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BOGGS V. BOGGS: CREATING REAL-LIFE CINDERELLAS

HEATHER J. ROSE*

INTRODUCTION

Once upon a time there was a rich, kindly old man, Mr. Money-Bags.¹ He lived with his wife and their three sons in Louisiana.² While he was working, Mr. Money-Bags invested in a pension plan that included stock options, a 401K plan, a retirement bonus, and other benefits. After about thirty-five years of marriage, his first wife died. Because she lived in a state in which assets were owned equally by husband and wife, her husband received a life estate in her share of his pension plan benefits. According to her will, their sons would receive her share of the benefits upon her husband's death.

Mr. Money-Bags remarried the next year. His second wife had her own money, and no children were born from this marriage. About four years after his remarriage, Mr. Money-Bags died. His will left his former wife a life estate in his pension plan benefits, and his sons were to receive all of the benefits upon her death. He left the remainder of the estate to his second wife.

The second wife wanted the entire estate for herself, so she sued both the estate and the sons in their individual capacities, claiming that she was being deprived of her rightful income. The court agreed with the second wife and said that she should receive all of the pension plan benefits. As a result of the suit, the sons received nothing from either parent's estate.³ The sons now work three jobs to support themselves because of the court's decision.⁴

* J.D. Candidate, June 2000. The Author would like to thank Professor Kathryn Kennedy for all of her help and support throughout the writing process.

1. See generally *Cinderella*, in THE CANDLEWICK BOOK OF FAIRY TALES 83 (Sarah Hayes, text retold by, Candlewick Press 1982) (recounting the fairytale on which the hypothetical is loosely based). See also *Boggs v. Boggs*, 520 U.S. 833, 833 (1997) (setting forth facts upon which the hypothetical is also based).

2. Louisiana is one of the community property states in the United States. Gerald B. Treacy, Jr., *Planning to Preserve the Advantages of Community Property*, 23 EST. PLAN. 24, 24 (1996).

3. Unfortunately for the sons, there are no princesses to sweep them away from poverty and take them to a wonderful castle to live happily ever after.

4. This hypothetical situation does not necessarily reflect the true ending

Can this really happen? Unfortunately, according to the recent decision of the United States Supreme Court in *Boggs v. Boggs*,⁵ the answer is yes. The Supreme Court held in *Boggs* that the second wife was entitled to all of the husband's benefits.⁶ In *Boggs*, the Supreme Court allowed the second wife to inherit everything from the husband's estate because, according to their reading of the legislative history and purpose of the Employee Retirement Income Security Act (ERISA), to do otherwise would be "unfair."⁷ While this decision applies mainly to community property states,⁸ it affects other states by preempting any state law that relates to an ERISA pension plan.⁹

of *Boggs*. *Boggs*, 520 U.S. at 854.

5. *Id.* at 844. In *Boggs*, the Court held that the second wife could not be deprived of a full share of her husband's estate, even though the couple lived in Louisiana, a community property state. *Id.* at 852. In the nine community property states alone, the *Boggs* decision may affect 80 million people. Judy Peres, *High Court Rulings Help to Define Reach of Federal Pension Act*, CHI. TRIB., June 3, 1997, § 3, at 3.

6. *Boggs*, 520 U.S. at 853.

7. *Id.* at 844; Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (1997), amended by Retirement Equity Act of 1984, 29 U.S.C. § 1055 (1997). The Court found that the protection afforded to beneficiaries by ERISA "would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity." *Boggs*, 520 U.S. at 844. In fact, as the Court pointed out, not only may heirs not take a non-participating, surviving spouse's right to the benefits, but even a plan participant may not do so. *Id.* The Court noted that it would be anomalous for Congress to allow a predeceasing spouse to do that which a plan participant could not. *Id.* "Nothing in the language of ERISA supports concluding that Congress made such an inexplicable decision." *Id.*

8. This is true because the parties in *Boggs* lived in Louisiana, which is a community property state. *Boggs*, 520 U.S. at 835.

9. *Boggs v. Boggs Holds that a Predeceasing Nonparticipant Spouse Has No Property Interest in an ERISA Pension Plan*, 6 NO. 3 ERISA LITIG. REP. 4 (1997) [hereinafter *Boggs v. Boggs Holds* . . .]. In this article, the authors noted that ERISA preempts state law, notwithstanding whether a state follows the community property doctrine, "to the extent that law treats a predeceasing nonparticipant spouse as having any type of property right in the participant spouse's pension plan." *Id.* By holding that the second wife was entitled to the entirety of the plan benefits, the Court invalidated the first wife's testamentary transfer of her interest in the benefits. *Boggs*, 520 U.S. at 848. See Tony Vecino, Note, *Boggs v. Boggs: State Community Property and Succession Rights Wallow in ERISA's Mire*, 28 GOLDEN GATE U. L. REV. 571, 572 (1998). Mr. Vecino points out that "[u]nder general principles of state community property law, the Court's holding divests a nonparticipant spouse of a present ownership right and of testamentary power over an interest in the community pension plan benefits." *Id.* See generally *Boggs*, 520 U.S. at 839-53 (explaining how ERISA can and does preempt a non-participating, predeceasing spouse's property ownership interest in the participating spouse's pension plan). Because in a community property state the first wife has a present, vested interest in one-half of the pension plan benefits, this holding reverses state community property law in the area of testamentary transfers. *Id.* at 835-39. A "testamentary transfer" is the transfer of money or

Part I of this Comment examines the history of ERISA¹⁰ and the Retirement Equity Act (REA).¹¹ Part I also analyzes the history of federal preemption of state law and the Court's decision in *Boggs v. Boggs*. Part II of this Comment analyzes the effects of the Supreme Court's decision on probate law. Finally, Part III proposes an amendment to ERISA that would solve the dilemma in which some families now find themselves as a consequence of the *Boggs* decision.

I. HISTORICAL BACKGROUND OF ERISA, PREEMPTION AND *BOGGS V. BOGGS*

In order to understand the problem, it is necessary to know the history of ERISA, REA and community property laws. It is also necessary to understand the implications of *Boggs*, as well as the various ways ERISA already allows plan participants to assign or alienate their benefits. Lastly, it is essential to understand the different preemption tests the Supreme Court has used in deciding whether a federal statute should preempt a state law.

Section A examines the legislative histories and purposes of ERISA and REA. Section B discusses in some detail Qualified Domestic Relations Orders (QDROs) and other methods for assigning or alienating benefits. Section C explores the history and function of community property laws. Section D explains the *Boggs* case by examining the facts and its procedural history. Finally, Section E examines the history of federal preemption of state law.

A. *Once Upon a Time . . .*

Before ERISA was enacted, the U.S. pension plan system was problematic.¹² The most serious problem was poor plan administration, which left participants without any retirement benefits.¹³ Another serious problem was the practice of firing an employee just as his or her benefits vested, leaving the participant without any benefits.¹⁴

The private pension system became an important social concern of the 1940s.¹⁵ Around that time, about four million people

property accomplished by means of a will. BLACK'S LAW DICTIONARY 1474, 1497 (6th ed. 1990).

10. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (1997), amended by Retirement Equity Act of 1984, 29 U.S.C. § 1055 (1997).

11. Retirement Equity Act of 1984, 29 U.S.C. § 1055.

12. H.R. REP. NO. 93-533, at 2 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4640.

13. *Id.* at 4643.

14. *Id.*

15. *Id.* at 4640 (observing that the private pension plans are fairly new and only began to gain importance in the mid-1940s). In the 1940s, the American

were covered by such plans.¹⁶ By 1950, about ten million people were covered, more than a twofold increase from 1940.¹⁷ By 1960, more than twenty-one million people were covered by pension plans in the United States;¹⁸ by 1973, the number jumped to more than thirty million.¹⁹ In 1997, in the nine community property states alone, eighty million people had more than one trillion dollars invested in pension plans.²⁰

Before Congress enacted ERISA, pension plans were governed by a series of federal statutes.²¹ Congress determined that plan participants were not sufficiently protected from abuses that occurred in the administration of the plans under the Welfare and Pension Plans Disclosure Act.²² Congress, therefore, enacted ERISA to “protect the interest of . . . pension plan participants and beneficiaries through disclosure of information with respect to such plans.”²³

economy matured to the point where employers recognized that they needed to care for their employees even after employment. *Id.* The other social development contributing to the increased use of pension plans was the change from a rural, farming culture to the modern, urban culture. *Id.*

16. *Id.* at 4641.

17. H.R. REP. NO. 93-533, at 4641.

18. *Id.*

19. *Id.* Not only were over 30 million people covered by pension plans, but such plans also comprised over \$150 billion in assets. *Id.*

20. *Boggs*, 520 U.S. at 833, 840.

21. H.R. REP. NO. 93-533 at 4641. ERISA's direct predecessor was known as the Welfare and Pension Plans Disclosure Act. Welfare and Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (1958). The very first statute to affect pension plans, however, was the National Labor Relations Act. National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69 (1994). After the National Labor Relations Act, the Labor Management Relations Act affected pension plans. Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-44, 167, 171-87 (1994). The next act to affect pension plans before ERISA was the Labor Management Reporting and Disclosure Act. Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-02, 411-15, 431 (1994).

22. H.R. REP. NO. 93-533 at 4641. The Welfare and Pension Plans Disclosure Act was ERISA's direct predecessor. *Id.* Congress found that due to “malfeasance and improper activities by pension administrators, trustees, or fiduciaries,” the Welfare and Plans Disclosure Act needed to be revised. *Id.* The amendments made such abuses federal crimes and granted investigative and regulatory powers to the Secretary of Labor over pension plans. *Id.* The changes to the Welfare and Plans Disclosure Act, however, were not sufficient to prevent the abuses the statute was supposed to correct. *Id.* Before adopting ERISA, Congress conducted a study finding that pension plan participants were losing benefits because of poor execution by the plan administrators. *Id.* at 4646. In 1965, the President established a cabinet committee to report on the state of pension plans. *Id.* The committee reported that for the system to be fair and equitable, every employee with a pension plan should be entitled to the security of knowing his retirement benefits would be there at retirement. *Id.* at 4647.

