

HAUNTED BY DEBT: ESTATE PLANNING AND LINGERING STUDENT LOANS

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ABSTRACT

This Comment delves into the often-overlooked aspect of what happens to student loan debts when borrowers die. Private lenders may not discharge these debts upon the borrower's death, leaving cosigners and surviving spouses to bear the financial burden. This Comment emphasizes the importance of proactive estate planning for student loan borrowers. It explores various strategies that debtors can employ to ease the burden on their loved ones, as well as for those that incur debt. This Comment also explores estate practitioner guidelines and advocates for changes to federal and state legislation that can ultimately relieve some of these burdens. Additionally, this Comment advocates for the implementation of life insurance into student loan agreements.

ABSTRACT	147
I. INTRODUCTION	148
II. THE DIFFICULTIES OF STUDENT LOANS	150
A. Student Loan Debt Crisis	150
B. When Student Loan Debtors and Cosigners Die.....	152
1. Federal Student Loans.....	152
2. Private Student Loans.....	153
C. Creditors of the Estate and Bankruptcy	159
D. Tax Implications for Debt That Is Discharged	161
III. OPTIONS FOR DEBT HOLDERS AND ACTIONS FOR THE STUDENT	
LOAN INDUSTRY	164
A. Options for the Primary Debtor	164
1. Life Insurance	164
2. Loan Forgiveness Programs	167
3. Asset Protection.....	169
4. Releasing Cosigners	172
B. Options for the New Debtor	174

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1. <i>Loan Forbearance and Loan Deferment</i>	174
2. <i>Repayment Plans and Refinancing</i>	175
3. <i>Loan Forgiveness Programs</i>	178
C. <i>Guidelines for Practitioners</i>	179
1. <i>Know the Client's Loan</i>	179
2. <i>Timing</i>	180
D. <i>Actions Lawmakers and Lenders Should Take</i>	181
1. <i>Actions for Lawmakers</i>	181
2. <i>Actions for Lenders</i>	185
IV. CONCLUSION	187

I. INTRODUCTION

It has long been ingrained in the collective consciousness that a college degree unlocks doors to a world of opportunities, career advancement, and financial stability.¹ In an era marked by the relentless pursuit of higher education, this dream often carries a heavy price tag in the form of student loan debt.² For millions of students, the quest for knowledge has translated into a financial burden that casts a long shadow over their future.³

Typically, it is the students themselves who bear this burden, but sometimes their family members must carry it.⁴ This was the case after Lynda Swearingen's son, Zachary, died in an accident, and her consumer-owned credit union said they would only discharge the interest owed on the loan; the remaining balance of \$31,000 was still thrust upon the 78-year-old single mother.⁵ In another case, Steve Mason, a pastor at a local church, and his wife, Danielle, had to take care of their daughter's three young children after their daughter died.⁶ Additionally, Mason had cosigned his daughter's \$100,000 loan for nursing school.⁷ Unfortunately, "[u]nable to keep up with the monthly payments on top of all of the other mounting expenses, the

1. Stephanie Owen & Isabel Sawhill, *Should Everyone Go To College?*, CTR. ON CHILD. & FAMILIES AT BROOKINGS (May 2013), <https://www.brookings.edu/wp-content/uploads/2016/06/08-should-everyone-go-to-college-owen-sawhill.pdf> [<https://perma.cc/6YVK-5AWU>].

2. Kathryn Underwood, *Why Student Loans Are So Hard to Pay Down — Interest Rates*, MKT. REALIST (Aug. 31, 2022, 12:08 PM), <https://marketrealist.com/loans/why-are-student-loans-so-hard-to-pay-down/> [<https://perma.cc/VG2E-NNDB>]; Matthew S. Rutledge et al, *Do Young Adults With Student Debt Save Less For Retirement?*, CTR. FOR RET. RSCH. AT B. C. 1, 1 (June 2018), https://crr.bc.edu/wp-content/uploads/2018/06/IB_18-13.pdf [<https://perma.cc/EU5W-UYWD>].

3. Underwood, *supra* note 2.

4. See Allison Gormly, *Mother Told She Owed \$31k on Son's Student Loan After He Died*, WTHR, <https://www.wthr.com/article/money/whats-the-deal/my-son-died-at-28-years-old-now-i-owe-31000-on-his-student-loan-zachary-swearingen/531-691761e1-c61d-4fce-b5e5-47018af49efc> (last updated July 8, 2022, 1:00 AM) [<https://perma.cc/S9CM-68U3>].

5. *Id.*

6. Blake Ellis, *Grieving Parents Hit with \$200,000 in Student Loans*, CNN MONEY (July 28, 2014, 6:41 PM), <https://money.cnn.com/2014/07/28/pf/parents-student-loans/index.html> [<https://perma.cc/8NEU-X7US>].

7. *Id.*

\$100,000 balance ballooned into \$200,000 as a result of late penalties and interest rates as high as 12%.⁸

In the landscape of ballooning student loan debt, an often overlooked issue emerges: what happens to these debts when borrowers pass away?⁹ For people like Lynda and Steve, these debts were passed on to them.¹⁰ Because if the loan is from a private lender, depending on the terms, some student loans will not be discharged upon the death of the primary debtor.¹¹ If there is a cosigner or surviving spouse, the balance and interest remaining on the student loan can be passed on to them.¹² This leaves cosigners and spouses to grapple with the daunting prospect of inheriting these financial obligations.¹³ If the money and assets left by the original debtor are enough to cover the outstanding debt balance after death then that amount will be deducted from the decedent's estate.¹⁴ However, this results in the surviving family members who are entitled to distributions from the estate receiving less money or fewer assets.¹⁵

This problem raises numerous legal and financial issues, highlighting the urgent need for comprehensive estate planning guidance in navigating the intricate web of financial obligations that make up student loans.¹⁶ For those who are left to incur their decedent's debt, there are some—although somewhat limited—options because bankruptcy proceedings for student loan debts can be unforgiving at times.¹⁷ That is why student loan debtors must be proactive in planning their estates accordingly.¹⁸ Numerous options exist for these debtors that might just save their family members from having to endure significant burdens.¹⁹

This Comment addresses several issues; first, it will provide further background information on the present state of the student loan crisis including the urgency of the crisis and the current difficulties in getting these debts discharged.²⁰ Next, this Comment examines an overview of strategies and planning that debtors can take before death.²¹ Some of these strategies are time-sensitive and require a degree of foresight, while others can be used

8. *Id.*

9. *Id.*

10. Gormly, *supra* note 4; see Ellis, *supra* note 6.

11. Gormly, *supra* note 4.

12. *Id.*

13. *Id.*

14. Jasmin Suknaran, *Here's What Happens to Your Loan Debt When You Die and Can No Longer Make Payments*, CNBC, <https://www.cnbc.com/select/what-happens-to-loan-debt-when-you-die/> (last updated June 24, 2024) [<https://perma.cc/QT2B-B8AU>].

15. *Id.*

16. Author's original thought.

17. See discussion *infra* Section II.B.

18. See discussion *infra* Section II.B.

19. See discussion *infra* Section III.B.

20. See discussion *infra* Section II.A.

21. See discussion *infra* Section III.A.

later but will have their effectiveness diminished.²² Then, this Comment explores strategies that a new debtor can take to mitigate the financial impact caused by taking on the debt.²³ This Comment then explores estate practitioner guidelines and methods for assisting debtors and their cosigners with these issues.²⁴ Lastly, this Comment advocates for and suggests changes to current laws, codes, and loan agreements that can ultimately help resolve or mitigate the issues discussed in this paper.²⁵

II. THE DIFFICULTIES OF STUDENT LOANS

A. Student Loan Debt Crisis

As of 2023, the average undergraduate student in the United States graduates with \$37,000 in student loan debt.²⁶ For those who choose to pursue advanced degrees, the financial toll is even greater.²⁷ The average graduate student will incur debts ranging between \$83,000–\$125,000, or more.²⁸ Those figures can increase by upwards of 60% if the loan was made by a private lender as opposed to a loan backed by the federal government.²⁹ This increase in debt comes as a result of generally higher interest rates, the substantial increase in the cost of financing higher education, and a lack of refinancing options and benefits that are standard with federally backed student loans.³⁰

Moreover, the weight of student loans can delay major life milestones from homeownership to starting a family and to retirement.³¹ Every 10% increase in student loan debt results in a 1%-2% drop in homeownership rates for borrowers within the first five years after leaving school, and those with student loans have approximately half as much in retirement assets as those who graduate without student loan debt.³² Graduating students credit the

22. See discussion *infra* Section III.C.2.

23. See discussion *infra* Section III.B.

24. See discussion *infra* Section III.C.

25. See discussion *infra* Section III.D.

26. Melanie Hanson, *Average Graduate Student Loan Debt*, EDU. DATA INITIATIVE, <https://educationdata.org/average-graduate-student-loan-debt> (last updated Sept. 1, 2024) [<https://perma.cc/E2MR-MAJG>].

27. *Id.*

28. *Id.*

29. Hanson, *supra* note 26.

30. Underwood, *supra* note 2.

31. Nancy E. Hill & Alexis Redding, *How Student Debt Has Contributed to 'Delayed' Adulthood*, THE ATLANTIC (Aug. 31, 2022), <https://www.theatlantic.com/family/archive/2022/08/biden-college-student-debt-forgiveness-benefits/671295/> [<https://perma.cc/8UCX-6E68>].

32. *Loans v. Legacy: The Ongoing Impact of Student Debt on Retirement Savings*, ATTIGO (Mar. 12, 2024, 2:20 PM), <https://www.attigo.com/news-and-insights/loans-vs.-legacy-the-ongoing-impact-of-student-debt-on-retirement-savings#:~:text=A%20recent%20study%20showed%20that,rates%20and%20retirement%20account%20balances> [<https://perma.cc/526S-4GLA>]; Alvaro A. Mezza et al., *Student Loans*

delay to having to establish themselves financially due to economic instability.³³ The inability to pay off the loans quickly stems from high interest rates, which continue to grow each year, and the ballooning price of college in recent decades.³⁴ The need to repay these loans often takes precedence over other financial goals, limiting the ability to save for retirement, invest money, or accumulate a down payment for a home.³⁵

Furthermore, the disproportionate impact of this crisis on low-income and marginalized communities exacerbates existing socioeconomic disparities.³⁶ Historically, marginalized students are disproportionately impacted by a lack of familial and generational wealth due to generations of barriers imposed on those communities.³⁷ Thus, these groups are more likely to rely on student loans to finance their education, often accumulating higher levels of debt.³⁸ Difficult loan repayments mean those communities will be further set back in attempting to build equity for their families, perpetuating cycles of poverty and economic inequality.³⁹

Making matters worse, lower income students borrow at higher rates. Students are counseled to borrow federal student loans whenever possible, but because these students often require more financial assistance, they reach the federal borrowing limits more frequently than higher income students, requiring them to seek loans from private lenders. This makes lower income borrowers more likely to be private loan borrowers faced with a tax liability in the event of death. Therefore, those affected most frequently are often the least able to pay.⁴⁰

It is essential that student loan debtors are proactive in planning their estate.⁴¹ Estate planning is often regarded as a means to distribute one's assets at death, and it is also significant not only for the allocation of wealth but also for the management of liabilities and debts.⁴² Recognizing these two aspects are vital to safeguarding the financial well-being of a testator's beneficiaries.⁴³

and Homeownership, WASH.: BD. OF GOVERNORS OF THE FED. RSRV. SYS. 1, 16, 30 (July 2017), <https://www.federalreserve.gov/econres/feds/files/2016010r1pap.pdf> [<https://perma.cc/3CLB-9B39>].

33. Hill & Redding, *supra* note 31.

34. Underwood, *supra* note 2; Rutledge, *supra* note 2, at 3.

35. Underwood, *supra* note 2; Rutledge, *supra* note 2, at 3.

36. Ana Hernández Kent & Fenaba R. Addo, *Gender and Racial Disparities in Student Loan Debt*, FED. RSRV. BANK OF ST. LOUIS (Nov. 10, 2022), <https://www.stlouisfed.org/publications/economic-equity-insights/gender-racial-disparities-student-loan-debt> [<https://perma.cc/HV8U-WQE9>].

