PREMARITAL CONSENT TO WAIVER OF SPOUSAL PENSION BENEFITS: A PROPOSAL TO EQUALIZE PRENUPTIAL "I DO" AND POSTNUPTIAL "I DO"

INTRODUCTION

Pension regulation has rapidly become one of the most complex areas of federal legislation. Congress enacted the Employee Retirement Income Security Act of 1974[1] (ERISA) to protect pensioners[2] and to implement uniform federal law governing pensions.[3] In order to maintain federal control of all pension

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1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993)).

2. 29 U.S.C. § 1001(a) (1988). In enacting ERISA, the House Committee on Education and Labor found that ERISA's "most important purpose [is] to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." H.R. REP. No. 533, 93d Cong., 1st Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646.

3. 29 U.S.C. § 1001(a) (1988). Several important reasons exist for national uniformity in the field of pension regulation. One commentator summarized key reasons for national uniformity.

> The proliferation of multiple-employer and multiple-state pension plans undermines arguments for state-level flexibility and experimentation, and heightens those for uniform standards for reasons of both fairness and efficiency. Moreover, the retirement security of American workers has been a matter of paramount federal concern since the Social Security Act of 1935. . . . When the federal government promulgates detailed regulations rather than minimum standard regulations, the case for exclusive federal regulation is stronger.

Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 544 (1993). For a discussion tracing the evolution of ERISA from early pension plans at the turn of the century to the present see Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 IOWA L. REV. 431 (1991).

matters, ERISA contains a broad preemption clause.[4] The sweeping preemption clause allows ERISA to supersede state laws that have even loose connections to employee benefit plans.[5] An expansive reading of ERISA's preemption clause gave federal pension laws priority over a wide range of state laws in areas that ERISA was not sufficiently detailed to control.[6]

While ERISA was considered a major advance for American workers,[7] as enacted it contained several unforeseen flaws.[8] Specifically, ERISA unintentionally disadvantaged women in two ways. First, in their capacity as pensioners, women rarely accumulated the pension levels of men because of their disparate work patterns. Second, upon divorce, women rarely received recognition for their contribution to a pension in their role as the wage earner's spouse.[9] ERISA's sweeping preemption clause defeated any protection afforded women by state divorce laws relating to pension funds.[10]

Congress enacted the Retirement Equity Act of 1984[11] (REA) after recognizing that pension law is affected by some state

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4. ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). *See infra* note 41 and accompanying text (discussing ERISA's preemption clause).

5. *See, e.g.*, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (holding that ERISA preempted state law reducing pension benefits by the amount of workers' compensation awards); *see also* part I.B (discussing ERISA's preemption doctrine). For a thorough analysis of ERISA's preemption clause see William J. Kilberg & Paul D. Inman, Observations, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313 (1984).

6. *See infra* notes 47-59 and accompanying text (discussing ERISA's ineffectiveness to manage property settlement upon divorce).

7. "At the time of its passage, ERISA was greeted as the most important social employment legislation ever enacted in the United States." David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 437 n.19 (1987). *See also* Watson, *supra* note 3, at 434-35 (discussing ERISA's effect on the American labor force).

8. *See* discussion *infra* part I.B; *see also* Leon E. Irish and Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109 (1985) (discussing judicial and legislative problems associated with ERISA's broad preemption language).

9. *See infra* part I.C (discussing ERISA's failure to adequately protect the interest of women).

10. *See, e.g.*, Stone v. Stone, 450 F. Supp. 919, 932 (N.D. Cal. 1978), *aff'd* 632 F.2d 740 (9th Cir. 1980) (noting the well established nature of state regulation of community property), *cert. denied sub nom.* Seafarers Int'l Union, Pacific District-Pacific Maritime Assoc. Pension Plan v. Stone, 453 U.S. 922 (1981). *See infra* part II (discussing the application of ERISA to family law matters). For further discussion of state regulation of family law matters see *infra* notes 49-61.

11. Pub. L. No. 98-397, 98 Stat. 1433 (codified at 29 U.S.C. §§ 1025, 1052-56, 1144 (1988)). *See infra* part I.C for further discussion of the REA.

domestic relations laws, but that ERISA was not equipped to replace traditional state control of these matters.[12] With the REA, Congress amended ERISA in two major ways.[13] First, the REA excepted from ERISA's broad preemption clause[14] certain matters of domestic relations law. Second, the REA required joint and survivor annuities to better meet the needs of pensioners and their spouses.[15] Although the REA corrected some inadequacies of federal pension law, the REA was only the first step in fulfilling Congress' goal of equality in retirement laws.[16]

While Congress amended ERISA's flawed pension laws to improve the lot of married and divorced women, Congress failed to similarly provide for women entering marriage. Changes in the modern American family prompted Congress to create joint and survivor annuity benefits in REA[17] and provisions that allow spouses to waive these benefits.[18] These changes though have also made prenuptial planning more common, particularly among those entering second marriages and those with children from previous relationships.[19] Attempts to waive pension benefits through premarital financial planning, however, have met with varied success.[20] Because most prenuptial agreements do not fit

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12. One of the act's proponents stated that the REA "is designed to improve the treatment of women under private pension plans. Inequities exist under present law which disadvantage both women as workers and women as surviving spouses. This bill represents the bipartisan efforts of many Members to make pension plans more responsive to the special needs of women." 130 CONG. REC. 13,325 (1984) (statement of Rep. Rostenkowski). For a more detailed discussion of the REA and its application to women see *infra* part I.C.

See infra parts I.B-.C (discussing ERISA's shortfalls with respect to domestic law issues and Congress' attempt to redress ERISA's shortfalls).

13. *See infra* part I.C (discussing the REA).

14. *See infra* notes 80-83 and accompanying text (discussing the creation of the qualified domestic relations order exception to the preemption clause).

15. *See infra* notes 72-78 and accompanying text (discussing the creation of joint and survivor annuity benefits).

16. One of the stated goals of the REA was to provide for "greater equity under private pension plans for workers and their spouses . . . ." Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended at 29 U.S.C. §§ 1025, 1052-56, 1144 (1988 & Supp. V 1993)).

17. *See infra* notes 60-71 and accompanying text (discussing congressional intent in the enactment of the REA); *infra* notes 70-72 and accompanying text (describing joint and survivor annuities).

18. *See infra* notes 72-79 (discussing the waiver provisions of the REA).

19. J. Thomas Oldham, *Premarital Contracts are Now Enforceable Unless . . .*, 21 HOUS. L. REV. 757, 757-58 (1984) (commenting that, due to uncertainty surrounding the financial ramifications of divorce and the increased likelihood of divorce in modern times, more couples use marital or premarital agreements).

20. *See infra* parts II and III (discussing attempts by participants and their spouses to distribute plan benefits premaritally).

neatly within the congressionally-specified waiver requirements, courts often refuse to let these agreements waive congressionally-mandated benefits.[21] Consequently, although Congress meant well when it enacted the REA, the survivor annuity requirements it mandated have actually frustrated pensioners' family financial planning.[22]

This Note discusses the effectiveness of prenuptial agreements as waivers to pension benefits. In order to update ERISA to address the problems of the modern family and to fulfill the REA's goal of equitable pension laws, this Note proposes a change to ERISA as modified by the REA. Part I discusses ERISA's preemption of state domestic relations law, premarital agreements, and the REA's amendments to ERISA. Part II discusses judicial interpretation of the REA's provision regarding waivers of pension benefits. Part III examines problems with the current legislation. Part IV suggests amending ERISA to allow couples to use prenuptial agreements to waive pension benefits.

I. Prenuptial Agreements and ERISA

A. *Prenuptial Agreements*

Traditionally, courts struck down premarital agreements, holding that they encouraged divorce or were void as against public policy.[23] Courts scrutinized premarital contracts more closely than other contracts because the parties' confidential relationship made them particularly susceptible to fraud or duress.[24] Primarily, courts were concerned that the wife would not receive fair treatment because she was the weaker party to the contract.[25]

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21. *See infra* part II (discussing judicial responses to premarital distribution of benefits).

