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ABLAMIS V. ROPER: PREEMPTION OF THE NONEMPLOYEE SPOUSE'S COMMUNITY PROPERTY RIGHTS IN ERISA PENSION PLANS

The Supremacy Clause of the United States Constitution gives Congress the power to establish areas of exclusive federal concern and to preempt a state's authority to legislate in these areas.¹ To find that Congress has explicitly or implicitly exercised the power of preemption, courts must find that Congress had a clear intent to nullify state law.² On July 3, 1991, the United States Court of Appeals for the Ninth Circuit provided an answer to the question whether Congress, in enacting the Employee Retirement Income Security Act (ERISA),³ intended to preempt state community property law governing a predeceasing nonemployee spouse's interest in an employee spouse's pension plan.⁴

In *Ablamis v. Roper*,⁵ the Ninth Circuit Court of Appeals decided that ERISA did preempt California community property law that arguably would allow a predeceasing spouse to devise her interest in her living husband's pension plans.⁶ ERISA grants a divorced nonemployee spouse the right to receive and dispose of benefits awarded in a divorce proceeding but does

1. U.S. Const. art. VI, cl. 2; see *Chicago & N. W. Transp. Co. v. Kalo Brick & Title Co.*, 450 U.S. 311, 317 (1981) (holding that when Congress chooses to legislate pursuant to its constitutional powers, court must find preemption of conflicting state legislation); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (stating that when Congress intends to occupy field of legislation, such as commerce, Congress intends to preempt all state laws regulating that field); *id.* at 525-26 (stating that congressional enactments which do not exclude all state legislation in field may still override conflicting state laws); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 17 (1824) (stating that Supremacy Clause invalidates any state law that is contrary to laws of Congress).

2. See *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990) (discussing congressional intent to provide ERISA with broad preemption power).

3. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1453 (1988) [hereinafter ERISA].

4. See *id.* § 1144(a) (stating text of preemption provision). Section 1144(a) states 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." *Id.*

5. 937 F.2d 1450 (9th Cir. 1991).

6. See *Ablamis v. Roper*, 937 F.2d 1450, 1460 (9th Cir. 1991) (holding that ERISA preempts nonemployee spouse's possible property right in employee spouse's pension under California community property law). The nonemployee spouse and the employee spouse will be referred to with female and male pronouns, respectively, throughout the Note to prevent confusion between the case at issue and the general discussion. This is not meant in any way to perpetuate the stereotype that the woman is the nonemployee spouse in a marriage. The statutes and case law are gender neutral on their face and as applied, despite the fact Congress designed the Employee Retirement Income Security Act of 1974 and the Retirement Equity Act of 1984 primarily to protect women. *Id.* at 1453-54 (stating that Congress designed Retirement Equity Act to protect financial interests of women); *infra* notes 65-66 and accompanying text (same).

not explicitly recognize state-created property rights in a married nonemployee spouse.⁷ The court's ruling that ERISA preempts state law creating rights in such a spouse, therefore, provides a strong incentive for a nonemployee spouse in a community property state to obtain a divorce before death as the only method of retaining transmissible property rights in the employee spouse's pension.⁸ This result is contrary to congressional intent and contrary to state and federal law.

I. THE PURPOSE AND PROVISIONS OF ERISA

Private pension plans have emerged as an important method by which workers can provide for financial security in their retirement.⁹ However, in the past the worker was at the mercy of unscrupulous plan administrators or unfortuitous investments.¹⁰ To protect workers and their retirement savings, Congress enacted ERISA in 1974 to regulate public and private employee benefit plans.¹¹ Before the enactment of ERISA, lack of centralized

7. See *infra* note 18 (stating exception to ERISA's anti-alienation provision that allows division of benefits only if division is pursuant to divorce proceedings); *infra* note 14 (stating text of ERISA's anti-alienation provision).

8. See *Ablamis*, 937 F.2d at 1468 (Fletcher, J., dissenting) (arguing that majority's holding will produce incentive to divorce that Congress could not have intended). The dissent in *Ablamis* claimed that Congress' policy could not have been to give dying spouses an incentive to divorce to protect property rights. *Id.*; see also *infra* notes 177-95 and accompanying text (stating that *Ablamis* result is counter to goals of ERISA and of California property law).

9. See H.R. REP. NO. 533, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4640 (observing that growth in pension plans parallels transformation of American society from agrarian dominated to urbanized wage earner economy); Dian T. Arruebarrena, *Applying Louisiana's Community Property Principle to Pensions*, 33 LOY. L. REV. 241, 242 (1987) (stating that growth in pension plans is due to favorable tax treatment, union bargaining, employment incentives, and concern for employee well-being during old age); Edmond Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F. L. REV. 635, 635 (1975) (stating that pension and home are two major assets of most families); Ellen J. Vargyas, *The Retirement Equity Act: Enhanced Rights for Survivors and Dependents of Pension Recipients*, 19 CLEARINGHOUSE REV., May 1985, at 30, 30 (stating that society historically has denied older women access to private pensions despite pension's major role in theory of economically secure old age).

10. See H.R. REP. NO. 533, *supra* note 9, reprinted in 1974 U.S.C.C.A.N. at 4641 (citing malfeasance and improper activities by pension administrators, trustees, and fiduciaries as impetus for increasing federal employee benefits legislation in 1950s and 1960s). Congress passed ERISA in 1974 because the previous legislation had not sufficiently accomplished congressional goals of guaranteeing pension benefits for workers and their dependents. *Id.*

11. See ERISA, *supra* note 3, § 1001(a) (stating that Congress' purpose in enacting ERISA was providing uniform scheme of pension regulation). As stated in § 1001, Congress passed ERISA pursuant to the Commerce Clause of the Constitution. *Id.*; U.S. CONST. art. 1, § 8. Because benefit plans had grown into a multi-billion dollar industry, Congress felt that a nationwide and uniform scheme of pension regulation was essential to protect the worker and to prevent adverse effects on interstate commerce. ERISA, *supra* note 3, § 1001(a). Congress, therefore, designed ERISA to be a minimum standard for administration of plans to safeguard benefits for employees and their dependents as well as to aid the free flow of commerce. *Id.* Section 1001(b) provides:

[i]t is hereby declared to be the policy of this chapter to protect interstate commerce

regulation resulted in financially unstable plans and in lack of uniformity among state laws governing pensions.¹² Congress found that this instability and lack of uniformity deprived employees of anticipated benefits.¹³ As one way to preserve retirement benefits for employees and their dependents, Congress included a provision in ERISA that forbids most transfers of the right to receive benefits.¹⁴ Federal and state courts, however, were split on the question whether this bar to the transfer of plan benefits to third parties applied to the apportionment of benefits to a nonemployee spouse pursuant to a divorce settlement.¹⁵

Congress enacted the Retirement Equity Act of 1984 (REA) as an amendment to ERISA, in part, as a response to this judicial uncertainty.¹⁶ The REA was Congress' reaction to its perception that under the original ERISA provisions, some courts' refusal to allow partition of benefits pursuant to a divorce settlement resulted in unfair treatment of nonemployee

and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Id. § 1001(b).

12. See H.R. REP. No. 533, *supra* note 9, reprinted in 1974 U.S.C.C.A.N. at 4643 (stating that federal law was not adequate to protect employees' pension rights). In enacting ERISA, Congress' concern was that without adequate federal standards, the employee was forced to resort to the equitable remedies of the common-law of trusts or some states' codifications of such principles. *Id.* Congress proposed ERISA to establish minimum standards of vesting, funding, and fiduciary duties and to establish a compulsory benefit insurance program to protect pension benefits. *Id.* at 4643-46.

13. See *id.* at 4643 (claiming that, before ERISA, pension participants lost benefits not because of violation of federal law but because of unfavorable contractual vesting and funding requirements); *supra* note 4 (stating that in § 1001(b) Congress' primary goals for ERISA as solving problems of lack of uniformity and instability).

14. See ERISA, *supra* note 3, § 1056(d)(1) (specifying anti-alienation provision). Section 1056(d)(1) states that "(e)ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *Id.*

15. See *Francis v. United Technologies Corp.*, 458 F. Supp. 84, 86 (N.D. Cal. 1978) (stating that congressional intent clearly was to prevent voluntary or involuntary assignment or alienation of benefits including in divorce context). But see *Stone v. Stone*, 632 F.2d 740, 742 (9th Cir. 1980) (holding that ERISA does not preempt court order requiring pension plan to pay community property share of benefits to former spouse), *cert. denied*, 453 U.S. 922 (1981); *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745, 748 (9th Cir. 1980) (holding that Supreme Court's dismissal of *In re Marriage of Campa*, 444 U.S. 1028 (1980) for want of substantial federal question was decision on merits that ERISA did not prevent application of California property law), *cert. denied*, 453 U.S. 922 (1981); *In re Marriage of Campa*, 152 Cal. Rptr. 362, 368 (Ct. App. 1979) (stating that state interest of fair division between former spouses has no bearing on Congress' interest to assure genuine pension rights), *appeal dismissed*, 444 U.S. 1028 (1980).

16. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (amending ERISA §§ 1001-1453). The REA provisions are applicable to plan years beginning after December 31, 1984. *Id.*

spouses.¹⁷ Congress, therefore, specifically authorized a procedure for transfers of benefits in a few situations.¹⁸ Congress' goal, in part, was to recognize the contributions to the family unit made by nonemployed spouses and to provide a specific exception to the anti-alienation provision for alimony and child support payments.¹⁹ Prior to enactment of the REA, some courts had granted such transfers without express statutory authority.²⁰ Under REA's procedural requirements, the only acceptable method of transferring the right to receive benefits is a court order pursuant to a "qualified domestic relations order" (QDRO).²¹ The REA defines a QDRO as a court order made pursuant to a state domestic relations law, including state community property law.²² With the QDRO exception, Congress now specifically permits

17. See S. REP. No. 575, 98th Cong., 2d Sess. 18-19 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2564-65 (noting that state and federal courts were inconsistent on whether ERISA preempted state law allowing attachment of benefits to satisfy family support obligations); *id.* at 2547 (stating that goal of REA is to provide for greater equity for workers and their spouses).

18. See ERISA, *supra* note 3, § 1056(d)(3)(A) (stating exception to ERISA's anti-alienation provision). Section 1056(d)(3)(A) states that the anti-alienation provision "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 [the anti-alienation provision] shall not apply if the order is determined to be a qualified domestic relations-order." *Id.*; see *infra* note 21 (defining qualified domestic relations order). Congress added § 1056(d)(3)(A) section to make a specific exception to § 1056(d)(1). See *supra* note 14 (stating text of ERISA's anti-alienation provision § 1056(d)(1)).

19. See S. REP. No. 575, *supra* note 17, at 1, reprinted in 1984 U.S.C.C.A.N. at 2547 (stating congressional recognition of marriage as partnership and outlining exceptions to preemption provision). The Senate Committee reported that Congress proposed ERISA in recognition of 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." *Id.* The Committee also specified the exceptions to ERISA's general preemption provision as being state orders "relating to child support, alimony payments, or marital property rights pursuant to a state domestic relations law." *Id.*

20. See *supra* note 15 (listing cases that are examples of pre-REA judicial refusal to apply ERISA's anti-alienation provision to division of pension benefits pursuant to divorce settlement).

21. See ERISA, *supra* note 3, § 1056(d)(3)(B) (defining qualified domestic relations order). Section 1056(d)(3)(B) states that the term "qualified domestic relations order" means a domestic relations order which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and . . . relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and is made pursuant to a State domestic relations law (including a community property law).

Id.

