

THE KILLING OF COMMUNITY PROPERTY

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I.	INTRODUCTION.....	1
II.	ASSUMPTIONS AND DEFINITIONS.....	3
III.	FEDERAL LAWS AND RULINGS INDICATE A COMMON LAW BIAS	10
IV.	GENERAL COMMUNITY PROPERTY LAW CONCEPTS.....	11
V.	DISPOSITION OF COMMUNITY PROPERTY ON DEATH OF FIRST SPOUSE	15
VI.	BENEFICIARY DESIGNATION ASSETS: OWNERSHIP AND DISTRIBUTION CONSIDERATIONS.....	16
VII.	PROBLEMATIC CASES AND RULINGS.....	20
	A. Boggs v. Boggs.....	21
	B. <i>The Street Cases</i>	25
	C. Bunney v. Commissioner.....	28
	D. Morris v. Commissioner	30
	E. <i>Private Letter Ruling 201623001</i>	31
VIII.	“KILLERS” OF COMMUNITY PROPERTY.....	33
IX.	A BRIEF HISTORY AND GENERAL OVERVIEW OF ERISA	36
X.	THE PROBLEM WITH CODE SECTION 408(g)	43
XI.	THE PROBLEM WITH THE <i>BOGGS</i> DECISION	57
	A. <i>A Focus on REACT</i>	57
	B. <i>Criticism of Boggs</i>	61
XII.	ONE POSSIBLE SOLUTION.....	69
XIII.	CONCLUSION.....	73

I. INTRODUCTION

The primary purpose of this article is to educate individuals who are unfamiliar with community property law and to explain why certain actions taken by Congress, federal courts, and the Internal Revenue Service (the “IRS”) have amounted to *the killing of community property*.¹ A secondary purpose of this article is to encourage Congress, and particularly the members of Congress from community property states, to consider passing legislation (i) to amend the Employee Retirement Income Security Act of 1974 (“ERISA”) to recognize the community property ownership interest of spouses of employees and retirees who have accumulated qualified employee benefit plans (“qualified plans”) while living in a community property state

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1. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016); *Boggs v. Boggs*, 520 U.S. 833, 835 (1997).

and to allow those spouses to dispose of their ownership interest in those qualified plans if those spouses die prior to the employee or retiree, to the maximum extent possible in view of both federal administrative goals and state law property ownership rights, and (ii) to clarify or modify section 408(g) of the Internal Revenue Code so that it does not abrogate the community property ownership of Individual Retirement Accounts (“IRAs”) accumulated by married persons living in community property states, except to the extent absolutely necessary to achieve federal income tax goals.²

Certain ERISA provisions, as interpreted by the United States Supreme Court in the case of *Boggs v. Boggs*, for example, preempt community property law in cases in which the spouse of the employee or retiree who participates in a qualified plan dies prior to the employee or retiree.³ The basis of the *Boggs* decision was ERISA’s preemption clause, which is worded too broadly or, at least, has been interpreted too broadly by federal courts.⁴ In addition, the majority in *Boggs* felt constrained by spousal annuity rights that were added to ERISA to “fix” problems stemming from the common law marital property system.⁵ In essence, the Supreme Court’s decision in the *Boggs* case prioritizes federal administrative goals over significant property ownership rights guaranteed to married couples in the community property states.⁶ In addition, the plain terms of section 408(g) of the Internal Revenue Code have been interpreted by federal agencies, such as the IRS, as preempting ownership of IRAs as community property.⁷ It is doubtful that section 408(g) of the Internal Revenue Code was intended to override the community property ownership of IRAs.

Community property laws address, among other matters, property rights of married persons living in community property states.⁸ It has been estimated that thirty percent of the United States population lives in community property states.⁹ Therefore, in view of recent estimated total U.S. population of slightly more than 327,000,000, the matters addressed in this article affect millions of people.¹⁰ In addition, as of March 2018, the value

2. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1169 (2006).

3. *Boggs v. Boggs*, 520 U.S. 833, 835 (1997).

4. *Id.* at 859.

5. *Id.* at 842.

6. *Id.* at 839.

7. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016); see also 26 U.S.C. § 408(g) (2006).

8. See, e.g., TEX. FAM. CODE ANN. ch. 3 (Supp.) (stating the marital property rights of persons living in Texas, a community property state); see generally *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA preempted Louisiana’s community property laws which prevented certain testamentary transfers).

9. Table: *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&src=pt [perma.cc/7PH9-89JV] (last visited Dec. 21, 2018); see also William Streng & Mickey Davis, RETIREMENT PLANNING—TAX AND FINANCIAL STRATEGIES ¶ 19.03[1] (Warren, Gorham & Lamont, 2nd ed. 2018) (stating that the ten community property states (the authors include Alaska) were held to represent “approximately one third of the U.S. population.”).

10. *Id.*

of qualified plans and IRAs (jointly, “retirement plans”) owned by U.S. employees and retirees was estimated to be \$28 trillion.¹¹ Considering the number of married employees and retirees living in community property states who own retirement plans, the matters addressed in this article involve millions, if not billions, of dollars.¹²

Property rights are fundamental and should not be eliminated absent clear Congressional intent.¹³ Property rights are determined primarily by applicable state law.¹⁴ Unfortunately, a common law bias pervades federal statutory law and federal court and agency decisions.¹⁵ The common law marital property system observed in the majority of the states has very different underpinnings from those underlying the community property system followed in a minority of U.S. states.¹⁶ In fact, community property law has much to commend it, yet it is not respected.¹⁷

Our democratic system of government was designed to protect the minority from the “tyranny of the majority.”¹⁸ Unfortunately, certain federal laws as interpreted and applied by federal judges and federal “agents” are killing community property.¹⁹

II. ASSUMPTIONS AND DEFINITIONS

This article is based on certain assumptions and, admittedly, a community property law perspective. Individualism and paternalism are the underpinnings of marital property law in the common law states.²⁰ Historically, in the common law states, husbands usually owned nearly all of the assets accumulated during marriage because, for the most part, husbands did the work outside the home that led to the accumulation of those assets.²¹ Thus, wives in common law states did not accumulate assets as a result of marriage.²² The common law states passed laws to require husbands to

11. See generally Charles McGrath, *U.S. Retirement Assets at \$28 Trillion in Q1, Little Changed from End of 2017*, PENSIONS AND INVS. (June 21, 2018, 4:05 PM), <https://www.pionline.com/article/20180621/INTERACTIVE/180629958/us-retirement-assets-at-28-trillion-in-q1-little-changed-from-end-of-2017> [perma.cc/8Q7G-C7T3] (providing economic data about retirement market assets and investment trends).

12. See *id.*

13. U.S. CONST. amend. V.

14. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (“The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law.”).

15. See *Boggs*, 520 U.S. at 835.

16. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994).

17. See *Boggs*, 520 U.S. at 835.

18. See Federalist Papers No. 51 (James Madison).

19. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

20. See generally Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31 (2006) (arguing that traditional Biblical ideals and individualism have shaped family law in the U.S.).

21. SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY*, 82 (Cornell Univ. Press 1998).

22. Robert E. Oliphant & Nancy Ver Steegh, *WORK OF THE FAM. LAW*, 6 (Erwin Chemerinsky et al.

provide sufficient assets to wives and their children upon death.²³ In essence, wives and children were viewed as “dependents” of the husband/father (i.e., the provider).²⁴

Although some women worked outside the home once the U.S. moved from an agrarian society to an industrialized society, women were “encouraged” to leave the work force after World War II to open up jobs for returning GIs.²⁵ Only in recent years have women participated in the work force to a great extent.²⁶ While many women in the United States advance to the top of their professions and now earn compensation commensurate to men, recent statistics indicate that, on the whole, working women still earn less than men, even when performing the same jobs.²⁷ In addition, many working women only work part-time or at certain times during their lives.²⁸ Thus, to the extent employee benefits are based on the amount of compensation and hours worked, working women’s employee benefit plans, on average, have less value than working men’s employee benefit plans.²⁹

In general, in common law states, the title of a particular asset indicates the owner of that asset.³⁰ That is not necessarily true in community property states.³¹ In community property states, the ownership of a particular asset usually requires a determination of *how* and *when* the asset was acquired.³² The title may simply indicate the *manager* of the asset on behalf of both spouses.³³

Community property is the minority marital property ownership system in the United States, so judges, lawyers, and employees of federal agencies

eds., 4th ed. 2016).

23. *Id.* at 7.

24. *See generally id.* (stating that a husband had to support his wife to “counterbalance” her legal disabilities).

25. *See Post World War: 1946-1970*, STRIKING WOMEN, www.striking-women.org/module/women-and-work/post-world-war-ii-1946-1970 [perma.cc/8TPF-RNLX] (last visited Oct. 8, 2018).

26. *Id.*

27. Tara Siegel Bernard, *When She Earns More: As Roles Shift, Old Ideas on Who Pays the Bills Persist*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/your-money/marriage-men-women-finances.html> [perma.cc/JPL2-GE7E]; *see also Pay Equity & Discrimination*, INST. FOR WOMEN’S POL’Y RES., <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/> [perma.cc/6L2M-F75W] (last visited Oct. 8, 2018).

28. George Gilder, *Women in the Work Force*, THE ATLANTIC, <https://www.theatlantic.com/magazine/archive/1986/09/women-in-the-work-force/304924/> [perma.cc/EKE6-FJN5] (last visited Sept. 24, 2018).

29. *Ten Facts About Women and Retirement*, WRS NEWS ONLINE, http://etf.wi.gov/news/WRS_news_012015/WRS_012015_art4.htm [perma.cc/PYE5-PDLR] (last visited Oct. 8, 2018).

30. Thomas M. Featherston, Jr., *Separate Property or Community Property: An Introduction to Marital Property Law in the Community Property States*, BAYLOR SCH. OF LAW 1, 4 (July 18, 2016), <https://www.baylor.edu/law/facultystaff/doc.php/272846.pdf> [perma.cc/F3Y3-6GV4].

31. *Id.*

32. *See id.* at 5.

33. *Id.* at 17–18.

who live and work in common law states may not understand it well.³⁴ Even in community property states, community property law is not necessarily well understood, except by those lawyers and judges involved in family law and estate planning and probate law.³⁵

A will, the historical method used to transfer assets at death, no longer applies to as many assets due to the increased use of several types of “nonprobate” or “nontestamentary” methods of transfer, also sometimes referred to as “contractual” methods of transfer.³⁶ Although practitioners and commentators tend to lump together the various types of nonprobate transfers, the nonprobate methods of transfer can be divided into three categories: (i) “beneficiary designation assets,” (ii) trust assets, and (iii) assets subject to a “multi-party nonprobate arrangement.”³⁷ More and more people are using various nonprobate transfer methods to dispose of assets after death.³⁸ The assets transferred at death by a nonprobate method of transfer are collectively referred to as “nonprobate assets,” although clear differences exist between each method of transfer.³⁹

The four true beneficiary designation assets are (i) life insurance, (ii) employee benefit plans, (iii) IRAs, and (iv) annuities.⁴⁰ The only transfer mechanism for true beneficiary designation assets is the beneficiary designation, whether that involves a paper or electronic beneficiary designation form submitted by the titled owner or a default beneficiary designation per the underlying documentation relating to that particular beneficiary designation asset or a required beneficiary designation per applicable law (such as certain beneficiary designations in favor of spouses mandated by ERISA). In other words, no other method can be used to

34. Jeff Landers, *Understanding How Assets Get Divided In Divorce*, FORBES (Apr. 12, 2011, 10:53 AM), <https://www.forbes.com/sites/jefflanders/2011/04/12/understanding-how-assets-get-divided-in-divorce/#6ad531e72b66> [perma.cc/23FE-8E42]; see also Amy P. Jetel, *Texas Marital Property Law 101*, BECKETT TACKETT & JETEL, <http://www.btjlaw.com/index.php/articles/Texas-marital-property-law-101> [perma.cc/JJL6-99A2] (last visited Oct. 10, 2018) (contrasting community property to separate property).

35. See Jetel, *supra* note 34.

36. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984); see also John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1667 (2014).

37. This is the author’s particular division. Notably, practitioners differ on how many types of nonprobate assets there are. For example, Professor Langbein divides “will substitutes,” which he refers to as “the core of the nonprobate system,” into four categories: (i) life insurance, (ii) pension accounts, (iii) joint accounts, and (iv) revocable trusts. See Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 at 1109. Likewise, Professor Michael Carrico of Indiana University School of Law, cited in footnote 3 of Professor Langbein’s article, *id.* at 1109, divides “will substitutes” into five categories: (i) life insurance, (ii) trusts, (iii) pensions, (iv) joint savings accounts, and (v) P.O.D. bonds.

38. See Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, *supra* note 36 (discussing the nonprobate transfer “revolution” in the United States).

39. *Id.* at 1115–16.

40. Again, this is the author’s division of the “beneficiary designation assets” nonprobate category.

transfer “true” beneficiary designation assets away from the titled owner upon his death. The titled owner of a beneficiary designation asset can name his “estate” as the beneficiary of that beneficiary designation asset. This causes the beneficiary designation asset to be distributed to his estate, for further distribution pursuant to the titled owner’s will or applicable intestacy laws. The same approach can be taken if a revocable trust contains the estate plan. The titled owner of a beneficiary designation asset can name his revocable trust as the beneficiary of that asset in the beneficiary designation form. This will cause that beneficiary designation asset ultimately to be distributed pursuant to the trust instrument. Nevertheless, the beneficiary designation is the initial transfer document that transfers the asset from the decedent on his death.

Other assets and accounts can be structured either as probate assets that will be transferred by the decedent’s will upon the decedent’s death or as nonprobate assets that will be transferred by a mechanism other than the decedent’s will upon the decedent’s death.⁴¹ Of course, if the decedent dies without a will, his probate assets will be distributed pursuant to the applicable intestacy statutes. For that reason, the “true” beneficiary designation asset category does not include accounts and assets that can be arranged as either probate or nonprobate assets.

Trust assets are those assets that (i) can be titled in the name of a trust while the owner of the asset is still living (for the most part, this excludes employee benefit plans and IRAs) and (ii) are actually titled in the name of the trust at the time of the owner’s death (i.e., placed in the trust before the owner dies).⁴² If an asset is merely distributable to the trust on the owner’s death, some other transfer method, such as a “pour-over will” or a beneficiary designation, will transfer the property from the decedent to the trust.⁴³ In many states, the majority of asset owners engaged in estate planning create and fund revocable trusts, also called “living trusts,” to avoid probate on their death.⁴⁴

Accounts and other assets that are not true beneficiary designation assets can be arranged to avoid probate without placing the assets in a revocable trust.⁴⁵ This category of nonprobate transfer methods, referred to herein as “multi-party nonprobate arrangements,” includes (i) titling accounts or other assets to include a “right of survivorship,” (ii) titling accounts or other assets to include a “Pay on Death” (“POD”) beneficiary, (iii) titling accounts or

41. To the extent these assets and accounts are structured to be distributed outside probate upon a party’s death, they will be included in the author’s category, “multi-party nonprobate arrangements.”

42. See generally *Trusts: An Overview*, FINDLAW, <https://estate.findlaw.com/trusts/trusts-an-overview.html> [perma.cc/96KN-XKUH] (last visited Nov. 9, 2018) (comparing living and testamentary trusts).

43. See Abraham M. Mora et al., *Use of a Pour-Over Will*, 12 FLA. PRAC., EST. PLAN. § 8:28 (2017–2018 ed.).

44. FINDLAW, *supra* note 42.

45. See *Manary v. Anderson*, 292 P.3d 96, 98 (Wash. 2013); see *supra* note 37.

other assets to name a “Transfer on Death” (“TOD”) beneficiary, and (iv) “Totten trust” accounts.⁴⁶ In some common law states, a type of joint account between husband and wife called “tenants by the entirety” automatically includes a right of survivorship.⁴⁷

Employees and retirees who own retirement plans, like employee benefit plans and IRAs, view those retirement plans as assets as well as sources of income during retirement.⁴⁸ In many cases, other than the family home, retirement plans represent the highest valued assets in terms of the total net worth of an individual or couple.⁴⁹

While judges and lawyers in the state of the decedent’s domicile have historically been involved in probate proceedings, these individuals are not necessarily involved in the transfer of nonprobate assets at death.⁵⁰ In addition, financial institutions with custody of nonprobate assets and administrators of employee benefit plans frequently engage in the distribution of nonprobate assets when the titled owner dies.⁵¹ The particular persons handling these nonprobate assets may not have any legal training.⁵² Thus, the persons who handle the transfer of nonprobate assets upon the decedent’s death may not possess sufficient knowledge regarding applicable laws, including marital property laws and wealth transfer laws.⁵³

The right to own property has been viewed as a fundamental right that should be protected by the government.⁵⁴ In the 1600s, John Locke opined that the purpose of government is to secure “the right to life, liberty and property.”⁵⁵ The Fifth Amendment to the United States Constitution provides: “No person shall be deprived of life, liberty, or property without due process of law.”⁵⁶ The Fourteenth Amendment contains a similar

46. *Id.* at n.11 (citing WASH. REV. CODE ANN. § 11.02.005(10) (West 2018)).