22. Despite the popularity of the changes in the REA, some critics have noted the deficiencies in the changes. One critic cautioned, "[t]hat the popular press and some rights organizations deem [the REA] a major advance for the non-employee spouse may simply work to unreasonably inflate the expectations of the non-employee spouse." William M. Troyan, *Pension Evaluation In Light of The Retirement Equity Act of 1984*, 11 Fam. L. Rep. (BNA), at 3005 (March 19, 1985).

23. Lenore J. Weitzman, The Marriage Contract: Spouses, Lovers and the Law 338 (1981). Traditionally, contracts between husband and wife were considered impossible because husband and wife were a single entity. *Id.*

24. *Id.* at 344-45.

25. *Id.* at 346.

This heightened scrutiny by courts produced special requirements for enforceability of prenuptial agreements that are more strict than the criteria for enforceability of ordinary contracts.[26] These special criteria included full disclosure of financial status and a full understanding of the consequences of the agreement.[27]

Today, the special criteria for valid prenuptial agreements vary widely from state to state. At least eighteen states have adopted all or part of the Uniform Premarital Agreement Act (UPAA).[28] Some states have specific statutes regulating prenuptial agreements[29] and others include special provisions in general statutes regulating agreements.[30] Whatever the form, most state statutes contain a few basic requirements for an enforceable prenuptial agreement,[31] and all states have laws that adequately protect parties to a prenuptial agreement.

The UPAA attempts to provide uniform guidelines that conform to social policy regarding prenuptial agreements.[32] The UPAA allows parties to contract with respect to all present and future property rights.[33] To protect the parties, the UPAA lists

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26. WEITZMAN, *supra* note 23, at 344-47 (reviewing courts' reactions to spousal contracts, and discussing concerns about fraud, unconscionability, and hardship).

27. *Id.* at 344.

28. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 371 (1983). *See* ARIZ. REV. STAT. ANN. §§ 25-201 to -205 (West Supp. 1993); ARK. CODE ANN. §§ 9-11-401 to -413 (Michie 1993); CAL. FAM. CODE §§ 1600, 1610-17 (West 1994); HAW. REV. STAT. §§ 572D-1 to -11 (Supp. 1992); ILL. REV. STAT. ch. 750, para. 10/1 to /11 (Smith-Hurd 1993); IOWA CODE ANN. §§ 596.1-.12 (West Supp. 1994); KAN. STAT. ANN. § 22-801 to -811 (1988); ME. REV. STAT. ANN. tit. 19, §§ 141 to 151 (West Supp. 1993); MONT. CODE ANN. §§ 40-2-601 to -610 (1993); NEV. REV. STAT. §§ 123A.010-.100 (1991); N.J. STAT. ANN. §§ 37:2-31 to -41 (West Supp. 1994); N.C. GEN. STAT. §§ 52B-1 to -11 (1987); N.D. CENT. CODE §§ 14-03.1-01 to -09 (1991); OR. REV. STAT. §§ 108.700-.740 (1990); R.I. GEN. LAWS §§ 15-17-1 to -11 (1988); S.D. CODIFIED LAWS ANN. §§ 25-2-16 to -25 (1992); TEX. FAM. CODE ANN. §§ 5.41-.56 (West 1993); VA. CODE ANN. §§ 20-147 to -155 (Michie 1990).

29. *See, e.g.*, DEL. CODE ANN. tit. 13, § 301 (1993); LA. CIV. CODE ANN. art. 2328 (West 1985); N.H. REV. STAT. ANN. § 460:2-a (1992); TENN. CODE ANN. § 36-3-501 (1991); W. VA. CODE § 48-2-1(b) (Supp. 1994).

30. *See*, WASH. REV. CODE ANN. § 26.16.250 (West Supp. 1994); WIS. STAT. ANN. § 767.255(11) (West 1993).

31. *See* Oldham, *supra* note 19, at 762-65. Generally, enforceable premarital agreements must be in writing; must not be procured through fraud or duress; must be made intelligently after adequate disclosure; must not encourage divorce; and must be made in exchange for consideration (marriage generally satisfies the consideration requirement). *Id.* at 762-65. *But see* UNIF. PREMARITAL AGREEMENT ACT § 2, 9B U.L.A. 372 (1983) (stating that a premarital agreement is enforceable without consideration).

32. UNIF. PREMARITAL AGREEMENT ACT Prefatory Note, 9B U.L.A. 369 (1983).

33. Section 3 of the Uniform Premarital Agreement Act provides: "(a)

the instances in which an agreement will be unenforceable. These instances include when an agreement has been involuntarily executed, when an agreement is unconscionable, and when the parties unfairly or unreasonably fail to disclose their financial status.[34]

An increasing number of second marriages has caused a rise in the number of couples using prenuptial agreements.[35] Couples often use prenuptial agreements to secure the inheritance rights of children from previous relationships.[36] Additionally, couples use these agreements to simplify matters in the event of divorce and to provide couples security during marriage.[37] Accordingly, a state court should enforce a prenuptial agreement unless the court determines that the agreement fails to meet a minimum standard of fairness.[38]

Parties to a premarital agreement may contract with respect to: (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located." UNIF. PREMARITAL AGREEMENT ACT § 3, 9B U.L.A. 373 (1983).

34. Section 6 of the Uniform Premarital Agreement Act provides:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that: (1) that party did not execute the agreement voluntarily; or (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party: (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (iii) did not have, or reasonably could have had, an adequate knowledge of the property or financial obligations of the other party.

UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1983).

35. WEITZMAN, *supra* note 23, at 37.

36. Oldham, *supra* note 19, at 757.

37. *Id.* at 760 (noting that rising divorce rates and an increase in the number of working women have made judges more amenable to prenuptial agreements).

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> Society has an interest in ensuring that both spouses have adequate means of support after a divorce. Such a result minimizes the friction and trauma of the divorce process and enables both spouses to continue to lead productive lives. If the divorce settlement provides both spouses with adequate support, then society has no interest in trying to alter the settlement agreed to by the parties. . . . Because spouses presumably rely upon the provisions in marital agreements, an agreement should be considered unenforceable only when there is a compelling public policy reason to do so.

Oldham, *supra* note 19, at 777.

B. *ERISA Preemption Doctrine*

Congress enacted ERISA to replace inadequate and varying state regulation of employee benefit plans.[39] Therefore, Congress included a clause preempting any state law "relat[ing] to" a qualified employee benefit plan to prevent states from regulating such plans.[40] Congress recognized, however, that state control of some related fields would not hinder effective federal control of retirement plans.[41] Thus, Congress excepted from preemption state laws regulating insurance, banking, and securities.[42] Apart from regulation of these specifically excepted industries, Congress intended ERISA to broadly preempt all state laws "relat[ing] to" employee benefit plans.[43]

ERISA has proved troublesome for courts interpreting the preemption clause. The U.S. Supreme Court indicated that some matters may be too tangential to employee benefit plans to require federal preemption.[44] The Court has been reluctant,

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39. The purpose of ERISA is:

> to protect . . . 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.

ERISA § 101, 29 U.S.C. § 1001(b) (1988).

40. ERISA section 514 provides that ERISA: "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a) (1988).

41. Congress intended "to preempt state law sweepingly, as a general matter, and then to carve out exceptions as special problems or special interests present themselves." Kilberg & Inman, *supra* note 5, at 1314-15, n.5. Therefore, "[i]f it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits).

42. The "savings clause" provides: "[E]xcept as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA § 514 (b)(2)(A), 29 U.S.C. § 1144 (b)(2)(A) (1988 & Supp. 1993).

43. "It should be stressed that with the narrow exceptions specified in the bill the substantive and enforcement provisions . . . are intended to preempt the field . . . ." 120 Cong. Rec. 29,933 (1974) (statement of Sen. Williams).

44. Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983). "Some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* at 100 n.21. Overly broad preemption could create other problems. "If ERISA preempted all state law relating to employee benefit plans, a dangerous vacuum

however, to explain specifically which state laws "relate to" ERISA and which do not.[45] Thus, with little specific guidance on how to interpret the ERISA preemption clause, lower courts have employed various approaches.

Several courts interpreted ERISA's "relate to" clause narrowly with respect to the traditionally state-regulated area of domestic relations law. In *Stone v. Stone*,[46] for example, the court faced the possibility of federal interference with this traditionally state-regulated area. In *Stone*, a plan participant's ex-wife attempted to use her divorce decree to obtain a portion of her ex-husband's plan benefits.[47] However, court action to

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would result. Progressive state legislation would be frustrated, and Congress might not fill the void with the necessary federal legislation. Major problem areas in employment law could be left unaddressed." Gregory, *supra* note 7, at 457.

45. "In the past eleven years, the Supreme Court has decided eleven ERISA preemption cases." Drummonds, *supra* note 3, at 524 n. 309. *See* District of Columbia v. Greater Wash. Bd. of Trade, 113 S. Ct. 580 (1992) (District of Columbia statute requiring health insurance for injured employees preempted); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) (state wrongful discharge claim preempted because alleged discharge was based on employer evasion of pension obligations); FMC Corp. v. Holliday, 498 U.S. 52 (1990) (state motor vehicle code preempted); Massachusetts v. Morash, 490 U.S. 107 (1989) (state law requiring employers to pay discharged employees for their unused vacation time was not preempted); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) (garnishment statute preempted because it singled out ERISA plans); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (state severance pay statute not preempted); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (state common law action for improper claim processing preempted); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (state common law contract and tort suits to recover benefits preempted); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state insurance law mandating minimum benefits not preempted); Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) (state law forbidding discrimination in benefit plans preempted); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (state statute reducing benefits by amount of prior workers compensation awards not preempted).

In 1992, Justice Stevens stated that there were approximately 2800 ERISA preemption cases pending in the federal courts. *Greater Wash. Bd. of Trade*, 113 S. Ct. at 586 n.3 (Stevens, J., dissenting). Despite the proliferation of ERISA preemption cases the Court stated: "[W]e express no views about where it would be appropriate to draw the line." *Shaw*, 463 U.S. at 100 n.21.

46. 450 F. Supp. 919 (N.D. Cal. 1978) *aff'd* 632 F.2d 740, (9th Cir. 1980) *cert. denied sub nom*, Seafarers Int'l Union, Pacific District-Pacific Maritime Assoc. Pension Plan v. Stone, 453 U.S. 922 (1981).

47. Stone v. Stone, 450 F. Supp. at 921. In *Stone*, the participant's wife obtained a divorce decree awarding her 40% of her ex-husband's pension representing her community property interest. When the participant refused to comply with the decree, the wife filed a suit in state court to compel him to comply with the terms of the divorce. The pension plan removed the case to federal court. *Id.* at 920.

force the plan administrator to distribute the plan benefits to the ex-spouse violated ERISA's prohibition against alienation.[48] Recognizing the strong history of state control over domestic relations law, as well as its tenuous relationship to pension law, the court denied federal preemption.[49] Instead, the court applied state community property laws and enforced the divorce decree.[50]

In *American Telephone and Telegraph Co. v. Merry*,[51] the Court of Appeals for the Second Circuit similarly denied ERISA preemption of a state alimony order distributing pension benefits.[52] The *Merry* court determined that the alimony order was within the state's police power. The court reasoned that basic state police powers are not properly preempted unless Congress clearly intended to preempt them.[53] The *Merry* and *Stone* courts both relied on a history of state regulation in the field of domestic relations. Accordingly, both denied ERISA preemption by narrowly reading ERISA's "relate to" provision.[54]

Although affirming traditional state control in the domestic relations area seems equitable, the *Merry* and *Stone* courts' narrow reading of the "relate to" language was contrary to congressional intent.[55] When it enacted ERISA, Congress de-

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48. The anti-alienation clause provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." ERISA § 206(d)(1), 29 U.S.C. § 1056(d) (1) (1988).

49. *Stone*, 450 F. Supp. at 932. The court applied the presumption that federal law does not preempt a state's historic police powers. *Id.* (citing Ray v. Atlantic Richfield Co., 434 U.S. 151, 157 (1978)). Without clear evidence that Congress intended to preempt state community property laws, the court refused to find ERISA preemption. *Id.* The court also noted that "[t]he intended beneficiaries of the California community property laws would be placed at a . . . disadvantage by preemption [because it] would deprive non-employee spouses of the share in marital assets which they indirectly helped to acquire . . ." *Id.* at 932-33.

50. *Stone*, 450 F.Supp. at 932.

51. 592 F.2d 118 (2d Cir. 1979). In *Merry*, the participant's ex-wife obtained a garnishment order to collect unpaid support payments. The pension plan trustees sought a declaratory judgement to discover whether they could pay the participant's pension benefits to the ex-wife. *Id.* at 120.

52. The court stated that "[a] garnishment order used to satisfy court ordered family support payments is impliedly excepted from preempted state law relating 'to any employee benefit plan.'" *Merry*, 592 F.2d at 121 (quoting ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

53. *Merry*, 592 F.2d at 122. The *Merry* court denied preemption due to a "fundamental principle of statutory interpretation . . . that the basic police powers of the States, particularly the regulation of domestic relations, are not superseded . . . unless that was the clear and manifest purpose of Congress." *Id.* (quoting Carteledge v. Miller, 457 F. Supp. 1146, 1154 (S.D.N.Y. 1978).

54. *Merry*, 592 F.2d at 121-22; *Stone*, 450 F.Supp. at 931-33.

55. The result appears to be equitable because the courts honored state decrees, recognizing that ERISA was not written to deal with matters related

scribed the broad preemption language as ERISA's "crowning achievement."[56] Congress intended the broad preemption clause to prevent state laws from eroding federal control of pensions.[57] Clear congressional intent for broad preemption made it difficult for the *Merry* and *Stone* courts to justify their contrary conclusions. The courts denied preemption notwithstanding the broad preemption clause because they found that ERISA was less adequate than state law to regulate certain domestic relations matters.[58]

C. *The Retirement Equity Act*

Concerned that ERISA inadequately responded to family issues, Congress enacted the REA to incorporate into ERISA the notion that marriage is an "economic partnership" and to more effectively address pensions as a marital asset.[59] Although the

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to postmarital distribution of assets. *See, Merry, supra.* The courts, however, were forced to use a restricted reading of the "relate to" language that defies specific congressional intent regarding the breadth of the "relate to" clause. Kilberg & Inman, *supra* note 5, at 1315-16 (observing that while Congress intended to assume the regulatory field, it excepted state regulation of the insurance, banking and securities industries from preemption because it did not want to remove state power to control those industries).

56. 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent).

57. Kilberg & Inman, *supra* note 5, at 1316 (identifying Section 514 as an "[e]xpress preemption provision").

Kilberg and Inman distinguish express preemption provisions and implied preemption provisions as follows:

> To strike down a state law in an implied preemption case, the court must find . . . a specific conflict between federal and state commands. . . . The goal of an implicit preemption analysis should be to accommodate the federal interest with the least possible displacement of state law. The goals of an express preemption analysis, in contrast, should be to prevent subtle or incremental state encroachment into a field that Congress has chosen expressly to reserve for federal law.

Id. at 1316. *See also*, NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.24 (5th ed. 1992) (discussing the use of norms of statutory construction to distinguish express and implied statutory provisions).

58. *See Stone*, 450 F. Supp. at 921.

59. 130 CONG. REC. 13,316-17 (1984) (statement of Rep. Rostenkowski). Congresswoman Ferraro explained the concept of "economic partnership" that REA addresses as follows:

> [the REA] establishes two principles that I consider fundamental: That the partner in a marriage has earned a stake in the fruits of that marriage, one of these being a pension; and that once a worker has become vested in a plan, neither he nor his spouse can be arbitrarily deprived of that earned benefit.

