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OLDER WOMEN AND PENSIONS: CATCH 22

Frances Leonard*

Pension funds in America represent one of the largest accumulations of capital in the history of the world.¹ Private and public sector funds exceed $550 billion, and are larger than the combined GNP’s of Great Britain and France.² Yet older American women, who comprise two-thirds of the retired population, share substantially less of this great national resource by every way of measurement. The result is that the poverty rate of these women is sixty percent higher than that of men.³ Thus, sex discrimination in pensions is a matter of profound concern to older women, and of overriding importance to planners concerned with the implications of our rapidly aging American population.

This paper will point out some of the ways that sex discrimination reduces the pension income received by women, and what can be done about it. This will include a summary of the problems faced by the woman earning her own pension check, as well as those faced by the woman dependent upon the retirement or survivor’s benefit of another.

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1. The pension funds are serious money, and are being taken seriously by the financial world. Funds now own 20% of all public and privately financed securities in the nation. Because unions and employers turn over control of the funds to banks or insurance companies, 25 institutional giants now control over one third of all public and private funds. The significance of this immense concentration of power is that economic and social policy is heavily influenced by the investments made by these giants. Rifkin & Barber, American Workers Own $550 Billion, in RETIREMENT INCOME: A REPORT FROM THE PENSION RIGHTS CENTER (1979) (available from Pension Rights Center, Rm. 1019, 1346 Conn. Av. N.W. Washington, D.C. 20036) [hereinafter cited as RETIREMENT INCOME].

2. Id. See also Raskin, Pension Funds Could Be the Unions’ Secret Weapon, FORTUNE MAGAZINE, Dec. 31, 1979, 64, 64-67.

The pension "universe" of thousands of plans can be loosely divided into those provided by public sector employment and private sector employment. Public pensions are generally better than private pensions, and almost all public employees are working under covered employment, while only one-half of the employees in the private sector are working in jobs covered by a pension plan. Of course, plans vary in their provisions and terms; however, the enactment in 1974 of minimum federal standards for private pension plans (ERISA) makes it possible to discuss the plans as a group.

When a woman reaches retirement age, her income will most likely not include a pension. Roughly one out of six women over sixty-five reported to the Census Bureau that she received a pension. And those pensions they do get are on the average lower than men's: $5,582 to $7,566. This is because pension plans reward the long term, steady worker with low mobility and high earnings. To the extent a worker's employment pattern deviates from this, the worker becomes a "loser" in the "pension game". Further, pension plans are computed on insurance principles. The cost of the plan will decrease as the number of forfeitures increase. Therefore, it is well for women and lower paid men to recognize that to the extent they are set up to be the losers under various programs, they are directly and deliberately being made to subsidize the "winners", and there is nothing inadvertent or innocent about it.

Furthermore, cost of living increases are a rarity in private sector pensions, and not universal in the public sector. This produces the well-known phenomenon of the inflation-devastated pensioner on a fixed income, where a ten percent rate of inflation halves real income in seven years. Sadly, even inflation dis-

5. Rich, Pensions: Too Few, Too Small for Most, in RETIREMENT INCOME, supra note 1, at 1, 16.
criminates by sex due to women’s greater longevity. One wonders if tolerance of the fixed retirement income is rooted in the lower male life expectancy. Cost of living indexing should be recognized as an issue of major importance to older women.

The impact of pension discrimination follows the woman in her various roles. The very person most expected to require income in old age (because of longevity) is handed a pension obstacle course of ominous dimensions. What follows, then, is a review of the pension reducing factors lurking in almost every choice a woman can make—from homemaker to high paid worker; from lifetime marriage to divorce.

I. THE HOMEMAKER

Homemakers comprise the largest group of workers in the country. Unlike some other nations (i.e., Canada, France, Germany, England and Sweden), the United States does not consider homemaking a pensionable activity. Here, pensions are based on revenue-generating occupations, and homemaking is not given recognition as such.

