Death, Taxes, and Now Divorce—The Dyad Expands to a Triad: ERISA's Social Policy Harms Women's Rights

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MR. AND MRS. Smith reside in Nevada, a community property state. The Smith family has added two children in the last four years. Mr. Smith works for an insurance company, while Mrs. Smith raises their two children and occasionally works as a substitute teacher. The Smith family is not wealthy, although Mr. Smith's pension plan at work has a balance of $100,000. They believe that they share everything equally because they live in a community property state. However, under the current interpretation of federal retirement benefits laws, Mrs. Smith does not share in her husband's retirement benefits unless she divorces her husband or outlives him.

When Mr. Smith retires in thirty years, he will receive a lump sum payment of 50% of his account balance and an annuity payment for the remainder of his life. Because he is married, the annuity will be paid to him and his wife for their joint lives.

If Mr. Smith dies prior to reaching the retirement age of sixty-five, Mrs. Smith will receive an annuity equal to what she would have received under the joint annuity with her husband. The remaining vested benefits would be distributed to Mr. Smith's estate for disposition according to his will.

If Mrs. Smith dies prior to her husband retiring, her estate receives none of the retirement benefits. Mr. Smith's benefits would be

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paid to him upon his retirement in the form of the 50% lump sum payment and an annuity amount for his life.

If Mr. Smith dies after he retires but before Mrs. Smith dies, then the annuity amount that they were receiving would be reduced by 50%, and Mrs. Smith will receive half of the joint annuity amount for the rest of her life. The lump sum amount, which was distributed to Mr. Smith upon his retirement, would be an asset of Mr. Smith' s estate. He would be free to bequeath the lump sum to anyone he chooses.[1]

If Mrs. Smith dies after her husband retires but prior to his death, the annuity amount the Smiths were receiving would be reduced by half. She will not be able to bequeath any of the retirement benefits, unless her husband permits her to do so. Mr. Smith would permit this by either making the lump sum payment a community property asset or taking title to the asset in both of their names.

How did this disparity in marital property rights arise? It was created by the United States Supreme Court's current interpretation of federal retirement laws.[2] In 1974, Congress enacted the Employee Retirement Income Security Act[3] ("ERISA") in response to a series of retirement plan failures and other pension plan problems.[4] In later years, Congress amended ERISA with the Retirement Equity Act[5] ("REA") to provide women better security in their husbands' retirement benefits. In order to accomplish its goals, Congress needed to

1. Depending upon state marital property laws, if Mr. Smith commingled this asset with other community property assets, then it would be considered a community property asset. Generally, as a community property asset, one-half would belong to Mrs. Smith. In a non-community property state, the asset would most likely belong to Mr. Smith, because it would be titled in his name only.

2. *See* Boggs v. Boggs, 520 U.S. 833 (1997) [hereinafter *Boggs III*].

3. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 83 (codified as amended at 29 U.S.C. §§ 1001–1461 (1994 & Supp. IV 1999)). Common use of the term ERISA refers to the statute itself as well as the large body of administrative rulings and case law interpreting it. When referring to the statute alone, this Article will provide the cite of the statute.

4. The most notable incident is what is referred to as the Studebaker incident. *See* discussion *infra* Part I.A.2. For a discussion of the abuses which led to ERISA's enactment, see David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 443–45 (1987). For a summary of the political, social, and legislative impetuses behind ERISA, see SPECIAL COMM. ON AGING, U.S. SENATE, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 1–25 (Comm. Print 1984).

5. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

prevent interference by state laws; therefore, it drafted a preemption clause into ERISA.[6]

In *Boggs v. Boggs*,[7] the United States Supreme Court held that ERISA preempted state community property laws because these marital property laws frustrate the purpose of ERISA.[8] ERISA's purpose is to protect plan participants and beneficiaries,[9] but the *Boggs* Court extended the purpose of ERISA beyond its intended boundaries. In expanding the purpose of ERISA, the Court judicially grafted a social policy onto ERISA, favoring the living over the dead. The Court used this social policy to justify stripping a woman[10] of her property rights in her husband's retirement benefits when she predeceases him.

Even if the Court is correct that Congress intended to favor the living over the dead, it is a poor policy choice because it does more societal harm than good. First, the result of this interpretation of an otherwise facially neutral law disparately impacts women. Second, this policy devalues the contribution that women make to their families by raising children and maintaining the home. Third, favoring the living over the dead ignores the current theory of marriage—that marriage is a partnership. Additionally, it assumes that women only need enough property for their support and maintenance. This policy suggests that society supports stripping an owner of her right to transfer her property at her death. This policy reverts the determination of who owns the retirement benefits to the title system of ownership—a system that community property states have expressly elected not to use because it disadvantages women and forces them to rely upon the good intentions of their husbands. Finally, by choosing to favor the living over the dead, this policy signals to women that divorce is the best way to protect their property rights—in effect, advocating divorce and discouraging life-long marriage.

Part I of this Article discusses the history of ERISA and describes the relevant provisions of ERISA. In addition, Part I describes the various state marital property laws. Part I also analyzes the Supreme Court's determination in *Boggs* of the purpose of ERISA.

6. *See* 29 U.S.C. § 1144(a) (1994). For the language and a discussion of the history surrounding the drafting of the preemption clause, see *infra* Part I.A.4.

7. *Boggs III*, 520 U.S. 833 (1997).

8. *See id.* at 844.

9. *See* Varity Corp. v. Howe, 516 U.S. 489, 513 (1996) (stating that ERISA has a general purpose of protecting participants' and beneficiaries' interests).

10. A man can be a predeceased nonparticipating spouse. However, in the typical case, the non-titled spouse is the woman. The arguments and observations throughout this Article apply with equal force, regardless of gender.

Part II of this Article examines ERISA's purpose at enactment and the effect the REA amendments have on that purpose. This section demonstrates that ERISA's purpose is to protect plan participants and beneficiaries from employers and plan administrators, and that the Court in *Boggs* erroneously extended the scope of protection beyond the intent and text of ERISA.

Part III examines the Court's finding that state marital property laws are preempted by ERISA. It demonstrates that women were given ownership rights in their husbands' retirement benefits.

Part IV discusses the deficient policy choice of favoring the living over the dead. It argues that the result has a disparate impact upon women; this policy devalues a woman's contribution to her family, ignores the theory of marriage as an economic partnership, and encourages divorce.

Finally, Part V examines solutions that have been presented to remedy the inequity. Part V then proffers a simple amendment to ERISA that would allow probate orders to qualify as qualified domestic relations orders.[11] This solution is designed to remedy the inequities created by the Court's interpretation of ERISA's social policy.

I. Background

A. The Employee Retirement Income Security Act of 1974

1. What Are Pension Plans?

ERISA regulates "employee pension benefit plans"[12] and "em-

11. A qualified domestic relations order is defined as "any judgment, decree or order . . . which relates to the provisions of . . . marital property rights . . . to a spouse [or] former spouse . . . and [which] is made pursuant to a State domestic relations law (including a community property law)." 29 U.S.C. § 1056(d)(3)(B)(i) (1994). A qualified domestic relations order allows a non-participant spouse to share in the retirement benefits of her spouse, even in the event of divorce. *See id.* § 1056(d)(3). For further explanation of qualified domestic relations orders, see *infra* Part I.B.3.

12. *See* 29 U.S.C. § 1002(2)(A) (1994). Section 1002(2)(A) defines employee pension benefit plans as:

> [A]ny plan, fund, or program which was . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
> (i) provides retirement income to employees, or
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Id.

ployee welfare benefit plans."[13] The general purpose of pension plans is to provide retirement income to employees.[14] The two types of pension plans are the defined benefit plan and the defined contribution plan.

A defined benefit plan guarantees a retiree a predetermined payment amount.[15] With a defined benefit plan the risk of investment is on the employer. The employer makes all contributions to the plan on behalf of the employee, so there are no individual accounts.[16] Defined benefit plans are not as common as defined contribution plans.

A defined contribution plan acts as a savings plan for employees. The employee, and sometimes the employer, make contributions to an individual account in the employee's name.[17] Two common types of defined contribution plans are a 401(k) plan[18] and a profit sharing plan.[19] With a defined contribution plan, a participant is not guaranteed to receive a predetermined amount upon retirement because the risk of the investments made with the contributions is on the employee.[20]

Most participating employees defer receipt of current income until retirement by placing the money into an account sponsored by their employer.[21] Their employer provides them with a limited range of investment options, typically mutual funds, individual stocks, and

13. *See id.* § 1002(1). Section 1002(1) defines a welfare plan as "any plan, fund, or program which was . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits." *Id.* Although ERISA regulates both types of plans, this Article focuses on pension plans.

14. *See* Treas. Reg. § 1.401-1(b)(1)(i) (as amended in 1976).

15. *See* Treas. Reg. § 1.401-1(a)(2)(ii) (as amended in 1976). For example, the employer promises to pay the employee $500 a month for life when the employee retires after the age of sixty-five.

16. *See* Treas. Reg. § 1.401-1(b)(1)(i).

17. *See id.* § 1.401-1(b)(1)(ii). For example, the employer promises the employee that it will match the employee's current contribution up to a certain set percentage of income; or the employer promises to contribute $50 a month to the employee's retirement account while the employee is working full-time for the employer.

18. Most often this type of retirement plan is a 401(k) plan, named after the Internal Revenue Code section which grants the plan tax benefits. *See* 26 U.S.C. § 401(k) (1994). In a 401(k) plan, the employee makes contributions from current income into an account, which the employer may or may not match. *See id.* § 401(k)(2)(A). The employee, generally, has control over the investment decisions made regarding his or her account. *See id.* § 401(k)(2)(B).

19. *See* Treas. Reg. § 1.401-1(b)(1)(ii). Profit sharing plans permit employees to share in the employer's profits.

20. *See id.*

21. *See generally* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 24–25, 42 (2d ed. 1995).

bonds.[22] The employee chooses from the options available.[23] The account will earn income through the purchase and sale of the mutual funds, stocks, or bonds, as well as the interest and dividends generated by these investments.[24] The contributions and the income generated by them are accumulated until the employee retires.[25] Upon retirement, accumulated income is paid to the employee in the manner chosen by the employee, such as a lump sum payment or an annuity.

2. ERISA's History

Congress elected to occupy the field of regulation of retirement benefits in part because of the Studebaker incident.[26] In December of 1963, the Studebaker plant closed its doors and terminated the plant's pension plan.[27] Because Studebaker's pension plan was underfunded,[28] over 4,000 workers who were within twenty years of retirement or less received only fifteen cents for every dollar of vested pension benefits.[29] Over 2,900 workers received absolutely nothing.[30]

In response to this incident as well as others, Congress investigated the need for additional federal regulation.[31] The House and Senate focused on the abuses that occurred in the administration of these funds.[32] The Senate Special Committee on Aging observed that the "extremely rapid growth of private pension plans had led to all

22. *See id.* at 50.

23. *See id.*

24. *See generally* Vincent Amorosso & Paul C. Wirth, *Pension Plans and Other Post-Retirement and Post-Employment Benefits, in* ACCOUNTANT'S HANDBOOK (D.R. Carmichael et al. eds., 9th ed. 1999).

25. *See* 26 U.S.C. § 401(k)(2)(B) (1994).

