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THE RIGHT TO PENSION BENEFITS UNDER ERISA WHEN A NONEMPLOYEE SPOUSE PREDECEASES THE EMPLOYEE SPOUSE

Stacy Lynn Anderson

Abstract: Under the Employee Retirement Income Security Act, retirement benefits cannot be assigned or alienated. In 1984, Congress enacted the Retirement Equity Act (REA) which allowed retirement benefits to be divided between former spouses upon divorce, under a qualified domestic relations order (QDRO). It is unclear whether the restriction on alienation of benefits extended to a transfer of the interests of a nonemployee spouse who predeceases the employee spouse, and if so, whether such a disposition is within the QDRO exception. In a two-to-one decision in Ablamis v. Roper, the Ninth Circuit held that the exception did not extend to such testamentary bequests. Ablamis, however, is contrary to the equitable principles of REA. This Comment critically examines the inequities which Ablamis' interpretation of the QDRO exception creates for nonemployee spouses, and urges Congress to amend ERISA to allow state law to determine whether a nonemployee spouse has an interest in the employee spouse's qualified pension plan that can be disposed of as an asset of the nonemployee spouse's estate.

In 1974, in response to the failure of private pension plans to deliver benefits to retirees,1 Congress enacted the Employee Retirement Income Security Act (ERISA) to regulate the private pension system.2 Under ERISA's spendthrift provision, pension benefits could not be "assigned or alienated,"3 in order to protect a stream of income for employees and their dependents.4 Due to the general wording of the spendthrift provision, however, it was unclear whether the provision's anti-alienation requirements preempted state laws that allowed the division of future pension benefits subject to divorce or separation.5

5. Ablamis v. Roper, 937 F.2d 1450, 1462 (9th Cir. 1991). Section 514(a) of ERISA preempts all state laws that relate to employee benefit plans covered by Title I of ERISA. 88 Stat. 897 (1974).
Shortly after ERISA's enactment, it became clear that the statute did not adequately protect the interests of women.\(^6\) Many women found that upon divorce, separation, or the death of their spouses, they had no right to share in their husbands' retirement benefits.\(^7\) In the years following the enactment of ERISA, courts generally responded to this dilemma by determining that the spendthrift provision did not apply in cases involving domestic relations.\(^8\) Congress settled the issue when it passed the Retirement Equity Act (REA) in 1984.\(^9\) REA amended ERISA to allow an employee's pension benefits to be divided between the spouses upon the dissolution of their marriage under a qualified domestic relations order (QDRO).\(^10\)

Although REA relieved the harsh effects of the spendthrift provision in divorce or separation situations, it failed to address the consequences that the clause would have in a case where the dissolution was the result of the nonemployee spouse's death, rather than divorce.\(^11\) In *Employees Savings Plan of Mobil Oil Corp. v. Geer*,\(^12\) the United States District Court for the Southern District of New York held that ERISA did not preempt community property laws affecting the distribution of pension interests upon the employee spouse's death.\(^13\) The court did not consider, however, whether community property laws would prevail if the nonemployee spouse were to die before the employee spouse.\(^14\) The Ninth Circuit Court of Appeals considered the issue in *Ablamis v. Roper*,\(^15\) and held that the spendthrift provision prevented a nonemployee spouse who predeceased the employee spouse from disposing of any interest in the qualified pension plan.\(^16\) The court also held that an attempt by the deceased nonemployee

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\(^11\) Ablamis v. Roper, 937 F.2d 1450, 1465 (9th Cir. 1991).

\(^12\) 535 F. Supp. 1052 (S.D.N.Y. 1982).

\(^13\) Id. at 1055.

\(^14\) Id.

\(^15\) 937 F.2d 1450 (9th Cir. 1991).

\(^16\) Id. at 1460; see also Op. Dept' of Labor, 90-46 A, 90-47 A (1990) available in LEXIS, Labor Library, ERISA File (two advisory opinions in which the Department of Labor concludes that Congress did not contemplate the application of the QDRO exception to a court order authorizing a nonemployee spouse's estate to claim one-half of an employee spouse's pension benefits).
spouse to dispose of the interest by will, through a probate court order, was not within the QDRO exception. 17

For retirement plans covered by ERISA, the Ablamis decision causes severe inequities between nonemployee spouses whose marriages end in divorce and those whose marriages end because of death. 18 These inequities are contrary to the congressional intent behind the passage of REA. 19 Therefore, Congress should amend ERISA to eliminate the inequities created by Ablamis.

I. THE DEVELOPMENT OF THE CONFLICT BETWEEN ERISA’S SPENDTHRIFT PROVISION AND THE EQUITABLE PRINCIPLES OF REA

Prior to the enactment of ERISA, employees were frequently left without pension benefits due to mismanagement, corruption and underfunding of private pension plans. 20 By enacting ERISA and REA, Congress intended to assure greater financial security for pensioners and their dependents. 21 In providing this security, however, there is one area that Congress has completely overlooked: that of a nonemployee spouse who predeceases an employee spouse.

