they attend (e.g., institutional vs farm cooperative training), whether they attend full or part time, and what tuition and fees they are charged.

2. Payments made for a maximum of 45 school months (or to the equivalent thereof in part-time training).
- E. State Programs. Servicemembers should not overlook numerous state educational programs such as Georgia's Hope Scholarship/Grant, and Texas's Hazlewood Exemption.

VII. SOCIAL SECURITY BENEFITS.

- A. General Types of Benefits.
- B. Eligibility. For an individual (or his/her survivors) to qualify for social security benefits, the individual will have to be either fully insured or currently insured, or both, depending on the benefit (but see para. C.2.d. below).
1. An individual is fully insured upon receipt of 40 quarters of social security work credits. If an individual dies before age 62, he/she may be considered as "fully insured" with less than 40 credits. The actual number of credits needed depends on age at time of death. Although a person is "fully insured," the term may be misleading because the amount of social security benefits received depends on actual earnings.
 2. An individual is currently insured if the individual has at least six quarterly work credits in the past 13 quarters.
 3. Generally, one social security work credit is awarded for each \$1,120 (in 2010 and 2011) of wages upon which FICA taxes are paid. A maximum of four credits can be earned in a year (hence, "quarterly credits").
- C. Available Benefits for Survivors.
1. Lump sum death benefit of \$255 (deceased must have been either fully or currently insured at time of death).
 2. Monthly survivor benefit payments.
 - a. Children under age 18 (deceased fully or currently insured).

- b. Widow(er) with children under 16 (deceased fully or currently insured).
 - c. Widower age 60 and over (deceased must have been fully insured at time of death).
 - d. If the death was service-connected, but the soldier was not either fully or currently insured, the VA will make up any of these Social Security payments for which the soldier's survivors do not qualify (38 U.S.C. § 1312(a)).
 - e. Amount of monthly benefits depends on work history of insured and family situation. Generally, the more social security (FICA) taxes paid by the insured, the greater the benefits available to the survivors. When calculating the amount of FICA taxes paid by an active duty soldier, most soldiers will qualify for an additional \$1,200 annual credit above the actual amount of FICA taxes paid.
- 3. Social Security benefits may be reduced if surviving spouse has earned income.
 - 4. More specific information on social security entitlements can be obtained by calling 1-800-772-1213 or on the www.ssa.gov web site, where you can apply for retirement benefits.

VIII. OTHER PAYMENTS AND BENEFITS TO SURVIVORS OF DECEASED MEMBERS.

- A. Death Gratuity (10 U.S.C. § 1475).
 - 1. Conditions of payment.
 - a. Soldier died on active duty (except if put to death by U.S. as lawful punishment for crimes committed; 10 U.S.C. §1480), or
 - b. 120 days after release if death resulted from disease or injury incurred while on active duty.

2. Amount.

- a. Lump sum payment of \$100,000 made by the local finance office. NDAA for FY06 amended 10 U.S.C. § 1478(a) increasing the death gratuity from \$12,000 to \$100,000. The amendment applies to all deaths occurring on or after 7 October 2001.
- b. The lump sum payment amount does not depend on the rank or years of service of the deceased.
- c. An additional death benefit may be possible depending on the circumstances and date of death. See 10 USC § 1478(d).

3. Beneficiaries.

- a. NDAA FY 2008 § 645 amends 10 U.S.C. § 1477 the authority of servicemembers to designation recipients of the death gratuity. On or after 1 July 2008 servicemembers may designate one or more persons to receive all or a portion of the death gratuity. The designation shall be in 10% increments and the balance of the death gratuity, if any, will be paid pursuant to subsection (b) of 10 U.S.C. § 1477.
- b. If the servicemember is married but does not designate the spouse to receive the entire death gratuity, the spouse will receive notification of the designation.
- c. If the servicemember fails to make a designation or designates only a portion of the death gratuity, then the death gratuity will be paid pursuant to subsection (b) of 10 U.S.C. § 1477.
- d. Subsection (b) 10 U.S.C. § 1477 provides the death gratuity will be paid as follows: First to the surviving spouse, if any; If no surviving spouse, then to children equally without regard to age or marital status; If no spouse or children, then to the parents; If no parents, to the administrator of the estate; if no administrator, then to the next of kin.

4. Tax consequences (I.R.C. § 101(b)(1)): If payment is for a death occurring after 10 September 2001, the entire \$100,000 is tax free. I.R.C. § 134(b)(3)(C).
 5. Apply by submitting DD Form 397, Claim Certification and Voucher for Death Gratuity Payments, to local finance office.
- B. Unpaid Pay and Allowances. 10 U.S.C. § 2771.
1. Amount.
 - a. All pay due soldier at death, including allowances.
 - b. Accrued leave, which can even exceed 60 days.
 2. Beneficiaries.
 - a. Designated by Soldier.
 - b. If no designation, to spouse, children, parents, or the estate (in that order).
- C. Burial Benefits (10 U.S.C. § 1482; 38 U.S.C. §§ 2301-08 & 2402; 38 C.F.R. § 3.1600).
1. Burial in a national cemetery.
 - a. The following individuals are eligible for burial in a national cemetery:
 - (1) All active duty personnel;
 - (2) Veterans who served a minimum period of time on active duty (generally, 2 years) and were discharged with an other than dishonorable characterization; and

- (3) Reservists who die on active duty, or die as a result of service-connected injuries, or die after completing 20 good years toward retirement. *See* Pub. L. No. 103-240.
- b. Burial in a national cemetery is on a space available basis. Eligibility creates the rights to:
- (1) A headstone (monetary reimbursement no longer available), and
 - (2) A grave liner (if actually buried in a national cemetery).

2. Additional assistance with burials.

- a. All active duty soldiers. The next of kin are eligible for the following support:
- (1) Interment Allowances: (10 USC 1481 & 1482; DoD Instruction 1344.8, March 11, 2009).
 - (a) If service arranges preparation and casket:
 - (i) \$6,000 if consigned to funeral home and burial in civilian cemetery;
 - (ii) \$3,600 if consigned to funeral home and burial in government cemetery;
 - (iii) \$1,000 if remains are consigned directly for burial in a government cemetery.
 - (b) If family arranges preparation and casket:
 - (i) \$8,800 for burial in civilian cemetery;
 - (ii) \$7,300 for burial in government cemetery.

(2) Reimbursement for next of kin travel to the burial site. 37 U.S.C. § 411f.

b. Certain veterans. The next of kin may be entitled to a burial allowance and an allowance for preparation and transportation of remains.

3. Military funeral honors have become a statutory benefit for all veterans effective January 1, 2000. 10 U.S.C. § 1491. *See* <http://www.militaryfuneralhonors.osd.mil/>.

D. Other Military Benefits.

1. Travel of dependents and shipment of household goods and personal effects. 37 U.S.C. § 406(f).

2. Temporary continuation of allowance for dependents of members dying on active duty to continue to occupy family housing for 365 days without charge. If dependents are not in family housing, dependents can receive basic allowance for housing at the rate that is payable for members of the same grade and dependency status as the deceased member for the area where the dependents are residing for 365 days. If in family housing and vacate before 365 days, then the dependents can receive basic allowance for housing for the remainder of the 365 days. 37 U.S.C. § 403. (The 180-day periods were extended to 365 days from May 11, 2005, until September 30, 2005, at which time they revert back to 180 days. Pub. L. No. 109-13, § 1022, 119 Stat. 231, 251 (2005). Permanently to 365 days in NDAA FY 2006). NDAA FY 2007 § 605 extends 37 U.S.C. § 403(l)(1-4) allowing for payment of housing allowance for dual military for 365 days.

3. Emergency financial assistance (Army Emergency Relief and/or American Red Cross).

4. Continued service benefits and privileges for dependents of Soldier dying on active duty.

a. Commissary.

- b. Post Exchange.
 - c. Medical care.
 - d. Legal assistance.
 - e. VA Death Pension (38 U.S.C. § 5112(b)(4); 38 C.F.R. § 3.660(d); and DA Pam 360-526, p. 16). This benefit is designed for surviving spouses and children of wartime veterans (i.e., those who served at least 90 days during designated war periods) whose survivors have limited income. Service during Desert Storm qualifies. Property holdings and date of marriage to the veteran also affect eligibility. Death need not be service-connected.
5. Marine Gunnery Sergeant John David Fry Scholarship (38 U.S.C. § 3311(f)). Providing Post 9-11 GI Bill benefits to children of servicemembers who die in the line of duty after 11 SEP 01.

E. Person Authorized to Direct Disposition (PADD) 10 U.S.C. § 1482(c)

- 1. Service member designates the spouse or blood relative to direct disposition over the service member's remains. The designation is reflected on DD Form 93, Block 13. See MILPER Message 06-020.
- 2. If the person designated by the service member declines to direct disposition over the remains or predeceases the service member then the remains will be given to the following in order of precedence:
 - a. Surviving spouse.
 - b. Sons or daughters if age of majority and if more than one child, the most senior.
 - c. Parents in order of seniority, unless only one had legal custody of the deceased service member.
 - d. Another relative that had legal custody over the service member.

- e. Siblings. Full siblings by seniority; if none, then half-siblings by seniority.

IX. CONCLUSION.

- A. The survivor benefits area of law is quite complex and constantly changing. It is extremely important to stay current with the latest benefit changes in order to provide Servicemembers and their surviving family members the best service possible.

- B. Servicemembers and their survivors can also receive assistance provided by numerous organizations such as FinancialPoint and the Armed Services Corporation. Their websites are listed below:
 - 1. <http://www.insurance.va.gov/SGLISITE/BFCS/BFCS.htm>.

 - 2. <http://www.afsc-usa.com/societies.html>.

APPENDIX A

SBP FOR THE RESERVE COMPONENT

- C. Under Option A, the member defers election to participate until age 60. If the reservist dies prior to reaching age 60, then there will not be an annuity to the reservist's survivors. (NOTE: Married members must provide written spouse concurrence to elect this option.)
- D. Under Option B, coverage is in effect immediately, but the beneficiary does not receive the SBP annuity until the date the service member would have reached age 60. (Married members must provide written spouse concurrence to elect this option for "spouse only" or "spouse and child" beneficiaries.)
- E. Under Option C, coverage is in effect immediately. The beneficiary begins receiving SPB benefits immediately upon the reservist's death. (Married members must provide written spouse concurrence to elect this option if the coverage is less than the maximum level for "spouse only" or "spouse and children.")
- F. Cost of electing any coverage before age 60 (Options B and C) is shared by the retiree (through increased premiums) and the beneficiary (through decreased benefits). The cost is based on a complicated calculation involving:
 - 1. The option elected;
 - 2. Retiree's age at election;
 - 3. Difference in age of retiree and beneficiary at election; and
 - 4. Actuarial tables.
- G. Under all three options, no SBP premiums are actually paid until the reservist reaches age 60 and begins to draw retirement pay.

COST OF RESERVE COMPONENT SBP

Option A:

No payments are due until the retiree reaches age 60.

Options B and C:

If RCSBP Option B (Deferred Annuity) or Option C (Immediate Annuity) is elected, there is a Reserve Portion cost added to the basic cost to cover the additional benefit and assured protection should you die prior to age 60. The Reserve Portion cost is based on a percentage of the SBP base amount, and it is dependent on your age and the age of your beneficiary at the time the RCSBP election is made.

For Option B, the annuity begins on what would have been your 60th birthday if you die before that age. If you die after age 60, the annuity begins on the day after your death.

For Option C, the annuity begins on the day after your die, regardless of your age at death.

An online RCSBP calculator is available at <http://www.armyg1.army.mil/rso/pay.asp>.

APPENDIX B SURVIVOR CHECKLIST

The following steps should be taken by the survivor of a deceased soldier or veteran.

1. Contact all insurance companies. They will require:
 - a. Policy Numbers, and/or;
 - b. Full name of the decedent.
2. Request approximately 10 certified copies of the Death Certificate.
3. Contact the Department of Veterans Affairs for burial payment. They will require:
 - a. Full name of the deceased.
 - b. Social Security Number and Branch of Service.
4. Contact the Department of Veterans Affairs for possible benefits for next of kin if Soldier died while on active military duty. They will require:
 - a. Certified copy of the Death Certificate.
 - b. Copy of Marriage Certificate.
 - c. Copies of the Birth Certificates of all dependent children.
5. If Soldier retired from military service after September 21, 1972, contact respective branch of service for Survivors Benefit Plan (SBP). They will require:
 - a. Full name of the deceased.
 - b. Social Security Number.
6. Contact Soldier's respective branch of service for Retired Serviceman's Family Protection Plan (RSFPP). They will require:
 - a. Full name of the deceased.
 - b. Social Security Number.

7. Contact nearest Social Security Office. They will require:
 - a. Certified copy of Death Certificate.
 - b. Social Security Number of deceased.
 - c. Social Security Numbers for spouse and dependent children.
 - d. Birth Certificates for spouse and dependent children.
 - e. Approximate earnings of deceased in the year of his death and present employer's name.
8. Contact veteran's present employer for possible insurance.
9. Contact your veteran's present employer for funds possibly due from Credit Union participation.
10. Contact Bank for possible mortgage insurance.
11. Notify all creditors of death; there may be Credit Life Insurance on installment loans.
12. Contact any fraternal organization to which the deceased may have belonged for possible life insurance.
13. Contact Civil Service if deceased was employed for more than 18 months in Civil Service.
14. Search for a Will. It may explain how the deceased wanted to disburse the funds and to determine if there are trust funds in existence.
15. Look for check stubs or any canceled checks for payments to an insurance company. Check for securities, real estate, and a safe deposit box.
16. Check for past enrollment in the Veteran's Education Assistance Program and/or payroll purchase plan for Savings Bonds.
17. If death occurred on a common carrier, survivors may be able to collect damages from the carrier (for fault or negligence) and/or insurance proceeds from the relevant travel agent/credit card issuer (no fault or negligence required).
18. If death occurred due to combat, there may be federal tax breaks, both on income tax (I.R.C. § 1692) and estate tax (I.R.C. § 2201).
19. Contact the VA for information on possible state benefits, including bonuses, educational assistance, employment preferences, and tax exemptions.

APPENDIX C
VGLI RATES

For more complete information see the rate charts at the following web addresses:

<http://www.insurance.va.gov/sgliSite/VGLI/VGLI%20rates.htm>

<http://www.armyg1.army.mil/rso/pay.asp>

APPENDIX D - RECOMMENDED SGLI LANGUAGE

SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemembers' Group Life Insurance Election and Certificate) (*see AR 600-8-1, figures 11-12 to 11-14*):

- * Testamentary Trust for Children:¹ **"My trustee to fund a trust established for the benefit of my children² under my will."**
- * Living Trust for Children:³ **"(Name of trustee), my trustee, pursuant to a trust agreement dated (date)."**
- * Custodianship under the Uniform Gifts or Uniform Transfers to Minors Act:⁴ **"(Name of custodian), as custodian for each of my children,⁵ pursuant to the UGMA/UTMA of the state of (name of state), (with distribution to each minor when that minor reaches age (desired age))."**

Instructions for SGLI preparers on EMILPO

1. At main menu, click on SGLI.
 2. On first screen, click box to "add beneficiary."
 3. Click "submit." This leads to the beneficiary add page. Skip – Family Member; Skip – Designation by Relationship. The third selection down allow you to choose "Relationship" – Select "Trustee" or "Custodian".
 4. Skip name and address information and instead choose Type/Share/Amount/Option.
 5. Then go to text box and type the language for Trust or UGMA/UTMA as applicable.
- Using this method allow for the printed form to contain the appropriate language within the beneficiary box as well as the "Trustee" or "Custodian" in the "relationship" box on the SGLV.

¹ The soldier's will must contain a trust.

² The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb,"

³ The soldier must create a living trust prior to completing the SGLI form. A copy of the trust agreement should be provided to the SGLI office.

⁴ Life insurance custodianships are recognized in every state. A separate custodianship will be established for each child. Either the soldier, the children, the custodian, or OSGLI should have some connection with the state named by the soldier. The age of distribution to the child in most jurisdictions is 18, although in CO, CT, IN, IA, MA, and TN the age of distribution is 21. In CA and NV (and only in these jurisdictions), the soldier may designate any age between 18 and 25 as the age of distribution.

⁵ See discussion, *supra*, note 2.

APPENDIX E
INFORMATION PAPER

DAJA-LA
25 March 1999

SUBJECT: Accelerated Death Benefit – SGLI [See <http://www.insurance.va.gov/sgliSite/ABO/ABO.htm>, last visited 7 July 2010]

1. PURPOSE: To provide information on obtaining an accelerated death benefit for terminally ill SGLI policy holders.
2. FACTS.
 - a. The President signed in to law on Veterans Day (November 11) as part of the Veterans Programs Enhancement Act. Implementation date was February 9, 1999. Interim final rule under review.
 - b. The Department of Veterans Affairs will issue rules soon. Watch VA's web site for more details: <http://www.va.gov>.
 - c. Holders of Servicemen's Group Life Insurance (SGLI) or Veterans Group Life Insurance (VGLI) who have been diagnosed as terminally ill may receive up to half the face value of their SGLI/VGLI policy as a lump sum - \$5,000 increments up to 50 percent available.
 - d. To qualify for the accelerated benefit, the policyholder must be diagnosed as having a life expectancy of less than 9 months. The member's subsequent SGLI/VGLI premiums will be reduced to reflect the remaining face value of the policy. The election may not be made more than once, and it will be irrevocable.
 - e. Not taxable - under the new law, the accelerated death benefit payment "shall not be considered income or resources for purposes of determining eligibility for or the amount of benefits under any Federal or federally-assisted program or for any other purpose."
 - f. Send proof of policy coverage & medical diagnosis to

Office of Servicemembers' Group Life Insurance (OSGLI)
213 Washington Street
Newark, NJ 07102-2999
1-800-419-1473

COL Hancock/703-588-6708

APPENDIX F



OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

23 DEC 2003

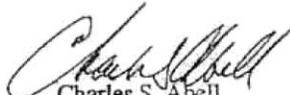
PERSONNEL AND
READINESS

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE
(RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE ARMY
(MANPOWER AND RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE NAVY
(MANPOWER AND RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE AIR FORCE
(MANPOWER AND RESERVE AFFAIRS)

SUBJECT: Change to Imminent Death Processing Policy in DoD Instruction 1332.38

Section 645 National Defense Authorization Act for FY 2004 expanded Section 1448(d), 10 USC, to provide a Survivor Benefit Plan (SBP) annuity for the surviving dependent children of a member who dies while on active duty but is not yet eligible for retirement, instead of the surviving spouse provided the Secretary concerned, in consultation with the surviving spouse, determines such an annuity is appropriate. Prior to this change, a dependent child could only receive the SBP annuity when there was no surviving spouse or when a surviving spouse subsequently died.

Sub-paragraph E3.P1.6.4 of DoD Instruction 1332.38, Physical Disability Evaluation, has allowed the Services to expeditiously refer members to the Disability Evaluation System when "competent medical authority determines that a Service member's death is expected within 72 hours." However, as a result of the recent expansion of SBP eligibility, this process is no longer appropriate. Sub-paragraph E3.P1.6.4 of DoDI 1332.38 is hereby rescinded, and Imminent Death Processing shall no longer be undertaken. Revisions to the new DODI will reflect this change. Please provide a copy of your implementation message to this office not later than 30 days from the date of this letter.


Charles S. Abell
Principal Deputy



**SUBJECT: Change to Imminent Death Processing (IDP) Policy in DoD Instruction
1332.38**

cc:

ASD (HA)

Surgeon General, Army

Surgeon General, Navy

Surgeon General Air Force



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

1 May 02

FORCE MANAGEMENT
POLICY

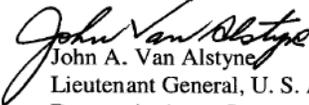
MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(HUMAN RESOURCES)
PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PERSONNEL PROGRAMS)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(FORCE MANAGEMENT AND PERSONNEL)
DIRECTOR, DEFENSE FINANCE AND ACCOUNTING SERVICE

SUBJECT: Survivor Benefit Plan (SBP) Annuities when Member Dies on Active Duty

This memorandum provides uniform guidance to the Services and the Defense Finance and Accounting Service (DFAS) for implementing section 642, National Defense Authorization Act for Fiscal Year 2002 (NDAA 2002), Public Law 107-107, December 28, 2001. This section of law provides new benefits under the Uniformed Services Survivor Benefit Plan (SBP). The new benefits are effective for deaths of members that occur on or after September 10, 2001. New benefits are provided in the case of most members not yet retirement eligible. Increased benefit amounts are provided in most cases of members eligible for retired pay. No new benefits are provided when the death of a member is determined to be not in Line-of-Duty.

Policies, procedures, and responsibilities for the new provisions of law are attached. These include the criteria for a qualified death, the determination of qualified beneficiaries, the computation of benefits, and guidelines for Line-of-Duty determinations necessary to support the award of benefits. Since these provisions apply retroactively, Services should identify qualified recipients and DFAS should initiate annuity payments as quickly as possible.

Separate guidance is being staffed to govern the practice of imminent death retirements. Deaths on active duty do not result in any Insurable Interest or Supplemental SBP benefits. All SBP elections remain available to all members who are retired, whether for length of service or for disability.


John A. Van Alstyne
Lieutenant General, U. S. Army
Deputy Assistant Secretary
(Military Personnel Policy)

Attachment: As stated
cc: See distribution list

Distribution List:

Deputy Chief of Staff for personnel, U.S. Army
Deputy Chief of Naval Operations (Manpower and Personnel), U.S. Navy
Deputy Chief of Staff for Personnel, U.S. Air Force
Deputy Chief of Staff Manpower and Reserve Affairs, U.S. Marine Corps
Assistant Commandant for Human Resources, U.S. Coast Guard
Director, Division of Commissioned Personnel, U/S. Public Health Service
Director, National Oceanic and Atmospheric Administration Corps Operations-NC
DoD Chief Actuary
Deputy General Counsel (Fiscal)

Implementing Policies, Procedures, and Responsibilities
Section 642, P.L. 107-107, December 28, 2001

General

Section 642, Public Law 107-107, December 28, 2001, provides expanded benefits under the Uniformed Services Survivor Benefit Plan (SBP) for the qualified survivors of eligible members who die in the Line-of-Duty while serving on active duty. These benefits are effective for a death on or after September 10, 2001. Active duty is that duty defined by 10 U.S.C. 101(d)(1). This includes reserve members on active duty for annual training duty, whether or not their orders specify a period of more than 30 days. Reserve members serving periods of inactive duty training are not included.

This document provides uniform guidance as to when a death qualifies survivors for benefits, which survivor or survivors are entitled to an annuity, and how annuities will be computed. It also establishes general guidelines for Line-of-Duty determinations and prescribes implementing responsibilities and procedures.

Qualified Deaths

A qualified death under the provisions of Section 1448(d), title 10, United States Code [10 U.S.C. 1448(d)], as amended by P.L. 107-107, is a death of a member on active duty who:

- (1) Died in the Line-of-Duty, or
- (2) Died not in the Line-of-Duty, but was retirement eligible as described by 10 U.S.C. 1448(d)(1)(A).

Benefits for those described in (2) are unchanged by the amendments of P.L. 107-107.

Guidance is provided below concerning the determination of whether the member's death was in the Line-of-Duty.

The death of a member is not a qualified death if the member was not on active duty, or was on active duty but whose death is determined to be not in the Line-of-Duty and the member was not eligible to retire as described in 10 U.S.C. 1448(d)(1)(A). The survivors of members whose death is not qualified are not entitled to SBP benefits under the provisions of 10 U.S.C. 1448(d), but may be entitled to other benefits under existing laws and regulations.

Qualified Annuitants

The amendments of P.L. 107-107 did not change the law with respect to who may receive an SBP annuity based on a qualified death (as described above). The only changes were in the criteria for a qualified death and the method of calculating the annuity.

In general, an annuity is payable to a surviving spouse unless an annuity is payable to a former spouse under the provisions of 10 U.S.C. 1448(d)(3). A former spouse annuity takes precedence over any other SBP annuity payable because of the service of the deceased member.

Under the provisions of 10 U.S.C. 1448(d)(2), a member's children qualify to receive an annuity under these provisions only when a former spouse annuity does not apply and either there is no surviving spouse or the surviving spouse later dies. A member's children are not qualified annuitants when a surviving spouse loses entitlement to an annuity as a result of a remarriage before age 55.

No other persons are qualified to receive benefits under these provisions. No benefits will be paid under these provisions to a person with an insurable interest as described in 10 U.S.C. 1448(b)(1).

Annuity Amounts

The annuity payable for a qualified death (as described above) under the provisions of 10 U.S.C. 1448(d) will be computed with the SBP base amount equal to the amount of retired pay that would have been paid to the member had that member been retired on the date of death as follows:

- (1) For a qualified death in the Line-of-Duty, the SBP base amount is equal to the retired pay as if the member were retired with total (100%) disability under 10 U.S.C. 1201 (which is equal to 75% of the appropriate retired pay base as described below). The annuity is then normally either 55 or 35 percent of the SBP base amount, following the provisions of 10 U.S.C. 1451(c).
- (2) For a qualified death not in the Line-of-Duty and the member is retirement eligible under 10 U.S.C. 1448(d)(1)(A), the SBP base amount is equal to the retired pay as if the member were retired for length of service under the applicable section of law for the respective service of the deceased member (which is 2.5% multiplied by the qualifying creditable years of service multiplied by the appropriate retired pay base as described below). The annuity is then normally either 55 or 35 percent of the SBP base amount, following the provisions of 10 U.S.C. 1451(c).

Retired Pay Base: The retired pay base applicable to a qualified death will be calculated as described under 10 U.S.C. 1406 or 1407 as appropriate to the deceased

member's Date of Initial Entry on Military Service (DIEMS). Further, such annuity calculations shall be made without regard to any reduction in the multiplier that would apply to a member under 10 U.S.C. 1409(b)(2) who elected to receive a bonus under the provisions of 37 U.S.C. 322. Cost-of-living adjustments (COLAs), however, shall be applied in the same percentage that would have applied to the member's retired pay (had the member not died). Therefore, for members who elected the bonus under 37 U.S.C. 322, the COLA applied to the SBP annuity will be reduced pursuant to 10 U.S.C. 1401a(b)(3).

No supplemental SBP (SSBP) benefits will be paid under these provisions to a surviving spouse of a member who dies while serving on active duty. Any SBP annuity paid under these provisions to a surviving spouse shall be reduced by the amount of dependency and indemnity compensation to which the surviving spouse is entitled under 38 U.S.C. 1311(a). Any such reduction shall be effective on the date of the commencement of the period of payment of such compensation.

Line-of-Duty Determinations

For purposes of determining eligibility for SBP benefits under 10 U.S.C. 1448(d), a service member's death will generally be considered to have occurred in Line of Duty unless: (1) the death occurred while the member was not serving on active duty, (2) the death was the result of the member's own intentional misconduct or willful negligence, or (3) the death occurred during a period of unauthorized absence.

For purposes of this section, the military services will make a written finding as to whether a member's death on or after September 10, 2001 was in the Line-of-Duty while the member was serving on active duty. The written finding must describe the circumstances under which the member died, and it must also address whether the death was caused by the member's own intentional misconduct or willful negligence and whether the death occurred during a period of unauthorized absence.

With the exception of the requirements contained in this memorandum and other current DoD guidance governing Line of Duty determinations and investigations, each military service should continue to apply its own existing regulatory guidance and procedures. A copy of all Line-of-Duty determinations will be retained by the military services for the period required by agency regulations but not less than three years, and will be subject to a DoD Joint Service review to be conducted approximately one year after implementation of this law. The DoD Joint Service review will assess uniformity and consistency among the military services with respect to this provision of law.

Responsibilities

The military services must review the death of each member who died on active duty on or after September 10, 2001, to ascertain whether the death was in the Line-of-Duty and

whether there are any qualified survivors entitled to SBP payments. The military services will inform the Defense Finance and Accounting Service (DFAS) of their Line-of-Duty determinations. The determination may be recorded in the remarks section of the DD Form 1300, Report of Casualty; Block 10 of the DD Form 261, Report of Investigation Line of Duty and Misconduct Status; or on any other form authorized under individual Service regulations. However, all Line of Duty (LOD) determinations must be supported by a written finding which describes the circumstances of death that support that LOD determination, as outlined in the guidance above. DFAS does not require a copy of the written finding, only an official communication from the Service to indicate the Service's determination that the death is in the Line-of-Duty -- Yes or No.

DFAS shall establish and pay SBP annuities to qualified survivors for qualified deaths as prescribed above.

The Office of the Under Secretary of Defense (Personnel and Readiness) in conjunction with the military services will convene a DoD Joint Service review board to review Line-of-Duty findings for consistency and uniformity among the military services after approximately one year of experience with the statute. This review board will make recommendations as appropriate to ensure consistency and uniformity.

MEMORANDUM FOR ARMY RETIREMENT SERVICES OFFICERS (RSO)

SUBJECT: Supplemental Guidance for Army Use—Survivor Benefit Plan (SBP) Annuities when Member Dies on Active Duty

1. The information that follows amplifies portions of DOD's implementing guidance, dated 1 May 2002, subject as above (see Encl 1). Recommend you read the DOD guidance first; then digest this Army guidance. While P.L. 107-107 was *effective* on 28 Dec 2001, Section 642 is *retroactive* to **10 Sep 2001**, and applies to all active duty deaths since that date.

2. Topics are presented in the same order in both documents: General, Qualified Deaths, Qualified Annuitants, Annuity Amounts, Line of Duty (LOD) Determinations, and Responsibilities.

a. **General.** The key phrase is *expanded benefit* (in Line 1). What has *expanded* is the pool of eligible soldiers who receive a benefit. Prior to passage of Sect. 642, P.L. 107-107, only soldiers who died on active duty *after* becoming retirement-eligible provided an SBP annuity to *qualified* survivors. Now, ALL soldiers who die on active duty share that entitlement. LOD findings are a factor, and are explained separately.

b. **Qualified Deaths.**

(1) ALL deaths on active duty are *qualifying deaths* **unless:** the member was not retirement-eligible **and** death was determined to be LOD-NO. If the soldier who dies on active duty IS retirement-eligible, it is a qualifying death regardless of LOD findings. However, SBP amounts are impacted. See *Table 2*.

(2) Reserve Component (RC) Soldiers. The same provisions apply to RC soldiers who die while serving ON ACTIVE DUTY. If they die while in an "Inactive Duty for Training (IDT)" status, they do not qualify. "Retirement-eligible" RC soldiers are those who have received their Letter of Notification of Eligibility for Retired Pay at Age 60 (*i.e.*, "20-year letter").

**- Table 1 -
(LOD and SBP)**

<i>Years of Qualifying Service</i>	<i>Line of Duty-- Yes or No?</i>	<i>SBP Payable? (To Eligible Beneficiaries)</i>
Less than 20	LOD-Yes	Yes
Less than 20	LOD-No	No
More than 20	LOD - Yes	Yes
More than 20	LOD - No	Yes

c. Qualified Annuitants.

(1) Relation to Death Imminent Retirement Processing. Do not confuse WHO is eligible for SBP under **this** law with what occurs as a result of "death imminent retirement" processing. Soldiers who die on active duty are not retired. We do not make an SBP election on their behalf. Instead, the law DIRECTS who is eligible and in what amount. Certain SBP election options that exist under death imminent retirement scenarios do not exist under this law (e.g., insurable interest for a parent; Supplemental SBP; and child only coverage when there is a spouse). The Army is considering their position now on continuing death imminent processing. You will be informed of the final policy. DOD will consider the Services' positions and make a recommendation to Congress on this topic in July 2002. As of this date, the Army continues expeditious retirements.

(2) Title 10, U.S. Code. This law (Chap. 73) identifies WHO is a qualified SBP annuitant under death-on-active-duty circumstances, just as it did prior to this law change for active duty deaths *of retirement-eligible soldiers.*

(3) The ONLY qualified SBP beneficiaries are:

- Spouse
- Children (if no spouse or former spouse)
- Former Spouse (if court order/written agreement exists)

(4) Child Eligibility. Unlike normal SBP, a child, when part of "spouse/FS and child" coverage, can ONLY receive SBP if the parent ***dies*** -- **not** if the parent becomes ineligible due to remarriage before age 55 -- even though the child remains eligible. And, of course, if there is no spouse or FS, "child only" coverage is established by law.

(5) Former Spouse Coverage.

(a) It is important that the soldier's records are closely examined for evidence of court-ordered former spouse SBP coverage. Typically, such an order would exist with "senior" soldiers - those who on date of divorce/agreement, the court considered well-vested in a military career.

(b) If such an order/agreement is uncovered, the former spouse must receive the annuity (if eligible). Under a former spouse election, only the soldier's children from his/her union with the former spouse are qualified.

(c) Why is it important to exert effort in uncovering an existing former spouse order? There are two main reasons: 1) it complies with the court's intent; and 2) it saves potential duplicate payments by the government. If the government incorrectly pays a surviving spouse, and an eligible former spouse later applies, the government likely first, would opt *not* to collect back the incorrectly paid spouse annuity; and second, would be obligated to pay the former spouse retroactively -- resulting in a double payment.

(d) The former spouse eligibility provision is not new. This has always been the case with active duty deaths of retirement-eligible members. We simply reemphasize it.

d. **Annuity Amounts.**

(1) The SBP annuity is 55% (or 35% if over age 62) of the soldier's retired pay "entitlement," as if the soldier had been retired for total disability (i.e., using a 75% multiplier). The exception is the case of a retirement-eligible soldier who dies under LOD-No conditions, in which case the multiplier is derived from actual years/months of service. (See sample below.)

(2) LOD determinations affect the annuity as follows:

- Retirement-Eligible; LOD-Yes: Final Pay (or high-36) X 75%; Retired Pay "entitlement" X 55% (or 35%) = SBP Annuity.
- Retirement-Eligible; LOD-No: Final Pay (or high-36) X multiplier based on years/months of service (e.g., 20 years = 50%); Retired Pay "entitlement" X 55% (or 35%) = SBP Annuity.
- NOT Retirement-Eligible; LOD-Yes: Final Pay (or high-36) X 75%; Retired Pay "entitlement" X 55% (or 35%) = SBP Annuity
- NOT Retirement-Eligible; LOD-No: No SBP Annuity Payable!

