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## How the Supreme Court and the Department of Labor May Dispel Myths About ERISA's Family Law Provisions and Protect the Benefit Entitlements that Arise Thereunder, 45 J. Marshall L. Rev. 635 (2012)

Albert Feuer

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HOW THE SUPREME COURT AND THE  
DEPARTMENT OF LABOR MAY DISPEL  
MYTHS ABOUT ERISA'S FAMILY LAW  
PROVISIONS AND PROTECT THE BENEFIT  
ENTITLEMENTS THAT ARISE  
THEREUNDER

ALBERT FEUER\*

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\* The Law Offices of Albert Feuer, JD, Yale Law School, Mathematics PhD, Columbia University. The author wishes to dedicate the article to his mentees and their children.

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## I. INTRODUCTION

This Article will discuss the interaction between state family law and the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).<sup>1</sup> There will be a discussion of issues that have been created or amplified with respect to this interaction by (1) two major and widely accepted myths about ERISA that have been reinforced by Supreme Court decisions, and (2) two major myths that stem from the U.S. Department of Labor (“DOL”) actions. By dispelling these myths, the Court and the DOL may improve the practice of family law and ERISA.

First, the Court incorrectly asserted that the ERISA family law provisions enacted by the Retirement Equity Act of 1984<sup>2</sup> (“REACT”) provide “enhanced protection to the spouse and dependent children in the event of divorce or separation, and in the event of death the surviving spouse.”<sup>3</sup> This assertion has encouraged plan administrators and other courts to find that domestic relations orders govern an excessively broad class of ERISA pension and life insurance benefits. However, REACT, like ERISA, was a reaction to the inadequacies of state law and prior federal law. Thus, it similarly circumscribed the role of state law and increased substantive protections for ERISA participants and beneficiaries.

Second, the Court added a gloss to ERISA in non-family law contexts that emphasizes the importance of limiting the cost burdens imposed on employers by ERISA, which, if excessive, would discourage employers from establishing and maintaining employee benefit plans.<sup>4</sup> This gloss has encouraged other courts to

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1. The primary focus will be on ERISA §§ 205, 206, 502, 514, 609, 29 U.S.C. §§ 1055, 1056, 1132, 1144, 1169 (2006). These sections set forth the terms of the interaction between ERISA and the family law provisions of the fifty states, the District of Columbia, Puerto Rico, and various territories. ERISA § 3(10), 29 U.S.C. § 1002(10).

2. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (hereinafter REACT).

3. *Boggs v. Boggs*, 520 U.S. 833, 847 (1997). The Court’s surviving spouse observation is correct.

4. *See, e.g., Conkwright v. Frommert*, 130 S. Ct. 1640, 1649 (2010)

lose sight of the leitmotif of ERISA, improving the security of retirement and other employee benefit entitlements.<sup>5</sup> Thus, courts have wrongfully permitted individuals to use superseded (state family law or federal common law) ownership claims to obtain benefit entitlements from the recipients rather than the plans. These holdings violate the reasoning of a line of Supreme Court decisions dating back more than a hundred years, which protected ERISA entitlements and other federal entitlements, after their distribution.

The DOL, which is responsible for issuing regulations pertaining to the effects that the requirements a state domestic relations order (“DROs”)<sup>6</sup> must meet in order to be a qualified domestic relations order (“QDRO”),<sup>7</sup> have on ERISA plans created many practical issues for both plans and courts for two reasons. First, the DOL has acted as if it may foster good ERISA practice with respect to DROs by providing only nonbinding, informal guidance to the general public rather than extensive DOL regulations.<sup>8</sup> This omission has created unnecessary issues for persons seeking to prepare DROs that comply with the pertinent ERISA requirements, and for plan administrators responding to such requests. Second, the DOL incorrectly asserted that the ERISA benefit claim provisions should not govern plan reviews of DROs for compliance with the QDRO requirements, but has failed to present an alternative set of review provisions for plans to

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(stating that deference to claims reviewers on remand is justified to avoid imposing excessive administrative costs that would result in benefit reductions); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 19 (1987) (describing “ERISA’s central focus on administrative integrity” as it finds that ERISA does not preempt Maine requirement that there be a one-time severance payment to employers closing plants because it does not relate to ERISA plan, which requires an “ongoing administrative program”); *Shaw v. Delta Airlines*, 463 U.S. 85, 105 n.24 (1983) (holding that the state law directing the plan to provide additional benefits is preempted). Without ERISA preemption, plan participants could be forced to shoulder the increased administrative burden of complying with multiple state requirements because employers may pay for those burdens by reducing plan benefits. *Id.*

5. ERISA § 2, 29 U.S.C. § 1001.

6. ERISA § 206(d)(3)(B)(ii), 29 U.S.C. § 1056(d)(3)(B)(ii).

7. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).

8. The only DOL regulations addressing this subject are 29 C.F.R. § 2530.206 entitled “Time and Order of Issuance of Domestic Relations Orders,” which were issued pursuant to specific Congressional directions in the Pension Protection Act of 2006, Pub. L. No. 109-280 § 1001, 120 Stat. 780 (2006). These regulations do not address: (1) the plans to which the rules apply; (2) the information the plans must make available, or when the information must be provided; (3) the procedures and standards the plans must use to review a DRO; (4) the effect, if any, on plan operations of the submission to the plan of a DRO for review; or (5) the role of state courts in enforcing and determining the effects of DROs on ERISA plans.

follow.<sup>9</sup> This failure has created unnecessary issues concerning the roles of plan administrators and courts in such reviews.

## II. SUMMARY OF CONCLUSIONS

This Article will present six major conclusions, suggest that it would be useful for the Supreme Court to address four related issues, and suggest that the DOL exercise its authority to issue regulations pertaining to DROs. Throughout this Article, all employee benefit plans shall be presumed to be ERISA plans, unless otherwise described.

First, ERISA benefit entitlements are federal entitlements. Thus, those entitlements may not be subject to state law encumbrances, except to the extent the federal government chooses to permit such encumbrances.

Second, in general, benefit entitlements under the terms of pension plans, disability plans, or life insurance plans are not subject to state family law, except to the extent, if any, the plan sponsors choose to subject the entitlements to such law. Such plan terms include provisions pertaining to QDROs mandated by ERISA. Thus, these plans are not generally subject to state family laws pertaining to domestic relation orders, elective shares, or community property, or revoking designations on divorce. Therefore, state family law generally may not be used to change benefit entitlements from any of these ERISA plans.

Third, benefit entitlements under the terms of pension plans, disability plans, and life insurance plans are not subject at plan distribution to state family laws pertaining to domestic relation orders, elective shares, or community property, or revoking designations on divorce, unless the plan terms provide for such deference. It would be useful for the Supreme Court to declare whether it agrees with this conclusion about ERISA plan payment entitlements,<sup>10</sup> because it seems contrary to *Mackey v. Lanier Collection Agency & Service, Inc.*,<sup>11</sup> for domestic relations orders directed at pension plans not required to provide spousal survivor benefits.

Fourth, benefit entitlements under the terms of pension plans, disability plans, or life insurance plans are, after distribution from the respective plan, not subject to ownership claims based on either federal common law waivers or state family laws pertaining to domestic relation orders, elective share laws, or community property, or revoking designations on divorce. The

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9. See 65 Fed. Reg. 70,245, 70,255 n.39 (Nov. 21, 2000) (providing a statement accompanying the release of claims regulations).

10. See *Kennedy v. Plan Adm'r of the Du Pont Sav. & Inv. Plan*, 555 U.S. 285 (2009) (discussing a pension plan's fiduciary obligation rather than benefit entitlements of participants and beneficiaries).

11. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988).



Supreme Court should declare whether it agrees with this conclusion, which it expressed in *Boggs v. Boggs*<sup>12</sup> and *Egelhoff v. Egelhoff ex rel. Breiner*,<sup>13</sup> but questioned in a *Kennedy v. Plan Administrator of the Du Pont Savings & Investment Plan* footnote.<sup>14</sup>

Fifth, domestic relations orders that satisfy the QDRO requirements do not govern disability plans, life insurance plans, or pension plans not required by ERISA to provide spousal survivor benefits, unless the terms of such plans so provide. Again, it would be useful for the Supreme Court to declare whether it agrees with this conclusion, which it has not yet addressed, although the *Kennedy* Court referred favorably to a Seventh Circuit decision that held to the contrary.<sup>15</sup>

Sixth, the QDRO requirements for a domestic relations order are not satisfied if the order does not require the relevant plan to make the benefit payment to an alternate payee but requires the participant to make such designation or to refrain from making a new designation. It would be beneficial if the Supreme Court, which has not addressed this issue, indicated whether it agrees with this conclusion because this characteristic is common among both the automatic restraining orders issued as a customary part of many domestic relations proceedings, and the many domestic relations orders pertaining to life insurance.

It would be useful for the DOL to eliminate most litigation pertaining to the QDRO requirements by issuing regulations that: (a) clarify that QDROs govern only pension plans required to provide spousal survivor benefits, and other plans whose terms provide for such deference; (b) clarify that QDROs do not include the customary automatic restraining orders directing parties to domestic relations court proceedings to refrain from making changes to life insurance and pension plan designations; (c) describe a fiduciary duty on plan administrators to provide the plan information needed to prepare a QDRO, such as general plan information, including the QDRO procedures, and benefit information about a participant to potential alternate payees under a QDRO; (d) require plans to process benefit claims based on domestic relations orders, like other benefit claims, with the additional requirement that the participant be notified of the claim and be permitted to object to the claim; (e) clarify the benefits that are available pursuant to the terms of a QDRO, which are not otherwise available under the plan term; and (f) recognize that state courts, which are authorized to decide and

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12. *Boggs*, 520 U.S. at 833.

13. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).

14. *Kennedy*, 555 U.S. n. 10 at 285.

15. *Id.* at 302 (citing *Metro. Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994)).

enforce benefit claims, may use such authority with respect to claims based on QDROs, i.e., determine if a domestic relations order is a QDRO.

### III. ISSUES PERTAINING TO THE INTERACTION BETWEEN ERISA AND STATE FAMILY LAW

This Article focuses on three major state family law issues. First, what spousal survivor benefits may ERISA plans provide?<sup>16</sup> Second, how might domestic relations orders and other state laws affect benefit entitlements? Finally, how do divorces affect entitlements of a participant's former spouse to the participant's survivor benefits? ERISA addresses all these issues, albeit often not explicitly.

#### A. Basic State Family Law Provisions Pertinent to Employee Benefits

There are two basic family law regimes: (1) community property, which is the rule in ten states and Puerto Rico, and (2) equitable distribution, which is the rule in forty states and the District of Columbia.<sup>17</sup> Community property laws treat marriage as an economic partnership in which both spouses, by operation of law, acquire and have equal ownership in property acquired by their efforts during the marriage, but separate ownership in other property.<sup>18</sup> Although, either party may manage community property, one party may dispose of the property for less than fair value without the consent of the other during the marriage.<sup>19</sup> In contrast, equitable distribution systems treat property as title based during the marriage, but upon the dissolution of the marriage, equitable principles are applied to divide between the spouses the particular state's concept of marital property—property acquired by their efforts during their marriage.<sup>20</sup> Thus, if one party has title in an equitable distribution state, even if such property would be treated as marital property on a marital dissolution, the party need not obtain permission from the other to dispose of it for less than fair value during the marriage.

Both systems provide for spousal survivor benefits from what

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16. There is also some discussion of the devisable interest of a spouse who predeceases a participant, for which there are few open issues.

17. See Caroline Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women*, 11 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 2-13 (2011) (discussing community property); Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L.J. 781, 789-95 (2002) (discussing community property and equitable distribution).

18. Newcombe, *supra* note 17, at 9-10; Bell, *supra* note 17, at 791.

19. Cal. Fam. Code § 1100 (a), (b) (West 2012).

20. Newcombe, *supra* note 17 at 35-37; Bell, *supra* note 17, at 793-95.

they treat as marital property. Under community property, upon the death of one spouse, the surviving spouse obtains by operation of law a full right to half of all of the community property, and the decedent may devise his or her half.<sup>21</sup> In particular, for death benefits obtained with community property, each spouse has the right to half of the benefits unless they consent to a different division.<sup>22</sup> Almost all equitable distribution states give surviving spouses a right to elect to take the maximum of a family allowance, and a share (one-third to one-half) of the statutory elective estate, which usually consists of the decedent's probate estate augmented in some manner.<sup>23</sup>

The elective share laws are derived from a widow's right to dower, which was a life estate in one-third of certain real property of her husband.<sup>24</sup> There are four major criticisms of many of the elective share statutes. First, the survivor may be entitled to excessive assets because the elective estate includes non-marital assets, such as the decedent's \$1,000,000 probate estate for a recently married decedent whose marital property is less than \$50,000. Second, the statute may be avoided by the use of excluded property, such as by buying life insurance that is often excluded.<sup>25</sup> For example, an elective share may not include a \$1,000,000 life insurance policy. Third, the statute may be avoided by gifts.<sup>26</sup> For example, an elective share may not include \$1,000,000 transferred during the decedent's life. Fourth, the spouse may be entitled to a different value of assets upon dissolution of the marriage by divorce than by death. In other words, are both spouses' properties considered in determining the elective share, so that a surviving spouse who owns a disproportionately large part of the marital property is not given a windfall because the surviving spouse has a small interest in the decedent's marital property?<sup>27</sup> For example,

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21. See, e.g., CAL. PROB. CODE § 100(a) (West 2002).

22. See, e.g., *Patillo v. Norris*, 135 Cal. Rptr. 210, 215 (Cal. Ct. App. 1976) (citing the predecessor of CAL. FAM. CODE § 1100 (b) (West 2004)).

23. See generally Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 LA. L. REV. 161 (2011). Georgia is the only state without an elective share statute. *Id.* at 162.

24. *Id.* at 161, 163-70.

25. *Id.* at 171-72, 180-81.

26. Thus, elective share statutes often add back gifts in some manner. See, e.g., N. Y. EST., POWERS & TRUSTS LAW § 5-1.1-A(b)(1)(A)-(B). The first add backs an undefined phrase "gifts causa mortis," which excludes gifts that may be excluded under the terms of 26 U.S.C. § 2503(b) or (e) (2006). The second adds back all transfers made within one year of death not otherwise added back.

27. See Turnipseed, *supra* note 23, at 172-86 (suggesting that divorce equivalency may be best achieved with a community property system). See generally Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617 (2010) (analyzing the attempt to address this issue with sections 2-201-214 of the Uniform Probate Code).

should a widow who owns marital assets of \$1,000,000 be entitled to an elective share of one half of her husband's marital property of \$200,000 rather than the parents who he designated to receive such property?

Both systems provide for property distributions and the payment of alimony, support, or maintenance on marital dissolutions. Community property systems entitle each spouse to an undivided half interest in the community property. Four community property states divide community property equally, but the other six distribute the property equitably.<sup>28</sup> In equitable distribution states, marital property is subject to equitable distribution, whose criteria vary by state.<sup>29</sup> With the prevalence of no-fault divorce and changes in social and work customs, there is less and less use of the traditional alimony model of monthly payments to a former wife to replace the husband's duty to support his wife's standard of living as long she remained unmarried. Such traditional payments were subject to change depending on the financial circumstances of both parties. These payments are being replaced by a more limited set of transition payments and lump sum payments associated with equitable property divisions in both property systems.<sup>30</sup>

Many states have laws revoking designations of spouses on divorce unless the divorce decree or the governing instrument provides to the contrary.<sup>31</sup> The Uniform Probate Code takes this approach, and treats the divorced spouse as having predeceased the designator.<sup>32</sup> The apparent presumption is that it is reasonable to presume that a person is likely to wish to replace his former spouse as his designee unless he acts to repeal the designation after the divorce, which may be done in the divorce decree, or in

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28. See generally James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal Equal*, 72 LA. L. REV. 21 (2011) (criticizing the lack of standards for these equitable distribution statutes). Cf. Newcombe, *supra* note 17, at \*4 n.9 (quoting CAL. FAM. CODE § 2550 (West 2004)) (“[i]n a proceeding for dissolution of marriage . . . the court shall . . . divide the community estate of the parties equally.”).

29. See, e.g., Bell, *supra* note 17, at 795-99 (providing a description of an implementation of such a system in Mississippi, the last non-community property state).

30. See generally *id.* at 799-803. There, however, may be a tax advantage for making periodic alimony payments. Under Code §§ 72 and 215, the payor may deduct the payment from his or her income, and the recipient must include the payment in his or her gross income.

31. See, e.g., N. Y. EST. POWERS & TRUSTS LAW § 5-1.4 (LEXIS 2012) (showing an example in an equitable distribution state); REV. CODE WASH. ANN. § 11.07.010 (2012) (showing an example in a community property state). Community property states need to deal with this issue because after a divorce no community property remains, only separate property.

32. UNIF. PROB. CODE § 2-804 (amended 2008).

his initial designation. The difficulty with this presumption is that it is not clear that someone who wants to keep a former spouse as the designee would realize that it is necessary to repeat the designation if the person does not prefer the default designee take following a divorce.

### *B. Basic ERISA Provisions Pertinent to Family Law*

ERISA governs private pension and welfare plans that are not church plans.<sup>33</sup> However, ERISA applies neither to plans that are limited to the self-employed or their spouses,<sup>34</sup> nor to individual retirement accounts ("IRAs") that are not part of an ERISA pension plan.<sup>35</sup>

Five major ERISA provisions govern family law issues.

First, ERISA provides a mechanism to enforce ERISA benefit entitlements. In particular a participant or a beneficiary has a right to initiate an action 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."<sup>36</sup> Other ERISA sections determine the extent, if any, to which plan terms must, or may, incorporate state law.

Second, ERISA regulates spousal survivor benefits. The terms of certain pension plans must provide for specified spousal survivor benefits that are available by default.<sup>37</sup> Moreover, those plans must disregard spousal waivers of those entitlements rights that are state law waivers but do not comply with the ERISA waiver and consent rules, such as prenuptial agreements.<sup>38</sup> It appears that ERISA permits life insurance plans and all other

33. ERISA §§ 4(a), 4(b)(1)-(2), 29 U.S.C. §§ 1003(a), 1003(b)(1)-(2). Church plans, however, may elect to be covered by ERISA.

34. 29 C.F.R. § 2510.3-3(b) (2012).

35. There is no exclusion for IRAs that are part of ERISA plans, such as Simplified Employee Pension Plans ("SEP Plans") or Simple Retirement Account Plans, although such plans are exempt from certain provisions of ERISA, such as the ERISA vesting provisions. ERISA § 201(6), 29 U.S.C. § 1051(6). *See also* ERISA § 4(c), 29 U.S.C. § 1003(c) (providing that individual retirement accounts that hold only voluntary employee contributions, which are permitted to be part of qualified plans under section 408(q), are treated as subject to the fiduciary provisions, enforcement, and preemption provisions as SEP Plans).

36. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

37. ERISA §§ 201, 205(b), 29 U.S.C. §§ 1051, 1055(b).

38. *See, e.g.,* Hurwitz v. Sher, 982 F.2d 778, 781 (2d Cir. 1992) (holding that a spouse may not be ordered to comply with a prenuptial waiver and waive a pension interest after the death of participant). This is a frequently cited case even though the plan was a one-person plan. Thus, it was not an ERISA plan. *See also* Nat'l Auto. Dealers & Assocs. Ret. Trust v. Arbeitman, 89 F.3d 496 (8th Cir. 1996) (reaching the same result for ERISA plan, including preemption of state court orders directing a participant's spouse to comply with the waiver).

ERISA pension plans to provide (1) no survivor benefits,<sup>39</sup> (2) only spousal survivor benefits, or (3) survivor benefits, that may, but need not, include spousal benefits, and may, but need not, permit participants to designate beneficiaries. It also appears these plans may choose whether to respect state law waivers of spousal benefits.

Third, ERISA regulates DROs. The terms of pension plans that are required to provide spousal survivor benefits must also provide that benefits, including survivor benefits,<sup>40</sup> be paid in accordance with a DRO that is a qualified domestic relations order ("QDRO").<sup>41</sup> Such plans may not choose to follow the requirements of any other DRO,<sup>42</sup> other than, perhaps, a requirement that a spouse has waived a claim to ERISA benefits.<sup>43</sup>

Fourth, ERISA requires the terms of those pension plans that are required to provide spousal survivor benefits to also provide that plan benefits may not be assigned or alienated.<sup>44</sup>

Fifth, ERISA preempts state laws related to "any employee benefit plan."<sup>45</sup> In particular, unless the plan terms provide to the contrary, it appears that four major state family law provisions are preempted:

(1) community property laws, elective share laws, or revocation on divorce laws, to the extent, if any, the laws relate to survivor benefits from ERISA pension plans or life insurance plans;<sup>46</sup>

(2) community property laws, to the extent the laws relate to devisable interests by a participant's spouse if the spouse predeceases the participant;

(3) waiver laws, to the extent, if any, the laws relate to survivor benefits from ERISA pension plans or life insurance plans, which may escape preemption if the resulting waivers are treated as federal common-law waivers;

(4) laws governing DROs, to the extent, if any, the laws relate to ERISA pension, disability, or life insurance plans or plan benefit entitlements.

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39. Insurance plans, of course, by definition provide survivor benefits.

40. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

41. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).

42. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

43. See *Kennedy*, 555 U.S. at 288 (holding that because the waiver did not satisfy the terms of the plan's governing documents, the plan must disregard a DRO with a waiver). However, the Court explicitly stated it would not address the effect of the waiver, if the waiver had conformed to the plan terms. *Id.* at 299 n.10.

44. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1).

45. ERISA § 514(a), 29 U.S.C. § 1144(a).

46. This Article largely disregards health care plans. ERISA § 609, 29 U.S.C. § 1169 requires that such plans provide benefits in accordance with the terms of DROs that qualify as Qualified Medical Child Support Orders.

### *C. Issues About ERISA Family Law Provisions*

The acceptance of ERISA myths has resulted in conflicting decisions and practices pertaining to five major issues. These issues could be resolved by decisions of the Supreme Court and the issuance of DOL regulations. Those actions would (1) assure that family law practice better conforms to the ERISA family provisions, and (2) reduce the number and cost of disputes about the meaning of those ERISA provisions.

First, it is not clear which ERISA pension or life insurance benefit plans must follow a DRO satisfying QDRO-like conditions. It appears that only pension plans required to provide spousal survivor benefits must do so. However, there are many decisions to the contrary. There is also considerable controversy about the meaning of the QDRO requirements even for pension plans required to provide spousal survivor benefits.

Second, it is not clear under which conditions, if any, pension and life insurance plans must give effect to benefit waivers in DROs, and what effects they must give to such waivers.

Third, it is not clear how DROs affect the rights of ERISA plan participants and beneficiaries to retain plan benefits. It appears that persons, who have received from the plan the plan benefit to which they are entitled, may not be required to pay any portion of the benefit to a person claiming entitlement to such portion under a DRO. Again, there are many decisions to the contrary.

Fourth, there is little case law about the effects of state community law on ERISA plan distributions during the marriage, state elective laws on ERISA plans.

Fifth, it is not clear which roles ERISA plans, federal courts, and state courts play in implementing ERISA's family law provisions. There are five major procedural questions:

(1) How may a person obtain the information about a participant's plan benefits or the plan's procedures pertaining to preparing a QDRO, if the participant is unwilling to direct the plan to provide such information, and the plan is unwilling to do so without such direction? The DOL online booklet entitled, "QDROs— the Division of Pensions Through Qualified Domestic Relations Orders"<sup>47</sup> ("DOL QDRO Guide") does not encourage a plan to distribute the plan's QDRO requirements and procedures until after a person has submitted a DRO for review. Such late distribution would appear to be rather inefficient.

(2) To what extent, if any, may a person seeking to prepare a

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47. *QDROs: The Division of Pensions Through Qualified Domestic Relations Orders*, U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. BENEFITS ADMIN. 2-1, <http://www.dol.gov/ebsa/publications/qdros.html> (last visited Aug. 13, 2012) [hereinafter DOL QDRO GUIDE].

DRO, or preparing a DRO, prevent the participant from rendering the qualified DRO moot, in whole or in part?

(3) To what extent, if any, are plans responsible for deciding if a person has a benefit entitlement if there is a family law dispute about the entitlement? If the plan is responsible for making such determination, must it use procedures similar to the claims procedure rules?<sup>48</sup>

(4) To what extent may state courts decide ERISA family law issues or issue ERISA family law orders?

(5) What recourse does a person with a benefit entitlement pursuant to the terms of a DRO have if the plan administrator has paid such benefits to another person, and when may the plan avoid double payment liability in such a case?<sup>49</sup>

#### IV. PRE-ERISA FAMILY LAW SUPREME COURT DECISIONS

Two sections of the U.S. Constitution are particularly relevant even though the Constitution never explicitly addresses either domestic relations law or family law. First, the full faith and credit section<sup>50</sup> provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Second, the Supremacy Clause provides that the federal law is the supreme law of the land and the "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>51</sup> The Supreme Court has invoked both to address family law issues starting in the mid-nineteenth century and continuing into the twenty-first century.

##### A. *Jurisdiction Decisions Applying the U.S. Constitution While Expressing Deference to State Domestic Relations Law*

The Supreme Court has always expressed a strong desire to keep the federal courts out of domestic relations disputes, but did not hesitate to decide if there were conflicting state law holdings, which governed, although it rarely does so at this time.<sup>52</sup> The

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48. See 29 C.F.R. § 2560.503-1 (2012) (setting forth benefit claims procedures).

49. ERISA § 206(d)(3)(I), 29 U.S.C. § 1056(d)(3)(I), provides relief to plans subject to the QDRO requirements similar to those available when spousal benefits are paid to the wrong person. Cf. ERISA § 205(c)(6), 29 U.S.C. § 1055(c)(6) (setting forth the circumstances under which a plan is discharged from liability).

50. U.S. CONST. art. IV, § 1.

51. U.S. CONST. art. VI.

52. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 176-77, 185 (1988) (explaining that the Parental Kidnaping Prevention Act of 1980 requires states to afford full faith and credit to valid child custody determinations entered by a sister state's courts, but does not give federal courts jurisdiction over such determinations).



Court's most recent decision provided that federal courts may exercise diversity jurisdiction over domestic relations disputes if the litigants were not seeking divorce, alimony, and child custody decrees.

For example, in 1858, the Court in its first such decision, *Barber v. Barber*,<sup>53</sup> declared, "[w]e disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony. . . ."<sup>54</sup> A divided court, however, concluded that the federal courts had diversity jurisdiction to decide a family law question.<sup>55</sup> Thus, the Court could and did apply the full faith and credit provision of the Constitution to enforce a New York alimony judgment against a New Yorker who became a Wisconsin resident, and tried to defeat the judgment by obtaining a Wisconsin divorce that provided for no alimony.<sup>56</sup> In 1890, in *Ex Parte Burrus*,<sup>57</sup> the Court ruled that a father could not use a federal writ of habeas corpus to obtain custody of his infant son from the parents of his deceased wife.<sup>58</sup> The Court held that the father alleged no breach of a federal law, thus, no such writ was available.<sup>59</sup> The Court expanded its *Barber* statement about the inapplicability of federal law to domestic relations to the following: "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."<sup>60</sup>

Moreover, the Court held that federal courts could not use diversity jurisdiction to decide child custody disputes.<sup>61</sup> On the other hand, in the twenty-first century the Court used the Due Process Clause of the Fourteenth Amendment to protect parental rights from being unduly restricted by family law and other state law.<sup>62</sup>

In 1945, in *Williams v. North Carolina*,<sup>63</sup> the Supreme Court cited *Burrus* and made a similar statement:

The problem is to reconcile the reciprocal respect to be accorded by

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53. *Barber v. Barber*, 62 U.S. 582 (1858).

54. *Id.* at 584.

55. *Id.* at 583.

56. *Id.* at 599.

57. *Ex Parte Burrus*, 136 U.S. 586 (1890).

58. *Id.* at 596-97.

59. *Id.* at 589-93.

60. *Id.* at 593-94. This quote also appears in *Williams v. North Carolina*, 325 U.S. 226, 233 (1945), in the context of a similar statement.

61. *Burrus*, 136 U.S. at 596-97.

62. *See, e.g., Troxell v. Granville*, 530 U.S. 57, 72-74 (2000) (preempting a Washington state law presumption in favor of grandparent visitation rights). The decision contains a good discussion of similar decisions. *Id.* at 65-66.

63. *Williams*, 325 U.S. 226. In contrast, there had been no challenge of the domicile claims of the same parties in *Williams v. North Carolina*, 317 U.S. 287 (1942).

the members of the Union to their adjudications with due regard for another most important aspect of our federalism whereby the domestic relations of husband and wife . . . were matters reserved to the States . . . and do not belong to the United States.<sup>64</sup>

The Court again decided it had jurisdiction, but this time it decided that the full faith and credit provision was inapplicable to the first divorce. The Court held that North Carolina could find that two of its residents were not domiciled in Nevada when they obtained a divorce from such state.<sup>65</sup> Thus, the full faith and credit provision did not require North Carolina to respect the divorce issued by Nevada because the Court held Nevada lacked jurisdiction to issue the divorce.<sup>66</sup>

Finally, in 1992, in *Ankenbrandt v. Richards*,<sup>67</sup> the Court first observed that the U.S. Constitution did not prevent the federal courts from exercising jurisdiction over domestic relations disputes.<sup>68</sup> The Court then discussed the extent to which *Burrus* limits federal jurisdiction, as follows:

Although *In re Burrus* technically did not involve a construction of the diversity statute, as we understand *Barber* to have done, its statement that “the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,” . . . *Id.*, at 593-94, has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction. See, e.g., *Bennett v. Bennett*, 221 U.S. App. D.C. 90, 93, 682 F.2d 1039, 1042 (1982); *Solomon v. Solomon*, 516 F.2d 1018, 1025 (CA3 1975); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (CA2 1967); see generally 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3609, pp. 477-479, nn. 28-32 (1984). This application is consistent with *Barber*'s directive to limit federal courts' exercise of diversity jurisdiction over suits for divorce and alimony decrees. See *Barber*, 21 HOW at 584. We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees.<sup>69</sup>

Thus, the Court concluded that federal courts had diversity

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64. *Williams*, 325 U.S. at 232-33 (internal quotations omitted) (quoting *Popovici v. Agler*, 280 U.S. 379, 383-84 (1930)) (citing *In re Burrus*, 136 U.S. at 593-94). In *Popovici*, the Court held that the federal courts lacked jurisdiction to conduct divorce proceedings between a Romanian diplomat and his American wife. *Popovici*, 280 U.S. at 383-84.

65. *Williams*, 325 U.S. at 239.

66. *Id.* The significance of this decision and its progeny is discussed in detail by Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381 (2007).

67. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

68. *Id.* at 696.

69. *Id.* at 703 (emphasis added).

jurisdiction to decide whether a mother, who was a Missouri citizen acting on behalf of her daughters was entitled to damages for the alleged tort of child abuse by their father and his female companion, who were citizens of Louisiana.<sup>70</sup>

*B. Early Twentieth-Century Decisions Regarding the Treatment of Alimony Judgments by Federal Statutes and the Preemption of State Family Law by a Federal Property Entitlement*

In the early twentieth century, the Supreme Court held that federal bankruptcy law did not treat a state law alimony judgment as a dischargeable ordinary debt.<sup>71</sup> The Court of Appeals for the District of Columbia reached a similar decision with respect to how another federal debtor protection statute treated a federal alimony judgment. On the other hand, the Supreme Court held that a federal property entitlement preempted a state family law claim both before and after the transfer of the property.

In 1904 in *Wetmore v. Markoe*,<sup>72</sup> the Supreme Court ruled unanimously that a state law alimony obligation was not discharged in bankruptcy because

*[u]nless positively required by direct enactment, the courts should not presume a design upon the part of Congress, in relieving the unfortunate debtor, to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children.*<sup>73</sup>

Thus, this was a statutory interpretation decision, namely whether Congress permitted and intended to permit an individual to use bankruptcy law to avoid a non-modifiable family support judgment. The Court never used the word “preempt.” Nor did it refer to the relation between federal law and family law in general. Instead, it resolved the question by focusing solely on the meaning of the statutory term “debt.”<sup>74</sup> Moreover, the Court previously held that traditional alimony payment obligations, which are subject to change depending on the circumstances of the parties,<sup>75</sup> could not be avoided by bankruptcy.<sup>76</sup> The Court saw no reason to distinguish the prior decision’s reasoning. In particular, debts from business transactions or contracts may be discharged in bankruptcy. However, family support obligations do not arise in

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70. *Id.* at 704.

71. *Wetmore v. Markoe*, 196 U.S. 68, 74 (1904).

72. *Id.* at 68.

73. *Id.* at 77 (emphasis added).

74. *Id.* at 72.

75. See generally Bell, *supra* note 17, at 799-800 (stating that the fixed obligation was in the original decree pursuant to New York law).

76. *Audubon v. Shufeldt*, 181 U.S. 575 (1901).

that manner; thus, they may not be so discharged.<sup>77</sup>

In 1940, in *Schlaefer v. Schlaefer*,<sup>78</sup> the Court of Appeals for the District of Columbia Circuit similarly held that disability payments were subject to execution for an alimony judgment. The Life Insurance Act Disability Insurance Code for the District of Columbia, a federal statute exempted the disability payments from process to pay any debt or liability of the insured.<sup>79</sup> The alimony judgment was entered under the District of Columbia family law, which again would have been a federal statute.<sup>80</sup> The Court rejected the exemption claim using language similar to that in *Wetmore*—"[t]he obligation on which appellant's claim is based is not a 'debt' or a 'liability' in the ordinary usages of those terms. It is a duty of higher obligation. As has been said, it is not one within the usual purposes of exemption statutes."<sup>81</sup> Thus, the discussion following the quote addressed the interpretation of similar state exemption statutes rather than any preemption issues.<sup>82</sup>

On the other hand, in 1905, in *McCune v. Essig*,<sup>83</sup> the Supreme Court ruled unanimously that the federal homestead law, rather than Washington state community property law, determined title to federal property that the decedent was establishing by homesteading it when he died, i.e., the federal law preempted the state family law.<sup>84</sup> This was the Court's first apparent family law preemption decision.<sup>85</sup> The Court held that federal law provides that title to U.S. property is not encumbered by any state claims before or after the title transfer. The Court first quoted an excerpt of the following from an earlier decision of the Court:

We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever,*

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77. *Wetmore*, 196 U.S. at 72-76.

78. *Schlaefer v. Schlaefer*, 112 F.2d 177 (D.C. Cir. 1940).

79. *Id.* at 179.

80. *Id.*

81. *Id.* at 186.

82. *Id.* at 186-88.

83. *McCune v. Essig*, 199 U.S. 382 (1905).

84. *Id.* at 390 (citing *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839)) (holding a conveyance of part of Ft. Dearborn in Cook County, Illinois not subject to the state encumbrance).

85. *But see The Constitution of the United States of America Analysis and Interpretation*, S. DOC. NO. 108-17, at 2163-324 (2002), available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf>; <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2010/pdf/GPO-CONAN-2010.pdf> (2010 Supplement) (chronological list of all state laws that Court has held to be preempted does not show an earlier family law preemption decision, but also does not list *Essen*).

*according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.*<sup>86</sup>

Moreover, the Court dismissed the homesteader's daughter's alchemy argument that she had an enforceable community property right that appeared as if by magic immediately after title passed to the homesteader's widow pursuant to the federal homestead law:

But, it is contended, that a beneficial interest having been created by the state law in McCune when the title passed out of the United States by the patent, it "instantly dropped back in time to the inception or initiation of the equitable right of William McCune, and that the laws of the State intercepted and prevented the widow from having a complete title without first complying with the probate laws of the State." This, however, is but another way of asserting the law of the State against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose.<sup>87</sup>

Thus, the Court held that state law claims that arise after the transfer, such as failure to pay a rental obligation, may encumber the transferred federal property, but a superseded state law ownership claim to the transferred property may not do the same.

### *C. Pre-ERISA Decisions—Federal Benefit Entitlements Preempt State Family Law*

Starting in 1950 and continuing to the present, the Court substantially broadened the scope of federal entitlements that would be transferred without any encumbrance by state family law. The Court consistently held that the owner of a benefit entitlement could obtain and keep payments to which he or she was entitled under federal law as opposed to a person who asserted a state family law claim to such benefits. As discussed, *infra*, the Court reached the same conclusion with respect to ERISA benefit entitlements after reversing one decision to the contrary in response to congressional legislation.

In 1950, the Supreme Court decided in *Wissner v. Wissner*<sup>88</sup> that a soldier's parents and designated beneficiaries were entitled to receive and retain all the proceeds from a life insurance policy under the National Service Life Insurance Act of 1940.<sup>89</sup> His

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86. *Id.*

87. *Id.*

88. *Wissner v. Wissner*, 338 U.S. 655 (1950).

89. *Id.* at 658-59.

widow, from whom he was estranged throughout his military service, was not permitted to obtain the proceeds from his parents, even though he used community property to pay the policy premiums.<sup>90</sup> The Court declared that:

The controlling section of the Act provides that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class] . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries. . . ." Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.<sup>91</sup>

The three dissenters argued that there was an implicit exception to such mandate in the eight community property states.<sup>92</sup> In such states, they asserted that the soldier may only decide upon the disposition of his half of the insurance policy if the premiums were paid with the compensation earned by the soldier during the marriage, as occurred in this case.<sup>93</sup> This is a consequence of the community property presumption that spouses have equal ownership rights to the compensation earned by either during the marriage.<sup>94</sup> Consequently, the dissent argued the spouse is entitled to half of the life insurance proceeds in this case.