Two approaches develop when discussions of mitigating the impoverished old age of career homemakers arise. The first approach is tied to dependency, the prevailing pattern of the traditional homemaker role. Under this tack, a wage earner’s benefits are increased in recognition of the dollar value of the homemaker’s efforts to the employer’s enterprise. But note that to benefit under this type of solution, the homemaker must still be married to the wage earner upon his retirement.

The better approach would abolish the concept of dependency and develop pension plans that vest in the homemaker’s own right. In addition to the basic fairness and dignity of this approach, it obviously is expedient in this age of frequent divorce for the worker in the home to protect her retirement years independently of her spouse’s benefits.

Discussion in depth of various proposals is beyond the scope of this paper. Briefly, they include splitting income credits for Social Security, establishing separate retirement credits with the employed spouse’s employer, direct federal pensions for homemakers, and homemakers’ Individual Retirement Accounts.
(IRA's) not tied to their spouse's IRA's.

The last proposal would be logistically the easiest to implement. Under a tax-sheltered IRA, a homemaker could achieve a retirement income double the yield of an ordinary savings program. Homemakers argue that they file joint tax returns, so should qualify for joint tax credits. Homemaker's IRA's are attacked by those who feel they would subsidize wealthier families, who can afford a stay-at-home spouse and reap the tax benefits. This argument should be strongly countered by women who well know the hard work they do in the home.

In addition to receiving no pension credits for work done in the home, the homemaker who was employed before leaving to raise a family is devastated by current methods of computing Social Security benefits. She may have paid the highest contributions for the full vesting period, but when her turn comes to draw benefits, she will draw a minimal amount. This is because her "zero income" years will be included in the computation. Great Britain and Quebec have recently reformed their programs to rectify this inequity.8

Whether or not Americans should continue to restrict retirement benefits to revenue producing work is a major policy question. If it is agreed that homemakers provide a service to the nation of incalculable value, then it is imperative that policymakers eliminate the disincentives to that role—including pension disqualifications that penalize or preclude combining paid work with home work, and retirement income concepts that utterly disregard the years of hard work in the home.

But if, as a matter of thoughtful consideration, our society determines to reject the role of homemaker and child-rearer as a worthwhile vocation and suitable for adults, then let's make the judgment emphatically clear to young women from their earliest days. Let's educate them for the purpose of fulltime, permanent participation in the paid workforce, and discourage homemaking or child-rearing as a choice.

II. THE EMPLOYED WOMAN

Older women have a great interest in the sex discriminatory provisions of pension plans, which serve to reduce their retirement income. Congress in 1974 passed major legislation regulating private pension plans (ERISA)—but chose not to make it mandatory for a private employer to offer a plan at all. Because most people over sixty-five are women, mandatory pensions are an issue of first importance to older women. Service industries and small employers are the least likely to have plans. Because employment discrimination forces women workers into these very areas, fewer than half as many women as men (twenty-one percent of women to forty-nine percent of men) working in the private sector are working in covered employment.9

Further, of those women working in covered employment, very few will ever qualify for a pension check. This is because of several provisions common to most plans, both public and private, that weigh against work patterns typical of women.

A. ERISA Standards

The Employees Retirement Income Security Act (ERISA) was enacted by Congress in 1974 to establish minimum standards for private pension plans. Although a much-needed reform act, unfortunately women are disproportionately disadvantaged by almost every qualification. This is because ERISA did little more than codify minimal standards which plans must meet, based on traditional pension “values”. Historically, in this country these values reward the long-term, steady, well-paid worker, and are reflected in pension plans in these ways:

Age exclusions. ERISA permits employers to exclude from coverage people under twenty-five years of age, and, under most plans, those persons hired within five years of the normal retirement age set by the plan. These age exclusions work to disqualify large numbers of women from participating in a plan, because age twenty to twenty-four represents the highest proportion of women in the workplace. In 1978, over sixty-eight percent of women aged twenty to twenty-four were employed; it

9. CRS Report, supra note 3, at 3.
is projected that this will exceed seventy-six percent by 1985. After age twenty-five, women's participation sharply drops off as women leave to assume family responsibilities. Similarly, an older woman entering the workplace because the divorce or death of spouse caused her to do so quite late in life would be excluded. Thus the age exclusions at both ends of her life penalize a woman for her middle years of family commitment—a disqualification that falls upon very few men.

