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NOTE

BOGGS v. BOGGS: STATE COMMUNITY PROPERTY AND SUCCESSION RIGHTS WALLOW IN ERISA'S MIRE

I. INTRODUCTION

On June 2, 1997, the United States Supreme Court decided the case of *Boggs v. Boggs*¹ and held that the Employee Retirement Income Security Act of 1974 ("ERISA")² preempted Louisiana community property and succession laws and prohibited the inheritance of a nonemployee spouse's community interest in pension plan benefits.³ Although the *Boggs* holding involved preemption of a claim based on community property and succession rights, the Court's holding is sufficiently broad to preempt any state laws that conflict with ERISA⁴ by providing a predeceasing nonparticipant, nonbeneficiary spouse with transferable property rights in a participant spouse's pension plan benefits.⁵ Accordingly, the participant spouse pos-

1. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

2. 29 U.S.C. §§ 1001-1461 (1994 & Supp. 1997).

3. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1760-67 (1997).

4. See *id.* at 1760. The Court stated:

This case involves a community property claim, but our ruling will affect as well the right to make claims or assert interests based on the law of any State, whether or not it recognizes community property. Our ruling must be consistent with the congressional scheme to assure the security of plan participants and their families in every State.

Id.

5. See La. Civ. Code Ann. art. 2336 (West 1996). Article 2336 states that "[e]ach spouse owns a present undivided one-half interest in the community property. . ." *Id.*

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sesses exclusive rights to the pension plan assets until death after which the beneficiaries receive the interest by operation of federal statute.⁶ It follows that the non-beneficiary legatees and heirs of a predeceasing nonparticipant, nonbeneficiary spouse are unable, either directly or indirectly, to benefit from any testamentary disposition consisting of pension plan assets of the participant spouse.⁷ Further, this holding extends to prevent such heirs and legatees from being awarded nonpension property of equivalent value in lieu of the plan assets.⁸ Under 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.⁹ Thus, the *Boggs* decision unexpectedly alters an otherwise predictable system of property ownership and succession under state law and, in its wake, leaves many married couples with uncertain future estate plans.¹⁰

This Note will summarize the history of *Boggs*¹¹ and discuss the issues that led to a circuit split between the Fifth and

La. Civ. Code Ann. art. 2346 (West 1996). Article 2346 states "[e]ach spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." *Id.*

6. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1764-65 (1997).

7. See *id.*

8. See *id.* at 1766, 1774-75.

9. See WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 2D EDITION 261-62, 459 (1971).

La. Civ. Code Ann. art. 2336 (West 1996). Article 2336 states:

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor the things of the community may be judicially partitioned prior to the termination of the regime.

Id.

WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 2D EDITION 459 (1971). Community property law allows each spouse to transfer his or her community interest to heirs and devisees at death. During marriage, community property law provides for the joint ownership of assets, benefit or gain, and liability for loss. See *id.*

La. Civ. Code Ann. art. 2346 (West 1996). Article 2346 states "[e]ach spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." *Id.*

10. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

11. *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996), *aff'g*, 849 F. Supp. 462 (E.D. La. 1994), *rev'd*, 117 S. Ct. 1754 (1997).

Ninth Circuits regarding community property rights and ERISA protected pension plan benefits in the testamentary context.¹² It will also track ERISA's legislative history to determine Congressional intent.¹³ In particular, this Note will examine inconsistencies among past judicial constructions based on the application of ERISA's preemption¹⁴ and spend-thrift¹⁵ provisions to regulate private pension plans.¹⁶ Further, this Note will scrutinize the Court's holding in *Boggs*¹⁷ giving deference to the facts in the record to clarify the problems inherent in the majority's questionable reasoning.¹⁸ Finally, this Note will discuss the broad reach of the *Boggs*¹⁹ holding in light of the practical estate planning considerations and resulting uncertainty now faced by lawyers and plan participants and spouses in community property states.²⁰ This Note ultimately suggests a legislative solution to remedy the adverse effects of the Court's holding in *Boggs*²¹ in order to avoid any further federal intrusion upon state granted property ownership and testamentary rights.²²

See infra notes 23-83 and accompanying text.

12. Compare *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996) with *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

See infra notes 160-93, 278-91 and accompanying text.

13. *See infra* notes 84-159 and accompanying text.

14. *See* 29 U.S.C. § 1144(a) (1994). This clause states that "[e]xcept as provided . . . the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan . . ." *Id.*

15. *See* 29 U.S.C. § 1056(d)(1) (1994). This clause applies only to pension plan benefits and states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *Id.*

16. *See infra* notes 160-309 and accompanying text.

17. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

18. *See* United States Supreme Court Official Transcript, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79); Brief for Respondents, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79); Brief for Petitioner, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79).

19. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

20. *See infra* notes 310-70 and accompanying text. *See generally*, *Boggs v. Boggs Holds That a Predeceasing Nonparticipant Spouse Has No Property Interest in an ERISA Pension Plan*, 6 No. 3 ERISA LIT. RPTR. 4 (August, 1997); Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

21. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

22. *See infra* notes 371-76 and accompanying legislative proposal text.

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II. *BOGGS v. BOGGS*²³

A. FACTS

Isaac Boggs, Jr. ("Isaac") was married to his first wife Dorothy Boggs ("Dorothy") when he commenced his employment with South Central Bell ("BellSouth") in 1949.²⁴ The couple had three children, Thomas Frank Boggs, Harry Maurice Boggs and David Bruce Boggs ("the sons"),²⁵ and remained married until Dorothy's death on August 14, 1979.²⁶

Isaac remarried on April 5, 1980.²⁷ Isaac and his second wife, Sandra Boggs ("Sandra"), remained married until Isaac's death on February 16, 1989.²⁸ The couple had no children from their marriage.²⁹ Isaac was survived by Sandra and the sons from his marriage to Dorothy.³⁰ During all relevant times the marital property at issue was governed by Louisiana community property laws.³¹

Isaac was employed by BellSouth for thirty-six years until his retirement in 1985.³² During his employment, he participated in private, voluntarily funded employee benefit plans ("pension plan") governed by ERISA.³³ Isaac funded his pension plan with community property; that is, property acquired

23. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

24. *See id.* at 1758.

25. *See Boggs v. Boggs*, 849 F. Supp. 462, 463 (E.D. La. 1994).

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. *See Boggs v. Boggs*, 89 F.3d 1169, 1172 (5th Cir. 1996).

31. *See id.* La. Civ. Code Ann. art. 2338 (West 1996). Article 2338 states that community property includes "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse." *Id.*

32. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1758 (1997).

33. *See Boggs v. Boggs*, 89 F.3d 1169, 1172 (5th Cir. 1996). Brief for Respondents at 8, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). The private, voluntary and community character of the funds used by Isaac to pay into the pension, basically deferred compensation, are "considered fruits of the labor of the community . . ." *Id.*

by his effort, skill or industry during his thirty year marriage to Dorothy and his nearly four year marriage to Sandra.³⁴

The pension plan was a “qualified plan”³⁵ and upon Isaac’s retirement it provided him with the following: (1) a lump-sum payment from the BellSouth Management Savings Plan which Isaac “rolled over” into an Individual Retirement Account (“IRA”),³⁶ (2) a joint and survivor annuity (“Annuity”),³⁷ (3) ninety-six shares of AT&T common stock from the BellSouth Employee Stock Ownership Plan (“ESOP”),³⁸ and (4) a life insurance policy naming Sandra as the designated beneficiary.³⁹

On Dorothy’s death, her estate claimed an undivided one-half interest in all community assets, including Isaac’s undistributed pension plan benefits that had accrued up to her date of death.⁴⁰ Under Louisiana’s community property system,

34. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1758 (1997). *Boggs v. Boggs*, 849 F. Supp. 462, 463 (E.D. La. 1994). La. Civ. Code Ann. art. 2338 (West 1996). Article 2338 states that community property includes “property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse.” The plans were primarily funded with community property from Isaac’s marriage to Dorothy as this period consisted of thirty out of the thirty-six years Isaac worked for BellSouth. The funds used by Isaac to contribute to the pension plan after his remarriage to Sandra were also community funds because they consisted of property acquired during his marriage to Sandra. See *id.*

35. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997). Qualified plans are those in compliance with the requirements of I.R.C. § 401 (1986). As an incentive to create and maintain plans meeting the strict requirements established under the Code, private employer’s receive tax deductions for contributions to such plans under I.R.C. § 404 (1986). Under I.R.C. § 402 (1986) employees participating in qualified plans are not taxed on their contributions, including employer matching benefits received in connection with their participation, until actual receipt of the accrued benefits from the plan. Further, qualified plan earnings are allowed to accumulate free of income taxes in the trusts used to fund them under I.R.C. § 501(a) (1986). Pension plans, as opposed to welfare plans, must have a spendthrift provision to be “qualified” under the Internal Revenue Code. See *id.*

36. See *Boggs v. Boggs*, 849 F. Supp. 462, 463-64 (E.D. La. 1994). The lump-sum payment of \$151,628.94 was rolled over into the IRA which was valued at \$180,778.05 on Isaac’s death. Isaac made no withdrawals from the IRA during his life. Sandra was the designated beneficiary of this IRA at Isaac’s death. See *id.*

37. See *Boggs v. Boggs*, 89 F. 3d 1169, 1172 (5th Cir. 1996). The Annuity provided monthly payments of \$1,777.67 to Isaac from the date of his retirement until his death with the survivorship benefit continuing in Sandra’s favor until her death. See *id.*

38. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1758 (1997).

39. See *id.*

40. See *id.*

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Dorothy's estate could claim such an interest even though the benefits did not become payable until Isaac's retirement because benefits accumulated during the community's existence constituted an "incorporeal, movable right."⁴¹

In addition, Dorothy bequeathed one-third of her community property estate to Isaac outright and confirmed the remaining two-thirds in his favor as a lifetime usufruct.⁴² Ultimately, under Louisiana law, the sons would receive naked ownership⁴³ of the two-thirds usufruct interest on Isaac's

41. *T.L. James & Co. v. Montgomery*, 332 So.2d 834, 851 (La. 1976). The court stated:

The value of the right to share in the retirement . . . funds is an incorporeal, movable right. When acquired during the existence of a marriage, the right to share is a community asset which, at the dissolution of the community, must be so classified - even though at the time acquired or at the time of dissolution of a community, . . . the contractual right to receive money or other benefits is due in the future and is contingent . . .

Id.

42. *See Boggs v. Boggs*, 89 F.3d 1169, 1172 (5th Cir. 1996). La. Civ. Code Ann. art. 535 (West 1996). Article 535 states: "Usufruct is a real right of limited duration on the property of another. The features of the right vary with the nature of the things subject to it as consumables or nonconsumables." *Id.*

Boggs v. Boggs, 117 S. Ct. 1754, 1758 (1997). Usufruct is a Louisiana civil law concept and is roughly the equivalent of a common law life estate. *See id.*

La. Civ. Code Ann. art. 538 (West 1996). Article 538 states that, at the termination of the usufruct, the usufructuary [holder of the usufruct] of a consumable is "bound to pay the naked owner either the value that the things had at the commencement of the usufruct or deliver to him things of the same quantity or quality." *Id.*

Brief for Respondents at 9, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). The testamentary clause in Dorothy's will states "I give and bequeath the maximum permitted under the law to my beloved husband [Isaac] together with the lifetime usufruct over the balance." All of Dorothy's property on the date of her death, the date on which all of her rights are determined for the purposes of this case, was community property. *See id.*

Boggs v. Boggs, 849 F. Supp. 462, 463 (E.D. La. 1994). "Pursuant to Dorothy Boggs' will, Isaac Boggs, Jr. received one-third of her estate [outright] and the lifetime usufruct of the remaining two-thirds of the estate, whose naked ownership was inherited by [the sons]." *Id.*

43. *See* La. Civ. Code Ann. art. 478 (West 1996). Article 478 states: "The ownership of a thing burdened with a usufruct is designated as naked ownership." *Id.*

La. Civ. Code Ann. art. 477 (West 1996). Article 477 states: "Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under conditions established by law." *Id.*

Boggs v. Boggs, 117 S. Ct. 1754, 1767 (1997). Naked ownership is roughly the equivalent of a common law remainder interest. *See id.*

Brief for Respondents at 10-11, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). The sons were not expressly mentioned in their mother's will and succeed to a portion

death.⁴⁴ In addition, under Louisiana succession laws, the sons were entitled to an accounting to settle their mother's community property interest on their father's death.⁴⁵ Such an accounting would fix the amount of the residue the sons would receive in the form of the naked ownership interest.⁴⁶

On his death, Isaac bequeathed a lifetime usufruct⁴⁷ to Sandra in the property distributed to him from the pension plan with the naked ownership interest⁴⁸ again held by the sons.⁴⁹ Subsequently, controversy arose between Sandra and the sons over ownership of the pension plan benefits.⁵⁰ Sandra claimed entitlement to Isaac's distributed plan benefits under ERISA and the sons claimed entitlement to the naked ownership interest in the benefits in an amount attributable to their

of her estate by operation of state law pursuant to the interaction between state law principles of usufruct and naked ownership. *See id.*

44. *See Boggs v. Boggs*, 849 F. Supp. 462, 463 (E.D. La. 1994). "Pursuant to Dorothy Boggs' will, Isaac Boggs, Jr. received one-third of her estate [outright] and the lifetime usufruct of the remaining two-thirds of the estate, whose naked ownership was inherited by [the sons]." *Id.*

45. *See* La. Civ. Code Ann. art. 538 (West 1996). *See*, Comment B regarding the duty of the usufructuary to render an accounting.

See also, Brief for Respondents at 10-11, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). The "Judgment of Possession" entered in the Succession of Dorothy Boggs (No. 8627) in the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana, on February 5, 1980 memorializes the existence of the naked ownership rights of the heirs according to state community property and succession laws. *See id.*

Id. at 9. Accordingly, by operation of state law, the sons inherit a portion of their parents' estates. This portion cannot be decreased or eliminated by the parents except in certain limited circumstances not present here. The sons' interests, as heirs, vest at the time of Dorothy's death by operation of Louisiana law. *See id.*

Id. at 9. A brief explanation of Louisiana community property and succession laws will help to fully understand the nature of the sons' claims and their interests in the benefits of their parents' community. Under the ancient law of "seizin," the sons' vested rights provided them, by operation of law, with succession to their mother's community interest inheritance immediately on her death. At this time, the sons were entitled to possession, subject to their father's lifetime usufruct and distribution of the plan benefits, without any further court proceedings. *See id.*

La. Civ. Code Ann. art. 940 (West 1996). Article 940 states: "A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds." *Id.*

46. *See supra* notes 42-45.