37. *Id.*

38. *Id.*

39. *Id.*

40. Terran Chambers, Note, *Death and Taxes: The Crushing Tax Burden After A Student Loan Is Discharged Due to Death of A Student*, 98 MINN. L. REV. 1917, 1935 (2014).

41. Author's original thought.

42. *Id.*

43. *Id.*

B. When Student Loan Debtors and Cosigners Die

Whether the remainder of the debt will be discharged at death is dependent on the loan itself.⁴⁴ A distinction can be made between federal student loans and private student loans.⁴⁵ Federally backed student loans are discharged at death while private loans will be dependent on the terms set by the lender.⁴⁶

1. Federal Student Loans

Federal student loans are backed by the U.S. Department of Education and are the most common types of student loans.⁴⁷ The federal government will guarantee some of these loans, and it is the government that sets the interest rates, which are typically lower than those for private loans.⁴⁸ Students fill out an application that determines eligibility for aid, grants, and loans, and the school's financial aid office determines the student's eligibility based on their financial need and the cost of attendance.⁴⁹

Federal student loans have standardized provisions that generally result in the discharge of the debt upon the borrower's death.⁵⁰ The Department of Education has a variety of borrowing options, including federal direct subsidized loans, direct unsubsidized loans, direct PLUS loans, and direct consolidation loans, all of which will be discharged upon the death of the debtor.⁵¹ This includes parent PLUS loans, which will also be discharged if the parent cosigner dies.⁵²

Under a federally backed student loan, the process for discharge requires submission of proof of death.⁵³ A family member, such as a parent, spouse, or other representative of the borrower, will need to provide the loan servicer with acceptable documentation of the borrower's or parent's death.⁵⁴

44. See *Will my student loan be discharged if I die?*, NAT'L CONSUMER L. CTR. (May 19, 2013), <https://www.studentloanborrowerassistance.org/will-my-student-loan-be-discharged-if-i-die/> [<https://perma.cc/YX62-ASKM>].

45. *Id.*

46. *Id.*

47. *Types of Federal Loans*, NAT'L CONSUMER L. CTR., <https://studentloanborrowerassistance.org/for-borrowers/basics-of-student-loans/understanding-your-student-loan-situation/types-of-federal-loans/> (last visited Oct. 30, 2024) [<https://perma.cc/33ER-3AU5>].

48. *Federal Loans vs. Private Loans*, NAT'L CONSUMER L. CTR., <https://studentloanborrowerassistance.org/for-borrowers/basics-of-student-loans/federal-loans-vs-private-loans/> (last visited Oct. 30, 2024) [<https://perma.cc/E7DB-N5QN>].

49. *Id.*

50. *Will My Student Loan be Discharged if I Die?*, *supra* note 44.

51. *Types of Federal Loans*, *supra* note 47.

52. See *id.*

53. *If Your Loan Servicer Receives Acceptable Documentation of Your Death, Your Federal Student Loans will be Discharged*, FED. STUDENT AID (Nov. 11, 2023), <https://studentaid.gov/manage-loans/forgiveness-cancellation/death> [<https://perma.cc/AK8W-ZTRF>].

54. *Id.*

Acceptable documentation for this process includes an original death certificate, a certified copy of the death certificate, or an accurate and complete photocopy of either of those documents.⁵⁵ Once provided with acceptable documentation, the servicer will discharge the loan.⁵⁶

2. Private Student Loans

In contrast, private student loans—issued by banks, credit unions, or other private financial institutions—are not subject to the same federal standards.⁵⁷ Private student loans are not guaranteed by the government and typically come with higher interest rates compared to federal student loans.⁵⁸ These rates are set by the lenders themselves and are typically based on the borrower's credit score and other factors.⁵⁹ The interest rates are often variable and can vary widely depending on the lender and the borrower's credit score.⁶⁰ Private student loans typically do not offer the same benefits as federal student loans, such as income-driven repayment plans, loan forgiveness programs, or deferment and forbearance options.⁶¹

“The five largest private lenders of student loans are Sallie Mae, Wells Fargo [now under NelNet], Discover, NelNet, and JPMorgan Chase.”⁶² Each offers many different types of non-federal student loans.⁶³ However, unlike the federal government, lenders require students with “limited credit history to seek creditworthy cosigners before they can be approved.”⁶⁴ Cosigners must “agree to be fully responsible for the student's loan obligations should the student be unable to make payments.”⁶⁵

“Unlike the federal government, private lenders may not offer forbearance or deferment options, and often will not forgive portions of the loan.”⁶⁶ Repayment options are generally less flexible for private loans.⁶⁷ Also unlike the federal government, most private lenders do not specify how “borrowers may qualify for a student loan discharge outside of bankruptcy.”⁶⁸ In recent years, “Sallie Mae and Wells Fargo [prior to the cancellation of their program] instituted ‘total and permanent disability’ provisions as well as

55. *Id.*

56. *Id.*

57. *Id.*

58. *Federal Versus Private Loans*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/loans/federal-vs-private> (last visited Oct. 29, 2024) [<https://perma.cc/8LCP-NTBG>].

59. *Id.*

60. *Id.*

61. *Id.*

62. Chambers, *supra* note 40, at 1921.

63. *Id.*

64. *Id.* at 1921–22.

65. *Id.*

66. *Id.* at 1922.

67. *Id.*

68. *Id.*

‘death to the primary borrower’ provisions for their” student loan agreements.⁶⁹

Despite the numerous differences between the two, “studies show that many students and families are unaware of the differences between” private and federal student loans.⁷⁰

Some private lenders employ aggressive marketing tactics and purposefully keep their terms and practices opaque to lure students into taking out loans.⁷¹ These lenders often target young and inexperienced borrowers who may not fully understand the financial implications of their decisions.⁷² When Lynda Swearingen contacted her deceased son’s lender, she was shocked to find out that she was not eligible for the lender’s discharge provision because the loan was actually an open line of credit despite being called a student loan.⁷³ Unmanageable interest rates combined with the lack of safety nets mean many borrowers will find themselves trapped in a cycle of debt.⁷⁴

Private student loans will be handled the same way as other private debts, meaning that they will be part of the debtor’s estate.⁷⁵ The specific policies and procedures for private student loans in the event of a borrower’s death can vary widely, often with less generous terms compared to federal loans.⁷⁶ Some lenders may have provisions in place to release cosigners from their obligations upon the death of the primary borrower; others may require the full repayment of the loan immediately, causing undue financial hardship for the surviving family members.⁷⁷ This difference highlights the importance of understanding the terms and conditions of one’s loan agreement.⁷⁸

Private student loan lenders that do discharge at death will generally require proof of death similar to the process for getting a federally backed loan discharged.⁷⁹ This is typically satisfied by the presentation of a death certificate, a coroner’s report, a statement by the funeral home, and/or other

69. *Id.*

70. *Id.*

71. See generally Gormly, *supra* note 4 (explaining why a private lender denied cancelling the loan after the borrower’s death).

72. See Adam Hayes, *Predatory Lending: How to Avoid, Examples and Protections*, INVESTOPEDIA, https://www.investopedia.com/terms/p/predatory_lending.asp (last updated May 23, 2023) [<https://perma.cc/M795-CL9V>].

73. Gormly, *supra* note 4.

74. See *id.*

75. See Ben Luthi, *What Happens to Student Loans When You Die?*, EXPERIAN (Oct. 22, 2022), <https://www.experian.com/blogs/ask-experian/what-happens-to-student-loans-when-you-die/#:~:text=If%20federal%20student,be%20discharged%20upon%20your%20death> [<https://perma.cc/T3AS-6NDL>].

76. *Id.*

77. *Id.*

78. *Id.*

79. *If your loan servicer receives acceptable documentation of your death, your federal student loans will be discharged.*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation/death> (last visited Dec. 20, 2024) [<https://perma.cc/9KNG-MECV>].

documentation that the lender will then verify to confirm the death of the borrower.⁸⁰ The documentation can generally be provided by a family member, a spouse, or someone with the power of attorney.⁸¹ For some lenders—depending on existing loan terms—the death of a cosigner does not change the terms of the loan and will not allow the buyer to renegotiate terms or interest rates, still leaving the primary debtor with the legal obligation.⁸²

Most of the nation's largest private lenders discharge student loans at death.⁸³ This includes Sallie Mae, Discover, and Citizens Bank.⁸⁴ However, private lenders have often been criticized for their lack of transparency in loan terms, and given the large variety of terms amongst lenders, it can often be difficult for borrowers (as well as the author of this Comment) to discern whether a specific lender's terms will allow for discharge upon death.⁸⁵ If there are provisions allowing for death discharge, they might not be readily apparent, making the process of determining debt discharge difficult for borrowers or their grieving families.⁸⁶

The fact that private student loans, like other financial assets, can be bought and sold in the secondary market adds to this complexity.⁸⁷ Lenders may sell bundles of loans to investors, other financial institutions, or government entities.⁸⁸ These loans can be packaged into securities or other financial products.⁸⁹ When the loans are sold, ownership of the loan is transferred from the original lender to the purchasing entity.⁹⁰ The borrower's loan terms and conditions remain the same, but the entity responsible for servicing the loan may change.⁹¹ Federal law requires lenders to provide notice to borrowers when loans are sold or transferred, but for some

80. Luthi, *supra* note 75.

81. *See id.*

82. *Id.*

83. Ian C. Langtree, *Total and Permanent Disability Claims on Private Student Loans*, DISABLED WORLD, <https://www.disabled-world.com/disability/finance/student-loan-claims.php#main> (last updated Nov. 29, 2023) (explaining “Sallie Mae, the nation’s largest [private] education lender,” instituted a new provision for the death of the primary borrower) [<https://perma.cc/J99X-L543>]; *Does Wells Fargo Offer Student Loan Forgiveness?*, TATE L., <https://www.tateesq.com/learn/does-wells-fargo-offer-student-loan-forgiveness> (last updated Oct. 3, 2022) [<https://perma.cc/ZX5N-UMGP>]; *Student Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation> (last visited Oct. 29, 2024) [<https://perma.cc/7U5X-WHE4>].

84. Langtree, *supra* note 83; *Does Wells Fargo Offer Student Loan Forgiveness?*, *supra* note 83; *Student Loan Forgiveness*, *supra* note 83; *Frequently Asked Questions: Managing Your Citizens Student Loans*, CITIZENS FIN. GRP., <https://www.citizensbank.com/customer-service/faqs/student-loans/managing-student-loan.aspx> (last visited Oct. 29, 2024) [<https://perma.cc/TUK8-3NLC>].

85. Author’s original thought.

86. *Id.*

87. Jennifer Calonia, *What’s Next After My Student Loan Was Sold to Another Company*, SOC. FIN. INC. (Oct. 11, 2023), <https://www.sofi.com/learn/content/student-loan-was-sold-new-lender> [<https://perma.cc/HU3U-GUKT>].

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

borrowers, especially those who never actually receive notice, the complexities that arise can make trying to get relief even more difficult.⁹² For family members who are trying to get a deceased borrower's loan discharged, just finding out who owns the debt can be a hurdle.⁹³ Loans can switch hands amongst multinational or foreign entities with little to no notice given to the borrower, leaving their estate struggling to determine who to contact to begin the discharge process.⁹⁴

Recognizing the need for reform in this area, the federal government took a substantial step by implementing a new policy via the Economic Growth, Regulatory Relief, and Consumer Protection Act.⁹⁵ Section 601 provides that all student loans, federal or private, taken out after November 20, 2018, and before January 1, 2026, are automatically discharged upon the death of the borrower.⁹⁶ If the loan was taken out before that date, this provision does not apply.⁹⁷ The applicable provisions are found under Section 601(a)(2)(g):

(2) COSIGNER RELEASE IN CASE OF DEATH OF BORROWER.—

(A) RELEASE OF COSIGNER.—The holder of a private education loan, when notified of the death of a student obligor, shall release within a reasonable timeframe any cosigner from the obligations of the cosigner under the private education loan.