**Vesting.** A person must work long enough for one employer, or forfeit the pension rights accrued. This is known as the “vesting” requirement. Most plans under ERISA require ten years of employment before vesting occurs. ERISA's tolerance of the ten year period eliminates from private pension eligibility most of the women workers who choose to leave the workforce to raise families.

**Part-time exclusion.** Many women do manage to be “long-term employees” by working part-time while caring for their families. This predominantly female employment pattern (thirty-three percent of women to twelve percent of men) also fails to qualify under most private plans. ERISA permits employers to exclude persons who work less than one thousand hours per year, or nineteen hours per week. The effect of this is to remove yet another large group of employed women from the “pension game.”

**Break-in-service.** Although ten years may be required for vesting, the plan must permit workers who leave and return, the opportunity to vest. But if the “break-in-service” equals or exceeds the last period of employment, the worker forfeits all prior credits toward vesting. A woman who leaves her job to have children, and then returns to her old job may have to start her vesting period anew. So yet another method of combining work and family has the effect of removing women from the pool of future

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10. Id. at 41-42.

11. On the average, men stay on one job 4.5 years, and women about two years. A Special News Report on People and their Jobs in Offices, Fields and Factories, Wall St. J., May 1, 1979, at 1, col. 5. Lobbyists on behalf of occupations with inherently high mobility, such as engineers, are energetically campaigning to lower the ERISA vesting period.

12. CRS Report, supra note 3, at 42.

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pension beneficiaries.

**Backloading.** The practice known as "backloading" allows a plan to increase retirement credit in later years of employment. This rewards the worker who spends a long working life in one place. It condemns the worker not fitted to that employment pattern to a lower retirement check. And once again, the rewarded work pattern is mostly that of males.

**Portability.** If workers could take pension credits "with them" when they change jobs, as is done under Social Security, mobile women workers would benefit greatly. But the logistics of accomplishing this in the private sector are enormous.

**Pension fund insurance.** It is clear that any woman wishing to devote full or part time care to the home will be virtually eliminated from the pool of pension beneficiaries. But for many women who do conform to the male work-pattern, there is a nasty surprise. When ERISA was enacted, Congress set up a pension fund insurance program, along the same idea as the federal deposit insurance for private bank accounts. Yet a major exemption from protection under the insurance is the worker in the small professional office. The nurse, legal secretary or bookkeeper may achieve a vested status, yet find their fund failed at the end. They will be uninsured and out of luck.13

**B. INTEGRATION AND OFF-SET**

**Integration.** The working woman faces another pension reducing measure because of the likelihood of her being among the lowest paid workers. Integration means that the private plan is "integrated" with the Social Security benefit. It is especially vicious to lower paid workers. For example, a plan would be permitted to define its pension benefit when combined with Social Security as amounting to fifty-five percent of the worker's last wage. A lower paid worker may find that her Social Security check is fifty-five percent of her last wage. Her pension check would be zero. Thus, any worker earning less than the Social Security wage base can end up with no pension check, under ex-

isting regulations. It is estimated that twenty-five percent of workers under a plan are now "integrated out" of a benefit. And because women's wages average sixty percent of men's for the same work, those integrated out are disproportionately female. Note that these are vested workers—the seeming "winners" of the game—the long distance runners who believe until the day they retire that they will have a pension plus Social Security!

