

# Covid-19 Legislation Creates New Financial Issues in Divorce Litigation

by

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Covid changed everything for almost everyone in the world. For most people that meant governmental restrictions, lock downs, masks, illness, and death. All of us have handfuls of worries that we have never had to deal with before. Things that we have done without a second thought now require multitudes of adaptations and work arounds. We are adjusting to Zoom or WebEx hearings and depositions, staff and court personnel working remotely; all while homeschooling our kids and ordering groceries online for our parents. As family lawyers, we face all of these challenges like everyone else. However, those things are only the beginning for us. Thousands of pages of complex legislation have been passed since the pandemic first began that can dramatically alter the advice we would have given to similarly situated clients just months ago. The changes<sup>1</sup> keep coming faster than ever. The purpose of this article is to alert you to some of these changes and to give you an awareness of how they may impact your advice to your clients.

This paper will give you a bird's eye view of the following acts as they affect family law practices:

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<sup>1</sup> Examples include the changes in retirement withdrawal rules. Specifically, Required Minimum Distribution ages. Also, business owners who become eligible for Covid related assistance and now have contingent debts to the Small Business Administration.

1. *The Setting Every Community Up for Retirement Enhancement (SECURE) Act*<sup>2</sup>

1. The Coronavirus Aid, Relief and Economic Security (CARES) Act<sup>3</sup>

2. The Keeping American Workers Paid and Employed Act<sup>4</sup>

3. The Paycheck Protection Program (PPP)<sup>5</sup>

4. The Economic Injury Disaster Loans (EIDL)<sup>6</sup>

5. The American Rescue Plan<sup>7</sup>

As of this writing, Congress is embroiled in a heated fight over the 2022 fiscal year budget, legislation for an infrastructure bill, and a second or amended version of the 2019 SECURE Act known as the SECURE ACT 2.0.<sup>8</sup> These pending bills create a sea change in the areas of taxation and retirement planning rules. It will be imperative that you know what actually passed and how it impacts you and your clients.

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<sup>2</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, 133 Stat. 3137 (2019). The Secure Act was passed as part of the Further Consolidated Appropriations Act of 2020. *See* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. O, 133 Stat. 2534, 3137–3182 (2019).

<sup>3</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>4</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, Div. A, Title I, 134 Stat. 281, 286–312 (2020). The Keeping American Workers Paid and Employed Act was passed as part of the CARES Act. *Id.*

<sup>5</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286–294 (2020).

<sup>6</sup> Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116-123, Title II, 134 Stat. 146, 147 (2020).

<sup>7</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

<sup>8</sup> Ellen Loanes, *How Congress's Dependence on Short-Term Funding Keeps Us Stuck in the Past*, Vox (Feb. 19, 2022, 5:43 PM), <https://www.vox.com/2022/2/19/22941984/congress-government-funding-continuing-resolution-appropriations>; Nick Fortuna, *A Stalled Retirement Bill Could Be Passed in 2022. What It Will Mean for You.*, Barron's (Jan. 3, 2022, 3:00 AM), <https://www.barrons.com/-retirement-act-means-for-you-51640890247>.

Most of the changes addressed in this article impact the property division aspects of divorce cases. We will, however, point out a few that provide opportunities in suits affecting parent-child relationships (SAPCRs) and a few financial and estate planning opportunities for lawyers and/or their law firms. Also, the article is just an overview, and you should always discuss these issues with a qualified expert in an applicable field, such as a CPA, financial advisor, business evaluator or an attorney who specializes in the applicable field of practice. Along the way you will find practice tips and life hack sections that will help you glean some of the most useful nuggets from the paper. As a roadmap, Part I of this article explores the Secure Act of 2019. Part II will address the CARES Act of 2020 and Part III will review the American Rescue Plan of 2021.

## I. The SECURE Act of 2019

Congress passed the Setting Every Community Up for Retirement Enhancement Act of 2019 (The SECURE Act) just as the news of the novel Coronavirus (Covid-19) began breaking out around the world.<sup>9</sup> The bill was part of a government funding package, which passed with overwhelming bipartisan support.<sup>10</sup> The SECURE Act was enacted on December 20, 2019, and went into effect on January 1, 2020. The SECURE Act is the most

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<sup>9</sup> CONGRESS.GOV, H.R.1865 – Further Consolidated Appropriations Act, 2020, Actions Overview H.R.1865 — 116th Congress (2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/1865/actions> (last visited Feb. 22, 2022). Congress passed the SECURE Act on December 19, 2019, as part of H.R. 1865. *Id.* H.R. 1865 became Public Law No: 116-94 on December 20, 2019. *Id.* The World Health Organization published its first Disease Outbreak News about Covid-19 in January 2020. WORLD HEALTH ORGANIZATION, *Archived: WHO Timeline – COVID – 19* (Apr. 27, 2020), <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19>.

