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I. INTRODUCTION

With the passage of the Employee Retirement Income and Security Act of 1974 (hereinafter ERISA)[1] a conflict has arisen as to whether pensions subject to ERISA regulation can be divided as part of the community property by state courts in marriage dissolution actions. A number of arguments have been urged, involving federal preemption of the field and various provisions contained in ERISA, which support subjecting ERISA-regulated pension plans only to federal regulation and not to division in a state dissolution proceeding. In *Hisquierdo v. Hisquierdo*,[2] the Supreme Court discussed thoroughly the conflict between pension plans and nonemployee spouses[3] and found that federal regulation preempted California community property law as it affected the division of pensions received under the Railroad Retirement Act of 1974.[4]

The purpose of this article is to examine the California and federal cases dealing with the division of ERISA-regulated pension plans, to evaluate the arguments supporting and opposing federal preemption, and to draw some conclusions as to the most appropriate resolutions of the various questions.

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1. 29 U.S.C. §§ 1001-1381 (1976).

2. 439 U.S. 572 (1979).

3. Typically, when the issue of federal preemption of community property law is litigated, the community property division in a state trial court results in an order that the pension plan pay directly to the nonemployee spouse a certain percentage of the employee spouse's pension. *See, e.g.*, Johns v. Retirement Fund Trust, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978).

4. 45 U.S.C. §§ 231-231t (1976 & Supp. II 1978).

II. DEVELOPMENT AND CURRENT STATUS OF CALIFORNIA PROPERTY LAW

To properly discuss the pension plan issue, it is necessary to examine the development and current status of California community property[5] law as it relates to pensions.

The leading case for many years dealing with the nature of "retired pay" was, *French v. French*.[6] In that case the wife claimed that retired pay was community property because it

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5. "Community property" is defined by the California statute as "property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." CAL. CIV. CODE § 687 (Deering 1971). *See also* CAL. CIV. CODE § 5110 (Deering Supp. 1981) which reads: "[e]xcept as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state . . . is community property."

Together CAL. CIV. CODE §§ 5107 & 5108 (Deering 1972) define separate property. CAL. CIV. CODE § 5107 states: "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property." CAL. CIV. CODE § 5108 states: "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. The husband may, without the consent of his wife, convey his separate property."

In addition to community property there are two additional classifications of property which a California state court will divide as though they were community property: "quasi-community property" and "quasi-marital property." CAL. CIV. CODE § 4803 (Deering 1972) defines quasi-community property as: "all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways: a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition."

Thus, pension rights acquired by an employee spouse while domiciled outside California will be deemed by California courts to be quasi-community property to the extent acquired during coverture.

CAL. CIV. CODE § 4452 (Deering 1972) defines quasi-marital property thus:

> Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such property or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed "quasi-marital property".

The actual division of community, quasi-community, or quasi-marital property is governed by CAL. CIV. CODE § 4800(a) (Deering Supp. 1981) which provides in relevant part: "Except upon written agreement of the parties, or an oral stipulation of the parties in open court, the court shall . . . divide the community property and the quasi-community property of the parties . . . equally."

6. 17 Cal. 2d 775, 112 P.2d 235 (1941).

was compensation for services rendered during the existence of the community. The California Supreme Court agreed, but noted that the husband would not be eligible to receive the pay until he completed fourteen years service in the naval reserve. The court concluded that "[a]t the present time, his right to retirement pay is an expectancy which is not subject to division as community property."[7] California courts followed this rule until 1976, when it was overruled in *In re Marriage of Brown.*[8]

The *French* decision dealt with nonvested pension rights distinguishing two earlier decisions which concerned pensions where the husbands already possessed certain or vested interests.[9] Courts maintained this vested-nonvested distinction during the period between the *French* and *Brown* decisions.[10]

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7. *Id.* at 778, 112 P.2d at 237.

8. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

9. 17 Cal. 2d at 777, 112 P.2d at 236. *See* Dryden v. Board of Pension Comm'rs, 6 Cal. 2d 575, 59 P.2d 104 (1936); Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939). In *Crossan,* the husband had a vested right, his earnings deductions during marriage. In *Dryden* the husband's right to a pension was held to be vested at the time his employment began since the right was an integral part of the employment contract under the city charter provisions.

10. *See In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); Phillipson v. Board of Adm'n Pub. Emp. Retire. Sys., 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970). In *Fithian* the California Supreme Court stated:

> The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved. [citation] Underlying the community treatment of retirement benefits is the concept that they do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee.

10 Cal. 3d at 596, 517 P.2d at 451, 111 Cal. Rptr. at 371 (footnote omitted).

In a footnote which explained the meaning of "vested," the court explained:

> The right to retirement benefits "vests" when an employee acquires an irrevocable right in a fund created by his own contributions and/or the contributions of his employer. The "vesting" of retirement benefits must be distinguished from the "maturing" of those benefits, which occurs only after the conditions precedent to the payment of the benefits have taken place or are within the control of employee.

Id. n.2, 517 P.2d at 451 n.2, 111 Cal. Rptr. at 371 n.2. Similarly, the court in *Phillipson* noted:

> Williamson v. Williamson (1962) 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167, summarized the law as follows: 'Pensions become community property, subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds. To the extent that payment is, at the time of the divorce, subject to conditions which may or may not occur, the pension is an expectancy, not subject to division as community property.' . . . [P]ension rights,

Thus, where a pension could be characterized as vested it was deemed community property subject to division by the court. Where the rights to the pension were nonvested it was a mere expectancy, not property, so not subject to division by the court.[11]

In 1976, with the California Supreme Court decision of *In re Marriage of Brown, French* was overruled and the cases relying on it disapproved.[12] The *Brown* court said:

> [T]he *French* rule cannot stand because nonvested pension rights are not an expectancy but a contingent interest in property; furthermore, the *French* rule compels an inequitable division of rights acquired through community effort. Pension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding.[13]

Thus, California case law now dictates that pensions, to the extent they are earned by the employee spouse[14] during the existence of the community,[15] are to be apportioned as

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having matured, were 'property' subject to the jurisdiction of the court. 3 Cal. 3d at 40-41, 473 P.2d at 770, 89 Cal. Rptr. at 66 (footnotes omitted). The court continued in a footnote:

> While an employee continues in state employ, the nature and value of his retirement pension is contingent both upon his survival until retirement and his age at retirement. [citation] Thus the retirement benefits of a present employee are classified as an expectancy, and neither those rights nor their actuarial equivalent is divided or awarded as community property in a divorce proceeding. [citations] On the other hand, no matter how or when an employee leaves state service he is entitled to withdraw his accumulated contributions, unless he elects otherwise [citation]; if he dies in state employ the contributions or equivalent are paid to his beneficiaries or estate [citation]. Thus the court should include the accumulated contributions in evaluating and dividing the community property [citation]; it cannot render any award, however, which compels the board to pay over such contributions prior to the employee's termination of service with the state.

Id. n.8, 473 P.2d at 770 n.8, 89 Cal. Rptr. at 66 n.8.

11. *See* note 6 *supra* and accompanying text.

12. 15 Cal. 3d at 841, 544 P.2d at 562, 126 Cal. Rptr. at 634.

13. *Id.* at 841-42, 544 P.2d at 562-63, 126 Cal. Rptr. at 634-35.

14. Where the masculine gender is used it is meant to include the feminine. Since all the cases referred to deal with male employee spouses and female nonemployee spouses, it is most convenient, and least confusing, to refer to the employee spouse in the masculine.