26. *See* LANGBEIN & WOLK, *supra* note 21, at 62.

27. *See* Caroline Wrenn Cleveland, *ERISA Preemption: As the Federal Courts Identify the Outer Boundaries of ERISA's Preemption Clause, What Are the Implications for South Carolina State Actions?*, 42 S.C. L. REV. 743, 744 (1991).

28. *See* LANGBEIN & WOLK, *supra* note 21, at 63.

29. *See id.* at 65.

30. *See* Cleveland, *supra* note 27, at 744.

31. The Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA") was the first federal legislation to regulate employee pension and welfare plans. *See* Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (repealed 1975). However, Congress limited the scope of WPPDA to disclosure. *See id.* § 2(b). WPPDA failed to prescribe funding rules or participation requirements for employee benefit plans. It also failed to outline the fiduciary responsibilities of fund administrators or to attempt to regulate pension plans in any extensive manner.

32. *See* Michael S. Gordon, *Overview: Why Was ERISA Enacted?, in* SPECIAL COMM. ON AGING, U.S. SENATE, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 6–25, *reprinted in* LANGBEIN & WOLK, *supra* note 21, at 67–68.

manner of abuses, ranging from ineptness and lack of know-how to outright looting of benefit funds and corrupt administration."[33]

ERISA was designed to prevent these abuses and protect employees. ERISA requires that a plan administrator, often the employer, file certain forms and observe reporting and disclosure obligations.[34] ERISA also dictates certain participation, funding, accrual, and vesting rules.[35] Part one of ERISA provides the reporting and disclosure rules that plan administrators must follow.[36] The participation and vesting requirements are laid out in part two.[37] Part three is aimed at preventing plans from being underfunded.[38] Congress outlined fiduciary responsibilities of plan administrators in part four.[39] Finally, part five, which is the last of those parts aimed at pension plans, provides the rules for enforcement and administration of ERISA.[40] All of these parts contain rules and regulations aimed at governing plan administrators.[41] Three areas of ERISA are important to this Article: anti-alienation, preemption, and the Retirement Equity Act amendments.

3. ERISA's Anti-Alienation Provision

When Congress enacted ERISA, it included a requirement that pension plans must prohibit the assignment or alienation of benefits.[42] ERISA does not define the terms "assigned" or "alienated." But the terms have been defined by Treasury Department regulations to

33. *Id.* at 67–68.

34. *See* 29 U.S.C. §§ 1021–1169 (1994 & Supp. IV 1999).

35. *See id.*

36. *See* 29 U.S.C. §§ 1021–1031 (1994 & Supp. IV 1999). For example, section 1021 imposes a duty to disclose and report to plan participants and beneficiaries. *See* 29 U.S.C. § 1021 (1994).

37. *See* 29 U.S.C. §§ 1051–1061 (1994 & Supp. IV 1999). For example, section 1052 limits the amount of time an employee must wait before he or she is permitted to participate in his or her employer's pension plan. *See* 29 U.S.C. § 1052 (1994).

38. *See* 29 U.S.C. §§ 1081–1086 (1994 & Supp. IV 1999). For example, section 1082 sets minimum funding standards that plans must meet in order to qualify for tax benefits. *See* 29 U.S.C. § 1082 (1994 & Supp. IV 1999).

39. *See* 29 U.S.C. §§ 1101–1114 (1994 & Supp. IV 1999). For example, section 1104 requires that a plan administrators acts as a prudent man would act. *See* 29 U.S.C. § 1104 (1994 & Supp. IV 1999).

40. *See* 29 U.S.C. §§ 1131–1147 (1994 & Supp. IV 1999). Section 1144 is the preemption clause, which preempts all state laws that relate to employee benefit plans. *See* 29 U.S.C. § 1144(a) (1994).

41. Some commentators might argue that 29 U.S.C. § 1056(d)(1) (1994), which requires that a plan prohibit assignments and alienations, is addressed to the participants and the beneficiaries. However, the language of this section speaks directly to plan administrators by telling them that their plans must forbid assignments and alienations. *See id.*

42. *See id.* (stating that each pension plan shall provide that benefits provided under the plan may not be assigned or alienated).

mean "[a]ny direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary."[43]

ERISA did permit two exceptions to this anti-alienation requirement.[44] First, a plan can permit a participant or beneficiary to borrow from the plan using the participant's accrued, nonforfeitable benefit as security.[45] Second, the participant may make a revocable and voluntary assignment of up to 10% of any benefit payment.[46]

4. ERISA's Preemption Provision

Congress knew when it enacted ERISA that it was necessary to preempt state laws. It used broad language of preemption when it wrote section 1144: "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[47] Originally, both the House[48] and Senate[49] versions of ERISA limited preemption to those state laws which regulated employee benefit plans. However, the Conference Committee broadened the language of ERISA's preemption provision without any effective explanation in its report.[50] Because the signing ceremony for ERISA was set for Labor Day, this change, which occurred ten days before the ceremony, was accepted "without thorough investigation, spirited debate, and careful study."[51] As a result, the legislative history

43. Treas. Reg. § 1.401(a)-13(c)(ii) (as amended in 1976).

44. *See infra* text accompanying note 153. The Retirement Equity Act created a third exception, qualified domestic relations orders. *See id.*

45. *See* 29 U.S.C. § 1056(d)(2) (1994) (stating in part that "a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of title 26").

46. *See id.*

47. 29 U.S.C. § 1144(a) (1994).

48. *See* H.R. 2, 93d Cong. § 514 (1973), *reprinted in* 120 CONG. REC. 8860 (1974). The House preemption provision provided that "[t]he Act supersedes all state and local laws relating to fiduciary standards, reporting, disclosure, vesting, and funding (except for civil action by a participant or beneficiary to recover benefits due or to clarify rights to future benefits)." *Id.*

49. *See* S. 4, 93d Cong. § 699 (1973), *reprinted in* 120 CONG. REC. 8860 (1974). The Senate's version was "[t]he provisions of this Act . . . supersede all state law as they relate to the subject matters covered by these two acts (i.e., vesting, funding, termination insurance, portability, reporting and fiduciary standards)." *Id.*

50. *See* Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 951, 979 (2000).

51. *Id.* at 977–78.

is of little help to understand Congress' intent in adopting ERISA's broad preemption provision.

When a court determines the issue of preemption, it must decide if Congress intended field preemption or conflict preemption.[52] Field preemption[53] is when federal law completely occupies the range of regulation, and all state laws are preempted, even those laws that are consistent with federal law.[54] Conflict preemption[55] would allow a state to regulate in the same subject area as federal law so long as the state law does not contradict federal law[56] or frustrate the purposes and goals of the federal law.[57]

In determining if Congress fully occupies the field of regulation in a subject area, a courts looks to Congress' intent.[58] Where legislation includes a preemption provision, a court will sometimes consider Congress' intent in enacting the entire legislation containing the preemption provision, while at other times it will only consider the intent behind the preemption provision itself.[59] When a court is considering field preemption of a subject of traditional state regulation, it looks for a clear manifestation of congressional intent to do so.[60]

The Supreme Court in *Boggs* never determined Congress intended ERISA to fully occupy the field of pension plans.[61] In developing a workable test for ERISA preemption issues, the Court determined that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."[62] However, the Court realized that some state laws may be connected in too "tenuous, remote, or peripheral a manner to war-

52. *See* Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983).

53. For a more detailed explanation of field preemption, see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *Rice* explains that one example of field preemption is the laws governing immigration and citizenship. *See id.*

54. *See* Bogan, *supra* note 50, at 961.

55. For a more detailed explanation of conflict preemption, see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

56. *See id.*

57. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

58. *See* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); *see also Rice*, 331 U.S. at 230.

59. In interpreting the intent of Congress when it enacted ERISA, the Court has considered Congress' intent both in enacting the entire legislation and in crafting the preemption provision itself. *Compare* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (looking at the intent of ERISA as a whole) *with* Shaw v. Delta Air Lines, Inc. 463 U.S. 85 (1983) (looking at the intent of the preemption provision).

60. *See Rice*, 331 U.S. at 230.

61. *See Boggs III*, 520 U.S. 833, 841 (1997).

62. *Shaw*, 463 U.S. at 96–97 (citing BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)).

rant a finding that the law 'relates to' the plan."[63] Although this is the general standard to determine preemption in ERISA cases,[64] this standard was not followed in *Boggs*.[65]

B. REA Amendments to ERISA

The Retirement Equity Act[66] ("REA") amended ERISA and the Internal Revenue Code of 1954 to improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers, their spouses, and their dependents.[67] REA was to provide equity by taking into account changes in work patterns.[68] REA also recognized marriage as an economic partnership[69] and the substantial contribution to that partnership of spouses who work both inside and outside the home.[70] REA included several changes to ERISA, which Congress felt were necessary to guarantee that the nation's private retirement-income system provides fair treatment for women.[71] Congress' intent was to protect the nonemployee spouse from losing his or her claim to a retirement resource through changes in marital status due to divorce or the death of the employee spouse.[72] Congress recognized that nonemployee spouses, generally women, have an interest in the pension earned by the working spouse.[73] Therefore, Congress added new requirements to ERISA designed to protect the rights of the nonemployee spouse.

1. Annuity Requirements

First, if a plan provided an annuity as a benefit, the plan was required to provide the annuity in the form of a Qualified Joint and Survivor Annuity ("QJSA") to all married participants.[74] A QJSA would pay an annuity amount to the participant and his spouse based upon

63. *Id.* at 100 n.21.

64. *See id.* at 95–96.

65. *See Boggs III*, 520 U.S. 833, 841–44 (1997) (holding that state law was preempted under traditional conflict preemption rules making it unnecessary to address the "relate to" test).

66. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

67. *See id.*

68. *See id.*

69. For a discussion about marriage as a partnership, see *infra* Part V.C.

70. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

71. *See* S. REP. No. 98-575, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2547.

72. *See* S. REP. No. 98-575, at 19, *reprinted in* 1984 U.S.C.C.A.N. at 2565.

73. *See* S. REP. No. 98-575, at 12, *reprinted in* 1984 U.S.C.C.A.N. at 2558.

74. *See* 29 U.S.C. § 1055(a) (1994). Section 1055(a) states:

their joint lives, referred to as the joint annuity.[75] Upon the death of the participant, the spouse would be entitled to continue to receive an annuity equal to at least 50% of the joint annuity amount for the rest of her life, referred to as the "survivor annuity."[76]

Second, if the plan offered any annuity options, it was required to provide a Qualified Preretirement Survivor Annuity ("QPSA") to married participants.[77] If the participant died prior to retirement, the QPSA would provide the surviving spouse with an annuity for her life

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Each pension plan to which this section applies shall provide that—(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and (2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

Id.

75. *See id.* § 1055(d)(1).

76. *See id.* § 1055(d). Section 1055(d) states that a QJSA is an annuity which:

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and (2) which is the actuarial equivalent of a single annuity for the life of the participant.

Id.