The majority held there was no implicit community law exemption to the designation mandate; thus, the widow's community property rights were preempted.<sup>95</sup> The majority also rejected the assertion that even if the U.S. military was required to pay the designated beneficiaries, the soldier's widow was entitled to obtain the proceeds from the designees under the community property rules. In addition to the above benefit mandate the majority pointed to the "flat conflict" of such an assertion with the statutory provision that "[p]ayments to the named beneficiary 'shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . .'"<sup>96</sup> Unlike the *Schlaeffler* statute at issue, *supra*, this statute protected the beneficiary rather than the participant, and protected payments received by the beneficiary from process.

The majority rejected three other arguments presented by the dissent. The dissent argued that many decisions held that family support claims were not preempted by anti-alienation language

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90. *Id.*

91. *Id.* at 659 (quoting 38 U.S.C. § 802(g) (2006)).

92. *Id.* at 661-64 (Minton, J., dissenting).

93. *Id.* at 661-62 (Minton, J., dissenting).

94. *Id.* (Minton, J., dissenting).

95. *Id.* at 659-60.

96. *Id.* at 659.

such as that under consideration.<sup>97</sup> The majority responded that family support was not at issue in this case and community property claims rest on business relations between the spouses rather than the moral obligations upon which family support rested.<sup>98</sup> The dissent also argued that the function of the anti-alienation provision was to protect the government insurance fund from attachments rather than to protect the beneficiaries.<sup>99</sup> Finally, the dissent stated that Congress could not have intended to permit a soldier to defraud his wife by using community property to purchase a life insurance policy whose benefits did not go to her.<sup>100</sup> The majority responded to the final two arguments with its above statement about the clarity of the statutory language.<sup>101</sup>

The Court concluded by describing the federal interest that is served by the statute,<sup>102</sup> which would appear to apply, *mutatis mutandis*, if the insurance were provided not to a serviceman, but to a private employee whose entitlement to life insurance was determined by federal law, such as ERISA, as follows:

Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.<sup>103</sup>

The Supreme Court in *Free v. Bland*,<sup>104</sup> decided in 1962, without dissent,<sup>105</sup> that a surviving spouse, rather than the decedent's sole heir and son from an earlier marriage, was entitled to full ownership of a savings bond that had been acquired with community property and had been issued in the name of both spouses with an "or" between the names. Under the relevant federal regulations such designation provided that "[i]f either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will

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97. *Id.* at 663 n.2 (Minton, J., dissenting).

98. *Id.* at 659-60. The only federal case cited, *Schlaefler*, did not discuss the federal preemption issue, but the interaction of two D.C. statutes. *Schlaefler*, 112 F.3d at 177.

99. *Id.* at 664 (Minton, J., dissenting). This is contradicted by the application of the anti-alienation provision on its face to distributed benefits.

100. *Id.* at 663 (Minton, J., dissenting).

101. *Id.* (Minton, J., dissenting).

102. See William L. Lynch, Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 382-84 (1978) (describing this federal interest as a federal objective of the statute).

103. *Wissner*, 338 U.S. at 660-61.

104. *Free v. Bland*, 369 U.S. 663 (1962).

105. Two of the justices did not participate in the decision. *Id.* at 671.

be recognized as the sole and absolute owner.”<sup>106</sup> The Court summarily dismissed the relevance of state family law with the following description of conflict preemption, i.e., the effect of the supremacy clause in the U.S. Constitution, as follows:

The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.<sup>107</sup>

In particular, the survivorship provision was a federal law, which as held in *Wissner*, must prevail over any conflicting state law, such as the community property provision at issue that attempted to supersede the survivorship provision.<sup>108</sup> Thus, the decedent's son was not entitled to have the decedent's bond interest transferred directly to him by the federal government as of the date of the death of the decedent.

Under the *Free* reasoning, there would be similar preemption of state right of election statutes that include federal savings bonds and other obligations that pass by right of survivorship in the elective estate, such as that in New York.<sup>109</sup> In particular, the state law could not affect the right of the survivor to receive the proceeds of the federal obligation. Nor could the survivor be required to give up any other property so that a surviving spouse would receive the statutory elective share.

The Court, as it did in *McCune* and *Wissner*, held that the decedent's son was also not entitled indirectly to the decedent's interest in the bond, i.e., he had no right to obtain the value of the inherited bond from the surviving spouse. The Court, as it did in *McCune* and *Wissner*, focused on the beneficiary designation resulting from the joint title:

Notwithstanding this [survivorship] provision, the State awarded full title to the co-owner but required him to account for half of the value of the bonds to the decedent's estate. Viewed realistically, the State has rendered applicable award of title meaningless. Making the bonds security for the payment confirms the accuracy of this view. If the State can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the State has interfered directly with a legitimate exercise of the power of the Federal Government to borrow

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106. *Id.* at 668 n.4.

107. *Id.* at 667 (citations omitted).

108. *Id.* at 668.

109. N. Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b)(3).



money.<sup>110</sup>

In 1966, the Supreme Court in *United States v. Yazell*,<sup>111</sup> decided, in apparent contrast, that the United States could not collect a debt from a wife who had not obtained the court approval required under the Texas coverture law to enter into the individually designed and negotiated SBA loan. The Court declared:

We do not here consider the question of the constitutional power of the Congress to override state law in these circumstances by direct legislation or by appropriate authorization to an administrative agency coupled with suitable implementing action by the agency. We decide only that this Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here. Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.<sup>112</sup>

This decision to find no federal preemption is consistent with both *Wissner* and *Free*. The Court distinguished *Wissner*, in which the Court observed that it had held the state property law at issue was “in derogation of the federal statutory policy that soldiers have an absolute right to name the beneficiary of their National Service Life Insurance [the requisite ‘federal interest’].”<sup>113</sup> Moreover, the Court also implicitly distinguished *Free* by stating that “[t]his Court’s decisions applying ‘federal law’ to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation.”<sup>114</sup> The Court gave as an example, the remedial rights on federal commercial paper. The same reasoning would apply to entitlements under federal savings bonds and the subsequently enacted uniform ERISA rules. In contrast, the SBA loans at issue were individually negotiated, required by the SBA rules to conform to the relevant state law, and the SBA judgment remedies were limited to those generally provided by state law.<sup>115</sup>

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110. *Id.*

111. *United States v. Yazell*, 382 U.S. 341 (1966).

112. *Id.* at 352 (emphasis added) (footnotes omitted).

113. *Id.* at 353.

114. *Id.* at 354.

115. *Id.* at 354-58.

*D. Summary of Relation of State Family Law to Employee Benefit Plans Immediately Before the Adoption of ERISA*

A participant's spouse has no entitlement to survivor benefits unless the pension plan provides such benefits, and the participant does not waive those benefits. Life insurance plans need not provide any spousal benefits. State community property laws, state election laws, and state revocation of designations upon divorces may change who obtains and may retain survivor benefits, if any.

DROs determine benefit entitlements for life insurance plans, disability plans, and pension plans. There seems to be no limits on the extent to which DROs may change plan benefit entitlements, rather than other entitlements. However, any changes required by a DRO that violate the plan terms may cause a pension plan to lose its tax qualification.

**V. THE FOCUS ON THE PAYMENT OF FAMILY SUPPORT OBLIGATIONS BY CONGRESS AND THE SUPREME COURT IN THE 1970S**

Both Congress and the Supreme Court devoted considerable attention to the payment of alimony and child support in the 1970s. Congress provided that alimony and child support obligations could be enforced against federal employees and retirees. The Supreme Court held that alimony could not be restricted to women.

In January 1975, Congress enacted the "Social Services Amendments of 1974,"<sup>116</sup> and thereby added a new Part D to Section IV of the Social Security Act ("SSA") entitled, "Child Support and Establishment of Paternity."<sup>117</sup> In that section, Congress provided that the federal government would permit child support and alimony obligations to be enforced against its payments to federal employees as follows:

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.<sup>118</sup>

This section would have no effect on *Wissner* situations because that claim was not for child support or alimony.

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116. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975).

117. *Id.* § 101.

118. 42 U.S.C. § 659, Social Security Act § 462 (2006) [hereinafter SSA].

Thus, within months of enacting ERISA with nary a word about DROs, Congress addressed the interaction between DROs and federal entitlements stemming from employee benefit payments by the federal government, which are not covered by ERISA. In particular, Congress provided for deference to the provisions of DROs requiring periodic payments of support and maintenance obligations but not for provisions requiring other payments. Thus, as discussed in *Hisquierdo v. Hisquierdo*,<sup>119</sup> the Supreme Court concluded that the DRO providing for payments of community property obligations was preempted for payments under the Railway Retirement Act.<sup>120</sup> Those payments were covered by the SSA because those payments were apparently made by a federal agency. Despite the lack of such provision, many courts as discussed, *infra*, nevertheless took a far more deferential approach to state law with respect to ERISA benefit entitlements before the enactment of REACT.

There were many ambiguities about the implementation of the child support sections of the Social Security Act.<sup>121</sup> Thus, in 1977, Congress amended the Social Security Act in Title V (the final Title) of the Tax Reduction and Simplification Act of 1977<sup>122</sup> to add definitions and detailed implementation instructions. The definitions included the following definition of alimony, which clarified that the statute was inapplicable to property settlements pursuant to state family law:

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means *periodic payments of funds* for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, *alimony pendente lite*, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term *does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.*<sup>123</sup>

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119. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), *superseded by statute*, Pub. L. No. 98-76, tit. IV, § 419(a), 97 Stat. 411, 438 (1983).

120. *Id.* at 590.

121. This provision did not seem to make social security payments subject to these support obligations, although as discussed, *infra*, that would change at about the time that REACT was enacted.

122. Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, 91 Stat. 126 (1977).

123. 42 U.S.C. § 662, SSA § 462 (emphasis added). This section was later revised without changing its meaning, and added to the end of 42 U.S.C.

In the same year, Congress further enhanced the social security benefits for a divorced spouse of an individual entitled to social security benefits by reducing the minimum period of marriage for a divorced spouse to obtain spousal benefits based on the individual's social security benefits from twenty to ten years.<sup>124</sup> ERISA has always only permitted plans to require at most one year of marriage.<sup>125</sup>

In 1979, in *Orr v. Orr*,<sup>126</sup> the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment preempted the Alabama alimony statute that restricted alimony to women.<sup>127</sup> The Court made no mention of the *Burrus* or *Barber* deference to domestic relations law. The Court determined that the statute did not satisfy the standard equal protection criteria: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>128</sup>

In 1980, in *Santosky v. Kramer*,<sup>129</sup> the Supreme Court similarly held the Due Process Clause of the Fourteenth Amendment preempted a New York statute terminating parental rights if a child is permanently neglected. The majority explained why the traditional deference to family law was inappropriate:

The dissent's claim that today's decision "will inevitably lead to the federalization of family law," post, at 773, is, of course, vastly overstated. As the dissent properly notes, the Court's duty to "[refrain] from interfering with state answers to domestic relations questions" has never required "that the Court should blink at clear constitutional violations in state statutes."<sup>130</sup>

## VI. ERISA AS INITIALLY ENACTED IN 1974

### ERISA Section 2: Congressional Findings and Declaration of Policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; *that the continued well-being and security of millions of employees and their dependents are directly affected by these plans*; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of

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§ 659, SSA § 459. See Pub. L. No 104-193, 110 Stat. 2105, 2242-46 (1996).

124. Social Security Amendments of 1977, Pub. L. No. 95-216, § 337, 91 Stat. 1509, 1548 (1977). The Social Security Amendments of 1977 considerably improved spousal benefits as discussed in Peter W. Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789 (1978).

125. ERISA § 205(f), 29 U.S.C. § 1055(f).

126. *Orr v. Orr*, 440 U.S. 268 (1979).

127. *Id.* at 282-83.

128. *Id.* at 279.

129. *Santosky v. Kramer*, 455 U.S. 745 (1982).

130. *Id.* at 768 n.18.

industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, *it is desirable in the interests of employees and their beneficiaries*, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; *that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries*, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.<sup>131</sup>

ERISA's substantive terms were explicitly directed at the protection of the benefit entitlements of participants and beneficiaries. The word dependent never appears again in the law. Moreover, despite the other congressional actions at this time emphasizing the importance of federal law facilitating the payment of family support, ERISA is silent about such payments, domestic relations law, or other aspects of family law.

#### A. ERISA's Purpose and Coverage

ERISA was a response to the protests made on behalf of many employees and their beneficiaries who had been deprived of anticipated pension and welfare benefits.<sup>132</sup> Under the pre-ERISA rules, many individuals who qualified for pension or welfare benefits never received their promised benefits because:<sup>133</sup>

(a) participants and beneficiaries were not generally entitled

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131. ERISA § 2, 29 U.S.C. § 1001(a) (emphasis added).

132. An excellent history of ERISA may be found at JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 A POLITICAL HISTORY* (U.C. Press 2004).

133. See, e.g., *EMPLOYEE BENEFITS LAW* lxxix-c (Steven J. Sacher *et al.* eds., BNA Books 2d ed. 2000) [hereinafter *EMPLOYEE BENEFITS LAW*] (providing an in-depth analysis on employee benefits law).

to the disclosure of plan terms and conditions, their benefits, or the financial condition of their plans; (b) no general federal standards required persons operating such plans to pay promised benefits or to avoid transactions that would dissipate plan assets; and

(c) participants and beneficiaries had no federal right to appeal benefit denials either within the plan or to the courts unless they participated in certain collectively bargained plans.<sup>134</sup>

ERISA, which was signed into law on Labor Day of 1974, protects plan participants and their beneficiaries. A participant is defined to include any employee or former employee of an employer who is, or may become, eligible to receive an ERISA plan benefit, such as a lifetime pension benefit, or whose beneficiaries may be eligible to receive an ERISA plan benefit, such as survivor benefits.<sup>135</sup> A beneficiary is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is, or may be, entitled to a benefit thereunder."<sup>136</sup>

Although the congressional declaration of policy refers to a concern for the "the continued well-being and security of millions of employees and their dependents," Congress never used the word "dependents" or "dependent" again in the statute, which is 207 pages.<sup>137</sup> There are instead multiple references in the declaration and the substantive parts of ERISA to protections for employees, participants, and beneficiaries. The only protections ERISA initially offered for dependents are the minimal spousal survivor provisions discussed, *infra*. Thus, there is little evidence from the face of the statute that Congress intended thereby to protect any other dependents of employees, except to the extent they were plan beneficiaries. Moreover, as discussed, *supra*, within months of enacting ERISA with nary a word about DROs, Congress provided that DROs may be applied against employee benefit payments by the federal government, which plans are not covered by ERISA.

Moreover, neither the declaration of policy nor the statute expresses a concern about the administrative burdens being placed on employee plans by ERISA, although as discussed, *infra*, the

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134. Benefit denials by collectively bargained plans administered jointly by representatives of the union and the employer or employers could be challenged as being violations of section 302 of the National Labor Relations Act, 20 U.S.C. § 186. This section permits the establishment and operation of jointly administered employee benefit plans. Claimants, however, had to show the determination was arbitrary and capricious. There was also no protection against employer retaliation. *Cf. Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 108-11 (1989) (rejecting this standard of review for ERISA benefit denials).

135. ERISA § 3(7), 29 U.S.C. § 1002(7).

136. ERISA § 3(8), 29 U.S.C. § 1002(8).

137. *Cf. ERISA* § 2(a), 29 U.S.C. § 1001(a) (lacking any further reference to the dependent reference in Pub. L. No. 93-406, 88 Stat 829-1035 (1974)).

courts repeatedly express such concern.

ERISA does not regulate all employer plans. Governmental plans are not subject to ERISA.<sup>138</sup> Church plans are also not subject to ERISA unless the plans elect to be covered.<sup>139</sup> Moreover, ERISA does not apply to employee benefit plans whose only participants are the owners and the spouses of the owners of the trade or business sponsoring the plan.<sup>140</sup> It is irrelevant whether the plan sponsor of such a plan is a corporation, a partnership, or an incorporated entity.<sup>141</sup> ERISA does not apply to IRAs that are not part of an ERISA pension plan, but applies to IRAs that are part of a pension plans.

ERISA applies to (1) pension plans,<sup>142</sup> which include profit-sharing and 401(k) plans, and (2) welfare plans,<sup>143</sup> which include medical, disability, life insurance and severance plans. For simplicity, all such plans by covered employers will be herein denoted as ERISA plans.

ERISA does not require employers to establish any ERISA plans, but ERISA imposes minimum standards on the establishment and operation of any covered employee benefit plans that covered employers choose to adopt.<sup>144</sup>

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138. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1).

139. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2).

140. 29 C.F.R. §§ 2510.3-3(b), (c). If there are other participants, then the owner and the owner's spouse are provided with the ERISA protections such as the protection of pension plan assets of a bankrupt participant. *Yates M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 4-5 (2004).

141. 29 C.F.R. §§ 2510.3-3(b), (c).

142. Pension plans are generally defined as plans that provide retirement income to employees or result in the deferral of income by employees for periods extending to the termination of covered employment; although, under certain circumstances, severance plan arrangements are treated as welfare plans rather than as pension plans. ERISA § 3(2), 29 U.S.C. § 1002(2). Employees may, but need not, be able to obtain distributions from pension plans before the termination of employment. Profit-sharing plans often permit such in-service distributions, although tax-qualified 401(k) plans may only permit the in-service distribution of employee contributions. However, certain unfunded pension plans, known as excess benefit plans, are excluded from ERISA coverage. ERISA § (4)(b)(5), 29 U.S.C. § 1003(b)(5).

143. Welfare plans are generally defined as plans that provide participants or their beneficiaries with medical, surgical, or hospital care, 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. ERISA § 3(1), 29 U.S.C. § 1002(1). These plans do not include payroll practices, such as sick pay, holiday pay, jury pay or overtime. 29 C.F.R. § 2510.3-1(b)(3). *See generally* *Mass. v. Morash*, 490 U.S. 107 (1989) (distinguishing ERISA covered welfare benefit plans from the customary unfunded vacation benefit plans, which are not covered by ERISA).

144. *See, e.g.,* *Esdén v. Bank of Bos.*, 229 F.3d 154, 172 (2d Cir. 2000) (providing that employer pension plan benefits may not be forfeited). Some of these standards do not, however, apply to unfunded plans that are maintained

Many, but not all, pension plans try to satisfy the tax qualification rules of sections 401 or 403 of the Internal Revenue Code of 1986, as amended (the "Code") and thereby qualify for favorable tax consequences.<sup>145</sup> Those rules, which are often similar to those of ERISA, are administered by the Internal Revenue Service (the "Service"). The Service issues determinations about the tax-qualification of pension plans. These rules are not always the same as required for ERISA compliance. For example, the Service may find that an amendment satisfies the qualification rules while declining to express an opinion on its ERISA compliance.<sup>146</sup> Thus, such an amendment may be ineffective because it violates ERISA.<sup>147</sup> A qualified pension plan may also violate ERISA requirements that are not part of the qualification rules, such as the additional disclosure requirements<sup>148</sup> and claims processing requirements.<sup>149</sup> On the other hand, pension plans may, but need not be drafted,<sup>150</sup> so that they incorporate the Code's qualification rules, and create benefit entitlements based on such rules.<sup>151</sup> In contrast, plans confined to owner-employees may be tax-qualified, but not be regulated by ERISA.

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primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. ERISA §§ 201(2), 301(a)(3), 401(a)(1), 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). Those plans are often called top-hat plans. See e.g., *Daft v. Advest, Inc.*, 658 F.3d 583, 594-95 (6th Cir. 2011) (discussing the standard of review of top-hat determinations by plan administration, particularly their select group nature); *In re IT Grp., Inc.*, 448 F.3d 661, 667-69 (3d Cir. 2006) (discussing the characteristics of such plans, particularly their unfunded nature). Such plans are often called non-qualified because they do not qualify for the favorable tax treatment that is generally provided to ERISA deferred compensation plans.

145. Albert Feuer, *Qualified Retirement and Deferred Comp Plan Death Benefits and Estate Planning*, 72 TAXES 255, 256-58 (1984) [hereinafter *Qualified Retirement Plans*].

146. See *Swede v. Rochester Carpenters Pension Fund*, 467 F.3d 216, 221-22 (2d Cir. 2006) (discussing this distinction).

147. See *id.* at 221 (holding that the Supreme Court's ruling in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746-48 (2009), invalidating post-retirement suspension of benefit provision was retroactive under ERISA, notwithstanding contrary ruling in IRS Rev. Proc. 2005-23, 2005-1 C.B. 991, with respect to the tax qualification of those same provisions).

148. See, e.g., ERISA § 102, 29 U.S.C. § 1022 (setting forth the substantive and distribution requirements for a summary plan description).

149. ERISA § 503, 29 U.S.C. § 1133.

150. See, e.g., *Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 143-44 (1st Cir. 2005) (holding that a discriminatory classification of employees eligible to participate in the plan may violate the qualification rules but need not violate the plan's governing documents).

151. For example, pension plans may explicitly incorporate qualification rules, which are not part of the ERISA rules, such as the non-discrimination rules. In *Edes*, the plaintiffs failed to timely argue that the plan included a requirement that it must "comply with Treasury regulations governing qualification for preferred tax status." *Id.* at 144 n.13.



Defined contribution pension plans [hereinafter DC Plans]<sup>152</sup> are pension plans in which each participant has an individual account.<sup>153</sup> DC plans include money purchase pension plans,<sup>154</sup> profit-sharing plans,<sup>155</sup> and 401(k) plans.<sup>156</sup> A participant's benefits in a DC plan are expressed in the form of a lump sum equal to the value of the participant's account at the time at issue. The plan terms may, however, permit benefits to be paid in a form other than a lump sum, such as a life annuity beginning either at once or at some future time.

Defined benefit pension plans [hereinafter DB Plans]<sup>157</sup> are pension plans in which participants do not have individual accounts.<sup>158</sup> A participant's benefits in DB plans are expressed in the form of a life annuity beginning at the participant's normal retirement age.<sup>159</sup> The annuity is called the participant's normal

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152. ERISA § 3(34), 29 U.S.C. § 1002(34). A participant's benefits in such plans are based solely upon the sum of: (1) the amounts contributed to the participant's account and any income, expenses, gains, and losses; and (2) any forfeitures of other participants' accounts allocated to such participant's account. All investment risk is placed on the participant, who benefits from investment gains and suffers from investment losses. Thus, a participant's accrued benefits, namely the participant's account balance, may either increase or decrease in the course of a year. Benefits may be and are usually made available on a participant's termination of employment. Distributions may be also permitted prior to the termination of such employment.

153. It is also possible for welfare plans to provide participants with individual accounts such as flexible spending arrangements or cafeteria plans which permit participants to allocate fixed amounts among a set of welfare benefits.

154. Plans in which the annual contributions are fixed by a plan formula. Treas. Reg. § 1.401-1(b)(1)(i).

155. Plans in which the annual contributions are not fixed by a plan formula but need not be based on profits. *Id.* § 1.401-1(b)(1)(ii); I.R.C. § 401(a)(27) (2010).

156. Plans in which employees may make pre-tax contributions of part of their compensation to the plan pursuant to the terms of I.R.C. § 401(k) and the regulations thereunder.

157. ERISA § 3(35), 29 U.S.C. § 1002(35).

158. *But see* Jennifer Staman & Erika Lunder, CONG. RESEARCH SERV., RS 22214, CASH BALANCE PENSION PLANS-SELECTED LEGAL ISSUES 1-2 (updated May 16, 2008), available at <http://aging.senate.gov/crs/pension11.pdf> (last visited Aug. 13, 2012); Patrick J. Purcell, CONG. RESEARCH SERV., RL 30196, PENSION ISSUES: CASH BALANCE PLANS 7-12 (updated Aug. 7, 2003), available at [http://benefitslink.com/articles/cashbal30196\\_2003.pdf](http://benefitslink.com/articles/cashbal30196_2003.pdf) (last visited Aug. 13, 2012) (providing a discussion of hybrid plans in which a participant's benefit in a DB plan may appear to be an individual account); see also Pension Protection Act of 2006, Pub. L. No. 109-80, § 701 120 Stat. 780 (2006) [hereinafter PPA of 2006] (permitting a wider range of such plans).

159. See generally ERISA § 3(24), 29 U.S.C. § 1002(24) (defining a participant's normal retirement age); see also *Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537, 545-46 (S.D.N.Y. 2006) (offering an extensive discussion of the significance of the phrase, "normal retirement age."); see also Treas. Reg. § 1.401(a)-1(b)(2) (setting forth the

retirement benefit and is derived from a formula that usually includes the participant's compensation and years of service.<sup>160</sup> The plan terms may, however, permit benefits to be paid in a form other than a life annuity, such as a lump sum payment, if such form is the actuarial equivalent to the life annuity.<sup>161</sup>

### B. Initial ERISA Provisions Pertinent to Family Law

As initially enacted in September 1974, ERISA contained only one of its five major family law provisions in its current form. That section was the civil enforcement section, which gives a participant or beneficiary a federal entitlement, *viz.*, the right 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."<sup>162</sup>

This section is implemented with three other provisions. First, actions for benefit claims may be brought either in the federal district courts or in state courts of competent jurisdictions.<sup>163</sup> The federal courts have exclusive jurisdiction for all other ERISA actions.<sup>164</sup> A defendant may, and often does, remove a benefit claim to federal court.<sup>165</sup>

Second, ERISA plans are required to process benefit claims pursuant to claims procedures that satisfy DOL requirements.<sup>166</sup>

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requirements to be a normal retirement age).

160. The plan need not permit lump sum payments of plan benefits. However, many plans permit lump sum payments of the value of the annuities as of the date of the payment, which may be as of the participant's normal retirement age or as of another date. A participant's accrued benefits, namely the annuity beginning as of the participant's normal retirement age, may not decrease in a year. For example, a participant who has accrued a \$1,000 annual lifetime annuity beginning as of the participant's normal retirement age may not find that such benefit will decrease at any later time. All investment risk is placed on the employer, who benefits from investment gains and suffers from investment losses. Benefits may be, but are often not, made available when a participant terminates employment for a reason other than death, although distributions are not generally permitted prior to such employment termination.

*See also* Prop. Treas. Reg. §§ 1.401(a)-(1)(b)(1)(iv), 1.401(a)-3 (as amended in 2004) (to be codified at 26 C.F.R. §§ 1.401(a)-1, 1.401(a)-3). These describe conditions under which participants may receive plan distributions prior to a termination of employment, but during a phased retirement without threatening the plan's tax-qualification. PPA of 2006 § 905.

161. ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3).

162. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Pub. L. No. 93-406, 88 Stat. 829, 891 (1974).

163. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

164. *Id.*

165. 28 U.S.C. § 1441(a), (b). *See generally* JAYNE E. ZANGELEIN ET AL., ERISA LITIGATION 155-62 (4th ed. 2011) (providing an overview of litigation arising under ERISA).

166. ERISA § 503, 29 U.S.C. § 1133.

These procedures must provide adequate written notice of any claim denial, the reasons for such denials, and the opportunity for a full and fair review of such denial by a claims fiduciary.<sup>167</sup> Those regulations<sup>168</sup> were first issued in 1977,<sup>169</sup> and were most recently amended in 2001.<sup>170</sup> Benefit claimants are generally required to exhaust plan review procedures before courts will accept benefit claims.<sup>171</sup>

Third, ERISA plan administrators are required to provide participants and beneficiaries of their plans with both general plan information, such as the plan governing documents,<sup>172</sup> and specific information, such as benefit statements.<sup>173</sup> ERISA permits participants and beneficiaries to bring actions against those administrators to obtain any information to which they are entitled under ERISA.<sup>174</sup> If such information is not provided within thirty days, penalties may, but need not, be imposed against the plan administrator.<sup>175</sup> Reasonable attorneys' fees may also be imposed against such an administrator.<sup>176</sup> Courts do not appear as a practice to award attorneys' fees or assess penalties merely because the participant or beneficiary found it necessary to retain and pay an attorney to request the material formally or initiate a law suit.<sup>177</sup> In contrast, ERISA mandates the assessment of attorneys' fees and liquidated damages if an employer fails to make timely benefit contributions to a multi-employer ERISA plan.<sup>178</sup>

The initial version of ERISA contained a predecessor of the second ERISA family law provision that regulated spousal survivor benefits, although far less extensively than it does now. Only one initial ERISA provision explicitly referred to spousal benefits, which had to be made available in very limited circumstances. ERISA § 205, 29 U.S.C. § 1055, required those pension plans that provided annuity benefits to provide joint and

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167. *Id.*

168. 29 C.F.R. § 2560.503-1.

169. Pension and Welfare Benefit Programs, 42 Fed. Reg. 27,426 (May 27, 1977) (to be codified at 29 C.F.R. pt. 2560).

170. Pension and Welfare Benefits Administration, 66 Fed. Reg. 35,886, 35,887 (July 9, 2001) (to be codified at 29 C.F.R. pt. 2560).

171. See generally ZANGELEIN ET AL., *supra* note 165, at 358-78 (discussing ERISA's exhaustion of remedies requirement).

172. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4).

173. ERISA § 105, 29 U.S.C. § 1025.

174. ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) authorizes actions to enforce the requirements set forth in ERISA § 502(c), 29 U.S.C. § 1132(c).

175. ERISA § 502(c), 29 U.S.C. § 1132(c).

176. ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1).

177. See, e.g., ZANGELEIN ET AL., *supra* note 165, at 284-88, 459-79 (discussing ERISA remedies for failure to provide information and when attorneys' fees may be recovered in ERISA litigation).

178. ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2).

survivor annuity benefits (with the spouse having survivor rights) as the default annuity benefit at retirement and during the period for which early retirement is permitted.<sup>179</sup> However, the plans to which the provision applied were also required to permit a participant to waive such benefit form and thereby deprive the spouse of those survivor benefits, because such waivers required no spousal consent.<sup>180</sup> Thus, spousal protection was quite limited even for these plans.<sup>181</sup> Moreover, those plans that provided no annuity benefits, such as profit-sharing plans and many money purchase pension plans, were not required to provide a participant's spouse with any survivor benefits. REACT significantly changed these provisions.

The initial version of ERISA contained no predecessor of the third family law provision that regulated DROs. The initial provisions of ERISA did not mention DROs; thus, it did not explicitly regulate them. REACT added such provisions.

The initial version of ERISA contained a close predecessor of the fourth family law provision that regulated the alienation of employee benefits. ERISA initially required pension plans subject to the spousal survivor benefit provisions described above to provide that the assignment or alienation of pension benefits is prohibited [hereinafter the Alienation Prohibition].<sup>182</sup> This protection is not limited to participants, but extends also to plan beneficiaries.<sup>183</sup> The Alienation Prohibition prevents an individual from endangering his or her pension benefits by voluntary or

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179. Pub. L. No. 93-406, 88 Stat. 829, 862-864. A similar provision was made part of the tax qualification rules at I.R.C. § 401(a)(11). Pub. L. No. 93-406, 88 Stat. 829, 935-37. Qualification requirements, however, do not provide participants or beneficiaries with substantive benefit rights unless, as discussed, *supra*, the plan terms include those requirements.

180. Pub. L. No. 93-406, 88 Stat. 829, 862-864. ERISA § 205(e), in its initial form, also supports this.

181. These plans did not include pension plans not subject to Part 2 of Title I pursuant to ERISA § 201, 29 U.S.C. § 1051, such as top-hat plans.

182. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1). Pub. L. No. 93-406, 88 Stat. 829, 864-65. Code § 401(a)(13) is the corresponding tax qualification provision. The pre-ERISA tax code did not contain any alienation prohibition. *Cf.* Rev. Rul. 56-432, 1956-2 C.B. 525 (providing that there is no tax-qualification issue if a pension plan pays participant's creditors rather than participant); Internal Revenue Code of 1954, ch. 736, 68A Stat. 134 (1954).

183. Treas. Reg. § 1.401(a)-13(c)(1)(ii). Under Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Oct. 17, 1978) (to be codified at 29 C.F.R. § 2570.200a-2), the Service has the responsibility for establishing the regulations with respect to the prohibition on the assignment or alienation of pension benefits. ERISA § 206(d), 29 U.S.C. § 1056(d). Those regulations are associated with the similar prohibition in I.R.C. § 401(a)(13)(B). Although the regulations were amended on August 22, 1988, in 53 Fed. Reg. 31,850, which was after the April 30, 1979, effective date of the reorganization plan, the initial version of the regulations were promulgated on February 15, 1978, in 43 Fed. Reg. 6942 (Feb. 15, 1978), which was prior to such date.

involuntary alienations. ERISA includes the prohibition in order “to further ensure that the employee’s accrued benefits are actually available for retirement purposes.”<sup>184</sup>

The Alienation Prohibition has been invoked to preempt DROs that attempt to govern ERISA benefits as will be discussed, *infra*. However as discussed, *supra*, the Supreme Court has repeatedly used a federally established entitlement rather than an alienation prohibition, to preempt DROs beginning in 1905 with *McCune* and concluding in 1981 with *Ridgway*. The current form of the Alienation Prohibition, as discussed, *infra*, may, however, be used to preempt a DRO that does not challenge the ownership of ERISA benefits, but that tries to enforce a judgment that is not based on an ownership claim against such assets. The initial provisions did not mention DROs. REACT significantly changed these provisions.

The initial version of ERISA contained a predecessor of the fifth ERISA family law provision that regulated the ERISA preemption of state laws. There are three kinds of ERISA preemption discussed, *infra*. Two are implicit and are described as ERISA Conflict Preemption and ERISA Field Preemption. One is explicit and described as ERISA General Preemption.<sup>185</sup>

ERISA Conflict Preemption is based on the United States Constitution’s supremacy clause,<sup>186</sup> which provides that federal law supersedes any conflicting state law.<sup>187</sup> Under such conflict preemption, ERISA supersedes a state law that contradicts either the ERISA minimum participation standards for pension plans,<sup>188</sup> or the ERISA minimum vesting standards for pension plans.<sup>189</sup> In particular, ERISA Conflict Preemption would supersede a state statute permitting pension benefits to be forfeited if a participant is credited with less than ten years because ERISA only requires

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184. H.R. REP. NO. 93-779, at 66 (1974), *reprinted in* (1) 1974-3 C.B. 244, 309, and in (2) STAFF OF S. COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG. LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: PUBLIC LAW 93-406, at 2584, 2655 (1976) [hereinafter ERISA LEG. HISTORY]; H.R. REP. NO. 93-807, at 68, *reprinted in* (1) 1974 U.S.C.C.A.N. 4670, 4734; and (2) ERISA LEG. HISTORY 3115, 3188.

185. See *The Constitution of the United States of America Analysis and Interpretation*, S. DOC. NO. 108-17, at 257-78 (2002), *available at* <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf>, as supplemented by S. DOC. NO. 111-397 (2010), *available at* <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2010/pdf/GPO-CONAN-2010.pdf> (discussing the general application of preemption principles).

186. U.S. CONST. art. VI, cl. 2.

187. *Gibbons v. Ogden*, 22 U.S. 1, 177 (1824) (voiding a New York law giving exclusive privileges to operate steamboats in New York waters because it conflicted with congressional statutes licensing those engaged in coastal trade).

188. ERISA § 202, 29 U.S.C. § 1052.

189. ERISA § 203, 29 U.S.C. § 1053.

six years.<sup>190</sup> However, ERISA Conflict Preemption has no effect on state laws that pertain to but do not contradict those standards. In particular, ERISA Conflict Preemption would not supersede a statute setting more stringent minimum participant or vesting standards than ERISA sets for pension plans or even one setting minimum participation or vesting standards for welfare plans.<sup>191</sup>

ERISA Field Preemption is based on the principles described by the Supreme Court as follows in *Rice v. Santa Fe Elevator Corp.*:

Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was *the clear and manifest purpose of Congress*. Such a purpose may be evidenced in several ways. *The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.* Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often *a perplexing question* whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.<sup>192</sup>

The “perplexing question” often leads to considerable disagreement about whether a state law is superseded by ERISA under field preemption.<sup>193</sup> For example, does field preemption apply to state laws imposing minimum participation standards for welfare plans?<sup>194</sup> On the other hand, any state law that conflicts with ERISA is subject to field preemption, because the conflict

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190. ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2).

191. We are disregarding the limited state regulation of insured plans, including welfare plans, which ERISA permits as discussed, *infra*.

192. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (emphasis added) (citations omitted). The Court decided that the United States Warehouse Act superseded state regulation of only those matters expressly regulated by the Act. *Id.* See also *Arizona v. United States*, 2012 U.S. LEXIS 4872, \*\*18-20 (June 25, 2012) (citing parts of this quote, which the Court used to find parts of the Arizona alien registration law were preempted).

193. See, e.g., Lynch, *supra* note 102, 376-82 (discussing field preemption four years after the enactment of ERISA).

194. See, e.g., Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 951, 972-85 (2000) (arguing that because ERISA does not substantively regulate welfare plans ERISA should not apply field preemption to the state regulation of welfare plans). Professor Bogen therein also disagrees with much of the preemption analysis of ERISA set forth in this article.

shows Congress had a clear and manifest purpose to supersede such state law. Courts as discussed, *infra*, often refer to the *Rice* “clear and manifest purpose” test when they find a state law is not preempted, without discussing whether the state law at issue is a police power or whether the the state and federal regulations conflict.

ERISA preemption is not limited to ERISA Conflict Preemption and ERISA Field Preemption. The initial ERISA provisions explicitly preempted state laws that “relate to any [ERISA] employee benefit plan,” but do not mention DROs, domestic relations law, or any other aspect of family state law.<sup>195</sup> This preemption is often called ERISA General Preemption, and includes both ERISA Conflict Preemption and ERISA Field Preemption, discussed, *supra*, because both preempt state laws that not only relate, but relate very adversely, to ERISA plans in their capacity as benefit providers. The term “state law” includes all laws, decisions, rules, regulations, or other state action having the effect of state law.<sup>196</sup> State laws are often enforced with state court or administrative agency orders. Thus, such orders are preempted under the same standards as state statutes.