A. Congressional Action to Remedy the Plight of Retired Workers Left with No Financial Security

1. The Need to Regulate the Private Pension System

Private pension plans existed in the United States as early as 1875, when railroad companies began offering the plans as incentives for older workers to retire. 22 Over the next seventy years, there was a gradual, but not significant, growth in the use of private retirement plans. 23 Immediately following World War II, however, private pensions experienced a period of rapid growth due to an aging workforce, concern about retirement security in the aftermath of the Great Depression, and a change in focus by unions to deferred, rather then current, compensation. 24 By the early 1970s, private pension plans covered an estimated 30 million workers, and controlled over $130

17. Ablamis, 937 F.2d at 1455.
18. See infra text accompanying notes 127–33.
22. Watson, supra note 6, at 440.
23. Id. at 441.
24. Id. at 433, 442.
billion in assets. These plans were largely unregulated, and in the late 1960s it became apparent that effective legislation was needed to police the system. When Congress held hearings on the need for private pension reform, it learned that despite widespread coverage, very few workers ever received any benefits.

In an effort to provide greater security to workers, Congress passed ERISA in 1974. ERISA established a comprehensive system of regulations to control the management of private pension plans. The main provisions of the Act established minimum funding and vesting requirements, plan termination insurance, fiduciary standards, and a voluntary program of portability to preserve benefits upon change of employment. In addition to these provisions, ERISA contained a spendthrift provision that was intended to protect workers and their families by prohibiting the alienation or assignment of pension benefits. Despite the extensive regulations, however, problems with ERISA soon appeared.

2. REA Was Enacted to Alleviate the Disparities Between Male and Female Workers, and to Provide Financial Security to Nonemployee Spouses

In operation it became apparent that ERISA discriminated against women. Congress drafted ERISA’s provisions with male workers in mind. As a result, the statute did not recognize the contributions of women to the economy and their unique work patterns. Statistics indicated that ERISA was deficient in several respects. First, working women often were not covered by pension plans at all, or were eligible

26. Watson, supra note 6, at 432–33.
27. *Private Welfare Hearings*, supra note 1, at 5 (statement of Sen. Williams). Congressional staff analyzed 87 private pension plans covering 9.8 million workers. The study found that 6.9 million workers participating in 51 of the plans had 11 years or more of service; of these, only 4 percent received benefits. Under the remaining 36 plans, 2.9 million workers had 10 years or less of service; only 8 percent of them received benefits. *Id.*
32. Watson, supra note 6, at 435.
33. *Id.*
34. *Retirement Equity Hearings*, supra note 7, at 14 (statement of Rep. Ferraro); *see also id.* at 3–4 (statement of Sen. Durenberger) ("The disparity that exists between men and women should shock the conscience of a nation founded upon the principle of equal opportunity . . . . Society has encouraged women to work, to raise and care for their families, but has refused to recognize the invaluable efforts of the homemaker as 'work.'").
only for minimal benefit payments. Second, ERISA's age requirements excluded the majority of the female workforce. Third, ERISA failed to recognize that women were more likely than men to work part-time, and consequently, were less likely to meet ERISA's standards for one "year" of service. Fourth, ERISA did not address the needs of working mothers. Fifth, no pension plan existed for homemakers. Finally, women were not protected in the case of divorce, because it was unclear whether the spendthrift provision prevented pension benefits from being divided between spouses at divorce. In 1984, Congress addressed these issues by enacting the Retirement Equity Act. REA provided for a lower participation age, automatic survivor benefits, and the division of pension benefits upon divorce. Each of these mechanisms helped to eliminate ERISA's disparate treatment of men and women.

3. The Answer to the Divorce Dilemma: The QDRO

Congress included in REA an express exception to the spendthrift provision for divorce or separation decrees in confirmation of court rulings that ERISA's spendthrift provision did not preempt the division of pension rights upon the dissolution of marriage. Under the QDRO exception, the spendthrift provision does not apply to the right

35. Id. at 43 (statement of Ms. Betty McElderry, Oklahoma State division president, American Association of University Women). Overall, only 21% of female workers were covered by pension plans compared to 49% of male workers. Id. at 11 (statement of Sen. Hawkins). Of the 21% of women who were covered, only 13% actually received any benefits. Id.

36. The highest proportion of working women was in the 20- to 24-year-old age range. Id. at 24 (statement of Ms. Janie Sowards, President, Oklahoma Federation of Business and Professional Women's Clubs). Yet coverage under ERISA was not required under the age of 25. Id.

37. Id.

38. Women were especially vulnerable to the lack of coverage by pensions since they were likely to stop their careers to have children. Id. (statement of Ms. Janie Sowards). Such a break in service often limited the pension credit earned or even caused a loss of all previously earned credits. Id.

39. Id. at 14 (statement of Rep. Ferraro).

40. Id. at 44 (statement of Ms. Betty McElderry); see also supra text accompanying notes 3–5.


43. Id. § 1055(b)(1)(C)(i) (requiring the consent of the surviving spouse in order to waive the automatic survivor's benefits).

44. Id. § 1056(b)(3)(A) (allowing pension benefits payable pursuant to a QDRO to be assigned and alienated).

45. Id. § 1056(d)(3).
to receive pension benefits pursuant to a “qualified domestic relations order.”

To constitute a QDRO, a domestic relations order must be in the form of a judgment, decree or order made pursuant to a state domestic relations law. The order must create or recognize the right of an alternate payee to a portion of the pension benefits, and relate to the provision of child support, alimony or marital property rights to a spouse, former spouse, child or other dependent.