77. *See id.* § 1055(e)(1). Section 1055(e)(1) states that the term "qualified preretirement survivor annuity" means a survivor annuity for the life of the surviving spouse of the participant if:

(A) the payments to the surviving spouse under such annuity are not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity under the plan (or the actuarial equivalent thereof) if—

(i) in the case of a participant who dies after the date on which the participant attained the earliest retirement age, such participant had retired with an immediate qualified joint and survivor annuity on the day before the participant's date of death, or

(ii) in the case of a participant who dies on or before the date on which the participant would have attained the earliest retirement age, such participant had—

(I) separated from service on the date of death,

(II) survived to the earliest retirement age,

(III) retired with an immediate qualified joint and survivor annuity at the earliest retirement age, and

(IV) died on the day after the day on which such participant would have attained the earliest retirement age, and

(B) under the plan, the earliest period for which the surviving spouse may receive a payment under such annuity is not later than the month in which the participant would have attained the earliest retirement age under the plan.

Id.

based upon the amount of vested benefits at the time of the participant's death.[78]

The legislative history of QJSA and QPSA demonstrates that the Senate Finance Committee thought that pre-REA law resulted in inequitable treatment of participants in pension plans who die before reaching the normal retirement age under their employer's plan.[79] The Finance Committee recognized that under the pre-REA law, the participant's spouse may be entitled to no survivor benefits from the plan even though the participant had accrued significant vested benefits before death.[80] Under pre-REA law, essentially, all vested benefits were forfeited. For these reasons, the legislative history illustrates that Congress opted to provide automatic survivor benefits to the spouses of vested participants to protect nonemployee surviving spouses.[81]

2. Ownership Rights

Congress gave spouses ownership rights, including decision-making rights in their spouses' retirement benefits, because it felt a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely.[82] Section 1055 of ERISA permits the participant to opt out of the QJSA or QPSA form of benefits, but only with the written consent of the participant's spouse.[83] These amendments suggest a recognition of a species of co-ownership, which is consistent with marital property rights and inconsistent with the policy described in *Boggs*.[84]

3. Qualified Domestic Relations Orders

REA also created Qualified Domestic Relations Orders ("QDROs"), allowing a non-participant spouse to share in the retirement benefits of her spouse even if the couple divorces.[85] A qualified domestic relations order is defined as "any judgment, decree or order . . . which relates to the provisions of . . . marital property rights . . . to a spouse [or] former spouse . . . and [which] is made pursuant to a

78. *See id.*
79. *See* S. REP. No. 98-575, at 12 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2558.
80. *See id.*
81. *See id.*
82. *See id.*
83. *See* 29 U.S.C. § 1055(c) (1994 & Supp. IV 1999).
84. *See Boggs III*, 520 U.S. 833, 852 (1997) (stating that the policy is to protect the living by providing a stream of income).
85. *See* 29 U.S.C. § 1056(d)(3) (1994).

State domestic relations law (including a community property law)."[86] Congress created QDROs as the mechanisms to assure that former spouses of pension plan participants received their share of the plan benefits in the event of a divorce.[87]

The provisions for QDROs arose because Congress recognized that the courts differed in their opinions of whether state marital property laws, as they relate to familial obligations, were preempted by ERISA.[88] REA's provisions for QDROs made it clear that state divorce laws could allocate retirement benefits and still be consistent with ERISA,[89] which is additional evidence of a recognition of co-ownership.

A QDRO "recognizes the existence of an alternate payee's right to . . . receive all or a portion of the benefits payable with respect to a participant under a plan."[90] The statute then describes the requirements for an order to be a qualified domestic relations order.[91] This section does not grant a spouse a right in her husband's benefits upon divorce; state law is still necessary to provide the right. This section is merely a federal enforcement mechanism of a property right granted by state marital property laws.

86. *Id.* § 1056(d)(3)(B)(i). This section provides:

(i) the term "qualified domestic relations order" means a domestic relations order—

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which—

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

Id.

87. *See* Ablamis v. Roper, 937 F.2d 1450, 1450–51 (9th Cir. 1991).

88. *See* S. REP. No. 98-575, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2565.

89. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

90. 29 U.S.C. § 1056(d)(3)(B)(i)(I) (1994).

91. *See id.* § 1056(d)(3)(C)–(D).

C. State Marital Property Laws

1. Community Property System

Washington,[92] Idaho,[93] California,[94] Texas,[95] Arizona,[96] Nevada,[97] Louisiana,[98] New Mexico,[99] and Wisconsin[100] have either a community property or community property-like regime for married couples. In these states, marriage is considered an equal partnership with each spouse contributing equally to the marriage.[101] All assets acquired during the marriage are presumed to be community property, which grants each spouse a one-half undivided ownership interest in the asset.[102] Any expenditure of time, skill, or effort by a married person during the marriage, which results in the acquisition of property, produces community property.[103] Wages, salaries, and anything of value acquired in the course of an employment relationship during the marriage are community property.[104]

2. Common Law Property System

Spousal property rights in the other forty-one states are determined under one of two systems: the title system and the equitable distribution system. The title system, which is not used when the marriage ends in divorce, treats the owner of the property as the person who held title to the property.[105] The equitable distribution system

92. *See* WASH. REV. CODE ANN. § 26.16.030 (West 1997).
93. *See* IDAHO CODE § 32-906 (Michie 1999).
94. *See* CAL. FAM. CODE § 760 (West 1994).
95. *See* TEX. CONST. art. XVI, § 15; *see also* TEX. FAM. CODE ANN. § 3.002 (1998).
96. *See* ARIZ. REV. STAT. § 25-211 (2000).
97. *See* NEV. REV. STAT. § 123.220 (Michie 1998).
98. *See* LA. CODE CIV. PROC. ANN. art. 2338 (West 1985).
99. *See* N.M. STAT. ANN. § 40-3-12 (Michie 1978).
100. *See* WIS. STAT. ANN. § 766.31 (West Supp. 1999). Wisconsin has incorporated some community property principles, but it is not a formal community property state. *See* Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 769 n.2.
101. *See Boggs III*, 520 U.S. 833, 840 (1997).
102. Not all community property states grant an immediate one-half interest upon divorce. Arizona, Nevada, Texas, and Washington divide property at divorce by equitable distribution. *See* Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 504 (2000).
103. *See* GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 6 (2d ed. 1993) (stating the general principle that "[c]ommunity property is all property produced by labor of either spouse during marriage").
104. *See id.*
105. *See* Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115, 117–18 (1997).

combines some of the elements of the community property system with some from the title system.[106]

Under the title system, marriage is a "union of economically separate individuals."[107] When property is acquired, it is not acquired on behalf of the marriage, but on behalf of the individual.[108] The title system often awards men most of the assets of a marriage because he was the wage earner and title holder.[109] Because of this inequity, no state continues to use the title system for property division at divorce, and most have converted to an equitable distribution system.[110]

Under the equitable distribution system, states developed different ways to determine which assets are marital assets.[111] A majority of these states use an approach similar to the community property system, which has both marital assets and separate assets.[112] Like some community property states,[113] some equitable distribution states have a presumption that the marital assets belong equally to wife and husband.[114] Unfortunately, in common law states, equitable distribution is often limited to dissolution of the marriage by divorce.[115] If the marriage terminates because of the death of one of the spouses, some states revert back to the title system of property.[116] Most of these states provide limited protection to the surviving spouse through elective share statutes.[117]

D. *Boggs v. Boggs*

1. Factual Background

Dorothy and Isaac Boggs, residents of Louisiana, were married for thirty years until Dorothy's death in 1979.[118] In her will, Dorothy

106. *See id.* at 124.

107. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 73 (1993).

108. *See* LESLIE HARRIS ET AL., FAMILY LAW 8 (1996).

109. *See* Bell, *supra* note 105, at 118.

110. *See* Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 479–80 (1999).

111. *See* Bell, *supra* note 105, at 125.

112. *See* BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 1.02, at 44 (2d ed. 1994).

113. *See* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY §§ 13.02, 13-8.1 (1994).

114. *See* TURNER, *supra* note 112, § 5.03(5).

115. *See* Bell, *supra* note 105, at 130.

116. *See id.* at 130–31.

117. For a discussion of the elective share statute, see *infra* Part IV.D.

118. *See* Boggs v. Boggs, 849 F. Supp. 462, 463 (E.D. La. 1994), *aff'd*, 82 F.3d 90 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997) [hereinafter *Boggs I*].

left one-third of her estate to her husband outright, and she left him a lifetime usufruct[119] of the remaining two-thirds.[120] The remainder of Isaac's lifetime usufruct was divided among their three sons.[121] The usufruct included retirement benefits from Isaac's employer, South Central Bell, that had accrued during Dorothy and Isaac's marriage.[122] Her half of the retirement benefits then vested, $21,194.29,[123] was included in Dorothy's gross estate.[124]

In 1980, less than a year after Dorothy's death, Isaac married Sandra.[125] Sandra and Isaac were married until he died in 1989.[126] When he retired in 1985, Isaac was entitled to various benefits from his employer's retirement plans. When Isaac died, his will gave his current wife, Sandra, a lifetime usufruct in the remainder of his estate, which included the retirement benefits and assets.[127] Isaac provided his three sons with the remaining interest.[128] Soon after Isaac's death, two of his sons from his first marriage sued in a Louisiana state court requesting that the court appoint an expert to determine what amount of the retirement benefits they were entitled to under their mother's will.[129] Sandra then filed a complaint in federal court for a declaratory judgment, asking the court to rule that ERISA preempted state law.[130]

The district court held that under Louisiana's community property laws, Dorothy owned a substantial interest in her husband's pension and retirement plans because they were married for thirty of the thirty-six years that he was employed by South Central Bell.[131] The court decided that ERISA did not preempt Louisiana's community property laws because they "were not specifically designed to affect

119. A usufruct is essentially the equivalent of a life estate. *See* LA. CIV. CODE ANN. art. 535 (West 1980).

120. *See Boggs I*, 849 F. Supp. at 463.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See* 26 U.S.C. § 2039(a) (1994). Section 2039(a) includes in the estate of the decedent the value of an annuity if the decedent possessed the right to receive an annuity payment during his or her lifetime, a period unascertainable without reference to decedent's death, or for a period of time which does not end prior to death. *See id.* Because Dorothy had the right to a joint and survivor annuity from Isaac's retirement plan, the value of her right was included in her gross estate. *See* Boggs v. Boggs, 82 F.3d 90, 97 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997) [hereinafter *Boggs II*].

125. *See Boggs I*, 849 F. Supp. at 463.

126. *See id.*

127. *See id.* at 464.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

ERISA benefit plans."[132] The court stated that Louisiana's community property laws do not "relate to" an employee benefit plan as required by ERISA's preemption provision.[133]

The Fifth Circuit affirmed the trial court's decision.[134] In determining if ERISA's preemption provision was triggered, the appellate court engaged in a two-part analysis.[135] First, the court considered whether the state law at issue "involve[d] an exercise of traditional state authority."[136] The court determined that laws governing the acquisition and ownership of property during marriage were an exercise of traditional state authority.[137]

Next, the Fifth Circuit considered whether the state law "affect[ed] relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries" or whether it only "affect[ed] relations between one of these entities and an outside party" or "two outside parties with only an incidental effect on the plan."[138] The court held that Louisiana's "community property laws [were] not sufficiently 'related to' an employee benefit plan" because nothing was sought from the plan or its fiduciary nor was a duty imposed on the plan or the administrator.[139] The court held that its decision related to "the disposition of the proceeds only after payment to the designated beneficiary" not to the plan itself.[140]

2. The Supreme Court's Decision

The issue before the United States Supreme Court was whether ERISA preempted community property laws as to the testamentary transfer of retirement benefits by a predeceasing non-participant spouse.[141] In a five-to-four decision, the Court held that ERISA preempted application of Louisiana community property laws, which would have allowed a first wife to make a testamentary transfer of her interests in her survivor's annuity and in her husband's retirement benefits.[142]

132. *Id.* at 465.
133. *See id.*
134. *See Boggs II*, 82 F.3d 90, 96 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997).
135. *See id.* at 95.
136. *Id.*
137. *See id.* at 96.
138. *Id.* at 95–96.
139. *Id.* at 96–97.
140. *Id.* at 97.
141. *See Boggs III*, 520 U.S. 833, 839 (1997).
142. *See id.* at 841.