47. Julie Garber, *Tenants by the Entirety vs. Joint Tenants With Rights of Survivorship*, THE BALANCE (May 19, 2018), <https://www.thebalance.com/tenants-by-entirety-versus-joint-tenants-3974805> [perma.cc/8GAA-6RL5].

48. See Jim Probasco, *How to Manage the Timing and Sources of Income in Retirement*, INVESTOPEDIA, <https://www.investopedia.com/retirement/how-to-manage-timing-and-sources-of-income-retirement/> [perma.cc/F7TJ-QMDM] (last visited Nov. 12, 2018).

49. See generally *Retirement Assets Total \$28.3 Trillion in Second Quarter 2018*, INV. CO. INST. (Sept. 27, 2018), https://www.ici.org/research/stats/retirement/ret_18_q2 [perma.cc/77XG-NT8K] (indicating retirement assets accounted for thirty-nine percent of all household financial assets in the United States as of June 2018).

50. See Manary v. Anderson, 292 P.3d 96, 96 (Wash. 2013); see Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, *supra* note 36.

51. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, *supra* note 36.

52. See *id.*

53. See *id.*

54. U.S. CONST. amend. V; see ADAM SMITH, *THE WEALTH OF NATIONS* 549-59 (S. M. Soares ed., 2007) (1776).

55. Jim Powell, *John Locke: Natural Rights to Life, Liberty, and Property*, FOUND. FOR ECON. EDUC. (Aug. 1, 1996), https://www.fee.org/the_freeman/detail/john-locke-natural-rights-to-life-liberty-and-property [perma.cc/J242-5MJU].

56. U.S. CONST. amend. V.

prohibition directed toward the states.⁵⁷ The right of private persons to acquire, own, use, manage, and dispose any type of property may be the most fundamental right in modern democratic societies; thus, “property is what grounds other rights and enables the individual to act as a free agent.”⁵⁸ Some argue that the right of an individual to own property is a fundamental *human* right.⁵⁹ In his essay, *On the History of Property*, James Wilson, United States Supreme Court Justice from 1789 to 1798, wrote, “Property is the right or lawful power, which a person has to a thing.”⁶⁰ Justice Wilson then divides the right into three degrees: possession, the lowest; possession and use; and possession, use, and disposition—the highest.⁶¹ The late Justice Scalia once said, “Economic rights are liberties: entitlements of individuals against the majority. When they are eliminated, no matter how desirable that elimination may be, liberty has been reduced.”⁶²

One of the rights possessed by the owners of assets, what Justice Wilson refers to as the “highest right,” is the right to dispose of those assets, particularly at death.⁶³ Part of the right to dispose of assets at death is the right to determine beneficiaries.⁶⁴ At an earlier time in U.S. history, with regard to the disposition of assets at death, a number of states enacted “forced heirship” laws.⁶⁵ Some states still have certain types of forced heirship laws, such as specified shares for pretermitted children.⁶⁶ Many common law states have “testamentary distribution statutes” in favor of surviving spouses, which require the deceased spouse to leave at least a certain portion of his estate to his surviving spouse at death.⁶⁷ Later in this article, certain federally mandated “spousal rights” in qualified employee benefit plans will be examined.⁶⁸

The United States has a dual system of government known as federalism.⁶⁹ Federalism unavoidably leads to tension between the federal

57. U.S. CONST. amend. XIV, § 1.

58. Rhonda E. Howard-Hassmann, *Reconsidering the Right to Own Property*, 12 J. HUM. RTS. 180, 183 (2013).

59. *Id.* at 189.

60. JAMES WILSON, *On the History of Property*, in COLLECTED WORKS OF JAMES WILSON, Vol. 1, 387 (Kermit Hall et al. eds., 2007).

61. *Id.*

62. ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 167 (Christopher J. Scalia et al. eds., 2017).

63. See WILSON, *supra* note 60.

64. *Id.*

65. See generally Joseph W. McKnight, *Spanish Legitim in the United States – Its Survival and Decline*, 44 AM. J. COMP. L. 75, 75 (1996) (describing the mandatory system of forced heirs designated by law).

66. See, e.g., TEX. EST. CODE ANN. § 255.053 (Supp.).

67. See Julie Garber, *Disinheriting a Spouse: Understanding Community Property and Elective Share Laws*, THE BALANCE (Aug. 5, 2018), <https://www.thebalance.com/can-you-disinherit-your-spouse-3505158> [perma.cc/7ZGV-PMWZ].

68. See *infra* Parts VIII, X.

69. See generally 16A AM. JUR. 2D CONSTITUTIONAL LAW § 217 (2018) (describing the dual form of government).

government and state governments.⁷⁰ The United States Constitution specifically grants the federal government certain enumerated powers and all other powers are reserved to and retained by the states.⁷¹ Historically, the federal government deferred to the states in certain areas of the law, such as marital property matters and probate matters.⁷² This deference has been waning in recent years with respect to certain transfers at death, perhaps due to the increased use of nonprobate transfers to dispose of assets at death.⁷³ In certain cases, conflicts between federal law and state law have been at the forefront of rulings involving beneficiary designation assets, such as retirement plans and life insurance policies.⁷⁴

The disposition of assets by the owner, whether during life or at death, is a fundamental property right.⁷⁵ Over many centuries, a large body of law developed relating to the transfer of wealth from one person to another.⁷⁶ This body of law, referred to as “wealth transfer law,” continues to develop today, primarily at the state level.⁷⁷ Wealth transfer laws address every aspect of property transfers, including: who owns the property, how and when the property can be transferred, who receives the property as a result of a particular transfer, how the new owners receive the property, and so on.⁷⁸ In the realm of wealth transfer law, when a question or issue arises regarding a particular transfer of property, the fundamental guideline is to ascertain and carry out intent of the transferor.⁷⁹ As will be shown, federal courts and agencies do not find the intent of the transferor relevant in many cases.⁸⁰

70. See *Garcia v. S. Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985) (defending the constitutionality of federal government setting minimum wage); see also *McCulloch v. Maryland*, 17 U.S. 316, 317 (1819) (holding that states may control their own operations, but not a federal entity, like a national bank).

71. U.S. CONST. amend. X.

72. See generally, James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1534–35 (2014) (describing the limits imposed on the federal government intervening in probate matters).

73. See Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635, 1638–39 (2014).

74. See *infra* Parts VI–VII.

75. See generally Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125 (2013) (referring to testamentary freedom as “the organizing principle of American succession law”).

76. See generally Alfred L. Brophy, *What Should Inheritance Law Be? Reparations and Intergenerational Wealth Transfer*, 20 LAW & LITERATURE 197 (2008) (asserting “inheritance law of a people will shape their attitudes”).

77. See generally *id.* (providing historical examples of the state’s power to limit property rights).

78. See *id.* at 206–07.

79. See, e.g., N. William Hines, *Implied Conditions of Personal Survivorship in Iowa Future Interests Law*, 75 IOWA L. REV. 941, 941 (1990) (stating that the Iowa Supreme Court must address two issues: 1) the intent of the transferor, and 2) if the law will carry out the transferor’s intent).

80. See generally Peter J. Wiedenbeck, *ERISA’s Curious Coverage*, 76 WASH. U. L. Q. 311, 314 (1998) (stating the goals of ERISA are “controlling mismanagement and abuse of benefit programs, increasing economic efficiency through improved career and financial planning, and protecting workers with pension quality standards are the chief purposes of federal benefit regulation.”).

Throughout this article, the term “participant” will be used to refer to both an employee or retiree who participates in a qualified employee benefit plan and to the titled owner of an IRA.⁸¹ When a distinction is not necessary, both qualified employee benefit plans and IRAs will be referred to as “retirement plans.”⁸² Unless otherwise indicated, male pronouns will be used to refer to the participant and female pronouns will be used to refer to the spouse of the participant. The spouse of the participant will sometimes also be referred to as the “nonparticipant spouse.”⁸³ It will be assumed that both the participant and his spouse are United States citizens. Unless otherwise indicated, this article assumes that the married couple in question did not enter into a marital property agreement to change the applicable state marital property rules.⁸⁴ The term “federal agent” will refer to individuals employed by federal agencies, such as the IRS.⁸⁵ Unless otherwise indicated, references to the “Code” are to the Internal Revenue Code of 1986 (as amended).⁸⁶ References to “section 408(g)” are to Code Section 408(g).⁸⁷

III. FEDERAL LAWS AND RULINGS INDICATE A COMMON LAW BIAS

When community property law practitioners consider federal laws, cases, and rulings in which federal law has been held to preempt community property law, a “common law bias” can frequently be detected.⁸⁸ In some cases, this common law bias may even be termed an “anti-community property law bias.”⁸⁹ It is likely that some of those who have made decisions based on a common law bias are not even aware they are operating under it.⁹⁰ However, this perceived common law bias is more than a lack of understanding community property law.⁹¹ It is a type of hostility toward community property law that often subtly appears in various cases and rulings.⁹² One goal of this article is to expose that bias.

Although the United States is a country governed by laws, it is also a democracy and the majority has the power to impose its will on the minority

81. See *Definitions*, IRS, <https://www.irs.gov/retirement-plans/plan-participant-employee/definitions> [perma.cc/4D65-639V] (last visited Nov. 12, 2018).

82. See *infra* Part III.

83. See *infra* Part VII.

84. See *infra* Part X.

85. See *infra* Part VIII.

86. See *infra* Part VI.

87. See *infra* Part VII.

88. See *infra* Part VII.

89. See *infra* Part VII.

90. See *generally* *Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (holding that federal law preempts state law claims).

91. *Id.*

92. *Id.*

in most cases.⁹³ However, many of our most revered federal laws were designed to protect the minority from the potential oppression of the majority.⁹⁴ The minority must speak up to be recognized or considered by the majority.⁹⁵

In this article, a case will be made that certain provisions in ERISA, the Internal Revenue Code, and certain federal decisions, such as the U.S. Supreme Court's holding in the *Boggs* case, result in a massive taking of property that would otherwise be owned by married persons living in community property states.⁹⁶ When one critically analyzes these federal statutes, cases, and rulings, this sweeping and wholesale preemption of community property laws appears to rest on federal goals that are often weak or flimsy in comparison to property ownership rights.⁹⁷ In some cases, decisions preempting community property are based on imaginary fears.⁹⁸ A common law bias pervades these laws and decisions.⁹⁹ It is important for individuals in positions to make or interpret laws, such as members of Congress, federal judges, and federal agents, to understand at least the basics of community property law.¹⁰⁰ It is submitted that community property law is a more enlightened and egalitarian system of marital property than marital property systems in the majority of states.¹⁰¹ Therefore, community property law deserves more respect than it has received throughout history.¹⁰²

IV. GENERAL COMMUNITY PROPERTY LAW CONCEPTS

Community property is a marital property system that dates back to the Visigoths in Spain in the fifth century.¹⁰³ Community property has been embraced by many countries, including Brazil, Chile, China, Costa Rica,

93. See generally Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23 (2006) (stating “[w]e count on representative government, not only to carry out the daily work of making and enforcing policy for the country, but also to meet our collective psychic need for a sense of legitimacy as it does so.”).

94. See *id.*

95. See Olga Mecking, *The “Spiral of Silence” Theory Explains Why People Don’t Speak Up on Things That Matter*, THE CUT (Mar. 10, 2017), <https://www.thecut.com/2017/03/the-spiral-of-silence-explains-why-people-dont-speak-up.html> [perma.cc/2988-L86E].

96. See *Boggs v. Boggs*, 520 U.S. 833, 854 (1997).

97. See *id.*

98. See *id.*

99. See *infra* Parts X–XI.

100. See *infra* Parts X–XI.

101. See *infra* Parts X–XI.

102. See Paul H. Dué, Comment, *Origin and Historical Development of the Community Property System*, 25 LA. L. REV. 78, 84 (1964).

103. *Id.*

Denmark, France, Italy, Mexico, the Netherlands, the Philippines, Russia, South Africa, Spain, Sweden, Switzerland, and Ukraine.¹⁰⁴

Nine states in the U.S. have adopted community property laws: California, Texas, Louisiana, New Mexico, Arizona, Idaho, Nevada, Washington, and Wisconsin.¹⁰⁵ Two states, South Dakota and Tennessee, authorize the creation of “community property trusts.”¹⁰⁶ Alaska allows both residents and nonresidents to create Alaska community property trusts.¹⁰⁷ In addition, Alaska allows resident married couples to create, by agreement, community property not held in trust.¹⁰⁸ Thus, Alaskan spouses can agree that all or part of their assets are community property.¹⁰⁹ Because community property is not the default marital property regime in Alaska, South Dakota and Tennessee, in this article, only the nine community property states listed in the first sentence of this paragraph will be treated as community property states.¹¹⁰

While only nine states apply community property as the default marital property regime, approximately thirty percent of the U.S. population lives in these states.¹¹¹ If the total current United States population exceeds 328 million, that means that close to 100 million people live in community property states.¹¹² A sizeable number of these people are married or will face marital property issues in their lifetimes.¹¹³

Community property is a very enlightened and egalitarian marital property system because it views both spouses as equal partners in the marital

104. Jennifer J. Wioneck, *Impact of Foreign Community Property Laws on U.S. Estate Tax Planning*, EST. PLAN. OF GREATER MIAMI, <http://www.epcmiami.org/assets/Councils/GreaterMiami-FL/library/MIADMS-376409-v1-Community%20Property%20Presentation%20for%20GMEPC.pdf> [perma.cc/23ZE-FUMT] (last visited Oct. 10, 2018).

105. William Perez, *Community Property Laws by States*, THE BALANCE (June 12, 2018), <https://www.thebalance.com/community-property-states-3193432/> [perma.cc/UHE7-CQKQ] (The first eight of the listed states are considered the “traditional” community property states. Wisconsin adopted community property by statute effective January 1, 1986.); see Featherston, *supra* note 30.

106. TENN. CODE ANN. §§ 35-17-101–108 (West 2010); S.D. CODIFIED LAWS § 55-17-5 (2016); see generally Terry Prendergast, *South Dakota Special Spousal Property Trusts: South Dakota “Steps-up” to the Plate and Hits a Home Run for Surviving Spouses*, 61 S.D. L. REV. 431 (2016) (describing the recent changes made by the South Dakota legislature that allow spouses who create community property trusts under South Dakota law to receive a 100% stepped-up basis on that trust property).

107. ALASKA STAT. §§ 34.77.010-34.77.995 (1998); see *Alaska Community Property Trusts: The Basics*, WEATHERBY & ASSOCS., <https://weatherby-associates.com/alaska-community-property-trusts-basics> [perma.cc/AZ7V-ZHYV] (last visited Nov. 13, 2018).

108. See ALASKA STAT. ANN. § 34.77.090 (West 1998).

109. *Id.*

110. See Featherston, *supra* note 30.

111. *Table: Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&src=pt [perma.cc/7PH9-89JV] (last visited Dec. 21, 2018).