Even though the QDRO exception clarified the law in the case of divorce or separation, the law’s scope was unclear. In requiring that a QDRO be made pursuant to state domestic relations law, Congress added the words “including a community property law.” This reference to community property did not indicate whether the QDRO exception extended to state community property law governing the disposition of community assets at death.

B. A Minority of Community Property States Terminates Nonemployee Spouses’ Pension Interests upon Their Deaths

If ERISA’s restriction on alienation applies to the testamentary disposition of nonemployee spouses, the provision will have the same effect as the “terminable interest rule,” which ends all property rights of a nonemployee spouse who predeceases the employee spouse. Under the terminable interest rule, the retirement plan interests traceable to contributions of community funds or to community labor constitute community property, but the interest of the nonparticipant spouse terminates upon the death of either spouse. An employee spouse who is the first to die is able to dispose of all the post-death benefits, not just his or her half interest in the community property. When nonemployee spouses die first, however, their testamentary power to leave their community property interest to a third party does not extend to the pension benefits. Under this doctrine, dissolution

46. Id. § 1056(d)(3)(A).
47. Id. § 1056(d)(3)(B)(ii).
48. Id. § 1056(d)(3)(B).
49. Id. § 1056(d)(3)(B)(ii)(II).
51. Id. In pension plans regulated by ERISA, however, the nonemployee spouse’s interest is not divested upon the death of the employee spouse. Rather, the nonparticipant spouse is entitled to an automatic survivor’s annuity. 29 U.S.C. § 1055(a) (1988).
52. Reppy, supra note 50, at 444.
of the community by divorce, rather than by death, does not terminate
the nonemployee spouse's interest.\textsuperscript{53}

Community property states do not agree with traditional property
states regarding the application of the terminable interest rule upon
the death of a nonemployee spouse.\textsuperscript{54} A minority of the community
property states that have considered the issue\textsuperscript{55} applies the terminable
interest rule to divest nonemployee spouses of their interests in pen-
sions earned by community labor.\textsuperscript{56} However, a majority of states has
declined to apply the terminable interest rule in the case of a private
pension where the nonemployee spouse predeceases the employee
spouse.\textsuperscript{57} By terminating the pension interests of a nonemployee
spouse who dies first, these states believe that the terminable interest
rule denies nonemployee spouses the right to use and enjoy their full
share of community property.\textsuperscript{58}

C. Judicial Interpretation of the Application of the Spendthrift
Provision in the Testamentary Context

At least two courts have attempted to define the scope of the spend-
thrift provision in the context of testamentary dispositions of pension
interests.\textsuperscript{59} In \textit{Employees Savings Plan of Mobil Oil Corp. v. Geer},\textsuperscript{60} a
United States district court held that ERISA does not preempt state
laws governing the disposition of pension interests upon the death of a
predeceasing employee spouse.\textsuperscript{61} In \textit{Ablamis v. Roper},\textsuperscript{62} however, the
Ninth Circuit Court of Appeals concluded that ERISA does preempt
state law that would otherwise allow a predeceasing nonemployee

\textsuperscript{53} Id.
\textsuperscript{54} See infra notes 55–57.
\textsuperscript{55} Idaho and Nevada have no law on the terminable interest rule. William Reppy, Jr.,
\textit{Update on the Terminable Interest Doctrine: Abolished in California; Adopted and Expanded in
\textsuperscript{56} See LA. CIV. CODE ANN. art. 890.1 (West Supp. 1991); WI. STAT. ANN. §§ 766.31(3),
766.62(5) (West 1981). The Arizona Supreme Court has applied a form of the rule to life
\textsuperscript{57} See CAL. CIV. CODE § 4800.8 (West Supp. 1992); Schweitzer v. Burch, 711 P.2d 889
(N.M. 1985); Allard v. Frech, 754 S.W.2d 111 (Tex. 1988), \textit{cert. denied}, 488 U.S. 1006 (1989);
Farver v. Dep't of Retirement Systems, 97 Wash. 2d 344, 644 P.2d 1149 (1982). Texas does,
however, apply the rule to statutorily-created pension plans. \textit{See} Lack v. Lack, 584 S.W.2d 896
\textsuperscript{58} Reppy, \textit{supra} note 55, at 9.
\textsuperscript{59} See \textit{Ablamis v. Roper}, 937 F.2d 1450 (9th Cir. 1991); \textit{Employees Sav. Plan of Mobil Oil
\textsuperscript{60} 535 F. Supp. 1052 (S.D.N.Y. 1982).
\textsuperscript{61} Id. at 1055.
\textsuperscript{62} 937 F.2d 1450 (9th Cir. 1991).
spouse to make a testamentary transfer of her interest in an employee spouse's pension. The conflict inherent in these two decisions illustrates the problems brought on by the general language of the spendthrift provision.

I. Employees Savings Plan of Mobil Oil Corporation v. Geer

In Geer, an employee spouse had designated beneficiaries to receive his pension benefits after his death. When the employee died, his wife claimed that she was entitled to half of the pension benefits as her share of a community property asset. The district court held that ERISA did not preempt community property laws to the extent that they affect the distribution of pension interests after the death of the employee spouse. The court based this decision on two factors. First, the Texas community property laws governing the distribution of pension benefits were not preempted by section 514 of ERISA. Second, the state law did not do "major damage" to a "clear and substantial" federal interest.