23. *Id.* at 4646. Congress found that courts were reluctant to use equitable

Congress found the most important purpose of ERISA to be the American workers' assurance of "financial security and dignity" during retirement.²⁴ Through ERISA, Congress attempted to create safeguards against past abuses, such as reporting requirements and the accelerated vesting of plans throughout the term of employment.²⁵ The official policy of ERISA mandates dealing with "malfeasance and maladministration" of pension plans, along with a gamut of other issues.²⁶ ERISA established minimum standards designed to transform the "private pension promise" into reality.²⁷ While ERISA was originally enacted to

remedies, like specific performance, to aid the pension plan participants and their beneficiaries. *Id.* Specific performance allows the plan participants, or their beneficiaries, to enforce their plan benefits, and is used to force the plan administrator to follow the benefits as written. *Id.* at 4642-43.

Because equitable remedies were not sufficient to curb abuses, Congress determined that a new statute was necessary to set forth remedies for participants who lost money because of plan administrators. *Id.* at 4643. Congress found that pension plans were being terminated so that employees lost all, or some, of their benefits from their pension plans. *Id.* This occurred even if the employee was fully vested in the plan, which means that he had the right to the full benefits of the plan. *Id.* Congress noted that if one participant's benefits were destroyed, that was one participant too many. *Id.* Another purpose for the new statute was to provide security to the participants. *Id.* The security provided is the knowledge that all of the benefits remain intact and are guaranteed to remain intact for the participants' and beneficiaries' lives. *Id.*

24. *Id.* at 4646. Congress also believed that it was important for American workers to face retirement knowing they would have the resources necessary to support themselves as real, active members of society. *Id.* Later in the legislative history, Congress explained in detail why ERISA was necessary. *Id.* at 4646-47. Congress cared about increasing qualified plans' fairness and effectiveness and wanted to increase the number of employees covered by pension plans. *Id.* Lastly, Congress changed the tax laws affecting pension plans so that the new laws were fairer and more equitable in their execution. *Id.* at 4676-77.

25. *See id.* at 4647 (explaining that "the Committee recognizes the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many").

26. *Id.* at 4647-48. The other issues range from the "adequacy of funding . . . [to] adequate communication to participants." *Id.* ERISA is a comprehensive legislative plan in order to achieve its goals. *Id.*

27. H.R. REP. NO. 93-533 at 4648.

It is hereby declared to be the policy of this Act:

- (1) to foster and facilitate interstate commerce,
- (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,
- (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and
- (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

29 U.S.C. § 1001(c) (1997). *But see Boggs*, 520 U.S. 833, 839-43 (1997) (noting

cover the administration of plans, courts have extended the scope of ERISA to also cover the distribution of funds.²⁸

B. Then the Government Decreed that . . .

1. ERISA Was Not Sufficient as Written

ERISA alone was not sufficient to achieve Congress' goal of protecting the benefits owed to pension plan participants.²⁹ Not only did the President revise ERISA four times after its enactment, but Congress also amended ERISA in 1984 through the Retirement Equity Act (REA).³⁰ REA was necessary in part

that ERISA is a comprehensive statute, enacted to protect spouses of plan participants). The Court wrote that under ERISA, a participant's spouse is entitled to more than he would be entitled to solely under community property regimes. *Id.* at 840. Later, in the decision, the Court stated that the qualified joint and survivor annuity provisions of ERISA provide a guaranty of benefits, no matter whether a participant dies before or after the annuity starting date. *Id.*

28. See *Boggs*, 520 U.S. at 852-55 (holding that ERISA covers not only the plan administration, but continues to apply even when the benefits have been distributed and are in the hands of the participant, or beneficiary). See also *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 52-53 (D. Mass. 1997) (holding that ERISA preempted any state tort action for wrongful death when suing a medical care provider). Note that the Court in *Boggs* held that ERISA's purpose was both to protect beneficiaries and to guarantee proper administration of plans. *Boggs*, 520 U.S. at 833, 840.

29. In 1978, President Jimmy Carter sent his fourth plan for the reorganization of ERISA to Congress. Message of the President, 29 U.S.C. § 1001(a) (1997).

To the Congress of the United States:

Today I am submitting to the Congress my fourth Reorganization Plan for 1978. This proposal is designed to simplify and improve the unnecessarily complex administrative requirements of the Employee Retirement Income Security Act of 1974 (ERISA). . . . The new plan will eliminate overlap and duplication in the administration of ERISA and help us achieve our goal of well regulated private pension plans.

ERISA was an essential step in the protection of worker pension rights. Its administrative provisions, however, have resulted in bureaucratic confusion and have been justifiably criticized by employers and unions alike. . . . Under current ERISA provisions, the Department of Treasury and Labor both have authority to issue regulations and decisions. . . .

Id.

30. Retirement Equity Act of 1984, 29 U.S.C. § 1055. (1997). See also *Boggs*, 520 U.S. at 842 (noting that REA allows participants to designate a beneficiary other than the spouse only if the spouse agrees to the designation in writing); MICHAEL J. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS, § 7.12 (1997) (commenting that before REA, an employee's spouse could claim an interest in the retirement plan benefits without running afoul of the spendthrift, or anti-alienation, provision in ERISA).

because Congress had not yet dealt with divorce issues inherent in pension plan benefits nor with the possibility of the participant dying before the beneficiary.³¹ In enacting REA, Congress acknowledged that because some spouses were being denied their benefits, the equitable remedies originally provided were insufficient to protect the beneficiaries of the plans.³²

REA allows for divorced spouses to recover some of the pension plan benefits, so long as the spouses follow the correct procedure³³ and receive a Qualified Domestic Relations Order (QDRO) at the time of divorce.³⁴ REA also ensures uniform spousal rights, such as the right to receive all of the benefits from the pension plan.³⁵ Originally, Congress made benefits non-

31. S. REP. NO. 98-575, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547. As evidenced by its silence in the legislative history, Congress still has not dealt with the issue of non-participating spouses who die before the participant and the distribution of the benefits. *Id.* Such spouses are also known as non-participating, predeceasing spouses. Non-participating spouses are spouses who do not contribute to the pension plan.

See also *Ablamis v. Roper*, 937 F.2d 1450, 1450 (9th Cir. 1991). In this case, the court examined whether devises in a will were valid when it was the predeceasing, nonparticipant's spouse's will and the devisees were children from that spouse's first marriage. *Id.* at 1452. The court found the devises unallowable under ERISA, as amended by REA, in part because of REA's purpose of protecting a spouse's interest in the participant's plan benefits. *Id.* at 1453. REA modified ERISA to primarily protect widows and divorcees and insure their financial security. *Id.*

32. In order to improve receipt of retirement benefits while providing greater equity for workers and their beneficiaries, Congress amended ERISA by examining "marriage as an economic partnership and the substantial contribution to that partnership of spouses who work both in and outside the home." S. REP. NO. 98-575 at 2547.

33. The correct procedure is to go to a family law court and have the judge enter a special order, which meets the statutory requirements. 29 U.S.C. § 1056(d) (1997).

34. 29 U.S.C. § 1056(d)(3)(B).

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.

S. REP. NO. 98-575 at 2549. REA created the qualified joint and survivor annuity, the qualified pre-retirement survivor annuity, and the QDRO, or qualified domestic relations order. Edward V. Atnelly et al., *Employee Benefit Plans and Estate Planning*, 30 REAL PROP., PROB. & TR. J. 27, 29 (1995). REA also places requirements, like obtaining the spouse's approval, on participants before receiving payments from their plans before the plans mature. *Id.*

35. Jayne Elizabeth Zanglein, *In the U.S. Supreme Court: Are Pensions for the Living or the Dead? ERISA Preemption and State Community Property Laws*, WEST'S LEGAL NEWS 14647, Jan. 16, 1997 [hereinafter Zanglein, *In the U.S. Supreme Court*]. "REA was enacted to address the burgeoning body of

assignable to protect beneficiaries by cementing their interests in the benefits.³⁶ REA expanded the situations where a QDRO could be issued, and therefore expanded the possibilities of alienation of pension plans.³⁷ Now, a QDRO may be issued in a divorce situation.³⁸

2. Assignments of Benefits may be Allowed if . . .

While alienation and assignments are not usually allowed, certain exceptions exist.³⁹ With ERISA plans, for example, alienation and assignment of benefits are allowed with a voluntary and revocable waiver.⁴⁰ The spendthrift section of ERISA⁴¹ "applies only to pension plan benefits."⁴² The spendthrift section of

conflicting jurisprudence addressing spousal rights in plans and plan benefits, particularly under community property regimes." *Id.* at 40 (internal citations omitted).

36. S. REP. NO. 98-575, at 2564. In general, benefits under a pension plan covered by ERISA are non-assignable. *Id.* By making the benefits non-assignable, beneficiaries' interests were protected because the benefits could not be given to anyone other than the beneficiary. *Id.*

37. *Id.* If all of the benefits, or a part of the benefits, must be distributed according to a QDRO, then that alternate payee's right to the benefits is not considered an alienation or assignment of the benefits. *Id.* In fact, under REA, a divorced spouse is in a better position than a spouse who remains married until death. *Boggs v. Boggs Holds . . .*, *supra* note 9, at 10.