112. See *id.*

113. See *Marriage and Divorce*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 17, 2017), <https://www.cdc.gov/nchs/fastats/marriage-divorce.htm> [perma.cc/7yP7-2CFU]; see also *Marriage & Divorce*, AM. PSYCHOL. ASS’N, <https://www.apa.org/topics/divorce/> [perma.cc/JJ3B-WQHG] (last visited Oct. 10, 2018).

unit.¹¹⁴ While differences exist between the laws of the nine community property states, in general, all assets acquired during the marriage by either spouse, except gifts, inheritances, and assets acquired with separate property, qualify as community property.¹¹⁵ This is true whether a spouse works outside the home or inside the home.¹¹⁶ It is also true regardless of the amount of compensation paid to each spouse if both work outside the home.¹¹⁷ Under community property law, both spouses are deemed to contribute to the well-being and success of the marital partnership.¹¹⁸ Therefore, both spouses share equally in the fruits of their labors as marital partners.¹¹⁹ Thus, community property is owned fifty percent by each spouse in undivided interests.¹²⁰

Even in community property states, a spouse can own separate property.¹²¹ In general, separate property refers to those assets owned prior to the marriage and property received by gift or inheritance.¹²² It is possible for an asset owned by one spouse prior to the marriage to remain the separate property of that spouse during the marriage.¹²³ In addition, if a spouse's separate property is sold during the marriage and the proceeds are invested in a new asset during the marriage, that new asset is separate property if it can be traced back to its separate property source.¹²⁴ Thus, when referring to assets "acquired" during marriage as being community property, the primary focus is on assets acquired through the efforts of the spouses during the marriage.¹²⁵

Note that many community property states, such as Texas, have a legal presumption that all assets on hand when a marriage terminates, whether by death or divorce, are presumed to be community property.¹²⁶ Thus, the spouse, or representative of the spouse, who claims that an asset on hand is the separate property of that spouse has the burden of rebutting the

114. See *Boggs v. Boggs*, 82 F.3d 90, 95 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997) (asserting that the community property system "conceives of marriage as a partnership in which each partner is entitled to an equal share.").

115. *Community Property Law*, IRM § 25.18.1.2.2, ¶ 3; see Featherston, *supra* note 30.

116. See Terry L. Turnipseed, *Why Shouldn't I be Allowed to Leave my Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 790 (2006).

117. See 15B AM. JUR. 2D *Community Property* § 40 (2018) ("Whatever is acquired during marriage by talent, toil, or other measure of productivity of either spouse is community property, and thus any spouse's personal income during marriage is community property.").

118. See *id.*

119. *Rodrigue v. Rodrigue*, 218 F.3d 432, 434 (5th Cir. 2000).

120. *Community Property*, *supra* note 117.

121. See *id.* at § 19.

122. *Id.* at § 24–25.

123. *Id.* at § 24.

124. *Id.* at § 27.

125. *Id.* at § 40.

126. See Featherston, *supra* note 30.

community property presumption.¹²⁷ That burden can be higher than the typical burden of proof in civil cases.¹²⁸ In Texas, for example, the challenger must prove the asset is separate property by clear and convincing evidence.¹²⁹

The most fundamental type of community property is compensation paid to a married person for personal services during the marriage.¹³⁰ Compensation is a very broad term and includes all forms of compensation, including, wages, salaries, tips, bonuses, fees, commissions, and both the employee's and employer's contributions to employee benefit plans on behalf of the employee.¹³¹ The fact that a spouse's salary, bonus, and other compensation received during the marriage is community property confuses persons who live in common law states, especially since the evidence of that compensation (i.e., the paycheck) is titled solely in the employee spouse's name.¹³²

Compensation received during the marriage can find its way into assets, making those assets community property.¹³³ Assets usually earn income. The income from community property assets is community property.¹³⁴ Note, however, that community property states differ in regard to whether the earnings from separate property assets during the marriage are community property or separate property.¹³⁵

In general, all income received by spouses for personal services and all income earned by community property assets during the marriage are considered community property.¹³⁶ In addition, all assets acquired with community property, including assets acquired with community income, are community property.¹³⁷

One of the largest hurdles to understanding community property is that the title of an asset is not definitive in terms of ownership in community property states.¹³⁸ In common law states, the title of an asset generally

127. *See id.*

128. *Id.*

129. *Id.*; *see, e.g.*, TEX. FAM. CODE ANN. § 3.003(b) (Supp.) ("The degree of proof necessary to establish that property is separate property is clear and convincing evidence.").

130. *See Poe v. Seaborn*, 282 U.S. 101, 117 (1930).

131. *See* 20 C.F.R. § 211.2 (1993).

132. *See Poe*, 282 U.S. at 111.

133. *See generally* *Boggs v. Boggs*, 520 U.S. 833, 852 (1997) (asserting assets purchased with compensation will be community property in a community property state).

134. *See generally id.* (stating that income earned by community property assets will be community property in a community property state).

135. *See Poe*, 282 U.S. at 116–17 (stating that community property states differ on characterization of income from separate property assets); *see* Featherston, *supra* note 30 (Three states, Texas, Idaho and Louisiana, treat income generated by separate property as community property. The other community property states treat such income as separate income.).

136. *See id.* at 113.

137. *See id.*

138. *See U.S. v. Mitchell*, 403 U.S. 190, 200 (1971); *see also* 15B AM. JUR. 2D *Community Property* *supra* note 117, at § 19 (stating that courts consider all relevant circumstances when characterizing property as separate or community property).

indicates the owner of the asset.¹³⁹ In community property states, assets can be titled in just one spouse's name and still be considered community property.¹⁴⁰ Thus, in a community property state, the most that can be determined from the title of the asset alone may be the manager of the asset.¹⁴¹ In some community property states, both spouses have management rights over the community property asset even if it is titled in only one spouse's name.¹⁴² If a community property asset is titled solely in the name of one spouse and that spouse is deemed to be the sole manager of the asset, he or she must exercise management rights over the asset on behalf of both spouses.¹⁴³ As manager of a community property asset, the spouse who is the titled owner of the asset owes a fiduciary duty to the other spouse to consider the other spouse's ownership interest.¹⁴⁴

In summary, in community property states, it is necessary to go beyond how the asset is titled and determine how and when the asset was acquired.¹⁴⁵ In general, if the asset was acquired during the marriage by either spouse (other than by gift or inheritance or with separate property), it is community property.¹⁴⁶ As noted, the usual starting point in a community property state is the presumption that an asset acquired during the marriage is community property.¹⁴⁷

V. DISPOSITION OF COMMUNITY PROPERTY ON DEATH OF FIRST SPOUSE

Marriages terminate by death or divorce. This article does not directly address the division of community property on divorce.¹⁴⁸ Instead, this article will focus on the division and distribution of the community property assets on the death of the first spouse and, in particular, the distribution of beneficiary designation assets on the death of the first spouse.¹⁴⁹

139. Ellen J. Beardsley, Note, *The Revised UPC Elective Share: Missing Essential Partnership Principles*, 13 QUINNIPIAC PROB. L.J. 225, 226 (1998).

140. *Community Property*, *supra* note 117, at § 19 (stating that title of asset does not necessarily indicate owner in a community property state).

141. *See, e.g.*, TEX. FAM. CODE ANN. § 3.102(a) (Supp.) (stating that each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single).

142. *See, e.g.*, WASH. REV. CODE ANN. § 26.16.030 (West 2008) (providing an example of a community property state in which both spouses have management rights over community property assets); *see also* J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMPORARY PROBLEMS 99, 106 (1993) (explaining the different management systems for community property).

143. *See Mitchell*, 403 U.S. at 201.

144. *See Fanning v. Fanning*, 828 S.W.2d 135, 149 (Tex. App.—Waco 1992, writ granted), *rev'd in part*, 847 S.W.2d 225 (1993).

145. *Community Property*, *supra* note 117, at § 19.

146. *See id.*

147. *See id.* at § 105.

148. *See Ablamis v. Roper*, 937 F.2d 1450, 1453 (9th Cir. 1991) (describing that Retirement Equity Act gave spouses the ability to receive the other spouse's pensions upon death or divorce).

149. *See infra* Part VI.

The marital relationship terminates when the first spouse dies.¹⁵⁰ At that time, the community property partitions into two equal shares: one share owned by the deceased spouse and the other share owned by the surviving spouse.¹⁵¹ The deceased spouse's one-half interest in the community property assets distributes upon his death to a new owner or owners.¹⁵² The surviving spouse is entitled to keep her one-half interest in the community property assets.¹⁵³ Even if a particular asset was titled solely in the deceased spouse's name at death, if it is a community property asset, the surviving spouse owns one-half of the asset in her own right and, when providing for the disposition of the asset, the managing spouse should consider his spouse's ownership interest.¹⁵⁴ If the deceased spouse fails to do so and disposes of his spouse's ownership interest in the community property asset at death, the surviving spouse has the right to recover her ownership interest in the asset.¹⁵⁵

Compare the community property marital system to the common law marital system.¹⁵⁶ Theoretically, in a community property state, in which each spouse is the actual owner of one-half of the community property and there is sufficient property, neither spouse would be considered dependent on the other spouse to the point of needing government-mandated distributions from the deceased spouse's assets upon the first spouse's death.¹⁵⁷ In contrast, under a common law marital property system, in which the husband historically owned all or nearly all of the assets, the wife truly depended on the husband to provide assets to support her and their children upon his death.¹⁵⁸

VI. BENEFICIARY DESIGNATION ASSETS: OWNERSHIP AND DISTRIBUTION CONSIDERATIONS

In this section, federal law will be ignored so that general principles of community property law relating to beneficiary designation assets can be explained.

As previously indicated, the four true beneficiary designation assets are (i) life insurance, (ii) employee benefit plans, (iii) IRAs, and (iv) annuities.¹⁵⁹

150. See *Ablamis*, 937 F.2d at 1453.

151. *U.S. v. Mitchell*, 403 U.S. 190, 198–99 (1971).

152. *Id.* at 202.

153. *Id.* at 200–01 (determining that a surviving spouse is entitled to retain her community property one-half interest in community property assets on the first spouse's death).

154. See *id.* at 195–96.

155. See *Boggs v. Boggs*, 520 U.S. 833, 871 (1997) (Breyer, J., dissenting) (stating that if a deceased spouse leaves surviving spouse's community property one-half interest to someone else at death, the surviving spouse has a right to try to recover her ownership interest in the asset).

156. Compare *Beardsley*, *supra* note 139, with *Community Property*, *supra* note 117, at § 19 (describing the different ways that common law and community property regimes handle titled property).

157. See *Boggs*, 520 U.S. at 847.

158. *Oliphant & Ver Steegh*, *supra* note 22.

159. See *supra* note 37.

These assets are distributed upon the death of the “titled owner” pursuant to a beneficiary designation.¹⁶⁰ The titled owner usually completes and submits a paper or electronic beneficiary designation form to the administrator or custodian of the particular beneficiary designation asset.¹⁶¹ When the titled owner dies, the administrator or custodian contractually must distribute the asset pursuant to that beneficiary designation.¹⁶² However, the titled owner may fail to submit a beneficiary designation, or the persons named in his beneficiary designation may predecease him.¹⁶³ In that case, the decedent’s beneficiary designation asset distributes to the default beneficiary pursuant to his contract with the administrator or custodian or the applicable plan documents.¹⁶⁴

If one of the four types of beneficiary designation assets were acquired during the marriage of a couple living in a community property state, the couple owns it as community property, regardless of who is listed as the owner of the asset in the books and records of the company administering or having custody of the asset.¹⁶⁵ In many cases, beneficiary designation assets accumulated during marriage will be titled solely in the name of one spouse.¹⁶⁶ Again, if the beneficiary designation asset is community property, the spouse listed as the owner is the manager of that asset on behalf of both spouses.¹⁶⁷ As manager of the asset, the spouse who is the titled owner maintains a fiduciary duty to consider the ownership interest of the other spouse when managing the asset and when submitting a beneficiary designation to dispose of the asset upon his death.¹⁶⁸

In the case of community property beneficiary designation assets titled in the name of one spouse, when the titled spouse completes the beneficiary designation form for that asset, he should name the other spouse as the beneficiary of at least fifty percent of that asset, in recognition of that spouse’s community property ownership interest in the asset.¹⁶⁹ If a particular beneficiary designation asset is community property and someone other than the spouse of the titled owner is named as the beneficiary of more than fifty percent of that asset, the titled owner is attempting to dispose of

160. *See id.* at 1110–11.

161. *See id.* at 1109.

162. *See Hillman v. Maretta*, 569 U.S. 483, 495 (2013) (citing *Wissner v. Wissner*, 338 U.S. 655, 660–61 (1950)).

163. *See generally id.* at 503 (discussing the problems that arise when one fails to change beneficiary designation).

164. *See Metro. Life Ins. Co. v. Parker*, 436 F.3d 1109, 1114 (9th Cir. 2006) (default beneficiary designation will apply if participant did not submit valid beneficiary design).

165. *See Poe v. Seaborn*, 282 U.S. 101, 112 (1930).

166. *See id.* at 111–12.

167. *See Community Property*, *supra* note 117, at § 19.

168. *See Boggs v. Boggs*, 520 U.S. 833, 850 (1997) (holding that spouse who is titled owner of community property beneficiary design asset has fiduciary duty to recognize community property interest of other spouse).

169. *See id.* at 842.

something he does not own.¹⁷⁰ The surviving spouse may want (or need) to file a lawsuit to recover her community property ownership interest in the beneficiary designation asset after the death of the titled owner.¹⁷¹ These lawsuits are rarely successful, especially if federal law overrides or preempts state community property laws.¹⁷² On the other hand, if the surviving spouse does not challenge the titled spouse's disposition of her fifty percent ownership interest in the beneficiary designation asset, she could be deemed to be making a gift to the non-spouse beneficiary to the extent that any part of her fifty percent ownership interest passes to the beneficiary when her spouse dies.¹⁷³ Considering typical values of beneficiary designation assets, that gift may be a taxable gift, reportable to the IRS in a Form 709, U.S. Gift (and Generation-Skipping Transfer) Tax Return.¹⁷⁴ The above situation—the death of the spouse named as the owner of a community property beneficiary designation asset—is relatively simple for persons unfamiliar with community property to understand.¹⁷⁵ The spouse with title to the asset and financial institutions with custody of the asset should recognize the other spouse's community property one-half ownership interest in the asset and ensure that the other spouse is designated as the beneficiary of at least fifty percent of that beneficiary designation asset.¹⁷⁶

The reverse situation is much trickier, and exponentially more difficult for persons unfamiliar with community property to understand.¹⁷⁷ In many cases, the spouse without title to the beneficiary designation asset dies first.¹⁷⁸ When the particular beneficiary designation asset is a qualified plan or IRA, the spouse who is not the titled owner is often referred to as the “nonparticipant spouse.”¹⁷⁹

How does the nonparticipant spouse dispose of her community property one-half interest in a beneficiary designation asset titled in the participant's name if she dies first?¹⁸⁰ Ignoring decisions in recent federal cases, start with the assumption that the nonparticipant spouse's community property one-half interest in the participant's beneficiary designation asset would be a probate asset because her ownership interest in that asset is not usually addressed in the contract or agreement that established that beneficiary designation asset.¹⁸¹ Further, the nonparticipant spouse is not usually a party to that

170. See *Street v. Skipper*, 887 S.W.2d 78, 81 (Tex. App.—Fort Worth 1994, writ denied).

171. See *id.* at 79.

172. See *id.* at 81; see I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

173. See *Street*, 887 S.W.2d at 81.

174. *United States Gift (and Generation-Skipping Transfer) Tax Return*, IRS, <https://www.irs.gov/pub/irs-pdf/f709.pdf> [perma.cc/US3Y-TVYY] (last visited Nov. 14, 2018).

175. See *Street*, 887 S.W.2d at 81.

176. *Boggs v. Boggs*, 520 U.S. 833, 843 (1997).

177. See *Lipsey v. Lipsey*, 983 S.W.2d 345, 348 (Tex. App.—Fort Worth 1998, no pet.).

178. See *Ablamis v. Roper*, 937 F.2d 1450, 1466 n.2 (9th Cir. 1991).

179. See *Lipsey*, 983 S.W.2d at 349.

180. See *Ablamis*, 937 F.2d at 1457.

181. See *id.* at 1456.

contract.¹⁸² As a result, the nonparticipant spouse's community property interest in the participant's beneficiary designation asset is neither a contractual asset nor a nonprobate asset.¹⁸³ By default, the nonparticipant spouse's interest in a community property beneficiary designation asset titled solely in the participant's name is a probate asset.¹⁸⁴ The highest courts of several community property states have made that specific determination, although other community property states have not ruled on this issue.¹⁸⁵ Also, note that at least two community property states have (or may have) laws overriding the nonparticipant spouse's ability to dispose of her community property interest in retirement plans and IRA rollovers from qualified plans titled in the participant's name in cases in which the nonparticipant spouse dies first.¹⁸⁶

Because the nonparticipant spouse's interest in a community property beneficiary designation asset titled solely in the participant's name is a probate asset and because she might die before the participant does, she should include specific provisions in her will disposing of her community interest in all beneficiary designation assets titled in the participant's name upon her death. If the nonparticipant spouse fails to include specific provisions in her will, then her community one-half interest in the beneficiary designation assets titled in the participant's name will fall into the residuary gift in her will.¹⁸⁷ However, if the nonparticipant spouse dies intestate, then the particular state's intestacy statutes indicate the recipients of that interest.¹⁸⁸

From the participant's perspective, the simplest approach is for the nonparticipant spouse to include a specific outright gift in her will to the participant of her community property interest in all of the participant's beneficiary designation assets. In that case, the participant will actually become the sole owner of the beneficiary designation assets titled in his name

182. See *Makar v. Stewart*, 486 So.2d 166, 177 (La. Ct. App. 3 Cir. 1986).

183. See Jeffrey Skatoff, *Non Probate Asset Controlled by Beneficiary Designation, Not the Will*, CLARK SKATOFF (July 30, 2016), <https://www.clarkskatoff.com/news-resources/blog/non-probate-asset-controlled-by-beneficiary-designation-not-the-will/> [perma.cc/K76H-B66N].