Section 514 of ERISA preempts any state laws that "relate to" an employee benefit plan. The Geer court determined that a community property law requiring distribution of community assets upon death did not "relate to" ERISA pension plans because the state law did not attempt to regulate pension plans. Although the state law had an impact on the pension plan, the court concluded that the impact was too remote to constitute a "relation to" ERISA.

In determining that Texas community property rights did not "relate to" ERISA, the Geer court also considered the Supreme Court's ruling in Hisquierdo v. Hisquierdo, that the subject of domestic relations was the province of the states, and should not be invaded

63. Id. at 1460.
64. Geer, 535 F. Supp. at 1053.
65. Id. The spouses entered into a common law marriage while domiciled in Texas, a community property state. Id. The community property system provides for shared ownership by husband and wife of all property that is earned by the labor of either spouse during the marriage (unless they agree to the contrary). WILLIAM A. REPPY, JR & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES, 1-1, 3-1 (3d ed. 1991). Thus, each spouse has a one-half ownership interest in any future benefits earned by the employee spouse's labor during marriage.
67. Id. at 1054.
68. Id. at 1055.
71. Id.
unless Congress "'positively required by direct enactment' that state law be pre-empted." In *Hisquierdo*, the Supreme Court held that in order for state family law to be pre-empted, there must be more than just a mere conflict of words between the federal statute and the state law. The state law must do "major damage" to "clear and substantial" federal interests before preemption will be found.

The *Geer* court determined that the state law did not meet the *Hisquierdo* standard for preemption. First, the court held that the state community property law would not do "major damage" to federal interests. The court found that the federal interest behind ERISA was to provide protection for employees against their employers, not to preserve benefits for any particular beneficiary. The court concluded, therefore, that distributions of assets under the state community property law did not damage that federal interest. Second, the court determined that even if there were a major federal interest at stake, it would not result in substantial damage to that interest because the application of community property law in the instant case would be so limited.

Although *Geer* is helpful in determining congressional intent regarding ERISA preemption in the testamentary context, the scope of the decision is limited because it was decided before the enactment of REA and the QDRO exception. Additionally, *Geer* only addressed preemption upon the death of the employee spouse, not the nonemployee spouse. The testamentary power of a nonemployee spouse was directly addressed, however, in *Ablamis v. Roper*, the only post-REA case which addresses the issue of ERISA's preemption when the nonemployee spouse dies first.

2. Ablamis v. Roper

In *Ablamis*, a nonemployee spouse died, leaving all of her property to two trusts for the benefit of her spouse and children, and her children from a former marriage. When the executrix of her estate claimed a community property interest in the employee spouse's

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73. *Id.* at 581 (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).
74. *Id.*
75. *Id.*
77. *Id.*
78. *Id.* at 1056.
79. *Id.*
80. 937 F.2d 1450 (9th Cir. 1991).
81. *Id.* at 1452. This bequest included her one-half interest in all community property. *Id.*
vested rights under two profit sharing plans, the trustee of the plans brought a declaratory relief action to stop the executrix.\textsuperscript{82}

The majority in the two-to-one decision held that ERISA's spendthrift provision preempted California community property law.\textsuperscript{83} Therefore, ERISA prohibits a transfer by a predeceasing nonemployee spouse of her interest in an employee spouse's pension benefits.\textsuperscript{84} The \textit{Ablamis} court found that the spendthrift provision prohibited retirement benefits from being assigned or alienated, and concluded that any exception to this provision must be expressly mandated by Congress.\textsuperscript{85} The court determined that the QDRO was such an exception.\textsuperscript{86} In order for Ms. Ablamis' testamentary bequest to be given effect, therefore, it had to fall within the QDRO exception. However, the court determined that the probate court order upholding the testamentary bequest was not a QDRO for two reasons. First, the order did not meet the statutory requirements of the QDRO exception, and second, the legislative history behind REA showed that Congress did not intend for the QDRO exception to include a probate order.\textsuperscript{87}

\textbf{a. The Probate Order Did Not Meet the Statutory Requirements for a QDRO}

The probate order did not qualify as a QDRO for several reasons. First, to constitute a QDRO, a domestic relations order must be made pursuant to a state domestic relations law.\textsuperscript{88} The \textit{Ablamis} court declared that the term “domestic relations law” could not be construed so as to include a probate order.\textsuperscript{89} Under the court's definition, “[d]omestic relations orders deal with household or family matters,” and are completely distinct from probate law, which establishes wills and settles decedents' estates.\textsuperscript{90} The court cited Congress' failure to include the term “probate order” as further evidence of its intention to exclude probate orders from the QDRO exception.\textsuperscript{91}

\textsuperscript{82} Id.
\textsuperscript{83} Id. at 1460. For the purposes of the opinion, the court assumed that California law authorized a predeceasing nonemployee spouse to make a testamentary transfer of her interest in the employee spouse's pension benefits. In a footnote, however, the court concluded that no California case allows such a bequest, and the California Supreme Court has not yet addressed the issue. \textit{Id.} at 1455 n.8.
\textsuperscript{84} Id. at 1460.
\textsuperscript{85} Id. at 1454.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 1455.
\textsuperscript{89} \textit{Ablamis}, 937 F.2d at 1456.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
Second, a QDRO recognizes the right of an alternate payee to receive a portion of the pension benefits. The term alternate payee is limited, however, to a spouse, former spouse, child or other dependent of the participant. The court held that Ms. Ablamis' estate did not constitute an alternate payee because the estate was not a spouse, former spouse, child or other dependent of Mr. Ablamis.