The ERISA General Preemption was an important element in the development and passage of ERISA.<sup>197</sup> One of the ERISA floor managers, John H. Dent, stressed how the ERISA General Preemption enhanced the protection of participants as follows:

Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] 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. . . .<sup>198</sup>

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195. ERISA § 514, 29 U.S.C. § 1144, in its initial form, Pub. L. No. 93-406, 88 Stat. 829, 897 (1974).

196. ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1).

197. See James A. Wooten, *Legislative and Political History of ERISA Preemption Part-1*, 14 J. PENSION BENEFITS 31 (2006), James A. Wooten, *Legislative and Political History of ERISA Preemption Part 2*, 14 J. PENSION BENEFITS 5 (2007), James A. Wooten, *Legislative and Political History of ERISA Preemption Part 3*, J. PENSION BENEFITS 15 (2008); WOOTEN, *supra* note 132, at 258-65, 281-85 (2004). *But cf.* Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. LEG. 35, 52-57 (1996) (discussing the ambiguity of the statute and the official legislative history); see also Robert H. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. 535, 538 (1948) (“It is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage.”).

198. 120 CONG. REC. H8696, H8701 (daily ed. Aug. 22, 1974) (statement of Rep. Dent) *reprinted in* ERISA LEG. HISTORY, *supra* note 184, at 4670

The ERISA provisions directing that there be a study on or before September 2, 1976, of the effects of the ERISA General Preemption were never implemented.<sup>199</sup> No regulations have been issued with respect to the section. Many court decisions have, however, addressed the significance of the statutory phrase “relate to any [ERISA] employee benefit plan.”

Two major police powers were excluded from the initial ERISA General Preemption, to the extent they were police powers. However, there was no exclusion or mention of DROs or any other aspect of state family law. The two exclusions must also apply to both conflict and field preemption, because both are included within the ERISA General Preemption. First, there is an exclusion for state laws regulating insurance, banking or securities.<sup>200</sup> This exclusion does not permit state insurance laws to determine the rights of designees of insured plans.<sup>201</sup> Second, there is also an exclusion from preemption for generally applicable criminal laws of the states.<sup>202</sup> This exclusion applies to general criminal laws, such as larceny and embezzlement laws. It may not be used to regulate employee benefit plans by criminalizing employee benefit requirements, such as criminalizing the failure of corporate officers to insure that prompt employer plan contributions are made.<sup>203</sup>

Thus, in accord with the principle that the state police powers may not be superseded by federal statutes unless “that was the clear and manifest purpose of Congress,” it is reasonable to conclude that if, *arguendo*, domestic relations laws, or any other

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(emphasis added).

199. ERISA § 3022, 29 U.S.C. § 1222.

200. ERISA § 514(b)(2), 29 U.S.C. § 1144(b)(2). This section also includes an exclusion for state laws regulating banking or securities. For a more extensive discussion of the insurance exemption see Matthew G. Vansuch, Note, *Not Just Old Wine in New Bottles: Kentucky Ass'n of Health Plans, Inc. v. Miller Bottles a New Test for State Regulation of Insurance*, 38 AKRON L. REV. 253 (2005); Donald T. Bogan, *ERISA: State Regulation of Insured Plans After Davila*, 38 J. MARSHALL L. REV. 69 (2005).

201. The Supreme Court unanimously decided that a state law is deemed to be a “law . . . which regulates insurance” only if: (1) the state law must be specifically directed toward entities engaged in insurance, and (2) the state law must substantially affect the risk pooling arrangement between the insurer and the insured. *Ky. Ass'n of Health Plans, Inc., v. Miller*, 538 U.S. 329, 342 (2003). Thus, the exclusion does not affect the focus of this Article, the rights of beneficiary designees. See *e.g.*, *Egelhoff*, 532 U.S. at 147 (preempting a state law pertaining to the designee of a life insurance plan).

202. ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4).

203. See, *e.g.*, *Sforza v. Kenco Constructional Contracting Co., Inc.*, 674 F. Supp. 1493, 1494 (D.C. Conn. 1986) (rejecting criminal law exclusion); *Blackburn v. Iversen*, 925 F. Supp. 118, 120, 122 (D.C. Conn. 1996) (preempting statute imposing personal liability on corporate officers because it relates to ERISA plans, but permitting alter ego claim against officers to go forward).



family laws, are state police powers, to the extent, if any, they are inconsistent with ERISA, including the requirement that the terms of an ERISA plan consistent with ERISA be followed, ERISA preempts those state laws.<sup>204</sup> Congress is unlikely to have inadvertently omitted any mention of these laws within ERISA or its legislative history because within the prior two years Congress adopted major legislation to enhance women's rights, such as the proposed constitutional amendment granting women equal rights<sup>205</sup> and Title IX of the Education Amendments of 1972.<sup>206</sup> A *fortiori*, domestic relations law, or any other family law provisions, are less obvious police powers than criminal law, banking law, securities law, or insurance law. Thus, they may not be implicitly characterized as police powers excluded from the ERISA General Preemption. Some commentators have used policy arguments to criticize Congress severely for this approach.<sup>207</sup>

ERISA generally does not preempt state laws to which plan terms refer. For example, the terms of a life insurance plan may provide that if a participant has made no effective designation, the proceeds shall be distributed in accord with the law of intestacy of a specified state. On the other hand, a plan may not incorporate a state law that violates any ERISA mandates. Thus, a provision that an ERISA plan be interpreted by the laws of a certain state only applies to the extent such laws are consistent with ERISA.

### C. Summary of Relation of State Family Law and ERISA Immediately After the Initial Adoption of ERISA

A participant's spouse has no entitlement to survivor benefits unless the pension plan provides such benefits and the participant does not waive those benefits. Life insurance plans need not provide any spousal benefits. It was then uncertain whether the ERISA federal protective entitlements of private employee benefits would be treated as federal entitlements similar to that in *McCune*, *Wissner*, or *Free*, or would be treated as private entitlements governed by state family law. In the former case, ERISA benefit entitlements would not be subject to state family law with respect to benefit payments by plans or with respect to

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204. *Rice*, 331 U.S. at 230.

205. Equal Rights Amendment, H.R.J. Res. 208, 92d Cong. (1971) and S.J. Res. 8, 92d Cong. 86 Stat. 1523, 92d Cong. (1972).

206. Patsy T. Mink Equal Opportunity in Education Act, Pub. L. No. 92-318, 86 Stat. 235, 373-75 (1972) (prohibiting sex discrimination in education).

207. See e.g., Sylvia Law, *Families and Federalism*, 4 J. OF L. & POL'Y 175, 202-04 (2000) (describing the ERISA statutory approach to domestic relations law as "thoughtless and seemingly irrational"). The author does not discuss the REACT changes to these provisions, although she therein discusses post-REACT decisions.

benefits received by participants or beneficiaries.<sup>208</sup> In the latter case, ERISA benefit entitlements would be subject to state family law both with respect to benefit payments by plans and with respect to benefits received by participants or beneficiaries.

#### VII. POST-ERISA BUT PRE-1984 SUPREME COURT DECISIONS—NON-ERISA FEDERAL BENEFIT ENTITLEMENTS PREEMPT STATE FAMILY LAW

The Supreme Court held that state domestic relations order obligations based on state community property law, rather than support obligations (the latter were addressed by the amendments to the SSA discussed, *supra*) were preempted for benefits under the federal railway workers retirement act, under the military retirement system, and under the military life insurance system.

In 1979, the Supreme Court held in *Hisquierdo*,<sup>209</sup> that state community property rules could not be used to compel a railroad worker to pay his divorcing wife any amount as a result of the railway pension benefits he had accrued during their marriage, but was not receiving. These benefits are funded with the taxes collected from the employers and employees together with contributions by the federal government.<sup>210</sup> The Court used a different approach than *Free*, although it referred to *Free*, *Wissner*, and *Wetmore* as follows:

This case, like those four,<sup>211</sup> has to do with a conflict between federal and state rules for the allocation of a federal entitlement. . . . *The critical terms here include a specified beneficiary protected by a flat prohibition against attachment and anticipation. . . . The critical terms here include a specified beneficiary protected by a flat prohibition against attachment and anticipation. . . . The pertinent questions are whether the [state community property] right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.*<sup>212</sup>

It is not clear why the Court described *Wetmore* as discussing a conflict between federal and state rules. *Wetmore*, as discussed, *supra*, simply pertained to a statutory interpretation question: Did the bankruptcy statute provide for the discharge of family support obligations, as it did for debts from business transactions? In

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208. *McCune*, 199 U.S. 382 at 389-90.

209. *Hisquierdo*, 439 U.S. at 572.

210. *Id.* at 574-75.

211. The fourth case was *Yiatchos v. Yiatchos*, 376 U.S. 306, 307-08 (1964), which dealt with the unrelated issue of whether an individual had wrongfully used community property to purchase a savings bond that was registered as owned jointly by the individual and his brother. There was no conflict between federal and state law.

212. *Hisquierdo*, 439 U.S. at 582-83 (emphasis added).

contrast, in *Hisquierdo*, there was a conflict. The federal statute provided that retirement payments be made solely to the participant, but the state community property law provided that a portion of the payments be made to the participant's former spouse.

The Court observed that Congress provided for a spousal benefit, which it deliberately terminated on divorce.<sup>213</sup> The Court also focused on the federal anti-anticipation statute, which provided that:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.<sup>214</sup>

The Court observed that this statute is not limited to prohibitions on garnishments, but also states that the participant's annuity shall not be subject to any "legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated"<sup>215</sup> Moreover, the explicit exception to these provisions set forth in legislation passed in 1975, for amounts needed to satisfy an obligation for alimony or child support, specifically excluded community property claims, such as the one at issue.<sup>216</sup>

Finally, the Court seemed to identify a federal interest for the federal treatment of the payments, namely that by exempting retirement pay from other garnishments, Congress deliberately increased the incentive for a divorced employee to retire.<sup>217</sup> It is not clear why a divorced employee requires a greater monetary incentive than a married employee. Thus, this is a make-weight argument.

The Court gave two reasons for rejecting the proposal that the participant be permitted to retain the pension benefits, but be required in exchange to give up other property of equivalent value, namely, the family home.<sup>218</sup> First, under traditional trust law, similar prohibitions prevent a beneficiary from receiving benefits before the person is scheduled to receive trust payments.<sup>219</sup> In this case, the participant was not eligible to start receiving pension annuity payments at the time of the divorce, but the participant's former spouse is seeking "equivalent" benefits at such time.

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213. *Id.* at 584-85.

214. *Id.* at 576.

215. *Id.*

216. *Id.* at 586-87.

217. *Id.* at 585, 590.

218. *Id.* at 588-90.

219. *Id.*

Second, there was considerable uncertainty about the amount of the participant's pension annuity payments because they depended on how long the participant lived, worked, and congressional changes in retirement benefits.<sup>220</sup>

The dissenters tried to distinguish *Hisquierdo* from *Wissner* and *Free* by observing that those cases dealt with survivor benefits, which the federal statute directed be paid to the person selected by the decedent.<sup>221</sup> "In each case, explicit provisions of federal law not only conflicted with principles of state law but also created property rights at variance with the rights that normally would have been created by local property law."<sup>222</sup> Moreover, the dissenters also pointed out that the reference in *Wissner* to similar anti-alienation language was dictum.<sup>223</sup> Finally, the dissenters asserted that the spendthrift-like language at issue is generally for protection against creditors not against spouses making claims under community property statutes.<sup>224</sup> The Court responded that Congress could change the law as it had recently done to permit the garnishment of civil service retirement benefits for community property claims.<sup>225</sup>

The Supreme Court similarly decided in 1981, in *McCarthy v. McCarthy*,<sup>226</sup> that a soldier's military retirement pay was not subject to a divorcing spouse's community property claim. As in *McCune*, *Wissner*, and *Free*, the Court focused on federal entitlement language:

The statutory language is straightforward: "A member of the Army retired under this chapter is entitled to retired pay . . ." . . . Indeed, Congress has explicitly stated: "Historically, military retired pay has been a *personal entitlement* payable to the retired member himself as long as he lives."<sup>227</sup>

The Court observed that this entitlement was part of a system that served a strong federal interest.<sup>228</sup> The system was a strong inducement for enlistment and re-enlistment and encouraged a

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220. *Id.* at 589.

221. *Id.* at 596 (Stewart, J., dissenting). The dissenters also distinguished *McCune v. Essig*, 199 U.S. 382 (1905), which held that the federal homestead law superseded state community property law.

222. *Id.* at 596 (Stewart, J., dissenting).

223. *Id.* at 599 n.3 (Stewart, J., dissenting).

224. *Id.* at 599-600 (Stewart, J., dissenting).

225. *Id.* at 590 (majority opinion) (referencing Pub. L. No. 95-366, 92 Stat. 600 (1978)).

226. *McCarthy v. McCarthy*, 453 U.S. 210 (1981), *superseded by statute*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X § 1002, 96 Stat. 718, 730-35 (1982) (codified at 10 U.S.C. § 1408).

227. *Id.* at 223-24 (quoting 10 U.S.C. § 3929; S. REP. NO. 1480, 90th Cong., 2d Sess., 6 (1968)) (emphasis added).

228. *Id.* at 232.

young and vigorous military.<sup>229</sup> Again, this appears to be a make-weight argument because it is unclear why a divorced serviceman needs more monetary incentive than a single one to enlist or reenlist. As in *Hisquierdo*, the Court pointed to the same 1975 federal legislation that made federal benefits subject to child support and alimony obligations, but not to community property awards.<sup>230</sup> Moreover, the Court noted in 1972 when Congress adopted the retirement pay system at issue, it rejected an attempt to make such pay subject to attachment by a DRO.<sup>231</sup>

The Supreme Court also decided in 1981, in *Ridgway v. Ridgway*,<sup>232</sup> that a soldier's second wife and designated beneficiary was entitled to receive and retain all the proceeds from a life insurance policy under the Servicemen's Group Life Insurance Act of 1965.<sup>233</sup> This was a successor to the federally funded National Service Life Insurance Act of 1940, which was at issue in *Wissner*.<sup>234</sup> For the successor, the federal government heavily subsidized insurance that was provided by private parties.<sup>235</sup> The Court also held that his first wife's minor children had no direct or indirect rights to those proceeds even though the participant's divorce judgment required him to designate them to receive those survivor benefits.<sup>236</sup> The issue concerned a property award to the participant's minor children rather than an issue of community property as in *Wissner*.<sup>237</sup> The Supreme Court cited the *Hisquierdo* reference to the need to show major damage to a clear and substantial federal interest before preempting state family law, and again found such interest by reviewing the federal statutory language.<sup>238</sup> In particular, the Court held that the case was controlled by *Wissner* and repeated its statement from that decision about the clarity of the congressional intent, which would also apply to a private employee whose entitlement to life insurance was determined by federal law, such as ERISA.<sup>239</sup> "Here, as there, it appropriately may be said: 'Congress has spoken with force and clarity in directing that the proceeds belong to the

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229. *Id.* at 232-34.

230. *Id.* at 234.

231. *Id.* at 228-30.

232. *Ridgway v. Ridgway*, 454 U.S. 46 (1981), *superseded by statute*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X § 1002, 96 Stat. 718, 735-36 (1982) (codified at 10 U.S.C. § 1448); Pub. L. No. 98-94, Title IX, Part D, § 941 (a)(3), (c)(3), 97 Stat. 653, 654 (1983) (codified at 10 U.S.C. § 1450(f)(3)).

233. *Id.* at 56, 62.

234. *Id.* at 55-56.

235. *Id.* at 52.

236. *Id.* at 48-49, 60-62.

237. *Id.* at 53-54, 61.

238. *Id.* at 54.

239. *Id.* at 55.

named beneficiary and no other.”<sup>240</sup>

The Court also held that the same anti-attachment provision considered in *Wissner* was again an “independent ground” for preventing (1) a direct claim by the children on the insurer, and (2) an indirect claim for a constructive trust against the proceeds to which the second wife was entitled.<sup>241</sup> The Court also cited its *Hisquierdo* statements that anti-alienation provisions ensure that benefits actually reach the beneficiary.<sup>242</sup> The three dissenters argued that the fraud and breach of trust exception of *Free* applied to the soldier who had violated a divorce order by not designating his minor children as his life insurance beneficiaries.<sup>243</sup> The majority responded that the Supreme Court had declared therein that this savings bond exception was not applicable where the issue was the designation rather than whose money was used to purchase the bonds.<sup>244</sup> The dissent argued that the second wife was being unjustly enriched by receiving the children’s entitlements, and even though she may not have behaved improperly, she was not entitled as a gratuitous recipient to keep the insurance proceeds to which the minor children were entitled.<sup>245</sup> The soldier in this case had voluntarily waived his rights to choose a designee other than his minor children by agreeing to the divorce decree after extensive negotiations.<sup>246</sup> The majority conceded that the equities favored the children, but, as in *Hisquierdo*, stated that Congress had chosen not to apply such equities when it wrote the law.<sup>247</sup> That law insulated the benefits paid to his designated beneficiary “from attack or seizure by any other claimant.”<sup>248</sup>

The dissenters tried to distinguish *Wissner*.<sup>249</sup> They pointed to the Court’s observation that alimony or family support was not at issue in *Wissner*.<sup>250</sup> In contrast, in this case the reason for the participant’s beneficiary commitment was an issue, and many decisions held that family support orders were not preempted by federal anti-alienation provisions similar to the one at issue,<sup>251</sup> or spendthrift provisions in general, because of the special nature of

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240. *Id.* at 56 (quoting *Wissner*, 338 U.S. at 658).

241. *Id.* at 60-61.

242. *Id.* at 61.

243. *Id.* at 64-71 (Powell, J., dissenting).

244. *Id.* at 58 (majority opinion).

245. *Id.* at 71-72 n.1 (Stevens, J., dissenting).

246. *Id.* at 80.

247. *Id.* at 61-63 (majority opinion).

248. *Id.* at 63.

249. *Id.* at 64-71, 71-82 (Powell and Stevens, JJ., dissenting).

250. *Id.* (Powell and Stevens, JJ., dissenting).

251. All the cited decisions other than *Schlaefler v. Schlaefler*, 112 F.2d 177 (D.C. Cir. 1940), discussed, *supra*, were state court decisions.

the parental legal duty.<sup>252</sup> The majority responded that *Wissner* applied to community property rights, which often have elements of support, as may be the case at issue, rather than alimony or family support.<sup>253</sup> Moreover, the beneficiary designation more resembles such a property claim than alimony or child support.<sup>254</sup> Thus, the state law seeking to overturn the designation is similarly preempted.<sup>255</sup>

#### VIII. COURT AND ADMINISTRATIVE INTERPRETATION OF PRE-REACT (1984) ERISA PROVISIONS

The significance of the ERISA sections was clarified by the case law and administrative interpretations in the years between the enactment of ERISA in 1974 and the enactment of REACT of 1984. The Supreme Court held that ERISA's preemption reach was quite far-reaching for state law other than family law. The regulations pertaining to the Alienation Prohibition implied that ERISA preempted DROs, and all other state family law provisions not consistent with the terms of pension plans subject to the spousal survivor provisions. The Supreme Court, however, held that ERISA did not preempt a DRO giving a participant's spouse the right to a portion of the participant's payments when the participant received plan payments, and the Service declared such payments raised no tax-qualification issues. The Seventh Circuit held that a DRO could give a participant the right to elect to receive a portion of the plan payments to which the participant was entitled even if the participant were not receiving benefits, if the participant could have elected to receive such payments. The case law and regulations held that the spousal survivor provisions provided quite limited protection to spouses. The case law and interpretations regarding the family law interaction with ERISA seem to have been confined to pension plans.

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252. *Id.* at 78-81 (Stevens, J., dissenting).

253. Insurance is often required to be provided for minor children to insure that the children will continue to obtain support if the provider of child support dies. However, in this case, the purpose of the insurance is not described even though the participant was required to provide his minor children with child support.

254. *Cf. Rose v. Rose*, 481 U.S. 619, 634 (1987) (distinguishing *Ridgway* because Congress intended that veteran's disability benefits be split between a former soldier and children, although concurrence focused on alimony exemption from prohibition on alienation).

255. *Ridgway*, 454 U.S. at 61-62.

*A. Treasury Regulation Pertaining to Alienation Prohibition and Implications for Domestic Relations Orders and the Social Security Alienation Prohibition*

In February 1978, the Department of Treasury issued Treasury Regulation § 1.401(a)-13 pertaining to the Alienation Prohibition.<sup>256</sup> Those regulations implied that ERISA preempted DROs, and all other state family law provisions not consistent with the terms of pension plans subject to the spousal survivor provisions. The Treasury regulations expanded the statutory prohibition for benefits as follows:

General rule. Under section 401(a)(13) [26 USCS § 401(a)(13)], a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan 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.<sup>257</sup>

Although the Treasury regulations do not define the statutory phrase “assignment and alienation,” they describe the items included in the phrase as follows:

(1) In general. For purposes of this section, the terms “assignment” and “alienation” include—

(i) Any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan, and

(ii) Any direct or indirect arrangement (whether revocable or irrevocable) 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.<sup>258</sup>

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256. 43 Fed. Reg. 6943 (Feb. 17, 1978).

257. Treas. Reg. § 1.401(a)-13(b)(1).

258. *Id.* § 1.401(a)-13(c)(1). Deference must be given to these regulations under the Supreme Court's recent unanimous decision in *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011) [hereinafter *Mayo*]. The Court concluded that the validity of all Treasury regulations (whether interpretative or legislative) should be determined under the test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Specifically, the court must determine “whether the statute's plain terms ‘directly address[s] the precise question at issue.’” *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (quoting *Chevron*, 467 U.S. at 843). If the statute is ambiguous on the point or silent, then the court must apply the second part of the *Chevron* test, which asks whether the regulation is “reasonable.” Regulations are reasonable unless they are “arbitrary, capricious, or manifestly contrary to the statute.” *Mayo*, 131 S. Ct. at 711 (“In the typical case, such an ambiguity would lead us inexorably to *Chevron* two, under which we may not disturb an agency rule unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’”) (citing *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242



A DRO, which requires a pension plan to pay a person other than the participant, satisfies the criteria for an included arrangement. Thus, the only issue is whether the payment is otherwise excluded from the prohibition. The regulations have explicit exemptions from the general rule not in the statute. There are exemptions for federal tax levies,<sup>259</sup> federal and state tax withholdings,<sup>260</sup> and recoveries of benefit overpayments,<sup>261</sup> but the regulations, like the statute, do not mention family support obligations, DROs, or any other aspect of state family law. There would appear to be as compelling of a case for implicit exemptions for these three explicit exemptions that the regulation adds to the statutory exemption for voluntary assignments, as for an implicit exemption for the payment of a family support obligation, or for any other aspect of family law.

Thus, in accord with the principle that the state police powers may not be superseded by federal statutes unless “that was the clear and manifest purpose of Congress,”<sup>262</sup> it is reasonable to conclude that if, *arguendo*, domestic relations law, or any other family law is a state police power, the Alienation Prohibition preempts those state laws that apply to those pension plans subject to the spousal survivor provisions. Analysis of the initial ERISA provisions resulted in the same conclusion as discussed, *supra*.

The Social Security Act (“SSA”) protected social security benefits from alienation in 1974 and 1978 as follows:

The right of any person to any future payment under this title [42 USCS §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title [42 USCS §§ 401 et seq.] shall be subject to execution, levy, attachment, garnishment, or other legal process, or

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(2004)). However, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012) (quoting *Chevron*, 467 U.S. at 843 n.9).

*Cf. Nat’l Bank of N. Am. v. IBEW Local No. 3 Pension and Vacation Funds*, 419 N.Y.S.2d 127 (N.Y. App. Div. 2d Dept. 1979) (limiting the Alienation Prohibition to voluntary transfers, but determining it is inapplicable to third party garnishments; however, the majority disregarded the dissent’s reference to a Treasury regulation to the contrary, which seems to have been overruled by *Helmsley-Spear, Inc. v. Winter*, 426 N.Y.S.2d 778 (N.Y. App. Div. 1st Dept. 1980), *aff’d*, 419 N.E.2d 1078 (N.Y. 1981), which prevented an employer from garnishing a participant’s pension for amounts fraudulently taken by the participant).

259. Treas. Reg. § 1.401(a)-13(b)(2).

260. *Id.* § 1.401(a)-13(c)(2)(ii).

261. *Id.* § 1.401(a)-13(c)(2)(iii).

262. *Rice*, 331 U.S. at 230.

to the operation of any bankruptcy or insolvency law.<sup>263</sup>

This is the same language as the initial 1935 enactment,<sup>264</sup> and is very similar, but much narrower, than the language in the regulations for the Alienation Prohibition discussed, *infra*, which implies that ERISA protection is not limited to traditional concepts of legal process or assignment. Without the regulation, there was considerable ambiguity about the extent of the brief Alienation Prohibition in ERISA that refers to ERISA pension benefits as follows, “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.”<sup>265</sup> However, the ERISA regulation did not address the extent, if any, to which the Alienation Prohibition, like the Social Security Act, may protect distributions from pension plans subject to the spousal survivor provisions.

In 1973, before the enactment of ERISA, the Supreme Court in *Philpott v. Essex County Welfare Board*<sup>266</sup> emphasized the extent of the Social Security protection of social security distributions by holding that social security payments retained the quality of money by remaining in “readily withdrawable” form.<sup>267</sup> In particular, the Court held social security benefits on deposit in a bank account were not subject to attachment by the local welfare board.<sup>268</sup> Thus, there seemed little question social security benefits were protected from alienation both before and after their distribution, which is more protection than the Supreme Court provided in the earlier preemption decisions based on federal entitlements, such as an entitlement to property transferred by the federal government. In those decisions, such as *McCune*, the Court protected the person claiming a superior ownership interest in the property from encumbering the property on the basis of such claim, but did not prevent independent levies on the transferred property based on unrelated claims.<sup>269</sup> However, there were some state decisions holding that support obligations were enforceable against distributed social security benefits.<sup>270</sup>

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263. 42 U.S.C. § 407 (2011), SSA § 207.

264. The section number was changed to the current section number on August 10, 1939, by ch. 666, Title II, § 207, 53 Stat. 1372. The original section number was § 208 of the SSA enacted on August 14, 1935, by ch. 531, Title II, § 208, 49 Stat. 625.

265. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1).

266. *Philpott v. Essex Cnty. Welfare Bd.*, 409 U.S. 413 (1973).

267. *Id.* at 416.

268. *Id.* at 415-16; *see also* *Carrier v. Bryant* 306 U.S. 545 (1939) (U.S. securities purchased with veteran's benefits, unlike the benefit distributions, is not protected from execution under a statute that, like the Social Security Act, protects distributed benefits and was enacted in 1935).

269. *McCune*, 199 U.S. at 390.

270. *See, e.g., Brown v. Brown*, 288 N.E.2d 852 (Ohio Ct. App. 1972) (holding that SSA limits on creditor claims are inapplicable to claims by

*B. Court Interpretation of Effects of ERISA Preemption Provisions on Domestic Relations Orders Before Campa Supreme Court Decision*

Prior to the 1980 Supreme Court decision in *In re Marriage of Campa*,<sup>271</sup> resolving the issue of whether DROs could apply community property law to ERISA pension plan benefits, on which the courts divided, courts consistently held that ERISA did not preempt DROs requiring that ERISA plan benefits be used to pay a participant's support obligations. Although the decisions focused on the Alienation Prohibition, none mentioned the relevant treasury regulation issued early in 1978. No case law addressed whether ERISA preempted DROs pertaining to life insurance plans or top-hat plans.

There was a good discussion in 1979 of the pre-*Campa* state of law, i.e., before the *Campa* Supreme Court decision, regarding child support or alimony DROs in *American Telephone and Telegraph Co. v. Merry*.<sup>272</sup> The court therein issued a garnishment order to a pension plan<sup>273</sup> to obtain payment of a participant's outstanding child support obligation.<sup>274</sup> The court first observed that the ERISA legislative history is silent about whether the Alienation Prohibition applied to DRO garnishments.<sup>275</sup> The court then agreed with Judge Weinfeld's statements in a similar case that: (1) there was no ERISA Conflict Preemption because the Alienation Prohibition was inapplicable, and (2) there was no ERISA General Preemption because of the "fundamental principle of statutory interpretation (whereby) courts have presumed that the basic police powers of the States, particularly the regulation of domestic relations, are not superseded by federal legislation unless that was the clear and manifest purpose of Congress."<sup>276</sup>

The *Merry* court cited five similar support holdings<sup>277</sup> in *Cody v. Riecker*,<sup>278</sup> *Cogollos v. Cogollos*,<sup>279</sup> *Wanamaker v. Wanamaker*,<sup>280</sup>

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dependents); *Huskey v. Batts*, 530 P.2d 1375 (Okla. Civ. App. 1974) (citing *Brown*).

271. *Carpenters Pension Trust Fund v. Campa*, 444 U.S. 1028 (1980) [hereinafter *Campa*].

272. *Am. Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979).

273. There was a question whether the order had been issued to the correct party, the plan or plan administrator rather than the plan administrator.

274. *Am. Tel. & Tel. Co.*, 592 F.2d at 122-25.

275. *Id.* at 120-21.

276. *Id.* at 122 (citing *Cartledge v. Miller*, 457 F. Supp. 1146, 1154 (S.D.N.Y. 1978)).

277. For citations to implicit exceptions for family support obligations from other broad alienation prohibition laws see *Cartledge*, 457 F. Supp. at 1154 n.42.

278. *Cody v. Riecker*, 454 F. Supp. 22 (E.D.N.Y. 1978).

279. *Cogollos v. Cogollos*, 402 N.Y.S.2d 929 (N.Y. Sup. Ct. 1978).

280. *Wanamaker v. Wanamaker*, 401 N.Y.S.2d 702 (N.Y. Fam. Ct. 1978).

*M.H. v. J.H.*,<sup>281</sup> and *Biles v. Biles*.<sup>282</sup> The court also mentioned a similar holding with respect to a community property dispute in *Stone v. Stone*.<sup>283</sup> The court distinguished *Hisquierdo*, which was decided by the Supreme Court earlier in 1979, because of its focus on community property and reservation that there may be different considerations for private plans regulated by ERISA.<sup>284</sup> The court also noted the similarity to the support obligation, which *Wetmore* held could not be discharged in bankruptcy.<sup>285</sup> The court dismissed *General Motors Corp. v. Townsend*<sup>286</sup> for relying only on the statutory language without considering the strong policy in having participants pay their family support obligations.<sup>287</sup> It also dismissed *Francis v. United Technologies Corp.*<sup>288</sup> as being less convincing than the contrary holding of *Stone* from the same federal district.<sup>289</sup> The court could have better distinguished *Francis* and *Townsend* by observing that in neither were support obligations at issue. Like *Stone*, the division of marital property was at issue. The court observed that the Tax Division of the Justice Department had filed an amicus brief stating that the support payments would not violate the alienation prohibition in the tax qualification rules that was identical to the Alienation Prohibition.<sup>290</sup> Finally, the court noticed that the ERISA declaration of policy reference to a concern for "employees and their dependents."<sup>291</sup>

*Merry* identified a conflict in the Ninth Circuit district courts about whether community property laws may be used to obtain an interest in the participant's pension interest in the course of a marital dissolution.

In 1978, in *Stone*, a former spouse had been awarded forty percent of the participant's monthly pension payments in accord with her community property interest.<sup>292</sup> The court permitted her to obtain payment directly from the pension plan. The court began with the reference to *Wetmore*. "This policy of federal noninterference with state domestic relations laws means that a federal court does not construe a federal statute to preempt one of

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281. *M. H. v. J. H.*, 403 N.Y.S.2d 411 (N.Y. Fam. Ct. 1978).

282. *Biles v. Biles*, 394 A.2d 153 (N.J. Super. Ct. Ch. Div. 1978).

283. *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *appeal then pending*, No. 78-2313 (9th Cir.).

284. *Am. Tel. & Tel. Co.*, 592 F.2d at 123.

285. *Id.*

286. *Gen. Motors Corp. v. Townsend*, 468 F. Supp. 466 (E.D. Mich. 1976).

287. *Am. Tel. & Tel. Co.*, 592 F.2d at 123.

288. *Francis v. United Techs. Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978).

289. *Am. Tel. & Tel. Co.*, 592 F.2d at 123.

290. *Id.* at 125.

291. *Id.* at 124.

292. *Stone*, 450 F. Supp. at 920.

those laws unless 'positively required by direct enactment.'"<sup>293</sup> However, the phrase quoted was not a reference to federal preemption or to federal laws in general, but to the interpretation of the discharge provisions of the federal bankruptcy law. After concluding that the legislative history did not address whether the Alienation Prohibition prohibited the application of community property law to obtain a participant's pension benefit, and asserting that the "plain meaning" of the statute does do so, the court applied policy considerations and the *Wetmore* presumption against preemption.<sup>294</sup> The court then asserted that preemption would frustrate a policy goal of the Prohibition, namely that the participant be able to support his family, and ERISA does not reject the community property premise that each spouse earns and deserves half of all marital property.<sup>295</sup> The difficulty with this analysis is that ERISA differs fundamentally from the bankruptcy law. ERISA includes a provision preempting all state law related to employer plans, and that preemption provision is at issue. Moreover, as discussed, *infra*, the provisions for the Alienation Prohibition regulations showed that the *Wetmore* exclusion arguments were inapplicable to the Alienation Prohibition.

Furthermore, the court asserted that support obligations may be enforced against pension plans, and there is often little difference between assets transferred for support and for property obligations, so it is far more practical to subject neither to the Prohibition.<sup>296</sup> The court rejected the relevance of (1) the 1977 social security amendment permitting support obligations but not community property obligations to be enforced against federal pensions, and (2) *Wissner*, which rested on the importance of following the beneficiary designation.<sup>297</sup> Finally, the court rejected the ERISA General Preemption for two reasons. First, the court argued that the Alienation Prohibition addresses transfers of pension benefits, and as discussed, permits the enforcement of the DRO. Thus, the general preemption provision is inapplicable.<sup>298</sup> However, specific ERISA mandates relate to ERISA plans, so the subject of the mandate must relate to employee benefit plans. Thus, the ERISA General Preemption preempts state law that is subject to the mandate unless the plan terms permit the DRO to be enforced, which the court did not consider. Second, the court argued that if, *arguendo*, the ERISA General Preemption is not rendered ineffective by the Alienation Prohibition permitting the DRO, like the Alienation Prohibition it is inapplicable because

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293. *Id.* at 925 (quoting *Wetmore*, 196 U.S. at 77).

294. *Id.* at 925-26.

295. *Id.* at 926-28.

296. *Id.* at 928-30.

297. *Id.* at 929.

298. *Id.* at 932.

there is no clear evidence of the requisite congressional intent to have preemption.<sup>299</sup>

In contrast, in the later decision in the same year, *Francis v. United Technologies*,<sup>300</sup> the *Stone* reasoning was considered and rejected. The court observed that the application of California community property law would result in the alienation of half of the participant's benefit contrary to the Alienation Prohibition, which has an exception for voluntary assignments, but none for community property laws.<sup>301</sup> Thus, there was no need to consider the policy behind the Prohibition, as the court did in *Stone, supra*. Therefore, ERISA preempted the application. A Michigan court had reached the same conclusion using the Alienation Prohibition in the same manner in 1976, in *General Motors Corp. v. Townsend*.<sup>302</sup>

*Francis* also held that the former spouse of the participant, who was not a designated beneficiary, did not have standing to bring an ERISA action because she was neither a participant nor a beneficiary as required under ERISA § 502(a), 29 U.S.C. § 1132(A).<sup>303</sup> The same conclusion was reached in *Kerbow v. Kerbow*,<sup>304</sup> where the court also held that Texas community property law did not make the spouse of the participant a beneficiary.<sup>305</sup> In contrast, the *Stone* court found that the spouse had standing because otherwise she would have no remedy for the plan's failure to pay her plan benefits to her, so the court held that state community property law transferred the participant's standing to her.<sup>306</sup>

Neither *Stone* nor *Francis* referred to Treasury Regulations § 1.401(a)-13, the regulations pertaining to the Alienation Prohibition, that the Service issued before both decisions.<sup>307</sup> Those regulations, issued earlier in 1978, strongly support the lack of an implicit exception to the Alienation Prohibition for DROs, as discussed, *supra*. Nevertheless, the DOL and the Service, which had prepared the regulations, asserted there was such an exception in at least two other amicus briefs at about this time,<sup>308</sup>

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299. *Id.* at 932-33.

300. *Francis*, 458 F. Supp. at 84.

301. *Id.* at 86.

302. *Townsend*, 468 F. Supp. at 466. GM, the plan fiduciary, brought the action pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), to obtain an injunction against a former spouse trying to garnish the participant's plan benefits. *Id.* at 466-67. The court rejected the applicability of the Explicit ERISA Exemption. *Id.* at 470.

303. *Francis*, 458 F. Supp. at 86-87.

304. *Kerbow v. Kerbow*, 421 F. Supp. 1253 (N.D. Tex. 1976).

305. *Id.* at 1260.

306. *Stone*, 450 F. Supp. at 921-22.

307. 43 Fed. Reg. 6943 (Feb. 17, 1978).

308. *Cartledge*, 457 F. Supp. at 1156; *Am. Tel. & Tel. Co.*, 592 F.2d at 125.

although neither decision discussed the reasoning of the government presented in the briefs, one of which will be discussed, *infra*.