38. 29 U.S.C. § 1056(d)(3)(B)(ii) (1997). QDROs can also be issued when child support payments are necessary. *Id.*

39. *Id.* Some plans are fully excluded from ERISA, and under those plans, assignments and alienation of benefits are presumably allowed. 29 U.S.C. § 1001 (1997). ERISA provides for assignments or alienation of plan benefits in the following manner:

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed [ten] percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. . . .

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

29 U.S.C. § 1056(d)(2) & (3)(A) (1994).

40. *Id.*

41. The spendthrift provision of ERISA is the provision forbidding alienation and assignment of benefits. 29 U.S.C. § 1056(d)(1).

42. Vecino, *supra* note 9, at 587. ERISA does not mention IRAs, 401K plans, stock option plans or retirement bonuses, but concentrates instead on

ERISA prevents benefits from being assigned to a party other than the direct beneficiary.⁴³ Some exceptions to the spendthrift provision are specifically mentioned.⁴⁴

One specially mentioned exception is the QDRO.⁴⁵ For a domestic relations order to be considered a QDRO, certain specific provisions must be met.⁴⁶ A QDRO is a judgment from a court that relates to property rights under an ERISA plan.⁴⁷ For example, the order must acknowledge the alternate payee, i.e., the person other than the current beneficiary, and the alternate payee's right to receive payment from the plan.⁴⁸ The order must also identify the name and last known mailing address of the participant and beneficiary, the percentage (or the formula for deciding the amount) of the benefits to be paid, and the number of payments necessary.⁴⁹ If the order does not meet these requirements, then the order is not a QDRO, and its alienation is not allowed.⁵⁰

"pension plans." 29 U.S.C. § 1056(d).

43. 29 U.S.C. § 1056(d)(1). Therefore, if the participant is receiving an annuity from his or her plan, the participant cannot choose an alternate payee. *Berry v. Kirkland*, Civ.A.97-2212, No. 1998 WL 187823 at *1 (E.D. La. Apr. 20, 1998). Here, the plaintiff was looking for a "redistribution of retirement benefits and an ownership interest in those benefits which were payable under two benefit plans in which her now deceased ex-husband participated." *Id.* The justices in *Berry* noted that the *Boggs* Court held that ERISA controls a survivor's annuity to the point that even participants cannot designate a different beneficiary "unless the nonparticipant spouse agrees." *Id.* The *Berry* court held that the plaintiff could not receive any such benefits because she did not obtain a QDRO when she divorced her husband; in the alternative, even if she had, his new wife did not voluntarily waive her rights in the plans and benefits. *Id.*

44. The Supreme Court decided that if an exception to ERISA's application is not mentioned specifically in ERISA's spendthrift provision, then that exception cannot be allowed. *See Ablamis v. Roper*, 937 F.2d 1450, 1454 (9th Cir. 1991) (citing *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990)). The *Guidry* Court specifically stated that for an exception to be valid it must be expressly mentioned in the spendthrift provision of ERISA. *Id.*

45. 29 U.S.C. § 1056(d)(3) (1997). Congress added the QDRO exception to ERISA because some courts had decided that ERISA did not preempt state "family support obligations." S. REP. NO. 98-575 at 2564 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547.

46. "[A] domestic relations order meets the requirements of this subparagraph only if such order clearly specifies A domestic relations order meets the requirements of this subparagraph only if such order" 29 U.S.C. § 1056(C)-(D).

47. *Id.* However, courts have found that ordinary probate orders do not meet the QDRO requirements. *Ablamis*, 937 F.2d at 1455.

48. *Ablamis*, 937 F.2d at 1455.

49. S. REP. NO. 98-575, at 20.

50. *Id.* Even if a domestic relations order would otherwise be a QDRO, if it requires a plan to provide for any benefit not otherwise provided for, provide increased benefits, or beneficiary's payment from the benefits to pay a third party, the order is not a QDRO. *Id.* *See also* Zanglein, *In the U.S. Supreme*

C. Local Governments and Community Property

There are nine states that follow a community property system concerning estate planning.⁵¹ In a community property state, marriage is considered an equal partnership with each spouse contributing equally to the acquisition of assets during the marriage.⁵² Therefore, each spouse owns equally all assets acquired during marriage.⁵³

In community property states, when one spouse dies, the surviving spouse owns at least one-half of the estate.⁵⁴ This ownership occurs automatically because of the community property laws.⁵⁵ The marriage community, or "partnership," ends when a spouse dies.⁵⁶ When this occurs, the surviving spouse must provide an accounting to the decedent's estate for any community property under the surviving spouse's control at the partnership's

Court, supra note 35, at § 4.0 (observing that QDROs are a special kind of domestic court order which must meet statutory standards).

51. *Boggs v. Boggs*, 520 U.S. 833, 840 (1997). The nine community property states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Treacy, *supra* note 2, at 24.

52. *Boggs*, 520 U.S. at 840.

53. *Ablamis*, 937 F.2d at 1450. "[Community property law] is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship." *Boggs*, 520 U.S. at 840. Even though both spouses may acquire property during marriage, property does not necessarily have to be divided equally as long as the decedent's estate is divided in two, with one-half of the entire estate going to the surviving spouse outright. *Id.* at 871. ERISA benefits, according to the holding in *Boggs*, cannot be divided and therefore must be placed entirely in one estate or the other. *Id.* at 873.

54. The Louisiana Civil Code requires a spouse to give an accounting "to the other spouse for community property under his control at the termination of the community property regime." LA. CIV. CODE ANN. art. 2369 (West 1998). Community property assets vest in each spouse equally when acquired. *Boggs*, 520 U.S. at 850-51. Upon the death of the first spouse, the surviving spouse must logically own one-half of the community property outright, without any transfers of interest. *Id.*

55. Jayne Elizabeth Zanglein, Fifth Circuit Survey, "*Meyered*" in the *Boggs* of ERISA Preemption: *Employee Benefits in the Fifth Circuit*, 29 TEX. TECH. L. REV. 581, 592 (1998) (citing *Bailey v. New Orleans Steamship Ass'n/Int'l Longshoremen's Ass'n*, 100 F.3d 28, 29 (5th Cir. 1996)) (holding the wife was "vested with a present undivided one-half interest in the portion of the pension plan vested during the time of her marriage to Herman Bailey"). [hereinafter Zanglein, "*Meyered*" in the *Boggs* of ERISA]. In community property states, each spouse has a one-half interest in all property acquired during the marriage. *Boggs*, 520 U.S. at 871-72. That interest is fully vested at the time the asset is acquired, and therefore the spouses are similar to joint tenants. See *id.* at 837 (stipulating that "absent pre-emption, Louisiana law controls and that under it, Dorothy's will would dispose of her community property interest in Isaac's undistributed pension plan benefits").

56. Tristan E. Propst, Note, *Boggs v. Boggs: The Fifth Circuit Finds ERISA Does Not Preempt Louisiana Community Property Law*, 71 TUL. L. REV. 1005, 1007-08 (1997) (citing LA. CIV. CODE ANN. art. 2356 (West 1985)).

end.⁵⁷ Survivors of the decedent also have the statutory right to demand an accounting of the estate's value.⁵⁸

D. This is the Story of a Family Named "Boggs"

The *Boggs* case involved the father's second wife, his children and ERISA.⁵⁹ The children sued for an accounting of their father's estate in order to collect their share.⁶⁰ The United States Supreme Court found that the sons had no rights, due to an invalid testamentary transfer.⁶¹

1. The Background of Boggs

Isaac Boggs, the father, worked for South Central Bell for thirty-six years.⁶² During this time, Isaac was married to Dorothy until she died.⁶³ Dorothy and Isaac had three sons.⁶⁴ Dorothy left Isaac an usufruct⁶⁵ in two-thirds of her estate and one-third outright to Isaac.⁶⁶ Isaac married Sandra soon after Dorothy's death.⁶⁷

When Isaac retired, he received a lump sum from the Bell System Savings Plan.⁶⁸ Isaac also received AT&T stock shares and a monthly annuity payment.⁶⁹ Isaac took the lump-sum payment and rolled it over into an IRA.⁷⁰ He died after about ten years of marriage to Sandra.⁷¹ Isaac's will left Sandra a life estate in his share of the pension plan, with the remainder to his sons after her death.⁷² Sandra also received all the other assets not included in the pension plan benefits.⁷³

57. LA. CIV. CODE ANN. art. 2369 (West 1998).

58. Propst, *supra* note 56, at 1008. According to *Boggs*, ERISA now preempts community property laws. *Boggs*, 520 U.S. at 834.

59. *Boggs*, 520 U.S. at 835.

60. *Id.*

61. *Id.* at 836.

62. *Id.*

63. *Id.*

64. *Boggs*, 520 U.S. at 836.

65. An usufruct is essentially the common law equivalent of a life estate. *Id.* The Louisiana Civil Code explains an usufruct as a "real right of limited duration on the property of another." LA. CIV. CODE ANN. art. 535 (West 1998). Therefore, since Isaac had an usufruct, the sons had a vested remainder interest in the property held in usufruct. *Boggs*, 520 U.S. at 835.

66. *Boggs*, 520 U.S. at 836.

67. *Id.*

68. *Id.*

69. *Id.* The stock was awarded as part of the Bell South Employee Stock Ownership Plan (ESOP). *Id.*

70. An IRA is an Individual Retirement Account. *Id.*

71. *Boggs*, 520 U.S. at 836.