15. *See* CAL. CIV. CODE § 5118 (Deering 1972), which reads: "The earnings and accumulations of a spouse and the minor children living with, or in the custody of,

community property. Consequently the community interest is divided equally between the parties, with the remainder going to the employee spouse as his or her separate property. This procedure will be followed in all cases involving pensions unless there is some countervailing federal statute.[16]

A. *Pre*-Hisquierdo *Cases*

The first California cases which dealt with the effect of ERISA on the possible division of ERISA-regulated pensions as community property in a state dissolution proceeding were *Johns v. Retirement Fund Trust*[17] and *In re Marriage of Johnston.*[18] Both were issued before the Supreme Court decided *Hisquierdo.*

Johns dealt summarily with the federal preemption issue under ERISA, the issue of whether the spendthrift provisions of ERISA[19] prevented the Pension Fund from making payments of one-half the amount of the pension to the former spouse, and the issue of whether being required to mail a check directly to the nonemployee spouse would be too burdensome on the Fund. The California Court of Appeal for the Fourth District held (1) that "[i]n this day of computer technology, the burden of the Fund to make out two checks and envelopes, rather than one, is insignificant,"[20] (2) that "[t]he

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the spouse, while living separate and apart from the other spouse, are the separate property of the spouse." Thus, the existence of a marriage does not mean there is a community of the sort which creates community property rights. If the parties, even though married, are living separate and apart from each other, earnings and accumulations received during that period are the separate property of each. In this context, "living separate and apart" means "that condition when spouses have come to a parting of the ways with no present intention of resuming marital relations." Makeig v. United Sec. Bank & Trust Co., 112 Cal. App. 138, 143, 296 P.2d 673, 675 (1931). *See also In re* Marriage of Baragry, 73 Cal. App. 3d 444, 448, 140 Cal. Rptr. 779, 781 (1977).

16. *See, e.g.*, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (retirement benefits under the Railroad Retirement Act of 1974 not subject to division as community property by a state court); *In re* Marriage of Hillerman, 109 Cal. App. 3d 334, 167 Cal. Rptr. 240 (1980) (social security benefits not community property subject to division in state court dissolution proceeding); *In re* Marriage of Cohen, 105 Cal. App. 3d 836, 164 Cal. Rptr. 672 (1980) (social security benefits).

17. 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *appeal dismissed* and *cert. denied*, 444 U.S. 1028 (1980).

18. 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978), *cert. denied*, 444 U.S. 1035 (1980).

19. 29 U.S.C. § 1056(d)(1) (1976) which provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

20. 85 Cal. App. 3d at 512, 149 Cal. Rptr. at 551.

spendthrift features of ERISA are not applicable because [the wife] is an owner, not a creditor,"[21] and (3) that "[ERISA] does not preempt California law as applied here in matrimonial matters."[22]

The court in *Johnston* analyzed in detail the impact of ERISA on California community property law. After acknowledging that the pension benefits at issue were community property under California law,[23] the court, relying on California case law, concluded that "the broad preemptive language of ERISA [did not] interfere with a state's right to control distribution of marital property."[24] The California cases relied upon, however, dealt with the Railroad Retirement Act of 1974,[25] military disability pay,[26] and state pension benefits.[27] The *Johnston* court failed to analogize its case facts to those cases which did not concern ERISA. In fact, the referred to cases did not even analyze the statutes' purposes which created the pension rights involved in each case.[28] Thus, the possible similarity of underlying policies between ERISA and those other statutory provisions dealing with pension benefits could not form the basis of the *Johnston* court's conclusions. Even if the court arguably purported to analyze the actual language of the ERISA general preemption clause,[29] it failed

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21. *Id.* at 513, 149 Cal. Rptr. at 552. *See also* Wanamaker v. Wanamaker, 93 Misc. 2d 784, 401 N.Y.S. 2d 702 (1978).

22. 85 Cal. App. 3d at 513, 149 Cal. Rptr. at 551-52.

23. 85 Cal. App. 3d at 905, 149 Cal. Rptr. at 801-02.

24. *Id.* at 908, 149 Cal. Rptr. at 803.

25. *In re* Marriage of Hisquierdo, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977).

26. *In re* Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975), the United States Supreme Court recently held that military retirement pay is not divisible as community property. McCarty v. McCarty, 101 S. Ct. 2728 (1981). Justice Blackmun, writing for the majority, first noted "that military retired pay differs in some significant respects from a typical pension or retirement plan." *Id.* at 2735. Having noted the differences, however, he based the decision on the fact that "the application of community property conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation." *Id.* at 2736. Thus, the unique character of military retired pay renders it a useless analogy in any analysis of ERISA preemption issues.

27. Phillipson v. Board of Adm'n Pub. Emp. Retire. Sys., 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970).

28. 85 Cal. App. 3d at 907-08, 149 Cal. Rptr. at 803.

29. 29 U.S.C. § 1144(a) (1976), reads in relevant part: "the provisions of . . . this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . . ."

in its purpose. Nevertheless, the court concluded the ERISA preemption clause did not preempt California community property law.[30]

Relying on a number of federal district court cases, however, the court further supported its conclusion that there was no federal preemption of California community property law. Thus, citing *Hewlett-Packard Co. v. Barnes*,[31] the court noted that where state law affects the administration or regulation of a pension plan the law will be preempted. It reasoned that ERISA was aimed at inconsistent state and local *regulation* of employee benefit plans. Thus, orders which merely affected the distribution of established benefits were not preempted.

The *Johnston* court also relied heavily upon the local nature of domestic relations matters and the federal courts' traditional reluctance to interfere with such matters. Citing *In re Marriage of Pardee*,[32] the court noted that if community property laws are determined to be laws relating to employee benefit plans, " 'the federal judiciary will have been granted a roving commission to delineate family property law with little assistance from the Congress as to how to proceed. Hopefully Congress did not intend that the members of the federal judiciary begin *ad hoc* to create a body of federal common law in an area so traditionally the preserve of the states.' "[33] They also referred to *Stone v. Stone*[34] which commented that " 'Congress does not infringe *sub silentio* "the power to make rules to establish, protect, and strengthen family life [which] is committed by the Constitution of the United States . . . to the Legislature of each state." ' "[35]

Finally the court in *Johnston* held that an order directing payment of pension benefits by an employee benefit plan directly to a nonemployee ex-spouse did not violate the spendthrift provisions of ERISA.[36] Such a community property distribution was neither an assignment nor an alienation, but simply the honoring of an ownership right.[37]

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30. 85 Cal. App. 3d at 912, 149 Cal. Rptr. at 806.
31. 425 F. Supp. 1294 (N.D. Cal. 1977).
32. 408 F. Supp. 666 (C.D. Cal. 1976).
33. 85 Cal. App. 3d at 911, 149 Cal. Rptr. at 805.
34. 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (1980), *cert. denied*, 101 S. Ct. 3159 (1981).
35. 85 Cal. App. 3d at 911, 149 Cal. Rptr. at 805.
36. 29 U.S.C. § 1056(d)(1) (1976). *See* note 19 *supra*.
37. 85 Cal. App. 3d at 912, 149 Cal. Rptr. at 806.

After *Johns* and *Johnston,* the California state courts' position seemed fairly clear. The preemption clause of ERISA did not preempt California community property law, nor did Congress so occupy the field as to cause preemption. Neither did orders directing covered plans to pay benefits directly to nonemployee ex-spouses violate the antiassignment provisions of ERISA. Unfortunately, though the courts' positions were clear, and predictable, they did not reveal their reasoning.

B. *The* Hisquierdo *Case*

The United States Supreme Court, in 1979, decided *Hisquierdo v. Hisquierdo.*[38] There, Justice Blackmun, writing for the majority, held that the 1974 Railroad Retirement Act[39] preempted California community property law and forbade a state court from dividing a pension governed by the Act as community property.[40]

Initially the Court explained the standard for reviewing state domestic relations law to determine if it was preempted. Noting first that " '[t]he whole subject of . . . domestic relations . . . belongs to the laws of the States and not the laws of the United States,' "[41] and that "[f]ederal courts repeatedly have declined to assert jurisdiction over divorces that present no federal question,"[42] the Court continued:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. [citation] A mere conflict in words is not sufficient. State family and family-

38. 439 U.S. 572 (1979).