Before the Supreme Court concluded that ERISA preempted the state's marital disposition law, the Court attempted to determine ERISA's purpose. The Court considered ERISA as it was amended by REA and concluded that the purpose was to protect the plan participants and beneficiaries.[143] The Court erroneously determined that because the state's community property laws frustrate this purpose, ERISA preempted these laws.[144]

The Court concluded that the purpose behind the requirements that REA added to ERISA was to provide a stream of income to participants and beneficiaries.[145] Since a surviving spouse is guaranteed to receive at least 50% of the QJSA when her husband dies, any attempt to decrease that amount would frustrate the purpose of the 50% requirement.[146] The Court decided that the goal of this provision was to protect the surviving spouse, granting her a certain level of income.[147] Allowing the first wife to bequeath her share would reduce the amount of income available to the second wife.[148] An ex-spouse, through a QDRO, could be entitled to receive part of the surviving spouse's share of the annuity.[149]

Next, the Court looked at the anti-alienation provision of ERISA. It determined that the purpose of this section was to assure the participants and beneficiaries that retirement funds would be available at retirement.[150] The Court found that Congress intended to preempt non-beneficiary non-participant interests with this anti-alienation provision.[151]

The Court then examined the effect of the QDRO provision on ERISA's anti-alienation section. The Court determined the purpose of this amendment was to provide a stream of income as well.[152] The QDRO provision was viewed as a limited exception to the anti-alienation provision.[153] The Court believed that a first wife's bequest of the right to a QJSA or other retirement benefits would be an assignment or alienation, which would be prohibited by ERISA.[154] A probate

143. *See id.* at 845.
144. *See id.*
145. *See id.* at 843.
146. *See id.* at 843–44.
147. *See id.* at 843.
148. *See id.* at 844.
149. *See id.*
150. *See id.* at 852.
151. *See id.*
152. *See id.*
153. *See id.* at 839.
154. *See id.* at 851.

court order enforcing the bequest would not qualify as a QDRO because the order would not deal with domestic relations.[155] Therefore, any bequest of a retirement benefit would be a prohibited assignment or alienation.[156]

The Court then noted that pensions are designed for the benefit of the living.[157] According to the majority, Congress' fundamental intent, which was evident throughout ERISA, was to insure that both spouses would receive sufficient funds to afford them security during their lifetimes.[158] The Court concluded that inherent in this goal of protecting plan participants and beneficiaries by providing a stream of income in the retirement years was a social policy of favoring the living over the dead.[159] Because Sandra was alive and in need of support, allowing Dorothy's bequest of her property right would limit the amount of support available to Sandra.[160] Therefore, the Court held that Louisiana's community property law, which allowed Dorothy to make her bequest, must be preempted by ERISA because it frustrated the purpose of ERISA.[161]

II. Purpose of ERISA

When enacting ERISA, Congress took great care to enumerate its reasons for doing so. By examining the structure of ERISA, its language, and the history surrounding its enactment, the purpose of protecting plan participants and beneficiaries is clear. However, that purpose was limited in its scope to protecting participants and beneficiaries from their employers and/or plan administrators.[162] The *Boggs* decision erroneously extended the scope of protection beyond ERISA's original intent and text.

155. *See id.* at 849.

156. *See id.* at 851.

157. *See id.* at 854; *see also* Ablamis v. Roper, 937 F.2d 1450, 1457 (9th Cir. 1991) (holding that ERISA preempts nonemployee spouse's possible property right in employee spouse's pension under California community property law). The court in *Ablamis* stated, "Pensions are designed for the benefit of the living." 937 F.2d at 1457.

158. *See Ablamis*, 937 F.2d at 1457.

159. *See Boggs III*, 520 U.S. at 854.

160. *See id.* at 844.

161. *See id.* at 841.

162. *See* discussion *infra* Part II.A.

A. Purpose of ERISA at Enactment

The text of ERISA's section 1001(a) states Congress' purpose in enacting ERISA.[163] The text of the purpose section stresses the importance of disclosure, minimum standards for pension plans, and financial soundness.[164] Inherent in this language is the intent to protect plan participants and beneficiaries. Looking at this language, it demonstrates that participants and beneficiaries need to be protected from their employers and/or plan administrators. Therefore, when enacting ERISA, Congress focused only on protection against abuses by the administrators of the plans.

The history surrounding the enactment of ERISA enforces this view of its purpose. As discussed earlier, ERISA was a reaction to abuses by plan administrators or employers, which left participants and beneficiaries without any benefits or limited benefits upon retirement.[165] Companies had closed and pension plans were eliminated.[166] Workers who had put money into plans were denied their benefits because they did not meet the stringent vesting requirements.[167] The legislative history rarely discusses the need for participants to be protected from themselves. What the legislative history indicates is a need for participants and beneficiaries to be protected from their employers and plan administrators.

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163. *See* 29 U.S.C. § 1001(a) (1994). Section 1001(a) provides:

> The Congress finds . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

Id.

164. *See id.*

165. *See supra* notes 26–30 and accompanying text.

166. *See* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 444 n.55 (1987).

167. *See id.* at 443–45.

Congress' purpose was "the establishment of certain minimum standards to which all private pension plans must conform if the private pension promise is to become real rather than illusory."[168] Congress' effort was designed to protect the long-term employee participating in and contributing to a pension plan who would otherwise lose his or her benefits.[169] Congress wanted to reduce the adverse pension effects of plant closings and bankruptcy on workers.[170] Congress' goals with ERISA were to "eliminate or substantially reduce unduly restrictive qualification requirements . . . reduce the probability of self-serving actions by pension fund administrators and trustees . . . reduce the likelihood that such funds will go broke, and provide insurance against the possibility that they may."[171]

Scrutiny of the structure of ERISA further reinforces this limitation on the protections of ERISA. Parts one through five of ERISA are relevant to pension plans and retirement benefits.[172] Part one provides reporting and disclosure requirements.[173] Part two establishes ERISA participation and vesting requirements.[174] Part three sets minimum funding standards.[175] Part four describes the fiduciary responsibilities of the plan administrators.[176] Finally, part five discusses the administration and enforcement of these protections.[177] These five parts of ERISA all impact plan administration and seek to regulate plan administrators.

Even the anti-alienation provision of ERISA[178] does not demonstrate that Congress' intent was to protect participants and beneficiaries from a bequest of a beneficiary's interest. This section permits

168. SUBCOMM. ON LABOR, COMM. ON LABOR AND PUBLIC WELFARE, U.S. SENATE, COMMITTEE ON WAYS AND MEANS, 93D CONG., REPORT ON LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 2924, 3306 (Comm. Print 1974) [hereinafter ERISA REPORT]. Underlying the provisions of ERISA, Congress recognized the need for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, or the consequences of lack of inadequate vesting, but also with the broad spectrum of questions such as adequacy of funding and adequate communication to participants. *See id.*

169. *See id.* at 3369 (statement of Mr. Perkins, the Representative from Kentucky and Chairman of the full Committee on Education and Labor).

170. *See id.*

171. *Id.*

172. For a description of the parts of ERISA, see *supra* Part II.A.1.b.

173. *See* 29 U.S.C. §§ 1021–1030 (1994 & Supp. IV 1999).

174. *See* 29 U.S.C. §§ 1053–1060 (1994 & Supp. IV 1999).

175. *See* 29 U.S.C. §§ 1082–1085 (1994 & Supp. IV 1999).

176. *See* 29 U.S.C. §§ 1101–1113 (1994 & Supp. IV 1999).

177. *See* 29 U.S.C. §§ 1131–1147 (1994 & Supp. IV 1999).

178. *See* 29 U.S.C. § 1056(d) (1994 & Supp. IV 1999).

loans to participants and beneficiaries.[179] It also permits voluntary and revocable assignments of up to 10% of distributions.[180] These exceptions suggest that Congress was not trying to prevent the participant or the beneficiaries from divesting themselves or each other of pension benefits. Instead, it suggests that Congress was preventing plan administrators from dealing with a creditor's claims against the benefits.

But was Congress concerned about a participant divesting themselves prior to retirement? In its report to the Senate, the Committee on Labor and Public Welfare did not indicate that alienation prior to retirement was a major issue.[181] That was only a minor concern of Congress. The anti-alienation issue was raised during the discussions about vesting benefits.[182] Congress was more concerned with plan administrators abusing assignments and alienations to divest participants of those benefits that had vested.[183] In discussing alienation, the Committee indicated that a garnishment or a levy would not be a voluntary assignment.[184] If the garnishment or levy was not a voluntary assignment, it would be an alienation in violation of ERISA. This sheds some light on what Congress might have meant by adding the anti-alienation provision. Congress wanted the employee to be protected from having his or her retirement benefits garnished or levied.[185]

B. Effect of REA Amendments on the Purpose of ERISA

How did the REA amendments to ERISA affect its purpose? Did these amendments extend the scope of ERISA's protection beyond its original purpose? The Supreme Court in *Boggs* stated that "[t]he statutory object of the qualified joint and survivor annuity provisions, along with the rest of [section] 1055, is to ensure a stream of income to surviving spouses."[186] Overall, the QJSA and QPSA amendments seem designed to guarantee or protect a non-participant spouse's interest.

179. *See* 29 U.S.C. § 1056(d)(2) (1994).

180. *See id.*

181. *See* S. REP. NO. 93-127 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4844–47.

182. *See* ERISA REPORT, *supra* note 168, at 3505, 3552 (noting Representative Griffiths' statements about the removal of income from the tax stream—the only discussion of a stream of income in the legislative history of ERISA).

183. *See* Gordon, *supra* note 32, at 17–20.

184. *See* S. REP. NO. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890.

185. *See id.*

186. *Boggs III*, 520 U.S. 833, 843 (1997).

Who is section 1055 geared toward? This section states what benefits a plan is required to provide.[187] The only difference between a QJSA and QPSA is the timing of the death of the participant. The purpose of the QJSA is to protect a spouse in the event of the premature death of the participant after retirement.[188] The purpose of the QPSA is to prevent forfeiture of vested benefits if the participant dies before retirement.[189] Nothing about the QJSA or QPSA requirements suggests expanding the purpose of ERISA beyond protection from plan administrators.

