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NOTES

The Retirement Equity Act: An Accommodation of Competing Interests

INTRODUCTION

In many marriages, the most valuable marital assets are the employee spouse's pension rights.¹ When a marriage terminates, a court must divide and dispose of marital property fairly and equitably. However, dividing an employee spouse's retirement benefits between the parties, unlike dividing most other marital property, involves the task of interpreting both state domestic law and federal pension law. In the last several years, dramatic and fundamental reforms have taken place at both state and federal levels affecting the status of pension rights as marital property.

The Retirement Equity Act of 1984 (REA)² is a major piece of federal legislation which affects state domestic law concerning the division and disposition of private retirement benefits upon divorce.³ The Act's purpose is to improve retirement benefit protection and to provide greater equity in private pension funds for participants and their families.⁴ REA amends the Employee Retirement Income Security Act of 1974 (ERISA)⁵ and the Internal Revenue Code of 1954 (IRC)⁶ in several important areas.⁷ The significant change for purposes of this Note is section 104 of REA, which exempts

⁷. REA addresses other significant areas which are outside the scope of this Note. Examples include the assurance of working women's participation in employer-sponsored retirement plans and automatic survivor benefits to surviving spouses of plan participants. For an overview of these areas, see Comment, The Retirement Equity Act of 1984: One Step Forward, Two Steps Back, 37 ALA. L. REV. 163 (1985).
certain domestic relations orders\(^8\) from ERISA’s spendthrift clause\(^9\) and preemption clause.\(^{10}\)

Prior to REA’s enactment, two significant problems prevented parties and courts from dividing and disposing of pension benefits in a dissolution proceeding. First, state court decrees ordering the assignment of pension benefits to the former spouses of plan participants’ placed pension funds in a predicament. A pension plan which complied with a court’s order risked losing its “qualified” status since ERISA’s spendthrift clause prohibited such assignments.\(^{11}\) Second, all state laws permitting the apportionment of pension benefits to the former spouses of plan participants arguably were superseded by ERISA’s express preemption of all state laws relating to private pensions.\(^{12}\)

The extent to which ERISA’s spendthrift and preemption provisions affected state marital property laws (if the provisions affect state laws at all) is an issue which has prompted much litigation.\(^{13}\) Under section 104 of REA, guidelines are established for the disposition of pension benefits between spouses upon dissolution of their marriage. If followed, the domestic rela-

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\(^8\) REA defines a “domestic relations order” (DRO) as:
any judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights of a spouse, former spouses, child, or other dependent of a participant, and is made pursuant to a State domestic relations law (including community property law).

\(^9\) The purpose of the spendthrift clause, aside from serving the convenience of the plan administrator, is to prevent funds accumulated for the employee’s retirement years from being squandered by the employee. Thus, the clause assures that the benefits will remain intact until the employee reaches retirement. See id. § 1056(d)(1) (“[e]ach pension plan [subject to ERISA] shall provide that benefits provided under the plan may not be assigned or alienated”).

\(^10\) Id. § 1144(a). Section 1144 provides in pertinent part:
(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(b) . . .

(c) For purposes of this section: (1) The term “State law” includes all laws, decisions, rules, regulations, or other State action having the effect of law . . . .
Id. § 1144(a), (c) (emphasis added).


\(^12\) See Solomon, supra note 1, at 1025-26. Despite ERISA’s express preemption of state laws, the following cases found the domestic relations orders impliedly excepted from the preemption clause: Cody v. Riecker, 594 F.2d 314, 315 (2d Cir. 1979); American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979). Stone v. Stone, 450 F. Supp. 919, 924-32 (N.D. Cal. 1978), aff’d, 632 F.2d 740 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981).

This Note analyzes the complications associated with the division and disposition of private retirement benefits upon divorce and discusses REA's solution to these complications. This Note then focuses on REA's attempt to balance the competing interests of the non-participant spouse, the participant spouse, and the private pension system. At present, it is not yet known how state courts will interpret REA. However, an analysis of post-ERISA, pre-REA decisions provides a meaningful framework for examining the ramifications of REA.

Section I of this Note discusses the private pension system and the various types of pension plans. Section II examines the advantages and limitations that are inherent in the two distribution methods of pension benefit division: the present cash value method and the reserved jurisdiction method. Such advantages and limitations vary depending upon the state's marital property system, the stages of the pension's vesting and maturity, and the type of pension plan. Section III discusses the post-ERISA judicial activism of state courts, REA's response to the activism, and the costs of the response. Finally, section IV evaluates the advantages of section 104 of REA over the other two distribution methods, and then discusses the proper role that state courts and state legislatures should play in future cases involving the division of pension benefits in a dissolution suit, in light of REA's enactment.

This Note proposes that states must determine a fair disposition of pension benefits in the event of divorce. They must develop laws which protect both participant and non-participant spouses during their later years. Such a disposition must take into account that pension benefits, as marital property, uniquely provide future security for beneficiaries whereas other such assets are normally for immediate consumption. Finally, a fair disposition must embrace the national concern for maintaining a private pension system that adequately protects the voluntary nature of private pensions. Such a disposition mechanism must be developed if REA is to accomplish its stated goals: improving retirement benefit protection and providing greater equity in private pension funds for participants and their families.15

I. OVERVIEW OF THE PRIVATE PENSION SYSTEM

A. Private Pensions in General

One of the most important public policy issues confronting the nation today is how to assure that individuals in their retirement years will have

15. See supra note 4 and accompanying text.
adequate income to meet their needs. The growth in the United States' population during the last half century has been phenomenal. The general population has doubled while the number of persons aged 65-and-over has quadrupled. Social Security, public employee pension funds, individual savings, and private pension plans provide income for the growing elderly population. In the last several decades, private pension plans have played an increasingly significant role in addressing this important national concern.

Prior to 1974, the federal government imposed only minimal regulations on the operation of privately provided retirement programs. However, this changed in 1974 when, pursuant to the Congressional power to regulate commerce among the states, Congress undertook to strengthen the private pension system by enacting the Employee Retirement Income Security Act. The major objectives of ERISA are to: 1) create national uniformity in private pension law; 2) encourage the spread of private employee retirement programs, thereby increasing the number of individuals participating in such plans; 3) increase the likelihood that participants actually receive benefits;

17. D. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS 3 (4th ed. 1979). In 1920, the population in America of citizens at least sixty-five years of age was approximately 4 million, whereas in 1978 it had grown to 23.9 million. It is estimated that by the year 2025, population of persons at least sixty-five years of age will number 50.9 million. Id. (citing U.S. DEP’T OF COM. CURRENT POPULATION REPORTS, Series P25, No. 702).
18. 42 U.S.C. §§ 301-433 (1982 & Supp. III 1985). The Social Security Act provides for the administration of a national program of contributory social insurance. Monthly payments are paid to replace part of the employee's earnings when earnings cease or are reduced because the employee retires, or becomes disabled.
Under the Social Security Act, all employed individuals are forced to assume some responsibility for the maintenance of retired individuals. However, the federal program was designed deliberately to provide for only minimum protection. Thus, the private pension plan system is important for its supplemental role. See D. MCGILL, supra note 17, at 7, 28.
20. Private and public employee pension plans play a significant role in providing income to older citizens since individual savings and investments can be wiped out by unforeseen illness of the participant or death of a spouse.
21. The first private plans developed around the turn of the century. These early plans were considered as mere gratuities from the employer, since the employer assumed no legal obligation to provide such benefits. D. MCGILL, supra note 17, at 16.
23. See Bonavich, Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings, 29 DePaul L. Rev. 1, 3-4 (1979); See also Kuchta v. Kuchta, 636 S.W.2d 663, 664-65 (Mo. 1982).
4) decrease the likelihood that participants will lose benefits because of strict forfeiture provisions; and 5) ensure that plans will accumulate and retain sufficient funds to meet their obligations. Congress recognized the purely voluntary nature of the private pension system and through ERISA established regulations to correct abuses in the system without discouraging the private business sector from establishing and maintaining pensions for its employees.

