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Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses under ERISA

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I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 ("ERISA")[1] is a massive, complex and technical piece of legislation[2] with a history as

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1. Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 and 29 U.S.C.).

The ERISA legislation is under the auspices of the Departments of Labor and Treasury, as well as the Pension Benefit Guaranty Corporation (PBGC), a nonprofit federal agency which administers pension plan termination insurance. The ERISA legislation consists of four titles: Title I amends the labor laws to ensure that participants actually receive their promised benefits (29 U.S.C. §§ 1101-44 (1988)); Title II amends the Internal Revenue Code and contains many provisions corresponding to Title I (26 U.S.C. §§ 401-20 (1989)); Title III designates and defines the duties of plan administrators (29 U.S.C. §§ 1201-04 (1982)); Title IV established the PBGC (29 U.S.C. §§ 1301-1461 (1982) (amending 29 U.S.C. §§ 1301-81 (1975)). For further discussion, see Lynn, Private Pensions in Perspective: Problems of the Years Ahead, 15 Ga. L. Rev. 269 (1981). Thus, unless otherwise indicated, the term "ERISA" is often used throughout this Article to encompass the entire legislation, which includes the tax provisions as well as the labor provisions.

2. This is not merely a rhetorical statement. Many employers have terminated their retirement plans because of the complexity and constant changes in the law. *See* Brennan, Complex Laws Have Small Firms Bailing Out Of Pension Plans, Athens Banner-Herald, Dec. 4, 1989, at 2, cols. 1-6.

A commentary on the complexity of ERISA was delivered by Senator Chafee, speaking to the Special Committee On Aging in September 1984:

> As you all know, this pension field is an esoteric and abstruse one, bordering on the mysterious or the occult. It reminds me of the way Churchill described Russia's action: "It is a riddle wrapped in a mystery inside an enigma." And it is also truly an eye-glazing subject. As a result, very few Members of Congress know much about this area. Indeed, sad though it is, with the departure of John Erlenborn from Congress, I think it's safe to say that there is no one in the House or Senate who knows as much as we really should know about this subject.
>
> This is unfortunate, because obviously we are dealing with not only billions of dollars, but we are also dealing with the standards of living of millions of Americans now and in the future.

Senate Special Comm. on Aging, 98th Cong., 2d Sess., 10th Anniversary of the Employee Retirement Income Security Act of 1974 at 54 (Comm. Print 1984) (statement of Sen. Chafee) [hereinafter 10th Anniversary Conference Report].

The complexity, technicality and continuous changes in this area are also a source of much frustration for ERISA practitioners. My colleague, John Rees, shared with me the following excerpt from a tongue-in-cheek article outlining the problems encountered by a researcher who sent 20 mice through law school:

passionate and compelling as that of the Civil Rights Act of 1964.[3] In fact, these two Acts are similar in other respects as well. For instance, each was regarded as ground-breaking legislation, yet neither was the panacea for the pressing social ills it sought to cure. Moreover, the enactment of each marked the watershed in long struggles for reform while raising profound social, political, and economic issues that burn strongly to this day.

The Civil Rights Act not only parallels ERISA but converges with it by directly and indirectly impacting on the private retirement system.[4] Indeed, the Civil Rights Act, along with related legislation,[5] has reduced the incidence of discriminatory employment practices[6] by creating a cause of action for unequal treatment for women and minorities in the workforce.[7] Creating this cause of action has increased, to some extent, the wages and job security of these groups and this, in turn, has affected their pension rights and benefits.

But deficiencies in the pension laws themselves[8] limited the impact of the civil rights legislation in alleviating sex discrimination and other inequities under the private pension system.[9] In the late 1960s it became apparent that the system could not police itself and that Congress would

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> What other findings did you turn up? Practicing mice who went into ERISA work had no sense of humor. How were you able to gauge sense of humor? We attached electrodes to the temples of practicing mice and [then] measured electrical responses. Our results gave us some momentary concern, as it appeared that 18 of the ERISA mice had died. Though we have as yet been unable to determine whether or not these mice are alive, our concern has dissipated, since in either case they appear to be performing adequately in their specialty.

Kanter, Practicing Mice and Other Amazing Tales, 8 Barrister 18, 20 (1981).

3. Pub. L. No. 88-352, 78 Stat. 241, (codified at 42 U.S.C. §§ 1981-2000 h-6 (1988)).

4. The term "private retirement system" is used throughout this Article to connote retirement plans maintained on a voluntary basis by private employers. The term is distinguishable from "public retirement system," which connotes public retirement plans such as Social Security and plans of public employers such as federal, state, and local governments.

5. *See, e.g.*, Equal Pay Act of 1963, Pub. L. No. 88- 38, 77 Stat. 56 (current version at 29 U.S.C. § 206 (1988)); Equal Employment Opportunity Act of 1972, Pub. L. No. 88-352, 78 Stat. 253 (current version at 42 U.S.C. § 2000e to 2000e-17 (1988)).

6. But neither the Civil Rights Act nor the Equal Pay Act has managed to cure the discrepancies in income levels between white males on the one hand, and women and minorities on the other. Women still continue to earn about $0.66 for every dollar earned by men. *See* U.S. Bureau Of Labor Statistics, Handbook of Labor Statistics, Table 4.1, at 162 (1989); *see also* Wessel, Poverty Rate Eased to 13.1% in 1988, But Income Disparities Widened Again, Wall St. J., Oct. 19, 1989, at A2, col. 3.

7. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (gender based classification violates due process clause of fifth amendment); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (gender-based classification is arbitrary and in violation of the equal protection clause); Lewis v. Cowen, 443 F. Supp 544, 552 (E.D. Pa. 1977) (treating women more favorably under the Railroad Retirement Act in order to ameliorate historic discrimination against women) *aff'd* 235 U.S. 948 (1978). *But see* United Auto Workers v. Johnson Controls, Inc., 886 F.2d 871, 901 (7th Cir. 1989) (en banc) (holding that women could be discriminated against in hazardous occupations in the interest of fetal protection), *cert. granted*, 110 S. Ct. 1522, *rev'd* S.Ct. (1991).

8. *See generally* infra notes 81-90, 101-06, 123-29 and accompanying text.

9. The civil rights legislation, however, has some drawbacks of its own which can result in a cumbersome, slow and often ineffective remedy. *See* Pearldaughter & Schneider, Women and Welfare: The Cycle of Female Poverty, 10 Golden Gate U.L. Rev. 1043, 1055-57 (1980) (discussing procedural and proof requirements of Title VII).

soon have to intervene.[10]

Pension issues on the congressional forefront during this period primarily appeared for three reasons. First, retirement plans had proliferated rapidly after World War II. This proliferation was a result of the increased mobility and aging demography of the workforce, the general concern about retirement security in the aftermath of the Depression and the awareness of that concern by the unions.[11] The escalating importance of the private retirement system was evident not only in the increase in the numbers of plans, but also in the significant amount of assets these plans controlled.[12] Second, the potential for abuse allowed by then existing laws was immense.[13] This was evident from statistics showing that despite the significant amount of assets controlled by the plans, only a few employees received any benefits.[14] Third, public sentiment, usually a prime congressional motivator, ran high during the late 1960s and early 1970s as media attention began to focus on documented cases of mismanagement, corruption, and inadequate legislation that allowed many employers to legally avoid doing the morally right thing.[15] One of the most effective media achievements was Edwin R. Newman's 1972 NBC documentary entitled "Pensions: The Broken Promise"[16] which documented individual cases of egregious hardships that resulted from denials of pension benefits while spotlighting the ineffectiveness of the private retirement system in general. This expose shattered the false sense of security of the American public and soon Congress was inundated with letters from angry and frightened constituents united in their urge for reform.[17]

In response to public reaction of this type, Congress in 1968 had begun holding hearings, which continued for the next five years, on the need for pension reform.[18] These hearings were replete with cases of

10. *See* infra notes 91-122 and accompanying text.

11. *See* Senate Special Comm. On Aging (Information Paper), 98th Cong., 2d Sess. The Employee Retirement Income Security Act of 1974: The First Decade 2-5 (Comm. Print 1984) [hereinafter Information Paper].

12. Id. at 5. In 1940 these assets amounted to approximately $2.4 billion, in 1950—$12.8 billion, in 1960— $52.0 billion, and in 1970—128.6 billion. *See* S. Rep. No. 634, 92d Cong., 2d Sess. 10 (1972). Today, retirement plans control more than $2 trillion. This represents more than one-half of the investment capital in this country. *See* White, Pension Managers Chilled by Notion of Tax On Trading, Wall St. J., Sept. 21, 1989, at C9, col. 2.

13. *See* infra note 18; *see also* Information Paper, supra note 11, at 2-5.

14. *See* infra note 102 and accompanying text.

15. *See* discussion infra notes 100-06 and accompanying text.

16. Pensions: The Broken Promise (NBC television broadcast, Sept. 12, 1972) (transcript on file at NBC headquarters, New York).

17. *See generally* Information Paper, supra note 11, at 15-24.

18. *See generally* Private Pension Plan Reform: Hearings Before the Subcomm. on Private Pension Plans of the Senate Comm. on Finance, 93d Cong., 1st Sess. 215 (1973) (focusing on stimulating growth in the pension system and ensuring pension plan participants of the benefits to which they are entitled, through extension and expansion of private pension plans and legislation to establish minimum standards for vesting and funding of benefits); Welfare and Pension Plan Legislation: Hearings on H.R. 2 and H.R. 462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. 1 (1973) (testimony on legislation to guarantee pension plan participants pension benefits at the time of retirement); Private Welfare and Pension Plan Study: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 1-2 (1972)

American workers who had devoted their entire lives to a single employer, believing that in return they would receive a financially secure retirement. Only later did they discover that their promised retirement benefits had been an illusion and they would be forced to live the rest of their lives in dire financial straits.[19]

This testimony resulted in the 1974 enactment of ERISA which represented a major bipartisan effort that triumphed over conflicting lobbying interests and strong tensions between the legislative and executive branches.[20] The issues in the political arena were complicated, however, and, in accordance with the adage "hard cases make bad law," the result was voluminous and complex legislation which members of Congress admitted at the time was not perfect.[21] On the other hand, ERISA had and continues

(addressing problems with private pension plans, including inadequate vesting, insufficient funding of plans, violations of fiduciary responsibility by those entrusted with safeguarding pension funds, laxity in enforcing pension laws, and failure to inform workers of the details of their pension rights); Tax Proposals Affecting Private Pension Plans: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. 27 (1972) (citing the need for tax incentives to encourage establishment of private pension plans); Private Welfare and Pension Plan Study: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess. 393 (1971) (addressing concerns about private pension plan failure to deliver benefits due to problems such as inequitable vesting provisions, inadequate funding, and lack of reinsurance); Welfare and Pension Plan Legislation: Hearings on H.R. 1269 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess. 1 (1971) (hearings on legislation to establish minimum standards for private pension fund management and to improve the soundness of private pension plans by requiring vesting benefits for employees with significant periods of service; to meet minimum standards for funding; and to protect the vested rights of participants against losses due to involuntary plan terminations); Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16,462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st and 2d Sess. (1969-70) (hearings on legislation to enhance the security of private pension funds, through minimum standards for vesting and funding of private pension plans and through an insurance program for plan termination protection); Pension and Welfare Plans: Hearing on S. 3421, S. 1024, S. 1103, and S. 1255 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 2d Sess. 1-2 (1968) (asserting the need for legislation to reform pension plan management based on complaints that some private pension plans were not paying employees expected benefits) [hereinafter collectively Hearings].

19. There were common threads running through most of these cases and these threads could be linked to one problem— inadequate legislation. In many cases the employer was either bankrupt or having serious financial problems and since plans were not required to provide funding in advance, there were often no remaining assets to fund liabilities on a "pay as you go" basis. In other cases, the lack of adequate vesting provisions caused employees who had spent their working lives with a single employer but were forced to retire short of the vesting period (in most cases because of financial concerns of the employer) to be left without retirement benefits. Further, the lack of adequate fiduciary rules made the trust assets easy prey for corrupt sponsors, particularly in the case of union trusts. The result, of course, was always the same—workers lost valuable, promised benefits upon which they had relied for financial security after retirement. *See generally* Hearings, supra note 18. This prompted Ralph Nader to remark that "pensions are no more certain than race horses." R. Nader & K. Blackwell, You And Your Pension 2 (1973).

20. *See* infra notes 91-122 and accompanying text.

21. *See* 120 Cong. Rec. 29,954 (1974) (statement of Sen. Nelson), reprinted in Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 at 4804 (1976) [hereinafter Legislative History] ("This is not a perfect bill, nor is it all that I hope for . . . ."); 120 Cong. Rec. 29,196 (statement of Rep. Dent), reprinted in Legislative History, supra, at 4667-68 (discussion of

to have broad socioeconomic significance for the entire aging American laborforce.[22]

Shortly after ERISA became effective, however, Congress began to realize, as the result of prodding by women's groups, that the ERISA legislation had been drafted with a male model in mind and that various provisions blatantly discriminated against women.[23] Nevertheless, enactment of corrective legislation required an additional ten years. In 1984, Congress passed the Retirement Equity Act ("REA")[24] to strengthen the retirement rights of women in the workforce.[25]

Although issues of discrimination against women in the private retirement system were the subject of specific congressional attention under REA, inequities persist. ERISA predominately covers plans that qualify for special tax advantages under the Internal Revenue Code.[26]

ERISA legislation); *see also* 120 Cong. Rec. 29,949 (1974) (statement of Sen. Bentsen), reprinted in Legislative History, supra, at 4791 (this legislation was not intended to provide the ideal pension plan but to institute minimum standards for pension plans).

22. However, it has been postulated that ERISA was enacted not as public interest legislation, but rather to benefit a small, specific group—union workers in dying firms, and that ERISA itself had, if anything, a slightly negative effect on the number of employees actually receiving retirement benefits. *See* Ippolito, A Study of the Regulatory Effect of the Employee Retirement Income Security Act, 31 J. L. & Econ. 85, 120 (1988).

It has been further postulated that forfeitures due to fraud in the pre-ERISA period were in reality not very large. *See* id. at 101. This result, however, is not terribly surprising when one considers that forfeitures due to fraud (in specific, dismissing employees short of full vesting) generally affects individual employees, while serious financial problems of the employer (not involving fraud) would affect the entire workforce of that employer. In some cases the numbers in the latter situation were very significant. *See* infra note 88 and accompanying text.

The phenomenon of postretirement existence on private retirement income is a relatively new one, coming into full swing only in the early 1970s. *See* The Goals of ERISA and the Impact of ERISA On Plan Participants, in Information Paper, supra note 11, at 26-28 (statement of Thomas C. Woodruff, Executive Director, Commission on College Retirement). It will assume more and more importance in the not too distant future as the American population ages. *See generally* K. Dychtwald, Agewave (1988); J. Jorgensen, The Greying Of America (1980).

23. Hearings on The Retirement Equity Act of 1983 (S. 19) Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 3-10 (1983) (testimony of Sen. Durenberger); id. at 42-48 (statement of Betty McElderry, Okla. State Division President, American Ass'n of University Women).

Consider the following statement by Michael Gordon, special counsel to the Senate Comm. on Labor and Human Resources and staff aide to Senator Javits during the legislative period of ERISA, made during the 10th anniversary of ERISA conference:

> [I]t has always been my feeling that ERISA was really 10 years behind when it should have been enacted. It is a great thing that it was enacted in 1974, but most of the concepts that are built into it are concepts that arose in the 1960's, were a response to situations which had begun to develop in the later 1950's, and probably, we would have been a leg up if it had been enacted when Senator Javits originally proposed it.

10th Anniversary Conference Report, supra note 2, at 23.

24. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1448 (Aug. 23, 1984).

25. *See* Preamble to S. Rep. No. 575, 98th Cong., 2d Sess. (1984).

26. *See generally* M. Canan, Qualified Retirement and Other Employee Benefit Plans § 1.4 (1991) (explaining various governmental limitations and compliance requirements of employee benefits). ERISA also covers plans, whether qualified or not, of employers engaged in interstate commerce. Id. at 10. Some plans, however, are exempted from ERISA. These

These plans are known collectively as "qualified plans" and in order to be eligible for these tax benefits, the plans must meet some very strict statutory requirements to ensure adequate coverage of lower paid workers and their beneficiaries.[27] Yet despite the social policy rationale behind extended coverage,[28] a plan administrator may deny a survivor's benefit to a surviving spouse who has been married to a participant less than one year at the earlier of the annuity starting date[29] or the date of the participant's death.[30] REA recognizes marriage as an economic partnership and provides automatic joint and survivor annuities for surviving spouses.[31] Thus, the survivor has a legal interest in the employee's retirement benefits, provided that the spouse meets the arbitrary marriage period; otherwise, the survivor may be left without benefits. In such a case, the denial may be based solely on the failure to meet the arbitrary time period without any consideration of the survivor's mental or physical health, status as a dependent, or financial, emotional, or physical contributions made to the marriage during this period.[32] While this provision appears to be facially sex neutral, it nevertheless discriminates against women.[33] This is true for two reasons. First, men usually marry younger women,[34] and women in general live slightly longer than men.[35] These two factors increase the chances of the woman being the survivor and thus being subject to this provision. Second, women, as a group, stand to lose more benefits under this provision since it is only in the last twenty-five to thirty years that women have been present in the workforce in significant numbers and they still tend to be clustered in lower paying jobs.[36] Thus, on the whole, women have had neither the time nor the opportunity to amass the amount of retirement benefits that men have.

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include governmental plans, church plans and unfunded excess benefit plans. ERISA §§ 4(b)(1)-(2), (5), 29 U.S.C. § 1003 (1982).

27. *See* I.R.C. § 401(a) (1988).

28. *See* infra notes 422-23 and accompanying text.

29. The term annuity starting date is defined under the Internal Revenue Code at § 417(f)(2)(A) as "the first day of the first period for which an amount is payable as an annuity, or in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the participant to such benefit." There is also a special rule for disability benefits. *See* I.R.C. § 417(f)(2)(B) (1988).

30. *See* 29 U.S.C. § 1055(f) (1985), I.R.C. §§ 401(a)(11)(A), 417(d) (1988).

31. *See* I.R.C. § 401(a)(11)(A) (1988):

> (A) In the case of any plan to which this paragraph applies, except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under this section unless-
>
> (i) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity, and
>
> (ii) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity is provided to the surviving spouse of such participant.

See also 29 U.S.C. § 1055(d), (e) (1988).

32. *See* infra notes 433-55 and accompanying text.

33. *See* infra notes 450-55 and accompanying text.

34. *See* infra note 455.

35. *See* infra note 454.

36. *See* U.S. Bureau of Labor Statistics, supra note 6, Table 43, at 194-93.

Workers who have been promised by their employers that they would be taken care of upon retirement deserve to be able to rely on this promise. After all, workers usually are paying for this privilege in the form of reduced wages.[37] Also, many employers use the promise of retirement benefits as a recruiting device. Thus, retirement benefits should be regarded as a contractual right; workers and their families should not be deprived of such an important benefit because of a technicality permitted under the law.[38] Indeed, the primary impetus of the original ERISA legislation was the public outcry over extreme hardships caused by employers legally reneging on their promise of retirement benefits to their workers.[39] But today, more than 16 years after the passage of ERISA, workers still are led to believe that their families will be adequately protected in the event of their deaths, whether before or after retirement. This, however, may not be the case.[40] The irony of this situation becomes apparent when considering President Nixon's message to Congress in 1971, on the eve of the congressional debates leading to the passage of ERISA. In this message, he attempted to set the tone of the legislation by remarking that its enactment would ensure that "all participants would have greater assurance that they will actually receive the benefits which are coming to them."[41]

The United States today has one of the lowest savings rates in the world.[42] When this fact is coupled with the realization that nearly twenty-two percent of the population will be age 65 or over by the year 2030,[43] it follows that issues of retirement security will be on the political forefront in the coming years, particularly since Social Security[44] provides, at best, only a minimum subsistence level benefit.[45] Because of the "graying of America"

37. *See* infra notes 412-23 and accompanying text.

38. *See* supra note 37.

39. *See generally* Hearings, supra note 18; *see also* Preface, 10th Anniversary Conference Report, supra note 2, at III.

40. *See* infra notes 433-55 and accompanying text.

41. Message from the President of the United States Concerning Private Pension Plans, H.R. Doc. No. 182, 92d Cong., 1st Sess. 5 (1971).

42. That rate is currently around 5.4%, having dropped slightly from mid-1989. *See* Personal Spending Outpaced Income in U.S. in August, Wall St. J., Sept. 25, 1989, at A2, col. 2. But according to Dorcas R. Hardy, former commissioner of Social Security, "[t]he American worker has had every reason to use his or her money for purposes other than investment into savings vehicles that may not be viable tomorrow. Betting on government consistency in recent years has been a sucker bet." Social Security's Insecure Future, Wall St. J., Aug. 21, 1989, at A8, col. 6; *see also* Thomas, Saving: Not the American Way, Newsweek, Jan. 8, 1990, at 44-45 (decrying the U.S. as having one of the lowest savings rates in the world).

43. This percentage represents nearly 66 million people. *See* Census Predicts Population Drop In Next Century, N.Y. Times, Feb. 1, 1989, at A18, col. 6.

44. Social security provides four types of benefits: old age or disability benefits to which the worker is entitled, dependents' benefits for retired or disabled workers, lump sum death benefits, and survivor's benefits. *See* Retirement Benefits: Are They Fair and Are They Enough?: Hearing Before the Senate Special Comm. on Aging, 96th Cong., 2d Sess. 6-8 (1980) (statement of William J. Driver, Commissioner, Social Security Administration).

45. *See* Musgrave, A Reappraisal of Financing Social Security, Social Security Financing 89, 97 (F. Skidmore, ed., 1981). It also has been speculated that the Social Security System is not as secure as Congress would have us believe. *See* Social Security's Insecure Future, supra note 42, at A8, cols. 3-6.

and uncomfortable speculation on what that will mean for the economy,[46] the time is now ripe to reexamine the current ERISA legislation. Perhaps the entire system should be reorganized,[47] but certainly weak areas should be strengthened to ensure that those Americans who are covered under the system will be adequately and fairly provided for in their postretirement years.[48] Despite compelling economic and social motives for ensuring the success of the private retirement system, Congress has displayed a curious apathy toward reform of the system.

While there are pervasive problems with the current ERISA legislation,[49] this Article will focus only on survivor benefits and will concentrate in particular on the short-term marriage provision.[50] This Article will maintain that facial neutrality notwithstanding, the short-term marriage provision is discriminatory in effect,[51] grounded in dubious logic,

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46. *See generally* Social Security's Insecure Future, supra note 42 (discussing failure of the social security system); *see also* K. Dychtwald, supra note 22; J. Jorgensen, supra note 22.

47. This has been suggested by some commentators. *See, e.g.*, Borzi, A National Retirement Income Policy: Problems and Policy Options, 19 U. Mich. J.L. Ref. 5 (1986); Graetz, The Troubled Marriage of Retirement Security and Tax Policies, 135 U. Pa. L. Rev. 851 (1987). *But see* Altman, The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz, 136 U. Pa. L. Rev. 1419 (1988).

48. The increasing crime rate among the elderly is a present indication that they are not adequately provided for in today's society. Statistics show that as the country ages, more and more of the elderly are ending up behind bars, and of that group an increasing number are in jail because of drug related charges. *See* Hagedorn, The Godfather of Soul Can Even Play Bingo In A Special Lockup, Wall St. J., Sept. 19, 1989, at 1, col. 4. According to Ms. Hagedorn:

> [A] geriatric crime wave appears to be sweeping the nation. Criminologists attribute the apparent crime spree to the frustrations of old age in this country, among them poverty and feelings of uselessness. . . . Drug dealing is also growing, especially among grandmothers who must raise their grandchildren because their daughters have problems with crime or drugs.

Id.

Thus, Congress could, theoretically at least, kill two birds with one stone by ensuring that their aging constituencies are adequately provided for. Also not to be overlooked is the fact that the American Association of Retired Persons (AARP) is indisputably a powerful lobby, having won every major battle it has ever undertaken. *See* K. Dychtwald, supra note 22, at 55-60. According to the Wall Street Journal, "That's why AARP is one of the most feared lobbies in Washington. Phil Longman, a former congressional aide who was fired from his job only days after criticizing AARP on television, told the New York Times 'When AARP's lobbyist shows up, it's like Darth Vader at the door—he tells people how to vote.' " AARP's Catastrophe, Wall St. J., Oct. 2, 1989, at A14, cols. 1-2.

49. *See, e.g.*, Shepard, Private Pension Funds: 'Games' Employers Play, Atlanta Journal/Constitution, Mar. 4, 1990, at 1, cols. 2-5 (discussing inequities permitted by Congress' "lip service" to pension issues).

50. While this Article focuses only on a specific problem area, a more general focus on age and gender based discrimination in the retirement system is undertaken by this author in The Pension Game: Age and Gender Based Inequities in the Retirement System, 25 Ga. L. Rev. 1 (1991).

51. Consider the following statement of Sen. David Durenberger on the Economic Equity Act, a predecessor bill of the Retirement Equity Act:

> There have been 1,722 senators since the beginning of our Republic; only 12 have been women. The result has been a pattern of policies that seem neutral on their faces, but when applied to real world situations create deep disparities between the opportunities available to men and those available to women. . . .
>
> Just about every woman in this country will face one or more of the following economic barriers at some time in her life: longer work requirements for pension vesting rights; termination of her survivorship benefits; inability to establish an

and unsupportable from a historical perspective.[52] In order to demonstrate this, this Article will delve thoroughly into the historical development of ERISA, with particular emphasis on the survivor benefit provisions. The depth to which this Article plumbs the general development of ERISA is intended to demonstrate the weak historical foundation on which the short-term marriage provision rests and to establish that weaknesses in this law are attributable largely to the tremendous obstacles the reformers had to overcome. These obstacles were so great that it was fortunate there was any reform at all. Indeed, the more far-reaching legislation had to fight for its life at virtually every stage of its development. Therefore, only so many battles could be won.[53] Although women had only recently begun to enter the workforce in significant numbers,[54] they were generally considered to be unimportant because of the relatively low-level positions they held. In addition, they were not organized and did not have a strong collective voice. Thus, they were not factored into the original ERISA legislation. It was not until several years later that Congress began to realize the injustice it had foisted upon American women. Yet despite Congress'attempt to rectify the situation with REA, inequities remain.