47. *See* La. Civ. Code Ann. art. 535 (West 1996).

48. *See* La. Civ. Code Ann. art. 478 (West 1996).

49. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1758 (1997).

50. *See id.*

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mother's community interest.⁵¹ The value of the sons' claim would be determined through an accounting under Louisiana community property and succession laws.⁵² The disputed amount of the pension plan's value was substantial in relation to its total because Dorothy was married to Isaac for thirty out of the thirty-six years he participated in the plan.⁵³ The ultimate dispute arose, however, from the alleged conflict between ERISA and Louisiana community property and succession laws as applied to the disposition of the distributed pension plan benefits.⁵⁴

Sandra did not refute Dorothy's community property ownership interest in the pension plan benefits under Louisiana law.⁵⁵ She insisted, however, that ERISA preempted Louisiana community property law and governed the disposition of Isaac's distributed pension plan benefits, including the value of Dorothy's community interest therein.⁵⁶ Sandra relied solely on ERISA's preemption provision to counter the sons' state law claims.⁵⁷

III. PROCEDURAL HISTORY

On Isaac's death, the sons filed an action in Louisiana state court demanding an accounting of the value of their father's usufruct to determine the portion of the retirement benefits traceable to their mother, Dorothy's, community interest.⁵⁸

51. *See id.* at 1759.

52. *See* La. Civ. Code Ann. art. 2369 (West 1996). *See* Comment B stating Louisiana community property law provides that at the termination of the community regime, each spouse owes to the other spouse (or when the community is terminated by the death of the spouse to his or her heirs or legatees), an accounting for community property under his or her control. (Emphasis added.) *See id.*

53. *See* Boggs v. Boggs, 849 F. Supp. 462, 464 (E.D. La. 1994).

54. *See* Boggs v. Boggs, 117 S. Ct. 1754, 1758-59 (1997).

55. *See* Boggs v. Boggs, 849 F. Supp. 462, 464 (E.D. La. 1994).

56. *See id.*

57. *See id.*

58. *See* United States Supreme Court Official Transcript at 33-34, Boggs v. Boggs, 117 S. Ct. 1754, 1774 (1997) (No. 96-79). The sons originally sought relief in the form of a percentage portion of the Annuity payments made to Isaac after his retirement and up to the date of his death, but later stipulated at oral argument that they sought only an accounting of the same. Such an accounting would provide a valuation of their

Based on this accounting, the sons sought a judgment awarding them a percentage of the Annuity payments received by their father, Isaac, during his retirement.⁵⁹ Pursuant to the accounting, the sons also sought an award of a percentage of the Annuity payable to Sandra from the date of Isaac's death in addition to a percentage of the IRA and a portion of the ESOP shares.⁶⁰

Pursuant to her rights as a named beneficiary under ERISA,⁶¹ Sandra filed a complaint in the United States District Court for the Eastern District of Louisiana.⁶² She sought a declaratory judgment that ERISA preempted Louisiana community property law.⁶³ Sandra also sought to establish her ownership rights in the disputed benefits under ERISA and prevent Louisiana state law from diminishing her ownership interest

mother's community interest in the benefits and Louisiana law would presumably allow the sons to recover other assets of equivalent value.

See *Succession of McVay v. McVay*, 476 So.2d 1070, 1073-74 (La. App. 1985). An IRA containing community assets was not listed as an asset of decedent's estate because there was a designated beneficiary, but the estate was deemed to contain the equivalent cash value. See *id.*

Hare v. Hodgins, 586 So.2d 118, 123 (La. 1991). A court may order that "cash or other property in lieu of an actual percentage of the pension payments" be paid in equalization of community assets on termination. See *id.*

59. See *Boggs v. Boggs*, 849 F. Supp. 462, 464 (E.D. La. 1994).

60. See *id.*

But see, United States Supreme Court Official Transcript at 33-39, *Boggs v. Boggs*, 117 S. Ct. 1754, 1774 (1997) (No. 96-79). Referring to the general question and answer discussion between the Justices and Respondents' counsel regarding the sons' claim and its relation to the Annuity proceeds both received by Isaac during retirement and payable to Sandra after his death. The sons stipulated at oral argument that although they prevailed on the claim for a portion of the survivor's annuity received and payable to Sandra in the Fifth Circuit they merely sought an accounting for the use of the property. This accounting would determine the portion of the Annuity attributable to their, mother, Dorothy's community interest and fix their naked ownership award. *Id.*

61. See 29 U.S.C. § 1132(a)(1)(B) (1994). This section states:

A civil action may be brought by a participant or beneficiary . . . to recover benefits due to him [or her] under the terms of [the] plan, to enforce his [or her] rights under the terms of the plan, or to clarify his [or her] rights to future benefits under the terms of the plan . . .

Id.

62. See *Boggs v. Boggs*, 849 F. Supp. 462, 464 (E.D. La. 1994).

63. See *id.*

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by an amount attributable to Dorothy's testamentary disposition.⁶⁴

Sandra moved for summary judgment based on her alleged entitlement to the property under ERISA.⁶⁵ The parties stipulated to the facts and the district court rejected Sandra's motion and ruled in favor of the sons.⁶⁶ The district court concluded that ERISA did not preempt Louisiana community property and succession laws because Congress did not expressly intend ERISA to preempt such state laws that did not regulate private employee benefit plans within the meaning of ERISA's preemption provision.⁶⁷ Since the Louisiana laws at issue did not directly relate to regulation of private pension plans within the meaning of ERISA's preemption provision, such laws did not substantially damage the federal regulatory interest and ERISA was held not controlling.⁶⁸

Sandra appealed to the United States Court of Appeals for the Fifth Circuit.⁶⁹ On April 17, 1996, the Fifth Circuit confirmed the district court's jurisdiction by holding that Sandra had standing as a beneficiary.⁷⁰ After *de novo* review⁷¹ of the district court's preemption analysis, the appellate court affirmed the district court's ruling.⁷² The appellate court held that, despite ERISA's plenary authority in employment benefits law and broad federal preemption power, ERISA did not preempt Louisiana community property and succession laws

64. *See id.*

65. *See id.* at 463.

66. *See id.*

67. *See Boggs v. Boggs*, 849 F. Supp. 462, 465 (E.D. La. 1994). Despite its broad preemption provision, ERISA does not preempt state laws such as Louisiana's community property laws which were not specifically designed to effect ERISA benefit plans. While such state laws may indirectly implicate an ERISA pension plan, they do not relate to an employee benefit plan to trigger ERISA's preemption provision. *Id.*

68. *See id.* at 465. "Application of Louisiana's community property law in this case will not do major damage to any federal interest, and thus, the Supremacy Clause does not require that the state law be overridden." *Id.* at 466.

69. *See Boggs v. Boggs*, 82 F.3d 90, 94 (5th Cir. 1996).

70. *See id.*

See supra note 61 regarding actions which may be brought and remedies available under 29 U.S.C. § 1132(a)(1)(B) (1994).

71. *See Boggs v. Boggs*, 82 F.3d 90, 94-95 (5th Cir. 1996).

72. *See id.* at 98.

because the federal interest in regulating pension plans was not frustrated.⁷³

Judge Wiener, who did not participate in the Fifth Circuit panel's decision, voiced concern with the appellate court's holding⁷⁴ and called for a poll of all active Fifth Circuit judges.⁷⁵ Judge Wiener asked to rehear the case en banc based on the ruling's pervasive economic impact on all pension plan participants and spouses in their retirement years.⁷⁶ The ma-

73. *See id.* Ruling per curiam, Judges Wisdom and Duhe affirmed stating that "a state community property system that affects what a plan participant does with his benefits after they are received does not impermissibly intrude on the mandates ERISA imposes on plan administrators." *Id.* at 96. Further, the court stated:

This Court concludes that under the facts of this case, the Louisiana community property law is not sufficiently 'related to' an employee benefit plan to necessitate ERISA preemption . . . Benefits will continue to be paid to the beneficiary in the manner provided in the plan. A spouse's accounting obligation under community property law affects employee benefit plans 'in too tenuous, remote, or peripheral' a manner to warrant a finding that the law 'relates to' the plan. Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary.

Id. at 96-97; citing *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983).

74. *See Boggs v. Boggs*, 89 F.3d 1169, 1170-71 (5th Cir. 1996). Judge Wiener was concerned over the pervasive impact of the majority's holding based on the following majority observations:

Today, . . . the preeminence and importance of pension plans and welfare benefit plans in the lives of most Americans has grown exponentially. With their combined assets totaling over 4.7 trillion dollars, employee benefit plans cover an estimated 54 million employees. In addition to its economic significance, [ERISA] plays a dominant role in present day jurisprudence as reflected, for example, by the unusually high number of ERISA cases for which the Supreme Court has granted writs in recent years. In sum, ERISA and employee benefit plans are ubiquitous and integral parts of our society.

Id.

75. *See id.* at 1170.

76. *See id.*

FED. R. APP. P. 35(a) states:

When Hearing or Rehearing in Banc Will Be Ordered: A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be honored except (1) when consideration by the full court is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Id.

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majority of the Fifth Circuit judges, however, refused to rehear the case.⁷⁷

Although Sandra bypassed filing a motion for rehearing en banc, she appealed the Fifth Circuit's judgment by writ of certiorari to the United States Supreme Court.⁷⁸ Sandra claimed that the Fifth Circuit's ruling usurped her rights under ERISA as the surviving spouse of a pension plan participant.⁷⁹ The Supreme Court granted certiorari⁸⁰ largely due to Fifth and Ninth Circuit conflict.⁸¹ The circuits conflicted over whether ERISA preempted state law that allowed for the testamentary disposition of a nonparticipant spouse's community property interest in pension plan benefits after distribution from a qualified plan.⁸²

On June 2, 1997, the United States Supreme Court reversed the Fifth Circuit and held that ERISA preempted Louisiana community property and succession laws and prohibited operation of state law from effecting the sons' inheritance.⁸³

77. See *Boggs v. Boggs*, 89 F.3d 1169, 1170 (5th Cir. 1996). Circuit Judge Wiener dissented to the per curiam opinion's denial of an en banc rehearing. He was joined in this dissent by Chief Judge Politz and Judges King, Benavides, Stewart and Parker.

78. See *Boggs v. Boggs*, 117 S. Ct. 379 (1996).

79. See *id.*

80. See *id.*

81. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1759 (1997).

82. See *id.*

Compare *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996) with *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

83. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1755, 1759, 1767 (1997). The Justices ruled seven to two in favor of ERISA preemption of Louisiana state laws allowing for the testamentary disposition of a nonparticipant spouse's interest in the Annuity. The Justices ruled five to four in favor of ERISA preemption of the state law testamentary disposition of all other benefits. Justice Kennedy's majority opinion was joined by Justices Scalia, Souter, Stevens and Thomas. Justice Breyer wrote the dissenting opinion in which Justice O'Connor joined and Justice Ginsberg and Chief Justice Rehnquist joined in part. See *id.*

IV. BACKGROUND

A. REGULATION OF PRIVATE PENSION PLANS PRIOR TO ERISA

Private pension and welfare plans are relatively modern economic institutions which have steadily increased in popularity as a means of providing for one's retirement security.⁸⁴ The growth and development of the private pension system has been substantial since its inception in the mid-1940's and today the assets of private employee benefits plans constitute the largest private accumulation of funds in the United States.⁸⁵

Congress did not enact federal regulation of private pension and welfare plans until the enactment of the Welfare and Pension Plans Disclosure Act of 1958 ("1958 Act").⁸⁶ Congress enacted the 1958 Act to protect the rights and interests of plan participants and their beneficiaries.⁸⁷ This protection would be achieved through the plan's required disclosure of information to the participants and beneficiaries, theoretically, enabling those parties to monitor the performance of their plans.⁸⁸ Since the 1958 Act was primarily a disclosure statute, however, it lacked an effective enforcement mechanism.⁸⁹ Thus, under most circumstances, plan administrators and fiduciaries could not be held responsible under federal law for any unlawful activity or mismanagement of employee pension funds.⁹⁰

In 1962, Congress amended the 1958 Act ("1962 Amendment") to address improper management of plan assets by plan administrators and fiduciaries.⁹¹ The 1962 Amendment made

84. See H.R. REP. NO. 533, 93d Cong., 4640 (1973).

85. See *id.* at 4641.

See *Boggs v. Boggs*, 117 S. Ct. 1754, 1760 (1997) (the participant residents of the nine community property states alone have perhaps \$1 trillion in private retirement plans).

86. H.R. REP. NO. 533, 93d Cong., 4641 (1973).

87. See *id.* at 4642.

88. See *id.*

89. See *id.* at 4641-42.

90. See *id.*

91. See H.R. REP. NO. 533, 93d Cong., 4641-42 (1973). Examples of such managerial improprieties included theft and embezzlement of plan assets which caused plans to lose all of their assets prior to distribution to participants and beneficiaries entitled

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certain acts federal crimes if committed in connection with pension plan administration and conferred some regulatory and investigatory authority on the Secretary of Labor.⁹² Congress intended these changes to provide the Secretary of Labor with enhanced enforcement power in this area.⁹³ The 1962 Amendment, however, did not accomplish the regulatory protection that Congress intended because it lacked substantive fiduciary standards and required only limited disclosure.⁹⁴ As a result, the 1962 Amendment continued to be largely ineffective in meeting Congress' primary goal of providing retirement income security⁹⁵ because continued mismanagement and unsound planning by pension plan administrators and fiduciaries caused many workers and their dependents to be deprived of the intended protection.⁹⁶

Ineffective federal regulation was further hampered by non-uniform and, often contradictory, state laws that also regulated employee benefit plans in the state in which the plan was being administered.⁹⁷ State regulation only compounded mismanagement by creating confusion among plan administrators and fiduciaries due to the non-uniform regulatory schemes.⁹⁸

B. ERISA'S PURPOSE

In 1974, Congress again recognized that private pension plans were emerging as the most important vehicle by which United States workers could provide post-retirement financial security for themselves, their spouses and their dependents.⁹⁹

to the lost benefits. Fiduciary improprieties such as these were made punishable as federal crimes under the 1962 Amendment. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.* "Experience in the decade since the passage of the amendments has demonstrated the inadequacy of the [1958 Act, as amended] in regulating the private pension system for the purpose of protecting rights and benefits due to workers." *Id.* at 4642.

96. *See* H.R. REP. NO. 533, 93d Cong., 4641 (1973).