<sup>10</sup> The SECURE Act was incorporated into H.R. 1865, also known as the Further Consolidated Appropriations Act, 2020. H.R. 1865, 116th Cong. (1st Sess. 2019); *see also* CONGRESS.GOV, H.R.1865 – Further Consolidated Appropriations Act, 2020, <https://www.congress.gov/bill/116th-congress/house-bill/1865/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D> (last visited Oct. 28, 2021).

substantial change to retirement account and savings laws since the Pension Protection Act of 2006.<sup>11</sup>

The SECURE Act of 2019 allows for Section 529 Plans to be used for qualified student loan repayment and apprenticeship program expenses with a \$10,000 lifetime limit per beneficiary.<sup>12</sup> Of course, it is also permitted to change the named beneficiary on an account.<sup>13</sup> This is especially helpful when one child has a smaller balance, received scholarships, there is age disparity, step-siblings, or one or more children are still in private K-12 programs or have K-12 or college debt.

#### A. *Practice tip*

When dividing a 529 plan, it is often prudent to divide the plan equally into each child's accounts, with each parent controlling one account per child. Allowing parents to equally split each child's accounts avoids the potential drama of determining who will control the account after the divorce. Splitting the plan equally also reduces future conflict and unwanted contact between the parents (e.g., No more post-divorce fights over whether to pay for a certain school or a particular degree). Each parent can fund or not fund the expenditures from the child's 529 account for which they are the individual trustee. This has the added benefit of allowing the child to know that the account was split and that each parent has control of a portion of the money. This may work to provide a basis for a parent-child connection post-divorce. I have also seen it allow a controlling parent to show their true colors to a child or a chance to change their ways.

Changing the owner on a 529 is very simple. Most plans only require a copy of the decree and a simple form to open a new account for the other parent to control and split the money. Including simple closing and cooperation instructions in the decree is a much smoother road than all the drama that a 529 can lead to years down the road.

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<sup>11</sup> Ephie Coumanakos, *SECURE Act Basics: What Everyone Should Know*, KIPLINGER (Mar. 24, 2020), <https://www.kiplinger.com/article/retirement/t037-c032-s014-secure-act-basics-what-everyone-should-know.html>.

<sup>12</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, § 302, 133 Stat 3137, 3175 (2019). *See also* 26 U.S.C.A. § 529 (West 2019).

<sup>13</sup> 26 U.S.C.A. § 529 (West 2019).

The SECURE Act also created a way for individuals to withdraw up to \$5,000 penalty free from IRAs or employer plans the year after the birth or adoption of a child.<sup>14</sup> The normal marginal tax rate is still owed on the monies withdrawn.<sup>15</sup> There are also provisions allowing the individual to repay the retirement account and avoid the tax consequence altogether.<sup>16</sup> This penalty free withdrawal could help with SAPCR costs, pay adoption expenses, or handle child support arrears, etc.

The SECURE Act changed the mandatory Required Minimum Distribution (RMD) age.<sup>17</sup> Previously, the Internal Revenue Code Required Minimum Distributions were mandated to be taken with the calendar during which an individual attains 70 ½ years of age.<sup>18</sup> Now, the Internal Revenue Code has been amended to require minimum distributions in the year that an individual reaches age 72.<sup>19</sup> This amendment became effective for individuals who reach age 72 after January 31, 2019.<sup>20</sup> So, for those who attained “70 ½” in 2020 and beyond, the new mandatory Required Minimum Distributions begin in the year after an individual has reached his or her 72nd birthday. These mandatory annual distribution ratios from tax qualified accounts are based on life expectancy charts promulgated annually by the Internal Revenue Service.<sup>21</sup>

The SECURE Act also removed the age limits for direct contributions into an Individual Retirement Account (IRA).<sup>22</sup> Previously, non-rollover contributions were not permitted after the age of 70 ½.<sup>23</sup> As a result of the change to the law, anyone who is working and has current earned income may contribute to

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<sup>14</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, § 113, 133 Stat 3137, 3154 (2019).

<sup>15</sup> *Id.* at 3154–55.

<sup>16</sup> *Id.* at 3155.

<sup>17</sup> *Id.* § 114, at 3156.

<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See IRS, Retirement Topics — Required Minimum Distributions (RMDs)*, <https://www.irs.gov/plan-participant-employee/retirement-topics-required-minimum-distributions-rmds> (last visited Oct. 28, 2021).

<sup>22</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, § 107, 133 Stat 3137, 3148 (2019).