39. 45 U.S.C. § 231-231t (1976 & Supp. II 1978).

40. 439 U.S. at 583-86. In *Hisquierdo* the wife argued two alternative means of division. First, she argued that the trial court could retain jurisdiction over the pension payment and order the husband to pay her her share as he received the payments himself. As mentioned, this direct form of division was rejected by the Supreme Court. *Id.* Secondly, she contended that the trial court could, under *In re* Marriage of Milhan, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), *cert. denied,* 421 U.S. 927 (1975), award the entire pension to the husband while awarding her offsetting community property then available, based on the acturial value of the pension. Justice Blackmun also rejected this approach, saying "[a]n offsetting award . . . would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from this benefit check." 439 U.S. at 588.

41. 439 U.S. at 581 (quoting *In re* Burns, 136 U.S. 586, 593-94 (1980)).

42. 439 U.S. at 581.

> property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. *United States v. Yazell,* 382 U.S. 341, 352 (1966).[43]

With this standard for guidance, the Court focused on the purposes and policies underlying the Railroad Retirement Act. The opening section of the opinion noted:

> [The Railroad Retirement Act's] sponsors felt that the Act would encourage older workers to retire by providing them with the means "to enjoy the closing days of their lives with peace of mind and physical comfort," and so would "assure more rapid advancement in the service" and also more jobs for younger workers. Both employees and carriers pay a federal tax which funds a Railroad Retirement Account.[44]

The Court further noted the two-tiered nature of the Act's benefits, one tier being similar to private pension funds while the other tier was essentially a substitute for, and corresponded exactly with, the provisions of the Social Security Act.[45] Thus, "[l]ike Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time."[46] Moreover, detailed provisions of the Act provided for a worker's spouse, but the benefits terminated when the spouse and worker were absolutely divorced.[47] Finally, in accordance with Congress' plenary power over railroad retirement benefits, it amended the Act's antiassignment provisions, specifically allowing such benefits to be attached to satisfy child support or alimony obligations.[48] The definition of alimony expressly excluded community property division.[49]

With the above provisions in mind the Court properly

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43. *Id. See also* 450 F. Supp. at 924-25.

44. 439 U.S. at 573-74.

45. *Id.* at 574-75. California has held, in cases citing *Hisquierdo,* that social security benefits are not subject to division as community property. *In re* Marriage of Hillerman, 109 Cal. App. 3d 334, 167 Cal. Rptr. 240 (1980); *In re* Marriage of Cohen, 105 Cal. App. 3d 836, 164 Cal. Rptr. 672 (1980); *In re* Marriage of Nizenkoff, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1976); *In re* Marriage of Kelly, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976). *Accord,* Flemming v. Nestor, 363 U.S. 603 (1960).

46. 439 U.S. at 575.

47. *Id. See also* 45 U.S.C. § 231d(c)(3) (1976).

48. 439 U.S. at 575. *See also* 45 U.S.C. § 231a(c)(3)(i) (1976).

49. 439 U.S. at 575-76 nn.8 & 9.

concluded that state community property law was preempted. Since the Act was intended to guarantee that the benefits would reach and remain with the retiree[50] so as to encourage retirement from service, a division of the benefits as community property would frustrate its purpose by discouraging the employee-spouse from retiring,[51] and actually working as a positive incentive to keep the employee-spouse working.[52] The conclusion was strongly supported by the Congressional actions in providing for spousal and child support while explicitly terminating spousal rights to benefits upon absolute divorce and expressly excluding community property settlements from the term "alimony."

C. *Post-* Hisquierdo *Cases*

California courts have in four opportunities since the *Hisquierdo* decision reviewed claims of federal preemption by ERISA.

In re Marriage of Campa[53] was a case the California Court of Appeal decided prior to publication of the *Hisquierdo* decision. However, on rehearing after the *Hisquierdo* decision, the court affirmed its earlier decision,[54] relying primarily on footnote twenty-four of *Hisquierdo,* where Justice Blackmun said the decision did not apply to ERISA-regulated pensions.[55]

The *Campa* court, after noting the "manifest purpose" to preempt standard under which it would analyze the case, looked to the purpose of ERISA. The court summarized the legislative history of the Act relating to the sharp need for pension reform, which was the motivation for the Act's passage, and further reviewed the major reforms which were

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50. *Id.* at 584.

51. This conclusion follows from the fact that the employee-spouse would have less income on which to retire.

52. This conclusion follows from the fact that any income attributable to the employee-spouse's efforts after separation constitutes part of his separate property. *See* CAL. CIV. CODE §§ 5107, 5101 & 5118 (Deering 1972) *quoted* in notes 5 & 14 *supra.*

53. 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed,* 444 U.S. 1028 (1980). *Campa* was a consolidation of three cases: *In re* Marriage of Campa, *In re* Marriage of Durkin, and Bryant v. Carpenters Pension Trust Fund.

54. *Id.* at 132, 152 Cal. Rptr. at 373.

55. 439 U.S. at 590 n.24.

mandated by the Act.[56] The court concluded that ERISA's purpose was to assure "that pension rights are real—that new employees are not kept from participating in a plan for a long time and that expected benefits do not evaporate due to underfunding, maladministration, a company going out of business or a termination of employment after many years of work."[57] With this background, the court examined the ERISA preemption claim.

A summary of the California law regarding division of community property and the characterization of pension benefits led to the conclusion that the California law which allegedly conflicted with ERISA was "concerned with effectuating a fair division of the monthly pension check between the former spouses."[58] The court concluded:

> This concern plainly has no bearing on the effort of Congress . . . to assure genuine pension rights. To ask a pension plan to send two monthly checks instead of one does not interfere with any of the Congressional objectives. It is, in fact, consonant with the objective of assuring that the members of the family receive the pension which they anticipated. We cannot find in ERISA or its extensive legislative history an unmistakable ordaining or "clear and manifest purpose" to prevent states from achieving this simple and sensible aim in their domestic relations proceedings.[59]

The court felt this conclusion was reinforced by the fact that domestic relations is a particularly local concern.[60]

Further, the court believed that the ERISA antiassignment and alienation provisions did not affect the division of benefit payments as community property. Again, Congress' concern was to keep retirement benefits intact until the employee reaches retirement age. Division of benefits, once received, did not clash with this objective. Rather, "[i]t merely assures that the ex-wife partakes of the pension to the extent that it was earned as a result of the community effort. [citation] Her rights are those of an owner, not a creditor.

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56. 89 Cal. App. 3d at 120-23, 152 Cal. Rptr. at 365-67.
57. *Id.* at 123, 152 Cal. Rptr. at 367.
58. *Id.* at 124, 152 Cal. Rptr. at 368.
59. *Id.*
60. *Id.*

[citation]"[61]

In re Marriage of Bastian[62] does not add to the analysis of the preemption issue. Relying to some extent, as did the *Campa* court, on the pre-*Hisquierdo* cases of *Jones* and *Johnston* and addressing specifically the burden on pension plans following a division of pension benefits, the court noted summarily that the burden on plans of having to mail out two checks rather than one was insignificant. It was apparently on the basis of such an alleged burden that the plan claimed an improper interference with the purposes of ERISA.[63] The court never really reached the issue, since the trial court had not yet determined a distribution method,[64] and it was possible that the trial court could formulate a remedy the plan