**- Table 2 -
(LOD-Related Examples)**

LOD (Y/N)	Grade	Yrs/Mos Svc	DIEMS Date	Final Pay/ High-36	Multiplier	Ret Pay Entit	SBP Amount	DIC Amount	SBP Left After DIC Offset
Y	E3	2/0	1 May 00	\$1000	.75	\$750	\$412	\$935	\$0
N	E3	2/0	1 May 00	\$1000	N/A	N/A	N/A	\$935*	N/A
Y	E8	22/0	1 May 80	\$3573	.75	\$2679	\$1473	\$935	\$538
N	E8	22/0	1 May 80	\$3573	.55	\$1965	\$1080	\$935*	\$145

(3) Career Status Bonus (CSB) Receipt Implications. If a soldier received the CSB, the normal reductions to the multiplier that would have been applied to the soldier's retired pay, are not applied to the annuitant. However, reduced cost-of-living adjustments (COLAs) for spouses of soldiers who received the CSB are applied to the annuity just as they would have to retired pay.

(4) Supplemental SBP (SSBP). SSBP is not payable in any active-duty death situation.

(5) Dependency & Indemnity Compensation (DIC). The VA's DIC offsets SBP annuities dollar-for-dollar to spouses. Both SBP and DIC to children are fully payable.

e. **Line-of-Duty (LOD) Determinations**.

(1) DOD has given the Services some leeway by allowing them to develop their own processes to meet Congress's direction regarding LOD. These requirements must be met by the Services:

- Describe circumstances under which the member died.
- Address whether the death was caused by the member's own intentional or willful negligence.
- Address whether the death occurred during a period of unauthorized absence.

(2) Army will apply its own regulatory guidance and procedures. A Joint Service Review Board will audit the Services within one year for uniformity and consistency.

*** LOD-No may or may not result in a denial of DIC by the VA.**

f. **Responsibilities.**

(1) DA Casualty & Memorial Affairs Operations Center:

- Will render LOD findings in which the circumstances are clearly in line of duty. In cases where the circumstances are questionable, the deceased soldier's commander will be required to conduct a LOD investigation.
- Will coordinate with DA Officer Retirement/Separations Section and EREC, Indianapolis, IN, in preparing statements of service.
- Will provide the statement of service and the record of determination to DFAS-Cleveland Center (DFAS-CL); DFAS-CL POC: Army Liaison.
- Will ascertain whether there are survivors for SBP.
- DA Casualty POC: Mr. Homer Henderson, 703-325-6047; DSN 221-6047; Homer.Henderson@hoffman.army.mil.

(2) Commanders:

- Will conduct LOD investigations on death cases, as required.

(3) DFAS-Cleveland Center (DFAS-CL):

- Will establish pay accounts and provide account data to appropriate DFAS personnel.
-- Note: Responsibility for establishing and maintaining both retiree *and* annuitant accounts is scheduled to consolidate at the Cleveland pay center. Proposed transfer dates from the Denver center to Cleveland are: New Accounts, NLT 30 Jul 02; All Accounts, NLT 30 Aug 02. These dates are subject to change.
- Will suspense annuity applications received from families if prior to account establishment, and process them at the first opportunity.

(4) Retirement Services Officers (RSO):

- Will estimate pay entitlement and SBP annuity amounts for the Casualty Assistance Officer (CAO) and/or survivors.
- Will provide personnel information as requested by DA Casualty and/or DFAS.
- Will counsel CAOs and families residing in their area of responsibility on SBP and associated government benefits.

3. HQDA POC is Avis Allen, CML (703)325-2695; DSN 221-2695; email Avis.Allen@hoffman.army.mil.

// signed //

Encls

JOHN W. RADKE
Chief, Army Retirement
Services

APPENDIX G

THIS MESSAGE HAS BEEN SENT BY THE PENTAGON TELECOMMUNICATIONS CENTER ON BEHALF OF DA WASHINGTON DC//DAPE-MSO//

SUBJECT: FAMILY SERVICEMEMBERS GROUP LIFE INSURANCE (FSGLI) COVERAGE DEBT REDUCTION

1. REFERENCES:

A. MEMORANDUM, UNDER SECRETARY OF DEFENSE, (PERSONNEL AND READINESS), SERVICEMEMBERS GROUP LIFE INSURANCE FAMILY COVERAGE, DATED 8 FEBRUARY 2005.

B. MEMORANDUM, OFFICE OF THE UNDER SECRETARY OF DEFENSE, (PERSONNEL AND READINESS), FAMILY SERVICEMEMBERS GROUP LIFE INSURANCE COVERAGE (FSGLI), DATED 27 MAY 2005.

C. LEADER/COMMANDER/ISG CHECKLIST AVAILABLE AS AN ATTACHMENT TO THIS MESSAGE.

2. PURPOSE. THIS MESSAGE HAS BEEN APPROVED FOR RELEASE BY THE VICE CHIEF OF STAFF OF THE ARMY (VCSA). THE PURPOSE OF THIS MESSAGE IS TO INFORM SOLDIERS AND COMMANDS IN ALL COMPONENTS WITHIN THE ARMY OF THEIR FSGLI REQUIREMENTS, AND TO ESTABLISH ARMY S PROCEDURES FOR COLLECTING PAST DUE FSGLI PREMIUMS FROM SOLDIERS WHO RECEIVED FSGLI COVERAGE WITHOUT PAYING THE PREMIUMS.

ADDITIONALLY, THIS MESSAGE TASKS NATIONAL GUARD BUREAU (NGB), OFFICE OF THE CHIEF OF THE ARMY RESERVE (OCAR), ALL ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS (ASCC), DIRECT REPORTING UNITS (DRU), INSTALLATION MANAGEMENT COMMAND (IMCOM), AND HUMAN RESOURCES COMMAND (HRC) WITH PROVIDING AN ACTION OFFICER (AO) TO ASSIST IN COLLECTING BACK FSGLI PREMIUMS OWED TO DEPARTMENT OF VETERANS AFFAIRS (DVA).

3. RECENT ANALYSES BY BOTH THE DVA AND DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS) INDICATE THAT A NUMBER OF SERVICE MEMBERS ARE RECEIVING FSGLI COVERAGE BUT ARE NOT PAYING PREMIUMS AS REQUIRED. THIS SITUATION IS ALMOST ENTIRELY DUE TO INCOMPLETE DEFENSE ENROLLMENT ELIGIBILITY REPORTING SYSTEM (DEERS) DOCUMENTATION. AS DEERS IS THE DATA SOURCE TO DETERMINE ENROLLMENT FOR FSGLI, ACCURATE DEPENDENT DATA IS VITAL. SERVICE MEMBERS MUST REPORT ALL DEPENDENTS IN DEERS, INCLUDING A SPOUSE WHO IS ALSO A MILITARY MEMBER, EVEN THOUGH EACH SPOUSE IS ALREADY ENROLLED IN DEERS IN HIS OR HER OWN RIGHT AS A MILITARY MEMBER.

4. INDICATIONS ARE THAT THE DVA MAY BE OWED AS MUCH AS \$25 MILLION IN BACK PREMIUMS BECAUSE OF INCOMPLETE DEERS DATA. THE DVA HAS REQUESTED THE DEPARTMENT OF DEFENSE (DOD), THE DEPARTMENT OF THE ARMY (DA), AND THE OTHER SERVICES ASSIST IN GETTING SPOUSES PROPERLY REGISTERED IN DEERS AND ASSIST WITH COLLECTING BACK PREMIUMS. COLLECTION OF PREMIUMS OWED WILL BE ACCOMPLISHED BY DFAS AS MEMBERS WITH UNREGISTERED SPOUSES ARE IDENTIFIED AND ENROLLED IN DEERS.

5. ALL SOLDIERS, REGARDLESS OF COMPONENT OR STATUS (TO INCLUDE DUAL MILITARY COUPLES) ARE ELIGIBLE FOR FSGLI AND ARE AUTOMATICALLY COVERED BY FSGLI UNLESS THEY DECLINE THE COVERAGE IN WRITING. TO PROPERLY DECLINE FSGLI, SOLDIERS MUST FILE SGLV FORM 8286A AT THEIR SUPPORTING PERSONNEL AND OR DEERS OFFICE. ALTHOUGH COVERAGE FOR CHILDREN IS WITHOUT COST TO THE SOLDIER, PREMIUMS MUST BE PAID FOR SPOUSES WHO ARE NOT AFFIRMATIVELY DISENROLLED FROM THE FSGLI PROGRAM. SOLDIERS WILL NOT SUBMIT RETROACTIVE DECLINATIONS. BACK DATING AND SIGNING SGLV FORM 8286A TO AVOID PAYING BACK PREMIUMS IS NOT AUTHORIZED. EACH MARRIED SOLDIER WHO IS NOT PAYING FSGLI PREMIUMS, AND HAS NOT DECLINED COVERAGE IN WRITING (OR CANNOT PROVE THEY HAVE DECLINED BY PROVIDING A COPY OF THEIR SIGNED DECLINATION STATEMENT) OWES BACK PREMIUMS. THIS INCLUDES SOLDIERS WHO WERE MARRIED AFTER THE EFFECTIVE DATE OF THE FSGLI PROGRAM AND WHO ARE NO LONGER MARRIED, BUT WHOSE SPOUSES WERE NOT AFFIRMATIVELY DISENROLLED WHILE THEY WERE MARRIED.

6. DUAL MILITARY COUPLES. A DUAL MILITARY COUPLE IS DEFINED AS SOLDIER MARRIED TO SOLDIER OR SOLDIER MARRIED TO A MEMBER OF THE OTHER ARMED SERVICES IN ANY COMPONENT COMBINATION. TO ENSURE THAT BOTH SPOUSES IN A DUAL MILITARY COUPLE ARE ENROLLED AUTOMATICALLY IN THE FSGLI PROGRAM, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATION 7000.14-R REQUIRES BOTH SPOUSES TO REGISTER EACH OTHER IN DEERS. ONCE A SOLDIER ENROLLS HIS OR HER SPOUSE IN DEERS, THE MILITARY PAY SYSTEMS WILL AUTOMATICALLY BEGIN DEDUCTING PREMIUMS FROM THAT SOLDIER S PAY.

7. RESERVE COMPONENT MEMBERS. WITH THE ONGOING GLOBAL WAR ON TERRORISM, QUITE FREQUENTLY, RESERVE COMPONENT (RC) SOLDIERS ARE CHANGING FROM DRILLING TO MOBILIZED ACTIVE DUTY STATUS AND BACK AGAIN. THERE HAVE BEEN INSTANCES WHERE FSGLI PREMIUMS WERE MISTAKENLY AND UNKNOWINGLY STOPPED AS A RESULT OF THESE TYPE STATUS CHANGES. AS A RESULT, IT IS PARAMOUNT THAT RC MEMBERS VERIFY THEIR FSGLI STATUS EVERY TIME THEY CHANGE STATUS.

8. TASKING. BY NO LATER THAN (NLT) 7 DAYS AFTER THE RELEASE OF THIS MESSAGE, NGB, OCAR, ALL ARMY COMMANDS, ASCC, DRU, IMCOM, AND HRC ARE TASKED WITH PROVIDING AN ACTION OFFICER (AO) IN THE GRADE OF 03-05, W2-W4, OR GS11-GS14 TO WORK WITH THE ARMY STAFF POINT OF CONTACT (POC) IN PARAGRAPH 15 TO ENSURE ALL SOLDIERS HAVE COMPLETED ALL FSGLI REQUIREMENTS.

REPORT ACTION OFFICERS TO THE ARMY STAFF POC IN PARAGRAPH 15 AND TO THE PERSONNEL CONTINGENCY CELL (PCC) OF THE ARMY OPERATIONS CENTER (AOC) AT THE FOLLOWING EMAIL ADDRESS: PCCIMA02@hqda-aoc.army.pentagon.mil.

9. MISMATCH DATA BASE. ARMY STAFF POC WILL PROVIDE A MISMATCH DATA BASE BY COMPONENT TO EACH AO. THERE ARE THREE MISMATCH DATA BASES (1 ACTIVE DUTY, 1 RESERVE, AND 1 NATIONAL GUARD). THE DATA BASES IDENTIFY SOLDIERS WHOSE MARITAL STATUS IN DEERS DOES NOT MATCH THEIR MARITAL STATUS IN THE TOTAL ARMY PERSONNEL DATA BASE (TAPDB). SOLDIERS APPEARING IN THE MISMATCH DATA BASES MAY OWE PAST DUE FSGLI PREMIUMS. ACTION OFFICERS MAY USE THE MISMATCH DATA BASES HOWEVER THEY DEEM APPROPRIATE TO FACILITATE THEIR COMMANDS NOTIFICATION EFFORTS.

10. LEADER/COMPANY COMMANDER/1SG CHECKLIST. THIS CHECKLIST IS ATTACHED TO THIS MESSAGE. IT IS DESIGNED TO ASSIST LEADERS AT ALL LEVELS IN IDENTIFYING SOLDIERS WHO OWE PAST DUE FSGLI PREMIUMS. IT IS SET UP IN A QUESTION/ANSWER FORMAT AND ALLOWS USERS TO QUICKLY ASSESS WHETHER A SOLDIER NEEDS TO UPDATE THEIR SPOUSAL DATA IN DEERS TO BEGIN FSGLI PREMIUM DEDUCTION.

11. REQUIREMENT. EFFECTIVE WHEN THIS MESSAGE IS RELEASED, ALL ARMY ORGANIZATIONS TASKED WITH PROVIDING AN AO WILL USE THE LEADER/COMPANY COMMANDER CHECKLIST TO CONDUCT A 100% REVIEW OF THEIR SOLDIERS FSGLI STATUS. THE CHECKLIST WILL BE USED AS A TOOL AT LOWEST ECHELON OF LEADERSHIP/COMMAND TO ENSURE EVERY MARRIED SOLDIER IN THE ARMY HAS CORRECTLY REPORTED THEIR SPOUSE IN DEERS. END STATE IS ALL MARRIED SOLDIERS WHO HAVE NOT DECLINED FSGLI COVERAGE MUST PAY (ASSUMING A WAIVER SUBMISSION FAILS) ALL PAST DUE FSGLI PREMIUMS, BE CURRENTLY PAYING FSGLI PREMIUMS OR HAVE PROPERLY DECLINED FSGLI COVERAGE. FOR THE ARMY STAFF AND STAFFS OF ALL ORGANIZATIONS TASKED, DIVISION/STAFF CHIEFS AT THE COL/GS EQUIVALENT LEVEL WILL ENSURE THEIR SOLDIERS COMPLIANCE. NLT 120 DAYS AFTER THE

RELEASE OF THIS MESSAGE, THE SAME TASKED ORGANIZATIONS WILL REPORT COMPLETION OF THIS ACTION TO THE PCC OF THE AOC AT THE FOLLOWING EMAIL ADDRESS: PCCIMA02@hqda-aoc.army.pentagon.mil. ARMY STAFF POC WILL WORK WITH ACTION OFFICERS TO DEVISE A TRACKING AND REPORTING MECHANISM FOR MONITORING PROGRESS.

12. DEPLOYED UNITS. DEPLOYED UNITS WILL CONDUCT THE FSGLI REVIEW (DESCRIBED IN PARAGRAPH 11) AS THEIR MISSION ALLOWS AND WILL WORK THROUGH THEIR REAR DETACHMENTS IN COMPLETING THIS REQUIREMENT. IF A DEPLOYED SOLDIER IS IDENTIFIED TO ENROLL HIS/HER SPOUSE IN DEERS, AND WORKING THRU THE REAR DETACHMENT IS NOT FEASIBLE, THE SOLDIER MUST PREPARE SGLV FORM 8286A (FSGLI COVERAGE ELECTION FORM). BY PREPARING SGLV FORM 8286A, THE SOLDIER EITHER INITIATES SPOUSE ENROLLMENT IN FSGLI OR DECLINES FSGLI COVERAGE (RETROACTIVE DECLINATION TO AVOID PAYING PAST DUE PREMIUMS IS NOT AUTHORIZED) AND TRANSMITS THIS FORM TO THEIR BRIGADE LEVEL S-1 FOR PROCESSING. THE BRIGADE LEVEL S-1 WILL TRANSMIT THE SOLDIER S COMPLETED SGLV FORM 8286A BY THE MOST EXPEDIENT MEANS TO MR. DAVID PULLIAM, HUMAN RESOURCES COMMAND (HRC), BENEFITS AND CLAIMS MANAGER AT PHONE 703-325-6047, FAX 703-325-3288, OR EMAIL david.pulliam1@hoffman.army.mil; OR david.pulliam1@us.army.mil. DEPENDING ON THE SOLDIER S INDIVIDUAL CIRCUMSTANCES, MR. PULLIAM WILL ADVISE THE BRIGADE LEVEL S-1 FROM THAT POINT FORWARD ON WHAT ACTION TO TAKE. A DEPLOYED SOLDIER MUST IMMEDIATELY TAKE STEPS TO ENSURE THEIR FSGLI COVERAGE IS UPDATED BECAUSE DELAYING SPOUSAL ENROLLMENT WILL ALLOW ADDITIONAL UNPAID PREMIUMS TO ACCUMULATE AND THE SOLDIER S DEBT TO INCREASE.

13. ARMY DEBT PRORATION RULES. IN PAYING BACK PREMIUMS OWED, ALL ARMY SOLDIERS (ACTIVE, GUARD, OR RESERVE REGARDLESS OF COMPONENT) ARE SUBJECT TO THE DEBT PRORATION RULES IMMEDIATELY BELOW. THESE DEBT PRORATION RULES TAKE EFFECT THE MILITARY PAY PROCESSING MONTH THIS MESSAGE IS ISSUED.

A. DEBTS LESS THAN \$10.00 ARE COLLECTED IN FULL.

B. DEBTS FROM \$10.00 TO \$71.99 ARE PRORATED OVER 3 MONTHS.

C. DEBTS GREATER THAN \$72.00 ARE PRORATED AS FOLLOWS:

(1) ACTIVE COMPONENT SOLDIERS: \$30.00 PER MONTH IS COLLECTED UNTIL THE DEBT IS PAID IN FULL.

(2) RESERVE COMPONENT SOLDIERS: \$1.00 PER DAY IS COLLECTED UNTIL THE DEBT IS PAID IN FULL(*NOTE FOR A FULL TIME RESERVIST, \$1.00 PER DAY EQUATES TO \$30.00 A MONTH, FOR A DRILLING RESERVIST, \$1.00 PER DAY EQUATES TO \$4.00 A MONTH.)

14. ARMY S DEBT WAIVER PROCESS. OFFICERS AND ENLISTED SOLDIERS MAY REQUEST WAIVER OF THE GOVERNMENT S CLAIMS FOR RECOVERY OF OVERPAYMENTS, SINCE THE GOVERNMENT HAS OVERPAID CERTAIN SOLDIERS BY NOT DEDUCTING PREMIUMS.

SOLDIERS CAN SUBMIT DD FORM 2789 (FORM FOUND AT THE FOLLOWING LINK:

<http://www.dtic.mil/whs/directives/infomgt/forms/forminfo/forminfopage2342.html>),

WAIVER/REMISSION OF INDEBTEDNESS APPLICATION IN ACCORDANCE WITH (IAW) THE INSTRUCTIONS ON THE FORM. THE SOLDIER COMPLETES PAGE 1 OF THE FORM AND THE SOLDIER S SUPPORTING FINANCE OFFICE COMPLETES PAGE 2. THE SUPPORTING FINANCE OFFICE ALSO TRANSMITS THE FORM TO DFAS-DENVER ON BEHALF OF THE SOLDIER REQUESTING WAIVER. SOLDIERS CANNOT TRANSMIT THEIR DD FORM 2789 DIRECTLY TO DFAS-DENVER. ARMY RESERVE SOLDIERS SUPPORTING FINANCE OFFICE IS: DFAS-IN, ATTN: AR LIAISON ACTIVITY, ROOM 122T, 8899 E. 56TH ST., INDIANAPOLIS, IN 46249 OR DIGITALLY SEND TO: ccin-arliason@dfas.mil.

NATIONAL GUARD SOLDIERS SUPPORTING FINANCE OFFICE IS THEIR SUPPORTING U.S. PROPERTY AND FISCAL OFFICER (USPFO).

TO REQUEST DEBT WAIVER, SOLDIERS OF ALL COMPONENTS MUST USE THE ABOVE PROCESS BECAUSE ONLY DFAS-DENVER ON BEHALF OF DOD CAN WAIVE PAST DUE FSGLI PREMIUMS. ARMY AGENCIES DO NOT HAVE THIS AUTHORITY. SUBMITTING THIS ACTION DOES NOT GUARANTEE PAST DUE PREMIUMS WILL BE WAIVED. THE SOLDIER IS STILL ULTIMATELY RESPONSIBLE FOR PAYING ANY PAST DUE PREMIUMS UNLESS FORMALLY RELIEVED OF RESPONSIBILITY BY DFAS-DENVER. SOLDIERS HAVE 120 DAYS FROM THE RELEASE OF THIS MESSAGE TO REQUEST WAIVER. AFTER 120 DAYS IF SOLDIERS DO NOT REQUEST WAIVER, ANY DEBT SUSPENDED BY DFAS WILL BE RELEASED AND COLLECTED IN ACCORDANCE WITH THE DEBT PRORATION RULES FOUND IN PARAGRAPH 13 OF THIS MESSAGE. SOLDIERS CANNOT REQUEST WAIVER FOR FSGLI PREMIUMS PREVIOUSLY DEDUCTED FROM THEIR PAY.

15. THE ARMY STAFF POC WORKING THIS ACTION IS LTC VOITHOFER AT DSN 222-6889, CML (703) 692-6889 OR MATTHEW.VOITHOFER@HQDA.ARMY.MIL.

16. EXPIRATION DATE CANNOT BE DETERMINED.

APPENDIX H

These numbers are now available and tailored to the individual at
<http://myarmybenefits.us.army.mil>

Family Information/Service Data

NAME: SSG Sample A Only 123-45-6789

	MM	DD	YYYY
DATE OF BIRTH	01	/ 02	/ 1974
DATE INITIAL ENTRY MILITARY SERVICE	10	/ 05	/ 1994
PAY ENTRY BASE DATE	01	/ 05	/ 1995
1405 DATE	01	/ 25	/ 1995
BASIC ACTIVE SERVICE DATE	02	/ 05	/ 1995
DATE OF PROMOTION	03	/ 01	/ 2007

	FIRST NAME		DOB
SPOUSE	VIRGINIA		02 / 01 / 1976
CHILDREN	FRED		05 / 01 / 2002
	JAN		04 / 01 / 1999
	BRYAN		03 / 08 / 1996

Based on data provided, SSG SAMPLE A ONLY's death on 1 June 2008
(Svc-Connected) (LOD=Yes) would provide these benefits to the family:

<u>Reason for Change</u>	<u>Family Benefits</u>			=	<u>Monthly</u>	<u>Annual</u>	
	<u>SS</u>	<u>+</u>	<u>DIC</u>	<u>+</u>	<u>SBP</u>	<u>Total</u>	<u>Total</u>
Current Benefit Jun-2008	\$2259	+	@1883	+	\$31	= 4,173	50,076
DIC Extra Ends Jun-2010	2259	+	1633	+	\$31	= 3,923	47,076
Bryan is 18 Mar-2014	1858	+	1362	+	\$31	= 3,251	39,012
Jan is 16 Apr-2015	929	+	1362	+	\$31	= 2,322	27,864
Jan is 18 Apr-2017	0	+	1091	+	\$31	= 1,122	13,464
Virginia is 62 Feb-2037	986	+	1091	+	\$31	= 2,108	25,296

Lump Sum funds available to designated beneficiaries:

Social Security Death Benefit	\$255
Death Gratuity	\$100,000
SGLI (Assumed)	\$400,000

Total	\$500,255

@DIC Extra \$250 until earliest of 2 yrs after death or youngest child age 18.

While SS, DIC, and SBP are adjusted for inflation by law, the amounts above are in today's dollars.

The Lump Sum funds shown above only reflect legislated entitlements. Payments will be made to the designated beneficiaries as elected in official records.

SBP amount is zero because DIC (VA) entitlement is greater than SBP (\$1027).

The Benefits Analysis Report is an estimate based on the most recent information available. Your official benefit amounts will be calculated by the appropriate agencies (Defense Finance and Accounting Service, Social Security, and Department of Veterans Affairs) and will be determined upon your application for the benefits.

Department of Veterans Affairs Education Benefits

Dependent Education Assistance (DEA)

Recipients	From	Age	Until	Age		
Virginia	11-Feb-2007	32	11-Feb-2027	52	45mos X \$881 =	\$39,645
Bryan	8-Mar-2014	18	8-Mar-2022	26	45mos X \$881 =	\$39,645
Jan	1-Apr-2017	18	1-Apr-2025	26	45mos X \$881 =	\$39,645

Current full time student rate is \$ 881 per month as of Oct 2007.
 Maximum number of school months is 45 (undergraduate or graduate).
 Spouse must be unmarried - Children may be married.
 DEA not paid if attending a federally funded academy or while on active duty.

Family Information/Service Data

NAME: CPT Sample A Only 123-45-6789

	MM	DD	YYYY
DATE OF BIRTH	01	/ 01	/ 1977
DATE INITIAL ENTRY MILITARY SERVICE	12	/ 01	/ 1998
PAY ENTRY BASE DATE	01	/ 05	/ 1999
1405 DATE	01	/ 05	/ 1999
BASIC ACTIVE SERVICE DATE	01	/ 05	/ 1999
DATE OF PROMOTION	02	/ 01	/ 2006
	FIRST NAME	DOB	
SPOUSE	JANE	01 / 02 / 1979	
CHILDREN	SUSAN	01 / 04 / 2005	
	JAMES	01 / 03 / 2002	

Based on data provided, CPT SAMPLE A ONLY's death on 1 June 2008 (Svc-Connected) (LOD=Yes) would provide these benefits to the family:

<u>Reason for Change</u>	<u>Family Benefits</u>			=	<u>Monthly</u>	<u>Annual</u>		
	<u>SS</u>	<u>+</u>	<u>DIC</u>		<u>+</u>	<u>SBP</u>	<u>Total</u>	<u>Total</u>
Member's death Jun-2008	\$3180	+	@1883	+	\$780	=	\$5,843	70,116
DIC Extra Ends Feb-2010	3180	+	1663	+	780	=	5,593	67,116
James is 18 Jan-2020	2726	+	1362	+	780	=	4,868	58,416
Susan is 16 Jan-2021	1363	+	1362	+	780	=	3,505	42,060
Susan is 18 Jan-2023	0	+	1091	+	780	=	1,871	22,452
Jane is 62 Jan-2041	1447	+	1091	+	780	=	3,318	39,816

Lump Sum funds available to designated beneficiaries:

Social Security Death Benefit	\$255
Death Gratuity	\$100,000
SGLI (Assumed)	\$400,000

Total	\$500,255

@DIC Extra \$250 until earliest of 2 yrs after death or youngest child age 18.

While SS, DIC, and SBP are adjusted for inflation by law, the amounts above are in today's dollars.

The Lump Sum funds shown above only reflect legislated entitlements. Payments will be made to the designated beneficiaries as elected in official records.

The Benefits Analysis Report is an estimate based on the most recent information available. Your official benefit amounts will be calculated by the appropriate agencies (Defense Finance and Accounting Service, Social Security, and Department of Veterans Affairs) and will be determined upon your application for the benefits.

Department of Veterans Affairs Education Benefits

Dependent Education Assistance (DEA)

Recipients	From	Age	Until	Age		
Jane	11-Feb-2007	28	11-Feb-2027	48	45mos X \$881 =	\$39,645
James	3-Jan-2020	18	3-Jan-2028	26	45mos X \$881 =	\$39,645
Susan	4-Jan-2023	18	4-Jan-2031	26	45mos X \$881 =	\$39,645

Current full time student rate is \$ 881 per month as of Oct 2007. \$118,935

Maximum number of school months is 45 (undergraduate or graduate).

Spouse must be unmarried - Children may be married.

DEA not paid if attending a federally funded academy or while on active duty.

Family Information/Service Data

NAME: LTC Sample A Only 123-45-6789

DATE OF BIRTH 01 / 01 / 1961
 DATE INITIAL ENTRY MILITARY SERVICE 05 / 01 / 1983
 PAY ENTRY BASE DATE 05 / 10 / 1983
 1405 DATE 05 / 10 / 1983
 BASIC ACTIVE SERVICE DATE 05 / 10 / 1983
 DATE OF PROMOTION 12 / 01 / 2004

	FIRST NAME	DOB
SPOUSE	SUSAN	01 / 02 / 1965
CHILDREN	JAN	02 / 10 / 1993
	JOHN	02 / 01 / 1992

Based on data provided, LTC SAMPLE A ONLY's death on 1 June 2008 (Svc-Connected) (LOD=Yes) would provide these benefits to the family:

<u>Reason for Change</u>		<u>Family Benefits</u>			=	<u>Monthly Annual</u>	
		<u>SS</u>	<u>+</u>	<u>DIC + SBP</u>		<u>Total</u>	<u>Total</u>
Member's death	Jun-2008	\$3570	+	@1883 + \$1918	=	\$7,371	88,452
Jan is 16	Feb-2009	3060	+	1883 + 1918	=	6,861	82,332
DIC Extra Ends	Feb-2010	3060	+	1612 + 1918	=	6,590	79,080
John is 18	Feb-2010	1530	+	1362 + 1918	=	4,810	57,720
Jan is 18	Feb-2011	0	+	1091 + 1918	=	3,009	36,108
Susan is 62	Jan-2027	1543	+	1091 + 1918	=	4,552	54,624

Lump Sum funds available to designated beneficiaries:

Social Security Death Benefit	\$255
Death Gratuity	\$100,000
SGLI (Assumed)	\$400,000

Total	\$500,255

@DIC Extra \$250 until earliest of 2 yrs after death or youngest child age 18.

While SS, DIC, and SBP are adjusted for inflation by law, the amounts above are in today's dollars.

The Lump Sum funds shown above only reflect legislated entitlements. Payments will be made to the designated beneficiaries as elected in official records.

The Benefits Analysis Report is an estimate based on the most recent information available. Your official benefit amounts will be calculated by the appropriate agencies (Defense Finance and Accounting Service, Social Security, and Department of Veterans Affairs) and will be determined upon your application for the benefits.

Department of Veterans Affairs Education Benefits

Dependent Education Assistance (DEA)

Recipients	From	Age	Until	Age		
Susan	11-Feb-2007	42	11-Feb-2027	62	45mos X \$881 =	\$39,645
John	1-Feb-2010	18	1-Feb-2018	26	45mos X \$881 =	\$39,645
Jan	10-Feb-2011	18	10-Feb-2019	26	45mos X \$881 =	\$39,645

Current full time student rate is \$ 880 per month as of Oct 2007. \$118,935
Maximum number of school months is 45 (undergraduate or graduate).
Spouse must be unmarried - Children may be married.
DEA not paid if attending a federally funded academy or while on active duty.

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¹ Indexes prepared by Major Andrew R. Atkins, Judge Advocate, U.S. Army. Presently assigned as a student, 60th Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, VA. J.D., 2007, University of Washington School of Law, Seattle, WA; B.S., 2000, U.S. Military Academy, West Point, N.Y. Member of the Bar of Washington.

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ESTATE PLANNING DOCUMENTS PART 1: WILL WORKSHEET as of 2 MAR 11

CLIENT INFORMATION:

Your Full Name (first, middle, last): Nicky Rage, Rank: COL(R), *SSN: 234-56-7890
Present Address: 95210 Kelly Lane, Cary, NC
X Male, Female; U.S. citizen? X Yes No; State of Legal Residence: NC
*Unit of Service Member: NA
Duty Phone: NA, Home or Cell Phone: (910) 123-4567, *ETS: NA, *PCS: NA
(If You Have a Prior Will or Estate Plan, Check This Block)

MARITAL STATUS (select the most appropriate):

- A. X Married once, and my spouse is alive.
B. Married and spouse is alive, but were married before (a prior spouse died or was divorced)
C. Widow/ widower.
D. Previously married, but now divorced and single.
E. Single, never married.

Spouse's full name: Allison Kim SSN: 345-67-8901 Is spouse a U.S. citizen? Yes X No

CHILDREN: X Yes No; If yes, is any child a minor (under 18 years)? Yes, No;

If no, are you expecting a child? Yes, No

Please list your children's full names, ages, sex, and their relation to you, i.e., whether they are your biological, adopted, or stepchild:

- 1. NAME: Clark Kent Rage AGE: 3 SEX: M RELATION: Son
2. NAME: Lois Lane Rage AGE: 5 SEX: F RELATION: Daughter
3. NAME: AGE: SEX: RELATION:
4. NAME: AGE: SEX: RELATION:

Is any biological child from a previous relationship? Yes X No. Does any child have special needs? Yes X No
If you have adopted children or stepchildren, do you wish to treat them the same as your natural children? Yes X No

INTERVIEW NOTES: Testator wants:

- (1) A Credit Shelter Trust for the benefit of his wife and children that is fully funded by formula.
(2) His wife to have a "5 & 5" Power to withdraw assets from the marital deduction trust only.
(3) The Trustee to have power to liquidate trusts with a value under \$100K.

VALUE OF ESTATE: To determine what type of will is appropriate for you, we need an estimate of the value of your estate.

Include the value of all of the property you own in your name, and if married, the value of your spouse's property. If any of your property secures a debt (for example, a mortgage on your home), include only your equity in the property. Also include the value of your life insurance policies (SGLI, VGLI, etc.). Note that life insurance ordinarily does not pass according to your will; it will go to the beneficiaries you designated in the policy. The policy's face value is usually included in determining whether estate taxes will apply in your case.

Approximate value of your estate (not including life insurance): \$ 2 Million Value of life insurance (self): \$ 1 Million

DO YOU OWN A FAMILY FARM/FAMILY-OWNED BUSINESS: Yes X No

DO YOU OWN ANY REAL ESTATE X Yes No (If no, skip to next section); If yes, what is its value? \$100,000

If yes, who do you own it with? NAME: NA RELATION:
In what state is the real property located? NC

To whom do you want to give the real estate:

- A. X All to the spouse, if he/she survives
B. to one or more different beneficiaries.
NAME: RELATION:
NAME: RELATION:
C. all real estate is to pass as part of the residuary estate, rather than being separately devised
D. just the Testator's home to the wife (with other real estate passing as part of the residuary estate)
E. the wife is to have a life estate.