97. *See id.*

98. *See id.* at 4650.

99. *See id.* at 4641.

In response to this continually developing trend and public concern over prior ineffective regulatory control,¹⁰⁰ Congress enacted ERISA.¹⁰¹ The purpose of ERISA was to establish a uniform system of law to govern employee benefit plans and distributions and to protect the rights and interests of plan participants and their beneficiaries.¹⁰²

Compare Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679 (1997). The two other primary sources of post-retirement economic subsistence are the benefits received from The Old Age, Survivors and Disability Insurance Program, commonly referred to as social security, and private savings. In most situations these sources do not provide adequate security for the retired person, let alone spouses and dependents. This inadequacy has led to the increased reliance on benefits from private retirement plans to provide for the means necessary to maintain a standard of living as close as possible to one's pre-retirement level. *See id.*

100. H.R. REP. NO. 533, 93d Cong., 4639-43 (1973).

101. 29 U.S.C. §§ 1001-1461 (1994 & Supp. 1997). Congress enacted ERISA under its Commerce Clause powers. The laws enacted under ERISA became effective on January 1, 1975. *See id.*

U.S. CONST. art I, § 8, cl. 3. "Congress shall have Power . . . To regulate Commerce . . . among the several States." *Id.*

102. *See* H.R. REP. NO. 533, 93d Cong., 4639, 4642, 4647-48 (1973). The report stated:

The primary purpose of the bill is the protection of individual pension rights . . . Underlying the provisions of this Act is the recognition of a necessity for a comprehensive legislative program dealing not only with the malfeasance and maladministration in the plans, . . . but . . . in short, the establishment of certain minimum standards to which all private pension plans must conform if the private pension promise is to become real rather than illusory.

Id. at 4639, 4647-48.

29 U.S.C. § 1001(b) (1994). Section 1001(b) states:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Id.

29 U.S.C. § 1003(a) (1994). Section 1003(a) states that ERISA's coverage shall apply to:

[A]ny employee benefit plan if it is established or maintained - (1) by any employer engaged in commerce or in an industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both.

Id.

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C. ERISA'S PREEMPTION PROVISION

Congress expressly intended ERISA to preempt state laws relating to private employee benefit plans.¹⁰³ ERISA's preemption provision enables the statute to effectively and exclusively regulate private employee benefit plans.¹⁰⁴ This provision states that "[e]xcept as provided . . . the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan . . ."¹⁰⁵ To further this objective, ERISA sets forth specific standards and procedures for pension plan administrators to ensure that participants and beneficiaries receive their benefits.¹⁰⁶ Accordingly, the statute requires plan administrators and fiduciaries to act solely in the interests of participants and beneficiaries.¹⁰⁷ Entitlement to plan benefits is based on the premise that only participants¹⁰⁸ and their beneficiaries¹⁰⁹ have a claim of right to such benefits.¹¹⁰

ERISA's preemption provision, however, does not specifically indicate an express intent to preempt areas of traditional state concern not directly related to the regulation of employee benefit plans.¹¹¹ The clause is silent on the testamentary dis-

103. See *supra* note 14 for the text of 29 U.S.C. § 1144(a) (1994).

See also, *Brooks v. Burlington Indus., Inc.*, 477 U.S. 903 (1986). Congress enacted ERISA with broad preemptive powers to ensure the uniformity of pension plan law by eliminating conflicting state laws. See *id.*

104. See *supra* note 102, citing 29 U.S.C. § 1001(b) (1994), for ERISA's stated purpose.

105. See *supra* note 14 for the text of 29 U.S.C. § 1144(a) (1994).

106. H.R. REP. NO. 533, 93d Cong., 4639-40, 4656-59 (1973).

107. See 29 U.S.C. § 1001(c)(1994).

108. See 29 U.S.C. § 1002(7) (1994). A "participant" is defined as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . ." *Id.*

109. See 29 U.S.C. § 1002(8) (1994). A "beneficiary" is defined as one "designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.*

110. See 29 U.S.C. § 1132(a)(1)(B) (1994). Section 1132(a)(1)(B) states:

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

Id.

111. See *supra* note 14 for the text of ERISA's preemption provision.

position of pension plan benefits on the death of a nonparticipant spouse who is the domiciliary of a community property state.¹¹²

D. ERISA'S SPENDTHRIFT PROVISION

ERISA's spendthrift provision prohibits most transfers of the right to receive pension plan benefits and prevents the assignment and alienation of plan benefits by plan participants and beneficiaries.¹¹³ This provision applies only to pension plan benefits and states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."¹¹⁴ Whether this spendthrift provision prevents the transfer of such rights solely to unrelated third parties or whether it also bars the apportionment of pension plan benefits to nonemployee spouses or to their estates and heirs on death has been a subject of judicial debate.¹¹⁵ The *Boggs* holding prevents the estate of a nonemployee spouse from claiming a community interest in pension plan benefits and is sufficiently broad to have settled this debate regarding the meaning of ERISA's spendthrift provision.¹¹⁶

E. PREEMPTION, THE SUPREMACY CLAUSE AND ERISA'S SILENT STRENGTH

The Supremacy Clause of the United States Constitution vests Congress with the power to enact legislation to establish areas of exclusive federal control and to preempt the states'

Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983). ERISA's preemption provision should be read to have a pre-emptive reach as broad as its language in that "[a] law 'relates to' [under 29 U.S.C. § 1144(a)] an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.*

112. See 29 U.S.C. § 1144(a) (1994). This clause states that "[e]xcept as provided . . . the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan . . ." *Id.*

113. See 29 U.S.C. § 1056(d)(1) (1994).

114. *Id.*

115. See *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996). The court held in favor of state community property and succession laws. See *id.*

But see, *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991). The court held in favor of ERISA preemption of state community property law in the testamentary context. See *id.*

116. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1765-66 (1997).

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power to legislate within those areas.¹¹⁷ Thus, despite the substantive nature of state marital property and succession laws, Congress has the constitutional power to preempt such laws by direct legislative action¹¹⁸ limiting a state's authority over the property rights of its domiciliaries.¹¹⁹ To find in favor of federal statutory preemption, however, courts must determine that federal and state laws conflict and that Congress clearly intended the usurpation of state law.¹²⁰ Where ambiguity exists, this determination must weigh the nature of the state interest against the goals of the federal legislation.¹²¹

The United States Supreme Court has interpreted ERISA's preemption provision broadly with respect to the provision's inherent preemptive power in finding that ERISA preempts

117. See U.S. CONST. art. VI, cl. 2. The Supremacy Clause states:

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.

Ablamis v. Roper, 937 F.2d 1450, 1459 (9th Cir. 1991); citing, as authority, *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981). State family property laws that conflict with federal laws will be overridden pursuant to the Supremacy Clause because:

The relative importance to the State of its own law is not material where there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail . . . That principle is but the necessary consequence of the Supremacy Clause of our National Constitution.

Id.

See also, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Any state law contrary to a law of Congress is invalidated by the Supremacy Clause. *Id.*; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The Court must find for preemption where state law conflicts with Congressional legislation validly enacted pursuant to its Constitutional powers. *Id.*

118. See *supra* note 117.

119. See *Free v. Bland*, 369 U.S. 663, 670 (1962). The Court held that Federal law preempted a conflicting state law in the determination of joint ownership rights to United States savings bonds. See *id.*

120. See *FMC Corp. v. Holliday*, 498 U.S. 52, 57-58 (1990) (discussion of Congressional intent regarding the enforcement of ERISA's preemptive powers and finding that Congress intended to ensure that only federal law governed pension plans).

See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) (Congress' intent to legislate within a particular sphere reflects intent to preempt all state laws in that field).

121. See *FMC Corp. v. Holliday*, 498 U.S. 52, 57-58 (1990).

state law in most areas of debate.¹²² ERISA's broadly stated preemption provision¹²³ ensures an equally broad application by the courts in reaction to a conflict with state laws that effectively regulate qualified pension plans.¹²⁴ However, the provision is silent as to its application to state community property laws that do not specifically relate to regulating such plans.¹²⁵

In judicial decisions, state community property laws have been preempted by ERISA or held to control dependent upon the state law connection with or relation to the federal legislation's purpose.¹²⁶ The United States Supreme Court has held that state law must do major damage to clear and substantial

122. See *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 137-39 (1990) (Congress intended ERISA's preemption provision to be interpreted broadly and past decisions by the Court applied preemption to prevent conflicts between federal and state regulation of pension plans in a wide variety of circumstances). See *id.*

123. See 29 U.S.C. § 1144(a) (1994). This clause states that "[e]xcept as provided . . . the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan" *Id.*

124. See *Boggs v. Boggs*, 82 F.3d 90, 95 (5th Cir. 1996). The *Boggs* Court, citing *Hook v. Morrison Milling Co.*, 38 F.3d 776, 781 (5th Cir. 1994), stated that "[c]ourts recognize the 'deliberately expansive language chosen by Congress.'" *Id.*

FMC Corp. v. Holliday, 498 U.S. 52, 60 (1990). Congress intended ERISA's preemption provision as a means of ensuring that only one body of law would govern employee benefit plans - "[t]o require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits." *Id.*

125. See 29 U.S.C. § 1144(a) (1994). ERISA's preemption provision contains no express reference to state community property laws. See *id.*

126. See *Free v. Bland* 369 U.S. 663, 669-70 (1962). Treasury regulations providing for the survivor's ownership of United States savings bonds preempt conflicting state law; despite the fact that the bonds were purchased with community funds. See *id.*

But see, *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 835-36 (1988). The Court held that Congress did not intend to preempt state law garnishment of an ERISA welfare benefit, even though the purpose of the garnishment was to collect a judgment against a plan participant. See *id.*

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739-40 (1985). The Court held that state laws requiring minimum coverage in insurance policies purchased by employee plans regulated by ERISA were not preempted because the state law regulates insurance and, thus, is expressly exempt by ERISA. See *id.*

29 U.S.C. § 1144(b)(2)(A) (1994). The exception to ERISA's preemption clause relied on by the *Metropolitan* Court states that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance" *Id.*

Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1276 (6th Cir. 1991). This court held against preemption because the state law's effect on the ERISA governed plan was too remote. See *id.*

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federal interests before the Supremacy Clause will demand that the state law be preempted.¹²⁷

Generally, courts have applied one of three theories to resolve conflict between federal and state law.¹²⁸ Under the prohibited relation theory, ERISA preempts all state laws that include a reference to ERISA governed plans due to the obvious regulatory conflict.¹²⁹ Under the prohibited connection theory, ERISA preempts all conflicting state laws, even those consistent with its own goals.¹³⁰ Under the tangential relation theory, however, courts have held that ERISA does not preempt state laws which have "merely tenuous, remote or peripheral" effects on qualified benefit plans because the state law impact does not rise to the level of a conflict.¹³¹ Thus, the Court has recognized that preemption is not warranted where a state law tangentially conflicts with ERISA.¹³² In addition, the Court has prohibited preemption where ERISA's language is silent on a state procedural matter.¹³³

127. See *United States v. Yazell*, 382 U.S. 341, 352 (1966).

128. See *infra* notes 129-31.

129. See *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983). ERISA's preemption provision should be read to have a pre-emptive reach as broad as its language in that "[a] law 'relates to' [under 29 U.S.C. § 1144(a)] an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.*

130. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). ("The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.").

131. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991).

132. See *Shaw v. Delta Air Lines*, 463 U.S. 85, 100 (1983). Citing, as authority, *AT&T v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979), the Court refused to preempt a state garnishment law providing for satisfaction of alimony and child support awards. See *id.*

Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 145-46 (2d Cir. 1989); *cert. denied* 493 U.S. 811 (1989). State laws survived preemption because they were laws of "general application - often traditional exercises of state power or regulatory authority - whose effect on ERISA plans is incidental." *Id.*

133. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 835-838 (1988). The Court upheld application of a state garnishment law to ERISA governed welfare plan benefits because ERISA was silent on state garnishment procedures. See *id.*

F. PROPERTY OWNERSHIP PRINCIPLES AND COMMUNITY PROPERTY MARITAL REGIMES

Nine states apply the community property system to ownership of property between husband and wife.¹³⁴ The primary goal of the present community property systems is equal treatment of the spouses by regarding marriage as a partnership to which both members contribute equally.¹³⁵ Under this system, property rights are determined by the manner and timing of the property's acquisition.¹³⁶ The community consists of all property acquired through the skill or efforts of either spouse during marriage.¹³⁷ Generally, community property law provides each spouse with present ownership of an undivided

134. See WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 2D EDITION 1 (1971). The community property states comprising the minority are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. These states have adopted community property principles with origins traceable to variations of the Spanish community property regime. See *id.*

W.S. MCCLANAHAN, *COMMUNITY PROPERTY LAW IN THE UNITED STATES - 1992 SUPPLEMENT* 310 (1982 & SUPP. 1992). Wisconsin adopted the Uniform Marital Property Act in 1984 to be effective January 1, 1986. See *id.*

135. See WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 2D EDITION 2-3 (1971). The authors state:

Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that all wealth acquired by the joint efforts of the husband and wife shall be common property; the theory of the law being that, with respect to marital property acquisitions, the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution.

Id.

La. Civ. Code Ann. art. 2325 (West 1996). Article 2325 states that a matrimonial regime creates a system of property ownership and management between married persons and toward third persons. See *id.*

136. See WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 2D EDITION 2 (1971). "All property which [the spouses] possess is presumed to be held and owned by them in common unless or until it is proved to be the separate property of one of them." Thus, property acquired *during the union* is *presumed* to be community property. (Emphasis added.) "This presumption has generally been continued in our community property states as to property possessed or acquired during the marriage or in possession of the spouses at the time of the dissolution of the marriage . . ." *Id.* at 117.

La. Civ. Code Ann. art. 2338 (West 1996). Article 2338 states that community property includes "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse . . ." *Id.*

137. See La. Civ. Code Ann. art. 2338 (West 1996).

See WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 2D EDITION 2 (1971).

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one-half interest in the property of the community.¹³⁸ Both spouses possess the testamentary power to transfer their respective half of the community at death.¹³⁹

All property acquired during marriage, except that acquired by gift, inheritance, bequest or devise is presumed to be community property irrespective of individual contribution.¹⁴⁰ Property acquired before marriage is presumed to be the separate property of each spouse.¹⁴¹ Generally, title is not determinative of ownership of property acquired during marriage.¹⁴² Thus, what may appear to be the separate property of one spouse, is generally presumed to be community property until the presumption is rebutted.¹⁴³

138. *See id.* at 261-62.