(B) NOTIFICATION OF RELEASE.—A holder or servicer of a private education loan, as applicable, shall within a reasonable time-frame notify any cosigners for the private education loan if a cosigner is released from the obligations of the cosigner for the private education loan under this paragraph.

(C) DESIGNATION OF INDIVIDUAL TO ACT ON BEHALF OF THE BORROWER.—Any lender that extends a private education loan shall provide the student obligor an option to designate an individual to have the legal authority to act on behalf of the student obligor with respect

92. See Marian Wang, *Grieving Father Struggles to Pay Dead Son's Student Loans*, PROPUBLICA (June 14, 2012, 9:05 AM), <https://www.propublica.org/article/grieving-father-struggles-to-pay-dead-sons-student-loans> [https://perma.cc/7HLN-QUED].

93. *Id.*

94. *Id.*

95. Luthi, *supra* note 75.

96. *Id.*

97. *Id.*

to the private education loan in the event of the death of the student obligor.⁹⁸

However, considering that it currently takes the average student debtor ten to twenty years to pay off their loans and that those numbers can reach thirty to forty-five years for those pursuing higher degrees of education, particularly those pursuing a law or medical degree, the issue is still relevant for a large part of the student loan debtor population.⁹⁹

It is the lender's policies that determine whether private student loans can be discharged if the parent or cosigner dies.¹⁰⁰ Different lenders may have various policies and provisions regarding this scenario.¹⁰¹ Some lenders may offer generous provisions for the death of the cosigner, while other lenders may impose stricter terms, potentially requiring the primary lender to continue with the loan obligations as-is or face adverse financial consequences, such as accelerated default.¹⁰²

In previous years, cosigned debt repayment could even be accelerated if the cosigner died.¹⁰³ If the balance became due immediately and the debtor could not pay right away, it could trigger a default.¹⁰⁴ If the debtor defaulted and their credit score was heavily affected, they would lose access to future student aid and loan deferment, loan forbearance, and likely lose the ability to choose a repayment plan.¹⁰⁵ A default can come with other legal issues and resulting legal fees.¹⁰⁶

In 2018, Title VI of the Economic Growth, Regulatory Relief, and Consumer Protection Act prohibited lenders from declaring automatic defaults in the case of the cosigner's death.¹⁰⁷ Section 602 of the Act also allow a consumer to request information related to a default on a private student loan be removed from their credit reports if the borrower satisfied the requirements of a loan rehabilitation program offered by a private lender (with the approval of prudential regulators).¹⁰⁸

98. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115–174, 132 Stat 1296 (2018).

99. Hanson, *supra* note 26.

100. Luthi, *supra* note 75.

101. *Id.*

102. Jill Chafin, *What Happens When a Student Loan Cosigner Dies?*, LENDING TREE, <https://www.lendingtree.com/student/student-loan-cosigner-dies/> (last updated Mar. 24, 2023) [<https://perma.cc/7ZTW-YSNQ>]; Christopher Murray, *What Happens if a Cosigner on a Student Loan Dies?*, LENDEDU, <https://lendedu.com/blog/what-happens-if-student-loan-cosigner-dies/#private> (last updated June 16, 2023) [<https://perma.cc/8NE4-ZYZR>].

103. Chafin, *supra* note 102; Murray, *supra* note 102.

104. Chafin, *supra* note 102; Murray, *supra* note 102.

105. *Default & Debt Collection*, NAT'L CONSUMER L. CTR, <https://studentloanborrowerassistance.org/for-borrowers/dealing-with-student-loan-debt/privateloansother-education-debt/default-debtcollection/> (last visited Oct. 29, 2024) [<https://perma.cc/KHY8-LYKR>].

106. *Id.*

107. *Id.*

108. *Id.*

In community property states, spouses may be responsible for the remainder of the student loan if the loan was taken out during marriage and was used to the benefit of the surviving spouse.¹⁰⁹ Community property states, including California, Texas, Arizona, and others, operate under a legal framework where most assets and debts acquired during a marriage are considered jointly owned by both spouses.¹¹⁰ This means that debts incurred by one spouse during the marriage are typically considered the responsibility of both spouses, regardless of whose name is on the loan.¹¹¹

In equitable distribution states, this issue would not arise.¹¹² In these states, each spouse will usually keep everything deemed to be separate property of that spouse, and student loans are typically considered the separate debt of the borrower.¹¹³ This classification is based on the principle that the education and career opportunities the student loans provide are typically seen as benefiting the individual who took out the loans, not the marital partnership.¹¹⁴ The classification of student loans as separate debt helps protect the surviving spouse in the event of the borrower's death because they will owe no legal obligation to the lender.¹¹⁵ If the borrower and their spouse obtain a divorce before the debtor's death, there is a possibility that the debt could be divided between the former spouses if they acquired it during the marriage and it was used to the benefit of the surviving spouse.¹¹⁶

Additionally, if the debt was combined through private spousal student loan consolidation, the spouse may have an obligation to the debt, with this obligation sometimes continuing after divorce.¹¹⁷ Consolidation is a permanent process that allows married couples to combine their student loans into one debt, qualifying the debtors for better loan terms, such as lower interest rates or smaller monthly payments.¹¹⁸ Federal loans can be consolidated into private loans, but depending on the lender that consolidates them, debtors may forfeit federal loan protections, such as mandatory

109. Clint Proctor, *Are Student Loans Community Property? 9 States Where They Are (And What to Do)*, STUDENT LOAN PLANNER, <https://www.studentloanplanner.com/what-is-community-property-state/> (last updated May 19, 2024) [<https://perma.cc/R8R5-UEMX>]; Stanley Tate, *Are Student Loans Community Property?*, TATE L., <https://www.tateesq.com/learn/student-loans-community-property> (last updated Oct. 6, 2022) [<https://perma.cc/C697-SU84>].

110. Proctor, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Lynn O'Shaughnessy & Carol Pope, *Is a Spouse Responsible for Student Loans?*, LENDINGTREE (July 5, 2023), <https://www.lendingtree.com/student/spouse-responsible-for-debt-marriage/> [<https://perma.cc/YV4S-ZHWP>].

118. Kat Tretina, *Can You Consolidate Your Spouse's Student Loans With Yours?*, FORBES (Jan. 1, 2023, 7:41 AM), <https://www.forbes.com/advisor/student-loans/spouse-student-loan-consolidation/> [<https://perma.cc/5M2N-B3QQ>].

discharge at death.¹¹⁹ If the couple ends up divorcing, they will still be obligated for the combined debt, which will allow for the possibility of one spouse incurring all the debt if the other dies.¹²⁰

If the loan was not consolidated, the responsibility of the surviving spouse towards the debt is determined by benefits derived from the loan during the marriage.¹²¹ “If the loan money was used only for tuition, books, and other education-related expenses, it may be considered separate debt.”¹²² The specific benefits derived can vary from case to case, but some common scenarios that may be considered by the courts include whether the loan was used to cover joint housing or living expenses, or if the spouses keep a joint account with which loan funds were collected.¹²³

C. Creditors of the Estate and Bankruptcy

The legal framework surrounding student loans in the United States encompasses a complex array of federal and state statutes, regulations, and policies.¹²⁴ To discharge student loans in bankruptcy, one typically needs to demonstrate undue hardship under the *Brunner* test, a very stringent standard that requires proof that repaying the loans would cause an exceptionally severe and long-lasting financial hardship.¹²⁵ The *Brunner* test is a three-part inquiry requiring the debtor to prove (1) that the debtor cannot maintain a “‘minimal’ standard of living” based on their current income and expenses; (2) that additional circumstances exist indicating that the debtor’s state of affairs is “likely to persist for a significant portion of the repayment period;” and (3) that the debtor has made “good faith efforts to repay the loan.”¹²⁶ The *Brunner* test is necessitated under Section 523, Title 11 of the U.S. Bankruptcy Code, which outlines certain types of debts that cannot be discharged in bankruptcy.¹²⁷ Among these, Subsection (a)(8) specifically addresses student loan debts, which requires, unlike other types of unsecured debts such as credit card debt or medical bills, that repaying loans would impose an “undue hardship” on the debt holder:

119. *Id.*

120. *Id.*

121. *Id.*

122. *Are Student Loans Community Property?*, *supra* note 109.

123. Bethany K. Laurence, *Debt and Marriage: When Do I Owe My Spouse’s Debts?*, NOLO, <https://www.nolo.com/legal-encyclopedia/debt-marriage-owe-spouse-debts-29572.html> (last updated Mar. 8, 2024) [<https://perma.cc/3PUS-HMK8>].

124. See discussion *supra* Section II.

125. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 373 (2013).

126. *Id.* (quoting *Brunner v. N.Y. State Higher Edu. Serv. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987)).

127. 11 U.S.C. § 523.

(a) A discharge under section 727, 1141, 1192 1 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . .

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.¹²⁸

The stringency of the *Brunner* test and student loan debtors' inability to prevail in bankruptcy have been explored in other scholarly works, with several proposed solutions.¹²⁹ However, as it stands, the *Brunner* test makes it difficult for most borrowers to qualify for loan discharge.¹³⁰ As a result, many borrowers find themselves in a predicament in which they are unable to shed the weight of their student loan debt, even when facing a significant financial burden.¹³¹ Importantly:

Although Congress may have intended that debtors who are truly unable to repay their student loans be given relief under the undue hardship exception, in practice, nondischargeability has become the broad presumption (under the current undue hardship tests), with discharge rarely granted under the courts' narrow interpretation of undue hardship. Most courts construe the undue hardship exception as requiring more than severe financial difficulty, calling for proof of extraordinary circumstances that go beyond financial failure. This inequitable burden has resulted in fewer debtors seeking a fresh start through an undue hardship discharge of their student loans because '[t]he borrowers most likely to prevail in many courts are those with the least possibility of being able to litigate the question.'¹³²

128. *Id.*

129. *See* Austin, *supra* note 125, at 395.

130. *Id.*

131. *Id.*

132. B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 122 (2002).

Some examples of the difficulties in bankruptcy are seen in *In re Cavender*, where an elderly debtor was unable to pay a private medical school debt and was denied a discharge in bankruptcy, despite her financial hardships and numerous attempts to practice medicine.¹³³ In *In re Roth*, an elderly debtor was awarded a partial discharge but not a full discharge, despite the fact that she had a multitude of medical issues and was suffering financial hardship.¹³⁴ In another case, the debtor, a teacher in her forties with limited ability to earn more than a nominal income due to her obligation to care for her two children with medical conditions, was still denied discharge by the bankruptcy court on the grounds that she could not fully prove undue hardship.¹³⁵

As demonstrated from the cases above, pursuing discharge through bankruptcy proceedings can be a long and difficult task that will most likely result in failure.¹³⁶ This goes for both the primary debtor and family members who later incur the debt.¹³⁷ Bankruptcy may be a valid method for some beneficiaries if they have exceptionally severe financial hardship and the time and resources to proceed.¹³⁸ Otherwise, student loan borrowers should generally refrain from relying on bankruptcy as the primary means of securing their inheritance, and they should seek all options available.¹³⁹

D. Tax Implications for Debt That Is Discharged

The IRS previously treated canceled student loan debt as income.¹⁴⁰ This meant that borrowers with a substantial amount of student loan debt forgiven could face significant tax bills, which could be financially burdensome.¹⁴¹ If a parent or spouse was connected to the loan, the IRS would treat them similarly.¹⁴² This is no longer the case as part of the Tax Cuts and Jobs Act of 2017, at least until its expiration in 2025.¹⁴³ Under this act, for loans discharged due to death or total and permanent disability, the forgiven amount becomes tax-free, effectively excluding it from the borrower's taxable income.¹⁴⁴ However, the tax treatment of discharged student loan debt is subject to changes in tax legislation, and it is essential to monitor any

133. *In re Cavender*, No. 16 B 29693, 2017 WL 8218841, *2–3 (Bankr. N.D. Ill. Nov. 27, 2017).

134. *In re Roth*, 490 B.R. 908, 911–13 (B.A.P. 9th Cir. 2013).