GIVING AWAY YOUR PROPERTY

PERSONAL EFFECTS AND TANGIBLE PERSONAL PROPERTY: How do you wish to give your personal property?

SELECT ONE ONLY

- A. X All to my spouse (If you wish to give everything to your spouse, OR to disinherit spouse check (D))
B. As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to spouse). (List specific bequests on a separate piece of paper.)
C. As per a schedule of specific bequests or a personal property memorandum (with items not listed passing to residuary estate) (List specific bequests on a separate piece of paper.)
D. As provided with regard to the residuary estate - SELECT THIS IF SINGLE.

RESIDUARY ESTATE: Your residuary estate is whatever property remains after paying debts and expenses of administration, and any specific bequests. Because most people do not make specific bequests, the "residuary" usually describes all the property left to your beneficiaries. To whom do you want to leave your residuary estate? SELECT ONE ONLY

- A. All to my spouse if he/she survives me, and if not, then to my children and issue.
B. X A marital deduction trust f/b/o the spouse (or if she predeceases, to the child and issue)
C. A minimum bequest to my spouse, (disinheriting them to the fullest extent of the law, with the remainder going to child(ren) or other person(s). List person(s) to whom you wish to give your property under (D)
D. Various other types of dispositions listed on top of back (check D if you are single and see selections top of back).

- A. All to one specific beneficiary. NAME: _____ RELATION: _____
- B. To more than one beneficiary. If you have more than one beneficiary, are they:
- Specific people who are to share equally. NAME: _____ RELATION: _____
NAME: _____ RELATION: _____
 - A group of people described as a class (e.g., "my brothers and sisters") who are to share equally.
Explain: _____
 - Some other unequal division between the beneficiaries (e.g., 50% to one beneficiary and 25% each to two others). Explain: _____
 - Other. Explain: _____

MINORS: If **any** of your beneficiaries is a minor, at what age do you want them to receive their gift? 18; 21; 1/2 @ 21 and 1/2 @ 25; 1/3 @ 21, 1/3 @ 25, 1/3 @ 30; Some other age: 30 (please indicate the age) (NOTE: Selecting an age greater than 21 will likely require a trust, which may cause your estate to incur additional expenses for the administration of the trust. These would lower the amount available for your beneficiaries. Please **READ LEAVING PROPERTY TO MINORS** below.)

SECONDARY/CONTINGENT BENEFICIARIES: If all of the beneficiaries you designated above (spouse, children) die before you, to whom do you wish to leave your estate?

- 1st Contingent-NAME: Bull Rage RELATION: Brother % 60
NAME: Sally Rage RELATION: Sister % 40
- 2nd Contingent-NAME: _____ RELATION: _____
- Last Resort- NAME: _____ RELATION: _____

GRANDCHILDREN: If you had grandchildren would you want them to receive your child's share if your child did not survive you?
 Yes No

EXECUTOR: Your Executor (or "personal representative") ensures your estate is settled upon your death. This ordinarily involves going through "probate", a court-administered procedure for settling an estate as provided in your will or under State law. Whom do you wish to have as your executor (cannot name a minor)? (CHECK ONE and follow instructions)

- A. My spouse. NO NEED TO LIST SPOUSE'S NAME.
- B. My spouse and a co-executor. Name co-executor below.
- C. My spouse and a successor executor. Name successor executor below.
- D. One executor other than my spouse. Name executor below.
- E. Two co-executors, neither of whom are my spouse. Name two co-executors below.
- F. One executor and a successor executor, neither of whom are my spouse. Name one executor and a successor below.

NAME: Big Rage RELATION: Father
NAME: Betty Rage RELATION: Mother

GUARDIAN: Do you wish to appoint a legal guardian for a minor child **other** than the child's other natural parent?

- A. One guardian for any child when I die. NAME: Bull Rage RELATION: Brother
- B. One guardian and a successor guardian. NAME: _____ RELATION: _____
SUCCESSOR NAME: _____ RELATION: _____
- C. Two co-guardians. Co #1 NAME: _____ RELATION: _____
Co #2 NAME: _____ RELATION: _____

CUSTODIAN OF PROPERTY: Would you like the child's guardian, regardless of who it is, to be the custodian of the child's property? YES NO. If no, who: NAME: Sally Rage RELATION: Sister

LEAVING PROPERTY TO MINORS: Instead of giving your estate directly to a MINOR beneficiary, you may give it to a Trustee, IN TRUST, for the benefit of the minor until they reach the age you designate. The trustee will manage the trust under court supervision. Although the trustee's primary purpose is to safeguard the inheritance, the money can also be used for any minor's health, education, welfare, or maintenance, at the trustee's discretion. For many people, a trust is unnecessary because, under the Uniform Gifts to Minors Act (UGMA/UTMA) language in your will, gifts to beneficiaries under 18 (or, if you prefer, 21) will be controlled by your executor initially, and guardian after probate, without establishing a trust. The executor and/or guardian can still use the minor's inheritance for the benefit of the minor, and this is ordinarily less complicated and less expensive than a trust. Unless you have children from a prior marriage, disabled children, or a very large estate, you might prefer not to use a trust. One disadvantage, however, to the UGMA is that your estate will be divided in as many equal shares as there are minor beneficiaries designated; each minor will receive the remainder of their share as they turn 18 or 21, at your option. A trust may be more appropriate if you do not want your child to get property until after age 21.

Do you want a trust? Yes No. (If yes, would this be: One trust for the benefit of all beneficiaries ("pooled" trust), or Individual trusts for each of the beneficiaries. NOTE: Individual trusts can be very expensive.

IF YES WHO DO YOU WANT AS TRUSTEE? (Please list name and relationship):

- A. One trustee. NAME: _____ RELATION: _____
- B. Two co-trustees. NAMES: _____ RELATION: _____
RELATION: _____
- C. One trustee and a successor. NAME: Big Rage RELATION: Father
NAME: Betty Rage RELATION: Mother
- D. One trustee and a co-trustee who is to be later appointed by the executor.
NAME: _____ RELATION: _____

OFFICE USE ONLY

Date Briefed: _____, **Briefed by:** _____, **Location** _____; **Attorney:** _____; **Date:** _____
Mode: CS (SRPC); CD (Demob); CL (Reg. Appt.); CE (ERDE); CN (NEO); CM (Mob Depl Read Ex); CP (Premob); **Case:** WW (Will), WA (AMD), WS (SGLI); **Services:** SW (Will prep); ST (Will w-trust/guardian); SV (AMD); SC (Counsel)

Setting Servicemembers Up for Success: Buying a Home, a Legal and Financial Analysis

Major Samuel W. Kan*

Owning a home is one of the most tried-and-true paths to wealth accumulation in our economy. . . . However, it takes more than a down payment to put people on the path that leads to ownership. Borrowers must be able to sustain their loans over the long term. Part of sustaining a loan is picking the right loan. Over the past several years, there has been an explosion of new and novel mortgage products But to the extent that these new mortgage products promote home buying decisions that are premised on unrealistic rates of home appreciation, they raise concerns. . . . Homeowners need to understand . . . [the] risks and thus financial evaluation, as well as a down payment, is a key ingredient for creating solid footing on the path of homeownership.¹

I. Introduction

Before purchasing a home, servicemembers need to do a thorough legal and financial analysis, considering their housing options, personal situations, and market conditions. To avoid future legal and financial problems, servicemembers should incorporate numerous legal and financial disciplines, including tax law, consumer law, landlord-tenant law, real estate finance law, bankruptcy law, family law, and military law, into this analysis. This article advocates a three-step approach for conducting an effective housing analysis and addresses significant issues servicemembers may encounter in the home buying process.

Part II of this article encourages servicemembers to identify and consider alternatives to buying a home—renting a residence, living in military housing, or residing in privatized military housing. Part II also addresses the advantages and disadvantages of buying a home and then draws a comparison to home-buying alternatives by discussing the advantages and disadvantages of renting a residence, living in military housing, and residing in privatized military housing.

Part III emphasizes the significance of evaluating a decision to purchase a home in light of an individual's personal situation, current market conditions, and the specific real estate property. This step highlights the importance of early financial planning and property selection. Part III not only addresses acquiring the right type of mortgage under the most advantageous terms but also addresses appraising the property in a manner that will maximize an individual's ability to later sell or lease the property. Finally, Part III goes further by discussing the importance of the source of funding for down payments and mortgage payments and the consequences of the property's location in light of family law considerations.

Part IV provides a quantitative starting point for analyzing whether it is more advantageous to purchase a home, rent a residence, or live in military or privatized military housing. As part of this analysis, Part IV stresses the importance of determining the potential income cash flow of a property. By conducting an income cash flow analysis based on renting the property to tenants, servicemembers can identify in advance of buying a property whether they will be able to keep the property after relocating to a new duty assignment. Part IV also recognizes that many factors cannot be easily quantified and will need to be prioritized differently depending on a servicemember's situation. To this end, Part IV suggests using mechanisms such as a decision matrix² to address these significant concerns.

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¹ Mark W. Olson, Governor, Fed. Reserve Bd., Speech at the Community Development Policy Summit, Cleveland, Ohio: Exploring the Benefits and Challenges of an Ownership Society (June 23, 2005) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2005/20050623/default.htm>) [Olson Speech].

² CAPTAIN RICHARD B. STICKERS, DECMAT PROGRAM FOR WINDOWS VERSION 2.2 (1998), available at <http://www.dcsswift.com/military/software.html> (allowing consumers to download the DECMAT software directly from the internet for free). See *infra* Appendix D (allowing decision makers to use a decision matrix to compare different courses of action by prioritizing and evaluating different factors).

II. Step One: Understanding Available Options

Servicemembers should consider all of their housing options before purchasing a home. The full range of housing options typically includes buying, renting, living in military housing, or residing in privatized military housing. At some duty locations, servicemembers may be required to live in military housing, foreclosing the need to consider other housing options. At other locations, military and privatized military housing may not be available, forcing servicemembers to rent or buy. Still, at other locations, servicemembers may have all of these housing options readily available and may need to weigh their options according to their personal financial situation and market conditions. Regardless, servicemembers need to conduct a housing analysis in a manner that maximizes the advantages and minimizes the disadvantages of their choice, thereby reducing unnecessary exposure to legal and financial risk.

A. Buying Property

1. Advantages

As previously stated, owning a home is “one of the most tried-and-true paths to wealth accumulation in our economy.”³ It is not surprising, therefore, that buying a home has numerous financial advantages.⁴ First and foremost, buying a home “builds wealth in two ways: through the ‘forced savings’ of paying down a mortgage, and through appreciation -- the rise in the home’s value over time.”⁵ Simultaneously, buying a home allows servicemembers to diversify their financial portfolios through real estate equity⁶ while taking advantage of the principle of leverage.⁷ Specifically, because real estate investments allow for a higher percentage of debt to fair market value compared to other types of investment, servicemembers might experience a significant rate of return on a small cash investment.⁸

In addition to building wealth, owning a home allows servicemembers to reduce certain expenses by deducting mortgage interest and mortgage interest points,⁹ mortgage prepayment penalties,¹⁰ property taxes,¹¹ and casualty losses.¹² These deductions are especially valuable to servicemembers because they “receive tax-free quarters allowances to pay interest expenses, which are themselves tax deductible.”¹³ Additionally, upon the sale of their principal residence, homeowners can

³ Olson Speech, *supra* note 1.

⁴ The following analysis will vary considerably based on the type of property purchased and the use of the property. Specifically, the analysis of purchasing a single family residence differs from that of a condominium, shares in a cooperative, a mobile home, or a multi-family property partially used as a rental unit. For example, “Cooperatives (coops) are an arrangement in which you don’t hold title to your individual unit; instead, you own stock in a corporation that owns the development.” MARTIN NISSENBAUM ET AL., ERNST & YOUNG’S PERSONAL FINANCIAL PLANNING GUIDE 339 (5th ed. 2004). Although coops are normally less expensive than single family residences and provide amenities similar to apartment complexes, they involve unpredictable maintenance fees and potential mismanagement by the corporation board. *Id.* Condominiums (condos) are “an arrangement in which you actually hold title to the unit you live in; you also own an interest in the development’s land and common areas.” *Id.* at 340.

⁵ Liz Pulliam Weston, *Why It’s Smarter to Buy than Rent*, MSN MONEY, Jan. 15, 2006, <http://moneycentral.msn.com/content/Banking/Homebuyingguide/P72655.asp>.

⁶ See NISSENBAUM, *supra* note 4, at 329.

⁷ See CARLTON H. SHEETS, HOW TO BUY YOUR FIRST HOME OR INVESTMENT PROPERTY WITH NO DOWN PAYMENT STEP BY STEP MANUAL 2-4 to -6 (3d ed. 1997).

⁸ See D. BARLOW BURKE, JR., REAL ESTATE TRANSACTIONS, EXAMPLES AND EXPLANATIONS 363 (1993). For example, transaction costs aside, if a servicemember pays \$100,000 for a home and the home increases in value by \$10,000, the servicemember receives a ten percent return on his investment SHEETS, *supra* note 7, at 2-5. If the servicemember makes a \$10,000 down payment on a mortgage, and the home goes up in value \$10,000, the servicemember makes a 100% return on his investment by using other people’s money. See *id.* This is a simple example of the benefits of leveraged investment. The effects of transaction costs will be considered later in the article. See *infra* pp. 4-6, apps. A and B.

⁹ See INTERNAL REVENUE SERV., DEP’T OF TREASURY, PUB. 17 YOUR FEDERAL INCOME TAX 144-47 (2005) [hereinafter PUB. 17] (discussing the deductibility of mortgage interest points) [hereinafter PUB. 17]; I.R.C. § 163(h) (LEXIS 2006) (discussing the deductibility of mortgage interest). See generally ADMINISTRATIVE AND CIVIL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 261, REAL PROPERTY GUIDE 1-63 (Dec. 1997) [hereinafter JA 261] (discussing that points are considered tax deductible interest only if they are solely for the use of money and not for lender services). See *infra* pp. 4, 24, apps. A and B.

¹⁰ MAJOR DAVID TRYBULA & LIEUTENANT COLONEL RICHARD HEWITT, ARMED FORCES GUIDE TO PERSONAL FINANCIAL PLANNING 182 (5th ed. 2002).

¹¹ See I.R.C. § 164(a); PUB. 17, *supra* note 9, at 142. See *infra* p. 4.

¹² I.R.C. § 165c(3). See generally JA 261, *supra* note 9, at 1-63 (distinguishing casualty losses that are sudden and unexpected such as damage to a home due to a fire, storm, flood, hurricane, vandalism, or other similar event, from non-casualty losses such as termite damage or progressive deterioration).

¹³ TRYBULA & HEWITT, *supra* note 10, at 182. “If you are . . . a member of the uniformed services and receive a housing allowance that is not taxable, you still can deduct your real estate taxes and your home mortgage interest. You do not have to reduce your deductions by your nontaxable allowance.”

exclude up to \$250,000 (\$500,000 for joint tax returns) of capital gain.¹⁴ Finally, unlike renters, homeowners avoid periodic rent increases.¹⁵

Besides reducing certain expenses, owning a home allows homeowners to protect their financial assets. First, owning a home is a hedge against inflation since homes have “historically appreciated faster than the cost of living.”¹⁶ Second, by buying a home, servicemembers can protect equity invested in their home in the event of bankruptcy.¹⁷ Third, homeowners experience protections from foreclosure. For example, homeowners may exercise redemption rights.¹⁸ Furthermore, servicemembers and their spouses¹⁹ that own homes are protected by the Servicemembers Civil Relief Act (SCRA).²⁰ For example, if a servicemember acquires a home with a mortgage, enters the military, and subsequently breaches the mortgage obligation, the mortgage lender may not sell, foreclose, or seize the property during, or within ninety days after, the period of the servicemember’s military service unless there is a court order granting such action or an applicable agreement.²¹

In addition to protecting assets, homeowners benefit from many intangible advantages such as enjoying the feeling of autonomy that comes from owning a home and the feeling of ease that comes from being able to borrow against home equity if the need arises. Moreover, homeowners do not have to worry about lease renewals, owners objecting to pets residing in the property, property managers preventing property improvements, or landlords exercising their right of entry.²² Furthermore,

INTERNAL REVENUE SERV., DEP’T OF TREASURY, PUB. 530 TAX INFORMATION FOR FIRST-TIME HOMEOWNERS 2 (2005) [hereinafter PUB. 530]. Receiving a housing allowance, however, also has some potential negative implications. See *infra* note 81 and accompanying text.

¹⁴ I.R.C. § 121(a). “Gross income shall not include gain from the sale or exchange of property, if during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer’s principal residence for period aggregating 2 years or more.” *Id.* See *infra* pp. 5, 22-25. This exclusion may be even greater if the homeowner dies after experiencing significant appreciation in his property because the decedent’s beneficiaries may receive a “stepped up” basis equal to “the fair market value of the property at the date of the decedent’s death.” I.R.C. § 1014(a)(1). Decedent is defined as: “A dead person, esp. one who has died recently.” BLACK’S LAW DICTIONARY 412 (7th ed. 1999). Basis is defined as the following: “The value assigned to a tax-payer’s investment in property and used primarily for computing gain or loss from a transfer of the property.” *Id.* at 145. Stepped-up basis is defined as the following: “The basis of property transferred by inheritance. Stepped-up basis equals the fair market value of property on the date of the decedent’s death (or on the alternate valuation date.” *Id.* at 145. The stepped-up basis advantage, however, will be eliminated to a great degree for property acquired from a decedent dying after December 31, 2009. See I.R.C. § 1014(f) (terminating the application of I.R.C. § 1014 to decedents dying after 31 December 2009); I.R.C. § 1022(a) (treating property transferred by a decedent dying after 31 December 2009 as a gift with a basis equal to the lesser of the fair market value or the decedent’s adjusted basis). Adjusted basis is defined as the following: “Basis increased by capital improvements and decreased by depreciation deductions.” BLACK’S LAW DICTIONARY, *supra* at 145. Depreciation is defined as the following: “A decline in an asset’s value because of use, wear, or obsolescence.” BLACK’S LAW DICTIONARY, *supra* at 452.

¹⁵ See KENNETH M. MORRIS & VIRGINIA B. MORRIS, GUIDE TO UNDERSTANDING PERSONAL FINANCE 56 (3d ed. 2000). Homeowners, however, may experience mortgage payment increases if they acquire an adjustable rate mortgage. See *infra* pp. 16-17. In addition, homeowners may experience increases in property tax, homeowner’s fees, and insurance premiums.

¹⁶ NISSENBAUM, *supra* note 4, at 329. This proposition has been demonstrated time after time by numerous studies such as the study conducted by Ali Anari and James Kolari, evaluating applicable data from 1968 to 2000. Ali Anari & James Kolari, *House Prices and Inflation*, in 30 REAL ESTATE ECONOMICS (Mar. 22, 2002) (comparing the relationship between the prices of houses and the prices of nonhousing goods and services; discussing numerous different studies reinforcing the proposition that real estate is the only “complete hedge” against inflation; and showing that real estate has a positive relationship to inflation while common stocks have a negative relationship to inflation).

¹⁷ For example, in the event of bankruptcy it is possible for a debtor to claim a homestead exemption even if the debtor resides elsewhere for a period of time, rents the home to others, or unsuccessfully lists the property for sale as long as the debtor intends to return to the home. See, e.g., *In re Inmon*, 137 B.R. 757 (Bankr. E.D. Ark. 1992); see also 11 U.S.C.S. § 522 (LEXIS 2006). See *infra* p. 6 (discussing federal and state homestead exemptions). Homestead is defined as the following: “The house, outbuildings, and adjoining land owned and occupied by a person or family as a residence. As long as the homestead does not exceed in area or value the limits fixed by law, in most states it is exempt from forced sale for collection of a debt.” BLACK’S LAW DICTIONARY, *supra* note 14, at 738.

¹⁸ See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 467 (3d ed. 1994). Redemption is defined as the following:

1. The act or an instance of reclaiming or regaining possession by paying a specific price.
2. Bankruptcy. A debtor’s right to repurchase property from a buyer who obtained the property at a forced sale initiated by a creditor. . . .
4. Property. The payment of a defaulted mortgage debt by a borrower who does not want to lose the property.

BLACK’S LAW DICTIONARY, *supra* note 14, at 1282. After defaulting on a mortgage, under certain conditions, “a mortgagor may perform his obligation under the mortgage and have the title to his property restored free and clear of the mortgage.” NELSON & WHITMAN, *supra* note 18, at 467. In addition, in “about half the states, the mortgagor . . . [is] permitted for a specific period after a valid foreclosure sale to redeem ‘from the sale’ by paying to the foreclosure sale purchaser the foreclosure sale price plus, in some instances, certain additional amounts.” NELSON & WHITMAN, *supra* note 18, at 468.

¹⁹ 50 U.S.C.S. app. § 538 (LEXIS 2006).

²⁰ *Id.* app. §§ 533, 501-96. “This Act may be cited as the Servicemembers Civil Relief Act.” *Id.* app. § 501.

²¹ *Id.* app. § 533.

²² See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 274 (2d ed. 1993). In general, leases:

frequently give landlords a privilege to enter for stated purposes, such as to inspect or to show the premises to prospective new tenants. If the landlord has a duty to make certain repairs, he generally is privileged to enter for that purpose. In the absence of some

those purchasing a home can take advantage of numerous government incentives ranging from grants that encourage first time homeownership²³ to subsidies for those making homes more energy²⁴ or water efficient.²⁵

2. Disadvantages

Unfortunately, numerous disadvantages are also associated with owning a home. Homeowners must pay purchasing costs, such as down payments and closing costs; continuing maintenance expenses, including plumbing and roof repairs;²⁶ escalating taxes, such as property and school taxes; and ongoing insurance premiums, including homeowners insurance and, possibly, private mortgage insurance (PMI).²⁷ Just to cover maintenance and repair costs, homeowners should budget at least one percent of the home's purchase price each year.²⁸ This amount can be considerably greater depending on the home's age, how well the home was maintained previously and the harshness of the climate.²⁹ Additional funds may be necessary to pay for supplemental insurance to cover floods, tornados, hurricanes, earthquakes, and other events not typically covered by homeowners insurance.³⁰ All of these expenses are in addition to a homeowner's monthly mortgage payment. By not planning for these expenses or other unforeseen circumstance, a homeowner may run out of money, default on his loan, and even experience foreclosure.

Although homeowners pay these numerous expenses associated with owning a home, they still may not experience significant tax savings. First, to take advantage of the tax benefits, homeowners must itemize their tax deductions, rather than taking the standard deduction, and determine what taxes and expenses are deductible.³¹ Second, unless homeowners are paying significant mortgage interest and property taxes, they may experience little benefit from itemizing their taxes as compared to taking the standard deduction.³²

specific privilege to enter, it has been held that the landlord may enter to collect rent and to distraint where that is permitted.

Id. Distraint is defined as the following: "To force (a person, usu. a tenant), by the seizure and detention of personal property, to perform an obligation (such as paying overdue rent)." BLACK'S LAW DICTIONARY, *supra* note 14, at 487.

²³ See, e.g., Texas Department of Housing and Community Affairs, *The Texas First Time Homebuyer Program*, <http://www.tdhca.state.tx.us/homeowner/ship/fthb/index.htm> (last visited Feb. 16, 2007) (providing grant funds up to five percent of the mortgage amount); Georgia Department of Community Affairs, Georgia Dream Homeownership Program, <http://www.dca.state.ga.us/housing/Homeownership/programs/downloads/GADreamBrochure.pdf> (last visited Aug. 15, 2006).

²⁴ See, e.g., Virginia Department of Housing and Community Development, Weatherization Assistance Program, <http://www.dhcd.virginia.gov/HOUSING/HEE/Weatherization.htm> (last visited Aug. 15, 2006) (providing financial incentives for weatherizing homes); Database of State Incentives for Renewables & Efficiency, <http://www.dsireusa.org> (last visited Feb. 16, 2007) (providing links by state to federal and state incentives for renewable energy); Database of State Incentives for Renewables & Efficiency, *Residential Solar and Fuel Cell Tax Credit*, http://www.dsireusa.org/library/includes/incentive2.cfm?Incentive_Code=US37F&State=federal¤tpageid=1&ee=1&re=1 (last visited Feb. 16, 2007) (providing up to a \$2,000 tax credit for the purchase and installation of residential solar electric and solar water heating).

²⁵ See, e.g., Austin City Connection, Toilet Replacement Program, <http://www.ci.austin.tx.us/watercon/sftoilet.htm> (last visited Aug. 15, 2006) (offering free replacement water efficient toilets).

²⁶ See Liz Pulliam Weston, *The Hidden Costs of Homeownership*, MSN MONEY, <http://moneycentral.msn.com/content/Banking/Homebuyingguide/P37628.asp?Printer> (last visited Jan. 26, 2006) [hereinafter *Hidden Costs*].

²⁷ See MORRIS & MORRIS, *supra* note 15, at 57, 64. "To guarantee payment" if a buyer defaults, lenders often require buyers to pay for PMI if they make a down payment of less than twenty percent. *Id.* at 64.

²⁸ *Hidden Costs*, *supra* note 26.

²⁹ *Id.*

³⁰ See *id.*; see also Sarah Max, *Should I Buy a House?*, CNNMONEY.COM (Apr. 4, 2005), http://money.cnn.com/2005/03/31/real_estate/homeguide_should_ibuy (addressing the need to keep a large cash reserve greater than four to six months of typical expenses to cover unanticipated expenses).

³¹ See PUB. 17, *supra* note 9, at 131. (For example, while state, local, and foreign real estate taxes can be deducted, taxes for local benefits, trash and garbage pickup fees, and homeowner association charges cannot be deducted. Similarly, homeowners cannot deduct fire or homeowner's insurance premiums, Federal Housing Administration (FHA) or other mortgage insurance premiums, depreciation, or the cost of utilities.)

³² For example, if a joint tax filing homeowner in the twenty-five percent tax bracket pays \$11,000 in mortgage interest and other deductions in 2005, he only receives a \$250 additional tax benefit if he itemizes his deductions instead of taking the \$10,000 standard deduction. Weston, *supra* note 5. Furthermore, the tax benefit will "shrink over time" since the amount of interest paid on a mortgage generally decreases each year while the standard deduction keeps "getting adjusted upward, squeezing your tax break from both directions." *Id.*

To make matters worse, a bipartisan Advisory Panel on Federal Tax Reform established by U.S. President George W. Bush on January 7, 2005,³³ recommended³⁴ “lowering the mortgage interest cap,”³⁵ “converting the mortgage interest deduction to a [fifteen percent] tax credit,”³⁶ and increasing the length of ownership requirement.³⁷ If this proposal becomes law, persons in a higher tax bracket with a higher mortgage will likely see less of a tax benefit than under the current system.³⁸ For example, under current law a homeowner in the twenty-five percent tax bracket paying \$18,000 a year in interest on a \$300,000 loan would reduce his taxable income by \$18,000 and save \$4500 (i.e., \$18,000 x .25) in taxes.³⁹ The same homeowner under the Advisory Panel proposal would only save \$2700 (i.e., \$18,000 x .15).⁴⁰

In addition to experiencing potentially fewer actual tax savings, homeowners may also build less wealth than they anticipate. Specifically, homeowners risk a decrease in their home’s value if the real estate market declines.⁴¹ This is important because a downturn in the market could cause a property’s value to fall below the principal owed on a mortgage, leaving homeowners unable to sell their properties and pay typical costs of sale without being financially liable for significant deficiencies.⁴² For example, if a seller of a home experienced a 5% decline from his home’s purchased price of \$300,000 and

³³ The President’s Advisory Panel on Federal Tax Reform, *America Needs a Better Tax System: Statement by the Members of the President’s Advisory Panel on Federal Tax Reform* (Apr. 13, 2005), <http://www.taxreformpanel.gov/04132005.pdf>.

³⁴ See THE PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, REPORT OF THE PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA’S TAX SYSTEM (2005), available at http://www.taxreformpanel.gov/final-report/TaxReform_Intro.pdf [hereinafter FEDERAL TAX REFORM]. Current law allows an interest deduction of up to \$1.1 million of mortgage debt. *Id.* at xvi. The proposal provides for a home credit equal to fifteen percent of paid mortgage interest and limits mortgages to an average regional price of housing ranging from about \$227,000 to \$412,000. *Id.* at xvii.

³⁵ Jeanne Sahadi, *Mortgage Tax Changes: Winners & Losers: Here’s a Look at Some Issues Concerning the Tax Reform Panel’s Proposal to Trim Mortgage Breaks*, CNNMONEY.COM (Oct. 25, 2005), http://money.cnn.com/2005/10/25/pf/taxes/homededuction_proposal/index.htm [hereinafter *Mortgage Tax Changes*]. The mortgage interest cap is “the amount of a loan on which homeowners would receive a tax break for interest paid.” *Id.*

³⁶ *Id.* “Deductions reduce your taxable income but favor those who itemize and those in higher tax brackets. Credits, which are dollar-for-dollar reductions of the taxes you owe, benefit all taxpayers equally.” *Id.*

³⁷ FEDERAL TAX REFORM, *supra* note 34, at 75. Comparing the current and proposed laws:

Under current law, up to \$500,000 of capital gains on a home that a taxpayer has owned and used as his principal residence for two out of the last five years may be excluded The Panel recommends that the length of time an individual must own and use a home as a principal residence to qualify for the tax exemption be increased from two out of five years to three out of five years.

Id. at 74-75.

³⁸ *Mortgage Tax Changes, supra* note 35.

³⁹ *Id.*

⁴⁰ *Id.* Theoretically, homeowners may be able to use the new law to their advantage as follows:

It also may be the case for some homeowners that if they no longer can deduct their mortgage they may opt to stop itemizing altogether, instead taking the standard deduction plus the mortgage credit, if that would be allowed. In that case, conceivably they might enjoy tax savings equal to or greater than they would see under the current system.

Id.

⁴¹ See NISSENBAUM, *supra* note 4, at 329.

⁴² See TRYBULA & HEWITT, *supra* note 10, at 157. Typical costs of sale include realtor costs, conveyance taxes, title costs, attorney fees, and inspections. *See id.* at 165-70. There are many indicators that 2006 and 2007 will mark a significant downturn in the real estate market. For example, a report released by the U.S. Department of Housing and Urban Development showed a 17.3% decrease in the sales of new single-family homes compared to 2005. U.S. Department of Commerce, *New Residential Sales in December 2006*, www.census.gov/const/newressales.pdf. Similarly, the National Association of Realtors reports that sales of existing single-family homes fell 8.4%, which marked the largest annual decline in nearly 20 years. John W. Schoen, *Has Housing Market Bottomed Out?*, MSNBC, Jan. 25, 2007, <http://www.msnbc.msn.com/id/16812267>. These declines in sales have accompanied a decrease in the median prices of homes in some areas. For example, the median price of homes in the Northeast of the United States “plunged” 4.8% in 2006. Matt Woolsey, *America’s Best and Worst Housing Markets*, MSNBC, Feb. 1, 2007, <http://www.msnbc.msn.com/id/16929669/>. *See generally* National Association of Realtors, *Median Sales Prices of Existing Single-Family Homes for Metropolitan Areas*, [http://www.realtor.org/Research.nsg/files/MSA_PRICESF.pdf/\\$FILE/MSAPRICESF.pdf](http://www.realtor.org/Research.nsg/files/MSA_PRICESF.pdf/$FILE/MSAPRICESF.pdf) (last visited Feb. 17, 2007) (showing the median prices of homes by year and by quarter). *See infra* notes 206-208 and accompanying text (showing historic examples of market downturns). Making matters even more, some experts such as Federal Reserve Vice Chairman Donald L. Kohn believe that:

[H]ousing starts may be not very far from their trough, but the risks around this outlook still are largely to the downside. Although house prices nationally have decelerated noticeably and appear to have fallen in some markets, they are still high relative to rents and interest rates. Building permits decreased substantially again in November [2006], and inventories of unsold homes have only started to edge lower. We also do not know whether the possible stabilization that seems to be taking hold would be immune to a rise in longer-term interest rates should term premiums increase or the federal funds rate fail to follow the downward path currently built into market expectations.

had to pay 7% of the home's \$285,000 sale's price to cover realtor and other costs of sale, he would have to have \$34,950 (i.e. \$15,000 + \$19,950) in equity just to cover the costs of selling his home without having to bring additional funds to the closing. Furthermore, due to frequent moves and associated transaction costs, military buyers may not experience significant equity growth since they often own their properties for short periods of time.⁴³

Another disadvantage homeowners may experience is fewer bankruptcy protections. Historically, debtors filing for bankruptcy protection could choose between the possible unlimited state homestead exemption⁴⁴ and the limited federal bankruptcy homestead exemption.⁴⁵ These protections have been extremely valuable in the event homeowners become defendants in civil lawsuits.⁴⁶ Due to significant recent changes in the federal bankruptcy code, however, there are numerous limitations to the state homestead exemption.⁴⁷ For example, if a debtor acquires a homestead within 1215 days preceding filing bankruptcy, the debtor can only exempt \$125,000 of his homestead.⁴⁸ Fortunately, this limitation "does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence"⁴⁹ if both residences are located in the same state. Furthermore, a homestead exemption above the \$125,000 is possible if "it is reasonably necessary for the support of the debtor and any dependent of the debtor."⁵⁰

Additional disadvantages may also accompany owning a home. First, military buyers must often engage in a long distance, timely, and costly process of locating a suitable property, acquiring necessary financing, and closing the transaction in time for a permanent change of station (PCS) or deployment. Second, homeowners must often comply with restrictive covenants and city and county codes and pay fees related to homeowner associations.⁵¹ Third, homeowners are less mobile compared to renters because they must sell, rent, or allow their property to remain vacant upon their PCS or deployment.⁵² For servicemembers who do not like these constraints, renting a home may be preferable because renting ensures maximum flexibility and mobility.

Donald L. Kohn, Vice Chairman, Fed. Reserve Bd., Speech at the Atlanta Rotary Club, Atlanta Ga: The Economic Outlook (Jan. 8, 2007) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2007/20070108/default.htm>).