**Off-set.** In an "off-set", it is Social Security which reduces its benefits. Any recipient of a public pension must reduce, dollar for dollar, any benefit received as a dependent on Social Security. Because most people entitled to the dependent's (spousal) benefit are women, this has disproportionately reduced the retirement income of women. Teachers, government clerks and the rest of the large body of women working in lower paid government jobs are affected by this off-set.

Private plans are growing fast in the retirement picture. The loopholes which work against the employed woman must be plugged. Because two-thirds of the retired population is female, this issue is one that all social planners should address as our population continues to age. The above-described difficulties are examples of so-called "sex-neutral" provisions in the law that have a discriminatory "impact" on women. This means that although the ERISA regulations just described apply to both men and women, they weigh more heavily on women because of predominant work patterns, and not because the enactment itself uses discriminatory language. Since recent Supreme Court decisions tolerate this type of sex discrimination, perhaps older women's advocates should concentrate their efforts on legislative reform rather than constitutional litigation. A further point for employed women to consider is that ERISA standards are mini-

14. By 1981 the Social Security wage base will be $29,000. The Congressional Research Service estimated that in 1974, 60% of all private plans were integrated. CRS Report, *supra* note 3, at 50. The percentage has greatly increased since then, because employers favor those plans. Louis Harris Assoc., 1979 Study of American Attitudes Toward Pensions and Retirement: A Nationwide Survey of Employees, Retirees, and Business Leaders (public opinion poll) [hereinafter cited as Harris Poll].


mums. Any pension plan is free to exceed the standards. A plan can, if it chooses, vest in one year, fully cover part-time workers, exclude no age group, and so forth. Therefore, the quickest way for employed women to benefit themselves is at the bargaining table at negotiating time.

C. SEX-BASED ACTUARIAL TABLES

Unlike the “sex-neutral” problems noted above, an explicit sex-based classification can be unlawful. A recent Supreme Court decision has been helpful to some employed women. In *City of Los Angeles v. Manhart*, the Court decreed that sex-based actuarial tables violate Title VII of the Civil Rights Act when they are used to increase the pension contribution taken from the paycheck. The Court expressly did not decide that use of sex-based actuarial tables to reduce a pension when received was prohibited by law. Because the majority of private plans do not require employee contributions, the apparent victory is somewhat hollow.

The use of sex-based actuarial tables to reduce women’s pensions when received is pervasive. This is justified by insurers on the basis of women’s greater longevity. Group insurance, which is what a pension fund is, always factors in the unequal risks in any group. The high risk participants are always “subsidized” by the low risk ones. Actuaries have identified dozens of risk factors related to longevity—among them race, marital status and smoking habits. Yet only the gender difference is used by the pension actuaries. It should be noted that the insurance industry actively opposes unisex tables because of cost. Decisions which will affect the income of the majority of the retired population should be made with other than a market mentality. In the meantime, women should avoid annuities whenever they have the choice of placement of their funds. For example, in an...

18. TASK FORCE ON SEX DISCRIMINATION, CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, COMMENTS TO THE U.S. COMM’N ON CIVIL RIGHTS ON THE CONSULTATION ON DISCRIMINATION AGAINST MINORITIES AND WOMEN IN PENSIONS, AND HEALTH LIFE, AND DISABILITY INSURANCE 23 (1978) [hereinafter cited as TASK FORCE REPORT].
IRA one can purchase a savings plan, bond or an annuity. If an annuity is chosen, a woman's dollar will not buy her the same monthly check as a man's dollar will. This is not true of dollars invested elsewhere.