22. *Id.*; see also S. REP. No. 575, *supra* note 17, at 20-21, reprinted in 1984 U.S.C.C.A.N. at 2566 (describing meaning of "qualified domestic relations order"). A QDRO creates or recognizes the existence of another person's right to receive benefits under a pension plan. *Id.* A court must make this order pursuant to a state law that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant. *Id.* ERISA treats an alternate payee as a beneficiary for all purposes under the plan. *Id.*

a court dissolving a marriage to partition pension benefits in the same manner as other marital assets.²³ Enactment of REA was not Congress' recognition of joint ownership, but, rather, Congress' adoption of equitable distribution concepts into the common-law framework of ERISA.²⁴

II. THE ORIGIN AND CURRENT STATUS OF COMMUNITY PROPERTY LAW²⁵

Congress based the pre-REA provisions of ERISA on the common-law system of property ownership followed by most states.²⁶ California based its property law, however, on the very different system of community property.²⁷ Community property principles are rooted in the Germanic and Visigothic law of early Europe.²⁸ This system gradually spread over the continent, and eventually the mainland Europeans brought it to colonies

23. See *supra* note 21 (stating text of § 1056(d)(3)(B) QDRO exception to ERISA's anti-alienation provision). Section 1056(d)(3)(B) allows transfer of the right to receive benefits in a divorce settlement if the transfer is made pursuant to state law. *Id.*

24. See S. REP. NO. 575, *supra* note 17, at 1, reprinted in 1984 U.S.C.C.A.N. at 2547 (stating Congress' recognition of marriage as economic partnership and contribution of nonemployee spouse to family). Congress passed the REA in an attempt to equitably compensate the nonemployee spouse because states' common law of property traditionally recognizes only the wage earner's rights in pension benefits. *Id.*

25. *Ablamis v. Roper*, 937 F.2d 1450, 1452 (9th Cir. 1991) (stating Ms. Ablamis died in 1988). The *Ablamis* court decided the case under California community property law in effect at the date of Ms. Ablamis' death. *But see infra* notes 116-17 and accompanying text (stating retroactive abolition of California's terminable interest rule). In 1986 the California legislature abolished the terminable interest rule, which had prevented the devise of the nonemployee spouse's interest in pension benefits. *Id.* A California court of appeals subsequently held that the abolition was retroactive. *Id.*

26. See *infra* note 32 and accompanying text (listing nine community property states). Considering that 41 of 50 states have common-law property systems, it is unsurprising that Congress designed ERISA to react to common-law mechanisms. *Id.* Additionally, many of the ERISA provisions change the common-law property system to include equitable distribution concepts. See ERISA, *supra* note 3, § 1055 (stating requirement of spousal annuity for nonemployee spouse); *id.* § 1056 (stating QDRO exception for division of benefits pursuant to dissolution of marriage).

27. See WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 84-85 (1971) (tracing origins of California property law). Spain established the community property system in its North American possessions. *Id.* at 55. When California entered the Union, the acting governor, General Riley, proclaimed that all laws in California not inconsistent with the laws and Constitution of the United States would be in force until changed by legitimate legislative enactments. *Id.* at 84. During the constitutional convention held in 1849, a strong debate ensued between those advocating the adoption of the common law of marital property and those advocating the continuance of the existing community property system. *Id.* at 85. The advocates of community property prevailed, but common-law concepts remained in the mind of legislators and judges. *Id.* After the convention, the California courts attempted to interpret and define community property through common-law principles. *Id.* at 87. This resulted in conflicting and confusing decisions that required legislative correction. *Id.* The present day courts consistently interpret community property free of interference from common-law principles. *Id.*

28. See GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 1-2 (1987) (outlining Visigothic origins of community property law); FUNIAK & VAUGHN, *supra* note 27, at 39-54 (describing historical development of Spanish property law).

established in the Western hemisphere.²⁹ When the Normans invaded England in 1066, however, they had not adopted a community property system but instead brought with them a feudal system that became the common law of property.³⁰ Although the common-law system evolved, the concept of title-based ownership remained basically unchanged. English settlers brought the common-law system to the North American colonies where, except as modified by statute, it remains the basis for the laws of most states.³¹ All states now have a common-law base for their property law except for Wisconsin, which adopted the Uniform Marital Property Act in 1984; Louisiana, which adopted the French Civil Law version of Spanish property law; and seven western states, including California, which adopted variations of the Spanish community property law.³²

The main objective of the modern community property system is equal treatment of husband and wife with regard to property rights.³³ A community property system regards marriage as an entity in which husband and wife are members, equally contributing their labor to the entity and possessing an equal right to the total wealth of the entity upon divorce or death.³⁴

29. See BLUMBERG, *supra* note 28, at 2 (describing Spanish and French colonization of North and South America as source of American community property law).

30. *Id.* See FUNIAK & VAUGHN, *supra* note 27, at 4 (discussing origin of common-law principles).

31. See BLUMBERG, *supra* note 28, at 2 (stating that English common law is source of most states' property law).

32. *Id.* The seven western community property states are Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington. *Id.* The state of California adopted community property principles by codifying the Spanish property law into its constitution in 1850. *Id.* at 96; see FUNIAK & VAUGHN, *supra* note 27, at 55-91 (describing origin of community property in individual community property states). See generally M.R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1 (1936) (discussing development of community property law in Europe and in western United States); Walter Loewy, *The Spanish Community of Acquests and Gains and Its Adoption and Modification by the State of California*, 1 CAL. L. REV. 32 (1912) (discussing origins of Spanish property law and its adoption by some states); Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20 (1967) (discussing origin and basic policies of community property law).

33. See FUNIAK & VAUGHN, *supra* note 27, at 2 (stating essential characteristic of community property is equal ownership and rights in marital property). Community property law is characterized by: (1) the transmissibility of each spouse's interest to his or her heirs and devisees and (2) the joint ownership of assets, benefit of gain, and liability for loss. *Id.* These characteristics guarantee equal ownership and enjoyment of all property acquired during the marriage. *Id.*

34. Compare CAL. PROB. CODE § 100 (West 1991) (stating that "[u]pon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent") and FUNIAK & VAUGHN, *supra* note 27, at 2-3 (stating that community property concept of marriage is of equal ownership) with 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 441 (Thomas M. Cooley ed., 3d ed. 1884) (stating that nineteenth century English concept of marriage is of ownership of woman by man). The equality of the California statute is in sharp contrast to the common-law notion of Blackstone where "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is

Under the common law, ownership rights turn on the existence of title.³⁵ Under a community property system, however, the method and timing of acquisition determines ownership of the property.³⁶ California law presumes that all assets and income acquired during marriage, other than property acquired by gift or inheritance, are community property from the moment of acquisition, regardless of the division or nature of the labor that produced them.³⁷ Unlike the common law, community property treats the earnings of each spouse as belonging to both spouses in equal shares.³⁸ Under California law, spouses may defeat this presumption only by one member's waiver of property rights that is in writing, signed, and fully enforceable as a contract.³⁹ The presumption of equal ownership is not merely evidentiary or procedural. Rather, equal ownership is a rule of substantive property law that serves as the base for California's system of property ownership.⁴⁰ Courts, therefore, should not interpret community property law as providing a windfall benefit for a nonemployee spouse or creating a claim by the

incorporated and consolidated into that of the husband." *Id.* at 441. Clearly, the common law of property has evolved since Blackstone's time to embrace the traditional community property notion of recognizing the wife's existence as an independent person. FUNIAK & VAUGHN, *supra* note 27, at 5. However, the full recognition of the wife as an equal partner still separates community property law from common law. *Id.*; see also WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* 10 (1982) (stating that in most common-law states surviving spouse has statutory share of decedent's estate, but nonemployee spouse has no testamentary power over assets earned by other spouse).

35. See FUNIAK & VAUGHN, *supra* note 27, at 2 (discussing differing nature of property ownership in community property and common-law systems). In the common-law system, ownership is dependent on title. *Id.* In the community property system, title will not defeat joint ownership if the spouses acquired the property during the marriage by a method other than gift to one spouse. *Id.*

36. See *id.* (describing differences between community property and common-law property systems). The fundamental difference between community property and common-law property concepts is best illustrated by examining the distribution of assets when the marital community dissolves. Upon divorce or the death of one party, a common-law jurisdiction grants the marital assets to the parties in an equitable settlement where one person gains new rights and the other loses the rights to specific assets. *Id.* In a community property jurisdiction, the same event results in a distribution to each person of the share of the assets that he or she already owns. *Id.* There is no transfer of title to assets because the marital relationship provided joint ownership of all assets. *Id.*

37. See BLUMBERG, *supra* note 28, at 6 (stating that community property states presume property to be held in common ownership unless parties demonstrate otherwise).

38. See FUNIAK & VAUGHN, *supra* note 27, at 2 (stating that all wealth acquired by husband and wife in community property states is commonly owned property). See also *In re Marriage of Brown*, 126 Cal. Rptr. 633, 641-42 (1976) (stating that joint effort is basis of community assets, irrespective of individual contribution, and all community assets must be divided upon divorce).

39. See CAL. PROB. CODE § 142 (West 1991) (stating that spouse is required to sign waiver to renounce community property interest).

40. See CAL. PROB. CODE § 100 (West 1991) (stating that one-half of community property belongs to each spouse); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 593 (1979) (Stewart, J., dissenting) (stating importance of state property law and reluctance of courts to find preemption by federal statute). The *Hisquierdo* dissent reaffirmed the court's recognition of the substantive nature of California community property law. *Id.* at 593.

nonemployee spouse to property owned by the employee spouse, but, rather, as recognizing a substantive property right in both members of the marriage community.⁴¹

III. HISTORY OF PREEMPTION

Despite the substantive and important nature of California's community property law, Congress can preempt this, or any other state law, by direct legislative action.⁴² Congress and the courts, however, traditionally have deferred to state property law because of the strong state interest in determining the nature of property rights.⁴³ A state and its political subdivisions have authority to assess taxes, to grant or remove title, and to determine zoning for the land within their borders.⁴⁴ These important powers allow the state great control over land use. While the Constitution and the specific mandates of Congress can limit a state's authority over property rights, Congress should respect state sovereignty and exercise its right of preemption sparingly.⁴⁵

41. *Hisquierdo*, 439 U.S. at 592-93; see also REPPY & SAMUEL, *supra* note 34, at 404-05 (commenting that *Hisquierdo* Court suggests wife is greedy, but court allows husband to use state law to take one-half of wife's acquisitions while shielding his pension behind federal requirement that pension is separate property).

42. See U.S. CONST. art. VI, cl. 2 (stating that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land. . ."); *Free v. Bland*, 369 U.S. 663, 668 (1962) (stating that federal law must prevail if it conflicts with state law). The Supremacy Clause requires that the Constitution and the laws passed under it be supreme over any conflicting state law. *Id.* However, Congress should exercise this power of preemption carefully, especially when the state law at issue represents a traditional state concern, because courts will interpret preemption provision without considering state interests. See James A. Riddle, Comment, *Preemption of Reconcilable State Regulation: Federal Benefit Schemes v. State Marital Property Law*, 34 HASTINGS L.J. 685, 685 (1983) (asserting that traditional preemption doctrine operates without reference to state interests at stake or policy considerations behind either federal or state legislation).

43. See *Hisquierdo*, 493 U.S. at 592-94 (Stewart, J., dissenting) (arguing that courts should give great deference to state property law because of strong state interest); *Stone v. Stone*, 450 F. Supp. 919, 924 (N.D. Cal. 1978) (stating that courts follow presumption that Congress did not intend to interfere with state property law because Congress generally avoids drafting statutes that conflict with any state policy), *aff'd*, 632 F.2d 740 (1980), *cert. denied*, 453 U.S. 922 (1981).

44. See RICHARD D. BINGHAM ET AL., *THE POLITICS OF RAISING STATE AND LOCAL REVENUE* 18 (1978) (stating that states are free to tax except when restrained by United States Constitution or state constitutions); 1 JOHN LEWIS, *LAW OF EMINENT DOMAIN* § 1 (3rd ed. 1909) (stating that eminent domain is power of sovereign to take property for public use upon making just compensation); 1 E.C. YOKLEY, *ZONING LAW AND PRACTICE* § 3-2 (4th ed. 1978) (stating that state or municipality's power to zone arises from inherent police power of state to meet demands of increase in population and complex commercial relations of citizens).