⁴³ See RICHARD J. BUDDIN ET AL., AN EVALUATION OF HOUSING OPTIONS FOR MILITARY FAMILIES 44 (1999), available at http://www.rand.org/pubs/monograph_reports/MR1020/index.html. Servicemembers, however, may be able to keep their homes longer by leasing the property to tenants. See *infra* pp. 23-24.

⁴⁴ See, e.g., TEX. PROP. CODE § 41.002 (LEXIS 2005). Texas has the following unlimited in value homestead exemption:

If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.

Id.

⁴⁵ 11 U.S.C.S. app. § 522(b) (LEXIS 2006).

⁴⁶ See generally Buying a Home via the Internet; Homestead Exemption, <http://iml.jou.ufl.edu/projects/Spring02/samsing/Assets/Assets%20Right%Side/homestead.htm> (last visited 25 Feb. 2006) (drawing attention to the difference between California and Florida law regarding O.J. Simpson's sale of his homestead) (on file with author). Had O.J. Simpson owned a homestead in Florida or Texas, he would have been able to keep his home rather than selling it due to California's small homestead allowance. *Id.* See generally Jack Novak, *Protection Time, the New Bankruptcy Law is Tough on Debtors* (6 June 2005) http://www.forbes.com/free_forbes/2005/0606/146.html (discussing the extremely rewarding practice of individuals such as former Conesco executive Ngairé Cuneo to invest their assets in a home in one of the eight states with historic unlimited homestead exemptions) (on file with author). In addition, servicemembers may want to consider acquiring an umbrella policy or increasing their homeowners and automobile policy coverage to provide appropriate protection from such civil lawsuits.

⁴⁷ See The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 1501(a), Pub. L. No. 108-9 (2005). "Except as otherwise provided in this Act, this Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act." *Id.*; see also 11 U.S.C.S. § 101.

⁴⁸ 11 U.S.C.S. app. § 522(p)(1).

⁴⁹ *Id.* app. § 522(p)(2)(B). In other words, as long as a servicemember moves from a previous residence into a current residence within the same state, the servicemember's entire transferred equity can be protected. See *id.*

⁵⁰ 11 U.S.C.S. app. § 522(q)(2).

⁵¹ See NATIONAL MILITARY FAMILY ASSOCIATION & NATIONAL ENDOWMENT FOR FINANCIAL EDUCATION, MILITARY FAMILIES, MONEY & MOBILITY 11 (2002) [hereinafter MONEY & MOBILITY]. Comparing homeowners and renters, renters would have to comply with terms in their leases. Homeowner landlords may want to ensure that leases include terms to ensure that tenants comply with restrictive covenants and city and county codes. For example, if boats are prohibited from being parked in driveways, landlords may want to include such terms in their leases. In short, homeowner landlords can ensure tenants comply with covenants and codes by drafting tight leases, giving tenants little power to modify the property. For example, landlords could prohibit tenants from painting the exterior of the property without first getting permission. In certain areas, painting the exterior of the property may be regulated to allow only certain color schemes. Painting a property with the incorrect color scheme may result in a violation and subsequent violation costs.

⁵² See MORRIS & MORRIS, *supra* note 15, at 57.

B. Renting Property

1. Advantages

Renting maximizes flexibility and mobility. Renters can move into a property by signing a lease⁵³ and can move out after terminating the lease.⁵⁴ Renters have the luxury of being able to ignore the hassles of monitoring the strength of the real estate market and locating a buyer for their property upon their relocation.⁵⁵ Servicemembers can take advantage of this flexibility as their need for space grows due to marriage or birth of a child or shrinks due to divorce or a child's departure from the home.⁵⁶ In addition, the SCRA increases this flexibility by giving military renters and their spouses the ability to terminate their leases early in the event of a PCS or a deployment of ninety days or longer.⁵⁷ Military members may enjoy even more flexibility in their ability to terminate their leases under unforeseen circumstances if their landlords allow them to include military clauses in their leases.⁵⁸

In addition to the principal advantage of flexibility and mobility, renters enjoy the advantages of being able to pursue other financial opportunities while simplifying their lives. First, rather than worrying about steep entrance costs, renters often need little more than a security deposit and a month's rent to move into a property.⁵⁹ Furthermore, depending upon the terms of the lease,⁶⁰ landlords usually are obligated to pay for most repairs and maintenance, property taxes and fees, and even some utilities.⁶¹ A landlord's failure to make necessary repairs may allow the tenant to vacate the property under the theory of constructive eviction.⁶² The overall lower costs of renting give renters the opportunity to invest their money elsewhere rather than having their funds committed in the home purchase and maintenance process.⁶³ Second, renters can quickly and

⁵³ CUNNINGHAM, *supra* note 22, at 273. The majority of states follow the "English rule," that the landlord "impliedly warrants, and has a duty to see to it, that the premises will be free from the presence of a former tenant holding over or from some other person wrongfully in possession." *Id.* In contrast, a minority of states follow the "American rule," that landlords do not impliedly warrant that tenants shall have actual possession under the rationale that the landlord should not be held liable for the wrongful acts of a third party. *Id.* at 274; *see, e.g.,* Julius A. Bauer & Co. v. Chamberlain, 138 N.W. 903 (Iowa 1912).

⁵⁴ CUNNINGHAM, *supra* note 22, at 251. A leasehold "gives the right of possession or occupation" while licenses, easements, and profits "involve only rights of use." *Id.*; *see, e.g.,* Hi-Rise Laundry Equip. Corp. v. Matrix Props., Inc., 466 N.Y.S.2d 375 (1983) (finding that the right to occupy for ten years upon paying rent qualified as a leasehold).

⁵⁵ *See* MORRIS & MORRIS, *supra* note 15, at 57.

⁵⁶ *See* BUDDIN, *supra* note 43, at 39. Compared to those in military housing, renters were more satisfied with their "ability to upgrade their housing as they like (by about 7 percent)." *Id.*

⁵⁷ *See* 50 U.S.C.S. app. § 535 (LEXIS 2006). *See generally* Lieutenant Colonel J. Thomas Parker, *Legal Assistance Note: Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) Amendments and Updates*, ARMY LAW., Mar. 2005, at 22 (explaining recent updates in the SCRA); John Meixell, *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, ARMY LAW., Dec. 2003, at 38 (explaining the SCRA's replacement of the SSCRA).

⁵⁸ TRYBULA & HEWITT, *supra* note 10, at 159. A sample military clause is as follows:

In the event the Tenant or spouse is or hereafter becomes a member of the United States Armed Forces, the Tenant may terminate this lease on thirty days' written notice to the Landlord in any of the following events:

- a. If the Tenant or spouse receives permanent-change-of-station orders to depart from the area where the premises are located.
- b. If the Tenant or spouse is relieved from active duty.
- c. If the Tenant or spouse has leased the property prior to arrival in the area and the orders are changed to a different area prior to occupancy of the property.
- d. If the Tenant or spouse is assigned government quarters.
- e. If the Tenant or spouse receives temporary-change-of-station (TCS) orders to depart from the area where the premises are located for more than ninety days.

Rents due will be prorated if departure occurs during the middle of a month.

Id.

⁵⁹ *See* SHEETS, *supra* note 7, at 21-6.

⁶⁰ CUNNINGHAM, *supra* note 22, at 258. A lease "conveys a leasehold, a landed estate, and also contains more or less contractual undertakings, such as promises to pay rent, make repairs, pay taxes, procure insurance, and so forth." *Id.*

⁶¹ MORRIS & MORRIS, *supra* note 15, at 57.

⁶² CUNNINGHAM, *supra* note 22, at 258.

⁶³ MORRIS & MORRIS, *supra* note 15, at 57.

easily take the standard income tax deduction⁶⁴ rather than taking the time to itemize their tax deductions.⁶⁵ Third, renters often benefit from additional amenities, including pools, tennis courts, and common areas, which negates the need to travel and pay expenses for similar entertainment.

2. Disadvantages

Although renting a property simplifies life in many ways, renting also has numerous disadvantages, most involving landlord-tenant laws. First, renters lack the legal right to prevent rent increases following the initial lease period, to modify the property (e.g., installing new carpet or painting the walls a certain color), and to occupy the property beyond their lease termination date, possibly resulting in “involuntary relocation”⁶⁶ at the renter’s expense.⁶⁷ Renters can minimize this relocation disadvantage, however, by signing longer leases (two or three years), including military clauses, and giving timely written notices. Second, landlords can evict renters under certain conditions, such as nonpayment of rent.⁶⁸ Fortunately, the SCRA reduces some of this risk by giving military renters and their spouses numerous protections against eviction.⁶⁹ For example, under the SCRA landlords must generally obtain a court order before evicting a military member or his dependents.⁷⁰ Third, unlike homeowners who can deduct mortgage interest as an itemized income tax deduction, renters cannot deduct their rent payments.⁷¹ Fourth, renters do not build equity and, as a result, cannot borrow against home equity if the need arises.⁷² Fifth, renters do not have the same degree of privacy as homeowners because landlords may access the property in certain situations,⁷³ such as to prevent pests and to show the property to prospective renters.⁷⁴ For those servicemembers who feel constrained by these disadvantages and find renting too expensive, living in military housing may be a viable alternative.

C. Living in Military Housing

1. Advantages

Compared to renting, living in military housing may significantly reduce a servicemember’s overall expenses and result in significant financial savings. According to a RAND Survey of Military Member’s Housing Choices and Preferences, economics has been “the primary reason” families have decided to live in military housing.⁷⁵ Historically, when compared to military housing, renters in the civilian community have had to pay \$167 more per month, while homeowners have had to pay \$356 more per month.⁷⁶ This is not surprising because housing allowances were not “designed”⁷⁷ to cover total housing

⁶⁴ See I.R.C. § 63(c) (LEXIS 2006). For most people, the 2005 standard deduction is \$5000 for single or married filing separately, \$10,000 for married filing jointly or qualifying widow(er) with dependent child, or \$7300 for head of household. PUB. 17, *supra* note 9, at 133.

⁶⁵ See PUB. 17, *supra* note 9, at 133. “You should itemize deductions if your total deductions are more than the standard deduction amount. Also, you should itemize if you do not qualify for the standard deduction . . .” *Id.* at 132.

⁶⁶ NISSENBAUM, *supra* note 4, at 329.

⁶⁷ See MORRIS & MORRIS, *supra* note 15, at 57. Renters may want to find rent controlled accommodations to “hold down living expenses.” *Id.*

⁶⁸ See CUNNINGHAM, *supra* note 22, at 258. State statutes generally give landlords the power to terminate a lease “on account of the tenant’s failure to pay rent or, more or less, to perform other covenants.” *Id.*

⁶⁹ See 50 U.S.C.S. app. § 531 (LEXIS 2006).

⁷⁰ *Id.* In general, a landlord may not evict a servicemember or his dependents from their primary residence when their monthly rent does not exceed \$2400, adjusted for inflation for years after 2003 by the consumer price index housing component, except by court order. *Id.*

⁷¹ NISSENBAUM, *supra* note 4, at 329.

⁷² *Id.*

⁷³ CUNNINGHAM, *supra* note 22, at 274.

⁷⁴ TRYBULA & HEWITT, *supra* note 10, at 158. See *supra* note 22 and accompanying text.

⁷⁵ BUDDIN, *supra* note 43, at 29. “Security, convenience for work, and availability were the next most common reasons for choosing to live on-base.” *Id.* at 11. “Joint-military couples were 14 percent more likely to prefer living in the civilian community, where they can combine their two allowances to afford good housing.” *Id.* at 17. “[S]ervice personnel do not seem to view many of the benefits that have traditionally been associated with on-base housing (e.g., acculturation of junior personnel, support for families whose military member is deployed or simply gone a lot, fostering military values) as critical.” *Id.* at 29. “Furthermore, members believe that their families are as well supported off-base as they are on-base.” *Id.* For example, only twenty-six percent of military housing residents “felt able to count on their neighbors” while about thirty-four percent of homeowners were “confident about getting assistance from neighbors.” *Id.* at 38. In short, “without the economic benefit, most military members see no compelling reason to live on-base.” *Id.* at 29.

⁷⁶ *Id.* at 11 (measuring differences in cost based on numerous surveys taken during the 1990s).

costs.⁷⁸ Fortunately, in 2000, the Department of Defense and Congress “adopted a five-year plan to close a 19 percent gap between BAH [basic allowance for housing] rates and local rental costs nationwide.”⁷⁹ Theoretically, this plan was suppose to eliminate out-of-pocket costs by 2005.⁸⁰

The degree of financial savings from not having to pay rent and utilities, however, is only the historical principal advantage. Some servicemembers benefit from not receiving BAH, which might otherwise be included in child support calculations.⁸¹ Other servicemembers benefit from not needing to pay renter’s insurance due to automatic coverage by the Personnel Claims Act⁸² for certain losses incident to service.⁸³ In addition, servicemembers living on post enjoy the intangible benefits of gate security, access to Department of Defense schools, and short commutes to work.⁸⁴ They also benefit from easy access to the Post Exchange and Commissary.⁸⁵

2. Disadvantages

Living in military housing also involves some significant disadvantages, such as waiting for on-post housing to become available,⁸⁶ moving from off-post to on-post once housing becomes available, dealing with frequent substandard and untimely maintenance,⁸⁷ and accepting substandard properties in extremely poor condition.⁸⁸ In addition, similar to renting, servicemembers do not have total control of the premises.⁸⁹ For example, Army regulations and many local installation

⁷⁷ *Id.* at 52. “The housing allowance is designed to cover 85 percent of an individual’s housing costs. The 15 percent target absorption rate in part reflects the previously un-estimated but perceived value of the military housing benefit . . .” *Id.*

⁷⁸ See MONEY & MOBILITY, *supra* note 51, at 9. As of 2002, “the allowance is meant to cover only about 89 percent of the average cost of housing in that area.” *Id.* To determine the Basic Allowance for Housing (BAH) for a specific location, go to www.dtic.mil/perdiem/bah.html.

⁷⁹ Tom Philpott, *Stateside Housing Allowance Rises for 2006*, STARS & STRIPES, Dec. 27, 2005, at 1, available at <http://www.military.com/features/0,15240,83894,00.html?ESRC=army-a.nl>. Unfortunately, in 2006, some servicemembers who PCS will receive less BAH compared to their counterparts who are already assigned to the gaining unit due to the scheduled end of the BAH geographic rate protection program. *Id.* Geographic rate protection was a temporary program intended to ensure that newly arrived servicemembers would not receive less BAH than those already stationed at the same location. *Id.* “It was a tool to stabilize BAH rates until the gap between allowances and average local rental costs was closed . . .” *Id.*

⁸⁰ See U.S. DEP’T OF VETERAN’S AFFAIRS, EVALUATION OF VA’S HOME LOAN GUARANTEE PROGRAM: FINAL REPORT APPENDICES (2004), available at <http://www.homeloans.va.gov/pdf/final%20report%20appendices.pdf>. “The National Defense Authorization Act for Fiscal Year 2001 repealed the requirement for members to absorb 15 percent of out-of-pocket costs, and the Secretary of Defense has pledged to increase BAH rates so that they will cover 100 percent of housing costs by 2005.” *Id.*

⁸¹ *Pegler v. Pegler*, 895 S.W.2d 580, 582 (Ky. Ct. App. 1995) (excluding from income receipt of on-installation housing for child support calculations). Compare I.R.C. § 134 (LEXIS 2006) (excluding certain military benefits from gross income for income tax purposes) and *D.F. v. L.T.*, 903 So. 2d 657 (La. Ct. App. 2005) (excluding BAH from child support calculations), with *Hixon v. Lundy*, 2004 Iowa App. Lexis 1300 (Ia. Ct. App. 2004) (including BAH in child support calculations) and *Hees v. Hees*, 82 P.3d 107 (Okla. Civ. App. 2003) (treating receipt of on-installation housing as imputed income for child support calculations).

⁸² 31 U.S.C.S. § 3721 (LEXIS 2006).

⁸³ See U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS para. 11-5 (1 July 2003) (covering losses caused by fire, flood, hurricane, unusual occurrence, theft, or vandalism) [hereinafter AR 27-20]; U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 11-5 (8 Aug. 2003) [hereinafter DA PAM. 27-162]. Nevertheless, servicemembers may still want to buy renters insurance if they own valuable property. They may also want renters insurance if they fear the high burden of proof, administrative requirements, and depreciation required by military regulation. See AR 27-20, *supra* note 83, para. 11-14; DA PAM. 27-162, *supra* note 83, para. 11-14.

⁸⁴ See BUDDIN, *supra* note 43, at 37. “Most military housing residents have a commute of less than 10 minutes, and virtually all commute less than 30 minutes. Few renters or owners are within 10 minutes of work, but about 80 percent commute 30 minutes or less. Owners have somewhat longer commutes than do renters.” *Id.*

⁸⁵ See TRYBULA & HEWITT, *supra* note 10, at 156.

⁸⁶ See BUDDIN, *supra* note 43, at 39. Over forty percent of renters listed unavailability of military housing when needed as their first or second most important factor in deciding to rent rather than live in military housing. *Id.*; see also U.S. DEP’T OF ARMY, REG. 210-50, HOUSING MANAGEMENT para. 3-8 (3 Oct. 2005) [hereinafter AR 210-50].

⁸⁷ The Army’s Residential Communities Initiative (RCI) Quality Communities for Army Families, *Frequently Asked Questions*, <http://www.rci.army.mil/programinfo/faq.html> (last visited Mar. 14, 2006) (on file with author). See generally U.S. DEP’T OF ARMY, ARMY FAMILY HOUSING MATER PLAN (AFHMP) FY 04-09, at 3, available at http://housing.army.mil/afh_plan.htm (discussing maintenance).

⁸⁸ See William M. Welch, *Army Housing No Longer Homely*, USA TODAY, Oct. 11, 2005, available at http://www.usatoday.com/news/nation/2005-10-11-army-housing_x.htm [hereinafter *No Longer Homely*]. “The homes for junior officers and enlisted soldiers with families had mold under the floors, rats in the walls and pipes, broken fixtures and the island’s red dirt everywhere.” *Id.* “The Pentagon says 200,000 of its 300,000 units of government-owned family housing (on and off base) are substandard and need replacement or major renovation. It was estimated that doing so would cost \$16 billion and take 30 years.” *Id.* See generally AR 210-50, *supra* note 86, para. 3-12 (discussing substandard housing assignments).

⁸⁹ See BUDDIN, *supra* note 43, at 41. Over thirty-five percent of renters and twenty-three percent of owners listed freedom from military housing rules and regulation as their first or second most important factor in deciding against living in military housing. *Id.*

regulations limit who can live in the property and how long visitors can stay.⁹⁰ Furthermore, the military can terminate a servicemember's housing privilege based on a change in a servicemember's status, "misconduct of the sponsor, his dependents, or guests,"⁹¹ or repeated waste of utilities.⁹² As a result, compared to renters, servicemembers in military housing reportably have been less satisfied⁹³ "concerning the rules governing their housing units (by about 15 percent)."⁹⁴ For those servicemembers frustrated by the strict rules and extremely poor condition of military housing, privatized housing may be an attractive alternative.

D. Living in Privatized Military Housing

1. Advantages

To address the significant shortcomings⁹⁵ and substandard conditions⁹⁶ of military housing, Congress privatized military housing, saving the government money while improving the quality of life for servicemembers and their dependents.⁹⁷ Passing the Military Housing Privatization Initiative in 1996,⁹⁸ Congress authorized the Pentagon to turn over the job of modernizing military housing to "real estate developers in the private sector."⁹⁹ In addition, privatized housing will provide other advantages, including free utilities based on average use,¹⁰⁰ low usage utility rebates, landlord-tenant law protections,¹⁰¹

⁹⁰ See AR 210-50, *supra* note 86, para. 3-17.

⁹¹ *Id.* para. 3-19.

⁹² *Id.*

⁹³ See BUDDIN, *supra* note 43, at 13. "Homeowners are the most satisfied with the quality of their residence and members in military housing are the least satisfied." *Id.*

⁹⁴ *Id.* at 39

⁹⁵ See *id.* at 35.

⁹⁶ See *id.* at 37. The following paragraph explains the condition of military housing:

Military housing is about 80 square feet smaller and 10 years older than civilian rental housing. Military housing has problems with pests and overall condition. Pests are a serious problem for 23 percent of families in military housing as compared with about 7 percent in civilian housing. About 66 percent of members in military housing rank the condition of their housing as good or very good compared to 79 and 95 percent of those living in rental and owned housing, respectively.

Id.

⁹⁷ See *id.* at 2-3, 25. In 1995, the average age of military housing was thirty-three years and much of the housing had already reached the end of its projected life. *Id.* at 2. The Congressional Budget Office recommended that the military should shift away from military housing because it was more costly than civilian housing alternatives. *Id.* at 2. To reduce the cost of military housing, DOD initiated privatization programs. *Id.* at 25; see also 10 U.S.C.S. § 2875 (LEXIS 2006) (authorizing the Secretary concerned to make investments in an eligible entity (e.g., a limited partnership) carrying out projects for the acquisition or construction of housing units suitable for use as military family housing).

⁹⁸ National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186 (1996). This Act amended chapter 169 of title 10, U.S.C., by adding a new subchapter entitled Alternative Authority to Construct and Improve Military Housing (codified as amended at 10 U.S.C. §§ 2871-85). *Id.*

⁹⁹ *No Longer Homely*, *supra* note 88. See generally 10 U.S.C.S. § 2688 (discussing utilities); *id.* §§ 2871-85 (discussing housing issues including government investment for the acquisition or construction of housing for the military). Practically speaking, privatization of military housing means that servicemembers living in Oahu will have homes that will be fifty percent larger, that will include two-car garages, and that will be more modern and environmentally friendly. *No Longer Homely*, *supra* note 88. Army housing in Oahu will be equipped with "thin solar panels that will [make it] . . . the largest solar-powered community in the world." *Id.*

¹⁰⁰ See, e.g., ARMY HAWAII FAMILY HOUSING, RESIDENT OCCUPANCY AGREEMENT para. 13, at 3. The Hawaii agreement includes the following terms:

[A]fter the implementation of the Army's Resident Direct Pay Program . . . the Tenant will be personally responsible for the payment of some or all utilities servicing the Premises and an appropriate adjustment will be made to the amount of the allotment of the BAH for a utility allowance. The Tenant will be responsible for utility costs that are in excess of such utility allowance.

Id.

¹⁰¹ See 42 U.S.C.S. § 3601. *But see* Memorandum, Principal Deputy Assistant Secretary of the Army Installations and Environment, to Director, Installation Management Agency, subject: Residential Communities Initiatives (RCI) Policy for Major Decision Authority (July 8, 2005) (giving garrison commanders authority to bar individuals or otherwise restrict individual's access to the installation as necessary to maintain good order and discipline).

and faster maintenance service standards.¹⁰² Furthermore, servicemembers will experience little difference regarding funding of local moves¹⁰³ and will receive limited renters insurance.¹⁰⁴

2. Disadvantages

Living in privatized housing involves some minor disadvantages. First, servicemembers may experience the constructive receipt of BAH, which may be included in child support calculations.¹⁰⁵ Second, they may have to pay for excessive use of utilities.¹⁰⁶ Third, they will fail to benefit from increases in BAH due to promotions or annual rate adjustments. Fourth, they will lack control over the premises, similar to living in military housing,¹⁰⁷ and will have to deal with the more complex procedures¹⁰⁸ involved in submitting cognizable claims to the government under the Personnel Claims Act.¹⁰⁹ All things considered, however, these disadvantages are relatively minor considering the overall benefits.

E. Considering Advantages and Disadvantages in the Planning Process

Given the many advantages and disadvantages of buying a home, potential homebuyers can easily become frustrated. The bottom line is that the longer a homebuyer plans on owning the same home, the more likely the homebuyer will outlast any negative market downturn and benefit from equity growth, appreciation, and income tax savings. To hold onto a home for a reasonable period of at least three to six years,¹¹⁰ however, servicemembers must be confident they can maintain a stable income that can comfortably cover the mortgage, maintenance expenses, and property tax increases. Maintaining this level of confidence may be difficult if servicemembers are contemplating a change in employment or change in duty station.

In contrast, the shorter a servicemember plans on owning the same home, the more advantageous it is for him to rent housing or live in military or privatized housing. These three options give servicemembers different degrees of flexibility with regard to lease terms, military clauses, autonomy, and responsibility. In addition, these options offer differences in quality of life with regard to location, size, condition, and amenities of the property. By factoring in these numerous issues and prioritizing them based on their individual preferences, servicemembers can better determine which housing alternative best meets their short and long term needs and objectives.

¹⁰² See, e.g., ARMY HAWAII FAMILY HOUSING, ARMY HAWAII FAMILY HOUSING RESIDENT GUIDE AND COMMUNITY STANDARDS HANDBOOK 34 (2005). In Hawaii, the standard for routine maintenance is a response within one working day and completion of the work within three working days. *Id.*

¹⁰³ See U.S. Dep't of Defense, Joint Federal Travel Regulation para. U5355-C3 (C229, 1 Jan. 2006) (authorizing appropriated funds to fund local moves).

¹⁰⁴ E-mail from Colonel Joseph Goetzke, Acting Chief, Personnel Claims and Recovery Division, United States Army Claims Service, to all Claims Judge Advocates (Sept. 8, 2005) [hereinafter Sept. 8 Message] (on file with author). "Most of the partnership agreements with the privatized housing contractors include a requirement for the contractor to provide some coverage for personal property as part of the lease. In some cases, this coverage is as much as \$25,000." *Id.*

¹⁰⁵ See *supra* note 81. Servicemembers living in privatized housing receive BAH on their leave and earning statement (LES), even though the BAH is used to pay for the housing they receive. As a result, servicemembers are "in control" of the income and it is easy for some courts to include servicemembers' BAH in child support calculations.

¹⁰⁶ See *supra* note 100.

¹⁰⁷ See Captain Stacie A. Remy Vest, *Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, A.F. L. REV. 7-11 (Spring 2002).

¹⁰⁸ E-mail from Colonel Joseph Goetzke, Acting Chief, Personnel Claims and Recovery Division, United States Army Claims Service, to all Claims Judge Advocates (Sept. 7, 2005) (on file with author). Military Housing Privatization Initiative (or Residential Communities Initiative) housing "will be considered to be provided in kind by the United States Government under 31 U.S.C. § 3721(b)(2)(e) if it is located within the perimeter of . . . military installations." *Id.* Specifically, for a claim to be cognizable, "the privatized quarters must be located within the boundaries of the installation" and servicemembers must first settle their claim with their private insurance carrier. *Id.* Sept. 8 Message, *supra* note 104. "The insurance that is provided as part of the lease of [privatized] quarters is considered to be private insurance and occupants of privatized quarters must file against this insurance coverage AND any other private insurance coverage they have before [the Army] can pay any part of their claim." *Id.*

¹⁰⁹ 31 U.S.C.S. § 3721 (LEXIS 2006).

¹¹⁰ See Weston, *supra* note 5.

III. Step Two: Evaluating a Servicemember's Personal Situation, the Market, and the Property

If servicemembers determine that buying a home is an available and appropriate option, then servicemembers need to evaluate their personal situation, the specific property, and the market in light of property law, real estate financing law, consumer law, tax law, landlord-tenant law, family law, and bankruptcy law.

A. Personal Financial Analysis

Servicemembers who do not have the ability to pay for a home in cash need to ensure that they not only obtain a mortgage to buy a home, but that they also set their mortgage payments in an amount that will allow them to make timely monthly payments to keep the home. By making too small a down payment, overextending their finances, failing to plan for possible contingencies, and relying on significant asset appreciation, servicemembers increase their exposure to default, foreclosure, and bankruptcy.

1. Financing and Leverage

Unlike many other types of investment, real estate allows servicemembers to use the principal of leverage to buy nicer homes than would otherwise be affordable. Of course the disadvantage of benefiting from the use of other people's money is managing the risk involved. One way servicemembers can manage risk is by making an appropriate down payment.

a. The Down Payment

Servicemembers can get a higher return on investment capital if they make a small down payment and experience significant real estate appreciation.¹¹¹ The principal risk of such leverage, however, is the possibility of owing more on the mortgage than the property is worth (i.e., going "up-side down") and not being able to sell the home. This situation is made even worse when renting the property for a positive or break-even cash flow is not an option. As a result, it is useful for homeowners to have a loan-to-value ratio significant enough "to absorb a potential decline in house prices."¹¹² This loan-to-value amount is typically 80% of the value of the property.¹¹³ One significant advantage of making a 20% down payment is that the borrower will not have to pay PMI.¹¹⁴ For many buyers, however, making a 20% down payment is not a viable option. For homeowners unable to make a 20% down payment, a piggyback loan may be an alternative to avoid non-tax-

¹¹¹ See SHEETS, *supra* note 7, at 2-4 to -6.

¹¹² Alan Greenspan, Chairman, Federal Reserve Board, Speech to the American Bankers Association Annual Convention, Palm Desert, California (Sept. 26, 2005) (transcript available at <http://www.federalreserve.gov/boardDocs/Speeches/2005/200509262/default.htm>). See *infra* note 113.

¹¹³ See BLACK'S LAW DICTIONARY, *supra* note 14, at 949. Loan-to-value ratio is defined as:

The ratio . . . [usually] expressed as a percentage, between the amount of a mortgage loan and the value of the property pledged as security for the mortgage. For example, an \$80,000 loan on property worth \$100,000 results in a loan-to-value ratio of 80% - which is . . . [usually] the highest ratio lenders will agree to without requiring the debtor to buy mortgage insurance.

Id. By lending a borrower 80% of the property's appraised value, the lender is protected in the event the property's value drops by up to 20%.

¹¹⁴ JA 261, *supra* note 9, at 1-31. The following statement explains how PMI works:

Under PMI, a private mortgage insurance company insures the loan, thus permitting the lender to go beyond its conventional loan limits of 75% to 80% loan-to-value ratio. In effect, PMI insures the lack of equity . . . Borrowers are charged a premium for the PMI coverage. The premiums vary, but generally they are about 2% of the amount of the loan.

Id.

deductible PMI.¹¹⁵ If servicemembers prefer paying PMI rather than acquiring a piggyback loan, they should terminate paying PMI as soon as they are eligible.¹¹⁶

b. The Impact of Marital Dissolution

The down payment is only the beginning of the financial analysis. Although it may seem unrelated to the home purchasing analysis, servicemembers need to understand the housing consequences involved in the unfortunate event of a divorce. These possible consequences relate to how servicemembers make a down payment and establish title. The effects of a divorce can be financially devastating and may potentially force the sale of a jointly held residence. Consideration of these effects is increasingly important because the probability of divorce in society is high¹¹⁷ and the probability of divorce in the military is increasing.¹¹⁸ Divorce is just another unfortunate possibility servicemembers should consider when attempting to minimize potential loss.

Servicemembers may consider divorce in their housing analysis for many reasons.¹¹⁹ For example, in many common law property states where title determines ownership, servicemembers who use their separate property to buy marital homes may be deemed as having made an implied gift to their spouses, transforming separate property into marital property.¹²⁰ In states following the Sources of Funds Rule, however, servicemembers who can trace their separate property contributed toward a marital home are entitled to a proportionate interest in the property.¹²¹ Furthermore, in community property states that follow the Inception of Title Rule,¹²² homes purchased during marriage using separate property may be characterized as community property, with the separate property-contributing spouse receiving an equitable interest, assuming no

¹¹⁵ See Greenspan, *supra* note 112. "Highly levered home purchases tend to use so-called piggyback mortgages; that is, second liens originated at the time of purchase. These loans are popular, in significant part, because they avoid the non-deductible private mortgage insurance payments required on larger, single loans." *Id.* Although this technique avoids non-tax deductible PMI, it may increase the payments due on the loans as well as the administrative burdens of keeping the multiple loans current. These administrative burdens are important to consider in advance, especially if the loans may be sold to third party lenders. To ensure that the new lenders receive proper payment, servicemembers may want to acquire loans that guarantee that whoever services their loans will continue to service the loans after sale to a third party. For servicemembers who do not have the ability to make a 20% down payment nor have the desire to acquire a piggyback loan, other options may be preferable such as a VA loan. See *infra* note 166 and accompanying text.

¹¹⁶ See 12 U.S.C.S. §§ 4901-02 (LEXIS 2006) (discussing how to terminate PMI). In general, borrowers can cancel PMI by submitting a written request to the servicer after reaching an eighty percent loan-to-value ratio, maintaining a good payment history, being current on mortgage payments, and satisfying other requirements of the holder of the mortgage. See *id.*; see *infra* note 157.

¹¹⁷ Donna Miles, *Military Programs Aim To Reduce Military Divorce Rates*, <http://www.pica.army.mil/Voice2005/050617/050617%20Divorce.htm> (last visited Aug. 24, 2006) [hereinafter *Military Programs*]. Nationwide, approximately 45 to 50% of first marriages end in divorce and 60 to 70% of second marriages end in divorce. *Id.* Since divorces occur at different points during a marriage, it is useful to look at a population's per capita annual divorce rate. For example, the U.S. per capita divorce rate was .4%, .38%, .38%, and .37% in the years 2001, 2002, 2003, and 2004 respectively. Americans for Divorce Reform, *Divorce Rates*, <http://www.divorcereform.org/rates.html> (last visited Aug. 24, 2006). For Army officers, the divorce rate was 2.1%, 1.9%, 3.3%, and 6.0% in the years 2001, 2002, 2003, and 2004 respectively. See E-mail from Debbie Eitelberg, Defense Manpower Data Center, to MAJ Samuel Kan (Mar. 15, 2005) [hereinafter *DATA*] (on file with author); see also Lisa Burgess, *Divorce Rate Among Active-Duty Army Officers, Enlisted Has Risen Dramatically*, STARS & STRIPES, June 9, 2005, available at http://www.military.com/NewContent/0,13190,SS_060905_Divorce,00.html (citing the same statistics). Combining the officers and enlisted of the Army, Air Force, Marine Corps, and Navy into a single population group, the group's divorce rate was 2.6%, 3.1%, 3.2%, and 3.6% in the years 2001, 2002, 2003, and 2004 respectively. See *DATA*, *supra* note 117.