For the employee, a pension affords some security for his or her retirement years and rewards the employee for long years of service. For the employer, pensions attract qualified employees and increase productivity by improving employee morale. ERISA offers advantages, mainly in the form of tax incentives, for both the employer and employee in order to foster establishment of, and participation in, pension plans. To qualify for the preferential tax treatment, pension plans must comply with the Internal Revenue Code and with ERISA's spendthrift clause. The purpose of the spendthrift clause, aside from serving the convenience of the plan administrator, is to prevent funds accumulated for the employee's retirement years from being squandered by the employee or seized by creditors of the employee, thus ensuring that the benefits will remain intact until the employee reaches retirement.

B. Defined Contribution Plans and Defined Benefit Plans

To fully understand the complexities arising from the disposition of pension rights upon divorce, it is necessary to examine the basic mechanics of


29. Employee morale is elevated through the elimination of the employee's anxiety over retirement security. Moreover, the employee receives a positive feeling that his employer cares about the employee's future. Furthermore, the establishment of pension plans may reduce employee turnover and hence, decrease the costs of training replacements. D. McGill, supra note 17, at 21-22. See Doyle, ERISA and the Non-employee Spouse's Community Interest in Retirement Pay, 3-4 COMM. PROP. J. 3, 4 (1977); Bonavich, supra note 23, at 4.

30. See I.R.C. §§ 401, 501 (1986); 26 U.S.C.A. §§ 401, 501 (West Supp. 1987). Generally, these incentives are employer contributions that are deductible when made. Neither employer nor participant is taxed on earnings of the fund, and participant may receive favorable tax treatment upon receipt of payment from the plan.


most pension plans. Two general types of retirement plans exist: defined contribution plans and defined benefit plans. Under a defined contribution plan, the employer contributes a definite amount to the fund, and the employee may be permitted or required to contribute also. An individual account is maintained for each participant, who bears the investment risks and benefits. Professional and small incorporated businesses prefer the defined contribution plan because it offers flexibility and is less expensive to administer than the defined benefit plan. Benefits in a defined contribution plan are easily divisible upon the dissolution of a marriage because individual accounts are maintained for each participant and periodic reports are furnished showing the investment transactions during the period. Thus, the value of a defined contribution plan upon divorce is always ascertainable and becomes merely a matter of reviewing the latest account statement.

The other major type of retirement plan is the defined benefit plan. Under this plan, benefits received are based on a combination of factors such as the highest income level achieved by the participant, the number of years worked by the participant, and the age of the participant at retirement. Large corporations most commonly utilize defined benefit plan. The employer sponsoring the pension plan bears the investment risks and rewards. Unlike the defined contribution plan, the employer's annual contributions are not fixed and individual accounts are not maintained. Therefore, upon divorce, valuation of benefits in a defined benefit plan is more difficult than valuation of benefits in a defined contribution plan. Although a court's determination of whether pension benefits and rights are marital property is not contingent upon the type of plan,

33. The defined contribution plan is also known as a contributory plan. See Pattiz, In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans, 5 PEPPERDINE L. REV. 191, 203 (1978). Common examples of the defined contribution plan include stock ownership, profit-sharing, and stock bonus. Park, The Division of Private Pensions in Divorce Actions Since the Retirement Equity Act of 1974, 20 CLEARINGHOUSE REV. 9, 10 n.9 (May 1986).

34. This type of plan is traditional. Park, supra note 33, at 10 n.9.


36. Park, supra note 33, at 10 n.10.


38. Id. at 108. The amount of future retirement payments is unknown because the yearly contributions are invested by the plan trustee, thus the future accounts depend upon market fluctuations.


41. Park, supra note 33, at 10 n.9.

42. Hardie, supra note 35, at 107.

43. See generally Hardie, supra note 35, at 107-09 (discussing a court's task in determining whether certain pension benefits are marital property).
problems of benefit valuation and allocation vary depending upon the particular plan in question.\textsuperscript{44}

**II. Retirement Benefits as Marital Property**

**A. Marital Property Systems: Common Law and Community Property Law States**

Most states in the last decade have acknowledged that certain retirement benefits are divisible upon divorce.\textsuperscript{45} Although pension benefits are property,\textsuperscript{46} whether they constitute marital property subject to disposition upon divorce depends on several factors. Such factors include whether a state is a common law jurisdiction or a community property law jurisdiction, and whether the benefits are vested\textsuperscript{47} and matured,\textsuperscript{48} vested and non-matured, or neither vested nor matured.

Marital property laws take two basic forms: common law and community property law. Currently, forty-two states and the District of Columbia utilize

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\textsuperscript{44} See, e.g., Johnson v. Johnson, 131 Ariz. 38, 42 n.10, 638 P.2d 705, 709 n.10 (1981). In a defined contribution plan, the current amount of benefits may be determined easily because individual accounts are maintained. In a defined benefit plan, however, the current amount of benefits is more difficult to determine because no individual accounts are maintained and the amount that must be discounted to its present value depends upon such factors as percentage of salary and years of service. Id. For a comprehensive treatment of pension division methods, see DiFranza & Parkyn, supra note 1, at 464-69.


\textsuperscript{46} See P. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA 149-50 (1976); Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981). In holding that the right to receive retirement benefits constitutes marital property, the Ohm court explained the rationale underlying similar decisions in other courts: "[R]etirement benefits are a form of deferred compensation or wage substitute . . . and the right to receive such benefits being contractual in nature, a chose in action and thus, property." 431 A.2d at 1374. See also In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

\textsuperscript{47} A "vested" right in a plan is one in which the right to receive the benefit is not subject to forfeiture if the employment relationship ends prior to the employee's retirement. Johnson, 638 P.2d at 708 nn.2. A "non-vested" right in a plan is one which is forfeited if the employment relationship ends before a certain time, such as retirement, death, discharge, or resignation. Id.

\textsuperscript{48} A pension benefit matures when the participant has an unconditional right of payment which only occurs after the conditions precedent to the benefit payment have taken place or are already in the control of the employee, e.g., early retirement. Williamson v. Williamson, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167 (1962), overruled on other grounds, Brown, 544 P.2d 561.
a common law property system. Generally, common law jurisdictions, by statute, require the "equitable distribution" of marital property upon termination of the marriage. The doctrine of equitable distribution allows courts to award property legally owned by one spouse to the other spouse, and recognizes the non-employee spouse's contribution to the marital estate. Property division under this doctrine varies among the common law states because the statute usually requires the court to distribute the property in a manner that is "equitable," "fair," or "just." In addition, trial judges in common law states exercise wide discretion in disposing of marital property upon the dissolution of the marriage.

Unlike the equitable distribution jurisdictions, some community property states require equal division of marital property. Community property states recognize the non-employee spouse's contributions to the marriage and, more generally, recognize marriage to be a partnership of shared assets. Property acquired by either spouse during the marriage is generally considered "community property" and is subject to division if the marriage is dissolved. Thus, each spouse owns an equal amount of all community earnings and property. Historically, community property states, as compared to


51. Id. at 484.


53. A court's discretion allows it to take into account many variables when disposing of the marital property. Discretion, however, does not provide divorcing parties guidance to determine whether it is better to enter into a property settlement or let the court divide the property. Furthermore, due to the trial judge's wide discretion, a dissatisfied party on appeal will have the difficult burden of showing that the trial judge abused his discretion. See, e.g., Hafner v. Hafner, 406 N.W.2d 590 (Minn. Ct. App. 1987) ("trial court's broad discretion in determining awards in dissolution proceeding will be overturned only upon a clear showing that this discretion was abused"); Luedke v. Luedke, 487 N.E.2d 133, 135 (Ind. 1985) (trial judge's decision will be found wanting on appeal only if it can be shown that he abused his discretion); Hale v. Hale, 439 So. 2d 160, 162 (Ala. Civ. App. 1983) ("court has a wide discretion in awarding . . . division of property").