184. See *Community Property*, *supra* note 117, at § 40.

185. See, e.g., *Allard v. Frech*, 754 S.W.2d 111 (Tex. 1988); *Mundell v. Mundell*, 857 P.2d 631 (Idaho 1993); see generally Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 286 (1997) (clarifying that the surviving spouse retains, not inherits, his or her one-half interest in the community probate assets during probate).

186. Compare *In re Marriage of Powers*, 218 Cal. App. 3d 626 (Cal. Ct. App. 1990), with *In re Estate of Hackl*, 604 N.W.2d 579 (Wis. Ct. App. 1999) (showing that two states, California and Wisconsin, have a "terminable interest rule" for IRA rollovers); see also WIS. STAT. ANN. § 766.62(5) (West 2018) (stating that IRA rollovers from qualified plans are not "marital property" [meaning community property] under Wisconsin law).

187. See 57 AM. JUR. *Wills* § 1415.

188. See 23 AM. JUR. 2D *Descent and Distribution* § 67.

when the nonparticipant spouse dies. Of course, this does not always happen.¹⁸⁹

The participant has the power to dispose of one hundred percent of the beneficiary designation assets titled in his name, even though he may only own a community one-half interest in those assets.¹⁹⁰ Meanwhile, the nonparticipant spouse may only dispose of her community one-half interest in the participant's community property beneficiary designation assets.¹⁹¹ Thus, community property laws protect the participant's fifty percent ownership interest in beneficiary designation assets from dissipation by the nonparticipant spouse.¹⁹²

Again, people unfamiliar with community property law may not understand the situation in which the nonparticipant spouse dies first and disposes of her community one-half interest in beneficiary designation assets titled in the participant's name.¹⁹³ From the common law perspective, the participant appears to own one hundred percent of the beneficiary designation assets titled in his name.¹⁹⁴ However, that is not the case if the participant acquired the beneficiary designation asset during his marriage while living in a community property state.¹⁹⁵ Admittedly, it is confusing that a beneficiary designation asset titled in the participant's name is a nonprobate asset when the participant dies first, because it passes outside the participant's will, but the nonparticipant spouse's community property one-half interest in that same asset is a probate asset if she dies first because it passes pursuant to her will.¹⁹⁶

VII. PROBLEMATIC CASES AND RULINGS

The following section of the article focuses on cases and rulings that involve collisions between community property law and federal law in the context of beneficiary designation assets.¹⁹⁷ When federal law with common law bias makes rulings that override community property law, married persons in community property states lose significant property rights.¹⁹⁸ As noted earlier, millions of people and millions, if not billions, of dollars are affected.¹⁹⁹

189. See *Boggs v. Boggs*, 520 U.S. 833, 844–45 (1997).

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.* at 856–57.

194. See Featherston, *supra* note 30.

195. See *id.* at 111.

196. See *id.* at 112 (citing *Boggs v. Boggs*, 520 U.S. 833, 844 (1997)).

197. See *infra* Sections VII.A–E.

198. See *Boggs v. Boggs*, 520 U.S. 833, 839 (1997).

199. See McGrath, *supra* note 11.

A. Boggs v. Boggs

The United States Supreme Court case, *Boggs v. Boggs*, is one of the major decisions that addresses the conflict between state community property law and federal law (ERISA).²⁰⁰ *Boggs* was not a unanimous decision.²⁰¹ Five justices joined in the majority opinion, two justices concurred in one part of the majority opinion, and one justice filed a dissenting opinion in which two justices joined, in part.²⁰² It is important to understand the precise facts of the *Boggs* case, although none of the intermediate court opinions clearly state all of the relevant facts.²⁰³

Isaac Boggs and Dorothy Boggs were married and living in Louisiana, a community property state, at the time of Dorothy's death in 1979.²⁰⁴ Isaac and Dorothy had three sons.²⁰⁵ At the time of Dorothy's death in 1979, and during a period that closely corresponded to the period of Isaac and Dorothy's marriage, Isaac worked for a company called South Central Bell and participated in multiple employee benefit plans the company sponsored.²⁰⁶ According to the federal courts' opinions, one of those plans was originally titled the "Bell System Savings Plans for Salaried Employees (the "savings plan")."²⁰⁷

Dorothy's will left her estate, with her interest in all of the community property acquired during her marriage to Isaac, including her community property interest in the savings plan, as follows: one-third outright to Isaac and the "naked ownership" in two-thirds to the sons, in equal shares, with Isaac receiving a usufruct, or life estate, in the two-thirds passing to the sons.²⁰⁸ Isaac retained his community property interest in all of the community property assets, including the savings plan.²⁰⁹ Because Isaac still worked at the time of Dorothy's death, Dorothy's interest in Isaac's savings plan as of her date of death was an interest in undistributed qualified plan benefits.²¹⁰

Dorothy's will was admitted to probate by the state court, which entered an order regarding Dorothy's interest in all the assets, including Isaac's savings plan, titled, "Judgment of Possession."²¹¹ In the Statement of Assets (the "Inventory"), the savings plan was listed as an asset worth \$42,388.57

200. *Boggs*, 520 U.S. at 841.

201. *Id.* at 854–75.

202. *Id.*

203. *See id.* at 835–38.

204. *Id.* at 836.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 836–37.

209. *Id.* at 837.

210. *Id.*

211. *Id.*

as of Dorothy's date of death.²¹² Therefore, Dorothy's community property one-half interest in the savings plan as of her date of death was worth \$21,194.29.²¹³

Isaac married Sandra within one year of Dorothy's death.²¹⁴ Isaac and Sandra remained married until Isaac's death in 1989.²¹⁵ Upon Isaac's retirement from the company in 1985, Isaac took a lump sum distribution of the savings plan and rolled it over into an IRA rollover.²¹⁶ The IRA rollover was worth \$180,778.05 at the time of Isaac's death.²¹⁷ Upon retirement, Isaac also received ninety-six shares of AT&T stock in kind from the company's Employee Stock Ownership Plan ("ESOP").²¹⁸ Upon his retirement, Isaac started taking his pension from the company's pension plan in the form of a Qualified Joint and Survivor Annuity ("QJSA")—the required default form of benefit from a defined benefit plan for a married participant upon retirement.²¹⁹ The monthly annuity amount payable to Isaac was \$1,777.67.²²⁰ The pension plan was the only company plan in which Isaac was still a participant at the time of his death.²²¹ Isaac no longer participated in the savings plan or the ESOP at the time of his death.²²² Justice Kennedy, the author of the majority opinion, lumped all of the company plans together and referred to them as "pension plan benefits" even though two of the plans were not pension plans.²²³

After Isaac's death, two of Isaac and Dorothy's sons filed an action in state court (i) requesting the appointment of an expert to calculate the percentage of Isaac's interest in the plans to which the sons were entitled pursuant to Dorothy's will and the Judgment of Possession and (ii) seeking a judgment awarding them a portion of (a) the IRA, (b) the AT&T stock, (c) the monthly annuity payments Isaac received during his retirement, (d) the monthly survivor annuity payments already paid to Sandra, and (e) the monthly survivor annuity payments payable to Sandra for the rest of her life.²²⁴ In response to the state court action, Sandra sought a declaratory judgment in the United States District Court for the Eastern District of Louisiana asserting "that ERISA pre-empts the application of Louisiana's

212. *Boggs v. Boggs*, 82 F.3d 90, 94 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997).

213. *Id.*

214. *Boggs*, 520 U.S. at 836.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *See id.* at 842.

220. *Id.* at 836.

221. *See id.*

222. *See id.*

223. *See id.* at 836–37.

224. *Id.* at 837.

community property and succession laws to the extent they recognize the sons' claim to an interest in the disputed retirement plan benefits."²²⁵

The court granted summary judgment in favor of Dorothy and found that she had an interest in Isaac's pension plan benefits that built up during her marriage to Isaac, and such interest does not violate ERISA's anti-alienation provisions because there was no assignment.²²⁶ The United States Supreme Court later found that Dorothy's rights in Isaac's pension plan benefits were acquired by operation of community property law and not pursuant to a transfer made by Isaac.²²⁷

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision.²²⁸ The majority stated that Louisiana law affects only what a participant may do with his plan benefits after they are received rather than the relationship between the pension plan administrator and the plan beneficiary.²²⁹ As reasoned by the majority of the Fifth Circuit, ERISA's anti-alienation provisions are inapplicable to the creation of Dorothy's interest in Isaac's plan benefits pursuant to Louisiana community property law—the transfer of Dorothy's interest in Isaac's plans by Dorothy to her sons was “two steps removed from the disbursement of benefits [by the Plan administrator].”²³⁰

The United States Supreme Court granted certiorari due to the conflict between the Fifth Circuit Court's opinion in *Boggs* and the Ninth Circuit's decision in *Ablamis v. Roper*.²³¹ Speaking for the majority in the Supreme Court's decision in *Boggs*, Justice Kennedy indicated that the issue presented was “whether the Employee Retirement Income Security Act of 1974 [ERISA], 88 Stat. 832, as amended, 29 U.S.C. § 1001 et seq., pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits.”²³² The majority determined that community property law conflicts with ERISA and operates to frustrate its objectives.²³³ In particular, community property law conflicted with the spousal rights provisions of ERISA, as imposed per the Retirement Equity Act of 1984.²³⁴ Accordingly, the Supreme Court reversed

225. *Id.*

226. *Boggs v. Boggs*, 849 F. Supp. 462, 467 (E.D. La. 1994), *aff'd*, 82 F.3d 90 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997).

227. *Boggs*, 520 U.S. at 838.

228. *Boggs v. Boggs*, 82 F.3d 90, 98 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997).

229. *Id.* at 96.

230. *Id.* at 97.

231. *Boggs*, 520 U.S. at 839; *Ablamis v. Roper*, 937 F. 2d 1450, 1460 (9th Cir. 1991).

232. *Boggs*, 520 U.S. at 835–36.

233. *Id.* at 841.

234. *See id.* at 843 (citing Retirement Equity Act of 1984, Pub. L. 98-397, Aug. 23, 1984); *see generally infra* Section X.A (The Retirement Equity Act of 1984 is usually cited as “REA,” but is cited in this article as “REACT” due to that being an apt acronym for the degree of analysis underlying that law).

the decision of the Fifth Circuit Court and held that ERISA pre-empted state community property law completely under the facts in this case.²³⁵

The *Boggs* majority stated the following: (i) ERISA is a “comprehensive” statute; (ii) Congress is concerned with providing “economic security” to surviving spouses, which was the basis for the provisions in REACT that mandated that the surviving spouse of a participant in a defined benefit plan receive a “qualified preretirement survivor annuity” (“QPSA”) or a “qualified joint and survivor annuity” (“QJSA”), as applicable; (iii) the qualified domestic relations order (“QDRO”) provisions added to ERISA by REACT, allowing a division of a participant’s qualified plan benefits between the participant and his spouse, relate solely to divorce and cannot be applied in the case of the death of the nonparticipant spouse; and (iv) ERISA’s preemption and anti-alienation provisions stand for the proposition that Congress intended to preempt claims like the ones the sons made in *Boggs*.²³⁶

In his dissent in *Boggs*, Justice Breyer started by noting that community property is a marital property system that conceives of marriage as a partnership in which each partner is entitled to an equal share.²³⁷ Justice Breyer noted the significant number of people who live in community property states and the significant value of their pension plans.²³⁸ In addition, Justice Breyer noted that there must be clear and manifest Congressional intent to reserve an area exclusively to federal law.²³⁹ In his opinion, in passing ERISA, Congress “did not intend to pre-empt all state laws that govern property ownership. After all, someone must own an interest in ERISA plan benefits.”²⁴⁰

With respect to the federal preemption issue, in Justice Breyer’s opinion, Louisiana’s community property statute does not “relate to” an ERISA plan nor mention pension plans at all, and does not interfere with ERISA’s primary purpose of regulating the administration of qualified plans.²⁴¹ In his view, “Congress did not intend ERISA to pre-empt this testamentary aspect of community property law—at least not in the circumstances present here, where a first wife’s bequest need not prevent a second wife from obtaining precisely those benefits [i.e., the QJSA] that ERISA specifically sets aside for her.”²⁴²

With regard to the anti-alienation provisions of ERISA, Justice Breyer stated:

235. *Id.* at 854.

236. *Id.* at 845–48.

237. *Id.* at 854–55 (Breyer, J., dissenting).

238. *Id.* at 855.

239. *Id.* at 861.

240. *Id.*

241. *Id.* at 862 (arguing “this case does not involve a lawsuit against a fund”).

242. *Id.* at 855.

The anti-alienation provision is designed to prevent plan beneficiaries from prematurely divesting themselves of the funds they will need for retirement, not to prevent application of the property laws that define the legal interest in those funds. One cannot find frustration of an “anti-alienation” purpose simply in the state law’s definition of property.²⁴³

Justice Breyer agreed with the majority that Louisiana law could not deprive Sandra of her survivor annuity that was mandated by ERISA (per REACT) in view of her status as the surviving wife of Isaac.²⁴⁴ He noted, however, that by the time of the Supreme Court case, the sons were no longer trying to deprive Sandra of her survivor annuity—they were merely seeking an accounting of the annuity amounts paid to her and paid to Isaac during his life.²⁴⁵ Justice Breyer noted that it is possible that Louisiana law would allocate other assets from the Isaac and Dorothy community estate to the sons as their inheritance based on such an accounting, leaving Sandra’s survivor annuity intact.²⁴⁶

Justice Breyer distinguished the QJSA payable to Sandra from the other benefits (i.e., the stock distributed from the ESOP and the IRA rollover) that were distributed out of the plan to Isaac before he died.²⁴⁷ Once Isaac obtained those other benefits from the plan, he was free to do whatever he wanted with those benefits—ERISA no longer applied to those distributed plan benefits.²⁴⁸

From the standpoint of a community property practitioner, Justice Breyer’s dissenting opinion in *Boggs* is better reasoned.²⁴⁹ The majority decision in *Boggs* is problematic.²⁵⁰

B. The Street Cases

The *Street* cases are included in this article not because they relate directly to the two primary “killers” of community property (i.e., *Boggs* and section 408(g) of the Code), but because they show the relationship between state property ownership laws, including community property laws, and federal tax laws.²⁵¹ The *Street* cases dealt with the federal estate and gift tax

243. *Id.* at 864.

244. *Id.* at 869.

245. *Id.* at 870.

246. *Id.*

247. *See id.* at 862.

248. *Id.* at 872.

249. *See infra* Section XI.B.

250. *See infra* Section XI.B.