¹¹⁸ *Military Programs*, *supra* note 117. In fiscal years 2001, 2002, 2003, and 2004, the Army had 5600, 7000, 7500, and 10,477 divorces respectively among active duty forces. *Id.* Among its 56,000 married officers, the Army had 1900 and 3300 divorces in the fiscal years 2003 and 2004 respectively. *Id.* It is important to note that the military characterizes a servicemember's marital status as married if the servicemember has been divorced and later remarries. See Americans for Divorce Reform, *Military Divorce Statistics*, <http://www.divorcereform.org/mil.html> (last visited Aug. 24, 2006). This characterization makes it difficult to compare divorce statistics. One way to attempt a comparison is to count the number of divorces each year and calculate the percentage with respect to the population group. See *supra* note 117. But see e-mail from Debbie Eitelberg, Defense Manpower Data Center, to MAJ Samuel Kan (Mar. 15, 2005) (showing the Pentagon's unofficial 2005 statistics that the divorce rate among Army officers and enlisted declined to 2.3% and 3.6% respectively) (on file with author); Donna Miles, *Army Divorce Rates Drop as Marriage Programs Gain Momentum*, ARMED FORCES PRESS SERVICE, Jan. 27, 2006, available at <http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/news/Jan2006/> (emphasizing that in 2005, the Army divorce rate decreased from the spike in 2004).

¹¹⁹ See *infra* p. 13 (discussing the source of the down payment) and p. 14 (discussing the source of mortgage payments).

¹²⁰ *E.g.*, *Ardrey v. Ardrey*, 2004 WL 1088385 (Ohio Ct. App. May 17, 2004); *Norman v. Norman*, 2003 WL 724677 (Tenn. App. Mar. 4, 2003); *Carter v. Carter*, 419 A.2d 1018 (Me. 1980).

¹²¹ *E.g.*, *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990) (establishing a preponderance of the evidence standard for tracing marital property back to separate property); *Harper v. Harper*, 448 A.2d 916 (Md. 1982) (demonstrating the Sources of Funds Rule); *Duffey v. Duffey*, 2002 Ohio App. LEXIS 781 (Ohio Ct. App. 2002).

¹²² *E.g.*, *Fisher v. Fisher*, 383 P.2d 840 (Idaho 1963); *Harper*, 448 A.2d 916 (demonstrating the Sources of Funds Rule); *Duffey*, 2002 Ohio App. LEXIS 781.

commingling occurred.¹²³ In short, unless the real estate transaction is handled properly from the beginning, servicemembers contributing separate property to a marital home may risk losing their previously characterized separate property in a later divorce.

To minimize the risk of losing separate property in a divorce, married servicemembers may consider using marital property when making the down payment on a marital residence. If they use separate property for the down payment, servicemembers need to understand the risks involved and document the financial transactions for tracing purposes in the event of divorce. Servicemembers contemplating both marriage and the purchase of a home can simplify these tracing requirements by executing a valid written and signed prenuptial agreement that clearly defines the parameters of marital and separate property and establishes the governing choice of law.¹²⁴ Of course, the prenuptial agreement might be successfully challenged if the agreement suffers from a lack of full disclosure,¹²⁵ if the agreement is not voluntary,¹²⁶ or if the agreement is otherwise unconscionable.¹²⁷

c. The House Payment

Having too large a house payment can leave servicemembers with “too little money for other goals [such as]: retirement, vacations, college funds for the kids . . . [and leave them] vulnerable to foreclosure and bankruptcy.”¹²⁸ In general, lenders recommend that housing expenses, including the mortgage payment, homeowners insurance, and property taxes, not exceed 28% of gross monthly income, while total payments on all debt including credit card debt, car loans, and student loans not exceed 36% of gross income.¹²⁹ These guideline figures are subject to many factors, such as expected maintenance and repair costs, job and income stability and growth, and anticipated inflation and real estate appreciation.¹³⁰ Additional factors¹³¹ homeowners may consider include plans to have children, to send children to college, and to retire.¹³² In today’s world of dual income families, mortgage payments often rely on both incomes leaving “no one on the sidelines to take up the slack” in case of a job loss such as when one partner decides to stay home to raise children.¹³³

¹²³ *E.g.*, *Holland v. Holland*, 35 P.3d 409 (Wyo. 2001); *In re Marriage of Mardsden*, 130 Cal.App.3d 426 (1982) (showing that commingling of separate and community property results in community property); *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App. 1963).

¹²⁴ UNIF. PREMARITAL AGREEMENT ACT § 6(a) (1983) [hereinafter UPAA] For example, a prenuptial agreement can specify that a servicemember’s salary, real property titled in the servicemember’s name during the marriage, and any appreciation of the property during the marriage are separate property. The servicemember can make the down payment as well as all subsequent expenses using the servicemember’s salary, eliminating the tracing concerns.

¹²⁵ *See id.*; *Peters-Riemers v. Riemers*, 644 N.W.2d 197 (N.D. 2002).

¹²⁶ UPAA § 6(a), *supra* note 124. Servicemembers may want to ensure their spouses have independent legal advice before entering into a prenuptial agreement. Although often not required, providing consideration to spouses in exchange for entering into the agreement can be one way of protecting the agreement from challenge.

¹²⁷ *E.g.*, *In re Marriage of Pownall*, 5 P.3d 911 (Ariz. Ct. App. 2000); *Hardee v. Hardee*, 588 S.E.2d 264 (S.C. Ct. App. 2001).

¹²⁸ Liz Pulliam Weston, *Don’t Bite Off Too Much House*, MSM MONEY, <http://articles.moneycentral.msn.com/Banking/HomebuyingGuide/Don'tBiteOffTooMuchHouse.aspx> (last visited Aug. 24, 2006) [hereinafter *Too Much House*].

¹²⁹ *Id.*; *see also* NISSENBAUM, *supra* note 4, at 332. Servicemembers should use their BAH amount as a guide for planning their housing expenses including their mortgage payment. However, due to tax savings, equity growth, and other factors such as cost of living allowances, servicemembers may determine that they can afford to spend more than their BAH amount to cover their housing expenses.

¹³⁰ *Too Much House*, *supra* note 128.

¹³¹ *See id.*

A much bigger proportion of the workforce was covered by traditional defined-benefit pensions 30 years ago -- which means they didn’t have to save massive amounts of money on their own to have a decent retirement. Today, the onus is typically on you to carve enough out of your budget to fund 401(k)s and IRAs.

Id. *See infra* note 132.

¹³² Susan Schmidt Bies, Governor, Fed. Reserve Bd., Speech at the Canisius College Richard J. Wehle School of Business Community Business Luncheon, Buffalo, New York (Apr. 18, 2005) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2005/20050418/default.htm>). “Data from the SCF [Survey of Consumer Finances] indicate that among workers with a retirement savings plan, nearly 60 percent of workers aged 25 to 34 were covered by a defined-benefit plan in 1989; by 2001, this share had declined to 31 percent.” *Id.* Fortunately for military members who retire after serving twenty years of active duty, they enjoy a defined-benefit pension.

¹³³ *Too Much House*, *supra* note 128.

However, the amount of the mortgage payment is only part of the analysis. Just as servicemembers may consider the source of the down payment, servicemembers may contemplate the source of monthly mortgage payments as well as repairs. For example, if a separate property residence appreciates as a result of marital labor or funds, the appreciation of the residence may be considered a marital asset.¹³⁴ To ensure clarity, servicemembers contemplating both marriage and buying a house may consider defining the parameters of marital and separate property appreciation in a prenuptial agreement.¹³⁵ Meanwhile, married servicemembers without a prenuptial agreement may consider ensuring that they use only marital funds to make mortgage payments and repairs to marital property and separate funds to make similar payments on separate property. Once servicemembers determine what type of funds they will use to make payments, they need to secure the most appropriate mortgage and interest rate for their situation.

2. The Mortgage Analysis

Although navigating through the mortgage waters is complex, servicemembers should take the time to ensure that they take the appropriate steps to set themselves up for success. As Federal Reserve Governor Susan Schmidt Bies explains,

When looking at different loan products, consumers should consider how long they plan to own their home, expectations of future income, their stage of life cycle, and broader financial obligations in choosing among mortgage alternatives. For example, if consumers want to pay off their mortgages before retirement, they must determine if the monthly payment will fully amortize the loan by the target date. If homeowners plan to move in three years, then they should compare prepayment penalties, if any, and interest rates among their mortgage alternatives . . . [Unfortunately,] some consumers do not actively shop for a lender or a mortgage, and they do not compare loan terms in light of their personal circumstances.¹³⁶

Failing to take the proper steps can increase financial risk. To minimize this risk, servicemembers should initially address their credit issues. Then, they should determine the type of mortgage that makes them feel the most secure. Finally, they should select the best length of mortgage for their situation.

a. Applying for Credit

To begin, servicemembers need to understand the importance of building and maintaining a good credit history. Mortgage interest rates and loan approval will depend upon the servicemember's credit¹³⁷ and bankruptcy scores.¹³⁸ First,

¹³⁴ *E.g.*, Chapman v. Chapman, 866 So. 2d 118 (Fla. Dist. Ct. App. 2004) (discussing marital appreciation of separate assets as a result of marital labor and marital funds); Cisneros v. Cisneros, 831 So. 2d 257 (Fla. Dist. Ct. App. 2002) (holding that a husband's physical labor to improve his spouse's residence resulted in marital appreciation). *But see* Fowlkes v. Fowlkes, 590 S.E.2d 53 (Va. Ct. App. 2003) (holding that a husband's \$30,000 separate property contribution to his spouse's house did not convert his spouse's home into marital property); Brown v. Brown, 58 Ariz. 333, 119 P.2d 938 (1941) (holding that the title to the improvements follow the land).

¹³⁵ See *supra* p. 13.

¹³⁶ Susan Schmidt Bies, Fed. Reserve Bd., Speech at the Eller College of Management Distinguished Speaker Series, Tucson Arizona: Economic Outlook and Development in Mortgage Markets (Jan. 18, 2007) (transcript at <http://www.federalreserve.gov/boarddocs/speeches/2007/20070118/default.htm>).

¹³⁷ *Anatomy of a Credit Score*, BUSINESS WEEK, available at <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P136689.asp?Printer> (last visited Aug. 24, 2006) [hereinafter *Credit Score*]. The following example shows the importance of your FICO (Fair Isaac & Co.) score:

On a \$350,000, 30-year fixed mortgage, you'll pay 6.24% in interest and \$2,153 a month if you score between 720 and 850. If your [FICO] score drops to between 620 and 674, your interest rate jumps to 8.05%, and your monthly cost rises to \$2,581. You will pay an additional \$154,131 over the life of the loan, according to a calculator on myfico.com.

Id. The credit bureaus determine credit scores by taking into account the following factors: payment history (35%), debt (30%), length of credit history (15%), new credit (10%), and types of credit used (10%). *Id.*

¹³⁸ *This Secret Score Can Hurt Your Credit*, Bankrate.com, <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P137322.asp?Printer> (last visited Aug. 24, 2006). Bankruptcy scores start in the negative numbers and increase to approximately 2000. *Id.* Bankruptcy scores are complex and use advanced math and data analytics to look ahead to see how likely a consumer is to file for bankruptcy. *Id.* In contrast, credit scores look at a consumer's past history of paying bills. *Id.* Although bankruptcy risk scores have been used for decades, they have not been made available to the general public because "no one wants to disclose the model . . . [and] give away the value of the research . . . conducted." *Id.* "However, Experian is considering making its [bankruptcy] score available to consumers." *Id.* at 2. "The things that improve your bankruptcy risk score are the same ones that improve your credit score: Pay your bills on time and apply for credit sparingly." *Id.* In short, consumers should strive to maintain a high credit score and a low bankruptcy score, by building and maintaining a good credit history. See *id.*

servicemembers should obtain and review their credit score¹³⁹ and credit report¹⁴⁰ well in advance of purchasing a home. The Fair Credit Reporting Act allows consumers to obtain a free credit report once a year upon the consumer's request and under certain circumstances, such as when an application for credit is denied.¹⁴¹ Second, consumers should take appropriate actions¹⁴² to correct errors¹⁴³ that they discover on their reports.¹⁴⁴ Third, consumers should pay off existing debt, cancel unnecessary credit cards, and pay all loan installments on time.¹⁴⁵ Fourth, consumers lacking a good credit history should build a credit history by opening savings and checking accounts and taking out and paying small loans.¹⁴⁶ By taking these steps to build a good credit history, servicemembers can maximize their financing options and take full advantage of the benefits of adjustable-rate and fixed-rate mortgages.

¹³⁹ Liz Pulliam Weston, *7 Fast Fixes for Your Credit Score*, MSM MONEY, <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P116527.asp?Printer> (last visited Aug. 25, 2006). "Despite all the media attention given to free credit reports, you still have to pay to find out your credit score, the three-digit number ranging from 300 to 850 that is the key to your borrowing costs." *Id.* "For the most detailed explanations on your FICO scores, go to the credit education area at [<http://www.myfico.com/>]. A score from one credit bureau costs \$14.95, all three are \$44.85. It's useful to buy all three because large lenders either average the scores or take the middle one." *Credit Score*, *supra* note 137.

¹⁴⁰ Federal Trade Commission, *Building a Better Credit Report*, May 2006, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre03.htm> [hereinafter *Better Credit Report*]. Consumers who want to get a copy of their credit report from one of the three major credit bureaus can call Equifax at 800-685-1111, Experian at 888-397-3742, or TransUnion at 800-916-8800, or review their websites at www.equifax.com, www.experian.com, and www.tuc.com. *Id.* Although, each of the three national credit reporting agencies sell consumer credit reports, consumers are better advised to get the same reports for free at www.annualcreditreport.com or by calling 1-877-322-8228. "When you request a free credit report, each bureau will offer to calculate a credit score for \$6.95. Experian and TransUnion use proprietary formulas; Equifax uses FICO scores. [Unfortunately the information is not comprehensive and] . . . lenders are less likely to look at these scores." *Credit Score*, *supra* note 137. *But see Credit Bureaus Create FICO Score Rival*, <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P147161.asp?Printer> (last visited Aug. 25, 2006) (discussing the new "VantageScore," which Equifax, Experian, and TransUnion will use to provide consumers more consistent credit scores between the bureaus).

¹⁴¹ 15 U.S.C.S. § 1681j(a)(1)(A) (LEXIS 2006). "In general. All consumer reporting agencies described in subsections (p) and (w) of section 603 [15 U.S.C. § 1681a] shall make all disclosures pursuant to section 609 [15 U.S.C. § 1681g] once during any 12-month period upon request of the consumer and without charge to the consumer." *Id.*

¹⁴² *Better Credit Report*, *supra* note 140. A sample dispute letter is as follows:

I am writing to dispute the following information in my file. The items I dispute also are circled on the attached copy of the report I received.

This item (identify item(s) disputed by name of source, such as creditor or tax court, and identify type of item, such as credit account, judgment, etc.) is (inaccurate or incomplete) because (describe what is inaccurate or incomplete and why). I am requesting that the item be deleted (or request another specific change) to correct the information.

Enclosed are copies (use this sentence if applicable and describe any enclosed documentation, such as payment records, court documents) supporting my position. Please reinvestigate this (these) matter(s) and (delete or correct) the disputed item(s) as soon as possible.

Id.

¹⁴³ MORRIS & MORRIS, *supra* note 15, at 52. Some common errors include mistakes due to confusion of a consumer with someone with a similar name or social security number, failing to remove incorrect information after the issue has been investigated and resolved in the consumer's favor, and failing to add information supplied by the consumer or a consumer's creditor. *Id.*

¹⁴⁴ 15 U.S.C.S. §1681i(a)(1)(A). The statute states:

In general. Subject to subsection (f), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

Id.

¹⁴⁵ SHEETS, *supra* note 7, at 3-8; *see also* TRYBULA & HEWITT, *supra* note 10, at 74. Although having a few credit cards is very useful to establish a good credit history, to facilitate purchases, and to earn frequent flyer miles or other perks, having too many credit cards and using too much available credit can be dangerous. Experian has "identified two groups of heavy card users: the 14% who own more than 10 cards and another, at times overlapping, 14% who use more than 50% of the credit available to them. This last group alone holds an average of nearly seven cards each [and] have credit scores about 30 points below the national average." Marilyn Lewis, *1 in 7 Americans Carry 10 or More Credit Cards*, <http://articles.moneycentral.msn.com/Banking/CreditCardSmarts/1In7AmericansCarries10CreditCards.aspx> (last visited Feb. 16 2007).

¹⁴⁶ SHEETS, *supra* note 7, at 3-10. Those without a credit history can obtain a certificate of deposit (CD) at a bank and then use the CD as collateral for a six-month or longer installment loan from that bank. *Id.* The borrower can invest the money in an interest-bearing account, use the money to pay the loan early, and build a credit history at little cost. *Id.* After paying the loan off early, the borrower can go back to the same bank and apply for an unsecured loan. *Id.* After paying off the unsecured loan, the borrower can repeat the procedure asking for a larger loan each time. *Id.* By practicing this "Credit Pursuit Strategy" at numerous banks simultaneously, a borrower can build a huge unsecured line of credit. *Id.*; *see also* TRYBULA & HEWITT, *supra* note 10, at 72.

b. Fixed-Rate or Adjustable-Rate Mortgage (ARM)

Fixed-rate mortgages provide the primary benefit of comfort because they establish “predictable monthly payments”¹⁴⁷ of principal and interest over the life of the loan. As a result, they are “ideal for purchasers who have a stable income and want predictable housing costs.”¹⁴⁸ Fixed-rate mortgages are probably the “best choice” if the borrower plans on keeping the mortgage for at least five years, and the borrower feels comfortable with the interest rate and monthly payment.¹⁴⁹ For convenience, an amount can be included in the mortgage payment to cover taxes and insurance costs, which will be kept in escrow until the appropriate due date.¹⁵⁰ Since taxes and insurance tend to increase over time, borrowers should plan on having this payment increase gradually over the life of the loan.

In contrast to fixed-rate mortgages, adjustable or variable-rate mortgages charge interest rates that “change at intervals determined at the beginning of the loan.”¹⁵¹ Since the interest rate changes along with market conditions, lenders can shift significant risk to the borrower and, as a result, charge lower interest rates at the beginning of the loan.¹⁵² Since servicemembers move frequently, they may plan to keep their property for only a few years.¹⁵³ As a result, they may be able to benefit from ARMs by paying lower interest rates at the beginning of loans and selling their properties before their interest rates increase.¹⁵⁴ Borrowers using ARMs can manage risk by ensuring that their ARMs are tied to an appropriate adjustment index¹⁵⁵ and have conservative adjustment caps¹⁵⁶ on possible interest rate increases.

c. The Federal Government’s Involvement in the Mortgage Market: Conventional, Veterans Administration (VA), and Federal Housing Administration (FHA) Loans

Conducting the mortgage type analysis, servicemembers should consider VA and FHA loans. For those who can afford to make a twenty percent down payment and avoid PMI,¹⁵⁷ conventional loans are generally the best alternative and the most common.¹⁵⁸ Conventional loans involve “a financial institution lend[ing] its own money and tak[ing] the entire risk of

¹⁴⁷ NISSENBAUM, *supra* note 4, at 332.

¹⁴⁸ TRYBULA & HEWITT, *supra* note 10, at 173.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Escrow is defined as “An account held in trust or as security The general arrangement under which a legal document or property [e.g., money] is delivered to a third person [e.g., the mortgage servicer] until the occurrence of a condition [e.g., the tax bill due date].” BLACK’S LAW DICTIONARY, *supra* note 14, at 564.

¹⁵¹ TRYBULA & HEWITT, *supra* note 10, at 173. An Adjustable-Rate Mortgage (ARM) is defined as: “A mortgage in which the lender can periodically adjust the mortgage’s interest rate in accordance with fluctuations in some external market index. - Abbr. ARM. - Also termed variable-rate mortgage; flexible-rate mortgage.” BLACK’S LAW DICTIONARY, *supra* note 14, at 1027. The adjustment period is defined as follows:

[T]he length of time between adjustments to the interest rate charged [Borrowers] will generally be able to choose adjustment periods ranging from six months to three years. Mortgages with the shortest adjustment period will have the lowest initial rate and the fewest points, since the short adjustment period makes them less risky to the lender.

TRYBULA & HEWITT, *supra* note 10, at 174. In addition, consumers need to understand that their loan may be re-amortized over the life of their loan resulting in higher mortgage payments. See generally THE FEDERAL RESERVE BOARD, CONSUMER HANDBOOK ON ADJUSTABLE-RATE MORTGAGES, (2006), available at <http://www.federalreserve.gov/pubs/arms/armsbrochure.pdf> (informing consumers about the numerous intricacies and dangers of ARMs and their variations).

¹⁵² See TRYBULA & HEWITT, *supra* note 10, at 174.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* “Adjustment indexes are standard, commonly reported interest rates that determine your interest rate.” *Id.* If rates are expected to increase, “a long-term index (such as the Treasury index)” is preferred since they adjust more slowly. *Id.* In contrast, if rates are expected to decrease, “a shorter-term index (such as the Cost of Funds index)” is preferred since they adjust more quickly. *Id.*

¹⁵⁶ See *id.* The following additional information is helpful for understanding interest caps with respect to loans:

Most loans have a cap on the amount the interest rate can increase each adjustment period (usually 2 percent) and over the life of the loan (usually 6 percent). So a one-year adjustable loan with an initial 7 percent rate [using these sample caps] could increase only to 9 percent at the end of the first adjustment period and to 13 percent over the life of the loan.

Id.

¹⁵⁷ See generally NELSON & WHITMAN, *supra* note 18, at 773. “Several states have statutes requiring lenders to notify borrowers at closing of the right to cancel [PMI] when a specified loan-to-value ratio has been achieved.” *Id.* at 786.

¹⁵⁸ See *id.* at 775 (explaining that in 1991, 87% of home loans were conventional loans while FHA and VA loans were about 8% and 4% respectively).

loss”¹⁵⁹ for the amount loaned. While minimizing total cost, conventional loans provide an equity cushion in the event of a downturn in the real estate market or a loss or reduction of income due to unemployment, change in employment, divorce, or disability.¹⁶⁰ For those unable to make a substantial down payment, however, VA and FHA loans may enable less wealthy borrowers to purchase a home.¹⁶¹ To accomplish this objective, the FHA¹⁶² insures loans rather than lending money.¹⁶³ Similarly, VA loans “guarantee a partial repayment”¹⁶⁴ to a financial institution in the event of default by the borrower, which generally results in lower interest rates for the borrower.¹⁶⁵

Compared to conventional loans, VA loans provide numerous advantages, such as little to no down payment, limitations on closing costs, no PMI, lower credit standards, default assistance to avoid foreclosure, and benefits for veterans with certain disabilities.¹⁶⁶ Other advantages include negotiable interest rates, required appraisals, choice of repayment plans, assumable mortgages, no prepayment penalties, and reasonable loan amounts.¹⁶⁷ The disadvantages include eligibility¹⁶⁸ requirements,¹⁶⁹ funding fees,¹⁷⁰ and higher default rates.¹⁷¹

For those who do not qualify for a VA loan or who are already using their VA loan eligibility, FHA loans may be an attractive alternative.¹⁷² Unlike VA loans that guarantee “only a portion of the loan,” FHA loans insure¹⁷³ “the full amount of selected loans made by private lenders.”¹⁷⁴ Unfortunately, FHA loans generally require a larger down payment¹⁷⁵ than VA

¹⁵⁹ TRYBULA & HEWITT, *supra* note 10, at 176.

¹⁶⁰ See U.S. DEP’T OF VETERAN’S AFFAIRS, EVALUATION OF VA’S HOME LOAN GUARANTEE PROGRAM: FINAL REPORT ES-7 (2004), <http://www.homeloans.va.gov/pdf/final%20report.pdf> [hereinafter FINAL REPORT].

¹⁶¹ See *id.* at 2-8. While “the VA Home Loan program is intended to provide a benefit to veterans . . . HUD’s loan program is intended to fulfill social objectives, that is, help low-income and minority groups gain access to loan markets that they might not have due to low income or discrimination.” *Id.*

¹⁶² See The National Housing Act, 12 U.S.C.S. §§ 1701-42 (LEXIS 2006) (establishing The Federal Housing Administration (FHA) in 1934).

¹⁶³ See NELSON & WHITMAN, *supra* note 18, at 773; see also JA 261, *supra* note 9, at 1-32. Federal Housing Administration loans are loans insured by The Federal Housing Administration, which is “now a part of the Department of Housing and Urban Development (HUD).” JA 261, *supra* note 9, at 1-32.

¹⁶⁴ JON W. BRUCE, REAL ESTATE FINANCE, IN A NUTSHELL 35 (4th ed. 1997). “The predecessor of the present Department of Veterans Affairs, the Veterans Administration, was given authority to guarantee home loans for GI’s by the Servicemen’s Readjustment Act in 1944.” NELSON & WHITMAN, *supra* note 18, at 773; see 38 U.S.C.S. § 3703 (LEXIS 2006).

¹⁶⁵ See TRYBULA & HEWITT, *supra* note 10, at 178.

¹⁶⁶ See FINAL REPORT, *supra* note 160, at 2-8.

¹⁶⁷ See VETERANS BENEFITS ADMINISTRATION, PAM. 26-91-1, VA HOME LOANS: A QUICK GUIDE FOR HOMEBUYERS & REAL ESTATE PROFESSIONALS (Feb. 2005) [hereinafter VA PAM. 26-91-1]. “Loan maximum may be up to 100 percent of the VA-established reasonable value of the property. Due to secondary market requirements, however, loans generally may not exceed \$359,650.” *Id.*

¹⁶⁸ See 38 U.S.C.S. §§ 3701-02 (LEXIS 2006).

¹⁶⁹ See VA PAM. 26-91-1, *supra* note 167, at 3. In general, to be eligible, veterans must have the following:

[A]ctive duty service, that was not dishonorable, during World War II and later periods Veterans with service only during peacetime periods and active duty military personnel must have had more than 180 days’ active service. Veterans of enlisted service which began after September 7, 1980, or officers with service beginning after October 16, 1981, must in most cases have served at least 2 years.

Id.

¹⁷⁰ See *id.* at 6 (explaining funding fees).

A funding fee must be paid by all veterans, except those exempt due to receipt of disability compensation, using the VA home loan program. The funding fee can range from 0.5 percent for Interest Rate Reduction Refinancing Loans (IRRRL) to 3.3 percent for veterans who are subsequent users of the VA home loan program. For all VA loans, the funding fee may be paid in cash or included in the loan.

Id.

¹⁷¹ See FINAL REPORT, *supra* note 160, at ES-7. In 1988, the percentage of delinquent VA loans was between 6 and 7% compared to 2 to 4% for conventional loans. *Id.* In 2003, the VA delinquency rate increased to between 7 and 9% while the delinquency rate of conventional loans increased by only “a fraction of a percentage point.” *Id.*

¹⁷² See TRYBULA & HEWITT, *supra* note 10, at 179.

¹⁷³ See 12 U.S.C.S. § 1709 (LEXIS 2006).

¹⁷⁴ FINAL REPORT, *supra* note 160, at ES-7.

¹⁷⁵ TRYBULA & HEWITT, *supra* note 10, at 179. The “FHA requires 3 percent of the value of the property for loans less than \$50,000. For loans greater than \$50,000, FHA requires a down payment of approximately 5 percent of the value of the property.” *Id.*

loans and charge a mortgage insurance premium on the outstanding balance of the loan.¹⁷⁶ In addition, FHA loans have a significantly higher delinquency rate than both conventional and VA loans, and the FHA loan delinquency rate has been rising. For example, from 1998 to 2003, the percentage of delinquent FHA loans increased from around seven percent to almost thirteen percent.¹⁷⁷

Realizing the high delinquency rate of VA and FHA loans, servicemembers need to beware of excessive leverage and be cognizant of the factors that contribute to increased delinquency, foreclosure, and bankruptcy. Some of these factors include being on active duty, being young, failing to qualify for a conventional mortgage, having a high loan-to-value ratio, and having a lower income.¹⁷⁸ Unfortunately, these factors are typical of most active duty servicemembers. In other words, the statistics show that based on the eligibility and selection criteria, FHA loans are more risky than VA loans, which are more risky than conventional loans. Servicemembers can use each of these tools effectively or at their own peril depending on how they structure their real estate transaction and manage their financial portfolios. In addition, borrowers can manage risk by securing shorter mortgages if they can afford the higher payments.

d. Mortgage Length

The most common mortgages have been longer thirty-year and shorter fifteen-year mortgages. While thirty-year mortgages allow borrowers to buy more expensive houses, pay lower monthly payments, and lock in interest rates over a longer period of time, fifteen-year mortgages allow borrowers to rapidly build up equity, significantly reduce the total amount of interest paid on their loan, and pay off their mortgage in half the time.¹⁷⁹ Borrowers should choose fifteen-year mortgages if they can manage the higher monthly payments and cannot achieve a higher after-tax return by investing elsewhere.¹⁸⁰ In contrast, borrowers should choose thirty-year mortgages if funds are tight, if they need the tax deduction, or if they have enough discipline to invest the difference between the fifteen and thirty-year mortgage payments in an investment with a guaranteed¹⁸¹ higher after-tax rate of return.¹⁸² By investing the payment difference for fifteen years, borrowers could pay off the balance on their thirty-year mortgage in fifteen years and have savings left over.¹⁸³

e. Creative and Possibly Dangerous Financing

Servicemembers need to select the right loan so that they can continue making payments over the long term.¹⁸⁴ Servicemembers must not rely on an “unrealistic rate of home appreciation” when choosing their loan.¹⁸⁵ Purchasing real estate using novel mortgages, such as interest-only mortgages, mortgages with forty-year amortization schedules, and option

¹⁷⁶ See JA 261, *supra* note 9, at 1-34. See generally NELSON & WHITMAN, *supra* note 18, at 776.

¹⁷⁷ FINAL REPORT, *supra* note 160, at ES-7.

¹⁷⁸ See *id.*

¹⁷⁹ See NISSENBAUM, *supra* note 4, at 333.

¹⁸⁰ See *id.* at 334. For example, the monthly payment difference between a fifteen-year (at 8.25% interest) and thirty-year (at 8.5% interest) mortgage of \$150,000 would be approximately \$302 per month. *Id.* at 333. The difference in actual interest paid on the loans is \$153,000. *Id.* In short, a servicemember could choose a thirty-year mortgage rather than a fifteen-year mortgage and invest the \$302 per month difference in a lucrative alternative investment. If the servicemember experienced success in the alternative investment, the servicemember could use the returns to pay off the thirty-year mortgage early. Of course, the alternative investment might not have the same tax benefits as interest payments on a mortgage. See *id.*

¹⁸¹ See, e.g., Defense Finance and Accounting Service, *A Savings Plan for Deployed Service Members*, Mar. 18, 2004, <http://www.dod.mil/dfas/news/releases/2004/04-14.htm> (allowing deployed servicemembers to contribute up to \$10,000 to a Savings Deposit Program and earn a guaranteed 10% annual return).

¹⁸² See TRYBULA & HEWITT, *supra* note 10, at 179-80.

¹⁸³ See *id.*; see *supra* note 180.

¹⁸⁴ Olson, *supra* note 1. To understand the importance of sustaining payments, homeowners should realize the following:

Foreclosure rates in some areas have increased dramatically since the early 1990s -- the same time frame in which the subprime market experienced its most rapid growth Predatory lending is a serious problem that needs to be addressed in a way that preserves incentives for responsible subprime lenders so that worthy borrowers with imperfect credit can become homeowners.

Id. at 7.

¹⁸⁵ *Id.*

adjustable-rate mortgages, increase the risks of making payments over the long term.¹⁸⁶ According to former Federal Reserve Chairman Alan Greenspan, these novel mortgages, “expose borrowers to more interest-rate and house-price risk than the standard thirty-year, fixed-rate mortgage and . . . enable marginally qualified, highly leveraged borrowers to purchase homes at inflated prices.”¹⁸⁷ As a result, if the housing market cools, “these borrowers, and the institutions that service them, could be exposed to significant losses.”¹⁸⁸ A cooling market could result in foreclosure or even bankruptcy if homeowners are unable to sell or rent their property when they need to move to another location upon a PCS.¹⁸⁹

B. Market and Specific Property Analysis

In order to minimize risk, servicemembers should consider purchasing a home that they can either rent, based on an acceptable cash flow, or sell, based on a suitable valuation. If buyers know servicemembers have to sell their property (e.g., the servicemember is moving, cannot afford two mortgages, and cannot rent for an amount sufficient to pay expenses), servicemembers have little bargaining power and are more likely to sell for considerably less than the property’s market value.

1. *The Importance of Being Able to Sell the Property*

a. *Location*

In order to maximize the ability to sell or rent their home, servicemembers need to ensure they select the right property in the right location for the right price. Probably the most common phrase in real estate, “location, location, location,”¹⁹⁰ captures the significant factors that make a home valuable, including the quality and access to the corresponding schools, employment opportunities, and mass transportation systems, as well as the absence of excessive traffic, crime, and hazards.¹⁹¹ In other words, “the same exact home built in one area will have a different value if built somewhere else.”¹⁹² For example, a prospective buyer may seriously consider purchasing a specific property until the buyer discovers that the home is located in a 100-year flood plain.¹⁹³ The seller may perceive the flood plain as a minor issue since there is only a “1 percent chance of

¹⁸⁶ Greenspan, *supra* note 112. An interest-only mortgage is defined as: “A balloon-payment mortgage on which the borrower must at first make only interest payments, but must make a lump-sum payment of the full principal at maturity.” BLACK’S LAW DICTIONARY, *supra* note 14, at 1028. An amortization schedule is defined as: “A schedule of periodic payments of interest and principle owed on a debt obligation; specifically, a loan schedule showing both the amount of principal and interest that is due at regular intervals over the loan term and the remaining unpaid principal balance after each scheduled payment is made.” BLACK’S LAW DICTIONARY, *supra* note 14, at 83. Therefore, a forty-year amortization schedule would allow the borrower to pay off the mortgage in forty years. An option adjustable rate mortgage is:

[A]real killer. It gives homeowners the choice each month of paying the principal and interest, just the interest or an even-smaller minimum amount. Every month you pay the minimum, you're deeper and deeper in the red. And up to 80% of option-ARM buyers pay only the minimum, according to Fitch Ratings. Because the minimum payment doesn't cover the monthly interest, the deferred interest is added to the loan balance. After the loan balance grows to a certain point, the lender will demand that you start paying the full principal and interest -- on your now-bigger loan.