130 CONG. REC. 13,339 (1984).

The Retirement Equity Act of 1984 further sought to:

> improve the delivery of retirement benefits and provide for greater

REA is written in gender neutral terms, its primary purpose was to improve the status of women in federal pension law.[60] Under ERISA, women often received inadequate pension benefits because of their work patterns.[61] Prior to the REA, ERISA left many wives with none of their husbands' pension benefits if their husbands, often long-time employees, died days, or even hours before retirement.[62] The number of elderly women living in poverty by 1984 was a testament to ERISA's inability to adequately protect the surviving families of plan participants.[63]

> equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home. . . .

S. REP. No. 575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547.

60. "If both spouses could be predicted to have substantially equal earnings and pension savings opportunities, neither spouse would be particularly likely to need pension support from the other. In conventional marriage patterns, however, childrearing and homemaking have been women's work, and the wife so engaged has been cut off from opportunities for doing her own pension saving." JOHN H. LANGBEIN AND BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 434 (1990) [hereinafter LANGBEIN, PENSIONS].

61. Congressional sponsors of the legislation explained how women as workers were disadvantaged:

> The first problem this legislation addresses is the special work history of many women. Women tend to enter and leave the work force more frequently and tend to have longer periods of absence than men. Historically, wives have had to leave their jobs to permit family mobility for their husbands. Also, women tend to have longer absences from the work force in order to care for young children.
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> . . . [The changes in REA] will insure that women, who tend to enter the work force earlier, will be able to begin earning pension credits for their service.

130 CONG. REC. 13,325 (1984) (statement of Rep. Rostenkowski).

62. Representative Conable told the story of one of the witnesses testifying before the Committee on Education and Labor as follows:

> [One] witness was married 36 years to a repairman in Kentucky coal mines for 27 years. [sic.] About a month after his fatal heart attack at age 54 in 1980, his pension fund sent her a letter saying she would get no widow's benefits because he had died "too early." Had he lived for only four more hours, she would have received widow's benefits.

130 CONG. REC. 13,326 (1984) (statement of Rep. Conable). *See also* Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust, 662 F.2d 617 (9th Cir. 1981) (denying spousal benefit to the spouse of an employee with vested pension rights who opted for survivor annuity benefits but died three months short of the plan's normal age of retirement).

63. In 1984, women comprised 72% of the elderly living in poverty. 130 CONG. REC. 13,327 (1984) (statement of Rep. Clay). *See also* KENNETH AULETTA, THE UNDERCLASS 68 (1982) (stating that "[p]erhaps the single greatest change in American poverty is that it has been feminized").

Congress' goal in enacting the REA, therefore, was two-fold: to increase the number of women with vested pension rights, and to provide adequate protection for women as pensioners' spouses.[64]

The REA attempted to increase the number of women with vested pension rights by changing the vesting and assignment requirements of qualified plans.[65] The REA, therefore, lowered the minimum age for participation in a qualified plan from twenty-five to twenty-one years.[66] The REA further protects pension rights of women by declining to treat maternity and paternity leave as a break in service.[67] These changes in participation requirements better reflect female work patterns and equalize treatment of women as pensioners.[68]

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64. Congresswoman Geraldine Ferraro indicated the congressional intent behind the REA when she introduced the legislation that later became REA and stated: "Women are shortchanged by private pension plans because the system does not truly recognize the contribution that women make to the economy or take into account women's unique work patterns, patterns which revolve around childrearing and other family responsibilities." *Pension Equity for Women: Hearings before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 26 (1983).

65. Retirement Equity Act of 1984 § 102(a), 29 U.S.C. §§ 1052(a) (1)(A)(i), (B)(ii), 1053(b)(1)(A) (1988). Congress reduced the minimum age for participating in a plan from 25 to 21. § 1052(a) (1)(A)(i). Congress also lowered the age from which years of service are taken into account for determining a pensioners nonforfeitable percentage from 22 to 18. § 1053(b)(1)(A).

66. Retirement Equity Act of 1984 § 102(a)(1), 29 U.S.C. § 1052(a)(1)(A)(i) (1988). By lowering the age at which vesting occurs Congress reflected the fact that many females entered the workforce earlier than men and then departed the work force earlier, either following a marriage or to raise a family. Earlier vesting allowed females to earn credit for those years that previously went undocumented for plan benefits. *See supra* note 62 (discussing the reasons that the change in age minimums for vesting will help women earn more pension credit).

67. Under ERISA, females who left work for maternity leave were disadvantaged in their amount of pension credit by a break in service. ERISA § 202, 29 U.S.C. § 1052(b) (1982). The REA amends ERISA by adding:

> (5)(A) In the case of each individual who is absent from work for any period — (i) by reason of the pregnancy of the individual, (ii) by reason of the birth of a child of the individual, (iii) by reason of the placement of a child with the individual in connection with the adoption of such child . . ., or (iv) for purposes of caring for such child for a period beginning immediately following such birth or placement, the plan shall treat as hours of service, solely for purposes of determining under this subsection whether a 1-year break in service . . . has occurred . . . [the employee's normally credited hours or eight hours per day]

Retirement Equity Act of 1984 § 102(e)(1), 29 U.S.C. § 1052(b) (1)(E) (1988).

68. The changes give credit to workers who enter the workforce earlier in life. *See supra* note 66 (discussing how the changes embodied in REA helped

The REA also attempted to improve treatment of women as wives of pensioners. The REA forced plan participants to include their spouses in decisions about allocating pension benefits in the event of a divorce or the death of a pensioner.[69] Prior to the REA, ERISA permitted a plan participant to waive spousal benefits without the spouse's knowledge or consent.[70] Consequently, if the participant died, spouses might be left without the benefits of the participant's pension. The REA created joint and survivor annuities mandating payment of benefits to spouses of retired plan participants.[71] Spouses of participants with vested rights, who die before retirement, also receive the survivor benefits.[72]

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women with credit for those entering the work force earlier). Also, the bill "affords couples an opportunity to begin raising a family without forfeiting pension credits." 130 CONG. REC. 13,327 (1984) (statement of Rep. Clay).

69. The legislative history of the REA indicates that Congress believed that a "spouse should be involved in making choices with respect to retirement income on which the spouse may also rely." S. REP. No. 575, 98th Cong. 2d Sess. 12 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2558. REA Section 103 provides for joint and survivor annuities and preretirement survivor annuities as follows:

> (a) 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, and
>
> (2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

REA § 103, 29 U.S.C. § 1055(a) (1988).

The provisions regarding joint and survivor annuities apply only to defined benefit plans, individual account plans subject to the funding standards of § 302, and any other individual account plan unless the plan provides that the accrued benefit is payable in full on the death of participant to the surviving spouse. REA § 103(b), 29 U.S.C. § 1055(b) (1988 & Supp. V 1993).

These provisions closely resemble forced share provisions in state estate law. *See generally* John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB. & TRUST J. 303, 304 (1987) [hereinafter *Langbein & Waggoner*] (describing a typical "forced share" provision as an option to a surviving spouse to claim one-third share of the decedent's estate).

70. During congressional debates on the REA, Rep. Martin recanted the story of a woman who had called her office overwrought with grief. After the sudden death of the woman's husband, her husband's former employer informed her that her husband had inadvertently waived her survivor benefits. 130 CONG. REC. 13,345 (1984) (statement of Rep. Martin).

71. REA § 103, 29 U.S.C. § 1055(a) (1988). *See supra* note 70 (discussing this section).

72. 130 CONG. REC. 13,345 (1984) (statement of Rep. LaFalce).