54. States with community property laws are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. McNamara, supra note 45, at 33.


common law states, have been more inclined to divide an employee's pension benefits upon divorce.\textsuperscript{57} Common law states, however, have begun to recognize pension rights as marital property.\textsuperscript{58}

\textbf{B. Stages of Vesting and Maturity}

Whether retirement benefits are found to be marital property depends upon the time of dissolution in relation to the stage of vesting and maturity of the pension rights.\textsuperscript{59} The first timeframe covers the period during which the pension rights are vested and matured.\textsuperscript{60} During this period, the pension plan participant has a legal right to receive the benefits if he or she elects to retire.\textsuperscript{61} In community property states, it is uniformly held that vested and matured benefits are community property\textsuperscript{62} to the extent that the benefits are earned during the marriage.\textsuperscript{63} Similarly, most common law states hold vested and matured benefits to be marital property.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{57} Solomon, \textit{supra} note 1, at 1023.
\item \textsuperscript{60} The three stages are discussed in reverse chronological order, beginning with the stage which presents the least amount of difficulty in a court's determination of whether pension benefits are marital property and ending with the stage which presents the most difficulty.
\item \textsuperscript{61} If the employment relation ends, the plan participant is entitled to certain benefits at the time of termination because the plan is both vested and matured. \textit{Kuchta}, 636 S.W.2d at 665.
\item \textsuperscript{63} The equation is the same regardless of the marital property system. In \textit{Ohm}, 431 A.2d at 1379, the equation was described in the following manner: \textquote[Ohm, 431 A.2d at 1379]{"[T]he marital interest in [the benefit] will be a fraction of that [benefit], the numerator . . . being the number of years . . . of marriage during which benefits were being accumulated, the denominator being the total number of years . . . during which [the benefits were accumulated . . . ]" Id. (quoting \textit{In re} Marriage of Hunt, 78 Ill. App. 3d 653, 663, 397 N.E.2d 511, 519 (1979)).
\end{itemize}
The second timeframe covers the period during which the participant’s pension rights are vested, but not matured. During this period, the participant has a legal right to the benefits. However, the payment of benefits does not begin until the employee reaches a certain age, retires, or otherwise terminates the employment relationship. Vested, non-matured benefits are divisible in all community property states. The courts in most common law states have held, in a variety of contexts, that a participant’s non-forfeitable, vested, and non-matured pension rights are marital assets.

The final timeframe covers the period during which pension rights are neither vested nor matured. During this period, the participant has no legal right to receive pension benefits. This stage presents the most difficulties for courts. Following California’s lead, all community property states hold, or clearly imply, that unvested and non-matured benefits are marital interests divisible as community property to the extent they derive from employment during marriage. These states base their holdings on a recognition of the economic importance of pension rights and the necessity of treating them equitably. Therefore, unvested benefits are held to be a “contingent interest in property” and not a mere expectancy.

Community property states have led the way in recognizing the important property value of unvested, non-matured retirement benefits and the non-participant’s interest in them. In contrast, common law states have been

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65. For example, retirement benefits earned by a thirty-five year old employee with ten years of service may be fully vested, although not payable until some future date. Until the date on which they become payable, such as upon the plan participant’s date of retirement, the benefits will remain non-matured.

66. See McNamara, supra note 45, at 34. For an analysis of vested but unmatured benefits in equitable jurisdictions, see Meyer, supra note 59, at 175-99.

67. See, e.g., In re Marriage of Brown, 544 P.2d 561; Johnson, 638 P.2d at 708. See also McNamara, supra note 45, at 34.


69. For example, the employee with six years of service usually has not worked long enough for his pension to vest. Thus, if he resigns, dies, or is discharged, he receives nothing. However, if he works longer, his pension will eventually vest.

70. In re Marriage of Brown, 544 P.2d 561, 569 n.14 (“Pension interests are divisible as community property whether or not vested and whether or not matured.”).

71. See McNamara, supra note 45, at 34. See, e.g., Johnson, 638 P.2d 705; Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979).

72. Campa, 89 Cal. App. 3d 113, 123; Brown, 544 P.2d at 566.

73. See, e.g., Kuchta, 636 S.W.2d at 665-66; Brown, 544 P.2d at 565 (“[P]ension benefits represent a form of deferred compensation for services rendered . . . [and] . . . not an expectancy but a chose in action, a form of property . . . ”).
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reluctant to recognize pension rights as marital property during this timeframe. Although the majority of common law states hold that unvested and unmatured benefits are marital property, the treatment of these benefits varies. A small minority of common law states still refuse to recognize unvested and non-matured benefits as marital property because the benefits’ value, and possibilities of vesting, are contingent upon many variables.

C. Distribution Options Available

After retirement benefits are determined to be marital property and are added to the marital assets, they must be allocated to the parties. Besides the varied treatment benefits receive depending upon their stage of vesting and maturity, retirement benefits receive varied treatment upon division in dissolution proceedings (when divided). The trial court must select a proper time at which the disposition of pension benefits may occur. Two alternative times may be selected: upon dissolution of the marriage, or at some time in the future. The two methods of dividing the benefits are the present cash value method and the reserved jurisdiction method. Many states afford trial courts complete discretion in determining which method is appropriate, while other states afford trial courts limited discretion, thereby suggesting a preference for the immediate disposition of the benefits. The competing interests of participant and non-participant spouses are not pro-

74. See McNamara, supra note 45, at 40. See, e.g., Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986); Ohm, 431 A.2d 1371.
75. See, e.g., Ind. Code § 31-1-11.5-2(d) (1985). The Indiana Code states: “The term ‘property’ means all the assets of either party or both parties, including: (1) a present right to withdraw pension . . . ; [and] (2) . . . retirement benefits that are not forfeited upon termination of employment . . . .” Id. Indiana’s new statute places only vested benefits in the marital pot subject to just and reasonable division. See also Ratcliff v. Ratcliff, 586 S.W.2d 292 (Ky. Ct. App. 1979) (“too speculative to be treated as marital property”).
76. For a practical guide of the advantages and disadvantages of the present cash value method and the reserved jurisdiction method, see Hardie, supra note 35; DiFranza & Parkyn, supra note 1.
77. For an overview of the present cash value method, see Pattiz, supra note 33, at 249-50. See also DiFranza & Parkyn, supra note 1, at 464-67.
79. See infra note 53. See, e.g., Wilder v. Wilder, 85 Wash. 2d 364, 369, 534 P.2d 1355, 1358 (1975) (“[T]here can be no set rule for everyone; the trial court must exercise wise and sound discretion . . . .”); Taylor v. Taylor, 329 N.W.2d 795, 798 (Minn. 1983) (“[V]aluation and division of pension rights is generally a matter for the trial court’s discretion . . . .”).
80. See, e.g., Diffenderfer v. Diffenderfer, 491 So. 2d 265, 269 (Fla. 1986) (“The most preferable approach involves a reduction to present value . . . .”); Kikkert v. Kikkert, 177 N.J. Super. 471, 477, 427 A.2d 76, 79, aff’d, 88 N.J. 4, 438 A.2d 317 (1981) (“Long-term and deferred sharing of financial interests are too susceptible to continued strife . . . .”); Johnson, 638 P.2d at 709 (“[T]he present cash value is clearly preferable in that the reserved jurisdiction method would require continued court supervision . . . .”).
vided complete protection by either method. Therefore, in light of the circumstances surrounding the particular case, the trial court must determine which approach affords each spouse optimal protection.

Under the present cash value method, the pension benefits are assigned immediately to the plan participant, and other assets of equivalent value are awarded to the other spouse. The court determines the marital interest in the benefits, calculates the present value of the interest factoring in contingencies of vesting, maturity and the pensioner's mortality, and awards half of that amount to the non-participant in a lump sum. The lump sum is usually awarded in the form of property of equivalent value. This method is generally preferred over the reserved jurisdiction method when retirement benefits are vested and the marital estate has sufficient property to satisfy the non-participant’s claim without undue hardship to the other spouse.

Under the reserved jurisdiction method, the court settles only the formula for division at the time of the dissolution. The actual division, however, is delayed until the retirement benefits are received. This method, also known as the “if, as, and when” approach, awards the non-participant spouse's interest in the benefits if the participant is paid, as the participant is paid, and when the participant decides to retire. The reserved jurisdiction method is preferred over the present cash value method when the present value of the retirement benefit is too difficult to determine.

