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NOTE

**BOGGS v. BOGGS: STATE COMMUNITY PROPERTY AND SUCCESSION RIGHTS WALLOWS 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 ERISA by providing a predeceasing nonparticipant, nonbeneficiary spouse with transferable property rights in a participant spouse's pension plan benefits.⁴ Accordingly, the participant spouse pos-

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.

sesses exclusive rights to the pension plan assets until death after which the beneficiaries receive the interest by operation of federal statute. 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. Further, this holding extends to prevent such heirs and legatees from being awarded nonpension property of equivalent value in lieu of the plan assets. 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. 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.

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


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


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.


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 preemption\[14\] and spendthrift\[15\] 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.


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.


22. See infra notes 371-76 and accompanying legislative proposal text.
II. BOGGS v. BOGGS

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. The couple had three children, Thomas Frank Boggs, Harry Maurice Boggs and David Bruce Boggs ("the sons"), and remained married until Dorothy's death on August 14, 1979.

Isaac remarried on April 5, 1980. Isaac and his second wife, Sandra Boggs ("Sandra"), remained married until Isaac's death on February 16, 1989. The couple had no children from their marriage. Isaac was survived by Sandra and the sons from his marriage to Dorothy. During all relevant times the marital property at issue was governed by Louisiana community property laws.

Isaac was employed by BellSouth for thirty-six years until his retirement in 1985. During his employment, he participated in private, voluntarily funded employee benefit plans ("pension plan") governed by ERISA. Isaac funded his pension plan with community property; that is, property acquired

24. See id. at 1758.
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.
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,
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.
   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. 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. Such an accounting would fix the amount of the residue the sons would receive in the form of the naked ownership interest.

On his death, Isaac bequeathed a lifetime usufruct to Sandra in the property distributed to him from the pension plan with the naked ownership interest again held by the sons. Subsequently, controversy arose between Sandra and the sons over ownership of the pension plan benefits. 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

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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 and the lifetime usufruct of the remaining two-thirds of the estate, whose naked ownership was inherited by [the sons]. See id.


46. See supra notes 42-45.


50. See id.
mother's community interest. The value of the sons' claim would be determined through an accounting under Louisiana community property and succession laws. 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. 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.

Sandra did not refute Dorothy's community property ownership interest in the pension plan benefits under Louisiana law. 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. Sandra relied solely on ERISA's preemption provision to counter the sons' state law claims.

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.

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.
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. 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.

Pursuant to her rights as a named beneficiary under ERISA, Sandra filed a complaint in the United States District Court for the Eastern District of Louisiana. She sought a declaratory judgment that ERISA preempted Louisiana community property law. 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.

60. See 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.

63. See id.
Sandra moved for summary judgment based on her alleged entitlement to the property under ERISA. The parties stipulated to the facts and the district court rejected Sandra's motion and ruled in favor of the sons. 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. 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.

Sandra appealed to the United States Court of Appeals for the Fifth Circuit. On April 17, 1996, the Fifth Circuit confirmed the district court's jurisdiction by holding that Sandra had standing as a beneficiary. After de novo review of the district court's preemption analysis, the appellate court affirmed the district court's ruling. 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 as articulated in the district court's opinion.

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.
71. See supra note 61 regarding actions which may be brought and remedies available under 29 U.S.C. § 1132(a)(1)(B) (1994).
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-
majority of the Fifth Circuit judges, however, refused to rehear the case.  

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. Sandra claimed that the Fifth Circuit's ruling usurped her rights under ERISA as the surviving spouse of a pension plan participant. The Supreme Court granted certiorari largely due to Fifth and Ninth Circuit conflict. 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.

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.

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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.
79. See id.
80. See id.
82. See id.
83. See Boggs v. Boggs, 82 F.3d 90 (5th Cir. 1996) with Ablamis v. Roper, 937 F. 2d 1450 (9th Cir. 1991).
84. 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. 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.

