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ERISA AND DIVORCE: A COMPLEX MARRIAGE

INTRODUCTION

In 1974, Congress adopted the Employee Retirement Income Security Act (ERISA)[1] to remedy abuses[2] in the administration of private employers' retirement and welfare plans.[3] The Act establishes minimum participation,

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1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001-1381 (1982)).

2. Among the abuses which Congress sought to curtail or eradicate were (1) overly restrictive plan participation requirements which excluded many employees from eligibility for plan retirement benefits; (2) inadequate vesting standards exposing employees with even a long history of service to potential loss of retirement benefits upon termination of their employment by the employer; (3) inadequate funding standards for private pension plans resulting in a failure to provide promised retirement benefits to covered employees; (4) forfeiture of pension benefits resulting from plan terminations; and (5) fiduciary mismanagement or misuse of pension funds. H.R. REP. No. 807, 93d Cong., 2d Sess. 3-4 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4670, 4672-73; S. REP. No. 383, 93d Cong., 2d Sess. 3-4 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4890, 4891-92. *See also* 29 U.S.C. § 1001(a) (1982).

3. In general, ERISA's statutory safeguards apply to employee benefit plans. An employee benefit plan is "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3) (1982). An employee welfare benefit plan is any plan, fund or program established by an employer to provide

> for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (1982). An employee pension benefit plan is any plan established by an employer which

> (A) provides retirement income to employees, or (B) 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.

29 U.S.C. § 1002(2) (1982).

The Internal Revenue Service's definition of a pension plan is more circumscribed than that of ERISA. For purposes of § 401(a) of the Internal Revenue Code, a pension plan "is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years . . . after retirement." Treas. Reg. § 1.401-(b)(1)(i), T.D. 6722, 1964-1 C.B. 150. The employer's contributions to the plan are "determined actuarially on the basis of definitely determinable benefits," or, in the case of money purchase pension plans, the contributions are fixed without regard to employer profits. *Id.*

This article deals only with the interrelationship of employee pension benefit plans as defined in 29 U.S.C. § 1002(2) (1982) with state divorce laws and proceedings. Unless other-vesting, and funding standards for employer contributions, prescribes standards of conduct for plan fiduciaries,[4] and imposes numerous reporting and disclosure requirements upon private pension plans.[5] To ensure that retirement benefits furnish a source of income free from creditors' claims,[6] section 206(d)(1) of Title I of ERISA[7] states "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[8] A correlative provision, section 401(a)(13), provides that a trust designed to accumulate pension benefits will not constitute a qualified trust unless the pension plan proscribes assignment or alienation of plan benefits.[9]

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wise stated, the term pension plan is given its expansive meaning under § 1002(2) and not its restrictive meaning under Treas. Reg. § 1.401-1(b)(1)(i), T.D. 6722, 1964-1 C.B. 150.

4. A fiduciary is one who exercises discretionary authority or control over the plan's management or the management or disposition of its assets, renders advice for the investment of plan assets, or possesses discretionary authority or responsibility in administering the plan. 29 U.S.C. § 1002(21)(A) (1982).

5. *See, e.g.*, 29 U.S.C. §§ 1051-1061 (1982) (participation and vesting); *id.* §§ 1081-1086 (funding); *id.* §§ 1101-1114 (fiduciary responsibilities); *id.* §§ 1021-1031 (reporting and disclosure). Comparable provisions of the Internal Revenue Code of 1954 as amended appear in I.R.C. §§ 410-412 (West Supp. 1983) (participation, vesting and funding).

6. *See* H.R. REP. No. 807, 93d Cong., 2d Sess. 68-69 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4670, 4734; H.R. CONFERENCE REP. No. 1280, 93d Cong., 2d Sess. 280 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5061.

7. Title I of ERISA refers, in general, to those sections of ERISA which appear in the Labor Code and not to those sections appearing in the Internal Revenue Code. *See* Pub. L. No. 93-406, §§ 1-514, 88 Stat. 829, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 935, 939-1019 (codified at 29 U.S.C. §§ 1001-1381 (1982)).

8. 29 U.S.C. § 1056(d) (1982). The complete text of this provision reads as follows:

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

9. I.R.C. § 401(a)(13) (1982). The section in its entirety reads as follows:

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph 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 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

Although section 514(a) of Title I stipulates that ERISA supersedes state regulation of employee benefit plans now covered by the Act,[10] nothing in ERISA's legislative history suggests an intent to eviscerate state divorce laws.[11] State statutes or court decisions often direct that pension benefits be equally or equitably divided between plan participants and their nonparticipating

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10. 29 U.S.C. § 1144(a) (1982). Employee benefit plans covered by ERISA are those "established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both." 29 U.S.C. § 1003(a) (1982). Employee benefit plans specifically declared to be outside the ambit of ERISA include (1) governmental plans, (2) church plans with respect to which no I.R.C. § 410(d) election has been made, (3) plans maintained solely to comply with state workers' compensation, unemployment compensation, or disability insurance laws, (4) plans maintained outside the United States primarily for nonresident aliens, and (5) unfunded excess benefit plans. 29 U.S.C. § 1003(b) (1982).

11. Statements of various legislative leaders, however, do suggest that § 514(a)'s preemptory language was to be accorded both a liberal and expansive reading. *See* H.R. CONFERENCE REP. No. 1280, *supra* note 6, at 383, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5162.

> [T]he substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 CONG. RECORD 29933 (1974) (statement by Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, upon introducing the conference report on H.R. 2).

> In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans — unless a criminal statute of general application — establishing State termination insurance programs, et cetera, will be superseded. It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.

120 CONG. RECORD 29942 (1974) (statement by Senator Jacob K. Javits).

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation. . . . [T]he provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof — including any professional society or association operating under color of law — which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

120 CONG. RECORD 29197 (1974) (statement by Congressman Dent). *See generally* Macey, *Labor Pains: ERISA and the Evolving Doctrine of Federal Preemption of State Law Relating to Employee Benefit Plans*, 4 SETON HALL LEGIS. J. 1, 35 (1978) (the preemption provision enacted into law was broader in its sweep than the versions introduced in the House of Representatives or the Senate).

spouses, who are not plan participants, upon their divorce.[12] In addition, states frequently permit delinquent alimony or child support payments to be satisfied out of a participant's pension benefits by means of garnishment or similar state procedures for enforcing judgments.[13] While Congress apparently did not foresee ERISA's impact on divorce proceedings, it is clear today that conflicts between the federal Act and state divorce laws pose serious threats to the stability of private pension plans. Both plan fiduciaries and divorced spouses of plan participants suffer from continuing congressional lethargy in modifying sections 401(a)(13), 206(d)(1) and 514(a). This article analyzes the administrative, judicial, and legislative attempts to reconcile ERISA with state divorce laws and proposes solutions to problems engendered by this strained reconcilation.

ADMINISTRATIVE INTERPRETATION OF ERISA IN THE CONTEXT OF MARITAL DISPUTES

The absence of legislative explanations concerning the application of sections 401(a)(13), 206(d)(1), and 514(a) to state divorce laws has given the Treasury Department considerable discretion in interpreting these provisions in the context of marital disputes involving pension benefits. Although the Labor and Treasury Departments have concurrent responsibility for administering ERISA,[14] only the Treasury Department, through the Internal Revenue Service, has promulgated rules and regulations concerning ERISA's prohibition against assigning or alienating pension benefits. Treasury Regulation section 1.401(a)-13[15] forbids pension plan benefits from being anticipated, assigned, alienated, or subject to attachment, garnishment, levy, execution or other legal or equitable process.[16] An assignment or alienation includes any arrangement, whether at law or in equity, direct or indirect, or revocable or irrevocable, whereby a party acquires a right or interest enforceable against a benefit which is, or may become, payable to the plan participant or his designated beneficiary.[17] Although section 401(a)(13) entitles a plan participant to make a voluntary, revocable assignment of up to ten percent of his current benefit payments, an attachment, garnishment, levy, execution or other legal process is not a voluntary assignment.[18]

12. *See, e.g., In re* Marriage of Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978) (equal division of participant's pension benefits), *cert. denied,* 444 U.S. 1035 (1980); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979) (equitable division of participant's pension benefits).

13. *See, e.g.,* Western Elec. Co. v. Traphagen, 166 N.J. Super. 418, 400 A.2d 66 (App. Div. 1979) (garnishment); Wanamaker v. Wanamaker, 93 Misc. 2d 784, 401 N.Y.S.2d 702 (Fam. Ct. 1978) (payroll deduction order).

14. *See, e.g.,* 29 U.S.C. §§ 1201-04 (1982).

15. T.D. 7534, 1978-1 C.B. 119.

16. Treas. Reg. § 1.401(a)-13(b) (1978). This particular phraseology represents an expansion of the House Conference Report's Statement that a garnishment or levy of a participant's benefit should not be considered a voluntary assignment. *See* H.R. CONFERENCE REP. No. 1280, *supra* note 6, at 280, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5061.

17. Treas. Reg. § 1.401(a)-13(c)(1)(ii) (1978).

18. *Id.* § 1.401(a)-13(d)(1).

Expansive as this regulation is, it does not indicate whether an award of existing or future pension benefits as part of an alimony or property settlement is a voluntary and revocable assignment.[19] If a divorce decree dividing the benefits is analagous to a writ of garnishment, then any attempt by the pension plan's fiduciary or the employee participant to honor the decree would constitute an assignment or alienation which could deprive the plan trust of its tax-exempt status.[20] The fiduciary might also be subjected to criminal penalties for honoring the decree and become personally liable to refund to the plan trust any amounts paid to the participant's former spouse.[21] Even if it were viewed as a voluntary and revocable assignment, the decree would endanger the plan trust's tax exemption if it awarded more than ten percent of a participant's pension benefits to the former spouse.[22]

In releasing Treasury Regulation section 1.401(a)-13, the Treasury Department expressly disclaimed its authority to decide whether section 514(a) preempts state divorce laws.[23] This disclaimer nevertheless fails to explain why the IRS declined to exclude from the definition of assignment or alienation in section 401(a)(13) plan retirement benefits which were transferred pursuant to state laws or court orders. Such exclusions were made concerning withholding taxes, recoveries of overpayments of benefits to plan participants, transfers of benefits from one qualified plan to another, and transfers of currently payable benefits directly to a joint bank account of the participant and the participant's spouse.[24] The consequent uncertainty surrounding the scope of

19. Clearly, if a fiduciary or employee honors a writ of garnishment, levy, or execution from a state divorce court to collect delinquent alimony or child support or to force a surrender of marital property to a former spouse, the fiduciary or employee has assigned or alienated his plan benefits according to the Regulation's literal terms.

20. This is so because a plan trust which does not satisfy the requirements of I.R.C. § 401(a)(13) (1982) is not an organization described in § 401 which is eligible for exemption from taxation under I.R.C. § 501(a) (1982).

21. *See* 29 U.S.C. § 1109(a) (1982) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach. . . ."); 29 U.S.C. § 1131 (1982) ("Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.").

22. I.R.C. §§ 401(a)(13) and 501(a) (1982). *See* Comment, *Attachment of Pension Benefits Under ERISA*, 74 NW. U.L. REV. 255, 263-64 (1979).