The REA maintained some flexibility by permitting participants and their spouses to waive survivor's benefits.[73] Waiver is only permitted, however, if the spouse of the plan participant voluntarily relinquishes survivor benefits.[74] The REA set forth three requirements for a valid waiver of spousal benefits. First, waivers must be in writing.[75] Second, the waiver must designate an alternate beneficiary.[76] Finally, the consenting spouse must acknowledge the effect of an election to waive spousal benefits.[77] By mandating benefit plans that permit waiver of spousal benefits only with spousal consent, the REA provides security for spouses that did not previously exist under ERISA.[78]

The REA further sought to maintain flexibility and protect the wives of pensioners by enacting special rules for assignment of pension benefits in divorce and similar proceedings.[79] At divorce, pension benefits frequently constitute a large part of the marital property. Prior to the REA, property settlements in divorce proceedings could not distribute pension benefits because ERISA forbade alienation of benefits.[80] Under the REA, a

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73. A participant might want to waive the joint and survivor annuity for several reasons. One economic reason is that waiving joint and survivor annuity benefits increases an employee's monthly benefit because the value of the pension is paid out over the length of one life instead of two. Drummonds, *supra* note 3, at 549, n.442.

74. REA § 103(c)(2)(A), 29 U.S.C. § 1055(C)(2)(A) (1988). The waiver provisions provide that:

> . . . [A]n election under paragraph (1)(A)(i) shall not take effect unless —
>
> (A) the spouse of the participant consents in writing to such election, the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public . . . .

75. *Id.*

76. *Id.*

77. *Id.*

78. In 1984, while ERISA governed pension distribution, "[o]nly 5 to 10 percent of surviving spouses receive[d] any pension benefits." 130 CONG. REC. 13,345 (1984) (statement of Rep. LaFalce).

79. Retirement Equity Act of 1984 § 104(a), 29 U.S.C. § 1056 (d)(3)(A) (1988). Section 104(a) provides:

> Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order.

Id. Paragraph (1) provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1988).

80. A qualified domestic relations order 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

"qualified domestic relations order" can require a plan administrator to pay benefits to someone other than the plan participant, such as a former spouse.[81] The REA allows state divorce and separation decrees to distribute pension benefits as long as the decrees are sufficiently detailed for compliance by the plan administrator and do not increase the total amount of benefits distributed by the plan.[82]

By allowing state law to govern postnuptial distribution of pension benefits, to some extent, the REA corrected the conflict between state domestic relations law and ERISA's broad preemption language.[83] Congress preserved the breadth of ERISA's

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> payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan . . . which . . . relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, or child of a participant, and . . . is made pursuant to State domestic relations law.

REA §§ 104(a)(3)(B)(i), (ii), 29 U.S.C. § 1056 (d)(3)(A) (1988). *See also* Stinner v. Stinner, 523 A.2d 1161 (Pa. 1987) (denying attachment of pension for alimony payments because liability had been contractually created and not court sanctioned) *rev'd* 554 A.2d 45, *cert. denied*, 492 U.S. 919 (1989).

81. Technically, ERISA's language prohibiting alienation and assignment of benefits prevented courts from dividing benefits in divorce proceedings. Courts avoided this result, however, by finding state laws regarding property distribution to be applicable and exempt from preemption by ERISA. *See supra* notes 47-59 and accompanying text (discussing court treatment of the conflict between state domestic relations laws and federal pension legislation).

82. To be sufficiently detailed under the REA an order must meet the following requirements:

> (C) A domestic relations order meets the requirements of this subparagraph only if
>
> (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
>
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
>
> (iii) the number of payments or period to which such order applies, and;
>
> (iv) each plan to which such order applies.
>
> (D) A domestic relations order meets the requirements of this subparagraph only if such order —
>
> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
>
> (iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

REA §§ 104(a)(3)(C), (D), 29 U.S.C. §§ 1056(d)(3)(C), (D) (1988).

83. The REA supporters acknowledged the courts' problems with recon-

preemption clause by creating a narrow exception to federal preemption for state sanctioned postmarital pension benefit distribution. Congress chose to carve a narrow statutory exception to ERISA's preemption language rather than allowing courts to narrowly interpret ERISA's preemption clause to achieve state control of postnuptial pension distribution.[84] Thus, the REA corrected the problems women confronted when, as pensioner's ex-spouses, they attempted to enforce divorce decrees distributing pension benefits.

II. Judicial Interpretations of the Waiver of ERISA Benefits

Although the REA enables women to enforce postnuptial agreements regarding pension benefits, the REA does not provide similar protection to women entering prenuptial agreements.[85] Specifically, people attempting to enforce prenuptial agreements in which a prospective spouse purports to waive ERISA benefits have met with varied success. A minority of courts believe that a spouse's clear intent to waive pension benefits, as evidenced by a prenuptial agreement, satisfies the REA's waiver requirements.[86] The majority of courts, however, require parties to comply with the REA's explicit waiver requirements, making attempts at prenuptial distribution of pension benefits futile.[87]

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ciling a pension plan's interests with a former spouse's interests:

> [the REA] also deals with the division of retirement benefits in the case of divorce. In part, problems have arisen in this area because of uncertainty as to the relationship between Federal and State law with respect to pension plans. The bill sets minimum standards of specificity with respect to a domestic relations order as it relates to a pension benefit. These standards balance the need of the former spouse for flexibility to provide appropriate support, and the plan's need for clear rules.

130 Cong. Rec. 13,325 (1984)(statement of Rep. Rostenkowski).

"Until REAct, however, enforcement of such claims lacked statutory basis and required the courts to circumvent both the antialienation rule and the preemption clause of ERISA." Langbein, Pensions, *supra* note 60, at 378.

84. 130 Cong. Rec. 13,325 (1984) (statement of Rep. Rostenkowski).

85. Congress' primary concern in enacting the REA was for current rather than prospective spouses. "[B]ecause the committee believes that a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely, [the REA] requires spousal consent when a participant elects not to take a survivor benefit." S. Rep. No. 575, 98th Cong. 2d Sess., 12 (1984) *reprinted in* 1984 U.S.C.C.A.N. 2547, 2558.

86. *See infra* notes 88-95 and accompanying text (discussing *In re* Estate of Hopkins, 574 N.E.2d 230 (Ill. App. Ct.), *app. denied*, 580 N.E.2d 115 (Ill. 1991)).

87. *See infra* notes 96-114 and accompanying text (discussing cases that hold prenuptial agreements ineffective to waive spousal benefits).

In *In re Estate of Hopkins*,[88] a plan participant and his prospective spouse signed a prenuptial agreement stating that each party would retain his or her own separate property and have no rights in the other's estate upon death.[89] Prior to entering the prenuptial agreement, the participant designated his daughter from a previous marriage as the beneficiary of his pension plan.[90] After the participant died, his widow contended that she, and not the named beneficiary, should receive the participant's pension.[91] The court held that the prenuptial agreement waived the widow's rights under the REA to receive the participant's pension.[92] Relying on *Fox Valley & Vincinity Construction Workers Fund v. Brown*,[93] an earlier Seventh Circuit decision, the *Hopkins* court reasoned that although the participant and his wife failed to comply strictly with the REA's waiver requirements, they could still waive spousal rights to pension benefits.[94] The court reasoned that the Hopkins' prenuptial agreement indicated their clear intent to waive pension benefits.[95]

Unlike the *Hopkins* court, most courts find that waiver of spousal rights to pension benefits requires strict compliance with the REA's statutory language. In *Hurwitz v. Sher*,[96] the Second

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88. 574 N.E.2d 230 (Ill. App. Ct. 1991), *app. denied*, 580 N.E.2d 115 (Ill. 1991).

89. *Id.* at 232.

90. *Id.* Five years before entering into the prenuptial agreement, the deceased plan participant provided that if his daughter, the named beneficiary, was still a minor at the time of his death, the benefits were to be paid to his sister as trustee for his daughter. *Id.*

91. Thomas Hopkins' spouse, Nancy Hopkins, relied primarily on the REA, which was enacted after they signed the prenuptial agreement but before Thomas died. *Id.* at 232, 234. Nancy argued that the enactment of the REA divested Thomas' daughter of her status as the beneficiary of his pension plan benefits. *Id.* at 233. Moreover, Nancy argued that the prenuptial agreement did not waive her automatic right to receive her husband's pension benefits because that right arose only after she had entered the prenuptial agreement. *Id.* Essentially, Nancy argued that she could not waive a right of which she was not aware.