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81. See DiFranza & Parkyn, supra note 1, at 464. Johnson, 638 P.2d at 708.
82. See supra note 63.
83. This is an oversimplification. When determining the present cash value of an interest in a retirement benefit, the value must be discounted for many contingencies. For example, the value must be discounted to reflect mortality, based upon group mortality tables, and the probability that the participant will remain employed with the same employer. See Hardie, supra note 35, at 108-09. Furthermore, the actuary must discount for inflation. DiFranza & Parkyn, supra note 1, at 465-67.
84. Tax consequences flow from each method and should be considered. See Sutherland, ABA Family Law Section Program: The Economics of Divorce (in a Community Property Division), 4 COMM. PROP. J. 47, 49-50 (1977); Solomon, supra note 1, at 1024. But see Johnson, 630 P.2d at 710 ("[The court] declines to consider the speculative future effects of taxes and inflation.").
85. See Solomon, supra note 1, at 1024. See, e.g., Kuchta, 636 S.W.2d at 666 ("In any dissolution proceeding, the most desired result would be a full and final division of marital property . . . .") ; Taylor, 329 N.W.2d at 79 ("This method is preferred where there are sufficient assets available . . . without causing an undue hardship to either spouse . . . .").
86. DiFranza & Parkyn, supra note 1, at 467. See Ohm, 431 A.2d at 1379.
87. DiFranza & Parkyn, supra note 1, at 467. See Johnson, 638 P.2d at 708.
88. Ohm, 431 A.2d at 1379 (quoting Hunt, 397 N.E.2d at 519).
89. Id. See also Bloomer v. Bloomer, 84 Wis. 2d 124, 136, 267 N.W.2d 236, 241 (1978). "In community-property states, the non-employee spouse's share is set at 50 percent of the benefits attributable to earnings during marriage. In Wisconsin . . . the trial court has the discretion to determine the appropriate percentage." Id.
90. Where it is difficult to ascertain a present value of the pension interest due to uncertainties regarding vesting or maturation or when the lack of marital property makes it impossible to award sufficient offsetting marital property to the non-participant, then the reserved jurisdiction is preferable. Ohm, 638 P.2d at 1379.
1. Advantages and Limitations of the Present Cash Value Method

The present cash value method provides three major advantages over the reserved jurisdiction method. These are: 1) all transactions between the spouses are finalized at the time of dissolution;\(^9\) 2) the spouse from whose employment the benefits are derived is awarded them;\(^9\) and 3) the non-participant spouse is awarded an immediate set-off of property.\(^9\) By finalizing all transactions between the divorcing spouses, this method benefits both parties. This benefit is evident when hostility exists between spouses since it allows the parties to avoid future confrontations about financial matters. The second advantage directly benefits the employee and indirectly benefits the employer. Under the present cash value method, the employee will reap the benefits of his or her long years of service in their entirety, and because the employee's work morale is high, the employer will benefit from the increased productivity of the plan participant.\(^9\)

A third consequence of this method is advantageous to the non-participant spouse. The present cash value method provides the non-participant with immediate control over his or her share of the marital estate, affording him or her the autonomy to spend that share however he or she prefers.\(^9\)

Three major problems arise, however, when the present cash value method is used. These problems are: 1) pensions and annuities are often difficult to value;\(^9\) 2) the participant bears the risk of vesting;\(^9\) and 3) the non-participant fails to receive adequate security for later years.\(^9\) Most commentators agree that the major drawback of this method is the problem of valuing pension benefits at the time the marriage is dissolved. Benefits which are vested and matured, especially if the pension is a defined contribution plan, present the fewest difficulties. However, when benefits are vested and unmatured, or unvested and unmatured, the complexity of valuation increases. Each spouse must employ an actuary to ascertain the present value of the benefits.

91. See Solomon, supra note 1, at 1024; Bonavich, supra note 23, at 31-32. See also Johnson, 638 P.2d at 708-09.
92. See Solomon, supra note 1, at 1024. See also Shill v. Shill, 100 Idaho 433, 437, 599 P.2d 1004, 1008 (1979).
93. Shill, 599 P.2d at 1008.
94. See supra note 29 and accompanying text.
96. The difficulty in valuation arises when the benefits are contingent and not matured. See Sutherland, supra note 84, at 49. See also Bergman v. Bergman, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (1985).
97. See Hardie, supra note 35, at 110. See also In re Marriage of Skaden, 19 Cal. 3d 679, 688, 566 P.2d 249, 253, 138 Cal. Rptr. 615 (1977); Johnson, 638 P.2d at 708-09 n.6.
98. The non-participant's lump sum does not receive ERISA's spendthrift clause protection, unlike the participant's awarded retirement benefits which will remain out of the reach of the participant's creditors.
The value of benefits under a defined contribution plan is easier to estimate because individual accounts are maintained and the most recent account statement at the time of the dissolution can be provided by the plan administrator. However, when benefits are in a defined benefits plan, the future amount to be received depends on factors which are unknown at the time of dissolution. Such factors include the highest level of income the participant will achieve, years of service at retirement, and age at retirement. In addition, the valuation must be discounted for the participant's mortality rate, the probability of the participant remaining with the employer until retirement, and inflation.

For the participant, the present cash value method may be undesirable because the participant bears the risks of paying the non-participant spouse for rights which may never materialize. For the non-participant spouse, this method fails to provide any security for his or her later years. Even if the lump sum award is wisely invested with the hope of providing security, the award does not receive the preferential treatment which the participant's award receives under ERISA's spendthrift clause. Thus, the non-participant's award is vulnerable to attachment by his or her creditors.

2. Advantages and Limitations of the Reserved Jurisdiction Method

The reserved jurisdiction method provides several advantages, as compared to the present cash value method. The three main advantages are: 1) no valuation of the benefits is needed; 2) risks of vesting are allocated equally between both spouses; and 3) the non-participant receives some security for later years. Since only the formula for division is determined at the time of divorce, the complex calculation of valuation is avoided and speculation is eliminated. Moreover, the participant does not forego his share

99. See supra notes 35-38 and accompanying text.
100. See supra notes 39-44 and accompanying text.
101. See Hardie, supra note 35, at 108-09; Bonavich, supra note 23, at 28. See also Johnson, 638 P.2d at 709.
102. See, e.g., Hafner, 406 N.W.2d at 593 ("[Participant asserts that] this division results in a 'gross inequity' because [non-participant] has immediate use of the money, while [participant] must wait to get his share until he retires.").
103. The ratio should be adjusted for the fact that the non-participant spouse will receive his or her share of the benefits only during his or her lifetime. The participant will receive the total benefits if the non-participant predeceases the participant. Unfortunately, the non-participant does not obtain a corresponding benefit if he or she survives the participant, since most pensions cease upon the participant's death. DiFranza & Parkyn, supra note 1, at 468.
105. Gillmore, 629 P.2d at 7. However, the non-participant spouse is entitled to the increase in or accruals on his or her share of the benefit because of the delay in receiving it. Id. See McNamara, supra note 45, at 42.
of the marital estate in exchange for pension rights, and both spouses bear
the risks involved with the vesting and maturity of benefits. Also, the non-
participant’s share of the pension receives the same protection under ERISA’s
spendthrift clause as the participant’s share. Thus, the non-participant is
assured of some income flow in the future.

The reserved jurisdiction method raises many problems, some apparent
and others less apparent, due to the method’s deceptively simple formula.
The three most obvious problems are: 1) transactions continue between the
divorced spouses;106 2) enforceability difficulties emerge;107 and 3) the non-
participant must wait until the participant elects to retire before he or she
can enjoy the rest of the marital property.108 Because many divorces end
with hostility, it may be undesirable to force parties to engage in future
transactions which will often be counterproductive. The problems of en-
forceability arise when the non-participant must collect his or her share from
the participant. A participant’s refusal to comply may create a problem
which is difficult to resolve, especially if the participant is not amenable to
process in the non-participant’s jurisdiction. Furthermore, enforcing the
decree may be too costly for the non-participant. A third problem exists
because the non-participant spouse must wait until the participant elects to
retire and is thereby foreclosed from controlling his or her share of that
portion of the marital estate.