See also, La. Civ. Code Ann. art. 2336 (West 1996). Article 2336 states:

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor the things of the community may be judicially partitioned prior to the termination of the regime. During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or part. In each case, the things that each spouse acquires are separate property.

Id.

139. *See* WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 2D EDITION 459 (1971). Community property law allows each spouse to transfer his or her community interest to heirs and devisees at death. *See id.*

La. Civ. Code Ann. art. 2346 (West 1996). Article 2346 states that "[e]ach spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." *Id.*

140. *See* WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 2D EDITION 117-20 (1971).

141. *See id.* at 2, 129-31.

142. *See id.* at 117-19.

See Nilson v. Sarment, 96 P. 315 (Cal. 1908). The presumption that property acquired during marriage is community property, despite title ownership in one spouse's name, is rebuttable. However, if the presumption is not rebutted, the property is considered community property. *See id.*

143. *See Nilson v. Sarment*, 96 P. 315 (Cal. 1908).

See Loutnitsky v. Loutnitsky, 266 P.2d 910, 914 (Cal. 1954). Under some circumstances, title taken in the one spouse's name may be sufficient to rebut the presumption, however, title taken in such a manner does not conclusively establish separate ownership rights. *See id.*

During marriage, spouses may transmute¹⁴⁴ community assets into the separate property of either spouse, or vice-versa, to defeat or reinforce the community property presumption, as desired.¹⁴⁵ Transmutation is accomplished by either declaring certain assets to be separate property or community property or agreeing to voluntarily partition community property, in whole or in part.¹⁴⁶ Generally, a writing specifically memorializing the spouses' intent to change the characterization of specified property is required.¹⁴⁷

G. THE RETIREMENT EQUITY ACT OF 1984¹⁴⁸ AND THE QUALIFIED DOMESTIC RELATIONS ORDER¹⁴⁹

Congress initially responded to conflicts between ERISA and state property and domestic relations laws by amending ERISA under the Retirement Equity Act of 1984 ("REA").¹⁵⁰ Specifically, REA addressed ERISA's failure to recognize the property rights of the nonemployee spouse or dependent chil-

144. See WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 2D COLLEGE EDITION (1984). Definition of transmute: "to change from one form . . . into another; transform; convert." *Id.*

145. See La. Civ. Code Ann. art. 2336 (West 1996). Article 2336 states: "During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or part. In each case, the things that each spouse acquires are separate property." *Id.*

146. See WILLIAM Q. DE FUNIAK AND MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 2D EDITION 116 (1971).

147. See *id.*

148. Retirement Equity Act of 1984, PUB.L. NO. 98-397, 98 Stat. 1426 (1984). This amendment to ERISA applies to plan years after December 31, 1984. *Id.* at 1451.

149. 29 U.S.C. § 1056(d)(3)(B)(i)(I) (1994). "[T]he term 'qualified domestic relations order' means a domestic relations order - 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" *Id.*

150. *Id.*

S. REP. NO. 575, 98th Cong., 2547 (1984). Congress directed its attention to the equitable resolution of marital dissolution and dependent support issues with respect to the disposition of ERISA plan benefits. See *id.*

See also, *Stone v. Stone*, 632 F.2d 740, 748-49 (9th Cir. 1980), *cert. denied sub nom.*, *Seafarer's Union v. Stone*, 453 U.S. 922 (1981). The Court refused preemption of state community property laws which awarded a divorced wife of a participant an interest in her husband's ERISA regulated pension plan. See *id.*

But see, *Francis v. United Tech. Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978). The court held in favor of preemption in a divorce centered context which prevented state community property law from permitting attachment of plan benefits for family support purposes. See *id.* at 87-88.

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dren on termination of the marriage through divorce by creating the qualified domestic relations order.¹⁵¹ Accordingly, REA includes a statutory exception to ERISA's spendthrift provision designated as the qualified domestic relations order ("QDRO")¹⁵² that is primarily designed to protect the nonemployee spouse's economic interest in pension plan benefits on divorce.¹⁵³ A QDRO¹⁵⁴ protects the right of an alternate payee, a third party that is neither a pension plan participant nor a named beneficiary but is often the nonemployee spouse, to receive ERISA regulated plan benefits payable to a participant or beneficiary under a plan.¹⁵⁵

REA established guidelines for plan administrators to follow in determining whether this limited exception to the spend-

151. See *Ablamis v. Roper*, 937 F.2d 1450, 1453-54 (9th Cir. 1991).

S. REP. NO. 575, 98th Cong., 2565 (1984). "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., plan." *Id.*, citing, as authority, *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom.*, *Seafarer's Union v. Stone*, 453 U.S. 922 (1981).

But see, *Francis v. United Tech. Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978).

See also, Brief for Estate Planning Trust and Probate Law Section of the State Bar of California as Amicus Curiae Supporting Respondents at 15, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). The divergence of opinion among the courts regarding ERISA preemption of state community property laws recognized by Congress in the record cites the *Stone* and *Francis* cases as the only specific examples of this divergence. Both of these cases involved a determination of ERISA preemption of spousal community property rights exclusively within the divorce context. Thus, by the evidence in the Congressional legislative record, the debate Congress sought to settle through the enactment of REA was purely within the context of marriage dissolution by divorce. Debate concerning conflicting testamentary rights bestowed on nonparticipant spouses under ERISA and state community property and succession laws was not recognized and had yet to become an issue of divergent opinion among the courts. Based purely on the cited evidence of *Stone* and *Francis* in the record as Congress' basis for amending ERISA, there was no actual "divergence" at the time REA was being discussed and drafted since the *Stone* decision in effect overruled the *Francis* holding because it came down roughly two years later and was issued by the circuit court, a superior judicial body. *See id.*

152. 29 U.S.C. § 1056(d)(3)(A) (1994). ERISA's spendthrift provision shall not apply to qualified domestic relations orders. *See id.*

29 U.S.C. § 1056(d)(3)(B)(i)(I) (1994). "[T]he term 'qualified domestic relations order' means a domestic relations order - 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 . . ." *Id.*

153. *See supra* note 150-51 regarding the purposes of enacting REA.

154. *See* 29 U.S.C. § 1056(d)(3)(B)(i)(I) (1994).

155. *See id.*

thrift provision applies.¹⁵⁶ Though Congress did not enact REA to apply community ownership to pension plan benefits, the text of REA contains terms suggesting that it utilizes community property principles.¹⁵⁷ Congress, however, enacted REA primarily to provide the legislative framework within which to equitably distribute pension plan benefits between participant and nonparticipant spouses on divorce.¹⁵⁸ Congress did not intend to directly apply principles of community ownership but created the QDRO to allow for equitable marital property division on dissolution based on a state divorce decree.¹⁵⁹

H. ERISA IN THE COURTS - CIRCUITS SPLIT

The Court granted certiorari in *Boggs*¹⁶⁰ primarily because the Federal Fifth and Ninth Circuits were split on issues related to state community property and testamentary rights under ERISA.¹⁶¹ The split was created when the Fifth Circuit upheld the testamentary disposition of a community interest in ERISA pension plan benefits in accordance with Louisiana community property and succession laws in *Boggs v. Boggs*.¹⁶² The Fifth Circuit's decision was contrary to the Ninth Circuit's ruling in *Ablamis v. Roper*¹⁶³ which held in favor of ERISA preemption of California community property laws on similar, yet

156. See S. REP. NO. 575, 98th Cong., 2565 (1984). "In order to provide rational rules for plan administrators, the committee believes it is necessary to establish guidelines for determining whether the exception to the spendthrift rules applies." *Id.*

157. See *id.* at 2547. Congress' purpose in enacting REA is "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 . . ." (Emphasis added.) *Id.*

158. See *id.*

159. See *id.*

160. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

161. See *id.* at 1759. "The reasoning and holding of the Fifth Circuit's decision [*Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996)] is in substantial conflict with the decision of the Court of Appeals for the Ninth Circuit in *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) . . . [T]he division between the Circuits is significant . . ." The Court attributed the significance to the community property systems in place within seven states in the Fifth and Ninth Circuits combined. See *id.*

162. *Boggs v. Boggs*, 82 F.3d 90, 98 (5th Cir. 1996).

163. *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

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distinguishable, facts.¹⁶⁴ Ultimately, in *Boggs*,¹⁶⁵ the United States Supreme Court reversed the Fifth Circuit and, in effect, affirmed the Ninth Circuit's ruling.¹⁶⁶ The *Boggs*¹⁶⁷ Court held that ERISA preempted Louisiana community property and succession laws.¹⁶⁸ This holding prevented the heirs' inheritance of a nonemployee spouse's community interest in pension plan benefits.¹⁶⁹ The Court reasoned that Congress intended ERISA to preempt such laws in areas of traditional state legislative concern;¹⁷⁰ thereby, preempting Louisiana state law from governing the testamentary disposition of community property.¹⁷¹

I. THE NINTH CIRCUIT CASE - *ABLAMIS V. ROPER*¹⁷²

*Ablamis*¹⁷³ is the leading case cited by the *Boggs*¹⁷⁴ Court involving ERISA preemption of state community property law in a testamentary context.¹⁷⁵ In *Ablamis*, the Ninth Circuit held that ERISA preempted California community property law that provided a predeceasing nonparticipant spouse with a testamentary power over a community interest in the participant spouse's plan benefits.¹⁷⁶ Preemption of state community

164. See *id.* at 1460

165. *Boggs v. Boggs*, 117 S. Ct. 1754, 1767 (1997).

166. See *id.*

167. *Id.*

168. See *id.*

169. See *id.*

170. See *Zschemig v. Miller*, 389 U.S. 429, 440 (1968). "The several States . . . have traditionally regulated the descent and distribution of estates." *Id.*

California Div. of Labor Standards Enforcement v. Dillingham Constr., 117 S. Ct. 832, 838 (1997), quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When considering preemption, the Court assumes "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." *Id.*

171. See *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

172. *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

173. *Id.*

174. *Boggs v. Boggs*, 117 S. Ct. 1754, 1759 (1997).

175. See *id.*

176. See *Ablamis v. Roper*, 937 F.2d 1450, 1452 (9th Cir. 1991). The court stated: We are asked to decide here whether a wife who dies while her husband is still living may leave half of his current or future pension benefits to a third party in her will. We hold that an employee whose pension interests are covered by ERISA may not be divested of his entitlement. *Id.*

property and succession laws in *Ablamis* prohibited the distribution of benefits directly to third parties who were neither participants nor beneficiaries under the terms of the pension plan.¹⁷⁷ The court reasoned that holding in favor of state law would have contravened Congress' intent to provide a stream of income to the participant survivor during life.¹⁷⁸ In upholding preemption, the *Ablamis* court ruled against the highest courts of three community property states.¹⁷⁹ Each of these high state courts provided the nonparticipant spouse with testamentary control over a community property share of the participant spouse's pension plan benefits or accounts consisting of distributed plan proceeds.¹⁸⁰

The facts of *Ablamis* concerned a married couple whose marital property was subject to California community property laws.¹⁸¹ Roger and Glee Ablamis ("Mr. Ablamis" and "Ms. Ablamis") were married from August 6, 1972 until Ms. Ablamis' death on February 1, 1988.¹⁸² On Ms. Ablamis death, Mr. Ablamis was a vested participant in employee benefit profit sharing plans subject to ERISA regulation.¹⁸³ Mr. Ablamis participated in the plans throughout the duration of the marriage.¹⁸⁴

177. See *Ablamis v. Roper*, 937 F.2d 1450, 1455 (9th Cir. 1991).

178. See *id.* at 1457, 1459. The majority's opinion, in its closing paragraph, states that this distinction makes no difference because, under operation of state law, the sons' claims are based on the theory that their interest is derived from the undistributed benefits. See *id.*

179. See Brief for Estate Planning Trust and Probate Law Section of the State Bar of California as Amicus Curiae Supporting Respondents at 7, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79).

Estate of MacDonald, 794 P.2d 911 (Cal. 1990) (the predeceased nonparticipant spouse was allowed testamentary control over a community property interest in distributed pension plan benefits deposited into IRA accounts).

Allard v. Frech, 754 S.W.2d 111 (Tex. 1988) (the predeceased nonparticipant spouse's estate was held to include community property interest in the participant spouse's retirement plan benefits).

Farver v. Department of Retirement Sys., 644 P.2d 1149 (Wash. 1982) (pensions are subject to state community property laws).

180. See *supra* note 179.

181. See *Ablamis v. Roper*, 937 F.2d 1450, 1452 (9th Cir. 1991).

182. See *id.*

183. See *id.*

184. See *id.*

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On her death, Ms. Ablamis' will left the majority of her estate "including [her] one-half (1/2) community property interest in all community assets" to two trusts.¹⁸⁵ One trust was for the direct benefit of her children from a previous marriage and the other trust was for Mr. Ablamis' lifetime maintenance with the remainder interest passing to the same children.¹⁸⁶ On her death, Ms. Ablamis' estate claimed a community property interest in Mr. Ablamis' vested rights in the pension plan benefits.¹⁸⁷ Whereupon, the trustee of the plan filed a summary judgment motion seeking declaratory relief prohibiting Ms. Ablamis' estate from entitlement to any interest in Mr. Ablamis' pension benefits.¹⁸⁸ The executrix of Ms. Ablamis' estate filed a cross motion for summary judgment claiming entitlement to the estate's statutory one-half community property interest in Mr. Ablamis' pension benefits.¹⁸⁹ The trustee's claim was based on ERISA preemption of conflicting state law, while the estate claimed entitlement to the pension plan benefits under California community property laws.¹⁹⁰

The district court granted summary judgment in favor of the plan trustee and held that ERISA preempts California community property laws to the extent that the state laws allow a nonparticipant spouse to bequeath a community property interest in the participant spouse's pension plan benefits.¹⁹¹ The executrix of the estate appealed and the Ninth Circuit held that ERISA preempted state community property laws and prohibited a predeceasing nonparticipant spouse from possessing a testamentary interest in the fully vested pension benefits, current or prospective, of a surviving participant spouse.¹⁹² Further, the Ninth Circuit held that state court probate orders effecting testamentary transfers were not QDROs

185. *See id.*

186. *See Ablamis v. Roper*, 937 F.2d 1450, 1452 (9th Cir. 1991).

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See Ablamis v. Roper*, 937 F.2d 1450, 1452 (9th Cir. 1991).