Third, a QDRO must relate to the provision of child support, alimony or marital property rights to a spouse, former spouse, child or other dependent. The court concluded that the probate order did not relate to the support of a spouse, former spouse, child or other dependent because as a deceased person, Ms. Ablamis was not a spouse or other dependent of the participant. In addition, the court found that Ms. Ablamis did not qualify as a former spouse because that term refers solely to divorced spouses, not deceased spouses. For the above reasons, the court held that the order was not a QDRO.

b. The Legislative History of REA Shows That the QDRO Exception Does Not Include a Testamentary Disposition by a Nonemployee Spouse

In addition to the statutory language of the QDRO exception, the legislative history of REA indicated that Congress did not intend for the QDRO exception to include probate orders. The Ablamis court focused on two factors. First, the court found that one of the primary purposes of the QDRO exception was to provide security for an employee's immediate family members in the case of divorce or separation. The court reasoned that Ms. Ablamis' bequest would not protect Mr. Ablamis, his immediate family or a former spouse. Instead, the court determined that the probate order would deprive Mr. Ablamis and his immediate family of pension benefits, and therefore, the bequest was contrary to the legislative purpose of REA. Second, the court found the bequest objectionable because it would

93. Id. § 1056(d)(3)(K).
94. Ablamis, 937 F.2d at 1456.
96. Ablamis, 937 F.2d at 1456.
97. Id.
98. Id. at 1455-56.
99. Id. at 1455.
100. Id. at 1456-57.
101. Id. at 1457.
102. Id.
take benefits away from the living members of the decedent's fam-
ily.\textsuperscript{103} The court declared that because pensions are designed to ben-
efit the living, Congress' fundamental purpose in enacting ERISA was
to provide security for both spouses during their lifetimes.\textsuperscript{104} According
to the majority, this purpose would be contravened if a deceased
spouse was allowed to take benefits away from a surviving spouse and
give them to a third person through the use of a testamentary
bequest.\textsuperscript{105} The \textit{Ablamis} court concluded, therefore, that the legisla-
tive history of REA shows that Congress did not intend for a probate
order to come within the QDRO exception.\textsuperscript{106}

c. \textit{Judge Fletcher's Dissent}

In a strong dissent, Judge Fletcher attacked the majority's QDRO
analysis as premature.\textsuperscript{107} In her opinion, the issue of whether the pro-
bate court order constitutes a QDRO did not need to be reached
unless there was a fundamental conflict between California commu-
nity property law and ERISA's spendthrift provision.\textsuperscript{108} Like the
\textit{Geer} court, Judge Fletcher argued that when state family-property law
is at issue, the Supreme Court requires ERISA's preemptive effect to
be construed narrowly.\textsuperscript{109} Judge Fletcher contended that the trustee
of the retirement plans had the burden of showing that the California
law which authorized a testamentary bequest of pension benefits
"would do 'major damage' to 'clear and substantial' federal inter-
ests."\textsuperscript{110} Judge Fletcher argued that the trustee should not prevail
because he failed to make such a showing.\textsuperscript{111}

\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} at 1455.
\textsuperscript{107} \textit{Id.} at 1462 (Fletcher, J., dissenting). Judge Fletcher also argued that California law
does, in fact, authorize a predeceased nonemployee spouse to make a testamentary bequest of a
portion of an employee spouse's pension benefits. According to Judge Fletcher, the lower court
relied on the terminable interest rule when it declared that such a bequest was not allowed under
California law. Judge Fletcher concluded that the terminable interest rule was abolished both by
the state legislature, with the addition of Civil Code Section 4800.8, and by judicial
pronouncement. \textit{Id.} at 1460–62.
\textsuperscript{108} \textit{Id.} at 1462.
\textsuperscript{109} \textit{Id.; see also supra} text accompanying notes 72–75.
\textsuperscript{110} \textit{Ablamis,} 937 F.2d at 1462.
\textsuperscript{111} \textit{Id.}
II. AMENDING ERISA TO PROMOTE FAIR TREATMENT OF NONEMPLOYEE SPOUSES

In light of the congressional purpose behind REA\(^{112}\) and the potential for grave inequities that exists with the outcome of *Ablamis*, the QDRO exception is unfair in its selective assistance for nonemployee spouses. To make the law fairer in its treatment of nonemployee spouses, Congress should amend ERISA so that it defers to state law to decide whether nonemployee spouses can make testamentary bequests of their interest in employee spouses' pensions.

A. The Legislative History of REA Supports Equity for All Nonemployee Spouses

Congress enacted REA in an effort to eliminate disparities between male and female workers and to protect nonemployee spouses.\(^{113}\) In recognizing that marriage is an economic partnership,\(^{114}\) Congress acknowledged that pensions are earned by both spouses in a marriage. Congress realized that nonemployee spouses make a substantial contribution to the marriage regardless of whether they work inside or outside the home.\(^{115}\) This contribution is no greater in the case of a divorced spouse than it is in the case of a married spouse. The *Ablamis* decision, however, is contrary to congressional intent in recognizing the contributions made by divorced nonemployee spouses, but refusing to acknowledge those made by married nonemployee spouses. Although Congress never explicitly discussed the issue, the existing legislative history supports the conclusion that Congress did intend to protect pension interests in the married nonemployee spouse's situation.