135. Eric T. Berkman, *Chapter 7 Debtor is Denied Discharge of Student Debt*, MASS. L. WKLY. (APR. 11, 2023), <https://masslawyersweekly.com/2023/04/11/chapter-7-debtor-is-denied-discharge-of-student-debt/> [<https://perma.cc/92TZ-56JG>].

136. See *Cavender*, 2017 WL 8218841, at *4–6; *Roth*, 490 B.R. at 916–18; Berkman, *supra* note 135.

137. Berkman, *supra* note 135.

138. *Id.*

139. *Id.*

140. *Id.*

141. See Chambers, *supra* note 40, at 1938.

142. *Id.*

143. Budget Fiscal Year, 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

144. *Id.*

potential changes.¹⁴⁵ While the current tax code offers relief for discharged student loan debt, it is important to recognize that tax laws change regularly over time.¹⁴⁶

Several states' income tax laws may still treat discharged debt as income for cosigners and spouses.¹⁴⁷ Some states follow the federal tax treatment and exclude discharged student loan debt from state income tax.¹⁴⁸ Others may have their own rules and regulations regarding the taxation of discharged student loan debt, which could result in different tax consequences at the state level.¹⁴⁹ This presents the issue of borrowers or their family members being able to escape federal tax implications but not their state income tax laws, and this is further compounded due to restrictions on the ability of the federal government to regulate this area of state sovereignty.¹⁵⁰

Currently, Montana, Indiana, North Carolina, and Mississippi make student loan discharge income for state income tax purposes.¹⁵¹ Wisconsin, Arkansas, and California discharge the debt tax-free, but are currently reviewing their tax laws, which could change how they treat forgiven student loans.¹⁵² This comes as states begin to anticipate broad loan forgiveness by the federal government, viewing the change as an opportunity to generate revenue for the state.¹⁵³ A more detailed description of how states currently treat discharged student loans is provided below:

The following shows a smaller list of states that, after pronouncements from state officials, still appear to be on track to tax student loan debt forgiveness.

Arkansas. One of a handful of states which does not conform to the Internal Revenue Code in any significant way, Arkansas's tax code is silent on the treatment of student loan debt forgiveness, and the ordinary rule—that a discharge of indebtedness constitutes taxable income—should prevail absent state action.

California. Previously noted here as a state where statutes seemed to indicate taxability but where the state consensus ran in the other direction, California has now confirmed that it will, in fact, tax student loan debt discharge under current law. The state's conformity date is January 1, 2015,

145. Author's original thought.

146. See Budget Fiscal Year, *supra* note 143.

147. *State Taxation of Forgiven Student Loans*, THOMAS REUTERS (Oct. 4, 2022), <https://tax.thomsonreuters.com/news/state-taxation-of-forgiven-student-loans/> [<https://perma.cc/SL5X-U6PC>].

148. Nihita Airi & Lilian Hunter, *Which States Tax Student Loan Forgiveness, and Why Is It So Complicated?*, TAX POL'Y Ctr. (Sept. 15, 2022), <https://www.taxpolicycenter.org/taxvox/which-states-tax-student-loan-forgiveness-and-why-it-so-complicated> [<https://perma.cc/F6PC-TQDP>].

149. *Id.*

150. David Gamage & Darien Shanske, *The Federal Government's Power to Restrict State Taxation*, ARTICLES BY MAURER FAC. (2016), <https://www.repository.law.indiana.edu/facpub/2442> [<https://perma.cc/2Z5L-HSJB>].

151. *Id.*

152. *Id.*

153. *Id.*

and provisions of an existing law exempting student loans canceled pursuant to income-based repayment programs will not apply.

Indiana. Although Indiana has a post-ARPA conformity date, the state statutorily decouples from IRC § 108(f)(5), which contains the exemption of forgiven student loan debt.

Minnesota. Minnesota's conformity date is December 31, 2018, which is well prior to ARPA, and the state currently lacks any other provision to exclude student loan debt cancellation from income.

Mississippi. Another state which largely goes its own way in defining its tax base, Mississippi retains the ordinary treatment of discharged debt and is in line to tax student loan debt forgiveness.

North Carolina. Although North Carolina conforms to a post-ARPA version of the Internal Revenue Code, its conformity statute contains an add-back which taxes student loan debt forgiveness despite the federal change.

Wisconsin. With a conformity date of December 31, 2020, Wisconsin is currently in line to tax student loan debt forgiveness.

In several other states, tax officials have indicated that there will be no tax on student loan debt discharge despite ambiguity in state law. California, previously on this list, is now understood to tax student loan debt cancellation and is included above. Meanwhile in Pennsylvania, officials have announced that the Biden administration's cancellation of student loan debt is not taxable, though the rationale for this determination is unclear. Pennsylvania has eight classes of taxable income, and historically, debt forgiveness—including student loan debt forgiveness—has been understood as fitting within existing classes.¹⁵⁴

As states contemplate revenue opportunities amid anticipation of broad federal loan forgiveness, it is important for individuals and their estate planning advisors to stay informed on the evolving tax landscape and its implications for the estate plan.¹⁵⁵ In states like Montana, Indiana, North Carolina, and Mississippi, taxing student loan discharge as income highlights the interplay between federal and state tax regulations.¹⁵⁶

154. Jared Walczak, *States That Might Tax Student Loan Debt Cancellation*, TAX FOUND. (Sept. 7, 2022), <https://taxfoundation.org/blog/student-loan-debt-cancellation-tax-treatment/> [<https://perma.cc/7U N-RUF2>].

155. Author's original proposal.

156. See Walczak, *supra* note 154.

III. OPTIONS FOR DEBT HOLDERS AND ACTIONS FOR THE STUDENT LOAN INDUSTRY

A. Options for the Primary Debtor

This section analyzes multiple avenues available to the primary debtor, each with its own unique set of considerations and implications.¹⁵⁷ These include life insurance policies, loan forgiveness programs, various strategies falling under the heading of asset protection, and releasing cosigners prior to death.¹⁵⁸ Each of these paths offer a distinct set of advantages and difficulties; primary debtors and estate planning practitioners must navigate these options with care and as much foresight as possible to ensure that their chosen strategy aligns with their estate planning goals and safeguards family members from incurring their debts.¹⁵⁹

1. Life Insurance

Life insurance coverage can be designed to help cosigners and spouses cover student loan debts after the primary debtor has died.¹⁶⁰ Borrowers can purchase and pay into a life insurance policy with their lender designated as the beneficiary of the proceeds.¹⁶¹ The proceeds are then put towards the remainder of the student loan balance, and any amount not used goes back to the borrower's estate or to an individual designated as the residuary.¹⁶² If the policy proceeds have been built up enough, debtors may be able to cover the entirety of their remaining loans, or a substantial portion of the remainder, to the extent that the policy can help mitigate the financial strain on whoever takes on the rest of the loan.¹⁶³

Policies can differ in numerous ways depending on the insurer, but if obtained, they can potentially help the debtor get rid of the debt faster or entirely.¹⁶⁴ Life insurance policies can be tailored to the unique circumstances of the policyholder.¹⁶⁵ This flexibility allows individuals to match the

157. Author's original thought.

158. *Id.*

159. *Id.*

160. *Does Life Insurance Cover Student Loan Debt*, AM. FAM. INS., <https://www.amfam.com/resources/articles/navigating-life-insurance/does-life-insurance-cover-student-loan-debt> (last updated May 4, 2020) [<https://perma.cc/7J3X-8PYV>].

161. *Id.*

162. *Id.*

163. *Id.*

164. Miranda Marquit, *How to Use Life Insurance to Repay Student Loans*, STUDENT LOAN PLANNER, <https://www.studentloanplanner.com/life-insurance-for-student-loans/> (last updated Apr. 12, 2024) [<https://perma.cc/V5WF-M95N>].

165. *See id.*

policy's coverage with their specific student loan debt, ensuring that there are adequate funds to discharge these obligations upon their death.¹⁶⁶

Debtors may name their creditor as a beneficiary only to the amount owed at death.¹⁶⁷ The general rule is that when the creditor's interest in the policy was given as security for indebtedness, the creditor can retain or recover from the policy only the proceeds towards the remaining indebtedness, plus certain disbursements made by the creditor on the strength of the policy or to keep it in force.¹⁶⁸

To use a policy to pay off the loan, the policy will need to build value over time.¹⁶⁹ This will generally require a whole life insurance policy as opposed to a term policy, building the cash value typically needed to repay the high costs of these loans.¹⁷⁰ Term coverage may be a viable option so long as the policy does not expire before the death of the debtor and if the debtor has a wider budget to properly fund the policy.¹⁷¹ Depending on the lender, another option is to use Indexed Universal Life (IUL) insurance, which invests portions of the monthly premiums into stock and bond indexes, and can generate value faster than a standard policy, at the cost of increased risk.¹⁷² Policies such as an IUL can also let the policyholder withdraw accumulated cash at no penalty after a certain amount of time and without a repayment requirement with a reduction in the total benefit; this may be attractive to borrowers that also need relief in the present.¹⁷³ Options like:

IUL can provide clients with greater potential for growth than a traditional universal life insurance policy, while safeguarding against market downturns. Withdrawals and policy loans may be structured to provide tax-advantaged income to the insureds, who should always consult their personal tax advisors with questions related to their own particular circumstances.

Not only do IUL policies offer the potential to credit interest based in part on the upward movement of a stock market index, most IUL policies also offer protection against the impact of market downturns. Additionally, some accumulation-centric IUL products offer account value enhancements, such as guaranteed minimum interest crediting bonuses—see specific policy contracts for details.

It is important to note, however, that IUL is not an investment; it is a life insurance product that provides growth potential through index interest crediting. As you might expect, clients cannot invest directly in an index

166. *See id.*

167. William H. Danne, Jr., Annotation, *Right of Creditor Beneficiary or Assignee of Insurance Policy on Life of Debtor to Excess Proceeds over Amount Owed on Debt*, 6 A.L.R.6TH 391, 391 (2005).

168. *Id.*

169. Marquit, *supra* note 164.

170. *See id.*

171. *See id.*

172. *Id.*

173. *Id.*

with life insurance products. Still, modern IUL insurance is designed to provide protection and cash value accumulation, while serving as a multipurpose solution.¹⁷⁴

The death benefit from a life insurance policy is typically not subject to federal income tax.¹⁷⁵ This tax advantage makes it an attractive source for discharging student loan debt because the entire payout can be used for this purpose without being eroded by tax liabilities.¹⁷⁶ Policy proceeds from an IUL are also typically tax-free.¹⁷⁷

Using life insurance can help ensure that the burden of student loan debt does not become a looming financial responsibility for surviving family members.¹⁷⁸ Which insurance provider to use and under what terms and price will depend on the needs, health, and qualifications of the borrower.¹⁷⁹ However, life insurance policies are widely available, making them a more accessible option, and the diversity of life insurance policies—including plans such as term life, whole life, and IULs—allow for customization to meet the unique needs of each individual and their family or spouse.¹⁸⁰ While premiums vary based on factors such as age, health, and coverage amount, the long-term financial benefits of a well-structured life insurance policy can far outweigh the initial costs.¹⁸¹

The integration of life insurance into estate planning has the potential to benefit lenders by mitigating the risk of default on student loans in the event of the borrower's death.¹⁸² An argument could be made that knowledge life insurance will cover outstanding debts upon death might reduce the borrower's incentive for timely repayment, and thus, negatively affect creditors' trust in borrowers, leading to more stringent loan terms.¹⁸³ However, this concern must be weighed against the benefits and broader financial stability for both parties.¹⁸⁴

Designing a life insurance strategy that aligns with estate planning goals can be complex and may necessitate professional guidance.¹⁸⁵ It is important that borrowers work with their estate planners and insurance agents, to ensure that the policy proceeds are managed and allocated properly.¹⁸⁶

174. Mark Peterson, *Look to IUL in Planning for Longevity*, LIFE & HEALTH ADVISOR (June 3, 2019), <https://www.lifehealth.com/look-iul-planning-longevity/> [https://perma.cc/6CPL-TFR8].