<sup>23</sup> 26 U.S.C.A. § 219(d)(1) (repealed 2019).

a Traditional IRA or Roth IRA. An added benefit is that the spouse of any person having earned income in a given tax year may also make a non-rollover contribution.<sup>24</sup> The change regarding the delay of the Required Minimum Distributions by roughly two years and the removal of the age limits for contributions allow older individuals to reduce their current year adjusted gross incomes by contributing to a Traditional Individual Retirement Account while also taking advantage of additional future years of tax deferred growth in a Traditional Individual Retirement Account or paying the tax due at time of contributions with the benefit of tax free growth in a Roth Individual Retirement Account.

### *B. Practice tip*

Be mindful that a person can generally (there are always exceptions) withdraw money from a qualified plan at any time. These withdrawals from Traditional IRAs and other tax deferred accounts bring with them the income tax hit at the person's top marginal rate. It is crucial to remember the tax consequences of these withdrawals when adjusting the property division for a true net. What appears to be a 50/50 division could be very unfair when taxes are considered. Further, be mindful of the early withdrawal penalties for taking money out of a qualified account too early. Although there are some exceptions, withdrawals before 59 ½ bring along a 10% penalty in addition to the marginal tax rate! When you are trying to figure out how to get a party from 57 to 67 so they can draw unreduced Social Security, remember that penalty and tax trap.

Prior to the SECURE Act, after the death of an IRA account holder, an individual who was a non-spousal beneficiary could "stretch" the proceeds of the inherited IRA over the duration of their lives pursuant to the afore mentioned IRS life expectancy charts. These "stretch IRAs" involved taking a small, factored amount of the account as a distribution annually over their lifetimes. This allowed non-spouse beneficiaries to have continued tax deferred growth in a Traditional IRA or Tax Free growth in a Roth IRA. But under the SECURE Act, this "stretch" strategy has been reduced to a 10-year window for de-

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<sup>24</sup> 26 U.S.C.A. § 219(c) (West)

cedents passing in 2020 and beyond.<sup>25</sup> Beneficiaries can elect when and how to take that payment. While the beneficiary waits to withdraw, the account continues its tax deferred. However, but the account must be fully liquidated within the 10-year period following the IRA owner's death. Because the withdrawal is taxed at the beneficiary's highest marginal tax rate, timing and amount of the withdrawals could substantially effect the net dollars that ultimately reach a particular beneficiary.

In general, this 10-year rule applies to non-spouse beneficiaries that were named as a designated beneficiary by the original account holder.<sup>26</sup> There are some exceptions to the 10-year rule. These exceptions apply to "eligible designated beneficiaries," which include surviving spouses, minor children, disabled or chronically ill beneficiaries, and a beneficiary who "is not more than 10 years younger than the original account holder."<sup>27</sup> The determination of whether a designated beneficiary is an eligible designated beneficiary [is] made as of the date of death of the employee.<sup>28</sup> The purpose of these rules is to allow the "stretch" to continue if feasible for the beneficiary. This allows a trust-like benefit for the special classes of beneficiaries. It should be noted that there is also a special rule for beneficiaries that qualify as an "eligible designated beneficiary" because they are minor children. In these situations, when the child reaches the age of majority, he or she will cease to qualify as an eligible designated beneficiary and "any remainder of the portion of the individual's interest" must be distributed within 10 years.<sup>29</sup>

The reason for the 10 year age restriction limitation is to prevent a decedent from leaving a large qualified account to an infant or great grandchild for example. The infant would've been able to defer taxes completely until majority and then begin the typical 10 year payout. Conversely, if the beneficiary is a non-spouse of similar age (within 10 years) as the decedent, the beneficiary in essence takes the place of the decedent and continues the factored lifetime RMD structure.

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<sup>25</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, § 401, 133 Stat 3137, 3176-78 (2019).

<sup>26</sup> *Id.* § 401(a)(2)(E) at 3177.

<sup>27</sup> *Id.* at 3177-78.

<sup>28</sup> *Id.* at 3178.

<sup>29</sup> *Id.*

In practice, this may dramatically influence the retirement spending strategy for all persons with qualified plans. A typical “stretch” strategy suggested a retiree spend down non-qualified assets that were needed above and beyond the RMD—preserving the tax deferred or tax-free growth in a traditional or Roth IRA to pass to heirs who could continue the strategic benefits of a “stretch” until the beneficiary was retired and likely in a lower tax bracket for the larger factored mandatory withdrawals. Now, it is often best, especially in families with plenty of money to live on in retirement, to have the retiree take income needed from his or her IRA while preserving the non-qualified assets for heirs to liquidate as needed in the future. Currently, a step up in the non-qualified asset’s cost basis to the value on the date of the original owner’s death allows these assets to grow tax free up to the date of death with capital gains taxes being owed after the original owner’s death for any sale proceeds above the stepped-up value.<sup>30</sup>

### C. Decedent Example

#### 1. Prior to SECURE Act

A 50-year-old IRA beneficiary of \$100k account would take as follows:

\$100k/Life Expectancy Factor (34.2) = \$2,923.98 RMD

Each year the factor applied to the account would be reduced slightly thereby annually increasing the ratio of monies required to be distributed from the decedent’s IRA over the survivor’s life expectancy.