Besides the aforementioned, obvious problems, the reserved jurisdiction
method has many hidden problems. The three major hidden problems are:
1) the participant may predecease the non-participant spouse;109 2) the non-
participant spouse may predecease the participant;110 and 3) the participant
may elect plan options that adversely affect the non-participant’s share.111

Pension benefits normally end upon the participant’s death. Thus, if the

106. See Bonavich, supra note 23, at 32. See also Johnson, 638 P.2d at 709. Under the
present value method, however, “[t]he former spouses are spared further entanglement because
litigation is completed . . . .”.

107. See Bonavich, supra note 23, at 31-32; Hardie, supra note 35, at 111. See also Johnson,
638 P.2d at 708-09 (noting that retaining jurisdiction to award the non-participant’s percentage
of each benefit payment “if, as, and when” it is paid out presents problems of continued court
supervision and of enforcing the participant’s duty to pay).

108. Brown, 544 P.2d at 567. Each spouse is awarded an appropriate portion of each pension
payment as received. Id. However, some trial courts have permitted the non-participant spouse
to receive his or her share at the participant’s earliest possible retirement date. See, e.g.,
Gillmore, 629 P.2d at 6.

109. DiFranza & Parkyn, supra note 1, at 468.

110. Id.

111. See Bonavich, supra note 23, at 32. See also In re Marriage of Lionberger, 97 Cal.
App. 3d 56, 158 Cal. Rptr. 535 (1979), cert. denied, 446 U.S. 951 (1980). The participant can
further frustrate the non-participant’s receipt of awarded portion of benefits. For instance, the
participant can change jobs, move across the country, or even retire in a foreign country. The
ensuing litigation to obtain jurisdiction over the plan administrator and the former spouse in
order to compel compliance can be very costly. Hardie, supra note 35, at 111.
participant dies prior to, or during, his or her retirement, the non-participant may receive none, or only a portion, of his or her share. Further, the non-participant receives his or her share of the benefits from the participant under the reserved jurisdiction method. If the non-participant predeceases the participant, then the participant receives a windfall in the form of the total remaining benefits. In addition, most pensions provide options which the participant can elect. Since a pension is a contractual obligation between the employer, who sponsors the pension plan, and the participant, the non-participant cannot control such an election. Unfortunately, a participant’s election may have adverse effects upon the non-participant’s share.

As the foregoing analysis suggests, both the present cash value method and the reserved jurisdiction method have serious limitations. Neither method completely protects the spouses’ competing interests in the employee spouse’s pension benefits once the benefits are deemed to be marital property. As a result, solutions at both state and federal levels have been fashioned. The most promising of these remedies are discussed below.

III. THE RETIREMENT EQUITY ACT: THE COMPROMISE BETWEEN COMPETING INTERESTS

A. Post-ERISA, Pre-REA Judicial Activism

To fully understand the reasons for enacting the Retirement Equity Act, and to predict the state courts' reaction to it, state court decisions occurring after the Employee Retirement Income Security Act was passed, but occurring before REA was enacted, must be examined. After ERISA’s enactment, state courts battled over whether, and to what extent, ERISA’s section 1144(a) (the preemption clause), and section 1056(d)(1) (the anti-alienation clause), affected their state marital property laws.\textsuperscript{112} The bulk of the litigation took place in the community property states because these states were more inclined to recognize pension benefits as a marital asset to be divided upon divorce.\textsuperscript{113} Realizing the problems with the present cash value and the reserved jurisdiction methods of dividing pension benefits, most courts failed to adopt either approach. Instead, the courts utilized a prototype of REA’s qualified

\textsuperscript{112} See Solomon, supra note 1, at 1025-26. See, e.g., Cody v. Rieckler, 594 F.2d 314 (2d Cir. 1979); American Tel. & Tel Co. v. Merry, 592 F.2d 118 (2d Cir. 1979); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), aff’d, 632 F.2d 740 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981); In re Marriage of Campa, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), appeal dismissed sub nom. Carpenters Pension Trust Fund v. Campa, 444 U.S. 1028 (1980).

\textsuperscript{113} See Solomon, supra note 1, at 1023; Doyle, supra note 29, at 3; Sutherland, supra note 84, at 48. See also Bloomer v. Bloomer, 84 Wis. 2d 124, 267 N.W.2d 236 (1978).
domestic relations order. The prototype method resembled the reserved jurisdiction approach to an extent, except that the non-participant portion of benefits were to be paid directly from the plan. This new approach highlighted the ambiguities of ERISA's effects on state marital property laws.

Most courts, using the notion of an "implied exception" to circumvent ERISA's preemption and anti-alienation provisions, ordered payments directly from an employee's retirement benefits to meet family support decrees. These courts harmonized the federal doctrine of preemption with their state domestic laws by reasoning that Congress merely intended ERISA to preempt all state laws purporting to regulate the administration of private retirement benefits, and not to preempt state laws affecting the distribution of retirement benefits including laws affecting distribution through family support decrees.

Although the state courts overcame the preemption obstacle, they still had to overcome ERISA's anti-alienation provision. The courts easily distinguished this provision to allow an assignment of awarded benefits to former spouses by relying on ERISA's policy considerations. The courts reasoned that the anti-alienation provision was directed at preventing employees from assigning away their future income security for short-range benefits, and to

114. A qualified domestic relations order allows benefits to be assigned to former spouses without violating ERISA's anti-alienation clause. See Park, supra note 33, at 9. See also infra notes 145-57 and accompanying text.

115. For example, in General Dynamics Corp. v. Harris, 581 S.W.2d 300 (Tex. Civ. App. 1979), the divorce decree ordered the participant to execute a release of his retirement benefits directing the pension fund to pay the benefit directly to his former wife. Id. at 301. See also Monsanto Co. v. Ford, 534 F. Supp. 51, 52 (E.D. Mo. 1981); Ball v. Revised Retirement Plan, 522 F. Supp. 718, 720 (D. Colo. 1981); Sochor v. IBM, 90 A.D.2d 442, 457 N.Y.S.2d 317, 318 (1982), rev'd on other grounds, 60 N.Y.2d 254, 457 N.E.2d 696, 469 N.Y.S.2d 591 (1983).

116. American Tel. & Tel. Co., 592 F.2d at 121 (The court stated that "strict, literal construction of ERISA . . . would necessarily lead to the unreasonable conclusion that Congress intended to preempt [peripheral state laws]."); Stone, 450 F. Supp. at 926 (The court stated that ERISA "does not explicitly prohibit the transfer of pension benefits under state community property laws."); Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371, 1377 (1981) ("[P]re-emption to occur, state law must do damage to substantial federal interests.").

117. In American Tel. & Tel., the court adopted the rationale that "the fundamental principle of statutory interpretation [is that] courts have presumed that the basic police powers of the states, particularly the regulation of domestic relations, are not superseded by federal legislation unless that was the clear and manifest purpose of Congress." 592 F.2d at 122 (quoting Cartledge v. Miller, 457 F. Supp. 1146, 1154 (S.D.N.Y. 1978). See also Cody, 454 F. Supp. 22 (E.D.N.Y. 1978); Carpenters Pension Trust v. Kronshnabel, 460 F. Supp. 978, 981 (C.D. Cal. 1978), aff'd., 632 F.2d 745 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981); Azzaro v. Harnett, 414 F. Supp. 473 (S.D.N.Y. 1976).