175. *See id.*

176. *Id.*

177. *Id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.*

183. Author's original thought.

184. *Id.*

185. *Id.*

186. *Id.*

2. Loan Forgiveness Programs

Loan forgiveness programs can help get rid of debt faster, further reducing the burden placed on beneficiaries, in the event they end up incurring the loan.¹⁸⁷ Programs are typically available through federal, state, and city programs, as well as nonprofit organizations, unions, universities, and career programs.¹⁸⁸ This strategy may be a viable option for beneficiaries after the primary borrower's death, discussed further in this section.¹⁸⁹

At the federal level, various student loan forgiveness programs are designed to alleviate the financial burden of student loan debt for certain borrowers.¹⁹⁰ The Public Service Loan Forgiveness (PSLF) program targets individuals working in qualifying public service jobs who make monthly payments under a qualified repayment plan.¹⁹¹ Additionally, the Teacher Loan Forgiveness program offers relief to teachers who work in low-income schools.¹⁹² Around forty other loan forgiveness or debt reduction programs exist and are dependent on the career field that the public servant is engaged in.¹⁹³ Currently, there are proposals at the federal level for significant loan forgiveness, with amounts varying among different policy suggestions.¹⁹⁴ Future developments in student loan forgiveness may depend on legislative changes, policy decisions, and the evolving political landscape.¹⁹⁵

While existing loan forgiveness and loan repayment programs may support similar broader goals, there is great variety across programs in their design and scope. Some programs are widely available to all borrowers who meet program eligibility criteria. However, many programs are narrowly focused on supporting specific public service or workforce needs and are available only to individuals serving in certain occupations or working in certain geographic regions, or individuals employed by certain federal agencies. In some programs, the availability of benefits is incorporated into the terms and conditions of borrowers' loans and is more certain, but in other programs, the availability of benefits is subject to discretionary funding and award criteria. Programs are also distinguished by types of loans that qualify for forgiveness or repayment, qualifying periods of service, the amount of

187. See *Life Insurance & Student Loan Debt*, *supra* note 162.

188. See *id.*

189. See discussion *infra* Section III.B.

190. Alexandra Hegji et al., *Federal Student Loan Forgiveness and Loan Repayment Programs*, CONG. RSCH. SER. 1, 12, <https://crsreports.congress.gov/product/pdf/R/R43571> (last updated Oct. 1, 2024) [<https://perma.cc/678A-2XDE>].

191. *Id.* at 13–15.

192. See *id.*

193. *Id.* at 1.

194. *Id.* at 31–32.

195. *Id.* at 32.

debt that may be discharged, and the tax treatment of discharged indebtedness.¹⁹⁶

Private student loans are generally not eligible for federal forgiveness programs such as PSLF and Teacher Loan Forgiveness, with limited exceptions.¹⁹⁷ Programs that provide relief for private loans at the federal level include the Veterinary Medicine Loan Repayment Program, various American Indian loan repayment programs, NHS Corps Loan Repayment Program, Loan Repayments for Health Professional School Faculty, General Pediatric and Public Health Dentistry Faculty Loan Repayment, Substance Use Disorder Treatment Loan Repayment Program, Nursing Faculty Loan Repayment Program, various programs for military members and veterans, CDC Educational Loan Repayment Program, various programs for those coming from disadvantaged backgrounds, and FDA Loan Repayment Program.¹⁹⁸ This list is non-exhaustive and programs vary in qualifications, amounts dispersed, and future obligations.¹⁹⁹

Many states and cities have introduced their own student loan forgiveness programs, often tailored to address local priorities and workforce needs.²⁰⁰ However, these programs also are not always available for private education loans.²⁰¹ Numerous employers, nonprofit organizations, and labor unions administer loans, thus forgiveness programs that are frequently aimed at particular industries.²⁰² These programs aim to relieve the financial burden of student loans, sparing cosigners and heirs from the obligation to repay the debt.²⁰³ Some educational institutions and vocational programs provide loan forgiveness incentives to their students.²⁰⁴ These programs are designed to attract individuals to specific fields or encourage graduates to work in underserved areas.²⁰⁵ The programs are generally criteria-based and centered around the debtor's employment or contribution to the program organizer.²⁰⁶

196. Hegji et al., *supra* note 190, at 1.

197. Rebecca Safier, *What Are Private Student Loans? And How to Use Them to Pay for School*, WALL ST. J., <https://www.wsj.com/buyside/personal-finance/private-student-loans> (last updated Sept. 13, 2024, 5:34 PM) [<https://perma.cc/4BZ4-6QRE>]; Hegji et al., *supra* note 190, at 6.

198. Hegji et al., *supra* note 190, at 85–96 tbls.B-2, B-3, B-4 & B-5.

199. *Id.*

200. See Clint Proctor, *Student Loan Forgiveness Programs by State*, THE COLL. INV., <https://thecolleinvestor.com/student-loan-forgiveness-programs-by-state/> (last updated Oct. 10, 2023) [<https://perma.cc/LLF2-Y29W>].

201. See *id.*

202. Safier, *supra* note 197.

203. *Id.*

204. Proctor, *supra* note 199.

205. Hegji et al., *supra* note 190, at 15.

206. Stanley Tate, *Student Loan Forgiveness Guide*, TATE L., <https://www.tateesq.com/learn/student-loan-forgiveness> (last updated Oct. 7, 2024) [<https://perma.cc/DS5X-EGHF>].

3. Asset Protection

In estate planning, asset protection employs numerous strategies and mechanisms to safeguard a person's assets after they die.²⁰⁷ It is important to note that the intricacies of asset protection and estate planning can extend beyond the scope of this paper, and individual circumstances may vary.²⁰⁸ Thus, readers are advised to consult with their estate planner or financial advisor to develop a strategy tailored to their unique situations.²⁰⁹ This overview aims to shed light on common avenues for asset protection from creditors, offering a starting point for those seeking to safeguard their beneficiaries.²¹⁰

By taking advantage of these options, individuals can retain control over the distribution of their assets while safeguarding them from potential creditor claims.²¹¹ Borrowers can thus proactively shield their assets, providing financial security in the face of the challenges posed by student loan repayment.²¹² This helps preserve family wealth for future generations.²¹³

This section explores several key strategies, each with its advantages and implications.²¹⁴ These include marriage agreements and divorce as a means of protecting beneficiaries, irrevocable trusts, and strategic beneficiary designations.²¹⁵ These strategies, if implemented properly, can help prevent student loan lenders from having access to the decedent borrower's property, which at the very least can help provide for the decedent's beneficiaries that do not have to incur the debt, or in the case of a marriage agreement, can even negate the issue entirely.²¹⁶ However, asset protection can give rise to legal implications including issues with fraudulent transfers, further highlighting the need for well-informed estate planning assistance.²¹⁷

207. Author's original thought.

208. *Id.*

209. *Id.*

210. *Id.*

211. See Alan S. Gassman, *Sophisticated Estate Planning Techniques by Massachusetts Continuing Legal Education*, 3 A.L.I.-A.B.A. COMM. ON CONTINUING PRO. EDUC. (1999); Frank Campisano, *Can I Create a Trust While in Debt?*, SEDITA, CAMPISANO & CAMPISANO LLC (Aug. 6, 2018), <https://www.scclegal.com/can-create-trust-debt/> [<https://perma.cc/WM77-VMPK>].

212. Gassman, *supra* note 211; Campisano, *supra* note 211.

213. *Id.*

214. Author's original thought.

215. *Dividing Community Property After Your Divorce*, TEX. L. HELP, <https://texaslawhelp.org/article/dividing-community-property-after-your-divorce> (last updated Dec. 21, 2022) [<https://perma.cc/9B5D-K6AX>]; Gassman, *supra* note 211; Campisano, *supra* note 211.

216. See *Dividing Community Property After Your Divorce*, *supra* note 215; see Gassman, *supra* note 211; see Campisano, *supra* note 211.

217. Emil A. Kleinhaus & Alexander B. Lees, *Debt Repayments as Fraudulent Transfers*, 88 AM. BANKR. L.J. 307, 309 (2014).

Some couples choose to sign a prenuptial agreement or postnuptial agreement that makes each spouse responsible for certain debts.²¹⁸ Prenups or postnups can override community property state laws, allowing the spouse to walk away debt-free at the time of the spouse's death.²¹⁹

If an agreement was not made, divorce may be an option to escape the obligation.²²⁰ Community property is partitioned at divorce, with the former spouses agreeing to how the property is to be divided between them.²²¹ However, divorce as a strategy to avoid paying a spouse's student loan debt raises legal and ethical concerns.²²² Courts may view divorce undertaken primarily to evade financial obligations as a fraudulent action.²²³ Parties engaging in such behavior could face legal consequences, including a requirement to repay the debt or penalties for fraudulent conveyance.²²⁴ The financial impact can also affect credit scores.²²⁵ The allocation of student loan debt during divorce proceedings is influenced by factors such as the benefit received from the education and the financial situation of each spouse.²²⁶ Courts will aim for an equitable division, considering the circumstances.²²⁷

Divorcing solely to escape financial responsibilities for a spouse's student loans may also be perceived as an abuse of the legal system and may seem unethical to the ideas of marriage.²²⁸ Individuals contemplating this approach should consider the legal and ethical consequences, the potential impact on their spouse, and the potential for legal difficulties.²²⁹ It is important to consider this option with integrity and regard for the legal and ethical obligations that marriage and the law entail.²³⁰

The laws prohibiting this behavior as a societal interest are extremely old. The federal version of the law since 2014 has been called the Uniform Voidable Transactions Act (UVTA), and is based on English common law dating back to the 1600s. The UVTA, as adopted by the individual states, exists to provide a remedy for creditors against fraudulent transfers by

218. *Dividing Community Property After Your Divorce*, *supra* note 215.

219. *Id.*

220. Author's original thought.

221. *Dividing Community Property After Your Divorce*, *supra* note 215.

222. Kleinhaus & Lees, *supra* note 217.

223. *Id.*

224. *Id.*

225. Jonathan M. Landers & Sandra Anita Riemer, *A New Look At Fraudulent Transfer Liability In High Risk Transactions*, AM. BAR ASS'N. (Dec. 20, 2016), https://www.americanbar.org/groups/business_law/resources/business-law-today/2016-december/a-new-look-at-fraudulent-transfer-liability/ [<https://perma.cc/F5B2-KB8G>].

226. Christy Bieber, *What is Equitable Distribution in Divorce?*, FORBES ADVISOR, <https://www.forbes.com/advisor/legal/divorce/equitable-distribution/> (last updated Mar. 7, 2023, 5:01 AM) [<https://perma.cc/LC3N-MHFF>].

227. *Id.*; *Dividing Community Property After Your Divorce*, *supra* note 215.

228. Author's original thought.

229. *Id.*

230. *Id.*

letting the transactions be voided and returning the value of the property to the debtor or their estate . . .

A debtor can overcome the presumption of fraudulent intent by proving a legitimate purpose for the transfer(s). Transfers that are actually pursuant to a bona fide separation agreement or divorce judgment do provide this legitimate purpose. A sham separation or divorce that was in name only, however, does not . . .

Even if a divorce is not a sham and both parties legitimately want it, it is enough that one of the parties intended to hide assets from creditors by transferring them in the otherwise legitimate divorce settlement agreement. On the other hand, even if you have no intent to defraud, it can be important to be aware of what courts will interpret as fraud.²³¹

Estate planners must navigate the fine line between legitimate asset protection strategies within the bounds of the law so as to not constitute fraudulent transfers.²³² This involves a thorough examination of the timing and intent behind marital decisions.²³³ Legal mechanisms such as prenuptial agreements, when executed transparently and fairly, can contribute to the establishment of clear boundaries and expectations, mitigating the risk of fraudulent conduct.²³⁴

Other traditional estate planning methods such as establishing an irrevocable trust, taking advantage of homestead exemptions, or designating a debt-exempt beneficiary for assets such as bank accounts, retirement plans, etc., can help keep those assets from being subject to student loan creditors.²³⁵ Homestead exemptions, available in various states, provide an avenue to shield a primary residence from certain creditors' claims, contributing to the protection of a family's primary dwelling.²³⁶ Furthermore, designating a debt-exempt beneficiary for assets, such as bank accounts and retirement plans, is a practical step in ensuring that these specific assets pass directly to the intended beneficiaries without being encumbered by outstanding student loan obligations.²³⁷

231. *Sham Divorce and Fraudulent Transfers*, ARNOLD & SMITH PLLC, <https://www.arnoldsmithlaw.com/sham-divorce-and-fraudulent-transfers.html> (last visited Oct. 29, 2024) [<https://perma.cc/PRV7-CHJP>].