Finally, this Article will examine the development of post-ERISA legislation and its effect on survivor benefits. In particular, the divorce distribution provisions[55] produce some current problems for survivors. The concept of the qualified domestic relations order ("QDRO") was added in 1984 to cure inequities existing because of the anti-alienation provision of ERISA[56] and to clarify the extent to which a court could order retirement benefits divided upon divorce.[57] The intent of the QDRO provisions was to provide greater equity in property distributions upon divorce.[58] In effect, however, they may operate to divest a current spouse and thus place that spouse's financial future in jeopardy, without that spouse's knowledge, and regardless of the length of the current marriage.[59] This Article will address specific problems facing survivors today and will propose a simple and fair solution.

> Individual Retirement Account of her own; denial of pension survivorship benefits; inability to afford high quality dependent care; failure to obtain employment because of a lack of training or experience; and, failure to collect child support. . . .
>
> Homemakers and women who work outside the home face a frustrating succession of roadblocks that progressively steal the quality of economic opportunity that men take for granted. The result, all too often, has been the feminization of poverty.

Potential Inequities Affecting Women: Hearings Before the Senate Comm. on Finance, 98th Cong., 1st Sess. (Part I) 41, 43 (1983) (statement of Sen. David Durenberger) [hereinafter Potential Inequities Hearing].

52. *See generally* infra notes 166-226 and accompanying text.
53. *See, e.g.,* infra note 432 and accompanying text.
54. *See* supra note 36 and accompanying text.
55. *See* I.R.C. § 414(p) (1989).
56. ERISA § 206(d)(1) (1974), I.R.C. § 401(a)(13) (1989).
57. ERISA § 206(d)(3) (1988); I.R.C. § 414(p) (1989).
58. *See* infra notes 295, 303-05, 331-41, and accompanying text.
59. *See* infra notes 397-409 and accompanying text.

II. HISTORICAL DEVELOPMENT OF ERISA

Many of the current problems with modern employee benefit legislation, including those pertaining to gender based discrimination, can be better understood with reference to their historical development. For purposes of this discussion, the history of private retirement legislation may be divided into three periods. The first period is the evolutionary period, which encompasses roughly the time from the turn of the century through the Second World War. During this period, there was a slow but steady growth in the number of private retirement plans and some development, although relatively minor, in the law governing private plans. The second period, the proliferation period, extends from the end of World War II to the early 1950s when there was little regulatory law and rapid proliferation of retirement plans and assets held by the retirement trusts. The third period, the regulatory period, begins in the early 1950's and ends with the passage of ERISA in 1974. This last period represents marked confusion, instability, and inadequacy in the law. During the first half of this period, the need for reform became apparent, and during the second half, Congress debated at length the scope of that reform. The problem Congress faced was in attempting to legislate adequate protection for employees while simultaneously avoiding any potential disincentive to employers to propagate new plans or to maintain existing ones.

A. The Evolutionary Period

Although this Article categorizes the evolutionary period as beginning roughly at the turn of the century, private retirement plans existed before that time, long before the tax code.[60] In fact, the first documented private retirement plan was that of the American Express Company (later known as the American Railway Express Company) in 1875.[61] Another was established by the Baltimore and Ohio Railroad Company in 1880. From that point until the turn of the century more than 100 private plans were established, all by railroad companies. These companies, on the forefront of profit-maximizing innovations, had discovered that it made good economic sense to provide a limited pension to their older workers as a retirement incentive. This allowed companies to hire younger workers at a cheaper rate and to spread the cost of the retirement benefits over a period of twenty-five to thirty years. This practice resulted in a low annual cost to the company and contributed to an overall profit.[62]

60. The tax code was first enacted in 1913 although tax laws were temporarily in existence at several points prior to that time. *See* R. Paul, Taxation in the United States 3-29 (1954).

61. *See generally* C. Dearing, Industrial Pensions 35 (1954). While private retirement income programs are generally a product of the twentieth century, the concept was first seen in the United States in the 1600's when the pilgrims enacted a law providing support to soldiers badly injured in the line of duty. Public pensions (in the sense of those pensions maintained by the federal government) are also generally products of the twentieth century but as early as 1789 there was a law providing that the federal government would assume the pension obligations of the states for injured soldiers of the Civil War for a period of one year. *See generally* Staff of House Select Comm. on Aging, 96th Cong., 1st Sess., Women and Retirement Income Programs: Current Issues of Equity and Adequacy (Comm. Print 1979) [hereinafter Women and Retirement Income Programs].

62. *See* C. Dearing, supra note 61, at 35. Benefits under these plans, however, were

The period from 1900 through the second World War saw only a gradual growth of the private retirement industry. The vast majority of plans during this period were instituted by unions[63] and many of the remaining plans were established by nonunionized big business.[64] Nevertheless, the proliferation of private retirement plans was such that tax exempt status for the trusts of stock bonus, profit sharing and pension plans was conferred under the revenue acts of 1921[65]and 1926.[66]

In the aftermath of the Depression, public awareness and concern over future financial security resulted in the enactment of the Social Security Act[67] and the Railroad Retirement Act.[68] But much of this public awareness manifested itself in a desire for current compensation to replace assets dissipated by the Depression. Thus, there was not a significant proliferation of private retirement plans until post-war economic conditions in the late 1940s changed the tenor of the employer-employee relationship.[69] At that time, high demand and short supply coupled with a steadily rising economy placed skilled labor at a premium in an increasingly competitive market. Many employers found that retirement plans gave them the cutting edge in incentive devices and retention of valuable employees.[70]

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provided at the whim of the companies since the plans were purely discretionary and could be revoked at any time. Since most of these plans were not funded, by the 1930s many sponsors found themselves unable to meet their commitments. At this point the federal government stepped in and took over the plans after Congress enacted the Railroad Retirement Act of 1934. This Act was declared unconstitutional the following year by the U.S. Supreme Court. The 1934 Act was amended in 1937 and reenacted as the Railroad Retirement Act of 1937, later replaced by the Railroad Retirement Act of 1974. *See* R. Robbins, Impact of Taxes on Industrial Pension Plans 3-9 (1949); *see also* Women and Retirement Income Programs, supra note 61, at 17.

63. *See* C. Dearing, supra note 61, at 30-34.

64. Id. at 35-40.

65. Revenue Act of 1921, ch. 136, § 219(f), 42 Stat. 247 (1921). The Revenue Act of 1921 provided a tax exemption for trusts "created by an employer as a part of a stock bonus or profit-sharing plan for the exclusive benefit of some or all of his employees." Id.

66. Revenue Act of 1926, ch. 27, § 219(f), 44 Stat. 33 (1926). The Revenue Act of 1926 extended the tax exemption of the Revenue Act of 1921 to "trusts that form a part of a pension plan." Id.

67. Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

68. Railroad Retirement Act, ch. 812, 49 Stat. 967 (1935), redesignated as Railroad Retirement Act of 1974, Pub. L. No. 93- 445, 88 Stat. 1305 (1974) (current version at 45 U.S.C. § 231).

69. A major factor in the increase of post-war plans was the high rate of income and excess profits tax. This, combined with the fact that wage controls provided a specific exception for fringe benefits, resulted in less emphasis being placed on current wage increases and more emphasis being placed on fringe benefits such as pensions. *See* C. Dearing, supra note 61, at 40-47.

70. *See* id. at 38-39. Also during this period, the Revenue Act of 1942 provided further protection for employees by instituting restrictions on the employer's ability to terminate a plan. It also prohibited qualified plans from being established solely to benefit the higher compensated employees. Revenue Act of 1942, Pub. L. No. 77-753, 56 Stat. 798, § 162 (1942) (amending § 165 of the Internal Revenue Code of 1939).

B. The Proliferation Period

During the post-World War II period, the combination of several factors contributed to the rapid increase in the number of private retirement plans. The single largest factor was the resurgence of interest in private retirement plans by the unions. The unions, distrustful of private plans because of perceived employee immobility and cautious in matters of retirement security after the Depression, had tended to rely on Social Security to meet the retirement needs of their members and had concentrated instead on current wage increases and fringe benefits.[71] However, in 1946, John L. Lewis, president of the United Mine Workers union ("UMWA"), negotiated a welfare and retirement fund for the benefit of the miners. This focused the attention of the unions for the first time on retirement benefits and deferred compensation issues.[72]

Another contributing factor to the proliferation of private plans after World War II was the Seventh Circuit's 1949 decision in *Inland Steel Co. v. NLRB*,[73] upholding a ruling by the National Labor Relations Board that retirement benefits were a mandatory subject of collective bargaining.[74] According to the Seventh Circuit, failure to negotiate this issue would result in a bad faith violation of the National Labor Relations Act, which would automatically void any collective bargaining agreement.[75] Management sought review of this decision in the Supreme Court, which refused to grant certiorari on the issue.[76] Within a few years of the *Inland Steel* decision the number of private plans had risen to over 13,000, an increase of over 600% in three years.[77]

C. The Regulatory Period

While tax benefits had been extended to private retirement plans,[78] there was little regulatory control over these plans prior to 1950. The rapid interstate growth rate of private retirement plans during the 1950s, coupled with the astonishing growth of pension assets,[79] compounded the inadequacy of the system. Congress made various efforts during the late 1950s and early 1960s to exert some regulatory control over the private retirement industry to ensure that employees would be treated fairly in the administration of the plans and that the promised benefit would be there

71. *See* C. Dearing, supra note 61, at 41-42.

72. Lewis was concerned that social security fell far short of providing a decent standard of living for retired or disabled workers. It was his belief that "the industry owed an obligation to those employees, and the coal miners could no longer be used up, crippled beyond repair and turned out to live or die subject to the charity of the community or the minimum contributions of the State." Id. at 49.

73. 170 F.2d 247 (7th Cir. 1948).

74. Id. at 267.

75. Id. at 255-63.

76. 336 U.S. 960 (1949).

77. Approximately 11.1 million workers were covered under these plans by the end of 1950. *See* C. Dearing, supra note 61, at 66.

78. *See* supra notes 65-66 and accompanying text.

79. These assets in 1940 had amounted to $2.4 billion and had reached $27.4 billion in 1958. *See* supra note 12.

when the employee retired.[80]

1. The Need for Reform

Although there was not much doubt that the system was an appalling one which permitted all manner of abuse,[81] the early attempts at corrective legislation during the 1950s and early 1960s were weak.[82] The futility of these early attempts was primarily attributable to a rift between the unions and management, neither of which trusted the other and both of which engaged in powerful lobbying efforts. Finally, Senators Paul Douglas of Illinois and Irving Ives of New York collaborated on a bill which they believed would solve many of the deficiencies of the system.[83] The thesis of the bill was that strengthening the disclosure requirements would prevent many of the abuses while forcing plans to regulate themselves without greater government involvement. Although not enacted, the Douglas-Ives bill was nevertheless important because it ultimately formed the basis for the Welfare and Pension Plans Disclosure Act ("WPPDA") of 1958[84] which was to be the primary pension legislation for the next sixteen years.

The Kennedy administration was less reticent about employee benefit legislation. As a former member of the Senate Labor and Public Welfare Committee, Kennedy had taken a very active role in employee benefit reform.[85] In 1962, strengthening amendments to the WPPDA were enacted.[86] These amendments increased the regulatory control of the government and required surety bonds of fiduciaries entrusted with plan funds.[87] However, shortly after the amendments had been enacted, several important events transpired which focused public attention on the fact that there were problems remaining in the private retirement system which the WPPDA, even with its strengthening amendments, did not begin to address. First, in 1964 the Studebaker plant in South Bend, Indiana closed, resulting in the termination of its pension plan. Studebaker had been experiencing financial problems for some time and the United Auto Workers ("UAW"), realizing this, had been engaged in a series of unsuccessful negotiations to gain priority over other creditors for its members

80. *See generally* Chadwick & Foster, Federal Regulation of Retirement Plans: The Quest For Parity, 28 Vand. L. Rev. 641, 654-58 (1975) (citing various legislative attempts to regulate retirement plans).

81. *See* Hearings, supra note 18. These abuses ranged from criminal activity (embezzlement and looting) to ineptness and ignorance in management. *See* Information Paper, supra note 11, at 6.

82. For a cogent discussion of this legislation, see Chadwick & Foster, supra note 80, at 654-68. *See also* Information Paper, supra note 11, at 6.

83. S. 2888, 85th Cong., 2d Sess. (1958).

84. Pub. L. No. 85-836, 72 Stat. 997 (1958). The Douglas-Ives bill originally tapped the SEC to administer the disclosure provisions because much of the abuse dealt with employer securities. In some cases there was excessive investment in employer securities and, it was felt, too high commissions being charged. *See* U.S. Dep't of Labor, Legislative History of the Welfare and Pension Plans Disclosure Act of 1958, at 96 (1962).

85. *See* Information Paper, supra note 11, at 7.

86. Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, 76 Stat. 35 (1962) (current version at 18 U.S.C. §§ 664, 1027, 1954; 29 U.S.C. §§ 301-09 (1988)).

87. Id.

who were covered under the pension plan. The ultimate closing commanded widespread public and congressional attention when nearly 4,400 workers with vested benefits lost some or all of those benefits, despite the efforts of the UAW.[88] The ensuing public furor was one of the factors which led to the second event, the publication by Professor Merton Bernstein of a book entitled *The Future of Private Pensions*.[89] In this book Bernstein argued very eloquently and persuasively that the private retirement system did not afford adequate protection or fairness to workers. This, he reasoned, was due to inadequate legislation which legalized funding on a pay-as-you-go basis permitting situations such as the Studebaker case and jeopardizing workers' futures by allowing plan terminations as a result of corporate mergers, acquisitions, dissolutions or financial difficulties.[90]

These two events enlightened the general public for the first time on the shortcomings of existing pension legislation. The need for reform was thus apparent and the next step was to determine the scope of that reform. But first, there were political hurdles to clear.

2. *The Political Games*

In 1962 President Kennedy established the Committee On Corporate Pension Funds and Other Private Retirement and Welfare Programs, to conduct an extensive review of the private retirement and welfare system. When it finally issued its report on January 15, 1965 it concluded that the lack of effective prescribed government standards had produced a retirement system that was inadequate to meet the needs of aging workers.[91] The Committee recommended radical reform of the system,[92] but at that time a new administration was in place. It soon became clear that President Johnson was lukewarm to the idea of radical reform because of tremendous pressure from big business, which sensed that the proposals would be expensive.[93]

On February 20, 1967, the Johnson administration introduced its own version of reform, which focused primarily on fiduciary requirements and

88 *See* S. Rep. No. 383, 93d Cong., 1st Sess. 78 (1973) (resolution disapproving the President's "alternative" pay plan which would postpone a pay adjustment for federal employees); Hearings on Private Pension Plans Before the Subcomm. on Fiscal Policy of the Joint Economic Comm., 89th Cong., 2d Sess. 103-07 (1966).

89. M. Bernstein, The Future of Private Pensions (1964).

90. Id. at 114-38.

91. *See generally* President's Committee On Corporate Pension Funds and Other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs, A Report to the President on Private Employee Retirement Plans (Jan. 1965).

92. The most important recommendations made by the Report were (1) the imposition of mandatory minimum vesting standards, (2) the imposition of mandatory minimum funding standards, (3) that further study be given to the provision regarding portable pension credits so that an employee would not lose valuable pension credits upon changing jobs, (4) the provision of plan termination insurance, (5) the recommendation that a dollar limitation be placed on contributions or benefits, (6) that a limitation be placed on the amount of employer securities which could be used to fund a plan, and (7) that the disclosure provisions be examined before any changes to the fiduciary provisions are made. Id.

93. *See* Information Paper, supra note 11, at 10.

fell far short of the Kennedy Committee's recommendations.[94] Senator Jacob Javits of New York thought the administration's bill was too weak and he immediately introduced his own comprehensive bill addressing the specific concerns of the Kennedy Committee.[95] The Javits bill originally was intended to be introduced as a tax bill because of its important tax implications and technical provisions. But the efforts of Assistant Secretary of the Treasury, Stanley Surrey, to move the bill out of the House Ways and Means Committee were thwarted by the Chairman of that committee, Senator Wilbur Mills of Arkansas, who yielded to protests from the business community and refused to act. After that, the bill was introduced as a labor bill.[96]

The switch from a tax bill to a labor bill was significant because after the Javits bill was introduced another rift developed, this time a personal one between Secretary of Labor Willard W. Wirtz, who had assumed primary responsibility for new pension legislation, and President Johnson.[97] This development, coupled with the fact that strong business opposition continued, resulted in the administration's failure to endorse the bill.[98] Without presidential support, the bill never gathered much momentum.

The Nixon Administration was equally reluctant to endorse comprehensive reform. Early in his administration, however, an event occurred which made it impossible for President Nixon to ignore the reform issue. That event was the January 1970 murder of Joseph Yablonski, who had waged a bitter and unsuccessful battle against incumbent W.A. Boyle for the presidency of the UMWA. The Yablonski murder prompted a widespread congressional investigation into the activities of the union.[99] In response to charges of mismanagement of the retirement and welfare benefits fund leveled against Boyle by Yablonski supporters, the Senate Labor Subcommittee was given the task of investigating the activities of the fund.

The Subcommittee uncovered such a history of mismanagement and outright corruption that a highly publicized round of litigation against

94. This bill, the Welfare and Pension Plans Protection Act, S. 1024, 90th Cong., 1st Sess. (1967), was in response to situations such as that discovered by the Senate Government Operations Committee, chaired by Senator John L. McClellan, in which the founder of two New Jersey unions, George Barasch, had managed to embezzle funds from the unions for his own benefit. Barasch had established two "charitable corporations" in Liberia and Puerto Rico to which he planned to transfer the remainder of the pension assets upon liquidating the funds. *See* S. Rep. No. 1348, 89th Cong., 2d Sess. (1966). The Committee learned that nothing could be done to prevent such situations because existing laws were inadequate. Senator Jacob K. Javits was so chagrined over this that within two weeks of the hearing he introduced a bill to impose fiduciary standards on employee benefit funds. *See* Information Paper, supra note 11, at 12.

95. S. 1103, 90th Cong., 1st Sess. (1967).

96. *See* Information Paper, supra note 11, at 14.

97. *See* id.

98. *See* id.

99. *See, e.g.*, Hearings on the United Mine Workers Election, 1971, Before the Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess. (1971); Hearing on UMW Welfare and Retirement Fund Before the Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 91st Cong., 2d Sess. (1970).

Boyle and the union ensued.[100] This litigation ultimately resulted in Boyle's arrest. Of even greater significance was the March 1971 publication of a broader based portion of the study which examined a sampling of plans and determined the percentage of covered employees who had actually received retirement benefits since 1950.[101] The study revealed that only eight percent of the millions of covered employees had qualified to receive benefits and only five percent actually had received any benefits.[102] Of the remaining employees, many had worked long periods of time and yet would never receive anything from the plan, primarily because of the lengthy period of service required for vesting.[103]

The Subcommittee also began holding hearings in 1968 which drew thousands of people all willing to testify about their own egregious experiences of lost pension benefits after a lifetime of work.[104] These hearings continued through 1971. In October of 1971, the Subcommittee began entertaining testimony of plan sponsors.[105] Their stories were all very similar: it would be too costly to provide for more liberal plan provisions. The Subcommittee, however, uncovered abundant cases of underfunding, mismanagement, and bad faith.[106] It concluded that the overall problems of the private retirement system were not attributable solely to restrictive plan provisions.

In late 1971, several other events occurred which worked to accelerate reform. First, shortly after the conclusion of the hearings, Senator Harrison Williams of New Jersey, Chairman of the Labor Subcommittee, collaborated with Senator Javits on a comprehensive joint pension reform bill modeled after the 1967 Javits bill. Second, in December of that year the White House Conference on Aging issued a report recommending specific reform that dovetailed with the proposals of the original Javits bill.[107] This provided an extra impetus to the Williams- Javits coalition.

At the same time the Nixon Administration released its proposal.[108] While calling for less comprehensive and more conservative reform, the Administration's proposal, nevertheless, contained a bombshell that threatened to blow apart the Williams-Javits coalition. That bombshell was a recommendation for expanded coverage through tax deductions for contributions to individual retirement accounts (IRAs) for individuals who lacked coverage under an employer- or union-sponsored plan plus new increased deduction limits on contributions by self-employed individuals to

100. *See, e.g.*, United States v. Boyle, 482 F.2d 755 (D.C. Cir. 1973) (upholding criminal conviction for conspiracy and unlawful conversion of union funds); Hodgson v. UMWA, 344 F. Supp. 17 (D D.C. 1972) (declaring Boyle's victory as president of union a nullity and ordering new election); Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971) (removing Boyle as trustee of UMWA Welfare and Retirement Fund).

101. *See* S. Rep. No. 634, 92d Cong., 2d Sess. 119, 123-28 (1972).

102. Id. at 64, 123-28.

103. Id. at 14-15, 64-66.

104. *See generally* Hearings, supra note 18.

105 *See* id.

106. *See generally* id.

107. *See* Section Recommendations on Employment and Retirement, White House Conference on Aging 2-10 (1971).

108. *See* H.R. Doc. No. 182, 92d Cong., 1st Sess. (1971).

Keogh or H.R. 10 plans.[109] Although this was the only popular aspect of the Administration's proposal, it turned out to be a coup in attracting support from a previously uncovered section of the populace who were mobile, well-educated, and highly articulate.[110] It also served, at least for the short term, to shift the focus of the reform debate away from the Williams-Javits bill.

In February 1972, the Senate Labor Committee released an interim report listing specific areas of deficiency and officially embracing the comprehensive reform package of the Javits bill.[111] In May, Williams and Javits finally introduced their joint bill,[112] modeled on the original Javits proposal.[113]

The Labor Subcommittee held hearings in June on both the Williams-Javits bill and the Administration's proposal.[114] Afterward, business gave its support to the Administration's proposal while labor, in general, leaned toward the Williams-Javits bill, although, unfortunately, its support was divided and thus weakened.[115]

The Subcommittee had, in the meantime, commissioned an independent actuarial team to study the economic effects of the vesting provisions of both proposals and these findings were released in September. The study

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109. Id. at 2-3. In 1962, legislation was enacted allowing self-employed individuals to establish qualified plans. These plans are named for their sponsor, Eugene Keogh, and the bill number, H.R. 10. The current provisions governing such plans are found at I.R.C. § 401(e) (1988).

110. See Information Paper, supra note 11, at 17-18, for a discussion of the effect of this provision.

111. *See* S. Rep. No. 634, 92d Cong., 2d Sess. (1972).

112. *See* Staff of Senate Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Retirement Income Security For Employees Act of 1972 (Comm. Print 1972). In later introducing a subsequent amendment to this bill, Javits paid tribute to his co-sponsor, calling their association "one of the most satisfying of my entire career." *See* Legislative History, supra note 21, at 206.

113. There was, however, one important modification. In order to win the support of organized labor, Javits was forced to concede the SEC-type commission he had originally envisaged in favor of the Department of Labor. Javits believed the regulatory functions should be performed by a body similar to the SEC because of the securities and insurance issues inherent in the proposals.

He conceded this issue after Williams pleaded with him, pointing out that the joint bill would be opposed by both business and labor. Williams also argued that while there was no hope of obtaining the support of business, the substitution of the Department of Labor as the regulatory body would win the support of labor. *See* Information Paper, supra note 11, at 20.

114. *See* Retirement Income Security for Employees Act, 1972: Hearings on S. 3598 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972).

115. The labor interests divided into warring factions in order to push their agendas. The craft unions maintained that their multi-employer plans should be exempted from the vesting provisions because these plans already contained special protections for employees such as portability from one employer plan to another within the multi-employer group. Some of these plans, they argued, were national in scope. They went on to argue that bankruptcy of one employer did not affect the fund. Therefore, multi-employer plans contained built-in safeguards which single employer plans did not have. *See* id. at 1109-12 (statement of Andrew J. Beimiller, Director, Department of Legislation, AFL-CIO).

Workers, on the other hand, maintained that the vesting provisions did not provide enough protection for them, even in multi-employer plans, since they covered only post-enactment service. Id. at 1116-43.

concluded that under either proposal the vesting provisions would not produce a significant cost increase but the indications were that the largest increase would result from the Administration's proposal of placing older workers on a faster vesting schedule.[116] These findings were subsequently confirmed by the Administration's own study. This caused industry to back away from the Administration's proposal and to align itself more closely with the Williams-Javits bill.[117]

In mid-September, the Senate Committee on Labor and Public Welfare unanimously reported the Williams-Javits bill.[118] Yet despite the enthusiastic endorsement of the full Committee, the bill received a setback when the Senate Finance Committee, citing important tax implications, requested a referral. Backed by industry and the Administration, the Senate Finance Committee then stripped the bill of most of its important and controversial provisions claiming that these matters should be undertaken by the tax committees of Congress.[119]

Javits denounced this delaying tactic on the floor of the Senate in one of the angriest speeches of his career claiming that the action had been based on a "myopic point of view" that had elicited "reactionary opposition" in the "fifty-ninth minute of the eleventh hour."[120] He further asserted that it would take a "magician to demonstrate" how the interests of the country and the American worker would best be served by this action.[121] Javits' stirring speech was not effective in obtaining immediate Senate consideration of the bill but it did elicit reaction from American workers. Constituencies across the country wasted no time in writing to complain about the action of Congress in failing to pass comprehensive pension reform; media

116. *See* S. Rep. No. 1150, 92d Cong., 2d Sess., appendix II (1972).

117. *See generally* Information Paper, supra note 11, at 21-22.

118. The report outlined the purpose of the bill:

> Its most important purpose will be to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society. The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral part of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers.

S. Rep. No. 1150, 92d Cong., 2d Sess. 13 (1972).

119. There were several reasons for this action. The Finance Committee legitimately may have believed that its power was being usurped. But the real reason is thought to be the perception by Senators Russel Long of Louisiana and Carl Curtis of Nebraska that the bill encroached upon issues that were not within the prerogatives of the federal government. Senator Long further opposed the bill because of its unpopularity with big business. *See* J. Javits, The Autobiography of a Public Man 383 (1981).

There were four committees primarily involved in the ERISA legislation: House Committee on Ways and Means, House Committee on Education and Labor, Senate Committee on Finance, and Senate Committee on Labor and Public Welfare. The tax committees were the House Ways and Means Committee and the Senate Finance Committee.

120. Id.

121. Id.

criticism of the Senate Finance Committee was also widespread.[122]

While the action of the Senate Finance Committee was an effective delaying tactic, the response to Javits' speech made it clear that Congress could no longer forestall pension reform. In December 1972 the staff of the Joint Committee on Taxation met with the staff of the Committee on Labor and Public Welfare to discuss a joint labor-tax bill incorporating the Williams-Javits proposals with tax modifications.