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61. *Id.* at 125, 152 Cal. Rptr. at 368. The appellant-fund in *Campa* further claimed: (1) That Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978), supported a finding of preemption. This claim was rejected as the state law in *Barnes* was an attempt at actually regulating pension plans, thus conflicting with ERISA. (2) That preemption is indicated by the fact that certain tax sections of ERISA were to apply without regard to community property law. The court noted that "[t]he fact that Congress chose to supersede community property laws *selectively* gives rise to a strong inference that Congress did not intend to preempt them generally. 89 Cal. App. 3d at 126, 152 Cal. Rptr. at 369 (emphasis in original). (3) That provisions of collective bargaining agreements negotiated under the aegis of the National Labor Relations Act generally supersede conflicting state law (the plan here prohibited nonemployee spouses from obtaining any order or other process against the fund). Relying on Malone v. White Motor Co., 435 U.S. 497 (1978), the court rejected this claim. "There is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." *Id.* at 504. (4) That the fiduciary obligations sections of ERISA, 29 U.S.C. § 1104(a) (1976), requiring in essence that fiduciaries discharge their duties exclusively for the benefit of participants and beneficiaries and within certain limits, forbade a plan from honoring state court orders requiring benefit payments to divorced spouses. Again, the contention was rejected. The court noted that Congress' concern was with the course of conduct of plans and the accountability of fiduciaries. The division of pension benefits, once they are already being paid out, had no bearing on the skillful and honest administration of the plan. (5) That community property laws "relate to" pension plans within the meaning of 29 U.S.C. § 1144(a) (1976) insofar as they govern joinder of plans. But the court noted that these sections actually provide added protection for, and evidence added concern for, pension plans. Thus, the possibility of conflict with Congress' concerns was lessened. 89 Cal. App. 3d at 126-31, 152 Cal. Rptr. at 369-72.

62. 94 Cal. App. 3d 483, 156 Cal. Rptr. 524 (1979).

63. Just what purposes were allegedly interfered with is never made clear.

64. It was possible that offsetting assets would be awarded, consistent with *In re* Marriage of Milhan, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), *cert. denied*, 421 U.S. 976 (1975), *see* note 39 *supra*, or the husband could be ordered to pay the wife her share after he received his check each month.

would find acceptable.[65]

The third case, *In re Marriage of Pilatti*,[66] also alleged lack of jurisdiction in state courts as well as federal preemption through ERISA. Noting the peculiarly local nature of domestic relations matters, and the fact that the plan's interpretation of ERISA would require removal to federal court of any case even remotely involving a pension plan, the court rejected the jurisdictional argument. Since the preemption issue was tied to the jurisdictional argument, it too was rejected,[67] but with no analysis, simply a citation to *Johns v. Retirement Fund Trust*.[68]

The court also rejected the standard antialienation and assignment clause argument, saying the wife was an owner of the benefit rights. Thus, she was not a creditor, but was a participant in the pension by operation of law. The court relied on California case law interpreting similar provisions in state statutes to support its conclusion. Thus, the analysis was not particularly illuminating. Indeed, in view of different Congressional concerns in enacting national regulatory legislation, the authorities relied upon by the court may have been inapposite to the issue of whether division as community property would constitute an assignment or alienation within the meaning of the federal statute. The fact that state law might consider a spouse an "owner" of pension rights otherwise payable to the employee-spouse would be irrelevant if the state policy and interpretation conflicted with the federal policy. In that event, the nonemployee spouse, regardless of characterization, would have no rights to the pension benefits. *Hisquierdo*, which the *Pilatti* court so readily distinguished, is a perfect example of this conflict.

It was not until the court dealt with the *Hisquierdo* deci-

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65. The rest of the *Bastian* decision was concerned with whether the trial court had *in personam* jurisdiction over the plan and with forum non conveniens. Relying on the minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310 (1945), and in particular on the analogous cases of Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950) and McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the court found sufficient minimum contact to warrant *in personam* jurisdiction. The forum non conveniens argument failed in a balancing of the facts.

66. 96 Cal. App. 3d 63, 157 Cal. Rptr. 594 (1979), *cert. denied*, 445 U.S. 916 (1980).

67. *Id.* at 65-66, 157 Cal. Rptr. at 596.

68. 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *appeal dismissed*, 444 U.S. 1028 (1980). Unfortunately, *Johns* lacks analysis, so the citation is not very helpful.

sion, which it distinguished almost offhand, that it made even a passing reference to the policy underlying ERISA. Unfortunately, the reference was not helpful in analyzing the preemption issue. Indeed, the real reliance in distinguishing *Hisquierdo* seemed to be on footnote twenty-four of that opinion.[69]

The last California case dealing with the issue of ERISA as it relates to community property law, is *In re Marriage of Mantor*.[70] Again, the case provided little analysis regarding this issue. Citing *Johns, Johnston,* and *Campa,* the court disposed almost summarily of the issues of state court jurisdiction to order disbursement to a nonemployee spouse, ERISA preemption of community property law insofar as it gives an interest in a pension to a nonemployee spouse, and the state court's power to order benefit payments directly to a nonemployee spouse. The court ruled that the trial court did have jurisdiction and power to award the nonemployee spouse an interest in the benefits and to order direct payment from the plan.[71]

D. *California Courts' Present View*

Clearly, the California courts believe that ERISA does not preempt California community property law concerning ERISA-regulated pension plans, do not believe that California courts do have jurisdiction and power to order direct payments to a nonemployee spouse of her community property share of the benefits, and that such awards are neither assignments nor alienations within the meaning of the antiassignment and alienation provisions of ERISA. The *Hisquierdo* decision has not changed this position.

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69. *See* text accompanying note 55 *supra*. While the court did not rely improperly on footnote 24 of *Hisquierdo*, it nevertheless managed to avoid facing the issues discussed in *Hisquierdo*. Justice Blackmun did not state that the analysis in *Hisquierdo* was inapplicable to ERISA-regulated pensions. He stated only that *Hisquierdo* itself expressed no view, one way or the other. This was proper since the preemption and ERISA issues were not before the Court. Thus, the question of the applicability of the reasoning in *Hisquierdo* to ERISA-regulated pensions was still an open question and should have been discussed rather than summarily dismissed.

70. 104 Cal. App. 3d 981, 164 Cal. Rptr. 121 (1980).

71. *Id.* at 985-86, 164 Cal. Rptr. at 123.

III. The Federal Case Law

The first two federal cases which dealt with the interaction of California community property law and ERISA were *Stone v. Stone*[72] and *Francis v. United Technologies Corp.*[73] Each federal district court case involved a nonemployee spouse who sued a pension plan to enforce her community property interest in the plan benefits; and each was decided before the Supreme Court decision in *Hisquierdo*.

In a well-reasoned and thorough decision, the *Stone* court held that California community poperty law did not conflict with section 206(d)(1)[74] of ERISA, forbidding assignments and alienations.[75] Nor were state community property laws preempted by ERISA through section 514(a),[76] which provides that state laws "relating to" ERISA-regulated pensions are superseded by ERISA.[77]

The court first noted that "[a] conflict between state and federal statutes exists 'where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [citations].' "[78] Thus, the court was forced to examine the purposes of, and policies underlying, ERISA. Against the background of the strong federal

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72. 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (1980), *cert. denied*, 101 S. Ct. 3158 (1981).

73. 458 F. Supp. 84 (N.D. Cal. 1978).

74. 29 U.S.C. § 1056(d)(1) (1976). That section provides in relevant part:

> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.
>
> (2) For purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceeding sentence shall not apply to any assignment or alienation made for the purpose of defraying plan administration costs.

75. 450 F. Supp. at 931.

76. 29 U.S.C. § 1144(a) (1976). That section provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter [subchapter I concerning reporting and disclosure, participation and vesting, funding, fiduciary responsibilities, administration and enforcement] and subchapter III [concerning plan termination insurance] of this chapter shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

77. 450 F. Supp. at 933.