45. See *Hisquierdo v. Hisquierdo*, 493 U.S. 572, 581 (1979) (stating that family law belongs to states and that courts are hesitant to find federal question or that state law is preempted by federal statute); *In re Burrus*, 136 U.S. 586, 593-94 (1890) (stating that subject of domestic relations belongs to states and not to federal government). The *Hisquierdo* Court stated that on the occasions when the Supreme Court has found it necessary to prevent injury

Because of the strong state interest in regulating property rights, a court should hesitate to interpret a federal statute such as ERISA in a way that needlessly sweeps away substantive property rights created by the states.⁴⁶ Historically, however, courts have interpreted ERISA's preemption provision broadly by holding that it preempts large areas of state law.⁴⁷ ERISA may be the most sweeping federal preemption statute ever enacted by Congress.⁴⁸ ERISA broadly preempts state law because Congress' primary concern in enacting ERISA was to require all pension plans to operate under a uniform legal scheme and to eliminate the threat of conflicting state regulation.⁴⁹ Because Congress intended to place regulation of pension plans beyond the reach of state laws, courts have honored that intent by preventing states from entering this area of exclusive federal concern.⁵⁰

to a federal right by a state community property law, the conflict, as in *Hisquierdo*, concerned federal and state rules for the allocation of a federal entitlement. *Hisquierdo*, 493 U.S. at 582; see also *McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981) (holding that military pension is not subject to division because federal pension program preempts community property law); *Wissner v. Wissner*, 338 U.S. 655, 659 (1950) (same).

46. See *FUNIAK & VAUGHN*, *supra* note 27, at 8 (arguing that community property law should be respected as substantive state interest). Funiak & Vaughn state:

The community property system is as legitimately the law of some of our states as the common law principles of marital property are in others. If ours is a government of laws and not of men, as has so often been said, the community property laws of certain states are entitled to as much respect and consideration as any other laws and are as much entitled to the protection of the United States Constitution as are any other laws. They have been the law of some of our states for well over a hundred years and if they bring any advantages to those living under them, such advantages are legitimately theirs by virtue of law and they are entitled to be protected in them.

Id.

47. See *Ingersol-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990) (stating that Congress' use of expansive language indicates intention that courts construe ERISA preemption provision broadly); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983) (stating comprehensive nature of ERISA); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 552-53 (6th Cir. 1987) (stating Supreme Court's consistently broad interpretation of ERISA preemption); *supra* note 14 (stating text of ERISA preemption provision § 1056(d)(1)).

48. See David A. Engel, *ERISA: To Preempt or not to Preempt, That is a Question!*, XXII *TORT INS. L.J.* 431, 431 (1987) (citing *Halland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1985) for proposition that Congress designed broad preemption provision to satisfy primary objective of ERISA and achieve complete uniformity of pension plan laws by eliminating state laws regulating pensions), *aff'd sub nom.* *Brooks v. Burlington Indus., Inc.* 477 U.S. 903 (1986).

49. See *FMC Corp. v. Holliday*, 111 S. Ct. 403, 408 (1990) (finding that Congress designed ERISA preemption provision to ensure that only one law governs pension plans). The *Holliday* Court found that, in the past, the Supreme Court had applied the preemption provision to prevent conflicting state and federal regulation. *Id.* The Court reasoned that "[t]o require plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits." *Id.*

50. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) (holding that ERISA preemption provision preempts all state laws which state legislatures specifically designed to affect ERISA covered pension plans); *Pilot Life Ins. Co. v. Dedeaux*,

Despite the broad sweep of ERISA's preemption provision, ERISA will not preempt a state law simply because the execution of the law implicates a pension plan.⁵¹ The court must decide whether the federal statute and the state law conflict in such a manner as to make adherence to both laws impossible and, if so, whether Congress intended that the federal statute preempt.⁵² Such a conflict between ERISA and California's community property law came before the Ninth Circuit in *Ablamis v. Roper*.⁵³

IV. *Ablamis v. Roper*

Mr. and Ms. Ablamis were married on August 6, 1972 and remained married until Ms. Ablamis' death on February 1, 1988.⁵⁴ At the time of his wife's death, Mr. Ablamis had fully vested interests in two employee benefit profit sharing plans subject to ERISA regulation.⁵⁵ In 1987, Ms. Ablamis executed a will that devised the major part of her estate to two trusts, one for her children from a previous marriage, and the other for the maintenance of her husband during his life with a remainder after his death to her children.⁵⁶ Any interest Ms. Ablamis had in the pension plans provided by her husband's employer would have passed under this devise. The trustee of her husband's retirement plans brought an action for declaratory judgment in the United States District Court for the Northern District of California because Ms. Ablamis' executor claimed a community property

481 U.S. 41, 46 (1987) (stating that Congress designed ERISA's deliberately expansive language to create pension plan regulation as exclusive federal concern); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (stating that ERISA preemption provision displaces all state laws that fall within its sphere even if state law is consistent with ERISA substantive requirements); *Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978) (stating that Congress designed ERISA to be comprehensive federal regulation for employee pension plans).

51. See *Mackey*, 486 U.S. at 829 (discussing requirement that state statute "relates to" ERISA regulated employee benefit plan if it refers to plan); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) (stating that ERISA does not preempt statutes that have "merely tenuous, remote or peripheral" effect on pension plans). The *Mackey* Court held that ERISA preempts a state law which makes a reference to or is designed to affect ERISA pension plans because it "relate[s] to" those plans within the meaning of § 1144(a). *Mackey*, 486 U.S. at 823. *But see infra* note 128 (discussing *Mackey* Court's finding that general garnishment statute that does not make reference to pension plans is not preempted by ERISA).

52. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (stating preemption provision of ERISA displaces all state laws that conflict even if state law is consistent with ERISA's goals); *infra* note 75 (stating *Hisquierdo* test for preemption of state property law is examination of whether Congress intended to preempt and whether state law causes major damage to substantial federal interest).

53. 937 F.2d 1450 (9th Cir. 1991).

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

55. *Id.* The Ablamis' two pension plans had a combined value of approximately \$380,000. Appellant's Opening Brief at 3, *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (No. 89-15352).

56. *Ablamis*, 937 F.2d at 1452. Ms. Ablamis devised "all property subject to [her] testamentary power including [her] one-half (1/2) community property interest in all community assets and any separate property [she] may have." *Id.*

interest in the pension plans.⁵⁷ The district court granted the plan trustee's motion for summary judgment on the grounds that: (1) California law does not allow a nonparticipant spouse to devise an interest in a retirement plan and (2) the REA preempts any state law that arguably would allow a devise of such an interest.⁵⁸ The executor of Ms. Ablamis' estate appealed the judgment to the United States Court of Appeals for the Ninth Circuit claiming that ERISA did not preempt California law.⁵⁹ The Ninth Circuit affirmed the district court's decision that ERISA did in fact preempt any California law that might allow Ms. Ablamis' devise.⁶⁰

A. Majority Opinion

The *Ablamis* court found that the purpose of ERISA was to protect women who are dependent on their husbands' earnings and pensions.⁶¹ The court also found that because the provisions of ERISA, as originally enacted, were unclear about nonemployee spouses' interests in pension benefits, courts were split on the question whether the wife could continue to receive benefits upon the termination of the marriage by divorce or death.⁶² As a result, the court found, Congress passed the REA to provide mandatory survivor benefits for the nonemployee spouse⁶³ and to except benefits payable as a result of a divorce settlement from ERISA's anti-alienation provision.⁶⁴ According to the *Ablamis* court, Congress' primary intent in passing the REA amending ERISA was to safeguard the financial security of widows and divorcees.⁶⁵ Congress designed the QDRO exception, the court found,

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1453.

62. *Id.*

63. *Id.* See ERISA, *supra* note 3, § 1055(a)(1) (stating requirement of spousal annuity for nonemployee spouse). Section 1055(a)(1) states that "in the case of a vested participant who retires under the plan, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity. . . ." *Id.* See also *id.* § 1055(d) (defining qualified joint and survivor annuity). Section 1055(d) states that:

[f]or purposes of this section, the term 'qualified joint and survivor annuity' means an annuity (1) for the life of the participant with a survivor annuity for the life of the spouse with is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse. . . .

Id.

64. *Ablamis v. Roper*, 937 F.2d 1450, 1454 (9th Cir. 1991). Congress made exceptions to ERISA's anti-alienation provision for any QDRO relating to child support or marital property rights to a spouse, child or other dependent of a participant, which is made pursuant to a state domestic relations law including community property law. *Id.*; see *supra* notes 18-23 and accompanying text (discussing QDRO exception to anti-alienation provision); *infra* notes 147-50 and accompanying text (same).

65. See *Ablamis*, 937 F.2d at 1453 (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) for proposition that primary purpose of QDRO exception was to protect pension benefits and domestic support orders for divorced spouses).

to create a narrow exception to the anti-alienation provision for the benefit of divorced women dependent on their former husbands' pension benefits.⁶⁶

From this reading of the legislative history of the enactment of REA, the *Ablamis* court found that the QDRO exception, allowing a division of pension benefits at divorce, does not include orders of probate courts directing the disposition of property pursuant to testamentary instruments.⁶⁷ The *Ablamis* court concluded that domestic relations orders concern a spouse, dependent, or child, and that an estate does not fall within the most liberal construction of those terms.⁶⁸ The court further explained that if Congress had intended to create an exception to ERISA's prohibition on alienation of pension rights that would permit a deceased spouse to bequeath her interests in a surviving spouse's pension benefits to a third party, Congress undoubtedly would specifically have excepted probate orders in addition to domestic relations orders.⁶⁹ The *Ablamis* court concluded that the court was bound to respect the intent of Congress and not expand the list of exceptions.⁷⁰

The *Ablamis* court dismissed the notion that ERISA might not preempt California community property law.⁷¹ The court concluded that to permit a nonemployee spouse's attempted bequest of one-half of a surviving employee's pension benefits to a "third party" would do "major damage" to ERISA's goal of preserving pension benefits for retirees and their dependents.⁷² The *Ablamis* court used a rule articulated in *Hisquierdo v.*

66. *Id.* at 1454.

67. *Id.* at 1455.

68. *Id.* at 1456.

69. *Id.* The *Ablamis* court stated that Congress could have excepted probate orders to allow Ms. *Ablamis*' transfer, or Congress could have excepted all transfers made pursuant to state property laws. *Id.* According to the court, however, Congress chose neither alternative. *Id.* The court claims that "Ms. *Ablamis*' beneficiaries would not qualify as an 'alternate payee' as the term is defined in section 1056. See *id.* at 1456 n.11 (stating Ms. *Ablamis*' beneficiaries are not alternate payees). An alternate payee must be a 'spouse, former spouse, child or other dependent of the participant.'" *Id.* (emphasis in original); see *supra* note 21 (stating § 1056(d)(3)(B) definition of "alternate payee" authorized to receive pension benefits). Because the beneficiaries are not children of Mr. *Ablamis*, the court concluded that they are not possible alternate payees. *Ablamis v. Roper*, 937 F.2d 1450, 1456 n.11 (9th Cir. 1991). The Ninth Circuit in *Stone v. Stone*, however, defined the community property nonemployee spouse as a participant in a pension plan. 632 F.2d 740, 743 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981). Therefore, Ms. *Ablamis*' children would qualify as alternate payees under the existing statute because they are the children of a plan participant so the court need not find a new exception. See *infra* note 144 and accompanying text (stating that California recognizes Ms. *Ablamis* as plan participant).

70. See *Ablamis*, 937 F.2d at 1456 (stating that courts are bound to respect Congress' choice to make limited exceptions to anti-alienation provision).

71. *Id.* at 1459. The *Ablamis* majority concluded that ERISA preempted California property law. *Id.* The court stated, "we have no doubt whatsoever that § 1056(d) of ERISA is generally applicable to transfers involving spouses and necessarily preempts all orders relating to such transfers that do not fall within the specific and limited QDRO exception set forth in REA." *Id.*

72. *Id.* at 1459-60.

*Hisquierdo*⁷³ to determine whether federal law should preempt state community property law.⁷⁴ In *Hisquierdo*, the Supreme Court held that to preempt the state law, a federal statute must do more than merely conflict with the words of the state statute.⁷⁵ Instead, a court must find that: (1) Congress positively expressed by direct enactment the intent to preempt the state law and (2) the state law does major damage to a clear and substantial federal interest.⁷⁶ The *Ablamis* court concluded, without a specific explanation of the conflict or the damage, that ERISA and the California law at issue in the case conflict and that the California law does major damage to a federal interest.⁷⁷ The court held, therefore, that ERISA preempts any California community property law that would allow Ms. Ablamis' devise.⁷⁸

The *Ablamis* court concluded by stating that ERISA, as amended by REA, prohibited the testamentary transfer by Ms. Ablamis of her purported

73. 493 U.S. 572 (1979).