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”). Congress enacted the 1958 Act to protect the rights and interests of plan participants and their beneficiaries. 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. Since the 1958 Act was primarily a disclosure statute, however, it lacked an effective enforcement mechanism. 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.

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

85. See id. at 4641.
86. 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).
87. See id.
88. See id. at 4642.
89. See id.
90. See id. at 4641-42.
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
certain acts federal crimes if committed in connection with pension plan administration and conferred some regulatory and investigatory authority on the Secretary of Labor. Congress intended these changes to provide the Secretary of Labor with enhanced enforcement power in this area. The 1962 Amendment, however, did not accomplish the regulatory protection that Congress intended because it lacked substantive fiduciary standards and required only limited disclosure. As a result, the 1962 Amendment continued to be largely ineffective in meeting Congress' primary goal of providing retirement income security 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.

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. State regulation only compounded mismanagement by creating confusion among plan administrators and fiduciaries due to the non-uniform regulatory schemes.

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.

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.
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, Congress enacted ERISA. 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.

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 lead 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.


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:

[Alny 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.
C. ERISA's Preemption Provision

Congress expressly intended ERISA to preempt state laws relating to private employee benefit plans. ERISA's preemption provision enables the statute to effectively and exclusively regulate private employee benefit plans. 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 . . ." To further this objective, ERISA sets forth specific standards and procedures for pension plan administrators to ensure that participants and beneficiaries receive their benefits. Accordingly, the statute requires plan administrators and fiduciaries to act solely in the interests of participants and beneficiaries. Entitlement to plan benefits is based on the premise that only participants and their beneficiaries have a claim of right to such benefits.

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. The clause is silent on the testamentary dis-

104. See supra note 102, citing 29 U.S.C. § 1001(b) (1994), for ERISA's stated purpose.
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 . . ."
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."
110. 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'
power to legislate within those areas.\textsuperscript{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 action\textsuperscript{118} limiting a state's authority over the property rights of its domiciliaries.\textsuperscript{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.\textsuperscript{120} Where ambiguity exists, this determination must weigh the nature of the state interest against the goals of the federal legislation.\textsuperscript{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

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

\textit{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.}

\textit{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.

\textit{Id.}


\textsuperscript{118} See supra note 117.

\textsuperscript{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. \textit{See id.}

\textsuperscript{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).

\textit{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).

state law in most areas of debate.\textsuperscript{122} ERISA's broadly stated preemption provision\textsuperscript{123} ensures an equally broad application by the courts in reaction to a conflict with state laws that effectively regulate qualified pension plans.\textsuperscript{124} However, the provision is silent as to its application to state community property laws that do not specifically relate to regulating such plans.\textsuperscript{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.\textsuperscript{126} The United States Supreme Court has held that state law must do major damage to clear and substantial

\begin{quote}
\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{125} See 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.


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. Equilor-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.
\end{quote}
federal interests before the Supremacy Clause will demand that the state law be preempted.\textsuperscript{127}

Generally, courts have applied one of three theories to resolve conflict between federal and state law.\textsuperscript{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.\textsuperscript{129} Under the prohibited connection theory, ERISA preempts all conflicting state laws, even those consistent with its own goals.\textsuperscript{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.\textsuperscript{131} Thus, the Court has recognized that preemption is not warranted where a state law tangentially conflicts with ERISA.\textsuperscript{132} In addition, the Court has prohibited preemption where ERISA's language is silent on a state procedural matter.\textsuperscript{133}

\textsuperscript{128} See infra notes 129-31.
\textsuperscript{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." \textit{Id.}
\textsuperscript{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.").
\textsuperscript{131} Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1276 (6th Cir. 1991).
\textsuperscript{132} See Shaw v. Delta Air Lines, 463 U.S. 85, 100 (1983). Citing, as authority, AT&T \textit{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. \textit{See id.}
\textsuperscript{133} Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 145-46 (2d Cir. 1989); \textit{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." \textit{Id.}
\textsuperscript{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. \textit{See id.}
Nine states apply the community property system to ownership of property between husband and wife. 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. Under this system, property rights are determined by the manner and timing of the property's acquisition. The community consists of all property acquired through the skill or efforts of either spouse during marriage. Generally, community property law provides each spouse with present ownership of an undivided...
one-half interest in the property of the community.\textsuperscript{138} Both spouses possess the testamentary power to transfer their respective half of the community at death.\textsuperscript{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.\textsuperscript{140} Property acquired before marriage is presumed to be the separate property of each spouse.\textsuperscript{141} Generally, title is not determinative of ownership of property acquired during marriage.\textsuperscript{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.\textsuperscript{143}