III. THE SURVIVOR

Women should fight the stereotype of dependency, and the harmful even disastrous consequences of being utterly dependent upon the income of another. It has often been said that a dependent woman is one man away from poverty. But it must not be forgotten that the victims of economic dependency are very much with us, and with only fifty percent of women employed today, the dependency problem is not going to disappear soon. For this reason, reformers sensitive to the impact of pensions on older women should oppose proposals aimed at eliminating spousal and survivor's benefits without alternative proposals to provide for women who are dependent. For example, in response to pressure from single workers, it was recommended that Social Security phase out its spousal and survivor's benefits. The seeming economic parity in this plan would come at the expense of older women—women who have been muscled out of the chance of obtaining a pension in their own right by the factors already discussed.

A. THE SPOUSAL BENEFIT

A woman dependent on her husband's earnings will be concerned with two elements of his retirement plan: first, does it pay a spousal (or dependent's) benefit while he is alive, and second, will there be a survivor's benefit to her after his death?

At retirement, a couple will receive joint benefits that are either more than (under Social Security) or less than (under a pension) a single retiree. This difference comes about because of divergent pension philosophies. Because of the "adequacy" notion in the social planning that went into Social Security, a couple will receive a joint Social Security benefit that exceeds a single retiree's. But strict adherence to insurance principles

21. CRS Report, supra note 3, at 34-35.
leads to the opposite result under employer pension plans. Pensions plans offer a “joint and survivor’s” option, which means the retiree can elect to take full monthly checks which will end at his or her death, or a lower monthly check of which a portion will continue to be paid the survivor. The effect of this election is to reduce the income of the couple below that of the single worker. Recent studies have questioned the legitimacy of the insurance principles which bring about this result.22

Eliminating the practice of reducing the pension check when the joint and survivor option is elected would do more than increase older women’s standard of living derivative upon their husband’s check. It would greatly reduce the temptation of the couple to “take a chance” that she will die first, thus electing to take the higher income for the worker’s life, with nothing for the survivor in the way of benefits.

B. Survivor’s Benefits

The widow will most likely receive no pension benefits after her husband’s death. Mandatory survivor’s benefits are rare, under either governmental or private plans. Moreover, the usual practice is to reduce the survivor’s check only if the dependent is the survivor. If the worker survives, the joint check is not reduced at all. This is an issue of some importance to older women, who wonder at the inequity of considering one half a joint pension adequate for a widow, while a whole joint benefit is continued for the widower.

ERISA compels private plans to award a survivor’s benefit of no less than one-half of the retiree’s benefits, unless this option is rejected in writing by the worker at retirement time. Formerly, when a worker retired, he or she was automatically awarded a single-life annuity. If a joint-life annuity was available at all, it was incumbent on the worker to opt in. Now, under ERISA and the big public plans, it is the reverse. But the big catch is this: the option is the retiring worker’s alone. The spouse need never even be informed of the decision, let alone be asked to ratify it. More than sixty-four percent of Civil Service (federal), thirty-one percent of Foreign Service, and ninety-four percent of the Military have opted out of survivor’s benefits as

of February 1979. The "opt-out" rate in the private sector cannot be presumed to be any rosier.

Obviously, this represents a problem of stunning proportions. For dependents of many retirees, the impact is cushioned by the Social Security benefit. But federal Civil Service retirees, along with some local government units (i.e., school districts), are not covered by Social Security. When these employees opt out, they leave their survivors with no pension benefit at all.

There is legislation pending in the 96th Congress to amend ERISA and various federal programs to require the written consent of the dependent before the retiree can opt out. These reforms are opposed by the insurance industry on the basis of the added expense. Rather than encumber the plan with this small duty, the industry would stand aside as millions of older women learn for the first time upon their husband's death, that they have been "elected out" of any interest in future pension payments.

Legislative reform requiring the written consent of the dependent before the option is taken is an important first step, but does not go far enough. It can be imagined that poorly-informed consent, or coercion, or misjudgment, will lead many dependents to sign away their rights. Mandatory survivor's benefits should be part of every plan; the joint-life annuity should yield as much income as the single-life annuity; and the practice of cutting in half the survivor's benefit only if the dependent is the survivor should be discontinued.