74. *Ablamis v. Roper*, 937 F.2d 1450, 1459-60 (9th Cir. 1991).

75. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (holding Railroad Retirement Act preempts state community law). In *Hisquierdo*, the Supreme Court reviewed the decision of the California Supreme Court which held that Railroad Retirement Act benefits resulting from employment during marriage are community property and are subject to division upon divorce. *Id.* at 580. The Supreme Court held that Railroad Benefits are not community property and that for courts to compensate wife from available community assets would be improper. *Id.* at 589.

Congress enacted the Railroad Retirement Act of 1974 to provide retirement benefits for railroad employees. *Id.* at 580. These benefits are not contractual and, therefore, they can be altered by Congress at any time. *Id.* at 575. Under the Act, benefits for the employee's spouse terminate upon divorce except for amounts needed to satisfy child support or alimony obligations. *Id.* at 574-75. In *Hisquierdo*, the nonemployee spouse sought a one half community property interest, pursuant to California law, of the benefits acquired during the marriage equalling 19.6% of the whole. *Id.* at 578. Because family property "belongs to the laws of the states," the *Hisquierdo* Court was reluctant to find that a federal statute preempted the state community property laws unless "Congress has 'positively required by direct enactment' that state law be preempted." *Id.* at 581 (citing *Wetmore v. Markoe*, 196 U.S. 68 (1904)). "A mere conflict in words is not sufficient." *Id.* State law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Id.* (citing *United States v. Yazell*, 382 U.S. 341 (1966)). In the four cases the *Hisquierdo* Court found in which courts held that ERISA preempted community property law, all dealt with a conflict between state and federal rules for the allocation of a federal entitlement. *Id.* at 582. The *Hisquierdo* Court held that Congress had made a deliberate choice on the allocation of pension funds and that state law could not disrupt the nationally uniform scheme. *Id.* at 585.

The *Hisquierdo* Court additionally held that the wife could not receive an offsetting award from presently available community property to compensate her for the lost interest in the expected pension benefits. *Id.* at 588-89. The Court felt that allowing this offset would do as much if not more harm to the statutory balance as granting her one-half of the expected benefits. *Id.* at 588.

Justice Stewart in his dissent found that because the wife already owned the interest there was no transfer. *Id.* at 599-600 (Stewart, J., dissenting). The dissent also argued that because the state interest is so strong, the federal law should not preempt the state property law. *Id.* at 594-95.

76. *Id.* at 581.

77. *Ablamis*, 937 F.2d at 1460; *id.* at 1468 (Fletcher, J., dissenting).

78. *Id.* at 1460.

community property interest in the surviving employee spouse's pension benefits.⁷⁹ The court further found that a spouse's testamentary devise of an asserted community property interest in pension benefits may not deprive an employee of any part of his pension benefits.⁸⁰ The Ninth Circuit in *Ablamis*, therefore, affirmed the district court's order granting summary judgment for the trustee of the pension plans.⁸¹

B. Dissenting Opinion

The dissenting judge in *Ablamis* began by refuting the majority's doubts that California law would allow Ms. Ablamis' bequest.⁸² The district court had relied on the existence of California's "terminable interest rule" to bar a nonemployee spouse's bequest of an interest upon the death of either spouse.⁸³ However, the dissent pointed out, the California legislature abolished the rule in 1986 as it applied to pensions in general in response to severe academic and judicial criticism of the rule.⁸⁴ California Courts of Appeals subsequently abolished the rule retroactively, specifically in the context of a devise of pension benefits.⁸⁵ The dissent found, therefore, that,

79. *Id.*

80. *Id.*

81. *Id.* The *Ablamis* majority did not decide whether California law would permit a testamentary transfer of the nonemployee spouse's pension benefits. *Id.* at 1455. The district court, however, did find that California's terminable interest rule barred the devise. *Id.* at 1460.

82. *Id.* at 1460 (Fletcher, J., dissenting).

83. *Id.* See also *infra* notes 113-18 and accompanying text (discussing California's terminable interest rule).

84. *Ablamis v. Roper*, 937 F.2d 1450, 1461 (9th Cir. 1991). See CAL. CIV. CODE § 4800.8 (West Supp. 1992) (abolishing California's terminable interest rule); *Bowman v. Bowman*, 217 Cal. Rptr. 174, 178 (Ct. App. 1985) (refusing to extend terminable interest rule to private pension plans); *Chirmside v. Board of Admin. of Pub. Employees Retirement Sys.*, 191 Cal. Rptr. 605, 607-11 (Ct. App. 1983) (holding that terminable interest rule does not apply to employee spouse's accumulated contributions, thereby avoiding unfair result); *In re Marriage of Peterson*, 115 Cal. Rptr. 184, 194 (Ct. App. 1974) (stating that rule which terminates nonemployee spouse's interest in pension benefits upon either spouse's death is unfair), *overruled by In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976); Kevin R. Culhane, *Toward Pension Equality: A Reexamination of California's Terminable Interest Doctrine*, 14 Sw. U. L. REV. 613, 616-17 (1984) (criticizing terminable interest rule for its implied repeal of statutes and fundamental unfairness to nonemployee spouse); John J. Gudebski & Susan Jovovich, Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347, 353 (1973) (arguing that California terminable interest rule mandating pension benefits to be mere expectancy is unfair and unnecessary); William A. Reppy, Jr., *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 UCLA L. REV. 417, 462-73 (1978) (stating terminable interest rule derived from courts' displeasure with community property rather than on California statutes); Deene Goodlaw Solomon, *Beyond Preemption: Accommodation of the Nonemployee Spouse's Interest Under ERISA*, 31 HASTINGS L.J. 1021, 1051-59 (1980) (discussing how terminable interest rule deprives nonemployee spouse of full benefit of property acquired by joint effort).

85. See *In re Marriage of Taylor*, 234 Cal. Rptr. 486, 490-91 (Ct. App. 1987) (abolishing terminable interest rule retroactively in divorce contest); *In re Marriage of Powers*, 267 Cal.

as a result of both legislative and judicial action, no bar exists to inheritance of any community property interest, including pension benefits, under California law.⁸⁶

The *Ablamis* dissent next concluded that no conflict exists between California law and ERISA that would justify preemption.⁸⁷ The dissent relied on a series of decisions holding that Congress did not intend for the spendthrift provision of ERISA to apply to transfers or allocations between employees and their spouses or dependents.⁸⁸ Additionally, because the *Hisquierdo* rule states that preemption is warranted only if the state law does major damage to a clear and substantial federal interest,⁸⁹ the correct question in the dissenter's view was whether the "right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."⁹⁰ The dissent concluded that the trustee of the pension plans had failed to carry the burden of proving that Ms. Ablamis' devise conflicted with the express terms of ERISA.⁹¹ Therefore, the court's analysis of the case concerning a transfer of interest from the husband to the wife and the court's conclusion that such a transfer does not fall under the QDRO exception was irrelevant.⁹²

Rptr. 350, 358-60 (Ct. App. 1990) (applying *Taylor* court's abolition of terminable interest rule to death context). The *Powers* court announced:

[b]y abrogation of the terminable interest rule the Legislature affirmed the right of the nonemployee spouse to what was his or hers by virtue of the community effort and eliminated a windfall profit to the employee spouse. This basic objective of the statute is not dependent on whether the nonemployee spouse is living or dead at the time these rights accrue.

Id. Consequently, "under section 4800.8, the community property interest of a nonemployee spouse is now inheritable." *Id.*

86. *Ablamis v. Roper*, 937 F.2d 1450, 1461-62 (9th Cir. 1991).

87. *Id.* at 1462.

88. *Id.* at 1463; see, e.g., *Savings & Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038 (7th Cir. 1983); *Bowen v. Bowen*, 715 F.2d 559 (11th Cir. 1983); *Operating Eng'r Local No. 428 v. Zamborsky*, 650 F.2d 196 (9th Cir. 1981); *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979); *AT&T v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Ball v. Revised Retirement Plan*, 522 F. Supp. 718 (D. Colo. 1981); *Central States, Southeast & Southwest Areas Pension Fund v. Parr*, 480 F. Supp. 924 (E.D. Mich. 1979).

89. *Ablamis*, 937 F.2d at 1462. See *supra* notes 72-76 and accompanying text (discussing *Hisquierdo* preemption test and its application); *infra* notes 123-41 and accompanying text (same).

90. See *Ablamis*, 937 F.2d at 1462 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979) for test that plaintiff must satisfy for ERISA to preempt state law). The *Ablamis* dissent stated:

[t]hus, the appellee [trustee] may not prevail in this case simply by showing a mere conflict between the bequest and the language of ERISA, or by showing that Congress did not contemplate the type of bequest at issue here. Rather, in order to prevail, the appellee must demonstrate that California law allowing the non-employee spouse to bequeath her community property share of pension benefits would do "major damage" to "clear and substantial" federal interests.

Id.

91. *Id.*

92. *Id.* at 1462.

The *Ablamis* dissent next questioned the court's conclusion that Congress intended the REA to preempt state property law in this instance.⁹³ At the time Congress passed the REA, the courts were split on whether they could award pension benefits to a nonemployee spouse in a divorce settlement.⁹⁴ Congress resolved that specific issue by including the QDRO exception in the REA.⁹⁵ The majority claimed that courts should interpret Congress' failure to authorize another exception for probate orders as a deliberate exclusion,⁹⁶ but the dissent countered that probate orders in community property states were not at issue at the time of the enactment of the REA.⁹⁷ Transfers by nonemployee spouses were not at issue in 1984 because the vast majority of states either followed the common law and did not recognize that the nonemployee spouse had any interest in the employee spouse's pension plans or were community property states with terminable interest rules preventing a devise of any such existing interest.⁹⁸ Because Congress never discussed the issue of probate orders in community property states, the dissent found it unsurprising that Congress did not include them in the QDRO exception.⁹⁹

The *Ablamis* dissent also questioned the court's characterization of Congress' goals in passing ERISA.¹⁰⁰ The majority stated, without explanation, that the application of California's community property law would do major damage to federal interests.¹⁰¹ The dissent argued that because ERISA allows the employee spouse to bequeath to a third party any portion of benefits remaining at the time of his death, the nonemployee spouse with equal ownership rights should be able to do the same.¹⁰² The dissent reasoned that a court does not offend Congress' goal of ensuring that ERISA views both spouses in a marriage as part of an economic partnership by applying a state community property law allowing the nonemployee spouse the same right as her husband to bequeath an interest in his retirement plans.¹⁰³

93. *Id.* at 1465.

94. *Id.*

95. *Id.*

96. *Id.* at 1458.

97. *Id.* at 1465. The *Ablamis* majority claimed that Congress expressly chose not to except probate orders from the spendthrift restriction by including in the restriction an exception for divorces. *Id.* at 1458. The dissent, however, found no indication in the legislative history that the issue of probate orders ever was considered by Congress. *Id.* at 1465. The dissent believed that Congress' goal was to resolve the debate over divorce that had been in the courts, but not preclude debates over new issues. *Id.* The dissent concluded, "as no debate had yet emerged on the issue of probate, it is unsurprising that the issue of probate orders never reached Congress." *Id.*

98. *Id.* at 1463.

99. *Id.* at 1465.

100. *Id.* at 1466.

101. *Id.* at 1459-60; see *supra* note 75 and accompanying text (stating state law must do major damage to federal interest as component of preemption test).

102. *Ablamis v. Roper*, 937 F.2d 1450, 1465 (9th Cir. 1991); see *infra* notes 191-95 and accompanying text (stating federal interest not harmed by application of California law).

103. *Ablamis*, 937 F.2d at 1465.