118. See Kronshnabel, 460 F. Supp. at 982 ("Community property laws do not act as an assignment but rather prescribe property rights in pension benefits as between spouses."); Cody, 594 F.2d at 317 ("[E]nforcing court ordered family support obligations . . . [is] not in conflict with ERISA's anti-alienation clause.").
prevent business creditors from seizing the retirement benefits.\textsuperscript{119} Unlike a former spouse of a plan participant, the business creditor has only himself to blame for extending credit to an individual whose property interests are beyond the creditor's reach. Such a creditor, therefore, does not deserve an exception to the anti-alienation clause as does a former spouse.\textsuperscript{120} The courts further reasoned that the basic purpose of ERISA is to protect the millions of people who depend on benefits from private pension plans for financial independence after retirement. Family members, including ex-spouses of participants, are within the class which ERISA protects.\textsuperscript{121} Therefore, an interpretation of section 1056(d)(1) which prevents the non-participant spouses from enforcing marital property obligations would frustrate the policies of the anti-alienation provision.\textsuperscript{122}

The United States Supreme Court, in \textit{Carpenters Pension Trust Fund v. Campa},\textsuperscript{123} resolved this conflict in favor of the state courts' interpretation of ERISA's preemption and anti-alienation clauses. In \textit{Campa}, pension funds were joined to marriage dissolution actions and the California courts ordered the respective plans to pay three non-participant spouses a portion of each pension payment receivable by their respective spouses.\textsuperscript{124} Representatives of the pension funds appealed to the Supreme Court arguing that ERISA precluded state courts from ordering such payments directly from the fund. The Supreme Court dismissed the appeal for want of a substantial federal question.\textsuperscript{125} Because the Supreme Court's dismissal of \textit{Campa} was a decision on the merits, the state courts won the battle over the scope of ERISA's preemption and anti-alienation clauses.\textsuperscript{126}

With ERISA's preemption and anti-alienation clauses cast aside, the door opened to judicial activism in the treatment of retirement benefits upon divorce. The purported "line" between pension \textit{administration} and pension \textit{distribution} began to fade. Progressively, state domestic relations orders interfered more with the pension plans' \textit{administration}.\textsuperscript{127} The interference


\textsuperscript{120} Stone, 450 F. Supp. at 926-27 ("Depriving business creditors of recourse against this kind of asset is fair . . . . ").

\textsuperscript{121} See, e.g., \textit{id.; Campa}, 89 Cal. App. 3d at 124.

\textsuperscript{122} See Bonavich, \textit{supra} note 23, at 35; \textit{See also Campa}, 89 Cal. App. 3d at 124; Stone, 450 F. Supp. at 926.

\textsuperscript{123} 444 U.S. 1028 (1980).


\textsuperscript{125} 444 U.S. 1028 (1980).

\textsuperscript{126} Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). When the Court finds that the state court decision is correct, the appeal will be dismissed for want of a substantial federal question. \textit{id.} at 343-45.

\textsuperscript{127} \textit{See infra} notes 129-32 and accompanying text.
placed additional costs on plans and threatened the financial foundation of the private pension system.\(^{128}\) State courts compelled pension funds to pay benefits directly to non-participant spouses who were awarded a portion of their spouses' interest.\(^{129}\) One appellate court went so far as to uphold a trial court's order precluding a fund from honoring an employee election to receive a joint and survivor annuity for the benefit of a subsequent surviving spouse.\(^{130}\) Such an election would reduce the monthly income payable during the participant's life and would consequently reduce the former spouse's awarded interest in the benefits.\(^{131}\) Another decision compelled a plan administrator to cancel a participant's previously elected form of benefit even though the participant had already retired and benefits were in pay status.\(^{132}\)

The above court decisions failed to consider the negative impact upon the private pension fund administration caused by paying benefits to someone other than the participant, changing the form of benefits already in pay status, or changing the nature of the plan contract.\(^{133}\) At least one court addressed these consequences and refused to award a non-participant spouse an interest in the participant's pension.\(^{134}\) The court held that it lacked authority to rewrite contractual obligations between participants and their employers who sponsor the pension plans because such an action would discriminate against other plan participants and abuse fund assets.\(^{135}\) Either result would be potentially detrimental to all plan participants and their families.\(^{136}\)

B. **REA: A Response to Judicial Activism**

The foregoing analysis of some post-ERISA, pre-REA decisions suggests that, while attempting to protect non-participant spouses against later financial insecurity, these decisions actually increased the risk that these individuals would be unprotected. By placing constraints on, and continuing to interfere with, pension fund administration, the courts inadvertently enhanced the possibility that private pension plans, unable to absorb the

\(^{128}\) See infra notes 133-36 and accompanying text.

\(^{129}\) See, e.g., *Stone*, 450 F. Supp. at 920; *General Dynamics Corp.*, 581 S.W.2d at 301.


\(^{132}\) *Ball*, 522 F. Supp. 718.

\(^{133}\) The court in *Kronschnabel*, expressly stated that the administrative burden and increased cost imposed upon the pension fund are insufficient considerations. 460 F. Supp. at 983.

\(^{134}\) In *Monsanto*, the court recognized the adverse effects and discrimination as against other plan participants caused by an award to the non-participant. 534 F. Supp. at 54.

\(^{135}\) *Id.* at 53-54.

\(^{136}\) *Id.*
additional burdens and costs, would terminate.\textsuperscript{137} The elimination of private pension plans under growing judicial activism would not only be detrimental to non-participating spouses, but also to participants and their families subsequent to divorce, as well as to married participants and their families. ERISA's objective of creating a favorable environment for the maintenance and establishment of private pensions would be destroyed. The bottom line is evident: the class of people the courts intended to help actually have been hurt.\textsuperscript{138}

However, the problems associated with ERISA should not lead one to conclude that a non-participant spouse should not be awarded a portion of his or her former spouse's pension benefits. These problems merely suggest that a middle ground needs to be reached. REA provides that middle ground by setting limitations on the courts' creativity in issuing a domestic relations decrees. In general, under REA, a domestic relations decree cannot force a plan to pay benefits in a form or at a time when the benefits would not otherwise be payable.\textsuperscript{139} As a result, the financial security of private pension plans should be ensured.

\textbf{C. REA's Express Limitations on Court Orders}

The major purposes of REA are to facilitate the delivery of retirement benefits, and to provide for greater equity under the private pension system for employees and their families.\textsuperscript{140} The Act "tak[es] into account changes in work patterns, [and] the status of marriage as an economic partnership of spouses who work both in and outside the home . . . ."\textsuperscript{141} Under REA, former spouses of private-sector employees are likely to obtain their fair share of pension benefits in divorce actions.\textsuperscript{142} However, REA's success remains speculative and will largely depend upon the manner in which state courts apply and interpret the Act.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{137} Since 1980, more than 500 pension plans have been terminated. \textit{Pension Plan Terminations Increase}, \textit{Pension World}, July 1986, at 12.
\item\textsuperscript{138} Pensions are very technical and complex, and family law practitioners and judges often know little about them. Bloss, \textit{Don't Forget the Pension Plan in a Divorce}, 71 A.B.A. J. 86 (Nov. 1985). Thus many courts may not have recognized the negative effects of their decrees. Even pension policy makers have a difficult time confronting pension issues because they are complicated and time-consuming. Borzi, \textit{What Plans Can Expect From the 98th Congress}, \textit{Pension World}, Apr. 1984, at 41-42.
\item\textsuperscript{142} Park, \textit{supra} note 33, at 9.
\end{itemize}
\end{footnotesize}
The significant amendments to ERISA\(^{143}\) and the Internal Revenue Code\(^{144}\) for purposes of this Note are embodied in section 104 of REA.\(^{145}\) Section 104 provides special rules for the assignment of pension rights in divorce proceedings.\(^{146}\) For individuals married at least one year,\(^{147}\) section 104 provides a clear statutory exemption from ERISA's anti-assignment clause.\(^{148}\) Like ERISA, REA promotes the national policy of assuring individuals adequate retirement income by permitting non-participant spouses to collect directly from the plan, provided that the domestic relations order is "qualified."\(^{149}\) A qualified domestic relations order (QDRO) creates, or recognizes the existence of, an "alternative payee's rights,"\(^{150}\) or assigns to an alternate payee the right to receive all or part of a participant's retirement benefits.\(^{151}\)

Although a detailed analysis of the requirements for establishing a QDRO is beyond the scope of this Note,\(^{152}\) a description of the basic principles governing such orders is essential to an understanding of the problems which the QDRO solves. In order for a domestic relations order to achieve the status of a QDRO and thereby qualify for the benefits of the exemption, REA establishes simple procedures that must be followed.\(^{153}\) In addition to complying with these procedures, the decree must not attempt to order either a payment form or option not otherwise available,\(^{154}\) a payment to the non-participant spouse greater than the participant is entitled to receive,\(^{155}\) or a payment of a benefit to the non-participant spouse that is supposed to be paid to another,\(^{156}\) such as payment to a previous spouse under an earlier QDRO.