72. *Id.*

73. *Id.*

2. The Procedural History of *Boggs*

Two of the three sons claimed a share of Isaac's estate in state court and wanted an accounting of the value of the benefits.⁷⁴ Sandra petitioned the United States District Court for the Eastern District of Louisiana, questioning the validity of Dorothy's bequest of Isaac's pension plan benefits.⁷⁵ Sandra argued that the sons' claim was preempted by ERISA since it was based on Dorothy's bequest.⁷⁶

The district court noted that ERISA did not preempt Louisiana's community property law.⁷⁷ It therefore granted summary judgment to the sons,⁷⁸ relying on Louisiana law.⁷⁹ The court found no assignment or alienation of pension plan benefits because Dorothy's interest had already vested,⁸⁰ and accordingly was valid at the time of her bequest.⁸¹

Sandra appealed to the Fifth Circuit Court of Appeals,⁸² which affirmed the judgment of the district court.⁸³ The Fifth Circuit

74. *Id.* Two of the three sons filed suit in state court after Isaac's death requesting an accounting from an independent expert. *Id.* at 837. The sons wanted the accounting to cover their percentage of Isaac's retirement benefits because of Dorothy's testamentary transfer. *Id.* The sons wanted portions of Isaac's IRA, his shares of AT&T stock, monthly annuity payments, and the survivor annuity payments. *Id.*

75. *Id.* Sandra, the second wife, contested whether Dorothy's testamentary transfer was valid based on Sandra's interest in those benefits, which derived both from Isaac's will and from 29 U.S.C. § 1055. *Id.* at 837. Sandra asked for declaratory judgment establishing ERISA's preemption of Louisiana community property law with regard to the sons' claims based on their mother's testamentary transfer. *Id.*

76. *Boggs*, 520 U.S. at 837.

77. *Boggs v. Boggs*, 849 F. Supp. 462, 467 (E.D. La. 1994), *aff'd*, 82 F.3d 90 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997).

78. *Id.*

79. *Id.* The District Court reasoned that since state law allowed Dorothy an undivided interest in all marital assets acquired during marriage, she had an interest in the benefits acquired during her marriage. *Id.* The Appellate Court found that the spouse's interest in the benefits under community property law did not violate ERISA's spendthrift provision (the provision prohibiting alienation or assignment) because Congress could not have intended to change traditional family law. *Boggs v. Boggs*, 82 F.3d 90, 97 (5th Cir. 1996).

80. The circuit court found that since community property law vested each spouse automatically with an interest in assets earned during marriage, ownership already existed and no transaction was necessary. *Boggs*, 82 F.3d at 97. The court found that because no transaction was necessary, there was no alienation or assignment of the interest. *Id.*

81. *Boggs*, 849 F. Supp. at 467. See *supra* note 79 for a discussion on how and why the lower court found no assignment of interests under community property law and therefore no violation of ERISA. The district court found Dorothy's attempted testamentary transfer valid because of ERISA's silence on protecting all of the benefits for the beneficiary. *Id.* at 465.

82. *Boggs*, 82 F.3d at 90.

83. *Id.* at 93.

held that Louisiana law only affects pension plans after the benefits have been distributed, not before nor while the plan administrator controls them.⁸⁴ After this decision, a conflict arose between the Ninth Circuit's 1991 decision, *Ablamis v. Roper*,⁸⁵ and the Fifth Circuit. The United States Supreme Court granted certiorari⁸⁶ and resolved the conflict by reversing the Fifth Circuit.⁸⁷

E. Preemption: Why Can Federal Law Do That?

The Supremacy Clause in the United States Constitution permits federal preemption of state law.⁸⁸ The Supreme Court has limited the Supremacy Clause by holding that "state law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that the state law be preempted."⁸⁹

84. *Id.* at 97. The appellate court stressed that state law affects what the participant does with his benefits after he has received them, not what the plan administrator does with them prior to distribution. *Id.* Some of the justices on the Fifth Circuit asked for a rehearing en banc, which was denied. *Boggs*, 82 F.3d 90 (5th Cir. 1996) *reh'g en banc denied* (July 16, 1996). Only six judges on the court of appeals wanted to rehear the case en banc and were therefore disappointed when it did not come through. *Boggs*, 520 U.S. 833, 837 (1997). The justices believed that allowing a spouse to devise pension plan benefits in a testamentary transfer would defeat ERISA's purposes of guaranteeing participants and their beneficiaries the benefits and "of securing national uniformity in pension plan administration." *Id.* at 838.

85. 937 F.2d 1450, 1460 (9th Cir. 1991). The Supreme Court agreed to hear the case in part because there was a conflict between circuits. *Boggs*, 520 U.S. at 839. The Fifth Circuit and the Ninth Circuit reached substantially different results on the same issue. *Id.* In *Ablamis v. Roper*, the Ninth Circuit held "that ERISA preempts a testamentary transfer by a non-participant spouse of [her] community property interest in undistributed pension plan benefits" was not allowed. *Id.*

86. *Boggs*, 520 U.S. at 839.

87. *Id.*

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

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be 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.

Id. See also *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 961 F. Supp. 1547, 1550 (D. Utah 1997) (stating that "state laws that 'interfere with, or are contrary to the laws of [C]ongress, made in pursuance of the [C]onstitution' . . . are invalid under the Supremacy Clause of the Constitution" (cites from original omitted)).

89. *Vecino*, *supra* note 9, at 589-90. See also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), *reh'g denied*, (June 17, 1963) (stating that, according to precedent, federal legislation should not preempt state legislation, unless persuasive reasons exist for preemption. Examples of such a reason include circumstances wherein the nature of the field leaves no other rational conclusion, or a situation in which Congress has expressly

Lower federal courts have limited the Supremacy Clause by finding a rebuttable presumption that Congress does not intend to preempt state law.⁹⁰

The Supreme Court has developed three different tests to determine whether a federal law preempts a state law: express preemption, conflict preemption, and field preemption.⁹¹ Express

allowed preemption).

The Tenth Amendment clarifies the power of the federal government, stating that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. However, the United States Supreme Court has held that the Tenth amendment is "but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941).

90. See *DeBuono v. NYSA-ILA Medical & Clinical Serv. Fund*, 520 U.S. 806, 815-16 (1997) (holding that ERISA does not preempt a state tax on hospitals, even when an ERISA plan benefit is taxed, because the statute applies to everyone). See also *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 57 (D. Mass. 1997) (observing that "[t]he key to § [1144] is found in the words 'relate to'"); *Mount Olivet Cemetery Ass'n*, 961 F. Supp. at 1550 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (holding that "[c]onsideration under the Supremacy Clause [of the Constitution] starts with the basic assumption that Congress did not intend to displace state law" (internal citations omitted))). The court in *Andrews-Clarke* noted that Congress used the words in the preemption clause in ERISA in their broadest meanings possible. *Andrews-Clarke*, 984 F. Supp. at 57. Congress rejected the more limited language that would have only preempted state laws relating to specific issues covered by ERISA. *Id.* The court defined the phrase "relates to" as any law connected with or that makes a reference to any employee benefit plan. *Id.*

However, cases have also held that whenever Congress enacts a law, that law preempts any state laws possibly existing in the field. See *Shaw v. Delta Airlines*, 463 U.S. 85, 106-07 (1983) (holding that ERISA preempts state law categorizing pregnancy as a disability because ERISA covers plans and not parts of plans). See also *Andrews-Clarke*, 984 F. Supp. at 49 (holding that ERISA preempted state tort remedies when the deceased was injured because of a denial of benefits from an ERISA plan by a medical care provider). Compare *Andrews-Clarke*, 984 F. Supp. at 49 (see above sentence for the holding of *Andrews-Clarke*) with *Boggs*, 520 U.S. at 841 (holding in part that ERISA and community property laws conflict with each other to an extent where ERISA should preempt state law).

91. *Mount Olivet Cemetery Ass'n*, 961 F. Supp. at 1552 (observing that if the federal legislation contains an "express congressional intent" to preempt state law, the federal statute will preempt the state law. If the express intent is not expressed, the federal law may still preempt the state law implicitly, by conflict or field preemption.). See also *Boggs*, 520 U.S. at 860-61 (Breyer, J., dissenting) (stating that the courts should look to whether the state law involves a field already covered by federal legislation or a field which Congress reserved for federal legislation). When a court decides whether or not there is federal preemption of state law, it must look to Congress' purpose, or reason, for enacting the law. *Shaw*, 463 U.S. at 95 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)). Whether preemption is express or implied, it occurs whether it is "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.*

preemption deals with the laws' exact words.⁹² Conflict preemption involves a direct conflict between federal and state laws.⁹³ This test examines whether it is physically impossible to obey both laws and still retain "federal superintendence of the field."⁹⁴ Field preemption examines the idea that federal law automatically preempts an entire field whenever it is enacted.

Field preemption, the last test, is based on the idea that when Congress makes a law, it automatically preempts the entire field.⁹⁵ For a court to use the field preemption test, it must determine that the "scheme of [the] federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . ."⁹⁶ Field preemption analysis involves deciding whether the federal law involves "traditional state regulation."⁹⁷

92. *Mount Olivet Cemetery Ass'n*, 961 F. Supp. at 1552. This first test is fairly easy and straightforward. Express preemption exists when Congress specifically says that it intends to preempt state law. *Id.* The other two types of preemption tests are more complex and are known as conflict preemption and field preemption. *Boggs*, 520 U.S. at 841. See also *Mount Olivet Cemetery Ass'n*, 961 F. Supp. at 1552 (holding that there is a "reasonable inference" that Congress left no room in a field for state law).

93. *Mount Olivet Cemetery Ass'n*, 961 F. Supp. at 1553.

94. *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142. See also *Mount Olivet Cemetery Ass'n*, 961 F. Supp. at 1553 for further discussion. If it is physically impossible to obey both laws, then the federal law preempts the state law. *Id.* When it is impossible to obey both state and federal statutes, then a court should use conflict preemption. *Id.* Courts should also use conflict preemption when obeying the state law would create an obstacle to fully carrying out the purpose of the federal statute. *Id.* (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). Likewise, if it is not physically impossible to obey both laws and the state law is not an obstacle to the federal statute's purpose, then the federal law does not preempt the state law and both are valid. *Id.* The Supreme Court in *Boggs* used conflict preemption to decide whether ERISA preempted state community property laws or not. *Boggs*, 520 U.S. at 844.