B. *Ablamis* Is Inequitable to Nonemployee Spouses

The *Ablamis* ruling is contrary to congressional intent because the decision is unfair to nonemployee spouses. First, *Ablamis* treats employee spouses and nonemployee spouses differently. According to *Ablamis*, it is unfair for a deceased nonemployee spouse to deprive a living employee spouse of support which is necessary for the employee's continued existence.\(^{116}\) On the other hand, it is acceptable for a deceased employee spouse to take such support away from a liv-

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112. *See supra* text accompanying notes 32–44.
113. *Id.*
115. *Id.*
ing nonemployee spouse. Second, *Ablamis* unjustly confiscates a non-
employee spouse’s pension interest, completely ignoring marital
property rights under community property law. Finally, *Ablamis*
treats nonemployee spouses with different marital statuses inconsist-
tently. *Ablamis* distorts congressional intent by recognizing the con-
tributions that divorced nonemployee spouses make to the marital
partnership, while disregarding the similar assistance that is given by
married nonemployee spouses. In light of the equitable purposes
behind REA, it is unlikely that Congress intended these inequalities.

1. *Ablamis* Treats Employee Spouses and Nonemployee Spouses
differently

*Ablamis* creates unequal treatment between nonemployee spouses
and employee spouses. Nonemployee spouses are deprived of their
testamentary power to dispose of community property while employee
spouses are freely allowed to devise their pension interests. There is
no logical basis for this unequal treatment.

A main governmental concern in pension regulation is to provide
for the subsistence of the employee and the spouse. The govern-
ment’s interest is not limited to the employee, however, simply because
the nonemployee spouse’s need for subsistence ends at death. If the
government had only a limited interest, then it would likewise prohibit
 testamentary disposition of pension benefits by an employee spouse
since its interest in the employee spouse’s subsistence would also end
upon death. However, ERISA allows predeceasing employee spouses
to bequeath their one-half share of the pension benefits. Therefore,
*Ablamis*’ unequal treatment of nonemployee spouses and employee
spouses is counter to the goals of ERISA.

One court has argued that the unequal treatment of employee
spouses and nonemployee spouses is explained by the fact that Con-
gress did not intend to benefit the heirs or legatees of nonemployee
spouses. However, employee salaries were not designed to confer
such a benefit either, yet predeceasing nonemployee spouses have the
right to bequeath their one-half interest in any property that repre-

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117. The disparity that *Ablamis* creates between divorced and married women is so great that
some commentators have even suggested it will encourage terminally ill people to get divorces.
Victoria Slind-Flor, *9th Circuit Limits Pension Bequest: Will Ruling Encourage Divorces?*, NAT’L
119. *Id.*
sents the savings from the salary of an employee spouse.\footnote{122} Salaries and pensions are both forms of compensation earned by community labor. Any difference between nonemployee spouses' interest in earnings and the right to pension benefits is a matter of form, not of substance. Therefore, \textit{Ablamis}' unequal treatment is wrong.

2. \textbf{Ablamis Unjustly Enriches the Employee Spouse}

Another unfair aspect of the \textit{Ablamis} decision is that it unjustly enriches employee spouses. ERISA's spendthrift provision presupposes that employee spouses, or their designated beneficiaries, are the sole owners of the pension proceeds.\footnote{123} Nonemployee spouses, however, can justly claim one-half ownership of the proceeds because they "are the fruits of funds [which were] originally [the nonemployee spouses']."\footnote{124} In a community property system, nonemployee spouses are entitled to a one-half ownership interest of future benefits earned by employee spouses during marriage.\footnote{125} Under \textit{Ablamis}, however, ownership of the one-half interest dissolves upon the nonemployee spouse's death. Therefore, because nonemployee spouses are not allowed to make testamentary bequests of their half ownership interest in pension benefits, employee spouses are unjustly enriched. The decision effectively confiscates the half interest of nonemployee spouses and diverts it to employee spouses, giving the employees complete control over a substantial community asset.\footnote{126} Thus, the protections afforded nonemployee spouses by the community property system are destroyed by \textit{Ablamis}. The \textit{Ablamis} decision leaves nonemployee spouses without remedies, unable to even get reimbursement for the community contributions made to the plan. Had the nonemployee spouses known that they would be deprived of their ownership rights, they may not have consented to any employee contribution of community funds to the pension. Nonemployee spouses should at least be able to recover their share of any community contributions made to the pension plan. Therefore, \textit{Ablamis} was wrong to confiscate nonemployee spouses' property.

\footnotesize{\begin{itemize}
\item \footnote{122} Reppy, \textit{supra} note 50, at 471.
\item \footnote{123} Wissner v. Wissner, 338 U.S. 655, 662 (1950) (Minton, J., dissenting).
\item \footnote{124} \textit{Id.}
\item \footnote{125} \textit{See supra} note 65.
\item \footnote{126} Increasingly, pension benefits are often the largest part of an estate. Slind-Flor, \textit{supra} note 117, at 9.
\end{itemize}}
3. Ablamis Treats Nonemployee Spouses Differently Depending on Their Marital Status

Ablamis results in the disparate treatment of nonemployee spouses who are divorced and those who are still married, because it recognizes a divorced nonemployee spouse's contribution to a marriage partnership, but not the contribution of a married nonemployee spouse. This case can be illustrated with a simple example: Amy is married and community property funds are used to contribute to her husband's retirement plan. Amy dies, and her will attempts to make a bequest of her interest in her husband's pension plan. Under ERISA, as interpreted by Ablamis, state law is preempted, and the bequest is invalid. This is true even though Amy had an ownership interest in one-half of the funds contributed to the plan. Because the law is preempted, Amy's estate cannot even recover the amount of Amy's contribution to the fund.