#### 2. Post SECURE Act

The 50-year-old beneficiary would be free to withdraw all, some, or none of the IRA as a RMD in any year but must completely empty the IRA within 10 years.

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<sup>30</sup> 26 U.S.C.A. § 1014 (West). Internal Revenue Code § 1014 provides a step-up basis for inherited property. *Id.* This means that heirs get the benefit of having the fair market value at the time of death be their basis in the property, which results in no capital gain and thus no capital gains tax to be paid. *Id.* However, § 1014(c) excludes any property which represents income in respect of a decedent under § 691. As a result, there is no step-up basis on annuities, Section 529 plans, IRAs, 401(k)s, or other such plans. *Id.*



#### D. *Practice tip*

These new provisions may greatly impact the division strategy in a divorce. Which party is the higher earner? Do the parties have sufficient income for retirement with or without mandatory distributions? Do either of the parties expect to be a beneficiary of an IRA from someone other than their spouse? Will a party likely inherit substantial non-qualified assets? While these issues may not affect the amount or ratio of the division, they can influence which spouse would be better served by a particular type of asset in their column. This is also true in large estate cases if the parties are likely to remain single and give assets via beneficiary designation to children or others.

The SECURE Act also required that 401(k) balances must be converted into a hypothetical monthly annuity payment as part of the participant disclosures.<sup>31</sup> This will allow the participant to see (based on the assumptions and calculations of the plan) what they could expect in retirement income based on the 401(k) value. It is important to note that these are not insured annuity numbers, they are merely hypothetical projections. It is possible that clients or attorneys will become confused and will view these calculations as a defined benefit of, or worse in addition to, the total value of the defined contributions plan. Avoid such a mistake. Simply divide the 401(k) as usual and do the concomitant closing documents.

#### E. *Practice tip*

Before assessing a case, be sure to get a recent copy of any employer plan statements. Do not merely look at the value on the front page. Is the account tax deferred, pre-taxed Roth, or post tax but not Roth qualified? The tax deferred money is the least desirable of these three. Taxes must be paid; penalty may be owed if withdrawn and it is more illiquid. Roth is the nectar of the gods. It is already taxed and will continue to grow TAX FREE forever! Post tax sub accounts are most often missed entirely. These sub accounts are a portion of the overall number represented by the balance on the statement. They are typically amounts that exceeded the annual deductible contribution limit

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<sup>31</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, § 203, 133 Stat 3137, 3163 (2019).

for the plan. These are treated just like the Roth component of the plan or a Roth IRA if properly transferred into a Roth IRA. This is known as a “back door” Roth because an individual can do this even if that person makes too much money to contribute to a Roth IRA. Using this loophole is a very savvy move and can save countless tax dollars for the middle class and above. This loophole is under scrutiny in the new Biden tax proposals. Be sure to know the tax classification of each marital account and every sub-category! Always try to secure the post-tax dollars for your client. Certainly, do not let the other side hoodwink you into tax effecting a retirement plan to “make it fair” without knowing for certain that the dollars have not already been taxed.

In that case, the community estate paid the tax already and now you mistakenly gave the other side a 25–40% discount on monies that were not taxable! Better yet, do it the other way around if the opposing side hasn’t done their homework. These are the advanced opportunities when partnering with an excellent advisor, the advisor should find these for you or at least explain to you and your client. Stated simply, review the components of the balance and highlight any section that says Roth or post tax. Ask a qualified financial advisor or a plan representative to explain the statement, including the taxable nature of the holdings

#### F. *Life Hack* \$\$\$\$

Most deferred compensation plans now allow Roth contributions. Most attorneys will not qualify for a Roth IRA due to family income limitations.<sup>32</sup> Consider making your contributions to your firm’s plan as Roth or post tax contributions. (See the “back door” Roth strategy described above). You will pay the