Another trap for the dependent is this: ERISA allows survivor's benefits to forfeit if the worker dies before retirement. This could happen to a fully vested worker, within a year or two of retirement age. His widow will get nothing. ERISA does permit


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a plan to contain a pre-retirement joint and survivor option—but this will further reduce the already reduced joint and survivor annuity—even if the worker survives after retirement. The disincentives to this choice are therefore severe. This leaves the middle-aged homemaker dangerously unprotected in her pre-retirement years. A particularly vicious angle to this “early survivor’s election is that if this choice is made, and the worker dies of natural causes within two years of making the election, the benefits are forfeited. This is because a worker who had received “bad news” might try to provide for his or her family by making this election, thus unsportingly creating, in insurance parlance, a “negative selection”. Experts say that ailing workers have been known to slam their cars into bridge abutments in order to provide for their dependents—because accidental deaths do not cause a forfeit!28

Also of importance is what becomes of the survivor’s benefit if the widow should remarry. Some federal plans such as Social Security and some federal retirement plans allow the benefits to continue if she remarries after age sixty. Under other federal plans and almost all private plans the survivor’s benefits forfeit upon remarriage at any age.

The President has commissioned a two-year study on pension reforms, and included on the agenda is survivor’s benefits. The Commission on Pensions27 must be made aware of the fact that most people over sixty-five are women, and because most of these women are not entitled to a pension in their own right, the issue of survivor’s benefits affects more people of retirement age than do straight pension rights.

IV. THE DIVORCED WOMAN

There is a growing recognition of the economic partnership of the marital unit among policy-makers.28 The earned compen-

27. Chaired by C. Peter McColough, Chairperson of Xerox; the commission will present its final report to the President in February 1981.
28. These bills [see note 24 supra] are based upon the premise that marriage is an economic partnership and the income earned is joint marital property. The spouse makes a contribution toward the employee’s ability to earn the wage and consequently receive the pension. There-
sation during the course of the marriage is attributable to the efforts of the unit, and pension rights are recognized as part of the compensation, not a mere gratuity.

A significant number of women will face divorce after age forty-five. The two major assets owned by the couple divorcing after a long marriage will most likely be the home and the pension fund. Yet Social Security alone automatically benefits the divorced wife and even then, only after a marriage of ten years. To date, there is no law compelling ERISA plans or public programs to cover a divorced spouse.

There are two ways for a divorced woman to share in the pension asset. One is by alimony, and the other is by property settlement. It is important to note the distinction. Alimony is awarded at the discretion of the court, based on the situation at hand, and in almost all jurisdictions, is no longer a right. What the property rights of the spouses are depends upon the laws of their state, and, unfortunately, these laws are far from uniform.

A. DEFINING THE MARITAL PROPERTY

The best legal position for the divorced spouse is the California recognition that even unvested pension rights are viewed as marital property and subject to division upon dissolution. Unfortunately, the California position has been hampered by

fore, a spouse married during the working years should be entitled to a portion of the retirement benefits payable at retirement.

30. Further, this is only for divorced women. The exclusion of divorced males has been upheld by the Supreme Court. The divorced woman receives 50% of the retiree’s benefit, as does the current spouse. Like the wife, the divorced woman must await the retirement of the worker before her benefits begin. There is legislation pending to decrease the required years of marriage. H.R. 874, 96th Cong., 1st Sess. (1979)(Yates).
31. The Congressional Research Service of the Library of Congress found “some States do not give divorce courts jurisdiction to divide marital property. Other States use a title theory of division. Some States provide for equitable division of the property. Yet other States are community property States. Some States consider retirement benefits gratuities rather than property. Other States consider retirement benefits to be property.” CRS REPORT, supra note 3, at 77.

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less progressive thinking in Congress and the United States Supreme Court. In early 1979, the United States Supreme Court disagreed with the California Supreme Court, and held in *Hisquierdo v. Hisquierdo* that Railroad Retirement benefits are *not* community property and therefore are not subject to the equal division the California court would have made. The U.S. Supreme Court distinguished between alimony and marital property rights, and this distinction remains important.