232. *Id.*

233. *Id.*

234. *Id.*

235. Arielle M. Prangner, *Just A Will Won't Cut It: Planning for the Transfer of Non-Probate Assets at Death*, 14 EST. PLAN. & CMTY. PROP. L.J. 55, 101 (2021).

236. *Property That Can Be Protected from Judgment Creditors*, TEX. L. HELP, <https://texaslawhelp.org/article/what-property-can-be-protected-from-judgment-creditors> (last updated Jan. 25, 2023) [<https://perma.cc/59KY-JBZH>].

237. *Understand the Risks of Using Beneficiary Designations*, JACKSON L. GRP. (Nov. 16, 2022), <https://www.jacksonlawgroup.com/blog/asset-protection/understand-the-risks-of-using-beneficiary-designations/> [<https://perma.cc/9LWQ-JGA7>].

Putting assets in an irrevocable trust is a method used to protect assets from creditors.²³⁸ Student loan debt is not inherited; it only transfers to a cosigner or spouse in community property states.²³⁹ So, if a cosigner or spouse of the debtor will incur the loan upon the primary debtor's death, establishing the trust and naming someone other than the future debtor as the beneficiary, such as the debtor's children, will prevent creditors from touching the assets of the original debtor.²⁴⁰ However, this could lead to issues with fraudulent transfers—the hindering, delaying, or defrauding of creditors.²⁴¹ This does not have to involve intent to defraud; it can be constructive.²⁴² If a court overturns the transfer of assets into the trust, then the court can undo the estate plan and subject the assets to probate and the hands of creditors and lead to an array of legal issues and penalties.²⁴³ Because these types of loans are not inheritable, designating beneficiaries who will not be the subject of creditors can help protect a debtor's assets and still allow for estate planning.²⁴⁴

4. *Releasing Cosigners*

Releasing a cosigner from a private student loan varies from lender to lender and is generally at their discretion.²⁴⁵ In the event of the borrower's death, the opportunity for the cosigner to be released from the loan may be significantly restricted or non-existent.²⁴⁶

The criteria and process for obtaining such a release can be stringent.²⁴⁷ Releasing a cosigner can require a lengthy period of on-time payments, proof of income, credit checks, and other application criteria depending on the lender.²⁴⁸ This requirement can be a roadblock for those who may have taken on the cosigner role to assist a borrower with limited credit history or financial resources.²⁴⁹ This can also be problematic in situations in which cosigners encounter financial hardship after the passing of the primary debtor

238. Gassman, *supra* note 211; Campisano, *supra* note 211.

239. Tate, *supra* note 109.

240. *Id.*

241. Kleinhaus & Lees, *supra* note 217.

242. *Id.*

243. *Id.*

244. Brian Douglas, *What Happens to Your Student Loans When You Die?*, BRIAN M. DOUGLAS & ASSOCs., LLC (Apr. 30, 2018), <https://www.atlantagaestateplanning.com/blog/2018/04/30/what-happens-to-your-student-loans-when-you-die/> [<https://perma.cc/JN48-US9V>].

245. Ben Luthi, *How to Remove a Cosigner From a Student Loan*, EXPERIAN (July 9, 2022), <https://www.experian.com/blogs/ask-experian/how-to-remove-cosigner-from-student-loan/> [<https://perma.cc/ZK7D-NDFS>].

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

due to funeral costs and preexisting financial burdens that become compounded by their loss.²⁵⁰

Cosigner release often hinges on effective communication between the primary borrower and the lender.²⁵¹ The borrower must initiate the process, provide necessary documentation, and maintain consistent contact with the lender.²⁵² In cases where borrowers are deceased, this communication can be challenging, especially for cosigners who do not understand the terms and complexities of the loan they signed on for.²⁵³

In a bankruptcy proceeding, the cosigner will still have to show the same stringent undue hardship that is required from primary debtors in these proceedings.²⁵⁴ Depending on the type of bankruptcy claim, the effect on the cosigner may change:

In general, Chapter 7 does not extend an automatic stay to the co-signer which means debt collectors can pursue the co-signer while the debtor is in bankruptcy proceedings. Unless the borrower reaffirms the debt or repays the debt in full, co-signers could face aggressive creditors.

Chapter 13 on the other hand, is less intense for the debtor and co-signer. Under Chapter 13, co-signers benefit from an automatic stay which means creditors may not pursue repayment by contact [sic] the co-signer. However, while Chapter 7 may discharge debt, Chapter 13 requires full repayment. This means that if the borrower does not indicate that their reorganization plan will result in payment of all debts in full, creditors could attempt to collect even after the bankruptcy case is over.

Co-signers are neither wholly responsible for bankruptcy nor absolved. They maintain some share of responsibility which varies depending on the type of bankruptcy filing.²⁵⁵

The importance of effective communication between the borrower and the lender is pivotal in initiating the release process.²⁵⁶ The release process, characterized by sometimes stringent prerequisites, can pose significant hurdles, especially for those who assume the cosigner mantle to support borrowers with limited financial means.²⁵⁷ Additionally, the involvement of cosigners in bankruptcy proceedings introduces an additional layer of

250. *Id.*

251. Luthi, *supra* note 245.

252. See Christina Couch, *Six Things to Know About Private Student Loans*, BANKRATE.COM, <https://www.foxbusiness.com/features/six-things-to-know-about-private-student-loans> (last updated Jan. 11, 2016, 12:19 PM) [<https://perma.cc/5HQP-S2SY>].

253. *Id.*

254. See Christopher D. Soper & Benjamin Nicolet, *Statutory Interpretation Merry-Go-Round: Student Loan Cosigner Discharge Then, Now and Later*, 35 AM. BANKR. INST. J. 22 (2022).

255. Seni Popat, *What Happens to Co-Signers During Bankruptcy?*, L. OFF. OF SENI POPAT P.C. (Oct. 14, 2022), <https://www.splawpc.com/blog/2022/october/what-happens-to-co-signers-during-bankruptcy-2/> [<https://perma.cc/LPP5-D9HS>].

256. Luthi, *supra* note 245.

257. *Id.*

responsibility.²⁵⁸ A comprehensive understanding of the legal, financial, and communicative aspects is essential, not just for cosigners but for all parties within the agreement.²⁵⁹

B. Options for the New Debtor

Cosigners of student loans are individuals who enter into a financial agreement alongside the primary borrower to help them secure the necessary funds for educational expenses.²⁶⁰ Typically, cosigners are close relatives, such as parents or guardians, spouses, or trusted individuals with a stronger credit history than the primary borrower.²⁶¹ Cosigners of student loans often have varying levels of knowledge about the specific terms and conditions of the loans they cosign.²⁶²

This section delves into student loans that have been incurred by cosigners and spouses, examining the legal, financial, and practical aspects.²⁶³ Some of these options are available to the borrower before death as well, but they can be useful to the borrower's successor if death is more sudden or unanticipated.²⁶⁴ The debtor can also engage in these activities to prove good faith efforts at repayment in bankruptcy proceedings.²⁶⁵

1. Loan Forbearance and Loan Deferment

Private student loans, in contrast to their federal counterparts, often lack standardized and comprehensive provisions for deferment and forbearance.²⁶⁶ However, navigating the specific options available on privately held student loans inherited by a cosigner or spouse can be a complex and lender-dependent endeavor.²⁶⁷ It is critical for individuals incurring private student loans to be fully informed about the potential options, the eligibility criteria, and the implications of deferment or forbearance because the rules and terms vary significantly among lenders.²⁶⁸

For individuals who find themselves carrying the responsibility of student loans from deceased family members or spouses, these methods offer

258. Popat, *supra* note 255.

259. See Luthi, *supra* note 245.

260. *Id.*

261. *Id.*

262. See Couch, *supra* note 252.

263. See discussion *infra* Section III.B.

264. See discussion *infra* Section III.B.

265. See discussion *infra* Section III.B.

266. Romy Ribitzky, *Loan deferment vs. forbearance: What works for your student loan or mortgage?*, CREDIT KARMA, <https://www.creditkarma.com/debt/i/loan-deferment-vs-forbearance> (last updated July 2, 2024) [<https://perma.cc/N2P9-RYWF>].

267. Soper & Nicolet, *supra* note 254; Couch, *supra* note 252.

268. Soper & Nicolet, *supra* note 254; Couch, *supra* note 252.

temporary relief from the financial burdens that arise.²⁶⁹ One significant advantage lies in the breathing room provided during situations such as unemployment or other economic hardships.²⁷⁰ The flexibility afforded by deferment or forbearance can serve as a financial lifeline, particularly in the face of unexpected circumstances or financial situations.²⁷¹ If the borrower's death was unexpected, engaging in these methods may provide adequate time to better formulate a more detailed strategy for handling the loans while the new debtor manages other responsibilities, such as managing the rest of the decedent's estate.²⁷²

Generally, deferment or forbearance is granted for certain situations, such as returning to school, unemployment, or economic hardship.²⁷³ During the specified period, borrowers, including those who have inherited loans, are not required to make payments, and the loan remains in good standing.²⁷⁴ However, interest may still continue to accumulate, and it is the responsibility of the debtor to cover these accrued interest charges while the balance stays the same.²⁷⁵ Lenders typically offer forbearance in three-month periods, but others may be more generous.²⁷⁶

While federal student loans often provide more borrower-friendly terms and easier access to deferment and forbearance, private lenders may impose less favorable conditions.²⁷⁷ Private lenders may not offer these options at all; however, the lender may still accommodate or work with the debtor informally to assist them in the short term.²⁷⁸

2. Repayment Plans and Refinancing

If permitted, student loan refinancing is the process of taking out a new loan with better terms and using it to pay off the existing private or federal student loans.²⁷⁹ If the debt holder is paying a high interest rate on the student loan, refinancing can result in lower monthly payments and long-term savings on interest charges.²⁸⁰ This may require a high credit score and can disqualify the applicant from other benefits, but not all loans will be

269. Ribitzky, *supra* note 266.

270. *Id.*

271. *Id.*

272. Author's original thought.

273. Ribitzky, *supra* note 266.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. Luthi, *supra* note 245; Caroline Basile, *Best Student Loan Refinance Lenders of November 2024*, FORBES, <https://www.forbes.com/advisor/student-loans/best-student-loan-refinance-lenders/> (last updated Dec. 2, 2024, 4:47 PM) [<https://perma.cc/52PU-9BCX>].

280. Basile, *supra* note 279.

eligible.²⁸¹ The benefit derived from this option further decreases the burden that beneficiaries will suffer if they incur the loan.²⁸² Ideally, prior to death, the primary debtor can use this option to provide enough relief that paying the debt before death becomes achievable.²⁸³

Refinancing is done through a private lender who pays off the current loan and issues a new one with a new interest rate and terms.²⁸⁴ Eligibility requirements vary by lender, generally based on credit score, income and employment requirements, and minimums for outstanding loan balances.²⁸⁵ Eligibility requirements can be met more easily by adding a creditworthy cosigner, but as this paper hopefully demonstrates, adding a cosigner can create burdens for the cosigner in the future.²⁸⁶ This is why debtors and potential cosigners should fully understand the terms that they are entering and should discuss amongst themselves and their financial or estate planner as to whether that is a route they should pursue.²⁸⁷ Debt holders may be a good candidate for a refinancing option if they hold:

Private loans with high fixed interest rates. Fixed interest rates remain the same for the life of the loan. So, think about the interest rate you received when you first qualified for the loan. Then ask yourself whether anything about your financial situation has changed that might make it possible to qualify for a lower interest rate today. Has the economy improved, leading to a drop in interest rates? Have your credit scores improved, making you a more desirable option for lenders? If so, refinancing might be a good option to help you save money by securing a lower interest rate. Even a small percentage difference can have a significant impact on the total amount of interest you pay on a loan.