Although pension reform appeared to be inevitable, the question was when it would appear. Congress had begun to consider seriously the issue of comprehensive legislation, but in 1973, new issues appeared which spawned fresh debates. Much to the chagrin of Javits and Williams, the 93rd Congress closed its session without enacting the much-needed pension reform legislation.

3. Survivor Benefits

In the 94th Congress one of the new issues that arose was survivor benefits. After concentrating for so long on the plight of the participants, Congress began to realize that there was another group of big losers in the pension lottery—surviving spouses.[123] The intent of Congress in implementing pension reform was to prevent pension benefits from being considered "an exclusive privilege of the fortunate few; rather they should be made a right for all."[124] "All," to at least some members of Congress, included the survivors as well as the plan participants. Since there was no legal requirement that qualified plans offer a survivor benefit option, many did not.[125] Those plans that did offer the option seldom had to pay the benefit because in most cases the participant was required to make an affirmative election during a period substantially preceding retirement.[126] Many employees, through ignorance, inadvertence, or misunderstanding, failed to make the election. But most thought that the plans protected surviving spouses.[127] Others failed to make the election because to do so meant receiving a lower benefit while they were alive.[128] If a participant who was financially dependent upon retirement benefits were to die without survivor benefits, however, his widow would more than likely be

122. *See* id. at 384.

123. *See* infra note 180 and accompanying text.

124. S. Rep. No. 383, 93d Cong., 1st Sess. 151 (1973) (statement of Senator Hartke), reprinted in Legislative History, supra note 21, at 1219.

125. *See* J. Schulz, The Economics of Aging 232 (1988) (discussing 1978 Dep't of Labor study showing that only 38% of married workers elected survivor coverage). The Internal Revenue Service during this pre-ERISA period did little to encourage plans to provide survivor annuities. Instead, it concentrated on the amount of benefits payable (whether the payments to beneficiaries were incidental to the main purpose of providing retirement benefits to the participants) and to whom those benefits were payable (*i.e.*, a beneficiary other than the spouse could be nominated but the benefits would be payable over the life of the spouse). *See* Rev. Rul. 72-241, 1972-1 C.B. 108; Rev. Rul. 72-240, 1972-1 C.B. 108.

126. *See* 119 Cong. Rec. 29,565 (1973) (statement of Senator Hartke), reprinted in Legislative History, supra note 21, at 1250. According to Senator Hartke, studies showed that 2% of widows at that time were receiving survivors' benefits from private plans. Id. *See also* infra note 172.

127. *See* 119 Cong. Rec. 24,456 (1973) (statement of Senator Mondale).

128. *See* infra note 136 and accompanying text.

destitute.[129]

Once again Jacob Javits was on the forefront of reform in introducing the issue of survivor benefits. On April 12, 1973, Javits introduced in the Committee on Labor and Public Welfare a bill on behalf of the Administration.[130] While recognizing some of its strengths, Javits was also critical of its weaknesses. One particular shortcoming, he believed, was its failure to "provide adequate protection against loss by default of survivor benefit options."[131] This was a curious statement in light of the fact that Javits' own bill with all its amendments also had failed to provide such protection.

Six days later the Williams-Javits bill, now called the Retirement Income Security for Employees Act, was favorably reported by the Labor and Public Welfare Committee.[132] Perhaps Javits realized the oversight, because among the amendments to that bill was the inclusion of a provision that allowed a waiver of an optional death benefit only in a signed writing after the participant had received an explanation of the terms, conditions, and effect of that benefit.[133]

Thereafter, survivor benefits emerged as a viable issue with the only remaining source of contention in this area being the form the survivor benefits provision would take. On July 18, 1973, Senator Walter Mondale of Minnesota proposed an amendment that went one step further than any other amendment previously proposed under the Williams-Javits bill.[134] Under Mondale's proposal, a survivor benefit option would be mandatory

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129. Throughout this Article the participant is referred to in the masculine and the survivor in the feminine. This is because studies showed that the proportion of men covered under the private retirement system was 45% greater than that of women. *See* Study of Dep'ts of Labor, HEW and Treasury, Coverage and Vesting of Full-time Employees Under Private Retirement Plans: Findings From the April 1972 Survey, Legislative History, supra note 21, at 3571. This study also revealed that the coverage rate for whites was almost 25% greater than that of other races. Id.

130. *See* S. 1557, 93d Cong., 1st Sess. (1973).

131. *See* 119 Cong. Rec. 12,075 (1973) (statement of Senator Javits), reprinted in Legislative History, supra note 21, at 274.

132. S. 4, 93d Cong., 1st Sess., 119 Cong. Rec. 130 (1973).

133. *See* S. 4, supra note 132, at § 5 (amending § 15(l) of the Welfare and Pension Plans Disclosure Act), reprinted in Legislative History, supra note 21, at 577.

134. *See* 119 Cong. Rec. 24,456 (1973), reprinted in Legislative History, supra note 21, at 673. Senator Mondale was concerned that none of the proposed amendments addressed the plight of surviving spouses. He stated:

> [f]ewer than 2% of elderly widows receive any benefits from private pension or profit-sharing plans, even though roughly half of our working force is covered by such plans Yet, surviving widows of workingmen comprise one of the most impoverished and financially helpless groups in our society. Median income for elderly women living alone in this country is less than half the median income for younger women living alone. And in 1972, the median income of women over 65 years of age was only $1899 a year.
>
> The Treasury Department reports that approximately 23 million persons participate in fixed-benefit pension plans. The large majority of these participants—88% according to census information—will have a dependent spouse as they approach retirement age. I believe we must do all we can to assure that these elderly women have the financial security that allows them personal dignity in their old age.

Id., reprinted in Legislative History, supra note 21, at 673- 74.

for all plans. The participant would have to elect the option, but once elected, the surviving spouse would continue to receive benefits after the participant's death.[135] The trade-off would be lower lifetime benefits for the participant in order to accommodate the survivor benefit.[136]

Apparently, Mondale believed that his amendment, combined with the Williams-Javits amendment, would guarantee an automatic survivor benefit under which all participants would be covered unless they affirmatively opted out.[137] This was not the effect of his amendment, however. In fact, the two amendments were inconsistent and could not be read together. It was clear, though, that Williams, Javits, and Mondale all felt that survivor benefits were an important issue and that pension reform legislation should strengthen plans in this regard.

Almost two weeks after the Mondale amendment was proposed, Representative John Dent of Pennsylvania submitted a revised version of a pension reform bill[138] he had introduced seven months earlier that had been referred to the Committee on Education and Labor.[139] The revised version, unlike the original bill, contained a survivor benefit provision.[140] Dent's proposal was similar to the Mondale proposal in that it was an opt-in provision. It differed from the Mondale proposal in several respects, however. First, it did not incorporate the affirmative waiver favored by Williams and Javits. Second, it proposed a two-year elective period.[141] Third, it proposed a joint and survivor benefit to be actuarially determined based on the joint life expectancy of both the participant and the spouse.[142] The Mondale amendment had proposed a pure survivor benefit to continue only for the actuarially determined life expectancy of the participant.[143] Fourth, the Dent proposal permitted a benefit reduction to

135. Amend. No. 378 to S. 4, 93d Cong., 1st Sess. § (a)(1) (1973), reprinted in Legislative History, supra note 21, at 675.

136. Mondale was not specific on the method of benefit reduction except to say that the reduction "would be computed according to actuarial methods approved by the Secretary of Labor." 119 Cong. Rec. 24,456 (1973), reprinted in Legislative History, supra note 21, at 674; Amend. No. 378 to S. 4, 93d Cong. 1st Sess. § (a)(2) (1973), reprinted in Legislative History, supra note 21, at 676.

137. *See* id. There was some confusion in Mondale's speech before the Senate because he first referred to an *election* of the benefit. Later, he referred to the Williams-Javits proposal and said, "[t]hat requirement guarantees that—if my amendment is adopted—every participant in a plan covered by the legislation would automatically earn a survivor's benefit unless he or she specifically rejected it." Id.

Mondale further proposed that his amendment take effect three years after the enactment of the bill "[i]n order to allow sufficient time for implementation." Id. This ran counter to the Labor and Public Welfare Committee's recommendation that its survivor benefit provision become effective upon enactment. *See* S. Rep. No. 127, 93d Cong., 1st Sess. 48 (1973), reprinted in Legislative History, supra note 21, at 634.

138. *See* H.R. 9824, 93d Cong., 1st Sess. (1973).

139. *See* H.R. 2, 93d Cong., 1st Sess. (1973).

140. *See* H.R. 9824, supra note 138, § 111(i).

141. Id. This elective period would begin at the earlier of (1) two years prior to regular retirement age and continue to regular retirement age or (2) two years prior to the time the participant first begins to receive regular retirement benefits and continue to the point at which the participant receives the benefits. Id.

142. Id.

143. *See* Amend. No. 378 to S. 4, 93d Cong., 1st Sess. (1973) and Amend. No. 380 to H.R.

reflect any increased period of life expectancy attributable to the spouse.[144] Thus, under the Dent bill, a participant could elect to receive either a single life annuity payable over his lifetime or a reduced annuity for his lifetime with a survivor benefit payable to his spouse, if she should survive him.

During the August recess, the Senate Finance Committee issued its report on the Comprehensive Private Pension Security Act of 1973[145] ("CPPSA"), an amended version of a bill submitted some months earlier by Senator Lloyd Bentsen of Texas. Although the original bill had been silent on the issue of survivor benefits, under the greatly expanded version of the bill issued by the Finance Committee, any plan offering an annuity as a benefit also had to offer a joint and survivor option.[146] This amendment left the Administration's bill as the only bill which contained no survivor benefit provision.

On September 13, Senator Vance Hartke of Indiana delivered an impassioned plea to the Senate:

> [w]idows are the oldest and the poorest of the aged. Although social security benefits for widows have been improved, they—widow and widower benefits—still only average $155 a month . . . . This may exceed some bureaucrat's definition of poverty, but it surely fails to meet the actual needs of most widows."[147]

Hartke then introduced an amendment to the CPPSA to require plans to provide an automatic joint and survivor annuity.[148] Under Hartke's amendment, participants would be required to affirmatively opt out of the benefit.[149]

On September 17, at the eleventh hour before the Senate began consideration of the Williams-Javits bill, Senators Nelson, Long, Bentsen, and Bennett proposed extended amendments to the bill,[150] including a rather poorly drafted one which would require plans providing a benefit in the form of an annuity to provide a joint and survivor annuity with an

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4200, 93d Cong., 1st Sess. (1973).

144. Id. The joint and survivor benefit would be the benefit to which the participant would normally be entitled but that benefit would be divided evenly between the participant and the spouse; payments would then be calculated according to the respective life expectancies. Since the payments would be made on a joint and survivor basis, the participant would receive lifetime payments representing his 50% interest plus the portion of the spouse's 50% interest which would overlap his life expectancy. After the participant's death, the spouse would then continue to receive the remainder of her 50% interest. Id.

Since women have longer life expectancies than men, the benefits payable to male workers would be subject to a longer payout period under a joint and survivor benefit. Thus, under the Dent proposal, the actuarial factors would have to be changed and plan sponsors would be allowed to reduce the amount of the benefit in order to reflect the longer payout period. Id.

145. S. 1179, 93d Cong., 1st Sess. (1973).

146. *See* id. § 261 (amending I.R.C. § 401).

147. 119 Cong. Rec. 29, 564 (1973) (statement of Senator Hartke), reprinted in Legislative History, supra note 21, at 1250.

148. *See* Amend. No. 484 to S. 1179, 93d Cong., 1st Sess. (1973), reprinted in Legislative History, supra note 21, at 1251.

149. *See* id. (amending § 261(a)(11) of S. 1179).

150. *See* Amend. No. 496 to S. 4, 93d Cong., 1st Sess. (1973). This amendment was so extensive that it was offered as an amendment in the nature of a substitution. Id.

affirmative opt-out provision.[151] The difference between this proposal and the other proposed survivor benefit provisions was that this one provided a two-year opt-out period.[152] Thus, under the Nelson proposal, the survivor benefit would be automatic if the plan offered an annuity as a form of benefit.

An interesting aspect of the survivor benefit proposals and discussions was that Congress had the previous year enacted automatic survivor rules for military plans.[153] Furthermore, these provisions encompassed certain children of the participants, as well as spouses.[154] Another interesting fact was that the House Armed Services Committee had regarded the matter as so important that it circumvented the normal procedure in order to assure enactment of the bill that session. Thus, it reported the bill directly to the floor of the House without the usual introduction in the Ways and Means Committee to incorporate the appropriate changes in the tax law.[155] The tax intricacies were worked out later by the 93d Congress.[156] Members of the military were not the only ones to have automatic survivor coverage. The Civil Service Commission had a similar provision in its plans covering federal civilian employees.[157]

Yet Congress grappled repeatedly with the concept of extending the same privileges to nonfederal workers. When the Williams-Javits bill appeared for consideration on the floor of the Senate on September 18, the compromise bill worked out between the Committee on Finance and the Committee on Labor and Public Welfare required plans offering an annuity as a form of benefit to provide a joint and survivor annuity option with an affirmative opt-out provision which was to be exercised during the

151. *See* id. at § 261(a)(11).

152. Id. This opt-out period, beginning two years prior to normal retirement age and continuing until retirement, or, if earlier, within two years of the first payment of regular retirement benefits and continuing until payment, was originally suggested by Dent for his opt-in election. *See* supra note 141 and accompanying text.

153. *See* Survivor Benefit Plan of the Armed Services Act, Pub. L. No. 92-425, 86 Stat. 706 (1972) (current version at 10 U.S.C. §§ 1431-1440 (1982)).

154. 10 U.S.C. § 1435. This provision includes children who are (1) unmarried and (2) are (i) under age 18 or (ii) incapable of supporting themselves because of a mental or physical handicap existing before age 18, or (iii) at least age 18 but under age 23 and a full-time student and (3) are dependent legitimate children, stepchildren or adopted children (4) living on the date the member retires or becomes entitled to retire, or if the member is already retired or entitled to retire on November 1, 1953, living on that date and (5) born on or before that date. Id.

155. H.R. 4200, 93d Cong., 1st Sess. (1973), a bill to amend § 122 of the Internal Revenue Code of 1954, was unanimously reported by the House Committee on Ways and Means on June 20, 1973 and passed the House on June 27, 1973. *See* H.R. No. 298, 93d Cong., 1st Sess. (1973); *see also* 119 Cong. Rec. 21,772-73 (1973).

156. The bill then was reported to the Senate Finance Committee on July 18, 1973 and that Committee favorably reported to the Senate on September 17, 1973, without amendment. S. Rep. No. 394, 93d Cong., 1st Sess. (1973). It then unanimously was passed by the Senate on September 19, 1973. *See* 119 Cong. Rec. 30,428 (1973).

157. *See* Civil Service Retirement Act, Pub. L. No. 89-554, 80 Stat. 577 (1966) (current version at 5 U.S.C. §§ 8331-8500 (1982)). Originally, this provision required either one year of marriage or that the survivor be the parent of a child of the decedent. Later, this was amended to reduce the one-year period to nine months. *See* id. § 8341. The Act also provided survivor coverage for certain children of members. *See* id. § 8341(a)(3).

two-year period prior to retirement.[158]

Meanwhile, Senator Hartke continued to plead for passage of a mandatory survivor benefit provision,[159] but many believed that he overstated his case when he lobbied for employer subsidization of this benefit. Hartke maintained that plans should be required to provide an unreduced lifetime benefit for the participant and a guaranteed fifty percent of the unreduced benefit for the surviving spouse.[160] He went so far as to propose a formal but rather incoherent amendment to this effect,[161] however, it was resoundingly defeated.[162]

In the meantime, the House Committee on Education and Labor reported favorably on the Dent bill, the Employee Benefit Security Act,[163] and referred it to the whole House for consideration.[164] Shortly afterward there was a repeat, this time in the House, of the Senate battle which had been waged two years earlier over the Williams-Javits bill. The Ways and Means Committee, considering a companion tax bill, had been unable to resolve its differences with the Education and Labor Committee. The primary dispute between the two committees concerned jurisdiction. The Ways and Means Committee maintained that the Treasury Department should have jurisdiction over the implementation and administration of the legislation. The Education and Labor Committee contended that this jurisdiction fell under the purview of the Department of Labor. Neither committee was willing to yield and the first session of the 93d Congress came to a close without House consideration of the bill. Finally, in February 1974, the committees agreed to disagree and each released its own proposal with the result that two bills, rather than one, went to the floor of the House for consideration.[165]

4. The Short-Term Marriage Requirement

Both bills contained similar survivor benefit provisions which varied greatly from their Senate counterparts. For example, each bill contained a five-year marriage provision.[166] Under this provision, a participant had to have been married throughout the five-year period prior to the earlier of

158. *See* S. 4, 93d Cong., 1st Sess, § 261(a)(2) (1973).

159. *See* 119 Cong. Rec. 30,373, 30,399 (1973) (statement of Senator Hartke), reprinted in Legislative History, supra note 21, at 1772, 1831-35.

160. *See* 119 Cong. Rec. 30,373 (1973) (statement of Senator Hartke), reprinted in Legislative History, supra note 21, at 1772; *see also* 119 Cong. Rec. 30,399 (1973) (response of Senator Williams), reprinted in Legislative History, supra note 21, at 1776.

161. *See* 119 Cong. Rec. 30,398-99 (1973) (statement of Senator Hartke), reprinted in Legislative History, supra note 21, at 1831 (discussing amendment 484, as modified).

162. The vote was by voice. *See* 119 Cong. Rec. 30,401 (1973).

163. *See* H.R. 2, 93d Cong., 1st Sess. (1973).

164. *See* 120 Cong. Rec. 4272 (1974).

165. *See* 120 Cong. Rec. 4272-4328 (1974).

166. *See* H.R. 12,906, 93d Cong., 2d Sess. § 204(c)(1) (1974); H. R. 12,855, 93d Cong., 2d Sess. § 1021(a)(1) (1974) (amending I.R.C. § 401(a)).

The Education and Labor bill, from the time it had been favorably reported in October until it was actually considered by the whole House the following February, had been amended once again as a result of the efforts of the two committees to reach a compromise. As a part of this compromise the survivor benefit provision was changed to provide a five-year requirement.

the annuity starting date[167] or the date of the participant's death in order to be eligible for a survivor benefit.[168]

This provision was strange in two respects. First, it allowed a "reasonable period . . . before the annuity starting date" during which the participant could opt out of the benefit.[169] Most of the bills up to this point had provided for a two-year opt-out election period.[170] It was clear that both bills anticipated the "reasonable period" to be longer than two years because they allowed plans to provide that opt-out elections or revocations of those elections would not be effective if the participant died within two years of the election or revocation.[171] Second, by requiring a five-year marriage period, these bills, relative to the other proposed bills, would have decreased the chances of a surviving spouse obtaining any benefits under the plan. These were ironic provisions in light of the fact that the purpose of the joint and survivor benefit was to relieve the plight of elderly women and other survivors living in poverty because of a lack of retirement benefits.[172]

Although the Education and Labor Committee Report failed to provide any explanation for the five-year marriage provision,[173] the Ways and Means Committee Report was more forthcoming. It maintained that the provision was added to prevent "adverse selection" against the plan such as the situation in which "a single person 'marries' immediately before

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167. The annuity starting date was defined under the bill as "the first day of the first period for which an amount is received as an annuity (whether by reason of retirement or by reason of disability)." H.R. 12,906, supra note 166, § 204(c)(3)(A); H.R. 12,855, supra note 166, § 1021(a)(1).

168. H.R. 12,906, supra note 166, § 204(c)(3)(A); H.R. 12,855, supra note 166, § 1021(a)(1). It was not clear under these bills whether the participant must have been married to the same spouse throughout this period. Presumably, that was the intention.

169. H.R. 12,906, supra note 166, § 204(c)(2)(A); H.R. 12,855, supra note 166, § 1021(a)(1).

170. *See, e.g.*, H.R. 9824, supra notes 138, 141 and accompanying text.

171. *See* H.R. 12,906, supra note 166, § 204(c)(2)(B); H.R. 12,855, supra note 166, § 1021(a)(1).

172. Consider the following statement of Rep. Elizabeth Holtzman:

> Especially disturbing are the bill's provisions regarding survivors' benefits. Even though her husband's pension plan provides for survivors' benefits, a widow will receive those benefits only if she has been married to the participant for 5 years and if he dies after he reaches retirement age—regardless of how early his benefits were fully vested. Older widows comprise the poorest segment of our population—6 out of 10 have income levels below the poverty level. The bill does very little to correct the present, sad state of the law regarding widows' benefits. . . .
>
> [These] gaps in the legislation are at most impossible to detect behind the complex and technical language of the bill, and we cannot expect the public to be aware of them. The bill's disclosure provisions might have remedied this problem. But, in fact, the bill does not even require a plan manager to inform participants of gaps in coverage or how they might lose benefits. I think this kind of disclosure is important, and the bill's failure to require it is a significant omission.

120 Cong. Rec. 4319 (1974).

173. The Education and Labor Committee did not issue a formal report, but rather material in the nature of a committee report shortly before the whole House began consideration of H.R. 2. *See* 120 Cong. Rec. 3977-4001, reprinted in Legislative History, supra note 21, at 3293, 3331 [hereinafter Education and Labor Report].

retirement, retires, and then chooses to take heavily subsidized joint and survivor benefits in the form of a lump sum distribution."[174]

But the Ways and Means Report of the Committee's position on the five-year marriage provision was highly problematic, suggesting that the provision had received only cursory attention from the Committee. First, the survivor benefit was required to be offered only in plans providing a lifetime annuity as a form of benefit.[175] The issue of a lump sum distribution, to this point, had never surfaced. Second, Congress had gone to great lengths in discussing various benefit reductions to accommodate the joint and survivor option so that plans would not be required to subsidize the benefit.[176] And, indeed, the Ways and Means Report acknowledged this point[177] but went on to state that it "did not want to provide a disincentive to such subsidized benefits."[178] The problem with this logic was that many plans already contained survivor benefit provisions and very few of them were actually paying these benefits, much less subsidizing them.[179] Congress became aware of this fact when statistics released by the Social Security Administration showed that less than 2% of widows were receiving any benefits under private plans.[180] The purpose of the proposed survivor benefit provisions had been not only to ensure coverage of spouses under private retirement plans, but also to increase the chances that the spouses would receive an actual benefit. Thus, under a cost benefit analysis, the rationale behind the five-year marriage provision was questionable at best.

A more positive aspect of the bills was the provision of a preretirement survivor annuity payable to the surviving spouse, although this provision was weakened by the five-year marriage requirement. Under the preretirement survivor annuity, if the participant were to die after reaching early retirement age (assuming one were delineated under the plan) but prior to actually retiring, the survivor would be entitled to a survivor annuity provided that the five-year marriage requirement was met.[181] The preretirement survivor benefit provision opened an additional window of opportunity during which the spouse's chances of obtaining a survivor benefit were increased, although this was neutralized to a large extent by the five-year marriage requirement. The bills also made it clear that the participant did not have to be receiving a benefit at the time of his death in

174. H.R. Rep. No. 807, 93d Cong., 2d Sess. 67 (1974) [hereinafter Ways and Means Report]. Adverse selection, as the term is used here, is an insurance term that means selection of a benefit option which produces an increase in plan costs.

175. *See* H.R. 12,906, supra note 166, § 204(c)(1); H.R. 12,855, supra note 166, § 1021(a)(1) (amending I.R.C. § 401(a)).

176. *See* supra notes 135-36, 142-44, 159-62 and accompanying text. In fact, the reduction in benefits was one of the underlying factors behind the requirement of notice to the participants of the right to make an election and the financial effect of that election. *See* infra notes 225-26 and accompanying text.

177. *See* Ways and Means Report, supra note 174, at 67.

178. Id.

179. *See* 119 Cong. Rec. 30,373 (1973) (statement of Sen. Hartke), reprinted in Legislative History, supra note 21, at 1772.

180. Social Security Administration, Dep't of Health, Education and Welfare, Resources of People 65 or Over 28-29 (1971).

181. *See* H.R. 12,906, supra note 166, § 204(c)(1)(B); H.R. 12,855, supra note 166, § 1021 (a)(1).

order for the spouse to receive survivor benefits.[182]

The bills authorized giving plan participants a reasonable period to opt-out of the survivor benefit.[183] The plan sponsor, however, could disregard an opt-out election, or revocation thereof, if the participant died within two years of the election or revocation.[184] According to the Committee Reports, the rationale behind the provision allowing plan sponsors to disregard an election or revocation was to prevent "adverse selection" against the plan.[185] While this provision did afford the plan flexibility in deciding whether to provide a survivor annuity,[186] its rationale was otherwise opaque. Indeed, it was difficult to fathom why problems for the plan could emerge both from an election to opt out of the survivor benefit provision as well as from a revocation of that election.

The Education and Labor bill allowed plans to reduce the amount of each annual payment to which the participant would have been entitled under a single life annuity in order to accommodate the joint and survivor annuity.[187] No such provision appeared in the Ways and Means bill. Its omission, however, may have been inadvertent, since the committee report shows it clearly was the intent of the Committee to allow such a reduction.[188]

The application of the survivor benefit provisions was identical under both bills. This issue appears to have received more careful attention than it had under any of the previous bills. Under both bills, the survivor benefit provisions would apply only to those who were active participants in the plan on the effective date of the joint and survivor provision and whose annuity starting date occurred after the effective date.[189]

1. The Debates

The bills of both the Education and Labor Committee and the Ways and Means Committee were incorporated into H.R. 2, the Employee Benefit Security Act, which the House began considering on February 26, 1974.[190] During the floor debates, Representative Patricia Schroeder of

182. *See* Ways and Means Report, supra note 174, at 67.

183. *See* H.R. 12,906, supra note 166, § 204(c)(2)(B); H.R. 12,855, supra note 166, § 1021(a)(1) (amending I.R.C. § 401(a)).

184. *See* H.R. 12,906, supra note 166, § 204(c)(2)(B); H.R. 12,855, supra note 166, § 1021(a)(1) (amending I.R.C. § 401(a)).

185. *See* Ways and Means Report, supra note 166, at 67- 68.

186. It was unclear whether this provision was to be applied in a consistent manner. If so, once a plan sponsor chose to disregard an election or revocation of an election of one employee, all other employees would have to be treated similarly. This point, however, was not made in the committee report. The report also left unclear whether any potential duty of consistency would require a plan sponsor who chose to disregard a revocation of an opt-out election to also disregard an opt-out election. Since the rationale behind the provision was to prevent adverse selection against the plan, presumably there was no duty of consistency.