251. *See Street v. Skipper*, 887 S.W.2d 78, 82 (Tex. App.—Fort Worth 1994, writ denied); *Estate of Street v. Comm’r*, 73 T.C.M. (CCH) 1787, *1 (1997); *Estate of Street v. Comm’r*, 152 F.3d 482, 484 (5th Cir. 1998).

laws, collectively referred to as the “transfer tax laws.”²⁵² As will be shown later, there can be a lack of consistency at the federal level between the transfer tax laws and the federal income tax laws.²⁵³

In the first “Street” case, *Street v. Skipper*, which arose in Texas, the legal issue was triggered because the husband named his estate as the beneficiary of his life insurance policies.²⁵⁴ Community property acquired during the marriage of the husband to his second wife was used to pay the premiums on the policies.²⁵⁵ When the husband died, the executors of his estate collected the insurance proceeds and ignored the second wife’s ownership claims.²⁵⁶ Apparently, the husband’s will did not instruct the executors to give the second wife her community property interest in the insurance proceeds that were payable to the husband’s estate.²⁵⁷ The second wife challenged the distribution of the insurance proceeds to the husband’s estate, claiming “fraud on the community.”²⁵⁸ The second wife sought recovery of her one-half interest in the insurance proceeds or, at least, reimbursement for her community property one-half of the community funds used to pay the premiums on the insurance policies.²⁵⁹

While the husband, as the “sole manager” of the community property insurance policies, had the power to complete the beneficiary designation forms for the insurance policies on his life and to designate someone other than his wife as the beneficiary of those policies, such action could be deemed fraudulent as to the second wife’s community property ownership interest in those policies.²⁶⁰ Texas law uses a “fraud on the community” or “fraud on the spouse” analysis in these types of cases.²⁶¹ Did the second wife receive sufficient benefits as a result of her husband’s death so that husband naming his estate as the beneficiary of the community property insurance policies (with no provision in his will directing the executors of his estate to give the second wife her community ownership interest) could be respected as “not fraudulent” as to his wife or as to the community?²⁶²

The local probate court found the second wife’s fraud claims to be invalid because she received other assets from the husband’s share of the community property.²⁶³ On appeal, the Texas Court of Appeals affirmed the

252. See Troy B. Hafner, *The New Wealth Transfer Tax Laws and Their Impacts on Existing Estate Plans*, GOULD COOKSEY FENNELL (Jan 31, 2018), https://gouldcooksey.com/wealth_transfer_tax [perma.cc/Y3DW-X83H].

253. See *infra* Part IX.

254. See *Skipper*, 887 S.W.2d at 80.

255. *Id.*

256. *Id.*

257. See *id.*

258. *Id.*

259. *Id.* at 79–80.

260. See *Estate of Street v. Comm’r*, 73 T.C.M. (CCH) 1787, 2 (1997).

261. TEX. FAM. CODE ANN. § 7.009 (Supp.).

262. See *Street v. Skipper*, 887 S.W.2d at 81.

263. *Id.* at 78.

lower court's judgment, holding (i) no actual or constructive fraud occurred in this case and (ii) one hundred percent of the insurance proceeds belonged to the husband's estate for distribution pursuant to the husband's will.²⁶⁴ The Texas Supreme Court denied the writ filed by the second wife.²⁶⁵

Meanwhile, the executors of the husband's estate reported fifty percent, rather than one hundred percent, of the insurance proceeds in the Form 706, U.S. Estate (and Generation-Skipping Transfer) Tax Return, filed for the husband's estate.²⁶⁶ Based on the ruling in *Street v. Skipper*, the Commissioner of Internal Revenue asserted that one hundred percent of the insurance proceeds were includable in the husband's estate and issued a notice of deficiency.²⁶⁷ At issue were the provisions in section 2042 of the Internal Revenue Code and the related Treasury Regulations.²⁶⁸ Per section 2042, the value of the gross estate includes the amount receivable by the executor as insurance proceeds from policies on the life of the decedent.²⁶⁹ However, Treasury Regulation Section 20.2042-1(b)(2) states that if insurance proceeds payable to the decedent's estate are community property and one-half of the proceeds belong to the surviving spouse, then only one-half is includable in the decedent's estate for federal estate tax purposes.²⁷⁰

In *Estate of Street v. Commissioner*, the United States Tax Court held that the "no fraud" finding in *Street v. Skipper* took the insurance policies "out of the regime of community property" so that section 2042's general rule applies and one hundred percent of the insurance proceeds are includable in the husband's estate.²⁷¹

The case was appealed to the Fifth Circuit Court of Appeals, which affirmed the Tax Court.²⁷² The executors of the husband's estate argued that the husband made a gift of the second wife's community property one-half interest in the insurance proceeds when he designated his estate as the beneficiary of the insurance policies on his life, which gift became effective upon the husband's death.²⁷³ Therefore, the executors argued, only one-half of the insurance proceeds was includable in the husband's estate for federal estate tax purposes.²⁷⁴ In view of the lawsuit that had been filed by the second wife to try to recover her community property interest in the insurance

264. *Id.* at 80.

265. *See id.* at 78.

266. *See Estate of Street v. Comm'r*, 73 T.C.M. (CCH) 1787, 2 (1997).

267. *Estate of Street v. Comm'r*, 152 F.3d 482, 483 (5th Cir. 1998).

268. *Id.*

269. 26 U.S.C. § 2042 (2006).

270. Treas. Reg. § 20.2042-1(b)(2) (1958).

271. *Estate of Street v. Comm'r*, 73 T.C.M. (CCH) 1787, 2 (1997); *Street v. Skipper*, 887 S.W.2d 78, 81 (Tex. App.—Fort Worth 1994, writ denied).

272. *Estate of Street*, 152 F.3d at 485.

273. *Id.* at 484.

274. *Id.* at 483.

proceeds, the Fifth Circuit noted the inequity of the executors' argument to the effect that the second wife made a taxable gift of her community property one-half of the insurance proceeds when the husband died and those proceeds were paid to his estate, to be further distributed to the husband's testamentary beneficiaries.²⁷⁵ The Fifth Circuit decided the case based on the plain meaning of section 2042, and held that one hundred percent of the insurance proceeds were includable in the husband's estate for federal estate tax purposes.²⁷⁶

C. *Bunney v. Commissioner*

In *Bunney v. Commissioner*, the issue was whether a named IRA owner and husband, who withdrew amounts from IRAs titled in his name to implement a divorce settlement, should be taxed on the full amounts withdrawn.²⁷⁷ Under California law, the husband's IRAs were community property.²⁷⁸ Pursuant to a division of assets at divorce, the husband's former spouse received a community property one-half interest in the IRAs titled in the husband's name.²⁷⁹ The husband withdrew \$125,000 from his IRAs and placed the funds in his money market savings account.²⁸⁰ He later distributed \$111,600 of those funds to his ex-wife in satisfaction of her community property ownership interest pursuant to the divorce settlement.²⁸¹ The husband did not report in his gross income for the year in question the full amount withdrawn from his IRAs, only the difference between the \$125,000 withdrawn and the \$111,600 paid over to his ex-wife.²⁸²

With respect to the income tax issue, the Tax Court first cited section 408(d)(1), which provides, "Except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72."²⁸³ The court also cited section 408(g) of the Internal Revenue Code, which provides, "This section shall be applied without regard to any community property laws."²⁸⁴ The court noted that neither the Code nor the Treasury Regulations define "payee" or "distributee"

275. *Id.* at 484 n. 2.

276. *Id.* at 485; *see also* Stanley M. Johanson, *Tax Update*, 1998 STATE BAR OF TEXAS ADVANCED ESTATE PLANNING & PROBATE LAW COURSE L-1, L-16 (June 3-5, 1998) (criticizing the decision of the Tax Court, specifically, that the outcome of the *Street* case is "outrageous" and "butchers" community property by including the entire proceeds of community property insurance policies in the insured's gross estate).

277. *Bunney v. Comm'r*, 114 T.C. 259, 259-60 (2000).

278. *Id.* at 259.

279. *Id.*

280. *Id.* at 260.

281. *Id.*

282. *See id.*

283. *Id.* at 261; *see* 26 U.S.C. § 408(d)(1) (2006).

284. *Bunney*, 114 T.C. at 261; *see* 26 U.S.C. § 408(g).

for purposes of section 408(d)(1).²⁸⁵ Then, the court noted that, in *Darby v. Commissioner*, a similar case involving a qualified plan, it had determined that “the participant or beneficiary who, under the plan, is entitled to receive the distribution” is considered the “payee” or “distributee” for federal income tax purposes.²⁸⁶ Said the *Bunney* court, “Thus, unless the community property interest of petitioner’s former spouse is recognizable for Federal income tax purposes, the distributions are taxable to petitioner.”²⁸⁷

Citing Private Letter Ruling 8040101, dated July 15, 1980, the Tax Court acknowledged that the recipient of an IRA distribution is not always the same as the taxable distributee, and section 408(g) does not always preclude taking community property rights into account when it allocates the tax consequences of IRA distributions.²⁸⁸ However, in *Bunney*, the Tax Court held that the husband owed taxes on the full amount he withdrew from his IRAs.²⁸⁹ In addition, the court held that the husband may not take an income tax deduction for the amount distributed to his ex-wife.²⁹⁰ Further, the court held the husband liable for the ten percent early distribution penalty under section 72(t) and also liable for some accuracy-related penalties.²⁹¹

The troublesome part of the *Bunney* case is not the court’s decision, but the various comments made by the court, including the following:

Recognition of community property interests in an IRA for Federal income tax purposes would conflict with the application of section 408 in several ways. As an initial matter, an account imbued with a community property characterization would have difficulty meeting the IRA qualifications. Section 408(a) defines an IRA as a trust created or organized “for the exclusive benefit of an individual or his beneficiaries.” An account maintained jointly for a husband and wife would be created for the benefit of two individuals and would not meet this definition.²⁹²

In addition, the Tax Court said recognizing a spouse’s community property interest in the participant’s IRAs “would jeopardize the participant’s ability to roll over the IRA funds into a new IRA” and “would affect the minimum distribution requirements for IRA’s [sic].”²⁹³ None of the above-stated concerns are necessarily true or impossible to overcome, and they indicate a common law bias and lack of understanding of community property ownership concepts.²⁹⁴

285. *Bunney*, 114 T.C. at 262.

286. *Id.*; see *Darby v. Comm’r*, 97 T.C. 51, 58 (1991).

287. *Bunney*, 114 T.C. at 262.

288. See I.R.S. Priv. Ltr. Rul. 8040101 (July 15, 1980).

289. *Bunney*, 114 T.C. at 264.

290. *Id.* at 266–67.

291. *Id.* at 265–66.

292. *Id.* at 263.

293. *Id.*

294. See *supra* Part III; see also Featherston, *supra* note 30, at 17–18.

Finally, in a footnote in the *Bunney* opinion, the court stated, “We address a somewhat narrower issue, i.e., whether for Federal income tax purposes petitioner is the sole ‘distributee’ and thus taxable on the distributions he received from his IRAs. We do not address . . . whether sec. 408(g) preempts community property interests in IRA’s altogether.”²⁹⁵ The issue supposedly not addressed in *Bunney* appears repeatedly in federal cases and rulings, thanks to the plain wording of section 408(g), as indicated in the case and ruling below.²⁹⁶

D. *Morris v. Commissioner*

Morris v. Commissioner involved a couple living in a community property state.²⁹⁷ The wife (“petitioner”) and her husband, who aroused petitioner’s suspicion by his handling of his business affairs and their community property, filed separate income tax returns for two years.²⁹⁸ At issue was the petitioner’s responsibility for income taxes relating to early withdrawals her husband had made from the IRA titled in his name, including the related early distribution penalty under section 72(t).²⁹⁹ The IRS determined deficiencies in the two tax returns filed separately by the petitioner.³⁰⁰ The petitioner timely filed a Form 8857 “Request for Innocent Spouse Relief.”³⁰¹

As stated by the Tax Court, the issues were “(1) whether distributions to petitioner’s husband from an individual retirement account (IRA) held by petitioner’s husband are included in petitioner’s share of community income and (2) whether petitioner is entitled, under section 66(c), to equitable relief from liability for unpaid taxes on half of the community income” for the two years in question.³⁰² The court first cited section 408(d), which states, “any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72.”³⁰³ Then, citing *Bunney*, the court noted that “the distributee or payee of a distribution from an IRA is ‘the participant or beneficiary who, under the plan, is entitled to receive the distribution.’”³⁰⁴

Noting that the petitioner and her husband did not have a matrimonial agreement opting out of their state’s community property laws, the Tax Court

295. *Bunney*, 114 T.C. at 261 n.3.

296. See *infra* Section VII.D.

297. *Morris v. Comm’r*, 83 T.C.M. (CCH) 1104, 1 (2002) (mem. op.).

298. See *id.*

299. *Id.*

300. *Id.*

301. *Id.* at 2.

302. *Id.* at 1.

303. *Id.* at 2; 26 U.S.C. § 408(d)(1) (2006).

304. *Morris*, 83 T.C.M. (CCH) at 2 (citing *Bunney v. Comm’r*, 114 T.C. 259, 262 (2000)).

cited *Bunney* again and used section 408(g) to hold that no portion of the IRA withdrawals made by petitioner's husband was includable in the petitioner's gross income for the two years in question.³⁰⁵ Basically, the court treated the IRA withdrawals as the separate income of the petitioner's husband, even though petitioner and her husband lived in a community property state and did not have a marital agreement overriding the community property ownership of the IRAs titled in the husband's name.³⁰⁶ The *Morris* court characterized *Bunney* as holding "that by operation of section 408(g), in a community property jurisdiction the spouse of a distributee, who did not receive the distribution from the IRA, is not treated as a distributee despite whatever his or her community property interest in the IRA may have been."³⁰⁷ The court's reliance on *Bunney* is questionable, however, as the facts in *Bunney* and *Morris* differ: *Bunney* was a divorce case terminating a marriage, while the marriage remained in effect in *Morris*.³⁰⁸

Analyzing the second issue, the Tax Court in *Morris* cited the United States Supreme Court's decision *United States v. Mitchell* and noted that, in a community property regime, each spouse may file a separate federal income tax return, but each spouse's return must report one-half of the community income.³⁰⁹ In addition, *Mitchell* says "with respect to community income, as with respect to other income, federal income tax liability follows ownership."³¹⁰ Apparently, the *Morris* court did not feel obliged to recognize this principle.³¹¹ The bottom line is that in *Morris*, section 408(g) was used to treat IRA withdrawals from a community property IRA as the separate income of the named IRA owner, despite the fact that the spouses lacked any agreement overriding community property law or the longstanding rule in *Mitchell*.³¹²

E. Private Letter Ruling 201623001

In Private Letter Ruling 201623001, the IRAs titled in the name of a married decedent ("the husband") were community property under applicable state law.³¹³ The husband named his son, his child with his wife, as the sole beneficiary of the IRAs titled in his name.³¹⁴ Upon the husband's death, an

305. *Morris*, 83 T.C.M. (CCH) at 2.

306. *See id.*

307. *Id.* (citing *Bunney v. Comm'r*, 114 T.C. 259, 263 (2000)).

308. *Compare Bunney*, 114 T.C. at 259, with *Morris*, 83 T.C.M. (CCH) at 1 (both cases dealt with property at different phases of marriage).

309. *Morris*, 83 T.C.M. (CCH) at 3; *U.S. v. Mitchell*, 403 U.S. 190, 196–97 (1971); *see also Poe v. Seaborn*, 282 U.S. 101, 110 (1930) (stating that spouses may file separate tax returns in the state of Washington).

310. *Mitchell*, 403 U.S. at 197.

311. *See Morris*, 83 T.C.M. (CCH) at 3.

312. *Id.* at 2–3.

313. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

314. *Id.*

inherited IRA for the son was set up to receive one hundred percent of the IRAs titled in the husband's name, in view of the son's designation as the husband's named beneficiary pursuant to the beneficiary designation form on file with the IRA custodian.³¹⁵ Sometime after the husband's death, the husband's surviving wife filed a claim against her husband's estate, attempting to recover her community property one-half ownership interest in the IRAs that were titled in her husband's name as of her husband's death (which had subsequently been transferred to the son's inherited IRA).³¹⁶ The wife and her late husband's estate settled her state law claim, which the state court approved.³¹⁷ The court ordered the IRA custodian to make an assignment of the wife's community property one-half interest held in the son's inherited IRA to a spousal IRA rollover for the wife.³¹⁸ The following rulings were requested:

1. The wife is the owner of 50% of the IRAs titled in the husband's name per applicable community property law.³¹⁹
2. The wife should be treated as a "payee" of her half of the son's inherited IRA.³²⁰
3. The IRA custodian should distribute to the wife from the son's inherited IRA the wife's 50% ownership interest.³²¹
4. The distribution of 50% of the Son's inherited IRA to an IRA rollover in the wife's name is not a taxable event.³²²

The IRS ruled as follows: (i) whether the husband's IRAs are community property "is a matter of state property law and not a matter of federal tax law"; (ii) section 408(g) provides that it "shall be applied without regard to any community property laws" and, therefore, the distribution must be made without regard to community property laws and, accordingly, 100% of the husband's IRAs now belong to the son's inherited IRA; and (iii) if any part of the son's inherited IRA is assigned or transferred to the wife, that will be a taxable distribution made by the son.³²³

The IRS also stated:

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

This ruling letter expresses no opinion on the property rights of the parties under state law, and only provides a ruling on the federal tax law impact on the specific facts presented . . . Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Additionally, no opinion is expressed as to the tax treatment of the transactions described herein under the provisions of any other section of either the Code or regulations which may be applicable thereto.³²⁴

In response to the above statements, note the following:

(1) The IRS's ruling in PLR 201623001 actually impacts state law property rights, as will be discussed, even though the IRS said it was "expressing no opinion" on that issue.³²⁵

(2) State property laws should be taken into account in federal tax decisions.³²⁶ For the most part, state law creates property rights and property interests, not federal law.³²⁷ Federal tax decisions are supposed to be made considering applicable state property laws.³²⁸ Of course, state law must be clear and expressed by the highest court of the state to be binding for federal tax purposes.³²⁹ How can a "federal tax law impact" be determined based on "the specific facts presented" without considering state law property rights?³³⁰

(3) Although not expressly indicated, the IRS is hinting that the wife could be making a (taxable) gift to the son of her community property one-half interest in the husband's IRA.³³¹

Section 408(g) of the Code is problematic and will be further discussed in Part IX.³³²

VIII. "KILLERS" OF COMMUNITY PROPERTY

The cases and private letter ruling discussed above highlight the difficulty that federal judges and federal agencies have when evaluating community property law in the case of certain types of beneficiary designation assets, such as qualified plans, life insurance, and IRAs.³³³ In the death context, in particular, these assets present significant challenges,

324. *Id.*

325. *See id.*

326. *See* U.S. v. Mitchell, 403 U.S. 190, 197 (1971) (citing *Burnet v. Harmel*, 287 U.S. 103, 110 (1932)); *see also* *Poe v. Seaborn*, 282 U.S. 101, 117–18 (1930) (citing *Florida v. Mellon*, 273 U.S. 12, 47 (1927)).