95. *Mount Olivet Cemetery Ass'n*, 961 F. Supp. at 1552.

96. *Id.* at 1552. For example, in *Andrews-Clarke*, the court found that it was Congress' partial intent to protect employers and ERISA plans from complying with conflicting state laws. 984 F. Supp. 49, 58 (D. Mass. 1997). Congress intended this protection only in order to achieve ERISA's full intent. *Id.* The court's holding was limited to medical care providers who provide care under ERISA plans. *Id.* The court found that because ERISA had at one time provided a remedy for abuses by medical care providers and that provision had been removed, Congress had preempted the entire field. *Id.*

97. *California Div. of Lab. Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Justice Breyer's dissent in *Boggs* urged the Court to use this type of test to determine that ERISA preempted Louisiana's state community property laws. *Boggs*, 520 U.S. at 858. The dissent points out that the Louisiana law makes no reference to ERISA and therefore should not be preempted. *Id.* Justice Breyer also noted that the Louisiana statute made no mention of ERISA or pension plans at all, but rather only referred to estates in

The field preemption test has two prongs.⁹⁸ The reviewing court must first ask whether the federal law concerns traditional state law.⁹⁹ Courts are more likely to answer yes if the law affects the relationships between the employee/beneficiary and plan administrator.¹⁰⁰ Next, the court must ask whether a federal law relates to a traditional area of state law.¹⁰¹ To do this, the court looks to whether the state law refers to the federal law in question.¹⁰² If the state law does refer to that law, then the federal law will probably preempt it.¹⁰³ Yet, even if the state law does not refer to the federal statute, it still may be preempted if the court finds a "connection with ERISA plans."¹⁰⁴ In order to determine whether a state law has a connection with a federal statute, the court must examine the legislative history of that statute and Congress' objectives in enacting it.¹⁰⁵

II. PREEMPTION IS NOT PROPER IN *BOGGS* BECAUSE . . .

The Court in *Boggs* held that ERISA does preempt state community property law because state community property law interferes with ERISA's purpose.¹⁰⁶ The Court did not adhere to its

general and included all marital assets. *Id.* Justice Breyer continued noting that the Louisiana statute also does not "act exclusively on, or rely on the existence of, ERISA plans." *Id.* Therefore, Justice Breyer concluded, in part, that ERISA did not preempt Louisiana state law. *Id.* at 859-60.

98. See *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983) (holding the test for whether a state law relates to ERISA to be whether the law is connected in some way with or somehow refers to pension plans.). See also *Dillingham*, 519 U.S. at 324 (citing *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992)) (stating that the test involves "a two-part inquiry: a law 'relate[s] to' a covered employee benefit plan for purposes of § 514(a) 'if it [1] has a connection with or [2] reference to such a plan'"); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456, 1465 (5th Cir. 1986) (adopting the test delineated in *Shaw*).

99. *Shaw*, 463 U.S. at 95-96.

100. *Sommers*, 793 F.2d at 1467.

101. *Dillingham*, 519 U.S. at 324-25.

102. *Id.* at 324.

103. See *id.* (explaining that when a state statute refers to ERISA plans, such a reference must have an immediate and exclusive effect on ERISA plans in order for the federal statute to preempt the state statute).

104. *Id.* at 338.

105. *Auslander v. Helfand*, 988 F. Supp. 576, 578 (D. Md. 1997) (holding that a reviewing court must consider multiple factors before determining that ERISA preempts a state statute. The factors include examining the purpose of ERISA and its associated statutes, the scope of the state law Congress intended to survive, and how the state statute will actually effect ERISA plans). While this court talked only about ERISA preemption, it noted that "ERISA pre-emption analysis does not differ significantly from traditional pre-emption analysis." *Id.*

106. *Boggs*, 520 U.S. at 853. The Court analogized savings bonds cases to ERISA plans concerning the community property interest and who should receive it. *Id.*

previous holdings, and it is now uncertain which test should be followed.¹⁰⁷ Section A discusses how the holding in *Boggs* is inconsistent with the purpose of ERISA, federal policy and previous holdings of the Supreme Court. Section B analyzes the preemption portion of ERISA and how it affects beneficiaries and their interests. Section C examines how the words “relates to” from the preemption portion of ERISA should be applied to state statutes. Section D explores why the consistent application of law policy should not be applied in this situation. Section E addresses situations where beneficiaries currently lose their benefit interests through the application of ERISA.

A. What Seems to be the Problems with *Boggs*?

1. *Boggs* versus the Stated Purpose of ERISA

When the *Boggs* Court found that ERISA preempted Louisiana state probate law,¹⁰⁸ it ignored the fact that distribution of the benefits had already been made. Why is this important? The decision in *Boggs* extends ERISA’s scope beyond protecting plan participants and their beneficiaries from plan administrators’ abuses¹⁰⁹ to protecting the beneficiaries from the plan participants.¹¹⁰ The *Boggs* Court justified its decision by contending that the purpose of ERISA is to protect beneficiaries.¹¹¹

Even though these benefits exist, the detriments outweigh the benefits. Congress made no provision for first spouses who live in community property states, remain married until death and die before the participant.¹¹² Therefore, under ERISA and *Boggs*, second spouses can take all the benefits from the family of the participant.¹¹³

Until ERISA was amended by REA, Congress did not give the protection of beneficiaries and their interests from plan participants as a reason for the passing of ERISA.¹¹⁴ Congress

107. This creates more problems for the law in the area of preemption. The Supreme Court in *Boggs* held that conflict preemption was appropriate when dealing with ERISA and community property laws. *Id.* at 844. However, the Court was not clear that courts should evaluate ERISA cases using conflict preemption. *Id.*

108. *Id.* at 835.

109. H.R. REP. NO. 93-533, at 4641 (1974).

110. *Boggs*, 520 U.S. at 859 (Breyer, J., dissenting).

111. *Id.* at 843. The Court noted that ERISA was enacted to provide the beneficiaries a source of income after the participant dies. *Id.* at 843.

112. See 29 U.S.C. § 1056(d)(3)(B) (making no special provisions for spouses in community property states).

113. *Id.*; *Boggs*, 520 U.S. at 835.

114. 29 U.S.C. § 1056(d)(3)(B). In the 1970s, Congress noticed that plan administrators were abusing the plans they were supposed to be safeguarding for the participants. H.R. REP. NO. 93-533, at 4643 (1973). Congress declared

instead debated how to protect participants and beneficiaries from plan administrators.¹¹⁵ The legislative history of REA, however, debates a spouse's interest in the benefits.¹¹⁶ REA protects divorced spouses over predeceasing spouses.¹¹⁷ Congress never mentioned predeceasing, non-participating spouses who had an interest in the plan arising from the application of community property laws.¹¹⁸ By holding that such spouses have no such interest, state law notwithstanding, the *Boggs* decision is inconsistent with the stated purpose of ERISA, i.e., to protect participants and their dependents from plan administrators.

2. *Boggs, Federal Preemption Policy and Precedent*

Despite the holding in *Boggs*, federal law does not, and should not, automatically preempt state law.¹¹⁹ If Congress enacts a law, however, some cases seem to state that Congress automatically preempts the entire field concerning that law.¹²⁰ In both *Shaw v. Delta Airlines* and *Andrews-Clarke v. Travelers Insurance Co.*, the courts found that since ERISA discussed the fields of disability benefits and medical benefits respectively, both those fields were completely preempted.¹²¹ In *Boggs*, the Court went one step too far

that REA was being enacted in order to allow equity for participants, their spouses and their dependent children. S. REP. NO. 98-575, at 2547 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547.

115. S. REP. NO. 98-575, at 2547.

116. *Id.* at 2564.

117. *Id.* Congress was concerned about non-participating spouses being cut off from their only retirement funds at the death of their participating spouses. *Id.* In the legislative history of REA, Congress never mentions protecting predeceasing spouses, let alone non-participating, predeceasing spouses. *Id.* at 2549, 2564.

118. *Id.* at 2549, 2564.

119. The argument being made here is mainly one of public policy. However, the text of ERISA supports the argument because it exempts certain state laws. 29 U.S.C. § 1144(b)(2)(A) (1994). *See also* *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-42 (1990) (explaining that Texas state wrongful discharge law is preempted because it conflicts with ERISA and covers the exact purpose of ERISA); *Ablamis v. Roper*, 937 F.2d 1450, 1455-56 (9th Cir. 1991) (explaining that ERISA preempts California state community property laws in testamentary transfers because such transfers do not fall under acceptable QDROs, or any other exception to ERISA). *Compare Boggs*, 520 U.S. at 858-59, *with Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 49 (D. Mass. 1997) (holding that ERISA does preempt the entire field of medical benefits enforcement and remedies when the granting of medical benefits has been abused by denying benefits when the ERISA plan covers the medical benefits). There is a rebuttable presumption that Congress does not intend to preempt state law. *DeBuono v. NYSA-ILA Medical & Clinical Serv. Fund*, 520 U.S. 806, 814 (1997).

120. *See Shaw v. Delta Airlines*, 463 U.S. 85, 100 (1983) (seeming to suggest that Congress does generally preempt a given field by passing a law in that field).