Another REA amendment added the QDRO requirement to ERISA's anti-alienation provision. What was Congress' purpose in passing the QDRO provision? A Senate report indicates that the purpose of the QDRO exception was to "clarif[y] that such order does not result in a prohibited assignment or alienation of benefits."[190] This provision demonstrates that Congress did not want ERISA to preempt community property laws. The Senate Finance Committee explained that those state laws, which provide for the rights (community property laws), would continue to be exempt from ERISA.[191] If these laws were going to continue to be exempt, then they must have been exempt prior to REA. If Congress did not want ERISA to preempt community property laws in the event of a divorce, why would it want to preempt in the event of death?

Furthermore, the existence of the QDRO exception cannot suggest that Congress wanted to preempt marital property laws, because these laws are the source of the property right that entitles a woman to obtain a QDRO. The QDRO is just the mechanism Congress selected through which women are able to exercise their state created property rights in the event of a divorce. It was not Congress' intent to trump all application of state community property laws and inject its own property regime. This is evidenced by the fact that nothing in the QDRO provisions creates a property right or establishes a federal property regime.[192]

Congress' intent was to protect pension plan administrators from inconsistent or vague state court orders and having to pay double

187. *See* 29 U.S.C. § 1055(a) (1994).

188. *See id.*

189. *See id.*

190. Erica S. Phillips, Note, *Equality in Life, Inequality in Death: The Ramifications of the United States Supreme Court Decision in* Boggs v. Boggs, 34 IDAHO L. REV 623, 643 (1998).

191. *See* S. REP. No. 98-575, at 19 (1984).

192. The legislative history and 29 U.S.C. § 1056(d)(3) (1994) do not contain language that creates a property right.

claims.[193] The QDRO provisions of ERISA are merely a checklist for judges to use so that a plan administrator knows who and when to pay.[194] This legislation, like the other ERISA regulations, was aimed at the plan administrators and not the beneficiaries. Neither REA's legislative history nor the statutory language of the QDRO demonstrates that Congress intended to completely occupy the field of property law upon the termination of the marriage by either death or divorce.

The *Boggs* decision impermissibly extended ERISA's scope beyond protection from plan administrators' abuses[195] to protecting the beneficiaries from the plan participants[196] and other beneficiaries. Because ERISA's purpose was to protect and secure pension benefits and not to change basic property rights, the Court stripped Dorothy and other women like her of a valuable opportunity to provide for their heirs.

III. Preemption of State Marital Laws by ERISA

When Congress enacted ERISA it was aware that some state laws would need to be superseded by federal law if ERISA was to work. Therefore, Congress provided a preemption section within ERISA.[197] The language of section 1144 is broad and has provided the Court with many opportunities to determine when ERISA preempts state law.[198]

The *Boggs* majority found that it was not possible to comply with both ERISA and state community property laws.[199] However, ERISA's preemption provision refers to state laws relating to "employee benefit plans," not those relating to "employee benefits."[200] A state community property law does not, on its face, appear to conflict with ERISA's goals and objectives. Community property laws do not purport to reg-

193. *See* LANGBEIN & WOLK, *supra* note 21, at 558.

194. *See id.*

195. *See* H.R. REP. NO. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

196. *See Boggs III*, 520 U.S. 833, 859 (1997) (Breyer, J., dissenting).

197. *See* 29 U.S.C. § 1144(a) (1994) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

198. The Court has dealt with numerous cases dealing with ERISA's preemption statute. However, because *Boggs* departs from those cases using a different theory of preemption, those cases will be discussed only as they relate to the erroneous decision in *Boggs*. For further information on these cases, see Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1 (2000) and Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996).

199. *See Boggs III*, 520 U.S. at 844.

200. 29 U.S.C. § 1144(a) (1994).

ulate pension plans, either directly or indirectly.[201] Community property laws merely determine who owns the benefits once the benefits have been distributed.

The *Boggs* Court reasoned that if ERISA did not preempt community property laws, these laws would make the wife a co-equal participant.[202] But the Court ignores the REA amendments which *do* treat the non-participant spouse as a co-equal participant. REA gave women rights in their husbands' retirement benefits by requiring that the plan provide a joint and survivor annuity, providing the wife with at least half of the annuity amount after her participant husband dies.[203] It gave women ownership rights by requiring the wife's consent for the husband to name a beneficiary other than her.[204] However, according to the Court, those ownership rights do not survive her.[205] A woman loses her ownership interest in her husband's retirement benefits upon her death, because the Court thought that ERISA has a social policy of favoring the living over the dead.[206]

The Court's belief that Congress chose to favor the living over the dead is disingenuous. Nothing in the language or legislative history of ERISA or REA states that Congress wanted to favor the living over the dead. Society will not benefit if Congress accepts this assigned social policy as its intent behind enacting ERISA.

IV. Negative Effects of Preemption and Imposition of Federal Policy Choices on Marriage and Women

If it is possible to read into the intent of Congress in creating ERISA this overarching policy of favoring the living over the dead has very troubling social policy implications. This social policy would be a disservice to women and their rights. It reinforces the belief that a wife is only entitled to enough property to support herself. Furthermore, this policy encourages a society, where a majority of marriages already end in divorce, to end its marriages in order to protect a property right.

"Women are one-half the world's people; they do two-thirds of the world's work; they earn one-tenth of the world's income; they own

201. *See* Paul E. Mansur, *ERISA Preemption, Community Property, and the Nonemployee Spouse: A Study in Confused Equities*, 30 HOUS. L. REV. 1695, 1700 (1993).
202. *See Boggs III*, 520 U.S. at 852–53.
203. *See* 29 U.S.C. § 1055 (1994 & Supp. IV 1999).
204. *See* 29 U.S.C. § 1055(b)(1)(C) (1994).
205. *See Boggs III*, 520 U.S. at 853.
206. *See id.* at 854.

one one-hundredth of the world's property."[207] Women in the United States are still faced with discrimination based on their gender in the twenty-first century. The Internal Revenue Code penalizes working middle class mothers and wives by suggesting that a woman's place is in the home.[208] The current private retirement system often "blatantly discriminates" against women in several aspects.[209] The Supreme Court in *Boggs* reinforced and perpetuated a system that flagrantly declares a woman's place is in the home and then punishes her when she chooses to be there. Recognition of a woman's co-ownership in her husband's retirement benefits is a necessary element of recognizing equality in married life.

A. Disparate Impact on Women

The Supreme Court slapped women in the face with its decision in *Boggs*.[210] Although the decision in *Boggs* appears to be facially neutral, it has disparate results. A large number of the women who are at the age of retirement, or nearing that age now, are women who opted to stay home and raise their children instead of working.[211] In the 1960s and 1970s, these women relied upon the income of their husbands to support their family. As housewives and mothers, they had no retirement plan. They must share in their husbands' retirement

207. Nancy E. Shurtz, *Gender Equality and Tax Policy: The Theory of "Taxing Men"*, 6 S. CAL. REV. L. & WOMEN'S STUD. 485, 485 (1997) (quoting PEGGY ORENSTEIN, SCHOOL GIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP 247 (1994)).

208. *See* Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971) (discussing the marriage penalties introduced by the 1969 tax act and describing the income tax law as perpetuating a pattern of work disincentives for married women); *see also* Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1485 (1997) (discussing the bias in federal tax laws based on race, class, and gender and arguing that by abolishing the joint income tax return "[w]ives would no longer be discouraged from working in the paid labor force").

209. Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 2 (1990) (arguing that the coverage, participation, vesting, and other ERISA requirements fail to adequately account for women's roles and experiences in the workforce, which leave few women eligible to participate and even fewer women receiving sufficient benefits).

210. This Article will discuss the disproportionate effect this ruling has on women. Although it can affect men as well, the reality is that the majority of the primary care providers are mothers and not fathers. *See* Kristen Keith & Abagail McWilliams, *The Returns to Mobility and Job Search by Gender*, 52 INDUS. & LAB. REL. REV. 260, 474 (1999).

211. In 1961, only 38% of women age sixteen and over participated in the labor market. *See* Karen C. Burke & Grayson M.P. McCouch, *The Impact of Social Security Reform on Women's Economic Security*, 16 N.Y.L. SCH. J. HUM. RTS. 375, 406 & n.20 (1999).

benefits and Social Security benefits.[212] Although the participation of women in the labor market has increased dramatically over the years, in 1996 only 59% of women age sixteen or older participated in the work force compared to 75% of men.[213] Women will continue to participate less in pension plans for various reasons: they sometimes leave their jobs to raise children; they tend to work in industries that offer no or few pension benefits; and they often work only part-time and do not meet the minimum hours requirement to participate in most pension plans.[214] Additionally, when married women with minor children are employed, it is often out of necessity.[215] These women are less able to defer current income until retirement because they need it for consumption now.[216]

Given the disparity among the salaries of men versus women,[217] when women do participate in pension plans their contributions are often less than their male peers. If a woman earning $25,000 a year elects to defer 3% of her current income to her pension plan, that deferral will result in a smaller retirement benefit than the 3% contribution of her male peers earning $35,000. By denying a woman an ownership interest in her husband's retirement benefits, society limits her ability to provide for her heirs. Although she has made monetary and non-monetary contributions to her husband's ability to contribute to his retirement benefits, she is stripped of the ability to share its rewards if she predeceases her husband.

B. Devalues a Woman's Contribution to Her Family

Those women who elect to forego a career or start a career after raising their children will not have much of a legacy to leave their heirs if they happen to predecease their husbands. The largest asset of

212. *See id.* at 381. When Social Security was enacted in 1939, only a handful of women worked outside the home. *See id.*

213. *See id.* at 379–80.

214. *See* LANGBEIN & WOLK, *supra* note 21, at 28.

215. *See* Ayla A. Lari, *Sharing Alike: French Family Taxation as a Model for Reform*, 37 DUQ. L. REV. 207, 224 (1999).

216. *See* Jean H. Baker, *Child Care: Will Uncle Sam Provide a Comprehensive Solution for American Families?*, 6 J. CONTEMP. HEALTH L. & POL'Y 239, 240 (1990).

217. *See* Margaret Mooney Marini & Pi-Ling Fan, *The Gender Gap in Earnings at Career Entry*, 62 AM. SOC. REV. 588, 597 (1997) (discussing how women in sample earned 84% of what men earned at career entry); *see also* Edward J. McCaffery, *Equality, of the Right Sort*, 6 UCLA WOMEN'S L.J. 289, 294 (1996); U.S. Dep't of Labor, *Women's Earnings as Percent of Men's, 1979–1999*, *at* http://www.dol.gov/dol/wb/public/wb_pubs/7996.htm (last visited July 20, 2000) (containing statistics of women's earnings as a percentage of men's) (hardcopy of web page on file with the author).

most marriages is the retirement benefits of the working spouse.[218] When both spouses are working, the husband's retirement benefits tend to be larger because he did not take time off to raise children.[219]

With REA, Congress attempted to take into account these differences. Congress began its discussion of REA with Geraldine Ferraro's comment: "Women are shortchanged by private pension plans because the system does not truly recognize the contributions that women make to the economy or take into account women's unique work patterns, patterns which revolve around childrearing and other family responsibilities."[220]

The Supreme Court interpreted ERISA in a way that suggests women's contributions to their families are worth less than the contributions of their husbands. This interpretation ignores the fact that the "principal reason married men are capable of reaping large salaries in the workplace is due to the level of support they receive from their wives at home."[221]

If a woman does not have the right to make a testamentary transfer of her right in her husband's plan benefits, then her right does not vest until he retires or dies. The only other way for a woman to be assured of receiving her interest is to divorce her husband and obtain a QDRO, which she can then present to her husband's pension plan administrator to obtain her share. In effect, the wife is granted a contingent life estate in her husband's retirement benefits, while he has a full-fledged property interest—fee simple absolute.