187. *See* H.R. 12,906, supra note 166, § 204(c)(1)(B).

188. *See* Ways and Means Report, supra note 174, at 68.

189. *See* H.R. 12,906, supra note 166, § 204(c)(4); H.R. 12,855, supra note 166, § 1021(a) (1974) (adding § 401(a)(11)(D)(i) and (a)(11)(E) to the 1954 Internal Revenue Code).

190. Both bills were incorporated and proposed as a substitute for H.R. 2. House Report 12,906. The Education and Labor Committee bill was incorporated as Title I, and H.R. 12855, the Ways and Means Committee bill, was incorporated as Title II.

Colorado expressed enthusiasm for the efforts of the committees but criticized the joint and survivor benefit provision of the bill because she believed that it was inequitable to allow the participant to unilaterally opt out. Since the spouse would be directly affected by the waiver, Schroeder asserted that the spouse should "participate directly in the process of the waiver."[191]

Two days later, Representative Elizabeth Holtzman of New York offered an amendment to the preretirement survivor annuity provision. In her view, the survivor should receive benefits if the participant died while vested,[192] even though death occurred prior to retirement age or early retirement age.[193] Under the bill being considered, a participant had to live as long as twenty to twenty-five years after being fully vested in his accrued benefits in order for his spouse to receive any survivor benefits. Holtzman argued that the preretirement survivor provision, as it was then drafted, was misleading since most participants were likely to believe that their spouses were covered when, in fact, they were not.[194] Holtzman observed: "This is a serious gap in the pending bill. . . . [I]f pension plans are to be more than a gamble on survival and a bet on coverage, and if we sincerely want to protect the rights of the surviving spouse, then my amendment should be adopted."[195]

But her amendment was not adopted. Instead, it was vigorously opposed by Representative John Erlenborn of Illinois who was a longstanding member of the Education and Labor Committee. He responded:

> If this were discussed in committee, I am not aware of it; if it was brought up, I doubt that it would have taken much time of the committee to determine, because what this does, it converts the pension system into an insurance system that would double, triple or quadruple the costs of operating a private pension plan.[196]

Holtzman expressed surprise that the committee would not have bothered

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191. *See* 120 Cong. Rec. 4317 (1974), reprinted in Legislative History, supra note 21, at 3475, 3497.

192. A participant was vested when he acquired a nonforfeitable right to receive accrued benefits upon reaching a distribution contingency specified under the plan. *See, e.g.*, H.R. 12,906, supra note 166, §§ 203-204.

193. *See* 120 Cong. Rec. 4723-24 (1974), reprinted in Legislative History, supra note 21, at 3512.

194. Id. at 4724, reprinted in Legislative History, supra note 21, at 3513. Retirement age is the age, specified in the plan, at which it is contemplated that most participants will retire and receive a full retirement benefit. Under ERISA, the plan may not specify a normal retirement age greater than age 65 and completion of 10 years of service (5 if the participant enters the plan within 5 years of normal retirement age). ERISA § 3(24), I.R.C. § 411. Retirement age also determines the point at which the participant is eligible to receive a benefit under the plan, the amount of the benefit, and the form of the benefit. *See* D. McGill & D. Grubbs, Fundamentals of Private Pensions 129 (6th ed. 1989). Some plans also designate an early retirement age usually 10 years, before normal retirement age. The benefit will be adjusted according to the length of service. *See* D. McGill & D. Dubbs, supra, at 131-35.

195. *See* 120 Cong. Rec. 4723-24 (1974), reprinted in Legislative History, supra note 21, at 3513.

196. Id.

> to discuss this issue or to undertake a study of the estimated costs of such a provision, particularly since the committee had acknowledged the importance of survivor benefits.[197]

Representatives John Dent of Pennsylvania and Al Ullman of Oregon then reiterated the remarks of Erlenborn. Both claimed to be sensitive to the cost such an amendment would impose upon voluntary plans but neither addressed the question raised by Holtzman concerning the factual basis of the cost argument and why the committee had neglected to address such an important issue.[197]

Further evidence that the survivor benefit provisions had received short shrift was that no one had addressed the issue which had been raised previously as a justification for pension reform—the benefits were actually part of the employees' salary.[198] Employers who did not offer retirement benefits frequently offered higher salaries. Also, a major part of the pension reform consideration had been directed toward funding. Much of the criticism of the then-existing private retirement system was that funding was permitted on a pay-as-you-go basis so that often assets were not available when they were needed. That issue had been under consideration by both the House and Senate for several years. As a result, all of the pending bills required plans to fund in advance of retirement.[199] Thus, it is difficult to comprehend the mortality of the argument that plan costs legitimately would increase if survivors were offered the benefit to which the participants had a nonforfeitable right at the time of their deaths.

Representative Shirley Chisholm of New York supported the automatic survivor's benefit, stating that the opt-out survivor benefit provision was an improvement over the opt-in provision.[200] Nevertheless, she supported Holtzman's suggestion to amend the unilateral opt-out provision to require spousal consent, adding that "widows and widowers would thus be

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197. *See* id. at 4725, reprinted in Legislative History, supra note 21, at 3514-15. Rep. Dent also argued, somewhat incoherently, if survivor benefits are computed at earliest retirement age, "the actuarians have something to work with." Id., reprinted in Legislative History, supra note 21, at 3515.

The only issue which this argument feasibly raises, however, is that actuaries would know in advance which participants had reached early retirement age and then could calculate the survivor benefit from that point on. But this issue is insignificant because even in large plans the provision would affect only a very small percentage of the workforce. Therefore, actuaries could calculate the survivor benefit as the occasion arose. Today with computers, of course, it should be of minimal effort.

198. *See, e.g.*, S. Rep. No. 634, 92d Cong., 2d Sess. 13, 75 (1972) (noting hearing of Subcommittee on Labor in July 1971, in which employers and employees considered pension benefits to be compensation or deferred wages for services rendered); *see also* Inland Steel v. NLRB, 170 F.2d 247, 254 (7th Cir. 1948) and infra notes 412-23 and accompanying text.

199. Plans, however, were permitted to take into account certain contingent liabilities. This meant that at any given point, if all liabilities were hypothetically to become due, the plan would probably not be able to meet those liabilities. They should be able, however, to meet their obligations as they normally become due. *See, e.g.*, H.R. 12,906, supra note 166, § 302; H.R. 12,855, supra note 166, § 412.

200. 120 Cong. Rec. 4773 (1974), reprinted in Legislative History, supra note 21, at 3571-72.

assured of knowing their financial status if their spouse should die before they do."[202] But more importantly, she spoke against the five-year marriage requirement:

> When inquiry was made as to why this requirement was included in the bill it was indicated that it was to protect the pension fund from being drained by survivors who marry participants much older than themselves. It was alleged that this was a problem with the survivors of black lung patients.
>
> This may happen on occasion, but I do not believe that the incidence of May-December weddings is really any of our business. It is a bit of an insult to an older citizen to suggest that we have any business placing restrictions upon whom and when they should marry. While it might be interesting to take this issue to court and see what kind of opinion Justice Douglas might write I would suggest that the section be deleted before it has to be taken to court.[203]

Chisholm then produced statistics supporting her argument. These statistics revealed that "the incidence of May-December marriages is not large at all. A requirement that the participant and spouse be married for the 5 years before retirement or death is totally unwarranted. It is an insulting restriction upon our senior citizens and could work a real hardship on older 'newlyweds.' "[204]

Despite her eloquent speech, Chisholm's suggestion was not incorporated and H.R. 2 passed the House on February 28, 1974 by a resounding majority.[205] The bill then went to the Senate which quickly passed its own version, substituting the language of H.R. 4200, the Survivor Benefits Plan of the Uniformed Services, which it had previously passed.[206] Under the Senate-passed bill there was no mention of a marriage requirement. Nor was there a preretirement survivor annuity provision.

The bill then went to the Conference Committee to resolve the differences between the House and Senate versions. The Conference Committee met on May 14 and took 20 days to reconcile the bills. Along with the pending bills, the Committee also had recommendations from the Administration.[207]

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202. Id.

203. Id., reprinted in Legislative History, supra note 21, at 3572.

204. Id., reprinted in Legislative History, supra note 21, at 3572. Chisholm closed with the statement: "Because of the complexity of this legislation I believe we shall have to continue to make 'improvements' in the pension legislation in the years to come but I hope that some improvements can be made before we send this legislation to the President to be signed into law." Id. at 4775, reprinted in Legislative History, supra note 21, at 3576.

205. The vote was 376 to 4 with 51 not voting. Reps. Chisholm and Holtzman both voted for the entire oill. Id. at 4781-82, reprinted in Legislative History, supra note 21, at 3593-96.

206. *See* H.R. 2, 93d Cong. 2d Sess., § 261(a)(2) (1974).

207. *See* Administration Recommendations to the House and Senate Conferees On H.R. 2, April 1974, reprinted in Legislative History, supra note 21, at 5047 [hereinafter Recommendations]. One of the primary concerns of the Administration was that jurisdiction over enforcement of participation, vesting, and funding standards be given to the Treasury Department. Jurisdiction over enforcement of fiduciary standards, according to the Administration, should be given to the Department of Labor. *See* Letter from George P. Shultz and Peter J. Brennan to Conference Committee (April 1974) (discussing Administration's recom-

The Administration's report addressed the survivor benefit provisions and recommended adoption of the House bill with two amendments. The first amendment was the deletion of the two-year period during which an election or revocation could be disregarded in the event of the participant's death. According to the report, this rule could not be justified. It added that "[i]nherent in the choice which an employee makes between an individual and a joint and survivor annuity is the chance that he may make what is ultimately an unfortunate decision."[208] The second amendment was the reduction of the five-year marriage requirement to two years. According to the Administration, a two-year period was more consistent with the two-year incontestability periods and suicide clauses of most state laws regulating life insurance.[209] This was a somewhat misplaced analogy since the insurance industry is a highly regulated industry. No doubt such time periods were instituted upon the basis of statistical evidence of insurance fraud, which would not be difficult to obtain. There was evidently no reliance by the Administration upon statistics of fraudulent deathbed marriages. Moreover, the occurrence of such marriages was apt to be much less likely than the occurrence of insurance fraud. The Administration added "[i]nasmuch as two years is generally regarded as sufficient to mitigate against 'death-bed' marriages and other similar abuses, the Administration sees no compelling reason for a longer period."[210] This was, ironically, the rationale Chisholm had unsuccessfully challenged a few weeks earlier on the floor of the House.[211]

The Administration also had a view on preretirement survivor benefits and it did not spell relief for the survivors whose spouses died prior to reaching normal retirement age. The Administration, citing undue expense to the plan, instead urged adoption of the Senate version of the bill which contained no preretirement survivor provision.[212] According to the Administration, the preretirement survivor option converted retirement benefits into life insurance benefits, thus creating a disincentive to the provision of creative early retirement options.[213]

After considering the House and Senate bills and the Administration's recommendations, the Conference Committee decided on a reduction of the five-year marriage requirement to one year.[214] There is no indication why this period was selected.

On the issue of preretirement survivor benefits, the compromise was a strange hybrid between the two bills. The conferees maintained that the House bill's preretirement survivor benefit provision was too liberal. On the other hand, they believed that the Senate version and the Administration's

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mendations for pension reform), reprinted in Legislative History, supra note 21, at 5048-49.

208. Recommendations, supra note 207, at 101-02, reprinted in Legislative History, supra 21, at 5141-42.

209. Id. at 102.

210. Id.

211. *See* supra notes 203-04 and accompanying text.

212. Recommendations, supra note 207, at 103, reprinted in Legislative History, supra note 21, at 5143.

213. Id.

214. *See* Conf. Rep. No. 1280, 93d Cong., 2d Sess. § 205(d) (1974), reprinted in Legislative History, supra note 21, at 4318.

recommendation established a government policy favoring early retirement. This policy potentially discriminated against survivors of participants who remained in the plan after reaching early retirement age.[215]

Under the Conference bill, plans were not required to provide a joint and survivor option for participants who died prior to reaching the end of the window period—the later of early retirement age or ten years prior to the date on which the participant would reach normal retirement age. There was an exception for participants who actually retired during that period whether because of early retirement or because of disability.[216] In the event of an actual retirement, the participant would be required to opt out of the survivor benefit if he did not want it.[217] If the participant continued to work, he would be allowed to opt into the survivor benefit during the period beginning with the end of the window period, and ending when the participant reached normal retirement age.[218] Once the participant reached normal retirement age or actually retired, the participant then would be allowed to opt out of the survivor benefit if he so desired.[219] Despite the required notice provision, this was, at best confusing for the participants, and at worst, left the survivors uncertain about their future financial status.

The anomaly of these provisions was that a participant who was fully vested in his accrued benefits, who had reached early retirement age prior to the ten-year point and who died without first retiring, would leave his spouse with no benefits. If that participant had first retired, the spouse would have received a survivor annuity. Participants who fully understood this provision and who wanted the survivor benefit would thus be at a disadvantage if they died of accidental causes prior to actually retiring during the window period. Terminally ill participants who understood the provision and wanted the survivors' benefit would be able to perform the technicality of formally retiring provided they reached early retirement age. In this event, their spouses would be entitled to a survivors' benefit. This meant that the surviving spouses of two people of the same age who started work for the same employer at the same time, covered under the same plan, vested to the same extent, and died on the same day could end up being treated very differently under the plan because of this technicality. But as far as public perception was concerned, the shortcomings of the survivor provisions were buried in the technical language of the bill.[220]

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215. *See* House and Senate Conferees On H.R. 2, 93d Cong., 2d Sess., Summary of Differences Between the Senate Version and the House Version of H.R. 2 To Provide For Pension Reform, Part One, 25 (Comm. Print 1974).

216. *See* H.R. 2, supra note 206, § 205(b), (g)(1).

217. Id. § 205(e).

218. Id. § 205(c)(1).

219. Id. § 205(a), (e).

220. During the discussions on the floor of the Senate, Senator Nelson requested that "an excellent summary" of the provisions of the pending bill from U.S. News and World Report be introduced into the record. According to the summary, "[s]urviving mates will gain protection when retired workers die. Their benefits will be automatic." How New Pension Law Will Affect You, U.S. News & World Rep., Aug. 26, 1974, at 37, reprinted in Legislative History, supra note 21, at 4805.

The rationale for the change in the preretirement survivor benefit provision was to "help to avoid the situation where an employee who had not yet retired might have his own retirement benefit reduced as a result of inaction on his part and should also help to prevent adverse selection as against the plan."[221] The first part of this reasoning was over-solicitous for participants and under-solicitous for survivors. Under the bill, participants had already been given a "reasonable period" (to be determined by the Secretary of the Treasury) in which to opt out of the benefit unilaterally.[222] The latter part of the reasoning, however, is more cogent because the greater the chances of a survivor not receiving benefits under the plan, the less the cost to the plan.

The bill contained several other provisions designed to prevent adverse selection against the plan. One of these provisions allowed plans to disregard any election or revocation of an election if the participant died within two years of the election or revocation, unless (1) the participant died from accidental causes, (2) the election or revocation was made before the accident occurred,[223] and (3) the spouse would be deprived of the survivor benefit if the election or revocation were not given effect.[224]

Another provision permitted plans to take into account any increased cost because of adverse selection by making a reasonable actuarial adjustment.[225] This provision allowed plans to decrease the amount of the participant's lifetime benefit to accommodate a joint and survivor annuity election. Because of this, the bill required plans to provide notice to participants, explaining in laymen's terms the survivor benefit options and the effect in terms of dollars and cents that such an election would have on both the participant and the spouse.[226]

The joint and survivor provisions were to be effective for plan years beginning after December 31, 1975.[227] The bill provided for coordination between the Departments of Labor and Treasury in enforcing the provisions.[228]

On August 22, 1974, the Senate unanimously passed the conference bill and, appropriately, on Labor Day, September 2, 1974, President Ford signed it, enacting ERISA into law.

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221. *See* H.R. Rep. No. 1280, 93d Cong., 2d Sess. 279 (1974), reprinted in Legislative History, supra note 21, at 4277, 4546.

222. *See* H.R. 2, supra note 206, § 205(e), reprinted in Legislative History, supra note 21, at 4318.

223. The purpose of this provision was to prevent death bed elections to cut off the benefits of the survivors. *See* infra note 369.

224. H.R. Rep. 2, 93d Cong., 2d Sess. § 205(f) (1974), reprinted in Legislative History, supra note 21, at 4318-19. Note that interestingly, the focus of congressional concern for the employer's interest in preventing adverse selection against the plan seems to have changed. Previously, in the interest of adverse selection Congress was willing to deprive survivors of any benefit but now they seem to have done an about-face and are more sympathetic to the survivors. This is apparently an indication of how sentiments changed somewhat during the long gestation period of ERISA.

225. *See* H.R. 2, supra note 206, § 205(h).

226. *See* id. § 205(e).

227. *See* id. § 1021(a).

228. *See* id. §§ 501-16, 1041-52.

III. Survivor Benefit Provisions Post-ERISA

A. The Regulations

Immediately after the enactment of ERISA, qualified retirement plans[229] had to be amended to conform to the new provisions. One source of contention between plan sponsors and the Internal Revenue Service ("the Service") concerned the interpretation of the subtleties and ambiguities of the survivor benefit provisions. The first step in resolving the ambiguities was the promulgation of regulations. But the road to resolution was a rocky one, containing some surprises.

1. Proposed Regulations

Almost a year after the passage of ERISA, the Service issued proposed regulations on the survivor benefit provisions.[230] These regulations were, on the whole, more favorable to the survivors than a strict reading of the statute required. However, they were among the most controversial regulations issued under ERISA.[231] Many commentators criticized these regulations on the ground that they were unclear, complex, and created more problems than they solved.[232] It also was feared that the administrative cost of the survivor benefit provisions would be burdensome.[233]

Problems with the regulations took various forms. In some respects, the statute and the proposed regulations openly conflicted and in other respects the proposed regulations were merely vague, primarily because the statute itself was vague. However, more specific problems arose as well. For instance, the proposed regulations required plans to offer joint and survivor annuities as the normal form of benefit if the plan offered an annuity.[234] The participant could opt out of this benefit and elect another form of benefit, but otherwise the joint and survivor annuity was to apply automatically.[235] This provision was thought to be a more restrictive

229. A qualified retirement plan must meet the requirements of § 401(a) of the Internal Revenue Code in order to be eligible for favorable tax treatment. *See* C. Watson & M. Hoeflich, Federal Taxation of Deferred Compensation Plans 99-242 (1989) (describing eligibility, participation, and vesting requirements in detail).

230. *See* 40 Fed. Reg. 45,828 (1975). The Service simultaneously issued temporary regulations substantially identical to the proposed regulations. *See* id. at 45,810 (1975).

231. *See* T.D. 7458, 1977-1 C.B. 99 (1977).

232. *See, e.g.*, Roth, Analysis of the Recent Proposed Regs. on Joint and Survivor Annuities, 45 J. Tax'n 178, 182 (1976) (citing various examples of ambiguity and complexity in the proposed regulations).

233. Id. at 182.

234. *See* Prop. Treas. Reg. § 1.401(a)-11(a)(1)-(2), 40 Fed. Reg. 45,830-31 (1975).

235. This raised several issues, the most troublesome being what form of benefit must be provided under defined contribution plans. A defined contribution plan, unlike a defined benefit plan, does not promise a specific benefit payable for the life of the participant. Instead, it usually promises only that the participant (or the estate) will receive his account balance upon death, disability, or retirement. Often, the plan administrator has discretion to select the method of payment. *See* C. Watson & M. Hoeflich, supra note 229, at 4-5; *see also* D. McGill & D. Grubbs, supra note 194, at 105-19 (discussing benefit formulas for defined benefit and defined contribution plans). Under the proposed regulations, it was unclear what effect the selection of a payment option other than an annuity would have in the case of a plan which offered an annuity as an option. Also, if an administrator chose a part lump sum and part

interpretation than the statute required and thus it was soon challenged.

In 1975, a Pennsylvania corporation, BBS Associates, adopted a profit-sharing plan and pursuant to routine procedure, requested a ruling from the Service on the plan's eligibility for tax advantages accorded a qualified plan.[236] Under the BBS plan, the normal form of benefit was a lump sum distribution. The participant could, however, opt out of this type of benefit in writing and elect instead, with the consent of the administrative committee, one of three forms of annuity. The normal form of annuity was a joint and survivor annuity to which the participant would be entitled automatically if he opted out of the lump sum distribution. If he then affirmatively opted out of the joint and survivor annuity, the participant could choose between an immediate or deferred life annuity or a term certain and life annuity.[237]

Over a year after BBS's request, the Service issued an adverse ruling. The basis for this ruling was that the plan did not comply with the joint and survivor annuity requirements of the Internal Revenue Code of 1954 ("the 1954 Code").[238] The Service took the position that if a plan offered an annuity as a form of benefit, the normal form of benefit had to be a joint and survivor annuity unless the participant elected otherwise.[239] BBS argued that the statute was not so restrictive and that for plans offering an annuity, there was no requirement to provide a joint and survivor annuity as the normal form of benefit. Instead, all that was statutorily required was that the annuity must have the effect of a joint and survivor annuity; the lump sum distribution option would be unaffected by the survivor benefit rules.[240]

After reviewing the legislative history, the Tax Court concluded that BBS was correct in its interpretation.[241] As further justification, the court noted that its holding also was supported from a policy aspect since Congress had intended to provide protection for surviving spouses by eliminating the situation in which participants died leaving their spouses with no benefits. By providing a lump sum distribution, the plan alleviated this situation since, according to the court, the spouse would have the right to benefits under applicable state law.[242]

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annuity distribution, would the entire payment have to have the "effect of a joint and survivor annuity?" There were other problems, in addition, which these regulations raised in connection with defined contribution plans. *See generally* Roth, supra note 232, at 178 (analyzing proposed regulations on joint and survivor annuity benefits).

236. These advantages are extended to the employee and the trust, as well as the employer. The employer is entitled to a deduction for ordinary, necessary, and reasonable amounts contributed to a qualified plan. I.R.C. § 404(a) (1989). The employees are not taxed on the amounts contributed on their behalf until they receive an actual distribution from the plan. I.R.C. §§ 72, 402, 401(a)(9), 401(a)(14) (1989). The trust is tax exempt so the corpus accumulates tax-free. I.R.C. § 501(a) (1989). *But see* White, supra note 12, at C9, col. 5.

237. *See* BBS Assocs. v. Comm'r, 74 T.C. 1119, 1123 (1980).

238. *See* id. at 1122-23.

239. Id. *See also* Treas. Reg. § 1.401(a)-11 (1976), 42 Fed. Reg. 1463 (1977) (clarifying joint and survivor annuity provision of the 1954 Code.)

240. *BBS Assoc.* 74 T.C. at 1123-24.

241. Id. at 1132-33.

242. Id. at 1130-31. The Service also argued that BBS's plan was not qualified because its consent requirement violated the provisions of I.R.C. § 401(a)(11)(A) (1976) (general provi-

Although some members of the 93rd Congress thought they were voting in favor of mandatory survivor benefits,[243] this was not the case. To the contrary, the convoluted history of the survivor benefits provisions left no clear path for the courts to follow in determining whether the intent of Congress had been to provide mandatory survivor benefits.

The proposed regulations presented participants with a number of problems, which, in turn, caused problems for the survivors. One such problem was that the proposed regulations went beyond the statute in allowing plans to impose a marriage requirement on the annuity starting date, as well as at the date of death, in order for the spouse to be eligible for the survivor annuity.[244] The purpose of this additional requirement was, ostensibly, administrative convenience to the plan in calculating the benefit payable to the participant and, if applicable, to the spouse.[245] The effect, however, was to deny a survivor's benefit to a surviving spouse who had not been married to the participant on both the annuity starting date and the date of the participant's death, although the gap between the annuity starting date and the date of death could be as long as twenty years or more.[246]

The proposed regulations also contained a problematic notification requirement. Under the statute, plans were required to provide a written explanation to the participant prior to the election period setting out in layman's terms the financial effect of an election out of the survivor benefit.[247] The proposed regulations, on the other hand, viewed the mechanics of notification differently. On the issue of notification to the participant of the right to opt out of the survivor benefit, the regulation conformed to the statute.[248] But on the issue of explaining the effect of the election to the participant, the proposed regulations placed the burden on

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sion of joint and survivor annuity for plans offering an annuity) and (E) (opt-out provision). The court also rejected this argument stating that it had concluded that a joint and survivor annuity was not mandated under the statute. Id. at 1131.

The Tax Court decision was affirmed without published opinion by the Third Circuit. BBS Assocs. v. Comm'r, 661 F.2d 913 (3d Cir. 1981).

243. This is evident from the discussions preceding the vote in which survivor benefits were perceived as an important issue. *See, e.g.*, supra notes 131-33, 147-48, 150-51 and accompanying text.

244. *See* Prop. Treas. Reg. § 1.411(a)-11(e)(1), 40 Fed. Reg. 45,832 (1975).

245. Since an annuity must be calculated actuarially, it was easier for a plan to calculate this benefit in advance if it was known before the annuity starting date whether a joint and survivor benefit was to be payable. Otherwise, it was an administrative hardship for the plan to provide a joint and survivor benefit after the participant had begun to receive payments under a single life annuity.

While the requirement of marriage on the annuity starting date was not included in the statute, the Ways and Means Report had mentioned the possibility of permitting plans to impose a one-year marriage requirement prior to the annuity starting date. *See* H.R. Rep. No. 807, supra note 174, at 67 (1974).

246. See supra note 29 for a discussion of the annuity starting date. While the "usual" annuity starting date will be entwined with the normal retirement age (usually age 65), the annuity starting date might actually be a much earlier date—for instance, upon early retirement (usually age 55) or disability. *See* 29 U.S.C. § 1055(g)(1) (1974). Thus the period between the annuity starting date and the date of death could be considerable.

247. *See* I.R.C. § 401(a)(11)(E) (1974).

248. *See* Prop. Treas. Reg. § 1.401(a)-(11)(c)(3)(i), 40 Fed. Reg. 45,831 (1975).

the participant to request such an explanation during the election period.[249] This provision was criticized as violating congressional intent: the participant ought to be able to make an informed choice without the added burden of requesting the explanation.[250]

The notification provisions also presented additional administrative inconveniences for defined contribution plans[251] that offered an annuity as a form of benefit. Under these provisions, a plan was required to furnish a participant with information delineating the financial effect of a joint and survivor election within 90 days of the request.[252] Since a defined contribution plan would calculate the annuity on the basis of the participant's account balance, the 90-day requirement was a hardship for the plan administrator who would normally not be able to determine the account balance accurately until year end. The 90-day requirement was a hardship for plan participants as well. Since the election was revocable during the 90 day period, most plans would not begin payments until the end of that period. Thus, there would be a lag period of 90 days until the participant began to receive payments under the plan.[253] For participants dependent upon their retirement income, 90 days could be an eternity. This provided a potential disincentive to the election of the survivor benefit.