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<sup>32</sup> Eligibility to contribute to a Roth IRA also depends on an individual’s or family’s modified adjusted gross income (modified AGI). 26 U.S.C.A. § 408A (c)(3). In 2022, individuals will be able to make full Roth IRA contributions if the individual’s modified AGI is than \$129,000, (or \$204,000 if married filing jointly) and partial contributions if the individual has a modified AGI of up to \$144,000 (or \$214,000 if married and filing jointly). IRS, *Amount of Roth IRA Contributions That You Can Make for 2022*, <https://www.irs.gov/retirement-plans/plan-participant-employee/amount-of-roth-ira-contributions-that-you-can-make-for-2022> (last visited Feb. 22, 2022). If the individual’s modified AGI equals or exceeds \$144,000 (or \$214,000 if married filing jointly), then no contribution can be made to a Roth IRA. *Id.*

tax now, but the money will grow forever tax free. The contribution limits for a plan are substantially higher than contributions to a Roth IRA and that number gets even bigger when you consider a back door Roth strategy while it's still available. If your firm plan doesn't allow Roth contributions, a simple change in plan documents will give everyone that option. If you have no plan, sit down with an advisor and institute a plan. As attorneys, especially solo practitioners and small firms, we often think that retirement plans are complicated or expensive. Neither is true. Just let an expert handle that for you. You will be glad you did!

A few changes to 401(k) plans are notable for attorneys or firms who operate these plans. Plans are now required to include long-term part-time workers for purposes of elective deferrals.<sup>33</sup> To qualify, section 401(k)(2)(D)(ii) requires that the employees work 500 hours or more per year for three consecutive years.<sup>34</sup> Employer matches are not mandatory for these part-time employees.<sup>35</sup> Notably, the SECURE Act specifies that “[t]he amendments made by this section shall apply to plan years beginning after December 31, 2020, except that, for purposes of section 401(k)(2)(D)(ii) . . . 12-month periods beginning before January 1, 2021, shall not be taken into account.”<sup>36</sup> In other words, the employee's service that occurred prior to 2021 is not counted, so this amendment is unlikely to impact these employees before 2024. Additionally, small firms (less than 100 employees) are eligible for tax credits to cover the startup cost of a new plan up to \$5,000.<sup>37</sup> Small employers also receive a \$500 annual credit for three years if they require automatic enrollment for employees.<sup>38</sup> Finally, the automatic escalation on contributions for automatic enrollees is now 15% annually.<sup>39</sup>

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<sup>33</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, § 112, 133 Stat 3137, 3153 (2019) (codified as amended at 26 U.S.C.A. § 401(k)(2)(D)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (codified as amended at 26 U.S.C.A. § 401(k)(15)(B)(i)(I)).

<sup>36</sup> *Id.* at 3154.

<sup>37</sup> *Id.* at 3147 (codified as amended at 26 U.S.C.A. § 45E(b)).

<sup>38</sup> Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, § 105, 133 Stat 3137, 3147–48 (2019) (codified as amended at 26 U.S.C.A. § 45T).

<sup>39</sup> *Id.* § 102 at 3145 (codified as amended at 26 U.S.C.A. § 401(k)(13)(C)(iii)).

## II. The CARES Act of 2020

On the heels of a massive drop in the markets due to fears of deaths, business failures, supply chain disruptions, and persistent lock downs, the government intervened. On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act, also known as The CARES Act.<sup>40</sup> The CARES Act was a massive \$2 trillion stimulus bill aimed at helping state and local governments, individuals, businesses, health care workers and others with the tsunami of financial consequences of the Covid 19 pandemic.

Within the CARES Act, Title I of Division A is entitled the Keeping American Workers Paid and Employed Act.<sup>41</sup> This title primarily relates to the Small Business Administration (SBA) 7(a) Loan Program.<sup>42</sup> These provisions created The Paycheck Protection Program (PPP) which was designed to keep people on their company payrolls.<sup>43</sup> Many businesses (including law firms) took advantage of salary, wages, health benefits, retirement contributions, and operating cost loans via the SBA Express Applications. If the monies received were spent on the approved categories and payrolls were maintained, these loans were likely forgiven.<sup>44</sup> If incurred and paid for during the covered period, a PPP recipient is eligible for forgiveness on certain costs, including “payroll costs,” “interest on any covered mortgage obligation,” “payment on any covered rent obligation,” and “any covered rent obligation.”<sup>45</sup> Although the Paycheck Protection Program ended on May 31, 2021, existing borrowers may still be eligible for PPP loan forgiveness.<sup>46</sup>

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<sup>40</sup> See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>41</sup> *Id.* at 286.

<sup>42</sup> *Id.* §§ 1101–02 at 286.

<sup>43</sup> *Id.* § 1102 at 286–94.

<sup>44</sup> See *Id.* § 1106 at 297–98.

<sup>45</sup> *Id.*

<sup>46</sup> SMALL BUSINESS ADMINISTRATION, *Paycheck Protection Program*, <https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program> (last visited Oct. 28, 2021).