Finally, the *Ablamis* dissent questioned the court's conclusion that the outcome reached by the majority is sensible and just.¹⁰⁴ The dissent claimed that under the court's holding that there is no transferable interest, the court treated Ms. Ablamis more unfairly than before the passage of REA—despite the fact that Congress designed the REA to increase the rights of the nonemployee spouse.¹⁰⁵ In a community property state such as California a nonemployee spouse need not be divorced or widowed to gain a right to marital property. The court's holding, however, forces this common-law result because the decision requires the nonemployee spouse to forfeit property rights if she dies married.¹⁰⁶ To avoid this legally unnecessary and morally unjust result, the dissent would have reversed the district court's decision and allowed Ms. Ablamis to devise her community property interest in the pension plans.¹⁰⁷

V. ANALYSIS OF *Ablamis v. Roper*

From the majority and dissenting opinions in *Ablamis*, it is clear that the law concerning ERISA's preemption of community property law is far from settled.¹⁰⁸ The law, however, is not so opaque as to necessitate two totally inconsistent resolutions of the case. The conflict between the opinions is more than a simple disagreement about application of law to fact. The majority and dissent disagreed on the status and meaning of the ERISA preemption provision,¹⁰⁹ the *Hisquierdo* preemption test,¹¹⁰ the existence of California's terminable interest rule,¹¹¹ and the nature of California community property law.¹¹² These disagreements are so central to the nature of both ERISA and California community property law that one of the

104. *Id.* at 1468.

105. *Id.* at 1468-69. See *Stone v. Stone*, 632 F.2d 740, 742 (9th Cir. 1980) (stating ERISA does not preempt state court order requiring pension plan to pay community property share to former spouse), *cert. denied*, 453 U.S. 922 (1981); *In re Marriage of Campa*, 152 Cal. Rptr. 362, 368 (Ct. App. 1979) (finding that state interest of fair division between former spouses has no bearing on Congress' interest to assure genuine pension rights), *appeal dismissed*, 444 U.S. 1028 (1980). Both *Stone* and *Campa* are pre-REA decisions that provide the nonemployee spouse with more protection and property rights under California law than the *Ablamis* court provides under the REA. *Stone*, 632 F.2d at 742; *Campa*, 152 Cal. Rptr. at 368. Clearly Ms. Ablamis was in a worse position after the passage of the REA than she had been in before.

106. See *Ablamis*, 937 F.2d at 1468 (stating that majority's decision encourages spouses to divorce so that nonemployee spouse can be guaranteed transferable property rights in pension plans).

107. *Id.* at 1468-69.

108. See *supra* notes 54-107 and accompanying text (discussing *Ablamis* decision).

109. See *supra* notes 71-78, 87-92 and accompanying text (stating interpretation of ERISA preemption provision).

110. See *supra* notes 73-78, 89-91 and accompanying text (observing scope of *Hisquierdo* preemption test).

111. See *supra* notes 81, 82-86 and accompanying text (stating status of California's terminable interest rule).

112. See *supra* notes 81, 82-86 and accompanying text (stating status of California's terminable interest rule).

opinions must express an incorrect statement of the current status of the law.

Because of this inconsistency in the opinions, the only way to judge the merit of the *Ablamis* majority and dissenting opinions is to examine California community property law and ERISA preemption law and to apply them to the facts of the *Ablamis* case. The proper questions of law are: 1) whether California community property law allows a predeceasing nonemployee spouse to devise an interest in a pension plan; 2) whether ERISA, by its terms, preempts California community property law through operation of the Supremacy Clause of the United States Constitution; and 3) whether the result reached constitutes a taking in violation of the Fifth Amendment. The answers to these questions will provide the framework for determining the correct holding in the case.

A. California Community Property Law

The first issue is whether California law allows Ms. Ablamis to devise her community property interest in the pension plans.¹¹³ The district court held that the continued existence of California's terminable interest rule prevented Ms. Ablamis from devising any interest in the pension plans because her interest terminated at her death.¹¹⁴ The California Supreme Court created the terminable interest rule by holding that the nonemployee spouse's interest in pension benefits terminates upon the death of either spouse so that an attempted devise of that interest is invalid.¹¹⁵ In 1986, however, the California Legislature abolished the terminable interest rule in

113. *Contra* Brief for Appellee at 39, *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (No. 89-15352). The trustee of the Ablamis pension funds argues that even if California law would allow a devise of a community property interest in the funds, the terms of the contract prevent the transfer. *Id.*

The trustee's argument has no foundation. If California law does apply, Ms. Ablamis will not be bound by a unilateral contract purporting to divest her of her property right in half of the pension assets. According to California law, a community asset will be classified as one spouse's separate property only if the other spouse signs a waiver or release document. CAL. PROB. CODE § 142 (West 1991). Because Ms. Ablamis did not sign a release form, her estate retains any interest recognized by California law. *Id.*

114. *See Ablamis v. Roper*, 937 F.2d 1450, 1460 (9th Cir. 1991) (stating holding by district court that California's terminable interest rule exists).

115. *See Waite v. Waite*, 99 Cal. Rptr. 325, 333 (1972) (holding nonemployee spouse's interest in pension benefits terminates at death), *overruled by In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976); *Benson v. City of Los Angeles*, 33 Cal. Rptr. 257, 261-62 (1963) (holding nonemployee spouse has no claim to benefits after employee spouse's death if employee spouse designated third party beneficiary for benefits); *Chirmside v. Board of Admin. of Pub. Employees Retirement Sys.*, 191 Cal. Rptr. 605, 606-08 (Ct. App. 1983) (discussing *Waite* and *Benson* and development of California's terminable interest rule). The *Chirmside* court explained that the *Benson* and *Waite* courts established the rule that the nonemployee spouse's community property interest in a pension terminates upon the death of either spouse. *Id.* at 607. The nonemployee spouse, therefore, may neither receive benefits at the death of the employee spouse if he designates a third party beneficiary, nor devise benefits at her death. *Id.* at 606.

the context of dividing retirement benefits upon divorce.¹¹⁶ The California courts then found that this abolition of the terminable interest rule should be applied retroactively and that it also should be applied to transfers at death.¹¹⁷ The terminable interest rule, therefore, no longer prevents a testamentary transfer of pension benefits.¹¹⁸

In addition to removing the judicial barrier to a devise, the California Legislature recognized the right of owners to devise property by specifically creating Ms. Ablamis' right to devise her interest in the pension plans.¹¹⁹ The California Probate Code states that a decedent may devise an interest in a qualified pension plan at death because the decedent is an owner of a transferrable interest in such plans.¹²⁰ Therefore, because she was an owner, California law entitles Ms. Ablamis to transfer her community property interest in the pension benefits.

B. ERISA Preemption

California courts and the California Legislature have stated that the terminable interest rule no longer exists and that no bar exists to testamentary disposition of interests in pension plans.¹²¹ Preemption by ERISA of California probate law authorizing such a devise, therefore, is the only legal barrier that would have prevented Ms. Ablamis' intended transfer.¹²² Under the *Hisquierdo* test, Ms. Ablamis' devise was invalid only if the court found that Congress specifically intended that ERISA preempt a devise authorized by the state's community property law and if that devise did major damage to a federal interest.¹²³

116. See 1986 Cal. Stat. c. 686, § 2 (stating that intent of legislature is to abolish terminable interest rule for retirement benefits), reprinted in *historical and statutory notes to CAL. CIV. CODE* § 4800.8 (West Supp. 1992). This statute abolished the holdings of *Benson* and *Waite* that had created the terminable interest rule. *Id.* The California Legislature passed this section as explanation to CAL. CIV. CODE § 4800.8 (West Supp. 1992). *Id.*

117. See *In re Marriage of Powers*, 267 Cal. Rptr. 350, 355 (Ct. App. 1990) (holding abolition of terminable interest rule retroactive in proceeding where property rights have not yet been adjudicated); *Estate of Austin*, 254 Cal. Rptr. 372, 373 (Ct. App. 1988) (holding legislative abolition of terminable interest rule applicable to death context).

118. See *Powers*, 267 Cal. Rptr. at 356 (stating nonemployee spouse's community property interests in pension benefits are inheritable under California law).

119. See CAL. PROB. CODE § 262 (West 1991) (defining "beneficiary" as person entitled to take property interest); *id.* § 263(b)(12) (stating employee or "other owner" of plan interest may transfer that interest); *id.* § 265 (defining "disclaimer" as writing which renounces interest otherwise receivable to beneficiary); *id.* § 266 (stating "employee benefit plan" includes pension and retirement plans); *id.* § 267(a) (defining "interest" to include whole or part of real or personal property); *id.* § 267(b)(12) (stating "interest" includes benefits created under employee benefit plan).

120. *Id.* § 263(b)(12); *id.* § 267(b)(12).

121. See *supra* notes 115-18 and accompanying text (discussing legislative and judicial abolition of California's terminable interest rule).

122. See *Ablamis v. Roper*, 937 F.2d 1450, 1461-62 (9th Cir. 1991) (Fletcher, J., dissenting) (arguing that California law allows Ms. Ablamis' devise, therefore, only majority's holding prevents transfer).

123. See *supra* notes 73-76 and accompanying text (discussing *Hisquierdo* rule for analyzing preemption of state property law by federal statute).

To satisfy the first prong of the *Hisquierdo* test, the *Ablamis* majority needed to find that ERISA's preemption provision specifically preempts any state law, including community property law, that relates to an employee benefit plan.¹²⁴ The court's statement that the state law contravenes ERISA's anti-alienation provision simply did not answer the first prong.¹²⁵ The *Ablamis* court failed to apply the specific facts of the case to the term "relate to" as stated in the preemption provision and as defined by the Supreme Court. The *Ablamis* court should have found whether California community property law as applied to Ms. Ablamis relates to an ERISA pension as the Supreme Court defined the term in *Mackey v. Lanier Collection Agency & Service, Inc.*¹²⁶

In *Mackey* the Supreme Court considered whether or not a Georgia garnishment statute related to an ERISA pension plan.¹²⁷ The *Mackey* Court held that ERISA preempts a state statute that singles out an ERISA employee benefit plan for different treatment or regulation.¹²⁸ The Court in *Mackey* found Congressional intent to allow section 1144(a) to preempt any state laws designed specifically to affect ERISA pension plans.¹²⁹ In *Ablamis*,

124. See *supra* note 75 (stating *Hisquierdo* preemption test); *supra* note 4 (stating text of ERISA preemption provision § 1144(a)).

125. *Ablamis*, 937 F.2d at 1460. Rather than concluding that ERISA preempts state law because the application of California property law causes a different result than application of ERISA provisions, the *Ablamis* court should have analyzed what relationship existed between the state and federal statutes to find a conflict. According to the *Hisquierdo* test, the conflict derives from congressional intent. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979). To find preemption, the state law must conflict with the express terms of a federal statute. *Id.* Congress, therefore, must specifically intend for the state law to be preempted. *Id.*

126. 486 U.S. 825 (1988); see *supra* note 4 (requiring under § 1144(a) that ERISA preempts state statute if state law "relate[s] to" pension plan).

127. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) (holding that ERISA § 1144(a) preempted specific Georgia garnishment statute that made reference to ERISA plan, but general garnishment statute was not preempted). In *Mackey* the Supreme Court considered the validity of Georgia statutes which allowed for garnishment of welfare plans pursuant to money judgments obtained against the beneficiaries. *Id.* at 827-28. One statute specifically identified ERISA welfare plans as subject to the statute if a court ordered the garnishment pursuant to a judgment for alimony or for child support. *Id.* at 828 n.2. The Court found that this state law "relates to" ERISA benefit plans primarily because it specifically refers to the plans. *Id.* at 829. The *Mackey* Court reaffirmed previous holdings that § 1144(a) preempts a statute that the state legislature specifically designed to affect employee benefit plans. *Id.* The Court also held that ERISA will preempt the state law even if it is consistent with the substantive goals or provisions of ERISA. *Id.* Consequently, the *Mackey* Court held that ERISA preempts the first Georgia statute. *Id.* at 830.

The second statute at issue was the general garnishment statute. *Id.* The *Mackey* Court considered whether the general statute related to the ERISA welfare plan. *Id.* at 830-31. The Court found that certain ERISA provisions and several aspects of the statute's structure indicated that Congress did not intend to prevent state mechanisms for executing judgments against plans, even when that would prevent participants from receiving their benefits. *Id.* at 831-32. The Court held that ERISA did not preempt the state garnishment mechanism because it was the only method to enforce a judgment against an ERISA plan. *Id.* at 834.

128. *Id.* at 830; see *supra* note 4 (stating text of ERISA preemption provision § 1144(a)).