Private loans with variable interest rates. Unlike fixed interest rates, variable rates change in response to market fluctuations. You may be able to secure a loan with a better fixed interest rate if the economy is strong and interest rates are low.

Private loans with short repayment periods. Loans with a short repayment period mean higher monthly payments, which could put a strain on cash-strapped borrowers. Refinancing offers the opportunity to secure a longer repayment term, spreading out what you owe. Smaller monthly payments may help you save money month to month — but remember that you could end up spending more in interest payments over the life of the loan.

A good credit history and credit scores. Generally speaking, the better your credit scores and credit history, the better chance you have at securing

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. See discussion *supra* Section II.B.

287. *Id.*

a lower interest rate and other favorable loan terms from lenders. If your credit scores have improved since taking out your loans, refinancing could help you qualify for better interest rates than you did initially.

Access to a cosigner. Even if your credit scores aren't ideal, you may still be able to qualify for refinancing with a cosigner, which is someone (typically a family member or friend) who agrees to be legally responsible for repaying the loan if you can't. A co-signer makes you a less risky borrower from the lender's perspective.

Steady income. A stable income is a good indicator to potential lenders that you will make your monthly payments in full and on time.²⁸⁸

Refinancing can also be used to consolidate multiple loans, which could make it easier to manage repayment, especially if the debtor held multiple loans that changed hands multiple times; working with a single lender can help streamline the process.²⁸⁹

It is important to note that refinancing federal loans can turn them into private loans, thereby forfeiting the benefits and protections under those terms.²⁹⁰ Also importantly, debtors should avoid this option for federal loans if they are planning for or anticipating death because federally backed loans will be discharged upon their death.²⁹¹ If the loan was federal, the beneficiary should seek a discharge through the previously discussed process.²⁹²

Additional negative factors may also play a role in determining whether to refinance.²⁹³ Refinancing may not be the best option for the debt holder if they have:

Poor credit history and no access to a cosigner. With a bad credit history and no co-signer, you're unlikely to be approved for refinancing. If you're struggling financially, reach out to your lender to negotiate a repayment plan that works for your financial situation. If you can, work on improving your credit scores by making payments on time and in full, reducing your total debt and making sure you have a good balance between loans and credit card debt.

A high debt-to-income (DTI) ratio. Your DTI ratio is the total amount of debt payments you owe every month divided by your gross monthly income. To a lender, this number is a strong indicator of your ability to repay what you owe. Lenders typically prefer to see a DTI ratio under 45%. Higher DTI ratios suggest you may be unable to repay any additional debt you take on.

288. *Refinancing Private Student Loans*, EQUIFAX, <https://www.equifax.com/personal/education/loans/articles/-/learn/refinancing-private-student-loans/> (last visited Jan. 1, 2024) [<https://perma.cc/RX47-2MPN>].

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

Private loans in default. If your loan is in default — meaning you’ve missed one or more payments — it will be very difficult for you to refinance your loans. A loan in default will appear on your credit reports and can cause your credit scores to drop significantly, signaling to a potential lender that you’re unable to repay any new debt.²⁹⁴

Ultimately, after weighing these factors, the decision to pursue student loan refinancing should align with the individual’s financial goals and circumstances.²⁹⁵ Engaging in open discussions with finance and estate planners, as well as thoroughly understanding the terms and implications of the refinancing process, is crucial to making the best decision under the circumstances.²⁹⁶

3. Loan Forgiveness Programs

As discussed in the previous section of this Comment, the option to use loan forgiveness programs can be very significant.²⁹⁷ Programs are available through federal, state, and city organizations, as well as nonprofit organizations, unions, universities, and career programs.²⁹⁸ However, the eligibility of cosigners for loan forgiveness is often dependent on the specific program and its terms, which can vary.²⁹⁹ Generally, most student loan forgiveness programs are designed for the main borrower, and cosigners are not always eligible for forgiveness on the basis of their role as a cosigner alone.³⁰⁰ Programs are generally targeted at the primary debtor based on a set of criteria usually related to the debtor’s employment or contribution to the program organizer.³⁰¹

If there is a lack of relief elsewhere, some private lenders offer rehabilitation programs that are available to cosigners.³⁰² Student loan rehabilitation programs are designed to help borrowers who have defaulted on their federal student loans to restore their loans to good standing.³⁰³ To enter a rehabilitation program, borrowers must typically agree to make a

294. *Id.*

295. Author’s original thought.

296. *Id.*

297. *Id.*

298. Hegji et al., *supra* note 190, at 85–96 tbls.B-2, B-3, B-4 & B-5.

299. *Student Loan Refinancing with a Cosigner*, ELFI (Dec. 14, 2022), <https://www.elfi.com/how-to-refinance-student-loans-with-a-cosigner/> [https://perma.cc/REV3-G7Y5].

300. *Id.*

301. Tate, *supra* note 206.

302. *Tips for student loan co-signers*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/paying-for-college/repay-student-debt/student-loan-cosigners/> (last visited Jan. 4, 2024) [https://perma.cc/R7NY-NZ59].

303. Ryan Lane, *Student Loan Rehabilitation: What It Is and When to Use It*, NERD WALLET, <https://www.nerdwallet.com/article/loans/student-loans/student-loan-rehabilitation> (last updated Mar. 17, 2022) [https://perma.cc/BHW3-QU2T].

series of on-time, reasonable, and affordable payments.³⁰⁴ These payments are often determined based on a percentage of the borrower's discretionary income or a fixed amount.³⁰⁵ Successful completion of the rehabilitation program results in the removal of the default status from the borrower's credit report.³⁰⁶ After completing the rehabilitation program, borrowers regain eligibility for certain benefits, including income-driven repayment plans, deferment, forbearance, and potential loan forgiveness programs.³⁰⁷

C. Guidelines for Practitioners

This section delves into guidelines for estate planning practitioners who handle clients who hold student loan debt.³⁰⁸ Central to these guidelines is the need for practitioners to comprehensively know the terms of their client's loan because variations in policies between lenders can significantly impact the estate plan and which strategies to use.³⁰⁹ Additionally, timing can play a large role in determining which strategy can be used most effectively.³¹⁰ Other factors can also influence the decision-making process.³¹¹

1. Know the Client's Loan

Knowing the terms and conditions of the loan will help determine the availability and practicality of certain options.³¹² Many debtors do not fully know the terms of the loan they took out and might not realize the risk to their cosigners (typically parents) or spouse.³¹³ As such, it is important to find out the terms and status of a client's student loans while making their estate plan.³¹⁴ Considering the high costs that these debts can reach with interest, depending on the debtor's financial situation, estate planners might need to center more focus on hedging against student loans.³¹⁵ The amount of consideration given to student loan debt will depend on the unique financial situation and goals of the individual client.³¹⁶ For some, managing student loan debt may be a central concern, while for others, it may play a less

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. See Proctor, *supra* note 200.

309. See discussion Section III.C.2.

310. See discussion Section III.C.2.

311. See discussion Section III.C.2.

312. Luthi, *supra* note 75.

313. Gormly, *supra* note 4; Ellis, *supra* note 6; Couch, *supra* note 252.

314. Gormly, *supra* note 4; Ellis, *supra* note 6; Couch, *supra* note 252.

315. Underwood, *supra* note 2; Rutledge, *supra* note 2.

316. Author's original thought.

significant role in the estate planning process, depending on their available assets and the remaining balance on the loan.³¹⁷

2. Timing

Another factor that one must consider is the timing of when the client actually starts taking steps towards planning for their family member to incur their debt.³¹⁸ Some of the strategies discussed can be more time-sensitive than others because they may have set registration deadlines.³¹⁹ Their effectiveness is dependent on the amount of time that the process may take.³²⁰

The timing of acquiring a life insurance policy tailored for this purpose is important because by securing the policy at the right time, individuals can maximize its effectiveness.³²¹ A balance has to be struck between starting early, ensuring affordability, and the actual amount of benefits required to cover the remaining student loan obligations effectively.³²² The cost of life insurance premiums tend to increase with age, and eligibility can become more limited as health conditions change.³²³ Thus, obtaining a policy sooner rather than later helps ensure lower premiums, greater flexibility, and a higher likelihood that the policy can actually be used effectively to provide the financial support necessary to address the remaining debt.³²⁴ Timing, in this regard, is an essential component of the strategy for those seeking to secure their beneficiaries' financial stability.³²⁵

To shield cosigners and spouses from incurring student loans, early and informed asset protection measures can be essential.³²⁶ Commencing asset protection planning when loan obligations are manageable can maximize the range of options available and strengthen the strategies' effectiveness.³²⁷ Delayed action may limit the availability of certain protection mechanisms, potentially exposing assets to claims by creditors.³²⁸

Strategies such as loan forbearance, deferment, and repayment plans will almost always have set deadlines and criteria that may require actions well in advance of death.³²⁹ This makes these options less valuable if death

317. *Id.*

318. *See* discussion *infra* Section III.C.2

319. *See* discussion *supra* Part III.

320. *See* discussion *supra* Part III.

321. Marquit, *supra* note 164.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. Author's original thought.

327. *Id.*

328. *Id.*

329. *See* discussion *supra* Section III.A.

is unexpected, meaning that the new debtor will have to adhere to the terms and deadlines of these policies.³³⁰

In the event of unexpected changes in financial circumstances, such as disability, sudden job loss, or unanticipated death, an early estate plan can include contingency measures for managing student loan obligations effectively.³³¹ By initiating the estate planning process early, individuals can assess more options and can better incorporate provisions designed to address their specific needs.³³²

D. Actions Lawmakers and Lenders Should Take

This section advocates for a comprehensive reevaluation of the legal landscape to alleviate the burdens faced by borrowers and their families that this Comment addresses.³³³ To foster a more equitable system, lawmakers should amend the Bankruptcy code to provide a more accessible avenue for discharging student loan debt.³³⁴ Additionally, lawmakers should revise both state and federal tax codes.³³⁵ Lastly, student loan lenders should consider implementing life insurance policies into student loan agreements.³³⁶

I. Actions for Lawmakers

Lawmakers and the Consumer Financial Protection Bureau should take action to make the discharge of student loan debts at death mandatory, regardless of whether it is federal or private.³³⁷ The knowledge that student loan debts will be discharged upon death could enhance borrower confidence and reduce the psychological and emotional stress associated with education-related financial obligations.³³⁸ Mandatory discharge also offers significant relief to families who are already coping with the emotional and practical challenges of a loved one's passing.³³⁹ This relief may prevent the exacerbation of financial distress during a difficult time.³⁴⁰ The absence of mandatory discharge provisions for private loans can also subject grieving families to aggressive debt-collection efforts by private lenders.³⁴¹ Also,

330. See discussion *supra* Section III.A.

331. Author's original thought.

332. *Id.*

333. See discussion *supra* Section III.C.1.

334. Author's original thought.

335. See discussion *supra* Section III.C.1.

336. See discussion *supra* Section III.C.1.

337. Author's original thought.

338. J. Geiman, *The Psychological Toll of Student Debt*, THE CTR. FOR L. & SOC. POL'Y (Oct. 8, 2021), <https://www.clasp.org/blog/psychological-toll-student-debt/> [<https://perma.cc/S2SS-VVDD>].

339. See Wang, *supra* note 92.

340. *Id.*

341. *Id.*

adopting a policy of mandatory discharge for all student loans at death, regardless of their origin, would provide legal clarity and uniformity, simplifying the process for surviving family members and lenders.³⁴² An example of a provision that should be mandated in every student loan agreement is provided below:

Article [X]: Discharge in Case of Borrower's Death

(a) General Discharge: In the unfortunate event of the borrower's death, the outstanding balance of the loan, including all accrued interest, shall be automatically discharged, and the borrower's estate shall not be held liable for any remaining repayment obligations.

(b) Notification: The borrower's representative or executor must provide the lender with a certified copy of the borrower's death certificate within [X] days of the borrower's passing. Upon receipt of the necessary documentation, the lender will process the discharge promptly.