23. Treasury Decision 7534, which accompanied the release of Treasury Regulation § 1.401(a)-13, noted that:

> Several comments requested that the final regulations clarify whether the various state laws (including the laws of community property states) and State court orders which are or may be in conflict with the general rule of section 401(a)(13) are preempted by section 514 of ERISA. As the Internal Revenue Service does not have the authority to prescribe regulations under Title I of ERISA, which includes section 514, these regulations do not address this issue.

T.D. 7534, 1978-1 C.B. 119; 3 PENS. & PROFIT SHARING (P-H) ¶ 85,180 (Feb. 15, 1978).

24. Treas. Reg. § 1.401(a)-13(c)(2) (1978).

ERISA's application to state court orders respecting alimony, child support and marital property divisions obliged plan fiduciaries to incur substantial legal costs to clarify their obligations.

Beginning in 1978, the IRS afforded fiduciaries some relief from this legal morass. The Service posited that a pension plan would not lose its tax-exempt status if it honored a state court decree directing payment of pension benefits to a participant's former spouse provided the participant was receiving retirement benefits at the time the former spouse sought enforcement of the decree.[25] The Service asserted that in enacting section 401(a)(13), Congress intended to distinquish between a garnishment proceeding to satisfy an ordinary creditor's claim and a proceeding to satisfy a family support order. Only by such a construction of ERISA, noted the Service, "can a family income producer be required to fulfill the obligation to provide necessary support to the family."[26]

This implied exception for family support orders was recognized in Private Letter Ruling 7939026.[27] In this ruling, the Service held that compliance with a court order directing payment of forty percent of a pension plan participant's benefits currently payable to satisfy alimony arrearages would not endanger the plan's tax-exempt status under sections 401(a) or 501(a) of the Internal Revenue Code.[28] The Service further noted that any distinction between current support obligations and support arrearages is immaterial in defining the scope of section 401(a)(13).[29] To avoid jeopardizing the trust assets of a plan, the implied exception was not extended to cover claims for support in excess of benefits currently payable to the participant. As the Service explained in a subsequent private letter ruling,[30] "accrued benefits that are not currently payable to the participant under the terms of the plan may not be attached since the participant has no present right to such benefits."[31]

25. This position was asserted in an *amicus curiae* brief. Brief of the Justice Dep't, Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978) (addressing the applicability of ERISA's prohibition against alienation of benefits to family support decrees) [hereinafter cited as Brief, Cartledge v. Miller], *reprinted in* Kroll & Tauber, *Divorce Under ERISA: The Controversy Between Retirement Plans and Aggrieved Spouses Continues,* 37 INST. ON FED. TAX'N § 3.06 (ERISA Supp. 1979). *See also* Rev. Rul. 80-27, 1980-1 C.B. 85.

26. Brief, Cartledge v. Miller, *supra* note 25, at 3-19.

27. Ltr. Rul. 7939026 (June 26, 1979).

28. *Id.* In this ruling, Mr. A, an employee of M Corporation, was divorced in 1967 while still in the employ of M. The decree of divorce awarded the former Mrs. A $X per week in spousal support. In 1975, Mr. A retired from M and began to receive a lifetime pension benefit payable monthly from M's pension plan. In 1977, the former Mrs. A filed suit to collect arrearages in her support payments. A court order issued directing that a certain dollar amount equal to forty percent of A's pension benefit be paid to the clerk of the court for Mrs. A's benefit.

29. *Id.*

30. Ltr. Rul. 8010051 (Dec. 12, 1979).

31. *Id.* The Service ruled that several defined contribution plans would not lose their tax-exempt status by complying with a state court order directing the plan to pay a portion of a participant's pension benefits to the participant's former spouse in satisfaction of alimony arrearages, but only if the benefits were currently being paid to the participant. Any payment of benefits to the former spouse before the participant began to receive benefit payments would terminate the plan's tax-exempt status irrespective of whether the par-

In Private Letter Ruling 8027041, the implied exception was extended to a state court order directing a plan to pay the participant's former spouse a community property share of each benefit payment.[32] The Service noted that courts requiring a community property division of currently payable plan benefits have reasoned that

> (1) ERISA was intended by Congress to protect the pensioner's family as well as the pensioner, and (2) a community property claim upon pension benefits is an ownership claim and not that of a creditor. Therefore, enforcing such claim against the pension does not violate ERISA restrictions on assignment and alienation. Rather than acting as assignments, community property laws prescribe property rights in pension benefits as between spouses.[33]

The Service has thus clearly opined that a plan participant's benefits may be garnisheed to satisfy family support arrearages or to effect a distribution of community property *if* the participant is currently receiving benefit payments from the plan. An increasing number of state court decrees dividing marital or community property,[34] however, are coming perilously close to disregarding the Service's restriction of the garnishment of such benefits to those which are currently being paid to a plan participant. A few decrees have even restricted a participant's right to select the form and timing of pension benefit payments.

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ticipant could withdraw his own contributions to the plans to satisfy part of the arrearages. *Id. See also* Rev. Rul. 80-27, 1980-1 C.B. 85.

Private Letter Ruling 8120045 held that a state court order directing a qualified plan to sequester a former employee's unpaid vested pension benefits so that a portion of these benefits would be available to satisfy spousal support claims against the employee when he became entitled to receive benefit payments would not endanger the plan's tax-exempt status. Ltr. Rul. 8120045 (Feb. 18, 1981). Since under Private Letter Ruling 8010051 and Revenue Ruling 80-27 the employee's benefits would not be used to satisfy family support obligations until the employee achieved "in pay" status, there was no prohibited assignment or alienation of the employee's plan benefits. *Id.*

32. Ltr. Rul. 8027041 (Apr. 9, 1980). In this ruling, A and his wife, W, were residents of a community property state when they were divorced in 1972. Although A was a participant in a qualified plan, the divorce decree did not attempt to divide A's pension benefits between A and W. W obtained a judgment against A in 1979 to partition A's plan benefits which, at that time, were currently being paid to A. The judgment required A to pay a portion of his monthly benefit payments to W as he received them. To ensure that she would actually receive her community property share of A's benefit payments, W requested the court to enter an order directing the plan to pay directly to her her share of the benefits payments. The plan requested a ruling to the effect that its compliance with such an order would not violate § 401(a)(13) or § 501(a) of the Internal Revenue Code. *Id.*

33. *Id.*

34. Both "marital" and "community" property refer to property acquired by either spouse during their marriage. Statutes employing the term "marital property" usually require this property to be divided equitably between the spouses upon their divorce, which is not necessarily tantamount to equally. *See, e.g.,* Foster v. Foster, 589 S.W.2d 223 (Ky. Ct. App. 1979). Community property statutes, on the other hand, presume that each spouse owns a one half interest in all property acquired during marriage with the couple's funds. Hence, upon the couple's divorce, each spouse is entitled to a one half share of this "community" property. *See, e.g., In re* Marriage of Campa, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed,* 444 U.S. 1028 (1980).

JUDICIAL ATTEMPTS TO RECONCILE *ERISA* WITH STATE DIVORCE LAWS, COMMUNITY PROPERTY LAWS, AND DELINQUENCY ENFORCEMENT PROCEDURES

To avoid exposure to civil or criminal liability under ERISA[35] or jeopardizing a plan's tax-exempt status,[36] plan fiduciaries[37] have frequently sought removal of divorce proceedings to federal courts to determine their obligations to make benefit payments to nonparticipating former spouses. The fiduciaries have requested declaratory judgments or permanent injunctions which would permit them to disregard state court orders directing payment of participants' plan benefits to their former spouses.[38] Judicial resolution of conflicts between the express language of sections 401(a)(13), 206(d)(1), and 514(a) and

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35. *See* 29 U.S.C. § 1131 (1982) (criminal penalties); *id.* § 1132 (1982) (civil enforcement).

36. I.R.C. § 501(a) (1982) states that "[a]n organization described in . . . section 401(a) shall be exempt from taxation under this subtitle. . . ." An organization described in § 401(a) is a qualified trust. However, a trust is not a qualified trust if it does not comply with § 401(a)(13). If a trust is not a qualified trust it is not an organization described in § 401(a) and thus cannot obtain tax-exempt status.

37. In addition to plan fiduciaries, plan administrators may be subject to criminal or civil liability under ERISA and their actions may jeopardize a plan's tax-exempt status. An administrator is

> (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
> (ii) if an administrator is not so designated, the plan sponsor; or
> (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16)(A) (1982). A plan sponsor may be

> (i) the employer in the case of an employee benefit plan established or maintained by a single employer,
> (ii) the employee organization in the case of a plan established or maintained by an employee organization, or
> (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

Id. § 1002(16)(B). For the definition of a plan fiduciary, see *supra* note 4. A plan administrator's duties are generally confined to preparing and distributing documents or reports to the Labor and Treasury Departments and to plan participants. *See* 29 U.S.C. §§ 1021-1025 (1982). A plan fiduciary, on the other hand, oversees the day-to-day management and operation of the plan and runs the greatest risk of liability for mismanagement of the plan trust or its assets. *See* 29 U.S.C. §§ 1102, 1104-1112 (1982). This article will focus upon the plan fiduciary's exposure to civil or criminal liability for obeying or failing to obey the terms of a state divorce decree awarding all or part of a plan participant's pension benefits to the participant's ex-spouse who is not a plan participant.

38. *See, e.g.,* Carpenters Pension Trust for S. Cal. v. Kronschnabel, 632 F.2d 745 (9th Cir. 1980), *cert. denied,* 453 U.S. 922 (1981); American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979); Senco of Fla. v. Clark, 473 F. Supp. 902 (M.D. Fla. 1979); Francis v. United Technologies Corp., 458 F. Supp. 84 (N.D. Calif. 1978); Stone v. Stone, 450 F. Supp. 919 (N.D. Calif. 1978), *aff'd,* 632 F.2d 740 (9th Cir. 1980), *cert. denied,* 453 U.S. 922 (1981).

state divorce laws and delinquency enforcement proceedings largely depends upon the following: whether (1) the court resolving the conflict is a state or federal court; (2) the pension benefits are treated as alimony or as martial or community property; and (3) the plan benefits are payable to the participant at the time the marriage is dissolved, or will become payable at some specified time thereafter.

Pension Benefits Classified as Alimony

Several state court decrees have awarded a portion of an employee plan participant's pension benefits to his nonparticipating former spouse as alimony and child support.[39] To date, no state court has ordered a plan to distribute benefits to a nonparticipating former spouse before the participant actually receives them.[40] Thus these decrees have not contravened the Service's distinction between nonforfeitable (vested) benefits and forfeitable (nonvested) benefits under section 401(a)(13).[41] By contrast, however, conflict between sections

39. *See, e.g.*, American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979); Sienkiewicz v. Sienkiewicz, 178 Conn. 675, 425 A.2d 116 (1979); M.H. v. J.H., 93 Misc. 2d 1016, 403 N.Y.S.2d 411 (Fam. Ct. 1978); Wanamaker v. Wanamaker, 93 Misc. 2d 784, 401 N.Y.S.2d 702 (Fam. Ct. 1978).