In 1979, the California Court of Appeals held in *In re Campa* [hereinafter *California Campa*]<sup>309</sup> that ERISA did not preempt: (1) an order joining an ERISA pension plan, the Carpenters Pension Trust Fund for Northern California [hereinafter the Carpenters' Plan] to a state domestic relations proceeding regarding the pension payments, or (2) a DRO based on state community property law that directed the Carpenters' Plan to pay a portion of the participant's benefit to his spouse, when the participant began to receive his plan benefits, even though the plan document prohibited such plan payments to a spouse.<sup>310</sup>

The court first rejected the Carpenters' Plan's assertion that the claim be dismissed because the spouse had failed to exhaust the plan claims process.<sup>311</sup> The court used the futility exception; denial of the benefit claim was inevitable because the plan terms prohibited spouses from being paid a portion of the benefits otherwise payable to the participant.<sup>312</sup>

The court analyzed the preemption issues using the *Rice* principle that state police powers are not preempted by a federal law unless that was the clear and manifest purpose of Congress.<sup>313</sup> There was no discussion of why a DRO was considered the exercise of state police powers. After describing ERISA's employee benefit standards, the court asked whether California law interfered with those standards, but concluded they did not because that law assures that family members receive the pension benefits they anticipated without affecting the integrity of the pension plans and family is particularly suited to state regulation.<sup>314</sup> The court repeated the *Stone* argument that the Alienation Prohibition is inapplicable because by obtaining a share of the pension payment, the spouse is getting what she earned.<sup>315</sup> The court asserted that specific references to community property not being applicable to tax rules, such as the deduction rules, showed that community property rules are applicable to ERISA.<sup>316</sup> The court failed to consider the more pertinent argument that the applicability of the Alienation Prohibition could be determined by looking at the relevant Treasury regulations also disregarded in *Stone*. The court rejected the argument that because the pension plan was

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309. *In re Campa*, 152 Cal. Rptr. 362 (Cal. Ct. App. 1979).

310. *Id.* at 363.

311. *Id.* at 364.

312. *Id.* at 365.

313. *Id.*

314. *Id.* at 365-68.

315. *Id.* at 368-69.

316. *Id.* at 369.

collectively bargained, the National Labor Relations Act preempted the application of state law.<sup>317</sup> The court also rejected the claim that dividing the pension payments between the spouses would cause the plan administrator to violate the fiduciary rules because the funds would no longer be in the plan.<sup>318</sup> However, it would seem to be a fundamental fiduciary responsibility to pay benefits only to the persons entitled to those benefits under the plan terms. The court distinguished *Wissner* because the relevant statute gave the participant the right to choose his beneficiary, whereas it asserted that ERISA had no such provision.<sup>319</sup> However, ERISA does have such a provision. An ERISA beneficiary is defined in such a manner.<sup>320</sup>

Finally, the court rejected the claim that ERISA preempted the California law that provided a DRO may only be enforced against a plan if the plan is joined as a party because the only consequence to the plan of such joinder is that the plan may have to issue two checks or one check to a different party, so no burden is placed on the plan.<sup>321</sup> However, being a party means that the plan could be subject to discovery within the state court, which authority it does not have under ERISA, and be subject all the costs of being a party to a litigation, including the need to monitor the impact of all filings on the plan's interests.

*C. Campa Supreme Court Decision that a Domestic Relations Order Enforcing Community Property Interest Governs An ERISA Pension Plan and the Plan May Be Forced to Be a Party to a Domestic Relations Court Proceeding*

In June of 1979, after the California Supreme Court denied a rehearing in California *Campa*, the Carpenters Plan<sup>322</sup> exercised its right to appeal a preemption decision from the highest state court directly to the Supreme Court.<sup>323</sup> The Carpenters Plan presented the followed two questions for appeal:

1. Do the provisions of Title I of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California Community property law and implementing statutes and court rules insofar as they relate to an employee pension benefit plan covered by that Act?

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317. *Id.* at 369-70.

318. *Id.* at 370.

319. *Id.*

320. ERISA § 3(8), 29 U.S.C. § 1002(8).

321. *In re Campa*, 152 Cal. Rptr. at 371-73.

322. Appellants' Jurisdictional Statement, Carpenters Pension Trust Fund for N. Cal. v. Campa, 444 U.S. 1028 (June 19, 1979) (No. 78-1881) [hereinafter *Carpenter's Initial Brief*].

323. 28 U.S.C. § 1257(2). This was later revised to eliminate such right of appeal in the Pub L. No. 100-352 § 3, 102 Stat. 662, 662 (1988).



2. Does a state court have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan?<sup>324</sup>

Both parties appeared to have thoroughly briefed the issues.<sup>325</sup> The Carpenters Fund briefed narrower distinct preemption issues than the jurisdictional issues. First, it discussed examples of the adverse effects of permitting California community property law to affect the administration of ERISA benefits, including forcing the plan to be joined in domestic relations proceedings involving plan participants and forcing the plan to treat a participant's spouse as an owner of part of the pension plan before the participant begins to collect his pension benefits.<sup>326</sup> Second, it discussed the adverse effects of the use of California community property law, rather than state law in general, to direct ERISA plans to make benefit payments contrary to their terms, and focused on the prohibition on payments to a participant's spouse.<sup>327</sup>

Both parties referred to a government brief filed on behalf of the DOL and the Service in the appeal of the *Stone* district court decision arguing that ERISA does not preempt benefit claims based on community property law claims [hereinafter the DOL *Stone* Brief].<sup>328</sup>

The DOL *Stone* Brief began by emphasizing the breadth of the ERISA General Preemption, which applied, as one of the ERISA draftsmen phrased it, to any state law "which would affect any employee benefit plan [subject to ERISA]."<sup>329</sup> The brief cited and agreed with a statement by Judge Renfrew that "[l]aws relating to benefits of employee benefit plans relate to those plans as much as laws relating to their administration."<sup>330</sup>

The DOL then presented three preemption conclusions. First, a participant's current or former spouse is not an ERISA plan participant or beneficiary by virtue of state community property law.<sup>331</sup> Second, state community property may not be used to provide a participant's spouse or former spouse with rights greater

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324. Carpenter's Initial Brief.

325. Ms. Campa's representatives filed a motion to affirm (Sept. 17, 1979) (hereinafter *Campa* Affirm Motion).

326. Carpenter's Initial Brief; Brief in Opposition to Motion to Affirm, Carpenters Pension Trust Fund for N. Cal. v. Campa, 444 U.S. 1028 (Sept. 27, 1979) (No. 78-1881) [hereinafter *Campa* Affirm Motion].

327. Carpenter's Initial Brief; *Campa* Affirm Motion.

328. The brief was reproduced in full at BNA Pension Reporter No. 221, January 8, 1979, p. R-7-R-14.

329. *Id.* at R-10.

330. *Id.* (citing *Standard Oil v. Agsalund*, 442 F. Supp. 695, 707 (N.D. Cal. 1977)).

331. *Id.* at R-11.

than those of the participant.<sup>332</sup> Third, to the extent the interest of a participant's spouse or former spouse is derived only from state property law, such interest may not be enforced against an ERISA plan.<sup>333</sup>

The DOL nevertheless concluded that the DRO was enforceable because it was subject to an implicit exemption from the Alienation Prohibition. There was no consideration of the Service's regulation on the Alienation Prohibition that been issued in February 1978, although the brief was filed in December 1978.<sup>334</sup> Three arguments were presented. First, similar language in other pre-ERISA federal statutes had been found not to prohibit the enforcement of family support obligations.<sup>335</sup> However, none presented the issue before the court, i.e., whether the enforcement was otherwise preempted as in this case. Second, community property divisions like family support obligations rested on equities, namely one in favor of a fair division of property, which justify an implicit exemption from the Alienation Prohibition.<sup>336</sup> Finally, ERISA had no provision similar to the *Wissner* provision giving the participant the right to designate his beneficiary and thereby defeat a community property claim to death benefit proceeds.<sup>337</sup> However, one of the most fundamental provisions of ERISA gives a participant the right to the benefits set forth in the plan terms.

The Carpenters' Plan focused on how the DOL *Stone* Brief concurred with its position on its two jurisdictional issues. In particular, the brief argued that ERISA does not permit (1) community law to require the plan to give spouses distribution rights they do not have under the plan terms, or (2) the "importation of state community property law principles into the

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332. *Id.* at R-12.

333. *Id.* at R-8, R-9 to R-12.

334. *Id.* at R-14. Those regulations, Treasury Regulation § 1.401(a)-13, provide that the ERISA phrase "assigned or alienated," has a far broader meaning than it did within the cited decisions. In particular, it includes any payments to a party other than the one entitled to those payments under the plan terms. The regulations do not include any such claims or any claims based on DROs within the list of explicit exemptions set forth therein.

335. *Id.* at R-12. Two decisions were cited: *In re Flanagan*, 31 F. Supp. 402 (D.D.C. 1940) (holding that veterans disability benefits paid to a lunatic's representative were subject to alimony claims) and *Schlaefter*, 112 F.2d at 177 (determining that DC disability payments are subject to alimony claims that are not debts but obligations). The latter was the cited basis for *Flanagan*. However, *Schlaefter* did not mention or address federal preemption because it only considered the interaction of two D.C. statutes. In particular, *Schlafer* held that because the alimony obligation was not a prohibited alienation, it could be enforced against the disability payments.

336. *Id.* at R-13.

337. *Id.*

administration and operation of benefit plans.”<sup>338</sup>

Ms. Campa focused on how the DOL *Stone* Brief concurred with her position that ERISA permitted the enforcement of a community property interest in a fraction of the participant’s pension payments,<sup>339</sup> the equitable principles that favor property settlements in divorces,<sup>340</sup> and the ERISA goal of protecting those relying on pensions.<sup>341</sup>

The Supreme Court was thus confronted with a thoughtful opinion on behalf of the highest court of California, the state with the largest population, and detailed briefs by both parties, which included a government brief on the issues presented to a lower court. The Supreme Court had never ruled before on any aspect of the preemption of ERISA.<sup>342</sup> The Supreme Court responded on January 14, 1980, by dismissing the appeal for “want of substantial federal question” without any explanation,<sup>343</sup> and on April 21, 1980, by denying a motion by Ms. Campa’s attorneys for attorneys’ fees without giving any explanation of either decision.<sup>344</sup>

The Supreme Court has unanimously proclaimed that dismissals for want of substantial federal question are not decisions to deny review, but rather are “decisions on the merits.”<sup>345</sup> Thus, “they bind state courts and other federal courts.”<sup>346</sup> The cited statement, which is supported by other sources, including *Hicks*,<sup>347</sup> was amplified by Justice Brennan in his *Bradley* concurrence. Therein, Justice Brennan emphasized

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338. *Id.* at R-8. The arguments, including an extensive quote from the DOL *Stone* Brief, can be found at *Campa* Motion to Affirm at 1-12.

339. *Campa* Affirm Motion at 4-7.

340. *Campa* Affirm Motion at 7-8.

341. *Campa* Affirm Motion at 9-10.

342. See David Gregory, *The Scope of ERISA Preemption of State Law*, 48 U. PITT. L. REV. 427, 459 (1987) (the first decision was issued the following year in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)); EMPLOYEE BENEFITS LAW, *supra* note 133, at 773-855 (beginning with a statement that the Supreme Court addressed preemption sixteen times from 1981 through 1997).

343. *In re Campa*, 152 Cal. Rptr. at 362; *Carpenters Pension Trust Fund*, 444 U.S. at 1028.

344. *Carpenters Pension Trust Fund v. Campa*, 446 U.S. 906 (1980).

345. Letter from all nine Justices of the United States Supreme Court to Sen. De Concini (June 22, 1978), reprinted in Eugene Gressman, *Requiem for the Supreme Court’s Obligatory Jurisdiction*, 65 A.B.A. 1325, 1328 (1979) (discussing the proposal to make appeals, such as *Campa*, no longer as of right but subject to the Court’s discretion). Virtually the same letter was written by Chief Justice Burger to Rep. Kastenmeier (June 17, 1987), reprinted in S. REP. NO. 300, 100th Cong. 2d Sess. 5 (1988), when the proposal was adopted. See generally ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 213, 215-17 (7th. ed. 1993).

346. *Id.* (citing *Mandel v. Bradley*, 432 U.S. 173 (1977) (per curiam); *Hicks v. Miranda*, 422 U.S. 332 (1975)).

347. *Id.* at 344.

that such holdings are limited to the particular facts involved, and the reasoning needed to address those facts.<sup>348</sup> Such features are often clearer with non-summary opinions that set forth the Court's reasoning and the facts upon which it relied.

Thus, the Ninth Circuit correctly concluded in *Carpenters Pension Trust for Southern California v. Kronschnabel*,<sup>349</sup> that in dismissing the California *Campa* appeal for want of a substantial federal question, the Supreme Court necessarily rejected the argument that ERISA preempts a state court order requiring the trustees of a pension plan to divide pension payments between the employee and his or her ex-spouse.<sup>350</sup> Similarly in the companion case of *Stone v. Stone*,<sup>351</sup> the court stated:

As our decision in *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), demonstrates, the Supreme Court's summary dismissal of the appeal in *In re Marriage of Campa*, 444 U.S. 1028, (*Campa*), binds district and circuit courts to the view that ERISA does not preempt state-court orders requiring a pension plan to pay [in the future] a community property share of a plan participant's monthly benefit payments directly to his or her ex-spouse.<sup>352</sup>

Neither court had to consider the effect of the dismissal of the first claim presented by the Carpenters Plan. As a result, contrary to the government brief, ERISA did not appear to preempt the importation of state community property law principles into the administration and operation of benefit plans, although the extent of such importation was very unclear. The *Campa* summary opinion left open questions of implications not discussed or at issue. For example, may the participant's spouse devise her state community property ownership in the participant's pension benefits to another person if she predeceases the participant?<sup>353</sup>

The *Campa* summary opinion left open at least two questions about whether ERISA preempts any DROs. Although the question that the Ninth Circuit focused on was whether ERISA preempted a state law directing a plan to make benefit payments prohibited

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348. *Mandel*, 432 U.S. at 179-80 (Brennan, J., concurring).

349. *Carpenters Pension Trust for S. Cal. v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980).

350. *Id.* at 747-49.

351. *Stone v. Stone*, 633 F.2d 740 (9th Cir. 1980) [hereinafter *Stone II*].

352. *Id.* at 742.

353. This was the issue in *Boggs*, 520 U.S. at 833. The Supreme Court therein: (1) reversed its summary decision in *Campa*, and (2) rejected the positions set forth in Julie McDaniel Dallison, Comment, *Disappearing Interests: ERISA Impliedly Preempts the Predeceasing Nonemployee Spouse's Community Property Interest in the Employee's Retirement*, 49 BAYLOR L. REV. 477, 504 (1997), which argued that ERISA does not preempt such divisibility, but if it does, the spouse's legatees or heirs may obtain those benefits from the person paid by the plan.

by the plan documents, the Supreme Court may not have intended to cover all state laws that did so, but only the claims discussed. The decision addressed a prohibition on who could receive plan benefits, and the state law was a community property claim in a DRO. There is thus a question, which was raised by the government brief, of whether ERISA would preempt a DRO, based upon community property law that required payment at a time or in a form not permitted by the plan. There was also an open question of whether ERISA preempted DROs based on non-community property principles because that question was not before the court, and not discussed in any of the briefs. Such preemption would appear to be unlikely because the same arguments in favor of claims for support obligations are applicable, and the same arguments in favor of equitable distribution of marital property (the alternative to community property) are applicable.<sup>354</sup>

*D. Post-CAMPA Interpretation of Effects of ERISA Preemption Provisions on Domestic Relations Orders*

Within days of the Supreme Court decision in *Campa*, the Service issued Revenue Ruling 80-27.<sup>355</sup> The Ruling held that the alienation prohibition in the tax qualification requirements, which is identical to the Alienation Prohibition, would not be violated if a pension plan complies with an order to meet the participant's family support obligations when the participant is receiving benefits by satisfying such obligation with a portion of the benefit payments that would have otherwise been made to the participant.<sup>356</sup> The ruling does not mention the Service's regulations pertaining to the Alienation Prohibition, which were issued by the Service with respect to the alienation prohibition in the qualification requirements. The ruling concluded with a sentence presuming that if the participant is not receiving benefits, the benefits may not be attached because the participant has no present right to such benefits.<sup>357</sup> However, the Supreme Court in *Campa* approved such an attachment, although no payments would be obtained until the participant entered pay status. Moreover, by the terms of the jurisdictional statement in *Campa*, which the Supreme Court rejected, payments to a

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354. See Stephen J. Brake, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C. L. REV. 761 (1982) (showing that at such time, all the states determined property allocation upon marital dissolution using equitable principles).

355. Rev. Rul. 80-27, 1980-1 C.B. 85. This Revenue Ruling withdrawn as obsolete by Revenue Ruling 91-8, 1991-1 C.B. 281, because of the enactment of REACT.

356. Rev. Rul. 80-27, 1980-1 C.B. 85.

357. *Id.*

participant's spouse are permitted before the participant begins to accept payments and before the time he may be entitled to begin to receive such payments.

A year later, a federal district court found conflict preemption without using the phrase for a state court order that a benefit payment be made contrary to the plan terms. In 1981, in *Monsanto Co. v. Ford*,<sup>358</sup> the court issued a declaratory judgment that the Alienation Prohibition would be violated by following a DRO providing a divorcing spouse with pension payments as marital assets before a participant reaches age sixty-five and first becomes entitled to begin receiving pension payments.<sup>359</sup> Those payments were probably sought because the spouse would be entitled to no survivor benefits if the participant had died before reaching age sixty-five.<sup>360</sup> In contrast, in the 1983 case, *Sochor v. IBM*,<sup>361</sup> the New York Court of Appeals reached a similar result without relying on ERISA by name or the Alienation Prohibition. The court concluded that a former spouse could not direct a pension plan to pay her pension benefits that the participant has not applied for, but is eligible to receive. In particular, she could not receive a reduced early retirement pension, because such election rights are his alone.<sup>362</sup>

In 1983, the Seventh Circuit in *Savings and Profit Sharing Fund of Sears Employees v. Gago*<sup>363</sup> distinguished *Ford*. The court held that ERISA did not preempt a direction by the participant's former spouse that the plan make plan payments to her when the participant could have given, but had not yet given, direction for plan payments to begin.<sup>364</sup> In particular, the former spouse sought payment of a property interest pursuant to a marital dissolution, which was based on marital property rights under an equitable distribution regime rather than a community property regime.<sup>365</sup> The court relied in large part on *Campa* using the same reasoning as the *Kronschnabel* court. It found no distinction in having the DRO based on a non-community law because the relevant property law for marital dissolutions starts with a similar presumption that marital property is owned fifty-fifty.<sup>366</sup> *Ford* was distinguished because the *Gago* plan permitted the form of the distribution at the time in question.<sup>367</sup> There was no discussion of the source of

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358. *Monsanto Co. v. Ford*, 534 F. Supp. 51 (E.D. Mo. 1981).

359. *Id.* at 54.

360. *Id.* at 53.

361. *Sochor v. IBM*, 457 N.E.2d 696 (N.Y. 1983).

362. *Id.* at 698-99.

363. *Sav. & Profit Sharing Fund of Sears Emps. v. Gago*, 717 F.2d 1038 (7th Cir. 1983) [hereinafter *Gago*].

364. *Id.* at 1039-40.

365. *Id.* at 1044-45.

366. *Id.*

367. *Id.* at 1045.

the right of the participant's former spouse to make such election.

Finally, in *Operating Engineers' Local 428 Pension Trust Fund v. Zamborsky*<sup>368</sup> the Ninth Circuit extended *Kronschnabel* to the payment of family support obligations, as well as community property law obligations, from the payments that would otherwise be made to a participant in pay status.<sup>369</sup> The court added three arguments not previously presented with respect to why the payment would not violate the Alienation Prohibition, but as with the other courts, it did not mention the relevant regulations.<sup>370</sup> First, the court cited Revenue Ruling 80-27, which showed that such payments did not violate the same requirement in the tax qualification rules.<sup>371</sup> Second, the prohibition merely required the inclusion of such a provision in the pension plan.<sup>372</sup> Apparently the court perceived no ERISA requirement that plan terms be followed. It seemed to have missed the ERISA provision giving participants the right to recover benefits pursuant to the plan terms.<sup>373</sup> Third, the court referred to the *Kronschnabel* analysis of the persuasive authority of *Campa* in concert with the observation that the courts and legislatures have generally given more deference to marital support obligations than to marital property obligations.<sup>374</sup>

Thus, prior to REACT, there was little reason to doubt that DROs requiring pension plans to use a portion of a participant's benefit payments to satisfy a participant's marital support obligation or marital property obligation were not preempted by ERISA. The Service had confirmed that the plan would not violate the tax-qualification rules by making such payments.<sup>375</sup> There were secondary questions, such as whether a spouse could use a DRO to obtain a benefit payment when the participant was not receiving benefits, although the Supreme Court had so held in its summary opinion in *Campa*, although such facts were not before it. However, no one challenged the Seventh Circuit's finding in *Gago* that a participant's spouse had authority to make such an election if the participant could have chosen to begin receiving payments.<sup>376</sup>

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368. *Operating Engineers' Local 428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196 (9th Cir. 1981) [hereinafter *Zamborsky*].

369. *Id.* at 202.

370. Treas. Reg. § 1.401(a)-13.

371. *Zamborsky*, 650 F.2d at 200.

372. *Id.* at 200-01.

373. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

374. *Zamborsky*, 650 F.2d at 201-02.

375. *Id.* at 200 (citing Rev. Rul. 80-27, 1980-1 C.B. 85).

376. *Gago*, 717 F.2d at 1045.

*E. Post-Campa and Pre-REACT Supreme Court Decisions About the Scope of ERISA Preemption*

The two post-*Campa* and pre-REACT Supreme Court preemption decisions held that the ERISA General Exemption preempted non-family law attempts to enhance ERISA protections, but suggested that ERISA plans would continue to defer to state family law.

The Supreme Court's first non-summary decision pertaining to ERISA preemption was in 1981, in *Alessi v. Raybestos-Manhattan*.<sup>377</sup> The Court held that the ERISA General Preemption prevents the states from enhancing the ERISA protections provided to pension plan participants and beneficiaries.<sup>378</sup> In particular, the Court held that a New Jersey law prohibiting pension benefit offsets for New Jersey workers' compensation awards was preempted because ERISA permitted such offsets.<sup>379</sup>

In *Shaw v. Delta Airways*,<sup>380</sup> the Supreme Court pointed to the administrative advantage for participants of having uniform rules throughout the United States when it held that Explicit ERISA Preemption preempted a New York law that required ERISA disability plans<sup>381</sup> to provide maternity benefits because ERISA contained no such mandate at such time.<sup>382</sup> The unanimous court observed that if such statutes were not preempted, plan participants could be forced to shoulder the increased administrative burden of complying with multiple state requirements because employers may reduce plan benefits to pay for such burdens.<sup>383</sup> Moreover, the Court stated:

An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State [if the preemption provision were disregarded], depending on what benefits the State mandated under disability, workmen's compensation, and unemployment compensation laws. The administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent.<sup>384</sup>

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377. *Alessi*, 451 U.S. at 504.

378. *Id.* at 521-26.

379. *Id.* at 510.

380. *Shaw v. Delta Airways*, 463 U.S. 85 (1983).

381. Disability plans, which are maintained *solely* for the purpose of complying with local disability rules, are exempt from ERISA coverage. ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3). The Supreme Court remanded the case to determine the applicability of this exemption. *Shaw*, 463 U.S. at 109.

382. *Shaw*, 463 U.S. at 108-09. Such discrimination was prohibited as of April 29, 1979, by the federal Pregnancy Discrimination Act. The issue before the Court was whether Delta Airways was obligated to pay the locally mandated benefits accruing before such date. *Id.* at 88-89.

383. *Id.* at 105.

384. *Id.* at 107-08.



The Court set the stage for this statement by observing that the breadth of the Explicit ERISA Preemption was shown by the use of the words “relate to any employee benefit plan” in ERISA § 514(a), 29 U.S.C. § 1144(a), rather than the far more limited words that were present in preliminary versions of ERISA bills.<sup>385</sup> The Court quoted portions of the Senate bill and the House bill<sup>386</sup> that immediately preceded the conference bill that became ERISA, which was approved by both houses in August 1974.<sup>387</sup> The first bill, which was approved by the Senate on March 4, 1974, limited preemption to matters that “relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act [a predecessor of ERISA].”<sup>388</sup> The second bill, which was approved by the House on March 6, 1974, limited preemption to specified matters, i.e., those that:

relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 [the fiduciary responsibility and disclosure parts of the act] applies . . . [or] relate to the nonforfeitability of participant’s benefits in employee benefit plans described in section 201(a) [the plans covered by the vesting rules] or 301(a) [the plans covered by the funding rules], the funding requirements of such plans, the adequacy of financing of such plans, portability requirements for such plans, or the insurance of pension plans under such plans.<sup>389</sup>

The Supreme Court observed in a *Shaw* footnote that there were limits on the reach of the “related to” phrase by suggesting, without any mention of its earlier *Campa* decision, that the DRO in *Merry*, which enforced a support obligation, may have been an example of a state law that was not preempted because it affected employee benefit plans in “too tenuous, remote and peripheral a manner.”<sup>390</sup> On the other hand, the Court began its analysis with a widely accepted statement of ERISA’s goals by citing the Court’s earliest non-summary decisions interpreting ERISA: “ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.”<sup>391</sup>

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385. *Id.* at 97-100.

386. *Id.* at 100 n.18.

387. WOOTEN, *supra* note 132, at 369-70.

388. See the preemption provision of the bill that passed the Senate, H. R. 2, 93d Cong., 2d Sess., § 699(a), reprinted in ERISA LEG. HISTORY, *supra* note 184, 3599, 3820.

389. See the preemption provision of the bill that passed the House, H. R. 2, 93d Cong., 2d Sess., § 514(a) reprinted in ERISA LEG. HISTORY, *supra* note 184, at 4057-59.

390. *Shaw*, 463 U.S. at 100 n.21.

391. *Id.* at 90 (citing *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-62 (1980); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510

*F. Pre-REACT (1984) Interpretation of Spousal Survivor Benefit Provisions that Were Initially in ERISA*

The Service, which was responsible for issuing regulations with respect to the spousal survivor pension provisions, interpreted them to have little effect on the only DC plans to which they applied, namely those that offered annuity benefits.<sup>392</sup> In particular, plans whose normal retirement benefit was not an annuity but offered annuities, such as some DC plans whose normal retirement benefit was a lump sum, could refuse to make the joint and survivor benefit the default benefit.<sup>393</sup> Moreover, the courts held that a participant waiver of joint and survivor benefits could be successfully challenged only with a showing that the spouse lacked the capacity to make such a waiver.<sup>394</sup>

Thus, the initial ERISA spousal protections were quite minimal, although under the logic of the Supreme Court's *Campa* decision, all elements of state family law, not merely DROs, would govern ERISA plans. In particular, the traditional spousal protections, community property and the right of a surviving spouse to elect against a decedent's elective estate, could be applied by a participant's spouse to obtain an interest in the participant's survivor benefit. However, there was one major gap. These protections would not appear to prevent a participant from choosing to take a life annuity benefit and, thus, leaving no survivor benefit.

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(1981)).

392. Under Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Oct. 17, 1978) and 29 C.F.R. § 2570.200a-2, the Service has the responsibility for establishing the regulations with respect to the spousal survivor benefit provisions of ERISA.

393. I.R.S. Notice 82-4, 1982-1 C.B. 356. The Service announced it would amend Treas. Reg. § 1.401(a)-11(b)(1) (1977) to conform to the holding in *BBS Associates, Inc. v. Commissioner*, 74 T.C. 1118 (1980), *aff'd*, 661 F.3d 913 (3d Cir. 1981), thus invalidating a contrary regulation. In particular, the joint and survivor annuity would have to be the default choice only if the participant chose to receive an annuity but not if he selected the lump sum form. However, no formal amendment seems to have been filed.

394. See *Sladek v. Bell Sys. Mgmt. Pension Plan*, 880 F.2d 972, 978-79 (7th Cir. 1989) (denying the dismissal of a spousal survivor benefit claim based on allegation that participant suffered from Alzheimer's disease and lacked capacity to deprive her of pre-REACT spousal benefits); *but cf.*, *Cobb v. Cent. States, Sw. and Se. Pension Fund*, No. 05-30906, 2006 U.S. App. LEXIS 21476, at \*17-19 (5th Cir. Aug. 22, 2006) (holding that the court lacked subject matter jurisdiction for spouse claiming pre-REACT survivor benefits); *Lerra v. Monsanto Co.*, 521 F. Supp. 1257, 1263 (E.D. Mass. 1981) (holding that a spouse was not entitled to pre-REACT survivor benefits when the participant chose life annuity).

G. *Summary of Pre-REACT Relation of State Family Law and ERISA in Aftermath of Campa*

A participant's spouse has no entitlement to survivor benefits unless the pension plan provides such benefits and the participant does not waive them. Life insurance plans need not provide any spousal benefits. It appears that state community property laws, state election laws and state revocation of designations upon divorces may change who obtains, and who may retain the survivor benefits.

DROs determine benefit entitlements for life insurance plans, disability plans and pension plans. There may be limits on the extent to which DROs may change entitlements, and changes contrary to plan terms may cause a pension plan to lose its tax qualification.

IX. CONGRESS PROVIDES FOR MORE DEFERENCE TO DOMESTIC RELATIONS ORDERS IN THE 1980S FOR NON-ERISA FEDERAL ENTITLEMENTS

In the 1980s, before enacting REACT, Congress significantly limited the extent to which DROs were otherwise preempted with respect to three major federal retirement entitlements—social security, military retirement, and railway retirement—by adding explicit domestic relations law exemptions to their respective alienation prohibition statutes. None of the relevant statutes appeared to have state law preemption statutes similar to the Explicit ERISA Preemption. Thus, those exemptions were sufficient to overcome the traditional preemption by federal entitlements of state law.<sup>395</sup>

The Supreme Court held on June 26, 1981, in *McCarthy*<sup>396</sup> that a former spouse could not use a DRO based on community property rights to obtain military pension benefits directly from the plan or indirectly from the participant.<sup>397</sup> In 1975, as discussed, *supra*, Congress provided that a DRO based on child support could be so used.<sup>398</sup> On September 8, 1982, Congress

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395. On the other hand, the fact that all involved federal payments, rather than private plan payments, may have justified less deference to state law.

396. *McCarthy*, 453 U.S. at 210.

397. *Id.* at 223-24. Prior to the legislation, 10 U.S.C. § 3929, entitled the soldier, and only the soldier, to receive retirement benefits, although 10 U.S.C. § 1434 permitted the soldier to choose whether to receive a smaller life annuity so that survivor benefits may be paid to either his children or surviving spouse. *Id.* at 215. Moreover, no alienation or anticipation of the retirement benefits was permitted other than for specified exclusions, one of which pertained to child support and alimony, but excluded payments based on community property law. Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501 (d), 91 Stat. 159 (codified as amended at 42 U. S. C. § 659 (2006)).

398. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337

enacted the Uniformed Services Former Spouses' Protection Act ("USFSPA")<sup>399</sup> to provide that military retirement pay may be divided when fixing the property rights or family support obligations between the parties to a divorce, dissolution, annulment, or legal separation. The USFSPA was effective for payments due and made after the enactment of the legislation.<sup>400</sup> Former spouses could not receive any benefits until the armed services member retires.<sup>401</sup> Direct payments from the military for community property obligations were limited to former spouses who had been married at least ten years to the service,<sup>402</sup> and the direct payments were limited to fifty percent of the member's disposable retired pay.<sup>403</sup> However, the alimony and child support payment obligations of the armed services member are not limited by the direct payment amounts, and thus they may be collected from the payments received by the member.<sup>404</sup>

The Supreme Court held on November 10, 1981, in *Ridgway*, that a former spouse could not use a DRO based on community property rights to obtain military death benefits on behalf of her children directly from the plan or indirectly from the beneficiary participant.<sup>405</sup> The USFSPA also permitted military retirees to elect voluntarily pursuant to a divorce decree to have survivor benefits paid to a former spouse,<sup>406</sup> but the court could not order the retiree to make the selection.<sup>407</sup> The statute was subsequently amended so it now permits a deemed election by the spouse.<sup>408</sup> The military established a simple administrative procedure for processing requests for direct payments.<sup>409</sup>

Congress took a more leisurely but similar approach with respect to pension benefits under the Railroad Retirement Act

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(1975).

399. Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982) (codified at 10 U.S.C. § 1408 (2006)); see generally DAVID C. CARRAD, THE COMPLETE QDRO HANDBOOK 175-98 (3d ed. 2009) [hereinafter COMPLETE QDRO HANDBOOK] (providing a detailed discussion of this Act); Kristine D. Kuenzli, *Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. REV. 1 (1999) (providing a complete review of the statute's origins and evolution).

400. § 1006, 96 Stat. at 737.

401. 10 U.S.C. § 1408(c)(3).

402. *Id.* § 1408(d)(2). This is the same ten-year requirement for an individual's former spouse to become entitled to a part of the individual's social security benefits that was added in 1977, as discussed, *supra*.

403. *Id.* § 1408(e)(1).

404. *Id.* § 1408(e)(6).

405. *Ridgway*, 454 U.S. at 59-60.

406. § 1003, 96 Stat. at 735-36 (codified at 10 U.S.C. § 1448 (2006)).

407. *Id.* § 1003(d).

408. 10 U.S.C. § 1450(f)(3) (2006).

409. See, e.g., COMPLETE QDRO HANDBOOK, *supra* note 399, at 183-86 (outlining the procedure for obtaining direct payments).

after the 1979 case, *Hisquierdo*, in which the Supreme Court held that a spouse could not use a DRO based on community property rights to obtain such retirement benefits directly from the plan or indirectly from the participant.<sup>410</sup> In 1975, as discussed, *supra*, Congress provided that a DRO based on child support could be so used. In 1981, divorced spouses, who had been married at least ten years, were first made eligible for spousal benefits from the Title I railroad retirement benefits, which resemble social security benefits and are coordinated with those benefits, without regard to the worker's benefit entitlement.<sup>411</sup> On August 12, 1983, Congress provided for an additional exclusion from the statute limiting assignments of retirement payments by the Railway Retirement Board. The exclusion was for a portion of the retiree's Title II railroad retirement benefits, which depend on the length of service and compensation while a railroad employee.<sup>412</sup> The portion is determined in accord with "a court decree of divorce, annulment, or legal separation or the terms of any court-approved property settlement incident to any such court decree."<sup>413</sup> The change was effective prospectively.<sup>414</sup> The Railroad Retirement Board established a simple administrative procedure for processing requests for partitioning Title II railroad payments.<sup>415</sup>

Finally, on April 20, 1983, Congress amended the SSA to provide unambiguously that an individual's spouse or dependent may in the future use a DRO to have the Social Security Administration use a portion of the social security benefit otherwise payable to the individual to satisfy the individual's child support or alimony in the same way as Congress had been done in 1975 for the spouses or dependents of a recipient of federal compensation.<sup>416</sup> The statute clarifies that any statutory exception

410. *Hisquierdo*, 439 U.S. at 583-85. Prior to the legislation, 45 U.S.C. § 231m(a), prevented any alienation or anticipation of the retirement benefits other than specified exclusions, one of which pertained to child support and alimony and explicitly excluded payments pertaining to community property.

411. *1981 Railroad Retirement Benefit Amendments*, SOCIAL SECURITY BULLETIN, at 20-21 (Dec. 1981), available at <http://www.ssa.gov/policy/docs/ssb/v44n12/v44n12p20.pdf> (last visited August 13, 2012). The change was part of Pub. L. No. 97-35, 95 Stat. 357 (1981).

412. *Id.*

413. Pub. L. No. 98-76, tit. IV, § 419(a), 97 Stat. 411, 438 (1983); see also COMPLETE QDRO HANDBOOK, *supra* note 399, at 226-28 (providing a detailed discussion of the Act); U.S. R.R. Retirement Bd., *Railroad Retirement Handbook* (2009), available at <http://www.rrb.gov/general/handbook/chapter1.asp> (providing a complete history of the introduction and amendment of the Railroad Retirement program) (last visited Aug. 13, 2012).

414. Pub. L. No. 98-76, tit. IV, § 419(b), 97 Stat. 411, 438 (1983).

415. See, e.g., COMPLETE QDRO HANDBOOK, *supra* note 399, at 226-27 (describing the procedures used for dividing Title II railroad payments).

416. Social Security Amendments of 1983, Pub. L. No. 98-21 § 335, 97 Stat.

to the alienation prohibition for social security payments<sup>417</sup> must be explicit by adding the following to that statute:

(b) No other provision of law, enacted before, on, or after the date of the enactment of this section [enacted April 20, 1983], may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.<sup>418</sup>

The statute added such a reference to SSA § 459(a), 42 U.S.C. § 659(a), which contains the correlative exception for periodic DRO support obligations.<sup>419</sup> On its face, the added language is not only effective prospectively, but it also leaves no question that payments of a DRO obligation from social security benefits were not implicitly available in the past or available to satisfy marital property payment obligations.<sup>420</sup>

#### X. CONGRESS MOOTS *CAMPA* WITH REACT AND REDUCES DEFERENCE OF ERISA PLANS TO DOMESTIC RELATIONS ORDERS

In contrast to its other legislation in the 1980s pertaining to the three major federal retirement programs, REACT significantly limited the extent to which DROs could be used to obtain ERISA plan entitlements. On the other hand, it introduced survivor benefits for surviving spouses, which could not be eliminated without the spouse's consent.