129. *Mackey*, 486 U.S. at 830. The *Mackey* Court's holding that a specific reference to

however, the California community property statute makes no mention of specific property rights, nor does the statute refer specifically to a pension plan covered by ERISA.¹³⁰

The *Mackey* Court did, however, address a question similar to that presented in the *Ablamis* case: did Congress intend to preempt general state statutes that do not refer to pension plans?¹³¹ The *Mackey* Court found that Congress did not intend to preempt state law mechanisms for executing judgments against ERISA plans, even when application of state law prevented participants from receiving benefits.¹³² The statute at issue in *Mackey* had an impact on plans and benefits, but the Court held that because it did not "relate to" an ERISA plan ERISA did not preempt the statute.¹³³ California community property law, therefore, does not necessarily "relate to" an ERISA plan just because it allows disposition of plan benefits or recognizes property rights in a manner different from the common-law framework of ERISA.¹³⁴

To satisfy the second prong of the *Hisquierdo* test, the *Ablamis* majority stated that the devise in question would do major damage to a federal interest if the court applied community property law.¹³⁵ The *Ablamis* court did not, however, specify how the devise would damage a federal interest or to what extent that interest would be damaged.¹³⁶ The Supreme Court has stated that complementary federal and state goals will not save a

an ERISA plan in the state statute impermissibly "relates to" a plan is logical considering the plain meaning of the words in § 1144(a). *Id.*

130. See CAL. PROB. CODE § 28 (West 1991) (stating that community property includes all property acquired by either spouse during marriage).

131. *Mackey*, 486 U.S. at 830-31. The *Mackey* Court considered whether ERISA preempted Georgia's general garnishment statute. *Id.* The general statute did not single out or specifically mention any ERISA plans. *Id.*

132. *Id.* at 831-32.

133. See *id.* at 840-41 (stating that language and structure of ERISA indicate that Congress did not intend to preempt general Georgia garnishment statute); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) (stating that ERISA preempts state claims for breach of contract, promissory estoppel, and breach of good faith against the pension plan because these claims are at heart of ERISA's exclusive regulation).

134. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) (stating that Congress intended that ERISA preempt state laws related to pension plans, not to pension benefits). The *Fort Halifax* Court held that ERISA did not preempt a Maine statute because the state statute did not burden the ERISA administrative practices with a patchwork scheme of regulation. *Id.* at 11-12. ERISA, therefore, does not preempt all state statutes that have an impact on employee benefits. *Id.* at 11.

135. *Ablamis v. Roper*, 937 F.2d 1450, 1460 (9th Cir. 1991). See *supra* note 75 (stating *Hisquierdo* test requirement of damage to federal interest before finding of preemption).

136. See *Ablamis*, 937 F.2d at 1459-60 (observing that application of California community property law would do major damage to Congress' goal of ensuring pension benefits). The *Ablamis* court does not specify why application of California law threatens pension benefits. *Id.* Additionally, the majority admits that ERISA does allow an equivalent testamentary transfer from Mr. *Ablamis* to a third party. *Id.* at 1457 n.12. The majority does not explain, however, why one transfer violates the goals of Congress, but the other does not.

conflicting state statute from preemption.¹³⁷ Therefore, the fact that ERISA and California law have the common goal of pension benefit equity will not alone save the state statute from preemption.¹³⁸ That fact, however, does indicate that there may be no major damage to a substantial federal interest if a court applies California law.¹³⁹ According to the *Hisquierdo* test, a federal statute will not preempt state property law unless application of the state law seriously damages a federal interest.¹⁴⁰ To satisfy the test, the *Ablamis* court needed to specify exactly how application of California law damages a federal interest.¹⁴¹

Because the *Ablamis* court's analysis satisfied neither prong of the *Hisquierdo* test, the court identified no conflict between ERISA and California community property law that required preemption.¹⁴² The *Ablamis* court, therefore, should not have been so eager to dismiss the application of state law in this case. The majority seemed to rely on the misconception that a prohibited transfer of interest from Mr. Ablamis to Ms. Ablamis took place.¹⁴³ This is an incorrect and misleading finding. California law considered Ms. Ablamis to be an owner of and participant in the pension plans.¹⁴⁴ Because no transfer occurred between the spouses, the court did not need to analyze whether the QDRO exception permits such a transfer.¹⁴⁵

137. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829-30 (1988) (stating that ERISA preempts consistent state law if it conflicts with ERISA statute); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (same).

138. See *supra* note 127 (stating *Mackey* Court's holding that mere concurrence of statutory goals will not save state statute from preemption).

139. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 595-96 (1979) (Stewart, J., dissenting) (defining what conflict results in damage to federal interest). The *Hisquierdo* dissent claimed that a state statute damaged a federal interest when the state law and the federal law defined property rights differently. *Id.* Damage, therefore, requires more than common state and federal goals. *Id.*

140. See *id.* at 583 (stating that injury to objectives of federal statute must be consequence of applying state law).

141. *Id.*

142. See *supra* notes 123-41 and accompanying text (discussing application of *Hisquierdo* preemption test).

143. See *Ablamis v. Roper*, 937 F.2d 1450, 1456 (9th Cir. 1991) (discussing whether court can classify Ms. Ablamis as "former spouse" as defined in § 1056(d)(3)(k)). The fact that the *Ablamis* court discusses whether or not Ms. Ablamis falls into the QDRO exception suggests that it is concerned about a husband to wife transfer. *Id.* This clouds the other issue that the court addresses—the owner to beneficiary transfer from Ms. Ablamis to her children. *Id.* These two transfers should not be confused, especially if one accepts the fact that no transfer took place between Mr. and Ms. Ablamis. *Id.* See *supra* notes 119-20 and accompanying text (discussing California law recognition of Ms. Ablamis as owner of pension plans).

144. See *Stone v. Stone*, 632 F.2d 740, 743 (9th Cir. 1980) (stating that nonemployee spouse is participant in pension plan because she enjoys same rights to enforce ERISA provisions as employee spouse), *cert. denied*, 453 U.S. 922 (1981); *In re Marriage of Brown*, 126 Cal. Rptr. 633, 639 (1976) (discussing division of community interest in pension plans).

145. See ERISA, *supra* note 3, § 1056(d)(1) (stating ERISA anti-alienation provision); *id.* § 1056(d)(3)(B) (defining QDRO exception to ERISA's anti-alienation provision). Section 1056(d)(3)(B) states that a QDRO is a domestic relations order "which . . . assigns to an

The fact that Ms. Ablamis did not fit under the definition of a "former spouse" is irrelevant.¹⁴⁶

As well as regarding Ms. Ablamis as the transferee of benefits, the court concluded that her children did not qualify as dependents of a plan participant.¹⁴⁷ The QDRO exception, however, does allow transfer of benefits to dependents of plan participants.¹⁴⁸ Rather than conclude that Ms. Ablamis' children were not dependents of Mr. Ablamis, the *Ablamis* court should have acknowledged that because Ms. Ablamis was a participant under California law, her children were dependents of a participant.¹⁴⁹ Because she was a participant, the transfer of benefits to the children may fall under the QDRO exception. The *Ablamis* court, however, was most likely correct in concluding that a testamentary transfer to children does not qualify as a "child support" payment.¹⁵⁰ The QDRO exception, therefore, may not be the best basis on which to allow Ms. Ablamis' transfer.

Even if the transfer to Ms. Ablamis' children did not qualify under the QDRO exception, California law recognizes that Ms. Ablamis had the same right to transfer benefits as Mr. Ablamis.¹⁵¹ Before Congress passed the REA establishing the spousal annuity requirement, California law limited the employee's devise to one-half of the pension benefits, recognizing that the spouse had a property interest in the benefits.¹⁵² Additionally, ERISA allows Mr. Ablamis to devise up to fifty percent of the pension funds remaining at his death to any third party.¹⁵³ Ms. Ablamis, as a participant

alternate payee" a right to receive pension benefits. *Id.* Neither the QDRO nor the anti-alienation provision apply if no court ordered a transfer of the right to receive benefits under the Ablamis' pensions. *Id.* Ms. Ablamis' community property interest in the pension funds, therefore, need not satisfy § 1056 to exist. *Id.*

146. *See Ablamis*, 937 F.2d at 1456 (noting that because Ms. Ablamis is "deceased spouse" rather than "former spouse," she does not qualify as alternate payee under QDRO exception to anti-alienation provision).

147. *Id.* at 1460 n.17.

148. *See supra* note 21 (defining § 1056 QDRO exception to ERISA's anti-alienation provision). Section 1056(d)(3)(B)(ii)(I) states that a domestic relations order is a court order which "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." *Id.*

149. *See Ablamis v. Roper*, 937 F.2d 1450, 1452 (9th Cir. 1991) (stating that Ms. Ablamis' children are beneficiaries of trusts at issue); *supra* note 145 (arguing that Ms. Ablamis is participant in pension plans).

150. *See Ablamis*, 937 F.2d at 1455 (concluding that child support is not testamentary in nature, therefore, probate order granting Ms. Ablamis' children pension benefits would not fall under QDRO exception of § 1056).

151. *See supra* note 119 (listing California statutes which recognize both spouses as equal owners of pension plans).

152. *See Chirmside v. Board. of Admin. of Pub. Employees Retirement Sys.*, 191 Cal. Rptr. 605, 610 (Ct. App. 1983) (holding that employee spouse's power to designate beneficiary is limited to amount of his community property interest in benefits).

153. *See supra* note 63 (defining § 1055 requirement of qualified joint and survivor annuity). Section 1055(d) states that the surviving spouse must receive at least 50% of the benefits after the participant's death. *Id.* The decedent, therefore, can devise the other 50% of the benefits to whomever he chooses. *Id.* *See also* Profit Sharing Plan Comm. for Employers

and owner under California law, therefore, should have had the same right to transfer fifty percent of the marital property.¹⁵⁴ If she did not have that right, her ownership rights in the pensions were worth much less than Mr. Ablamis' rights.¹⁵⁵ As a plan participant, therefore, Ms. Ablamis' transfer did satisfy both California state law and ERISA requirements.¹⁵⁶

C. Taking of Property Without Compensation

In addition to the preemption question, there is a Fifth Amendment takings issue that neither the *Ablamis* court nor the parties addressed. The *Ablamis* estate has a strong argument that the court's application of ERISA to preempt California property law resulted in an unconstitutional taking of Ms. Ablamis' property without just compensation in violation of the Fifth Amendment.¹⁵⁷ This argument exists because the *Ablamis* decision completely destroyed Ms. Ablamis' power to devise a property interest that California law recognized she possessed at her death.¹⁵⁸

Under California law, Ms. Ablamis owned a one-half interest in the pension plans.¹⁵⁹ During the marriage, state law deemed her to have con-

of Republic Fin. Serv., Inc. v. MBank Dallas, N.A., 683 F. Supp. 592, 595 (N.D. Tex. 1988) (holding that employee spouse can designate third party beneficiary for plan benefits that do not pass to spouse pursuant to survivor annuity); Art Builders Profit Sharing Plan v. Bosely, 649 F. Supp. 848, 853 (D. Md. 1986) (holding that designated beneficiaries of employee spouse are entitled to remainder of pension account balance after spousal annuity is paid); Naddeo v. Officers & Employees Pension Plan of Laundry, Dry Cleaning & Dye Workers' Int'l Union, 637 F. Supp. 82, 85 (E.D. Pa. 1986) (holding that employee spouse's beneficiary is entitled to one-half of pension benefit account).

154. See *In re Marriage of Peterson*, 115 Cal. Rptr. 184, 194 (Ct. App. 1974) (arguing that despite California rule that court must follow, because wife contributed equally to husband's pension, court should not deprive her of her equal share), *overruled by In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

155. See *infra* notes 157-76 and accompanying text (analyzing Ms. Ablamis' loss of property rights as taking of property without just compensation).

156. See *supra* note 63 (stating that § 1055 allows employee spouse to devise up to 50% of pension assets); *supra* note 119 and accompanying text (citing California statutes that authorize Ms. Ablamis to devise her property interest in pensions).

157. U.S. CONST. amend. V. The Fifth Amendment states: "[n]or shall private property be taken for public use, without just compensation." *Id.* Because the issue of whether ERISA preempts California law that authorizes a devise of pension benefits by the nonemployee spouse is disputed, Ms. Ablamis had a reasonable expectation that she would have a full property interest in the plans. See *In re Marriage of Powers*, 267 Cal. Rptr. 350, 358 (Ct. App. 1990) (stating that husband's reliance on existence of terminable interest rule would not prevent retroactive application of new statute promoting equitable distribution). Additionally, because Ms. Ablamis' rights in the plans originated when they married in 1972, she had a property interest before the enactment of ERISA in 1974 or the REA in 1984. *Ablamis v. Roper*, 937 F.2d 1450, 1452 (9th Cir. 1991).