40. At least one state court has suggested, however, that a divorced wife could compel her employee husband to elect early retirement in order to satisfy arrearages in alimony and child support. In Pepitone v. Pepitone, 108 Misc. 2d 12, 436 N.Y.S.2d 966 (1981), defendant husband was a former member of the New York Yankees entitled to collect retirement benefits from the Major League Baseball Players Benefit Plan when he retired. Defendant could begin to receive benefits from age forty-five to sixty by electing early retirement. The plan's normal retirement age was sixty. Plaintiff and defendant were divorced in 1973 and defendant had subsequently accumulated arrearages in alimony and child support payments totalling $42,000. *Id.* at 12-13, 436 N.Y.S.2d at 967. Plaintiff brought an action to sequester defendant's pension benefits in an attempt to satisfy these arrearages, although at the time the action was filed defendant could not elect early retirement for at least another five years. *Id.* at 13, 436 N.Y.S.2d at 968. The court concluded "that ERISA does not operate to immunize pension payments from family support obligations" and denied plantiff's request for relief. *Id.* at 14, 436 N.Y.S.2d at 968. Nevertheless, the court did hold that plaintiff could compel defendant to elect early retirement in five years and could sequester all benefit payments to defendant at that time until the alimony and child support arrearages had been extinguished. *Id* at 16, 436 N.Y.S.2d at 969. Although this portion of the court's order achieved technical compliance with the dictates of Revenue Ruling 80-27 since the participant would be "in pay" status in five years, the court did not address whether the sequestration would deprive defendant of most if not all of his retirement benefits. The plan would then be placed in the position of paying nearly all of a participant's retirement benefits to an individual who would conceivably utilize them for support and maintenance rather than for retirement income, in contravention of Congress's original purpose in enacting ERISA. Also left unanswered by the court was the question of whether ERISA or the Internal Revenue Code interposed any obstacle to the validity of a state court order requiring a plan participant to retire at a particular age.

41. *See* Rev. Rul. 80-27, 1980-1 C.B. 85. In broad outline, pension benefits are said to be nonforfeitable or "vested" if the employee does not forfeit his right to receive them upon discharge or voluntary retirement from his or her employment before reaching normal retirement age under the plan. 29 U.S.C. §§ 1053(a)(2), 1002(24) (1982), I.R.C. § 411(a)(2), (8) (1982); *see also In re* Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979).

206(d)(1) and 514(a) and state divorce decrees which permit satisfaction of alimony obligations from pension payments has not been mitigated by regulations or other pronouncements. Instead, tedious and costly adjudication of a pension plan's liability to pay a nonparticipating, former spouse is still necessary to safeguard the plan's fiduciary from possible civil or criminal sanctions.

Although most federal courts have concluded that sections 206(d)(1) and 514(a) of ERISA do not prohibit payment of pension benefits to a participant's former spouse to satisfy an alimony claim,[42] an early federal district court decision held otherwise. In *General Motors Corp. v. Townsend*,[43] the defendant attempted to garnish one half of her former spouse's interest in General Motors stock.[44] The writ of garnishment would have run against the trustee of the General Motors Retirement Program for Salaried Employees.[45] General Motors, as the program fiduciary, sought a temporary restraining order and permanent injunction to prohibit the garnishment.[46] Relying on the literal language of section 206(d)(1) and the supremacy clause of the Constitution, the district court granted the injunction. The defendant was enjoined from garnishing any of her former spouse's pension benefits despite the fact that Michigan law "permitted assignment of an interest in a pension or retirement plan in enforcing a judgment of divorce."[47] This narrow reading of the interplay between section 206(d)(1) and state alimony awards has not been followed by any subsequent court decisions.[48]

Two years later, in *Cartledge v. Miller*,[49] a federal district court found an implied exception to ERISA's anti-assignment or alienation provisions with respect to family support orders issued by a state court.[50] A New York state court had issued an order directing a participant's pension plan to deduct thirty-five dollars per week from his pension benefit payments and to pay this sum to a collection support unit.[51] The plan sought to enjoin enforcement of the state court order as an invalid assignment of pension benefits.[52]

Relying on fundamental principles of statutory interpretation, the court presumed that the state's police power to regulate domestic relations would not be superseded by federal legislation unless that was the clear and manifest purpose of Congress. The court noted that the significant state interest in enforcing the support rights of dependent spouses and children could justify the attachment of assets or earnings normally inalienable or unassignable

42. *See, e.g.*, Operating Eng'rs. Local #428 Pension Trust Fund v. Zamborsky, 650 F.2d 196 (9th Cir. 1981).

43. 468 F. Supp. 466 (E.D. Mich. 1976).

44. *Id.* at 467.

45. *Id.*

46. *Id.* at 466-67.

47. *Id.* at 468-70.

48. In fact, *Townsend* is of questionable validity in the district of its origin. *See* Central States Pension Fund v. Parr, 480 F. Supp. 924 (E.D. Mich. 1979).

49. 457 F. Supp. 1146 (S.D.N.Y. 1978).

50. *Id.* at 1149.

51. *Id.* at 1150.

52. *Id.*

under state law. Examining ERISA's legislative history, the court found nothing to indicate that Congress clearly intended to include family support obligations within the scope of ERISA's proscription against assignment or alienation of pension benefits.[53] Moreover, the court concluded that federal regulation of private pension plans was designed to provide financial protection for employees *and their dependents*.[54] The court accordingly denied the plan's request to enjoin enforcement of the state court order.

Subsequent federal court decisions have followed this line of reasoning where the plan benefits sought to be garnished are currently payable to a plan participant. In *American Telephon & Telegraph Co. v. Merry*,[55] the court expanded upon this line of reasoning by noting that section 514(a) does not restrict the enforcement of state court orders directing payments of pension benefits to a nonparticipating former spouse because such orders are the product of state laws that only peripherally touch upon pension plans.[56] Relying on fundamental principles of trust law, the *Merry* court concluded that a plan's fiduciary would not breach a fiduciary duty under ERISA by making these payments because the fiduciary's action would be in accordance with a court's instructions.[57]

Like the federal courts, virtually every state appellate court has held that sections 206(d)(1) and 514(a) do not bar an award of pension benefits to a participant's former spouse in accordance with a divorce decree or delinquency enforcement proceedings.[58] However, the reasons advanced in support of these conclusions are varied. Some appellate decisions have adopted the federal courts' finding of an implied exception to sections 206(d)(1) and 514(a) for family support orders.[59] Still others have largely ignored these statutory provisions and have based their decisions on the construction of state statutes.[60] In all cases, however, the plan participant was currently receiving benefit payments from the plan. To date, no state court has ruled that a pension plan

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53. *Id.* at 1154-55.

54. *Id.* at 1156. The court gave great weight to an *amicus curiae* brief submitted by the Justice Department on behalf of the Departments of Labor and the Treasury which asserted that family support decrees were not within the intended ambit of ERISA's antialienation provisions. *Id.*

55. 592 F.2d 118 (2d Cir. 1979).

56. *Id.* at 121.

57. *Id.* at 125. This raises the interesting but unresolved question of whether a fiduciary who complies with a state court order directing the distribution of pension benefits to a nonparticipating spouse is subject to suit by the participating spouse under 29 U.S.C. § 1132 (1982) for failure to comply with either the statutory injunction contained in 29 U.S.C. § 1056(d)(1) (1982) against involuntary assignments or alienations of the pension plan participants' benefits or with the provisions of 29 U.S.C. § 1104(a)(1) (1982).

58. *See, e.g.*, Western Elec. Co. v. Traphagen, 166 N.J. Super. 418, 400 A.2d 66 (App. Div. 1979); Biles v. Biles, 163 N.J. Super. 49, 394 A.2d 153 (App. Div. 1978); M.H. v. J.H. 93 Misc. 2d 1016, 403 N.Y.S.2d 411 (Fam. Ct. 1978); Wanamaker v. Wanamaker, 93 Misc. 2d 784, 401 N.Y.S.2d 702 (Fam. Ct. 1978).

59. *See, e.g.*, Biles v. Biles, 163 N.J. Super. 49, 394 A.2d 153 (App. Div. 1978).

60. *See, e.g.*, Sienkiewicz v. Sienkiewicz, 178 Conn. 675, 425 A.2d 116 (1979); Cogollos v. Cogollos, 93 Misc. 2d 406, 402 N.Y.S.2d 929 (1978).

must distribute pension benefits to a participant's former spóuse before the participant begins to receive such benefits.

In *Western Electric Co. v. Traphagen*,[61] for example, a New Jersey intermediate appellate court upheld the garnishment of a pension plan to extinquish the participant's alimony arrearages.[62] Western Electric argued that section 514(a), by virtue of the federal supremacy clause, preempted state regulation of distributions of pension plan benefits. In response, the court stated that the purpose of section 514(a) was to ensure uniformity in regulation of pension plans.[63] Only state laws which attempted to regulate ERISA covered plans in the same fashion or to a greater extent than ERISA would be preempted.[64] New Jersey's garnishment laws, which expressly authorized executions on pension benefits to satisfy orders for alimony, merely insured that a portion of a plan participant's benefits would be utilized for the support of his dependents.[65] These laws did not impinge upon uniform federal regulation of ERISA regulated pension plans because they did not purport to regulate such plans. In addition, their enforcement would not jeopardize either the plans' continued solvency or a divorced participant's expectation of receiving pension benefits upon retirement.[66] The garnishment laws merely insured that a portion of a plan participant's pension benefits would be used to support his dependents.

In *Biles v. Biles*,[67] another New Jersey appellate court upheld a garnishment order for alimony arrearages against a pension plan. The court reasoned that section 206(d)(1) sought to ensure that the employee's accrued benefits were available for retirement purposes by insulating them from seizure by business creditors.[68] An employee's former spouse, however, was not simply a business creditor. Thus the court declared "[t]he public policy of New Jersey law is clearly that support obligations outweigh the competing interest of insulating pension benefits from creditors,"[69] particularly when the benefits constitute the former spouse's only substantial source of support.[70]

In *M.H. v. J.H.*,[71] a New York court likewise upheld an order directing payment of pension benefits to the participant's former spouse for alimony. This court, however, did not construe section 206(d)(1) as applying only to

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61. 166 N.J. Super. 418, 400 A.2d 66 (App. Div. 1979).
62. *Id.*
63. *Id.* at 424, 400 A.2d at 69.
64. *Id.*
65. *Id.* at 423, 425, 400 A.2d at 68, 69.
66. *Id.* The court also found an implied exception to ERISA's anti-assignment provisions for divorce decrees. *Id.* at 426-29, 400 A.2d at 69-71.
67. 163 N.J. Super. 49, 394 A.2d 153 (App. Div. 1978).
68. *Id.* at 55, 394 A.2d at 156.
69. *Id.* at 56, 394 A.2d at 157.
70. *Id.* at 57, 394 A.2d at 157. *See also* Wanamaker v. Wanamaker, 93 Misc. 2d 784, 401 N.Y.S.2d 702 (Fam. Ct. 1978), where the court stated: "It would be against the public interest to permit the pensioner, a husband, or former husband, or father to reap all of the benefits of his pension while his dependents have to seek support from other sources." *Id.* at 788, 401 N.Y.S.2d at 705.
71. 93 Misc. 2d 1016, 403 N.Y.S.2d 411 (Fam. Ct. 1978).

business creditors. Instead, it adopted the distinctly minority position that this section prohibits only voluntary assignments of more than ten percent of a participant's pension benefits.[72]

Pension Benefits Classified as Marital or Community Property

Although the modern trend is to the contrary, earlier federal court decisions gave short shrift to a divorcing nonparticipating spouse's community property claim to a share of pension benefits being paid to the participant at the time of the participating and nonparticipating spouses' divorce.[73] For example, in *Kerbow v. Kerbow*,[74] a federal district court held that two spouses were not "participants" or "beneficiaries" of their former husbands' pension plans within the meaning of ERISA. The spouses were therefore barred from maintaining any action under section 502 of ERISA[75] to compel payment to them of their community property shares of their former husbands' pension benefits.[76] The court found no merit to the spouses' contentions that Texas community property laws made them "participants" or "beneficiaries" under the Act since those terms were defined in terms of status other than ownership.[77]

Although the *Kerbow* court never reached the issue, *Francis v. United Technologies Corp.*[78] decided that sections 401(a)(13), 206(d)(1) or 514(a) also foreclosed any state court division of pension benefits between the participant and his former nonparticipating spouse. In that case, a divorcing spouse

72. *Id.* at 1021, 403 N.Y.S.2d at 415. This construction of § 401(a)(13) appears questionable when compared with the language of Treas. Reg. § 1.401(a)-13(b)(1) (1978). Most courts have construed § 401(a)(13) to prohibit the assignment or alienation of any portion of a plan participant's pension benefits save voluntary assignments or alienations by a participant of no more than 10% of the benefits which are currently being paid to him. *See* Comment, *supra* note 22, at 263-64. Since the court also reiled on *Wanamaker*, however, this construction of § 401(a)(13) may not have been the principal basis for its decision.