Beth is also married, but her husband uses his own separate property to make contributions to his pension plan. Beth and her husband get divorced, and the divorce decree, a QDRO, divides the interest in the husband's retirement plan. Beth dies leaving a will that devises her interest in the pension plan. In this situation, ERISA does not preempt state law, and the bequest is upheld, despite the fact that the pension was her husband's separate property prior to the divorce.127

The only difference between Amy and Beth was that Beth got divorced. Simply because she got a divorce, Beth was granted the same share of the pension benefits that she would have been entitled to if "she had remained married and her husband predeceased her."128 Beth enjoyed "full right, title and interest" in her pension benefits, and she was "free to bequeath any funds remaining at the time of her death to the beneficiary of her choice."129

This example illustrates the inequity that the Ablamis decision creates among nonemployee spouses. In the example, the divorced nonemployee spouse is treated more favorably than the married nonemployee spouse. However, divorced nonemployee spouses are no more deserving of rights to pension benefits than married nonemployee spouses. The divorcees do not make any greater contribution

127. Even though the pension was her husband's separate property, Beth would have had an interest in the pension if he had predeceased her while they were still married, because ERISA provides for an automatic surviving spouse's annuity that can only be opted out of with the consent of both spouses. 29 U.S.C. § 1055(e)(2) (1988).
129. Id.
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to the marriage. Therefore, the system established by Ablamis is unfair and contrary to congressional intent.

Some courts contend that the disparity between divorced nonemployee spouses and married nonemployee spouses is justified because the two classes of nonemployee spouses are distinguishable on the theory that community property claims are less worthy because they are not based on need. This view is not persuasive, however, because under the QDRO exception, divorced nonemployee spouses are not required to have a claim based on need. The division of benefits may simply relate to the former spouses’ marital property rights, which is the same basis for the claim of predeceasing nonemployee spouses. If the award of pension benefits in a divorce decree is due to a property settlement, and not child support or alimony, those funds are not in payment for the support of the family. The divorced spouses can do whatever they want with those funds, including bequeath them to anyone they choose, not simply the children. Therefore, pension benefits divided in divorce decrees might not be used to support the needs of the family. While pre-QDRO courts may have been basing divorce awards of pension benefits on the support need of ex-spouses, that basis is no longer required. Thus, it is unjust to distinguish between divorced nonemployee spouses and married nonemployee spouses whose claims may both be based on marital property rights.

C. Given that Ablamis Is Contrary to the Legislative Intent Behind REA, Congress Must Act to End the Inequalities Created by the Decision

I. Congress Should Resolve the Problem by Amending ERISA

Given that Ablamis is contrary to the equitable purposes of REA, Congress should amend ERISA, thereby eliminating Ablamis’ unjust results. An amendment to ERISA would allow Congress to assess the full extent of the inequities created by Ablamis and address the problem in a way that best recognizes the rights of all spouses. A congressional amendment would avoid the piecemeal approach that will occur

130. See Hisquierdo v. Hisquierdo, 439 U.S. 572, 587 (1979) (“It is . . . logical to conclude that Congress . . . thought that a family's need for support could justify garnishment, . . . but that community property claims, which are not based on need, could not do so.”), superseded by 45 U.S.C. § 231m(b)(2); American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (“[A] garnishment order used to satisfy court ordered family support payments is impliedly excepted from preempted state law . . . .”).


132. Id.

133. Ablamis, 937 F.2d at 1457.
if another circuit court addresses the issue of a nonemployee spouse's testamentary power and rejects the *Ablamis* holding.

Congress has two alternatives that would eliminate the inequities that *Ablamis* creates for nonemployee spouses. Congress could either defer to state law on whether nonemployee spouses should have testamentary power over pension interests or enact an amendment which expressly grants such power.

**a. Congress Could Defer to State Law Regarding the Status of a Testamentary Disposition by a Predeceasing Nonemployee Spouse**

Congress could resolve the problems created by *Ablamis* by amending ERISA to allow states to decide whether the pension interest of a predeceasing nonemployee spouse terminates upon the death of that spouse. This alternative offers the advantage of an entire system of law on this issue that is already in place. The community property states have all previously addressed the terminable interest doctrine and decided whether it applies upon the death of the nonemployee spouse. 134 Additionally, there are precedents for congressional deference to state law governing property rights in domestic relations cases. The QDRO exception specifically defers to state law to determine the division of property upon divorce or separation. 135

Deferring to state law does present some disadvantages, however. Courts will have to go through the complex procedure of tracing the source of pension funds to determine the status of a nonemployee spouse's pension interest. The pension benefits may or may not be community assets, depending on the type of retirement plan, and whether the employee's contributions came from community, or separate funds. 136 In addition, tracing funds becomes more complicated when families migrate between common law states and community property states. 137 These disadvantages are not insurmountable, however. Although the process is complex, tracing pension contributions is not a major obstacle. Courts already must trace pension funds upon divorce. Further, many pension plans are exempt from ERISA provi-

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134. *See supra* text accompanying notes 55–57.