##### A. REACT's Explicit Purpose and Its Actual Provisions

The Retirement Equity Act of 1984 (REACT) was adopted on August 23, 1984, after the adoption of the legislation regarding Social Security, military retirement pay, and railroad retirement pay described *supra*. However, there was a fundamental difference between ERISA and those statutes. Before REACT, a participant's spouse and dependents had more access to the participant's ERISA pension payments than the amendments of those statutes granted, i.e., they could obtain a portion of the participant's pension payments when made pursuant to a DRO to satisfy family support obligations, family property obligations, or a mixture of

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65, 130 (1983).

417. In contrast, the Alienation Prohibition, ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1), protects benefits rather than payments from alienation.

418. SSA § 207(b), 42 U.S.C. § 407(b) (1998).

419. Pub. L. No. 98-21 § 335(b)(1), 97 Stat. 65, 130 (1983).

420. *But see* Stanley W. Welsh & Franki J. Hargrave, *Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce*, 20 J. AM. ACAD. MATRIMONIAL LAW 285 (2007) (discussing how some, but not all, courts permit social security benefits, which are marital property, to be offset against marital property to which the retiree would otherwise be entitled even though a social security retiree may not be compelled to use social security benefits to make marital property payments).

both. Thus, unless there was a change in Supreme Court jurisprudence or the Service's policies, there was no need for legislation to permit DROs to avoid the ERISA General Exemption, the Alienation Prohibition, or tax issues with respect to pension plan benefit payments.<sup>421</sup> However, there was a serious issue with spousal survivor benefits. ERISA pension plans, unlike the Social Security system or the railroad retirement system, were not required to provide a participant's spouse with minimal survivor benefits, whether they had been married one year, ten years, or twenty years.

Congress expressed a desire to make ERISA more accommodating to spouses and their dependents by describing REACT as intended:

to improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home, and for other purposes.<sup>422</sup>

The President's signing statement described REACT as follows:

I am pleased to sign into law H.R. 4280, the Retirement Equity Act of 1984. This important legislation is the first private pension bill in our history to recognize explicitly the importance of women both to the American family and to the Nation's labor force. It contains significant measures to enhance women's ability to earn pensions in their own right. It improves and protects the vital role of pensions as retirement income to widows.

An end to inequities in the provision of pension benefits to women has been a top priority of my administration. In September 1983 I sent to Congress our own pension equity bill. I am pleased that most of that bill has been incorporated into this legislation I have now approved. . . .<sup>423</sup>

Thus, the President and Congress apparently decided to provide no additional protections for the two ERISA plans that, like pension plans, often provided income replacement for a participant's spouse and dependents, *viz.*, disability plans and life

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421. However, there was a need to address the tax qualification of plans forced to make payments pursuant to the requirements of a DRO which were not a fraction of the participant's payments. Under the pre-REACT rules such payments would disqualify the plan.

422. Pub. L. No. 98-397 Preface, 98 Stat. 1426 at 1426 (1984).

423. President Ronald Reagan, *Statement on Signing the Retirement Equity Act of 1984* (Aug. 23, 1984), available at <http://www.reagan.utexas.edu/archives/speeches/1984/82384b.htm> (last visited Aug. 13, 2012).

insurance plans.<sup>424</sup> As discussed, *infra*, the additional protections were also not applicable to all pension plans. This was the same attitude taken in the initial version of ERISA. ERISA did not address the substantive terms of those plans, but provided for the enforcement of the terms of the plans.

REACT enhanced spousal protections for plans that could be required to provide spousal survivor benefits, which, as discussed, *supra*, are a subset of ERISA pension plans. However, Congress reversed the pertinent Supreme Court decision pertaining to DROs. It had done the same with military pensions and railroad worker pensions. As a result, ERISA plan benefits would be treated like those other federal entitlements. In particular, DROs could not encumber ERISA benefit entitlements except under specified conditions. This change may have been intended to assure that there could be simple administrative review of the compliance of the DROs with these conditions. In particular, those pension plans required by REACT to provide spousal survivor pension benefits, described, *infra* ("Spousal Survivor Pension Plans"), were required to defer to DROs that are QDROs, but prohibited from deferring to any others. The sponsors of all other ERISA plans, such as disability plans, life insurance plans, and pension plans other than Spousal Survivor Pension Plans, defined, *infra*, could decide the extent to which they would defer to DROs.

The legislative history gives some of the considerations apparently used by Congress as it formulated the parity approach described in the prior paragraph. After referring to four cases upholding orders for family support obligations despite claims that they violated the Alienation Prohibition or the ERISA General Preemption, including *Merry*,<sup>425</sup> two of the committee reports describe the law regarding whether ERISA preempts community property rights to pension benefits as follows. "There is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc.

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424. See, e.g., ALEXANDER LINDY ET AL., LINDEY & PARLEY SEPARATION AGREEMENTS & ANTENUPTIAL CONTRACTS 26-1-26-39 (2d. ed. 2011) (discussing the role of insurance in assuring the payment of support obligations).

425. See *Am. Tel. & Tel. Co.*, 592 F.2d at 122-25 (summarizing case law in the course of upholding an order requiring a pension plan to satisfy child support and alimony arrearage); *But see Townsend*, 468 F. Supp. at 466 (holding that an order based on community property rights to a pension plan was preempted by the Alienation Prohibition). That case was cited by *Merry*, but not by any of the Committee reports.

The reports also did not mention the more up-to-date discussion of this issue in *Zamborsky*, 650 F.2d at 196, which as discussed, *supra*, referred to many of the *Campa* implications.



plan."<sup>426</sup> Footnote number 24, which appears in both reports, cites only two decisions. The first is a 1978 district court decision, *Francis*, which, as discussed, *supra*, held that the Alienation Prohibition prevented a participant's spouse from using community property to obtain an interest in the participant's pension interest in the course of a marital dissolution.<sup>427</sup> The second decision, *Stone II*, was issued two years later by the Ninth Circuit, which contains the *Francis* district court and thus eliminates the conflict within that Circuit. The *Stone II* court stated:

As our decision in *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), demonstrates, the Supreme Court's summary dismissal of the appeal in *In re Marriage of Campa*, 444 U.S. 1028, 100 S. Ct. 696, 62 L. Ed. 2d 664 (1980) (*Campa*), binds district and circuit courts to the view that ERISA does not preempt state-court orders requiring a pension plan to pay a community property share of a plan participant's monthly benefit payments directly to his or her ex-spouse.<sup>428</sup>

Thus, the reports presented evidence not of a conflict, but rather of a consensus ratified by the Supreme Court that DROs based on state community property laws, alimony, or family support laws established enforceable rights to pension benefits.<sup>429</sup>

The Senate bill was described as resolving this non-existent conflict about DROs as follows:

In the case of a judgment, decree, or order relating to child support, alimony payments, or marital property rights pursuant to a State domestic relations law that meets certain requirements (a qualified domestic relations order), the bill clarifies that such order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA. In addition, the bill provides that the general ERISA preemption rule does not apply to these qualified domestic relations orders.<sup>430</sup>

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426. H.R. REP. NO. 98-655, pt. 2, at 18 (1984); S. REP. NO. 98-575, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2565.

427. *Francis*, 458 F. Supp. at 86.

428. *Stone II*, 633 F.2d at 742.

429. See Louise Everett Graham, *Kentucky Survey-Domestic Relations*, 73 KY. L.J. 379, 380-83 (1984) (discussing the pre-REACT law with respect to the applicability of the Alienation Prohibition to domestic relations orders); *but see Kerbow*, 421 F. Supp. at 1253 (holding that the court lacked ERISA jurisdiction to consider spousal claim to participant's retirement benefits because marital dissolution order recognizing spousal community rights in pension did not result in the spouse being an ERISA participant or beneficiary). REACT resolved such issue by treating QDROs as beneficiary designations thereby giving claimants access to federal courts to enforce their benefit entitlements.

430. S. REP. NO. 98-575, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2557.

In short, a DRO that meets the new requirements to be a QDRO is not preempted and is enforceable. All other DROs are preempted, and thus not enforceable.

Congress recognized there was an open tax issue about DROs that provided rights to benefits that the participant had not yet requested. The discussion in both congressional reports concludes with a reference to Revenue Ruling 80-27<sup>431</sup> that the alienation prohibition in the qualification requirements will not be violated if a pension plan complies with a DRO to meet the participant's family support obligations when the participant is receiving benefits.<sup>432</sup> The reports also observe that the IRS took no position about whether the alienation prohibition would be violated if a state court requires pension payments when the participant is not receiving benefits.<sup>433</sup> However, the reports do not mention the Seventh Circuit's *Gago* decision, discussed, *supra*, that there is no ERISA violation if the participant could have elected but did not elect to receive pension benefits, and the participant's spouse makes such an election on his behalf.<sup>434</sup> However, with REACT, Congress provided, as discussed, *infra*, that under very limited conditions, a state court may require a pension plan to pay benefits when the participant is not receiving benefits.<sup>435</sup>

### B. REACT's Substantive Provisions

REACT enhanced the protection of spouses of participants during the marriage by strengthening and extending the original pension beneficiary designation mandate of ERISA § 205, 29 U.S.C. § 1055.<sup>436</sup> There were four enhancements to this provision: (a) coverage was broadened beyond pension plans that provided

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431. Rev. Rul. 80-27, 1980-1 C.B. 85, was withdrawn as obsolete by Rev. Rul. 91-8, 1991-1 C.B. 281 because of the enactment of REACT.

432. H.R. REP. NO. 98-655, pt. 2, at 18 (1984); S. REP. NO. 98-575, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N., 2565. H.R. REP. NO. 98-655, pt. 1, at 30 (1984), also observed that the Department of Labor had taken a position similar to that of the IRS.

433. *Id.*

434. *Gago*, 717 F.2d at 1045. The decision also referred to a question whether a state court may order a pension plan to make benefits payments in violation of the plan terms in the jurisdictional statement. *In re Marriage of Campa*, 444 U.S. 1028 (1980). The Supreme Court dismissed the appeal because such an issue did not raise a substantial federal question, and thereby answered the question in the affirmative, as discussed *supra*.

435. The QDRO Provisions permit QDROs to obtain benefits when the participant is not receiving benefits if the participant could obtain such benefits and is still working. ERISA § 206(d)(3)(E), 2 U.S.C. § 1056(d)(3)(E).

436. On Nov. 8, 1984, a short time after the enactment of REACT, similar enhancements were made to the survivor benefits for spouses of federal civil service employees by the Civil Service Retirement Spouse Equity Act of 1984, Pub. L. No. 98-615, 98 Stat. 3195, 3195-96 (1984).

annuities;<sup>437</sup> (b) covered pension plans were required to offer survivor benefits before the participant began to receive plan benefits, and at the time the participant would begin to receive benefits;<sup>438</sup> (c) if a participant were married, covered pension plans were required to designate the participant's spouse as the beneficiary of specified survivor benefits;<sup>439</sup> and (d) any change in such default designations required a written consent of the participant's spouse witnessed by a third party.<sup>440</sup> The amended mandate shall be referred to as the Spousal Survivor Benefit Mandate,<sup>441</sup> and the plans covered by such mandate shall be hereinafter described as the Spousal Survivor Pension Plans. ERISA § 205, 29 U.S.C. § 1055, however, does not give a participant's spouse any protection after the dissolution of their marriage or, if earlier, after the entry of a separation order.<sup>442</sup>

The congressional reports do not mention any consideration of the advisability of requiring ERISA plans to have spousal survivor provisions other than the pension plans that were subject to the initial version of ERISA § 205, 29 U.S.C. § 1055. Welfare plans, such as life insurance plans or disability plans, are not subject to this REACT enhanced requirement.<sup>443</sup> Three major kinds of pension plans need not provide spouses with survivor benefits: (a) top-hat plans, which are primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees ("Top-Hat Plans"),<sup>444</sup> (b) plans maintained

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437. ERISA § 205(b), 29 U.S.C. § 1055(b).

438. ERISA § 205(a), 29 U.S.C. § 1055(a).

439. ERISA § 205(c)-(e), 29 U.S.C. § 1055(c)-(e). The required default benefit is generally: (1) at retirement is a joint and fifty percent survivor benefit at retirement, with the spouse entitled to the survivor benefit; and (2) before retirement, an annuity for the spouse's life. Profit-sharing plans that offer no annuities may instead provide that the surviving spouse is entitled to the full account balance if the participant dies before withdrawing his benefits. ERISA § 205(b)(1)(C), 29 U.S.C. § 1055(b)(1)(C).

440. ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2).

441. The Spousal Survivor Benefit Mandate is subject to the same criticisms of many state elective laws. A surviving spouse's interest is not affected by the term of the marriage, so after a year of marriage the surviving spouse may be entitled to a substantial share of pension assets accumulated before the marriage. See generally Heather Rose, Comment, *Boggs v. Boggs: Creating Real-Life Cinderellas*, 33 J. MARSHALL L. REV. 271 (1999) (criticizing the statutory allocation, analogizing it to the interests acquired by Cinderella's step-mother). ERISA § 205(f), 29 U.S.C. § 1055(f) permits, but does not require, a plan to provide that the marriage last for at least a year. Similarly, if the surviving spouse has a disproportionate share of the marital property it is not fair to give her more from the pension assets of the deceased spouse.

442. Treas. Reg. § 1.401(a)-20 Q&A-27 (2006); but cf. 42 U.S.C. § 416(d), SSA § 216(d) (providing that an individual's divorced spouse is entitled to spousal social security benefits if the marriage lasted at least ten years).

443. ERISA § 201(1), 29 U.S.C. § 1051(1).

444. ERISA § 201(2), 29 U.S.C. § 1051(2); see, e.g., *In re IT Grp. Inc.*, 448

solely to provide pension benefits for certain employees in excess of the contribution and benefit limits that the Internal Revenue Code (the "Code") imposes for tax qualification purposes,<sup>445</sup> and (c) simplified employee pension plans and simple retirement account plans, which place assets for participants' benefits in individual retirement accounts.<sup>446</sup>

Before the enactment of REACT, no ERISA section explicitly referred to the interaction between ERISA and the DROs. Thus, Congress could not simply transform an existing section to a beneficiary designation mandate as it had done for spousal survivor benefits. Congress chose not to add a new section setting forth a similar beneficiary designation mandate for DROs, which would have encouraged it to consider which DRO rules to apply to which ERISA plans. Congress, instead, modified the ERISA sections setting forth the Alienation Prohibition and the ERISA General Preemption "to clarify" when such orders were to be followed and when they were to be disregarded.

First, a second ERISA beneficiary designation mandate was added, namely ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).<sup>447</sup> Spousal Survivor Pension Plans were required to designate spouses, former spouses, children and dependents of participants as beneficiaries<sup>448</sup> pursuant to those state domestic relations orders that meet the QDRO standards, i.e., QDROs.<sup>449</sup> These standards included the requirements that the orders be domestic relations orders,<sup>450</sup> which (a) clearly specified the plan, the

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F.3d 661 (discussing the characteristics of such plans, particularly their unfunded nature). Such plans are often called non-qualified because they do not qualify for the favorable tax treatment that is generally provided to ERISA pension plans described in Qualified Retirement Plans, *supra* note 144.

445. ERISA §§ 3(36), 201(7), 29 U.S.C. §§ 1002(36), 1051(7). *But see* Albert Feuer, *The Effects of Marital Property Rights, Alimony, Child Support, and Domestic Relations Orders on Top-Hat Plans, Excess Benefit Plans, and Bonus Plans*, 38 COMP. PLAN. J. 319, 320 (2010), available at <http://ssrn.com/abstract=1719787> (last visited Aug. 13, 2012) (stating that such plans are very rare).

446. ERISA § 201(6), 29 U.S.C. § 1051(6); I.R.C. §§ 408(k), 408(p). To the extent a 401(k) plan has designated Roth IRA accounts pursuant to I.R.C. § 402A(b)(2), the benefits in such accounts are also not subject to the Spousal Survivor Benefit Mandate.

447. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

448. ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J). This beneficiary status provided the spouses, former spouses, children, and dependents of participants with standing to claim their plan benefits directly from the plan under: (a) ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), for a non-terminated plan; (b) ERISA § 4070(a), 29 U.S.C. § 1370(a) for a terminated single-employer plan; or (c) ERISA § 4301(a), 29 U.S.C. § 1451(a) for a terminated multi-employer plan.

449. The specifications for such orders are set forth in ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B).

450. ERISA § 206(d)(3)(B)(i), 29 U.S.C. § 1056(d)(3)(B)(i).

beneficiaries, and the designated benefits;<sup>451</sup> (b) were consistent with the pension plan's terms;<sup>452</sup> and (c) did not increase the plan's actuarial costs.<sup>453</sup> However, QDROs are permitted to provide the following two benefits that may not otherwise be consistent with the plan's terms: (a) separate benefit interests in certain circumstances, so that payments may be made even if the participant is not collecting pension benefits, but has not yet retired,<sup>454</sup> and (b) spousal treatment of former spouses in certain circumstances as spouses for purposes of spousal survivor benefits.<sup>455</sup>

Second, Spousal Survivor Pension Plans were prohibited from following the benefit terms of a DRO that was not a QDRO.<sup>456</sup> Thus, those benefit terms would be unenforceable because they were preempted by conflict preemption.

Third, an explicit exclusion of QDROs was added to the ERISA General Preemption, which shall be described as the QDRO Exclusion.<sup>457</sup> The QDRO Exclusion is not needed to protect QDROs from preemption, or to preempt DROs that are not QDROs. The ERISA requirement that Spousal Survivor Pension Plans provide that QDROs are beneficiary designations so protects QDROs.<sup>458</sup> The treatment by Spousal Survivor Pension Plans of a DRO that is not a QDRO as an assignment or alienation results in the desired preemption.

There appears only to be one sensible explanation for the QDRO Exclusion. It implies that the excluded items are part of a larger class of state law that is otherwise preempted because they "relate to" benefit plans. Thus, ERISA preempts a DRO that is not a QDRO, but creates, assigns or recognizes rights under state law to benefit payments from any ERISA plan. However, QDROs only appear to be defined for Spousal Survivor Pension Plans. Thus, the implication is that, for life insurance plans, disability plans, and pension plans other than Spousal Survivor Pension Plans, ERISA preempts all DROs that create, assign or recognize rights under

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451. ERISA § 206(d)(3)(C), 29 U.S.C. § 1056(d)(3)(C).

452. ERISA § 206(d)(3)(D)(i), 29 U.S.C. § 1056(d)(3)(D)(i).

453. ERISA § 206(d)(3)(D)(ii), 29 U.S.C. § 1056(d)(3)(D)(ii).

454. ERISA § 206(d)(3)(E), 29 U.S.C. § 1056(d)(3)(E). It would appear that it would be more prudent to permit such a spousal decision when the participant is not working. At such time the participant is not generating the compensation that was presumably used to pay for support, but the spouse could expect the source of support to be replaced by the pension plan payments.

455. ERISA § 206(d)(3)(F), 29 U.S.C. § 1056(d)(3)(F).

456. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A). Treating ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) as applicable to those benefit provisions, means the plan is prohibited from following those terms.

457. ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7).

458. *Id.*

state law to benefit payments unless the plan chooses to defer to such a DRO.

If such a DRO "relates to" benefit plans, than other family laws that create or recognize such state rights to benefit payments also "relate to" benefit plans. *A fortiori*, such an exclusion implies that all family law provisions that create, assign, or recognize rights under state law to benefit payments, such as provisions revoking beneficiary designations upon divorces, are preempted. In short, REACT unequivocally overruled *Campa* and its implications that ERISA does not preempt family state law. If family law, not merely domestic relations law, is not preempted, as discussed, *supra*, such law could change benefit entitlements for ERISA plans.

If Congress wished to provide that ERISA did not preempt state domestic relations law, or other state family law, for ERISA plans other than Spousal Survivor Pension Plans, it could have simply added such an exclusion to ERISA § 514(b), 29 U.S.C. § 1144(b), together with the QDRO Exclusion. It did not. Such an implicit and broad exclusion would also violate the thrust of the QDRO provisions. Those provisions require deference by Spousal Survivor Pension Plans essentially for those DROs that (1) comply with plan terms, and (2) provide suitable disclosure to the plan administrator and the parties to the domestic relations proceeding of the benefits provided under the DRO. Why would such requirements be appropriate only for Spousal Survivor Pension Plans, and why would only such plans be protected from double payment obligations if their fiduciaries satisfied their fiduciary obligations in their treatment of DROs?

Thus, in accord with the principle that the state police powers may not be superseded by federal statutes unless "that was the clear and manifest purpose of Congress,"<sup>459</sup> it is reasonable to conclude that if, *arguendo*, domestic relations law or any family law is a state police power, to the extent, if any, they are inconsistent with ERISA or ERISA plan terms (those terms included the required QDRO provisions for Spousal Survivor Pension Plans), ERISA preempts those state laws. Analysis of the initial ERISA provisions resulted in the same conclusion.

Congress recognized that the new REACT rules would preempt DROs, which were previously treated as effective. Thus, Congress included two grandfather provisions in REACT. First, those domestic relations orders which did not meet the QDRO requirements, but which had been accepted by pension plans prior to the effective date of REACT, remained valid.<sup>460</sup> Second, pension plans could choose to honor domestic relations orders obtained

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459. *Rice*, 331 U.S. at 230.

460. Pub. L. No. 98-397, § 303(d), 98 Stat. 1426, 1453 (1984).

before the effective date of REACT, which did not meet the QDRO requirements.<sup>461</sup>

In 1986, Congress enacted REACT technical corrections. Among those corrections was the addition of ERISA § 206(d)(3)(L), 29 U.S.C. § 1056(d)(3)(L), which confirmed that the only ERISA plans that must follow DROs that satisfy QDRO-like rules are Spousal Survivor Pension Plans. That subparagraph limits the application of the paragraph (d)(3), which includes all the QDRO sections, to Spousal Survivor Pension Plans. Subparagraph (d)(3)(L) was enacted together with a similar addition to the corresponding tax-qualification Code Section as part of Section 1898(c)(4) of the Tax Reform Act of 1986, entitled "Clarification of Domestic Relation Provisions."<sup>462</sup> Congress explicitly intended that the two added provisions "clarif[y] that the qualified domestic relations provisions do not apply to any plan to which the assignment or alienation restrictions [the Alienation Prohibition] do not apply."<sup>463</sup>

### *C. Summary of the Relation Between State Family Law and ERISA in Aftermath of REACT*

A participant's spouse has an entitlement to survivor benefits from Spousal Survivor Pension Plans unless she consents to the participant's waiver of the benefit. Life insurance plans and pension plans other than Spousal Survivor Pension Plans need not provide any spousal benefits. It appears that state community property laws, state election laws and state revocation of designations upon divorces are all preempted and may not change who obtains the survivor benefits unless the respective plan terms authorize such changes, and ERISA specifies how the default spousal designation of a Spousal Survivor Pension Plans may be changed.

DROs may not affect benefit entitlements for life insurance plans, disability plans and pension plans other than Spousal Survivor Pension Plans unless the respective plan terms authorize such changes. Spousal Survivor Pension Plans must defer to, and may only defer to, DROs that are QDROs, which can address benefits payable to the participant, and the participant's death benefits.

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461. *Id.*

462. Pub. L. No. 99-514, § 1898(c)(4), 100 Stat. 2085, 2953 (1986).

463. S. REP. NO. 99-313 at 1106 (1986). The final bill made no change to this section other than changing the section number from 1897(c) to 1898(c). Thus none was made in the explanation. H.R. REP. NO. 99-514 at II-857, *reprinted in* 1986 U.S.C.C.A.N. 4075, 4941.

XI. THE ALIENATION PROHIBITION TRILOGY OF THE SUPREME COURT  
AND THE IMPLICIT DEFERENCE OF ERISA PLANS TO DOMESTIC  
RELATIONS ORDERS

The Supreme Court issued three decisions in six years pertaining to the Alienation Prohibition. The first, *Mackey*, held in 1988 that ERISA does not preempt the state law garnishment of benefits of ERISA welfare plans.<sup>464</sup> Under *Mackey's* reasoning, ERISA would also not preempt other state law alienations, such as DROs for disability plans, life insurance plans, and pension plans other than Spousal Survivor Pension Plans. The second, *Guidry v. Sheet Metal Workers National Pension Fund*,<sup>465</sup> held in 1990 that the Alienation Prohibition prevented a union from using a federal labor law to stop a pension plan from paying plan benefits to a participant who had embezzled funds from the union.<sup>466</sup> The third, *Patterson v. Shumate*,<sup>467</sup> held in 1992 that the Alienation Prohibition prevented a participant's federal bankruptcy trustee from obtaining the participant's pension benefits.<sup>468</sup> The last two decisions did not consider whether a recipient could retain the benefits after their distribution, although Mr. Guidry relied on state law to do so.<sup>469</sup>

A. *Supreme Court Approves Garnishment of Vacation Plan Benefits*

In 1988, the *Mackey* Court held that an individual's creditor may garnish<sup>470</sup> the individual's benefits from an ERISA welfare plan.<sup>471</sup> Many questions can be raised about the Court's analysis, although this Article will focus primarily on the Court's analysis of the significance of the Alienation Prohibition and the Prohibition's interaction with the ERISA General Preemption.<sup>472</sup>

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464. *Mackey*, 486 U.S. at 841. The Court did not discuss the extent, if any, to which plan terms may limit such garnishments.

465. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) [hereinafter *Guidry I*].

466. *Id.* at 367, 371-75.

467. *Patterson v. Shumate*, 504 U.S. 753, 755, 760 (1992).

468. *Id.* at 755, 760.

469. The Tenth Circuit, however, found on remand that: (1) the Alienation Prohibition did not apply to the pension plan benefits after their distribution, but (2) state law prohibited the union from obtaining those distributed benefits. *Guidry v. Sheet Metal Worker Local Unions*, 39 F.3d 1078, 1081, 1083 (10th Cir. 2000) [hereinafter *Guidry II*].

470. Garnishment is defined as "a statutory proceeding whereby a person's property, money, or credits in possession or under control of or owing another are applied to payment of the person's debt to a third person by proper statutory process against debtor and garnishee." BLACK'S LAW DICTIONARY 612 (5th ed. 1979).

471. *Mackey*, 486 U.S. at 831-32.

472. See Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 945-47 (2007) [hereinafter *Survivor*].



The Supreme Court first unanimously agreed that ERISA preempted an exemption from the Georgia general garnishment statute for “[f]unds or benefits of a pension, retirement, or employee benefit plan or program subject to the provisions of the federal Employee Retirement Income Security Act of 1974, as amended. . . .”<sup>473</sup>

The Court cited the *Shaw* statement in its unanimous opinion that “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.”<sup>474</sup> By referring directly to ERISA plans, the Court concluded that the state law related to ERISA and was thus preempted.<sup>475</sup> The Supreme Court had never preempted a law for this reason, probably because *Shaw* also contains the following statement in a footnote: “Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.”<sup>476</sup> A provision preventing an ERISA plan from being affected by another state statute results in state law not affecting ERISA plans. Thus, ERISA does not preempt the exemption provision. Therefore, the garnishment should not have been permitted, and there was no reason for the Court to consider the general garnishment statute without the ERISA exemption.<sup>477</sup> The absurdity of this preemption holding is shown by observing that the Court thereby allowed state law garnishments of the pension benefits of Spousal Survivor Pension Plans.<sup>478</sup> However, those garnishments would violate the Alienation Prohibition.<sup>479</sup> Thus, ERISA Conflict Preemption preempts such garnishments.

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*Benefit Entitlements*], available at <http://ssrn.com/abstract=1087504> (last visited Aug. 13, 2012) (criticizing that analysis).

473. *Mackey*, 486 U.S. at 828 n.2.

474. *Id.* at 829 (internal quotations omitted) (quoting *Shaw*, 463 U.S. at 96-97).

475. *Mackey*, 486 U.S. at 829-30.

476. *Shaw*, 463 U.S. at 100 n.21. The Supreme Court therein cited *American Telephone and Telegraph Co.*, 592 F.2d at 121 (“state garnishment of a spouse’s pension income to enforce alimony and support orders is not preempted”), as, perhaps, presenting such an example. *Shaw*, 463 U.S. at 100 n.21.

477. After finding that the ERISA plan exemption portion of the garnishment statute was preempted, the Court analyzed the garnishment statute. *Mackey*, 486 U.S. at 829. It then found that ERISA did not preempt that portion in part by using the arguments discussed above. *Id.* at 831. This may reflect the Court’s strong desire to decide whether ERISA preempted the application of the general Georgia garnishment statute to ERISA plans other than Spousal Survivor Pension Plans. This strong desire seemed to be reflected in the Court’s decision to appoint an amicus curiae when the credit agency elected not to appear in court. *Id.* at 829 n.3.

478. *Mackey*, 486 U.S. at 832.

479. See Treas. Reg. § 1.401(a)-13(b)(1) (mentioning garnishments explicitly).

The Court followed its discussion of why ERISA preempted the ERISA exemption in the state law with a disagreement about whether the ERISA General Preemption prohibited state law garnishments for plans other than Spousal Survivor Pension Plans.

The majority asserted that the limitation of the Alienation Prohibition to garnishments by Spousal Survivor Plans showed that garnishments were permitted for other plans.<sup>480</sup> If, as originally enacted in 1974, the Explicit ERISA Preemption prohibited garnishments for all plans, the majority asserted the Alienation Prohibition would be superfluous, and this would violate standard statutory interpretation rules.<sup>481</sup> The majority missed the fact that the Alienation Prohibition is not superfluous because it prevents Spousal Survivor Pension Plans from permitting the prohibited alienations, whereas, other ERISA plans, such as Top-Hat Plans, may choose to permit alienations. Thus, ERISA permits arguments about the extent to which the terms of those other plans permit alienations, such as assignments. However, the dissent responded that the majority assertion fails to recognize that the Explicit ERISA Preemption preempts state law that conflicts with any ERISA mandate, such as the Alienation Prohibition, because such law thereby relates to employer benefit plans in a prohibited fashion.<sup>482</sup> The majority responded regardless of the reason, statutes should not be treated as superfluous, particularly two that were enacted simultaneously.<sup>483</sup>

The dissenters also asserted that the majority interpretation would render the QDRO Exclusion from the Explicit ERISA Preemption nugatory because the Exclusion's purpose was "to save from preemption certain garnishments designed to enforce domestic relations obligations."<sup>484</sup> The majority cited the statutory REACT goal of "guarantee[ing] that the Nation's private retirement-income system provided fair treatment for women."<sup>485</sup> The majority then asserted that there was a more plausible explanation for the QDRO Exclusion, "namely, that Congress thought that some courts had erroneously construed § 514(a) as preempting such [domestic relations] orders. In this view, the 1984 amendment served the purpose of correcting the error, thus clarifying the original meaning of the section."<sup>486</sup> The dissenters accused the majority of thereby rendering the QDRO Exclusion

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480. *Mackey*, 486 U.S. at 837-38.

481. *Id.*

482. *Id.* at 846 (Kennedy, J., dissenting).

483. *Id.* at 837.

484. *Id.* at 842 (Kennedy, J., dissenting).

485. *Id.* at 838.

486. *Id.* at 839.

superfluous.<sup>487</sup> Both sides partially missed some important points.

The dissenters correctly described the interaction between the Explicit ERISA Preemption and all ERISA mandates, including the Alienation Prohibition. ERISA mandates help determine the significance of the phrase “relate to,” although laws not pertaining to ERISA mandates, such as the one in *Shaw*, may also relate to ERISA plans. This should not have been the end of the discussion. The Court should have asked, as it did in *Shaw* and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance*,<sup>488</sup> whether the relation is too tenuous, remote, or peripheral, as the dissenters did.<sup>489</sup> The Supreme Court’s subsequent decision in *Boggs* implicitly held that the relation of the garnishment statute was not too tenuous, remote, or peripheral, when it found any state law preempted if it adversely affected the right of a participant or a beneficiary to receive a plan benefit, as discussed, *infra*.<sup>490</sup> However, the garnishment would have been permitted if the plan terms permitted state garnishments. There was no evidence the plan terms did so. Thus, the garnishment was preempted.

Both sides misunderstood the QDRO Exclusion from the ERISA General Preemption. As discussed in the REACT section, *supra*, it is not needed to preempt DROs pertaining to Spousal Survivor Pension Plans that are not QDROs. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3), provides for such preemption. The QDRO Exclusion could serve a useful purpose without addressing or having any relation to garnishments. Whether or not a DRO based on marital rights is a garnishment or would violate the Alienation Prohibition, the DRO may still violate the Explicit ERISA Preemption, as the maternity benefits did in *Shaw*. Thus, as discussed in the REACT section, *supra*, the QDRO Exclusion paradoxically clarified that ERISA preempts DROs not satisfying the QDRO rules, without regard to whether they apply to Spousal Survivor Pension Plans or any other ERISA plan.

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487. *Id.* at 845-46 (Kennedy, J., dissenting).

488. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645 (1995) (holding that ERISA did not preempt the imposition of hospital surcharges only on non-Blue Cross health insurers) [hereinafter *N.Y.S. BCBS*]. The Court therein referred favorably to its *Mackey* decision, even though the majority therein failed to discuss whether the relation was too tenuous. *Id.* at 662.

489. *Mackey*, 486 U.S. at 842-44.

490. *Boggs*, 520 U.S. at 841-43.

*B. Supreme Court Finds Alienation Prohibition Supersedes Other Federal Laws and Rejects Implicit Equity Exemption from Alienation Prohibition*

The Supreme Court has unanimously decided two cases in which a participant's creditor sought to use federal law to obtain the participant's benefits from an ERISA pension plan. ERISA does not preempt federal statutes. Rather, ERISA provides that none of its provisions "alter, amend, modify, invalidate, impair or supersede" any other federal statute.<sup>491</sup> Yet, in each case the Court unanimously decided that the Alienation Prohibition precluded the creditor's claim.

In 1990, the Supreme Court held in *Guidry* that the Alienation Prohibition prevented a union from using a federal labor law to impose a constructive trust against an ERISA pension plan and directed the plan to pay plan benefits to an individual who had embezzled substantial funds from the union.<sup>492</sup> In 1992, the Court held in *Patterson*, that the Alienation Prohibition prevented a participant's federal bankruptcy trustee from obtaining the participant's pension benefits.<sup>493</sup>

The *Guidry* Court held that the specific ERISA prohibition, the Alienation Prohibition, superseded the general relief parts of the labor statute.<sup>494</sup> Moreover, eight of the justices<sup>495</sup> unequivocally declared:

Nor do we think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. *If exceptions to this policy are to be made, it is for Congress to undertake that task.*

*As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text.* The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the

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491. ERISA § 514(d), 29 U.S.C. § 1144(d).

492. *Guidry I*, 493 U.S. at 375-76. The plan was a result of collective bargaining by the victimized union. *Id.* at 372-76.

493. *Patterson*, 504 U.S. at 759-60.

494. Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 501(b) (2006).

495. Justice Thurgood Marshall did not join in this part of the opinion.

desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be “especially” inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.<sup>496</sup>

Thus, the Court totally rejected equitable arguments supporting implicit exceptions to the Alienation Prohibition discussed, *supra*. Moreover, the Court cited the regulations for its holding that garnishments were prohibited.<sup>497</sup> However, prior to making this statement the Court described the family law exception that Congress had made in REACT “where Congress mandated that the anti-alienation provision should not apply to a ‘qualified domestic relations order.’”<sup>498</sup> The Court thereby implied that contrary to *Campa*, DROs that create, assign, or recognize rights under state law to benefit payments violated the pre-REACT Alienation Prohibition. Thus, such DROs would be preempted.

In 1992 in *Patterson*, the Supreme Court unanimously held that the Alienation Prohibition prevented pension benefits from being alienated under another federal law, the Federal Bankruptcy Code.<sup>499</sup> In particular, the Court held that the Alienation Prohibition, which must be part of the terms of an ERISA pension plan, constituted “an enforceable transfer restriction” for purposes of the Bankruptcy Code § 541(c)(2)’s exclusion of property from the bankruptcy estate.<sup>500</sup> The Court<sup>501</sup> described its unanimous decision as extending its holding in *Guidry*<sup>502</sup> and repeated the previously quoted language from *Guidry* about how ERISA § 206(d) reflects a considered congressional policy choice.<sup>503</sup>

### C. Summary of Relation of State Family Law and ERISA in Aftermath of Alienation Prohibition Trilogy

A participant’s spouse has an entitlement to survivor benefits from Spousal Survivor Pension Plans unless she consents to the

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496. *Guidry I*, 493 U.S. at 376-77 (emphasis added) (footnotes omitted).

497. *Id.* at 372.

498. *Id.* at 376.

499. *Patterson*, 504 U.S. 753.

500. *Id.* at 760.

501. At this time Justice Clarence Thomas had replaced Justice Thurgood Marshall on the Supreme Court, and unlike his predecessor, Justice Thomas joined this part of the opinion that declined to recognize any exceptions to the Alienation Prohibition.

502. *Id.* at 764.

503. *Id.* at 765.

participant's waiver of the benefit. It appears that for Spousal Survivor Pension Plans (1) state community property laws, state election laws, and state revocation of designations upon divorces are all preempted and may not change who obtains the survivor benefits unless the respective plan terms authorize such changes, and (2) ERISA specifies how the default spousal designation of a may be changed.

Life insurance plans and pension plans other than Spousal Survivor Pension Plans need not provide any spousal benefits. DROs determine benefit entitlements for life insurance plans, disability plans and pension plans other than Spousal Survivor Pension Plans. There may be limits on the extent to which DROs may change entitlements, and changes contrary to plan terms may cause a pension plan to lose its tax qualification. Spousal Survivor Pension Plans must defer to and may only defer to DROs that are QDROs, which can address benefits payable to the participant, and the participant's death benefits.