121. *Id.*; *Andrews-Clarke*, 984 F. Supp. at 53.

along this path.¹²²

Courts apply field preemption as a final test after examining the other two available tests.¹²³ ERISA, a comprehensive statute, provides for cases where it does not preempt state laws in its savings clause.¹²⁴ Therefore, some state laws exist which do obstruct its purpose.¹²⁵ ERISA is pervasive enough to preempt laws that relate to it; however, if the state law is one of general application, the language of ERISA and relevant precedent conclude that it is not preempted.¹²⁶ By holding that merely because a law affects ERISA benefits it is thereby preempted, the *Boggs* holding is also inconsistent with policy and precedent.¹²⁷

B. ERISA's Spendthrift Provision and State Law

Congress did not intend for ERISA to cover all fields of law,

122. See EDWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 291 (1997) (discussing the theories and practices behind field and conflict preemption).

123. *Id.* Field preemption is also known as implied or implicit preemption. *Id.* Because this test allows the widest scope of preemption, it is used only when called for by the comprehensive nature of the statute. It is because the statute is comprehensive. *Id.* Congress will preempt a field if the law seems to provide detailed instructions for their law in that field. CHEREMINSKY, *supra* note 122, at 292. See also *supra* Part I.E. for a discussion of the different types of preemption.

124. *Shaw*, 463 U.S. at 90-91; see also 29 U.S.C. § 1144 (1994) (setting forth the conflict savings clause of ERISA).

125. This seems to argue that the *Boggs* court erred when it applied a conflict preemption test to ERISA and state community property laws. *Boggs*, 520 U.S. at 841. The Court stated that since community property law conflicted with the purpose of ERISA, those laws should be preempted. *Id.* However, ERISA specifically provides for areas where conflicting laws may exist. 29 U.S.C. § 1144. If conflicting laws can exist, then conflict preemption does not seem to be a valid test for ERISA problems. Lastly, the Court has found that if a law does not "relate to" ERISA, it is not preempted. *DeBuono v. NYSA-ILA Medical & Clinical Serv. Fund*, 520 U.S. 806, 815-16 (1997). See also *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-40 (1990) (holding that law "related to" ERISA, and therefore preempted).

126. For a more detailed explanation of the "relates to" test, see *infra* Part II.C.1., *Ingersoll-Rand*, 498 U.S. at 139, and *DeBuono*, 520 U.S. at 815-16. ERISA is not so pervasive that it preempts the field of all laws affecting ERISA. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 238 (1984) (holding that state laws providing remedies against nuclear companies were not preempted by the National Nuclear Regulatory Act, even though that act extensively covered the field of nuclear regulation); see also *California Div. of Lab. Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 326 (1997) (holding that California state law concerning the payment of apprentices does not obstruct ERISA's purpose and therefore is not preempted by ERISA); *Auslander v. Helfand*, 988 F. Supp. 576, 579-80 (D. Md. 1997) (holding that ERISA does not preempt Maryland state release law in the area of wrongful discharge).

127. See *supra* note 126 (discussing effect of ERISA on state laws).

since it specifically exempts certain types of state laws.¹²⁸ ERISA “supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .”¹²⁹ Later in this provision, however, it exempts insurance, banking and securities laws from ERISA’s application.¹³⁰ Moreover, the provision also exempts state criminal laws.¹³¹

ERISA’s silence on state community property laws and its effect on those laws is not indicative of inclusion.¹³² Instead, the silence implies Congress never thought about the situation at all. Previous cases have held that silence does not automatically mean a field is included in the scope of a federal statute, if the field is one that could be expected to be included.¹³³

The *Boggs* decision creates a curious situation. ERISA now exempts banking laws, but not probate laws, from its control. Probate and banking laws are similar in that neither is enacted specifically to affect ERISA plans.¹³⁴ By allowing ERISA to preempt state community property law, a field similar to probate law, the Court allows other areas of law, which are traditionally less controlled by states than probate laws, to remain unaffected. Because preemption permits states to retain control of fields they have traditionally controlled, the new result of ERISA is inconsistent with preemption.

C. “Relates To” and ERISA

1. “Relates To” can be Interpreted in Many Ways

The Court uses the words “relates to” as being key in ERISA’s preemption section.¹³⁵ Section 1144 of ERISA provides that all state laws *relating to* ERISA are preempted.¹³⁶ In *Boggs*, however, the Court ignored the words “relate to” and instead used straight conflict preemption simply because the laws affected an ERISA

128. Employee Retirement Income Security Act, 29 U.S.C. § 1144(b) (1998).

129. *Id.* § 1144(a). The preemption provision specifically exempts any plans not subject to ERISA. *Id.*

130. *Id.* § 1144(b)(2)(A).

131. *Id.* § 1144(b)(4).

132. There is no mention of community property laws or how ERISA or REA will affect those state laws. S. REP. NO. 98-575, at 2549, 2564 (1984).

133. Vecino, *supra* note 9, at 606. See also *supra* note 126 for examples of cases in which courts held that fields of law not mentioned in ERISA were not preempted because ERISA was silent on the matter.

134. This is logical because banking and probate laws have existed at common law and ERISA was first enacted in 1974. Because banking and probate laws pre-date ERISA, they do not specifically mention or affect ERISA and therefore should not relate to ERISA plans. Using the Court’s test, if the laws do not relate to ERISA, then they should not be preempted by ERISA. *Boggs v. Boggs*, 520 U.S. 833, 841 (1997).

135. *Shaw v. Delta Airlines*, 463 U.S. 85, 97-98 (1983).

136. 29 U.S.C. § 1144.

plan.¹³⁷ In previous cases, the Court has rejected an overbroad interpretation of “relates to” because everything relates to everything else in this world, if examined closely enough.¹³⁸ Using field preemption, as Justice Breyer’s dissent urges,¹³⁹ is more logical because state community property laws can be followed without conflicting with or obstructing ERISA.¹⁴⁰

Justice Scalia wrote that the words “relates to” should only set up a way to determine whether a field preemption analysis is appropriate.¹⁴¹ He argued express or conflict preemption should not be used when “relates to” appears.¹⁴² If “relates to” were interpreted broadly, then any state law might be preempted based on the most remote effect on ERISA.¹⁴³

In *DeBuono v. NYSA-ILA Medical & Chemical Service Fund*, the Court explained that ERISA did not preempt a state hospital tax affecting ERISA plans simply because holders of the plans were also required to pay the tax.¹⁴⁴ The Court stated that since the law was not enacted for the sole purpose of affecting ERISA plans, but instead applied to everyone, the state law was not preempted.¹⁴⁵ Community property laws affect all assets earned by all resident couples.¹⁴⁶ They are laws of general application, just like the tax law in *DeBuono*.¹⁴⁷ Therefore, there is no reason why the community property laws should be treated any differently than other laws of general application.¹⁴⁸

2. *The Boggs Court and Louisiana’s Probate Laws*

The Court found that ERISA preempted the state community property probate and distribution laws.¹⁴⁹ Probate laws apply to everyone who lives in the state, not only to those with ERISA

137. *Boggs*, 520 U.S. at 841.

138. *See DeBuono v. NYSA-ILA Medical & Chemical Serv. Fund*, 520 U.S. 806, 813-15 (1997) (explaining that the words “relate to” should not be interpreted in their broadest sense because then all state laws would be preempted by ERISA since everything relates to everything else in today’s world). For similar discussion of the “relates to” test, see also *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990), and *Shaw*, 463 U.S. at 92.

139. *Boggs*, 520 U.S. at 859-61 (Breyer, J., dissenting).

140. *Id.*

141. *Zanglein*, *supra* note 55, at 588.

142. *Id.*

143. *DeBuono*, 520 U.S. at 812-13.

144. *Id.* at 815-16.

145. *Id.* at 818.

146. LA. CIV. CODE ANN. art. 2369 (West 1998).

147. *DeBuono*, 520 U.S. at 818.

148. Community property states will be treated differently than non-community property states; however, that is a problem of state law and courts should not look to ERISA for the solution.

149. *Boggs*, 520 U.S. at 854.

plans.¹⁵⁰ The laws apply to all property owned by the deceased, with no differentiation between benefits and other property.¹⁵¹ Therefore, according to the analysis in *DeBuono*, Louisiana state community property laws should not be preempted by ERISA.

In *Auslander v. Helfand*, the plaintiff sought benefits from his former employer's ERISA plan.¹⁵² The plaintiff had been fired for embezzling funds.¹⁵³ The parties settled on the condition that the plaintiff waive all related claims.¹⁵⁴ The District Court found that "Maryland's law of release does not 'refer to' ERISA-qualified plans because waiver and release are principles of general applicability."¹⁵⁵ The court used a conflict preemption test to determine that ERISA did not preempt Maryland's release law.¹⁵⁶ The *Auslander* court stated that because Maryland's law was not "an obstacle to the accomplishment of the full purposes and objectives of Congress," the law was not preempted by ERISA.¹⁵⁷ Since community property laws are not an encumbrance to ERISA's application, they should not be preempted.

3. Which Test Should the Boggs Court Have Used?

In *Boggs*, the Court found that state community property law was preempted because of a conflict in state and federal laws.¹⁵⁸ However, state community property laws do not present an obstacle to ERISA's purposes. Nor do state community property laws meet any of the types of laws intended to be preempted.¹⁵⁹ State community property laws do not dictate to administrators the structure of plans.¹⁶⁰ They do not "bind administrators to a particular choice"¹⁶¹ because they only affect the benefits after the

150. See 755 ILL. COMP. STAT. 5/2-1 (West 1998) (applying the default probate rules to all residents of Illinois, no matter where they are at the time of their death).

151. See *id.* (making special provisions only for real estate located inside the state).

152. *Auslander v. Helfand*, 988 F. Supp. 576, 577 (D. Md. 1997).

153. *Id.*

154. *Id.*

155. *Id.* at 578.