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148. Park, supra note 33, at 9.
149. 29 U.S.C. § 1056(d)(3)(K). "The term 'alternate payee' means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits . . . ." Id.
150. Id. § 1056(d)(3)(B)(i)(I), (II). "The term 'qualified domestic relations order' means a domestic order . . . which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan . . . ." Id.
151. Id.
152. For a general overview of a qualified domestic relations order (QDRO), see Park, supra note 33 and Bloss, supra note 138.
153. 29 U.S.C. § 1056(d)(3)(C)(i)-(v). Some of the procedures that must be followed include providing the names of the spouses, their respective addresses, the percentage of interest payable to the alternate payee, and the number of payments. Id.
154. Id. § 1056(d)(3)(D)(i). The DRO, for example, cannot request a lump sum payment from the pension fund if the participant is not entitled to a lump sum payment.
155. Id. § 1056(d)(3)(D)(ii). For example, the DRO cannot include an early retirement subsidy if the participant has not yet begun receiving the subsidy benefits.
156. Id. § 1056(d)(3)(D)(iii).
If the domestic relations order purports to do any of the above, then the assignment of benefits to the non-participant spouse is prohibited under ERISA as an alienation of benefits.\textsuperscript{157} However, REA permits one exception. In response to several state court decrees ordering employees to take an early retirement so their former spouses could begin receiving their awarded portion of the pension benefits, REA permits a non-participant spouse to begin receiving his or her portion at the participant’s earliest retirement date even though the participant has not retired.\textsuperscript{158}

\textbf{D. Who Should Pay the Costs of the Qualified Domestic Relations Orders}

REA protects the interests of the private pension system, plan participants, former spouses of plan participants, and plan administrators. By setting forth clear guidelines for QDROs, REA limits the courts’ interference with the administration of private pension funds.\textsuperscript{159} However, REA may not be a panacea because it too places increased costs and burdens on the plans. Fund administrators must determine if the domestic relations order is qualified,\textsuperscript{160} establish procedures to ensure that more benefits are not paid out than collectively entitled,\textsuperscript{161} and distribute the benefits to two or more individuals, depending on the number of times the participant remarry’s and divorces.\textsuperscript{162} Since these increased burdens on the plan administrator are costly, the question arises whether it is fair for the pension plans to absorb the costs.\textsuperscript{163}

Initially, one might propose that participants and alternate payees utilizing the QDRO should bear the cost since they alone benefit. By placing the cost on them, other plan participants are not penalized and their benefits are not jeopardized due to the divorces of participants. Moreover, placing the cost on the participant and alternate payee could easily be implemented under a

\textsuperscript{157} Section 1056(d)(1) of ERISA provides that “[e]ach pension plan [subject to ERISA] shall provide that benefits provided under the plan may not be assigned or alienated.” \textit{Id.} § 1056(d)(1). Section 104 of REA, however, provides in part that section 1056(d)(1) “shall not apply if the order is determined to be a qualified domestic relations order.” \textit{Id.} § 1056(d)(3)(A).

\textsuperscript{158} \textit{Id.} § 1056(d)(3)(E)(I).

\textsuperscript{159} See supra notes 146-56 and accompanying text. See also Mazo, \textit{Women and Pensions: What Congress is Doing About Them}, \textit{PENSION WORLD}, Feb. 1984, at 32.

\textsuperscript{160} Additional burdens placed on the plan administrators can be found throughout 29 U.S.C. § 1056(d)(3)(G)-(H), which was passed in the name of women’s rights with almost no opposition, and has increased the expenses and administrative burdens of most qualified plans. Wodtke, \textit{supra} note 24, at 41.


\textsuperscript{162} \textit{Id.}

\textsuperscript{163} For a discussion of some of the additional responsibilities of the plan administrator that may increase the costs of administration significantly, see Park, \textit{supra} note 33, at 11-12 and Comment, \textit{supra} note 7, at 174-75.
defined contribution pension since individual accounts are maintained.\textsuperscript{164}

However, by placing the costs on divorced participants and their former spouses, the class of people the QDRO is supposed to help would be deterred from using it, and thus they would prefer the present cash value method or reserved jurisdiction method. Not only would such a result be counterproductive, but the QDRO would frustrate both ERISA’s and REA’s goals.

After the initial confusion surrounding QDROs settles, plan administrators will have established procedures to minimize the costs of the relatively new Act. Of course this enhances the position that users of a QDRO should bear its cost; however, pension funds are better situated to spread the costs among a larger pool of individuals benefitting from pensions. Thus, pension funds should absorb the additional costs, thereby enhancing the effectiveness of the QDRO and minimizing the QDRO’s administrative costs.

IV. THE COMPROMISE BETWEEN COMPETING INTERESTS: NON-PARTICIPANT AND PARTICIPANT SPOUSES

As previously discussed, the two schemes for dividing pension benefits upon dissolution of a marriage, the present cash value method and the reserved jurisdiction method, have many limitations in protecting each spouse’s competing interest in the benefits.\textsuperscript{165} As the following discussion will demonstrate, Section 104 of the Retirement Equity Act of 1984 (REA) eliminates these limitations. First, this Note will discuss the advantages and disadvantages that the qualified domestic relations order (QDRO) possesses in comparison to the reserved jurisdiction method, highlighting the similar characteristics of these two methods. The analysis will indicate that in the future, courts should be inclined to utilize the QDRO, and as a result, the reserved jurisdiction method may become obsolete. Second, this Note will discuss the advantages and disadvantages that the QDRO possesses in comparison to the present cash value method. Finally, this Note will examine the role that state courts and legislatures should play in dividing pension benefits between the parties to a marital dissolution.

A. The QDRO Versus the Reserved Jurisdiction Method

The QDRO possesses many advantages, compared to the reserved jurisdiction method, in dividing pension benefits between former spouses. Both

\textsuperscript{164} In a “defined contribution plan,” each individual’s pension is maintained in a separate account and as a result, each participant could be charged with the costs of administration. See supra note 35. However, imposing costs on the participant and alternate payee under a “defined benefit plan” would be difficult since the pension benefits of all participants in the plan are pooled together. See supra note 42.

\textsuperscript{165} See supra notes 76-110 and accompanying text.
approaches avoid the difficulties of valuing the pension benefits at the time of the dissolution, since the only formula for division is determined at the time of the dissolution, while the benefits are not actually divided until they are receivable by the plan participant. In addition, both approaches place the risks of non-vesting or plan termination on both spouses. Finally, each method provides some security for the non-participant spouse. However, under a QDRO this last advantage is greatly enhanced. This is obvious when comparing the QDRO’s advantages against the limitations of the reserved jurisdiction method.

As noted in Part II, the reserved jurisdiction method has six major problems: 1) it requires continued transactions between the divorced parties; 2) it raises difficulties in enforcement; 3) a non-participant must wait until the participant elects to retire in order to receive his or her share of the benefits; 4) later-elected plan options may adversely affect the non-participant’s awarded interest without his or her consent; 5) the participant may predecease the non-participant causing the benefits to cease and leaving the non-participant spouse with an inadequate means of support; and 6) the non-participant may predecease the participant. Utilization of a QDRO eliminates most of these problems.

Under a QDRO, a non-participant spouse is an “alternate payee” and a “beneficiary.” With alternate payee and beneficiary status, a non-participant is entitled to receive payments directly from the plan. Furthermore, transactions between the divorced couple terminate at the time the marriage is dissolved, and enforceability problems associated with continued relations between often hostile parties are eliminated. As to enforceability problems associated with the plan itself, the status of beneficiary and alternate payee allows the non-participant spouse to sue the plan, to claim attorney’s fees for breach of fiduciary duties, and to obtain information from the plan. Further, the non-participant is entitled to payment of benefits pursuant to the QDRO at the participant’s earliest possible retirement age even though the participant has not yet retired. Thus, the non-participant maintains some control over the pension portion of the marital estate.

Provisions for pre-retirement survivor’s benefits and post-retirement survivor’s benefits may be incorporated into the QDRO, thereby protecting the non-participant if the participant dies. These provisions prevent the

166. See supra notes 102-10 and accompanying text.
169. Id. § 1132(a)(1).
170. Id. § 1132(g)(1).
171. Id. § 1021.
172. Id. § 1056(d)(3)(E), (I).
173. See Park, supra note 33, at 11.
participant from recovering a windfall if the non-participant dies, because the election of survivor benefits reduces the amount of monthly payments to the participant. Finally, plan administrators must annually notify the alternate payee of accrued benefits which may be forfeited if the participant dies. The notification gives the alternate payee knowledge of the status of his or her share of the benefits and allows the non-participant to make other financial arrangements for retirement security.