### A. Practice tip

In divorce cases involving a business, check to see if a PPP loan (or the EIDL loan) was received. Attorneys should be mindful of the overwhelmingly high rate of forgiveness of these loans.<sup>47</sup> A payment on the company books for repayment of a PPP loan is very likely fraudulent or in error. An outstanding loan balance being shown on a company's balance sheet would dramatically change the accuracy of the balance sheet as well. This could dramatically affect the valuation of a business that received a PPP loan. Further, if money is shown for repayment of one of these loans, an audit to find those funds is necessary. Finally, the fraud rate is very high on these loan applications and the government is working to find whatever fraud it can.<sup>48</sup> It is imperative that the parties assign liability for future audits and liabilities based on the use of these loans and grants. For cases where business valuation is at issue, obtain the PPP loan application. It may provide a wealth of information regarding actual value or fraud exposure.

The CARES Act also suspended the 2020 Required Minimum Distribution from qualified accounts by both account holders and beneficiaries.<sup>49</sup>

Additionally, Section 2202 of the CARES Act also "provided for special distribution options and rollover rules for retirement plans and IRAs and expand[ed] permissible loans from certain retirement plans."<sup>50</sup> The purpose of this provision was to help reduce withdrawals from market-based investments at a time when values were substantially reduced from their prior end of year values. This helped both the markets and the individuals

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<sup>47</sup> See Press Release, Small Bus. Admin., *1.1 Million Paycheck Protection Program Loans Forgiven So Far Totaling Over \$100 Billion* (Jan. 12, 2021), <https://www.sba.gov/article/2021/jan/12/11-million-paycheck-protection-program-loans-forgiven-so-far-totaling-over-100-billion>.

<sup>48</sup> See Press Release, Dep't of Justice, *Twenty-Two Charged in Connection with a More than \$11-Million Paycheck Protection Program Fraud Scheme* (July 22, 2021), <https://www.justice.gov/opa/pr/twenty-two-charged-connection-more-11-million-paycheck-protection-program-fraud-scheme>.

<sup>49</sup> Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2203, 134 Stat. 281, 343-44 (2020).

<sup>50</sup> IRS, *Coronavirus-Related Relief for Retirement Plans and IRAs Questions and Answers*, <https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers> (last visited Oct. 28, 2021).

by stabilizing the market and allowing account values to return higher before a forced but unnecessary distribution due to a Required Minimum Distribution.

For those who *needed* distributions from their retirement accounts, the CARES Act created Coronavirus Related Distributions.<sup>51</sup> These distributions from IRAs, employer plans, or any combination thereof may be up to \$100,000 in 2020.<sup>52</sup> The list of those eligible to make the withdrawals is so broad as to be nearly all inclusive. One qualified if they, a spouse or child were diagnosed with “the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention.”<sup>53</sup> However, the broadest category allowed individuals to qualify if they

experience[d] adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury (or the Secretary’s delegate).<sup>54</sup>

Given the scope and magnitude of the effect of the coronavirus, it is hard to imagine anyone who could not find a way through that exception door. These are in essence loans against an IRA or employer plan.

These coronavirus related distributions have several other benefits. The CARES Act specifies that section 72(t) of the tax code does not apply to any coronavirus-related distribution.<sup>55</sup> Thus, coronavirus related distributions are exempt from early withdrawal penalties, which are normally 10% for those under 59 ½ years of age.<sup>56</sup> Additionally, these distributions are not subject to the typical federal mandatory withholding requirement of at least 20% of the amount withdrawn.<sup>57</sup>

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<sup>51</sup> Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281, 340 (2020).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 341.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 340.

<sup>56</sup> *Id.* See also 26 U.S.C.A. § 72(t) (West 2019).

<sup>57</sup> *Id.* at 342; 26 U.S.C.A. § 3405(c) (West 2017).

As family lawyers, the biggest trap to be mindful of is the three-year repayment period. Under § 2202(a)(3)(A) of the CAREs Act, an individual who receives a coronavirus-related distribution has three years to repay the “loan.”<sup>58</sup> This three-year period to repay the distribution begins on the day after the date the distribution was received.<sup>59</sup> Additionally, when it comes to income taxes, the recipient of the distribution can either show all of the income in 2020 or divide it evenly over tax years 2020, 2021 and 2022.<sup>60</sup> If a person took \$100,000 as a “loan” then repays it, they must file an amended return for the year or years in which they showed the income.<sup>61</sup>

### B. Practice tip

Be aware that the tax is due on those monies in the years shown if not fully repaid. When representing a client in a divorce, it is vital to determine whether the parties took a Coronavirus Related Distribution and if taxes are still due. Finally, practitioners should be aware that if taxes were paid, then the “loan” repaid on a future amended return will yield a return of the taxes previously paid on the withdrawal. Which party is entitled to pay back the loan? Which party owes the tax or gets the refund of previously paid taxes? This is absolutely an issue for a tax professional and will require very detailed drafting. You will need to have cooperation language as well to ensure that the non-benefitted party will cooperate timely in filing amended returns.