136. *See Reppy & Samuel, supra* note 65, at 6-11 n.1. The type of plan determines what method of apportionment will be used to assess the community property portion of the benefits. *Id.* With some types of pension plans, the community share will depend on the amount of community funds contributed. *Id.*

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sions, including its anti-alienation clause. Under these plans, state law is not preempted. Therefore, in states where the terminable interest rule has been abolished, courts must trace the contributions to these pension plans.

If Congress does decide to defer to state law, the ERISA amendment must define the scope of nonemployee spouses' testamentary power. One reason the Ablamis result was so unjust is that Ms. Ablamis was bequeathing her pension interest to her children from a previous marriage and to her spouse. She was trying to help her family. Congress' purpose in enacting ERISA was to provide for employee spouses and their families, not some third party. Therefore, the scope of nonemployee spouses' testamentary power should be limited. For the same reasons, employee spouses' testamentary power should also be limited. Congress should limit the scope of both spouses' testamentary power by providing that they may only designate a relative as beneficiary. This limitation comports with the goals of ERISA and avoids the inequalities of Ablamis.

b. Congress Could Specifically Grant Nonemployee Spouses the Right to Make Testamentary Dispositions of Their Interests in Employee Spouses' Pension Benefits

Another alternative to the problems created by Ablamis is for Congress to amend ERISA to specifically define the interest that a nonemployee spouse has in the retirement plan and to allow the nonemployee spouse to designate a beneficiary to receive that defined interest when the nonemployee spouse dies.

With this proposed amendment, Congress will have to consider whether nonemployee spouses are entitled to a pension interest that is less than or equal to that of employee spouses. If Congress decides that the share should be less than that of employee spouses, then it will have to determine what percentage of the pension should be allocated to nonemployee spouses. Congress will also need to decide whether nonemployee spouses should have their share limited to the recovery of their portion of those funds contributed, or if the share should include a portion of the pension fund's growth. Further, Congress should address whether nonemployee spouses should have unlimited testamentary power, as with a divorced nonemployee spouse, or limited power to make a testamentary bequest only when the beneficiary

139. Ablamis v. Roper, 937 F.2d 1450, 1452 (9th Cir. 1991).
140. Id. at 1456-57.
is a relative. These are just a few of the issues that Congress must address in amending ERISA.

Congress also must consider the effect that these proposed amendments will have on non-community property states. Amendment of ERISA or the QDRO exception will override state law and give non-employee spouses pension interests which the states have previously refused to recognize. In most common law states, predeceasing non-employee spouses have no testamentary power over assets earned by employee spouses during marriage because nonemployee spouses have no ownership interest in employee spouses’ pensions. Therefore, many of the arguments which support the recognition of testamentary power in nonemployee spouses from community property states are not applicable to nonemployee spouses from common law states.

Congress may need to exclude common law states from an ERISA amendment which grants nonemployee spouses testamentary disposition rights because there is not as much basis for preempting common law property rights. Such an exception will add to the complexity of any amendment. It will be especially difficult for Congress to draft an amendment considering that the community property states do not agree on the division of pension interests between employee spouses and nonemployee spouses.

D. Congressional Deference to State Law Is the Best Solution for Solving the Predeceasing Nonemployee Spouse Issue

The best solution to the problems caused by Ablamis is to allow state law to decide the issue of a testamentary disposition by a nonemployee spouse. The success of the QDRO exception proves that deference to state law can effectively address the needs of nonemployee spouses. Deference to state law raises the issues of pension fund tracing and the scope of a nonemployee spouse’s testamentary power, but these problems are manageable. By deferring to state law, Congress will avoid the need for an extremely complex amendment which would override separate property laws in common law states. Deference to state law is the most equitable alternative because it fully recognizes the ownership rights of spouses under state law. Employee spouses in common law states and community property states which

141. Reppy & Samuel, supra note 65, at 1-9 n.4.
142. See supra text accompanying notes 123–26.
143. See generally Reppy & Samuel, supra note 65, at 6-6 to 6-13.
144. See supra text accompanying notes 10–11.
145. See supra text accompanying notes 136–40.
146. See supra text accompanying notes 141–43.
recognize the terminable interest rule will not be divested of their property, and nonemployee spouses in community property states which have abolished the terminable interest rule will not be divested of their half interest in the pension funds. Therefore, deference to state law best addresses the inequities of Ablamis.

III. CONCLUSION

Congress enacted ERISA and REA to protect employee pension benefits and create equity for nonemployee spouses and female workers. The Ablamis rule, however, produces an inequitable result. In effect, the decision deprives nonemployee spouses of their ownership rights in pension plans and differentiates between spousal interests on the basis of marital status. A better approach to balancing the financial safeguards of the spendthrift provision and the equitable premise behind REA is to defer to state law on the issue of a nonemployee spouse's testamentary power. This approach provides for equality in the treatment of all nonemployee spouses, and it gives full recognition to the interests of all parties having ownership rights to the pension proceeds. Congressional deference to state law also avoids the necessity of an extremely complex statute that would have to mesh community property ownership rights with those of common law states. Congress has the opportunity to end the inequality and finally give nonemployee spouses the full recognition that they deserve by amending ERISA to correct the inequalities of Ablamis.