192. *See id.* at 1460 (9th Cir. 1991).

and, thus, were not excepted from ERISA's spendthrift provision.¹⁹³

V. UNITED STATES SUPREME COURT'S ANALYSIS OF *BOGGS v. BOGGS*

ERISA's preemption provision states that "[e]xcept as provided . . . the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan . . ."¹⁹⁴ The United States Supreme Court, however, did not interpret the meaning of the "relate to" element within the text ERISA's preemption provision.¹⁹⁵ Instead, the Court applied conventional preemption principles to find preemption of Louisiana community property laws because the state laws conflicted with ERISA's purpose.¹⁹⁶ In support of its holding, the Court found that testamentary transfers allowed under Louisiana law could effectively reduce the amount payable under the Annuity to below the statutory minimum¹⁹⁷ thereby frustrating ERISA's purpose of providing a stream of income to the surviving spouse.¹⁹⁸ The Court held that ERISA preempted Louisiana state law and denied the sons' claims to any interest in the distributed benefits.¹⁹⁹

193. *See id.* at 1459-60.

194. 29 U.S.C. § 1144(a) (1994).

195. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1760-61 (1997).

We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further additional support for the pre-emption claim.

Id.

196. *See id.* at 1760-62 (1997). The Court stated that "conventional pre-emption principles require pre-emption of state law 'where compliance with both federal and state law is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" *Id.* at 1762; citing *Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 98 (1992).

197. *See* 29 U.S.C. § 1055(d)(1) (1994). The survivor's annuity shall not be less than 50% of the annuity which is payable during the joint lives of the participant and spouse. *See id.*

198. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1762 (1997). "In the face of this direct clash between state law and ERISA's provisions and objectives, the state law cannot stand." *Id.*

199. *See id.* at 1767.

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A. CASES DECIDED PRIOR TO THE ENACTMENT OF THE RETIREMENT EQUITY ACT OF 1984²⁰⁰ ARE NO LONGER APPLICABLE

Maintaining that Congress enacted ERISA with the primary goals of providing uniform legislation and protecting the rights of plan participants and their beneficiaries, the majority opinion identified specific instances in which Louisiana law conflicted with ERISA's purposes.²⁰¹ The Court reasoned that ERISA cases decided prior to the enactment of REA²⁰² allowing

200. Retirement Equity Act of 1984, PUB.L. NO. 98-397, 98 Stat. 1426 (1984). This amendment to ERISA applies to plan years after December 31, 1984. *See id.* at 1451.

201. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1762 (1997). Speaking of the specific conflicts, the Court stated:

ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity. Even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to such an annuity.

Id.

Id. at 1763. "ERISA confers pension plan beneficiary status on a nonparticipant spouse only to the extent that a survivor's annuity is required in covered plans. A qualified domestic relations order awards a spouse, dependent, or alternate payee an interest in a participant's benefits." *Id.*

Id. at 1764. "The sons are neither participants nor beneficiaries . . . [and their] claims are based on Dorothy Boggs' attempted testamentary transfer, not on a designation by Isaac Boggs or under the terms of the retirement plans." *Id.*

202. For cases decided before the enactment of REA, *see In Re Marriage of Campa*, 89 Cal. App. 3d 113 (1979), *cert. denied sub nom. Carpenters Pension Trust Fund v. Campa*, 444 U.S. 1028 (1980) (the nonparticipant spouse's rights in and to pension plan benefits are not barred by ERISA's spendthrift provision because they are not derived from a transfer within the meaning of 29 U.S.C. § 1056(d) and the appeal was dismissed on jurisdictional grounds for want of a substantial federal question).

Carpenter's Pension Trust for Southern Cal. v. Kronschnabel, 632 F.2d 745, 748-49 (9th Cir. 1980). The court stated:

[A] summary dismissal [by the Supreme Court] for want of a substantial federal question, fully binds the lower courts. The *Campa* appeal definitively presented the question whether ERISA preempts state-court orders directing a pension plan to pay a community property share of a participant's monthly benefits to his or her ex-spouse. The Supreme Court has answered that question in the negative.

Id.

Mandel v. Bradley, 432 U.S. 173 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974); *United Ass'n. of Journeyman v. Myers*, 488 F. Supp. 704, 712-13 (M.D. La. 1980). Louisiana's community property laws were not preempted by ERISA's spendthrift provision because community property rights are essentially ownership rights and not transfers under state law, thus precluding the finding of an unlawful assignment or alienation in violation of ERISA. The court used state law marital property characterization due to ERISA's silence on the matter and concluded that, in the absence of Congress' express intent to control,

for a spousal community property interest in employment plan benefits, were no longer applicable.²⁰³ The Court reasoned that Congress specifically preempted the future application of those holdings²⁰⁴ by amending ERISA's spendthrift provision pursuant to REA.²⁰⁵

B. ERISA PREEMPTS LOUISIANA COMMUNITY PROPERTY AND SUCCESSION LAWS

The Court characterized ERISA's silence on the testamentary rights of nonparticipant spouses to pension plan benefits as support for its conclusion that such rights are nonexistent even after the benefits are distributed in accordance with ERISA.²⁰⁶ The majority then denied the sons' claims because they were neither participants²⁰⁷ nor beneficiaries.²⁰⁸ Their alleged interest was derived from Louisiana community property and succession laws that created their mother's right to dispose of her interest in the plan benefits.²⁰⁹ In effect, the Court held that Dorothy had no testamentary power over her state law community interest in the pension plan.²¹⁰ While

state community property rights must prevail. *United Ass'n. of Journeyman*, 488 F. Supp. at 712-13

203. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1764-65 (1997). Congress enacted REA with the QDRO exception to provide enhanced protection to nonparticipant spouses and children in the event of divorce and, aside from that provision, nonparticipants who are not designated beneficiaries cannot achieve beneficiary status by reason of marriage or the nature of their dependence. See *id.*

204. See *supra* note 202 for the preempted holdings.

205. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1764-65 (1997).

206. See *id.* at 1763-64 (1997); citing *Massachusetts Mut. Life Co. v. Russell*, 473 U.S. 134, 147-48 (1985).

207. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1764 (1997).

29 U.S.C. § 1002(7) (1994). A "participant" is defined as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan" *Id.*

208. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1764 (1997).

29 U.S.C. § 1002(8) (1994). A "beneficiary" is defined as one "designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.*

209. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1765 (1997).

210. See *id.* "[I]t would be inimical to ERISA's purposes to allow 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." *Id.*

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recognizing the strength of the state interest in the property rights of its domiciliaries,²¹¹ the Court found that the state law disposition of Dorothy's community interest directly conflicted with ERISA's spendthrift provision.²¹² As such, the state law testamentary disposition constituted a prohibited transfer of pension plan benefits.²¹³

The Court's ruling preempted the sons' claims to each type of benefit: the IRA, the Annuity and the ESOP.²¹⁴ Regarding the Annuity, the Court found that ERISA mandates pension plans to provide a qualified joint and survivor annuity payable to the participant during life and then to the surviving spouse of a predeceasing participant.²¹⁵ Thus, a predeceasing nonparticipant spouse has no interest or rights in the annuity.²¹⁶ Be-

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990). ERISA's spendthrift provision "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents) . . ." *Id.*

211. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1760 (1997). The Court stated:

This case lies at the intersection of ERISA pension law and state community property law. None can dispute the central role community property laws play in the nine community property States. It is more than a property regime. It is a commitment to the equality of the husband and wife and reflects the real partnership inherent in the marital relationship . . . Louisiana's community property laws, and the community property regimes enacted in other States, implement policies and values lying within the traditional domain of the States. These considerations inform our pre-emption analysis.

Id.

Brief for Estate Planning Trust and Probate Law Section of the State Bar of California as Amicus Curiae Supporting Respondents at 5, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). "The almost 80 million residents in the nine community property jurisdictions have as much as one trillion dollars in qualified retirement plans." *Id.*

212. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1765 (1997).

213. *See id.*

214. *See id.* at 1764.

215. *See* 29 U.S.C. § 1055(a) (1994). "Each pension plan to which this section applies shall provide that - (1) in the case of a vested participant who retires under the plan, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity . . ." *Id.*

29 U.S.C. § 1055(d) (1994). Section 1055(d) states that a qualified joint and survivor annuity is an annuity payable from accrued benefits to a plan participant for life then to the surviving nonparticipant spouse after death in an amount that is "not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse . . ." *Id.*

Boggs v. Boggs, 117 S. Ct. 1754, 1761 (1997). "Congress' concern for surviving non-participant spouses is also evident from the expansive coverage of § 1055 . . . [because] as a general matter [it applies to] . . . all pension plans . . ." *Id.*

216. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1762 (1997).

cause Sandra, Isaac's surviving spouse, neither waived her rights to the Annuity nor consented to the naming of another beneficiary she was entitled to all of the survivor's benefits under ERISA.²¹⁷

The Court then examined the remaining disputed benefits.²¹⁸ The Court held that the interests of pension plan participants and beneficiaries are entitled to absolute protection and payment of benefit distributions must be made only to plan participants or beneficiaries.²¹⁹ Despite the fact that the sons' claims were brought against Sandra and not directly against the pension plan itself, the Court refused to allow them any recovery.²²⁰

Accordingly, the Court reversed the Fifth Circuit by finding that the sons had no interest in the pension plan benefits because their mother had no testamentary right over any portion of that property.²²¹ The sons' petition for rehearing was

217. See *id.* at 1761. Provision of the survivor's annuity may not be waived by the participant, absent certain limited circumstances, unless the spouse consents in writing to the designation of another beneficiary. See *id.*

29 U.S.C. § 1055(c)(2) (1994). In regards to the nonparticipant spouse's consent to an alternate beneficiary designation, Section 1055(c)(2) states that such a designation "cannot be changed [subsequently] without further spousal consent, witnessed by a plan representative or a notary public." *Id.*

218. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1762 (1997). The remaining benefits consisted of the IRA, the ESOP shares and a percentage of the monthly annuity payments made to Isaac during his retirement. See *id.*

219. See *id.* at 1765. Congress has provided specific and limited exceptions to ERISA where it intended to alter the statutory framework.

Assets of a plan are held for the exclusive purposes of providing benefits to participants and beneficiaries . . . Reading ERISA to permit non-beneficiary interests, even if not enforced against the plan, would result in troubling anomalies . . . Congress intended to pre-empt [the sons'] nonbeneficiary, nonparticipant interests . . . by the pension plan anti-alienation provision. The Court further stated that "Dorothy's 1980 testamentary transfer, which is the source of the [sons'] claimed ownership interest is a prohibited 'assignment or alienation'."

Id.

26 CFR § 1.401(a) - 13(c)(1)(ii). An assignment and alienation has been defined as "any direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefit which is, or may become, payable to the participant or beneficiary." *Id.*

220. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1766-1767 (1997).

221. See *id.* at 1767.

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denied.²²² The Court then remanded the case to the Fifth Circuit to vacate the district court's order ruling in favor of the sons and enter judgment in accordance with the Supreme Court's opinion.²²³

VI. CRITIQUE

The issue in this case was whether state community property and succession laws determined testamentary rights in community property consisting of qualified pension plan benefits or had Congress intended ERISA to provide the conclusive solution in determining ownership of such property.²²⁴ When considering preemption of laws in an area of traditional state legislative concern, such as community property and succession laws, Congress and the courts should give deference to the strong state interest.²²⁵ Within ERISA or its legislative history, Congress does not provide an express intention to supersede state community property and succession laws.²²⁶ Where

222. See *Boggs v. Boggs*, 118 S. Ct. 9, 10 (1997).

223. See *Boggs v. Boggs*, 121 F.3d 168 (5th Cir. 1997).

224. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1758 (1997).

225. See *In Re Burrus*, 136 U.S. 586, 593-94 (1890). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States not to the laws of the United States." *Id.*

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 593 (1979). The Court held that the nonemployee spouse was not entitled to a community share of railroad retirement benefits because the Railroad Retirement Act preempted state community property law, but cautioned that family law belongs to the states and courts have limited review in determining whether or not to preempt state law. The *Hisquierdo* Court was hesitant to find preemption, but found it necessary to prevent infringement of a federal right by a state community property law because conflict between the two involved the allocation of an entitlement to federal benefits under the Railroad Retirement Act. See *id.* at 581, 590.

But see, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 591-96 (1979) (Stewart, J., dissenting) (stating the importance of respecting the tradition of state property law because of the strength of the state interest and asserting the nonemployee spouse's present ownership rights).

226. See 29 U.S.C. § 1001(b) (1994). Section 1001(b) states:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

preemption is at issue and Congress has not expressed an intention to preempt state law, the courts must find conflict between state and federal law before federal law can provide a constitutionally conclusive settlement.²²⁷

Although the *Boggs* Court relied on a standard conflict preemption analysis, the proper focus in determining whether conflict exists between federal and state law in the context of *Boggs* is an analysis based on the statutory language and meaning of ERISA's preemption and spendthrift provisions.²²⁸

A. THE COURT'S QUESTIONABLE ANALYSIS

The *Boggs* majority ignored inquiry into the meaning of ERISA's preemption provision and stated that it need only rely on basic conflict preemption principles to resolve all issues.²²⁹ The *Boggs* holding established Sandra's ownership of the pension plan benefits and preempted the sons' claims largely based on what the Court characterized as a conflict between Doro-

Id.

Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 52-53 (Winter, 1996). The article states that, with regard to the legislative history of ERISA's preemption provision, the House Bill proposed preemption of state laws that relate to reporting, disclosure, fiduciary duties, and funding and vesting matters; while the Senate Bill proposed preemption of state laws that relate to the subject matters regulated by ERISA. The preemption provision, as enacted, was the product of the Conference Committee's revision roughly a few weeks prior to the January 1, 1975 enactment of ERISA. *See id.*

227. *See* U.S. CONST. amend. X. The Tenth Amendment states: "The 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." *Id.*

U.S. CONST. art. VI, cl. 2. The Supremacy Clause states:

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.

228. *See* *Boggs v. Boggs*, 117 S. Ct. 1754, 1769 (1997).

229. *See id.* at 1762. "Conventional conflict pre-emption principles require pre-emption where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, citing *Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 98 (1992).