149. *Id.*

157. *Auslander*, 988 F. Supp. at 578 (internal citations omitted). The court found that there were three kinds of state laws that Congress intended ERISA to preempt: those that require certain "employee benefit structures or [methods of] plan administration"; those that force employers or administrators to make certain choices or otherwise "preclud[e] uniform administrative practice"; and those that allow alternative means of enforcing ERISA claims. *Id.* at 578-79.

158. *Boggs*, 520 U.S. at 854.

159. *Auslander*, 988 F. Supp. at 578-79.

160. See LA. CIV. CODE ANN. art. 2369 (West 1998) (containing no discussion on any specific structure of plans).

161. *Id.* at 579.

benefits have been distributed.¹⁶² Community property laws also do not provide an “alternate enforcement mechanism for ERISA claims”¹⁶³ because they do not specifically deal with ERISA claims at all.¹⁶⁴

Because the Court has proposed the “relates to” test and its application in ERISA issues, the Court should remain consistent and apply that test to state community property laws. This would mean that the laws would not be preempted by ERISA because the laws were not enacted for the sole purpose of affecting ERISA plans. Laws that generally affect issues outside of ERISA plans are not obstacles to ERISA’s application.

D. Uniform Application of Laws and ERISA

Preemption is supposed to allow for uniform enforcement of laws.¹⁶⁵ That way, ERISA would be enforced in the same manner throughout the country.¹⁶⁶ If a couple lived in a community property state for a few years, and then moved to a non-community property state, like Illinois or Florida, proponents of this theory argue executors would be saddled with extra work. The executor or administrator would have to create separate accountings: one recording contributions made within the community property state and a second recording those contributions made outside of that state.¹⁶⁷

There are several flaws with this theory. There is no reason why probate laws should be uniform throughout the country. Probate is an area traditionally regulated by the states.¹⁶⁸ Currently, if a couple moves from a community property state into a non-community property state, technically, it is standard practice in the probate field for the executor of wills to create one list of assets earned in community property state and one list of assets earned in the non-community property state. He would have to determine the value of the assets earned by the couple while in the community property state and the value of the assets

162. *Boggs*, 520 U.S. at 861 (Breyer, J., dissenting).

163. *Auslander*, 988 F. Supp. at 579.

164. *See Boggs*, 520 U.S. at 860-61 (Breyer, J., dissenting) (explaining that community property laws do not relate to ERISA because they do not mention ERISA plans at all).

165. *Id.* at 852.

166. For further review, see Vecino, *supra* note 9, at 585 and 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, 481-82 (1997).

167. Plan administrators must determine how much is owed to the participants and to their beneficiaries.

168. For more specific information, see Propst, *supra* note 56, at 1019, and Treacy, *supra* note 2, at 2.

earned by the couple while in the non-community property state.¹⁶⁹ The executor would have to do this so that he would know what was included in the deceased's estate.¹⁷⁰

If the couple lived in Louisiana for ten years and Illinois for ten years, the executor of the estate would have to compute two accountings: one accounting to determine the assets earned during the time in Louisiana and another to determine those earned in Illinois.¹⁷¹ The same problem occurs if the couple moves from a non-community property state into a community property state. Because this complexity exists for plans outside of ERISA, allowing a non-participating, predeceasing spouse an interest in the plan does not increase the complexity of the accountings or add any work to anyone's job. Considering the current inconsistency in ERISA by exempting fields of law, allowing spouses to retain their interests does not increase, nor decrease, the inconsistency.

E. If the Purpose is to Protect Beneficiaries, Then Why Can the Following Situations Occur?

The Supreme Court has found that one of ERISA's purposes is to protect beneficiaries' interests in benefits.¹⁷² However, the Court has also held in multiple cases that ERISA does not prevent certain agencies from taking all of a beneficiary's interest in the benefits.¹⁷³

169. See 755 ILL. COMP. STAT. 5/2-1 (West 1998) (including the property of an Illinois resident in the default probate rules). See also LA. CIV. CODE ANN. art. 2369 (West 1998) (including property earned while a resident of Louisiana in the application of community property rules).

170. Once an interest vests, the law considers it a present interest and it cannot be divested, unless special circumstances exist. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 123-25 (2d ed. 1988). Therefore, the spouse's interest in the benefits could not be divested without a condition allowing for divestment. *Id.* Also, spouses consider the pension plans as assets of their estates when they do estate planning. Not only do the spouses, but when applying for mortgages, the lenders also consider pension plan assets as assets of the couple applying for the loan.

171. See *supra* note 169 (explaining what property is included and under which statute the property must be considered when determining the assets included in a decedent's estate).

172. *Ablamis v. Roper*, 937 F.2d at 1450, 1455 (9th Cir. 1991); *Boggs*, 520 U.S. at 845.

173. See *DeBuono v. NYSA-ILA Medical & Chemical Serv. Fund*, 520 U.S. 806, 816 (1997) (holding that a general tax imposed by the state on hospitals can be passed on to ERISA plans, even where the tax may interfere with a beneficiary's interest); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 59 (D. Mass. 1997) (holding that insurance companies can effectively negate a beneficiary's right to medical treatment); *In re Saylor*, 98 B.R. 536, 541 (Bankr. D. Kan. 1987) (holding that a participant's creditors could take all of the benefits in order to cover debts, if the plans were created to avoid payment of the debts).

1. *What About Divorce Situations?*

ERISA allows for beneficiaries' interests to be taken by some other party¹⁷⁴ by not only exempting state banking, insurance and securities laws, but also providing for QDRO exceptions.¹⁷⁵ This means that a divorced spouse can get a court order taking some of the current spouse's benefits. In today's world, many marriages fail, which means that many ERISA plans will be affected by at least one QDRO.

Imagine a situation where a person is married four times during his life. If each spouse obtains a QDRO, then the last spouse's interest will be decreased, because of the three preceding QDROs. According to *Boggs*, if those previous spouses die before the last spouse, the last spouse will not lose *any* benefits due to the previous spouses' wills.¹⁷⁶ The last spouse has security in knowing her benefits will remain intact.

The detriments of QDROs as currently written, however, outweigh their benefits. In the above hypothetical, there would be three spouses with an interest in that plan. Currently under ERISA, if the participant has a child with one spouse, then that spouse can attach more of the benefits because of child support obligations.¹⁷⁷ Therefore, under ERISA as it is currently written, by the time the plan participant dies, the last spouse may be left with less than twenty percent of her full interest in the benefits due to valid QDROs.¹⁷⁸ ERISA allows divorced spouses to obtain an interest in the benefits through QDROs,¹⁷⁹ thereby reducing the beneficiary's interest in those benefits.

2. *Insurance Companies and Benefits*

Currently, insurance companies can take all of a beneficiary's benefits. In *Andrews-Clarke*, a plan participant sued her plan's administrators for the wrongful death of her alcoholic husband¹⁸⁰

174. See 29 U.S.C. § 1056 (1994) (allowing state banking and insurance laws to preempt ERISA, therefore opening the possibility of the beneficiary losing all of his or her interest in the benefits).

175. *Id.* § 1055.

176. *Boggs*, 520 U.S. at 841.

177. See 29 U.S.C. § 1056 (allowing spouses to attach pension plans under state family law and containing no restriction on the amount that can be attached).

178. The *Boggs* holding also means that a divorced spouse has more rights to a participant's benefits than a spouse who remains married until his death. *Boggs v. Boggs Holds . . . , supra* note 9, at 10. This cannot be a policy that Congress intended to encourage. If this policy were true, then it would be more economically advantageous to divorce someone than to remain married. Therefore, the Court's decision is contrary to the public policy of supporting and promoting marriage and stable families.

179. 29 U.S.C. § 1056(b).

180. *Andrews-Clarke*, 984 F. Supp. at 52 (explaining that the health care

who had sought treatment.¹⁸¹ The plan's medical advisor refused to admit him into a rehabilitation program, even though the plan allowed for such a program.¹⁸² Because of his failure to receive treatment, the husband committed suicide.¹⁸³ The District Court of Massachusetts found that ERISA preempted the participant's cause of action and therefore left her without damages.¹⁸⁴

If the purpose of ERISA truly is to protect beneficiaries, then *Andrews-Clarke* was wrongly decided. However, it has not been overturned.¹⁸⁵ The participant was not only denied her entitled benefits, but was also denied any recourse.¹⁸⁶ The District Court found that ERISA controlled, and no way to remedy the situation existed.¹⁸⁷

Insurance companies should be able to protect themselves from going bankrupt. One way they can do this is by controlling the care their beneficiaries receive, which helps control health care costs.¹⁸⁸ By controlling health care costs, people can better afford health care, whether covered by insurance or not.¹⁸⁹ Under ERISA, however, insurance companies may reject viable and justified treatment merely because of expense,¹⁹⁰ even when the policy allows for treatment.¹⁹¹

In *Andrews-Clarke*, ERISA did not protect the interest of a

provider had wrongfully refused rehabilitation treatment to the participant's husband thereby causing his death).

181. *Id.* at 51.

182. *Id.*

183. *Id.*

184. *Id.* at 53. The participant's cause of action was for "breach of contract, medical malpractice, wrongful death, loss of parental and spousal consortium, intentional and negligent infliction of emotional distress, and specific violations of the Massachusetts consumer protection laws." *Id.* at 52.

185. A January 15, 1999 search of databases on the Westlaw and Lexis-Nexis services revealed that a petition for certiorari had not yet been filed in this case.

186. *Andrews-Clarke*, 984 F. Supp. at 53.