73. *See, e.g.*, Carpenters Pension Trust for S. Calif. v. Kronschnabel, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981); Stone v. Stone, 632 F.2d 740 (9th Cir. 1980), *aff'g*, 450 F. Supp. 919 (N.D. Calif. 1978); Francis v. United Technologies Corp., 458 F. Supp. 84 (N.D. Calif. 1978).

74. 421 F. Supp. 1253 (N.D. Tex. 1976).

75. A plan participant is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit," 29 U.S.C. § 1002(7) (1982). A beneficiary of a pension plan is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.* § 1002(8). Section 502 of Title I of ERISA provides that "[a] civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . ." *Id.* § 1132(a)(1)(B). State and federal district courts have concurrent jurisdiction over these actions. *Id.* § 1132(e)(1).

76. 421 F. Supp. at 1259-60.

77. *Id.* at 1260.

78. 458 F. Supp. 84 (N.D. Calif. 1978).

claimed a community property interest in her husband's retirement plan which was subject to regulation by ERISA. The husband's employer and the plan administrator sought dismissal of the claim on the ground that sections 206(d)(1) and 514(a) preempted any division of the benefits pursuant to California community property law.[79] The federal district court found that to the extent California's community property laws permitted the divorcing wife to receive any portion of her former husband's retirement benefits, they violated section 206(d)(1) by alienating the husband's pension benefits.[80] The court interpreted section 514(a) as reflecting Congress' intent to preempt all inconsistent state laws. The court held that ERISA preempted California's community property laws insofar as they allowed such an alienation of the husband's pension benefits.[81] *Francis* represented the high water mark of federal preemption of state divorce laws and court decrees requiring payment of pension benefits by ERISA regulated pension plans. Repudiating both the rationale and the holding of *Francis*, most courts today permit the division of pension benefits as marital or community property.[82]

Probably the most influential decision rejecting the *Francis* rationale and holding that sections 401(a)(13), 206(d)(1), and 514(a) were not intended to disturb the operation of state marital or community property laws is *Stone v. Stone*.[83] A California state court awarded Mrs. Stone a forty percent interest in the pension benefits which her husband was receiving at the time of their divorce.[84] Failing to receive her share of these benefits, Mrs. Stone instituted delinquency enforcement proceedings in state court. The fiduciary of her former husband's pension plan removed the proceedings to a federal district court. Unlike the *Kerbow* and *Francis* courts, the district court in *Stone* found that the California divorce decree had transferred a portion of Mr. Stone's right to receive pension benefits to Mrs. Stone. Additionally, Mrs. Stone had a federal cause of action to enforce this right under section 502 because she was a beneficiary of the plan.[85] To deny her a cause of action would leave her "dependent on the willingness of her spouse to sue the plan or its trustees on

79. *Id.* at 85-86.

80. *Id.* The court did not clearly indicate whether the attempted division of the participant's retirement benefits between the participant and the nonparticipating spouse was invalid under § 514(a), § 206(d)(1) or both. Arguably, if California's community property laws related to an ERISA regulated pension plan, such laws would be invalid under §514(a) irrespective of whether or not they violated § 206(d)(1). *See, e.g.*, Stone v. Stone, 450 F. Supp. 919 (N.D. Calif. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

81. 458 F. Supp. at 86. Echoing the reasoning of the district court in *Kerbow*, the court concluded that since the wife was not a participant in or beneficiary of her husband's pension plan, she could not maintain a cause of action under § 502 to receive any portion of her husband's pension benefits. *Id.* at 87.

82. *See, e.g.*, Ball v. Revised Retirement Plan for Salaried Employees of Johns-Manville Corp., 522 F. Supp. 718 (D. Colo. 1981); *In re* Marriage of Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978), *cert. denied*, 444 U.S. 1035 (1980).

83. 450 F. Supp. 919 (N.D. Calif. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

84. *Id.* at 920.

85. *Id.* at 921-23.

her behalf, which [her] spouse has little or no incentive to do."[86]

The *Stone* court next addressed the issue of whether the divorce decree was invalid under section 206(d)(1) as an assignment or alienation of pension plan benefits. The court observed that a federal statute should not be construed as preempting a state domestic relations law unless "positively required by direct enactment."[87] The court also noted that neither ERISA's legislative history nor the plain meaning of "assignment" or "alienation" expressly forbade transferring pension plan benefits in accordance with state community property laws.[88] Moreover, the distinction between a spouse's community property interest and the interest of a commercial creditor in the participant's benefits supported the court's conclusion that Congress did not clearly intend to preempt community property laws.[89]

The spouse's claim was thus entitled to recognition, notwithstanding section 206(d)(1), for several reasons. First, ERISA was designed to assure the payment of retirement benefits not only to a plan participant but also to his dependents for their support and maintenance.[90] ERISA was not designed to provide comparable protection for business creditors who could rely on other debtors to generate income for them.[91] Second, permitting section 206(d)(1) to prevent the award of pension benefits to the nonparticipating spouse would encourage that spouse to limit contributions to the marital community. Where the pension benefits accumulated by the participant represented the primary or sole community asset, such a construction of section 206(d)(1) would also foreclose the nonparticipating spouse's opportunity to receive any community property upon divorce.[92] Unlike a spouse, third party business creditors should have ascertained the extent and character of the participant's resources before extending credit to the participant.[93] Third, the nonparticipating spouse, by contributing to the marital community, earned the pension benefits no less than the participant spouse, and to allow the participant to retain all of the benefits would present the participant with a windfall gain.[94]

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86. *Id.* at 922.

87. *Id.* at 925. The court noted that the United States Supreme Court had carved out an implied exception from explicit statutory language discharging all of a debtor's debts in bankruptcy for child and spousal support obligations even before Congress had codified the exception. *Id.* at 924-25.

88. *Id.* at 926.

89. *Id.*

90. *Id.* at 926. "Members of the families of employees are included in the class which ERISA protects. . . . It would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce." *Id.*

91. *Id.*

92. *Id.* at 926-27. "A second reason to conclude that ERISA treats community property interests differently from other claims against benefits is that the nonemployee spouse cannot minimize her losses if her husband fails to honor his obligations to her." *Id.*

93. *Id.* at 927.

94. *Id.* The court rejected any notion that § 206(d)(1) was designed to protect pension plans from "possible multiple payment of claims" or the necessity of investigating the validity of purported assignments, finding no support for these positions in ERISA's legislative history. Additionally, "[i]f Congress intended § 206(d) to protect plans against these kinds of

The *Stone* court next considered whether California's community property laws permitting an award of pension plan benefits pursuant to a divorce decree were therefore preempted by section 514(a). The court stated that section 206(d)(1) prohibited only transfers of interests in benefits that interfere with ERISA policies. If this specific provision permitted transfers under the community property laws, the court reasoned, then a general provision like section 514(a) did not prohibit them. California's community property laws were not preempted by section 514(a) because they "affected" but did not "relate to" ERISA regulated pension plans.[95]

Most state and federal courts have followed *Stone* in concluding that ERISA does not preclude treating a plan participant's pension benefits which are currently being paid to him or her as marital or community property which may be divided between divorcing spouses.[96] These courts, however, have varied in their treatment of benefits which are not currently payable to the participant and in the degree of control granted a participant over the timing and form of pension benefit payments.[97] The majority view is that both vested and nonvested pension benefits which have not yet "matured" are divisible upon divorce as marital or community property.[98] This view is contrary to the traditional notion that a nonvested pension benefit is a mere expectancy and, hence, not property available for division between the participant and the nonparticipating spouse.[99] If a participant is not "in pay" status at the time of the divorce proceedings, most state courts either award all pension benefits to the participant and compensate the participant's spouse for that spouse's share of such future benefits with other community assets of comparable value or retain jurisdiction over the divorce proceedings until the participant retires and division of the benefits may be effected.[100]

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problems, it would not have permitted, as it did in § 206(d)(2), even voluntary and revocable assignments of up to ten percent of any benefit payment." *Id.* at 930.

95. *Id.* at 932.

96. *See, e.g., In re* Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979); Weir v. Weir, 173 N.J. Super. 130, 413 A.2d 638 (Ch. Div. 1980).

97. *Compare In re* Marriage of Hunt, 78 Ill. App. 3d 653, 663-64, 397 N.E.2d 511, 519 (1979) (participant is free to agree to a modification of the terms of his retirement benefits or to elect between alternative retirement programs) *with In re* Marriage of Lionberger, 97 Cal. App. 3d 56, 158 Cal. Rptr. 535 (1979) (participant precluded by divorce decree from electing a joint and survivor annuity subsequent to his divorce), *cert. denied*, 446 U.S. 951 (1980).

98. For a definition of vested pension benefits, see *supra* note 41. Matured benefits are those in which the participant has an unconditional right to receive immediate payment. *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 658, 397 N.E.2d 511, 515 (1979).

99. *See, e.g., In re* Marriage of Brown, 15 Cal. 3d 838, 841-44, 126 Cal. Rptr. 633, 634-36, 544 P.2d 561, 562-64 (1976). Although California is a community property state, states which have mandated the equitable distribution of a divorcing couple's marital property have generally adopted the *Brown* position that both vested and nonvested pension benefits are divisible marital property. *See, e.g., In re* Marriage of Evans, 85 Ill. App. 3d 260, 406 N.E.2d 916 (1980), *rev'd on other grounds*, 85 Ill. 2d 523, 426 N.E.2d 854 (1981); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76 (App. Div.), *aff'd*, 88 N.J. 4, 438 A. 2d 317 (1981).