78. *Id.* at 924 (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978)).

policy of non-interference with state domestic relations laws,[79] the court considered the terms of section 206(d)(1) and their possible conflict with state law. The court noted that

> [t]he possibility of a conflict between California community property law and 206(d)(1) . . . cannot be avoided by categorizing a community property interest as an ownership rather than a creditor interest. . . . This mode of analysis focuses on whether the nonemployee spouse's claim is an ownership or creditor interest, but the characterization of the interest under state property law does not affect the degree of conflict with the purposes of the federal statute, which determines whether state law is preempted.[80]

This cogent and accurate statement of the law was the point California courts missed. Those courts used state law concepts, which in and of themselves conflicted with ERISA, to characterize state-created property rights in federally regulated benefit plans in such a way as to find no conflict with ERISA. The reasoning was circular and led to an anomalous result.

In examining 206(d)(1)'s terms, the court noted that they did not expressly preclude division as community property, and that the plain import of the terms "assignment" or "alienation" would not include divisions as community property.[81] Since there was no conflict with the express terms of the statute, the next step was to

> rely primarily on an analysis of policy considerations in interpreting §206(d)(1). . . . More specifically, the Court must compare the interest in benefits which the nonem-

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79. *Id.* at 924-25. The court said at one point that "Congress does not infringe *sub silentio* 'the power to make rules to establish, protect, and strengthen family life [which] is committed by the Constitution of the United States . . . to the legislature of [each state].'" (emphasis in original) *Id.* at 924 (quoting Labine v. Vincent, 401 U.S. 532, 538 (1971).

80. *Id.* at 925. The court continued:

> If the characterization under state property law were dispositive, a spouse entitled to a fair and equitable share of marital property in a non-community property state . . . could not collect benefits if the law of that state did not recognize a pre-existing ownership interest as California law does. The substance of the spousal claim to marital property conflicts no more or no less with § 206(d)(1) because of the forum in which it is asserted.

Id. at 925-26.

81. *Id.* at 926.

> ployee spouse has under the community property laws with the interest in benefits asserted by other claimants. If Congress could have had no discernible reason to treat those kinds of interests differently, its clear intent to prohibit the transfer of one kind of interest demonstrates its intent to prohibit the transfer of the other kind. If, on the other hand, the relative interests of husband and wife differ from the relative interests of participant and other claimants, no basis to infer a clear congressional intent to preempt community property laws exists.[82]

This analysis lead to the conclusion that there was no conflict between the community property claims of a spouse and the purposes of section 206(d)(1). Families are among the class of people ERISA was designed to protect. The basic purpose of ERISA is to protect those who must rely on benefits from private pension plans in their retirement.[83]

> Congress was concerned not only about the workers themselves whose employment entitles them to benefits. Congress was also concerned about the families of those workers who depend to the same degree on the actual availability of those benefits. It would be ironic indeed if a provision designed in part to insure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce.[84]

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82. *Id.*

83. H.R. REP. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4640-41; S. REP. No. 127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4838, 4839-40.

84. 450 F. Supp. at 926. *See also* Operating Eng'rs' Local No. 428 Pension Trust Fund v. Zamborsky, 650 F.2d 196 (9th Cir. 1981) (ERISA does not preclude state court from ordering garnishment of pension benefits of an individual who falls behind in monthly maintenance payments to an ex-spouse). The court bolstered its conclusion by noting the ramifications of denying a nonemployee spouse a community property share of pension benefits. One argument stated that by insulating a substantial community asset from community property claims in the event of divorce might lead a nonemployee spouse to anticipate (or perhaps precipitate) the divorce by limiting her contributions to the marriage. 450 F. Supp. at 926. This, however, seems too speculative in creating a make-weight argument.

Furthermore, even though ERISA-regulated benefits could be reached for spousal support awards, this did not alter the conclusion, since such awards may not be limited to essential needs, but may be ordered in sufficient amount to support the ex-spouse in the manner in which she lived before the divorce. Thus, not much difference may exist between the two. *Id.* at 927.

Nor did the possibility of an increased burden on benefit plans impress the court. The court noted that § 206(d)(1) did not protect any interests of plans as plans. *Id.* at

In discussing the possibility of preemption of state law by section 514(a), forbidding state laws relating to ERISA-regulated plans, the court stated that, though the section was intended to have broad preemptive effect, it "was not . . . designed to preempt any state law with even the most tangential relation to ERISA."[85] The court noted that section 206(d)(1) covered prohibitions on transfers, since it previously found that the specific section did not prohibit division as community property, the court refused to find that the more general provisions of section 514(a) prohibited the division.[86]

The second case dealing with ERISA and California community property law, *Francis,* was decided, as was *Stone,* by the District Court for the Northern District of California. The judge in *Francis,* however, in a less thorough decision than *Stone,* disagreed with his brother judge. In reaching his decision he relied on another case, *Hewlett-Packard v. Barnes.*[87] The *Hewlett-Packard* opinion was written by the same judge who wrote the *Stone* opinion, even though the *Stone* court did not mention that case. In *Francis,* the court, quoting from section 514(a) of ERISA, and relying on *Hewlett-Packard,* cursorily concluded that ERISA totally preempted pensions

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930.

Finally, in a footnote, the court mentioned the fact that the California case of *In re* Marriage of Milhan, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), *cert. denied,* 421 U.S. 976 (1975), might allow a court to compensate a nonemployee spouse by awarding that person offsetting community property in an amount equal to one-half the community interest in the pension benefits, even though ERISA might otherwise prohibit division of the benefits themselves. 450 F. Supp. at 927 n.12. If ERISA involves as complete a preemption of state law as some would claim, *see* Francis v. United Technologies Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978) and note 86 and accompanying text *infra,* and in light of the subsequent *Hisquierdo* decision, 439 U.S. at 588, it would foreclose this possibility.

85. 450 F. Supp. at 932.

86. *Id.* The court also stated, in a footnote, that

> ERISA does not preempt state community property laws to the extent they authorize the transfer to the nonemployee spouse of her spouse's federal cause of action under § 502(a)(1)(B) as well as the transfer of the right to the benefits themselves. If ERISA permits the transfer of the latter it permits the transfer of the former. If Congress intended to permit divorced non-employee spouses to receive their community interest in benefits directly from employee benefit plans, it is reasonable to conclude that Congress intended to give them the means to obtain the benefits which belong to them.

Id. at 933 n.17.

87. 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd,* 571 F.2d 502 (9th Cir. 1978), *cert. denied,* 439 U.S. 831 (1978).

and other employee benefit programs.[88]

The court further held that section 206(d)(1) precluded division of pension benefits, since such a division would constitute an alienation of one half the benefits.[89] Again, however, the court concluded without analyzing why such a result should obtain, particularly in view of the strong federal policy of noninterference in state domestic relations matters.[90]

Finally, the *Francis* court held that no court had jurisdiction to hear a claim by a nonemployee ex-spouse to ERISA-regulated pension benefits. This conclusion followed because section 502(a)(1)(B)[91] of ERISA allows only participants and beneficiaries a cause of action to recover benefits due. Likewise, section 502(a)(3),[92] providing for other equitable relief,

88. 458 F. Supp. at 86 (quoting Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382, 387 (D. Kan. 1977)).

89. *Id.*

90. The *Francis* court noted the *Stone* decision but disagreed with it. *Id.* First, the *Francis* judge summarized the *Stone* holding as stating that, though the nonemployee spouse has no independent cause of action against a retirement plan, and § 1056(d)(1) forbids assignment and alienation of plan benefits, the employee spouse's cause of action is not prohibited and can therefore be involuntarily assigned to the nonemployee spouse by operation of California community property law. This, however, was not the holding in *Stone*. The *Stone* holding was that the benefits themselves were transferable, not constituting an alienation or assignment in the first instance. 450 F. Supp. at 926. All the *Stone* court said about transfer of causes of action was that if the benefits could be transferred, logically the means to collect could also be transferred. *Id.* at 933 n.17. *See* note 86 *supra*.