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. \textit{Id.}

139. See \textit{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. \textit{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.” \textit{Id.}


141. See \textit{id.} at 2, 129-31.

142. See \textit{id.} at 117-19. See \textit{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. \textit{See id.}


See \textit{Loutitzky v. Loutitzky}, 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. \textit{See id.}
During marriage, spouses may transmute community assets into the separate property of either spouse, or vice-versa, to defeat or reinforce the community property presumption, as desired. 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. Generally, a writing specifically memorializing the spouses’ intent to change the characterization of specified property is required.

G. THE RETIREMENT EQUITY ACT OF 1984 AND THE QUALIFIED DOMESTIC RELATIONS ORDER

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”). Specifically, REA addressed ERISA’s failure to recognize the property rights of the nonemployee spouse or dependent child.

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.
147. See id.
149. 29 U.S.C. § 1056(d)(x)(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. Accordingly, REA includes a statutory exception to ERISA’s spendthrift provision designated as the qualified domestic relations order ("QDRO") that is primarily designed to protect the nonemployee spouse’s economic interest in pension plan benefits on divorce. A QDRO 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.

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).
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.

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.
155. See id.
The Court granted certiorari in *Boggs* primarily because the Federal Fifth and Ninth Circuits were split on issues related to state community property and testamentary rights under ERISA. 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*. The Fifth Circuit's decision was contrary to the Ninth Circuit's ruling in *Ablamis v. Roper* which held in favor of ERISA preemption of California community property laws on similar, yet
distinguishable, facts. Ultimately, in *Boggs*, the United States Supreme Court reversed the Fifth Circuit and, in effect, affirmed the Ninth Circuit’s ruling. The *Boggs* Court held that ERISA preempted Louisiana community property and succession laws. This holding prevented the heirs’ inheritance of a nonemployee spouse’s community interest in pension plan benefits. The Court reasoned that Congress intended ERISA to preempt such laws in areas of traditional state legislative concern, thereby, preempting Louisiana state law from governing the testamentary disposition of community property.

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

*Ablamis* is the leading case cited by the *Boggs* Court involving ERISA preemption of state community property law in a testamentary context. 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. Preemption of state community

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164. See id. at 1460
166. See id.
167. Id.
168. See id.
169. See id.
170. See Zschernig v. Miller, 389 U.S. 429, 440 (1968). “The several States...have traditionally regulated the descent and distribution of estates.” Id.
173. Id.
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.\(^{184}\)

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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*.
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*.
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. 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. On her death, Ms. Ablamis' estate claimed a community property interest in Mr. Ablamis' vested rights in the pension plan benefits. 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. 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. 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.

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. 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. 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 minimum 197 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.

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.
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


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. 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. 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 Journeymen v. Myers, 488 F. Supp. 704, 719-13 (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.\textsuperscript{203} The Court reasoned that Congress specifically preempted the future application of those holdings\textsuperscript{204} by amending ERISA's spendthrift provision pursuant to REA.\textsuperscript{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.\textsuperscript{206} The majority then denied the sons' claims because they were neither participants\textsuperscript{207} nor beneficiaries.\textsuperscript{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.\textsuperscript{209} In effect, the Court held that Dorothy had no testamentary power over her state law community interest in the pension plan.\textsuperscript{210} While

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\textsuperscript{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. \textit{See id.}

\textsuperscript{204} See supra note 202 for the preempted holdings.