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thy's community property interest in the pension plan benefits and ERISA's spendthrift provision.²³⁰ The Boggs majority construed Dorothy's ownership and testamentary disposition of her community property interest under Louisiana law as a prohibited assignment and alienation of Isaac's pension plan benefits in conflict with ERISA's spendthrift clause.²³¹ The Court reasoned that this assignment and alienation was not excepted under the QDRO provision because Congress chose not to accommodate testamentary transfers of pension plan benefits under this exception.²³² Due to ERISA's silence on the issue, the Court then extended this reasoning to find that Congress implied that community property claims in the testamentary context were to be preempted because such claims were not consistent with ERISA's statutory scheme.²³³

B. A COMMUNITY PROPERTY INTEREST IS A PRESENT OWNERSHIP INTEREST NOT AN INTEREST DERIVED FROM A PROHIBITED ASSIGNMENT OR ALIENATION

The effect of Louisiana laws governing the ownership and testamentary disposition of the pension plan benefits in *Boggs* did not constitute a prohibited "assignment or alienation" under ERISA's spendthrift provision²³⁴ and, thus, state law should have prevailed. Under Louisiana community property law, Dorothy possessed a present ownership interest in the pension plan benefits at her death.²³⁵ Accordingly, her interest was not derived from an assignment or alienation of Isaac's pension plan benefits.²³⁶ Dorothy's community property interest passed to the sons by operation of state law and was, thus,

230. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1763-64 (1997).

231. See *id.*

232. See *id.* at 1764.

233. See *id.* at 1763-64.

234. 29 U.S.C. § 1056(d)(1) (1994).

235. See *T.L. James & Co. v. Montgomery*, 332 So.2d 834, 841-44, 846 (La. 1976). The nonemployee spouse's community interest in pension plan benefits arises through operation of state law and not as a result of an assignment or alienation from the participant spouse. See *id.*

236. See *id.*

not transferred to them by assignment or alienation.²³⁷ The Court, however, held to the contrary and the majority's conflict analysis in *Boggs* unconstitutionally divested Dorothy of a testamentary power over a present ownership interest.²³⁸ Further, the majority failed to give deference to the fact that the sons' inheritance became effective only *after* the benefits were distributed from the pension plan and Isaac's usufruct terminated.²³⁹ The Court allowed ERISA to continue its reign over distributed property after ERISA's federal purpose had been satisfied and assets properly distributed from the plan which it controlled.²⁴⁰

C. PROTECTING THE FEDERAL INTEREST - LIMITED CONFLICT AND THE ANNUITY

The conflict in *Boggs*, if any, between Louisiana law and ERISA existed only in relation to the Annuity benefits.²⁴¹ The Court did not provide an adequate basis for its finding of preemption because Sandra's federal rights to the Annuity could have been protected while allowing the sons just relief under their state law claims.²⁴² Thus, preemption could have been limited to the value of the Annuity benefits only.²⁴³ Where state law offends neither general preemption nor ERISA specific preemption principles, no conflict with federal law exists.²⁴⁴ The Court's contrary holding in *Boggs* favoring preemption on general principles, despite the absence of state and

237. See *supra* notes 42-45 regarding the sons' interest under operation of Louisiana law.

238. See Brief for State of Louisiana as Amicus Curiae Supporting Respondents at 15, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79) (citing La. Civ. Code Ann. arts. 2327, 2334 and 2336).

239. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1771-72 (1997) (Breyer, J., dissenting).

240. See *id.* at 1775-76 (Breyer, J., dissenting).

241. See *id.* at 1774-76 (Breyer, J., dissenting).

242. See *id.* at 1776 (Breyer, J., dissenting). "In sum, an annuity goes to Sandra, a surviving spouse; but otherwise Dorothy would remain free . . . to bequeath, her share of the marital estate to her children." *Id.*

243. See *id.*

244. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). The *Hisquierdo* Court said that state law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that State law be overridden." *Id.*; citing *United States v. Yazell*, 382 U.S. 341 (1966).

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federal conflict, significantly impacts spousal property rights in the nine community property states²⁴⁵ because it prevents state community property rights from attaching to property which is often the most significant asset of the community.²⁴⁶

The Court does not give deference to the distinction between the concededly impermissible result of awarding the sons a distribution of a percentage of the monthly Annuity proceeds directly from the pension plan and the permissible result of providing them with other, possibly nonpension, Dorothy/Isaac community assets of equivalent value.²⁴⁷ Such an equivalent value could have been determined pursuant to an accounting of their mother's date of death community interest adjusted for Isaac's usufruct.²⁴⁸ On the resolution of an accounting pursuant to the sons' state law rights, Sandra could have been awarded the Annuity²⁴⁹ and the sons' claims could have been satisfied with an award of other property of equivalent value, if necessary and available.²⁵⁰ To the extent that the sons' award would invade Sandra's share of the Annuity, and no other property was available for its satisfaction, the sons' award relating only to the Annuity benefits would be preempted.²⁵¹ Such a holding would have protected the federal interest²⁵² and avoided the implied result.²⁵³

D. UNDERSTANDING LOUISIANA LAW AND THE SONS' CLAIMS

Under Louisiana law, community assets bequeathed by Dorothy to Isaac in the form of the usufruct presumably pass

245. See *supra* note 134. The nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

246. *Boggs v. Boggs*, 117 S. Ct. 1754, 1767 (1997) (Breyer, J., dissenting). Benefits in ERISA qualified pension plans "are often a couple's most important lifetime assets." *Id.*

247. See *id.* at 1774-75.

248. See *id.*

249. See *id.* at 1774-76.

250. See *id.*

251. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1774-76 (1997) (Breyer, J., dissenting).

252. See *id.*

253. See *id.* "On the assumptions I have made, to find a conflict in this case, one would have to depart from what Congress actually said in ERISA and infer some more abstract general purpose . . ." *Id.*

naked ownership to the sons on Isaac's death by operation of state law.²⁵⁴ Dorothy's bequest to Isaac vested the sons, as heirs on her death, with a cause of action for an accounting to value her interest on their father's death.²⁵⁵ Based on this accounting, the sons had a right to receive assets of equivalent value to their mother's community interest on their father's death, subject to his usufruct.²⁵⁶

Further, Dorothy's will did not operate to transfer pension plan benefits prior to their distribution from the pension plan.²⁵⁷ Instead, the will operated to control disposition of her community interest upon Isaac's death *after* the benefits were distributed from the plan.²⁵⁸ This disposition first took the form of Isaac's lifetime usufruct.²⁵⁹ Subsequently, on Isaac's death, the sons should have been awarded naked ownership of the remaining benefits or property of equivalent value attributed to their mother's community interest as determined by an accounting.²⁶⁰

The majority in *Boggs* cites an array of case law supportive of preemption, but does not adequately recognize the distin-

254. See *supra* notes 42-45 regarding Louisiana usufruct, naked ownership and succession principles.

255. See *id.*

256. See *id.*

257. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1772 (1997) (Breyer, J., dissenting).

258. See *id.*

See Brief for Respondents at 18, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). Sandra's preemption claim is in conflict with Congress' intent and past holdings of the Court because it ignores the distinction between the effect of state law on *benefits* (after distribution), as opposed to *benefit plans*. (Emphasis added.) In effect, the former being merely a property interest after distribution in accordance with the ERISA qualified provisions of the latter. See *id.*

But see, Brief for Petitioner at 15, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). The pre-distribution/post-distribution issue represents "a distinction without a difference" because the Fifth Circuit majority recognized the very existence of the plan when it found that Dorothy had a community interest in the benefits on her date of death prior to their distribution upon Isaac's retirement in 1985. The brief calls for preemption based on the argument that the Fifth Circuit majority's recognition is proof that Louisiana's laws 'relate to' the plan under ERISA's preemption clause because the "[s]ons' claims are premised on the very existence of the *vel non* of the Bell Plan." *Id.*

259. See *supra* note 42 regarding usufruct.

260. See *supra* notes 42-45 regarding Louisiana usufruct, naked ownership and succession principles.

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guished characteristics of the sons' claims.²⁶¹ With the exception of *Ablamis*,²⁶² the cases cited in the Court's preemption analysis should not have been applied to resolve the dispute in *Boggs* because the cited cases concern *federally funded* benefit plans or programs and conflicting state law.²⁶³ The *Boggs* plan, however, was *privately funded* with community funds.²⁶⁴ Congress enacted ERISA to regulate only private employee benefit plans and to protect participants and beneficiaries by providing a framework for plan integrity and security in the payment of benefits.²⁶⁵

Under Louisiana community property law, funds contributed, as deferred compensation, into private benefits plans are fruits of the labor of the community.²⁶⁶ On its face, the contribution of community income to fund ERISA regulated benefit plans merely represents an investment strategy.²⁶⁷ Such a strategic investment choice, however, should not alter the predictable status of property ownership under state law by subjecting the property to federal control which compels a result

261. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1759 (1997). "ERISA pre-empts a testamentary transfer by a nonparticipant spouse of her community property interest in undistributed pension plan benefits." *Id.*

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). Railroad Retirement Act benefits cannot be divided on divorce under state community property law. See *id.*

McCarty v. McCarty, 453 U.S. 210 (1981). The Supremacy Clause warrants preemption of any division of federal military pay in state divorce proceedings. See *id.*

Ridgway v. Ridgway, 454 U.S. 46 (1981). The Supremacy Clause prohibits state intervention into a service member's right to designate the beneficiary of federally funded insurance and the surviving spouse of a service member cannot enforce an interest in federally funded insurance proceeds based on state community property laws. See *id.*

Free v. Bland 369 U.S. 663 (1962). Treasury regulations providing for the survivor's ownership in accordance with the manner in which title to U.S. savings bonds was held to preempt conflicting state law; despite the fact that the bonds were purchased with community funds. See *id.*

262. *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

263. See *supra* note 261 regarding the *Hisquierdo*, *McCarty*, *Ridgway* cases.

264. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1767 (1997) (Breyer, J., dissenting).

265. See *supra* note 102 regarding ERISA's intended purposes.

266. La. Civ. Code Ann. art. 2338 (West 1996). Article 2338 states that community property includes "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse." *Id.*

267. See *supra* note 35 regarding tax incentives in connection with participation in qualified benefit plans.

inconsistent with one's testamentary scheme.²⁶⁸ The Court's construction ignores the core basis of the community property system and creates uncertain and undesirable effects for the multitudes whose property rights it has altered.²⁶⁹

The majority cited the equitable nature of the REA amendments to ERISA as evidence of Congress' intent to provide a stream of income for surviving spouses.²⁷⁰ A state law regulating the plan to effect payment of benefits directly to a third party clearly frustrates the federal purpose because such a transfer, if not a QDRO, would be a prohibited assignment or alienation under federal law.²⁷¹ Preemption would be necessary to protect the integrity of the federal legislation in this context.²⁷² If this were the actual issue before the Court, the majority would be correct in ruling for Sandra based on ERISA's spendthrift clause.²⁷³

The sons, however, merely sought an accounting to value their mother's community interest in the pension plan benefits after the benefits were distributed from the pension plan.²⁷⁴ This distribution was in compliance with ERISA and the sons did not request relief from the Court in the form of a direct payment of a percentage of the monthly Annuity payments from the plan.²⁷⁵ ERISA should no longer apply to control

268. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1772, 1775 (1997) (Breyer, J., dissenting).

269. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1760 (1997). "The nine community property states have some 80 million residents, with perhaps \$1 trillion in retirement plans." *Id.*

270. See *id.* at 1761.

271. See 26 CFR § 1.401(a) - 13(c)(1)(ii). An assignment and alienation has been defined as "any direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefit which is, or may become, payable to the participant or beneficiary." *Id.*

See Brief for Respondents at 33-39, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). However, the above definition [pursuant to 26 CFR § 1.401(a) - 13(c)(1)(ii)] speaks in terms of enforcement against a plan and applies to benefits which are "payable." (Emphasis added.) Accordingly, this definition should not control in *Boggs* because enforcement against the plan was not sought and the benefits had already been distributed in compliance with ERISA. See *id.*

272. See Brief for Respondents at 33-39, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79).

273. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1770, 1774 (1997) (Breyer, dissenting).

274. See *id.* at 1774.

275. See *id.*

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property once it is distributed in accordance with the plan.²⁷⁶ The majority, however, did not give deference to the fact that the benefits had already been duly disbursed by the pension plan.²⁷⁷

E. THE FACTS OF *BOGGS* ARE DISTINGUISHABLE FROM *ABLAMIS*

The significant distinction between the facts of *Ablamis* and *Boggs* is that in *Boggs* the plan benefits were already distributed when the state laws at issue came into operation.²⁷⁸ In *Ablamis*, however, the benefits had yet to be distributed from the ERISA governed benefit plan.²⁷⁹ The *Ablamis* court held that ERISA preempted California community property laws which otherwise gave the predeceasing nonemployee spouse a testamentary interest in a surviving employee spouse's vested, but undistributed, pension benefits.²⁸⁰ Despite this distinction, the United States Supreme Court reversed the Fifth Circuit in *Boggs* and remanded the case.²⁸¹

The *Ablamis* reasoning relies on the Ninth Circuit's reading of a statute and legislative record that are silent on the treatment of probate orders under the QDRO exception.²⁸² The silence in this regard could imply that probate orders are outside the scope of the QDRO exception and, therefore, are not expected.²⁸³ Conversely, this legislative silence could imply that probate orders are outside the scope of ERISA and, therefore, are not in conflict.²⁸⁴ The *Ablamis* majority, by implication, extends ERISA's reach in a manner that is inconsistent with Congress' legislative intentions by enlarging the meaning of

276. See *id.* at 1775.

277. See *id.* at 1761.

278. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1761 (1997).

279. See *id.* at 1759.

280. See *id.*

281. See *id.* at 1767.

282. See *Ablamis v. Roper*, 937 F. 2d 1450, 1466-67 (9th Cir. 1991) (Fletcher, J., dissenting). State marital property laws do not conflict with ERISA and the statute as written by Congress "cannot be read as creating the testamentary disenfranchisement of a predeceasing spouse." *Id.* at 1467, n.2.

283. See *id.* at 1462-63.

284. See *id.*

REA's QDRO exception to exclude application to community property rights in a testamentary context.²⁸⁵

The preemption that divested the nonparticipant spouse of testamentary rights over the community share of pension plan benefits in *Ablamis* was grounded in that court's circular reasoning. The majority assumed that because a probate order did not fit within the statute's definition of a "qualified domestic relations order" it could not come within the exception provided under REA.²⁸⁶ REA, however, does not expressly recognize probate orders within the QDRO exception and, thus, should not be read to implicitly allow for the preemption of probate orders.²⁸⁷ REA's silence with respect to testamentary rights places state law governing such rights out of its preemptive reach.²⁸⁸ If Congress had intended preemption in such a setting, then it would have expressly provided for such treatment under REA.²⁸⁹

The REA amendment provides an exception to ERISA's spendthrift provision and recognizes state community property law only in the divorce context and only to the extent that a division of marital assets is based on community property principles as reflected in the QDRO.²⁹⁰ Therefore, pre-REA case law should generally provide the proper basis for determining the community property rights of nonparticipant spouses in a testamentary setting.²⁹¹

285. *See id.* at 1460.