Courts should be less inclined to dispose of pension rights under the reserved jurisdiction method now that the QDRO exists. The QDRO offers the same advantages of the reserved jurisdiction method while eliminating most of its problems. Therefore, courts will merely have to determine whether the present cash value method or the QDRO offers greater advantages to the parties.

B. The QDRO Versus the Present Cash Value Method

The present cash value method has three major advantages over the reserved jurisdiction method. The present cash value method: 1) finalizes transactions between divorced couples; 2) awards benefits to the spouses from whose employment they derive; and 3) awards an immediate off-set of property to non-participants. Like the present cash value method, the QDRO allows for transactions between the parties to terminate, since the non-participant receives his or her share directly from the plan and not the participant. However, the QDRO does not include the latter two advantages discussed above.

Nevertheless, the three limitations of the present cash value method, as against the reserved jurisdiction method, are the same limitations with respect to the QDRO: valuation difficulties, vesting risks borne solely by the participant, and failure to provide adequate security for the non-participant’s later years. Thus, a close examination of the present cash value method’s three disadvantages can help indicate when the method should, and should not be used. Whether a QDRO is preferable over the present cash value method depends on such things as the divorcing couple’s needs, years of marriage, type of pension plan, and the benefit stage of vesting and maturity. For example, a lump sum award to a non-employee spouse is preferable where there are substantial amounts of other assets and the retirement either has occurred or is imminent.

175. See supra notes 91-94 and accompanying text.
176. See Bloss, supra note 138, at 87.
177. For a discussion of the present cash value method’s disadvantages, see supra notes 96-101 and accompanying text.
and the benefits are in a defined benefit plan, then the QDRO may be preferable to the present cash value method. 179

C. Appropriate Steps State Legislatures and Courts Should Take

A QDRO provides courts with another alternative for disposing of marital interests in pension benefits. Retirement benefits are an important and unique asset of the marital relationship: they guarantee financial security, whereas most other marital assets are only for immediate consumption. Under ERISA, the federal government has encouraged more participation in private pensions. 180 State legislatures can aid this national policy by: 1) acknowledging all retirement benefits as marital property; and 2) adopting clear criteria to guide trial courts when determining the appropriate allocation of benefits between the parties.

Primarily, legislation should be drafted which recognizes all retirement benefits earned during the marriage, regardless of vestment or maturity stage, to be property of both spouses. Classification of retirement benefits into stages of vesting and maturity arbitrarily draws lines which should not be drawn. Categorizing unvested, non-matured benefits as “too speculative” ignores the fact that these benefits are valuable property rights. Valuation of the benefits is often difficult to calculate; however, this difficulty should not alter one’s right to receive the benefits once they are determined to be property of the marriage. Damage calculations involving similar types of probabilities and estimations are made in other areas of the law and should be made in domestic cases as well.

Upon dissolution of a marriage, it is desirable that the benefits should be divided between the parties in some reasonable manner. Some state legislatures are re-evaluating their statutes with this objective in mind. 181 For instance, in 1985, the Indiana General Assembly took steps toward this goal by amending the “Definitions” section 182 of the Dissolution of Marriage Act. 183 However, the General Assembly failed to take all the necessary steps since the amended version only incorporates vested, matured benefits and vested, non-matured benefits into the Act’s definition of property. 184 Until state legislatures, such as Indiana’s, overcome their reluctance to incorporate unvested, non-matured benefits into their states’ property definitions, non-participant spouses will continue to be precluded from valuable property interests.

179. See supra notes 99-100 and accompanying text.
180. See supra notes 25-28 and accompanying text.
182. IND. CODE § 31-1-11.5-2.
183. Id. § 31-1-11.5-2(d)(1) to (3).
184. Id.
State legislatures should establish clear guidelines for courts to follow when the disposition of retirement benefits is at issue. These guidelines should reflect the uniqueness of this important marital asset: an asset that has enduring value to the beneficiary and provides income for the recipient's retirement years. Most states already have statutes setting forth factors to be considered when dividing a marital estate. Unfortunately these factors are generic in character and not promulgated with an eye toward the disposition of pension benefits. Moreover, these factors are usually unaccompanied by instructions as to the weight to be accorded each, and consequently fail to recognize the stark fact that many non-participant spouses will be dependent on the state during retirement.

New guidelines should be adopted which pertain solely to the disposition of pension benefits. These rules must give specific instructions on the weight to be afforded each factor in light of the state's interest in preventing non-participant spouses from being a public burden in later years and in providing non-participant spouses with what they considered mutual security during the marriage's duration. The determinative factor should be whether the non-participant will have the opportunity to participate in some kind of retirement or pension plan in the future. By enacting this type of legislation, instead of concentrating the wealth of these benefits in employee spouses, legislatures can spread retirement benefits among former spouses, thereby alleviating some of the disparity among citizens' wealth during their retirement years.

State courts play an indispensible role when disposing of retirement benefits between divorcing spouses. Many courts are granted wide discretion to decide the temporal question of when to divide the pension benefits of an employee spouse. Presently, the majority of courts prefer the present cash value method. However, with the availability of the QDRO, courts should evaluate the advantages and disadvantages of each method of dividing pension benefits, and should rely on the method that most reasonably meets the needs of both the plan participant and the non-participant spouse.

185. See, e.g., Ind. Code § 31-1-11.5-11(c)(1) to (5). An Indiana trial court is mandated to consider the following five factors in determining a just and reasonable disposition of the marital assets:

(1) The contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker.

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The economic circumstances of each spouse at the time disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties. Id.
When confronted with the division and disposition of a pension benefits during dissolution proceedings, courts should select the division and distribution methods which best suit the particular circumstances of the case, giving due regard to the uniqueness of the marital asset. Special attention should be given to the needs of the non-participant spouses since these individuals are more susceptible to financial insecurity in future years.\footnote{186} If the trial court determines a lump sum award would best serve the interests of the parties, then an immediate award of money or other marital asset of equivalent value should be allocated to the non-participant spouse. However, if in its determination the court concludes that the non-participant spouse is unlikely to have an opportunity to save adequately for retirement, obtain gainful employment providing a retirement program, or obtain resources to ensure financial independence, and is likely to be a public burden in his or her retirement years, then a portion of the benefits should be awarded to the non-participant spouse through the use of a QDRO.

This Note does not suggest that state courts in divorce proceedings are the proper forum in which to solve the growing problem of poverty among elderly citizens. However, retirement benefits accrued during a marriage constitute shared wealth which parties to marriage consider to be their mutual security. Upon divorce, these pension benefits should be distributed proportionately between the spouses. Thus, state courts can help promote the national public policy of assuring that individuals have sufficient income to meet their needs during their retirement years.

**CONCLUSION**

The Retirement Equity Act of 1984 is a Congressional response to damaging judicial interference with private pension plan administration. Court decisions that occurred after the Employee Retirement Income Security Act was enacted, but prior to the passage of REA, frustrated ERISA’s underlying policies by threatening to tip the delicate balance between the national regulation of pensions and the voluntary nature of the private pension system. Section 104 of REA is a compromise which balances the competing interests of participant and non-participant spouses, while ensuring an atmosphere in which the private pension system can survive.

State legislatures and courts should recognize private retirement benefits as marital property regardless of vesting or maturity stages. Moreover, redefined guidelines should be adopted to ensure that benefits are distributed in light of national policy. Furthermore, non-participant spouses should be afforded greater protection due to their susceptibility to financial insecurity in their later years and their reliance, during the marriage, on the plan

\footnote{186. See Park, supra note 33, at 9. See also Comment, supra note 7, at 167-71.}
participant's pension benefits. The unique characteristics of private pension plans may prevent some of the financial dependency of these individuals on the state if reasonable plans, such as use of the qualified domestic relations order, are utilized in dividing and disposing of pension benefits when marriages are dissolved.

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