There was a further conflict between the statute and the proposed regulations on the issue of opting out of the survivor benefits. Section 401(a)(11)(E) of the 1954 Code required plans to allow the participant the opportunity to opt out of the survivor benefit and thus to receive a larger lifetime benefit. The proposed regulations, on the other hand, provided that no such election need be provided under plans offering a joint and survivor annuity as the only benefit payable under the plan.[254] While the legislative history indicated that plan sponsors might be able to avoid the election by subsidizing the benefit,[255] this was not necessarily the effect of the proposed regulations. Thus, participants under the proposed regulations could have their benefits involuntarily reduced.[256]

Under the statute, if an employee retired prior to reaching normal or early retirement age, the plan did not have to provide a survivor benefit until that employee reached the later of earliest retirement age under the plan or ten years prior to normal retirement age (the statutory period).[257] Thus, an employee who commenced employment at an early age and was permitted to retire after a specified number of years of service, prior to the statutory period, could be denied a survivor annuity if that employee died after retiring but prior to reaching the statutory period.[258] The employee was entitled, however, to elect a survivor annuity upon reaching the

249. *See* id. § 1.401(a)-(11)(c)(3)(ii).
250. *See* Roth, supra note 232, at 179.
251. *See* discussion of defined contribution plans, supra note 235.
252. *See* Prop. Treas. Reg. § 1.401(a)-11(d)(3)(iii), 40 Fed. Reg. 45,832 (1975).
253. *See* Roth, supra note 232, at 182.
254. *See* Prop. Treas. Reg. § 1.401(a)-(11)(c)(1), 40 Fed. Reg. 45,831 (1975).
255. *See* H.R. Rep. No. 1280, supra note 221, § 279.
256. *See* Roth, supra note 232, at 179-80.
257. *See* 29 U.S.C. § 1055(b) (1974).
258. *See* Prop. Treas. Reg. § 1.401(a)-11(d)(2)(i), (iii), 40 Fed. Reg. 45,831 (1975).

statutory period.[259] The problem this raised, other than the obvious one of depriving the spouse of survivor benefits during the pre-early retirement period, was how to determine the employee's benefit if he elected the joint and survivor annuity upon reaching the statutory period. Since the joint and survivor annuity did not have to be offered under the plan until the employee reached the statutory period, the employee could have been receiving a single life annuity up to that point. If the employee then elected a joint and survivor annuity, the remainder of the single life annuity would have to be converted to a joint and survivor annuity. This type of actuarial recalculation would raise the administrative expense of maintaining the plan. Since plan sponsors could not deprive the employee of the right to elect the joint and survivor annuity later on,[260] it would have been administratively easier, and perhaps cheaper, for plans to provide the survivor annuity during the pre-early retirement period. This strained construction, therefore, was beneficial to neither the employer/sponsor nor the employee/participant.

Another conflict between the statute and the proposed regulations existed in the case of a participant who took pre- early retirement and elected the survivor annuity after reaching the statutory period. Under the statute, that participant's spouse would, upon the death of the participant, be entitled to receive the equivalent benefit that the participant would have received under the joint annuity.[261] The proposed regulations, however, provided that the survivor would receive an actuarial equivalent of the survivorship benefit of the joint and survivor annuity.[262] Thus, the survivor would receive no less than 50% and no more than 100% of the participant's share.[263]

These problems concerned many critics of the proposed regulations. This caused the Service to rethink some of the provisions under the proposed regulations. When final regulations were issued on December 7, 1976, they contained a number of changes.[264]

2. *Final Regulations*

If anything, the final regulations were even more onerous than the proposed regulations. First, the Service clarified that there would be no exceptions for defined contribution plans. If a tax qualified plan provided an annuity as a form of benefit, it would have to provide that benefits would be payable as a joint and survivor annuity unless the participant elected another form of benefit under the plan.[265] Otherwise, the annuity option

259. *See* 29 U.S.C. § 1055(c)(1) (1974); Prop. Treas. Reg. § 1.401(a)-11(d)(2), 40 Fed. Reg. 45,831 (1975).

260. Note that with pre-early retirement, the survivor benefit was provided on an opt-in, rather than an opt-out, basis. *See* 29 U.S.C. § 1055(c)(1) (1974); Prop. Treas. Reg. § 1.401(a)-11(d)(3), 40 Fed. Reg. 45,831-32 (1975).

261. *See* 29 U.S.C. § 1055(d)(2) (1974).

262. Prop. Treas. Reg. § 1.401(a)-11(d)(3)(v), 40 Fed. Reg. 45,832 (1975).

263. Id.

264. *See* Treas. Reg. § 1.401(a)-11 (1976), as amended by T.D. 7458, 1977-1 C.B. 99.

265. Id. § 1.401(a)-11(a)(3), Ex. 1.

would have to be deleted altogether.[266] It was curious that the Service chose the strictest construction of the statute because this placed the annuity option at risk for many plans, particularly defined contribution plans, to the detriment of the participants and their survivors.[267] When a suggestion to exempt defined contribution plans was made at the hearing on the proposed regulations, the Service rejected it on the ground that "as a matter of construction, it could be applied with equally good logic to traditional defined benefit plans, with the result that most of the long and intricate provisions of [the joint and survivor annuity provisions] would be a nullity. This, obviously, cannot be what Congress intended."[268]

But the fact was that defined contribution plans were subject to special administrative problems in determining the amount of the annuity. This was not the case with defined benefit plans.[269] Although the Service claimed that problems with defined contribution plans could be alleviated with a special claims procedure under the final regulations,[270] this provision allowed participants to choose the form of benefit only in writing and did not alleviate any of the problems.

The final regulations delineated the classes of participants entitled to receive a joint and survivor annuity[271] but these classes did not include those who retired prior to early retirement age and had begun receiving benefits. Although such a "springing joint and survivor annuity" had been mandated under the proposed regulations, the final regulations deleted that provision on grounds of administrative facilitation.[272]

The final regulations contained a further change over the proposed regulations in the definition of a qualified joint and survivor annuity. Under the final regulations, a qualified joint and survivor annuity was defined as the greater of the actuarial equivalent of the normal form of life

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266. Id.

267. *See* supra note 235. Furthermore, the Service did not stand to gain a significant amount of revenue by taking such a strict position.

268. Tech. Memo. on T.D. 7458 (Dec. 7, 1976) [hereinafter Tech. Memo.].

269. A defined benefit plan promises a specific benefit payable upon retirement for the remainder of the participant's life, as well as the spouse's life if it is a joint and survivor benefit. Thus, the plan administrator calculates actuarially the amount which must be contributed to the plan on a continuing basis to fund the participant's retirement benefit. *See* D. McGill & D. Grubbs, supra note 194, at 105-12.

270. *See* Treas. Reg. § 1.401(a)-11(d)(2) (1976). While it is conceivable that problems of valuation could be alleviated under the claims procedure if the claim were placed far enough in advance for the plan to be able to calculate the benefit, and it is true that the regulation did not place any time constraints on the claim, nevertheless, the Service's intention as expressed in the Technical Memo, supra note 268, was in conflict with the 90-day opt-out period which continued to be permitted under the final regulations. *See* Treas. Reg. § 1.401(a)-11(c)(1)(B)(ii) (1976).

271. *See* Treas. Reg. § 1.401(a)-11(a)(1)(i) (1976). These categories consisted of (1) participants who had reached normal retirement age and had begun receiving benefits, (2) participants who died on or after reaching normal retirement age and while in active service of the employer maintaining the plan, (3) participants who had attained early retirement age under a plan permitting early retirement and who had begun to receive benefits under the plan, and (4) participants who separate from service on or after attaining normal retirement age (or early retirement age, if applicable), and die prior to receiving benefits under the plan but who were eligible to receive benefits and did not opt out of the survivor benefit. Id.

272. *See* Tech. Memo., supra note 268.

annuity under the plan or any other optional form of life annuity offered under the plan.[273] Under the proposed regulations, a life annuity was defined as "an annuity requiring survival of the participant or his spouse as a condition of payment."[274] The final regulations, however, contained an example of such an annuity and this example permitted a restriction on the time period of the benefit payment that had not been present in the proposed regulations.[275] Thus, under the regulations, the survivor annuity did not have to be payable over the life of the survivor. This clearly contradicted the statute.[276]

Another change in the final regulations that was detrimental to the survivors was the deletion of the survivor benefit option for early retirement due to disability. The proposed regulations had defined early retirement age as including retirement because of disability prior to attaining technical early retirement age under the plan.[277] The final regulations deleted disability as an early retirement option and instead made a distinction between early retirement benefits and disability benefits.[278] The effect of this distinction was to deny survivor benefits to spouses of participants who became disabled prior to early retirement age. Thus the group of spouses who were most apt to be in need of survivor benefits could be denied these benefits under the final regulations.

The election periods for both the survivor annuity and the early retirement survivor annuity also were revised under the final regulations. Under the proposed regulations, the election period for the survivor annuity had included the 90 days before the annuity starting date, to be extended another 90 days from the furnishing of the required information on the election if the information was not furnished within the 90-day period.[279] Under the final regulations, the election period consisted of the 90-day period following the furnishing of the required information and prior to the commencement of benefits.[280] If the participant requested additional information, the election period had to be extended another 90 days from the furnishing of the additional information.[281]

One beneficial change was the broadening of the election period. Under the proposed regulations, a participant was eligible to elect an early retirement survivor annuity during a period that began at least 90 days

273. Treas. Reg. § 1.401(a)-11(b)(2) (1976).
274. Prop. Treas. Reg. § 1.401(a)-11(a)(1), 40 Fed. Reg. 45,830 (1975).
275. Under the final regulations, an annuity could make payments for "ten years or until death, whichever occurs first or whichever occurs last" and still be considered a valid life annuity. Treas. Reg. § 1.401(a)-11(b)(1)(i) (1976).
276. *See* 29 U.S.C. § 1055(d)(1) (1974).
277. *See* Prop. Treas. Reg. § 1.401(a)-11(b)(3), 40 Fed. Reg. 45,831 (1975).
278. *See* Treas. Reg. § 1.401(a)-11(b)(4) (1976).
279. Prop. Treas. Reg. § 1.401(a)-11(c)(2), 40 Fed. Reg. 45,831 (1975).
280. Treas. Reg. § 1.401(a)-11(c)(1)(B)(ii) (1977). In no event could this period end more than 90 days prior to the commencement of benefits. Id.
281. Id. Plans could provide, however, that additional information must be requested within 60 days of mailing or personal delivery to the participant. This could only be done if the participant had been furnished with all information required to be furnished. If additional information were requested under these conditions, the plan could then extend the election period 60 days from the date of mailing or personal delivery of the additional information to the participant. Treas. Reg. § 1.401(a)-11(c)(1)(ii)(A) (1977).

before the later of (1) the date the participant reached early retirement age under the plan or (2) the first day of the 120th month beginning before the date on which the participant reached normal retirement age. The election period ended on the date the participant terminated employment.[282] The problem this raised was the potential denial of an early retirement survivor benefit election to an employee who began participation after the beginning of the election period. The final regulations cured this defect by providing for an election period beginning no later than the later of either the 90th day before the participant attained qualified early retirement age or the date on which the participant began participation in the plan, and ending on the date the participant terminated employment.[283]

The final regulations allowed plan sponsors to obtain spousal permission for an election out of the survivor benefit, but such permission was not mandated.[284] This provision was interesting because Congress explicitly had stopped short of requiring such spousal permission.

There were additional modifications to the election provisions. The proposed regulations had permitted plans to allow spouses to elect to receive benefits in a form other than a qualified joint and survivor annuity.[285] The final regulations expanded this provision, requiring the plan sponsor to furnish to the spouse upon request a written nontechnical explanation of the general and financial effect of the survivor annuity and any alternative form of benefit.[286] The final regulations also permitted plan sponsors to require, as a condition precedent to the payment of benefits, an express writing from the participant electing a form of benefit and providing all information necessary to the payment of such a benefit.[287]

The final regulations also modified the marriage requirement. The proposed regulations had permitted plan sponsors to require, as a condition of receiving benefits, the participant and his spouse to have been married to each other both on the annuity starting date and for one year prior to the participant's death.[288] The final regulations provided that plan sponsors also could require the participant and spouse to have been married throughout the one-year period ending on the annuity starting

282. Prop. Treas. Reg. § 1.401(a)-11(d)(2), 40 Fed. Reg. 45,831 (1975).

283. Treas. Reg. § 1.401(a)-11(c)(2)(ii)(A) (1977). This regulation also provided that plans which contained provisions voiding the election if the participant died within a certain period of time after making the election had to extend the election period to cover that extra time period. Thus, if a plan provided that the death of the participant within two years of making the election would void the election, the plan had to provide an election period of two years and 90 days prior to the statutorily specified period, unless that extension covered any period prior to the effective date of the joint and survivor provisions. Treas. Reg. § 1.401(a)-11(c)(2)(ii)(B) (1977).

284. Treas. Reg. § 1.401(a)-11(c)(1)(i)(B) (1977). Under both sets of regulations, the election was revocable during the applicable election period and once revoked, another election could be made during that period. *See* Prop. Treas. Reg. § 1.401(a)-11(c)(5), 40 Fed. Reg. 45,831 (1975); Treas. Reg. § 1.401(a)-11(c)(4) (1977).

285. Prop. Treas. Reg. § 1.401(a)-11(a)(1), 40 Fed. Reg. 45,830 (1975).

286. Treas. Reg. § 1.401(a)-11(c)(5) (1977). The plan was not required to respond to more than one request from the spouse. Id.

287. Treas. Reg. § 1.401(a)-11(d)(2) (1977).

288. Prop. Treas. Reg. § 1.401(a)-11(e), 40 Fed. Reg. 45,832 (1975).

date.[289] Under the final regulations, the same spouse had to satisfy both of the marriage requirements, and the participant was required to notify the plan administrator of his marital status within a reasonable period of time specified by the plan.[290] The effect of a participant's failure to notify the plan administrator of his marital status was unclear.

Under both the proposed and the final regulations, a spouse was not entitled to a survivor benefit if that spouse and the participant were not married to each other on the annuity starting date. The statute, however, did not authorize such a requirement since it addressed only the one-year period ending on the participant's death. The regulations left open the question of whether a survivor benefit had to be provided in the case of a participant who died prior to the annuity starting date. The intent of the statute otherwise appeared to be in favor of the spouse's receiving such a benefit.[291]

B. The 1984 Retirement Equity Act ("REA")

1. Historical Development of REA

Although the passage of ERISA was a step forward in the struggle for adequate and fair pension laws, for many elderly Americans, particularly single women, retirement security remained a broken promise, resulting in the "feminization of poverty."[292] Specific problems included the age 25 minimum participation limit which excluded many women from qualifying

289. Treas. Reg. § 1.401(a)-11(d)(3) (1976).

290. Id. § 1.401(a)-11(d)(3)(iii), (iv).

291. Under the statute, the participant was required to elect *into* a qualified joint and survivor annuity during the period before early retirement age. 29 U.S.C. § 1055(c)(1) (1976). But, for the normal retirement survivor annuity, the participant was required to make an election only if he was opting *out of* the survivor annuity. Id. The provision under the statute which allowed plans to disregard elections or revocation of elections within two years of the date of the participant's accidental death applied to normal retirement benefits only in the situation in which the participant had opted *out of* the survivor annuity (or revoked such an election) and where the failure to give effect to such *revocation* would deprive the surviving spouse of the survivor benefit. 29 U.S.C. § 1055(f) (1976).

292. Pension Equity For Women: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. On Education and Labor, 98th Cong., 1st Sess. 24 (1983) (statement of Rep. Marjorie Roukema) [hereinafter Pension Equity Hearing]; *see also* Potential Inequities Hearing, supra note 51, at 72- 73; House Select Comm. on Aging, 96th Cong., 2d Sess., Retirement: The Broken Promise 48-54 (Comm. Print 1980). A Report prepared by the Women's Studies Program and Policy Center of George Washington University attributed the plight of elderly single women, who are the poorest Americans, to inequities and discrimination against women in the private pension system, the Social Security system, and the job market. Potential Inequities Hearing, supra note 51, at 12-57.

The statistics backed up the report. In 1983, 21% of women were covered under private pension plans while 49% of men were covered. Of the 21% of women covered, only 13% of those ever received benefits. Of the elderly women over 65 not living with relatives, 81% had income below the poverty level. Also, 60% of women depended on Social Security compared to 46% of men. *See* Potential Inequities Hearings, supra note 51, at 44-45 (Part I) (statement of Senator Mark O. Hatfield). *See generally* Leonard, Older Women and Pensions: Catch 22, 10 Golden Gate U.L. Rev. 1191, 1195-97 (1980) (discussing biases and inequities under ERISA); Pearldaughter & Schneider, Women and Welfare: The Cycle of Female Poverty, 10 Golden Gate U.L. Rev. 1043, 1078-84 (1980).

for coverage under retirement plans,[293] the fact that women frequently left work to start or raise a family and as a result often lost pension benefits,[294] ERISA's anti-alienation provision that prevented women from reaching retirement assets upon divorce,[295] and the fact that fewer than ten percent of widows received any survivors' benefits[296] because of the many obstacles placed in their paths. These obstacles included the short-term marriage provision,[297] the unilateral consent requirement, the two-year default provision, and the lack of a preretirement survivor annuity.[298]

President Carter, in 1979, appointed a special commission to study the national pension system and to make recommendations. The Commission released a preliminary report on February 19, 1981 to the House Select Committee on Aging, which was conducting hearings on the retirement system.[299] In this preliminary report, the Commission recognized marriage as an economic partnership[300] and proposed three specific changes in the

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293. The majority of women in the workforce during the post-ERISA years were between the ages of 18 and 24. Women tended to enter the workforce at an earlier age than men and to remain in the workforce for a shorter period of time. *See* Pension Equity Hearing, supra note 292, at 27, 41-42 (statements of Rep. Geraldine Ferraro and Daniel K. Benjamin, Acting Assistant Secretary for Policy, U.S. Dep't of Labor).

294. For instance, if a woman had met the age and service requirements for participation, she did not have to be admitted to the plan if she was not employed on the admission date by the employer maintaining the plan. Furthermore, when she returned to work, her pre-leave service was often disregarded with the result that she would have to start over accruing service for participation in the plan. If a woman was already covered under the plan and left to start a family then later returned to work, the same would hold true. In addition, though, she would have to start over on the vesting ladder and would not be given any credit for her earlier service. Id.

295. Statistics showed that 25% to 33 1/3% of men never paid any child support and only about 10% paid on time and in full. Thus, most men were successful in avoiding their legal obligation to support their children with the result that this obligation fell upon their wives or former wives. *See* Potential Inequities Hearing, supra note 51, at 235 (Part II) (statement of Patricia Kelly, President and Cofounder, KINDER).

296. *See* Pension Equity Hearing, supra note 292, at 24 (statement of Rep. Marjorie Roukema). Rep. Roukema emphasized that pension benefits were a crucial factor in the prevention of poverty. According to Rep. Roukema's statement:

> [Eighty-one percent] of all women over the age of 65 who live alone are living below the poverty line. Obviously, there is no single reason for this, but when one observes also that less than 10% of all surviving spouses receive pension benefits, one can only conclude that this is a contributing factor.
>
> The importance of a pension is underscored by the fact that while 32% of those who receive social security benefits alone are at or below the poverty line, 98% of those receiving social security benefits and pension benefits are above the poverty line. This is one measurement of the so-called feminization of poverty.

Id.

297. Because the law provided that a survivor had to have been married to the participant throughout the one-year period ending on the date of the participant's death, the concern was that divorced spouses who had been formerly married to that participant for many years would not be able to claim a survivor's benefit. Id.

298. *See* supra notes 181-82 and accompanying text.

299. *See* House Select Comm. on Aging, 97th Cong., 1st Sess., The Future of Retirement Programs In America, Appendix 1: Final Report by President's Comm. on Pension Policy, Feb. 19, 1981, 87-192 (Comm. Print 1981) [hereinafter Preliminary Report].

300. *See* id. at 168. Around this time (end of the 1970s and beginning of the 1980s), public attention began to focus on the family and questions were raised as to whether the laws

private pension system to close the coverage gap vis-a-vis women.[301] First, the Commission recommended requiring bilateral consent for a waiver of the joint and survivor annuity option. Second, it sought to make available a preretirement survivor annuity for survivors of participants who died within ten years of normal retirement age. The Commission also believed that survivor benefits should be provided either through insurance or through the plan to the extent of vested benefits for those dying earlier.[302] Third, the Commission recommended subjecting retirement benefits to the jurisdiction of the divorce courts.[303] The Commission concluded that women were being treated unfairly under the pension laws and that the gaps in coverage resulted in financial hardships, particularly for elderly women.[304]

The Carter Commission's recommendations were criticized, however, by a grassroots volunteer organization, the Citizens' Commission on Pension Policy, ("Citizens' Group") composed of workers, homemakers and retirees.[305] The Citizens' Group accused the Commission of not fulfilling its mandate of comprehensive pension reform and of proposing instead ideas that were acceptable on the surface but were not innovative, comprehensive, or new.[306] In its view, the President's Commission did not go far enough in curing the past defects in pension coverage and instead offered only minimal protection by proposing "political compromises as steps toward fair treatment of widows and divorcees."[307] For instance, the group noted that a significant coverage gap remained in the case of a participant who died prior to reaching age fifty-five. Although the President's Commission had recommended the extension of coverage to these participants and their spouses, it had recommended that the coverage be provided "either through the pension plan or through life insurance."[308] The Citizens' Group believed that life insurance would not be an adequate substitute for a survivor annuity because most life insurance policies provided lump sum distributions which the Citizens' Group maintained would not constitute "an adequate flow of income comparable to a

pertaining to all aspects of the family—child care, divorce, custody, changing employment patterns and its effect on the family—properly dealt with modern issues. *See, e.g.*, Broken Families: Hearings Before the Subcomm. On Family and Human Services of the Senate Comm. On Labor and Human Resources, 98th Cong., 1st Sess. (1983); Children, Youth, and Families: Beginning the Assessment: Hearing Before the House Select Comm. On Children, Youth, and Families, 98th Cong. 1st Sess. (1983).

301. While the specific recommendations were on their face gender neutral, the Commission acknowledged that the provisions would primarily affect women. *See* Preliminary Report, supra note 299, at 136, 144, 168.

302. Id. at 168. It was unclear from the report whether survivor benefits for survivors of participants dying prior to the ten-year period were intended to be mandatory or merely voluntary.

303. Preliminary Report, supra note 299, at 168.

304. Id.

305. *See* id. at 195 (quoting House Select Comm. on Aging, 97th Cong., 1st Sess., The Future of Retirement Programs in America, Appendix 2: A Report by the Citizens' Comm. on Pension Policy, A Blue Print for Pension Reform, 193, 195 (Comm. Print 1981)).

306. *See* id. at 195, 235.

307. Id. at 241.

308. *See* id. at 168.

pension."[309] It added that the "President's Commission purposely did not say that the life insurance should be equivalent in value to the pension earned by your spouse. Since practically all companies already provide some form of life insurance, [widows] would not receive any pension benefits for [o]ld age under this recommendation."[310]

The Citizens' Group further maintained that the bilateral waiver of survivor benefits recommended by the President's Commission was "an important step forward," but nevertheless a toothless provision because

> couples feeling pressed for money will gamble in favor of a slightly higher 'normal' benefit, without survivor protection, particularly if companies continue to push their bias for 'normal' benefits. We question whether policymakers can reasonably expect a system that forces people to make such a choice to ever assure widows of adequate protection in retirement.[311]

The Citizens' Group also asserted that retirement benefits should be joint property, divided equally upon dissolution of marriage.[312] It criticized

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309. *See* id. at 219.

310. Id.

311. Id. Consider, however, the following exchange which occurred on September 29, 1983, between Rep. Ferraro and Rep. Clay during a hearing on H.R. 2100, a bill designed to provide greater protection to women under private pension plans:

> Mr. Clay. Why do you suppose that 60% of the men sign away their survivor rights, their wives' survivor rights?
>
> Ms. Ferraro. I think all of us believe that we are never going to die. I honestly believe that they think they will get more out of a plan if they elect for higher benefits while they and their spouse are alive. I am convinced that none of us believe that we are ever going to go off.
>
> That notification to me is just a matter of fairness. People might still continue not to choose survivor benefits. That is O.K. The purpose of this is for the woman at least—or the spouse, in the instance when the husband is the collecting survivor and it is the wife's pension plan, which is very, very rare—at least in this instance the woman or the man would know that they are not getting benefits and they can prepare for the future in the event the holder of the policy were to die. That is the point, I think. It may still continue the way it is now. People might still elect for the higher benefits.
>
> Mr. Clay. Some of those men might die earlier if they brought that form home to be signed. [Laughter].

Pension Equity Hearing, supra note 292, at 28.

312. Id. at 221. This point was well stated by Rep. Geraldine Ferraro during the subsequent hearing on H.R. 2100 before the House Subcomm. on Labor-Management Relations:

> I am a lawyer, and I have practiced in New York State. I think what will happen if this becomes law is that pensions would become part of the property that will be subject to discussion during the course of divorce proceedings. What it does is recognize the fact that the women have contributed to that pension plan. Mr. Smith and Mr. Jones go to the office or go to work and he, according to the pension system, is the one who earns the benefits in that plan. But if Mrs. Smith and Mrs. Jones were not home taking care of the kids and the car and the house and everything else, he wouldn't be able to do the things that he has done.
>
> What we first of all have to recognize is that marriage is a partnership and that the pension is something that they have both contributed to in their own way. What the bill does is say to the court, take a look at this pension plan as part of the property and you make a determination on whether or not the wife has contributed to the plan . . . .

Pension Equity Hearing, supra note 292, at 28-29.

the President's Commission for rejecting such a proposal and recommending only that the benefits be brought within the jurisdiction of the courts, to be divided under state law. This approach failed to address the issue of less than equal division of marital property which was the norm in twelve states. Moreover, twenty-three other states allowed a choice between equal division and less than equal division.[313] Finally, the Citizens' Group was further concerned about the lack of survivor protection upon divorce.[314]

The criticisms by the Citizens' Group exposed a critical weakness in the Commission's proposal—a lack of seriousness toward retirement issues concerning women. But despite the strong criticism from the Citizens' Group, when the President's Commission released its final report, the recommendations to relieve the plight of elderly widows, and the recognition of marriage as an economic partnership, were inexplicably absent.[315]

The issues themselves did not disappear, however, and various women's groups continued to lobby for more equitable retirement and insurance laws.[316] This precipitated further congressional discussions on the issue of gender inequities under the pension laws.