Marilyn Lewis, *Ouch! Your House Payment Just Doubled*, <http://articles.moneycentral.msn.com/Banking/HomeFinancing/OuchYourHousePaymentJustDoubled.aspx> (last visited Feb. 16, 2007). See generally *supra* note 151 and accompanying text (discussing ARMs).

¹⁸⁷ Greenspan, *supra* note 112.

¹⁸⁸ *Id.* Europe's largest bank HSBC announced that bad home loans to high-risk borrowers in the U.S. would be \$10.5 billion, 20% more than anticipated. See Elizabeth Strott, *Housing Woes Slam Big Bank*, MSN MONEY, <http://articles.moneycentral.msn.com/Investing/Dispatch/HousingWoesSlamBigBank.aspx> (last visited Feb. 9, 2007).

¹⁸⁹ See Liz Pulliam Weston, *Borrowers Gamble With Adjustable-Rate Mortgages*, MSM MONEY, <http://moneycentral.msn.ontent/Banking/P49733.asp?Printer> (last visited Aug. 25, 2006). “There are already plenty of signs that consumers are overdosing on debts. Bankruptcies, foreclosures and delinquencies are at or near records -- despite low interest rates and soaring home values.” *Id.* “Frank Nothhaft, chief economist at Freddie Mac, which provides mortgage capital to the nation’s lenders, estimates that adjustables comprise 15% to 20% of the \$6.64 trillion in outstanding single-family mortgage debt.” *Id.*

¹⁹⁰ TRYBULA & HEWITT, *supra* note 10, at 163.

¹⁹¹ See NISSENBAUM, *supra* note 4, at 338.

¹⁹² TRYBULA & HEWITT, *supra* note 10, at 163.

¹⁹³ See generally Jo Ann Howard, Federal Insurance Administrator, Speech at the US/Canada Consultative Group Meeting (Aug. 30-31, 2000) (transcript available at <http://www.fema.gov/nfip/jahsp12.shtm>). In light of Hurricane Katrina, potential homebuyers need to scrutinize location more than ever. Attempting to minimize financial risk, insurance companies like State Farm may stop issuing new homeowner policies in risk prone areas. See Associated Press, *State Farm: No New Home Policies in Miss*, <http://www.msnbc.msn.com/id/17150886/> (last visited Feb. 17, 2007).

having a flood in a century,” however, the buyer may view the flood plain as a major issue because there is approximately a 30% chance of having a flood “over the course of a 30-year mortgage.”¹⁹⁴

Servicemembers need to understand that location is not a purely financial valuation or convenience consideration but also a legal issue involving the attachment of personal jurisdiction.¹⁹⁵ Two ways a court may establish personal jurisdiction over servicemembers include servicemembers choosing a state as a domicile or consenting to a court’s jurisdiction.¹⁹⁶ A third way a court may establish personal jurisdiction over servicemembers includes servicemembers purchasing real property in a state.¹⁹⁷

Personal jurisdiction can become a significant issue for servicemember homeowners in divorce proceedings and situations involving tort liability (i.e., someone is injured on the servicemember’s property). In the case of divorce, a state court may issue a divorce decree without dividing property in order to protect the due process rights of a defendant.¹⁹⁸ A subsequent court with appropriate jurisdiction may then divide the property unless the court entering the divorce decree had jurisdiction to divide the property but failed to do so.¹⁹⁹ This scenario is extremely important for servicemembers who PCS from state to state and who may acquire marital properties in different states. If servicemembers file for divorce after separating from their spouses and relocating to different states, servicemembers may have to file an action for property division in the state where the property is located or the state where their spouses are domiciled.²⁰⁰ Furthermore, by purchasing a home with separate assets in states that divide property on an “equitable” basis, servicemembers risk losing their separate property in the event of divorce.²⁰¹ As a result, servicemembers contemplating divorce as a strong possibility may want to rent rather than buy and later cope with the jurisdiction and property division complications of home ownership.

b. Valuation

Just as important as finding the right location for a home is paying the right purchase price based on the “real” value of the home. One of the traditional methods of calculating valuation is an appraisal based on a market sales analysis, comparing the prices of similar properties that recently have sold in the same neighborhood.²⁰² The major problem with this method of valuation is that appraisals may be inflated or deflated based on whether the market is experiencing a real estate boom or bust. For example, in 2005, a study conducted by Global Insight and National City indicated that “65 metro areas representing 38 percent of the total U.S. housing market . . . [were] extremely overvalued and face[d] a high risk of future price correction.”²⁰³ This overvaluation was accompanied by national signs of a slowdown in the real estate market such as rising inventories and increasing sell times that indicated that the market was heading for a plateau.²⁰⁴ As Federal Reserve Chairman Ben S. Bernanke warned:

¹⁹⁴ *Insuring Against Natural Disasters*, USAA MAG., Spring 2006, at 38; see Insurance Information Institute, *Catastrophes: Insurance Issues*, Feb. 2006, <http://www.iii.org/media/hottopics/insurance/xxx>.

¹⁹⁵ See, e.g., VA CODE ANN. §§ 8.01-328.1 (2006) (giving the state of Virginia personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person’s interest in, use, or possession of real property in the state of Virginia).

¹⁹⁶ See, e.g., *Williams v. North Carolina*, 325 U.S. 226 (1945) (discussing domicile); *In re Marriage of Berry*, 155 S.W.3d 838 (Mo. Ct. App. 2005) (discussing domicile and consent).

¹⁹⁷ See BLACK’S LAW DICTIONARY, *supra* note 14, at 857. Quasi In Rem Jurisdiction is defined as “Jurisdiction over a person but based on that person’s interest in property located within the court’s territory.” *Id.*

¹⁹⁸ See, e.g., *In re Marriage of Berry*, 155 S.W.3d at 838 (refusing to divide marital property as a result of due process concerns since the respondent was not a domiciliary of the state and lacked minimum contacts to the state); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948) (establishing the divisible divorce doctrine and holding that a court decree was effective only in changing the marital status of the parties because the court lacked personal jurisdiction over the defendant).

¹⁹⁹ E.g., *O’Connell v. Corcoran*, 802 N.E.2d 1071 (2003) (holding that res judicata barred actions for property division at a future date if the court entering the original decree had jurisdiction to divide the property but failed to do so). *But see Bottigii v. Wall*, 765 N.E.2d 819 (Mass. App. Ct. 2002) (holding that res judicata only applies when property division was actually litigated).

²⁰⁰ *In re Marriage of Berry*, 155 S.W.3d at 838.

²⁰¹ See CUNNINGHAM, *supra* note 22, at 243.

²⁰² See SHEETS, *supra* note 7, at 9-10.

²⁰³ GLOBAL INSIGHT AND NATIONAL CITY, HOUSE PRICES IN AMERICA VALUATION METHODOLOGY & FINDINGS (DEC. 2005) <http://www.globalinsight.com/publicDownload/genericContent/3Q2005report.pdf>. *But see* Jim Jubak, *Why There is No Housing Bubble, The Sky is Not Falling*, MSN MONEY, June 10, 2005, <http://moneycentral.msn.com/content/P116257.asp?Printer>.

²⁰⁴ See Les Christie, *Outlook Sours For Real Estate, Many Indicators Point to a Major Slowdown in Home Prices*, CNNMONEY.COM, Nov. 15, 2005, http://money.cnn.com/2005/11/14/real_estate/buying_selling/prices_going_south/index.htm; National Association of Realtors, *Pending Home Sales Index*

[One] sector that is showing signs of softening is the residential housing market. Both new and existing home sales have dropped back, on net, from their peaks of last summer and early fall . . . [and] the reading for March points to a slowing in the pace of homebuilding as well. House prices, which have increased rapidly during the past several years, appear to be in the process of decelerating At this point, the available data on the housing market . . . suggest that this sector will most likely experience a gradual cooling rather than a sharp slowdown. However, significant uncertainty attends the outlook for housing, and the risk exists that a slowdown more pronounced than we currently expect could prove a drag on growth this year and next.²⁰⁵

In short, Chairman Bernanke forecasted the end of the 2000 to 2005 housing boom. However, only history will be able to tell the magnitude or existence of possible market bubbles.

Of course, if there is a housing bubble and the bubble pops, losses could be significant. For instance, from 1990 to 1996, the average house price in Los Angeles dropped 20.7%, or 34% after accounting for inflation.²⁰⁶ Similarly, in Oklahoma City prices dropped 26% from 1983 to 1988 and took approximately fifteen years to recover.²⁰⁷ This phenomenon has not only been experienced in the United States. Specifically, Japan experienced “rapidly increasing equity and real estate prices during the 1980s” followed by a “bursting of the bubble” in the 1990s causing real estate prices to plummet and the economy to suffer “a decade of relative stagnation marked by three arguably related recessions.”²⁰⁸

Looking at real estate history and comparing it to today’s environment of additional risks, servicemembers should be concerned. For example, many ARMs and interest only loans will be adjusting within the next few years and a lot of homeowners who overextended their finances to get into the housing market may experience foreclosures.²⁰⁹ A large number of foreclosures could significantly affect the market.²¹⁰ Furthermore, making the situation even more risky, the National Association of Realtors estimates that home “prices, particularly in high costs areas, could decline 15 percent” if recent tax proposals get implemented.²¹¹ Despite these factors, it is difficult to determine the actual risk. As former Federal Reserve Vice Chairman Roger W. Ferguson, Jr. states, detecting a bubble is “arguably impossible in real time” and, as a result, “preparation for a potential problem seems to be the best course of action.”²¹² For lending institutions it means that “good risk management . . . and the pursuit of fiscal prudence and price stability during booms, may ultimately serve as the best

Slowing, Jan. 5, 2006, available at <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/PHSI0106?OpenDocument>. One way to measure the strength of the market is to evaluate the average time it takes to sell properties in a certain area. In strong markets, properties will not stay on the market long before buyers purchase them. In weak markets, properties will stay on the market longer and inventories will increase. Increasing inventories could result in a market correction. According to Economist Dean Baker of the Center for Economic Policy and Research: “a rising inventory of homes in the Washington region could fuel a double-digit price decline if interest rates climb higher. Condo prices could fall by as much as 30 percent, and prices of single-family homes could drop by as much as 15 percent.” Tomoeh Murakami Tse, *Housing Cool-Down is ‘Orderly,’ Fed Chief Says*, WASH. POST, May 19, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051802196_pf.html.

²⁰⁵ Ben S. Bernanke, Chairman, Fed. Reserve Bd., Speech at the Joint Economic Committee, U.S. Congress: Outlook for the U.S. Economy (Apr. 27, 2006) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2006/20060427/default.htm>).

²⁰⁶ Les Christie, *Real Estate: When Booms Go Bust ... Home Prices Can and Do Go Down. Here’s What Declines Have Looked Like in the Past*, CNNMONEY.COM, Sept. 29, 2005, http://money.cnn.com/2005/09/19/real_estate/buying_selling/price_declines/index.htm.

²⁰⁷ *Id.*

²⁰⁸ Roger W. Ferguson, Jr., Vice Chairman, Fed. Reserve Bd., Speech at the Real Estate Roundtable, Washington, D.C.: Recessions and Recoveries Associated with Asset-Price Movements: What Do We Know? (Jan. 27, 2005) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2005/2005112/default.htm>).

²⁰⁹ See Kirstin Downey & Sandra Fleishman, *Housing Market Cooling, Data Say, In Washington, Sales Are Down, Inventory is Up*, WASH. POST, Nov. 11, 2005, available at www.washingtonpost.com/wp-dyn/content/article/2005/11/10/AR2005111022241.html?sub=new. “The number of home in the United States foreclosed by lenders rose 42 percent in 2006 from a year earlier in a sign that many homeowners have become overextended in mortgage debt More than 1.2 million foreclosure filings were reported nationwide during 2006, which is a rate of one foreclosure for every 92 households, according to RealtyTrac, Inc.” Reuters, *Foreclosures Surge 42 Percent in 2006*, CNNMONEY.COM, Jan. 25, 2007, http://money.cnn.com/2007/01/25/real_estate/bc.usa.economy.housing.foreclosures.reut/index.htm?postversion=2007012508.

²¹⁰ See Olson, *supra* note 1. “As we all know, foreclosures do not affect just the borrower who loses his home; they affect the entire community. Multiple foreclosures in one neighborhood will bring down the property value for all homeowners in the neighborhood.” *Id.*

²¹¹ National Association of Realtors, *Change to Mortgage Interest Deduction Could Drop Home Prices by 15%, NAR President Warns*, Oct. 28, 2005, <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/ChangetoMIDCouldDropHomePrices?OpenDocument> (discussing possible ramifications of tax proposals). See discussion *supra* p. 5.

²¹² Ferguson, *supra* note 208.

insurance for dealing with the inevitable occasional asset-price breaks observed in our modern economy.”²¹³ This advice is just as useful to the average servicemember making the home buying analysis.

Regardless of a possible bubble, servicemembers who can keep their properties for longer durations should be able to deal with asset-price breaks and, as a result, benefit from appreciation and capital gain tax advantages. Fortunately, servicemembers and other homeowners who move frequently can take advantage of exceptions to the rule requiring homeowners to own (i.e., ownership test) and live (i.e., use test) in their principal residence for at least two of the last five years in order to exclude \$250,000 (\$500,000 for joint returns) of capital gain.²¹⁴ For example, servicemembers may suspend the five-year period for up to ten years of qualified extended duty.²¹⁵ In addition, servicemembers may take advantage of prorated capital gain exclusions if they fail to qualify for the ownership and use tests due to a change in place of employment or certain other unforeseen circumstances.²¹⁶

To take advantage of these capital gain exclusions, however, servicemembers will normally have to own their principal residences for longer periods of time to allow their homes to appreciate. One way to increase the ability to hold onto a property is to ensure that the property can be successfully rented after considering rental income and expenses. In short, when purchasing a property, it is important for servicemembers to evaluate possible rental income²¹⁷ in addition to the ratio of home price to household incomes.²¹⁸

2. *The Importance of Being Able to Rent the Property (Cash Flow)*

One of the most important financial aspects of a homeowner’s decision to make their home available for rent is the homeowner’s ability to maintain a positive or break-even cash flow after paying applicable expenses, such as principal, interest, taxes, maintenance, and management fees.²¹⁹ Purchasing a home based on its fundamental value as a potential income property is vital to this process. In general, the

²¹³ *Id.*

²¹⁴ See I.R.C. § 121(a) (LEXIS 2006).

To claim the exclusion, you must meet the ownership and use tests. This means that during the 5-year period ending on the date of the sale, you must have: Owned the home for at least 2 years (the ownership test), and [l]ived in the home as your main home for at least 2 years (the use test).

INTERNAL REVENUE SERV., DEP’T OF TREASURY, PUB. 523 SELLING YOUR HOME 9 (2005) [hereinafter PUB. 523].

²¹⁵ See I.R.C. § 121(d)(9). “The term ‘Qualified official extended duty’ means any extended duty while serving at a duty station which is at least 50 miles from such property or while residing under Government orders in Government quarters.” *Id.* § 121(d)(9)(i). “The term ‘extended duty’ means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period.” *Id.* § 121(d)(9)(iv). The following example shows how the five-year period can be extended by ten years:

Mary bought a home on April 1, 1989. She used it as her main home until September 1, 1992, when she went on qualified official extended duty with the Navy. She did not live in the house again before selling it on August 1, 2005. Mary elects to use the entire 10-year suspension period. Therefore, the suspension period would extend back from August 1, 2005, to August 1, 1995, and the 5-year test period would extend back to August 1, 1990. During that period, Mary owned the house all 5 years and lived in it as her main home from August 1, 1990, until September 1, 1992, a period of 25 months. She meets the ownership and use tests because she owned and lived in the home for 2 years during this test period.

PUB. 523, *supra* note 214 at 13. “Together, the 10-year suspension period and the 5-year test period can be as long as, but no more, than 15 years. You cannot suspend the 5-year period for more than one property at a time.” *Id.* at 13.

²¹⁶ See I.R.C. § 121(c)(2); PUB. 523, *supra* note 214, at 12-15. To determine the reduced maximum exclusion, servicemembers should fill out Worksheet 3 of I.R.S. Publication 523. See PUB. 523, *supra* note 214 at 15.

²¹⁷ See CARLETON H. SHEETS, REAL ESTATE MASTERY COURSE, A GRADUATE COURSE IN CREATIVE REAL ESTATE INVESTING 13-2 (1997); see also SHEETS, *supra* note 7, at 9-11.

²¹⁸ See GLOBAL INSIGHT & NATIONAL CITY, HOUSE PRICES IN AMERICA VALUATION METHODOLOGY & FINDINGS, UPDATED FOR THE 3RD QUARTER OF 2005 (2005), available at <http://www.nationalcity.com/content/corporate/economicinsight/documents/3q2005report.pdf#search=HOUSE%20PRICES%20IN%20AMERICA%20VALUATION%20METHODOLOGY%20%26%20FINDINGS>.

²¹⁹ See TRYBULA & HEWITT, *supra* note 10, at 289. It is important for potential homeowners to understand the following:

It does you no good for a property to appreciate significantly over a twenty-year period if you couldn’t hold on to it because of cash flow problems. The biggest mistake most new real estate investors make is underestimating the costs associated with real estate management. . . . It is essential to set aside a maintenance reserve of maybe 5 to 10 percent of gross rents to cover . . . “unexpected” costs. Don’t forget that your rental will never be occupied 100 percent of the time and set aside an allowance for this also.

Id.

fundamental price of an asset typically is defined in terms of the discounted present value of the income stream . . . that the asset is expected to provide over time . . . [F]or real estate, it is the discounted value of the rents or services that are expected to accrue to the owner over time.²²⁰

Servicemembers should attempt to purchase homes based on their fundamental value so that they have the option to lease the homes to tenants for an amount that will cover expenses. In general, this rental amount is one percent per month or more of the home's purchase price.²²¹ For example, if servicemembers are considering purchasing a property for \$100,000, they should determine whether or not the property could be leased to tenants for \$1000 per month. If servicemembers can lease the property to tenants for only \$500 per month based on market rental rates, servicemembers may determine that the listed price of the property is too high. Nevertheless, servicemembers may still purchase a property at a possibly inflated price if they need to move into a nice home quickly and few alternative options exist. In addition, they may hope that the property will appreciate significantly over time and make the investment worthwhile. Furthermore, they may need a tax shelter or have plans to increase cash flow.

a. Increasing Cash Flow

If a one percent monthly rent is not possible upon the purchase of a home, servicemembers may be able to increase cash flow. Some common ways to increase cash flow include renting on a bi-weekly basis,²²² eliminating property management fees, renovating the property,²²³ adding low cost amenities, furnishing the property, lowering real estate taxes, and transferring utility costs to tenants.²²⁴ It is not necessarily easy, however, to increase cash flow. For example, servicemembers attempting to increase cash flow by eliminating property management fees may be taking significant risks. Since servicemembers deploy and are often stationed far from their property, eliminating property management fees may be dangerous, especially if servicemembers do not have personal experience managing properties.²²⁵ As a result, servicemembers need to plan for deployment and identify a capable property manager that can take over these responsibilities at a moments notice.²²⁶

Another way servicemembers can increase cash flow is to take advantage of tax law. By renting their property, servicemembers can generally deduct all rental expenses²²⁷ and depreciate the property's basis and improvement costs.²²⁸ As an additional benefit, servicemembers can deduct a loss upon sale of their rental properties.²²⁹ Furthermore, servicemembers

²²⁰ Ferguson, *supra* note 208.

²²¹ CARLTON H. SHEETS, THE PAINLESS GUIDE TO PROFITABLE PROPERTY MANAGEMENT 1-6 (1997) [hereinafter PROPERTY MANAGEMENT].

²²² SHEETS, *supra* note 7, at 21-5. By renting on a bi-weekly rather than a monthly basis, a landlord can get thirteen months of income from a twelve month lease. *Id.* "Owners of properties do this [i.e., rent on a weekly or bi-weekly basis] not only to accommodate tenants who can only afford to pay rent on a weekly basis, but also because they know that they [i.e., property owners] are going to get an additional four weeks rental income a year." *Id.*

²²³ PROPERTY MANAGEMENT, *supra* note 221, at 2-3. Low cost renovations could include painting, replacing old carpet, installing new bathroom and kitchen fixtures, and adding better lighting. *Id.* More complex renovations might include conversion of a single family property into a duplex, assuming zoning and code requirements are met.

²²⁴ *See id.* at 10-2 to -4.

²²⁵ *See* SHEETS, *supra* note 7, at 21-3. At least at the beginning, servicemembers should manage their own property to learn the management business and be able to better manage property managers. *Id.* at 21-3 to -4.

²²⁶ When this author was deployed to Afghanistan in 2004 as the Chief of Client Services, CJTF-76, this author saw servicemembers hand over property management responsibilities to spouses. Unfortunately, some spouses did not have the appropriate experience and mismanaged the properties, which, in some cases, resulted in foreclosure and bankruptcy.

²²⁷ *See* INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 527, RESIDENTIAL RENTAL PROPERTY 3, 8 (2005) [hereinafter PUB. 527]. "You can deduct the cost of repairs to your rental property. You cannot deduct the cost of improvements. You recover the cost of improvements by taking depreciation . . ." *Id.* at 3. Examples of expenses include repairs, advertising, cleaning, maintenance, utilities, insurance, taxes, interest, points charged solely for the use of money, commissions, tax return preparation fees, travel expenses, rental payments, and local transportation expenses. *Id.* at 3-4. Examples of improvements include bedroom additions, kitchen and bath modernizations, heating and air conditioning system installations, roof installations, and other work that adds "to either the value or the life of the property." *Id.* at 3.

²²⁸ *See id.* at 8, 10. In general, for a taxpayer to depreciate property, the taxpayer must own the property and use the property in a business or income-producing activity, and the property must have a determinable useful life greater than one year. *Id.* at 8. Unfortunately, you cannot depreciate land "because land does not wear out, become obsolete, or get used up." *Id.* at 9.

²²⁹ *See* I.R.C. § 165(c) (LEXIS 2006).

selling homes after 1997 and satisfying the objective ownership and use tests²³⁰ may still be able to exclude considerable capital gain upon sale.²³¹

b. Accounting for Depreciation

In their efforts to increase cash flow, servicemembers need to ensure they account for depreciation. Specifically, if they decide to sell the property in the future, they “cannot exclude the part of the gain equal to the depreciation . . . claimed or [that] could have [been] claimed for renting the house.”²³² For example:

Dan sold his main home in 2005 at a \$10,000 gain. He meets the ownership and use tests to exclude the gain from his income. However, he used one room of the home for business [or as a rental unit] in 2004 and has records showing he claimed [or could have but failed to claim] \$1,000 depreciation. He can exclude \$9,000 (\$10,000 - \$9,000) of his gain. He has a taxable gain of \$1,000.²³³

Servicemembers must account for depreciation whether or not they actually claimed depreciation. Fortunately, however, servicemembers *may* treat their homes as principal residences if they rent their homes and their homes appreciate in value, and they may treat their homes as rental properties if they rent their homes and their homes lose value.²³⁴ Having both options, servicemembers may take advantage of tax law when managing their financial assets.

C. Maximizing Financial Options

Servicemembers need to understand their personal situation, the market, and the value of specific properties to maximize their current and future financial options. By buying a home before establishing themselves financially, servicemembers may end up feeling that their home mortgages own them rather than the other way around. Similarly, by paying too much for a home, servicemembers may be constrained from selling or renting their properties. As a result, servicemembers wanting to buy homes should select properties that “make economic sense”²³⁵ so that they have the option to sell or rent their properties in the future. Of course, servicemembers may find it challenging to keep all these options available in light of the numerous legal and financial issues involved in making a housing decision.

IV. Step Three: Making the Decision to Purchase, Rent, or Live in Military or Privatized Military Housing; A Quantitative Starting Point

Servicemembers can easily become overwhelmed with the numerous legal and financial considerations in determining whether to purchase, rent, or live in military or privatized housing. To help start the analysis, servicemembers should begin by making a quantitative comparison concerning the measurable costs associated with each alternative. Specifically,

²³⁰ See Pub. L. No. 105-34, 111 Stat. 788 (1997). See generally Lieutenant Colonel Noël Woodward, *Important News for Servicemembers Who Sold Homes after 6 May 1997 and Paid Income Tax on Gains from Those Sales*, ARMY LAW., Oct. 2004, at 8 (discussing tax law changes due to the Tax Relief Act of 1997 and the Military Family Tax Relief Act of 2003). See *supra* note 214 (discussing the objective ownership and use tests); see *infra* note 234 (discussing the subjective intent test for sales prior to 1997).

²³¹ See I.R.C. § 121.

²³² PUB. 523, *supra* note 214, at 17. “If you were entitled to take depreciation deductions because you used your home for business purposes or as rental property, you cannot exclude the part of the gain equal to any depreciation allowed or allowable as a deduction for periods after May 6, 1997.” *Id.* “Lease of real property for definite duration is depreciable; therefore, it is ‘section 1250 property’ and is subject to depreciation recapture when disposed of.” Rev. Rul. 72-85 (1972) 1972-1 CB 234; 26 U.S.C.S. § 1250 cmt. n.2 (LEXIS 2006).

²³³ *Id.*

²³⁴ See I.R.C. § 121 (discussing gains); *id.* § 165(c) (discussing losses). However, if their homes are not rented out and treated as rental properties, taxpayers cannot deduct the loss upon sale of their homes. See PUB. 523, *supra* note 214, at 4; see also 26 C.F.R. §§ 1.165-9 (LEXIS 2006) (discussing losses). In addition, if their homes are not rented for profit, taxpayers can deduct rental expenses only up to the amount of the rental income. See PUB. 527, *supra* note 227, at 5. The dual benefit of taking advantage of both gains and losses is a welcome change from the subjective test tax law governing the sale of homes occurring prior to 6 May 1997. See generally Major Thomas Keith Emswiler, *The Tax Consequences of Renting and Then Selling a Residence*, ARMY LAW., Oct. 1995, at 20 (discussing the subjective test for sales prior to 1997 concerning the taxpayer’s intent to convert his home into a rental property as part of a “profit-oriented enterprise”). Factors the courts looked to in making this subjective determination included: “(1) the length of time the house was occupied by the individual as his residence . . . ; (2) whether the individual permanently abandoned all further personal use of the house; (3) the character of the property (recreational or otherwise); (4) offers to rent; and (5) offers to sell.” *Grant v. Comm’r*, 84 T.C. 809 (1985).

²³⁵ PROPERTY MANAGEMENT, *supra* note 221, at 2-1.

servicemembers should consider tax benefits, equity growth, foregone interest, and maintenance. In addition, if servicemembers plan to live in the property initially and then rent the property to tenants, they should consider depreciation, management fees, and vacancy. Servicemembers will obviously prioritize different factors based on their individual circumstances and tastes. The following sections run through examples demonstrating a process for making these quantitative comparisons. These examples are summarized in the tables in Appendices A, B, C, and D.

A. To Rent vs. Buy a Home (Appendices A and B)

To begin their analysis, servicemembers should identify the quantifiable expenses and benefits associated with each housing alternative. Next, servicemembers should calculate the tax savings of purchasing a home and itemizing deductions and compare these figures to renting a similar residence and taking the standard deduction. Finally, servicemembers should total their expenses, tax savings, and avoided costs of renting a similar property. To make a comparison to military or privatized housing, servicemembers should substitute their BAH allowance for their avoided rental costs and factor in other costs such as free utilities and renters insurance.

For example, Appendix A shows a hypothetical couple filing a joint tax return, making \$59,400 annually, and deciding whether to purchase a \$300,000 home or rent an equivalent residence. In making this determination, the couple anticipates using savings from a 4% interest bearing account to make a 20% down payment of \$60,000 and cover closing costs of \$10,000. The couple plans on making this down payment to avoid PMI, reduce their monthly mortgage payment, and provide an equity cushion from possible declines in market value.

After identifying the expenses and benefits associated with each housing option, the couple should determine their tax savings between buying and renting a home. By itemizing their deductions of mortgage interest, real estate taxes, and other tax-deductible expenses, the couple in Appendix A reduces their net taxable income from \$59,400 to \$35,900. Although they forego their \$10,000 standard deduction, by purchasing the home and itemizing their deductions they end up saving \$2445 in taxes when compared to renting a similar property. Next, the couple totals their expenses, foregone interest, tax savings, and rental costs avoided to determine whether it is cheaper to buy or rent on an annual basis. In this example, the couple experiences a net benefit of \$1745 annually by purchasing a home.

These tax benefits increase based on the couple's income. Appendix B shows the same example except the couple has a higher annual income. Instead of being in the 15% tax bracket, the couple in Appendix B is in the 25% tax bracket. This example demonstrates that because of the progressive tax system, purchasing a home can be more beneficial if there is more taxable income to shelter. Although the examples in Appendices A and B are the same except for annual income, the couple in Appendix B experiences a tax savings of \$4075 and a net home ownership benefit of \$3375.

Servicemembers must also keep in mind the Alternative Minimum Tax (AMT), which attempts to ensure that persons earning above a certain amount and benefiting from certain tax advantages pay at least a minimum amount of tax.²³⁶ To determine whether the AMT applies, taxpayers should complete IRS form 6251.²³⁷ Fortunately, the President's Advisory Panel on Federal Tax Reform has recommended eliminating the AMT.²³⁸ Until the AMT is officially repealed, however, it will cover more and more middle-class taxpayers each year.²³⁹

Although these examples are rather simplistic, they can be modified based on a servicemember's specific circumstances. For example, a servicemember can factor in quantifiable costs or benefits, such as utilities and transportation costs, for a better-tailored analysis. Similarly, transaction costs for selling the property, appreciation, and capital gain could be estimated for the period of home ownership and broken down into yearly amounts, which also could be factored into the analysis. Unfortunately, statistics cannot adequately measure the numerous intangible costs and benefits such as having the autonomy to decorate or improve one's home. As a result, this type of quantitative analysis must serve as only a starting point in an effective analysis.

²³⁶ See Internal Revenue Serv., Topic 556 - Alternative Minimum Tax, <http://www.irs.gov/taxtopics/tc556.html> (last visited Aug. 28, 2006).

²³⁷ INTERNAL REVENUE SERV., DEP'T OF TREASURY, 2005 INSTRUCTIONS FOR FORM 6251 (REV. JAN. 2006) ALTERNATIVE MINIMUM TAX FOR INDIVIDUALS (2006).

²³⁸ FEDERAL TAX REFORM, *supra* note 34, at 85.

²³⁹ *Id.* In 2006, the AMT is estimated to apply to 21.6 million taxpayers. *Id.* at 86. By 2015, the AMT is estimated to apply to 52 million taxpayers. *Id.*

B. Cash Flow as an Income Property (Appendix C)

Although this rent vs. buy analysis is useful in comparing the quantifiable costs between purchasing, renting, or living in military or privatized military housing, it is practical only if servicemembers remain in the same residence. The analysis is not effective if servicemembers move to another duty station and want to keep their home at their departing station. As a result, before purchasing a property, servicemembers should consider whether the property could be rented with a positive or break-even cash flow. If servicemembers cannot achieve a break-even or positive cash flow, servicemembers may not experience sufficient equity growth and appreciation to cover the transaction costs upon the eventual sale of the property.

For example, Appendix C shows a hypothetical real estate investor considering the purchase of a rental property. First, he calculates his expected rental gross income allowing for vacancy. Second, he totals his expenses including principal, interest, taxes, management fees, maintenance, insurance, and other miscellaneous costs. Third, he offsets his rental gross income by his expenses to determine his cash flow. In this hypothetical case, the real estate investor can maintain an annual \$564 positive cash flow, \$3000 equity growth, and \$436 paper loss. Over time, as the investor holds on to the property, however, the tax benefits will decrease and the investor will have to find a new tax shelter to cover his income from his rental property.

C. The Decision Matrix (Appendix D)

With so much focus on costs and cash flow, servicemembers may fail to see the big picture. To address this concern, servicemembers should consider using a decision matrix.²⁴⁰ A decision matrix can assist servicemembers in making choices that involve “multiple, and often competing, decision criteria” where some factors may be more important than others.²⁴¹ Servicemembers can use a decision matrix as part of their analysis incorporating their cost comparison (e.g., Appendices A and B) and cash flow (e.g., Appendix C) results or as a totally separate analysis tool disregarding cost and cash flow. The U.S. Army has successfully used one such tool, the DECMAT Program for Windows Version 2.2, to train its students at the Combined Arms and Services Staff School and the U.S. Army Command and General Staff College.²⁴² Although the detailed instructions are included in Appendix E, the process can be summarized in five relatively simple steps.²⁴³

First, servicemembers should identify the significant factors bearing on their decision and determine the relative weights of these criteria based on their own personal preferences. Possible factors bearing on the servicemember’s housing decision could include quality of residence, location, cost, and wait time to move in. Other factors could include the possibility of deployment, divorce, bankruptcy, or change in employment. For example, the Pairwise Comparison in Appendix D shows an example where a servicemember slightly favors “quality of residence” to “location,” favors “quality of residence” to “cost” and “wait time,” and strongly favors “quality of residence” to “duration of residence” and “investment.” By specifying these priorities, the DECMAT program automatically assigns numerical weights to each criterion. In the example “quality of residence,” “location,” “cost,” “wait time,” “duration of residence,” and “investment,” received the following weights of 4.93, 3.09, 1.78, 1.78, 1, and 1 respectively.

Second, servicemembers should determine whether the criteria can be measured numerically or whether the possible courses of action can only be ranked against each other based on the criteria. For example, a criterion such as “cost” could be numerically measured in dollars, but a criterion such as “quality of residence” could not be measured easily with a raw numerical figure. However, servicemembers could effortlessly determine whether the “quality of privatized housing” should be ranked higher than the “quality of military housing” and rank the courses of action accordingly.

Third, servicemembers should select the appropriate type of decision matrix. A relative values matrix is probably more appropriate for most servicemembers because it is easy to use and does not require evaluation criteria to be expressed with specific numerical values such as dollars or miles per gallon.²⁴⁴ Although a multiplication matrix is more accurate because it

²⁴⁰ See STIKKERS, *supra* note 2.

²⁴¹ CAPTAIN RICHARD B. STIKKERS, DECMAT 2.2 INSTRUCTIONS 1, Oct. 26, 1998 [hereinafter INSTRUCTIONS]. See *infra* Appendix E.

²⁴² See *id.* at 2.