## III. American Rescue Plan Act of 2021

The American Rescue Plan Act of 2021 (“ARP Act”) passed in the House on February 27, 2021, in the Senate on March 6, 2021, and was signed into law on March 11, 2021 by President Biden.<sup>62</sup> This legislation added \$1.9 trillion in relief spending to the \$3.2 trillion in Coronavirus related relief of the

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<sup>58</sup> Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2202(a)(3)(A), 134 Stat. 281, 340 (2020).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* § 2202(a)(5)(A) at 341.

<sup>61</sup> *See id.* § 2202(a)(5)(B); *see also* 26 U.S.C.A. § 408A(d)(3) (West 2019).

<sup>62</sup> *H.R. 1319 – American Rescue Plan Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1319> (last visited Oct. 29, 2021).

CARES Act and the Consolidated Appropriations Acts of 2020.<sup>63</sup> The ARP Act primarily provided relief to individuals, state and local governments, and certain businesses still struggling in the wake of the pandemic.<sup>64</sup> While much of the American Rescue Plan does not appear to impact the daily practice of family law, there are a few areas that will provide the family law practitioner with a few complications and some opportunities.

### A. *Child Tax Credits*

The most notable of these changes is the Child Tax Credit modifications that apply to 2021.<sup>65</sup> The ARP increased the amount of the Child Tax Credit from \$2,000 to \$3,000 per child, with the credit being further increased to \$3,600 for children under six years old.<sup>66</sup> Further, it raised the maximum age eligible for the credit to 17 years of age.<sup>67</sup> The credit is now fully refundable so that persons with no tax owing at the end of the year can receive a “tax refund” of the creditable amount.<sup>68</sup> Towards that end, persons expected to be eligible for a Child Tax Credit began receiving advances on that “refund” around July 1, 2021 that will continue through December of 2021.<sup>69</sup> These advances on the “refund” to parents will come from the Internal Revenue Service via the Bureau of the Fiscal Service as monthly payments. This will pose interesting issues when actual incomes are reported during tax season, and people may be excluded based in incomes. The advances will have to be “repaid” via a larger tax bill due to the exclusion. The ARP also temporarily and significantly in-

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<sup>63</sup> See, *American Rescue Plan Act of 2021*, NAT'L CONFERENCE OF STATE LEGISLATURES (Mar. 9, 2021), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/american-rescue-plan-act-of-2021.aspx>.

<sup>64</sup> *Id.*

<sup>65</sup> See generally *American Rescue Plan Act of 2021*, Pub. L. No. 117-2, §§ 9611–12, 135 Stat. 4, 144–152 (2021).

<sup>66</sup> *Id.* § 9611(a)(i)(3) at 145 (codified as amended at 26 U.S.C.A. § 24(i)(3) (2021)).

<sup>67</sup> *Id.* § 9611(a)(i)(2) at 144–45 (codified as amended at 26 U.S.C.A. § 24(i)(2) (2021)).

<sup>68</sup> *Id.* § 9611(a)(i)(1) at 144 (codified as amended at 26 U.S.C.A. § 24(i)(1) (2021)).

<sup>69</sup> *Id.* § 9611(b).



creases the value of the Earned Income Tax Credit while further loosening the income limits for eligibility.<sup>70</sup>

Additionally, the ARP also creates a fully refundable increase in the Child and Dependent Care credit. Previously, the maximum credit was 35% of \$3,000 (i.e., \$1,050) for one qualifying dependent or 35% of \$6,000 (i.e., \$2,100) for more than one qualifying dependent, and this credit was non-refundable. Under the ARP, the maximum applicable percentage for 2021 is increased to 50% and the amount creditable has been raised to \$8,000 for one dependent and \$16,000 for more than one. Thus, these credits could be as high as \$4,000 to \$8,000 respectively.<sup>71</sup>

These and other credits could come into play in child support cases where the government is seeking to levy on an obligor for an assignment of benefits paid by and though the state for a child. Each jurisdiction is different, but it is good to be aware of these changes to assist in child support and needs based cases. Additionally, it is important to determine who will have the right to seek these benefits and credits. Especially in the age of split parentage orders, these benefits are substantial and need to be addressed.