2. *S. 19 (Retirement Equity Act of 1983) and S. 888 (Economic Equity Act of 1983)*

The two most important bills to emanate from these discussions were S. 19, the "Retirement Equity Act of 1983"[317] and S. 888, the "Economic

313. *See* Preliminary Report, supra note 299, at 221.

314. Id.

315. *See* Report of the President's Commission On Pension Policy: Hearing Before the Subcomm. on Savings, Pensions and Investment Policy of the Senate Comm. on Finance, 97th Cong., 1st Sess. (1981) [hereinafter Final Report].

This report was interesting in several respects. First, it recommended a minimum universal pension system ("mups") to be funded through mandatory employer contributions of 3% of pay per employee per year. The Commission was concerned that over half of American workers were not covered under a private pension and that with the population aging rapidly, society would soon be divided into two class systems—those retirees whose income source was Social Security and private pensions and those whose only income source was Social Security. *See generally* id. at 18-30 (statement of Thomas C. Woodruff, Exec. Dir., President's Comm'n on Pension Policy). Second, it endorsed the concept of Individual Retirement Accounts, even for employees covered under private pension plans. Third, while it did not officially endorse a mandatory reduction in vesting provisions under ERISA, it did recommend voluntary reduction of the vesting periods, particularly "for mature plans." *See* Preliminary Report, supra note 299, at 164. Fourth, it recommended consolidation of all federally sponsored retirement programs. *See* Final Report, supra note 315, at 30.

316. *See generally* Nondiscrimination In Insurance Act of 1983: Hearings on H.R. 100 Before the Subcomm. On Commerce, Transportation, and Tourism of the House Comm. On Energy and Commerce, 98th Cong., 1st Sess. (1983) (women's groups lobbying to prohibit discrimination in insurance on the basis of race, color, religion, sex or national origin).

Other factors affecting the revision of the insurance laws were the decisions in City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (prohibiting employers from requiring larger contributions from women in order to obtain the same monthly retirement benefits as men) and Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (prohibiting employers from providing lesser benefits for women than men for equal contributions, whether such benefits were provided directly through the employer's funding vehicle or through insurance).

317. S. 19, 98th Cong., 1st Sess. (1983) was introduced by Senators Dole, Long, Heinz,

Equity Act of 1983,"[318] both of which proposed important reforms in the pension laws affecting women. Although there was some minor discussion of these bills initially, it was not until mid-1983 that the proposals started to generate steam when the Senate Finance Committee initiated hearings on the two bills. The Retirement Equity Bill was concerned only with the rights and fair treatment of women under the private retirement system. The Economic Equity Bill was more comprehensive in its scope, attempting to strengthen the rights of women in the workforce from both a retirement and a nonretirement aspect. It proposed current benefits, such as an increase in child and dependent care credit, nondiscrimination in insurance coverage and sex-neutral regulations, an increase in the zero bracket amount for heads of households, and the general improvement and strengthening of state and federal laws regarding child support.[319]

(1) The Proposals

The bills made clear the fact that Congress was beginning to recognize that there were serious inequities against women under the private retirement system. Therefore, both bills purported to increase the chances that women would receive a benefit, whether in their own right as workers[320] or as beneficiaries.[321] The bills also contained some weaknesses, however, which could potentially affect women in general and survivors in particular. To facilitate discussion of the strengths and weaknesses of the bills, the proposals may be divided into four general groups: (a) postretirement survivor benefits, (b) preretirement survivor benefits, (c) the treatment of retirement assets upon divorce, and (d) the revision of the break-in-service rules to permit a maternity absence.

(a) Postretirement Survivor Benefits

While both bills proposed to strengthen the postretirement survivor benefits provisions, they nevertheless fell short of the more liberal reforms urged by the Citizens' Group two years earlier. The Retirement Equity Bill proposed a reversal of the *BBS* decision.[322] Under the proposal, a joint and survivor annuity would be mandatory for all plans providing for payment

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Danforth, Wallop, and others in June 1983.

318. S. 888, 98th Cong., 1st Sess. (1983) was introduced by Senators Durenberger, Packwood, Baucus, Wallop, Heinz, Mitchell, Matsunaga, and others.

319. S. 888, § 111 (zero bracket increase), Title II (dependent care program), Title III (nondiscrimination in insurance), Title IV (regulatory reform and gender neutrality), and Title V (child support enforcement).

320. For instance, under both bills the minimum age of participation was reduced from 25 to 21. This was significant because 68% of women in the workforce were between the ages of 21 and 24. *See* Potential Inequities Hearing, supra note 51, at 45 (statement of Sen. Hatfield).

321. Both bills required spousal consent to waive survivors' benefits. This requirement was in recognition of the fact that the spouse also had important interests at stake. The bilateral waiver provision was criticized, however, by the American Association of Pension Actuaries, which maintained that it constituted an unwarranted governmental intrusion into the marital relationship. It suggested instead a notification requirement "so that an individual will know if he or she cannot rely on the availability of a survivor annuity from the spouse." Id. at 186. This philosophy illustrated the depth of discriminatory thinking.

322. *See* supra notes 236-42 and accompanying text.

of benefits in the form of a life annuity, provided that the participant and spouse had been married for at least one year prior to the payment of benefits, and provided that the participant did not elect another form of benefit.[323] There was no comparable provision under the Economic Equity Bill.

Both bills proposed a bilateral written consent to opt out of the survivor benefit. This was an important provision because it ensured that the nonparticipant spouse would be certain of her status with respect to survivor benefits in the event of the death of the participant. The Economic Equity Bill proposed to repeal the provision allowing a plan to disregard any election, or revocation of an election, not to receive the survivor annuity if the participant died within two years of the election or revocation.[324] The repeal of this provision would prevent the plan from unilaterally affecting the spouses' rights. It also would provide greater financial certainty for the survivor. There was no comparable provision in The Retirement Equity Bill.

The Retirement Equity Bill and the Economic Equity Bill contained a curious provision that required plans to pay survivor annuities to the spouse who was married to the participant on the annuity starting date, regardless of whether the same spouse was married to the participant on the date of death.[325] The rationale behind this provision was that the spouse who had helped the participant earn the benefit should share the reward. But this raised a serious problem in the case of a participant who retired early, was married on the annuity starting date, then subsequently divorced and remarried. The former spouse would be entitled to the survivor benefit if the participant should die. Such a provision allowed no consideration of the length of the marriages, whether the former spouse had been married to the participant for a significant length of time prior to the annuity starting date, whether there were any children by either marriage and whether the former spouse had remarried. More importantly, this provision did not consider whether the participant and the former spouse had entered into an equitable property settlement at the time of the divorce.[326]

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323 *See* Staff Of Joint Comm. on Taxation, 98th Cong., 1st Sess., Description of Bills Relating To Economic Equality In Various Tax, Pension, and Related Federal Laws, 19 (Joint Comm. Print 1983) [hereinafter Joint Committee Description].

324. S. 888, supra note 318, § 103.

325. *See* Joint Committee Description, supra note 323, at 22. Under S. 19, the provisions were to be effective for plan years beginning after December 31, 1984, for plans in existence on January 25, 1983, and for plans not in existence on that date, the provisions were to be effective for plan years ending after January 25, 1983. S. 888 was to be effective for plan years beginning more than one year after the date of enactment. In addition, participants who were not active participants on or after the effective date were given a choice of electing to receive a joint and survivor annuity form of benefit, provided the election was made before the annuity starting date. Id. at 22-23.

326. This provision was an anomaly because both bills proposed an exception to the anti-alienation provision of ERISA in the event of "a judgment, decree or order (including an approval of a property settlement agreement) relating to child support, alimony payments, or marital property rights, pursuant to a State domestic relations law (whether of the common law or community property type)." S. 888, supra note 318, §§ 104-05. A comparable provision was found in S. 19. *See* S. 19, supra note 317, § 5.

The practical purpose of the provision was clearly to facilitate the plan administrator's task of determining whether, and to whom, a survivor benefit was payable. But such factors could have been worked out in a more equitable manner. Moreover, matters of administrative convenience should never be allowed to override fundamental principles of equity and fairness.

(b) Preretirement Survivor Benefits

Because ERISA had neglected to provide preretirement survivor annuities, the surviving spouses of long-time, fully-vested participants could be denied survivor benefits. This could occur if the participant died prior to attaining retirement age. The inequity of this situation would appear to be overwhelming, but only the Economic Equity Bill provided for a preretirement survivor annuity. Under this provision, a survivor was entitled to an annuity if the participant died before the annuity starting date and after completing ten years of service for vesting purposes.[327] The annuity would be payable on the date the participant would have begun to receive benefits if he had lived[328] and the payments would be made to the surviving spouse for the remainder of her life.[329] The Economic Equity Bill, however, ensured that the spouse would receive only a survivor's benefit (*i.e.*, no more than one-half of the participant's share) rather than allowing the survivor to step into the shoes of the participant and receive the full amount to which the participant would have been entitled.[330]

(c) Treatment of Retirement Assets Upon Divorce

The provisions of ERISA, in general, override state laws affecting qualified retirement plans.[331] In keeping with the policy of maintaining tax

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Note the position of the final regulations which provided that plans need not accommodate survivor annuities if the surviving spouse was not married to the participant both on the survivor benefits election date and on the date of death. Treas. Reg. § 1.401-11(d)(3) (1976); *see also* supra notes 288-90 and accompanying text.

327. *See* S. 888, supra note 318, § 103, amending 29 U.S.C. § 1055 (1975). Vesting is the concept by which the participant's rights under the plan are solidified. The participant has no legal right to the benefit until vested. A year of service for vesting purposes is defined as "a calendar year, plan year, or other 12-consecutive month period designated by the plan during which the participant has completed 1,000 hours of service." ERISA § 203(b)(2)(A). See ERISA § 203(b)(1), for years of service which could be disregarded.

328. Benefits were payable on the annuity starting date which was defined under S. 888 as (1) the date the participant's benefit payments would have begun if the participant had survived to the earliest retirement date under the plan, (2) the date of death of the participant (if later), or (3) any other date selected by the surviving spouse in accordance with the procedures of the plan, but not later than the participant's annuity starting date if the participant had survived until normal retirement age under the plan. Joint Committee Description, supra note 323, at 15 n.24.

329. Id. at 15.

330. The bill was actually phrased in terms of the survivor not receiving *less than* the amount he or she would have received if the participant had terminated employment on the date death occurred, had survived until the annuity starting date, and had died the following day. *See* Joint Committee Description, supra note 323, at 15. But this provision was likely to guarantee that the survivor did not receive *more* than that amount, particularly in light of the convoluted language of the bill, since employers would probably provide only the minimum required benefit.

331. *See* 29 U.S.C. § 514 (1988).

favored assets for retirement, ERISA provides that benefits under qualified plans must inure to the exclusive benefit of the participants[332] and thus may not be assigned or alienated.[333] This presented a problem for the courts when faced with the issue of whether retirement benefits were reachable for purposes of property distribution, alimony, and child support, or whether ERISA preempted state laws purporting to attach these assets. The question was a difficult one and the body of law on the subject was inconsistent. The result was that similarly situated people in different jurisdictions were treated differently with respect to fundamental economic issues of child support and separate maintenance.[334]

Both bills purported to exempt retirement benefits from the anti-alienation provision and to allow such benefits to be reachable on an equal basis by the divorce courts of both common law and community property jurisdictions.[335] Before such benefits could be attached, however, certain specific requirements first had to be met under both bills.[336] The anti-alienation provision of the Retirement Equity Bill was more comprehensive than that of the Economic Equity Bill in its treatment of distributions under a court order from qualified plans to a child or former spouse. The Retirement Equity Bill clarified that the alternate payee[337] stepped into the

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332. *See* ERISA § 403(c)(1) (1974). There is also a comparable provision under the Internal Revenue Code which provides that plans, in order to be tax qualified, must be maintained for the exclusive benefit of the participants and their beneficiaries. *See* I.R.C. § 401(a)(2) (1988); *see also* Treas. Reg. § 1.401-1(b)(2) (1976) (abandonment of a plan without a business reason within a few years of this inception will be proof that plan was not established for exclusive benefit of employees).

333. ERISA § 206(c). The Internal Revenue Code also contains a comparable provision at 26 U.S.C. § 401(a)(13) (1988).

334. *See, e.g.*, American Telephone and Telegraph Co. v. Merry, 592 F.2d 118 (2d Cir. 1979) (allowing vested benefits to be reached to satisfy family support obligations); General Motors Corp. v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976) (relying on explicit statutory language to deny consideration of family support obligations); Kikkert v. Kikkert, 438 A.2d 317 (N.J. 1981) (allowing nonvested benefits to be attached for purposes of satisfying support obligations); Weir v. Weir, 413 A.2d 638 (N.J. 1980) (same) . And, of course, community property considerations further muddied the waters. *See* Stone v. Stone, 632 F.2d 740 (9th Cir. 1980) (ERISA does not preempt community property laws); Francis v. United Technology Corp., 458 F. Supp. 84 (N.D. Cal. 1978) (ERISA preemption applies).

The Service's position was that a plan did not violate the anti-alienation provision when the trustee complied with a court order directing the payment of benefits for support obligations of the participant where that participant's benefits were payable. *See* Rev. Rul. 80-27, 1980-1 C.B. 8. This ruling, however, did not address the issue of reaching benefits that were not payable.

335. *See* S. 19, supra note 317, § 5; S. 888, supra note 318, §§ 104, 105.

336. For instance, the benefits were reachable only by judgment, order or decree relating to alimony, child support, or marital property rights which (1) created or recognized the existence of an individual's right to receive all or a portion of the benefits to which a participant or a participant's designated beneficiary would otherwise be entitled; (2) clearly identified the participant, the amount or percentage of the benefits to be paid to the individual, the number of payments to which the judgment applied, and the name and address of the individual; and (3) did not require the plan to alter the effective date, timing, form, duration, or amount of any benefit payments under the plan or to honor any election that was not provided under the plan or that was made by a person other than a participant or beneficiary. Joint Committee Description, supra note 323, at 17-18.

337. An alternate payee is defined as "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,

shoes of the participant in receiving a distribution from the plan. Thus, the alternate payee would not be entitled to receive a distribution until the participant was so entitled.[338] Once that point was reached, the distribution could be made as either a single life annuity (for plans which provided annuities) or a lump sum distribution. The amount that the alternate payee was entitled to receive was dictated under the court order but could not exceed the amount of the participant's vested accrued benefits. With respect to taxation, the alternate payee would be taxed on the distribution when it was received and would be entitled to a prorated offset of the participant's investment in the contract.[339] Amounts received by the alternate payee as a lump sum distribution would be eligible to be rolled over tax- free into an individual retirement arrangement. However, the favorable ten-year averaging treatment available to the participant upon receiving a lump sum distribution[340] was not available to the alternate payee.[341]

(d) Maternity Absences

The vesting provisions of ERISA were particularly unforgiving toward women who left work to start or add to a family and later returned to work. These women often found upon their return that they were no longer participants in the plan and would have to start over accruing hours of service in order both to enter the plan and to vest in any accrued benefits thereafter.[342]

Both bills proposed to cure the vesting defect but the Retirement Equity Bill was less liberal in this regard than the Economic Equity Bill. Under the Retirement Equity Bill, an individual incurring an absence attributable to the birth of a child or the caring for a child immediately following the birth would be credited with up to 501 hours for a year of absence.[343] This would be sufficient to prevent any break in service for purposes of requiring the individual to start over accruing hours of service for participation, vesting, and accrual of benefits upon her return.[344] This would not, however, allow such an individual to be credited with a full year for those purposes, unless the employer chose to do so, which most did not. The result was that the individual would be held in abeyance as far as the year of maternity absence was concerned. Thus, that absence could count neither for nor against the individual.

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or a portion of, the benefits payable under a plan with respect to such participant." I.R.C. § 414(p)(8) (1984).

338. *See* S. 19, supra note 317, § 5.

339. See I.R.C. § 72 (1991) for the mechanics of how this would work.

340. *See* I.R.C. § 402(e)(1) (1982).

341. S. 19, supra note 317, § 5(c)(2).

342. A break in service occurs when a participant has less than 500 hours of service in a 12 consecutive month period. If a participant is 0% vested in accrued benefits and incurs a break in service, any years of service prior to the break are not required to be counted for vesting purposes provided that the number of break years equals or exceeds the aggregate number of pre-break years of service. For a discussion of the pre-REA break-in-service rules, see M. Canan, Qualified Retirement Plans 195-200, 242-44 (1977).

343. S. 19, supra note 317, § 3.

344. Paternity absences were also covered under this provision. *See* id.

The Economic Equity Bill, on the other hand, proposed allowing 20 hours of service for each week of approved absence.[345] An individual who incurred a full year of approved maternity absence would be credited with a full year for purposes of participation and vesting and at least a partial year for purposes of benefit accruals.[346] Under this bill, however, the absence was required to be approved by the employer before the participant could be given credit for the year.[347] Also, the credit would not be effective unless the participant either returned to work with that employer after the approved period had lapsed or offered to return to work but was not reemployed.[348]

(2) The Administration's Position

The provisions of the Retirement Equity Bill were supported in their entirety by the Reagan Administration.[349] In addition, the Administration supported some provisions of the Economic Equity Bill, such as the reduction of the minimum vesting age from age 22 to age 21.[350] Although the Retirement Equity Bill provided only for the maternity break-in-service rule to apply to participation, the Administration recommended that it be extended to apply to vesting also.[351] As far as the qualified divorce distributions, the Administration supported this concept, including the provision which denied a benefit to a survivor who was married to a participant for less than one year preceding the annuity starting date.[352]

The Administration also was concerned about the need to clarify certain provisions. One such provision was the status of the former spouse under the plan: whether the former spouse was considered to be a participant in the plan by virtue of the qualified divorce distribution provision.[353] If spouses were considered to be participants, the Administration feared that the antidiscrimination rules[354] would have to be met with regard to these spouses. This could create administrative problems for the plan. The Administration was further troubled about extending the rights of former spouses (and thus the obligation of the plan) beyond that

345. S. 888, supra note 318, § 108.
346. Id.
347. Id. § 108(a)(1) (amending ERISA § 204).
348. Id.
349. *See* Potential Inequities Hearing, supra note 51, at 4 (Part III) (statement of John E. Chapoton, Assistant Secretary, Tax Policy, Dep't of Treas.).
350. Note the difference between minimum ages for vesting and minimum ages for participation. The minimum age for participation determines when the employee would be eligible to be admitted to the plan. The minimum age for vesting determines the rights of the employee/participant to any accrued benefits. Vesting does not assume importance until the employee has been admitted to the plan. After admittance, vesting will be determined in accordance with the number of years of service after the minimum vesting age which the employee has accumulated with the employer maintaining the plan.
351. Here the Administration supported a credit of up to 501 hours during the break year. *See* Potential Inequities Hearing, supra note 51, at 11-12 (Part III) (statement of John E. Chapoton).
352. Id. at 16.
353. This concern was shared by the National Employee Benefits Institute (NEBI). *See* Potential Inequities Hearing, at supra note 51, 468-69 (Part II).
354. *See* I.R.C. §§ 401(a)(3), 410 (1988) (minimum participation standards).

required by the court order. Finally, the Administration questioned the denial of favorable lump sum treatment[355] to the former spouse in some instances but not in others under the Retirement Equity Bill. For example, a distribution would be treated as a lump sum distribution for purposes of allowing the former spouse to roll over the amount into an IRA. This would prevent the excessive bunching of income in the year of distribution. Favorable lump sum treatment was not extended, however, to allow capital gains treatment and special ten-year averaging.[356]

With respect to the survivor annuity portion of the bills, the Administration supported the automatic preretirement survivor provision of the Economic Equity Bill but did not support the early death survivor annuity.[357] The rationale was that since the early death survivor annuity was not payable until the date the participant would have been able to first receive retirement benefits had he lived, the spouse, particularly a younger spouse, would be served better by employer-provided life insurance on the life of the participant. Another concern was that this type of benefit could have adverse effects on the plan in that some employers who would otherwise have offered a life insurance feature might not be so inclined if they had to bear an increased plan cost as a result of the early death benefit. Also, there was apprehension that some employers would discontinue annuity features altogether and opt instead for lump sum or installment or term certain payments.[358]

Throughout this analysis, the Administration failed to address the fact that employers were not required to provide life insurance, whereas the early death benefit under the Economic Equity Bill was provided automatically. Also, life insurance was not designed to provide the same type of financial security as the survivor benefit; it was not intended to be a substitute for retirement income. Life insurance often is paid in a lump sum, most of which the survivor must use for funeral and last illness expenses of the decedent.[359] Furthermore, the Administration apparently did not consider whether the preretirement survivors should be allowed to receive benefits prior to the point at which the participant would have been able to first obtain such benefits.[360]

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355. *See* Potential Inequities Hearings, supra note 51, at 15 (Part III) (statement of John E. Chapoton).

356. Id.

357. The Administration, however, did support a notification requirement so that spouses and participants would be notified of any forfeiture of vested benefits in the event of the participant's early death. *See* Pension Equity Hearing, supra note 292, at 40, 43 (statement of Daniel K. Benjamin, Acting Assistant Secretary for Policy, U.S. Dep't of Labor).

358. *See* Potential Inequities Hearing, supra note 51, at 18 (Part III). This view was shared by the National Council of Senior Citizens, *see* id. at 472 (Part II), and the ERISA Industry Committee (ERIC), *see* id. at 370 (Part II). The Western Conference of Teamsters Pension Trust Fund also opposed the provision, as it opposed most of the other provisions (including the bilateral consent provision), but for reasons of increased cost and administrative convenience. *See* id. at 393-96.

359. *See* Pension Equity Hearing, supra note 292, at 83 (statement of Anne Moss, Director, Women's Pension Project, Pension Rights Center).

360. Note that these provisions are minimum statutory provisions. Thus, a plan may always be more lenient with its participants than the law provides and, in fact, many are more lenient in the interests of cost and administrative convenience. But the Administration was on the

b. The Ferraro Bill

On March 15, 1983, Rep. Geraldine Ferraro introduced H.R. 2100 in the House.[361] This bill, like the Retirement Equity Bill and the Economic Equity Bill, was designed to provide greater protection to women under private pension plans. But while this bill contained many of the same provisions of the Retirement Equity Bill and the Economic Equity Bill, it was, nevertheless, a stronger bill than either of the other two. It contained the more favorable provisions of the two bills[362] without their weaknesses and also proposed additional protections. In the case of survivors, for example, H.R. 2100 required bilateral consent to opt out of the survivor annuity, and such consent had to be in the form of a signed, notarized statement.[363]

c. The Enactment of REA

By late 1983, it had become obvious that ERISA had been designed with a male model in mind and that women as wives, workers, homemakers and mothers had been shortchanged under that legislation.[364] It also had become obvious that something had to be done to correct this situation. On November 18, 1983, the Senate passed the Retirement Equity Act.[365] This bill was drafted based on the Retirement Equity Bill and some of the Administration's suggestions.[366] On May 24, 1984, the House passed its version,[367] a blending of H.R. 2100 and another bill introduced earlier by Rep. Geraldine Ferraro.[368]

While containing very similar provisions, the House Bill was more liberal than the Senate bill in two respects. First, the Senate bill contained the old ERISA provision that allowed a plan to disregard an election if the participant died of natural causes within two years of making the

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whole well-intended in recognizing inequities toward women in the pension laws and recommending that something be done about them. John Chapoton, speaking for the Administration in support of the bills, concluded that "it does seem to me the law developed in a way that was, if you will, irrational on these items, that they are discriminatory and they are biased, and I think it is correct that they be removed." Potential Inequities Hearing, supra note 51, at 23 (Part III).

361. H.R. 2100, 98th Cong., 1st Sess. (1983).

362. For instance, the bill contained an early death benefit, a qualified divorce distribution, a reduction in the age requirement for participation, vesting and accrual of benefits, and partial credit for maternity/paternity leaves of absence. *See* id. at §§ 2(b) (early death benefit), 3, 4 (divorce distributions), 5 (lowering age for participation), 6 (lowering age for vesting, maternity/paternity leaves).

363. Id. § 2(a)(2) (amending 29 U.S.C. § 1055(e) (1975)).

364. *See generally* Pension Equity Hearing, supra note 292 (addressing problems women face with private pension system); Potential Inequities Hearing, supra note 51 (same); The Future of Retirement Programs In America: Hearing Before the House Select Comm. on Aging, 97th Cong., 1st Sess. (1981) (same).

365. *See* 129 Cong. Rec. 34,359 (1983).

366. For instance, the minimum vesting age was lowered from age 22 to 21 in accordance with the Administration's position. *See* supra note 350 and accompanying text. Also, the break-in-service rule was extended to vesting as well as participation. *See* supra note 351 and accompanying text.

367. *See* 130 Cong. Rec. 4277 (1984).

368. *See* H.R. 2099, 98th Cong., 1st Sess. (1983).

election.[369] The House version deleted this provision. Second, while both bills provided for an early death survivor annuity, the Senate version provided such an annuity only after the participant reached age 45.[370] The House version contained no such arbitrary cut-off but instead provided a preretirement survivor annuity upon the death of any participant who was vested in accrued benefits under the plan.[371] Both versions lowered the age for vesting to 18 and the age for participation to 21.[372]

The compromise version of the bill adopted the House amendments and required defined benefit plans and certain defined contribution plans[373] to provide an automatic survivor benefit.[374] In addition, the compromise agreement provided for a more stringent notice requirement so that a waiver of either a normal survivor benefit or a preretirement survivor benefit would be based on informed consent.[375]

When REA[376] was enacted by Congress on August 9, 1984, it, like ERISA, represented a bipartisan effort. This legislation went a long way in curing the oversights of ERISA.[377] After the passage of REA, the chances of more women receiving retirement benefits were much greater than they had ever been in the past.[378]

REA's treatment of the one-year marriage provision, however, was curious. With the emphasis on fairness to women and the amount of time

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369. *See* supra notes 183-85 and accompanying text. Evidently, there were reported cases of terminally ill workers slamming their cars into bridge abutments so that their dependents would be provided for since an accidental death would not result in a forfeiture. *See* Leonard, supra note 292, at 1203.