Second, the *Francis* court stated that a total preemption of California community property law was not novel. In support he cited the United States Supreme Court decision in Wissner v. Wissner, 338 U.S. 655 (1950), as being an analogous situation. There, the Court "held that California's community property laws are preempted by the broad national statutory scheme of the National Service Life Insurance Act which allowed the insured to designate the beneficiary of all of the policy's benefits, thus defeating a spouse's community property interest in the policy." 458 F. Supp. at 86.

But the court's analysis fails for two reasons. First, *Wissner* was inapposite. That case involved a direct clash of conflicting state and federal statutes. The federal statute affirmatively gave absolute freedom of choice to a serviceman in the selection of his beneficiary. Division of benefits under California community property law directly contravene the federally created right. No such situation arguably exists where the federal law focuses on the administration of a trust, does not create any affirmative right of exclusivity in the employee spouse, and merely ensures that pension benefits will still exist at retirement so that the employee will be able to provide for his family. Thus, *Wissner* provides a dubious analogy.

Second, it appears the *Francis* court was myopic being unable, or unwilling, to analyze beyond the black-and-white terms of ERISA and view it in light of its and other federal policies which might have affected its enforcement.

91. 29 U.S.C. § 1132(a)(1)(B) (1976).

92. 29 U.S.C. § 1132(a)(3) (1976).

grants causes of action only to participants, beneficiaries, and fiduciaries. The court felt that the only category a nonemployee ex-spouse could arguably fit into was that of a beneficiary,[93] and here the ex-spouse had not been so designated by her former husband.[94]

Clearly, a serious split of opinion existed in the Northern District of California as to the interaction of ERISA and California community property law. The Ninth Circuit Court of Appeals resolved this conflict when it took two cases on appeal: *Stone v. Stone*[95] and *Carpenters Pension Trust v. Kronschnabel.*[96]

In *Kronschnabel* the pension plan conceded that ERISA did not prevent California courts from treating ERISA-regulated pension rights as community property. The only question the court studied was "whether a state court may require the trustees of an ERISA-regulated pension plan to pay some portion of pension payments directly to a participant's ex-spouse."[97] The court of appeals found the United States Supreme Court's dismissal of the appeal in *In re Marriage of Campa*[98] for want of a substantial federal question dispositive, and affirmed the state court's power to issue such orders.[99]

The court first stated that "[a] summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question, when the federal question is properly presented and within the Supreme Court's appellate jurisdiction . . . operates as a decision on the merits."[100] Quoting from *Mandel v. Bradley*,[101] the court continued:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclu-

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93. *But see* Stone v. Stone, 632 F.2d 740, 743 (9th Cir. 1980), where there is some indication that a nonemployee ex-spouse may indeed fit within the meaning of "participant."

94. 458 F. Supp. at 87.

95. 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3158 (1981).

96. 632 F.2d 745 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3159 (1981).

97. *Id.* at 747.

98. Carpenters Pension Trust Fund v. Campa, 444 U.S. 1028 (1980).

99. 632 F.2d at 747.

100. *Id.*

101. 432 U.S. 173, 176 (1977).

> sions on the presise issues presented and necessarily decided by those actions. . . . Summary actions, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.[102]

An examination of the jurisdictional statement in *Campa*[103] revealed that in dismissing the appeal, "the Supreme Court necessarily considered and rejected the argument that ERISA preempts a state court order requiring the trustees of a pension plan to divide pension payments between the employee and his or her ex-spouse."[104]

The court reached the same conclusion in *Stone*[105] relying on *Kranschnabel.* Since the court disposed of the preemption question, the only issue remaining was "whether the district court properly exercised jurisdiction to reach the merits in this case."[106] The answer to that question turned on "whether the district court would have had jurisdiction over this action had it been filed originally in district court."[107]

In *Kerbow v. Kerbow*[108] a federal district court held that a nonemployee ex-spouse lacks standing to sue under section 502(a)(1)(B). It further held that ERISA was generally preemptive, so ex-spouses who had no standing under section 502(a)(1)(B) may not bring a civil action in any court against an ERISA-regulated plan to enforce community property rights against the plan.[109]

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102. 632 F.2d at 747.

103. *Id.* at 748. The jurisdictional statement was:

> 1. Do the provisions of Title I of the Employee Retirement Income Security Act, commonly known as ERISA, supercede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee benefit plan covered by the Act?
>
> 2. Does a state court have jurisdiction to order the board of trustees of an employee pension plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan?

Id.

104. *Id.*

105. 632 F.2d at 742.

106. *Id.*

107. *Id.*

108. 421 F. Supp. 1253 (N.D. Tex. 1976).

109. *Id.* at 1259-60. The *Kerbow* court noted that 29 U.S.C. § 1132(s)(1) (1976) of ERISA was the sort of jurisdictional grant which is "hopelessly intertwined with questions of standing and failure to state a claim." *Id.* at 1259. Thus, the court first

Again, however, the circuit court found that the Supreme Court's dismissal of the *Campa* appeal directly concerned the issues of the jurisdiction of state courts to order direct payments by pension plans to nonemployee ex-spouses and federal preemption of state community property laws.[110] Since the state court found no preemption, and did find jurisdiction, the Supreme Court's dismissal "necessarily determined that ERISA, including section 502(a)(1)(B), does not foreclose suits in state courts against ERISA-regulated pension plans by spouses seeking to enforce community property interests. . . . Hence, *Kerbow* was decided incorrectly."[111]

Clearly, then, the Ninth Circuit interprets ERISA as not preempting California community property law, nor divesting state courts of jurisdiction to order direct payments by pension funds to nonemployee ex-spouses.

IV. Viability of the ERISA Preemption Arguments

The foregoing summary and case analysis indicates that arguments that ERISA prevents state courts from requiring direct payment to nonemployee ex-spouses involve three main issues: (1) that ERISA is a comprehensive piece of legislation which occupies the field of pension regulations; (2) that section 502(a)(1)(B) of ERISA,[112] which determines the jurisdiction of courts in cases against pension funds, does not grant standing to sue nonemployee ex-spouses; (3) that section 206(d)(1),[113] forbidding assignments and alienations, prevents state courts from ordering direct payments to nonemployee ex-spouses.

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inquired into the standing of an exspouse, under 29 U.S.C. § 1132(a)(1)(B) (1976), to bring the action. That section says civil actions may be brought by participants or beneficiaries, and the court noted that it was undisputed that the ex-spouse was not within the Act's meaning. In light of that conclusion, the district court dismissed the claims of the ex-spouses and remanded to the state court. *Id.* at 1260. However, the decision was reached with very little analysis, beyond the four corners of the Act, of the policies underlying ERISA, and with no consideration of, or attempt to reconcile, important state community property concerns. *See also* Francis v. United Technologies Corp., 458 F. Supp. at 86-87.

110. *See* note 103 *supra*.

111. 632 F.2d at 743.

112. 29 U.S.C. § 1132(a)(1)(B) (1976).

113. 29 U.S.C. § 1056(d)(1) (1976).

A. *Preemption*

There are two bases to the argument that ERISA is a comprehensive piece of legislation which occupies the field of pension regulation. The first, a statutory basis, relies on ERISA's section 514(a)[114] which expressly supersedes any and all state laws "relating to" ERISA-regulated pension plans. The second, the general preemption argument, is that ERISA is such a complete scheme of regulation that it deprives states generally from acting in the area.

Turning to the latter basis first, the argument cannot stand. Although ERISA apparently occupies the pension regulation field,[115] this does not mean that every state law with even a tangential effect on pension plans is proscribed.[116] Unless there is some interference with the federal legislation's purposes or goals, no conflict between it and state laws which tangentially impact the federal scheme should be found.[117] This particularly relates to the important local state interest in domestic relations which otherwise would be preempted.[118]

The Congressional concerns in enacting ERISA are evident in ERISA's provisions. The seven major reforms in ERISA are: (1) setting a maximum length of time an employee must work to become a participant in a pension plan; (2) setting "minimum vesting standards, giving employees nonforfeitable rights to a pension upon reaching retirement age, whether or not they leave their employment before that age;"[119] (3) setting up minimum funding requirements to keep plans solvent; (4) setting up an insurance system (the Pension

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114. 29 U.S.C. § 1144(a) (1976).