100. *See, e.g., In re* Marriage of Gilmore, 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1

Many courts favor awarding all the pension benefits to the participant since a tribunal need not ascertain when the participant retires, value each spouse's share of the benefits, or ensure that the nonparticipating spouse actually receives his or her court-ordered share of the pension payments.[101] Because benefits are not transferred to anyone other than the participant, it is unlikely that a plan will lose its tax-exempt status or that its fiduciary will be subjected to civil or criminal liability. Moreover, the participant is completely free to select the timing and form of pension benefit payments. In compensating the participant's spouse for that spouse's share of pension benefits, the court must ascertain the present value of the benefits at the time of the divorce decree. This valuation should take into account the possibility that the participant might die before retirement and thereby forfeit all rights to receive pension payments.[102] One state decision has even suggested that the nonparticipating spouse's share of the vested and nonvested pension benefits should be determined by multiplying the benefits' present value "by a fraction whose numerator is the number of years (or months) of marriage during which benefits were being accumulated, and whose denominator is the total number of years (or months) during which benefits were accumulated prior to divorce."[103]

Although a court may award other assets to a nonparticipating spouse in lieu of the participant's pension benefits if the participant is not currently receiving such benefits, it may not order such benefits to be paid to the nonparticipating spouse upon divorce. In *Monsanto Co. v. Ford*,[104] the pension plan fiduciary sued to enjoin distribution of the participant's pension benefits as marital property since at the time of the divorce the participant was not receiving the benefits.[105] The district court granted the injunction, finding that such a distribution would endanger the plan's tax-exempt status, discriminate against other plan participants, and violate section 206(d)(1).[106] The state court

(1981). *See also* Solomon, *Beyond Preemption: Accommodation of the Nonemployee Spouse's Interest Under ERISA*, 31 HASTINGS L.J. 1021, 1024 (1980); Stripling, *The Transfer of Pension Benefits Incident to Divorce or Separation: An Analysis*, 54 J. TAX'N 216, 219-20 (1981).

101. *See, e.g., In re* Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

102. *See id.* at 848, n.10, 126 Cal. Rptr. at 639, n.10, 544 P.2d at 567, n.10 (1976). The court left open the possibility, however, that a trial court could order an ERISA covered plan to pay the nonparticipating spouse the entire present value of her share of the participant's pension benefits at the time the decree of divorce was entered. *Id.* A plan participant's right to receive accrued and vested benefits derived from his employer's contributions to his pension plan may be forfeited upon the participant's death if the plan contains a provision to this effect. I.R.C. § 411(a)(3)(A) (1982). This forfeiture provision does not apply, however, to a surviving spouse's right to receive annuity payments from her husband's pension plan, if the participant has previously elected to receive a distribution of his benefits in the form of a § 401(a)(11) joint and survivor annuity. *Id. See also* Treas. Reg. 1.411(a)-4(b)(1)(i) (1977).

103. *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 663, 397 N.E.2d 511, 519 (1979). The court cautioned that "[p]lacing a present value on a nonvested pension or profit sharing interest requires a court to take into account the possibility that death or termination of employment may destroy the interest." *Id.* at 663-64, 397 N.E.2d at 519.

104. 534 F. Supp. 51 (E.D. Mo. 1981).

105. *Id.* at 52.

106. *Id.* at 53-55.

could nonetheless order part of the benefits to be immediately sequestered on the plan's books and awarded to the spouse when the participant began to receive benefit payments.[107]

As *In re Marriage of Brown* suggests, if uncertainties surrounding the maturation of the pension render valuation of future pension benefit payments difficult, a court may instead award each divorcing spouse an appropriate portion of each pension payment as it is paid. This method of dividing pension benefits also divides equally the risk between participant and spouse that the pension will fail to vest.[108] This type of compensation may be the only one available if the value of community or marital property or the participant's separate property is not sufficient to offset the value of the nonparticipating spouse's interest in the benefits.[109] Several problems may be engendered in implementing this method such as the participants freedom to select his own retirement date[110] and the form of retirement benefits he will receive.[111]

If a state court elects to retain jurisdiction over a divorce, it will usually direct the pension plan's fiduciary to pay benefits directly to the nonparticipating former spouse when the participant achieves "in pay" status.[112] In *In re Marriage of Campa*,[113] a California appellate court rejected a pension trust's argument that sections 206(d)(1) and 514(a) precluded court orders to divide pension payments between the participant and the nonparticipating spouse once the participant began to receive benefit payments.[114] Although Congress enacted section 206(d)(1) to ensure that pension benefits would actually provide a plan participant with retirement income, a decree ordering division of

107. *Id.* at 54. The district court relied on Ltr. Rul. 8120045 (Feb. 18, 1981), *see supra* note 31, in arriving at this conclusion although it is questionable whether the plan could thereby conclude with reasonable certainty that § 206(d)(1) would not be violated if it honored the sequestration order. *Id.*

108. *See* 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 639, 544 P.2d 561, 567 (1976). A nonparticipating spouse may elect to receive her community property interest in the participant's pension benefits when they are paid to the participant even though computation of the present value of that interest at the time of divorce is *not* unreasonably difficult or impossible. *See In re* Marriage of Gilmore, 29 Cal. 3d 418, 425, 174 Cal. Rptr. 493, 497, 629 P.2d 1, 5 (1981).

109. *See, e.g., In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979).

110. *See In re* Marriage of Gilmore, 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1 (1981).

111. *See In re* Marriage of Lionberger, 97 Cal. App. 3d 56, 158 Cal. Rptr. 535 (1979), *cert. denied*, 446 U.S. 951 (1980).

112. *See, e.g., In re* Marriage of Campa, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028 (1980); *In re* Marriage of Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978), *cert. denied*, 444 U.S. 1035 (1980); Johns v. Retirement Fund Trust, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *appeal dismissed*, 444 U.S. 1028 (1980); General Dynamics Corp. v. Harris, 581 S.W.2d 300 (Tex. Civ. App. 1979).

113. 89 Cal App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028 (1980). The United States Supreme Court's summary dismissal of the pension plan's appeal from the judgment in *Campa* for want of a substantial federal question has subsequently been viewed by the Ninth Circuit as dispositive of the issue of whether or not a pension trust may be compelled to pay over a portion of a participant's "in pay" benefits to his former wife. *See* Carpenters Pension Trust for S. Calif. v. Kronschnabel, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

114. 89 Cal. App. 3d at 116, 152 Cal. Rptr. at 363.

these benefits between a participant and a nonparticipating ex-spouse was consonant with the objective of assuring that family members received the pension they anticipated.[115] Furthermore, enforcing such a decree did not conflict with the implementation of federal funding, vesting, and fiduciary standards for private pension plans; therefore, section 514(a) was inapplicable to such orders.[116]

Where the payment of pension benefits to a nonparticipating spouse hinges upon the participant's achievement of "in pay" status, the question arises whether the nonparticipating spouse can prevent the participant's delayed retirement or restrict the participant's right to select a joint and survivor annuity as a payment option in order to protect the nonparticipant's marital or community property share of the participant's pension benefits. In *In re Marriage of Lionberger*,[117] a California state court awarded each spouse one-half of the participating spouse's pension benefits and directed the pension plan not to honor any subsequent election by the participant to receive a joint and survivor annuity with any future spouse.[118] A California court of appeals upheld this directive as necessary to avoid decreasing the value of the nonparticipating spouse's community share of the participant's pension benefits by converting a portion of that share into the participant's separate property.[119] The participant was only free to make elections concerning his pension benefits that would result in either an equivalent or increased community share of such benefits for the nonparticipating former spouse.[120] The appellate decision did not decide whether restricting a plan participant's selection of plan payment options (1) violated the qualified joint and survivor annuity rules of section 401(a)(11) and endangered the plan's tax-exempt status or (2), in view of the possibility of the participant's remarriage, frustrated the congressional purpose behind section 401(a)(11) to ensure that a plan participant's spouse would not become destitute upon the participant's death.[121]

115. *Id.* at 124, 152 Cal. Rptr. at 368.

116. The decree was principally "concerned with effectuating a fair division of the monthly pension check between the former spouses." *Id.* at 123-24, 152 Cal. Rptr. at 367-68.

117. 97 Cal. App. 3d 56, 158 Cal. Rptr. 535 (1979), *cert. denied*, 446 U.S. 951 (1980).

118. *Id.* at 66-67, 152 Cal. Rptr. at 540-41.

119. *Id.* at 67-69, 158 Cal. Rptr. at 541-42. This would occur if the participant had not elected to receive his pension benefits in the form of a joint and survivor annuity before his divorce, but had elected this form of payment subsequent to the divorce and before his retirement. By exercising this election the present value of the participant's benefits would be decreased by the value of the benefits payable to the new surviving spouse. Thus, the nonparticipating spouse's share of the participant's benefit payments would be correspondingly decreased by the value of the pension benefits payable to the new surviving spouse. In effect, the participating spouse would have transferred a portion of the present value of the former spouse's interest in the pension benefits to the new spouse, thereby converting part of the former spouse's community property to the participant's separate property.

120. *Id.* at 68-69, 158 Cal. Rptr. at 541-42.

121. *See* H.R. REP. No. 807, 93d Cong., 2d Sess. 67-68 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4732. I.R.C. § 401(a)(11)(A) (1982) provides that "[a] trust shall not constitute a qualified trust . . . if the plan of which such trust is a part provides for the payment of benefits in the form of an annuity unless such plan provides for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity." A

In *In re Marriage of Gilmore*,[122] the court held that a participant could not delay his retirement when to do so would deprive a nonparticipating former spouse of an equal share of the community interest in the pension. In that case, the participant became eligible to receive benefits several months after his divorce but elected to continue working until he reached mandatory retirement age.[123] His former wife petitioned the trial court for an order directing the participant to immediately pay to her her share of his pension benefits, retroactive to the date the participant became eligible to collect them.[124] The trial court declined to issue the order and the California Supreme Court reversed.[125] Since the pension plan provided that if the participant died before retiring, benefits attributable to his employer's contributions would be forfeited, the participant's pre-retirement death would eliminate the nonparticipating spouse's community property share of such benefits.[126] The supreme court thus reasoned that the participant should be obliged to purchase his former spouse's interest in his retirement benefits.[127] The value of this interest would be the present value of the former spouse's share of the benefits measured from the earliest age at which the participant could have retired and begun to receive benefit payments.[128]

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qualified joint and survivor annuity is "an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not less than one-half of, or greater than, the amount of annuity payable during the joint lives of the participant and his spouse and which is the actuarial equivalent of a single life annuity for the life of the participant." I.R.C. § 401(a)(11)(G)(iii) (1982). A plan clearly may require a participant to obtain a spouse's written approval before the participant may elect *not* to receive benefit payments in the form of a qualified joint and survivor annuity. *See In re* Marriage of Lionberger, 97 Cal. App. 3d 56, 71, 158 Cal. Rptr. 535, 543 (1979), *cert. denied*, 446 U.S. 951 (1980). However, certain Code provisions do not appear to permit anyone other than a plan participant to decide whether the participant will receive a distribution of his pension benefits in the form of a qualified joint and survivor annuity. I.R.C. § 401(a)(11) (1982) and Treas. Reg. §1.401(a)-11 (1979). Kroll & Tauber, *Divorce Under ERISA: The Controversy Between Retirement Plans and Aggrieved Spouses Continues*, *supra* note 25, § 3.04.