370. H.R. 2769, 98th Cong., 1st Sess. § 103(a) (amending I.R.C. § 401(a)(11); id. § 203 (amending 29 U.S.C. § 1055 (1983)).

371. H.R. 4280, 98th Cong., 2d Sess. § 3(a)(1) (1984) (amending ERISA § 205 (a)). This benefit was not required to commence until the participant reached the earliest retirement age under the plan. *See*, 130 Cong. Rec. 4251-52 (1984).

372. *See* H.R. 4280, supra note 371, § 102(b); H.R. 2769, supra note 370, § 102(a)-(b). H.R. 2769 was originally introduced in the House on April 27, 1983 as the Caribbean Basin Economic Recovery Act. Subsequent committee action struck the Caribbean Basin Act and substituted the Retirement Equity Act of 1983. On July 19, 1983, H.R. 2763, now the Retirement Equity Act, was introduced in the Senate.

373. A defined contribution plan was exempted from this requirement if it provided that a participant's vested accrued benefits were payable to the survivor in a lump sum upon the participant's death or if it provided for a benefit payable in employer stock. H.R. 4280, supra note 371, § 203(a) (amending I.R.C. § 401(a)(11)(B), (C)).

374. Id.

375. *See* H.R. 4280, supra note 371, § 103(a) (amending 29 U.S.C. § 1055); id. § 203(b), adding I.R.C. § 417(a)(3) (1984).

376. Pub. L. No. 98-397, 98 Stat. 1426 (1984).

377. Although, as well stated by Senator Exon on the floor of the Senate during consideration of REA:

> [t]hese changes are certainly no means a "cure-all" for the retirement needs of American women. Many of the changes in this legislation may even benefit men. But it is an important recognition of the disparities and needs in today's society of more working women. This is an appropriate beginning in addressing the problem we find today where more and more women are finding themselves in an old age of poverty, living meagerly on minimum Social Security benefits.

130 Cong. Rec. 9744 (1984).

378. *See generally* The Pension Gamble: Who wins? Who loses?: Hearing Before the Special Senate Comm. On Aging, 99th Cong., 1st Sess. 136-46 (1985).

spent in drafting, considering, and passing this legislation, there was never any serious consideration of the inequities of the short-term marriage provision. Instead, it was discussed primarily as an obstacle to divorced spouses receiving survivor benefits.[379] REA amended the one-year marriage provision to allow plans to refuse a survivor benefit to a surviving spouse who had not been married throughout the one-year period ending on the *earlier* of the annuity starting date or the date of death.[380] There was, however, a savings clause which provided that the one-year marriage rule was satisfied if the participant and spouse had married within one year before the annuity starting date but had been married at least one year on the date of death.[381] REA also provided that a court could order a plan to pay survivor benefits to a former spouse even though the former spouse may not have otherwise met the one-year requirement.[382] Thus, benefits payable under a qualified domestic relations order were an exception to the one-year rule.

C. *Tax Reform Act of 1986*

The next major act after REA was the Tax Reform Act of 1986 ("TRA 1986").[383] TRA 1986 made some major revisions in the employee benefits area[384] but this act, unlike REA, did not purport to benefit women directly.[385]

The TRA 1986 did, however, clarify some of the ambiguities in the survivor benefit provisions under REA. There were several amendments to clarify the spousal consent requirement. First, the bilateral waiver was strengthened to require a more specific consent.[386] The report of the

379. *See, e.g.*, 130 Cong. Rec. 4252 (1984).

380. 130 Cong. Rec. 4239 (1984). This provision originally was added by the House and later adopted by the Senate in its version of the bill. *See* 130 Cong. Rec. 8759 (1984).

381. H.R. 4280, supra note 371 § 103(f)(2)(B).

382. *See* id., at § 203(b), adding new § 417 to the I.R.C. Under the REA amendment, the former spouse and participant must have been married for at least one year in order for the former spouse to be entitled to a survivor annuity under the QDRO. But, the former spouse does not otherwise have to meet the time restrictions (such as marriage on the earlier of the annuity starting date or the date of the participant's death). Id.

383. Pub. L. No. 99-514, 100 Stat. 2085 (1986).

384. For example, it lowered the minimum vesting period from ten years to five years, TRA 1986 § 1113(a) (1986), and added a new minimum participation rule for qualified plans, TRA 1986 § 112 (b) (1986).

385. Some of its provisions, however, such as the reductions in the minimum time for vesting, were beneficial to all participants, including women. *See* I.R.C. § 411(a)(2) (1988).

386. Effective for plan years beginning in 1985 (or consent given after December 31, 1984), the consent to waive either a joint and survivor or preretirement survivor annuity is not valid unless it either (1) designates a specific form of benefits or a specific beneficiary who is to receive the survivor benefits in lieu of the spouse (such designation cannot be changed without further spousal consent), or (2) the written spousal consent expressly permits the participant to make designations without further consent by the spouse.

TRA 1986 clarified that a waiver by a nonparticipant spouse of a joint and survivor or preretirement survivor benefit before the death of the participant does not result in a taxable transfer for purposes of the gift tax. TRA 1986 § 1898(b)(3), amending I.R.C. § 401(a)(11)(A)(i) and ERISA § 205(a)(1). In general, there are two major differences between pre- and postretirement survivor annuities. First is the time of payment. Under a preretirement survivor annuity, payments do not commence until the participant reaches early retirement age. For participants dying on or after early retirement age or after attaining

Senate Finance Committee suggests that any general consent that is given should indicate that the spouse is aware that a more limited consent could have been provided.[387] Second, TRA 1986 ensured that a participant could not circumvent the survivor benefit provisions through the use of a plan loan. Under TRA 1986, if a participant seeks a plan loan and any portion of the accrued benefit is covered under the survivor benefit provisions, the spouse must consent to the loan.[388] If the spouse consents, the plan may realize its security interest in the event of a default, despite the fact that the participant may be married to a different spouse at the time of the default.[389] If the participant is not married at the time the security agreement is executed, the plan is not prevented from realizing its security interest, even if the participant is married at the time of the default.[390] Any amount collected in satisfaction of a default on the loan will reduce the amount, if any, of the survivor benefit.[391] This provision protects the plan

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normal retirement age, survivor benefits must commence sooner. A second difference is the amount of the benefit. A qualified joint and survivor annuity is an annuity for the life of the participant with a survivor annuity for the life of the spouse which is (1) neither less than 50% of, nor greater than 100% of, the amount payable during the joint lives of the participant and spouse, and (2) which is the equivalent of a single life annuity for the life of the participant. I.R.C. § 417(b). A preretirement survivor annuity, on the other hand, has no ceiling on the amount of the benefit. There is, however, a floor on the amount of this benefit, which may not be less than the amount which would have been payable under the qualified joint and survivor annuity. *See* I.R.C. § 417(c)(1). The preretirement survivor annuity, however, will usually be less than the qualified joint and survivor annuity because the preretirement survivor annuity is discounted for the early retirement feature. *See generally* Lee, Joint and Survivor Annuities Under ERISA—The Gamble On Survival, 3 J. Corp. Tax. 241 (1976) (discussing the effect of the two types of annuities); *see also* Treas. Reg. § 1.401(a)(20) (1988); D. McGill & D. Grubbs, supra note 235, at 138-41.

TRA 1986 also addressed the issue of the amount of the preretirement survivor benefits. If a participant separates from service prior to death (and prior to normal retirement age), the amount of the benefit payable under the qualified preretirement survivor annuity is calculated by reference to the actual date of separation from service rather than the date of death. TRA 1986 § 1898(b)(1), amending I.R.C. § 417(c)(1) and ERISA § 205(e)(1). This provision is effective for plan years beginning after 1984.

For defined contribution plans, the amount of the qualified preretirement survivor annuity payable to the surviving spouse must be the actuarial equivalent of not less than 50% of the vested portion of the participant's account balance, including employee contributions at the time of the participant's death. TRA 1986 § 1898(b)(9), amending I.R.C. § 417(c)(2) and ERISA § 205(e)(2).

387. S. Rep. No. 313, 99th Cong., 2d Sess. 1098-99 (1986). Note that a plan which subsidizes the cost of the survivor benefit is not required to provide the opportunity for a waiver or a change of beneficiary if it so chooses. Thus, it does not have to provide notice of such a waiver. A plan is considered to subsidize the benefit if the failure to waive the benefit does not result in a decreased benefit under the plan or in increased employee contributions. TRA 1986 § 1898(b)(11) (amending I.R.C. § 417(a)(5)(A) and ERISA § 205(c)(5)(A)).

388. TRA 1986 § 1898(b)(4), adding I.R.C. § 417(a)(4). The spouse for this purpose is determined as of the date into which the security agreement is entered. *See* S. Rep. No. 313, supra note 387, at 1099.

389. *See* S. Rep. No. 313, supra note 387, at 1099.

390. Id. Also, according to the Senate Finance Committee Report, if a security agreement securing benefits accrued under a plan that is exempt from the survivor benefit provisions is executed without spousal consent, the plan is treated as having met the spousal consent requirements as to the portion of assets secured by the agreement if the plan should later become subject to the survivor benefit provisions. Id.

391. The benefit would be reduced regardless of whether this benefit is a pre-or postretire-

administrator from claims by a subsequent spouse.

There was further clarification in the calculation of the amount of the survivor's benefit under the joint and survivor and preretirement survivor annuity. In the case of a participant who dies after attainment of normal retirement age or after actual retirement but before the annuity starting date the spouse's benefit (unless waived) is to be a preretirement survivor annuity.[392]

Plans that are exempt from the automatic survivor annuity rules, such as certain defined contribution plans[393] and certain stock bonus plans,[394] may provide that vested accrued benefits[395] of a deceased participant will not be payable to the surviving spouse if the participant and spouse have not been married throughout the one-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death.[396] The wording of this provision is significant. The phraseology connotes a mandatory ("will not be paid" to the survivor), rather than a voluntary ("may" be paid to another beneficiary) provision. Presumably, despite the awkward wording, a participant may choose to leave such benefits to his spouse, rather than another beneficiary, but the designation is not automatic.

The most interesting survivor benefit amendments occurred under the QDRO provisions.[397] Under these provisions, a former spouse may be treated as a surviving spouse.[398] If the former spouse and the participant

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ment survivor benefit. TRA 1986 § 1898(b)(7) (amending I.R.C. § 401(a)(11)(B)(iii)(I) and ERISA § 205(b)(1)(C)); TRA 1986 § 1898(b)(9) (amending I.R.C. § 417(c)(2) and ERISA § 205(e)(2)).

392. TRA 1986 § 1898(b)(1), amending I.R.C. § 417(c)(1) and ERISA § 205(a)(1). *See* Tulley v. Ethyl Corp., 678 F. Supp. 614, 621 (M.D. La. 1987) (preretirement survivor annuity payable to surviving spouse of participant who died after reaching early retirement age but prior to retiring must be no less than the amount which would have been payable under a joint annuity if the participant had retired on the day before his death).

393. *See* I.R.C. § 401(a)(11)(B)(iii) (1988).

394. *See* I.R.C. § 401(a)(11)(C) (1988). However, a plan which is exempt from the survivor benefit requirements may become subject or partially subject to such requirements if it is a transferee of a plan subject to those requirements. A plan may become a transferee by receiving a direct transfer of assets in connection with a merger, spinoff, or conversion of a plan that is subject to the requirements or by receiving a direct transfer of assets for a given participant, provided that the transfer occurs after January 1, 1985. I.R.C. § 401(a)(11)(B) (1988), as amended by TRA 1986 § 1898(b)(7)(A).

395. For purposes of the survivor benefit provisions, for plan years beginning after December 31, 1984, the term "vested participant" means any participant who has a nonforfeitable right within the meaning of I.R.C. § 411(a) to any portion of such participant's accrued benefit. TRA 1986 § 1898(b)(8) (amending I.R.C. § 417(f)(1) and ERISA § 205(h)(1)).

396. I.R.C. § 401(a)(11)(D) (1988). This provision is effective for plan years beginning after 1984.

397. Under TRA 1986, if there is doubt as to whether a domestic relations order is a QDRO, the plan administrator must defer distribution for a period of up to 18 months until the dispute is resolved. The same applies if the plan administrator has notice that a QDRO is being sought. If before the expiration of the 18-month period it is determined that the QDRO is defective, the administrator may delay distribution until the expiration of the 18-month period if he has knowledge that the deficiencies are being rectified. *See* S. Rep. No. 313, supra note 387, at 1105.

398. TRA 1986 § 1898(c)(6) (amending I.R.C. § 414(p)(5)(A) and ERISA

have been married at least one year, the one-year marriage provision is considered to be met.[399] The result is that a survivor annuity (either pre- or post-retirement) must be provided for the former spouse under the QDRO provisions.[400] The effect is that the payments do not cease upon the remarriage of the former spouse nor upon the death of the participant. To this extent, a current spouse may be divested.[401]

This raises substantial questions concerning a later spouse's rights under the survivor benefit provisions. The legislative history of REA indicates that both spouses—the former spouse and the current surviving spouse—would be able to receive survivor benefits.[402] This becomes problematic, however, under the statutory definition of the survivor annuity. A qualified joint and survivor annuity is an annuity for the life of the participant with a survivor annuity for the life of the spouse which is *not less than fifty percent of* the amount of the annuity payable during the joint lives of the participant and the spouse and which is the actuarial equivalent of a single annuity for the life of the participant.[403]

The first problem this raises is one of timing: determining which spouse provides the measuring life. Presumably, each spouse's benefit would be payable over her own life provided each spouse is entitled to receive a survivor's benefit. The second, and more serious, problem involves the amount of the benefit. A current spouse may be divested by a former spouse to the extent of the benefit payable to the former spouse

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§ 206(d)(3)(F)(i)). *But see* Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275, 279-80 (7th Cir. 1990) (8-4 en banc decision holding that a waiver of rights to spouse's death benefits pursuant to divorce settlement will prevent payment of such benefits to the waiving spouse even though the waiver did not meet the qualifications of a QDRO and even though the waiving spouse was the designated beneficiary), cert. denied, 111 S.Ct. 67 (1990).

399. TRA 1986 § 1898(c)(7)(A)(iv) (amending I.R.C. § 414(p)(5)(B)).

400. If the alternate payee is the spouse or former spouse of the participant, a distribution pursuant to a QDRO is taxable to the alternate payee as ordinary income. Any investment in the contract is to be allocated between the participant and the alternate payee. *See* I.R.C. § 72(c) and (m)(10) (1988). If, on the other hand, the alternate payee is not the spouse or former spouse, distributions pursuant to the QDRO are taxable to the participant. This affects the participant in two other ways. First, for purposes of favorable tax treatment upon receiving a lump sum distribution, amounts paid to an alternate payee other than a spouse or former spouse are treated as part of the balance to the credit of the participant. *See* I.R.C. § 402(e) (1986). For clarification of the definition of the term "balance to the credit of the participant," see Rev. Rul. 72-242, 1972-1 C.B. 116 (distribution did not qualify as lump sum where one-half of the participant's account balance was distributed to him); Rev. Rul. 72-59, 1972-1 C.B. 117 (distribution did not constitute balance to the credit of the participant where contingent payment remained to be made). This may deprive the participant of the favorable lump sum treatment. Second, if the alternate payee is a person other than a spouse or former spouse, the investment in the contract does not have to be allocated and the participant is entitled to a recovery under the normal basis recovery rules. *See* TRA 1986 § 1898(m)(10) (amending I.R.C. § 72(b) (1986)).

Since alternate payees are considered to be beneficiaries under the plan, a plan administrator owes them the same duties and loyalties that are owed to the participants. Moreover, they are entitled to the same notification requirements (such as summary plan descriptions and plan amendment notifications) as participants.

401. TRA 1986 § 1898(c)(6) (amending I.R.C. § 414(p)(5)(A)).

402. *See* H.R. Rep. No. 655, 98th Cong., 2d Sess. 39-41 (1984).

403. I.R.C. § 417(b) (1988).

under the QDRO. If a former spouse is treated as a surviving spouse and is entitled to receive a survivor's benefit under the QDRO, she will receive *not less than* 50% of the benefit payable over the joint lives of the participant and herself. If the plan provides a survivor's benefit equal to 50% of the annuity payable over the joint lives of the participant and spouse, the current spouse could be completely divested by a former spouse.[404] Furthermore, the survivor benefit provision is available only to the former spouse, not to the alternate payee under the QDRO, which may include a child or other dependent.[405] Any amount payable to an alternate payee under the QDRO will, however, affect the survivor benefit of a subsequent spouse. Thus, any alternate payee, whether or not a former spouse, will divest a subsequent spouse to some extent and if the amount of the benefit is great enough, an alternate payee, even though not a former spouse, may completely divest a subsequent spouse. A QDRO is not limited in scope to the participant's current accrued benefits; it may also reach future accrued benefits.[406] There are, at present, no reported cases addressing the issue of the divestiture of a subsequent spouse. Should the issue arise, a plan administrator will be forced to either interplead or seek a declaratory judgment in order to define the plan's legal obligations.

Another important QDRO clarification under TRA 1986 is that a former spouse may have greater rights than a current spouse. A former spouse or other alternate payee under the QDRO may force a distribution of benefits even though the participant has not yet separated from service.[407] Normally, an alternate payee's right to a distribution under the plan is determined by the participant's eligibility to receive a distribution. However, under this provision, an alternate payee may begin receiving payments under the QDRO on or after the time the participant attains earliest retirement age,[408] even though the participant has not yet separated from service.[409] Thus, the participant's continued employment may not defeat the right of an alternate payee to receive a distribution. A current spouse has no such protection.

The QDRO may not, however, require the plan to make payments to an alternate payee in any form in which benefits are not payable under the plan to the participant.[410] This applies regardless of whether the distribution under the QDRO occurs before or after the participant's separation from service. Moreover, the annuity may not take the form of a qualified joint and survivor annuity with respect to the alternate payee and his or her

404. In an effort to alleviate this situation, the participant should demand clarity and specificity in the QDRO.

405. *See* I.R.C. § 414(p)(5) (1988).

406. *See* I.R.C. § 414(p)(1) (1988). *But see* I.R.C. § 414(p)(3) (1988).

407. TRA 1986 § 1989(c)(7)(A)(vii) (amending I.R.C. § 414(p)(4)(B)).

408. Earliest retirement age for purposes of the QDRO provisions is defined as the earlier of (1) the date on which the participant is entitled to a distribution under the plan and (2) the later of the date the participant attains age 50 or the date on which the participant could begin receiving benefits under the plan if the participant separated from service. TRA 1986 § 1898(c)(7)(B)(iv) (amending I.R.C. § 414(p)(4)(A) and ERISA § 206(d)(3)(E)(ii)).

409. Id.

410. I.R.C. § 414(p)(3) (1988).

subsequent spouse.[411] Thus, even though the QDRO may designate the former spouse as a surviving spouse entitled to a joint and survivor annuity, the joint and survivor portion applies only to the participant and the former spouse, not the former spouse and her subsequent spouse.

IV. The Current State of Survivor Benefits and Remaining Problems

In order to grasp the full extent of the remaining problems with the law pertaining to survivor benefits, retirement benefits must be viewed, in large part, as deferred compensation. That is, an employer offering a retirement plan for the benefit of its employees usually will pay those employees less current compensation on the plausible theory that the promise of retirement security is a current benefit.[412] Thus, the bulk of the retirement benefit usually represents the employee's foregone current compensation.[413] Indeed, this was the thrust of the *Inland Steel* decision,[414] as well as the underlying rationale of REA.[415]

Employers derive current tax benefits on the contributions they make on behalf of the employees to a qualified retirement plan.[416] Employees also derive tax benefits since they are not taxed on the contributions until they actually receive a distribution.[417] Therefore, the assets of qualified retirement plans represent foregone tax revenues, so to that extent qualified retirement plans are subsidized by the taxpayers.[418] There are other advantages for the employer as well. Adequate retirement plans are very effective recruiting, retention, and incentive devices.[419] Generally, the employer is legally permitted to delay giving the employee complete

411. TRA 1986 § 1898(c)(1) (amending I.R.C. § 402(a)).

412. *See, e.g.*, Bianchi v. Commissioner, 66 T.C. 324, 330 (1976) ("pension payments constitute compensation which must be considered in determining whether the total compensation paid to an employee is reasonable") (quoting with approval Edwin's, Inc. v. United States, 501 F.2d 675, 679 (7th Cir. 1974)); *see also* C. Watson & M. Hoeflich, supra note 229, at 1-4.

413. The benefit itself may be composed of several parts. For instance, the employer's contribution (the employee's foregone current compensation), the employee's contribution (some plans require a mandatory employee contribution), and earnings on those contributions. The benefit is deferred because the employee has no tax liability on that benefit until he receives a distribution from the plan, usually upon retirement. *See* C. Watson and M. Hoeflich, supra note 229, at 3-5.

414. *See* Inland Steel Co. v. NLRB, 170 F.2d 251, 263, 267 (7th Cir. 1949) (holding that term "wages" includes pension benefits).

415. *See* Retirement Equity Act of 1983: Hearing Before the Senate Subcomm. on Labor of the Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 41 (1983) (statement of Betty McElderry, Okla. State Div. President, American Ass'n of Univ. Women) (pensions are earned by employees as part of employment package) [hereinafter REA 1983 Hearing].

416. *See* supra note 236 (summarizing tax benefits for both the employers who contribute to qualified plan as well as employees/participants of plan).

417. Id.

418. *See* C. Watson & M. Hoeflich, supra note 229, at 4-5. *But See* Zelinski, The Tax Treatment of Qualified Plans: A Classic Defense of the Status Quo, 66 N.C.L. Rev. 315 (1988) (qualified plans are illustrative of normative income tax principles and do not constitute tax expenditures).

419. *See generally* C. Watson & M. Hoeflich, supra note 229, at 1-12 (discussing the basic considerations in implementing a pension plan).

nonforfeitable rights in the plan until the employee has worked for that employer for up to seven years.[420] But once the employee becomes fully vested his benefits are supposedly nonforfeitable.[421] Because these benefits represent foregone current compensation, once benefits become nonforfeitable they should theoretically become the legal property of the employee to be passed on to the employee's heirs. Since the public policy behind the provision of tax benefits for contributions to qualified retirement plans is to encourage the provision of financial security after retirement,[422] Congress ought to be concerned about the well-being of the employee's family in the event of that employee's death.[423] After all, if family members are not adequately taken care of by the retirement plan, they may end up being supported by the federal government. Thus the provision of tax benefits is supposedly a trade-off to prevent a large federal dole at a later time.

A. The Definition of Survivor

One general problem with the survivor benefits provisions under ERISA is that the term survivor is usually limited to a spouse or a former spouse.[424] The law does not consider the needs of dependents, whether children or dependent parents, as survivors. Therefore, at the death of the surviving spouse, benefits under the survivor annuity provisions cease. Likewise, if the spouse should die before the participant, no survivor benefit is required to be offered to any surviving dependents. The dependents are forced to rely on the provision of death benefits and life insurance, neither of which is required to be offered.[425] Furthermore, those employers who offer such a benefit usually provide it in a lump sum distribution, which is generally not as favorable as a life annuity.[426] Death benefits, when offered, are usually a minimal amount intended to cover funeral and last illness expenses of the participant, and in some rare cases, the surviving spouse.[427]

QDROs, while providing for dependents, do not offer dependents the protection granted to a spouse.[428] Thus, dependents are normally not entitled to a life annuity which will continue after the death of the

420. *See* I.R.C. § 411(a)(2)(B) (1988). In the case of a multi-employer plan, the minimum vesting provision permits full vesting after ten years of service. *See* I.R.C. § 411(a)(2) (1988). TRA 1986 lowered the minimum vesting requirements. A plan sponsor may choose between seven-year graduated vesting or five-year cliff vesting.

421. *See* supra note 327.

422. This policy is enforced in I.R.C. § 401(a)(13) (1988) (benefits under qualified plans shall not be alienated or assigned).

423. *See* infra text at notes 469-71.

424. *See, e.g.*, I.R.C. § 417(a) (1988).

425. When life insurance is offered, the provision of such a benefit presumes, of course, that the participant is insurable. This presumption may not always hold true.

426. *See generally* D. McGill & D. Grubbs, supra note 194, at 163-73 (under the regulations, death benefits must be incidental to the main purpose of a pension plan thereby limiting lump-sum payments to 100 times the monthly expected benefit and limiting their cost to 25% of premiums while life annuities may pay up to 100% of the deceased participant's benefits).

427. *See* id. at 163-75.

428. *See* I.R.C. § 414(p)(5) (1986); *see also* supra notes 397-409 and accompanying text.

participant.[429] Such benefits, however, are offered under many public, non-ERISA, retirement plans.[430]

Admittedly, providing for dependents as well as spouses would increase the employer's cost of maintaining a plan. However, when one considers the inequity of survivors left destitute because for one reason or another they are not entitled to a survivor's benefit even though the deceased participant was vested in those benefits, the question arises: Who is the better party to bear the costs of the plan—the employer or the survivors? Since the employer receives tremendous tax benefits for contributing to a qualified plan, in addition to the other benefits mentioned, and since the benefits should be considered deferred wages of the participant, this author believes that the employer is in a much better position than the survivors to bear the cost of the plan.

The issue of dependent coverage was raised several times in the hearings during consideration of the various bills which led to the passage of REA, but there was not much interest shown in extending the protection of a surviving spouse to a dependent.[431] Evidently Congress concluded as Senator David Durenberger did during discussions of the Economic Equity Act, that "[this legislation] represents the outer limits of the doable."[432]

B. The Short-Term Marriage Provision

1. Inequities

While surviving spouses fare better than nonspouse dependents under the current private employee benefit law, there nevertheless remains much inequity and ambiguity in the law. A major inequity is the short-term marriage provision under which a participant's nonforfeitable benefits may be forfeited based on an arbitrary cut-off point of one year.[433] The short-term marriage provision represents an irrebuttable presumption that the survivor contributed nothing to the marriage. According to this presumption, the survivor, by reason of the short duration of the marriage, may not be eligible to receive survivor benefits after the death of the

429. The QDRO cannot compel a form of benefit not provided under the plan. I.R.C. § 414(p)(3)(A). Thus, a plan offering only a joint and survivor annuity is required to provide such a benefit solely to a surviving spouse. Any other alternate payee could theoretically be cashed out in a lump sum.

430. *See, e.g.*, 5 U.S.C. §§ 8311 (1980), 2105 (1977) (covering members of Congress, members and former members of the uniformed services, government employees of the District of Columbia, and other members of government).

431. *See generally* Potential Inequities Hearings, supra note 51, at Parts I and II.