286. *See* 29 U.S.C. § 1056(d)(3)(B)(i)(I) (1994). A QDRO is defined as "a domestic relations order - 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 . . ." *Id.*

29 U.S.C. § 1056(d)(3)(A) (1994). A QDRO is exempt from ERISA's spendthrift provision. *See id.*

287. *See* 29 U.S.C. § 1056(d)(3)(B)(i)(I) (1994).

288. *See* 130 CONG. REC. H 875 (1984). Rep. Erlenborn's statement that REA was not intended to "define or restrict the marital property interest in retirement benefits as determined under state law." *Id.*

289. *See supra* notes 148-59.

290. *See id.*

291. For cases decided before the enactment of REA, *see In Re Marriage of Campa*, 89 Cal. App. 3d 113 (1979), *cert. denied sub nom.*, *Carpenters Pension Trust Fund v. Campa*, 444 U.S. 1028 (1980) (the nonparticipant spouse's rights in and to pension plan

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F. ALTERING THE SPHERE OF TRADITIONAL STATE LEGISLATIVE CONCERN

The state laws at issue here are family, property and probate.²⁹² These areas traditionally occupy the sphere of state legislative concern²⁹³ and may be superseded only if Congress has clearly expressed an intention to legislate within those areas.²⁹⁴ Congress enacted ERISA to regulate private pension plans and not to alter an individual's state granted property rights.²⁹⁵ In *Boggs*, Louisiana laws allowing for the sons' inheritance should not be preempted under proper analysis focused on the language and intended purpose of ERISA's preemption provision because the state laws do not "relate to" a regulated plan.²⁹⁶ A state law "relate[s] to" an ERISA regulated plan within the meaning of the federal preemption provision where it expressly refers to or has a connection with such a plan.²⁹⁷ The Louisiana laws at issue in *Boggs* were not

benefits are not barred by ERISA's spendthrift provision because they do not constitute a transfer within the meaning of 29 U.S.C. § 1056(d) and the appeal was dismissed on jurisdictional grounds for want of a substantial federal question).

See *United Ass'n. of Journeyman v. Myers*, 488 F. Supp. 704 (M.D. La. 1980). Louisiana's community property laws were not preempted by ERISA's spendthrift provision because community property rights are essentially ownership rights and not transfers under state law, thus precluding the finding of an unlawful assignment or alienation in violation of ERISA. The court used state law marital property characterization due to ERISA's silence on the matter and concluded that, in the absence of Congress' express intent to control, state community property rights must prevail. See *id.*

292. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1770 (1997) (Breyer, J., dissenting). "I cannot say that the state law at issue here concerns a subject that Congress wished to place outside the State's legal reach . . . the state law in question involves family, property, and probate - all areas of traditional, and important, state concern." *Id.*

293. See *id.*

294. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). Congress' intent to legislate within a particular sphere reflects intent to preempt all state laws in that field regardless of whether or not the effective enactments expressly prohibit all state legislation within that area of legislative concern. See *id.*

295. See *supra* note 102 regarding ERISA's intended purposes.

296. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7, 15 (1987). In refusing to preempt state law and distinguishing between state laws that regulate employee benefit plans and those that provide for a system of benefit distribution after the funds are paid out, the Court stated that the state law ". . . fails to implicate the regulatory concerns of ERISA itself . . . because 'ERISA's pre-emption provision does not refer to state laws relating to 'employee benefits' but to state laws relating to 'employee benefit plans . . .'" (Emphasis added.) *Id.*

297. See *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 117 S. Ct. 832, 837 (1997).

within the scope of ERISA's preemption provision because those laws do not refer to ERISA regulated employee benefit plans.²⁹⁸ These state laws instead refer to property rights.²⁹⁹ Further, the Louisiana laws preempted in *Boggs* did not have a prohibited connection with an ERISA plan.³⁰⁰ These state laws instead have a connection with *distributed benefits*.³⁰¹ Additionally, state community property and succession laws are not legislative fields which Congress has historically sought to occupy.³⁰² Thus, it follows that state law operations within those

298. *See id.*

N.Y. Conference of Blue Cross v. Travelers Ins., 115 S. Ct. 1671, 1677-78 (1995) (Souter, J., analyzing ERISA's preemption clause, and in particular, the meaning of the 'relate to' phrase within ERISA's preemption provision). "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*

Justice Souter concluded that Congress intended to avoid a multitude of indirectly conflicting state regulation and provide national uniformity with respect to the *administration* of employee benefit plans. (Emphasis added.) *See id.* at 1680, 1683.

299. *See* La. Civ. Code Ann. art. 2325 (West 1996). Article 2325 states that a matrimonial regime creates a system of property ownership and management between married persons and toward third persons. *See id.*

La. Civ. Code Ann. art. 2338 (West 1996). Article 2338 states that community property includes "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse . . ." *Id.*

La. Civ. Code Ann. art. 2336 (West 1996). Article 2336 states "each spouse owns a present undivided one-half interest in the community property." *Id.*

La. Civ. Code Ann. art. 535 (West 1996). Article 535 states that: "Usufruct is a real right of limited duration on the property of another. The features of the right vary with the nature of the things subject to it as consumables or nonconsumables." *Id.*

La. Civ. Code Ann. art. 538 (West 1996). Article 538 states that, at the termination of the usufruct, the usufructuary [holder of the usufruct] of a consumable is "bound to pay the naked owner either the value that the things had at the commencement of the usufruct or deliver to him things of the same quantity or quality." *Id.*

La. Civ. Code Ann. art. 478 (West 1996). Article 478 states: "The ownership of a thing burdened with a usufruct is designated as naked ownership." *Id.*

La. Civ. Code Ann. art. 477 (West 1996). Article 477 states: "Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under conditions established by law." *Id.*

La. Civ. Code Ann. art. 940 (West 1996). Article 940 states: "A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds." *Id.*

300. *See* California Div. of Labor Standards Enforcement v. Dillingham Constr., 117 S. Ct. 832, 838 (1997).

301. *See* *Boggs v. Boggs*, 117 S. Ct. 1754, 1770 (1997).

302. *See id.* at 1761. The Court stated "[n]or need we consider the applicability of field pre-emption . . ." *Id.*

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fields should not be subject to preemption on the alternative theory of field preemption or otherwise.³⁰³

The Louisiana laws at issue provide for the testamentary distribution of community property derived from whatever source within the constitutional parameters of the state's police power.³⁰⁴ As a general matter, once property is distributed to the domiciliary of a state from a federally regulated pension plan state law becomes operative and may affect the subsequent disposition of the distributed property.³⁰⁵ For example, state income tax is owed on distributed benefits and state law may proscribe certain uses of the distributed benefits as fraudulent.³⁰⁶

In sum, ERISA should not control an estate distribution through preemption of state community property and succes-

303. See *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). A state law will be preempted if it is within a legislative field which Congress has sought to occupy. See *id.*

304. See U.S. CONST. amend. X. "The 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." *Id.*

See *T.L. James & Co. v. Montgomery*, 332 So.2d 834, 841-44, 846 (La. 1976). Pension plan benefits are community property. See *id.*

305. See Brief for State of Louisiana as Amicus Curiae Supporting Respondents at 6-7, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79). Stating, with regard to preemption by ERISA that:

A workable bright-line rule is this: state law has no application until pension funds are distributed out of the pension plan since the purpose of ERISA is to assure that plans are well administered by fiduciaries who are freed from interference from state orders and state law claims. Once funds are distributed, state law fully attaches. State income tax is owed. State law defining what is a fraudulent use of the funds applies. All aspects of state property law apply. The same bright-line test applies to the anti-alienation section of ERISA. Plan administrators are to ignore instructions . . . to pay benefits to some third party (such as a creditor). However, once funds are distributed, they may be used [in a manner that could be termed an alienation under federal regulation]. Under this sensible bright-line rule, the timing of an alienation document is irrelevant under ERISA so long as it has no impact on pension plan administrators and no effect in rem on pension funds until they fall under the control of state property law after distribution.

Id.

N.Y. Conference of Blue Cross v. Travelers Ins., 115 S. Ct. 1671 (1995) (state surcharges imposed on employee health care plans do not 'relate to' employee benefit plan within the meaning of ERISA's preemption clause).

306. See Brief for State of Louisiana as Amicus Curiae Supporting Respondents at 6-7, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79).

sion laws once its federal purposes are met by direct payment of the plan benefits to the participant or the designated beneficiary.³⁰⁷ Congress has expressed no intention that ERISA supersede state family, property and probate laws on such facts.³⁰⁸ The Court's holding despite these legislative deficiencies usurps the state laws at issue in *Boggs* and unconstitutionally preempts the ownership rights of Dorothy and the sons.³⁰⁹

VII. PRACTICAL ESTATE PLANNING CONSIDERATIONS

The *Boggs* decision raises some significant questions for professionals planning estates that include community property and community property rights.³¹⁰ Unfortunately, the holding does not provide definitive answers to some of the significant questions it raises.³¹¹ These questions primarily involve the use of the unified credit³¹² and the marital deduction³¹³ for estate tax purposes.³¹⁴ Although a thorough discussion of the federal estate tax ramifications is beyond the scope of this Note, consideration is given to the basic estate planning and tax issues arising from the pervasive impact of *Boggs*. Accordingly, this section will focus on the basic estate planning and federal estate tax inquiries and the apparent answers flowing from the *Boggs* decision.³¹⁵

307. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1775-76 (1997) (Breyer, J., dissenting).

308. See *supra* notes 103-12 and accompanying text regarding Congress' intent that ERISA supersede state law.

309. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1776 (1997) (Breyer, J., dissenting).

310. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 683 (1997).

311. See *id.* at 683-85.

312. See I.R.C. § 2010 (1997). This Code section provides for the unified credit amount against estate tax. The applicable credit amount is the amount of the tentative tax determined under the rate schedule set forth in I.R.C. 2001(c) (1997). See *id.*

I.R.C. § 2505 (1997). This Code section provides for the unified credit to be applied against estate tax. See *id.*

313. See I.R.C. § 2056 (1997). This Code section provides for the marital deduction, which permits a husband and wife to transfer unlimited amounts to each other without federal estate or gift tax consequences on the death of the first spouse. See *id.*

314. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

315. See *infra* notes 316-70 and accompanying text.

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A. THE UNIFIED CREDIT AND COMMUNITY PROPERTY ESTATE PLANNING

Though a degree of uncertainty exists,³¹⁶ the holding in *Boggs*³¹⁷ appears to adversely limit the use of the unified credit in community property states.³¹⁸ Available to each taxpayer only once, the unified credit is a credit against gift and estate tax levied on inter vivos gifts and death transfers.³¹⁹ This credit can be aggregated on a rolling basis until the total limit is reached.³²⁰ The unified credit against gift and estate tax is currently \$202,050 for decedents dying in 1998, which is the equivalent of tax imposed on taxable gift transfers totaling \$625,000.³²¹ Thus, as a practical matter, this credit allows for an individual tax shelter of \$625,000 worth of taxable gifts.³²² Proper planning utilizing a combination of techniques allows a married couple to transfer a total of \$1,250,000 worth of gifts tax free.³²³ The most basic combination of spousal estate planning techniques commonly used in community property states are the bypass trust and inter vivos gifts.³²⁴

316. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

317. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

318. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

319. See REGIS W. CAMPFIELD, MARTIN B. DICKINSON, JR. AND WILLIAM J. TURNIER, *TAXATION OF ESTATES, GIFTS AND TRUSTS* 35 (19th ed., CCH Inc. 1994).

320. See *id.* at 127.

I.R.C. § 2010 (1997). This Code section provides for the unified credit amount against estate tax. The applicable credit amount is the amount of the tentative tax determined under the rate schedule set forth in I.R.C. 2001(c) (1997). See *id.*

I.R.C. § 2505 (1997). This Code section provides for the unified credit to be applied against estate tax. See *id.*

321. See I.R.C. 2010 (1997) and I.R.C. 2505 (1997).

322. See REGIS W. CAMPFIELD, MARTIN B. DICKINSON, JR. AND WILLIAM J. TURNIER, *TAXATION OF ESTATES, GIFTS AND TRUSTS* 127-29 (19th ed., CCH Inc. 1994). The author of this Note has adjusted the amount of the tax shelter referenced in the text above to conform with the Taxpayer Relief Act of 1997, which amended I.R.C. 2010 and I.R.C. 2505.

323. See *id.*

324. See *id.*

The bypass trust is primarily designed to take full advantage of each spouse's unified credit against estate tax.³²⁵ The decedent's personal representative must take care not to make a QTIP election under I.R.C. § 2056(b)(7) with respect to the property left to fund the bypass trust so that the predeceasing spouse's unified credit can be used to offset any tax imposed on the property left to this trust.³²⁶ If, however, there is no property to fund the bypass trust, the estate plan will fail and all marital property will be taxed on the survivor's death without the offset of the predeceasing spouse's unified credit.³²⁷ Further, the estate tax liability is increased because the marital property could not be split to take advantage of the progressive tax rate scheme.³²⁸

The *Boggs*³²⁹ holding may prevent the effective implementation of the bypass trust in community property states by excluding the value of any pension plan assets from the estate of a predeceasing nonparticipant spouse.³³⁰ Because such funds often constitute the largest asset of a married couple, the exclusion of the value of these funds from the estate of the predeceasing nonparticipant spouse may prevent the bypass trust from being funded.³³¹ The failure of the bypass trust estate plan results in an increased taxable estate on the death of the survivor because the predeceasing spouse lacked sufficient assets to use the unified credit and the progressive tax rates to full advantage.³³²

325. *See id.* This vehicle is commonly known as the bypass trust because, in the case of a married couple with assets sufficient to cause estate tax concerns, it ultimately offers a credit shelter for the surviving spouse beneficiary. *See id.*

326. *See* Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

327. *See id.*

328. *See id.*

329. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

330. *See* Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

331. *See id.*

332. *See* KATHRYN A. BALLSUN AND ANNE K. HILKER, ESTATE PLANNING GUIDE VOL. 1 110-13 (Continuing Education of the Bar-California 1997).