\textsuperscript{205} See \textit{Id.}

\textsuperscript{206} See \textit{Id.}

\textsuperscript{207} See \textit{Id.}

\textsuperscript{208} See \textit{Id.}

\textsuperscript{209} See \textit{Id.}

\textsuperscript{210} \textit{It 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.} \textit{Id.}
recognizing the strength of the state interest in the property rights of its domicilliaries, the Court found that the state law disposition of Dorothy's community interest directly conflicted with ERISA's spendthrift provision. As such, the state law testamentary disposition constituted a prohibited transfer of pension plan benefits.

The Court's ruling preempted the sons' claims to each type of benefit: the IRA, the Annuity and the ESOP. 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. Thus, a predeceasing nonparticipant spouse has no interest or rights in the annuity.

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."


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.

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.


221. See id. at 1767.
denied. 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.

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. 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. Within ERISA or its legislative history, Congress does not provide an express intention to supersede state community property and succession laws. Where

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222. See Boggs v. Boggs, 118 S. Ct. 9, 10 (1997).
223. See Boggs v. Boggs, 121 F.3d 168 (5th Cir. 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-

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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 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.


229. See id. at 1762. "Conventional conflict pre-emption principles require preemption '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).
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 provision 234 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,

231. See id.
232. See id. at 1764.
233. See id. at 1763-64.
236. See id.
not transferred to them by assignment or alienation. 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. 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. 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.

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. 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. Thus, preemption could have been limited to the value of the Annuity benefits only. Where state law offends neither general preemption nor ERISA specific preemption principles, no conflict with federal law exists. 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.
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).
federal conflict, significantly impacts spousal property rights in the nine community property states because it prevents state community property rights from attaching to property which is often the most significant asset of the community.

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. 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. On the resolution of an accounting pursuant to the sons' state law rights, Sandra could have been awarded the Annuity and the sons' claims could have been satisfied with an award of other property of equivalent value, if necessary and available. 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. Such a holding would have protected the federal interest and avoided the implied result.

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.


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. 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. 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.

Further, Dorothy’s will did not operate to transfer pension plan benefits prior to their distribution from the pension plan. Instead, the will operated to control disposition of her community interest upon Isaac’s death after the benefits were distributed from the plan. This disposition first took the form of Isaac’s lifetime usufruct. Subsequently, on Issac’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.

The majority in Boggs cites an array of case law supportive of preemption, but does not adequately recognize the distin-
guished characteristics of the sons' claims.\textsuperscript{261} With the exception of \textit{Ablamis},\textsuperscript{262} the cases cited in the Court's preemption analysis should not have been applied to resolve the dispute in \textit{Boggs} because the cited cases concern \textit{federally funded} benefit plans or programs and conflicting state law.\textsuperscript{263} The \textit{Boggs} plan, however, was \textit{privately funded} with community funds.\textsuperscript{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.\textsuperscript{265}

Under Louisiana community property law, funds contributed, as deferred compensation, into private benefits plans are fruits of the labor of the community.\textsuperscript{266} On its face, the contribution of community income to fund ERISA regulated benefit plans merely represents an investment strategy.\textsuperscript{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

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


\textit{Ridgway} v. \textit{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. \textit{See id.}

\textit{Free} v. \textit{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. \textit{See id.}

\textit{Ablamis} v. \textit{Roper}, 937 F.2d 1450 (9th Cir. 1991).

\textsuperscript{263} See supra note 261 regarding the \textit{Hisquierdo}, \textit{McCarty}, \textit{Ridgway} cases.


\textsuperscript{265} See supra note 102 regarding ERISA's intended purposes.

\textsuperscript{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." \textit{Id.}

\textsuperscript{267} See supra note 35 regarding tax incentives in connection with participation in qualified benefit plans.
inconsistent with one's testamentary scheme. 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.

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. 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. Preemption would be necessary to protect the integrity of the federal legislation in this context. If this were the actual issue before the Court, the majority would be correct in ruling for Sandra based on ERISA's spendthrift clause.