187. *Id.* at 65. The District Court found that ERISA preempted any state remedy the participant might have had, because one of the goals of ERISA was to protect employers and plans from conflicting state laws. *Id.* at 58. However, this purpose was a way to promote ERISA's principal purpose of protection. *Id.* The District Court found that the lack of remedies was not because of an "overbroad application of ERISA's preemption clause, but rather [because of] the failure of Congress to amend ERISA's civil enforcement provision to keep pace with the changing realities of the health care system." *Id.*

188. See David Tarrant, *Managed Care Changing Doctor-Patient Relations*, GREENSBORO NEWS & REC. (Greensboro, N.C.), Sept. 8, 1998, at D4 (stating that insurance companies are controlling the care received in order to keep down costs).

189. *Id.*

190. *Andrews-Clarke*, 984 F. Supp. at 53.

191. This is the exact situation that occurred in *Andrews-Clarke*. *Id.*

participant or her beneficiary from harm.¹⁹² If protecting beneficiaries and participants from harm is truly the object of ERISA,¹⁹³ then this case should be overturned. ERISA allows insurance companies to deny benefits to plan participants and their beneficiaries without giving either party recourse.

3. *Bankruptcy and Benefits*

Bankruptcy is another area where ERISA does not preempt state law to protect beneficiaries. In *In re Saylor*, the Kansas District Court found that ERISA did not preempt Kansas' state bankruptcy law and therefore the plaintiff's creditors could attach his benefits.¹⁹⁴ The participant, the plaintiff, invested his retirement funds in an ERISA pension plan before filing bankruptcy.¹⁹⁵ He then withdrew some of the funds to pay off other expenses.¹⁹⁶ The court found that any insurance policies purchased by the debtor when the debtor intended to commit fraud were not exempted by ERISA.¹⁹⁷

Creditors may attach benefits when the debtor created the benefits only to thwart the creditors' claims.¹⁹⁸ ERISA tolerates this situation by allowing state bankruptcy laws to remain in full effect.¹⁹⁹ ERISA places no limit on the attachable amount or percentage of the benefits.²⁰⁰ Therefore, it is theoretically possible that creditors could attach all of the benefits, leaving the beneficiary with nothing. If ERISA was enacted in order to protect a beneficiary's interest in the ERISA plan benefits, then this should not be possible. Based on the above stated inconsistencies between ERISA and prior holdings, Congress should amend ERISA to aid courts in applying ERISA as Congress originally intended.

192. *Id.* at 52-53.

193. See *supra* notes 24-26 for an explanation of the purpose of ERISA contained in the legislative history. Nowhere in the legislative history does Congress state that ERISA is intended to protect beneficiaries and participants from any and all harm. H.R. REP. NO. 93-533, at 4646-47, 4676-77 (1974), reprinted in 1974 U.S.C.C.A.N. 4639.

194. *In re Saylor*, 98 B.R. 536, 541 (Bankr. D. Kan. 1987).

195. *Id.* at 537.

196. The plan participant used the funds to pay taxes, pay off his mortgage, buy new cars and other items for his household, "pay accounting and legal fees," "pay off a personal loan at a bank," and "convert two existing [life insurance policies]." *Id.*

197. *Id.* at 539. The court remanded the case for a finding of the participant's intent in purchasing ERISA policies. *Id.* at 541.

198. 29 U.S.C. § 1144 (1997).

199. *Id.*

200. *Id.*

III. PROTECTING THE PEOPLE

Section A discusses exactly how ERISA should be amended in order to avoid the community property problem. Section B discusses the problems with amending ERISA. Section C explains why the amendment is the best solution, despite its problems.

A. Amending ERISA to Allow for Community Property

The way ERISA currently reads causes problems for courts.²⁰¹ Sometimes, a beneficiary's interest is protected through ERISA.²⁰² Other times, the interest is completely superseded by that of a third party.²⁰³ Because of the conflicting results of the ERISA's application, Congress should amend ERISA.

The best way for Congress to fix this problem is to amend the QDROs provision. This provision of ERISA should be amended so that probate orders would qualify as QDROs in more circumstances. The wording should be as follows.

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

While amending ERISA might not solve all of the problems, it will help cure the most important ones.

B. The Created Problems and ERISA

There will be problems with the above-suggested wording for an amendment to ERISA. Heirs who may be entitled to some of the benefits might have to pay extra lawyer's fees to have their

201. For example, in *Emard v. Hughes Aircraft Co.*, the Ninth Circuit held that *Boggs* did not extend to preempt state laws concerning ERISA insurance policies. *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 957 (9th Cir. 1998). In *Emard*, the second husband wanted the insurance proceeds from his wife's ERISA insurance policies. *Id.* at 952. The wife had never changed her beneficiary from her first husband on those policies. *Id.* The second husband argued that he had a constructive trust in the proceeds from those policies. *Id.* at 954. The Ninth Circuit did not decide the case on the merits, but did decide that ERISA did not preempt California community property law with respect to constructive trusts and that the case had been improperly removed to federal court. *Id.* at 961-962.

202. Sandra's interest was protected in a similar manner in *Boggs v. Boggs*, 520 U.S. 833 (1997).

203. *In re Saylor*, 98 B.R. 536, 541 (Bankr. D. Kan. 1987).

interests determined. Heirs could also face significant court delays in receiving funds. The delay would be due to the necessary accounting to determine the exact percentage of any benefits to which the heirs are entitled.

Another possible problem is the result that the Supreme Court feared would occur in *Boggs*, i.e., the second spouse would be left with nothing.²⁰⁴ Because the suggested amendment wording allows spouses to receive a portion of the benefits according to how long the couple was married, and only while the couple lived in a community property state, the problem should be avoided. Therefore, if the second spouse was married longer than the first spouse, he should receive a greater portion of the benefits.

The other possible problem is that application of ERISA will not be consistent throughout the country. Laws currently exist that are not applied consistently throughout the country. For example, individual states decide whether to adopt community property laws. Each state also determines family law within its borders, as well as laws concerning bankruptcy.

While adopting the suggested amendment would lead to an inconsistent application of ERISA, such inconsistent application already exists. Divorced spouses, for example, may currently obtain a percentage interest in ERISA benefits. Allowing a spouse to transfer his interest in a will, when that interest is already vested, is not different from allowing divorced spouses to obtain QDROs. Either way, the surviving spouse's interest in the benefits is lessened. The amendment will create problems, but it solves more problems of greater magnitude than it creates.

C. Amending ERISA and the Resulting Problems

The proposed amendment's wording is not perfect. Its application will cause problems, but will solve more problems than it creates. Spouses who should have an interest in plan benefits will have that interest, whether or not they predecease the participating spouse. This creates a greater certainty in estate planning.

The amendment should also avoid a *Boggs*-type situation. The first wife had thirty years of interest built up in the pension plan,²⁰⁵ yet her estate received nothing. Therefore, the sons received nothing from either their father or their mother.²⁰⁶ The

204. *Boggs*, 520 U.S. at 853. The Supreme Court feared that the second spouse would be left with no retirement funds if it allowed the first spouse's interest to go to the sons. *Id.*

205. *Id.* at 836.

206. *Id.* at 836-37. The Court did not discuss the sons' request for an accounting. *Id.* at 837. The Court also did not attempt to value Dorothy's share of Isaac's pension plan and grant the sons an equivalent from the estate. *Id.* Either of these solutions would probably avoid the inequitable situation

Court took away their inheritance by changing the law and invalidating the estate planning that had been done.²⁰⁷

Boggs and ERISA currently affect the rights of the participant.²⁰⁸ According to *Boggs*, if the participant dies first, then any testamentary transfer of the benefits he makes will be invalid.²⁰⁹ His interest would be completely cut off, leaving all the benefits to the surviving spouse who could transfer them by will. This is not an equitable situation. By allowing a spouse, or an estate, the right to a maximum fifty percent of the benefits, ERISA would avoid also cutting off the participant's interest.

The other problem that would be avoided is that of any extra taxes that may be due if an estate is found to contain more than originally thought. If an estate defers distribution until after the spouse dies, taxes are not due until then. If the courts then decide that the estate was not due the property, then the taxes will be overpaid, or, even worse, the estate may owe more taxes because of various tax benefits allowed. Additional taxes may be due if the estate is larger than was reported because of a spouse's benefits. So, while the amendment will create problems, the amendment introduces important solutions to current situations.

CONCLUSION

In *Boggs v. Boggs*, the Supreme Court held that a non-participating, predeceasing spouse could not leave his interest in the participating spouse's pension benefits. This is so even though community property law vests the spouse, participating or not, predeceased or not, with a one-half interest in everything earned by the couple while married. With the holding in *Boggs*, the Court sent the message that it is better to be divorced than to remain married.

ERISA allows divorced spouses to obtain court orders entitling them to a percentage of the pension benefits. The order must meet strict standards in order to qualify as a QDRO. By amending ERISA to allow non-participating spouses to obtain QDROs, Congress will avoid the inequitable situation created by

children and other descendants now face.

207. By amending ERISA, Congress would not send the message that couples should get divorced in order to receive that to which state law says their estate is entitled. Congress would also mend an inequitable situation, by allowing spouses to keep their vested interests in plans. While some spouses will be adversely affected, over all, most spouses' estates would benefit from the change. At the very least, estate planners would be more secure in making plans because of knowing it does not matter whom dies first, each spouse receives his interest in the benefits.

208. *Boggs v. Boggs Holds* . . . , *supra* note 9, at 10.

209. *Boggs*, 520 U.S. at 843-44. The idea that a participant cannot transfer his or her interest is extrapolated from the fact that spouse's cannot transfer their interest in plan benefits.

the *Boggs* decision.

In the Money-Bags' situation, if such an amendment existed when the sons were in court, the outcome would have been different. The sons would not be penniless because they would have received their mother's share of the pension benefits. While the stepmother would have received fewer benefits, she was not so dependent on her second spouse that she needed those benefits in the first place. Therefore, the proposed amendment provides an equitable situation for those most affected by the current state of the law.