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B. THE MARITAL DEDUCTION AND COMMUNITY PROPERTY ESTATE PLANNING

Despite the apparent exclusion in *Boggs* of a community interest in ERISA plan benefits from the predeceasing nonparticipant spouse's taxable gross estate, inclusion of such an interest would allow it to pass tax free to the surviving participant spouse under the unlimited marital deduction.³³³ This deduction may also be utilized in the case of a predeceasing participant spouse with respect to the transfer of the benefits to the nonparticipant spouse.³³⁴ If however, on the death of the first spouse, this is the only credit or deduction taken, the surviving spouse's estate would be taxed without the benefit of the marital deduction and with only the survivor's unified credit available.³³⁵

C. AN ILLUSTRATION OF THE EFFECT OF THE BYPASS TRUST:

The bypass trust is designed to provide income to the beneficiary spouse for life with the corpus in trust for the children or third parties so that at the death of the surviving spouse, the assets of the bypass trust are not includable in the surviving spouse's gross estate.³³⁶ This technique is an effective planning tool utilized to avoid or mitigate the tax liability of married couples with assets sufficient to raise estate tax concerns on the death of the surviving spouse.³³⁷ In the full credit situation, the use of a bypass trust excludes the taxation of \$625,000 (the tax shelter amount under the unified credit) of assets on the death of the first spouse after December 31, 1997³³⁸ by al-

333. See I.R.C. § 2056 (1997). This Code section provides for the marital deduction, which permits a husband and wife to transfer unlimited amounts to each other without federal estate or gift tax consequences on the death of the first spouse. See *id.*

334. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 684-685 (1997).

335. See REGIS W. CAMPFIELD, MARTIN B. DICKINSON, JR. AND WILLIAM J. TURNIER, *TAXATION OF ESTATES, GIFTS AND TRUSTS* 127-29 (19th ed., CCH Inc. 1994).

336. See KATHRYN A. BALLSUN AND ANNE K. HILKER, *ESTATE PLANNING GUIDE* VOL. 1 110-13 (Continuing Education of the Bar-California 1997).

337. See *id.* at 110.

338. See I.R.C. § 2010 (1997). This Code section provides for the unified credit amount against estate tax. The applicable credit amount is the amount of the tentative tax determined under the rate schedule set forth in I.R.C. 2001(c) (1997). See *id.*

lowing that predeceased spouse's unified credit to offset the tax imposed on the property transferred to the trust.³³⁹ Assuming that the trust is administered properly and generates sufficient income without significant gain in value, the surviving spouse can use the income but transfer the trust principal, as well as his or her own estate, tax free at death.³⁴⁰ By naming the surviving spouse as the beneficiary of the bypass trust, a terminable interest is created.³⁴¹ Thus, the assets of the trust are not includable in the estate of the surviving spouse because the surviving spouse's interest is essentially a life estate terminable on death.³⁴² Accordingly, the unified credit of the predeceasing spouse is fully utilized and tax on the transfer of the excess to the surviving spouse is avoided under the marital deduction and the marital assets will consequently bypass the survivor's estate.³⁴³ In a situation where one spouse's property interests are substantially larger than the other spouse's, an inter vivos gift can be used to equalize the estates and maximize use of the credit.³⁴⁴

The following simplified, but illustrative, scenarios assume a textbook example marital gross estate of \$1,250,000 to demonstrate the effect of the bypass trust.³⁴⁵ The first scenario assumes that no bypass trust was in place and that the married couple decided, on the death of the first spouse, to only take

See I.R.C. § 2505 (1997). This Code section provides for the unified credit to be applied against estate tax. *See id.*

See I.R.C. § 2001(c) provides the rate schedule to be used in determining the tentative tax on the applicable exclusion amount. *See id.*

339. *See* KATHRYN A. BALLSUN AND ANNE K. HILKER, ESTATE PLANNING GUIDE VOL. 1 110-13 (Continuing Education of the Bar-California 1997).

340. *See id.*

341. *See* REGIS W. CAMPFIELD, MARTIN B. DICKINSON, JR. AND WILLIAM J. TURNIER, TAXATION OF ESTATES, GIFTS AND TRUSTS 660-62 (19th ed., CCH Inc. 1994).

342. *See id.*

343. *See id.*

344. *See* REGIS W. CAMPFIELD, MARTIN B. DICKINSON, JR. AND WILLIAM J. TURNIER, TAXATION OF ESTATES, GIFTS AND TRUSTS 127-29 (19th ed., CCH Inc. 1994).

345. *See id.* The simplified scenario discussed in the text above assumes that no QTIP election with respect to trust property is made by the predeceasing spouse's personal representative under I.R.C. § 2056(b)(7). It also assumes no significant appreciation of the assets of the surviving spouse's personal representative held outside of the trust. The author of this Note has adjusted all values referenced in the text above to conform to the Internal Revenue Code, as amended by the Tax Payer Relief Act of 1997.

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advantage of the marital deduction.³⁴⁶ Accordingly, because of the marital deduction, the entire community property estate of \$1,250,000 is transferred outright to the survivor free of tax.³⁴⁷ The estate of the survivor, however, will be subject to federal estate tax upon his or her death because the survivor will be able to take advantage of only his or her unified credit.³⁴⁸ Thus, assuming no significant appreciation or depreciation, the survivor's taxable estate for federal estate tax purposes is \$1,250,000.³⁴⁹ The unified credit will preclude tax on \$625,000 and the remaining \$625,000 will be subject to federal estate tax.³⁵⁰

In the second scenario, assume that a bypass trust is funded on the death of the first spouse.³⁵¹ This technique will direct \$625,000 to be transferred to a bypass trust for the surviving spouse's benefit during his or her life, with the remainder interest in the trust for the benefit of the spouses' children or third parties.³⁵² Thus, on the death of the first spouse, no federal estate tax is due on the \$625,000 tax shelter amount because of the use of the unified credit and the amount transferred in excess of the \$625,000 in trust qualifies for the marital deduction.³⁵³ The amount in excess of \$625,000 passes outright to the surviving spouse and, assuming no significant appreciation of the assets transferred, will not be taxed on the survivor's death due to the availability of the unified credit.³⁵⁴ If the assets appreciate, only the amount in excess of \$625,000 is subject to federal estate tax because of the availability of the unified credit.³⁵⁵ This results in no taxable estate on the death of the survivor because his or her taxable estate does not in-

346. See KATHRYN A. BALLSUN AND ANNE K. HILKER, ESTATE PLANNING GUIDE VOL. 1 110-13 (Continuing Education of the Bar-California 1997).

347. See *id.*

348. See *id.*

349. See *id.*

350. See *id.*

351. See KATHRYN A. BALLSUN AND ANNE K. HILKER, ESTATE PLANNING GUIDE VOL. 1 110-13 (Continuing Education of the Bar-California 1997).

352. See *id.*

353. See *id.*

354. See *id.*

355. See *id.*

clude the assets of the bypass trust as this interest is only a life interest terminable at death.³⁵⁶ Thus, the use of the bypass trust eliminates estate tax on both spouse's estates.³⁵⁷

*Boggs*³⁵⁸ may thwart the effectiveness of this plan within community property states because it prohibits a predeceasing nonparticipant spouse from having a testamentary power over a community property interest in qualified pension plan benefits.³⁵⁹ Thus, the *Boggs* holding prevents a credit from being taken on assets in or distributed from employee benefit plans.³⁶⁰ Because these benefits are usually the largest asset of the community, the effectiveness of the bypass technique is jeopardized for many married couples unless there are other significant community assets.³⁶¹ If no other significant community assets exist, the trust cannot be funded and all of the marital assets may be taxed on the death of the surviving spouse.³⁶²

D. THE IRA AND THE UNIFIED CREDIT

Boggs may also prevent IRA funds from being similarly used in connection with estate planning goals designed to take maximum advantage of the unified credit.³⁶³ This appears true to the extent that the source of the assets used to fund the IRA can be traced to ERISA benefits.³⁶⁴ The *Boggs* decision overrules at least one California Supreme Court holding by not recognizing IRA funds as community property.³⁶⁵ This treatment by the *Boggs* Court further limits the options available to make

356. See KATHRYN A. BALLSUN AND ANNE K. HILKER, ESTATE PLANNING GUIDE VOL. 1 110-13 (Continuing Education of the Bar-California 1997).

357. See *id.*

358. *Boggs v. Boggs*, 117 S. Ct. 1754 (1997).

359. See *id.* at 1762-64.

360. See *id.*

361. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

362. See *id.*

363. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

364. *Boggs v. Boggs*, 117 S. Ct. 1754, 1764 (1997).

365. See *Estate of MacDonald*, 794 P.2d 911 (Cal. 1990). The assets in an IRA were held to be community property. See *id.*

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effective use of taxpayer credits by removing another significant asset from the available pool of community resources.³⁶⁶

E. THE RETURN OF THE TERMINABLE INTEREST RULE

The *Boggs* decision also appears to trigger the return of the terminable interest rule³⁶⁷ because it does not allow for a predeceasing nonparticipant spouse's testamentary power over a community interest in undistributed benefits in the surviving participant spouse's ERISA benefit plan.³⁶⁸ Thus, a community interest under state law is not to be included in the predeceasing nonparticipant spouse's gross estate for federal tax purposes and the value otherwise attributed to this interest is not subject to estate tax.³⁶⁹ The surviving participant spouse, however, will likely face increased estate tax liability as a result of this transfer, unless estate planning techniques control this property's taxable exposure.³⁷⁰

VII. PROPOSED LEGISLATIVE SOLUTIONS

The impact of *Boggs* significantly affects the community property system by creating uncertainty among estate planning attorneys and participants and beneficiaries who may now need to amend or abandon their estate plans.³⁷¹ It alters the predictable state community property and succession rights in a manner that was not foreseen and on which participants and beneficiaries in community property states have not been con-

366. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685 (1997).

367. See *id.* at 684. Most believe that California repealed the terminable interest rule in 1986 pursuant to the repeal of I.R.C. § 2039(c) in that same year. The change required the predeceasing nonparticipant spouse's community interest in the survivor's benefits to be included in the predeceasing spouse's gross estate for federal estate tax purposes in situations where the nonparticipant predeceased the participant. The terminable interest rule now seems applicable only in cases involving a predeceased nonparticipant spouse. See *id.*

368. See *id.*

369. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 684 (1997).

370. See *id.*

371. See *id.*

clusively heard through their elected representatives.³⁷² The *Boggs* holding creates uncertainty for attorneys in community property states to properly advise clients on estate planning strategy because it is an overly broad judicial solution on a unique set of facts.³⁷³ The issues presented in *Boggs*, however, are worthy of and require a detailed legislative resolution.³⁷⁴ A legislative resolution enacted to provide clarity, predictability and guidance as to ERISA's relation to the community property and testamentary rights of participants, spouse's and beneficiaries is needed.³⁷⁵ Such a solution requires Congress to recognize the impact of the *Boggs* decision and, if desired, preempt its effects after due consideration based on detailed findings throughout the process.³⁷⁶

One proposed solution would be to clarify ERISA's preemption provision so that it expressly excepts state community property and succession laws that do not directly regulate ERISA governed pension plans. This would allow for the state law testamentary disposition of benefits after distribution from the employee benefit plan. Another proposal is to further amend ERISA's spendthrift provision to either include probate orders under the QDRO exception or provide for some similar mechanism by which probate orders can qualify for an exception. Any amendment of ERISA's spendthrift clause should also expressly recognize that a community property interest constitutes a present ownership interest with inherent testamentary rights and not an interest derived from a prohibited assignment or alienation. Further, any such future legislation should give specific deference to estate planning and tax ramifications.³⁷⁷

372. See *supra* notes 310-70 and accompanying text.

373. See *supra* notes 310-70 and accompanying text.

374. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No.5 TAX NOTES 679, 685-86 (1997).

375. See *id.*

376. See *id.*

377. See Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No.5 TAX NOTES 679, 686 (1997).

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IX. CONCLUSION

Numerous cases have been filed in relation to issues of ERISA preemption of various state laws.³⁷⁸ The *Boggs* case and its extended, contested history prove that Congress needs to clearly delineate the extent of ERISA preemption within the testamentary context.³⁷⁹ ERISA's broadly stated preemption provision and vague spendthrift provision are inadequate due to complexities unforeseen at the time the provisions were drafted.³⁸⁰ If the legislation is to withstand the test of constitutional validity, Congress must consider matters of which the legislative record is void.³⁸¹ Such consideration may have prevented the federal intrusion upon the state granted rights in *Boggs* or, in the alternative, provided for a clear solution to avoid unnecessary litigation.³⁸²

The *Boggs* Court stated that ERISA was not amenable to the "sweeping extratextual extension"³⁸³ necessary to find implied support for the sons' claims, but failed to act on its own advice regarding implied reasoning and held in favor of Sandra by broad implication to the contrary.³⁸⁴ In essence, the Court decided what Congress would do if it were to legislate on this specific issue and ignored the fact that Congress has taken no action to definitively address the specific issue of ERISA preemption of a predeceasing nonparticipant spouse's community property rights.³⁸⁵ Such a solution rarely forms the basis for sound future legal application because it often creates no logi-

378. See Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 59 n.106 (Winter, 1996). Over 3,000 cases have been filed in the courts in relation to issues of ERISA preemption of state laws.

California Div. of Labor Standards Enforcement v. Dillingham Constr., 117 S. Ct. 832 (1997) (Scalia, J., concurring). "Since ERISA was enacted in 1974, this Court has accepted certiorari in, and decided, no less than 14 cases to resolve conflicts . . . regarding ERISA pre-emption of various sorts of state law." *Id.*

379. See *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996), *aff'g*, 849 F. Supp. 462 (E.D. La. 1994), *rev'd*, 117 S. Ct. 1754 (1997).

380. See *supra* notes 103-33, 148-59 and accompanying text.

381. See *supra* notes 103-33, 148-59 and accompanying text.

382. See *supra* notes 224-309 and accompanying text.

383. *Boggs v. Boggs*, 117 S. Ct. 1754, 1765 (1997).

384. See *id.* at 1776 (Breyer, J., dissenting).

385. See *id.*

cal and conclusive rule designed for uniform application.³⁸⁶ The majority's holding is one way to theoretically provide uniform regulation, but legislative solutions can better provide for proper and consistent future treatment where such sensitive and traditional state interests as community property and succession rights are involved.³⁸⁷

In particular, a legislative solution will allow the significantly numerous population of plan participants and beneficiaries domiciled in community property states to have their concerns conclusively determined through the legislative process. Accordingly, the consensus of those whose property rights in pension benefits are adversely affected by the *Boggs* holding may provide for the desired level of protection of, what is to many, the most valuable economic asset of life's labor.

*Tony Vecino**

386. *See id.*

387. *See* Philip H. Wile, *Boggs v. Boggs: The Good News and the Bad News*, 76 No. 5 TAX NOTES 679, 685-86 (1997).

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