## XII. THE ERISA DESIGNATION TRILOGY OF THE SUPREME COURT AND THE POTENTIAL EROSION OF THE TREATMENT OF ERISA ENTITLEMENTS PROTECTED FROM STATE FAMILY LAW OWNERSHIP CLAIMS BEFORE AND AFTER THEIR PLAN DISTRIBUTION

In 1997, the Supreme Court decided *Boggs*, in which it focused on the importance of protecting ERISA pension entitlements and explicitly declared that *Campa* no longer governed pension entitlements and held that pension entitlements are protected from state community property claims before and after their distribution from an ERISA plan.<sup>504</sup> In 2001, in *Egelhoff*, the Supreme Court again focused on the importance of protecting such entitlements, while using administration language.<sup>505</sup> The Court declared therein that those protections were achieved with the core ERISA concern that plan payments be made pursuant to plan terms.<sup>506</sup> In particular, the *Egelhoff* Court held that both pension and life insurance entitlements are protected from state community property claims before and after their distribution from the ERISA plan.<sup>507</sup> In 2009, the *Kennedy* Court focused on minimizing a plan's administrative burdens when it was confronted with the question of a pension plan's benefit payment liability.<sup>508</sup> In contrast, in *Boggs* and *Egelhoff*, the Court was confronted with the questions of the extent of benefit entitlements. The *Kennedy* Court, in dicta, cast some doubt on

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504. *Boggs*, 520 U.S. at 850.

505. *Egelhoff*, 532 U.S. at 141.

506. *Id.* at 150.

507. *Id.* at 146-47.

508. *Kennedy*, 555 U.S. at 301-03.

whether a person with an ERISA entitlement may keep the plan benefit payment if another person has an ownership claim to the benefit, which does not entitle that person to receive the plan benefit from the ERISA plan.

*A. The Supreme Court Supersedes Campa with Boggs and Treats ERISA Pension Entitlements as Federal Entitlements Protected from State Family Law Ownership Claims Before and After Their Distribution*

In 1997, the Supreme Court in *Boggs v. Boggs* held that ERISA prevented a participant's spouse from using Louisiana state community law to transfer a portion of his ERISA pension benefit to their children when she predeceased him.<sup>509</sup> Thus, those children did not thereby derive an entitlement to the pension amounts paid to him or his designated beneficiaries following his death. As in *Wissner*, *Free*, and *Ridgway*, the Court applied federal entitlement principles and held that the federal designation rules trumped state community property law.<sup>510</sup> There appeared to be no challenge of the decision below that the plans had no direct liability to the children.<sup>511</sup>

The participant's first wife, Dorothy, died in 1979.<sup>512</sup> This was after the 1974 enactment of ERISA but before the 1984 enactment of REACT. In 1980, a Louisiana court ascribed to the first wife's estate an interest of \$21,194.29 in the undistributed interest of the participant's savings plan (the "Savings Plan").<sup>513</sup> The first wife's will gave (a) the participant a life interest in her assets and one third of the remainder, and (b) her children two-thirds of the remainder.<sup>514</sup> The participant remarried Sandra within a year of the first wife's death, i.e., in 1980.<sup>515</sup> In 1985, he retired and received (a) a lump sum distribution of \$151,628.94 from the Savings Plan, which he rolled into an IRA—he made no withdrawals before his death in 1989; (b) AT&T shares from an ESOP, which he retained until his death; and (c) the initial payments of a qualified joint and survivor annuity with survivor rights in his second wife from a distinct retirement plan (the "Retirement Plan").<sup>516</sup> Under the participant's will his widow, Sandra, received a life interest in the AT&T shares and Sandra appeared to be the sole beneficiary of the IRA.<sup>517</sup> The adult

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509. *Boggs*, 520 U.S. at 842-44.

510. *Id.* at 844.

511. *Id.* at 838.

512. *Id.* at 836.

513. *Id.* at 837.

514. *Id.* at 836-37.

515. *Id.* at 836.

516. *Id.*

517. *Id.* at 837.

children, after the participant's death, sought the property they claimed to have been entitled to as of the date of their mother's death, namely a portion of (a) the annuity payments received by the participant during his life, (b) the annuity payments being received by the participant's widow, (c) the IRA account, and (d) the ESOP shares.<sup>518</sup> There appeared to be no claim that the original probate order was a QDRO or subject to the REACT transition rules.<sup>519</sup>

The Court began its analysis with the traditional statement that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."<sup>520</sup> There was unanimous agreement that the children were not entitled to any of Sandra's payments from the Retirement Plan. The Court decided by a vote of 7-2 that the children were not entitled to receive from the widow, payment for any part of the spousal survivor benefits paid to the participant's widow from the Retirement Plan in accord with the Spousal Survivor Benefit Mandate.<sup>521</sup> The dissent, however, argued that (a) to the extent that the spouse had received other assets from the estate she was liable to the children to use them to compensate the children for the value of the survivor benefits that she received, and (b) ERISA was only concerned with the uniformity of payments by ERISA plans.<sup>522</sup> Thus, the dissent argued there would be no ERISA violation if the widow was required to provide the children with property other than the survivor benefits that she received.<sup>523</sup> The majority rejected this argument, as the Court had done in *Wissner*, *Free*, and *Ridgway*. In particular, the majority observed that the statutory beneficiary designations of the Spousal Survivor Benefit Mandate were designed to insure an income stream to the surviving spouse.<sup>524</sup> Thus, ERISA Conflict Preemption made the children's community property claim unenforceable:

It would undermine the purpose of ERISA's mandated survivor's annuity to allow Dorothy, the predeceasing spouse, by her testamentary transfer to defeat in part Sandra's entitlement to the annuity § 1055 guarantees her as the surviving spouse. This cannot be. States are not free to change ERISA's structure and balance.<sup>525</sup>

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518. *Id.*

519. The REACT transition rules were not applicable because the pension plan had not honored the pre-REACT order before the enactment and did not choose to honor it after the enactment. Pub. L. No. 98-397, § 303(d), 98 Stat. 1426, 1453 (1984).

520. *Boggs*, 520 U.S. at 845 (citing *Shaw*, 463 U.S. at 90).

521. *Id.* at 842.

522. *Id.* at 862-74.

523. *Id.* at 871-73 (Breyer, J., dissenting).

524. *Id.* at 843-44.

525. *Id.* at 844.



The Court applied ERISA Conflict Preemption to another designation mandate, the right of a participant to choose his beneficiary pursuant to the plan terms, to decide by a vote of 5-4 that the children were not entitled to receive a portion of (a) the Savings Plan benefits that the participant had received and rolled over into an IRA, (b) the stock the participant had received from an ESOP, or (c) the Retirement Plan annuity benefits that the participant received, but had not rolled over into an IRA or other tax-qualified plan.<sup>526</sup> The majority, as the Court had in *Wissner*, *Free*, and *Ridgway*, emphasized that the children were not plan beneficiaries under the plan terms.<sup>527</sup>

The Court distinguished the *Burrus* statement that domestic relations are governed by state law rather than federal law in two ways.<sup>528</sup> First, the issue before the Court, the validity of a testamentary transfer, is not a matter of domestic relations. Second, Congress addressed domestic relations by ensuring that DROs that meet statutory requirements are not preempted. The Court had earlier described those requirements as “essential to one of REA[CT]’s central purposes, which is to give enhanced protection to the spouse and dependent children in the event of divorce or separation, . . .”<sup>529</sup>

The majority also stated that the enactment of REACT made inapplicable its prior 1980 decision, *In re Marriage of Campa*.<sup>530</sup> As in *Wissner*, the Court “reinforced” its designation argument by referring to the Alienation Prohibition,<sup>531</sup> but then referred to the participant’s designation pursuant to the plan terms “[a]s was true with survivors’ annuities, it would be inimical to ERISA’s purposes to permit testamentary recipients to acquire a competing interest in undistributed pension benefits, which are intended to provide a stream of income to participants and their beneficiaries.”<sup>532</sup>

The Court repeated its *Free* statement that giving full title to an individual but forcing the individual to account for the value is to provide meaningless title.<sup>533</sup>

The majority in its final paragraph emphasized the critical importance of extending ERISA protection to distributed ERISA benefits as follows:

*The axis around which ERISA’s protections revolve is [sic] the*

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526. *Id.* at 844-50.

527. *Id.* at 845-50.

528. *Id.* at 848.

529. *Id.* at 847.

530. *Id.* at 849-50. The Supreme Court also explicitly overruled decisions that reached the same results as *Campa*, such as *Stone*, *Gago*, and *Eichelberger v. Eichelberger*, 584 F. Supp. 899 (S.D. Tex. 1984).

531. *Boggs*, 520 U.S. at 851.

532. *Id.* at 852.

533. *Id.* at 853.

*concepts of participant and beneficiary.* When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. *It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits.* Their state-law claims are pre-empted. The judgment of the Fifth Circuit is Reversed.<sup>534</sup>

The Court had similarly rejected a similar alchemy claim that a state community property right magically sprang into effect after the federal government transferred a homestead property in *McCune*.<sup>535</sup>

The Court thereby repudiated its suggestion in *Shaw* footnote 21, discussed, *supra*, that domestic relations orders may have too tenuous of an impact on pension plans to be preempted. Instead, under the Court's reasoning, any state law that adversely affected a participant's or beneficiary's right to receive an ERISA benefit entitlement was preempted. The conclusion did not depend on the benefit being a benefit from a Spousal Survivor Pension Plan, or from a pension plan. Moreover, under the Court's reasoning, ownership claims contrary to ERISA plan terms could not be used to wrest the benefit from the participant or beneficiary entitled to the benefit under the plan terms.

The dissent responded by focusing on administrative issues and the Alienation Prohibition, rather than the protection of the ERISA entitlements of plan participants and beneficiaries. The dissent thus pointed to the traditional concern for uniform laws to administer pension plans that it asserted would be satisfied if decisions by plan fiduciaries to pay benefits to participants and designated beneficiaries were not affected.<sup>536</sup> The dissenters also argued that community property law didn't "frustrate the statutory purposes of ERISA."<sup>537</sup> First, they argued as the *Wissner*, *Free*, and *Ridgway* dissents had argued that there is no violation of the Alienation Prohibition because community property establishes the spousal ownership at the time the pension benefits are generated.<sup>538</sup> Second, they argued that ERISA is not concerned

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534. *Id.* at 854 (emphasis added).

535. *McCune*, 199 U.S. at 389-90.

536. *Boggs*, 520 U.S. at 861-62 (Breyer, J., dissenting).

537. *Id.* at 863-64 (Breyer, J., dissenting).

538. *Id.* (Breyer, J., dissenting); see also Julie McDaniel Dallison, Comment, *Disappearing Interests: ERISA Impliedly Preempts the Predeceasing Nonemployee Spouse's Community Property Interest in the Employee's Retirement*, 49 BAYLOR L. REV. 477 (1997); Grant Summers, Comment, *ERISA Preemption of "Direct" and "Indirect" Community Property Interests in Pension Plans upon the Non-Participant Spouse's Death*, 55 LA. L. REV. 409 (1994).

with the disposition of any survivor benefits (other than spousal benefits) from pension plans.<sup>539</sup> Thus, they argued that state law should control the ultimate disposition of such proceeds as in this case.<sup>540</sup> Third, they argued that (a) the probate order is not a DRO because it was not issued under a domestic relations law, and thus such orders are not alienations under the QDRO Provisions,<sup>541</sup> and (b) by permitting transfers of pension benefits to former spouses when they are alive and get divorced, Congress implied that former spouses should not be deprived of such benefits if they predecease participants.<sup>542</sup>

The majority responded that (a) the Court had to follow the congressional directions that the spousal survivor provisions and the QDRO provisions protected the living, such as divorcing spouses and spousal survivors, rather the dead, such as a spouse predeceasing the participant, and (b) ERISA protects the income stream of both participants and beneficiaries, which means the benefits of both are protected from pre-distribution and post-distribution claims, such as the community property ones at issue.<sup>543</sup>

*Boggs* cited *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance*<sup>544</sup> but did not refer to the ERISA preemption statement therein:

in cases like this one [health regulation], where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>545</sup>

A forerunner of that statement, however, appears in the dissent.<sup>546</sup> The Court rejected this field preemption approach. Instead, the Court focused on the ERISA purpose and the conflict with that purpose, which is similar to its *Free* approach. "We can begin, and in this case end, the analysis by simply asking if state law conflicts

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539. *Boggs*, 520 U.S. at 572-73 (Breyer, J., dissenting).

540. *Id.* at 864-66 (Breyer, J., dissenting).

541. This is a *Mackey* argument—that if state law alienation is not explicitly preempted in the Alienation Prohibition, ERISA permits such alienation.

542. *Boggs*, 520 U.S. at 866-68 (Breyer, J., dissenting). This is the argument used to justify elective share laws better approximating the share a surviving spouse would be entitled to upon a divorce. As discussed, *supra*, there is no consensus. Thus, there is a great disparity among the different state laws, even among the community property states.

543. *Id.* at 854.

544. *Id.* at 860 (Breyer, J., dissenting) (citing *N.Y.S. BCBS*, 514 U.S. at 654).

545. *N.Y.S. BCBS*, 514 U.S. at 655 (citations omitted). The *Boggs* majority cited the prior page. *Boggs*, 520 U.S. at 860.

546. *Id.* at 861 (Breyer, J., dissenting) (citing *Rice*, 331 U.S. at 218).

with the provisions of ERISA or operates to frustrate its objects. *We hold that there is a conflict, which suffices to resolve the case.*"<sup>547</sup>

In particular, ERISA preempted any state law that conflicted with the principle that ERISA plan terms determine participant or beneficiary entitlements. The Court thereby furthered the core objective of ERISA, which the Court described in *Shaw* as "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."<sup>548</sup>

*B. The Supreme Court in Egelhoff Treats Both ERISA Pension and Life Insurance Entitlements as Federal Entitlements Protected from State Family Law Ownership Claims Before and After Their Distribution*

In 2001, the Supreme Court in *Egelhoff* broadened its *Boggs* holding when it held that ERISA preempts a Washington state law that attempts to override a participant's designation of his or her spouse in an ERISA pension plan or an ERISA life insurance plan upon the participant's divorce.<sup>549</sup> Thus, the adult children of the participant's first wife were again not entitled to obtain the benefits either directly from the plan or indirectly from the participant's second wife and designated beneficiary.<sup>550</sup> The Court mentioned administrative burdens in the context of federal entitlement principles by focusing on the ERISA General Preemption, which preempts any state laws that seek to prevent plan benefits from being paid in accord with the plan terms.<sup>551</sup>

The *Egelhoff* majority declined to use the ERISA Conflict Preemption but instead used the broader ERISA General Preemption.<sup>552</sup> However, the Court stated: "[a]nd as we have noted, the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents."<sup>553</sup> These ERISA requirements are fiduciary requirements, applicable to most ERISA plans.<sup>554</sup> These fiduciary requirements arise from the more fundamental

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547. *Id.* at 842 (emphasis added).

548. *Shaw*, 463 U.S. at 90.

549. *Egelhoff*, 532 U.S. at 147-48.

550. *Id.* at 144-46.

551. *Id.* at 149-50. There is an exception for state laws explicitly exempted from the ERISA General Exemption, such as insurance law, securities law, banking law, criminal law, or DROs that are QDROs.

552. Two of the justices, in a concurring opinion, observed that the Court found that state law was connected with ERISA because it conflicted with ERISA, and thus the Court was applying conflict preemption. *Egelhoff*, 532 U.S. at 152-53 (Scalia, J., concurring).

553. *Id.* at 150.

554. See ERISA § 401(a), 29 U.S.C. § 1101(a) (identifying the plans that are excluded from those fiduciary requirements).

requirement that for all ERISA plans, participants and beneficiaries have enforceable entitlements to benefits under the plan terms.<sup>555</sup> Thus, state laws, which conflicted with the plan terms of any ERISA plan, would be similarly preempted by the ERISA Conflict Preemption.<sup>556</sup> In particular, state statutes providing for revocation of spousal designations upon the participant's divorce statutes would be preempted for plans not subject to the referenced fiduciary rules, such as Top-Hat Plans.<sup>557</sup>

The majority concluded that the state statute was preempted under the ERISA General Preemption because it had two impermissible connections with ERISA plans.

[First,] [t]he administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. *The statute thus implicates an area of core ERISA concern.* In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), *making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan."* § 1002(8).<sup>558</sup>

The Court also distinguished generally applicable laws, which regulate "areas where ERISA has nothing to say," such as state minimum wage and benefit for apprentices, which are not preempted because they only incidentally affect ERISA plans,<sup>559</sup> from statutes, such as the one at issue, which are preempted because they "govern[] the payment of benefits, a central matter of plan administration."<sup>560</sup> Because garnishment laws govern the payment of benefits, even though they may be generally applicable laws, they are preempted. Therefore, the Court implicitly rejected *Mackey's* allowance of the garnishment of ERISA benefit payments without considering the "core ERISA concern" of paying benefits in accord with plan terms.<sup>561</sup> This approach is also consistent with its

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555. Such entitlements may be enforced under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

556. See generally Albert Feuer, *Will The Supreme Court Reinforce Or Undermine Basic ERISA Principles When It Decides A Death Benefit Dispute?*, 3 CHARLESTON L. REV. 289, 302-06 (2009) (discussing why ERISA entitlements are based on plan terms rather than on plan documents), available at <http://ssrn.com/abstract=1337276>. (last visited Aug. 13, 2012).

557. See *supra* note 144 and accompanying text (discussing Top-Hat Plans).

558. *Egelhoff*, 532 U.S. at 147 (emphasis added).

559. *Id.* at 148 (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 330 (1997)). The issue in *California Division of Labor Standards Enforcement* was a minimum wage and benefit statute for apprentices. *Cal. Div. of Labor Standards Enforcement*, 519 U.S. at 316.

560. *Egelhoff*, 532 U.S. at 148.

561. See *id.* at 147 (setting forth the "core ERISA concern").

deferential approach to field preemption in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance* to fields of traditional state regulation, such as health regulation discussed, *supra*.

Second, it conflicts with “one of the principal goals of ERISA,”<sup>562</sup> *viz*, to enable employers “to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.”<sup>563</sup>

Such conflict arises because:

*Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents.* Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been “revoked” by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.<sup>564</sup>

The Court rejected the argument that because administrators could avoid liability to a second claimant either by refusing to make payments until the benefit dispute is resolved or by following plan designations unless they had notice of a marital dissolution, the state law did not impose an undue burden on plan administrators.<sup>565</sup>

The Court emphasized that the primary ERISA concern was protecting benefit entitlements rather than minimizing administrative burdens on plans by observing:

The dissent observes that the Washington statute permits a plan administrator to avoid resolving the dispute himself and to let courts or parties settle the matter. See post, at 6. *This observation only presents an example of how the costs of delay and uncertainty can be passed on to beneficiaries, thereby thwarting ERISA's objective of efficient plan administration.*<sup>566</sup>

The Court also observed that under the Washington statute, a

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562. *Id.* There is no reference for this characterization.

563. *Id.* (internal quotations omitted) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)). This sentence was used by the *Coyne* Court to describe the purpose of the ERISA General Preemption. The Court therein considered the purpose of the ERISA General Preemption in order to determine the significance of the phrase “employee benefit plan.” The Court did not therein characterize uniformity as a principal goal of ERISA.

564. *Id.* at 148-49 (emphasis added) (footnotes omitted).

565. *Id.* at 149.

566. *Id.* at 149 n.3 (emphasis added) (citations omitted).

plan making payments in accord with the beneficiary designation exposes the administrators to the risk that a claim may be made that the administrators had actual knowledge of the marital dissolution.<sup>567</sup> Furthermore,

[u]nder the text of ERISA, the fiduciary “shall” administer the plan “in accordance with the documents and instruments governing the plan[.]” . . . The Washington statute conflicts with this command because under this statute, the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow.<sup>568</sup>

The two dissenters asserted that family law may not be preempted unless the state statute does substantial damage to “clear and substantial federal interests”<sup>569</sup> as described in *Hisquierdo*.<sup>570</sup> In particular, plan administrators must resort to state law to determine who is a spouse or who is a child, so why may they not do the same to determine whether a participant wishes to continue to have a spouse as a beneficiary? If the plan sponsor wishes to avoid resort to state law, it can simply provide that state law is irrelevant in such determinations. In fact, in *Mackey* the Court permitted a far more significant burden to be imposed upon plans by allowing levies on welfare plan benefits.<sup>571</sup> The dissenters also argued that Washington’s law “furthers ERISA’s ultimate objective—developing a fair system for protecting employee benefits.”<sup>572</sup> In particular, they asserted that the revocation rule is consistent with the general rule of the Uniform Probate Code and prevents the former spouse from receiving an unexpected windfall, such as this case in which the divorce settlement provided that the participant retained one hundred percent of his pension benefits.<sup>573</sup> As a result of the majority’s decision, the former spouse thus received a windfall of \$80,000 six months after the divorce.<sup>574</sup> Finally, the dissent asserted that under the Court’s reasoning, slayer statutes, which in many states prevent designees who kill participants from being

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567. *Id.* at 149.

568. *Id.* at 151 n.4 (quoting 29 U.S.C. § 1104(a)(1)(D)).

569. *Id.* at 157-60 (Breyer, J., dissenting).

570. *Hisquierdo*, 439 U.S. at 581. However, immediately after that reference, the *Hisquierdo* Court referred to four instances where such damage was found and concluded that such damage was present in the case it was considering. *Id.* at 582-83. The Court therein prevented a spouse from using community property law to obtain a portion of the participant’s pension. *Id.*

571. *Mackey*, 486 U.S. at 841. However, the *Mackey* majority did not discuss the burden imposed on the plan or its participants by the garnishments.

572. *Egelhoff*, 532 U.S. at 158 (Breyer, J., dissenting).

573. *Id.* at 159 (Breyer, J. dissenting).

574. *Id.* (Breyer, J., dissenting). This is similar to the waiver argument made by the dissenters in *Ridgway*, where the majority also disregarded the argument.

entitled to plan benefits, would be preempted because they differ from state to state.<sup>575</sup>

The majority response was that “this [state] statute governs the payment of benefits, a central matter of plan administration.”<sup>576</sup> Like all federal entitlements, ERISA entitlements were established to serve a substantial federal interest. In this case, there is a desire to insure that participants and beneficiaries obtain the benefits due under the terms of an ERISA plan, which must meet ERISA’s requirements. Consequently, the state law undermines a substantial federal interest by calling for a disregard of a “core ERISA concern.”<sup>577</sup> Thus, the statute is preempted.

*C. The Supreme Court Holds in Kennedy that a Domestic Relations Order May Create an ERISA Claim that Is Not Based on State Law and Suggests that a Superseded Benefit Claim May Be Enforced Against a Distributed ERISA Benefit*

In 2009, the Supreme Court decided *Kennedy*, in which it held that a waiver by Liv, the participant’s former spouse, of pension benefits in their divorce decree did not affect her right to obtain the plan’s survivor benefits from the plan pursuant to the participant’s pre-divorce designation.<sup>578</sup> The Court rejected the premise of the plan administrator’s argument that ERISA preempted the waiver because the administrator asserted that the waiver violated the Alienation Prohibition.<sup>579</sup> The Court held that the waiver was not an alienation. Thus, it was not subject to the Alienation Prohibition.<sup>580</sup>

The Court also rejected the argument by the plan administrator that because the waiver was part of a domestic relations order it was a state law preempted by ERISA § 514(a), 29

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575. *Id.* at 160 (Breyer, J., dissenting). The dissent is correct about the prevalence and the differences among slayer statutes. However, that issue was not before the Court, which declined to decide the issue at such time. *Id.* at 152.

576. *Id.* at 148.

577. *Id.* at 147.

578. *Kennedy*, 555 U.S. at 289, 297. For an extensive and critical analysis of this decision, see Albert Feuer, *Did a Unanimous Supreme Court Misread ERISA, Misread the Court’s Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?*, 37 COMP. PLAN. J. 247 (2009) [hereinafter *Kennedy Analysis*], available at <http://ssrn.com/abstract=1485204> (last visited Aug. 13, 2012) (providing an extensive and critical analysis of *Kennedy*); Albert Feuer, *Will The Supreme Court Reinforce or Undermine Basic ERISA Principles When it Decides a Death Benefit Dispute?*, 3 CHARLESTON L. REV. 289 (2009), available at <http://ssrn.com/abstract=1337276> (last visited Aug. 13, 2012) (same).

579. *Kennedy*, 555 U.S. at 291-92, 297-98.

580. *Id.* at 292-98.



U.S.C. § 1144(a) (the “ERISA General Preemption”).<sup>581</sup> Without giving any citations, the Court declared:

But recognizing a waiver in a divorce decree would not be giving effect to state law; the argument is that the waiver should be treated as a creature of federal common law, in which case its setting in a state divorce decree would be only happenstance. A court would merely be applying federal law to a document that might also have independent significance under state law.<sup>582</sup>

In short, the Court held that the waiver was not subject to ERISA preemption because it was a federal common law waiver.<sup>583</sup>

However, the Court failed to set forth the terms of what it elsewhere describes as a “federal common law waiver embodied in a divorce decree that was not a [qualified domestic relations order] QDRO.”<sup>584</sup> Which parts of the divorce decree are discarded? If none, the waiver is identical to a domestic relations order that is preempted for failing to be a qualified domestic relations order (“QDRO”).<sup>585</sup> On the other hand, does the embedded common law waiver consist of anything other than the former spouse’s waiver? This uncertainty makes it difficult to determine whether the federal common law waiver has any effect other than letting the designee decline the benefit if the plan terms permit him to do so with such a waiver. The Court suggested that the waiver has such a limited effect in its footnote 10 discussed, *infra*.

The Court’s opinion also created two issues about the significance of its prior holdings that an ERISA benefit entitlement gives the one with the entitlement the right to retain such benefits against another person claiming an ownership interest in the benefit, which claim is superseded by the ERISA benefit entitlement.

First, the opinion never addressed the issue whether Liv had a benefit entitlement under the plan terms. Instead, after dismissing the arguments that ERISA preemption rendered the waiver a nullity, the opinion solely focused on whether the plan administrator fulfilled its fiduciary responsibilities by distributing the plan payment to Liv, which question was not before the Court. The Court found the administrator did because the Court held that the waiver was not consistent with the plan’s governing documents; thus, the plan fiduciaries could not follow its terms.<sup>586</sup> Unlike the *Egelhoff* and *Boggs* Courts, the *Kennedy* Court focused entirely on the administrative advantages of the requirement that the plan documents be followed. Thus, it referred to those

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581. *Id.* at 298-99.

582. *Id.* at 299.

583. *Id.* at 297.

584. *Id.* at 288.

585. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).

586. *Kennedy*, 555 U.S. at 299-304.

decisions as follows:

Two recent preemption cases are instructive here. *Boggs v. Boggs*, held that ERISA preempted a state law permitting the testamentary transfer of a nonparticipant spouse's community property interest in undistributed pension plan benefits. We rejected the entreaty to create "through case law . . . a new class of persons for whom plan assets are to be held and administered," explaining that "[t]he statute is not amenable to this sweeping extratextual extension." And in *Egelhoff* we held that ERISA preempted a state law providing that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. We said the law was at fault for standing in the way of making payments "simply by identifying the beneficiary specified by the plan documents," and thus for purporting to "*undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators*, (identifying "the conflict between the plan documents (which require making payments to the named beneficiary) and the statute (which requires making payments to someone else)").<sup>587</sup>

The dissenters in *Boggs* and *Egelhoff*, who argued that the recipients of plan distributions should not be entitled to keep those amounts, had used a similar approach. They emphasized that their rejected position would be the consistent with the ERISA goal minimizing the administrative burden because it had no effect on the plan's payment obligations.

Second, the opinion contained a footnote that raised questions about the Court's current and prior holdings. The Court had no reason to address whether the participant's estate could force the former spouse to give it the distributed benefit. The question was not before the Court, which had been informed that the former spouse had spent the plan distribution.<sup>588</sup> Thus, it would have been impractical for the participant's estate to seek to recover the benefit distribution from her, and the estate did not try to do so. Nor did the parties brief this theoretical issue for the Court. Nevertheless, in footnote 10 ("Footnote-10"),<sup>589</sup> the Court limited

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587. *Id.* at 302-03 (emphasis added) (citations omitted).

588. See Petitioner's Reply Brief on the Merits at 33-34, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (filed Aug. 7, 2008) (No. 07-636), available at [https://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-636\\_PetitionerReply.pdf](https://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-636_PetitionerReply.pdf). (last visited Aug. 13, 2012).

589. Compare Teia Moore, Comment, *When Happily Ever After is Not Ever After, After All: Rectifying the Plan Documents Rule Under ERISA to Benefit the Right Person*, 52 S. TEX. L. REV. 127 (2010) (discussing the implications of Footnote-10, and arguing that designee should be forced to give the distributed benefit to the default designee) with Albert Feuer, *The Kennedy Supreme Court Giveth with Footnote 13, but Taketh with Footnote 10, The Department*

its holding, and then addressed the issue as follows:

Despite our following answer to the question here [holding that the plan administrator was “not required to honor Liv’s waiver” and thus not required to distribute the pension benefit to the participant’s estate], our conclusion that § 1056(d)(1) does not make a nullity of a waiver leaves open any questions about a waiver’s effect in circumstances in which it is consistent with plan documents. Nor do we express any view as to whether the [participant’s] Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed. Compare *Boggs v. Boggs*, 520 U.S. 833, 853, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997) (“If state law is not preempted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit”), with *Sweebe v. Sweebe*, 474 Mich. 151, 156-159, 712 N.W.2d 708, 712-713 (2006) (distinguishing *Boggs* and holding that “while a plan administrator must pay benefits to the named beneficiary as required by ERISA,” after the benefits are distributed “the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds”); *Pardee v. Pardee*, 2005 OK CIV APP. 27, PP20, 27, 112 P. 3d 308, 313-314, 315-316 (2004) (distinguishing *Boggs* and holding that ERISA did not preempt enforcement of allocation of ERISA benefits in state-court divorce decree as “the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed”).<sup>590</sup>

In the first part of Footnote-10,<sup>591</sup> the Court declines to discuss the extent, if any, of the effectiveness of the former spouse’s waiver. Of course, a waiver that does not violate the cited Alienation Prohibition may violate other ERISA provisions.<sup>592</sup> However, in this case, the Court had concluded earlier, on the same page, that there was no such violation for the waiver at issue. Why, then would a waiver consistent with the plan’s governing documents not be effective? The Court held that because the waiver in this case was not consistent with those documents, it did not adversely affect the designee’s right to receive the

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of Labor & Many Lower Courts Miss the Decision’s Ultimate Meaning, 39 COMP. PLAN J. 111, 121-25 (2011) [hereinafter *Kennedy Footnote Analysis*], available at <http://ssrn.com/abstract=1859809> (last visited Aug. 13, 2012). (discussing the implications of Footnote-10, but arguing that the designee has the right to retain the distributed benefit).

590. *Kennedy*, 555 U.S. at 300 (emphasis added).

591. I did not recognize the significance of the first part of the footnote when I prepared the *Kennedy Analysis*, *supra* note 578, or the *Kennedy Footnote Analysis*, *supra* note 589.

592. For example, as discussed with respect to the *Campa* filings, *supra*, a DRO may be preempted for violating the Explicit ERISA Preemption even if it does not violate the Alienation Prohibition.

designated benefit from the plan.<sup>593</sup>

There seems to be only one logical explanation for the first part of Footnote-10. The Court appears to have decided that a federal common law waiver may be effective to the extent the individual wishes to use it to decline to receive property, as was done with each waiver in the decisions and treatises the Court cited in support of the proposition that ERISA permits federal common law waivers of ERISA benefits.<sup>594</sup> On the other hand, a waiver need not provide the basis for another party to wrest the waived property from the waiving individual, as the participant's estate was seeking to do. In short, the Court observed that it was not deciding the extent of effectiveness of a federal common law waiver.

In the second part of Footnote-10, the Court suggests it may be prepared to revisit its cited *Boggs*<sup>595</sup> holding and its *Egelhoff*<sup>596</sup> holding, which was not cited. Those decisions held that the owner of an ERISA benefit, which supersedes another person's ownership claim to the plan benefit, also supersedes that person's ownership claim to the benefit after its distribution by the plan. By undermining those precedents *sua sponte*, the Court seemed to be warning practitioners that it may be willing to reconsider those holdings.

### XIII. SUPREME COURT ISSUES

There are four major Supreme Court issues. First, may a preempted or superseded claim of ownership under family law be enforced after the ERISA benefits have been distributed?<sup>597</sup> Second, may DROs be used to obtain plan payments from any ERISA plan other than a Spousal Survivor Pension Plan if the plan terms do not provide for such payment? Third, must all pension plans, disability plans, and life insurance plans, not merely Spousal Survivor Pension Plans, follow DROs that satisfy the QDRO requirements? Fourth, are the QDRO requirements satisfied if the order directs the participant to make or maintain a designation rather than directing the plan to accept the designation? If not, those DROs, which are often used by DROs applicable to life insurance plans or by automatic restraining orders issued as part of domestic relations proceedings, would not

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593. *Kennedy*, 555 U.S. at 291.

594. *Id.* at 294-95.

595. *Boggs*, 520 U.S. at 845.

596. *Egelhoff*, 532 U.S. at 141.

597. A similar issue arises under the Federal Employees' Group Life Insurance Act. See, e.g., *Maretta v. Hillman*, 722 S.E.2d 32 (Va. 2012) (preempting a Virginia revocation upon divorce statute which applied only after the benefit distribution, and discussing the conflicting state decisions on this point).

be treated as effective by such plans, unless the plan terms provided for such deference.

*A. May a Preempted State Family Law or Superseded Common Law Claim of Ownership of an ERISA Entitlement Be Used to Wrest the Benefits From the Person Entitled to the Benefit Payment?*

The *Kennedy* Footnote-10 suggests that the Supreme Court may be ready to revisit the *Boggs* and the *Egelhoff* holdings, perhaps within the narrower context recently used by the Third Circuit, in *Estate of William Kensinger v. URL Pharma, Inc.*<sup>598</sup> The court therein also characterized a waiver by Adele, a designee, in a divorce decree, like Liv in *Kennedy*, as a federal common law waiver. The court then used the arguments from the decisions cited in Footnote-10 to help establish that Adele was compelled by such waiver to give Mr. Kensinger's estate her distributed ERISA entitlement.<sup>599</sup> It will thus be useful in the discussion, *infra*, to refer to the additional arguments presented by the court to uphold the Kensinger's Estate's claim against Adele, who unlike Liv, the *Kennedy* designee, had not dissipated the funds at issue.

The *Kensinger* court and the two state decisions cited in Footnote-10, which the *Kensinger* court used to bolster its conclusions, present three basic arguments against post-distribution protection: (1) an individual should fulfill his contractual obligation,<sup>600</sup> (2) the key concern of ERISA is the plan's administrative convenience rather than the protection of the benefits of plan participants and beneficiaries,<sup>601</sup> and (3) the *Boggs* decision contains a critical reservation.<sup>602</sup>

The contract argument<sup>603</sup> is somewhat difficult to grasp

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598. *Estate of William Kensinger v. URL Pharma, Inc.* 674 F.3d 131 (3d Cir. 2012). See generally Albert Feuer, *A Misguided Kennedy Offspring from the Third Circuit*, 31 TAX MGMT WKLY. J. 564 (Apr. 23, 2012), available at <http://ssrn.com/abstract=2047238> (last visited Aug. 13, 2012).

599. See generally *Estate of William Kensinger*, 674 F.3d 131 (analyzing the *Kennedy* decision).

600. *Id.*

601. *Id.* at 136-37.

602. *Id.* at 138.

603. *Id.* at 136; see also *Andochick v. Byrd*, 2012 U.S. Dist. LEXIS 65903, at \*20 (E.D. Va. May 9, 2012) (holding that the participant's estate may wrest pension and life insurance benefits from the participant's designee under the plan terms, and describing the contract right as "the right to enforce the waiver provision [in the separation agreement]"). The *Andochick* court rejected the claim that the contingent beneficiary under the plan terms could use the waiver to obtain the benefits from the plan or the designee. *Id.* at \*29 n.8. Permitting such wresting is contrary to the most rational interpretation of the participant's intentions, namely to have the plan terms, rather than his will's treatment of assets otherwise undisposed or intestate rules, determine who is entitled to keep his plan survivor benefit.

because the terms of the “contract,” i.e., the federal common law waiver, are uncertain.<sup>604</sup> First, the *Kennedy* Court did not describe the extent of the federal common law waiver that was not subject to ERISA preemption. As discussed, *supra*, we can only be confident that the participant may compel the ERISA plan not to pay him the waived benefit, as was the case with each waiver cited by *Kennedy*.<sup>605</sup> Thus, even if, *arguendo*, state case law about similar waivers in domestic relations orders pertaining to non-ERISA survivor benefits<sup>606</sup> could help determine the law for federal common-law waivers, its relevance is quite unclear.

The courts have consistently rejected contractual arguments to enforce a spousal waiver of survivor benefits that violates a pension plan's terms.<sup>607</sup> Such designees may not be ordered to give up their survivor benefits to the default designee.<sup>608</sup> The question is whether the protections for benefits provided under the terms of an ERISA plan similarly override a contract, such as the uncertain one at issue. *Kennedy* held those protections override a contract with respect to the plan distribution of a survivor benefit. Moreover, in Footnote-10 on which the *Kensinger* court is relying, the Supreme Court refused to rule whether such waiver could be used to wrest benefit payments from the former spouse, if the plan

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604. *But see* Geoff Ward, Note, *Clear, Voluntary, & Made in Good Faith: An Alternative to the Supreme Court's Incorrect Approach to Resolving Conflicts Between Common Law Waivers and ERISA Plan Documents in Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 64 TAX LAW 1003, 1010-17 (2011). The contract and the common-law waiver are treated as identical to the DRO. However, in such cases, as discussed, *supra*, the common law waiver would appear to be preempted by the ERISA General Preemption.