158. See *supra* note 78 and accompanying text (stating that *Ablamis* holding prevents Ms. Ablamis from devising interest in pension plans).

159. See CAL. PROB. CODE § 28 (West 1991) (stating that community property means "community property heretofore or hereafter acquired during marriage by a married person while domiciled in this state"); *id.* § 100 (stating that "upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent").

tributed one-half of the money used to finance the pensions, and, therefore, she had identical ownership rights in the plan assets to those of her husband.¹⁶⁰ Under ERISA, Ms. Ablamis enjoyed the same rights as Mr. Ablamis during her life because, in the event of divorce, ERISA allows a division of the pension benefits pursuant to property rights recognized by state law.¹⁶¹ When she died, however, her rights were no longer identical to her husband's rights.¹⁶² The *Ablamis* court's application of the ERISA preemption provision eliminated Ms. Ablamis' right to dispose of her property through testamentary transfer, even though Mr. Ablamis could, at his death, under state law and ERISA, dispose of one-half of the benefits to anyone he designated.¹⁶³ The once equal spouses were no longer equal.¹⁶⁴

The Supreme Court has held that a permanent elimination of a property right by state action constitutes a taking.¹⁶⁵ The theoretical basis of the

160. See *supra* notes 33-38 and accompanying text (discussing nature of ownership and acquisition of property in community property states).

161. See *supra* notes 21-23 and accompanying text (discussing QDRO exception allowing divorcing spouses to partition pension benefits pursuant to state property law); *supra* note 14 (stating text of § 1056(d)(1) ERISA anti-alienation provision). Mr. and Ms. Ablamis had identical rights in the pension plans while alive because under the § 1056 anti-alienation provision, neither spouse could make an inter vivos transfer of the right to receive benefits. *Id.*

162. See *Ablamis v. Roper*, 937 F.2d 1450, 1460 (9th Cir. 1991) (holding that Ms. Ablamis has no testamentary power over pension plan); *id.* at 1457 n.12 (acknowledging that employee spouse may devise pension benefits).

163. See ERISA, *supra* note 3, § 1055 (stating requirement of spousal annuity of at least one-half of pension benefits). Section 1055 requires that "[e]ach pension plan to which this section applies shall provide that—(1) in the case of a vested participant who retires under the plan, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity. . . ." *Id.* The spousal annuity restricts the dispositional power of the employee spouse, but his right to devise is not eliminated. *Id.*; see also *supra* note 153 (discussing case law concerning § 1055 spousal annuity requirement and employee spouse's ability to designate beneficiary for residue of benefit account).

164. See *In re Marriage of Brown*, 126 Cal. Rptr. 633, 637 (1976) (arguing that because pension plans consist of deferred compensation, pension benefits are property interests not expectancies). If the asset at issue was the family home, it would be clear from California community property law that each spouse had a one half interest in fee simple. See CAL. PROB. CODE § 28 (West 1991) (stating that community property is all real and personal property acquired during marriage). Each spouse contributes one half of the community assets toward the purchase of the house. California law recognizes joint rights during the marriage and allows for division of the value at the divorce or death of either spouse. See *id.* § 100 (stating that parties divide community property equally when marriage dissolves at death of one spouse); CAL. CIV. CODE § 4800 (West Supp. 1992) (stating that spouses divide community property equally upon divorce). If a federal statute prevented any disposition of the house at the death of either spouse, a taking in violation of the Fifth Amendment would result. See *supra* note 157 (stating text of Takings Clause). *Ablamis* is not a mere restriction on property rights, but a conversion of the fee simple into a life estate. See *infra* note 170 (stating nature of Ms. Ablamis' loss). Under California law Ms. Ablamis' interest in the pension plans is identical to her interest in the family home. See CAL. PROB. CODE § 267 (West 1991) (indicating that California property law considers interest in home equivalent to interest in employee benefit plan). The loss of her right to devise her property interest is a loss rising to the level of a taking. See *supra* note 157 (stating text of Takings Clause).

165. See *Nollan v. California Coastal Comm.*, 483 U.S. 825, 831 (1987) (stating that

Fifth Amendment's prohibition of the taking of property without just compensation is to prevent the state from forcing one person to bear the cost of a societal benefit.¹⁶⁶ The situations, therefore, in which courts have refused to find a taking generally involve the granting of a reciprocal benefit to the individual whose property rights are eliminated by the state action.¹⁶⁷ If the individual receives a similarly valued benefit in return for the lost property right, the government action is analogous to a forced sale or exercise of eminent domain.¹⁶⁸ A taking occurs, by definition, when an individual loses a property right but the state does not compensate with an identifiable and specific gain.¹⁶⁹

Ms. Ablamis has lost an important property right through the interpretation of ERISA by the *Ablamis* court. The *Ablamis* ruling did not merely interfere with Ms. Ablamis' expectations of her property rights or limit the use of her property.¹⁷⁰ Her ability to transfer her property interest in the pension plans to her devisees is a distinct right that the court eliminated, not merely abridged.¹⁷¹ For this loss she has received no reciprocal benefit. Congress passed ERISA and the REA to provide a societal benefit, but the

requirement to grant permanent easement would have been taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (stating that loss of economic advantage may not be taking, but loss of recognized right to interest in property is taking).

166. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (discussing purpose of Takings Clause). The *Armstrong* Court asserted that the purpose of forbidding uncompensated taking of private property for a public purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*

167. See *United States v. Sperry Corp.* 493 U.S. 52, 63-64 (1989) (holding that one and one-half percent deduction on awards received from Iran-United States Claims Tribunal was not taking, but rather reasonable user fee for benefit to claimants provided by Tribunal); *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980) (stating that zoning regulations protect residents of city from ill effects of urbanization, therefore, zoning benefits both injured individual and public).

168. See *Nollan*, 483 U.S. at 831 (stating one principal use of eminent domain power is to assure conveyance of desired property interest, however, government must pay for property taken).

169. See *supra* note 157 (stating just compensation language of Takings Clause of the Fifth Amendment).

170. See *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) (stating that Congress has power to create burdens for some people to benefit others). The *Connolly* Court listed minimum wages, price controls and causes of action as examples of regulations that burdened individuals but did not result in a taking. *Id.* The Court implied that these types of adjustments are the price of congressional regulation of "commercial and other human affairs." *Id.* Ms. Ablamis' rights, however, were not merely adjusted, but completely eliminated. See *Ablamis v. Roper*, 937 F.2d 1450, 1460 (9th Cir. 1991) (holding that Ms. Ablamis has no devisable interest in pension plans).

171. See *Ablamis*, 937 F.2d at 1460 (holding that Ms. Ablamis may not devise interest in pension plans); *Agins*, 447 U.S. at 262-63 (stating that taking occurs when state prevents best use of property or extinguishes fundamental attribute of ownership). The *Agins* Court argued that a taking occurred if the injured property owner was unable to pursue reasonable uses of her property other than the use prohibited by the state. *Id.* Any diminution in market value the owner may suffer is minimal compared to the benefit to the city and its citizens and, therefore, is not a taking. *Id.*

benefit to nonemployee spouses as a group does not compensate Ms. Ablamis for her loss.¹⁷²

The Supreme Court has not ruled on the specific question of whether ERISA preemption of community property law constitutes a taking.¹⁷³ It is clear, however, that because Congress and the courts should respect individual property rights and refrain from drafting or construing laws to create unredressed takings, this is an issue that must be decided.¹⁷⁴ The *Ablamis* decision is a classic taking that requires Congress to compensate Ms. Ablamis' loss, or to change the language of the ERISA preemption provision.¹⁷⁵ Congress should amend the ERISA statute to recognize the realities of California law and of the eight other community property states to avoid the huge potential cost of compensating nonemployee spouses in these states.¹⁷⁶

VI. POLICY CONSIDERATIONS

As illustrated by the previous analysis, no unassailably correct rule exists that the *Ablamis* court could have followed.¹⁷⁷ From the perspective of Ms.

172. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (stating that taking can occur regardless of importance of public benefit or minimal impact on individual); *supra* note 11 (stating that, in passing ERISA, Congress intended to protect workers by creating uniform regulation for employee benefits); *supra* note 17 (stating that, in passing the REA, Congress intended to ensure greater equity between spouses).

173. See *In re Marriage of Campa*, 152 Cal. Rptr. 362, 368 (Ct. App. 1979) (finding that ERISA does not preempt state order dividing pension benefits because ERISA is concerned with maintaining benefits before they reach beneficiary and spouse), *appeal dismissed*, 444 U.S. 1028 (1980). In *Campa*, the jurisdictional statement asked whether ERISA preempted California community property law. *Ablamis v. Roper*, 937 F.2d 1450, 1464 (9th Cir. 1991). By dismissing the appeal for want of a federal question, the Supreme Court answered that question in the negative. *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745, 748 (9th Cir. 1980). With this dismissal the Supreme Court has stated indirectly that ERISA does not preempt community property law. *Id.* If California law is not preempted, therefore, Ms. Ablamis has a property interest to devise which the *Ablamis* decision takes from her.

174. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321 (1987) (stating that court may not compel Congress to exercise power of eminent domain); *id.* (stating that Takings Clause is designed to limit freedom of governmental authorities); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that individuals cannot be forced to bear public burdens); *Stone v. Stone*, 450 F. Supp. 919, 924 (N.D. Cal. 1978) (stating that courts interpret federal laws consistently with state property law because Congress generally avoids undue conflicts), *aff'd*, 632 F.2d 740 (1980), *cert. denied*, 453 U.S. 922 (1981).

175. See *First English Evangelical Lutheran Church*, 482 U.S. at 321 (holding that when taking occurs, government may choose either to compensate injured party, or to change statute and eliminate taking).

176. See ERISA, *supra* note 3, § 1144(a) (stating text of ERISA's preemption provision). Section 1144(a) states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.* Congress could amend this section to specify a limitation on the scope of the preemption. My suggestion for an amendment is: "Section (a) is not intended to prevent the application of State property law to the apportionment of plan benefits pursuant to termination of marriage through death or divorce." See also *infra* note 196 (proposing alternate anti-alienation provision to recognize community property interests).

177. See *supra* notes 113-76 and accompanying text (analyzing scope of California com-

Ablamis and other California citizens, however, the choice to uphold community property law clearly is the better result.¹⁷⁸ California has strong policy reasons to want the court to find in favor of Ms. Ablamis' right to devise her community property interest in the pension plans and to arrive at an interpretation of ERISA allowing that outcome.

The *Ablamis* decision will be unwelcome precedent for community property states because the primary effect of this decision, notwithstanding the most basic principles of the community property system, is to treat an employee spouse differently from a nonemployee spouse.¹⁷⁹ While working, the spouses equally contribute community assets to fund a pension plan. When the spouses receive benefits during retirement, the two members of the marriage have identical rights and power over the pension benefits.¹⁸⁰ Upon death, however, the *Ablamis* court has determined that it would be unjust for the property interests to remain identical.¹⁸¹ While Mr. Ablamis can devise up to fifty percent of the benefits to anyone he chooses, the *Ablamis* court prevented Ms. Ablamis from doing the same.¹⁸² The court in *Ablamis* did not adequately address why one spouse can devise an interest in the pension to a third party while the other cannot devise the same interest to her children.¹⁸³ This is an unjust result because the majority destroys the reasonable expectations of the citizens of community property states.¹⁸⁴ The court's holding deprives the nonemployee spouse of the op-

munity property law, scope of ERISA, and possible taking of Ms. Ablamis' property without compensation).