92. *Hopkins*, 574 N.E.2d at 234. The court discredited Nancy's arguments and focused instead on the "clear intent" of the parties as gleaned from the prenuptial agreement. *Id.* The court emphasized the agreement's comprehensive, prospective language to conclude that Nancy waived her claim to future acquired rights. *Id.*

93. 897 F.2d 275 (7th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 820 (1990). The *Fox Valley* court permitted a distribution of pension funds upon divorce to the alternate payee in the divorce decree, despite the failure of the decree to satisfy the requirements of a qualified domestic relations order. *Id.* at 280. *See supra* note 82 and accompanying text for a discussion of qualified domestic orders.

94. *Hopkins*, 574 N.E.2d at 235.

95. *Id.* at 237.

96. 982 F.2d 778 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 2345 (1993).

Circuit specifically rejected the *Hopkins* court's holding and analysis as contrary to the plain language of the REA.[97] The plan participant in *Hurwitz* entered a prenuptial agreement with his prospective spouse similar to the agreement in *Hopkins*.[98] The participant died nine months after his marriage.[99] The *Hurwitz* court held that the prenuptial agreement was not a waiver of pension benefits because it did not comply with waiver requirements under the REA.[100] The *Hurwitz* court required strict adherence to waiver requirements but noted, however, that Congress probably did not contemplate prenuptial waiver of pension benefits when it enacted the REA.[101] Reasoning that it

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97. *Hurwitz*, 982 F.2d at 783.

98. *Id.* at 779.

99. *Id.* The deceased participant, David Hurwitz, was an attorney and businessman. Before marrying Sher, he had been married twice. In 1988, he had his second wife waive benefits under the plan and he designated his son from his first marriage, Peter, as the beneficiary. Before marrying Sher in 1990, David had her sign an agreement waiving her right to claim any of his property after his death. *Id.*

The *Hurwitz* court criticized the *Hopkins* court for improperly applying *Fox Valley*. The *Hurwitz* court reasoned that:

> *Fox Valley* addressed the question of whether a divorced spouse who was designated as a beneficiary prior to divorce may still receive death benefits despite a waiver provision in a divorce settlement. A divorced spouse, unlike a current spouse, is not protected by the explicit terms of the statute. The Seventh Circuit held, therefore, that a divorced spouse may waive benefits without following the explicit requirements of the statute. The *Hopkins* court erred by applying the same logic to current spouses.

Id. (citations omitted).

100. *Id.* at 781. In *Hurwitz*, the court reserved judgment on whether the agreement would fail if its only defect was that at the time of its execution the parties were not married so that the "spouse" waiving benefits, was not yet legally a spouse, thereby failing to meet the waiver requirements. *Id.* at 781 n.3.

The *Hurwitz* court also found that the *Hopkins* court erroneously failed to give weight to a Treasury Regulation stating that prenuptial agreements are not effective as waivers to spousal benefits. *Id.* at 781.

The regulation, although nonbinding, is intended to provide guidance for interpretation of ERISA because the IRS is one of the agencies responsible for administering ERISA. The regulation interprets parallel provisions in the internal revenue code to ERISA § 205, 29 U.S.C. 1055 (1988). The regulation provides: "Q-28: Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of section 401(a)(11) and 417? A-28: No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within applicable election period." Treas. Reg. § 1.401 (a)-20 (1988).

101. "[I]t is likely that the Congressional sponsors did not anticipate the situation at issue here, in which two older, wealthy individuals relied on an antenuptial agreement to protect their children's inheritances." *Hurwitz*, 778 F.2d at 781.

could not "by fiat" disfranchise newlywed widows in order to benefit the children of previous marriages,[102] the *Hurwitz* court ignored the participant's desire to have benefits paid to his son.[103]

Other courts refuse to enforce prenuptial agreements because the parties were not spouses when they entered the agreements. In *Zinn v. Donaldson Co.*,[104] the widow of a deceased plan participant challenged a prenuptial agreement similar to the one in the *Hurwitz* case.[105] The *Zinn* court concluded that the agreement did not waive spousal benefits because the participant and his prospective spouse were not married at the time they signed the agreement.[106] Under the *Zinn* court's analysis, the participant's fiance was not a "spouse" when she signed the agreement and was therefore not capable of waiving her benefits.[107]

If courts follow the strict statutory construction used in *Hurwitz*[108] and *Zinn*,[109] they will invalidate every agreement entered into prior to marriage that purports to waive spousal rights to pension benefits, regardless of the parties' intent. Proper statutory analysis of ERISA requires the inequitable results reached by the *Zinn* and *Hurwitz* courts.[110] According to the traditional rules of statutory construction, courts must strictly construe the waiver requirements.[111] The plain meaning rule of

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102. *Id.* at 781.

103. The *Hurwitz* court rejected Peter's argument that it should force Sher to comply with the unambiguous terms of the agreement because of David's ambiguous intentions. The court felt it would be inappropriate to "plumb the decedent's ambiguous intentions when the statutory requirements are so clear." *Id.* at 783.

104. 799 F. Supp. 69 (D. Minn. 1992).

105. *Id.* at 70-71. Donald Zinn, the plan participant, divorced his first wife, Alice, and married Audrey Petri. Prior to marrying her, Donald had Audrey sign a waive to claims on his property. *Id.*

106. *Id.* at 73.

107. *Id.*

108. 782 F.2d at 781 (requiring strict compliance with the REA's waiver rules).

109. 799 F. Supp. at 73 (barring use of a prenuptial agreement to waive pension benefits because the parties were not spouses).

110. *See supra* notes 106 and 107 and accompanying text. These courts' decisions are inequitable for two reasons. First, the courts refused to fulfill the deceased plan participant's intent. Second, the courts treated prenuptial and postnuptial agreements differently due to the language of the statute. These decisions require that the law differently treat substantively identical agreements executed minutes after rather than minutes before the marriage ceremony.

111. Because Congress chose for the relevant REA provisions to apply to a "spouse," Congress excluded all other people. A common rule of statutory construction provides: "[W]here a form of conduct, the manner of its per-

statutory construction dictates that the parties to a waiver be married to fulfill the statute's "spouse" requirement.[112] Following accepted statutory construction rules, most courts facing this issue side with the *Hurwitz* and *Zinn* courts and discredit the *Hopkins* decision.[113]

The *Hurwitz* court noted that fulfilling congressional intent will not necessarily fulfill the participant's intent.[114] This is especially true in cases involving second marriages. That courts cannot fulfill participants' clear intent without abandoning accepted legal principles demonstrates Congress' failure to adequately legislate in this area.[115]

Because the majority of courts require strict adherence to waiver requirements, couples using premarital agreements often attempt new ways to waive benefits by agreement before marriage. Recently, in *Callahan v. Hutsell, Callahan & Buchino*,[116] a participant and his future spouse adjusted their prenuptial agreement to comply with waiver requirements.[117] The agreement in *Callahan* contained a provision requiring the participant's spouse to execute all necessary documents to waive her spousal

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formance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." SINGER, *supra* note 58 at § 47.23 (1992).

112. Spouse is defined as: "a man or woman joined in wedlock: married person." WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 2208 (1986).

113. *See, e.g.*, Howard v. Branham & Baker Coal Co., No. 90-00115, 1992 WL 15457 (6th Cir. July 6, 1992) (rendering ineffective deceased plan participant's prenuptial agreement stipulating that the parties' assets would not be affected by the marriage). *Hurwitz*, 778 F.2d at 781.

114. Congress intended to protect American workers, their spouses, and their retirement incomes by requiring mandatory spousal and survivor benefits for qualified plans. For a discussion of congressional intent in the enactment of ERISA and REA, see *supra* notes 60-65 and accompanying text. However, these requirements can frustrate individuals' attempts to plan for retirement on their own. The statutes restrain those families that make alternate plans for retirement income security, who often fail to successfully circumvent statutory defaults.