These limitations reinforce the idea that a woman is only entitled to her share of her husband's pension plan if she needs it for her support. And dead women need no support. This policy ignores the fact that a wife makes a valuable contribution to her family, via domestic chores and childrearing, that do not result in monetary rewards. If a woman must survive her husband in order to take her share, then the policy is that the woman only gets her share because she needs it.

218. *See Boggs III*, 520 U.S. 833, 840 (1997); *see also In re* Marriage of Brown, 544 P.2d 561, 566 (1976).

219. *See* Burke & McCouch, *supra* note 211, at 380 ("Women may continue to increase their participation in the work force, but they will remain more likely than men to work intermittently or part-time.").

220. LANGBEIN & WOLK, *supra* note 21, at 549 (citing *Pension Equity for Women Hearings Before Subcomm. on Labor Management Relations of the House Comm. on Education and Labor*, 98th Cong. 26 (1983) (comments of Rep. Geraldine Ferraro made when the bill, which eventually became the REA, was introduced)).

221. Shurtz, *supra* note 207, at 516.

And she needs it because her husband is no longer alive to provide her support or is no longer married to her.

C. Violates the Theory of Marriage As an Economic Partnership

Both family and tax law theories acknowledge that marriage is like a partnership.[222] The modern theory of marriage is that marriage is an economic partnership where both husband and wife combine resources to the benefit of both.[223] This theory recognizes that the financial aspect of marriage is one of profit-sharing.[224] Sometimes it is portrayed "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike."[225] For policy reasons, society wants to encourage this partnership framework because it advocates mutual commitments between spouses and serves broader societal objectives regarding the caring for children and elderly dependents.[226] The modern view or partnership theory also promotes gender equality.[227]

The partnership model of marriage can also mitigate the continuance of gender biases in both the home and outside world.[228] It takes into account the partners' allocation of domestic responsibilities and society's allocation of salaries and benefits.[229] A combination of all the partners' resources disperses "the risks and benefits of sex-linked roles."[230]

The purpose of the partnership model is not only to reward the spouse of a long-term marriage who sacrifices "financial-earning opportunities" in order to provide domestic services to the marriage, but also to deny a windfall to the spouse in whose name the assets were mostly titled.[231] However, in the case of shorter, late-in-life marriages, the partnership model should curtail the windfall of the spouse who

222. *See* Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1413 (1996).

223. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 42 (1994).

224. *See id.*

225. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 131 (1989).

226. *See* Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 198–99 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

227. *See id.*

228. *See* Waggoner, *supra* note 223, at 44.

229. *See id.*

230. Rhode & Minow, *supra* note 226, at 198–99.

231. *See* Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV 223, 241 (1991).

happens to live the longest.[232] In these shorter marriages, it is unlikely that either spouse contributed significantly to the other's wealth.[233]

When Congress amended ERISA by providing for a qualified joint and survivor annuity and qualified domestic relations orders, it recognized that marriage is like a partnership.[234] Each spouse is considered to make equal contributions to the partnership.[235] Thus, Congress sought to provide non-participant spouses with rights and benefits in their spouses' retirement benefits.

The *Boggs* decision rejects the partnership theory of marriage by treating the pension plan assets as belonging to the husband. By preempting community property laws with ERISA, a woman has no rights until her husband dies, retires, or they divorce, even though the contribution to the retirement account is in part hers.[236] In effect, preemption strips the non-participant spouse of any property right in her spouse's retirement pension unless she chooses to divorce the working spouse.[237] The *Boggs* decision interferes with the spousal equality that REA sought to achieve.

In effect, the decision in *Boggs* distorts a state's marital property system by fashioning one spouse's share of the gains during the marriage into a larger share than that of the other spouse.[238] It is very rare that one spouse will have a pension benefit equal in value to that of the other spouse.[239] In effect, the *Boggs* Court has suggested to wives that they must end their marriage to obtain their partnership benefits of marriage.

Historically, women were allocated part of the marital wealth based upon a theory of dependency.[240] Women were awarded alimony and other marital assets, because, as women, they were dependent upon their husbands for support.[241] In contrast, the modern theory

232. *See id.* at 242.

233. *See id.*

234. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

235. *See* Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 396.

236. *See Boggs III*, 520 U.S. 833, 836 (1997).

237. *See id.*

238. If a wife's right in her husband's retirement benefits does not vest until he dies or retires, then essentially the benefits are all his until he dies or retires.

239. As discussed earlier, if women are entitled to pension benefits from their employer, for various reasons, the amount of their benefits will often be less than that of their husbands. *See supra* Part IV.A.

240. *See* Fineman, *supra* note 235, at 397.

241. *See* Robin J. Davis, *Alimony and Equitable Distribution: Are the Two Concepts Commingled in West Virginia?*, 95 W. VA. L. REV. 469, 469–70 (1992–1993).

for allocation of marital wealth recognizes the contributions women have made to the family.[242] Their contribution in maintaining the home and raising children justifies their share of the partnership assets at dissolution.[243] This contribution should also justify their share at termination by death.[244] This economic justification recognizes that women who serve in the role of mother/housewife also make important contributions to the marriage, and that their contributions are worth more than a mere inter-vivos reward.[245]

D. Imposes the Title System of Ownership

"In the United States, a [testator's] spouse is the only relative who is protected against intentional disinheritance."[246] Most states have adopted an elective share statute based upon the Uniform Probate Code ("UPC"),[247] which permits a surviving spouse to elect to take a statutory percentage or share of her husband's estate.[248] Georgia is the only non-community property state that does not have an elective share statute.[249] An elective share statute is not required in a community property state because each spouse gets a vested one-half interest in the property acquired during the marriage.[250]

Boggs reinforces the title system of property upon death because the Court failed to recognize that a woman has a vested property right in her husband's retirement benefits. If a woman does not have a vested property interest in her husband's retirement benefits, then women are dependent upon their husband's retirement plan providing an annuity benefit to which ERISA grants a contingent life estate

242. *See* Bartlett, *supra* note 110, at 479.

243. *See* Fineman, *supra* note 235, at 397.

244. If it fails to recognize the contribution upon death, then the society is still limiting the property rights of women to support only. We can only escape this problem by allowing the property rights to survive her death.

245. *See* Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2435 (1994). Singer argues that the woman's contribution is worth compensation at dissolution of the marriage. *See id.* This Article extends her argument to the proposition that the contribution is worth compensation at the termination of the marriage as well.

246. Waggoner, *supra* note 223, at 41–42.

247. *See* Newman, *supra* note 102, at 489–90 (stating that the UPC's general objective is an equal division of the couple's marital property and no division of their separate property).

248. *See* UNIF. PROBATE CODE § 2-202 (amended 1993).

249. *See* American College of Trust & Estate Counsel (ACTEC), Study 10: Surviving Spouse's Rights to Share in Deceased Spouse's Estate (1994).

250. *See* W.S. MCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 11.4, at 510–11 (1982); *see also* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 520 (2d ed. 1997).

to the wife. If the retirement plan does not provide an annuity benefit, the only protection against disinheritance that a woman has is her elective share, which is not available to women in community property states.

Almost every state recognizes marriage as a partnership.[251] However, the elective share statute was required for common law states because common law property rights vested only in the spouse whose name the property was titled.[252] Since the title to property was most often in the name of the husband, upon his death he had the ability to give the property to anyone he chose. Elective share statutes permit common law states to give deference to marital partnership principles,[253] while maintaining separate property principles[254] and the autonomy of the individual.[255] These elective share statutes demonstrate society's acknowledgment that a surviving spouse has some claim to the assets of the marriage.[256]

Upon her husband's death, the surviving spouse may elect to take under her husband's will or she may elect to receive a statutorily prescribed percentage of her husband's estate.[257] The percentage to which she can elect depends upon the length of the marriage, but can never exceed 50% of the husband's estate.[258]

This percentage is applied against the augmented estate[259] to determine a dollar amount to which the surviving spouse is entitled.[260] The dollar amount (elective share amount) is then reduced by the

251. *See* Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696 (1990).

252. *See* John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 306 (1987) (arguing that the purpose of the elective share statute was "to correct the failure of a separate property state to create the appropriate lifetime rights for spouses in each other's earnings").

253. *See* UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt. (amended 1993) (noting that the main purpose of changes in the elective share "[was] to bring elective-share laws in line with the contemporary view of marriage as an economic partnership").

254. *See* Smith, *supra* note 251, at 707 (arguing that "community-property states adopting the partnership theory emphasized the wife's separate legal existence and her right to own property while de-emphasizing the notion of commonly owned property").

255. *See* Note, *The Revised UPC Elective Share: Missing Essential Partnership Principles*, 13 QUINNIPIAC PROB. L.J. 225, 226 (1998) [hereinafter *Partnership Principles*].

256. *See id.* at 238.

257. For purposes of discussion, the Uniform Probate Code's elective share statues will be used.

258. *See* UNIF. PROBATE CODE § 2-202 (amended 1993).

259. *See* UNIF. PROBATE CODE § 2-203 (amended 1993). The augmented estate includes the probate estate, certain nonprobate transfers made by the deceased spouse and/or the surviving spouse, and property owned by the surviving spouse. *See id.*

260. *See* Newman, *supra* note 102, at 506–07.

surviving spouse's own property[261] and property she received from the decedent.[262] Any remaining elective share amount is the amount that she may take of her husband's estate.[263]

For example, if husband and wife were married for eleven years when the husband died, and his will left all of his property to his children, under the UPC, the wife is entitled to 34% of the augmented estate.[264] He dies with a probate estate of $500,000 and a life insurance policy of $150,000, which names her as the beneficiary. She owns property worth $50,000 and has not made any non-probate transfers. The augmented estate is $700,000. The dollar amount to which she is entitled is $238,000. This elective share amount is reduced by the amount of property she owns ($50,000) and the amount of property he gave her ($150,000 life insurance). The elective share amount that the wife may obtain from her husband's estate is $38,000.

Forcing women to rely upon their states' elective share statutes poses significant problems. The elective share statutes fail in their attempts to treat marriage as a partnership. The statutes require a woman to not only survive her husband in order to share in the marital property, but also she must affirmatively act to obtain her property rights. These statutes are based upon invalid or outdated assumptions. Additionally, the statutes are designed in such a way that enables a husband to easily limit his wife's access and rights to the marital property after his death.

However, the elective share system does produce results consistent with the marital partnership theory upon which it is based.[265] The intent of the elective share statutes is to prevent disinheritance and provide support for the surviving spouse.[266] Elective share statutes are not intended to be the means for the allocation of assets amassed during the marriage.[267] Such use can produce inequitable results in long-term marriages.[268]

261. This includes property she owns and nonprobate transfers made by the surviving spouse to others that would have been included in her augmented estate had she been the decedent.

262. *See* UNIF. PROBATE CODE § 2-209 (amended 1993).

263. For a more detailed explanation, see Newman, *supra* note 102, at 507.

264. *See* UNIF. PROBATE CODE § 2-202 (amended 1993).