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. 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. ERISA should no longer apply to control

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.
272. 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.
274. See id. at 1774.
275. See id.
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 distrib­
uted 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 treat­
ment of probate orders under the QDRO exception.282 The si­
lence in this regard could imply that probate orders are outside
the scope of the QDRO exception and, therefore, are not ex­
cepted.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 Ablamis v. Roper, 937 F. 2d 1450, 1456-67 (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.
279. See id. at 1759.
280. See id.
281. See id. at 1767.
282. See id.
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)(ii)(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.*


\(^{289}\) 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.*

\(^{290}\) See supra notes 148-59.

\(^{291}\) 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
F. ALTERING THE SPHERE OF TRADITIONAL STATE LEGISLATIVE CONCERN

The state laws at issue here are family, property and probate. These areas traditionally occupy the sphere of state legislative concern and may be superseded only if Congress has clearly expressed an intention to legislate within those areas. Congress enacted ERISA to regulate private pension plans and not to alter an individual's state granted property rights. 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. 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. 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 Journeymen 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.

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


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. 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. 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.


302. See id. at 1761. The Court stated "[n]or need we consider the applicability of field pre-emption ... " Id.
fields should not be subject to preemption on the alternative theory of field preemption or otherwise.\textsuperscript{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.\textsuperscript{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.\textsuperscript{305} For example, state income tax is owed on distributed benefits and state law may proscribe certain uses of the distributed benefits as fraudulent.\textsuperscript{306}

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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{305} See T.L. James & Co. v. Montgomery, 332 So.2d 834, 841-44, 846 (La. 1976). Pension plan benefits are community property. See id.

\textsuperscript{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). 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.


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

VII. PRACTICAL ESTATE PLANNING CONSIDERATIONS

The \textit{Boggs} decision raises some significant questions for professionals planning estates that include community property and community property rights.\textsuperscript{310} Unfortunately, the holding does not provide definitive answers to some of the significant questions it raises.\textsuperscript{311} These questions primarily involve the use of the unified credit\textsuperscript{312} and the marital deduction\textsuperscript{313} for estate tax purposes.\textsuperscript{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 \textit{Boggs}. Accordingly, this section will focus on the basic estate planning and federal estate tax inquiries and the apparent answers flowing from the \textit{Boggs} decision.\textsuperscript{315}

\begin{itemize}
\item \textsuperscript{308} See supra notes 103-12 and accompanying text regarding Congress' intent that ERISA supersedes state law.
\item \textsuperscript{309} See \textit{Boggs v. Boggs}, 117 S. Ct. 1754, 1776 (1997) (Breyer, J., dissenting).
\item \textsuperscript{311} See id. at 683-85.
\item \textsuperscript{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.
\item \textsuperscript{313} See I.R.C. § 2505 (1997). This Code section provides for the unified credit to be applied against estate tax. See id.
\item \textsuperscript{314} 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.
\item \textsuperscript{315} See infra notes 316-70 and accompanying text.
\end{itemize}
A. THE UNIFIED CREDIT AND COMMUNITY PROPERTY ESTATE PLANNING

Though a degree of uncertainty exists, the holding in *Boggs* appears to adversely limit the use of the unified credit in community property states. 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. This credit can be aggregated on a rolling basis until the total limit is reached. 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. Thus, as a practical matter, this credit allows for an individual tax shelter of $625,000 worth of taxable gifts. Proper planning utilizing a combination of techniques allows a married couple to transfer a total of $1,250,000 worth of gifts tax free. The most basic combination of spousal estate planning techniques commonly used in community property states are the bypass trust and inter vivos gifts.

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320. See id. at 127.
321. 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.
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 \textit{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.
\[^{327}\] See id.
\[^{328}\] See id.
\[^{331}\] See id.
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, 1997\(^{338}\) 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.*


\[^{337}\] 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. 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. By naming the surviving spouse as the beneficiary of the bypass trust, a terminable interest is created. 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. 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. 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.

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. The first scenario assumes that no bypass trust was in place and that the married couple decided, on the death of the first spouse,

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.