122. 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1 (1981).

123. *Id.* at 422, 174 Cal. Rptr. at 495, 629 P.2d at 3.

124. *Id.*

125. *Id.* at 421, 426, 174 Cal. Rptr. at 494-95, 498, 629 P.2d at 2, 6.

126. *Id.* at 424, 174 Cal. Rptr. at 496, 629 P.2d at 4.

> Under the cases and statutory law, [the participant] cannot time his retirement to deprive [the nonparticipating spouse] of an equal share of the community's interest in [the participant's] pension. It is a "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse."

Id. at 423, 174 Cal. Rptr. at 496, 629 P.2d at 4.

127. *Id.* at 427, 174 Cal. Rptr. at 498, 629 P.2d at 6. The participant could purchase the nonparticipating spouse's interest in installments. *Id.* at 429, 174 Cal. Rptr. at 500, 629 P.2d at 8.

128. *Id.* The court did not address the question of what would happen if a participant's separate property was inadequate to purchase the former spouse's community interest in the participant's pension benefits.

TOWARD A MORE HARMONIOUS RELATIONSHIP BETWEEN ERISA AND STATE DIVORCE LAWS

The House Conference Report which accompanied ERISA in its initial form stated that a pension plan could permit an employee to *voluntarily* assign up to ten percent of any pension benefit currently being paid to him if the assignment was not made to defray the plan's administrative costs.[129] The report did not clarify whether Congress intended to prevent an employee from voluntarily assigning more than ten percent of his pension benefits, or from assigning or alienating any portion of the benefits save voluntary assignments or alienations of up to ten percent of his pension benefits.[130] While indicating that a garnishment or levy against a retiree's benefit was an involuntary assignment,[131] the report shed no light upon whether a divorce decree awarding pension plan benefits to the participant's former spouse would be considered a voluntary or an involuntary assignment.

The report's explanation of section 514(a) merely paraphrased the statutory language and offered no clue as to its interaction with section 206(d)(1) or state divorce laws.[132] Committee reports which preceded the House Conference Report reveal that Congress enacted section 514 to protect pension plans governed by ERISA from duplicative or conflicting state regulation of such areas as vesting, funding, fiduciary conduct, and reporting and disclosure of plan management and assets.[133] Congress thus intended ERISA to preempt virtually all state regulation of pension plans covered by the Act except those areas of regulatory activity expressly reserved to the states in section 514(b).[134]

Legislative Attempts to Amend ERISA

Despite the uncertainty concerning the interaction of ERISA with state divorce and delinquency enforcement proceedings, various legislative attempts

129. H.R. CONFERENCE REP. No. 1280, *supra* note 6, at 280, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5061.

130. *See* Comment, *Attachment of Pension Benefits Under ERISA*, 74 NW. U.L. REV. 255, 263-64 (1979).

131. Treasury Regulations promulgated in 1978 adopted and expanded upon this definition of an involuntary assignment. More specifically, Treas. Reg. § 1.401(a)-13(b)(1) (1978) states that plan benefits "may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution, or other legal or equitable process." An assignment or alienation *includes* (but is not limited to) "[a]ny direct or indirect arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." *Id.* § 1.401(a)-13(c)(1)(ii). An attachment, garnishment, levy, execution, or other legal or equitable process is not to be considered a voluntary assignment or alienation insofar as a plan permits a participant to make a voluntary assignment of up to 10% of his current benefit payments. *Id.* § 1.401(a)-13(d)(1). The Regulation does not purport to define the terms "voluntary" or "revocable."

132. H.R. CONFERENCE REP. No. 1280, *supra* note 6, at 383, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5162.

133. H.R. REP. No. 533, 93d Cong., 2d Sess. 17 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4655; S. REP. No. 127, 93d Cong., 2d Sess. 35 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4871.

134. *See supra* note 11.

to clarify ERISA's intended scope have become mere spectres upon the advent of congressional adjournments. A bill was introduced in the House of Representatives in 1978 which addressed the proper interaction of sections 401(a)(13) and 206(d)(1) with state divorce laws, but it died in the House.[135] The bill would have permitted an assignment or alienation of a plan participant's pension benefits which were "in pay" status if it was made pursuant to a decree of divorce, separate maintenance, or child support, and the decree did not affect the timing of benefit payments from the plan.[136] Another unsuccessful bill, commonly known as the ERISA Improvements Act of 1979,[137] would have expressly permitted an award of pension benefits in conjunction with an alimony award or division of property upon divorce.[138] Such an award could not, however, require the participant's pension plan to alter the effective date, timing, form, duration or amount of benefit payments, or to honor any election made by a nonparticipant or not otherwise provided for under the plan.[139]

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135. H.R. 13446, 95th Cong., 2d Sess., 124 CONG. REC. 21054 (1978).

136. *Id.* A copy of the decree would also have to be submitted to the Secretary of Labor in accordance with regulations to be promulgated after enactment of the bill into law. *Id.*

Upon introducing the bill, Representative John Seiberling of Ohio made the following remarks:

> My interest in this subject began when I received a letter from a constituent whose husband left her and their two children, and retired at the age of 53. Because ERISA section 206(d)(1) provides that benefits provided under the plan may not be assigned or alienated, and because ERISA preempts State law, the husband's pension plan has ignored a State court order attaching his pension for the support of his two children. My constituent has had to turn to welfare for subsistance. I do not believe that Congress intended this result from 206(d)(1), and I think we have a responsibility to speak unequivocally on this point.
>
> Spouses and children being denied pension benefits for support by this interpretation of ERISA are hardly in a position to sue the pension plan in Federal court. H.R. 13446 would remove this burden of litigation by clearly expressing Congress' intent to allow pension attachment by court order for support.

Id.

137. S. 209, 96th Cong., 1st Sess., 125 CONG. REC. 930-48 (1979).

138. *Id.* Section 128 of the Act would have added a new subsection (3) to § 206(d), making subsection (1) of that section inapplicable,

> in the case of a judgment, decree or order (including an approval of a property settlement agreement), pursuant to a State domestic relations law (whether of the common law or community property type), which — (A) affects the marital property rights of any person in any benefit payable under a pension plan or the legal obligation of any person to provide child support or make alimony payments, and (B) does not require a pension plan to alter the effective date, timing, form, duration, or amount of any benefit payments under the plan or to honor any election which is not provided for under the plan or which is made by a person other than a participant or beneficiary.

125 CONG. REC. 935-36 (1979). Section 205(j) of the Act would have amended § 401(a)(13) to include language identical to that embodied in proposed § 206(d)(3). 125 CONG. REC. 940 (1979).

139. 125 CONG. REC. 940 (1979) (§ 206(d)(3)(B)). Additionally, § 155 of the Act would have provided that § 514(a) would not apply to a judgment, decree or order described in

The most recent attempt to modify ERISA's anti-alienation provisions occurred in 1983 when the "Retirement Equity Act" was introduced in the Senate.[140] This bill would exclude alimony payments, child support payments, and marital and community property awards from classification as assignments or alienations under section 206(d)(1), but would contain restrictions virtually identical to those found in the ERISA Improvement Act of 1979.[141] If these

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new § 206(d)(3). 125 CONG. REC. 937 (1979). Senator Jacob Javits of New York, who introduced the bill, together with Senator Harrison Williams of New Jersey, explained that:

> [t]he purpose of these provisions is to reserve for the States their traditional control over marital and family matters, and to assist plan administrators who are faced with the conflicting duties of obeying State court decrees to pay benefits to plan participants' former spouses and also complying with the Federal antialienation rule under penalty of plan disqualification.

Id. at 947.

At approximately the same time that hearings on the ERISA Improvements Act were taking place, Representative Seiberling introduced a bill in the House of Representatives which was essentially a slightly modified version of his 1978 bill to amend §§ 401(a)(13) and 206(d)(1). *See* H.R. 1884, 96th Cong., 1st Sess. (1979). The only difference between the bills was that H.R. 1884 would have provided that "[n]othing in this subsection [i.e. § 206(d)] shall be construed to alter, amend, modify, invalidate, impair, or supersede the operation of any State law governing the acquisition, division, or distribution of property defined by state laws as community property or as property belonging to a marriage." *Id.* (Subsection (4)). This bill was referred jointly to the House Committees on Ways and Means and Education and Labor, but was never favorably reported out of either committee to the full House.

In 1981, Representative Erlenborn introduced a similar bill entitled the "Retirement Income Incentives and Administrative Simplification Act of 1981." H.R. 4330, 97th Cong., 1st Sess. (1981). The bill would have permitted a qualified plan to distribute all or part of a participant's pension benefits to a nonparticipating spouse only to the extent provided for in a decree of divorce or a property settlement agreement approved by a state court. *Id.* § 3310(a)(2). The decree or agreement could not alter the "date, timing, form, duration, or total amount of any benefit payment under the plan" nor require the plan to honor an election which would effect such an alteration or which would be made by anyone save the participant or his designated beneficiary. *Id.* A decree or agreement satisfying the aforementioned requirements would not be preempted by virtue of § 514(a). *Id.* § 3605(a)(2). To date, however, no version of this bill has been enacted into law.

140. S. 19, 98th Cong., 1st Sess. (1983).

141. *Id.* Section 5(a)(1) of the Act would amend § 206(d) by adding subparagraph (3) to subparagraph (1) and (2). Subparagraph (3) would read as follows:

> Except as provided in paragraph (4), paragraph (1) shall not apply in the case of a judgment, decree, or order (including an approval of a property settlement agreement) relating to child support, alimony payments, or marital property rights which is made pursuant to a State domestic relations law (whether of the common law or community property type) and which — (A) creates or recognizes the existence of an individual's right to receive all or a portion of the benefits to which a participant's designated beneficiary would otherwise be entitled under a pension plan, (B) clearly identifies (i) such participant, (ii) the amount or percentage of such benefits to be paid to such individual, (iii) the number of payments to which such judgment, decree or order applies; and (iv) the name and mailing address of such individuals; and (C) does not require such plan — (i) to alter the effective date, timing, form, duration, or amount of any benefit payments under the plan, or (ii) to honor any election which is not

restrictions were satisfied, a pension plan could distribute a nonparticipating spouse's share of the participant's pension benefits in a lump sum within a single taxable year. If, however, the plan provided for the payment of benefits in the form of an annuity, the plan would be compelled to make a single life annuity "available" to the nonparticipating spouse.[142] Finally, the bill would permit a nonparticipating spouse to defer immediate taxation on the lump sum distribution by rolling the distribution over into an individual retirement account (IRA).[143]

Inadequacy of Proposed Legislation to Amend ERISA

The proposed legislation to amend ERISA apparently merely codifies federal and state court decisions and the Internal Revenue Service's rulings rather than striking a better balance between the aims of ERISA and state divorce laws. Congress's principal purpose in enacting sections 401(a)(13) and 206(d)(1) was to ensure that a plan participant's pension benefits would provide an actual source of income for the participant and the participant's dependents upon the participant's retirement. Section 514(a) advances this purpose by insulating the participant's benefits from the claims of creditors.[144] At the same time, however, state divorce laws seek to divide property accumulated during marriage equally between the divorcing spouses and ensure that

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> provided for under the plan or which is made by a person other than a participant or beneficiary.