### B. Farm Loan Assistance

The provision of the American Rescue Plan that has received the most press and has already seen the courtroom is the provision dealing with farm loans. The ARP provided \$1.01 billion for assistance to socially disadvantaged farmers, ranchers, foresters, and affiliated groups, operators and businesses.<sup>72</sup> The ARP specifically provided that the Secretary of the U.S. Department of Agriculture “shall provide a payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021, to pay off the loan directly or to the socially disadvantaged farmer or rancher (or a combination of both)” any loans guaranteed by the Secretary.<sup>73</sup> A socially disadvantaged farmer or rancher is defined in the Food, Agriculture, Conservation, and Trade Act of 1990, as “a farmer or rancher who is a member of a socially dis-

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<sup>70</sup> *Id.* §§ 9621–9623.

<sup>71</sup> *Id.* § 9631.

<sup>72</sup> *Id.* § 1006 at 13.

<sup>73</sup> *Id.* § 1005 at 12.

advantaged group.”<sup>74</sup> “The term socially disadvantaged group means a group whose members have been subjected to a racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.”<sup>75</sup> The Department of Agriculture has clarified that [m]embers of socially disadvantaged groups include, but are not limited to: American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos.<sup>76</sup>

The enactment of the ARP was shortly thereafter met with numerous lawsuits challenging the constitutionality of this debt relief.<sup>77</sup>

Family lawyers who have clients that may be affected by this legislation need to proceed very carefully until the issue is settled. It is reported that most of these loans exceed \$1 million per borrower. Since 120% of the loan value is in play, this could make a substantial shift in the balance sheet of any agribusiness. Typically, these are family operations. A change in value of this size will obviously impact any property division. If you have a case that is a potential beneficiary of a repayment of a farm loan, regardless of the nature of the borrower, be sure to include language in your agreements incident to divorce to address any future forgiveness or repeal of a forgiveness.

The American Rescue Plan also funded \$5 billion for emergency housing vouchers until 2030. Persons are eligible to make acclaim for the assistance if they are: 1) at risk of homelessness or are homeless, 2) fleeing or attempting to flee domestic violence, dating violence, stalking, sexual assault or human trafficking, or 3) recently homeless and rental assistance will prevent the family’s homelessness.<sup>78</sup> Be aware of these options and discuss them with your local bar associations, crisis centers, family violence courts, victim’s assistance organizations and the like.

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<sup>74</sup> *Id.*; see also 7 U.S.C. § 2279(a)(5).

<sup>75</sup> 7 U.S.C. § 2279(a)(6).

<sup>76</sup> U.S. Dep’t of Agric., *American Rescue Plan Debt Payments FAQ*, FARMERS.GOV, <https://www.farmers.gov/loans/american-rescue-plan/faq> (last visited March 21, 2022).

<sup>77</sup> Josh Gerstein & Ximena Bustillo, *Historic Debt Relief for Minority Farmers Faces Legal Juggernaut*, POLITICO (Aug. 3, 2021, 4:30 AM), <https://www.politico.com/news/2021/08/03/biden-equity-agriculture-502209>.

<sup>78</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3202(b)(2), 135 Stat. 4, 59 (2021).

### C. *Life Hack* \$\$\$\$

As part of the Consolidated Appropriations Act signed into law on December 27, 2020, the rules for deductibility of meals have changed. While entertainment expenses are still not deductible, many meals and parties are now fully deductible. Any food included as compensation to employees and included on the W-2 is fully deductible. Food and drink provided free of charge to the public is fully deductible. Meals provided for staff working late or over the lunch hour is again fully deductible. Food for mediations, board meetings, and even an employee outing or company party are fully deductible. The big one is this—beginning January 1, 2021, through December 31, 2022 businesses can claim 100% of their (non-lavish or extravagant) food or beverage expenses paid to a restaurant if a business owner or employee is present when the food or beverages are provided. This is a way to show some love to those that helped get you and your practices through Covid. As always, be sure to discuss with your tax team.

The last big package of Coronavirus spawned legislation, the Build Back Better package appears to be stalled. This legislation contains what has been dubbed the SECURE Act 2.0. This action would dramatically change the rules and eligibility for most retirement plans and individual retirement strategies. While this bill is stalled the philosophies behind it persist and will find their way into future legislation of some sort.

This article was not designed to make you an expert on the financial issues discussed herein. The goal of this article is to make you keenly aware of how many areas of life can seriously impact a family law case. Taxes, inheritance, loans, tuition, business planning, retirement, child support, levies, and the list goes on and on.

The family practitioner who is doing the best possible job for a client must call on a large ancillary support group of financial, tax, valuation and other professionals to ensure that advice given is thorough, accurate and up to date in the world that changes at a mind boggling pace. As part of the other changes we made due to Coronavirus, it is the authors' hope that the family law bar embrace the litigation change from a lawyer or firm as lone advocate to a more integrated team of experts fighting for a client.