115. *See, e.g.*, Standard Oil Co. of Cal. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977). In *Agsalud*, Hawaii's state health insurance law was held to be preempted by ERISA. The state law contained specific requirements for coverage by the plans as well as certain reporting requirements which differed from those of ERISA. *Id.* at 696.

116. *See* Stone v. Stone, 450 F. Supp. at 932.

117. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). The Supreme Court said in *Ray* that conflict exists "where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

118. *See* Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968), where the court said " 'the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.' " (quoting Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930)) *Id.* at 372.

119. *See In re* Marriage of Campa, 89 Cal. App. 3d at 122, 152 Cal. Rptr. at 366-67.

Benefit Guaranty Corporation) to ensure receipt of pension benefits by vested employees even in the event of premature plan termination; (5) setting up fiduciary standards and reporting and disclosure requirements; (6) providing for "administrative and judicial remedies;"[120] (7) making certain tax changes.[121] These reforms are intended to ensure that pension benefits, toward which employees work over a period of years, are obtainable when the employee retires.[122] One of the reasons this assurance is needed is to make sure retired employees will continue to be able to provide for their families.[123]

No conflict, real or potential, exists between the concerns noted above and orders of state courts requiring pension plans to make direct payments to nonemployee ex-spouses. Neither the letter nor the aim of any of those provisions is interfered with. In fact, the state court orders further the concern for the retired employee's family.

The Railroad Retirement Act's provisions support this conclusion. The provisions were largely responsible for the Supreme Court's preemption decision in *Hisquierdo*. Section 231(d)(e)(3)[124] of the Railroad Retirement Act provides that in the event of absolute divorce the entitlement of a spouse to an annuity will terminate. This provision addressed the policy of that Act, which was to encourage railroad employees to retire. ERISA does not involve such a policy; and though Congress clearly knows how to deal with the situation of divorced employees, as it expressly did in the Railroad Retirement Act, it chose not to use that limitation in ERISA. Thus, ERISA does not preclude provision of benefits to nonemployee former spouses.[125]

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120. *Id.* at 122, 152 Cal. Rptr. at 367.

121. *Id.*

122. *Id.* at 121-22, 152 Cal. Rptr. at 366. *See also* [1974] U.S. CODE CONG. & AD. NEWS at 5177 (statement of Harrison A. Williams, Chairman of the Senate Committee on Labor and Public Welfare).

123. 450 F. Supp. at 926.

124. 45 U.S.C. § 231d(c)(3) (1976).

125. *Cf.* 42 U.S.C. § 659 (1976), Social Security Act of 1975, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357 (1976), which amended section 231m of the Railroad Retirement Act and similar provisions in all other federal benefit plans relating to non-assignability of benefits, allows the benefits to be reached to satisfy spousal and child support obligations. Section 459 was later clarified by section 462(c) (Pub. L. No. 95-30, § 501(d), 91 Stat. 160 (1977)) which made clear that community property settlements were not included in the exemption to section 231m. Thus, it could be argued that absent an expression to the contrary, non-assignability clauses should include

The statutory basis for a preemption finding is section 514(a) of ERISA and the effect of state court orders directing payments by regulated plans to nonemployee ex-spouses. As previously mentioned, that section supersedes any and all state laws relating to regulated pension plans. The argument for preemption says a state court order requiring a plan to make payments directly to an ex-spouse "relates to" the plan. This argument, though superficially logical, neglects ERISA's underlying policies and fails to accommodate important state concerns. Nor can the meaning of "relates to" be said to be so unambiguous as to preclude interpretation. Indeed, the Supreme Court rejected recently the "plain meaning" rule,[126] even if it would otherwise be applicable here.

The ERISA policies and the state concerns in domestic relations matters were discussed above. Due to the important and uniquely local state concerns with domestic relations, no interference with congressional objectives results, and the clearly tangential relationship of direct-payment orders to ERISA-regulated plans does not "relate to" regulated pension plans within the meaning of section 514(a).

Therefore, ERISA does not preempt California community property law, either by the general preemption doctrine or by section 514(a) of ERISA.[127]

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community property divisions. However, these clauses must in the first instance be viewed in light of the purposes for and policies underlying the federal benefit plans to which they apply, such as the Railroad Retirement Act. *See* Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (1976), for the proper approach to statutory construction to be used in examining the antiassignment provisions of ERISA. *See* note 126 *infra*.

126. Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (1976). The Court in *Train* held that courts can and should consider legislative history even if the language of the statute is clear. *Id.* at 9-10. As summarized in Standard Oil Co. of Cal. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), "[t]he rule of statutory construction established in *CPIRG* is that unambiguous evidence in the structure and history of the legislation can rebut a contrary presumption created by unambiguous language of the legislation. Courts cannot amend statutes in the guise of interpreting them, and they must presume that Congress meant what it said. But the presumption, though heavy, is rebuttable." *Id.* at 703.

127. Indeed, because pension plans commonly do not object to the distribution of benefits to nonemployee ex-spouses, they arguably concede that no preemption exists, at least under the general doctrine. *See, e.g.*, Carpenters Pension Trust v. Kronschnabel, 632 F.2d at 747. This follows from the language of Mr. Justice Blackmun in *Hisquierdo*, indicating that such post-receipt distribution of an award of other community property to make up for the community share of the pension lost by the nonemployee ex-spouse would be contrary to the purposes of the Railroad Retirement Act and so forbidden by preemption. Hisquierdo v. Hisquierdo, 439 U.S. at 588.

B. *Standing of Nonemployee Ex-spouses Pursuant to Section 502(a)(1)(B) of ERISA*

Section 502(a)(1)(B) of ERISA provides:

> (a) A civil action may be brought -
> (1) by a participant or beneficiary -
> . . . .
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

"Participant" is defined as

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer of members of such organization, or whose beneficiaries may be eligible to receive any such benefits.[128]

"Beneficiary" means "a person designated by a participant or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."[129]

The typical standing argument says that since nonemployee ex-spouses clearly do not fall within the express definitions of "participant" or "beneficiary," such individuals do not have standing to sue for benefits under section 502(a)(1)(B).[130] This argument, however, though it has some surface appeal, would result in creating a right in nonemployee ex-spouses, but denying them any means of enforcing that right.[131] Since the courts looked to the legislative history

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Thus, the only remaining complaint would be the possibility of conflict with ERISA's regulatory provisions. But, as has been seen, such a conflict simply does not exist with regard to community property laws and direct-payment orders effectuating them.

128. 29 U.S.C. § 1002(7) (1976).

129. 29 U.S.C. § 1002(8) (1976).

130. Under § 502(e)(1) of ERISA, both state and federal district courts have jurisdiction over § 502(a)(1)(B) suits. Section 502(e)(1) provides:

> (e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by . . . a participant [or] beneficiary. . . . State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

131. This conclusion, of course, is inextricably tied to the conclusion in the pre-

of the Act in order to give full force and effect to Congress' intent,[132] they saw that employees' families constitute a class of people sought to be protected by Congress.[133] Consequently courts, logically, granted standing to nonemployee ex-spouses.[134]

The problem with this result is that courts are uncomfortable unless they have a peg on which to hang the result. Thus, courts have attempted to encompass employee families within the definitions of "participant" and "beneficiary,"[135] or to circumvent the definitions altogether.[136]

Regardless of which approach is attempted, the *Stone* court's position is the most reasonable and practical. The court had difficulty with the district court's interpretation of "participant" as meaning something other than what the plain words of its statutory definition conveyed.[137] Nevertheless, the circuit court glossed over the problem, saying:

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ceding section that state law is not preempted by ERISA and that Congress, in writing ERISA, intended that pension benefit rights survive to an employee's retirement, as well that those benefits survive so the employee can care for his family and live in dignity after his retirement. If a contrary conclusion is reached, the nonemployee ex-spouse would not have such a right.