²⁴³ See *id.* at 1. It should be noted that the author simplified the specific DECMAT procedures.

²⁴⁴ *Id.* at 4.

accounts for “the magnitude of difference among an evaluation criterion’s raw data,” it cannot be used if a single criterion such as “quality of residence” lacks a numerical measure of value.²⁴⁵

Fourth, assuming servicemembers select a relative values matrix, they should evaluate each course of action with respect to each criterion and rank each course of action accordingly. To rank courses of action, servicemembers must specify whether a lower rank or higher rank is better and consistently apply the ranking system throughout the decision matrix to properly determine the outcome.²⁴⁶ For instance, in the hypothetical case in Appendix D regarding the “quality of residence” criterion, “buy,” “privatized housing,” “rent,” and “military housing” are ranked 1, 2, 3, and 4 respectively, with 1, the lower rank, being better. In the event that two courses of action are equal, their rankings are averaged and assigned accordingly.²⁴⁷ For example, in the “location” criterion from the same hypothetical case, “military housing” and “privatized housing” provide similar benefits. As a result, the example assigns them both the same value of 1.5 (i.e., $(1+2) / 2 = 1.5$).

Fifth, servicemembers should compute the values of each course of action to determine which housing alternative is best. If servicemembers apply a “higher rank is better analysis,” the best course of action will have the highest score. Conversely, if servicemembers apply a “lower rank is better analysis,” the best course of action will have the lowest score. For example, in Appendix D, “privatized housing” is the best housing alternative given the priorities of this hypothetical servicemember because it has the lowest score. To test this result, servicemembers can conduct a sensitivity analysis to determine whether the decision would be different if the priorities of the servicemembers changed.²⁴⁸ For example, if servicemembers valued “investment” more (i.e., giving it a weight of 2.77 rather than 1), then “buy” would become the optimal decision.

Although the analysis may seem complex, the DECMAT program is relatively user-friendly and can be used quickly to evaluate different options given the different priorities of servicemembers.²⁴⁹ As a result, servicemembers should consider using the DECMAT or similar tool to evaluate the numerous factors they deem important to their specific situation.

V. Conclusion

Servicemembers need to thoroughly analyze numerous legal and financial disciplines, from tax law and family law to valuation and cash flow, in order to minimize the risks associated with selecting housing options. Failure to consider the numerous disciplines and their consequences as a whole *in advance of selecting a housing option*, can result in events, such as not being able to terminate a lease prior to a deployment, unintentionally submitting oneself to the jurisdiction of a state court, and defaulting on a mortgage. Although owning a home may be one of the best ways to build wealth, buying a home can be disastrous if servicemembers pay too much for a home, buy a home in the wrong location, overextend their finances, or own their home for too short a period of time.

Servicemembers need to consider their housing options and take the necessary steps months to years in advance to ensure minimum risks and maximum rewards. Servicemembers should begin by immediately evaluating their credit, fixing any discrepancies, and taking steps to improve their credit scores to prepare themselves for buying a home or renting an apartment in the future. Simultaneously, servicemembers should strive to eliminate debt, build financial reserves, and increase access to credit. Taking these steps will facilitate buying a home when the timing based on individual circumstances is most advantageous.

Months prior to a PCS, servicemembers should consider taking permissive temporary duty to locate suitable housing alternatives. At that time, servicemembers can identify the housing and rental markets by talking to realtors, housing office representatives, and sponsors. Servicemembers can evaluate the flexibility of landlords to include military clauses as well as review the housing rules and wait times associated with military and privatized housing. Servicemembers can compare costs associated with each housing option and factor in typical issues such as tax benefits and property taxes as well as atypical concerns such as child support and divorce.

²⁴⁵ *Id.*

²⁴⁶ *See id.* at 2.

²⁴⁷ *See* INSTRUCTIONS, *supra* note 241, at 3.

²⁴⁸ *See id.* at 8. “Sensitivity analysis identifies the degree to which the DECMAT results are subject to change with only small changes in the evaluation criteria weights. A solution which is not sensitive to changes in weights provides the decision-maker with confidence that he or she has a valid solution.” *Id.*

²⁴⁹ *See* STICKERS, *supra* note 2.

Servicemembers, especially those anticipating a deployment or PCS shortly after arriving at a new duty station, should also consider selling or renting their prospective home. By considering these issues prior to purchasing a home, servicemembers will be able to determine if they will be able to sell their homes without incurring significant deficiencies or rent their homes while maintaining a break-even or positive cash flow. For those interested in renting out their home but concerned about having negative cash flows, servicemembers can calculate renovation costs into the purchase decision in order to determine whether they could achieve a break-even or positive cash flow.

By considering the numerous legal and financial issues and evaluating them based on their individual circumstances, servicemembers can set themselves up for success regardless of the following: how long they plan to be physically located at a duty station, how strong their finances are at any point in time, or what housing option they ultimately select. In today's world of rising interest, divorce, foreclosure, bankruptcy, and deployment rates, servicemembers need to plan now more than ever to avoid potentially disastrous results in the current unforgiving legal and financial environment.

Appendix A

To Rent vs. Buy a Home (15% Tax Bracket in 2005)²⁵⁰

Step 1. Computing the Tax Deduction Benefit (Assuming Married Filing Joint Return).

	Rent (\$)	Buy (\$)
Taxable Income	59,400	59,400
Foregone Interest (\$70,000 x .04)	2,800	
Standard Deduction	(10,000)	
Itemized Deductions		(2,000)
Interest Expense Deduction		(20,000)
Real Estate Taxes		(1,500)
Net Taxable Income	52,200	35,900
Taxable Income Reduction		16,300
x Marginal Tax Rate (2005)		x 15%
Tax Savings Due to Purchase		2,445

Step 2. Comparing Renting versus Buying in terms of Cash Flow and Equity Growth.

Homeowner (costs) or Benefits*		Buy
Interest Paid on Mortgage		(20,000)
Real Estate Taxes		(1,500)
Non Tax Deductible Fees such as Association Costs and Trash Fees		(500)
Home Owners vs. Renters Insurance Difference		(400)
Maintenance		(3,000)
Foregone Interest on Other Possible Investments		(2,800)
Tax Savings		2,445
Equity Growth due to Paying Down the Mortgage		<u>3,500</u>
Net Cost of Home Ownership		(22,255)
Rental Cost Avoided or BAH if on-post		+24,000
Net Benefit or (Cost) of Home Ownership		1,745

*This Analysis may include

Other Quantifiable Costs or Benefits

- Utilities (landlord may pay for some utilities)
- Transportation Costs (if there is a difference in commuting distance to work)
- Transaction Costs and Time Involved in Selling or Renting upon PCS
- Appreciation (or loss in value) of the Property

Other Intangible Costs or Benefits

- Pleasure of Owning and having a High Degree of Privacy
- Having Autonomy to Improve the Property
- Difference in the Size and Quality of the Residence

²⁵⁰ See TRYBULA & HEWITT, *supra* note 10, at 182 (showing a similar example). The examples in this Appendix use the 2005 tax tables. The analysis does not change using a different year's tax tables, but the amounts themselves change. For example, in 2006, the standard deduction for married taxpayers filing jointly increased from \$10,000 to \$10,300. See INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 17 YOUR FEDERAL INCOME TAX 132 (2006).

Appendix B

To Rent vs. Buy a Home (25% Tax Bracket in 2005)²⁵¹

Step 1. Computing the Tax Deduction Benefit (Assuming Married Filing Joint Return).

	Rent (\$)	Buy (\$)
Taxable Income	100,000	100,000
Foregone Interest (\$70,000 x .04)	2,800	
Standard Deduction	(10,000)	
Itemized Deductions		(2,000)
Interest Expense Deduction		(20,000)
Real Estate Taxes		(1,500)
Net Taxable Income	92,800	76,500
Taxable Income Reduction		16,300
x Marginal Tax Rate (2005)		x 25%
Tax Savings Due to Purchase		4,075

Step 2. Comparing Renting versus Buying in terms of Cash Flow and Equity Growth.

Homeowner (costs) or Benefits*	
Interest Paid on Mortgage	Buy (20,000)
Real Estate Taxes	(1,500)
Non Tax Deductible Fees such as Association Costs and Trash Fees	(500)
Home Owners vs. Renters Insurance Difference	(400)
Maintenance	(3,000)
Foregone Interest on Other Possible Investments	(2,800)
Tax Savings	4,075
Equity Growth due to Paying Down the Mortgage	<u>3,500</u>
Net Cost of Home Ownership	(20,625)
Rental Cost Avoided or BAH if on-post	+24,000
Net Benefit or (Cost) of Home Ownership	3,375

*This Analysis may include

Other Quantifiable Costs or Benefits

- Utilities (landlord may pay for some utilities)
- Transportation Costs (if there is a difference in commuting distance to work)
- Transaction Costs and Time Involved in Selling or Renting upon PCS
- Appreciation (or loss in value) of the Property

Other Intangible Costs or Benefits

- Pleasure of Owning and having a High Degree of Privacy
- Having Autonomy to Improve the Property
- Difference in the Size and Quality of the Residence

²⁵¹ See *id.* (showing a similar example).

Appendix C

Cash Flow as an Income Property²⁵²

Income	Dollars
Possible Annual Gross Income (\$1,400 x 12 months)	16,800
Minus 5% Vacancy Allowance (\$16,800 x .05)	<u>(840)</u>
Actual Gross Income	15,960
Expenses	
Mortgage Payment (principal of \$3,000, interest, and taxes)	(12,500)
10% Management Fees (\$15,960 x .10)	(1,596)
Maintenance/Repairs	(1,000)
Insurance	(200)
Miscellaneous such as advertising, accounting, and legal fees	(100)
Total Expenses	15,396
Cash Flow (\$15,960 of income minus \$15,396 of expenses)*	564

* In addition to this \$564 cash flow (i.e., income minus expenses) are equity growth (i.e., principal payments reducing the mortgage balance) and tax incentives (i.e., interest deductions, real estate tax deductions, and depreciation deductions).

For example, in this hypothetical case, the landlord could experience \$3,000 of equity growth, while having a tax deduction of \$16,396 (i.e., expenses of \$12,396 [\$15,396 of expenses minus \$3,000 of principal payments] plus depreciation of \$4,000). As a result, the landlord has a property generating a positive cash flow, paying off the mortgage, and simultaneously creating a paper loss of \$436 (e.g., \$16,396 of deductions minus \$15,960 of income = \$436 loss) for legal tax sheltering purposes.

²⁵² See PROPERTY MANAGEMENT, *supra* note 221, at 2-1 (showing a similar example); see also SHEETS, *supra* note 7, at 9-12.

Appendix D

Decision Matrix²⁵³

Pairwise Comparison

	2	3	4	5	6
1	2	3	3	4	4
2		2	2	3	3
3			1	2	2
4				2	2
5					1

Enter the importance factor of each horizontal evaluation criteria compared to each vertical evaluation criteria

Print

Send Values

Cancel

Override

Help

Legend of Importance Factors
 1 - Equal
 2 - Slightly Favored
 3 - Favored
 4 - Strongly Favored

DECISION MATRIX

Housing Decision

Weight	4.93	3.09	1.78	1.78	1.00	1.00	Total
Criteria	Quality of Residence	Location of Residence	Cost of Residence	Wait Time to Move In	Duration of Residence	Investment Opportunity	
COA							
Buy	1	3.5	4	2	4	1	31.419
Rent	3	3.5	3	1	3	3	38.721
Live in Military Housing	4	1.5	1	4	1.5	3	37.749
Privatized Housing	2	1.5	2	3	1.5	3	27.889

Relative Values Matrix
 Less is better
 Consistency Ratio = 99.33

Sensitivity Analysis

Quality of Residence: Not Sensitive
 Location of Residence
 Changes at 1.32, Optimal is Buy
 Cost of Residence: Not Sensitive
 Wait Time to Move In: Not Sensitive
 Duration of Residence: Not Sensitive
 Investment Opportunity
 Changes at 2.77, Optimal is Buy

²⁵³ U.S. DEP'T OF ARMY, 52D ID & FORT RILEY MEMO. 25-50, 52D INFANTRY DIVISION (M) & FORT RILEY STAFF OFFICERS GUIDE (1 Feb. 20yy).

Appendix E

DECMAT 2.2 Instructions²⁵⁴

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1. Introduction.

a. The Decision Matrix (DECMAT) is a tool decision-makers can use to assist them in solving problems with multiple, and often competing, decision criteria. Some of these criteria may be more important than others. This DECMAT program provides a structured approach, first to establish criteria weights and then to apply these weights within the decision matrix. In this way, decision-makers have a relatively objective tool to use for their decisions.

b. This program was developed for use at the Combined Arms and Services Staff School (CAS3) at the U.S. Army Command and General Staff College, Ft. Leavenworth, Kansas. The program author is a 1997 graduate of CAS3. This program is considered freeware and is intended for dissemination throughout the U.S. Army.

2. Terms.

a. Objective: The desired end state or goal of the decision.

b. Evaluation Criteria (or States of Nature): Aspects of the situation over which the decision-maker has no control.

c. Courses of Action (or Strategies): Alternative choices available to the decision-maker.

d. Raw Data (Payoffs): The dependent variable. Results of the interaction between the criteria and the courses of action (i.e., the cost of a course of action given an evaluation criterion).

3. Program Start-Up Window.

a. Upon executing the DECMAT Program, one finds an empty, unlabeled 2x2 DECMAT in the program start-up window. This program has the capability to work up to a 10x15 matrix.

b. This program always calculates values based on lower values being better, both within the matrix and for the total column.

²⁵⁴ INSTRUCTIONS, *supra* note 241.

4. Select Matrix Type and Matrix Set Up.

a. Select the matrix type by dragging down the Matrix menu and highlighting either the Multiplication Matrix or the Relative Value Matrix. An alternate method to select the matrix type is to select the circled M or R on the tool bar to select a Multiplication or Relative Value Matrix, respectively. The default selection is a "Multiplication Matrix."

b. Evaluation Criteria are shown along the top of the matrix. Click on the + or - button with the horizontal arrow (located on the tool bar) to add or delete Evaluation Criteria columns. Add the criteria names to title boxes at the top of the matrix; the title boxes accept two lines of entry. By convention, Evaluation Criteria are shown in order of weight, descending from left to right in the matrix. See Weighting of Criteria for further explanation.

c. Courses of Action are shown along the left side of the matrix. Click on the + or - button with the vertical arrow (located on the tool bar) to add or delete Courses of Action rows. Add the Courses of Action names to the boxes on the left side of the matrix; the Course of Action name boxes accept two lines of entry.

d. Add a matrix title to the box at the top of the matrix.

5. Relative Value Matrix.

a. This matrix type is the easier of the two methods to use; however, this method is also less accurate since it does not account for the magnitude of difference between raw data values.

b. To use the relative value matrix:

(1) For a given evaluation criterion, rank the courses of action based on the payoff raw data.

(2) Assign 1 to the best course of action for a given evaluation criterion and continue rank ordering the rest of the courses of action within that evaluation criterion.

(3) If two or more courses of action have the same raw data value within a given evaluation criterion, average their rankings and assign that average to each of these courses of action.

EXAMPLE:

Two courses of action are tied for the 2d and 3d ranking.

$$(2+3)/2 = 2.5$$

Assign 2.5 to each course of action.

(4) Input the relative values to the DECMAT in the appropriate raw data box corresponding to that combination of Course of Action and Evaluation Criterion.

c. Computation: The relative value method computes the total for each Course of Action by adding the products of each evaluation criterion's relative value times the evaluation criterion's weight along a Course of Action row (see Weighting of Criteria), as follows:

$$(RV1)(W1) + (RV2)(W2) + \dots + (RVn)(Wn) = \text{Total REL VAL}$$

Where: RV_n = Relative Value for the Raw Data of the nth Evaluation Criterion

W_n = Weight of the nth Evaluation Criterion

6. Multiplication Matrix:

a. This method is the more accurate of the two methods since it uses the actual raw data payoffs for each course of action in its computation. In this way, the multiplication method can account for the magnitude of difference among an evaluation criterion's raw data for the Courses of Action.

EXAMPLE: In a case where the raw data for a criterion's three courses of action is 3, 21, and 22, the method uses the values of 3, 21, and 22 to determine its solution rather than assigning the less precise relative values of 1, 2, and 3. Notice how the middle value would have an advantage in the relative value matrix by appearing to be closer in value to the best value than it actually is.

b. To use the multiplication matrix:

(1) Input the raw data directly to the DECMAT in the appropriate raw data box corresponding to that combination of Course of Action and Evaluation Criterion.

(2) Min and Max Tabs. Below each Evaluation Criterion column is a tab for Min and Max. The default is that Min is selected. The matrix in the DECMAT program is designed to analyze on the basis that lower values are better. To properly use this matrix:

(a) For each Evaluation Criterion, determine whether the value for that Evaluation Criterion is better as a higher number or as a lower number.

(b) If the Evaluation Criterion is better as a lower value, leave Min selected below that Evaluation Criterion and analyze the next Evaluation Criterion.

(c) If the Evaluation Criterion is better as a higher value, select the Max tab appearing below that Evaluation Criterion. The program will automatically invert this value in the matrix during its computation so that the larger values are expressed numerically as smaller values. The final printout will show these values as inverted fractions.

EXAMPLE: For an automobile purchase, you are considering Fuel Economy as an Evaluation Criterion, measured in miles per gallon (MPG). In this case, higher values are better. By selecting the Max tab below the Evaluation Criterion, you will have the program invert these values. The values of 15 MPG and 20 MPG become 1/15 MPG and 1/20 MPG, respectively, in the matrix as the program calculates the total. The final print out will show 1/15 and 1/20 for these values.

(3) Computation. The multiplication method computes the total for each Course of Action by multiplying each evaluation criterion's raw data value taken to the exponential power of the evaluation criterion's weight (see Weighting of Criteria), as follows:

$$(RD1)(W1) \cdot (RD2)(W2) \cdot \dots \cdot (RDn)(Wn) = \text{Total MULTIPLICATION}$$

Where: RDn = Raw Data of the n th Evaluation Criterion

Wn = Weight of the n th Evaluation Criterion as the exponent

(4) Limitations on the use of the Multiplication Matrix. One cannot use the multiplication method, and therefore must use the relative value method, if either of the following conditions exists:

(a) Evaluation Criterion which cannot be expressed with a numerical value. Do not assign relative values for use in a multiplication matrix, as this introduces inconsistencies derived from using a hybrid matrix.

(b) Raw Data with a zero value. Zero multiplied by anything will always equal zero for the total, no matter how large other criteria values may be. For this situation, one may redefine the evaluation criteria in a way that results in values other than zero. If this cannot be done, one must use the Relative Value Matrix. Do not simply add 1 (or any other value) to the raw data as this will introduce subjective inaccuracies to the matrix.

7. Weighting of Criteria:

a. Some criteria will often be more important than other criteria. This program uses the technique of Pairwise Comparison to lend objectivity to what otherwise would be a subjective ranking of many criteria simultaneously -- something the human mind has difficulty doing. In short, the program translates a verbal comparison of the relative importance of the Evaluation Criteria into numerical values and then uses a mathematical model to determine an appropriate weight that accurately reflects the logic.

b. To determine criteria weights using the Pairwise Comparison techniques:

(1) Step 1: Rank order the evaluation criteria in general importance as you see them at this point.

EXAMPLE:

1 Evaluation Criterion #1
2 Evaluation Criterion #2
:
:
:
n Evaluation Criterion #n

(2) Step 2: Pull down the Matrix menu and select Criteria Weights. The window for determining Pairwise Comparison will appear.

(3) Step 3: Review the factors for criteria comparison at the bottom right of the screen:

1 Equal
2 Slightly Favored
3 Favored
4 Strongly Favored

(4) Step 4: Input the numerical importance factor to the chart by comparing each of the Evaluation Criteria with each of the other criteria. The example below shows the process by which one can determine the pairwise comparison:

EXAMPLE:

-- Which Evaluation Criterion is more important ... Evaluation Criterion #1 or Evaluation Criterion #2?

Answer: Evaluation Criterion #1

-- By what importance factor?

Answer: 3 (Favored)

-- Enter 3 in the box where Evaluation Criteria #1 along the left intersects Evaluation Criterion #2 along the top.

-- Continue to evaluate all pairs until the chart is complete.

(5) Step 5: Conduct a logic check. All pairwise comparison importance factors should increase in value or be equal in value as you move from left to right along a row of the chart.

EXAMPLE:

	EC#2		EC#3		EC#4
EC#1	3	---	3	---	4
EC#2			1	---	3
EC#3					3

If the values do not increase or remain the same as you move from left to right in the chart, one of two conditions exists:

(a) Evaluation Criteria are originally rank ordered out of sequence. To solve, change the rank order of the Evaluation Criteria and rework the Pairwise Comparison. Change the values of the columns in the DECMAT to show the Evaluation Criteria in the same order.

(b) The logic of the pairwise comparison is incorrect. To solve, review the pairwise comparison factors.

Conduct a similar check within a given Evaluation Criterion. The values should decrease or remain the same as you move from top to bottom in the chart.

(6) Step 6: To print the Pairwise Comparison chart, select "Print." To return to the DECMAT without sending the calculated weights to the matrix, select "Cancel."

(7) Step 7: Select the Send button. The computer calculates the weights for each of the Evaluation Criteria, imports the values to the DECMAT, and returns you to the DECMAT window.

c. The mathematical model which determines the criteria weighting is based on the Eigenvector method as described by Ching-Lai Hwang and Kwangsun Yoon in their monograph Lecture Notes in Economics and Mathematical Systems (186: Multiple Attribute Decision Making: Methods and Applications) (Springer-Verlag, Berlin, 1981). The methodology for solving the Eigenvalues for a specific Eigenvector is described by Anthony J. Pettofrezzo in his book, Matrices and Transformations (Dover Publications, Inc., New York, 1966).

8. Override of Criteria Weights.

a. To override one or more of the Pairwise-Comparison-calculated weights, select Criteria Weights from the Matrix menu. Understand, however, that overriding the Pairwise Comparison weights will introduce an element of subjectivity to the matrix.

b. The "Weight of Evaluation Criteria" screen will appear listing the Evaluation Criteria and their weights.

c. To enter a different weight, delete the Pairwise-Comparison-calculated weight and insert the new value for the weight.

d. Select Print to print the revised weights.

e. Select Cancel to return to the DECMAT. The original weights will remain unchanged.

f. Select Override Off to return to the Pairwise Comparison screen. The original weights will remain unchanged.

g. Select Send Values to input the revised values to the DECMAT and to return to the DECMAT screen.

9. Consistency Ratio.

a. After you have determined the criteria weights, the program determines the Consistency Ratio. The Consistency Ratio is a numerical value measuring how well the Pairwise Comparison values maintain a logical series of relationships. The program uses another mathematical model, based on the least squares method, to measure how well the logic fits.

b. The program shows the Consistency Ratio as a percentage below the right side of the DECMAT.

c. For this particular mathematical model, a Consistency ratio of 95% or more means the logic of the Pairwise Comparison is acceptable enough to use the resultant weights in the DECMAT.

**** NOTE: CAS3's previous version of the DECMAT program used a different mathematical model to model the logic, resulting in an acceptable Consistency Ratio threshold of 90%. The value of 90% in the older model is equivalent to 95% in the new version.**

d. Should you input the Pairwise Comparison so that the resultant Consistency Ratio is below 95%, an error box will appear alerting you of this fact. Re-evaluate your Pairwise Comparison for logic errors.

e. With a large number of Evaluation Criteria, the program model may not catch a single, obvious error in the Pairwise Comparison logic. This limitation to the model makes Step 5 of the Pairwise Comparison very important.

f. The mathematical model which determines the Consistency Ratio is based on the method described by Cliff T. Ragsdale in his book, Spreadsheet Modeling and Decision Analysis: A Practical Introduction to Management Science, 2d Edition (South-Western College Publishing, Stamford, Connecticut, 1997).

10. Sensitivity Analysis.

a. Sensitivity analysis identifies the degree to which the DECMAT results are subject to change with only small changes in the evaluation criteria weights. A solution which is not sensitive to changes in weights provides the decision-maker with confidence that he or she has a valid solution.

b. Together with the Consistency Ratio, Sensitivity Analysis is a measure of the DECMAT's subjectivity. A solution that is "sensitive" to changes in weights is a red flag for the decision-maker to re-evaluate the relationships among the Evaluation Criteria. With a sensitive solution, the decision-maker must review the pairwise relationships of the criteria to see if the criteria relationships really reflect how the decision-maker feels. In other words, the decision-maker must develop confidence in the criteria weighting.

c. The program conducts sensitivity analysis by changing each Evaluation Criterion weight independently, within the range of plus or minus three points, and recalculates the matrix to determine whether the solution changes. The program does not re-calculate when the weights are taken below the value of 1.00. The program resets the criterion weight to its original value before proceeding on to analyze the sensitivity of the next Evaluation Criterion.

d. EXAMPLE: For an Evaluation Criterion weight of 2.38, the program:

(1) Sets the weight incrementally lower (e.g., 2.37, 2.36, etc.), recalculates, and determines the weight where the solution may change. NOTE: In this example, the program does not set the value lower than 1.00 and therefore does not complete the calculation within the full range of -3.

(2) Sets the weight incrementally higher (e.g., 2.39, 2.40, etc.), recalculates, and determines the weight where the solution may change. Stops calculating at the weight of 5.58 to complete the range of +3.

(3) Resets the weight to the original value of 2.38 and moves to analyze the next Evaluation Criterion.

e. To conduct a Sensitivity Analysis, drag down on the "Matrix" menu and select "Sensitivity Analysis."

f. The Sensitivity Analysis screen will appear with the completed results.

(1) To print the Sensitivity Analysis, select “Print.”

(2) To return to the DECMAT screen, select “OK.”

11. Reordering The Matrix.

a. By convention, show the Evaluation Criteria in decreasing order of weight from left to right in the matrix.

b. To reorder a Evaluation Criterion, place the cursor along the top of the matrix above the Evaluation Criterion desired until a hand appears. Click and drag the hand to the desired location for the Evaluation Criterion and release the mouse button. The Evaluation Criterion will be “dropped” at that location, reordering the Evaluation Criteria as a column.

c. Reorder the Courses of Action in similar manner.

12. Matrix Output.

a. The DECMAT program calculates the totals of each Course of Action and shows the values in the far right column of the matrix. The program re-calculates the totals whenever a value is changed.

b. The type of matrix selected (Relative Value or Multiplication) is shown at the bottom right of the matrix.

c. The Consistency Ratio also appears at the bottom right of the matrix.

d. The program circles the recommended solution (the smallest total value).

e. Should the total values be extremely large or small such that the number, the program sets the total values to the same order of magnitude (power of 10) and shows this power of 10 at the bottom right of the matrix. An exception to this occurs when the difference in the numbers is greater than 108.

f. You may print the DECMAT, showing all comments at the matrix’s bottom right, by selecting the printer button along the tool bar or by dragging down on the “File” menu and selecting “Print.”

g. You may print the Pairwise Comparison chart by dragging down on the “Matrix” menu and selecting “Criteria Weights.” When the Pairwise Comparison screen appears, review the values to ensure they are correct and select “Print.”

h. You may print the Sensitivity Analysis by dragging down on the “Matrix” menu and selecting “Sensitivity Matrix.” When the Sensitivity Matrix screen appears, select “Print.”

13. Saving Data. To save your file:

a. Select the disc button on the tool bar or drag down on the “File” menu and select “Save.”

b. Name the file as a “*.dec” file.

c. Select the correct directory and select “OK.”

d. To resave a file, select the disc button on the tool bar or drag down and select Resave. Follow the same procedure as above.

14. Importing to PowerPoint.

a. There is no direct method to import the matrix to PowerPoint.

b. To depict the decision matrix in a PowerPoint presentation:

- (1) Open PowerPoint concurrently with the Decmat program.
- (2) Print Screen in the Decmat program.
- (3) Select Paste in PowerPoint.
- (4) The Decmat screen will appear in a bit map format in PowerPoint.

c. As the bit map format is memory intensive, one may:

- (1) Crop out the tool bar portion of the Decmat screen using the Crop Picture function of PowerPoint.
- (2) Resize the matrix to fit using the object corner.

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Servicemember Education Benefits: Using Government Sponsored Programs to Help Lower or Eliminate Higher Education Costs

Lieutenant Colonel Samuel W. Kan*

*[A]s an investment, education provides excellent returns, both for individuals and for society. . . . But the benefits of education are more than economic. A substantial body of evidence demonstrates that more-highly educated individuals are happier on average, make better personal financial decisions, suffer fewer spells of unemployment, and enjoy better health One great challenge in higher education lies in making sure our high-school graduates have access to it*¹

I. Introduction

Students, in an effort to achieve the American dream by attending their dream school and securing their dream job, are graduating college with an excessive amount of student loan debt. Unfortunately, these dreams may quickly turn into nightmares as students attend their dream school at any cost, graduate with a burden of debt, and subsequently enter a challenging employment environment.²

Fortunately, numerous laws, programs, and benefits exist to help servicemembers, veterans, and their dependents pursue higher education at reasonable cost. This article addresses some of the most relevant issues servicemembers may encounter in their efforts to minimize the cost of higher education. Part II of this article addresses how to obtain in-state tuition at public schools. Part III discusses strategies

for minimizing educational costs. Part IV provides ways to eliminate paying tuition altogether. By learning about and taking advantage of these benefits, servicemembers, veterans, and their dependents can achieve the American dream without graduating under a burden of year's of debt.

II. Federal Law Enables Servicemembers and Their Dependents to Pay In-State Tuition

Federal law³ mandates that states receiving federal assistance under Title 4 of the Higher Education Act⁴ charge members of the Armed Forces⁵ and their dependents in-state tuition for attendance at public institutions of higher education.⁶ Specifically, federal law states

In the case of a member of the armed forces who is on active duty for a period of more than 30 days and whose domicile or permanent duty station is in a State that receives assistance under this chapter, such State shall not charge such member (or the spouse or dependent child of such

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¹ Ben S. Bernanke, Chairman, Fed. Reserve Sys., Education and Economic Competitiveness, Address at the U.S. Chamber Education and Workforce Summit (Sep. 24, 2007), available at http://www.federalreserve.gov/news_events/speech/bernanke20070924a.htm.

² See, e.g., Douglas W. Elmendorf, Dir., Cong. Budget Office, The Budget and Economic Outlook Fiscal Years 2011 to 2021, Address before the Committee on The Budget, United States Senate (Jan. 27, 2011), available at <http://budget.senate.gov/republic/hearingarchive/testimonies/2010/2011-01-27Elmendorf.pdf> (explaining that almost nine million workers who wanted full-time work in 2009 and 2010 have been employed only part time; predicting that the recovery in employment will be slow with an unemployment rate of 9.2% in the fourth quarter of 2011, 8.2% in the fourth quarter of 2012, and eventually a natural rate of unemployment around 5.3% in 2016). See also Anne Marie Chaker, *Students Borrow More Than Ever for College*, WALL S. J., available at <http://articles.moneycentral.msn.com/CollegeAndFamily/CutCollegeCosts/students-borrow-more-than-ever-for-college.aspx> (last visited Jan. 31, 2011) (explaining that students borrowed approximately \$75 billion in the 2008-2009 academic year which was up 25% from the previous year; highlighting that in a 2006 survey of college graduates under the age of 35, 39% expected that it would take them more than ten years to pay off their household's education-related debt). But see 20 U.S.C. § 1078 (2006) (capping the interest rates of federally insured student loan debt incurred by servicemembers before they entered the military). As a result, servicemembers with pre-service student loan obligations, either federally or non-federally insured, may be able to pay off their debt sooner due to a potentially lower interest rate cap of 6% provided by the Servicemembers Civil Relief Act, 50 U.S.C. App. 527.

³ Higher Education Opportunity Act, 20 U.S.C.A. § 1015d (2008) (reauthorizing the Higher Education Act of 1965).

⁴ Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in 20 U.S.C. §§ 1001-1161aa-1); see, e.g., *Federal Financial Aid Return of Title IV Funds Policy*, CENT. OR. COMMUNITY C., <http://finaid.cocc.edu/Policies/Repayment/default.aspx> (last visited Feb. 1, 2011) (providing that Title IV financial aid programs include Federal Pell Grant, Academic Competitiveness Grant, Federal Supplemental Educational Opportunity Grant, Federal Work-Study, and Federal Stafford Loans). See generally *Title IV Programs*, FED. STUDENT AID, http://federalstudentaid.ed.gov/about/title4_programs.html (last visited Feb. 1, 2011) (discussing the numerous Title IV programs available; explaining that due to the Health Care and Education Reconciliation Act, beginning 1 July 2010, that federal student loans will no longer be made by private lenders and that all loans will now come directly from the U.S. Department of Education under the Direct Loan Program).

⁵ Armed Forces is defined as "the Army, Navy, Air Force, Marine Corps, and Coast Guard." 10 U.S.C. § 101(a)(4) (2006).

⁶ See 20 U.S.C.A. § 1015d (2008) (mandating that public institutions of higher education receiving assistance under 20 U.S.C. Chapter 28 charge servicemembers on active duty, as well as their spouses and dependent children, in-state tuition rates for the first period of enrollment beginning after 1 July 2009).

member) tuition for attendance at a public institution of higher education in the State at a rate that is greater than the rate charged for residents of the State.⁷

This language specifies that servicemembers need only be stationed in the state to qualify for in-state tuition; servicemembers do not need to be domiciled⁸ in the state to receive in-state tuition.

A. The Significance of Domicile

The distinction between being stationed and being domiciled in a specific state is extremely important because establishing and maintaining a state as one's domicile means a servicemember must meet certain requirements. Specifically, these requirements include establishing physical presence in the state and forming the intent to make the state the servicemember's permanent home.⁹ A servicemember can demonstrate this intent by taking specific steps, such as registering to vote in the state, purchasing real property in the state, obtaining professional and driver's licenses in the state, and telling others about an intent to make the state a permanent home.¹⁰ More importantly, establishing domicile in a state has significant consequences, including submission to the state's jurisdiction for taxation purposes.