605. *Kennedy*, 555 U.S. at 294-95.

606. *See, e.g.*, *Life Ins. Co. of N. Am. v. Ortiz*, 535 F.3d 990 (9th Cir. 2009); *State Farm Life Ins. Co. v. Brockett*, 737 F. Supp. 2d 1146 (E.D. Cal. 2010) (discussing the California law regarding waivers, particularly its focus on: (1) reviewing all the terms of the decree or settlement agreement, and (2) determining why the policy owner did not subsequently change the designation at issue). *See generally* Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes by Gary*, 18 QUINNIPIAC PROB. L.J. 83, 93-99 (2004) (providing an overview of revocation-on-divorce statutes and the call for expansion).

607. *See, e.g.*, *Hagwood v. Newton*, 282 F.3d 285, 291-92 (4th Cir. 2002) (providing a good summary of the case law regarding consents to waivers of spousal benefits, and other situations where the law fails to enforce contracts that violate statutory standards).

608. *See, e.g.*, *Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992) (holding that a spouse may not be ordered to comply with a prenuptial waiver and waive the survivor benefit after the participant's death). *But cf.* *Callahan v. Hutsell, Callahan & Buchino P.S.C. Revised Profit Sharing Plan*, No. 92-5796, 1993 U.S. App. LEXIS 34005, at \*3-4 (6th Cir. Dec. 20, 1993) (remanding to determine if spouse breached a prenuptial agreement to execute a plan consent to a new beneficiary designation). The *Callahan* court failed to recognize that because consents are not beneficiary designations, it is irrelevant if there was such consent.

allowed such a waiver.<sup>609</sup>

In *Sweebe v. Sweebe*,<sup>610</sup> the Michigan Supreme Court held that the participant's former spouse, the recipient of benefits from an ERISA life insurance plan, had to give the benefit payment to the default designee because the recipient had agreed when she divorced the participant to waive that benefit.<sup>611</sup>

The *Sweebe* court distinguished its case from *Boggs* because *Boggs* involved pension benefits,<sup>612</sup> which is correct but irrelevant because *Egelhoff* reached the same conclusion with respect to distributed life insurance benefits. The court also asserted that its holding did not conflict with *Egelhoff* because it relied on an agreement, rather than a state law, and it did not change the administrator's responsibilities.<sup>613</sup> However, the ERISA General Preemption preempts any state law, not merely state statutes, but also state court decisions concerning state law, such as those by a Michigan court.<sup>614</sup> Thus, this is another distinction without a difference.

Finally, the *Sweebe* court distinguished *Egelhoff*, because the *Sweebe* court asserted that its holding did not change the administrator's responsibilities.<sup>615</sup> However, the Supreme Court in *Egelhoff* considered, and rejected, such an administrative focus. In particular, the Supreme Court held that the revocation by a divorce statute was preempted even though the Court reported that the lower court had "emphasized that the statute does not alter the nature of the plan itself, the administrator's fiduciary duties, or the requirements for plan administration."<sup>616</sup>

In *Pardee v. Pardee*,<sup>617</sup> the Oklahoma Court of Appeals held that a participant's widow, who received his pension survivor benefit, was required to give half the benefit to his former spouse in accord with the terms of a domestic relations order that was not a QDRO.<sup>618</sup> The *Pardee* court did not mention *Egelhoff* but attempted to distinguish *Boggs* as follows:

The facts in *Boggs* are distinguishable from those presented here. In *Boggs*, the facts involved *pre-distribution funds* still in the control of the plan administrator, as opposed to the present case where the

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609. *Kennedy*, 555 U.S. at 299 n.10.

610. *Sweebe v. Sweebe*, 712 N.W.2d 708 (Mich. 2006).

611. Such a provision is a part of "Michigan's statutory insurance clause," for inclusion in Michigan divorce decrees. *Partlow v. Person*, 798 F. Supp. 2d 878, 881 (E.D. Mich. 2011).

612. *Sweebe*, 712 N.W.2d at 713.

613. *Id.*

614. ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1).

615. *Sweebe*, 712 N.W.2d at 713.

616. *Egelhoff*, 532 U.S. at 145 (internal quotations omitted).

617. *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2004).

618. *See id.* at 315-16 (holding that ERISA does not provide protection for funds that have already been distributed).

pension plan funds were *distributed* to Pardee and were no longer in the hands of the plan administrator. The Supreme Court in *Boggs* emphasized this distinction by stating that "this case does not present the question whether ERISA would permit a nonparticipant spouse to obtain a devisable community property interest in benefits paid out during the existence of the community between the participant and that spouse."<sup>619</sup>

The Oklahoma court, like the *Kensinger* court,<sup>620</sup> misunderstood the *Boggs* reservation. The ownership claim of the *Boggs* children arose therein when their mother died, at which time the pension benefit had not been distributed.<sup>621</sup> The children did not try to enforce their claim, which relied on their mother's community property devisable interest, until after the participant's pension benefits had been distributed.<sup>622</sup> That is why the pension plan was not a party in *Boggs* or in *Pardee*. Similarly, the ownership claims in both *Kensinger* and *Pardee* originated when the divorce decree was issued, which was prior to the distribution of the pension benefit. As in *Boggs*, the claimants did not try to enforce their claim until after the pension benefits had been distributed. The case the *Boggs* Court did not decide was the one that would have arisen therein if the participant had received his pension benefits before the mother's death. Such benefits were not at issue in *Kensinger* or *Pardee*.

The *Kensinger* court also sought to distinguish *Boggs* further with its assertion that the Supreme Court therein used the Alienation Prohibition to preclude the testamentary transfer by the participant's spouse before the benefit was distributed.<sup>623</sup> In contrast, the *Kensinger* court asserted it was considering a post-distribution transfer.<sup>624</sup> However, this was not the basis of the *Boggs* decision or of the similar decision in *Egelhoff*. The Alienation Prohibition could have not been the basis in *Egelhoff*, because the Alienation Prohibition does not apply to the life insurance benefit at issue. Moreover, in both cases, the Supreme Court held that post-distribution transfers.

The *Kensinger* court also referred to some decisions that it asserted had permitted creditors to obtain distributed benefit entitlements, and asked how they may be distinguished.<sup>625</sup> There are two important distinctions. None can reverse the Supreme Court because all are by lower courts. Second, all but one of these lower court decisions involved creditors rather than parties

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619. *Id.* at 313 (emphasis in original) (citations omitted).

620. *Estate of William Kensinger*, 674 F.3d at 138-39.

621. *Boggs*, 520 U.S. at 836-37.

622. *Id.* at 834-35.

623. *Estate of William Kensinger*, 674 F.3d at 138.

624. *Id.* at 138.

625. *Id.* at 137-38.



claiming the ownership of the benefit. The issue in those cases was whether the Alienation Prohibition prohibited a creditor from recovering distributed benefit payments. In contrast, the issue in *Kensinger* was whether a party whose ownership claim to an ERISA benefit that had been superseded may force the owner of the benefit to pay the party the benefit that the owner received from the plan.<sup>626</sup> The non-creditor decision of *Trucking Employees of North Jersey Welfare Fund v. Colville, Inc.*,<sup>627</sup> supports the *Boggs* approach. That decision permitted a plan to recover a benefit overpayment, i.e., the court enforced a superior claim to an ERISA benefit entitlement.<sup>628</sup>

Thus, the following concluding words of the *Boggs* decision also apply to the *Pardee* and *Kensinger* fact patterns, whether the superseded ownership claim rests on state law or federal common-law:

Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. *It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits.* Their state-law claims are pre-empted. The judgment of the Fifth Circuit is Reversed.<sup>629</sup>

Thus, there seems to be little reason to reverse the Supreme Court holdings that a person may not obtain ERISA benefits from either the plan or the benefit recipient on the basis of an ownership claim to the benefits that is superseded by the plan terms.<sup>630</sup> On the other hand, the post-*Kennedy* lower courts have divided on this

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626. *Id.* at 134.

627. *Trucking Emps. of N.J. Welfare Fund, Inc. v. Colville*, 16 F.3d 52 (3d Cir. 1994).

628. *But see* *Great-W. Life & Annuity Ins. Co. v. Knudsen*, 534 U.S. 204 (2002); *Sereboff v. Mid-Atl. Med. Servs.*, 547 U.S. 356 (2006) (describing conditions under which benefit overpayments may be recovered).

629. *Boggs*, 520 U.S. at 854 (emphasis added).

630. *Cf.* David S. Lebolt, *Making the Best of Egelhoff: Federal Common Law for ERISA-Preempted Beneficiary Designations*, 28 J. PENSION PLAN. & COMPLIANCE 29, 38-42 (2002) (arguing that the *Egelhoff* Court's focus on fiduciary payment responsibility leaves room for the application of a constructive trust to the distributed proceeds); Sarabeth A. Rayho, *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans*, 106 MICH. L. REV. 373 (2007) (arguing like the *Pardee* court that ERISA permits a constructive trust to be imposed on the distributed proceeds without adequately addressing the *Egelhoff* or *Boggs* decisions); Ward, *supra* note 604, at 1017-19 (2011) (arguing that constructive trusts are still viable after the *Kennedy* decision); *see also* *In re Estate of Paul J. Sauer*, 971 A.2d 1265, 1271 n.4 (Pa. 2009), *rev'd in part*, 32 A.3d 1241 (Pa. 2011) (reversing the lower court's acceptance of the *Rayho* argument on the grounds that ERISA preempted such a state law remedy).

issue. They have generally permitted designees to retain distributed pension death benefits but not life insurance benefits.<sup>631</sup>

*B. Are Domestic Relations Orders Always Enforceable Against ERISA Plans Other Than Pension Plans Required to Provide Spousal Survivor Benefits?*

Although this position has not been widely embraced, a unanimous Supreme Court referred positively to *Metropolitan Life Ins. Co. v. Wheaton*,<sup>632</sup> in which the concurrence presented by the Seventh Circuit's Chief Judge Daniel A. Manion took this position.<sup>633</sup> This was the *Campa* position, is a logical consequence of *Mackey*, and is a variation of a view expressed by the dissenters in *Boggs* and *Egelhoff*. Thus, it merits a full and serious discussion.

Judge Manion characterized domestic relations law as a law of general applicability, similar to the general garnishment law, which the Supreme Court held, without using such phrase in *Mackey*<sup>634</sup> that an ERISA plan, that was not a Spousal Survivor Pension Plan, must defer to. In both cases, the limits on the general law were applicable only to Spousal Survivor Pension Plans. Thus, Judge Manion asserted, ERISA plans other than Spousal Survivor Pension Plans, must follow all DROs, whether or not the orders meet any of the QDRO requirements.<sup>635</sup> However, the reasoning of the *Mackey* decision has been repudiated by subsequent Supreme Court decisions with respect to state family law, and thus its relevance is quite questionable.

The "generally applicable law" exception to ERISA Preemption was found applicable to a California state unrelated business tax that mirrored the federal unrelated business tax, although with a much lower tax rate, by the Second Circuit decision, *Hattem v. Schwarzenegger*.<sup>636</sup> The court therein referred to *Mackey* although that decision never used the phrase "generally applicable law." However, the Second Circuit analysis cited<sup>637</sup> the generally applicable law analysis of *Egelhoff v. Egelhoff*.<sup>638</sup> In that

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631. *Kennedy Footnote Analysis, supra* note 589, at 121-25; *Partlow*, 798 F. Supp. 2d 878, Flesner v. Flesner, 2012 U.S. Dist. LEXIS 4615 (S.D. Tex. Jan. 13, 2012) (consisting of post-article life insurance decisions also holding that ERISA does not protect distributed benefits with similar arguments to the ones discussed above).

632. *Metro. Life Ins. Co. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994).

633. *Id.* at 1086 (Manion, C.J., concurring).

634. *Mackey*, 486 U.S. at 825.

635. *Metro. Life Ins. Co.*, 42 F.3d at 1084.

636. *Hattem v. Schwarzenegger*, 449 F.3d 423 (2d Cir. 2006).

637. *Id.* at 430.

638. *Egelhoff*, 532 U.S. at 141.

case, the Supreme Court majority did not mention *Mackey*.<sup>639</sup> The majority also did not therein hold or declare that generally applicable state laws are exempt from ERISA preemption. Instead, the majority declared:

In other words, unlike generally applicable laws regulating “areas where ERISA has nothing to say,” *Dillingham*, 519 U.S. at 330, which we have upheld notwithstanding their incidental effect on ERISA plans, see, e.g., *ibid.* [holding that prevailing wage statutes applicable to all apprentice plans without making any reference to whether the Plan is an ERISA Plan], this statute governs the payment of benefits, a central matter of plan administration.<sup>640</sup>

The *Hattem* decision has been strongly criticized for its analysis of whether the relation between a state tax and ERISA plans is too tenuous, remote, or peripheral.<sup>641</sup>

The *Egelhoff* Court held that a state family law statute revoking a designation upon divorce was preempted because the state law conflicted with the fundamental requirement that ERISA plan participants and beneficiaries have enforceable entitlements to benefits under the plan terms. Under the same reasoning, a state court order that attempted to revoke a participant’s designation would also be preempted, as would a state DRO directing that life insurance benefit payments be made to a person other than the participant’s designee, such as the one at issue in *Wheaton*.<sup>642</sup> Thus, *Mackey* does not imply that ERISA Plans (other than Spousal Survivor Pension Plans) must follow all state DROs. Moreover, such an implication would fly in the face of REACT’s explicit purpose of giving a participant’s spouse, former spouse, and other dependents particularly good access to benefits from Spousal Survivor Pension Plans, as discussed, *supra*.

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639. *But see id.* at 157-58 (Breyer, J., dissenting) (discussing *Mackey*).

640. *Id.* at 147-48.

641. See, e.g., Yonatan Gelblum, Note, *Hattem v. Schwarzenegger: Terminating Preemption Challenges to State Taxation of ERISA’s Plans’ Unrelated Business Taxable Income*, 60 TAX LAW 215, 232 (2006) (criticizing the Court’s analysis but concluding that the result may have been correct because the state UBTI tax, which piggybacked on the federal tax, has a tenuous effect on ERISA plans); see also Mark F. Sommer, Mark A. Loyd, and Jennifer Y. Barber, *O Preemption, Where Art Thou?: ERISA’s Lost State and Local Tax Preemption*, 64 TAX LAW 783 (2011) (updating and expanding the Gelblum framework for analyzing whether ERISA preempts state tax laws).

642. However, the DRO in *Wheaton* did not direct the plan to pay life insurance payments to a specified person, but directed the participant to so change the designation. *Wheaton*, 42 F.3d at 1081-82.

*C. Are Disability Plans, Life Insurance Plans, and Pension Plans that Are Not Spousal Pension Plans Required to Follow Domestic Relations Orders that Satisfy the QDRO Requirements if the Plan Terms Do Not Provide for Such Deference?*

Six of the seven circuits that have considered this issue have decided that any ERISA plan, not merely Survivor Spousal Pension Plans, must follow a DRO that meets the QDRO requirements,<sup>643</sup> and some cite the *Boggs* discussion of the enhanced protection for spouses and dependents provided by REACT.<sup>644</sup> Many, but not all commentators have taken a similar position.<sup>645</sup> The strongest arguments in favor of this position were presented in 1994 by Judge Richard A. Posner's majority opinion for *Metropolitan Life Insurance Co. v. Wheaton*.<sup>646</sup> Thus, the opinion merits a full and serious discussion.<sup>647</sup>

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643. *Barrs v. Lockheed Martin Corp.*, 287 F.3d 202 (1st Cir. 2002); *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002); *Metro. Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998); *Metro. Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997); *Wheaton*, 42 F.3d at 1080; *Carland v. Metro. Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991). The Third Circuit observed in dicta that "every Court of Appeals" that had addressed that question had held that QDROs applied to life insurance plans and referenced these cases. *Metro. Life Ins. Co. v. Price*, 501 F.3d 271 (3d Cir. 2007); *but see Brown v. Con. Gen. Life Ins. Co.*, 934 F.2d 1193 (11th Cir. 1991) (holding that ERISA preempted such an order without explanation). Thus, courts in the Eleventh Circuit have ruled with the majority, such as *USable Life v. Brown*, No. 2:08-CV-442-WKW, 2009 U.S. Dist. LEXIS 24633 (M.D. Ala. Mar. 24, 2009).

644. *Price*, 501 F.3d at 274; *Barrs*, 287 F.3d at 208-209; *Bigelow*, 283 F.3d at 441.

645. *See, e.g.*, COMPLETE QDRO HANDBOOK, *supra* note 399, at 92; J. JORDEN ET AL., HANDBOOK ON ERISA LITIGATION, 5-109 n.417 (3d ed. 2012) (listing cases with such holding); Elizabeth M. Wells, *State Domestic Relations Orders Under ERISA and the Code-An Unfortunate Hodgepodge*, N.Y.U. REV. EMP. BEN. 15-7, 15-12-15-15 (2011) (showing how legislative materials and policy arguments may be used to advocate broad coverage); *but cf.* GARY SHULMAN, THE QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK §§ 18.01, 18-4, 18-5 (3d ed. 2006 & Supp. 2012) [hereinafter QDRO HANDBOOK] (stating that welfare plans are not subject to the QDRO requirements).

646. *Wheaton*, 42 F.3d at 1084. The DRO at issue required the participant to designate his children from a divorced wife as the beneficiaries under an ERISA life insurance plan. However, at the time of the participant's death his widow was his designee.

647. For a full discussion of all the arguments presented therein see *Survivor Benefit Entitlements*, *supra* note 472. *See generally* Teresa S. Renaker, *Employee Welfare and Other Nonpension Benefits Section 9.14-Preemption Exception for QDROs and Applicability to Welfare Plans*, DIVIDING PENSIONS AND OTHER EMPLOYEE BENEFITS IN CALIFORNIA DIVORCES (CEB 2007) (providing an excellent review of the then recent case-law in this area); Albert Feuer, *Who Is Entitled to Life Insurance Benefits and Top-Hat Benefits from an ERISA Plan Following a Divorce or a Marital Separation?*, 41 N.Y. ST. B.A. FAM. L. REV. NEWSLETTER 10, 10-12 (Fall, 2009) and 31 N.Y. ST. B.A. ONE ON ONE 8, 8-10 (Winter 2009) [hereinafter Feuer *Life Insurance Article*], available at <http://ssrn.com/abstract=1535733> (last visited Aug. 13, 2012).

Judge Posner focused on the interaction of the following sentence defining a QDRO:

(B) *For purposes of this paragraph [(3) which describes QDROs for QDRO Pension Plans]—*

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

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

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

(ii) the term “domestic relations order” means . . .<sup>648</sup>

with the following ERISA exclusion from the General ERISA Preemption.

(b)(7) Subsection (a) of this section [the General ERISA Preemption] shall not apply to *qualified domestic relations orders (within the meaning of section 206(d)(3)(B)(i) of this title)*, qualified medical child support orders (within the meaning of section 609(a)(2)(B)(ii) of this title). . . .<sup>649</sup>

Judge Posner’s *Wheaton* decision summarized his linguistic analysis as follows:

We conclude that *the literal reading of ERISA* as amended by the Retirement Equity Act, a reading that establishes an exception to preemption for qualified domestic relations orders pertaining to all ERISA plans, not just pension plans, *makes more practical sense than a flexible reading* that gives weight to the history of the provision and to the fact that the provisions that surround the definition of qualified domestic relations orders, including the antialienation provision, are limited to pension plans, though the definition is not.<sup>650</sup>

This explicit disregard for the traditional statutory interpretation rules<sup>651</sup> reflected Judge Posner’s underlying concern that if QDROs are not applicable to life insurance plans, Congress would have

648. ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B) (emphasis added).

649. ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7) (emphasis added).

650. *Wheaton*, 42 F.3d at 1084 (emphasis added).

651. *See, e.g.*, *United States v. Great N. Ry.*, 287 U.S. 144, 154-55 (1932) (“In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.”); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220-21 (1991) (“Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of subsection (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service”).

made it more difficult for a divorcing spouse to change a life insurance designation than a pension plan designation, which can be changed with a QDRO. This seemed so *prima facie* absurd to Judge Posner that he dismissed the possibility.

Judge Posner disregarded the possibility that Congress believed its declarations that pension benefits were so important that spousal survivor provisions and divorcing spouse designation access was needed for those plans with broad participation. In contrast, Congress may have believed that other pension plans, such as Top-Hat Plans, disability plans, and life insurance plans provided less critical benefits. Thus, Congress permitted sponsors of those plans to decide the conditions, if any, under which those plans would provide spousal survivor benefits and divorcing spouse designation access. However, regardless of the congressional motivation or the wisdom of the congressional choices, it is the role of the courts to defer to such legislative choices.

Judge Posner began by observing that the QDRO definition section cited by the exclusion refers to “a plan” rather than “a pension plan.”<sup>652</sup> This he asserted means the reference is to any ERISA plan not to any Spousal Survivor Pension Plan. Therefore, Judge Posner asserted ERISA preempts no DRO meeting the QDRO requirements.<sup>653</sup> Thus, all ERISA plans, including the life insurance plan at issue in *Wheaton*, must follow the designation terms of such a DRO.<sup>654</sup>

This linguistic analysis is quite questionable. Judge Posner failed to explain why an ERISA plan was implied by use of the word “plan” in a sentence explicitly limited by its first five words to a paragraph directed at Spousal Survivor Pension Plans. Moreover, the sentence is contained within a paragraph directed by its first subparagraph at Spousal Survivor Pension Plans,<sup>655</sup> which paragraph is in turn in a part of Title I of ERISA explicitly limited to such plans.<sup>656</sup> Such deliberate disregard of the entire sentence in which the definition is presented violates the long-standing Supreme Court injunction: “[W]e must not be guided by a single sentence or *member of a sentence*, but look to the provisions of the whole law, and to its object and policy.”<sup>657</sup>

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652. *Wheaton*, 42 F.3d at 1082-84.

653. *Id.* at 1083.

654. *Id.* at 1084.

655. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).

656. ERISA § 201, 29 U.S.C. § 1051 restricts Part 2 of Subtitle B of Title I of ERISA, which consists of ERISA §§ 201-211, 29 U.S.C. §§ 1051- 1061 to such Plans.

657. *Dada v. Mukasy*, 554 U.S. 1, 16 (2008) (citing *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850) (emphasis added)). In the more recent case, the Supreme Court held that an alien who agrees to voluntarily depart the country retains the right to reopen proceedings regarding the alien's removal

The "literal" interpretation must also be rejected because it violates "a cardinal principle of statutory construction" set forth by the Supreme Court that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."<sup>658</sup>

If, as asserted by Judge Posner, ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B), in concert with ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7), provides that a DRO meeting the QDRO requirements determines benefit payment obligations for all ERISA Plans, and ERISA preempts other DROs, then those provisions determine such obligations for the ERISA plans that are Spousal Survivor Pension Plans. However, that interpretation would render superfluous ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A), which provides that (1) QDROs determine benefit payment obligations for Spousal Survivor Pension Plans, and (2) no other DROs may determine benefit payment obligations for Spousal Survivor Pension Plans.<sup>659</sup> Moreover, that interpretation leads to absurd results, such as (1) plans other than Spousal Survivor Pension Plans, such as Top-Hat Plans, need not suspend benefit payments while a determination of the DRO's compliance with the QDRO requirements is being made; (2) plans other than Spousal Survivor Pension Plans, such as disability plans, need not provide review procedures for DROs that purport to be QDROs; and (3) plans other than Spousal Survivor Pension Plans, such as life insurance plans, may have to pay benefits twice even if their fiduciaries fulfilled their fiduciary responsibilities in determining if a DRO was a QDRO and making payments consistent with those determinations.

Congress explicitly considered and rejected Judge Posner's interpretation when it enacted ERISA § 206(d)(3)(L), 29 U.S.C. § 1056(d)(3)(L). That subparagraph limits the application of the paragraph (d)(3), which includes the cited QDRO definition section, to Spousal Survivor Pension Plans. Subparagraph (d)(3)(L) was enacted together with a similar addition to the corresponding tax-qualification Code Section as the part of section 1898 of the Tax Reform Act of 1986, "Technical Corrections to the Retirement Equity Act [which introduced the QDRO Provisions]."

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from the country. See also Feuer, *Life Insurance Article*, *supra* note 647, at 11-12 (discussing the purpose of the two provisions interpreted by Judge Posner).

658. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The Court observed the statute contained a narrow discovery exception to starting time of the two-year statute of limitations of the Fair Credit Reporting Act. The exception was limited to cases of a misrepresentation by a creditor. The Court therein rejected the assertion that a far broader general discovery rule could also delay the starting time because this would make the language establishing the narrow exception superfluous. *Id.*

659. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

<sup>660</sup> Congress intended, as discussed, *supra*, that the two added provisions “clarif[y] that the qualified domestic relations provisions do not apply to any plan to which the assignment or alienation restrictions [the Alienation Prohibition] do not apply.”<sup>661</sup> Thus, this limitation clarifies that ERISA Plans other than Spousal Survivor Pension Plans may not follow DROs that satisfy the QDRO requirements set forth above, unless the plan terms require such deference, because such plans are ERISA plans, but not Spousal Survivor Pension Plans. This limitation is consistent with the preface of REACT, and the Presidential signing statement, discussed, *supra*, and the congressional reports that accompanied the 1984 adoption of the Retirement Equity Act, which introduced the QDRO Provisions. For example, the Senate Report referred only to pension plans when it described the significance of the QDRO provisions.<sup>662</sup>

*D. Are the QDRO Requirements for Domestic Relations Orders Satisfied if the Order Does Not Require the Relevant Plan to Make the Benefit Payment to an Alternate Payee but Requires the Participant to Maintain, Make, or Refrain from Making Such Designation, Such as a Customary Restraining Order Issued to Both Parties in a Domestic Relations Proceeding?*

At least two district courts have clashed over whether if, *arguendo*, the QDRO requirements apply to life insurance plans, a domestic relations order that directs the participant to make or maintain a designation meets the QDRO requirements. This was an undiscussed feature of the DROs at issue in each of the six circuit decisions that held that any ERISA plan, not merely Survivor Spousal Pension Plans, must follow a DRO that meets the QDRO requirements.<sup>663</sup> The same issue arises with respect to the automatic restraining orders often issued to parties at the start of domestic relations proceedings, as discussed, *infra*. Thus, the issue merits a full and serious discussion.

In 2011, an Ohio district court in *LaVelle v. LaVelle*,<sup>664</sup> held that a domestic relations order that directs the participant to make a designation was not effective with respect to an ERISA life insurance plan. Thus, the participant's second wife, and life insurance designee was entitled to retain the plan benefits she received following the participant's death. The participant violated the terms of a divorce decree, which had been issued five years

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660. Pub. L. No. 99-514, § 1898(c)(4), 100 Stat. 2948 (1986).

661. *Survivor Benefit Entitlements*, *supra* note 466, at 977.

662. S. REP. NO. 98-575, at 18-23 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2549, 2564-69.

663. *See supra* cases cited in note 591.

664. *LaVelle v. LaVelle*, No. 1:11 CV 600, 2011 U.S. Dist. LEXIS 74890 (N.D. Ohio July 12, 2011).



before the second marriage, and required him to “[m]aintain and pay the premiums for life insurance upon his or her life currently in effect and . . . [to] designate the children [who remained minors at the time of the participant’s death] as irrevocable beneficiaries thereon. . . .”<sup>665</sup>

The court decided the decree did not meet the QDRO requirements because it did not identify an ERISA policy or “expressly recognize a party’s right to the proceeds of an ERISA policy.”<sup>666</sup> The court did not explain itself further. In contrast, a New Jersey district court held in 2003 that those requirements were met with respect to the death benefits from a pension plan in *Smith v. Estate of Smith*.<sup>667</sup> In particular, the court held that the following language recognized the former spouse’s right to the participant’s survivor benefits:

Husband therefore does hereby irrevocably assigns [sic] to Wife the sum of 50% of his said pension. The E.I. DuPont DeNemours Company is hereby authorized to pay to Wife 50% of Husband’s pension entitlement, directly to the Wife, at the time Husband begins to receive the said pension. If, a death benefit is paid in lieu of the pension then a minimum of 50% of that death benefit shall be paid to wife.<sup>668</sup>

The difficulty with a “make or maintain a designation” provision is that QDROs are beneficiary designations that determine which beneficiaries and benefits the plan will pay.<sup>669</sup> Thus, a DRO that is a QDRO must create, recognize, or assign under state law the “right to receive” all or a portion of the benefits payable with respect to a participant.<sup>670</sup> In particular, if the plan does not pay the person designated on the face of the order, the person may obtain relief under state law from the plan.<sup>671</sup> This is in fact the case with a classical QDRO applicable to the pension benefits that are most similar to life insurance proceeds, the survivor benefits of a pension plan. Such a DRO declares that a specified person has a right to those survivor benefits.<sup>672</sup> This is not the case with an order that a participant designate or refrain from designating a

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665. *Id.* at \*11.

666. *Id.* at \*12.

667. *Smith v. Estate of Smith*, 248 F. Supp. 2d 348 (D. N.J. 2003).

668. *See id.* at 351 (finding that the clause established a right to fifty percent of the death benefit).

669. ERISA §§ 206(d)(1)(A), (J), 29 U.S.C. §§ 1056(d)(1)(A), (J).

670. ERISA §§ 206(d)(1)(B), (J), 29 U.S.C. §§ 1056(d)(1)(B), (J).

671. ERISA may, however, excuse the plan from its violation of such payment obligation if the plan fiduciaries had satisfied their fiduciary obligations when making such payment. ERISA § 206(d)(3)(I), 29 U.S.C. § 1056(d)(3)(I).

672. Sample QDROs can be found in section E of IRS Notice 97-11, 1997-1 C.B. 379, which was prepared pursuant to Congress’s instructions in section 1457(a)(2) of the Small Business Job Protection Act of 1996, P.L. No. 104-188.

specified person as his beneficiary, as is done with the life insurance DROs. The specified person has no right from the face of the order to obtain relief under state law from the plan if the plan administrator follows the plan terms and refuses to pay him or her the life insurance proceeds. Instead, the person may have recourse against the participant for breaching an obligation.

In 2007, the District Court of Massachusetts in *Unicare Life & Health Insurance Co. v. Phanor*<sup>673</sup> held that a domestic relations order that directs the participant to maintain a designation was effective with respect to an ERISA life insurance plan. The court held that the QDRO requirements were satisfied by an automatic restraining order ("ARO") issued as standard practice in Massachusetts divorce proceedings. The ARO provided that it "PROHIBITS either party to a complaint for divorce or separate support from: . . . (3) Directly or indirectly changing the beneficiary of any life insurance policy, pension or retirement plan, or pension or retirement investment account, except with the written consent of the other party or by Order of the Court."<sup>674</sup>

During the divorce proceeding, which the participant had initiated, the participant violated the court order and changed his ERISA life insurance designee from his wife to his girlfriend. He passed away before the divorce was obtained.

Although, the court conceded that ARO satisfied none of the specific QDRO requirements<sup>675</sup> the court found it to be a QDRO because it held that literal compliance was not needed.<sup>676</sup> Thus, the proceeds, which the plan had interpleaded were released to the participant's widow. The employer argued that the ARO could not be a QDRO because it created no rights but only imposed an obligation on the participant.<sup>677</sup> The court responded that the courts could do more than hold the participant in contempt, but could grant equitable relief by imposing a constructive trust on the proceeds so the specified person would receive the life insurance in the same manner as they would with respect to life insurance that is not part of an ERISA plan but is subject to a similar state domestic relations order.<sup>678</sup> The court also observed that if the ARO is preempted the result would be unchanged because it asserted federal courts have permitted equitable actions against distributed plan benefits.<sup>679</sup> However, as was discussed, *supra*,

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673. *Unicare Life & Health Ins. Co. v. Phanor*, 472 F. Supp. 2d 8 (D. Mass. 2007).

674. *Id.* at 9.

675. *Id.* at 11-12. The application of the QDRO requirements was supported by references to the relevant circuit and *Boggs's* statements about how the QDRO provisions protect non-participants in divorce actions. *Id.* at 10.

676. *Id.* at 12-14.

677. *Id.* at 11, 14.

678. *Id.* at 15-16.

679. *Id.* at 16 (referring to Cent. States, Se. & Sw. Areas Pension Fund v.

with respect to the first Supreme Court issue, the Supreme Court held in both *Boggs*<sup>680</sup> and *Egelhoff*<sup>681</sup> parties who are not entitled to benefits directly from ERISA plans are not entitled to those benefits indirectly from the recipients. Thus, such equitable relief would not be available.

XIV. STATE LAW ISSUES REGARDING COMMUNITY PROPERTY,  
ELECTIVE SHARES, STATE COURT AUTHORITY, FOR WHICH COURT  
DECISIONS APPEAR TO BE LACKING

In *Boggs*,<sup>682</sup> the Supreme Court held that ERISA preempted the community property ownership claim of the children of Isaac, the participant, which they asserted accrued when their mother, Dorothy, died, before any of the pension benefits had been distributed.<sup>683</sup> However, Sandra, the participant's second wife, was entitled to the property in accord with his designations and pursuant to his lifetime distributions.<sup>684</sup> The children did not try to enforce the claim based on their mother's community property devisable interest against the participant's second wife until after the participant's death.<sup>685</sup> They then only sought the benefits distributed by the pension plan. The Court concluded that the ERISA protection of benefit entitlement applied to these distributions because ERISA is designed to prevent the diversion of plan benefit entitlements, regardless of whether the diversion occurs before or after the distribution.

Under the children's analysis, their mother had a community interest in the participant's community property, which she devised to them at her death.<sup>686</sup> If that devised property had a value of \$100,000 when it was distributed to their step-mother after the participant's death, they would have claimed to be entitled to \$100,000 from her plus presumably any subsequent earnings on the \$100,000. The Supreme Court rejected such a claim, and the dissent's proposal that Sandra, the widow, be permitted to keep the \$100,000 she received, but only be required to pay \$100,000 to the extent she had other assets that could be used to make such payment.<sup>687</sup>

In short, the Court concluded that the participant's pension

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Howell, 227 F.3d 672 (6th Cir. 2000)).

680. *Boggs*, 520 U.S. at 833.

681. *Egelhoff*, 532 U.S. at 141.

682. *Boggs*, 520 U.S. at 833.

683. *Id.* at 836-37.

684. *Id.*

685. *Id.* at 837.

686. The devise was not an immediate payment at her time of death but "naked ownership in the remaining two-thirds [Isaac received the other third], subject to Isaac's usufruct." *Id.* at 836-37.

687. *Id.* at 870 (suggesting this is what Louisiana law provides).

benefit was not treated as community property, but as the participant's separate property (the only alternative under community property systems). ERISA determines whether Dorothy, his wife, may affect the benefit distribution to the participant.<sup>688</sup> For a plan other than a Spousal Survivor Pension Plan, she has no such rights unless the plan gives her such rights. For a profit-sharing plan, she has no such rights unless the plan gives her such rights. For all other Spousal Survivor Pension Plans, the distribution must be made in the form of a joint and survivor annuity unless she consents to another form.

The *Boggs* Supreme Court stated as discussed, *supra*, within *Kensinger*:

[b]oth parties agree that the ERISA benefits at issue here were paid after Dorothy's death, and thus this case does not present the question whether ERISA would permit a nonparticipant spouse to obtain a devisable community property interest in benefits paid out during the existence of the community between the participant and that spouse.<sup>689</sup>

This is the customary Supreme Court reservation that the Court would not decide a question that is not before it and presumably was not briefed.

Upon reflection, there seems little reason for the results to change if the children's claim had been based on a claim that their mother had a devisable interest in pension benefits that had been distributed before her death. The above example illustrates why this is a difference without a distinction. The ERISA concept that protects benefit entitlements before and after their plan distribution, implies the benefit entitlements of Sandra and Isaac's children should not be affected by whether Isaac died a day before he withdrew the money, or the day after he withdrew the money.<sup>690</sup> If the pension benefits were treated as separate property while in the pension plan, there is no alchemy that can or should transmute it into community property immediately following its distribution, and thereby reduce the participant's ownership interest in the benefits by fifty percent. *Boggs*, *Free*, and *McCune* all rejected similar alchemy claims.

However, there seems to be no case law addressing this issue. Similar questions arise with respect to state elective share laws. There seems to be no case law on the interaction of these laws with ERISA benefit entitlements. Suppose such a law entitles the surviving spouse to elect to obtain one-third of the elective share, which is defined as the probate estate plus pension assets.

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688. ERISA §§ 205(a), (b), 29 U.S.C. §§ 1055(a), (b). These apply only to Spousal Survivor Pension Plans.

689. *Boggs*, 520 U.S. at 845.

690. We are assuming there is no applicable QDRO.

Suppose the decedent owned \$300,000 in probate assets and \$1,500,000 in accrued benefits in a Top-Hat Plan, and leaves it all to Gloria, his girl-friend, when he is married to Wendy. Suppose under the law, Wendy, the surviving spouse, could elect to receive one-third of the sum of \$1,800,000,<sup>691</sup> which is \$600,000. However, ERISA would preempt Wendy's state right to an ownership interest in any portion of the Top-Hat Plan benefits, except, to the extent that she was the beneficiary under the terms of the plan, which she was not. Thus, Gloria would receive at least \$1,500,000, and Wendy would obtain at most \$300,000.

Under the extension of the *Boggs* reasoning described, *supra*, the results would not change if the participant had received the Top-Hat Plan benefits and placed them in what turned out to be his probate assets at the time of his death.