132. *See* note 126 *supra.*

133. *See* Stone v. Stone, 450 F. Supp. at 926.

134. *See id.* at 933 n.17.

135. This was the case in *Kerbow,* 421 F. Supp. at 1259, where the plaintiffs apparently attempted to bring themselves within the definition of "beneficiaries" by saying that a state court decree altered the terms of the plan so as to make them beneficiaries. The district court rejected this argument, as it should have. Not only does the argument contradict the commonly held notion of what a beneficiary in this kind of setting means, but it means the state court crossed the line from mere distribution of community property to dabbling in the administration of the trust, an area preempted by Congress.

It is easier to say that a spouse is some sort of de facto participant under community property participation concepts. *See, e.g.,* Stone v. Stone, 450 F. Supp. at 931. The circuit court believed this was the approach taken by the district court in *Stone,* and found the approach troublesome. Carpenters Pension Trust v. Kronschnabel, 632 F.2d at 743. It should be noted, however, that, while reading between the lines of the district court decision in *Stone* may support this conclusion, nowhere did that court attempt to say that nonemployee ex-spouses are participants. Indeed, in reading that court's footnote seventeen, it appears the court was careful not to say that. *See* notes 86 & 88 *supra.*

136. The California state courts commonly adopt this approach in rejecting the contention that community property divisions are assignments, and in stating that nonemployee ex-spouses claim not as creditors but as owners. *See In re* Marriage of Johnston, 85 Cal. App. 3d at 912, 149 Cal. Rptr. at 806. *See also* Phillipson v. Bd. of Admin. Pub. Employees' Retirement Sys., 3 Cal. 3d at 44, 473 P.2d at 772, 89 Cal. Rptr. at 68.

137. *But see* note 135 *supra.*

> The Supreme Court's summary action in *Campa* sheds some light on this issue . . . and supports the district court's conclusion. . . . In dismissing the *Campa* appeal for want of a federal question, the United States Supreme Court necessarily determined that ERISA, including section 502(a)(1)(B), does not foreclose suits in state courts against ERISA-regulated pension plans by spouses seeking to enforce community property interest. *At the very least, therefore, we must say that the word "participant," as used in section 502(a)(1)(B), does not exclude an ex-spouse . . . from state court.*[138]

Rather than torturing the statutory definitions to fit these particular fact situations, this reasonable approach relies on the legislative history and clear intent of Congress by simply holding that the statutory definitions, particularly after the Supreme Court disposition of *Campa*, do not *exclude* nonemployee ex-spouses.[139]

Thus, section 502(a)(1)(B) does not preclude nonemployee ex-spouses from suing in state or federal court to enforce community property rights in their former spouse's pensions.

C. *Prohibition (by Section 206(d)(1)) of Assignments and Alienations*

The argument that section 206(d)(1) prohibits division of pension benefits as community property is inconsistent with ERISA's purposes and must be rejected.[140]

First, it should be noted that the terms "assignment" and "alienation" do not unambiguously refer to community property divisions. Indeed, the only law defining the status of spouses in this context is state law, which views them as coowners, not as creditors,[141] which is what the terms apply to

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138. Stone v. Stone, 632 F.2d at 743 (emphasis added).

139. While this approach arguably splits hairs, and one might say that since the definitions do not exclude such plaintiffs they arguably include them, thus leading back to the original problem, such is not the case. Such a rigid and unbending approach, and blind adherence to words without regard to the purpose for which they were written, creates unnecessary analytical problems and leads to a result contrary to that intended by Congress. *See generally* note 126 *supra*.

140. There is little that can be added in this analysis to the very thorough discussion by Judge Renfrew in Stone v. Stone, 450 F. Supp. at 924-31. Thus, this section will be more of a summary.

141. Phillipson v. Bd. of Admin. Pub. Employees' Retirement Sys., 3 Cal. 3d at

generally. This, of course, does not dispose of the issue. Since community property divisions are rather unique, and section 206(d)(1) does not clearly apply to them, it is necessary to look at the legislative history and the purposes of ERISA to see if state law interferes with congressional objectives. These objectives have been previously discussed and will not be repeated here. Suffice it to say community property principles, as applied to ERISA-regulated pensions, do not interfere with, but further the congressional objective to protect the employees' and their families' expectations.

Nor are the ERISA concerns of regulating the administration of pension plans interfered with. An examination of the ERISA provisions evidences this lack of conflict.[142] The only possible conflict is that pension plans making direct payments to former spouses will have to write two checks instead of one. No court thus far has found this burden enough to warrant precluding direct-pay orders. The extensiveness of the burden is unclear, though in this day of computer technology it is unlikely that the burden would be viewed as excessive. Moreover, if the claimants were actual participants rather than former spouses, it is unlikely the responsibility of writing an increased number of checks would justify a plan which refused to issue them. Thus, since former spouses have just claims, their status should not lead to a contrary result.

Furthermore, as the district court noted in *Stone*, no conflict exists with section 206(d)(1) due to direct-pay orders, even if the burden on plans is more substantial than foreseen presently, because section 206(d)(1) is not designed to protect any interests of the plans *qua* plans. That court noted that, though "[s]ome antiassignment statutes are designed 'to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignment, and to enable the [nonassigning party] to deal only with the [assigning party],' "[143] such was not the case with section 206(d)(1). Rather, "[i]f Congress [had] intended . . . to protect plans against these kinds of problems, it would not have permitted, as it did in 206(d)(2), even voluntary and revocable assign-

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44, 473 P.2d at 772, 89 Cal. Rptr. at 68.

142. *See* note 121 *supra* and accompanying text.

143. Stone v. Stone, 450 F. Supp. at 930 (quoting United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 373 (1949).

ments of up to ten percent of any benefit payment."[144]

Since Congress presumptively did not intend to interfere with state domestic relations laws,[145] but, rather, remains neutral with regard to such laws,[146] section 206(d)(1) does not preclude a state court from ordering an employee benefit plan to make direct payments to a nonemployee ex-spouse.

Clearly, if Congress had meant to preclude community property division of ERISA-regulated pensions, or to preclude direct-pay orders, it would have done so. Obviously it was aware of community property laws, and presumably their effect on pension benefits, as indicated by the Railroad Retirement Act provisions which cut off benefits to spouses upon absolute divorce, and preclude community property settlements from the exceptions to the antiassignment provisions of that act.[147] Nonetheless, in spite of this awareness, and the fact that Congress made provisions for it in the past, it chose not to do so in ERISA. Thus, Congress presumably intended to leave unaffected this area of important and unique state concern.

V. CONCLUSION

In passing ERISA, Congress intended to deal with problems in the administration of employee benefit plans which, in the past, served to frustrate the expectations of employees and their families. The object was to insure that pension benefits would survive until the employee's retirement so that he and his family would be provided for. Division of such benefits pursuant to state community property laws, and direct-pay orders by state courts to regulated plans, do not interfere with the purposes of ERISA and are neither preempted nor otherwise forbidden by that act, nor should they be.

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144. *Id.* In fact, the exception of § 206(d)(2) creates, if anything, a greater burden than direct pay orders since it requires the plan to make sure no more than ten percent of the payment is assigned. The court further noted that, in any event, the availability of interpleader under FED. R. CIV. P. 22 enables the plan to avoid the risk of double liability and exposure to substantial investigation and litigation expenses when each spouse claims a right to benefits under a judicial decree of property settlement. Stone v. Stone, 450 F. Supp. at 930.

145. *See* note 43 *supra* and accompanying text.

146. Stone v. Stone, 450 F. Supp. at 931.

147. *See* note 125 *supra* and accompanying text.