The Act would make comparable amendments to § 401(a)(13).

142. *Id.* Section 5(b) of the Act would add a new subsection (e)(1) to § 206. It is unclear from the terms of this provision whether a nonparticipating spouse who receives a distribution of pension benefits pursuant to this subsection *must* accept payment of his or her portion of the participant's pension benefits in the form of a single life annuity if the participant's plan makes such an annuity available. "Available" is not defined in the proposed Act. The Act would also add a new subparagraph (25) to I.R.C. § 401(a) which would contain language identical to that appearing in new § 206(e).

143. S. 19, 98th Cong., 1st Sess. § 5(c)(3) (1983). *See also* I.R.C. § 402(a)(5)(A) (1982); *id.* § 402(a)(5)(D)(iv)(I). An individual retirement account is a "trust created or organized in the United States for the exclusive benefit of the individual or his beneficiaries, but only if the written governing instrument creating the trust" satisfies certain requirements. I.R.C. § 408(a) (1982). The more important of these requirements are as follows:

> (1) Except in the case of certain "roll over" contributions, all contributions to the IRA must be made in cash and the total amount of such contributions for any taxable year on behalf of any individual cannot exceed $2,000. I.R.C. § 408(a)(1) (1982).
> (2) The trustee, with one minor exception, must be a bank. *Id.* § 408(a)(2).
> (3) The individual's account balance must be fully vested. *Id.* § 408(a)(4).
> (4) "The entire interest of an individual for whose benefit the trust is maintained [must] be distributed to him not later than the close of his taxable year in which he attains age 70 1/2, or will be distributed, . . . before the close of such taxable year, . . . over – (A) the life of such individual or the lives of such individual and his spouse, or (B) a period not extending beyond the life expectancy of such individual or the life expectancy of such individual and his spouse." *Id.* § 408(a)(e).

144. *See* Stone v. Stone, 450 F. Supp. 919, 932 (N.D. Calif. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

neither spouse is left destitute after the divorce. The purpose behind sections 401(a)(13), 206(d)(1) and 514(a) is antithetical to the purposes of state divorce laws if a state court awards a portion of a participant's pension benefits to the nonparticipating spouse although the participant is not "in pay" status at the time the divorce decree is entered or the property settlement is approved.

The proposed legislative amendments to sections 401(a)(13), 206(d)(1) and 514(a) would balance these state and federal purposes by permitting adequate retirement benefits to be paid to both spouses once the participating spouse retires and begins to receive benefit payments. The reforms would thus ensure that a participant and the participant's dependents actually received income upon the participant's retirement. In addition, the reforms would protect a plan fiduciary from incurring legal expenses to defend itself against plan participants attempting to recoup benefits distributed to their former nonparticipating spouses pursuant to state court decrees of divorce or state court approved property settlement agreements.[145]

Unfortunately, the proposed legislative amendments do little to preserve the basic purposes of state divorce laws. They specifically provide that a state court order can be exempted from the general prohibition against assigning or alienating plan benefits only if it does not alter the timing of benefit payments to a plan participant.[146] Several proposals further condition an order's exemption upon the absence of any provision in the divorce decree or settlement agreement requiring the pension plan to alter benefit payments or to honor elections either not provided for under the plan or made by a person other than a participant or beneficiary.[147] Accordingly, a qualified plan could disregard a state divorce decree or property settlement agreement directing payment of benefits to the nonparticipating spouse if the participant is not currently "in pay" status. The plan could also ignore state court orders which restrict the participant's right to select the form of retirement benefits which will be paid to him or her.[148]

If the participating spouse is not receiving benefit payments at the time of his or her divorce and the future pension benefits represent the only substantial source from which an alimony or property award to the nonparticipating spouse may be made, it appears unjust to require the nonparticipating spouse to forego receiving his or her share of such benefit payments until the participant decides to retire and, thus, to begin collecting pension benefits.

145. It is true that none of the bills would specifically amend ERISA to immunize a plan fiduciary from potential civil liability under 29 U.S.C. § 1104(a)(1)(A) (1982) for distributing a participant's benefits to a former nonparticipating spouse pursuant to a state court decree of divorce. *See generally* Solomon, *supra* note 100, at 1041. Nevertheless, a court would probably cloak a fiduciary with such immunity on the theory that Congress, in enacting a bill amending ERISA to a specifically authorize a plan fiduciary to distribute a participant's "in pay" benefits to the former spouse, implicitly intended to immunize the fiduciary from civil liability for acting in accordance with this authority.

146. *See supra* notes 135-41 and accompanying text.

147. S. 209, 96th Cong., 1st Sess. 125 CONG. REC. 930-48 (1979) (§ 128); H.R. 4330, 97th Cong., 1st Sess. (1981) (§ 3310(a)(2)(B)(ii)); S. 19, 98th Cong., 1st Sess. (1983) (§ 5(a)(1)).

148. *See In re* Marriage of Lionberger, 97 Cal. App. 3d 56, 158 Cal. Rptr. 535 (1979), *cert. denied*, 446 U.S. 951 (1980).

This is particularly true if the nonparticipating spouse is left in severe financial straits as a result of the participant's refusal to retire immediately following the couple's divorce. In this situation, the nonparticipating spouse needs pension benefit payments for sustenance, not a retirement pension. Furthermore, permitting a participant to select the form in which he or she shall receive pension benefit payments may effectively diminish the nonparticipating spouse's share of such benefit payments.[149] For example, a participant may elect to receive benefit payments in a single life annuity before the divorce and thereafter elect to receive benefit payments in the form of a joint and survivor annuity. Consequently, the value of the nonparticipating spouse's interest in the participant's pension benefits would be automatically reduced by that portion of the benefits required to fund a survivor's annuity for the participant's new spouse.[150]

The proposed amendments also fail to diminish the costs to a plan of maintaining the detailed records necessary to calculate a former nonparticipating spouse's share of a participant's pension benefits once the participant achieves "in pay" status, an event which may occur many years after the couple's divorce. The present value of the participant's pension benefits upon his or her retirement is relatively simple to compute. In a defined benefit plan, the benefit's present value is computed with reference to the benefits accrued by the participant until retirement and the participant's actuarial life expectancy after his or her retirement.[151] On the other hand, in a defined contribution plan, the present value of the benefits upon the participant's retirement is simply the participant's account balance at that time.[152] Some courts, though, have limited the nonparticipating spouse's share of the participant's pension benefits to that portion of the total benefits which accrued during the couple's marriage.[153] To compute the nonparticipating spouse's share of these benefits, the plan fiduciary must maintain records indicating the date of the participant's divorce. Maintaining such records may require complex and costly data retrieval systems which may dampen employer enthusiasm for continuing the plan. If both the present value of the benefits and the nonparticipating spouse's share of such benefits were determined at the time of divorce, then these records would not be necessary, if the plan distributed the nonparticipat-

149. *See id.* at 67, 158 Cal. Rptr. at 541.

150. *See id.*

> [T]he effect of an election by the employee spouse to convert his pension benefits to those available under the joint and survivor annuity provisions of the plan, would be to reduce the monthly income payable during the participant's life and increase the benefits payable after his death. Because the divorced wife's right to share in pension benefits terminates with the death of the husband, the monetary value of her interest in the pension benefits would be reduced by such an election.

Id. See also Comment, *The Employee's Retirement Income Security Act of 1974 — The Spouse's Interest or Non-Interest in a Community Property Asset*, 12 CAL. W.L. REV. 560, 577-81 (1976).

151. I.R.C. §§ 411(a)(2), (a)(7)(A)(i) (1982).

152. *Id.* § 411(a)(7)(A)(ii).

153. *See, e.g., In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979).

ing spouse's share of such benefits to him or her at such time.

Finally, and most importantly, the amendments do not address the issue of whether a former nonparticipating spouse's share of the participant's pension benefits should be limited to a share of those benefits which accrued or vested during the marriage or should include a share of those benefits which accrued or vested after the divorce and before severance of the participant's employment.[154] While the former position has not been explicitly endorsed by the legislative proposals, it appears consistent with both the state and federal purposes detailed previously. Only in rare circumstances will the former nonparticipating spouse be reduced to poverty if that spouse receives only a share of the participant's pension benefits which accrued during their marriage.[155] Adoption of such a position usually also ensures that the participant and his or her new spouse will receive retirement income adequate to furnish them with sustenance.

The nonparticipating spouse arguably should also be limited to sharing in the participant's pension benefits which were vested in the participant at the time of the divorce. Fundamental pension law principles stipulate that a retiring plan participant is entitled to receive only those accrued benefits which were vested at the time of his or her retirement.[156] A nonparticipating spouse could thus conceivably receive a larger share of the participant's pension benefits which accrued during the couple's marriage than the participant would be entitled to receive upon retirement. It would seem to be inequitable to award the nonparticipating spouse fifty percent of the benefits which accrued during his or her marriage to the participant when the participant will only receive forty percent of these benefits upon his or her retirement. On the other hand, because the vested portion of a participant's accrued benefits increases with the length of employment,[157] it would be unfair to deny pension benefits to the nonparticipating spouse simply because the participant, at the time of the divorce, had not accumulated enough years of service to become vested in any portion of his or her accrued benefits. This is particularly true when a reasonable probability exists that the participant will become vested in these benefits

154. As used here and in the balance of this article, employment with an employer is severed when the employee resigns, is fired or retires from employment. An employee who is a plan participant does not automatically forfeit his or her vested benefits under the plan upon being fired or resigning. *See* I.R.C. § 411(a)(2) (1982).

155. This might occur if, for example, the couple were married for only two years before the divorce and thereafter the participant worked for an additional twenty years for his employer, accruing and becoming vested in benefits for each of these years.

156. *See* I.R.C. § 411(a) (1982). The plan need not begin payment of benefits to the participant before sixty days after the end of the latest plan year in which (a) the participant reaches the earlier of age 65 or the plan's normal retirement age, (b) the participant completes ten years of plan participation or (c) "the participant terminates his service with the employer." *Id.* § 401(a)(14).

157. This is technically true only if the plan has adopted a "5 to 15" year vesting schedule or a "rule of 45" vesting schedule. I.R.C. § 411(a)(2)(B), (C) (1982). If the plan contains a ten year vesting schedule, a participant does not become vested in any of his or her accrued benefits until he or she completes at least ten years of service with his or her employer. *Id.* § 411(a)(2)(A).

in the near future.[158]

Reconciling ERISA with the Aims of State Divorce Laws

The failure of the proposed amendments to specify vesting schedules for courts to apply to pension benefits which accrued during the marriage of a plan participant and his or her nonparticipating spouse fosters uncertainty concerning the computation of the nonparticipating spouse's share of these benefits upon the couple's divorce. Legislation should be introduced amending the vesting schedules of section 203(a) of Title I of ERISA and section 411(a) of the Internal Revenue Code.[159] First, such legislation should provide that the vested percentage of a nonparticipating spouse's share of the participant's pension benefits which accrued during their marriage should be equal to the participant's vested percentage of his or her share of such benefits at the time of divorce. The proposal should also provide that when the participating spouse is not vested in any portion of his or her accrued benefits at the time of divorce, the nonparticipating spouse's vested percentage of his or her share of such benefits shall be determined as follows. In the case of a plan with a ten year vesting schedule or a "rule of 45" vesting schedule,[160] the nonparticipant spouse's share would be calculated by assigning ten percent to each year of service rendered by the participant and multiplying this figure by the number of years of service the participant accumulated under the plan.[161] If a plan has adopted a five to fifteen year vesting schedule, the nonparticipant's share would be determined by assigning five percent to each year of service rendered by the participant to the employer and multiplying this figure by the number of years the participant has accumulated under the plan. By enacting such legislation, Congress would ensure that the nonparticipating spouse actually receives some portion of the participant's pension benefits which accrued during their marriage, but not more than the participant would receive following the participant's retirement.