In short, due to federal law, servicemembers can obtain in-state tuition privileges without exposing themselves to the many disadvantages of becoming a domiciliary in a

⁷ *Id.* § 1015d(a). Active duty for a period of more than thirty days is defined as "active duty under a call or order that does not specify a period of 30 days or less." 10 U.S.C. § 101(d)(2). Active duty is defined as

full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

Id. § 101(d)(1); see also U.S. DEP'T OF EDUC., FEDERAL STUDENT AID HANDBOOK 2-35, available at <http://www.ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook&awardyear=2009-2010> (discussing the definitions of armed forces, active duty, and active duty for a period of more than thirty days).

⁸ Domicile is defined as "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." BLACK'S LAW DICTIONARY 558 (9th ed. 2009).

⁹ See generally Major Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 MIL. L. REV. 49, 52 (2003) (explaining the requirements of establishing domicile).

¹⁰ See 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 LAW., Jan. 2010, at 57 (discussing domicile in terms of taxation and estate planning).

particular state.¹¹ Furthermore, in addition to mandating that public universities charge in-state tuition to servicemembers and their dependents domiciled or stationed in the state, federal law also requires public universities to continue charging in-state tuition rates even when a servicemember is subsequently stationed elsewhere, as long as the student is continually enrolled at the institution.¹²

B. Steps to Paying In-State Tuition

Servicemembers interested in taking advantage of the opportunities created by federal law should take three steps. First, they should research applicable state policies and practices, which may be helpful in understanding how specific states are implementing federal law with regard to paying in-state tuition.¹³ By educating oneself about various

¹¹ For example, Virginia domiciliaries are subject to paying licensing fees and personal property taxes on their personally owned vehicles. However, servicemembers who are stationed in Virginia but are not domiciled in Virginia can contact their local state revenue office, provide them appropriate documentation, and exempt themselves from paying personal property taxes on their vehicles. Servicemembers should be aware that they may still need to pay appropriate licensing fees for their vehicles. For example, servicemembers stationed in Charlottesville, Virginia, could visit the City of Charlottesville Treasurer's Office and provide the office with a copy of the servicemember's military orders and leave and earnings statement. By providing this documentation, servicemembers can exempt their personally owned vehicles from Virginia personal property tax. See generally *Comm'r of Revenue*, CITY OF CHARLOTTESVILLE, <http://www.charlottesville.org/Index.aspx?page=22> (last visited Feb. 1, 2011). Similarly, servicemembers stationed but not domiciled in Georgia can follow comparable procedures to accomplish similar objectives. For example, servicemembers can file an affidavit for exemption of *ad valorem* taxes on motor vehicles, Form PT 471, with the Georgia Department of Revenue. See *Service Member's Affidavit for Exemption of Ad Valorem Taxes for Motor Vehicles*, GA. DEP'T OF REVENUE, available at http://motor.etax.dor.ga.gov/forms/pdf/motor/MVService_Members_Affidavit_PT471.pdf (last visited Feb. 1, 2011). By filing this affidavit, servicemembers can exempt not only their personally owned vehicle, but also a vehicle jointly owned with a non-resident civilian spouse. See GA. DEP'T OF REVENUE 2009 GEORGIA MOTOR VEHICLE AD VALOREM ASSESSMENT MANUAL, at ix, available at http://motor.etax.dor.ga.gov/forms/pdf/motor/MV_2009_MV_Assessment_Man_Mar_Ed.pdf (last visited Feb. 1, 2011).

¹² 20 U.S.C.A. § 1015d (2008). The Act states,

If a member of the armed forces (or the spouse or dependent child of a member) pays tuition at a public institution of higher education in a State at a rate determined by subsection (a), the provisions of subsection (a) shall continue to apply to such member, spouse, or dependent while continuously enrolled at that institution, notwithstanding a subsequent change in the permanent duty station of the member to a location outside the State.

Id.

¹³ See, e.g., *In-State Tuition Rates for Armed Forces Members, Spouses, and Dependent Children at Public Institutions: Public Law 110-315, Sec. 135*, U.S. ARMY HUM. RES. COMMAND, <https://www.hrc.army.mil/site/education/index.html> (last visited Feb. 1, 2011). This website posted a state-by-state summary of how the states were implementing federal law. Unfortunately, at the time this article was published, the state-by-state summary was not available.

state policies and practices, a servicemember can determine what states are good candidates for future military assignments in terms of available educational opportunities. Second, after researching a state's policies, the servicemember should contact the Registrar's Office at the specific educational institutions of interest to the servicemember for additional guidance. Registrars' offices at many schools, such as the University of California¹⁴ and the State University of New York,¹⁵ may forward servicemembers to a separate residency determination office to answer in-state tuition qualification questions. Third, once the servicemember has determined the specific requirements for in-state tuition at a particular educational institution, the servicemember should gather the appropriate documentation and submit it in a timely fashion.

The following example illustrates how a servicemember can obtain in-state tuition. A servicemember domiciled or stationed in Virginia, who is interested in sending a dependent to the University of Virginia at the in-state tuition rate, should call the university's Registrar's Office or visit the school's website.¹⁶ Applicants from military families are directed to contact the Committee on Student Status.¹⁷ Military dependents are instructed to fill out an Application for Virginia In-State Educational Privileges form, and the rest of the application process is relatively straightforward. Dependents can qualify for in-state tuition simply by providing appropriate documentation, such as a copy of the servicemember's military orders, a leave and earnings statement, or a lease showing physical residence¹⁸ in Virginia.

¹⁴ For example, the University of California at Berkeley will forward applicants to the Residence Affairs Office at (510) 642-5990. See generally Office of the Registrar, *Military Waiver of Nonresident Tuition*, BERKELEY, <http://registrar.berkeley.edu/military.html> (last visited Feb. 1, 2011) (providing that students will need to provide a statement from their commanding officer or personnel officer indicating the specific date of their assignment in California); Office of the Registrar, *Exemptions from Nonresident Tuition (Proof of Eligibility Is Required)*, U.C. BERKELEY, http://registrar.berkeley.edu/current_students/exemptions.html (last visited Feb. 1, 2011) (listing the numerous ways students may qualify for exemptions from paying nonresident tuition).

¹⁵ For example, the State University of New York at Binghamton will forward applicants to the Student Accounts Office. The Student Accounts Office will inform military applicants that they need to provide a copy of the servicemember's military orders and a letter from the commander verifying that the servicemember is stationed in New York. See generally Student Accounts Office, *Establishing New York Residency*, BINGHAMTON U., <http://www2.binghamton.edu/student-accounts/residency.html> (last visited Feb. 1, 2011).

¹⁶ See generally Office of Undergraduate Admission, *Virginia Domicile*, UNIV. OF VA., <http://www.virginia.edu/undergradadmission/status.html> (last visited Feb. 1, 2011).

¹⁷ The Committee on Student Status can be reached at (434) 982-3391. See *id.*

¹⁸ Residence is defined as,

The act or fact of living in a given place for some time. . . . The place where one actually lives, as distinguished from a domicile... Residence usu. just means bodily presence as an inhabitant in a given

Some schools may require additional documentation. For example, prior to registration each semester, the University of Texas at Austin requires submission of a letter from the servicemember's commander on military letterhead stating that the servicemember is on active duty.¹⁹ Similarly, the University of North Carolina requires an affidavit attesting to the servicemember's "duty status, PCS [Permanent Change of Station] orders, and location."²⁰

While many states limit the in-state tuition benefit to active duty servicemembers and their families, some states define active duty military quite broadly. For example, servicemembers interested in attending schools in Texas will discover that active duty military includes active Reserve and National Guard members of units in Texas.²¹ The importance of this distinction becomes clear when considering the consequences of not being on active duty and having to establish residency in Texas under the general rules. Individuals who are not on active duty military status and who want to establish residency for purposes of qualifying for in-state tuition must live in Texas for "12 consecutive months and establish a domicile in Texas prior to enrollment."²² In other words, active duty military members and their dependents can move to Texas, enroll in school, and qualify for in-state tuition immediately, while a person with no military affiliation, or a military member not on active duty, must move to Texas and live in Texas for a year before qualifying for in-state tuition. Enrollment in school prior to satisfying the twelve-consecutive-month residency requirement would result in paying out-of-state tuition for these non-military or non-active duty individuals.

III. One Step Beyond Paying In-State Tuition: Strategies for Minimizing Educational Costs

Servicemembers can minimize educational costs by pursuing additional cost-saving strategies while paying in-state tuition. For example, students who have weaker high school academic credentials or who need to save as much money as possible may find that attending a local community college may be their best choice. For instance, rather than applying directly to the University of Virginia, a

place; domicile usu. requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile.

BLACK'S LAW DICTIONARY, *supra* note 8, at 1423.

¹⁹ See Office of Admissions, *Texas Residency—Frequently Asked Questions*, UNIV. OF TEX. AT AUSTIN, <http://bealonghorn.utexas.edu/residency/faq/> (last visited Feb. 1, 2011) [hereinafter Texas FAQ].

²⁰ See Office of the Registrar, *Military Tuition Benefits*, UNIV. OF N.C. AT CHAPEL HILL, http://regweb.unc.edu/residency/military_benefits.php (last visited Feb. 1, 2011).

²¹ See, e.g., Texas FAQ, *supra* note 19.

²² *Id.*

student from a military family could attend Piedmont Virginia Community College (PVCC) or another school in the Virginia Community College System (VCCS).²³ By doing so, the student²⁴ would not only be eligible for extremely inexpensive in-state tuition rates,²⁵ but also would qualify for guaranteed admission to numerous four-year universities, including the University of Virginia. Under a guaranteed admission agreement between the University of Virginia and schools in the VCCS, students who complete an associate's degree achieving "a cumulative grade point average in VCCS coursework of 3.4 or better on a 4.0 scale" and who meet certain other minor criteria, such as completion of specified courses, are guaranteed admission to the University of Virginia.²⁶ Attending a local community college and then transferring to a larger university is just one example of how military families can save additional costs on education.

IV. Two Steps Beyond Paying In-State Tuition: Tuition Elimination Possibilities

A. Federal Programs

Before relishing the possibility of paying only in-state tuition, servicemembers and their families should be aware of educational opportunities that do not require paying any tuition at all. For example, students who apply and are accepted to attend the nation's service academies, such as the U.S. Military Academy at West Point, not only receive a free education,²⁷ but also draw a salary while in school and are guaranteed a job upon graduation.²⁸ Similarly, military

officers who apply and are accepted to the Funded Legal Education Program²⁹ or numerous Master of Laws (LL.M.) programs³⁰ at civilian law schools not only do not have to pay tuition, but they also receive their full salary throughout their attendance in school. Furthermore, the military³¹ provides other opportunities to earn a graduate degree through the Advanced Civil Schooling program for those interested in attending other types of full-time, fully-funded graduate programs, such as business school.³²

In addition to these traditional programs, which have existed for some time, many relatively new programs have been created to assist servicemembers. For example, the Post-9/11 GI Bill will pay for undergraduate or graduate school education.³³ Eligible servicemembers on active duty may currently receive the total amount of a school's tuition and fees.³⁴

In contrast, those not on active duty (e.g., eligible veterans who have been discharged) may currently only receive an amount limited to the highest in-state tuition³⁵

²³ See generally *PIEDMONT VA. COMMUNITY C.*, <http://www.pvcc.edu/> (last visited Feb. 1, 2011) (providing general information about PVCC).

²⁴ Students from military families with questions regarding in-state tuition should contact the Welcome Center in room 144 of PVCC's Main Building or call (434) 961-6551. See *Piedmont Va. Cmty. Coll., Admissions: Am I Eligible for In-State Tuition Rates*, available at http://www.pvcc.edu/admissions/am_i_eligible.php (last visited Feb. 1, 2011).

²⁵ For example, Virginia in-state tuition at PVCC is approximately \$110.65 per credit hour. See *Piedmont Va. Cmty. Coll., Tuition & Fees*, available at http://www.pvcc.edu/tuition_fees/ (last visited Feb. 1, 2011). Taking twelve credits in a semester in 2011, students at PVCC would have to pay approximately \$1328 for in-state tuition. A similar undergraduate student taking twelve credits at the University of Virginia would have to pay approximately \$10,836 for in-state tuition. See *Univ. of Va., Tuition, Fees & Estimated Costs of Attendance*, available at http://www.virginia.edu/Facts/Glance_Tuition.html (last visited Feb. 1, 2011).

²⁶ See *Guaranteed Admission Agreement: University of Virginia and Virginia Community College System*, available at <https://www.vccs.edu/Portals/0/ContentAreas/Transfer/uva.pdf> (last visited Feb. 1, 2011).

²⁷ The U.S. Military Academy at West Point was ranked as America's Best College by Forbes in 2009. See *Forbes, America's Best Colleges*, available at http://www.forbes.com/2009/08/02/best-colleges-ratings-opinions-rank-ing-2009_land.html (last visited Feb. 1, 2011).

²⁸ See *West Point Admissions, Overview of the Academy*, U.S. MIL. ACAD., <http://admissions.usma.edu/overview.cfm> (last visited Feb. 1, 2011) (explaining that cadets receive free tuition, room, board, and medical care, as well as an annual salary of more than \$6,500).

²⁹ See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 14-1 (30 Sept. 1996), available at http://army.pubs.army.mil/epubs/pdf/r27_1.pdf (last visited Feb. 1, 2011) (explaining the process to obtain a law degree at government expense at approved civilian law schools). See also *JAGCNet.army.mil, Funded Legal Education Program*, available at https://www.jagcnet.army.mil_8525769A00495E0D.nsf/0/D88CC9A221321F27852577680059F095?Open (last visited Feb. 1, 2011) (describing the selection criteria, including average undergraduate GPA and LSAT score, and providing Ms. Yvonne Caron as a point of contact at (703) 588-6774).

³⁰ See *JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES* para. 7-9 (1 Nov. 2010), available at [https://www.jagcnet2.army.mil/852573690045CE9E/0/F96A7D8D811B0691852577F2006DDDFC/\\$file/The%20Directory%202010-11.pdf](https://www.jagcnet2.army.mil/852573690045CE9E/0/F96A7D8D811B0691852577F2006DDDFC/$file/The%20Directory%202010-11.pdf) (explaining the process to obtain advanced LL.M. degrees at government expense in specialized areas including international law, criminal law, contract law, information technology law, environmental law, labor and employment law, and tax law).

³¹ See, e.g., *About Us*, U.S. ARMY STUDENT DETACHMENT, <http://www.jackson.army.mil/sites/usasd/pages/222> (last visited Dec. 21, 2010) (providing information such as the unit's mission and policies).

³² See generally *Advanced Civil Schooling (ACS), MYARMYBENEFITS*, [http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Advanced_Civil_Schooling_\(ACS\).html?serv=147](http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Advanced_Civil_Schooling_(ACS).html?serv=147) (last visited Feb. 1, 2011) (providing an information paper on the requirements, application procedures, and benefits of Advanced Civil Schooling). See also U.S. DEP'T OF ARMY, REG. 621-1, TRAINING OF MILITARY PERSONNEL AT CIVILIAN INSTITUTIONS para. 1-1 (28 Aug. 2007) (explaining the scope and goals of numerous educational programs).

³³ See *The Post-9/11 GI Bill*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.gibill.va.gov/post-911/post-911-gi-bill-summary/> (last visited Feb. 1, 2011) (providing information on Post-9/11 GI Bill benefits).

³⁴ See *Post-9/11 GI Bill: General Information*, U.S. DEP'T OF VETERANS AFFAIRS [hereinafter *Post-9/11 GI Bill: General Information*], http://www.gibill.va.gov/documents/Post-911_General_Info.pdf (last visited Feb. 1, 2011) (explaining that individuals on active duty may currently receive the total amount of tuition and fees); see also *infra* note 59 and accompanying text.

³⁵ See, e.g., *2010-2011 Maximum In-State Tuition & Fees*, U.S. DEP'T OF VETERANS AFFAIRS [hereinafter *Maximum Tuition*], available at <http://>

charged by a public educational institution in the state where the school is located.³⁶ Although they may not qualify for the same amount of tuition and fees available to active duty servicemembers, they may qualify for a monthly housing allowance as well as an annual book and supply stipend.³⁷ For those attending schools with higher tuition than what the Post-9/11 GI Bill will cover, the Yellow Ribbon Program³⁸ allows schools to voluntarily contribute funds to help close the tuition gap.³⁹ Schools can contribute up to 50% of the expenses and the Department of Veterans Affairs will match the amount.⁴⁰

Depending on the situation, other benefits may also be available. Some of these benefits may include a one-time rural relocation benefit, a one-time reimbursement for a certification or licensing exam, and college fund or “kicker” payments.⁴¹

Furthermore, additional Post-9/11 GI Bill educational benefits will soon be available.⁴² First, starting on 1 October

www.gibill.va.gov/gi_bill_info/ch33/tuition_and_fees.htm (last visited Feb. 1, 2011) (providing a state-by-state list of the maximum tuition and fees applicable for the 2010–2011 school year).

³⁶ See *Post-9/11 GI Bill: General Information*, *supra* note 34.

³⁷ *Id.*

³⁸ See *Yellow Ribbon Program Information 2010–2011 School Year*, U.S. DEP’T OF VETERANS AFFAIRS, http://www.gibill.va.gov/GIBill_Info/CH33/YRP/YRP_List_2010.htm (last visited Feb. 1, 2011) (providing a list of the participating schools by state such as the Massachusetts Institute of Technology in Cambridge, Massachusetts). The Yellow Ribbon Program, which is officially known as the Yellow Ribbon GI Education Enhancement Program, allows institutions of higher learning “to voluntarily enter into an agreement with the VA to fund tuition expenses that exceed the highest public in-state undergraduate tuition rate.” *Yellow Ribbon Program*, U.S. DEP’T OF VETERANS AFFAIRS, http://www.gibill.va.gov/gi_bill_info/ch33/yellow_ribbon.htm (last visited Feb. 1, 2011). In general, to be eligible for the Yellow Ribbon Program, individuals must: (1) have served an aggregate period of active duty after 10 September 2001, of at least thirty-six months; (2) have been honorably discharged from active duty for a service connected disability, and served thirty continuous days after 10 September 2001; or (3) be a dependent eligible for transfer of entitlement under the Post-9/11 GI Bill based on a veteran’s service under the eligibility criteria listed above. See *id.*

³⁹ See generally *Benefits of The Yellow Ribbon Program*, U.S. DEP’T OF VETERANS AFFAIRS, available at <http://www.gibill.va.gov/post-911/post-911-gi-bill-summary/yellow-ribbon-program.html> (last visited Feb. 1, 2011) (providing examples of how much money students can receive through the Yellow Ribbon Program).

⁴⁰ See *Post-9/11 GI Bill: General Information*, *supra* note 34.

⁴¹ See *id.*; see also MILITARY.COM, UNDERSTANDING THE POST-9/11 GI BILL (2009), available at <http://images.military.com/media/education/pdf/post-911-gi-bill.pdf>. See generally MILITARY.COM, YOUR MILITARY EDUCATION BENEFITS HANDBOOK (2009), available at <http://images.military.com/media/education/pdf/education-benefits.pdf> (providing information concerning the numerous types of educational benefits including the Post-9/11 GI Bill). See generally MILITARY.COM, SPOUSE BENEFITS OF THE POST-9/11 GI BILL (2009), available at http://images.military.com/education/Spouse_GIBill_Benefits.pdf (providing information concerning spousal education benefits).

⁴² Post-9/11 Veterans Educational Assistance Improvement Act of 2010, Pub. L. No. 111-377, 124 Stat. 4016 (amending 38 U.S.C. §§ 101–3680).

2011, servicemembers and their spouses enrolled in school while on active duty will receive book allowances.⁴³ Second, National Guard members performing active service “for the purpose of organizing, administering, recruiting, instructing, or training the National Guard” or “under section 502(f) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency” will be entitled to benefits.⁴⁴ Third, starting 1 October 2011, students will be able to attend vocational and other types of non-degree training.⁴⁵ Fourth, also starting on 1 October 2011, non-active duty distance learners on more than a half-time basis will receive housing allowances.⁴⁶ Fifth, beginning 1 August 2011, students will be able to obtain reimbursement of fees for multiple licensure and certification tests (previously only a single reimbursement was authorized), and can now also obtain reimbursement for national tests required for admission, such as the Standard Aptitude Test (SAT).⁴⁷

However, with these additional benefits also comes the possibility of losing certain benefits. First, effective 1 August 2011, active duty members, veterans, and transferees attending private and foreign school will have a national annual maximum of \$17,500 to cover tuition and fees.⁴⁸ Second, housing allowances will be prorated so that a student taking fewer credits would receive a smaller housing allowance than a student taking the credits required for full-time pursuit of the program.⁴⁹ Additionally, students will

See also *Major Changes to GI Bill in 2011*, U.S. DEP’T OF VETERANS AFFAIRS [hereinafter *2011 GI Bill Changes*], available at https://www.gibill2.va.gov/cgi-bin/vba.cfg/php/enduser/std_adp.php?p_faq_id=1417&p_created=1292942163&p_sid=pGCp5tlk&p_accessibility=0&p_redirect=&p_lva=&p_sp=cF9zcmNoPSZwX3NvcnRfYnk9JnBfZ3JpZHNvcnQ9JnBfcm93X2NudD00MzUsNDM1JnBfcHJvZHM9JnBfY2F0cz0mcf9wdj1_YW55fiZwX2N2PX5hbnl_JnBfc2VhcmNoX3R5cGU9YW5zd2Vy cy5zZWYy2hfbmwmwmcF9wYWdlPTE* &p_li=&p_topview=1 (last visited Jan. 31, 2011) (outlining the changes to the GI Bill in 2011).

⁴³ Pub. L. No. 111-377 § 103, 124 Stat. 4016. See also *2011 GI Bill Changes*, *supra* note 42.

⁴⁴ Pub. L. No. 111-377 § 101, 124 Stat. 4016 (providing that although Post-9/11 GI Bill benefits for national guard members on active duty become effective on Aug. 1, 2009, no benefits will actually be paid before Oct. 1, 2011).

⁴⁵ *Id.* § 105.

⁴⁶ *Id.* § 102(c)(2). “The housing allowance payable is equal to ½ the national average BAH for an E-5 with dependents. The full-time rate for an individual eligible at the 100% eligibility tier would be \$673.50 for 2011.” *2011 GI Bill Changes*, *supra* note 42.

⁴⁷ Pub. L. No. 111-377 §§ 107, 108, 124 Stat. 4016. See also *2011 GI Bill Changes*, *supra* note 42.

⁴⁸ Pub. L. No. 111-377 §§ 102(a), 103(a), 124 Stat. 4016. See also *id.* § 103. See also *Upcoming Changes to the Post-9/11 GI-Bill*, U.S. Dep’t of Veterans Affairs, available at http://www.gibill.va.gov/post-911/post-911-gi-bill-summary/Post911_changes.html (last visited Feb. 25, 2011) (providing that effective 5 Mar. 2011, the benefits of active duty servicemembers will be prorated based on eligibility tiers previously established for veterans).

⁴⁹ *Id.* § 102(b).

not receive housing allowances during breaks in school such as breaks between semesters.⁵⁰

Despite the potential loss of some benefits, the Post-9/11 GI Bill still offers a great deal of flexibility. For example, servicemembers can use their Post-9/11 GI Bill educational benefits themselves or choose to transfer their benefits to their dependent family members.⁵¹ Furthermore, if the active duty servicemember dies in the line of duty after 11 September 2001, all of the servicemember's children may⁵² be able to take advantage of Post-9/11 Educational Assistance under the Marine Gunnery Sergeant John David Fry Scholarship.⁵³ This program provides children of deceased servicemembers "up to the highest public, in-state undergraduate tuition and fees, plus a monthly living stipend and book allowance."⁵⁴ The Department of Veterans Affairs began accepting applications for this benefit on 1 May 2010.⁵⁵ Applicants enrolled in school from 1 August 2009 through 31 July 2010 "may receive retroactive payments for that time."⁵⁶

Using this information, servicemembers can strategically structure their educational pursuits as well as their dependents' educational pursuits based on the applicable benefits available. For example, a servicemember could personally pay his or her dependents' tuition and fees to attend an inexpensive public undergraduate school in

Washington, D.C., while saving the Post-9/11 GI Bill benefits to pay for the servicemember's own tuition and fees at a more expensive private school in Washington, D.C., such as Georgetown Law. Following this strategy, rather than allowing the dependents to receive a capped benefit of approximately \$3,500 per semester for twelve credits,⁵⁷ the active duty servicemember could use the benefit to attend Georgetown Law and receive a benefit of \$22,553 per semester⁵⁸ since tuition and fees would not be limited to the highest in-state tuition charged by a public educational institution.⁵⁹ However, the effectiveness of this strategy will be of limited duration, because starting 1 August 2011, the servicemember would begin being capped at \$17,500 for tuition and fees since the servicemember attended a private school.

Another strategy to maximize benefits might include having a dependent attend school on slightly more than a half-time basis. For example, by taking seven credits in a semester rather than twelve credits, the dependent would still qualify for the full monthly housing allowance.⁶⁰ In this manner, although it would take longer to complete school, the dependent would receive more benefits due to the longer period of time the dependent would qualify for and receive a housing allowance. However, this strategy would also be of limited duration, because starting 1 August 2011, housing allowances will be prorated based on the number of credits taken. At that time, students will have to take a full load of credits to get the full monthly housing allowance.

⁵⁰ 2011 GI Bill Changes, *supra* note 42.

⁵¹ See *Transfer of Education Benefits*, DEF. MANPOWER DATA CTR, <https://www.dmdc.osd.mil/appj/agentsso/LoginSelect.jsp?gotourl=%2FTEB%2Findex.jsp&modules=DFAS,FAM,CAC> (last visited Feb. 1, 2011) (providing a secure means to transfer Post-9/11 GI Bill benefits). Applicants may check the status of their applications and verify their acceptance and approval on the website.

⁵² See Pub. L. No. 111-377 § 111, 124 Stat. 4016. It is important to note that due to the Post-9/11 Veterans Educational Assistance Improvement Act of 2010, individuals who take advantage of educational assistance under the Fry Scholarship under 38 U.S.C. § 3311(b)(9) will not be able to receive other possible entitlements such as dependent indemnity compensation under 38 U.S.C. §§ 1301–1323 and transferred education benefits under 38 U.S.C. § 3319. *Id.*

⁵³ See 38 U.S.C. § 3311 (2006). See also *Information About the Fry Scholarship*, U.S. DEP'T OF VETERANS AFFAIRS, available at https://www.gibill2.va.gov/cgi-bin/vba.cfg/php/enduser/std_adp.php?p_faqid=1411&p_created=1273158744&p_sid=TLeyitlk&p_accessibility=0&p_redirect=&p_lva=&p_sp=cF9zcmNoPSZwX3NvcnRfYnk9JnBfZ3JpZHNvcnQ9JnBfcm93X2NudD00MzUsNDM1JnBfcHJvZHM9JnBfY2F0cz0mcF9wdj1_YW55fiZwX2N2PX5hbml_JnBfc2VhcmNoX3R5cGU9YW5zd2Vy cy5zZWYy2hfbmwmcF9wYWdlPTE*&p_li=&p_topview=1 (last visited Jan. 31, 2011) (providing information about eligibility (e.g., students may use the benefit between their 18th and 33d birthday), when benefits will be paid, how long the benefits will last (i.e., 36 months of benefits at the 100% level), and how to apply online for benefits (i.e., VA Form 22-5490 Dependent Application for VA Education Benefits)).

⁵⁴ U.S. Dep't of Veterans Affairs, Post-9/11 GI Bill: Marine Gunnery Sergeant John David Fry Scholarship, available at http://www.gibill.va.gov/documents/Fry_Scholarship.pdf (last visited Feb. 1, 2011).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., *Maximum Tuition*, *supra* note 35 (establishing a maximum charge per credit hour of \$265.83 and a maximum total fees per term of \$310 in the District of Columbia).

⁵⁸ See Office of Student Affairs, *Tuition and Fees Per Semester*, GEORGETOWN LAW, <http://www.law.georgetown.edu/finaff/studaccts/tuition.html> (last visited Dec. 17, 2010) (establishing that full time J.D. and LL.M. students would be charged \$22,553 per semester for tuition and fees in the 2010–2011 school year).

⁵⁹ See *Chapter 33 Benefit Estimator*, U.S. DEP'T OF VETERANS AFFAIRS, <http://gibill.va.gov/CH33Estimator/> (last visited Feb. 1, 2011) (providing a calculator to calculate benefits). For example, an active duty servicemember who enters Georgetown's zip code of 20001 and clicks the "estimate benefit" tab will be informed that "Active duty individuals are not subject to in-state maximums. Active duty individuals will receive 100% of tuition and fees certified by the school (excluding any amount paid using tuition assistance)." *Id.*

⁶⁰ See *Frequently Asked Questions*, U.S. DEP'T OF VETERANS AFFAIRS, available at https://www.gibill2.va.gov/cgi-bin/vba.cfg/php/enduser/std_alp.php (last visited Feb. 1, 2011) (providing information on how much money students may receive under the Post-9/11 GI Bill and explaining that students receive a housing allowance equal to the housing allowance payable to an E-5 (i.e., sergeant) with dependents, based on the zip code of the school). For example, in 2011, a student attending school in Washington, D.C., in the zip code 20001, would receive a housing allowance of \$1,881 per month. See Basic Allowance for Housing Query Results for Zip Code 20001, DEF. TRAVEL MGMT. OFF., <http://www.defensetravel.dod.mil/site/bahCalc.cfm> (last visited Feb. 1, 2011).

B. State Programs

In addition to these federal programs, servicemembers and veterans can benefit from significant educational opportunities offered by many states. For example, prospective students who want to attend state colleges or universities in New Hampshire may qualify for tuition waivers as a member of the New Hampshire National Guard.⁶¹ Similarly, veterans and their dependents interested in attending schools in Texas, including the University of Texas at Austin, may take advantage of state educational programs, such as the Hazelwood Exemption.⁶² The Hazelwood Exemption allows eligible veterans, their children, and their spouses to receive “an exemption from the payment of all tuition, dues, fees, and other required charges.”⁶³ To find out more about individual eligibility for state tuition assistance, applicants can contact the veterans education office or financial aid office of the school to which they wish to apply. Interested applicants will generally be required to provide documentation, such as a Department of Defense Form 214 (DD Form 214) or an education benefits letter from the Veteran’s Administration, to prove their eligibility.⁶⁴

Although these benefits are tremendous, some states go even further. For example, Georgia’s HOPE Scholarship funds “the full cost of tuition, certain HOPE-approved mandatory fees, and a book allowance of up to \$100 per quarter or \$150 per semester.”⁶⁵ An applicant does not even have to be from a military family to apply. To qualify for the HOPE Scholarship, an applicant must be a U.S. citizen and a Georgia resident who graduated from “an Eligible High School with a minimum of a 3.00 cumulative grade

point average on a 4.00 scale.”⁶⁶ Significantly, dependent children of active duty servicemembers who are stationed in Georgia qualify as Georgia residents for purposes of HOPE Scholarship eligibility.⁶⁷ Meanwhile, applicants with a cumulative grade point average below a 3.0 may qualify for Georgia’s HOPE Grant Program.⁶⁸ Similar to Georgia’s HOPE Scholarship, Georgia’s HOPE Grant Program provides for tuition, HOPE Grant-approved fees, and a book allowance.⁶⁹ However, while Georgia’s HOPE Scholarship allows for students to attend degree-granting programs at colleges or universities, Georgia’s HOPE Grant Program only allows students to attend technical colleges to earn certificates or diplomas.⁷⁰

V. Conclusion

Although the high price of tuition may appear to be a significant barrier to attending and completing college, members of military families can easily avoid paying out-of-state tuition and benefit from in-state tuition rates at public institutions of higher education due to federal law. Those who think strategically and plan ahead can request an assignment in their preferred state and can begin working in the state before their family members begin school. In addition, applicants who want to minimize educational costs can take advantage of tuition-free programs provided by the Federal Government and many states. In short, students from military families can attend college without accumulating excessive educational debt, which can be extremely beneficial, especially in an ever-changing economic environment.

⁶¹ See NEW HAMPSHIRE REV. STAT. § 110-B: 63-c Educational Assistance Authorized (West 2010) (establishing the minimum requirements to take courses tuition-free on a space-available basis, such as being an active member of the New Hampshire national guard, enrolling in a degree-enhancing curriculum, and first utilizing federally funded military tuition assistance programs); see also Educational Resources, N.H. NAT’L GUARD, <https://www.nh.ngb.army.mil/members/education> (last visited Feb. 1, 2011).

⁶² See TEX. ED. CODE ANN. § 54.203 (Vernon 2010) (establishing the Hazelwood Legacy Act and the numerous requirements, such as Texas residency, to qualify for the Hazelwood Exemption).

⁶³ *Exemptions for Texas Veterans*, COLLEGE FOR ALL TEXANS, <http://www.collegeforalltexas.com/index.cfm?ObjectID=6D1D574C-EC9F-C46E-831E6865C9C6F882> (last visited Feb. 1, 2011). In general, to qualify for the Hazelwood Exemption, veterans seeking the exemption must have entered the service in Texas, served at least 181 days of active military duty, and received an honorable discharge. See *id.* Children and spouses of veterans who died as a result of service-related injuries or illness can also qualify for these benefits. See *id.* Veterans can also transfer their benefits to their dependents under certain conditions. See *id.*

⁶⁴ *Id.* Applicants can find out more information by visiting the U.S. Department of Veterans Affairs’ website at www.gibill.va.gov or by calling the VA office in Muskogee, Oklahoma, at (888) 442-4551. See *id.*

⁶⁵ Ga. Student Fin. Comm’n, HOPE Scholarship Program at Public Institutions: Regulation–100, at 21, available at http://www.gsfc.org/main/publishing/pdf/2009/hope_public_regs.pdf (last visited Feb. 1, 2011).

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ See Georgia’s HOPE Grant Program, GACOLLEGE411, available at http://www.gacollege411.org/Financial_Aid_Planning/HOPE_Program/Gorgia_s_HOPE_Grant_Program.aspx (last visited Feb. 1, 2011).

⁶⁹ See *id.*

⁷⁰ See HOPE, TECH. C. SYS. OF GA., available at <http://www.dtae.org/hope.html> (last visited Feb. 1, 2011). See generally Ga. Student Fin. Comm’n, HOPE Grant Program: Regulations–300, http://www.gsfc.org/main/publishing/pdf/2009/hope_grant_regs.pdf (last visited Feb. 1, 2011) (providing detailed information about the HOPE Grant Program).

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