115. *See, e.g.*, Nellis v. Boeing Co., No. 91-1011-K, 1992 WL 122773, at *4 (D. Kan. May 8, 1992) ("The court is not unmindful that the application of these laws and regulations may work a result which is contrary to the decedent's intent.").

116. Nos. 92-5796, 92-5797, 92-5862, 1993 U.S. App. LEXIS 34005 (6th Cir. Dec. 20, 1993).

117. Although there is no indication in the prenuptial agreement that they were trying to avoid waiver requirements, the parties to the agreement in *Callahan* were apparently cognizant of the necessity to contract around the requirements. The participant's attorney submitted an affidavit swearing that he had been instructed to include the provisions necessary to effectuate a waiver. *Id.* at *6-*7.

benefits once the couple became legally married.[118] However, after the participant's death, the court awarded the benefits to the spouse because the couple failed to meet the waiver requirements of the plan itself.[119] The court did not address the wife's status as a "spouse" at the time she executed the prenuptial agreement. The court suggested, however, that a strict reading of the "spouse" requirement might be inconsistent with other decisions of the Sixth Circuit.[120] The court refrained from effectuating the participant's intent through a loose reading of the waiver requirements because the parties had failed to fulfill other requirements of their agreement.[121]

The *Callahan* court remanded the case so that the lower court could determine if the participant's spouse had breached her prenuptial agreement by failing to execute properly the necessary plan documents to effectuate a waiver.[122] If, on remand, the

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118. Paragraph 15 of the antenuptial agreement said that:

> Nancye consented, effective upon marriage, to Ed's election to waive a qualified joint and survivor annuity form of benefit in his ERISA plans. Nancye agreed, in this paragraph, that Ed might designate any beneficiary he desired; acknowledged that she would not be entitled to a death benefit under the plans; agreed to execute all further documents requested by Ed to evidence the consents and waivers contained in the agreement; and "specifically agreed to execute the attached forms as to Ed's interest in the Hutsell, Callahan & Buchino, P.S.C. plan and Ed's Individual Retirement Account as soon as possible after marrying Ed.

Id. at *7.

119. *Id.* at *15.

120. *Callahan*, 1993 U.S. App. Lexis 34005 at *17. In its analysis the court referred to the Sixth Circuit decision in United States v. Honaker, 5 F.3d 160 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1226 (1994). The *Honaker* decision involved the interpretation of a criminal statute. *Honaker* held that in order to determine the meaning of a particular statute, courts look "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Honaker*, 5 F.3d at 161 (quoting Crandon v. United States, 494 U.S. 152, 158 (1990). By referring to *Honaker*, the *Callahan* court implicitly rejected a strict interpretation of "spouse" as an inaccurate reading of the REA and as contrary to congressional intent.

121. The court appeared ready to enforce the agreement when it stated: "The participant in the plan[] was Ed, after all, and it was he whom Congress intended should be 'master of his own ERISA Plan.'" *Callahan*, 1993 U.S. App. LEXIS 34005, at *21 (quoting McMillan v. Parrot, 913 F.2d 310, 312 (6th Cir. 1990)).

The dissent urged the court to use its equitable powers and enforce the agreement as a waiver to benefits because of the clear intent of the parties to do so. *Callahan*, 1993 U.S. App. LEXIS 34005, at *24 (Gilmore, J., dissenting) ("It appears clear to me that the express provisions of the antenuptial agreement foreclose any consideration of Nancye's benefiting beyond the terms of that agreement.").

122. *Callahan*, 1993 U.S. App. Lexis 34005 at *22.

Callahan court decides that couples are permitted to circumvent the specific requirements of REA, control over pension distribution will pass from Congress to plan participants and then spouses.[123] Attempts to circumvent waiver requirements, like the attempt in the *Callahan* case, indicate that ERISA does not satisfy the needs of pensioners and their spouses. To maintain as much uniform, federal control as possible while addressing modern demands, Congress should amend ERISA.

III. Problems with Existing Legislation

Congress could easily avoid the problems caused by pension participants' attempts to defeat ERISA's preemption requirements in the prenuptial agreement area by amending ERISA to allow prenuptial waivers. The Federal Government should respect the states' traditional control of domestic matters and existing state regulation of premarital agreements. Furthermore, the existing paternalistic federal regulation of such matters has complicated financial planning for the modern family.[124] Therefore, just as Congress excepted state regulation of divorce from ERISA preemption, so too should Congress except state regulation of premarital agreements from ERISA preemption.[125]

To comply with the existing legislation, many prospective spouses use innovative prenuptial agreements to circumvent the

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123. *See supra* note 3 and accompanying text (discussing the congressional desire for national uniformity in the field of pension regulation).

124. The ERISA waiver requirements are paternalistic because they replace individual control of financial planning with federal control. Congress achieved uniform federal control at the expense of simple, individual choice on personal financial matters. "Paternalism presumes that people are unable to understand their own best interest and require the protection of a benevolent state. . . . Congress clearly supposes that people are unable to make wise savings decisions for themselves." Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. Chi. L. Rev. 1275, 1276, 1283 (1991) (criticizing the paternalistic federal regulation under ERISA and the Social Security Act because the statutes are not in accord with economic theory).

125. *See supra* notes 80-85 and accompanying text (discussing the creation of the qualified domestic relations order exception to the preemption clause).

Similarly, several other federal pension plans have been amended following inequitable court decisions. For example, the decision in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), which denied division of a Railroad Retirement Act pension pursuant to a state divorce decree, prompted amendment to the spousal benefit provisions of the Railroad Retirement Act. *See* 45 U.S.C. § 231a(c)(4) (1988). The benefits now mirror the Social Security Act provisions providing benefits for certain spouses. *See* Soc. Sec. Act §§ 201 (b)(1), 292(c)(1), 216 (d), 42 U.S.C. §§ 402(b) (1), 402(c)(1), 416(d) (1988). *See also*, McCarty v. McCarty, 453 U.S. 210 (1981) (denying application of state community property law to divide a military pension, prompted the Former Spouses

requirements for a waiver.[126] Creative attorneys are consulted to draft effective prenuptial agreements, and practitioners' journals run numerous advice articles for dealing with this complicated issue.[127] These articles suggest several ways to meet clients' needs.[128] First, a postmarriage ratification of the premarital agreement can breathe life into an agreement that was not valid at the time the parties signed it because they were not "spouses."[129] Second, practitioners suggest adding a clause in the premarital agreement requiring the parties to execute the necessary documents to designate a beneficiary other than the participant's spouse.[130] Third, in the event one party fails to execute such documents, the payee spouse can agree to pay the benefits over to the intended beneficiary when the payee spouse receives them.[131] Finally, couples contemplating marriage may want to cohabitate instead of legally marrying.[132] These attempts to manipulate distribution prior to marriage appear effective, but actually have hidden defects.

Forcing plan participants to evade ERISA legislation and attempt their own distribution of pension benefits can have

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Protection Act). *See* 10 U.S.C. § 1408 (1988) (permitting state community property law application). For additional discussion, see generally LANGBEIN, PENSIONS, *supra* note 60.

126. *See, e.g.*, Callahan v. Hutsell, Callahan & Buchino, Nos. 92-5796, 92-5797, 92-5862, 1993 U.S. App. LEXIS 34005, at *3 (6th Cir. Dec. 10, 1993) (reviewing a prenuptial agreement that required a prospective spouse to sign a waiver "as soon as possible" after the wedding).

127. *See supra* notes 113-23 and accompanying text (discussing cases involving attempts to circumvent waiver requirements). *See also* Louise E. Graham, *Kentucky Law Survey, Domestic Relations*, 73 KY. L.J. 379 (1984) (examining the pitfalls that practicing attorneys face after the entry of federal legislation into the field of domestic relations); Kathleen B. Vetrano, *Spousal Waiver of Pension Premaritally and Upon Divorce*, FAIRSHARE, Sept. 1993, at 10 (reviewing recent decisions regarding domestic agreements and ERISA legislation); Jacques T. Schlenger et al., *Current Tax Developments: Antenuptial Agreement Didn't Waive Surviving Spouse's Right to Retirement Plan Benefit*, 20 EST. PLAN. 304 (1993) (summarizing *Hurwitz v. Sher* and advising practitioners on the decision); Troyan, *supra* note 22 (alerting the public to the REA's pitfalls).