Congress could also amend the Internal Revenue Code provisions concerning the distribution of pension benefits and the establishment of indi-

158. If, for example, an employee and his spouse were married for eight years before their divorce, and the employee participated in a plan containing a 10 year vesting schedule for each of these years, the nonparticipating spouse would receive no portion of the employee's pension benefits upon the couple's divorce because the employee would not have been vested in any portion of his pension benefits at that time. However, the employee would become competely vested in such benefits with only two more years of service with his employer. *See* I.R.C. § 411(a)(2)(A) (1982).

159. The existing vesting schedules in 29 U.S.C. § 1053(a)(2) (1982) are identical to those contained in I.R.C. § 411(a)(2) (1982).

160. *See* I.R.C. § 411(a)(2)(A), (C) (1982).

161. If the plan has a 10 year vesting schedule or a rule of 45 vesting schedule, the vested percentage of a participant's accrued benefits theoretically increases by 10% for each year of service the participant renders to the employer. Thus, if a participant under the proposed 10 year vesting schedule had accumulated three years of service at the time of his or her divorce from the nonparticipating spouse, the vested percentage of the nonparticipating spouse's share of the participant's accrued benefits at this time would be 30%.

vidual retirement accounts (IRA's)[162] to attain a balance between the purposes of ERISA and the states' divorce laws. Section 402(a)(5) of the Internal Revenue Code provides that a plan participant who receives a lump sum[163] distribution of pension benefits within a taxable year due to the plan's termination[164] may transfer any portion of the distribution to an eligible retirement plan, including an IRA.[165] If so transferred within sixty days of its distribution, the lump sum distribution will be excluded from the participant's gross income for that taxable year.[166] A lump sum distribution is a distribution from a pension plan of a participant's pension benefits within one of his taxable years if such benefits will be paid to the participant if one of the following occurs: the participant dies, lives beyond the age of 59½, leaves his employer's employ, or becomes disabled.[167]

If section 402(a) were amended to permit a plan to make a lump sum distribution to a nonparticipating spouse upon a participant's divorce of no more than fifty percent[168] of the pension benefits which accrued during their marriage and vested, in accordance with the vesting schedules previously discussed, the nonparticipating spouse would be assured of income to provide her with adequate financial support. Such a distribution would make it unnecessary for a divorce court to prohibit the participant from exercising any election respecting the participant's share of such benefits subsequent to the divorce, because no post-divorce election could diminish the nonparticipating spouse's share of such benefits which accrued and vested during their marriage. Furthermore, a lump sum distribution would eliminate the administrative costs of maintaining records concerning plan participants' divorce dates to compute the nonparticipating spouse's proper share of the participant's pension benefits.

A lump sum distribution may not provide the nonparticipating spouse with a source of support, however, if it must be used to satisfy an increased

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162. *See* I.R.C. § 402 (1982) (distributions of benefits); *id.* § 408 (IRA's).

163. *See* I.R.C. § 402(e)(4)(A) (1982) for a definition of "lump sum."

164. In the case of a profit sharing or stock bonus plan, a complete discontinuance of contributions under the plan will satisfy the termination requirement. I.R.C. § 402(a)(5)(D)(i)(I), (II) (1982).

165. *Id.* § 402(a)(5)(A)(ii) (1982). An eligible retirement plan is (a) an individual retirement acount described in § 408(a) (i.e. an IRA), (b) an individual retirement annuity described in § 408(b), (c) a qualified trust, or (d) an annuity plan described in § 403(a). I.R.C. § 402(a)(5)(D)(iv) (1982).

166. I.R.C. § 402(a)(5)(A), (C) (1982).

167. *Id.* § 402(e)(4)(A).

168. Limiting the distribution to 50% of the participant's accrued benefits would (1) ensure that the participant and any new dependents would not be totally deprived of retirement benefits and (2) achieve some parity between divorce decrees in community property states, which generally award each spouse one half of the participant's accrued plan benefits, and divorce decrees in marital property states, which usually divide the participant's plan benefits equitably, although not necesarily equally, between the spouses. *See, e.g.*, Foster v. Foster, 589 S.W.2d 233 (Ky. Ct. App. 1979) (former wife awarded a one-third interest in husband's benefit payments). The percentage of accrued benefits which a participant should be entitled to retain upon divorce from his or her nonparticipating spouse should not depend to any substantial extent on the participant's particular state of residence.

income tax liability for the taxable year in which the distribution is made to such spouse.[169] Congress should therefore amend section 402(a) to permit a nonparticipating spouse to elect ten year income averaging[170] to minimize this adverse tax consequence. Such an amendment would further one of the purposes of state divorce laws by ensuring that most of the lump sum distribution would be available for the nonparticipating spouse's financial support.[171]

If the distribution is not necessary to provide sustenance for the nonparticipating spouse, ERISA's goals are not subverted if the Internal Revenue Code encourages the nonparticipating spouse to preserve the distribution until that spouse reaches the normal retirement age of the participant's pension plan.[172] By preserving the distribution until such time, both the participant and the nonparticipating spouse would be assured of income when they reach retirement age and neither would need to rely on state and federal welfare.[173]

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169. Such a dramatic increase in income is likely if the nonparticipating spouse was married to the participant for several years while the participating spouse was accruing and becoming vested in his or her plan benefits.

170. I.R.C. §§ 402(e)(1), (e)(4)(A), (e)(4)(D), (e)(4)(E) (1982).

171. Some commentators have warned that distributing a portion of a participant's pension benefits to a nonparticipating spouse pursuant to a divorce decree may force the participant to recognize *Davis* gain on the transfer or invite the Service to tax the nonparticipating spouse's share of the benefits to the participant under traditional assignment of income principles. *See* Haroutunian & Marks, *Designing Court Orders and Agreements for Dividing Marital Interests in Qualified Plans*, 58 J. TAX'N 322, 324-25 (1983); Solomon, *supra* note 100, at 1064-66; Stripling, *supra* note 100, at 219-22. If compelled to pay income taxes on such a distribution of pension benefits in this theory of taxation, the participant will be paying taxes on income which was not used or disposed of in accordance with the participant's wishes. Conversely, *Davis* gain is traditionally recognized and assignment of income principles are usually applied where the transferor of the property upon which the gain is recognized or the individual to whom the income from employment activities is attributed used the property or income with unfettered discretion. *See, e.g.*, United States v. Davis, 370 U.S. 65 (1962); Helvering v. Horst, 311 U.S. 112 (1940); Lucas v. Earl, 281 U.S. 111 (1930). Moreover, if distributing a portion of the participant's benefits to the nonparticipating spouse is characterized as an assignment of income or triggers the recognition of *Davis* gain, the distribution will be taxed to the participant. If this same amount had been distributed to the participant upon his or her retirement only a portion of the distribution would be taxable to the participant in the year he or she received the distribution. *See* I.R.C. § 402 (1982). For these reasons, Congress should amend the Internal Revenue Code to foreclose any application of assignment of income principles or *Davis* gain concepts to a distribution of a portion of a participant's pension benefits to the participant's former spouse pursuant to a state court decree of divorce.

172. A plan's normal retirement age is "the earlier of (A) the time a plan participant attains normal retirement age under the plan, or (B) the later of — (i) the time a plan participant attains age 65, or (ii) the 10th anniversary of the time a plan participant commenced participation in the plan." I.R.C. § 411(a)(8) (1982). Some plans may provide the participant with the option of electing to retire at an earlier age and receiving reduced benefit payments.

173. This would be true assuming the participant retired from the service of his employer before reaching the plan's normal retirement age, had been a plan participant for more than 10 years upon his retirement, and the plan's normal retirement age was less than 65. I.R.C. § 401(a)(14) (1982).

In sum, Congress should amend section 402 of the Internal Revenue Code to classify a distribution to a nonparticipating spouse of that spouse's share of the participant's pension benefits which accrued and vested during their marriage as a lump sum distribution. If the nonparticipating spouse concludes that the distribution is not currently necessary to provide him or her with support, that spouse should be permitted to roll the distribution over into an IRA within sixty days of receiving it and avoid immediate income taxation upon such distribution.[174] Under the Code's current provisions regarding IRA's, the nonparticipating spouse would be able to receive the distribution deposited in an IRA upon reaching age 59½ and until age 70½ without incurring a penalty tax for premature withdrawals from an IRA.[175] By withdrawing the distribution from the IRA between these ages, the nonparticipating spouse effectively receives retirement benefits at approximately the same time as the former participating spouse. The penalty tax for premature withdrawals from an IRA would encourage the nonparticipating spouse to leave the lump sum distribution in the IRA until retirement. Thus, the nonparticipating spouse's election to roll over his or her share of the participant's pension benefits into an IRA would place the nonparticipating spouse on an approximately equal footing with the former participating spouse. Both individuals would receive their retirement benefits at approximately the same time and with approximately the same tax consequences. Neither spouse would be deprived of retirement income and neither would be required to resort to federal or state welfare programs for sustenance.

CONCLUSION

A nonparticipating divorced spouse of a participant currently receiving pension benefit payments is today clearly entitled to receive a portion of these payments to satisfy an alimony or marital property award to such nonparticipating spouse. Unfortunately, the courts, the Treasury and Labor Departments, and Congress have not recognized that the spouse of a participant who is not "in pay" status at the time of their divorce may need these pension benefits immediately to provide him or her with financial support. The proposed legislative amendments to section 401(a)(13) of the Internal Revenue Code and to sections 206(d)(1) and 514(a) of ERISA do not satisfy this need

174. *Cf.* I.R.C. § 402(a)(5)(A), (C) (1982) pertaining to a qualifying rollover distribution to a plan participant upon termination of the plan.

175. The penalty tax for premature withdrawals by an individual from his IRA is found in I.R.C. § 408(f)(1) (1982). That section provides that,

> [i]f a distribution from an individual retirement account . . . to the individual for whose benefit such account . . . was established is made before such individual attains age 59 1/2, his tax . . . for the taxable year in which such distribution is received shall be increased by an amount equal to 10 percent of the amount of the distribution which is includible in his gross income for such taxable year.

An individual's IRA contributions must "be distributed to him not later than the close of his taxable year in which he attains age 70 1/2" unless the contributions are distributed in the form of a joint and survivor annuity. I.R.C. § 408(a)(6) (1982).

by balancing the purposes of ERISA and state divorce laws. The changes in the Internal Revenue Code of Title I of ERISA advocated by this article would achieve these purposes as well as provide an approximately equivalent distribution of pension benefits to the nonparticipating spouse regardless of whether the participant happened to be "in pay" status at the time of their divorce.

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