432. *See* Potential Inequities Hearings, supra note 51, at 74 (Part I) (1983) (quoted in statement of Patricia Reuss, Legislative Director of Women's Equity Action League).

This statement is confirmed by former Rep. Geraldine Ferraro who stated: "Most of us felt that if we couldn't get it all, we would take what we could get and keep plugging." She went on to say that "the little booklet distributed by Congress to school kids entitled *How the Laws are Made* should contain a whole section on the bargaining and compromising that goes on to satisfy or at least not alienate a constituency or a fellow legislator, in order to get the votes necessary for passage of a bill." Letter from Geraldine Ferraro to Camilla Watson (Jan. 10, 1990) (discussing reasons why the Retirement Equity Act fell short of more liberal reform).

433. *See* supra notes 166-80, 203-11, 297 and accompanying text.

participant. Presumptions always discriminate against those who do not conform to the standard that was the subject of the presumption. The anomaly of this particular presumption is that it discriminates against the group that was itself the subject of discrimination under the original ERISA legislation.[434] Indeed, the extent of that discrimination was so great that Congress spent considerable time and energy discussing, debating, and drafting corrective legislation solely to cure it.[435]

Despite the fact that the short-term marriage provision rests on very tenuous legislative reasoning,[436] the provision has been reenacted several times since ERISA.[437] It was actually addressed under TRA 1986 in connection with QDROs.[438] Thus, it is not a provision that has merely slipped through the cracks unnoticed.

The short-term marriage provision may appear reasonable on its face. It seems to make sense that a spouse who has been married to a participant less than one year should not be entitled to a life annuity when that spouse did not contribute anything to the retirement assets comprising the annuity. Indeed, the rationale behind REA was that marriage is an economic partnership and it is because the spouse has made a contribution to the marriage that the participant has been able to amass the amount of benefits that he has.[439] Therefore, it appears only fair that the nonparticipant spouse be considered. That same logic apparently does not apply to a spouse who has been married to a participant less than one year.[440] Further thought, however, reveals shortcomings in this analysis.

First, the statute provides that a plan is not required to provide a joint and survivor annuity (or a preretirement survivor annuity) unless the participant and spouse have been married throughout the one-year period ending on the earlier of (1) the participant's annuity starting date, or (2) the

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434. *See* supra notes 292-304 and accompanying text. This presumption, which also exists under the income tax laws (*see* I.R.C. §§ 401(a)(11)(D), 417(d) (1988)) is unique under the Internal Revenue Code. For instance, the tax laws do not entertain such a presumption in the allowance of the filing of joint income tax returns, which generally depends only on the fact of marriage on the last day of the taxable year. *See* I.R.C. § 7703 (1988).

435. *See* supra notes 316-78 and accompanying text.

436. *See* supra notes 166-222 and accompanying text.

437. *See, e.g.*, TRA 1986, supra note 383; REA, supra note 376; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

438. *See* TRA 1986, supra note 383, §§ 1898(c)(6) (amending I.R.C. § 414(p)(5)(A) (1988) and ERISA § 206(d)(3)(F)(i)); TRA 1986 § 1898 (c)(7)(A)(iv) (amending I.R.C. § 414(p)(5)(B) (1988)); TRA 1986 § 1898 (c)(7)(B)(i) (amending ERISA § 206(d)(3)(F)(ii)); *see also* supra notes 393-401 and accompanying text.

439. *See* H.R. Rep. No. 655, 98th Cong., 2d Sess., Preamble (1984); S. Rep. No. 575, 98th Cong., 2d Sess., Preamble (1984).

440. But under the laws of most states a surviving spouse is generally entitled to a forced share of the estate by virtue of status as a surviving spouse without any consideration of the duration of the marriage. Some commentators, however, have recommended redesigning the spouse's forced share and apportioning it according to the duration of the marriage. *See* Langbein & Waggoner, Redesigning the Spouse's Forced Share, 22 Real Prop., Prob. & Trust J. 303 (1987). But even this model provides a 10% vesting in the forced share fraction upon marriage. Thus, even under a marriage of short duration, the spouse is entitled to something. *See* id. at 316-17. For another approach to the spouse's forced share, see Ala. Code § 43-8-70 (1975) (basing forced share on size of survivor's estate relative to decedent's estate so that the greater the survivor's estate, the less the forced share).

date of the participant's death.[441] If, however, the participant and spouse marry within one year before the annuity starting date but have been married more than a year at the date of the participant's death, a survivor benefit must be provided.[442] This means that the denial of a survivor benefit could occur (1) where the participant and spouse have been married less than one year at the date of the participant's death or (2) marry after the annuity starting date. Thus, a marriage after the annuity starting date could, theoretically, last twenty to thirty years,[443] but the surviving spouse would not be entitled to receive a survivor annuity because the short-term marriage provision requires the marriage to exist one year *before* the annuity starting date. This is an anomalous result considering that a marriage before the annuity starting date only has to survive for one year in order for the surviving spouse to be entitled to a survivor benefit.

Second, the denial of a survivor benefit to a surviving spouse who falls within the one-year window may be contrary to the participant's desire to provide for that spouse upon his or her death, particularly if it means that those accrued benefits will otherwise be forfeited.[444] Furthermore, the law does not require a plan to consider the mental or physical state of the surviving spouse or the expectation of the survivor.[445] In other words, the fact that the survivor may be unable to care for herself is of no consequence. The fact that the survivor may be pregnant or have custody of the participant's dependent child is also of no consequence, even though the participant may have been fully vested in his accrued benefits and such a survivor benefit could be provided without hardship to the employer. Moreover, the spouse may have given up valuable job opportunities to

441. I.R.C. § 417(d)(1) (1988).

442. I.R.C. § 417(a)(2) (1988).

443. The annuity starting date will normally depend upon the participant's retirement date. *See* supra note 29. The normal retirement age under most plans is age 65. *See* I.R.C. § 411(a)(8)(B)(i) (1988). However, many plans allow early retirement and the usual age for early retirement is age 55.

444. The distinction between death benefits and retirement benefits must be drawn. If a retirement benefit is funded solely with employer contributions and the plan provides only a joint and survivor or single life annuity, that benefit will terminate upon the death of the participant if the survivor is not entitled to receive a survivor's benefit. A death benefit, on the other hand, is payable upon the death of the participant, so it will be paid to someone. If the survivor is not entitled to receive a survivor's death benefit, that benefit would then be payable to the participant's designated beneficiary (which might be the spouse) or to the participant's estate. If not payable to the spouse as a survivor's benefit, a problem for the spouse, even though that spouse may ultimately receive the benefit, is that the benefit becomes a part of the probate estate rather than passing directly to the spouse. For a more in depth discussion, see D. McGill & D. Grubbs, supra note 194, at 101-78.

445. For instance, Congress allows older couples to receive a survivor benefit if they marry within one year of the annuity starting date but have been married more than one year on the date of the participant's death. Younger couples, on the other hand, who are married less than one year on the date of the participant's death may be denied a survivor benefit even though the participant may be completely vested in his accrued benefits. *See* I.R.C. § 417(d) (1988). Logically, the younger couple should have a greater expectation of receiving a survivor benefit than a couple who marries within one year of the annuity starting date. Also, it was not until TRA 1986 that plans were required to accrue benefits past the normal retirement age if the participant continued to work. *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986) (amending ERISA § 204 (1989), 29 U.S.C. § 1054 (1989), I.R.C. § 411(b)(1)(H) (1988)).

marry the participant, and the expectation of being provided for, even in the event of the participant's death, may well have been a consideration. One does not usually relinquish a job without the expectation of some financial security in exchange. Particularly if the spouse is elderly, it may present a hardship for the spouse to find new employment.[446]

In some cases it may not be feasible for the plan to provide a survivor benefit. Where the participant and spouse marry after the annuity starting date and that participant is already receiving a single life annuity under the plan, calculating the benefits could be difficult.[447] But at least in this case, the spouse would not have as great an expectation of receiving benefits under the plan as she would have had if the marriage had occurred earlier, prior to the annuity starting date but within one year of the participant's death.

Another inequity under a literal reading of the statute is that the participant may be receiving reduced payments to accommodate a joint and survivor annuity even though he is no longer married. If the participant was married on the annuity starting date and subsequently divorces or the spouse dies, and the participant remarries, the participant and the new spouse could be married a significant period of time[448] but technically, a joint and survivor annuity does not have to be provided to the subsequent spouse because the participant and *that spouse* were not married on the annuity starting date.[449]

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446. Note that only about one-half of workers are covered under an employer-provided pension. *See* J. Schulz, supra note 125, at 219. Since women are, in general, confined to lower paying positions and more menial jobs, they are disproportionately represented in the statistics of uncovered workers. *See* Rhode, Occupational Inequality, 1988 Duke L.J. 1207, 1208-12 (1988); *cf.* J. Schulz, supra note 125, at 242. Thus, if the survivor is female and has given up a job to marry the participant, that survivor may not be entitled to a pension in her own right. Furthermore, the tax laws do not help. If the participant has life insurance which the survivor is entitled to receive as an annuity, she may no longer exclude up to $1000 of interest on each annual payment. The former favorable exclusion provision was repealed under TRA 1986. *See* TRA 1986, supra note 383, § 1001 (amending I.R.C. § 101(d) (1988)).

Although some employers do provide survivor benefits over and above the qualified joint and survivor annuity, these benefits, on the whole, have been determined to be inadequate. *See* J. Schulz, supra note 125, at 232.

447. Indeed, the participant may have received more than the amount required under a joint and survivor annuity—e.g., 50% of the amount payable over the joint lives of the participant and spouse. I.R.C. § 417(b) (1988).

448. *See* supra note 443 and accompanying text.

449. In the event of a divorce, consideration must be given to the existence of a QDRO which may divest the subsequent spouse anyway. *See* supra notes 397-406 and accompanying text.

Note that the statute refers to participant and "spouse" when describing the duration of marriage restriction, rather than requiring the participant to be married on the annuity starting date. *See* I.R.C. § 417(d) (1988). The latter provision would have covered a subsequent spouse but the former probably does not. The regulations clarify this by providing that the same spouse must be married to the participant on the annuity starting date and on the date of death. Treas. Reg. § 1.401(a)-11(d)(3)(iii) (1976).

Another irony of the short-term marriage provision is that the survivor may not be adequately provided for under the participant's will if they have been married a short period of time. While most states provide an opportunity for the surviving spouse to renounce the will in order to receive a forced share of the estate, this is usually psychologically detrimental to the survivor. *See* Langbein & Waggoner, supra note 440, at 304 n.3. It will often pit the survivor

Women have been in the workforce in significant numbers only since the mid-1960s.[450] Statistics show that more men than women are covered under an employer-provided retirement plan[451] and that more women than men are concentrated in lower paying jobs.[452] Therefore, it is men who have amassed the greatest benefits or assets under the private retirement system.[453] While the gap is closing, women, nevertheless, continue to live longer than men[454] and there are more men marrying younger women than there are women marrying younger men.[455] Thus, while the short-term marriage provision is facially gender-neutral, in operation it impacts more heavily against females and ultimately results in "his and her death benefits" in which "her" benefits are more tenuous than "his."

2. *Ambiguities*

The short-term marriage provision is curious in many respects. While a plan may deny a survivor benefit based on the arbitrary one-year of marriage cut-off, the administrative inconvenience of such a choice may be daunting. In denying such a benefit, the plan administrator must look not only to the fact of the marriage but also to the length of that marriage, neither of which may be particularly easy to determine. Federal law defers to state law to determine the existence of a marriage.[456] The validity of a marriage may vary from state to state. For instance, some states recognize common law marriages[457] while others do not. There are also some situations in which people may believe themselves to be married when, in fact, they are not. For example, the validity of a foreign divorce may vary from state to state.[458] In states which do not recognize the validity of a

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against the participant's other legal heirs. The survivor is then left with the worst of all possible worlds: loss of the security and companionship of the spouse, loss of probably the largest and most liquid asset in the participant's estate, and perhaps loss of the support of the participant's other legal heirs during this trying time.

450. *See generally* O. Banks, The Faces of Feminism 180-203 (1986).

451. *See* supra note 446. One reason for this is that more men than women are members of a union which means that they have a greater resource to mobilize their forces and demand better wages, better working conditions, and better retirement benefits. *See* Gottlich, The Tax Reform Act of 1986: Does It Go Far Enough To Achieve Pension Equity For Women?, 4 Wis. Women's L.J. 1, 13 (1988).

452. *See generally* Rhode, supra note 446 and authority cited therein (women's average full time annual wage is 64% of their male counterparts).

453. These assets are significant. Private retirement plans control more than one-half of the investment capital in the U.S. today with assets valued at more than $2 trillion. *See* Pension Managers Chilled By Notion of Tax on Trading, Wall St. J., Sept. 21, 1989, at C9, col. 2.

454. *See* Dep't of Commerce, Bureau of Census, Statistical Abstract of the U.S. 109 (1987).

455. *See* Dep't of Health and Human Services, Vital Statistics of the U.S., Tables 1-7 to -10 (1985).

456. Federal law may be concerned with timing, such as whether there is a marriage in existence at the end of the taxable year. *See* I.R.C. § 7703 (1988). But the fact of the marriage itself may vary from state to state. Thus, federal law defers to state law on this issue.

457. Those states which currently recognize the validity of common law marriages are Alabama, Colorado, the District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Pennsylvania, Rhode Island, South Carolina, and Texas.

458. *See generally* L. Wardle, C. Blakesley, & J. Parker, Contemporary Family Law: Principles, Policy and Practice § 18:02 (1988) (ex parte divorces are invalid in American

foreign divorce, any subsequent marriage may be invalid. The existence of an "unconventional marriage" may further muddy the waters. While no state currently recognizes the validity of same sex marriages, some commentators argue that presumptions against such marriages demand heightened scrutiny.[459] These commentators further argue that the failure to recognize the validity of such marriages is invidious and irrational.[460]

A problem in determining the length of the marriage is particularly evident in common law marriage jurisdictions, where it may be difficult, if not impossible, to determine in all cases the specific point at which the marriage began. The problem with the short-term marriage provision is that it is an arbitrary and rigid provision which does not provide relief for people who fall outside the policy rationale of the requirement.

In addition to problems with common law marriages, unconventional marriages, and foreign divorces, the provision contains no relief for a participant who has been validly married for many years, obtains a divorce and is not married on the annuity starting date, then subsequently remarries the same spouse. That spouse, although married to the participant for a number of years in total, cannot compel a survivor annuity if the plan should strictly adhere to the letter of the statute and take full advantage of the one-year marriage provision.[461] In this situation, a spouse who falls within the policy rationale of the joint and survivor annuity provision nevertheless may be denied benefits.

3. Administrative Problems

The extent to which an administrator is obligated to verify the authenticity of a marriage is unclear. Usually, the administrator is entitled to rely upon the statement of the participant in this regard.[462] However, if it is unclear whether a marriage exists or if so, the point at which the marriage began, ambiguities must be resolved on an impartial basis so that all participants are treated fairly and equally.[463] Therefore, presumptions in favor of one participant must be applied to all.

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jurisdictions where domicile is not obtained and short residence requirements are barely satisfied).

459. *See, e.g.*, Freidman, The Necessity of State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family, 3 Berkeley Women's L.J. 134, 144-47, 152-60 169 (1987); Note, Custody Denials To Parents In Same-Sex Relationships: An Equal Protection Analysis, 102 Harv. L. Rev. 617, 621-30 (1989) (arguing that states' rationales for invalidating same-sex marriages fail both strict scrutiny and rational basis review).

460. *See* Freidman, supra note 459, at 169.

461. Note that if there is a QDRO in effect from the divorce, the spouse may then be entitled to a survivor annuity regardless of the length of the second marriage. Even if there is no QDRO in effect, state community property laws may compel a division of the retirement benefits upon the divorce even though those benefits may not be payable as a survivor annuity. *See generally* Note, Private Retirement Benefits Earned During Marriage Characterized As Community Property And Do Not Automatically Remain Property Of Surviving Spouse, 20 St. Mary's L.J. 373 (1989).

462. This is implicit in the regulations. *See* Treas. Reg. § 1.401(a)-11(d)(3)(iv) (1977).

463. *See* Restatement (Second) of Trusts § 183 (1959) (fiduciary duty to deal impartially with beneficiaries).

Since the statutory provisions represent minimum requirements and since the short-term marriage provision is not a mandatory provision, a plan may choose to be more lenient than the statute and provide for a survivor benefit regardless of the duration of marriage. Because there is an administrative inconvenience in determining when a participant has been married for one year, the majority of plans, particularly large plans, do not deny a survivor benefit to a newly married spouse.[464] But this fact should not diminish the significance of the marriage requirement. To the contrary, it escalates the discriminatory aspect of the provision because it indicates that the requirement is used only in smaller plans to legally discriminate against, not only the survivor, but also the participant who has an interest in having his family adequately protected after his death. The economic impact on those survivors caught by this provision can be devastating.

The fact that the short-term marriage provision is a minimum requirement and is not mandated under the law cannot be raised as a cogent argument in favor of its existence. Employees cannot safely rely on the benevolence of employers to disregard the provision and provide the benefit, because the potential to legally discriminate is always there.[465] Furthermore, history indicates that where there is a conflict between money and the moral or humane point of view, greed nearly always wins.[466]

There is precedent for curing such an inequitable provision that impacts on only a few individuals. This very issue was raised during the discussion of the REA legislation[467] with an ultimately favorable result. Like the provisions which were "cured" under REA, the short-term marriage provision is a discriminatory provision which tends to exploit women[468] when they are most vulnerable. The elimination of the provision will not significantly harm the employer[469] and it benefits the participants, the

464. *See* Congressional Research Service of the Library of Congress for the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 96th Cong., 1st Sess. 46, n.8 (Comm. Print 1979) (citing Hay Associates study).

465. Furthermore, courts have been very strict about adhering to specified time restrictions. *See, e.g.*, Hernandez v. Southern Nev. Culinary and Bartenders Pension Trust, 662 F.2d 617 (9th Cir. 1981) (no survivor benefit when husband died 3 months short of retirement age); Wyzik v. Employee Benefit Plan of Crane Co., 512 F. Supp. 1222 (D. Mass. 1981) (no survivor annuity when husband died 10 months short of retirement age); Gibson v. International Harvester, 557 F. Supp. 1000 (W.D. Tenn. 1983) (no survivor benefit when husband died 36 hours short).

466. *See, e.g.*, testimony throughout the pre-ERISA hearings, supra note 18. In utilizing the short-term marriage provision, employers may use forfeitures to reduce costs under the plan. *See* D. McGill & D. Grubbs, supra note 194, at 112-15.

467. *See* Pension Equity Hearing, supra note 292, at 138 (statement of Dallas Salisbury, Employee Benefit Research Institute) (remarking that only 5% of women age 35 to 45 with more than 5 years of service lost credit under then current break in service rules).

468. The provision may tend to exploit men to some extent as well, since their vested benefits will in these cases not be used to care for their families. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (a denial of the deceased wife's survivor benefits to the surviving husband and infant child constituted discrimination against the wife).

469. Although plan costs may be increased to some extent, the costs attributable to the elimination of the short-term marriage provision should not be all that great as far as the employer is concerned. Those costs should be borne by the plan participants. The employer, however, would no longer be able to count on reallocating the participant's benefits which would ordinarily have been forfeited because of the short-term marriage.

survivors, and society in general since society otherwise may bear a double tax cost.[470] An oddity here is that this type of discrimination is not only sanctioned, it is rewarded with tax benefits.[471]

C. The Abandonment Issue

The legislative history of TRA 1986 indicates that a participant may be treated as having no spouse if that participant has been abandoned within the meaning of local law.[472] Thus, the spouse's rights may be abrogated without notice or consent even though the spouse may otherwise be available for notice. Proof of such abandonment is to be accepted by court order but a separation agreement will suffice.[473] This raises two problems. First, what happens if the participant dies during this period? Presumably, the spouse may be denied survivor benefits even though the spouse and the participant were married at the date of the participant's death. If the participant had lived and he and the spouse had divorced, the spouse would probably have been legally entitled to a portion of the participant's vested retirement benefits under the QDRO provisions, provided the short-term marriage provision was met. The second and more troublesome problem this provision raises is the presumption against the nonparticipant spouse. Many women abandon their husbands because they are mentally or physically abused. For women who have endured such a marriage and who have the courage to leave their husbands, a denial of survivor benefits solely because of the abandonment would be yet another humiliation. The fact that the abandonment is proved by court order or separation agreement does not change this result. The purpose of this provision was probably one of administrative convenience for plan administrators. It could have, however, devastating consequences for those who are the most vulnerable. While this provision does not appear in the statute, it does, nevertheless, significantly illustrate the insensitivity to the needs of surviving spouses.[474]

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470. For instance, qualified retirement plans are eligible for significant tax benefits. *See* supra note 236 and accompanying text. Thus, taxpayers in general bear the cost of those plans. If a family must go on welfare or other public assistance because of a denial of survivor benefits, again, society must bear the tax cost. *See* Congressional Budget Office, Tax Policy for Pensions and Other Retirement Savings 13-14 (1987) (projecting lost tax revenues of $56.5 billion for 1990 and $61.8 billion for 1991).

471. *See* I.R.C. §§ 401(a)(11) 417(d) (1988) (survivor annuities need not be provided if participant and spouse married less than one year).

472. S. Rep. No. 313, 99th Cong., 2d Sess. 1100-01 (1986). There was no such provision in the Ways and Means Report. H.R. Rep. 426, 99th Cong., 2d Sess. (1986). Presumably, there is no question of this provision applying if the nonparticipant spouse is abandoned by the participant.

473. S. Rep. No. 313, supra note 472, at 1100-01.

474. Another possible rationale for this provision is to legitimately protect those who have been abandoned by their spouses so that no benefits will be payable to the abandoning spouse. The method the Committee considered is a crude one, however, because it does not consider whether the abandoning spouse had cause to leave. Instead, the Committee makes the presumption that the abandoning spouse is the wrongdoer. Since this could have drastic consequences on innocent people, the abandonment issue is better dealt with under the divorce laws.

D. The Opt-Out Provision

While REA allowed the nonparticipant spouse the luxury of being informed of her future financial status under the plan and provided an automatic interest in the participant's vested benefits, the opt-out provision was retained nonetheless.[475] The question remains whether it is fair to survivors to allow an opt-out at all, particularly in light of the plan loan provisions enacted under REA in which a participant may, with consent of the spouse, obtain a loan from vested benefits.[476] Since many plans provide the participant with a larger lifetime annuity if the participant and spouse opt out of the joint and survivor annuity, there is a temptation to gamble on outliving one's spouse. This can result in serious inequities.[477]

V. CONCLUSION

The federal government has an economic and a social interest in ensuring that the maximum number of people possible are covered under the private retirement system. Yet the history of ERISA and its subsequent legislation shows that women have been consistently discriminated against under the private retirement system. Although Congress made an effort in 1984 to cure some of this discrimination, that effort was not entirely successful. Some of the "high visibility" problems under ERISA were cured, but many other discriminatory provisions remain. Some of these are subtle in their effect and do not engender public passion as the pre-ERISA problems once did. Indeed, private pension policy has recently been called "boring, a non-vote-getter."[478]

An example of the general apathy is the fact that the short-term marriage provision has been mentioned several times by commentators in connection with survivor benefits.[479] None of these commentators has recognized any problem with the provision.

Moreover, the Senate Finance Committee in 1986 raised the issue of denial of survivor coverage upon an abandonment without addressing the obvious problems such a denial would raise. The failure to address these

475. *See* supra notes 363, 375, 386-91 and accompanying text.

476. *See* I.R.C. § 72(p) (1988). *But see* S. Gustavson and J. Trieschmann, Universal Life Insurance As An Alternative to the Joint and Survivor Annuity, 55 J. Risk & Ins. 529 (1988) (arguing that in some cases it is best for the participant to elect a single life annuity and provide separately for the spouse through life insurance).

477. *See* Lorenzen v. Employers Retirement Plan of the Sperry & Hutchinson Co., 896 F.2d 228 (7th Cir. 1990) (holding that widow of participant who died three days short of an extended retirement date was entitled to lower preretirement survivor benefit rather than a straight retirement benefit); *see also* Watson, supra note 50, at 36-40 (discussing *Lorenzen* decision).

478. *See* Social Security's Insecure Future, supra note 42.

479. *See, e.g.*, Dowdle, The Retirement Equity Act of 1984—Nature and Extent of Spousal Rights, Impact on Plan Distributions and Administration, and Implications for the Non-ERISA Practitioner, 1 45th Annual Inst. on Federal Tax. § 13.02 (1987); Lee, supra note 386, at 241; Congress Considers Remedy for "Joint and Survivor" ERISA Problems, 17 Clearing House Review 544 (1983) (discussing the unfair treatment of a non-employee spouse).

Perhaps a more notable example is found during the REA hearings in which Senator Paula Hawkins mentions the short-term marriage provision as being an obstacle in the path of survivors receiving their benefits, but in describing corrective legislation she fails to mention the abrogation of the requirement. *See* REA Hearing, supra note 415, at 11.

problems indicates that Congress continues to pay mere lip service to women's issues under the private retirement laws. This makes it easier to see why provisions such as the short-term marriage presumption remain.

Perhaps another aspect of congressional apathy toward more complete pension reform is that the historical development of ERISA was very much influenced by unions[480]—which were historically dominated by men. While one would hope the future will bring a fairer and more workable retirement system in this country, Congress' past performance does not bode well for the future financial security of those survivors caught within the one-year window of vulnerability. For them, "poverty is just a man away."[481]

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480. *See* supra note 451 and accompanying text.

481. Potential Inequities Hearings, supra note 51, at 60 (Part II) (1983) (prepared statement of Rep. Schroeder).

One may at this juncture raise the question of why no one has previously addressed the issues raised in this article since ERISA was enacted more than 16 years ago and some of these issues have been in existence since the original legislation. The answer to that is twofold. First, the area of employee benefits law has until very recently been an intellectually neglected area. Second, the impact is on the surviving spouse, usually an elderly female with few resources. In the words of Berthold Brecht: "There are those who live in darkness and those who live in light We see those in the light. We do not see those in the dark." The Threepenny Opera, prologue (screenplay version). This sentiment, as it relates to inequities in the private retirement system toward survivors, is espoused by Geraldine Ferraro: "[L]et me tell you how pleased I am that you are writing about the subject. It's women professors in the law schools and women members in the Congress who will make a difference for women who have no power or voice of their own. Thank you for your concern." Letter of January 10, 1990, supra note 432, at 2.