128. *See, e.g.*, Lynn Wintriss, *Waiver of REA Rights in Premarital Agreements*, J. PROB. & PROP. May/June 1993 at 16 (discussing the ineffectiveness of conventional premarital agreements for waiver of benefits and suggesting drafting techniques for effective waivers).

129. *Id.* at 18.

130. *Id.* at 19.

131. *Id.*

132. ERISA does not require an unmarried participant to obtain a waiver. ERISA § 205(c)(2)(B), 29 U.S.C. § 1055(c)(2)(B) (1988). *See also* Michael D. Rose, *Pension Plans: Why Antenuptial Agreements Cannot Relinquish Survivor Benefits*, 43 FLA. L. REV. 723, 735 (1991) (discussing prenuptial agreements' ineffectiveness for waiving pension benefits and suggesting alternative methods participants could use to achieve their purposes).

unintended consequences. None of these options has been tested in the courts,[133] and it is possible that a court, unhappy with individuals trying to evade federal law, might disallow these arrangements. Also, agreements requiring a spouse to pay over benefits received and the option of cohabitation can have adverse tax consequences. For example, the spouse accepting benefits as the plan beneficiary and then paying those benefits over to the desired beneficiary will be taxed on the amount of benefits received.[134] Remaining unmarried might also have adverse tax consequences for couples who cohabitate to affect a desired pension distribution. Furthermore, in some states cohabitation may be regarded as common law marriage, thereby frustrating the attempt to avoid automatic spousal benefits.[135] Finally, the Internal Revenue Service may disqualify the plan from favorable tax treatment for attempting to evade Internal Revenue Code provisions.

Sound social policy also dictates amending ERISA to allow prenuptial waivers. First, if participants are forced to use alternate ways to distribute pension benefits, only those with good legal advice will be able to distribute their benefits as desired. Truly equitable pension legislation should provide the same options for *all* plan participants. Second, paternalistic pension legislation assumes that women and all spouses are not capable of acting in their own best interest.[136] This assumption, which Congress uses to justify regulation, is contrary to the accepted economic theory that people make economic decisions rationally and in their own best interest.[137] While the selected paternalistic approach to pension legislation has helped achieve the goal of gender equity, it has created other problems for its intended beneficiaries.

Instead of forcing participants to contract around the REA waiver requirements, Congress should amend the statute.[138] An

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133. For example, in *Callahan* the court remanded so the trial court could determine whether the spouse should be bound by her agreement to execute all necessary waiver documents once she married the plan participant. *Callahan*, 1993 U.S. App. LEXIS 34005, at *22. *See supra* note 121 and accompanying text (discussing the *Callahan* court's decision to remand).

134. Wintriss, *supra* note 128, at 18. *See also* Lucas v. Earl, 281 U.S. 111 (1930) (holding that income is taxed to the individual who earned it).

135. Rose, *supra* note 132, at 736.

136. Weiss, *supra* note 124, at 1276 (discussing Congress' paternalistic approach to pension policy).

137. *Id.* (noting that economists presume that rational individuals act in their own best interests).

138. To make this change, congressional amendment is preferable to court manipulation of the statutory language, because congressional action gives broad social policies proper weight and consideration. Congress, not the courts,

amendment would give couples the freedom to plan their financial futures. Leaving regulation of prenuptial agreements to the states would not endanger plan participant's spouses because state laws adequately regulate premarital agreements.[139] Accordingly, Congress should leave regulation of such matters to the states by excepting them from ERISA preemption.

IV. Proposal to Amend ERISA

In order to respect state regulation of prenuptial agreements and to permit these agreements to effectively distribute pension benefits, two amendments to ERISA are required. First, Congress must except state laws regarding these agreements from ERISA preemption.[140] Second, Congress must amend the requirements for the waiver of joint and survivor annuities to allow for premarital distribution of benefits.[141] Altering the language of the waiver requirements will allow courts both to construe properly the statute and reach an equitable result.[142]

First, Congress should amend section 514 (b) as follows:

> *(8) subsection (a) shall not apply to state laws regulating prenuptial agreements regarding the division of marital property.*

This change will codify the traditional state control of these matters. Because these agreements will need to conform to the relevant state laws, there will be a loss of uniformity in laws that relate to pensions. However, plan participants will correspondingly gain the freedom to contract prenuptially for financial planning. Allowing for easier financial planning will help fulfill another of Congress' goals: respecting marriage as an "economic partnership."[143]

Second, Congress should amend the requirements for the waiver of joint and survivor annuity payments. Section 205(c)(2) should be rewritten as follows:

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should identify exceptions to statutory language. *See* Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990) (deciding to approve an equitable exception to ERISA's assignment and alienation provisions).

139. *See supra* notes 48-61 and accompanying text (discussing state regulation of domestic relation matters).

140. *See supra* part I.B (discussing ERISA preemption).

141. *See supra* notes 74-79 (reviewing ERISA waiver requirements).

142. The Internal Revenue Code and corresponding Treasury Regulations will need similar changes. *See* 26 U.S.C. § 417(a) (1988) (relating to waivers of spousal benefits).

143. *See supra* note 60 and accompanying text (explaining congressional recognition of marriage as an economic partnership).

> Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect —
>
> (A) unless the spouse of the participant *or the prospective spouse, in the case of a premarital agreement*, consents in writing to such election, (i) such election designates a beneficiary *or in the event that a beneficiary is not named in the consent document, the beneficiary designated in the plan documents will control* and (ii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

The italicized language corrects the potential problems of couples trying to waive their pension benefits premaritally. The amendment modifies the requirement that a "spouse" actually waive the benefits by allowing for a prospective spouse to waive benefits in the case of a premarital agreement. This modification allows courts to properly construe the statutory language and still fulfill the participant's intent. The other modification provides a default provision for those premarital agreements that fail to designate a beneficiary. Instead of voiding an agreement for its lack of a designated beneficiary, the statute fulfills the participant's intent by requiring benefit payment to the beneficiary noted in the plan documents. These changes in the requirements for waiver will cure the technical defects that many premarital agreements suffer under the present statutory scheme.

Fulfilling Congress' primary goal of ensuring the retirement income security of American workers and their families is best achieved with an amendment to ERISA. Congressional provisions that mandate pension savings do not always coincide with the retirement savings choices of American families. These proposed amendments preserve the congressionally mandated joint and survivor annuity benefits as default provisions, insuring that all wives of pensioners are cared for in retirement. However, the additional language permitting prenuptial waiver for those agreements that satisfy state law, provides flexibility in financial planning and broadens the class of people benefitted by pension regulation to include dependents and families. These modifications are not burdensome to the plan administrators and can assist in fulfilling a participant's intent.[144]

VI. CONCLUSION

Just as the REA's provisions allowing for pension benefits to be distributed pursuant to a qualified domestic relations order

144. The legislative history of the REA indicates that Congress was reluctant to create provisions that are overly burdensome to plan administrators. 130 CONG. REC. 13,325 (1984) (statement of Rep. Rostenkowski).

corrected the inequities resulting from the clash of ERISA with state postnuptial laws, so too can an amendment dealing with prenuptial matters solve inequities caused by ERISA. The qualified domestic relations order exception to ERISA's preemption and assignment provisions can serve as a model for amending the statute to deal with prenuptial matters. Although the amendment would prevent uniform federal regulation, the corresponding gain for women and families would help fulfill the intent of the REA. Because states already have statutes that only allow enforcement of fair agreements, federal pension legislation is unnecessary to protect plan participants and their spouses. Allowing women and their spouses to contract premaritally regarding distribution of plan benefits provides security on which competent couples, as economic partners, can rely.

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