265. *See* Newman, *supra* note 102, at 488.

266. *See Partnership Principles*, *supra* note 255, at 247.

267. *See* Susan N. Gary, *The UPC's Elective Share: Share and Share Alike?*, 19 PROB. & PROP. A.B.A. J. 18, 20 (Mar.–Apr. 1998).

268. *See* Newman, *supra* note 102, at 521.

The amount that the surviving spouse is entitled to under the elective share statute may be inadequate. Professor Helene Shapo argues that the elective share statutes of most states do not go far enough to protect women because these statutes do not take into account whether or not the surviving spouse is raising minor children.[269] Even though the elective share is maximized at 50%, Professor Shapo notes that a woman raising children may need more than half of her deceased husband's estate.[270]

Although the elective share is based in part on the partnership theory of marriage, the right to a portion of the marital property does not arise until one spouse dies.[271] The elective share statutes do not change who holds title to property; property ownership resides with the titleholder.[272] For the non-titled spouse to obtain her "fair share," she must survive her husband.[273]

The elective share statutes are based on assumptions that are no longer valid or accurate. First, the purpose of elective share statutes is to prevent the intentional disinheritance of the surviving spouse.[274] This assumes that decedents would disinherit their spouses absent these statutes.[275] This assumption may no longer be realistic.[276] If spousal disinheritance is not a problem, then the elective share system does more harm than good.[277]

Additionally, the elective share statutes are based upon a narrow view of what constitutes a family. The elective share assumes that a family is two heterosexual, married parents and their children, unaffected by divorce and remarriage.[278] This traditional family may no longer exist.[279]

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269. *See* Helene S. Shapo, *"A Tale of Two Systems": Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 725–33 (1993).

270. *See id.* at 728.

271. *See* Gary, *supra* note 267, at 21.

272. *See* UNIF. PROBATE CODE § 2-202 cmt. (amended 1993); *see also* Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers"*, 10 LAW & INEQ. J. 137, 151 (1991).

273. *See* UNIF. PROBATE CODE § 2-202 cmt. (amended 1993); *see also* Fellows, *supra* note 272, at 151.

274. *See Partnership Principles*, *supra* note 255, at 247.

275. *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 141 (1994).

276. *See* MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 86–95 (1970). In more than 85% of the estates surveyed, the testator bequeathed everything to the surviving spouse. *See id.* at 89.

277. *See* Brashier, *supra* note 275, at 141.

278. *See id.* at 148.

279. In 1985, only 27.9% of American households consisted of a married couple and their own children under the age of eighteen. *See* STATISTICAL ABSTRACT OF THE UNITED

One of the most severe defects in elective share statutes is that a decedent may satisfy his obligation to his surviving spouse by giving her an income interest for her life in the marital property.[280] These statutes[281] allow the use of a life estate to defeat a surviving spouse's right to control a share of the marital property.[282]

E. Encourages Divorce and Discourages Marriage

The social policy of favoring the living over the dead creates a tension between death and divorce. A woman who divorces her husband has very different property rights than if she dies before he does. Because of the vast difference in result depending upon how the marriage ends, a wife's property rights are treated as inferior to her husband's rights.

When a woman divorces her husband, the divorce court can award the wife a portion of her husband's retirement benefits.[283] State marital property laws will determine the extent of the woman's interest in her husband's retirement benefits.[284] This award will be in the form of a qualified domestic relations order so that she can present it to her ex-husband's retirement plan to enforce her property right.[285]

Under the Supreme Court's holding in *Boggs*, when a woman predeceases her husband, state marital property laws that gave her an interest at divorce are preempted.[286] She is not able to bequeath her share of her husband's retirement benefits because upon her death she no longer has any property rights in the benefits.[287] Because she has no rights at death, she in effect has no control over the property. Therefore, in order to have an enforceable property right and control, the woman must survive her husband or divorce him.

Mary Louise Fellows argues that laws that have given women rights to property have not changed the power relationship with

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STATES 1987, tbl. 61 (107th ed. 1987). This percentage includes both families where the children are the children of both parents and children of only one parent; therefore, the percentage of traditional families is lower.

280. *See* Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 568 (1995).

281. *See, e.g.*, DEL. CODE ANN. tit. 12, § 907 (1995).

282. *See* Gary, *supra* note 280, at 568.

283. *See* 29 U.S.C. § 1056(d)(3) (1994). The court achieves this allocation by complying with the QDRO provisions of ERISA. *See supra* Part I.A.5.c.

284. *See supra* Part I.B.

285. *See* 29 U.S.C. § 1056(d)(3).

286. *See Boggs III*, 520 U.S. 833, 841–42 (1997).

287. *See id.*

men.[288] The disparate result created by this social policy reinforces her argument. Men, as the family breadwinners, still control the marital property. Essentially, the only way for women to gain control over the property short of divorce is to outlive their husbands. Professor Fellows states that by recognizing a woman's claim to marital assets only if she survives her husband is consistent with "the maintenance (or vessel) ideology of the fourteenth century."[289] This policy denies women the right to testamentary control, unless "practicality demands" it.[290]

Why would society allow a woman to have an interest upon divorce but not upon her death? Society's concerns are vastly different in the protection of property rights at death than they are at divorce. Society's concern at the dissolution of a marriage is the support of the spouse and minor children.[291] A divorce court wants to allocate marital property in a manner that provides for the support of the spouse and rewards her for her contribution to the marital assets. This concern for support after a divorce is the cornerstone in the social policy of favoring the living over the dead.[292]

However, support is not the only concern society has in regulating the transfer of property at death. Laws that regulate the transfer of property at death are often described as "an attempt to express the family in terms of property."[293] The goals of most succession laws are: (1) maintaining the regime of private property;[294] (2) effectuating the wishes of the individual property owner;[295] (3) providing for the well-being of the family;[296] (4) providing for the well-being of society;[297] and (5) discharging the decedent's debts and protecting creditors.[298]

288. *See* Fellows, *supra* note 272, at 141–42.

289. *Id.* at 151. Professor Fellows argues that in the fourteenth century women were viewed as the vessel which transported property from the husband to the first born son. *See id.*

290. *See id.* A woman who survives her husband would have testamentary control over those retirement assets that she received upon his death.

291. *See* MacPherson v. MacPherson, 496 F.2d 258, 265 (6th Cir. 1974).

292. *See Boggs III*, 520 U.S. 833 (1997).

293. John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 507 (1977) (quoting T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 711 (5th ed. 1956)).

294. *See id.* at 501.

295. *See id.*

296. *See id.*

297. *See id.*

298. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1120 (1984).

These goals must be weighed and balanced against one another. One goal alone cannot trump all other goals.

Society's interest in protecting a predeceased wife's property rights outweighs society's interest in supporting a second wife. The second wife has not earned the entire surviving spouse's share, especially the share which is attributable to the efforts of the first wife. The second wife is entitled to receive her husband's Social Security benefits,[299] part of her husband's retirement assets,[300] and a statutory minimum of her husband's estate.[301] The predeceased wife should have testamentary power over the retirement benefits she helped earn during her time in the marriage.

Moreover, a spouse of the decedent is the only relative protected against complete disinheritance.[302] Recognizing a predeceased wife's property right in her husband's retirement benefits will not leave the second wife without support. The second wife has at least an elective share. She had the ability to acquire property before the marriage and the opportunity to continue to acquire property after the marriage. Awarding the current spouse all of the assets because she needs them for support is illusory. She may not need the assets any more so than the predeceased spouse's heirs and certainly is not more entitled to them.

Because this social policy is harmful to women's rights, society should seek to remedy the harm. Women should be treated as equal partners in a marriage regardless of whether or not they are employed outside the home. Their contributions as wives and mothers should be recognized and treated as valuable. In order to correct this inequity, ERISA's social policy needs to be changed.

V. Solution

The Supreme Court has ruled, and couples are currently bound by that decision. Therefore, congressional action is now required to

299. *See* 42 U.S.C. § 402(b), (c), (e), (f) (1994); *see also* Burke & McCouch, *supra* note 211.

300. *See* 29 U.S.C. § 1055(a) (1994); *see also* 29 U.S.C. § 1056(d)(3) (1994). The second wife would be entitled to the part of the qualified joint and survivor annuity, which was not awarded as part of a QDRO. *See* 29 U.S.C. § 1055(a).

301. The majority of states permit a widow's election whereby the widow can elect to take the statutory amount of her husband's estate if that amount is greater than what her husband left her in his will. If the husband dies without a will, all states intestate succession systems allocate a minimum amount of the husband's estate to his surviving spouse.

302. *See* Margorie Engel, *Pockets of Poverty: The Second Wives Club-Examining the Financial [In]security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 346 (1999).

remedy this inequity borne by women. Solutions to this problem abound. This Part will discuss the solutions that are most viable. Specifically, it proposes the exact language of an amendment to ERISA that provides the requisite protection of the predeceasing spouse's interest.

A. Narrow Interpretation of *Boggs*

One solution, which does not require congressional intervention, is a narrow interpretation of the holding in *Boggs*.[303] A court could read the holding so as to limit its application to only predeceasing non-participant spouses who die prior to retirement of the participant. Some courts[304] and practitioners[305] are already doing so. Although this solution certainly provides some improvement, it does not fully redress the problem.

While this solution has the benefit of being simple and does not require an act of Congress, it does lack uniformity. Women who rely on a court narrowly reading the holding will be gambling with their property rights. Two women's estates in the same state, in similar situations, could be faced with very different results depending on how the courts choose to interpret the *Boggs* opinion.

Given the current state of the law, many practitioners are taking the opportunity to plan around the *Boggs* holding.[306] They operate under the assumption that a woman does not have any right in her husband's retirement benefits if she predeceases him. Practitioners then advise their clients to allocate non-retirement benefit assets to the spouse with the smaller estate by transferring title to the non-participant spouse. For example, the couple would place title of the family home in the wife's name only to offset her lack of ownership interest in his retirement benefits. But this solution requires the consent of her husband, who may be reluctant to depart with his share of some of the marital assets. This solution is also limited to those couples with access to affordable legal services.

This solution keeps the burden of the problem on women. It requires a woman to affirmatively act to protect her property rights. It

303. *See* Patricia L. Brown, *The Mind-Boggling Bog Broadened by* Boggs—*A Practitioner's Approach*, SD 53 A.L.I.-A.B.A. COURSE OF STUD. 661, 668 (Feb. 25, 1999), *available in* WESTLAW at SD53 ALI-ABA 661.

304. *See* Hawxhurst v. Hawxhurst, 723 A.2d 58 (N.J. 1998); *see also* Manning v. Hayes, 212 F.3d 866 (5th Cir. 2000).

305. *See* Brown, *supra* note 303, at 681.