Originally viewed as a major setback, the *Hisquierdo* decision has been applied by the California courts quite narrowly. Whether or not certain sections in ERISA would require a similar determination for private plans has not been decided by the U.S. Supreme Court. Courts in California and across the nation are reaching different results under similar facts. The rights involved are weighty ones: can a plan be garnished to satisfy marital property settlement?; can a fund be forced to issue two pension checks?; are there marital property rights to survivor's benefits as well as to retirement benefits?; must a right be vested before it is divisible?; can a divorced spouse receive her share before the worker retires?; and more.

Basic rights, such as property interests in a major asset (such as the pension fund) should not be unevenly available to older women, depending on the part of the country they live in. Where a major asset will be available to an older woman upon divorce only if she resides in a progressive area of the country, the inequities exceed tolerable levels. The courts are chaotically engaged in statutory interpretation, and the best place to resolve statutory problems is in the legislatures themselves. There is reform legislation before Congress now. If passed, this will be helpful to divorced spouses of federal employees, as they will draw automatic retirement and survivor's benefits. The proposed ERISA amendments, however, do not do this for divorced spouses of private pension beneficiaries. These amendments will

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be very helpful to the divorced residents of progressive states where marital property rights in the pension fund are recognized. But another solution will have to be found for residents of states whose courts are not so inclined.

Further, the difference between retirement income and survivor benefits has legal importance. Even California courts do not recognize community property interests in survivor’s benefits. The bills amending federal retirement programs recognize this, and provide for rights in both types of benefits.

B. DIVIDING THE PENSION

Another important consideration is the way the pension fund will be divided in the property settlement. If there are sufficient assets, it may be preferable to assign a value to the pension rights, and allocate and award a dollar amount to the spouse at the time of dissolution. When this is not possible, the court can order either the fund trustees or the retiree to pay one-half to the divorced spouse each month at retirement time. The former is obviously preferable because it is more certain, and has the considerable advantage of not continuing the dependency relationship long after the marriage is over. Fund operators oppose trustee payment as greatly increasing their overhead.

Divorced working women are disadvantaged by the Individual Retirement (IRA) regulations. Under IRA, persons can put aside a portion of their income as tax-deferred savings for retirement. IRA’s are a major tax shelter by which workers can shelter up to fifteen percent or $1,500 of their income, whichever is lower. But alimony income is not counted into the income for IRA deductions, even though it is taxed for income tax purposes. Thus a worker with alimony and earned income will pay income tax on the total but can shelter only the earnings. This reduces the amount of taxable income a divorced woman can shelter.35

The problems facing divorced women are the most complex in the pension reform field, and because of conflicting laws, will be the most difficult to resolve. This cause will be further bur-

35. H.R. 3250, 96th Cong., 1st Sess. (1979) (Kemp) would eliminate this inequity.
dened by the opposition of plan trustees, plan participants, and wives of retirees. It is here that women must be particularly alert to the need for unity. Conflict between older divorced women and married women must be condemned as defeating the recognition of property rights for all women. So too should retirees and former spouses unite over the important issue of divided pension payments being paid separately by the plan itself.

V. EDUCATE, LEGISLATE, LITIGATE AND NEGOTIATE

A. EDUCATE

Pension funds control billions of dollars, yet the return on investments is scandalously low. Funds are heavily into common stocks, and in recent years the top fund investors averaged only a one percent return on these equity investments. Why on earth do the leading financial experts in the country invest so poorly? One commentator says: “If the people who contribute to pension funds listen and look, they will find their money is being used to build economic empires. They will learn they are receiving very low returns on their investment.” The control over other corporations gained through the use of the worker’s money, is then exercised in ways that are often against the interests of the worker. Workers are urged to insist on having a say in the placement of their funds. Bankers, of course, vigorously oppose this.