327. *Mitchell*, 403 U.S. at 197.

328. *Id.*

329. *Comm'r v. Estate of Bosch*, 387 U.S. 456, 463 (1967).

330. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

331. *See id.*

332. *See id.*; *see infra* Part IX.

333. *See supra* Part VII.

primarily because the “titled owner” of the particular beneficiary designation asset may not own 100% of the asset under applicable community property laws.³³⁴ In addition, unless a beneficiary designation asset is payable to the decedent’s “estate,” it will pass directly to the beneficiary or beneficiaries provided for in the beneficiary designation and not through the decedent’s will or by intestacy.³³⁵ Thus, lawyers and judges in the state of the decedent’s domicile, who regularly handle probate matters and understand how to apply relevant state property laws, including community property laws, will not be involved in many of the problematic cases.³³⁶ Instead, persons who do not understand and, perhaps, do not care to understand community property laws, such as plan administrators, IRA custodians, insurance companies, federal judges, and federal agents, are often the only persons involved in determining “issues” relating to that type of nonprobate transfer.³³⁷ Of course, federal courts and agencies must deal with problematic federal statutes passed by Congress that, for the most part, were passed based on a common law bias.³³⁸ Faced with the perceived insurmountable conflict between federal law and state law, federal judges and federal agencies apply a very literal interpretation of section 408(g) of the Code and the provisions of ERISA as an easy way out.³³⁹

Two of the beneficiary designation assets discussed in the selected cases and rulings, qualified plans and IRAs (i.e., retirement plans), are subject to extensive federal income tax rules known as the minimum distribution rules.³⁴⁰ There are at least two primary purposes of the minimum distribution rules: (i) to ensure that amounts are withdrawn from retirement plans by retired participants, to provide income to those participants during their retirement, and (ii) to ensure that federal income taxes are not postponed indefinitely.³⁴¹ While the participant is living, he must take required minimum distributions (“RMDs”) from his retirement plans upon reaching the specified commencement date, known as the “Required Beginning Date”

334. See *supra* Part VII.

335. See *supra* Part VII; see also *Passing on Assets Outside of Probate: PODs and TODs*, ELDER LAW ANSWERS (Mar. 3, 2018), <http://www.elderlawanswers.com/passing-on-assets-outside-of-probate-pods-and-tods-15137> [perma.cc/GT3G-26DG].

336. See *Probate v. Non-Probate: What Is the Difference?*, ELDER LAW ANSWERS (Nov. 28, 2017), <http://www.elderlawanswers.com/probate-v-non-probate-what-is-the-difference-14411> [perma.cc/PP67-7SBV].

337. See *id.*

338. See *supra* Part III.

339. See Aloysius A. Leopold, *Disposition of Beneficial Interests in Property Insurance in Divorce*, 38 TEX. PRAC., MARITAL PROPERTY & HOMESTEADS § 9.11 (2018).

340. See *Retirement Topics – Required Minimum Distributions (RMDs)*, IRS, <http://irs.gov/retirement-plans/plan-participant-employee/retirement-topics-required-minimum-distributions-rmds> [perma.cc/UCP3-5AZX] (last visited Oct. 9, 2018).

341. See John P. Dedon & Pamela M. Buskirk, *IRA Beneficiary Designations Stretch or Shorten Payout Period*, 38 EST. PLAN. 9 (2011), <https://dedononestateplanning.typepad.com/files/estate-planning-vol.-38-no.-2---ira-beneficiary-designations-stretch-or-shorten-payout-period-by-john-dedon-esq.-and-pam-buskirk-esq..pdf> [perma.cc/4NFD-RPSK].

(“RBD”).³⁴² In the case of IRA owners and qualified plan participants who own five percent or more of the company sponsoring the plan, the RBD is April 1 of the year following the calendar year in which the participant attains age seventy and a half.³⁴³ In the case of an employee who does not own five percent or more of the employer sponsoring the qualified plan, generally, the RBD is April 1 of the year following the later of (i) the year in which the participant reaches age seventy and a half or (ii) the year in which the participant retires.³⁴⁴ The calculation of the RBD payable to a living participant is based on just one of two tables: the Uniform Lifetime Table or, if the participant’s spouse who is more than ten years younger than the participant is his sole beneficiary, the Joint and Last Survivor Table.³⁴⁵

Beneficiaries are also required to take RBDs after the participant’s death.³⁴⁶ The commencement date of those RBDs and the amount of those RBDs depend on (i) whether the participant dies before or after his RBD and (ii) whether the participant is deemed to have a “designated beneficiary” and if so, who that designated beneficiary is.³⁴⁷ In general, the surviving spouse of the participant has the most options under the minimum distribution rules.³⁴⁸ She can remain in the position of being the participant’s beneficiary or she can roll over the participant’s retirement plan into an IRA rollover in her name and become the participant herself, or do both (for example, the surviving spouse can take distributions as the beneficiary of the participant’s retirement plan without penalty prior to age fifty-nine and one-half and then rollover the participant’s retirement plan to her own IRA rollover after reaching that age).³⁴⁹

In most cases, distributions from pre-tax IRAs and qualified plans will be taxed as ordinary income in the year of receipt.³⁵⁰ In any event, it is clear that the federal government has a significant interest in these matters due to the income taxes payable on RMDs.³⁵¹ Thus, Congress, federal judges, and federal agents are interested in making sure that the recognition of community property laws does not impede the collection of income taxes by the federal government.³⁵² While that legitimate interest probably led to the

342. 26 U.S.C. § 401(a)(9)(A)(i) (2006).

343. *Id.* § 401(a)(9)(C)(i)(I).

344. *See id.* § 401(a)(9)(C)(ii).

345. 26 C.F.R. § 1.401(a)(9)-9, A-2–A-3 (2002).

346. 26 C.F.R. § 1.401(a)(9)-3, A-1(a) (2002).

347. *Id.*; 26 C.F.R. § 1.401(a)(9)-4, A-1 (2004).

348. *See Retirement Topics – Required Minimum Distributions (RMDs)*, *supra* note 340.

349. *See Rollovers of Retirement Plan and IRA Distributions*, IRS, <https://www.irs.gov/retirement-plans/plan-participant-employee/rollovers-of-retirement-plan-and-ira-distributions> [perma.cc/S2AC-E5PA] (last visited Nov. 16, 2018).

350. *See* 26 U.S.C. § 72(u)(1)(B) (2006); *see also* 26 U.S.C. § 408(d) (2006).

351. *See* 26 U.S.C. § 408(d).

352. *See id.*

passage of section 408(g) of the Code, the overly broad (and irrational) wording of section 408(g) is clearly the product of a common law bias.³⁵³

Qualified plans are also subject to the provisions of ERISA.³⁵⁴ ERISA, in particular, has had a lot to do with the killing of community property.³⁵⁵ Thus, the next part of this article will discuss the background and purposes of ERISA, as well as the “direction” federal judges and federal agencies have gone in interpreting issues involving qualified plans.³⁵⁶ Following that, the specific cases and ruling discussed in Part VII of this article will be analyzed more critically.³⁵⁷

IX. A BRIEF HISTORY AND GENERAL OVERVIEW OF ERISA

Various types of “qualified employee benefit plans” or simply, “qualified plans,” are subject to ERISA.³⁵⁸ In general, qualified plans that are “retirement plans” fall into one of two categories: (i) defined contribution plans; and (ii) defined benefit plans.³⁵⁹ A 401(k) plan is an example of a defined contribution plan.³⁶⁰ A “true” pension plan is an example of a defined benefit plan.³⁶¹ Today, very few companies sponsor “true” pension plans, but these plans were among the first employee benefit plans to be provided by employers to employees.³⁶²

Private pensions developed primarily after World War II.³⁶³ Few rules governed the administration of pension plans until the passage of ERISA in 1974.³⁶⁴ Pension plan abuses, such as mismanagement and theft—of which there were many “high profile cases” during the 1950s and 1960s, and other problems (e.g., bankruptcy of the employer)—primarily influenced the

353. See 26 U.S.C. § 408(g) (2006); see *infra* Part X.

354. See *infra* Part IX.

355. See *infra* Part IX.

356. See *infra* Part IX.

357. See *supra* Parts IV & VII.

358. See 29 U.S.C. § 1003(a) (2006); *ERISA Requirements for Employee Benefit Plan Administration*, WOLTERS KLUWER, <https://www.bizfilings.com/toolkit/research-topics/office-hr/erisa-requirements-for-employee-benefit-plan-administration> [perma.cc/9F4K-RLQD] (last visited Nov. 16, 2018).

359. See *Types of Retirement Plans*, U.S. DEP'T OF LAB., <http://www.dol.gov/general/topic/retirement/typesofplans> [perma.cc/X78V-QXZN] (last visited Oct. 9, 2018).

360. *Id.*

361. See, e.g., *Boggs v. Boggs*, 520 U.S. 833, 833–34 (1997) (Many people, including the U.S. Supreme Court Justices who decided the *Boggs* case, lump together all qualified plans and refer to them as “pension plans”; however, technically, that is not correct).

362. See Bradley R. Duncan, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986, 986 (1984); see also Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 619, 642 (1994) (analyzing the history and impact of ERISA and the preemption clause).

363. See Patrick Purcell & Jennifer Staman, *CRS Report for Congress: Summary of the Employee Retirement Income Security Act (ERISA)*, CONG. RES. SERV. (Apr. 2008), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1510&context=key_workplace [perma.cc/NY9N-J26H].

364. See *id.*; see also Duncan, *supra* note 362.

passage of ERISA.³⁶⁵ For example, when the Studebaker-Packard Corporation shut down in 1963, it did not have sufficient funds to pay its retirees and employees the pensions they had earned and been promised.³⁶⁶ That seminal case triggered hearings in Congress to discuss how to protect pension plans for workers.³⁶⁷ Those hearings continued during the 1960s, and finally, ERISA was passed in 1974.³⁶⁸

ERISA was passed primarily as a labor law. ERISA is administered by both the Department of Labor (DOL) and the Treasury Department (IRS).³⁶⁹ Although two separate federal agencies co-administer ERISA, and although ERISA provisions appear in both the Labor Code and the Tax Code, according to one commentator, “the tax aspects [of ERISA] were secondary.”³⁷⁰

ERISA focuses on protecting employees, pension plans, and other retirement plans so that qualified plan participants can be assured of having income during retirement.³⁷¹ When ERISA was passed, its primary goals were stated to be the following: (1) to achieve national uniformity in the administration of qualified plans, (2) to reduce the administrative burden on plan administrators, and (3) to insure the payment of retirement benefits for retirees and their “beneficiaries.”³⁷²

Because of the chaos in the administration of employee benefit plans prior to the passage of ERISA, Congress wanted to provide “uniform rules” at a national level applicable to all qualified plans.³⁷³ In addition, to protect participants and retirement plans, the duties imposed on administrators of qualified employee benefit plans greatly increased.³⁷⁴ Thus, the first two stated goals of ERISA were designed (i) to provide clear rules for the administration of qualified plans and (ii) to make it easier for plan administrators to follow the rules.³⁷⁵ Further, those two goals were designed to eliminate situations in which plan administrators were at risk of paying out benefits twice due to competing claims.³⁷⁶ The first two goals of ERISA are primarily administrative goals. Consistent with those goals, a significant

365. *See id.*

366. *See* Purcell & Staman, *supra* note 363, at 3.

367. *Id.*

368. *Id.*

369. *Id.* at 60.

370. *Id.*; *see* Michael S. Sirkin, Symposium, *The 20 Year History of ERISA*, 68 ST. JOHN’S L. REV. 321, 323 (1994).

371. *See* Purcell & Staman, *supra* note 363, at 3.

372. *See* Ryan McParland, *ERISA: A Statute’s History, Purpose, and Progression*, LAW STUDENT CONNECTION (June 1, 2011, 7:46 PM), http://nysbar.com/blogs/lawstudentconnection/2011/06/erisa_history_purposes_and_pro.html [perma.cc/L37C-7Z26].

373. *See id.*

374. *See id.*

375. *See id.*

376. *See id.*

portion of ERISA is devoted to administrative matters, such as reporting, record keeping, and disclosure.³⁷⁷

The third stated goal of ERISA concerns two sub-goals: (i) making sure retired participants receive the qualified plan benefits they were promised or earned, so that they will have income during retirement, and (ii) making sure that the beneficiaries of those participants receive the benefits to which they are entitled as promptly as possible after the participant's death.³⁷⁸ The first of those two sub-goals directly responded to pre-ERISA abuses in the management of pension plans.³⁷⁹ For example, ERISA includes specific participation, vesting, and benefit accrual provisions.³⁸⁰ It also includes insurance provisions in the case of terminated plans.³⁸¹ The first sub-goal of the third stated goal of ERISA correlates highly with the legislative history of and reasons for passing ERISA.³⁸²

Turning to the second sub-goal of the third stated goal of ERISA, while it is important to insure the prompt payment of qualified plan benefits to beneficiaries of participants who die, this is more incidental to the original purpose of ERISA—to protect participants themselves by also protecting the participants' plans, and to insure participants have income during retirement.³⁸³ In support of that statement, consider that the provisions in REACT securing survivor benefits to surviving spouses of participants were added ten years after the passage of ERISA.³⁸⁴

As noted, prior to the passage of ERISA, the administration of employee benefit plans was chaotic, inconsistent, and, in the worst cases, riddled with abuses.³⁸⁵ ERISA was passed to solve that primary problem.³⁸⁶ The drafters of ERISA intended to prevent “getting around” ERISA requirements and to prevent retirement plan abuses by including, among other provisions, (i) a preemption clause and (ii) an anti-alienation clause.³⁸⁷

377. See Brian M. Murray, *Guidance for Employers on ERISA Discrimination, Retaliation, and Whistleblower Claims*, LEXIS NEXIS ADVISOR J. (Apr. 18, 2018), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2018/04/18/guidance-for-employers-on-erisa-discrimination-retaliation-and-whistleblower-claims.aspx> [perma.cc/2SHM-NV3A]; see also 29 U.S.C. § 1140 (2006).

378. See McParland, *supra* note 372.

379. See Duncan, *supra* note 362, at 989.

380. See generally *Michael v. Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1029–30 (9th Cir. 2001) (finding a violation of ERISA's anti-cutback rule because participant's benefits had accrued despite an amendment to the plan); see generally Purcell & Staman, *supra* note 363 (describing the protections include “requirements relating to reporting and disclosure, participation, vesting, and benefit accrual, as well as plan funding”).

381. See 29 U.S.C. § 1001 (2)(b) (2006) (stating that ERISA includes “insurance provisions” in the case of terminated plans (i.e., PBGC)).

382. See *id.*; see also McParland, *supra* note 372.

383. See generally Purcell & Staman, *supra* note 363 (stating that ERISA intended to protect plan participants).

384. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984).