306. *See id.*

may disrupt the harmony of marriage and create tension between the partners, if one spouse is reluctant to a reassignment of assets. This tension in turn could harm the institution of marriage by resulting in more divorces. Society does not benefit when more than half of its marriages end in divorce.[307]

B. Amend ERISA

1. Revise the Preemption Provision

Several commentators have suggested an amendment to ERISA's preemption provision, section 1144. One suggestion is to expressly exclude from the preemption provision state community property and succession laws that do not directly regulate ERISA pension plans.[308] Indeed, one student commentator argues that a provision that explicitly states ERISA is not intended to preempt state community property law would solve the inequities created by *Boggs*.[309] This observer further argues that Congress should narrow the language of ERISA's broad preemption provision by returning it to the narrower language contained in the original House and Senate versions of the provision.[310] She believes that this language would limit preemption to those state laws that affect the regulatory provisions of ERISA.[311]

Amending the preemption provision to permit application of community property laws would solve the inequity created by *Boggs*. This solution would permit a testamentary disposition of community property benefits after distribution from the employee benefit plan.[312] Another benefit of this option is that it recognizes that women in community property states have a property right in their husband's retirement benefits; a right which does not extinguish upon her death.

However, this alternative would only benefit women who die in community property states. It does nothing to solve the inequity problem for women in non-community property states. Furthermore, courts would still have to decide when a community property law im-

307. *See* Linda Henry Elrod, *Epilogue: Of Families, Federalization, and a Quest for Policy*, 33 FAM. L.Q. 843, 845 (1999) (noting that the number of divorces quadrupled between 1960 and 1999, resulting in nearly one-half of all marriages ending in divorce).

308. *See* Note, Boggs v. Boggs*: State Community Property and Succession Rights Wallow in ERISA's Mire*, 28 GOLDEN GATE U. L. REV. 571, 625 (1998) [hereinafter *State Community Property and Succession Rights Wallow*].

309. *See* Note, *Equality in Life, Inequality in Death: The Ramifications of the United States Supreme Court Decision in* Boggs v. Boggs, 34 IDAHO L. REV. 623, 647 (1998).

310. *See id.* at 647–48.

311. *See id.* at 648.

312. *See State Community Property and Succession Rights Wallow, supra* note 308, at 625.

pacted a plan and determine if preemption is warranted. Thus, amending the preemption language of ERISA would only lead to additional litigation and limited protection for women.

2. Amend the QDRO Provision to Include Probate Orders

Another potential solution is to amend ERISA's anti-alienation provision to expressly permit probate orders to qualify as QDROs or provide a similar provision for probate orders.[313] One observer insists that this type of amendment should expressly state that a community property interest is a "present ownership interest with inherent testamentary rights."[314] Another commentator suggests that the following words should be added somewhere in the QDRO provision:

> A spouse, or estate, with an interest in a pension plan through the application of community property laws shall be able to obtain a probate order stating the percentage of the pension plan benefits to which the spouse, or estate, is entitled. The percentage awarded shall be determined based on the number of years the couple was married and the number of years the plan was funded by marital monies. The percentage to go to the spouse, or estate, cannot exceed fifty percent (50%) of the total benefits, if there is/are (an)other spouse(s) at the time of the participant's death.[315]

Amending ERISA's QDRO provision is the best solution to solve the inequity inherent in the *Boggs* decision. The QDRO provision is also the easiest section of ERISA to amend because it has the least impact on the other sections of ERISA. The suggested language would limit the amount allocable to the predeceased non-participant spouse to no more than she is entitled to under state community property laws.

While these suggestions offer significant improvement over the current approach, more is needed to protect the rights of all women. Both solutions are limited to protection of women who live in community property states. Women who live in the other forty-one states would not have a testamentary interest in their husband's retirement benefits. This solves one inequity problem yet creates another.

Additionally, the author of the suggested amendment fails to indicate how her suggested proposal would be incorporated into the current statute. The language needs greater clarity and precision. The suggestion that a spouse could get a probate order to protect her

313. *See id.*

314. *Id.*

315. Note, Boggs v. Boggs*: Creating Real-Life Cinderellas*, 33 J. MARSHALL L. REV. 271, 298 (1999).

rights may not be feasible. In some states, for the probate court to have jurisdiction, the spouse would have to be dead. The proposed amendment would only require the probate order to state the percentage that the estate would be entitled to. However, the author fails to describe how this section would interact with the other provisions of ERISA. Would the probate order have to comply with the other requirements of a QDRO? Would a probate order become a QDRO? Or is the commentator suggesting that Congress create a qualified probate order exemption?

C. Suggested Amendment to the QDRO Provision of ERISA

This section suggests a proposal that hopes to more fully redress the disparate impact of the *Boggs* decision. Additionally, it has the benefit of working with the existing language to ease its immediate impact and later interpretation. Creating a qualified probate order provision would result in a separate and different set of rules, which could cause confusion among the courts and plan administrators. ERISA's QDRO provision could be amended by the addition of two clauses to its existing framework. First, the definition of a QDRO would need to be amended. Then, the definition of an alternate payee would also need to be amended. By merely changing these definitions to incorporate probate orders, women will have the ability to make testamentary transfers of their share of their husband's retirement benefits.

1. Changing the Definition of a QDRO

The current definition of a QDRO does not allow for a probate order to be treated as a domestic relations order. The additions to the definition, which are bracketed in bold, would include a probate order within the definition of a QDRO. This amendment would also change Internal Revenue Code section 414(p)(1)(B) and the new provision would read:

> (ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which—
>
> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, **[or to the marital property rights of a deceased spouse]** and
>
> (II) is made pursuant to a State domestic relations law (including a community property **[or probate]** law).[316]

316. I.R.C. § 414(p)(1)(B) (1994) and 29 U.S.C. § 1056(d)(3)(B)(ii) (1994) (alterations added).

2. Changing the Definition of an Alternate Payee

In order to prevent confusion and allow for uniformity, the definition of an alternate payee would also need to be amended. Changing the definition to incorporate the estate of a deceased spouse would allow a plan to pay benefits directly to the estate. The addition to section 414(p)(8)[317] of the Internal Revenue Code and section 1056(d)(3)(K) of ERISA is bracketed in bold.

> The term "alternate payee" means a spouse, former spouse, **[estate of a deceased spouse,]** child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

3. Other Conforming Amendments

In addition to these amendments, another technical amendment would need to be made. In order for the other amendments to avoid creating a negative income tax impact upon the participant, the estate would need to be treated as a distributee for income tax purposes. Internal Revenue Code section 402(e)(1)(A) would need to be changed as follows:

> For purposes of subsection (a) and section 72, an alternate payee who is the spouse**[,** ~~or~~**]** former spouse **[or estate of a deceased spouse]** of the participant shall be treated as the distributee of any distribution or payment made to the alternate payee under a qualified domestic relations order (as defined in section 414(p)).

D. Analysis of the Proposed Amendment

1. How It Works

Upon the death of the wife, her estate would include a share of her husband's retirement benefits.[318] This amendment would leave the allocation of the retirement benefits up to state law. Some community property laws would result in the estate being allocated 50% of the vested balance of the retirement benefits at the time of death to the estate. Non-community property states could use the same equitable distribution system that they use at divorce. The probate court

317. I.R.C. § 414(p)(8) (1994) and 29 U.S.C. § 1056(d)(3)(K) (1994).

318. *See* I.R.C. § 2039 (1994), which includes the value of an annuity in the decedent's gross estate. In Private Letter Ruling 89-43-006, the Service stated that the value of the spouse's community interest in the plan is includible in the spouse's gross estate under section 2039(a) even if the spouse cannot dispose of the interest by testamentary disposition. *See* Priv. Ltr. Rul. 89-43-006 (July 21, 1989). It is includible in the spouse's gross estate, because the spouse had a beneficial interest in the plan prior to death. *See id.*

would evaluate what the deceased wife's share should be. Her estate would be permitted to obtain a QDRO in the amount determined by the probate court. The estate would be the alternate payee. Once the estate received the funds from the pension plan, it would distribute the funds according to either her will or her state's intestacy laws.

2. Effect of the Amendment

The proposed amendment would allow a woman to leave her property to someone other than her husband. This amendment would recognize that a woman is entitled to a share of her husband's benefits because she makes a valuable contribution to the partnership by taking on the responsibilities of child-care and domestic chores, and that such contributions are worth more than an inter-vivos monetary reward.

3. Potential Problems

ERISA currently imposes a succession law on the predeceasing non-participant spouse, from which no woman can opt out. ERISA forces women to give their interest to their husbands. The proposed amendment gives women the option of bequeathing their interest to whomever they choose. If a woman prefers not to choose or fails to choose, her state will choose for her through its intestate succession laws. This amendment places the choice in the hands closest to the retirement benefits: the non-participant spouse and the state in which she lives.

Some critics may argue that these amendments would impose a different succession law upon non-participating spouses—that of their state. Women are then forced to opt out of their state's intestate succession laws by writing a will if they want their interest to pass in a manner that is not consistent with the intestate succession laws. Non-participant spouses would be expected to know or find out their state's intestate distribution scheme, which may not mirror their wishes. But these amendments would not be adding anything to the problem which already exists.

First, the purpose of the intestate distribution scheme is to mirror how each state thinks its deceased citizens would have wanted their property distributed if they had written a will.[319] If a non-participant

319. *See* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW AND INEQ. J. 1, 7 (2000) ("The most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators.").

spouse believes that the intestate system of her state does not mirror her wishes, the burden is upon her to write a will that is consistent with her wishes.

Is it unfair to place the responsibility of knowing the intestacy scheme of her state in the hands of the non-participating spouse? It is already a responsibility that is placed upon all owners of all types of property and interests. Retirement benefits should not be treated any differently. A system where the owner of property has a choice as to the distribution is preferable to a system that gives the owner no choices.

Another potential problem these amendments may create is the time and cost involved in keeping an estate open until the funds are distributed. A pension plan also incurs costs when it deals with the administration of QDROs. The earliest a QDRO can require payment of benefits to an alternate payee is when the participant reaches the earliest retirement age under the participant's pension plan.[320] ERISA does not require pension plans to provide for an earlier distribution date, but it does permit pension plans to provide an earlier distribution date to alternate payees.[321] The Department of Labor has ruled that the costs associated with administering a QDRO can not be borne solely by the participant and/or the alternate payee.[322] Given the fact that the plan must bear the cost of the administration, it may be in the plan's best interest to provide that QDRO payments occur earlier than the earliest distribution date.

Additionally, costs and time delays exist for QDROs in the context of a divorce. Society did not see those costs or delays significant so as to deny a non-participant spouse an interest in her husband's pension plan. Therefore, the potential cost and delay should not be grounds for denying the predeceased non-participant spouse her interest either. The costs and delays may not be substantial enough to require Congress to legislate a mandatory distribution deadline for QDROs. But if the need for additional legislation is discovered, Congress should be quick to remedy the problem.

Conclusion

Women make valuable contributions to society and their families when they opt to forego the monetary rewards of employment in or-

320. *See* I.R.C. § 414(p)(4)(B) (1994).

321. *See* Cindy Lynn Wofford, *Divorce and Separation*, 515 TAX MANAGEMENT PORTFOLIOS A-1, at A-26 (1999) (citing Treas. Regs. § 1.401(a)-13(g) (as amended in 1976)).

322. *See* Department of Labor Advisory Opinion 94-32A (Aug. 15, 1994).

der to raise their children and provide domestic services for their families. Society should recognize those contributions by ensuring that a woman has a property right in her husband's retirement benefits regardless of how the marriage ends. ERISA protects women who divorce their husbands and women who survive their husbands. ERISA should also protect women who do not survive their husbands. Once it does, it should be extremely difficult for a woman to fall through the cracks of ERISA protection.