(c) Co-Signer Release: In the case of loans with co-signers, the death discharge shall also apply, and the co-signer(s) will be released from any further obligations related to the loan upon submission of the required documentation.

(d) Exceptions: This discharge provision is subject to any applicable laws and regulations governing the discharge of student loans due to the death of the borrower.³⁴³

Lawmakers should amend the Bankruptcy Code to make student loan debt easier to discharge because, under the current provisions of the Code, discharging student loan debt in bankruptcy is a challenging process.³⁴⁴ The current legal framework under the *Brunner* test has created significant barriers to achieving relief from student loan debt in bankruptcy.³⁴⁵ Lawmakers should consider revising standards within the Bankruptcy Code to provide a more balanced and forgiving approach.³⁴⁶ Numerous amendments to this section of the Code have been proposed, but proposals have included modifying "undue hardship" to be more flexible and considerate of economic conditions, returning student debt to the list of nonpriority general unsecured debt, and court-ordered modification of the debt to fair market value.³⁴⁷ This can create a more flexible standard that accounts for unforeseen economic challenges.³⁴⁸ Rather than placing the burden solely on borrowers to demonstrate good faith, lenders and loan servicers should be held accountable for transparent and fair loan servicing

342. *Id.*

343. Author's original thought.

344. Austin, *supra* note 125.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

practices.³⁴⁹ These solutions and more can be found in existing scholarly works that further analyze student loans and bankruptcy, particularly those that advocate for repealing Section 523 and the replacement of the *Brunner* test.³⁵⁰

Therefore, Congress should repeal section 523(a)(8) and enable student loans to be dischargeable debts under the Bankruptcy Code. In doing so, the symptoms that have arisen as a consequence of the undue hardship exception would be cured. Student loan debtors would finally be free from the disparate treatment shown to them through the undue hardship exception. The inconsistent application of the current undue hardship exception would also be fixed, and courts would no longer need to circumvent the plain language of section 523(a)(8) by acting as judicial legislators and granting partial discharges of student loans. Furthermore, the elimination of section 523(a)(8) would provide an equitable remedy for student loan debtors, while also promoting the fresh-start policy that is the main theme behind the Bankruptcy Code . . . Section 523(a)(8) provides characteristics opposite to those our bankruptcy system currently needs. It has been rightfully stated, “[a] bankruptcy system that does not [strike an equitable balance between] the interests of creditors and the interests of debtors will have neither their confidence nor, of even greater importance, the confidence of the American people.”³⁵¹

Lawmakers should amend the Internal Revenue Code to make the exclusion from taxable income of any student loan forgiveness or discharge permanent because the fear of potential tax liabilities may deter individuals from participating in loan forgiveness programs, limiting the use of these critical tools designed to assist those struggling with substantial student loan burdens.³⁵² Congress should add a provision to 26 U.S.C. Section 108 (f)(5) that extends the current period by which student loan discharge will not be included in gross income or that extends the period indefinitely.³⁵³ A previously proposed modification that can accomplish this is provided below:

(1) IN GENERAL. —In the case of an individual, gross income does not include any amount which (but for this subsection) would be includible in gross income by reasons of the discharge (in whole or in part) of—

(A) any loan provided expressly for post-secondary educational expenses, regardless of whether provided through the educational institution or directly to the borrower, if such loan was made, insured, or guaranteed by—

349. *Id.*

350. *See id.*

351. Huey, *supra* note 132, at 127–28.

352. Chambers, *supra* note 40.

353. *Id.*

- (i) the United States, or an instrumentality or agency thereof,
- (ii) a State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, or
- ‘(iii) any institution of higher education,
- ‘(B) any private education loan (as defined in section 140(a)(7) of the Truth in Lending Act),
- ‘(C) any loan made by any educational organization described in section 170(b)(1)(A)(ii) if such loan is made—
 - ‘(i) pursuant to an agreement with any entity described in subparagraph (A) or any private education lender (as defined in section 140(a) of the Truth in Lending Act) under which the funds from which the loan was made were provided to such educational organization, or
 - (ii) pursuant to a program of such educational organization which is designed to encourage its students to serve in occupations with unmet needs or in areas with unmet needs and under which the services provided by the students (or former students) are for or under the direction of a governmental unit or an organization described in section 501(c)(3) and exempt from tax under section 501(a), or
 - ‘(D) any loan made by an educational organization described in section 170(b)(1)(A)(ii) or by an organization exempt from tax under section 501(a) to refinance a loan to an individual to assist the individual in attending any such educational organization but only if the refinancing loan is pursuant to a program of the refinancing organization which is designed as described in subparagraph (C)(ii).³⁵⁴

By ensuring that the discharge or forgiveness of student loans does not lead to a tax burden, lawmakers can encourage individuals to pursue higher education.³⁵⁵

In terms of state income tax codes, Congress does not have the authority to regulate state income taxes.³⁵⁶ For states that treat discharged student loans as income, Congress can only indirectly influence their taxation law.³⁵⁷ For example, Congress can provide grants to states with conditions that require states to conform to certain federal standards or policies.³⁵⁸ States often conform to certain provisions of the federal tax code to simplify tax compliance for their residents, and changes at the federal level can have

354. Student Loan Tax Relief Act of 2023, 118th Cong. (1st Sess. 2023) (proposed); Jimmy Gomez & Bill Pascrell, *Reps. Gomez and Pascrell Introduce Bill to Make Student Loan Forgiveness Tax-Free*, REPRESENTATIVE JIMMY GOMEZ CAL’S 34TH DIST. (June 9, 2023), <https://gomez.house.gov/news/document/single.aspx?DocumentID=2819> [<https://perma.cc/5F29-YNVV>].

355. See Austin, *supra* note 125.

356. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012).

357. South Dakota v. Dole, 483 U.S. 203, 210 (1987).

358. *Id.* at 211–12.

ripple effects on state tax policies.³⁵⁹ However, this specific issue is the subject of other scholarly publications and goes beyond the scope of this Comment.³⁶⁰ The issue raises numerous constitutional arguments concerning state sovereignty to levy taxes within their borders, and it is especially complicated by the ongoing efforts of the Biden administration to instigate student loan forgiveness and states being resistant to some of these efforts, as seen in *Biden v. Nebraska*.³⁶¹ Outside of efforts by the federal government, this Comment still advocates that state lawmakers should either repeal provisions in their tax codes that make the discharge of student loan debt taxable income or include provisions in their respective codes that reflect 26 U.S.C. Section 108 (f)(5) and include similar language, as provided below:

(5) Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part), of —

(A) any loan provided expressly for postsecondary educational expenses, regardless of whether provided through the educational institution or directly to the borrower, if such loan was made, insured, or guaranteed by—

(i) the United States, or an instrumentality or agency thereof,

(ii) a State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, or

(iii) an eligible educational institution . . . ,

(B) any private education loan (as defined in section 140(a)(7) [1] of the Truth in Lending Act),

(C) any loan made by any educational organization described in section 170(b)(1)(A)(ii)³⁶²

2. Actions for Lenders

Lenders themselves should go as far as to implement underwriting, and they should offer or require that borrowers take out a life insurance policy for purposes that this Comment has addressed.³⁶³ In the event of death the lender could use the policy proceeds towards paying off the remaining balance of the loan and any remaining debt would then be discharged.³⁶⁴ Lenders can establish partnerships with insurance providers to make the process of obtaining life insurance policies more efficient for borrowers.³⁶⁵ This collaboration can result in insurance products that are tailored to the specific

359. *Id.* at 211.

360. *See* Chambers, *supra* note 40.

361. *See* *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023).

362. 26 U.S.C. § 108(f)(5).

363. Author's original thought.

364. *Id.*

365. *Id.*

needs and financial circumstances of student loan borrowers.³⁶⁶ This collaboration could also involve bundled packages or negotiating a balance between rates and coverage, making it convenient and possibly more cost-effective for borrowers to obtain the necessary policies.³⁶⁷ Lenders should also educate borrowers about the benefits of such policies, emphasizing the long-term advantages of safeguarding their financial legacy.³⁶⁸

An argument may be made that adding life insurance to student loan obligations could increase prices and exacerbate existing financial strains for debtors.³⁶⁹ Borrowers may feel compelled to pay for an insurance policy they feel is unnecessary, particularly if they are young and healthy, perceiving the likelihood of death as low.³⁷⁰ Other borrowers may already have life insurance policies or other estate planning mechanisms in place, making this requirement repetitive or creating resistance from borrowers who perceive it as an intrusion into their personal financial planning.³⁷¹ Additionally, integrating life insurance into student loan programs and collaboration with insurance providers could potentially add complexity to the loan application process.³⁷² This loan application process is already complicated and known for lacking transparency or help for new borrowers navigating the process.³⁷³

As a result, lenders that implement this option should offer a voluntary opt-in system in which borrowers can choose to include life insurance as part of their loan agreement.³⁷⁴ This respects individual autonomy and financial preferences.³⁷⁵ If the lender has partnered with reputable insurance providers to offer various rates and tailored packages, then borrowers can select from a range of insurance options.³⁷⁶ Borrowers can thus choose the coverage amount based on their needs and personal circumstances.³⁷⁷ Premiums can then be incorporated into the monthly loan payment.³⁷⁸ In the event of the borrower's death, the life insurance proceeds will be used to settle the outstanding loan balance, ensuring that family members are relieved from any financial obligations related to the student loan, up to the amount of the policy benefit.³⁷⁹

366. *Id.*

367. *Id.*

368. *Id.*

369. Author's original thought.

370. LIMRA: *Younger Adults Seek a Different Buying Experience for Life Insurance*, LIMRA (July 18, 2023), <https://www.limra.com/en/newsroom/industry-trends/2023/limra-younger-adults-seek-a-different-buying-experience-for-life-insurance/> [<https://perma.cc/J9BH-YWSR>].

371. Author's original thought.

372. *Id.*

373. Austin, *supra* note 125.

374. Author's original thought.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

Student loan lenders that pursue an integrated life insurance policy into their loans should incorporate terms that further the protection of borrowers.³⁸⁰ Lenders should allow borrowers to opt out at any time during the loan term; opting out should not affect the terms of the student loan, and the borrower should remain responsible for the remaining loan balance.³⁸¹ All terms and conditions related to the life insurance option should be clearly outlined in the loan agreement, and borrowers should receive information from the insurance provider, detailing exact coverage, terms, and conditions.³⁸² Borrowers opting for life insurance should be required to go through a confirmation process to ensure they understand the terms and implications of the decision and should be required to sign an acknowledgment of inclusion in their student loan plan.³⁸³ Furthermore, lenders should maintain open communication with borrowers regarding their life insurance coverage, and they should provide updates on any changes to the policy.³⁸⁴ By incorporating these terms, lenders can provide transparent information that allows borrowers to make properly informed decisions about integrating life insurance into their student loan.³⁸⁵

IV. CONCLUSION

In an era where the pursuit of higher education is undeniably linked with financial gain and personal achievement, the specter of student loan debt looms large for millions of individuals.³⁸⁶ The stories of Lynda Swearingen, Steve Mason, and countless others serve as stark reminders of the unforgiving nature of this financial burden, one that not only endures through the debtor's lifetime but, as exemplified, can extend into the afterlife and haunt the family members of the deceased.³⁸⁷

This Comment has analyzed various methods and strategies that student loan debtors and their cosigners can explore, offering the prospect of relieving their family members from the profound burden of inherited debt.³⁸⁸ The student loan debt crisis may persist for a time, but through informed estate planning and the utilization of available strategies, its effect can be mitigated, allowing individuals to secure a less stressful future.³⁸⁹ Whether through life insurance policies, loan forgiveness programs, or other estate planning techniques, the potential for an unhindered financial future can be

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. Hanson, *supra* note 26.

387. Gormly, *supra* note 4; Ellis, *supra* note 6.

388. See discussion *supra* Part III.

389. Author's original thought.

achieved.³⁹⁰ It is crucial for individuals to seek guidance, stay informed, and make proactive decisions to achieve the peace of mind that they deserve.³⁹¹

390. See discussion *supra* Part III.

391. Author's original thought.