Nor would any of the results change if the Top-Hat Plan had instead been a Spousal Survivor Pension Plan. However, many elective share laws (1) add to the elective estate for pension benefits from a Spousal Survivor Pension Plan if the spouse has consented to the participant's waiver of those benefits pursuant to the terms of such plan, and (2) treat the spouse as having received such amounts.<sup>692</sup> Thus, under such a law, Wendy will be treated as though she received \$1,500,000, and thus be entitled to no elective share, and Gloria would be entitled to keep the \$1,800,000 she received as the participant's designee.

Another question arises. Does ERISA produce a result even closer to the community property treatment, which would treat the pension benefits as unavailable for any payment of survivor benefits because such property is not treated as community property but as separate property? The rationale for such treatment is that the elective share treatment should disregard what happens with ERISA entitlements that are governed by ERISA. In particular, Wendy would be entitled to \$100,000, which is one-third of the participant's probate estate, and Gloria would be entitled to \$200,000 from that estate, together with the \$1,500,000 from the pension plan. This way, Gloria suffers no reduction in the value of the property, which she is otherwise entitled to, because of her pension benefit entitlement. Additionally, Wendy suffers no reduction in her elective share because she may have consented to the participant's waiver of her interest in such pension benefits, which consents do not require any knowledge of the participant's total property unlike the waivers required by most elective share laws. Such treatment would be consistent with the Supreme Court's treatment of the

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691. The sum of \$300,000 and \$1,500,000.

692. See, e.g., N. Y. EST. POWERS & TRUSTS LAW §§ 5-1.1A(a)(4),(b)(1)(B), (e)(4) (discussing the elective share implications of waivers of Spousal Survivor Pension benefits).

community property rights most analogous to elective shares, namely the community property rights of a surviving spouse, when the federal entitlement was not to ERISA pension benefits, but to survivor rights of federal debt obligations, such as those in *Free*, discussed *supra*.

Many state courts take one of two approaches to the QDRO qualification of DROs with respect to pension plans.<sup>693</sup> More and more insist that no DROs will be issued with respect to pension benefits that have not been approved as complying with the QDRO requirements by the plan administrator. The other approach is to issue successive DROs until the plan administrator approval is obtained. If done in an informal manner, i.e., without joining the plan to the domestic relations proceedings, no ERISA issues are raised.<sup>694</sup> State courts may not impose attorney award orders against plan administrators for failing to meet the state court's preferences for assisting a potential alternate payee with the task of preparing a DRO that satisfies the QDRO requirements.<sup>695</sup> One court responded as follows to such an award, before issuing an injunction against enforcement of the order:

Obviously, a judicial decision assessing attorneys' fees against a pension plan, regardless of the reason, relates to the pension plan. . . . Indeed, it is difficult to imagine a closer or more direct relationship between a judicial decision and an employee benefit plan than the assessment of attorneys' fees at issue in this case.<sup>696</sup>

The question that arises is what additional conduct by state courts would lead to similar preemption. Orders to plans or their administrators to provide information so that a QDRO may be prepared almost certainly fall in the same category, although there have been no decisions on point.<sup>697</sup> It would also appear that those state laws that permit the automatic joinder of pension plans associated with a party to a domestic relations proceedings are similarly preempted.<sup>698</sup> However, such joinder may not be occurring as a matter of course.<sup>699</sup> Again, there have been no

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693. It does not appear many consider whether DROs applying to disability plans or life insurance plans comply with the QDRO rules.

694. *But see* *Jones v. Am. Airlines, Inc.*, 57 F. Supp. 2d 1224, 1228-29 (D. Wyo. 1999) (describing the difficulties that may arise when comity breaks down, and the court uses its authority to find that a DRO meets the QDRO requirements).

695. *AT&T Mgmt. Pension Plan v. Tucker*, 902 F. Supp. 1168 (C.D. Cal. 1995).

696. *Id.* at 1175-76.

697. Only federal courts have the authority to issue such orders. ERISA §§ 502(a)(1)(A), (e)(1), 29 U.S.C. §§ 1132(a)(1)(A), (e)(1).

698. *See, e.g.*, CAL. FAM. CODE § 2337 (West 2012) (setting forth California's provisions regarding the same).

699. *Retirement Plan Joinder—Information Sheet*, JUDICIAL COUNCIL OF CAL. 1 (Jan. 1, 2009), available at

decisions on point,<sup>700</sup> with the exception of the Supreme Court summary decision in *Campa*, which approved such joinder.<sup>701</sup> Although, the post-REACT viability of that decision is questionable after *Boggs* held that *Campa* was moot with respect to the application of state community property claims to ERISA benefit entitlements, no federal court seems to have addressed the joinder issue. This may be because for most plans, it is much less expensive to monitor some domestic relations proceeding in which often nothing occurs that adversely affects the plan than it is to challenge the authority of the court to enforce joinder.<sup>702</sup>

#### XV. DEPARTMENT OF LABOR REGULATION ISSUES

Those who practice family law, ERISA, or both need binding guidance about the most critical features of the QDRO Requirements. Which plans are covered? Is an automatic restraining order by a domestic relations court a QDRO? Must QDROs be directed at the covered employee plans? How must plan information be conveyed to QDRO applicants? What kinds of plan benefits are available from the plans? What responsibilities do plans have with respect to QDRO applications? What is the role of state courts? The only binding guidance with respect to the QDRO requirements are the DOL regulations issued in 2010, addressing the timing and the order of issue of QDROs,<sup>703</sup> but none of the above critical features.

Some but not all of these questions are answered in informal guidance, but because such advice is not binding, the advice is often disregarded. IRS Notice 97-11 ("IRS QDRO Guide"),<sup>704</sup> discusses and presents sample language for QDROs pursuant to a congressional mandate, but disclaims any intention to interpret the statutory requirements.<sup>705</sup> The DOL prepared a booklet

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<http://www.courts.ca.gov/documents/fl318info.pdf> (last visited Aug. 13, 2012).

700. *But see* *In re Marriage of Nasca*, 87 F. Supp. 2d 967 (N.D. Cal. 1999) (holding that removal could not be compelled simply because the California court's action may be subject to the ERISA General Preemption but not holding that the state court's actions were not preempted).

701. *See generally In re Campa*, 152 Cal. Rptr. at 362; *Carpenters Pension Trust Fund*, 444 U.S. at 1028 and discussion of decision, *supra*.

702. *QDRO in California Court—How to Avoid Joinder*, BENEFITSLINK MESSAGE BOARDS, <http://benefitslink.com/boards/lofiversion/index.php/t1491.html> (last visited Aug. 13, 2012).

703. 29 C.F.R. § 2530.206 (2010). An excellent review of these regulations may be found in Elizabeth M. Wells, *For Better or Worse Timing of DROs Under 29 CFR PART 2530.206*, N.Y.U. REV. EMP. BEN. (Forthcoming 2012).

704. 1997-1 C.B. 379.

705. 1997-1 C.B. 379-80. The notice was released in response to the requirement of section 1457(a)(2) of the Small Business Job Protection Act of 1996, P.L. No. 104-188, § 1457(a)(2) (1996). The Notice reports that the DOL advised the IRS that the discussion and language are consistent with the DOL

discussing many of those statutory issues, which in the introduction is described as “general guidance,” that is available online, and is the DOL QDRO Guide mentioned, *supra*. This publication is of uncertain precedential value. The DOL QDRO Guide contains the IRS QDRO Guide and many DOL advisory opinions upon which only the individual parties described in the opinion may rely.<sup>706</sup> Finally, the Pension Benefit Guaranty Corporation has also prepared a publication entitled “Qualified Domestic Relations Orders,” which is also available online.<sup>707</sup> (“PBGC DOL Guide”)<sup>708</sup> The PBGC DOL Guide presents sample QDRO language, which declares in the preface, “None of this information takes precedence over legislation, regulations, or specific interpretations or rulings.”<sup>709</sup>

*A. Which ERISA Plans Are Governed by the QDRO Requirements, Is a QDRO Required to Explicitly Direct the Plan to Pay a Specific Person Benefits, and Are Automatic Restraining Orders QDROs?*

In view of the discussion, *supra*, asserting that many courts have wrongfully directed plans other than Spousal Survivor Pension Benefits to follow DROs that meet the QDRO requirements even though their terms do not so require, the DOL should give serious consideration to whether those court decisions are correct. Three major ERISA plan types would be subject to these requirements: life insurance plans, disability plans, and pension plans that are not Spousal Survivor Pension Plans, such as Top-Hat Plans.<sup>710</sup> The DOL has regulatory authority to interpret the ERISA General Exemption,<sup>711</sup> so it has authority to address its application, and to describe which QDRO requirements apply to those plans. For example, would the temporary sequestration of benefit payments while the status of a QDRO is determined be applicable if the plan were a Top-Hat Plan.<sup>712</sup>

In view of the discussion, *supra*, asserting that many courts have wrongfully held that DROs addressing life insurance plans

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views.

706. According to section 10 of the ERISA Procedure 76-1, 41 Fed. Reg. 36218 (Aug. 27, 1976).

707. *Qualified Domestic Relations Orders*, PENSION BENEFIT GUARANTY CORP., <http://www.pbgc.gov/wr/benefits/qdro.html> (last revised Sept. 2009) (last visited Aug. 13, 2012).

708. The Sample Orders are similar to those in the IRS QDRO Guide, but this publication emphasizes that a QDRO may not require the PBGC to pay alternate payees more than the PBGC guaranteed benefits. *Id.*

709. *Supra* note 707.

710. Vacation plans, such as the one described in *Mackey*, 486 U.S. at 825, would also be covered.

711. ERISA § 505, 29 U.S.C. § 1135; Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Oct. 17, 1978).

712. ERISA § 206(d)(3)(H), 29 U.S.C. § 1056(d)(3)(H).



meet the QDRO requirements even though the DROs do not direct the life insurance plans to make plan payments to a specified person, the DOL should give serious consideration to whether the courts are correct. This question is not confined to life insurance plans. Similar DROs could be prepared directing a participant to name a designee of a pension plan's survivor benefits. Would they be QDROs if the plan were a Spousal Survivor Pension Plan to which the QDRO requirements unquestionably apply?

Many states have statutes similar to the Massachusetts one described in *Unicare Life & Health Insurance Co.*,<sup>713</sup> which provide for an automatic restraining order that directed both parties to a domestic relations order not to change any employee benefit plan designation, or to withdraw any plan benefits, without the consent of the court or the other party during the proceeding.<sup>714</sup> The aim is to prevent either party from changing the status quo while the proceedings are under way, as the participant sought to do in that case.

It would be advisable for the DOL to decide whether automatic restraining orders avoid preemption as QDROs. They appear to fail to meet any of the QDRO requirements. No directions are issued to any life insurance plan as discussed, *supra*. The DRO does not give the name and mailing address of the alternate payee.<sup>715</sup> The DRO does not specify the amount or percentage of the payments.<sup>716</sup> The DRO does not specify the period to which the order applies.<sup>717</sup> The DRO does not specify the name of the plan.<sup>718</sup> Does the DOL accept the substantial compliance justifications presented by the *Unicare* court, which seem to render the QDRO requirements nugatory? The Court argued that the (1) the potential alternate payees can be determined from the other court filings, (2) no payments are required, (3) the order is effective until withdrawn, and (4) the plan name could be determined from the participant's policies owned at the time of the filing?<sup>719</sup> Would the result be the same if pension plan payments were similarly curtailed by the order, as is the case with some of these statutes?<sup>720</sup> The QDRO requirements apply to Spousal Survivor Pension Plans, so the issue may not be avoided by the inapplicability of the QDRO rules<sup>721</sup> as may be the

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713. *Unicare Life & Health Ins. Co.*, 472 F. Supp. 2d at 8.

714. *See, e.g.*, N.Y. DOM. REL. LAW § 236B.2(b)(5) (McKinney 2011) (pertaining only to life insurance plan designations).

715. ERISA § 206(d)(3)(C)(i), 29 U.S.C. § 1056(d)(3)(C)(i).

716. ERISA § 206(d)(3)(C)(ii), 29 U.S.C. § 1056(d)(3)(C)(ii).

717. ERISA § 206(d)(3)(C)(iii), 29 U.S.C. § 1056(d)(3)(C)(iii).

718. ERISA § 206(d)(3)(C)(iv), 29 U.S.C. § 1056(d)(3)(C)(iv).

719. *Unicare Life & Health Ins. Co.*, 472 F. Supp. 2d at 12-16.

720. *See, e.g.*, N.Y. DOM. REL. LAW § 236B.2(b)(2) (covering pension except those that are in pay status).

721. *But see* ERISA § 206(d)(3)(H), 29 U.S.C. § 1056(d)(3)(H) (providing for

case with respect to automatic restraining orders restricted to life insurance benefits. Does the ERISA General Exemption preempt all such orders, or perhaps only those applicable to Spousal Survivor Pension Plans?

*B. What Information, and Under What Circumstances Must an ERISA Plan Provide Information to Assist a Potential Alternate Payee Prepare a QDRO?*

One frequent concern that is expressed is how may a potential alternate payee, who may be a spouse, former spouse, or a dependent obtain the information needed to prepare a QDRO.<sup>722</sup> There are usually six basic items: (1) the plan's governing documents, including, but not limited to, the summary plan description; (2) a statement of the participant's benefit entitlements for at least two annual periods, including an explanation of the entitlement and its determination; (3) a description of the participant's payment options, and when those options may be exercised; (4) the names of the participant's beneficiary designations; (5) the statutorily required plan QDRO procedures;<sup>723</sup> and (6) model QDRO forms, if any.<sup>724</sup> Additional information is sometimes needed after the initial information is reviewed.<sup>725</sup>

The DOL QDRO Guide observes that Congress intended potential alternate payees to have access to "plan and participant benefit information sufficient to prepare a QDRO," which "might include the summary plan description, relevant plan documents, and a statement of the participant's benefit entitlements."<sup>726</sup> The plan administrator may require that the requestor reasonably establish that the information is being sought in connection with a domestic relations proceeding, which may be done without submitting a DRO.<sup>727</sup> Applicants and plan administrators will find

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sequestration of payments for up to eighteen months while a DRO is being reviewed for QDRO compliance, and perhaps being revised to be in compliance).

722. See, e.g., DOL ADVISORY COUNCIL ON EMPLOYEE WELFARE AND PENSION BENEFIT PLANS, DISPARITIES FOR WOMEN AND MINORITIES IN RETIREMENT SAVINGS, 3, 7 (2010) [hereinafter DOL DISPARITY STUDY] (recommending that measures be taken to reduce the obstacles to a non-employee spouse obtaining plan information), available at <http://www.dol.gov/ebsa/publications/2010ACreport3.html> (last visited Aug. 13, 2012).

723. ERISA § 206(d)(3)(G)(ii), 29 U.S.C. § 1056(d)(3)(G)(ii).

724. *But cf.* COMPLETE QDRO HANDBOOK, *supra* note 399, at 335-38 (providing a more complete information letter).

725. We will not discuss how to determine the plans in which the participant participates. This is a sub issue of determining the extent of a participant's assets.

726. DOL QDRO GUIDE, *supra* note 47, at 2-1.

727. *Id.*

no further details in the Guide. Many difficulties may be solved by good plan and potential alternate payee practices, such as the ones described in the *QDRO Handbook* or the *Complete QDRO Handbook*.

There are cases in which potential alternate payees do not obtain the information they believe they need from the plan administrator to prepare a QDRO. If such an individual is a plan beneficiary, i.e., a designee under the plan terms, and such information is needed for that purpose, then they have the right to compel the plan administrator to provide the information within thirty days.<sup>728</sup> The difficulty with this remedy is that it is only available from federal courts,<sup>729</sup> so an action in addition to the domestic relations proceeding would have to be brought, which may be expensive,<sup>730</sup> and as discussed, *supra*, attorney fees often may not be recovered.

The more serious obstacle to obtaining additional information is that many potential alternate payees, such as former spouses and dependents, may not be beneficiaries. This may also be the case for spouses, if plans other than Spousal Survivor Pension Plans are considered, such as Top-Hat Plans and life insurance plans, which need not have spousal beneficiaries.<sup>731</sup> As discussed in *Kerbow*<sup>732</sup> and *Boggs*,<sup>733</sup> a state community property interest may not be used to establish a necessary beneficiary relation to bring an information suit. It would appear that the usual reticulated statute argument against creating rights not set forth in ERISA<sup>734</sup> would prevent a potential beneficiary from bringing an action to recover information because Congress failed to create such a right when it enacted or amended the REACT provisions.

The only complete solution to this information access deficiency would be an ERISA amendment giving potential

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728. ERISA §§ 502(a)(1)(A), 502(c)(1), 29 U.S.C. §§ 1132(a)(1)(A), 1132(c)(1). Plan beneficiaries need not be in pay status to obtain the plan information set forth in ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), although the information is only available upon request for beneficiaries not in pay status. Similarly, plan beneficiaries need not be in pay status to obtain the individual benefit information set forth in ERISA § 105, 29 U.S.C. § 1025, although the information is only available upon request for beneficiaries not in pay status.

729. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

730. DOL DISPARITY STUDY, *supra* note 722 (estimating that the expense could be \$5,000 to \$10,000).

731. Even spouses may not be beneficiaries for Spousal Survivor Pension Plans. They could have waived the survivor interest, which does not preclude them from regaining an interest in a divorce.

732. *Kerbow*, 421 F. Supp. at 1253.

733. *Boggs*, 520 U.S. 833.

734. See, e.g., *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (holding no extracontractual damages available under reticulated statute); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (holding no monetary damages may be imposed on non-fiduciaries participating in a fiduciary breach).

alternative payees the same right to obtain information that is available to plan beneficiaries. However, the DOL may now provide potential alternate payees with a greater ability to obtain information that they may need to prepare QDROs, while easing the burden on plan administrators, by issuing regulations describing the information that administrators have a fiduciary obligation to provide to potential alternate payees. By seeking public comments before issuing the regulations, the DOL would best be able to characterize such information, and decide whether it is appropriate to set fixed deadlines for the provision of such information. Such regulations would not appear to give the potential alternate payee the ability to go to court to obtain the information, but they would provide the DOL with the tools needed so it could enforce those regulatory obligations. The DOL could also decide what would be needed to show that one is a potential alternate payee. Spouses who are beneficiaries have access in such capacity. For other parties, it would seem adequate to be a party to a domestic relations proceeding, have a DRO, or be represented by a state agency, which may itself issue domestic relations orders.

*C. What Internal Plan and Court Rules Govern Claims Pertaining to a Domestic Relations Order that Is Asserted to Be a QDRO?*

It is advisable that the DOL clarify many substantial questions about the QDRO requirements by issuing and enforcing regulations pertaining to those requirements, which include claims rules together with the QDRO procedures that Spousal Survivor Pension Plans must establish and maintain.<sup>735</sup> Consideration must be given to both the potential alternate payee and the participant (and his designee if the participant is deceased when the DRO is under consideration). If the DOL believes that the QDRO requirements are applicable to pension plans other than Spousal Survivor Pension Plans, disability plans, and life insurance plans, its regulations must address how those requirements apply to such plans.

There are many comprehensive treatments of the QDRO requirements, such as *the QDRO Handbook* or *the Complete QDRO Handbook*, in addition to the government's informal guidance, such as the DOL QDRO Guide. Thus, this discussion will be restricted to identifying some, but not all, of the major issues that would benefit from such clarification.

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735. ERISA § 206(d)(3)(G), 29 U.S.C. § 1056(d)(3)(G). As discussed, *supra*, it is advisable to make such procedures available even before a potential alternate payee prepares a DRO. The individuals who requested such a document would be most likely to try to address its requirements from the outset and thus save all parties time and expense.

What is the plan administrator expected to review about a DRO that it receives pertaining to any of the plan participants or beneficiaries? Of course, it is the one with the most expertise on whether the benefit terms of the DRO satisfy the QDRO requirements, which depend on the plan's terms. To what extent is the administrator expected to go beyond the face of the DRO and focus merely on compliance with the QDRO disclosure requirements<sup>736</sup> and benefit limits?<sup>737</sup> The DOL QDRO Guide provides that the administrator need not determine the validity of the order under state domestic relations law.<sup>738</sup> A DOL Advisory Opinion held that the administrator is not required to verify the correctness of the spouse, former spouse, or other dependents set forth in the DRO.<sup>739</sup> The Seventh Circuit held in *Blue v. UAL Corp.*,<sup>740</sup> that the plan administrator is not even "permitted to look beneath the surface of the order."<sup>741</sup> The court thus rejected a claim that the plan administrator committed a fiduciary breach by failing to check whether the DRO included attorneys' fees as child support.<sup>742</sup> Presumably the plan administrator is expected to ask for court confirmation that the DRO is in effect, but does not need to check any further.<sup>743</sup>

If one of the primary functions of the plan administrator is to review the compliance of the DRO with the four disclosure requirements, it would be useful for the DOL to clarify what substantial compliance suffices for those requirements. The DOL QDRO Guide expands language from the REACT Senate Report about the requisite compliance<sup>744</sup> to the following:

In many cases, an order that is submitted to a plan may clearly describe the identity and rights of the parties, but may be incomplete only with respect to factual identifying information

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736. ERISA § 206(d)(3)(C), 29 U.S.C. § 1056(d)(3)(C).

737. ERISA §§ 206(d)(3)(D), (E), 29 U.S.C. §§ 1056(d)(3)(D), (E).

738. DOL QDRO GUIDE, *supra* note 47, at 2-8.

739. U.S. Dep't of Labor Advisory Opinion 92-17A (Aug. 21, 1992); *but see* *Owens v. Auto. Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009) (rejecting a challenge by the plan, rather than by the participant of the QDRO compliance of a DRO, and holding that a woman who lived with the participant could be his dependent if they were never married).

740. *Blue v. UAL Corp.*, 160 F.3d 383 (7th Cir. 1998).

741. *Id.* at 385.

742. *Id.* It is not clear why this would be a QDRO compliance issue if the attorneys' fees "related to" the child support award. ERISA § 206(d)(3)(B)(ii)(I), 29 U.S.C. § 1056(d)(3)(B)(ii)(I).

743. *But see* *Brown v. Cont. Airlines*, 647 F.3d 221 (5th Cir. 2011) (holding that administrator may not check if the divorce was a sham; such divorces were presumably obtained to qualify to receive lump sum distributions from a severely underfunded pension plan before benefits would be reduced in a plan termination).

744. S. REP. NO. 98-575, at 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2566.

within the plan administrator's knowledge or easily obtained through a simple communication with the alternate payee or the participant. For example, an order may misstate the plan's name or the names of participants or alternate payees, and the plan administrator can clearly determine the correct names, or an order may omit the addresses of participants or alternate payees, and the plan administrator's records include this information. In such a case, the plan administrator should supplement the order with the appropriate identifying information, rather than rejecting the order as not qualified.<sup>745</sup>

However, there is a strong disagreement as to whether the statute permits so much or even more substantial compliance.<sup>746</sup> *Unicare*<sup>747</sup> discussed, *supra*, is an extreme example of how little compliance some courts require. However, many of these disputes will vanish if the QDRO requirements are found not applicable to life insurance plans, because it appears that in many of those cases, the divorcing spouses do not seem to consider the QDRO requirements when the divorce papers are prepared.

What is the role of the participant in the review of a DRO, who must be notified of the submission of a DRO that is claimed to be a QDRO?<sup>748</sup> If the administrator is not supposed to look beyond the surface of the DRO, it would seem that the participant can do little more than show whether the DRO at issue is superseded, which is a simple task. Should the participant be expected to challenge the plan determination that the DRO satisfied the QDRO benefit requirements?<sup>749</sup> Presumably this is the major responsibility that the plan is expected to fulfill. Should the participant be expected to challenge whether the QDRO requirements apply to the Plan?

Most litigated disputes about compliance of DROs with the QDRO requirements do not appear to be between participants and potential alternate payees, but between potential alternate payees and the person designated by the deceased participant,<sup>750</sup> when it is most difficult to change a DRO to meet the QDRO requirements.

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745. DOL QDRO GUIDE, *supra* note 47, at 2-9.

746. See *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143 (9th Cir. 2000) (noting a good exchange between the majority and the dissent about the degree of substantial compliance that the QDRO requirements permit).

747. *Unicare Life & Health Ins. Co.*, 472 F. Supp. 2d at 8.

748. SUSAN REES, QUALIFIED DOMESTIC RELATIONS ORDERS: RECENT CASE LAW AND DEPARTMENT OF LABOR GUIDANCE, ALI-ABA COURSE OF STUDY MATERIALS (July 2006).

749. See, e.g., *Files v. ExxonMobil Pension Plan*, 428 F.3d 478 (3d Cir. 2005) (permitting the alternate payee to begin receiving a separate interest pension when the participant was neither employed nor receiving a pension, which violates ERISA § 206(d)(3)(D) and (E), 29 U.S.C. § 1056(d)(3)(D) and (E)). However, no one challenged the QDRO compliance on that ground. *Id.*

750. See, e.g., REES, *supra* note 748.

Does this mean notice of the DRO submission that would otherwise go to the participant, should go to the participant's designee? Again, what would be the role of the designee in the review process?

There are questions about the ERISA provisions that provide for a sequestration of payments otherwise due for up to eighteen months while the QDRO compliance of a DRO is determined.<sup>751</sup> The DRO may be modified during the sequestration period to bring it into compliance with the QDRO requirements. It is advisable to provide guidance with respect to what both the plan administrator and the applicant are expected to do and when they should do it, if the DRO is rejected, but the potential alternate payee wishes to modify the DRO.<sup>752</sup> For example, it is quite easy for a potential alternate payee to file an automatic restraining order to obtain an immediate sequestration even though it does not satisfy the QDRO requirements. What, if anything, is the alternate payee expected to do, during the sequestration period to show that a modification that attempts to comply with the QDRO requirements will be made within a reasonable period? Similarly, what, if anything is the plan administrator expected to do with respect to providing plan information in a timely fashion to a potential alternate payee who wishes to modify a DRO to comply with the QDRO requirements? Finally, under what conditions, if any, does a successive DRO filing start a new 18-month sequestration period, and to what extent, if any, must it differ from earlier filings?

If, *arguendo*, the sequestration procedures are clarified, there would seem to be no need for ERISA plans to interplead even when there is a question about compliance with the QDRO requirements because if the plan fiduciary follows those procedures, it has no risk of a double payment obligation.<sup>753</sup> This policy also encourages plan administrators to develop the factual record that may be needed to determine the participant's designation under the plan terms. The courts have shown increasing irritation at plan administrators who interplead when there is no question about the failure of a DRO to meet the QDRO requirements. Recently, one court imposed attorney fees against the interpleading administrator after criticizing such behavior. "This conduct in litigation unnecessarily imposes a burden on Lois, Gwendolyn, and Julius: each had received a considerable sum in life insurance benefits, but not enough of a king's ransom to spend a fortune defending the case. MetLife's conduct is irresponsible,

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751. ERISA § 206(d)(3)(H), 29 U.S.C. § 1056(d)(3)(H); *see also* DOL QDRO GUIDE, *supra* note 47, at 2-11 (describing the duties of plan administrator during the QDRO determination process).

752. *Cf.* DOL QDRO GUIDE, *supra* note 47, at 2-11.

753. ERISA § 206(d)(3)(I)(ii), 29 U.S.C. § 1056(d)(3)(I)(ii).

and borders on bad faith.”<sup>754</sup>

The First Circuit also suggested that it may not permit a plan administrator to interplead if the administrator has the information needed to decide who is entitled to a survivor benefit.<sup>755</sup> On the other hand, the party whose QDRO position was rejected may believe its position is convincing. Thus, he or she may decide to undertake the expense needed to interplead before the benefit payments are scheduled to begin.<sup>756</sup>

It is also advisable for the DOL to describe how plans are expected to process a benefit claim based on a DRO that is claimed to meet the QDRO requirements or a benefit claim that may be challenged by such a DRO. Unlike other benefit claims, the plan administrator is not permitted to decide all issues. As discussed, *supra*, the plan administrator may not look beyond the surface of the DRO. It is advisable to apply the same prudential exhaustion doctrine otherwise applicable to benefit claims to the issues for which the administrator is responsible.<sup>757</sup> In this way, the court will have the advantage of the claim fiduciary's review of the DRO's compliance with the QDRO benefit requirements, which is within the fiduciary's area of expertise.

It is advisable for the DOL to describe the conditions, if any, under which participants or potential alternate payees may be charged fees for QDRO determinations. The Department of Labor currently permits defined contribution plan administrators to charge reasonable fees, if those plans are adequately described in the plan summary plan description.<sup>758</sup> This policy raises several questions. Are fees permitted for defined benefit plans? There are usually more questions about whether the plan permits the desired form of payment with defined benefit plans, than defined contribution plans. If the DOL gives clear and binding guidance about QDROs and QDRO determination procedures, would plans

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754. *See Metro. Life Ins. Co. v. Leich-Brannan*, 812 F. Supp. 2d 729, 739 (E.D. Va. 2011) (holding that participant's commitment to keep former wife beneficiary of all life insurance policies did not constitute a QDRO; thus, the court could not enforce commitment).

755. *Forcier v. Metro. Life Ins. Co.*, 469 F.3d 178, 182 n.4 (1st Cir. 2006) (citing *Travelers Indem. Co. v. Israel*, 354 F.2d 488, 490 (2d Cir. 1965)) (analyzing the reverse exhaustion doctrine that prevents insurers from using interpleader to transfer “part of their ordinary cost of doing business” under such circumstances). *See generally McLaren Inv. and Ret. Comm. v. Whitehead and Gignac*, 2009 U.S. Dist. LEXIS 77329 (W.D. Mich. Aug. 28, 2009) (analyzing the case law and issuing an order to show cause why reverse exhaustion is not required before court considers dispute about beneficiary not related to a DRO).

756. *See, e.g., Estate of William Kensinger*, 674 F.3d at 133.

757. ZANGELEIN ET AL., *supra* note 165, at 358-78.

758. *U.S. Dep't of Labor Field Assistance Bulletin 2003-3*, U.S. DEPT OF LABOR (May 19, 2003), [http://www.dol.gov/ebsa/regs/fab\\_2003-3.html](http://www.dol.gov/ebsa/regs/fab_2003-3.html) (last visited Aug. 13, 2012) [hereinafter FAB 2003-3].



incur any significant processing expenses in determining whether a DRO is a QDRO? Finally, is it any more appropriate for a plan to charge a processing charge for a QDRO determination than for processing a benefit claim when there is a question about a beneficiary designation? The claims regulations prohibit processing charges for all benefit claims.<sup>759</sup>

It is advisable for DOL regulations to address the role of the courts and the consequence of a court overruling a claim denial based on a DRO asserted to be a QDRO. Plan administrators have the initial responsibility for determining whether a DRO meets the QDRO requirements,<sup>760</sup> but the courts can overrule them. Moreover, the courts have full authority to determine compliance with the QDRO requirements regardless of whether the plan fiduciaries paid the benefits to the wrong party by following the sequestration rules<sup>761</sup> or otherwise met their fiduciary responsibilities.<sup>762</sup> In wrongful payment cases, however, the person entitled to those benefits may only recover such benefits from the party who was wrongfully paid the benefits if the administrator satisfied the appropriate fiduciary rules.

Finally, it is advisable for the DOL to correct its error about the authority of state courts.<sup>763</sup> ERISA gives both state courts and federal courts jurisdiction over actions by a plan 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."<sup>764</sup> The terms of Spousal Survivor Pension Plans must provide that benefits are paid in accord with the applicable requirements of any DRO that is a QDRO.<sup>765</sup> Thus, if a participant or beneficiary seeks to obtain a determination that a DRO satisfies the QDRO requirements or seeks to obtain benefits pursuant to such a DRO, state courts and federal courts both have jurisdiction.<sup>766</sup> Moreover, if there is a question about what is below the surface of the terms of the DRO, which is outside the responsibilities of the plan's claims fiduciary, a state court is probably better able to resolve such a question than a federal court. State courts are simply more knowledgeable about state law than federal courts that may sit within the same geographical area. Moreover, unlike federal

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759. Cf. 29 C.F.R. § 2560.503-1(b)(3); U.S. Dep't of Labor Advisory Opinion 94-32A (Aug. 4, 1994) (presenting this position, but was overruled without any discussion by FAB 2003-3, *supra* note 758).

760. DOL QDRO GUIDE, *supra* note 47, at 1-13.

761. ERISA § 206(d)(3)(I)(ii), 29 U.S.C. § 1056(d)(3)(I)(ii).

762. ERISA § 206(d)(3)(I)(i), 29 U.S.C. § 1056(d)(3)(I)(i).

763. DOL QDRO GUIDE, *supra* note 47, at 1-13.

764. ERISA §§ 502(e)(1), 502(a)(1)(B), 29 U.S.C. §§ 1132(e)(1), 1132(a)(1)(B).

765. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3) (A).

766. See, e.g., *Jones*, 57 F. Supp. 2d at 1230-32 (reviewing and approving the state court's jurisdiction to decide QDRO compliance).

courts, state courts may address QDRO compliance concerns expressed by a plan administrator about the DRO. Thus, they more efficiently resolve those concerns.<sup>767</sup> Furthermore, as discussed, *supra*, most state courts prefer to have DROs presented to them whose QDRO compliance has been approved by the pension plan, rather than being forced to decide whether the plan administrator correctly made such decision.<sup>768</sup> If such determinations are needed, most litigants with the blessing of the state courts remove the decisions to federal court. Thus, there are few QDRO decisions from state courts. It should be noted that if the QDRO requirements are applicable to pension plans other than Spousal Survivor Pension Plans, disability plans, and life insurance plans, then the DOL is correct that the state courts would lack authority to decide whether DROs pertaining to such plans comply with those requirements because there is no ERISA provision incorporating those requirements into the plan terms.<sup>769</sup>

## XVI. CONCLUSION

The “principal object of the statute [ERISA] is to protect plan participants and beneficiaries,”<sup>770</sup> is implemented in large part by adherence to a “core ERISA concern” of paying benefits in accord with the plan terms,<sup>771</sup> and the preemption of state laws that “govern[] the payment of benefits.”<sup>772</sup> Thus, state family law is preempted except to the extent that plan terms provide for deference to such law. Such preemption is consistent with the long and general practice of the federal courts giving Congress the primary responsibility for setting the balance of federalism between federal law and state family law,<sup>773</sup> and with the context in which both ERISA and REACT were enacted.

Congress mandated that the terms of a pension plan that Congress required to provide spousal survivor benefits, must also provide that (a) benefits be determined in accord with the applicable requirements of a domestic relation order that is a QDRO, and (b) the requirements of other domestic relations orders

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767. See *e.g., id.* at 1227-28 (providing an example of such resolution).

768. Questions may be raised by a potential alternate payee whose DRO was held to violate the QDRO requirements by the plan administrator, or by a participant who believes that a DRO was incorrectly approved by the plan administrator.

769. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A), is such a provision for Spousal Survivor Pension Plans.

770. *Boggs*, 520 U.S. at 845.

771. *Egelhoff*, 532 U.S. at 147.

772. *Id.* at 148.

773. See generally Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 321-23 (2009) (summarizing the decisions pertaining to ERISA and non-ERISA pension plans).

be disregarded.<sup>774</sup> Congress gave sponsors of other pension plans, disability plans, and life insurance plans the discretion to decide the extent, if any, to which they wished such plans to defer to domestic relations orders and other state law. For example, the terms of such plans could provide for deference to domestic relations orders that comply with requirements similar to the QDRO requirements. Those requirements apply only to the pension plans required to provide spousal survivor benefits.<sup>775</sup> It would be useful for the Supreme Court to confirm that plans other than these plans may disregard domestic relations orders unless their respective plan terms provide for such deference.<sup>776</sup>

The state family law addressed by ERISA is not limited to domestic relations orders. ERISA preemption prevents state community property law, state revocation of designation laws, and state elective share laws from being used to determine ERISA benefit entitlements except, to the extent, the terms of those plans require deference.

ERISA benefit entitlements are not limited to the right to receive benefit payments from an ERISA plan,<sup>777</sup> but include the right to prevent a superseded (state family law or federal common-law) ownership claim from being used to wrest the benefit away from the person with the benefit entitlement.<sup>778</sup> It would be useful for the Supreme Court to confirm this benefit retention right.<sup>779</sup>

The DOL could substantially improve family law practice with respect to ERISA plans by preparing and promulgating regulations,<sup>780</sup> (1) describing which plans are subject to the QDRO requirements, (2) describing the responsibilities of the fiduciaries of those plans with respect to the provision of information needed to prepare domestic relations orders complying with the QDRO requirements, and (3) clarifying how these orders may be reviewed by ERISA plans and the courts.

The suggested Supreme Court decisions and DOL regulations

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774. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A); *but see Kennedy*, 555 U.S. at 300 n.10 (suggesting that a benefit waiver in a domestic relations order may be followed if the plan terms permit).

775. ERISA § 206(d)(3)(L), 29 U.S.C. § 1056(d)(3)(L).

776. *But see Kennedy*, 555 U.S. at 302 (citing *Wheaton*, 42 F.3d at 1084) (illustrating the QDRO requirements). However, *Wheaton* held that life insurance plans must follow domestic relations orders that satisfy the QDRO requirements.

777. *But see* ERISA § 205(c)(6), 29 U.S.C. § 1055(c)(6) (discharging a plan from the obligation to pay spousal survivor benefits if the plan fiduciaries acted properly in paying such benefit to another person).

778. *Boggs*, 520 U.S. at 833; *Egelhoff*, 532 U.S. at 141.

779. *Cf. Kennedy*, 555 U.S. at 300 n.10 (declining to express a view on the issue of whether common-law waivers may be enforced against a designee after, but not before, the designee receives her or his benefit entitlement).

780. The DOL authority stems from ERISA §§ 206(d)(N) and 505, 29 U.S.C. §§ 1056(d)(N) and 1135.

will reduce litigation about ERISA family law issues by eliminating disagreements about the law, and will improve conformity between ERISA practice and the ERISA law.