385. See S. REP. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4892.

386. See *id.*; 29 U.S.C. § 1001(2)(A) (2006).

387. See generally S. REP. No. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838 (stating why a preemption clause and anti-alienation clause were included in ERISA).

ERISA's preemption clause is very broadly worded: "... the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title."³⁸⁸ (emphasis added). In ERISA's preemption clause as written and as interpreted by federal courts, the provisions of ERISA supplant any and all state laws that could relate to any employee benefit plan.³⁸⁹ ERISA's preemption provision, as stated, does not condition preemption on whether the particular state law interferes with the administration of an ERISA plan or prevents accomplishment of one or more purposes of ERISA.³⁹⁰

ERISA's anti-alienation clause prohibits assignment or transfer of an employee benefit plan in a way not clearly permitted by ERISA.³⁹¹ That provision contains broad language as well: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."³⁹² ERISA plans are fundamentally spendthrift trusts and a major goal of ERISA was protecting plan benefits so that participants would be assured of retirement income.³⁹³ Of course, the issue is determining what constitutes an impermissible assignment or alienation.³⁹⁴

Over the years, numerous federal cases have addressed situations in which ERISA allegedly preempted state laws related to employee benefit plans.³⁹⁵ That is not surprising in view of the fact that employee benefit plans are not only sources of income during retirement, but also assets.³⁹⁶ The states have been addressing the disposition of assets for well over two hundred years.³⁹⁷ As previously noted, when issues arose regarding the transfer of assets, state common law and, now, frequently, state statutory law, stepped in to provide rules of construction and rules for evaluating competing claims in order to resolve those conflicts.³⁹⁸ As previously noted, a primary guideline in resolving wealth transfer disputes has been to determine and carry out the intent of the transferor.³⁹⁹

The drafters of ERISA borrowed some concepts from wealth transfer law—trust law, in particular, including the concepts of fiduciary duty and

388. 29 U.S.C. § 1144(a) (2006) (emphasis added).

389. *See id.*

390. *See id.*

391. 29 U.S.C. § 1056(d)(1) (2006).

392. *Id.*

393. *See* Michael T. Murray, *The Fraud Exception to ERISA's Anti-Alienation Provision: A Permissible Exercise of the Chancellor's Powers?*, 57 FORDHAM L. REV. 835, 839 n.32 (1989).

394. *Id.* at 837.

395. *See, e.g.,* Boggs v. Boggs, 520 U.S. 833, 840–41 (1997); *see, e.g.,* Egelhoff v. Egelhoff, 532 U.S. 141, 146 (2001) (holding on the event of divorce, revocation of any designation of a spouse as beneficiary to an asset was automatically preempted, relating to ERISA plans); *see also infra* Part X.

396. *See Boggs*, 520 U.S. at 872.

397. *See Egelhoff*, 532 U.S. at 151–52.

398. *See* Langbein, *infra* note 404, at 1674.

399. *Id.*

spendthrift trusts—but did not consider other “foreseeable” aspects of wealth transfer law that might be implicated when they originally wrote the statute, such as the division of a participant’s qualified plan on divorce.⁴⁰⁰ That the drafters of ERISA did not consider divorce as a matter to be addressed when ERISA was initially passed lends credence to the idea that the drafters of ERISA were thinking primarily about retirement plans as pensions—a source of income during retirement—and not as assets.⁴⁰¹ Of course, participants in retirement plans considered their retirement plans as assets, and still do.⁴⁰²

One category of cases in which ERISA has been held to preempt otherwise applicable state law involves “revocation on divorce” statutes.⁴⁰³ Sixteen states have laws providing that a subsequent divorce revokes pre-divorce wealth transfer arrangements made by one spouse in favor of his or her now former spouse.⁴⁰⁴ A state’s revocation on divorce statute may apply to both probate and nonprobate transfers.⁴⁰⁵ In his article, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, Professor John Langbein states, “[w]hat motivates the rule is the understanding that divorce commonly entails a sufficiently traumatic breach in the relations of the former spouses that they are not likely thereafter to intend to benefit each other by means of wealth transfer on death.”⁴⁰⁶ Unfortunately, even though a property settlement in a divorce proceeding should effectuate a division of all assets subject to division on divorce, the divorce settlement itself is not always sufficient. The former spouses should implement the settlement by eliminating all probate and nonprobate transfer arrangements in favor of the former spouse; however, this often does not occur.⁴⁰⁷ Thus, without necessary follow-through, the surviving former spouse often ends up being the beneficiary of one or more assets owned by the former spouse who dies first.⁴⁰⁸ No federal law prevents the state probate court from enforcing a state’s revocation on divorce statute with respect to probate dispositions in favor of a former spouse.⁴⁰⁹ However, if the particular asset involved is a

400. See 29 U.S.C. § 1056 (d)(1) (2006); see 29 U.S.C. § 1104 (2006).

401. See *Egelhoff*, 532 U.S. at 149–50 (describing the uncertainties of applying ERISA to divorce situations).

402. See *Pension Plan Assets*, MONEY-ZINE (Sept. 26, 2018, 12:00 AM), <https://www.money-zine.com/definitions/investing-dictionary/pension-plan-assets> [perma.cc/ZJ75-LNND].

403. See Katherine A. McAllister, *A Distinction Without Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, 1482 (2011).

404. See John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1669 (2014).

405. *Id.*

406. *Id.*

407. *Id.* at 1669–70.

408. See *id.* at 1668–69.

409. *Id.* at 1669–70.

qualified plan governed by ERISA, ERISA's preemption clause has been held to apply.⁴¹⁰

In discussing the ERISA preemption cases involving qualified plans, Professor Langbein states:

*In Egelhoff v. Egelhoff (2001), the Supreme Court held that when the instrument of transfer is a beneficiary designation in a pension plan or life insurance policy subject to federal regulation under the Employee Retirement Income Security Act ("ERISA"), the otherwise applicable state divorce revocation statute is preempted even though ERISA makes no mention of divorce revocation. The Court reasoned that enforcing the state divorce revocation statute would "interfere with nationally uniform plan administration."*⁴¹¹

Thus, in *Egelhoff*, a federal "administrative goal" was held to supersede a significant wealth transfer goal.⁴¹² In his article, Professor Langbein also discusses the case of *Hillman v. Maretta*.⁴¹³ In *Hillman*, the United States Supreme Court went beyond *Egelhoff* and held that federal law preempts a state's divorce revocation law even in the case in which the federal benefits, in that case, life insurance proceeds, were already distributed completely out of the federal plan.⁴¹⁴ Thus, the decedent's estate (and intended beneficiaries) had no cause of action against the decedent's former spouse to recover the insurance proceeds after they were distributed out of the plan to the former spouse.⁴¹⁵ The *Hillman* case carried federal administrative concerns beyond protecting plan administrators into the realm of deciding a typical wealth transfer issue: based on the decedent's intent, who is entitled to the particular assets in question?⁴¹⁶ As noted by Professor Langbein, "[t]here is no federal policy favoring wealth transfer to ex-spouses."⁴¹⁷ ERISA's primary focus was to provide administrative rules to be followed by all plan administrators, thereby making it easier for plan administrators to administer retirement plans and assure that retired participants receive their benefits.⁴¹⁸ These goals are understandable in view of the history of employee benefit plans prior to the passage of ERISA.⁴¹⁹ ERISA is not primarily concerned with "wealth transfer" matters in the traditional sense.⁴²⁰ Ascertaining and carrying out the intent of the participant with respect to the distribution of his qualified plans

410. *Id.* at 1673.

411. *Id.* at 1675.

412. *Id.* at 1665–66.

413. *Id.* at 1666; *Hillman v. Maretta*, 569 U.S. 483, 489–90 (2013).

414. *Hillman*, 569 U.S. at 499.

415. *See id.*

416. *Id.* at 504–05.

417. *See* Langbein, *supra* note 404, at 1666.

418. *Id.* at 1672–73.

419. *See* Wiedenbeck, *supra* note 80, at 312.

420. *Id.* at 313–15.

at death is not one of the stated goals of ERISA.⁴²¹ It is doubtful, however, that Congress intended all state wealth transfer laws to be preempted by ERISA.⁴²² Despite what federal courts have said, including the majority in *Boggs*, ERISA is not a “comprehensive” statute.⁴²³ It does not address a wide range of wealth transfer issues that can arise.⁴²⁴ For example, who qualifies as a “child” of a person who has died for purposes of distributing assets to his “children”?⁴²⁵ That question may easily arise during the distribution of a beneficiary designation asset at death.⁴²⁶ The answer is not always clear, especially today when children can be adopted in various ways (including adoption by estoppel) or couples freeze their embryos.⁴²⁷ Thus, if ERISA provides no answer to the question, and if ERISA preempts otherwise applicable state law, federal courts will have to invent answers and develop federal common law.⁴²⁸ This approach has already led to peculiar results and, in many cases, results most likely neither intended nor desired by participants.⁴²⁹

Unfortunately, federal courts, including the Supreme Court, interpret ERISA’s preemption clause very broadly.⁴³⁰ As noted by Professor Langbein, “ERISA is a regulatory statute enacted to protect promised benefits against forfeiture on account of overreaching plan design or plan maladministration. ERISA was not designed to do the interpretive work of state wealth transfer law, that is, to resolve constructional problems concerning the transferor’s intent.”⁴³¹ Further, as pointed out by Professor Lawrence Waggoner in his article, *The Creeping Federalization of Wealth-Transfer Law*, ERISA contains other “gaps” such as those relating to tort law and contract law.⁴³² The idea that Congress passed a federal law (ERISA) relating to valuable assets (employee benefit plans) and intended it to supersede centuries of wealth transfer law—law that arose due to the innumerable problems arising from the transfer of assets—is naïve to the point of ignorance.⁴³³

421. *Id.*

422. See Langbein, *supra* note 404, at 1676.

423. See *id.*; see *Boggs v. Boggs*, 520 U.S. 833, 839 (1997).

424. See Langbein, *supra* note 404, at 1674.

425. See *id.* at 1676.

426. *Id.*

427. See *id.* at 1674; see also Maggie Fox, *Couple Has Baby from 24-Year-Old Frozen Embryo*, NBC NEWS (Dec. 19, 2017, 10:36 PM), <https://www.nbcnews.com/health/health-news/couple-has-baby-24-year-old-frozen-embryo-n83133> [perma.cc/884Q-5PFP].

428. See Langbein, *supra* note 404, at 1693.

429. See *id.* at 1696.

430. *Id.* at 1673.

431. *Id.* at 1674.

432. See Waggoner, *supra* note 73, at 1646.

433. *Id.* at 1640–42.

Today, employee benefits plans and IRAs are the most valuable assets owned by many people.⁴³⁴ Thus, wealth transfer issues, which are primarily state law issues, conflict with ERISA more often.⁴³⁵ According to federal judges and federal agents, as soon as ERISA was passed, all state wealth transfer laws that could possibly relate to employee benefit plans were completely preempted.⁴³⁶ To the extent federal courts and federal agencies continue to find otherwise applicable state wealth transfer laws preempted by ERISA, as noted, they will need to develop federal common law to address the wealth transfer issues presented.⁴³⁷ That is not a good approach, especially because federal judges and federal agents are far removed from the regular business of adjudicating wealth transfer issues.⁴³⁸

According to *Boggs*, ERISA preempts state community property laws in the case of qualified plans when the nonparticipant spouse predeceases the participant.⁴³⁹ The *Boggs* case will be analyzed more critically in Part X.

X. THE PROBLEM WITH CODE SECTION 408(g)

In general, section 408 of the Internal Revenue Code contains definitions and qualifications and provides rules relating to Individual Retirement Account (IRA) distributions and contributions.⁴⁴⁰ Section 408 is primarily an income tax provision relating to these accounts.⁴⁴¹ It is clearly not an estate and gift tax provision because, for the most part, the estate and gift tax provisions of the Code apply depending on the ownership of assets under applicable state law, including state marital property laws.⁴⁴²

As previously noted, section 408(d)(1) of the Code, relating to the taxation of IRA distributions, provides, “[e]xcept as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72.”⁴⁴³ Thus, section 72 of the Code, which contains the income tax rules applicable to distributions from annuities, is made applicable to IRAs and also applies to distributions from qualified plans per section 402(a).⁴⁴⁴

434. See McGrath, *supra* note 11.

435. See Wiedenbeck, *supra* note 80, at 311–12.

436. See Waggoner, *supra* note 73, at 1646–47.

437. See Langbein, *supra* note 404, at 1691–92; see Waggoner, *supra* note 73, at 1649; see also *Boggs v. Boggs*, 520 U.S. 833 (1997).

438. See Langbein, *supra* note 404, at 1695–96.

439. See *supra* Section VII.A.

440. See 26 U.S.C. § 408 (2006).

441. See 26 U.S.C. § 408(d).

442. See 26 U.S.C. § 2033 (2006); see also *Morgan v. Comm’r*, 309 U.S. 78, 80 (1940).

443. See 26 U.S.C. § 408(d)(1).

444. See *id.*; 26 U.S.C. § 402(a) (2006); 26 U.S.C. § 72 (2006).

As previously noted, section 408(g) states, "This section shall be applied without regard to any community property laws."⁴⁴⁵ The wording of section 408(g) is more broadly stated than what Congress intended.⁴⁴⁶ A review of the legislative history of section 408(g) indicates that Congress intended to ignore community property laws primarily with respect to contributions made to IRAs.⁴⁴⁷ For example, of the 1,578 pages of Title I of the Legislative History of ERISA, "community property" is specifically mentioned twelve times.⁴⁴⁸ Those twelve references to community property relate to contribution limits, excess contributions, and the taxation of lump sum distributions.⁴⁴⁹ In addition, of the 1,928 pages of Title II of the Legislative History of ERISA, community property is specifically mentioned only seventeen times, and solely in regard to the same types of matters, such as contribution limits.⁴⁵⁰ Nothing in the legislative history of section 408(g) indicates congressional intent to override community property law for all purposes with respect to IRAs, including ownership.⁴⁵¹ Furthermore, it is doubtful that Congresspersons from community property states would have passed ERISA, including section 408(g), if they understood that they were preempting community property ownership of IRAs accumulated by married persons living in community property states.⁴⁵² Such a draconian intent should not be assumed from the plain wording of section 408(g), despite the breadth of that wording.⁴⁵³

In the past, the IRS was more deferential in issuing private letter rulings when section 408(g) was implicated.⁴⁵⁴ In PLR 8040101, the IRS addressed the alleged community property ownership of two IRAs titled in the name of the surviving husband and the purported testamentary disposition of the community property one-half interest of the wife ("Taxpayer A") in those IRAs to persons other than the husband upon the wife's death.⁴⁵⁵ The ruling also requested a determination of the income tax consequences of making that distribution.⁴⁵⁶

PLR 8040101 involved a married couple living in a community property state.⁴⁵⁷ The husband accumulated employee benefit plans while the couple

445. See 26 U.S.C. § 408(g).

446. See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at I.R.C. § 1001 (1974)), reprinted in SUBCOMM. ON LABOR, 93RD CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (1976).

447. See *id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. See *id.*

452. See *id.*

453. See *id.*

454. See I.R.S. Priv. Ltr. Rul. 8040101 (July 15, 1980).

455. *Id.*

456. *Id.*

457. *Id.*

lived in that community property state.⁴⁵⁸ Upon the husband's retirement, he rolled over his qualified plans to two IRA rollovers titled in his name.⁴⁵⁹ The husband's IRA rollovers were community property under state law.⁴⁶⁰

The wife died while the couple lived in the community property state.⁴⁶¹ The wife's will left her community property one-half interest in all community property assets, including her community property one-half interest in the two IRA rollovers titled in the husband's name, to her siblings and her niece.⁴⁶² The husband, as executor of the wife's estate, was willing to distribute the wife's community property one-half interest in "his" IRA rollovers to the beneficiaries per the wife's will, but he sought a ruling that he would not be taxed on that distribution.⁴⁶³ In its ruling, the IRS stated the following with regard to section 408(g):

At issue herein is whether section 408(g) of the Code preempts Taxpayer A's community interest under State law in the two IRAs. The relationship of section 408(g) and the community property laws of State D must be evaluated against Congress' intent in enacting the section.

The House Committee Report set forth in H.R. Rep. No. 93-779, 93rd Cong., 2nd Sess., 1974-3 C.B. 244, 363, provides that community property laws are not to apply with respect to deductions taken for contributions made to IRAs. This provision clearly applies only to the deduction provisions under sections 219 and 220 of the Code. The committee report cites the example that if a husband and wife live in a community property State and only the husband has income, a contribution may be made by the husband based on his earnings even though under the laws of the State one-half of the income belongs to his non-working wife. However, the committee reports make no specific references to State community property laws as they are affected by the provisions under section 408 of the Code.