The point for older women is this: now, at the very beginning of the “social investment” debate, women must make their interests known. Pension activists must watch out for occasions where this is debated, and ensure that women’s issues are on the agenda. Women working in large companies or unions must come to recognize their unified clout. Their collective voice could cause their plan’s funds to be placed constructively, and if the


37. Id. In his article urging workers to wake up to the situation, Sen. Metzenbaum referred to one fund manager which owned a controlling interest in 143 major corporations.

38. “We can no longer tolerate this situation of using worker-produced capital against ourselves.” Raskin, supra note 2, at 68 (quoting Lloyd McBride, President of the U.S. Steelworkers of America). “We shall be pursuing every available means to ensure that pension money is invested creatively and constructively, to the benefit of workers and fair employers.” Id. at 64 (quoting Lane Kirkland, President, AFL-CIO).
It is discouraging that a major pension survey commissioned by the insurance giant Johnson & Higgins, and conducted by Louis Harris, Assoc., practically ignored pension issues that affect older women. Out of 137 principal questions, not one explored survivors', dependents' or divorced persons' benefits. Survivors' benefits came up only three of four times in subparts of questions. Further, this study was regarded as major and extensive, and is being heavily used by policy makers. Yet those surveyed included only employers and employees. Persons dependent on survivors or spousal benefits were not included in the sample, even though this group is numerically the largest segment of retired Americans.

B. LEGISLATE

There are close to 100 bills before the 96th Congress which are designed to improve pensions for women. The key to their passage rests in pressure upon members of Congress to support them. One member, Rep. Patricia Schroeder (D. Colo), a pension reform advocate, reported recently that the outlook for most of them is unfavorable. The importance of pressure groups is illustrated by the progress of two of her bills: one, (H.R. 2857) which is moving, has an active group working for it—Foreign Service wives. One which is not, (H.R. 2817) has an active group working against it—Military husbands.

Older women cannot wait for Congress to do what is right. Pensions, both public and private, are especially subject to legislative reform because the statutory frameworks are already enacted. Letter writing, testifying, and supporting helpful amendments should be very useful.

C. LITIGATE

A good place for individual litigation is in marital property settlements. If a state has a harsh rule on pension rights, and does not recognize the fund as divisible marital property, then creative alimony settlements should be considered. For example,


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perhaps an annuity could be purchased as part of alimony, as distinct from property, which would yield an income upon maturity equal to the denied pension benefit.

On a broader base, pension reform litigators should look to the federal enactments (Equal Pay Act, Title VII, Equal Employment Opportunity Act, and even the Constitution) for assistance. State law varies widely, but in progressive jurisdictions the federal statutes may be supplemented or surpassed.

D. NEGOTIATE

Women employees should get on the agenda at contract negotiation time. Unions should be educated to the requirements of their women members, and make these the "bottom line" at the bargaining table. It is important to remember that the ERISA (dis)qualifications outlined in this paper are minimum standards under federal law. A plan cannot, for example, require a vesting period of fifteen years, a minimum coverage age of thirty, or a "part-time" definition of thirty hours work per week. On the other hand, it can provide a one-year vesting period, no minimum age, and cover all part-time employees, regardless of hours worked.

In addition to insisting on a good pension plan at bargaining time, it is appropriate for prospective employees to question the personnel officer about the plan in force. If a job is turned down because of unsatisfactory coverage (especially appropriate in the case of a permanent "part-time" job: twenty years with the company, Tuesdays and Thursdays = no pension), let the interviewer know why, and follow-up with a letter to the management.

Fringe benefits are rapidly expanding as a method of compensation. As part of this strong trend, pension funds are now a major component of the nation's economy. In addition, the importance of pensions as the major source of retirement income increases annually. As the major segment of the retired population, older women should act to protect their interests in this critical national resource.