340. See id.


342. See id.

343. See id.


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.
advantage of the marital deduction.\textsuperscript{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.\textsuperscript{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.\textsuperscript{348} Thus, assuming no significant appreciation or depreciation, the survivor's taxable estate for federal estate tax purposes is $1,250,000.\textsuperscript{349} The unified credit will preclude tax on $625,000 and the remaining $625,000 will be subject to federal estate tax.\textsuperscript{350}

In the second scenario, assume that a bypass trust is funded on the death of the first spouse.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{355} This results in no taxable estate on the death of the survivor because his or her taxable estate does not in-

\textsuperscript{347} See id.
\textsuperscript{348} See id.
\textsuperscript{349} See id.
\textsuperscript{350} See id.
\textsuperscript{352} See id.
\textsuperscript{353} See id.
\textsuperscript{354} See id.
\textsuperscript{355} See id.
clude the assets of the bypass trust as this interest is only a life interest terminable at death.\textsuperscript{356} Thus, the use of the bypass trust eliminates estate tax on both spouse’s estates.\textsuperscript{357}

\textit{Boggs}\textsuperscript{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.\textsuperscript{359} Thus, the \textit{Boggs} holding prevents a credit from being taken on assets in or distributed from employee benefit plans.\textsuperscript{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.\textsuperscript{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.\textsuperscript{362}

D. THE IRA AND THE UNIFIED CREDIT

\textit{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.\textsuperscript{363} This appears true to the extent that the source of the assets used to fund the IRA can be traced to ERISA benefits.\textsuperscript{364} The \textit{Boggs} decision overrules at least one California Supreme Court holding by not recognizing IRA funds as community property.\textsuperscript{365} This treatment by the \textit{Boggs} Court further limits the options available to make

\textsuperscript{357} See id.
\textsuperscript{359} See id. at 1762-64.
\textsuperscript{360} See id.
\textsuperscript{362} See id.
\textsuperscript{365} See Estate of MacDonald, 794 P.2d 911 (Cal. 1990). The assets in an IRA were held to be community property. See id.
E. THE RETURN OF THE TERMINABLE INTEREST RULE

The Boggs decision also appears to trigger the return of the terminable interest rule because it does not allow for a pre-deceasing nonparticipant spouse's testamentary power over a community interest in undistributed benefits in the surviving participant spouse's ERISA benefit plan. 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. 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.

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. 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-
clusively heard through their elected representatives.\textsuperscript{372} The \textit{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.\textsuperscript{373} The issues presented in \textit{Boggs}, however, are worthy of and require a detailed legislative resolution.\textsuperscript{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.\textsuperscript{375} Such a solution requires Congress to recognize the impact of the \textit{Boggs} decision and, if desired, preempt its effects after due consideration based on detailed findings throughout the process.\textsuperscript{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.\textsuperscript{377}

\textsuperscript{372} See supra notes 310-70 and accompanying text.
\textsuperscript{373} See supra notes 310-70 and accompanying text.
\textsuperscript{375} See id.
\textsuperscript{376} See id.
IX. CONCLUSION

Numerous cases have been filed in relation to issues of ERISA preemption of various state laws. The Boggs case and its extended, contested history prove that Congress needs to clearly delineate the extent of ERISA preemption within the testamentary context. ERISA's broadly stated preemption provision and vague spendthrift provision are inadequate due to complexities unforeseen at the time the provisions were drafted. If the legislation is to withstand the test of constitutional validity, Congress must consider matters of which the legislative record is void. 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.

The Boggs Court stated that ERISA was not amenable to the “sweeping extratextual extension” 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. 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. 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.


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.


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

385. See id.
cal and conclusive rule designed for uniform application.\textsuperscript{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.\textsuperscript{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.

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\begin{footnotesize}
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\item \textsuperscript{386} See id.
\item * Golden Gate University, Class of 1999. I wish to express my gratitude to all those who contributed their editorial support to the publication of this Note.
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