178. See FUNIAK & VAUGHN, *supra* note 27, at 85 (discussing origins of California community property law). In 1850, California chose community property law to be its system of property ownership. *Id.* Obviously, the application of that law is in the best interests of the state and its citizens. *Id.*

179. See *supra* note 33 (stating that primary purpose of community property is equal treatment of husband and wife).

180. See *supra* note 33 (stating that primary purpose of community property is equal treatment of husband and wife).

181. *Ablamis v. Roper*, 937 F.2d 1450, 1457 (9th Cir. 1991). The *Ablamis* court stated that "there is no reason to allow a predeceasing nonemployee spouse to leave part of her surviving employee spouse's pension to a friend, lover, or relative." *Id.*; see also *supra* note 145 (discussing ownership of Ablamis' pension plans). The court did not recognize that it would be unjust to strip Ms. Ablamis of a property right. *Ablamis*, 937 F.2d at 1457. Mr. Ablamis does not lose any property right by Ms. Ablamis' devise—he never owned her one-half interest in the pension. *Id.*

182. See *supra* note 153 (discussing § 1055 authorization for employee spouse to designate beneficiary of remaining pension fund upon death).

183. See *Ablamis*, 937 F.2d at 1457 n.12 (stating that ERISA provides employee spouse with more pension benefits than nonemployee spouse, thus justifying employee spouse's ability to devise up to 50% of pension benefits at death).

184. The impact of the *Ablamis* decision on community property states is best illustrated through a hypothetical example of its effect. A painter is married to a banker. When they retire, the husband/painter has saved \$100,000 from the sale of his paintings. The wife/banker has \$1 million in pension plans regulated by ERISA.

Under pre-ERISA common law and ignoring spousal election, each spouse has complete ownership of his or her own asset and no rights in the other spouse's asset. Upon the death

portunity to devise the share of the pension benefits generated by the assets she contributed.¹⁸⁵

If the *Ablamis* court had cited a compelling reason to destroy the parties' reasonable expectations, the holding might be an acceptable result. The majority, however, seems to have based its conclusion on a misunderstanding of California law rather than on a necessity for preemption. The *Ablamis* majority opinion dwells on the supposed divestment of Mr. Ablamis' interest in his pensions but ignores the effect the decision has on Ms. Ablamis' interest.¹⁸⁶ Most importantly, the majority fails to recognize that the interest Mr. Ablamis was in danger of losing was never his to begin with.¹⁸⁷ Mr. Ablamis never possessed the entire interest in the plan benefits.¹⁸⁸ The court should have considered the nature of ownership while both were

of either spouse his or her asset passes to his or her estate, therefore, the husband's estate would have \$100,000 and the wife's estate would have her right to receive any balance remaining to be paid from her plan. ERISA and REA alter this by requiring at least one-half of the banker's remaining pension benefits to go to the painter when the banker dies. The banker, therefore, would lose the ability to transfer one-half of her asset while the painter would retain complete control of his asset. However, this cost is offset by the benefit to the spouse not covered by the pension plan. Congress' intent in enacting ERISA and the REA was to protect the spouse least likely to be protected by the common law and least likely to have outside assets—traditionally the nonemployed wife.

Under California's community property law, each spouse has an undivided one half interest in each marital asset. Upon the death of either spouse, one-half of each asset belongs to his or her estate and the other half belongs to the survivor. California, therefore, already provides the protections that ERISA and REA attempts to guarantee. If California law is preempted by ERISA, the banker's position at death does not change. One-half of the painter's money and one-half of the balance of her pension pass to her estate. The painter is left with one-half of his asset and the ERISA mandated spousal annuity of one-half of the pension. The painter's position at his death, however, is very different. One-half of the asset he earned belongs passes to his wife, but according to the *Ablamis* majority, none of his wife's pension belongs to his estate. He, therefore, loses a property right over a marital asset and gains nothing in return.

While ERISA was designed to protect the interests of spouses not covered by pensions, it is ironic that its effect in community property states is to make the nonemployee spouse considerably worse off. See *Ablamis*, 937 F.2d at 1468-69 (stating that majority opinion creates result opposite to Congress' intent by stripping away rights of people Congress wanted to protect). The painter loses property rights over the pension for which he is deemed to have provided one-half of the funds.

185. See *Allard v. Frech*, 754 S.W.2d 111, 114 (Tex. 1988) (holding that pension funded with community assets was community property, therefore, one-half passed to nonemployee spouse's estate), *cert. denied*, 488 U.S. 1006 (1989); *supra* note 34 (discussing presumption of equal contribution of assets to acquisition of community property).

186. See *Ablamis v. Roper*, 937 F.2d 1450, 1457 (9th Cir. 1991) (characterizing effect of allowing Ms. Ablamis to devise interest in pension plans as injury to employee spouse).

187. *Id.* The *Ablamis* court speaks of Ms. Ablamis' devise divesting Mr. Ablamis of his pension rights. *Id.* See also *supra* note 144 (identifying Ms. Ablamis' property interest during her life). Under California law and under the QDRO exception, however, Ms. Ablamis does have a community property interest in the plans. *Id.* Therefore, the question remains of how Mr. Ablamis can be divested of something he does not possess.

188. See *supra* note 143-44 and accompanying text (discussing ownership of Ablamis' pension plans while both spouses were alive).

alive before it discarded California property law and Ms. Ablamis' property rights.

Despite the holding in *Ablamis*, ERISA need not preempt state substantive property law. The determination and characterization of property rights is an extremely important state function and Congress should not involve itself in that function absent a compelling need.¹⁸⁹ Congress' regulation of pension plans clearly does not require such an involvement.¹⁹⁰ By enacting ERISA, Congress intended to provide stability and uniformity to pension plan management and guarantee benefits.¹⁹¹ State determination of the ultimate ownership of benefits within the family unit does not injure this intent.¹⁹² California community property law does not adversely affect Congress' goals of preserving funds for future distribution, providing uniform management rules, and safeguarding benefits from creditors.¹⁹³ Congress recognized the contribution made to the marriage by the nonemployee spouse and designed the REA to compensate for that contribution.¹⁹⁴ Because this recognition is central to California property law, it is ironic that by adopting principles that provide common-law nonemployee spouses with equitable interests, Congress has reduced the property rights of the nonemployee spouse in community property states.¹⁹⁵ Congress, therefore, should amend ERISA's anti-alienation provision to recognize specifically community property states' choice to create the existence of the one-half interest of each spouse in pension benefits earned by either spouse in community property states.¹⁹⁶

189. See *supra* notes 43-45 and accompanying text (discussing policy of congressional respect for state sovereignty and for state interest in its property law).

190. See *supra* note 11 (stating that Congress' purpose in enacting ERISA was to protect beneficiaries by regulating management of pension plans).

191. *Id.*

192. See *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) (stating that Congress designed ERISA to safeguard benefits for pensioners and dependents); *AT&T v. Merry*, 592 F.2d 118, 124 (2d Cir. 1979) (stating that Congress designed anti-alienation provision to protect employee from his own financial improvidence in dealing with third parties and not to preclude benefit transfer between spouses); *supra* notes 100-03 and accompanying text (noting in *Ablamis* dissent that application of state law results in no injury to federal interests).

193. See *supra* note 11 (stating Congress' goals in enacting ERISA as listed in § 1001(b)). In § 1001(b), Congress stated that the goals of ERISA are to protect beneficiaries by establishing standards for plan management and administration. *Id.*

194. See S. REP. No. 575, 98th Cong., 2d Sess. 1 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2547 (describing goals of REA).

195. See *supra* notes 119-20 and accompanying text (stating that California law allows testamentary transfer of interest in pension plan). The REA increases the benefits and rights of nonemployee spouses in common-law states, but eliminates the property right of nonemployee spouses in community property states. See *supra* note 105 and accompanying text (citing pre-ERISA cases recognizing nonemployee spouse's property right). Considering that the word "equity" is in the title of the Act, this outcome is ironic. See John Hopwood et al., *Selected Current Issues in Community Property Aspects of Retirement Plans*, 39 BAYLOR L. REV. 1199, 1228 n.194 (1987) (noting argument that equity requires both spouses to be treated alike under REA provisions).

196. See ERISA, *supra* note 3, § 1056(d) (stating that qualified domestic relations order

VIII. CONCLUSION

In a case where an unsympathetic party sought relief Justice Jackson stated, “[w]e agree that this is a hard case, but we cannot agree that it should be allowed to make bad law.”¹⁹⁷ This should be a lesson followed by the *Ablamis* majority because its decision to take Ms. Ablamis’ property rights is the result of bad law. In *Ablamis*, the court seemed horrified by the thought that an innocent husband would be stripped of his hard earned pension by the adult children of his deceased wife.¹⁹⁸ If any property was taken, it was Ms. Ablamis’ property rights in the pension plans.¹⁹⁹ Because the tone of theft so pervaded the majority opinion, the *Ablamis* court would likely have decided the case differently if Ms. Ablamis’ children had been helpless infants or profoundly mentally disabled adults.²⁰⁰ Because the beneficiaries were not at issue, the majority should not have allowed the beneficiaries’ identity to influence the property rights of the deceased Ms. Ablamis. Justice Jackson’s message is that judges make good law not through sympathetic fact patterns, but rather by consistent application of sound legal principles.

ERISA should not preempt California community property law to satisfy the *Ablamis* court’s view of equity in this particular case.²⁰¹ Ms. Ablamis’ estate should prevail in its fight for recognition of Ms. Ablamis’ property

is exception to anti-alienation provision). Section 1056(d) states that:

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2)

(3)(A) 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. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

Id. Congress should amend this section specifically to allow any transfer in plan benefits pursuant to state definitions of spousal ownership. My suggestion for an amendment is to change paragraph (3)(A) to (3)(A)(i) and insert paragraph (3)(A)(ii) stating, “Paragraph (1) shall not apply to the recognition of ownership rights in the pension plan as a result of State property law.” See *supra* note 176 (proposing alternate preemption provision to clarify status of state property law).

197. *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946).

198. *Ablamis v. Roper*, 937 F.2d 1450, 1457 (9th Cir. 1991).

199. See *supra* notes 157-76 and accompanying text (discussing possibility that *Ablamis* court’s ruling results in taking of property in violation of Fifth Amendment).

200. See *Ablamis*, 937 F.2d at 1457 (claiming that Ms. Ablamis attempted transfer was to “third parties” and that Ms. Ablamis sought to divest Mr. Ablamis’ “family” of benefits); *id.* at 1460 n.17 (claiming that transfer of benefits to Ms. Ablamis’ family would frustrate a general statutory purpose of preserving benefits for pension owner’s family). The *Ablamis* majority characterizes Ms. Ablamis’ devise as a transfer to a stranger rather than to her children and husband. *Id.* This allows the court to preserve the supposed goals of ERISA while blocking any sympathy for either Ms. Ablamis or her family. The *Ablamis* court is not heroically saving the benefits of a defenseless Mr. Ablamis.

201. See Hopwood, *supra* note 195, at 1215-16 (1987) (observing that community property principles should not be preempted simply to suit perceived equities of particular case).

right not because she had a sympathetic story, but because she had a substantive legal right to the pension plans under California law and under ERISA. *Ablamis v. Roper* is an important case for the citizens of community property states. Barring Supreme Court review or congressional action, the decision in *Ablamis* may become the final word on the ERISA preemption issue because five out of nine community property states are within the Ninth Circuit's jurisdiction.²⁰² The *Ablamis* court, however, incorrectly satisfied supposed congressional intent by sacrificing important state-granted property rights.²⁰³ For all citizens of community property states, this is an unjust result.

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202. Assuming the *Ablamis* court decision will stand, the question remains of what the next person in Ms. *Ablamis*' position should do. The nonemployee spouse has a few options to ensure property rights that may be devised. First, the spouses could divorce. This is an unattractive option, but it would enable the property rights of the spouses to be adjudicated consistent with state law. Second, the nonemployee spouse could waive all rights in the pension in exchange for title to other assets. This solution depends upon the existence of other assets of comparable value. Additionally, spouses must complete this transfer before death, because the Supreme Court has held that compensating the nonemployee spouses estate subverts Congress' intent of preservation of benefits for the employee spouse. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-89 (1979). Third, the nonemployee spouse could waive all rights in the pension in exchange for the employee spouses enforceable promise to pay a portion of the pension benefits to the people the nonemployee spouse desires to benefit. This solution takes the pension benefits out of the realm of ERISA restrictions because the parties have made no attempt to transfer the right to receive benefits directly from the plan, but the nonemployee spouse must rely on the good faith compliance of the spouse or court intervention to guarantee the contract. Any of these options permits the nonemployee spouse to devise the interest recognized by California law.

203. See *supra* notes 191-95 and accompanying text (observing that application of California law does not harm federal interests).