Section 408(d)(6) of the Code, and the Regulations thereunder, permit an individual's interest in an IRA to be transferred, in whole or in part, to his or her former spouse under a valid divorce decree or a written instrument incident to such divorce without such transfer being considered a taxable transfer. This provision indicates that Congress recognized the effect of State domestic relations law on IRAs.

As a general rule, the death of one spouse in a community property State has the same effect on the community as a divorce decree. Upon either death or divorce, the community is terminated and a division of the community property usually occurs. It would follow that a similar result should be reached whether the community is ended by divorce or death.

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

Because there is no specific language on what effect Congress intended Code section 408(g) to have, and because of the general rule of statutory construction which provides that federal statutes are construed as to not preempt State law unless that was the clear and manifest intent of Congress, we conclude that section 408(g) does not abrogate any substantive rights under State law.

It follows, in the instant case, that the classification of the two IRAs as community property is clearly a matter to be determined under the laws of State D. Therefore, in response to ruling request 1, we accept your determination that the two IRAs constitute community property under the laws of State D in which Taxpayer A had an undivided one-half interest.⁴⁶⁴

In PLR 8040101, the IRS ruled that: (i) the wife's community property one-half interest in the two IRA rollovers titled in the husband's name could be distributed to the wife's will beneficiaries, (ii) the wife's will beneficiaries would be treated as payees of the amounts distributed to them for federal income tax purposes, and (iii) the wife's will beneficiaries, as payees (not the husband), would be responsible for the income taxes on that distribution.⁴⁶⁵

Nineteen years after PLR 8040101, PLR 199937055 addressed: (i) whether the wife could have a community property interest in the IRA titled in her husband's name and (ii) whether, pursuant to the terms of a marital property agreement, an amount deemed to be owned by the wife could be transferred from the IRA in the husband's name to an IRA in the wife's name as a tax-free transfer.⁴⁶⁶ With regard to the section 408(g) issue, the IRS used the exact same language from PLR 8040101, quoted above, to discuss Section 408(g) except that (i) the paragraph quoted above to the effect that the death of the first spouse causes a termination and division of the community property was omitted because that situation was not applicable in the later ruling and (ii) the last sentence in the later ruling, comparable to the last sentence in the earlier ruling, indicated that the IRS was less willing to accept the facts supplied by the taxpayer:

It follows, in the instant case, that the classification of IRA X and IRA Y as community property is clearly a matter to be determined under the laws of State A. Therefore, in response to ruling request one, we conclude that Taxpayer B *may* have a community property interest in Taxpayer A's IRA X and IRA Y to the extent the existence of that interest is consistent with State A law (emphasis added).⁴⁶⁷

464. *Id.*

465. *Id.*

466. See I.R.S. Priv. Ltr. Rul. 199937055 (Sept. 17, 1999).

467. See *id.*

The ruling in PLR 199937055 was favorable in some respects but certainly not as favorable as the ruling in PLR 8040101.⁴⁶⁸ In PLR 199937055, the IRS ruled favorably that: (i) the wife can have a community property ownership interest in the IRA titled in the husband's name and (ii) the mere execution of the Marital Property Agreement by the spouses making the IRA titled in the husband's name "marital property" owned one-half by each spouse did not amount to a taxable event.⁴⁶⁹ However, in PLR 199937055, the IRS also ruled that if any amounts were transferred from the IRA titled in the husband's name to an IRA titled in the wife's name, the transfer would be treated as a taxable distribution.⁴⁷⁰

In PLR 199937055, noting that this was not a case involving the division of an IRA on divorce, which would implicate section 408(d)(1), the IRS said:

[E]ven if title does not determine ownership under applicable State law, and even if the IRA owner's spouse's property interests in the IRA are identical to the owner's under applicable State law, distributions from the IRA are to be taxed as if the *owner* is the sole owner of the IRA (emphasis added).⁴⁷¹

This statement, with its reference to the husband as the "owner" of the IRA, evidences a common law bias because "ownership" is a state law concept and the husband will be deemed to be the "owner" of the IRA only in a common law jurisdiction.⁴⁷² Under community property law, both the husband and wife co-own the IRA titled in the husband's name.⁴⁷³ A better choice of words would have been to refer to the husband as the "titled owner," rather than the "owner" of the IRA.⁴⁷⁴ "Titled owner" versus "owner" may seem to be a distinction without a difference but this is an important distinction in community property law.⁴⁷⁵

In PLR 201623001, the IRS declined either to accept as fact that the IRA in question was community property (as in PLR 8040101) or to indicate that the IRA in question could be community property (as in PLR 199937055).⁴⁷⁶ In addition, in PLR 201623001 there are no references to the lack of Congressional intent relating to section 408(g) as was present in both PLR 8040101 and PLR 199937055.⁴⁷⁷ Instead, in PLR 201623001, the IRS

468. See *id.*; I.R.S. Priv. Ltr. Rul. 8040101 (July 15, 1980).

469. I.R.S. Priv. Ltr. Rul. 8040101 (July 15, 1980).

470. See I.R.S. Priv. Ltr. Rul. 199937055 (Sept. 17, 1999); see also Noel C. Ice, *Article 7 Income Tax Issues*, TRUSTSANDESTATES.NET (Feb. 23, 2012, 3:22 PM) http://trustsandestates.net/assets/2004_07_Income_Tax_Issues_Distribution_And_Estate_Planning_For_Deferred_Compensation_And_IRA_Benefits.pdf [perma.cc/X5LJ-N3BC].

471. See I.R.S. Priv. Ltr. Rul. 199937055 (Sept. 17, 1999).

472. *Id.*

473. See *id.*

474. See *id.*

475. See *id.*

476. See *supra* Section VII.E.

477. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

stated: “In regard to the first ruling request, whether an amount of the inherited IRA for Taxpayer B is classified as Taxpayer A’s community property interest is a matter of state property law and not a matter of federal tax law. Accordingly, we decline to issue the requested ruling.”⁴⁷⁸ However, the IRS went on to say:

In regard to the second, third, and fourth ruling requests, Taxpayer B [Son] was the named beneficiary of the IRA of Decedent and the IRA has been retitled as an inherited IRA for Taxpayer B. Section 408(g) provides that section 408 shall be applied without regard to any community property laws, and, therefore, section 408(d)’s distribution rules must be applied without regard to any community property laws. Accordingly, because Taxpayer A [Wife] was not the named beneficiary of the IRA of Decedent and because we disregard Taxpayer A’s community property interest, Taxpayer A may not be treated as a payee of the inherited IRA for Taxpayer B and Taxpayer A may not rollover any amounts from the inherited IRA for Taxpayer B (and therefore any contribution of such amounts by Taxpayer A to an IRA for Taxpayer A will be subject to the contribution limits governing IRAs). Additionally, because Taxpayer B is the named beneficiary of the IRA of Decedent and because we disregard Taxpayer A’s community property interest, any “assignment” of an interest in the inherited IRA for Taxpayer B to Taxpayer A would be treated as a taxable distribution to Taxpayer B. Therefore, the order of the state court cannot be accomplished under federal tax law.⁴⁷⁹

Although the IRS in PLR 201623001 indicates it could not make a determination of whether the IRA in question was community property, its ruling actually precludes community property ownership of the IRA under state law because the son remains “stuck” as the recipient of 100% of the deceased husband’s IRA for federal income tax purposes.⁴⁸⁰ In PLR 201623001, IRS is no longer exercising the deference and restraint it showed in PLR 8040101 and PLR 199937055.⁴⁸¹ As noted, in those earlier rulings the IRS said:

Because there is no specific language on what effect Congress intended Code section 408(g) to have, and because of the general rule of statutory construction which provides that federal statutes are construed as to not preempt State law unless that was the clear and manifest intent of Congress, we conclude that section 408(g) does not abrogate any substantive rights under State law.⁴⁸²

478. *Id.*

479. *Id.*

480. *Id.*

481. See I.R.S. Priv. Ltr. Rul. 8040101 (July 15, 1980); see I.R.S. Priv. Ltr. Rul. 199937055 (Sept. 17, 1999); see I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

482. I.R.S. Priv. Ltr. Rul. 199937055 (Sept. 17, 1999).

It is clear from the wording in PLR 201623001 the IRS does not fully understand community property law and, perhaps, does not want to understand community property law.⁴⁸³ The wife requested that she be allowed to obtain *her* community property one-half ownership interest in the IRA titled in the husband's name because death causes a partition of community property.⁴⁸⁴ Thus, this is not a situation like the one in PLR 199937055 where the husband, as named IRA owner, was still living.⁴⁸⁵ If the wife's request had been honored in PLR 201623001, there would not have been a transfer or assignment of anything to the wife because the IRA titled in the husband's name was community property under state law and, therefore, the wife already owned in her own right fifty percent of the IRA titled in the husband's name.⁴⁸⁶ In addition, the wife, the taxpayer in PLR 201623001, did not request permission to make a contribution to an IRA, something that section 408(g) was designed to address.⁴⁸⁷

Just as in the state law *Street* case, the wife in PLR 201623001 had to file a state court lawsuit to try to obtain her ownership interest in the IRA titled in the husband's name that was distributable to her son as the named beneficiary to avoid making a taxable gift to son.⁴⁸⁸ As previously noted, state property laws and marital property laws are respected for purposes of the federal gift tax.⁴⁸⁹ The ownership of assets is directly related to the federal gift tax because it is the owner of an asset who has the right to make a gift of that asset.⁴⁹⁰ Absent a favorable ruling in PLR 201623001, however, and despite the state law determination that the IRA was community property on the husband's death, the son cannot satisfy the state court judgment without incurring severe tax consequences because he would have to pay immediate income taxes, as well as the section 72(t)(1) early withdrawal penalty, on the amount withdrawn from his inherited IRA that belongs to his mother (his father's wife).⁴⁹¹ In essence, the IRS ruled in PLR 201623001 that section 408(g) abrogates community property ownership interests in IRAs, at least for federal income tax purposes.⁴⁹² At the same time, community property may not be abrogated for federal gift tax purposes—a “double whammy” to the wife.⁴⁹³

483. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

484. *Id.*

485. *Id.*; see I.R.S. Priv. Ltr. Rul. 199937055 (Sept. 17, 1999).

486. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

487. See *id.*

488. See *id.* (And, presumably, the wife needed that half of the IRA for her own support after the husband's death.)

489. *Morgan v. Comm'r*, 309 U.S. 78, 80 (1940).

490. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

491. *Id.*

492. See *id.*

493. See *id.*

Note that the IRS's Publication 555 specifically states, "IRAs and ESAs by law are deemed to be separate property."⁴⁹⁴ Thus, without any due process safeguards or any federal court decision holding IRAs to be the separate property of the named IRA owner, the IRS has determined that IRAs are separate property. This is likely based on the wording in section 408(g).

Consider also the "plan documents rule" developed by federal courts in cases involving qualified plans under ERISA.⁴⁹⁵ The plan documents rule provides that, on the death of the plan participant, the plan administrator *must* distribute the deceased participant's qualified plan to the beneficiary actually named in the applicable plan documents (whether that is a beneficiary designation that was submitted by the plan participant himself or the default beneficiary designation per the plan documents).⁴⁹⁶ The distribution is to be made pursuant to the plan documents no matter how compelling conflicting state law might be, such as a state divorce revocation statute.⁴⁹⁷ The primary reason for the plan documents rule is based on the stated goals of ERISA.⁴⁹⁸ This rule developed in recognition that, in passing ERISA, Congress wanted to simplify the administration of qualified plans, including making distributions from qualified plans, to protect the plan, the plan participants, and the plan administrator.⁴⁹⁹ If distributions from qualified plans on the participant's death could be made pursuant to something other than the plan documents, plan administrators could end up making incorrect distributions and that could put plans at risk of having to make double distributions.⁵⁰⁰ While the plan documents rule is administratively helpful to plan administrators, it represents another example of exalting administrative concerns over ownership rights.⁵⁰¹

In PLR 201623001, although the provisions of section 408(g) were the alleged basis for the IRS's ruling, in effect, the IRS imposed a "plan documents rule" in that case and insisted that distribution of the decedent's IRA could only be made to the participant's son as the named beneficiary of the IRA per the applicable beneficiary designation.⁵⁰² In that ruling, the IRS further stated that the IRA beneficiary designation was binding for federal income tax purposes and, therefore, if the participant's son transferred any

494. I.R.S. Publication 555 (Rev. Feb. 2016).

495. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 303–04 (2009).

496. *Id.* at 300.

497. *See id.* at 302.

498. *See supra* Part IX.

499. *See* Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (1974).

500. *See generally Kennedy*, 555 U.S. at 301–02 (quoting that "plan documents . . . requirements that amount to a statutory checklist working to 'spare [an administrator] from litigation-fomenting ambiguities.'" (citing *Metro. Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994)).

501. *Id.* at 303.

502. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

amount of the IRA to the participant's surviving wife, the son would incur the income taxes, including penalty taxes, on that distribution.⁵⁰³

The result in PLR 201623001 is especially strict considering the hundreds of private letter rulings issued in cases involving qualified plans and IRAs that were made payable to an estate or trust as the beneficiary, rather than to the surviving spouse, in which the surviving spouse was allowed to roll over the deceased participant's plan or IRA into a spousal IRA rollover anyway, without suffering adverse income tax consequences.⁵⁰⁴ Those rulings will be referred to as the "IRA to trust to spouse rulings."⁵⁰⁵ Thus, the especially harsh treatment of the surviving spouse in PLR 201623001 appears to be another indication of a common law bias or even a hostility toward community property.⁵⁰⁶

Consider the actual wording used in PLR 201623001:

[B]ecause Taxpayer A [decedent's wife] was not the named beneficiary of the IRA of Decedent and because we disregard Taxpayer A's community property interest, Taxpayer A may not be treated as a payee of the inherited IRA for Taxpayer B [decedent's son] and Taxpayer A may not rollover any amounts from the inherited IRA for Taxpayer B (and therefore any contribution of such amounts by Taxpayer A to an IRA for Taxpayer A will be subject to the contribution limits governing IRAs). Additionally, because Taxpayer B is the named beneficiary of the IRA of Decedent and because we disregard Taxpayer A's community property interest, any "assignment" of an interest in the inherited IRA for Taxpayer B to Taxpayer A would be treated as a taxable distribution to Taxpayer B.⁵⁰⁷

Again, compare the language from PLR 201623001 above to the language used by the IRS in the hundreds of IRA to trust to spouse rulings in which the surviving spouse was permitted to roll over the participant's qualified plan or IRA upon his death to an IRA rollover in the surviving spouse's name without adverse tax consequences, even though she was not named as the beneficiary in the beneficiary designation. For example, in PLR 201844004, the IRS stated:

Decedent maintained an IRA with a custodian at the time of his death and named the Trust as the primary beneficiary of Decedent's IRA. The assets of Decedent's IRA were transferred via a trustee-to-trustee transfer, to an IRA for the benefit of the Trust (the IRA).

503. *See id.*

504. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201844004 (Nov. 2, 2018); I.R.S. Priv. Ltr. Rul. 201225020 (June 22, 2012); I.R.S. Priv. Ltr. Rul. 201125047 (June 24, 2011); I.R.S. Priv. Ltr. Rul. 200935045 (Aug. 28, 2009).

505. *See id.*

506. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016); *see supra* Part III.

507. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

Taxpayer intends to distribute the assets of the IRA to herself, as sole beneficiary of the Trust, and roll over the distribution into one or more IRAs in her own name.

...

Section 1.408-8, Q&A-5, provides that a surviving spouse of an individual may elect to treat the spouse's entire interest as a beneficiary in the individual's IRA as the spouse's own IRA. In order to make this election, the spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA. If a trust is named the beneficiary of the IRA, this requirement is not satisfied even if the spouse is the sole beneficiary of the trust.

Under the preceding facts, Decedent's IRA passed to the Trust upon decedent's death. Under these circumstances, Taxpayer, as the surviving spouse of the Decedent, is not permitted to treat the IRA as her own, because the Trust was named the beneficiary of Decedent's IRA. However, because Taxpayer is the trustee and sole beneficiary of the Trust and is entitled to all income and the entire corpus of the Trust, for purposes of applying section 408(d)(3)(A) to the IRA, Taxpayer is effectively the individual for whose benefit the account is maintained. Accordingly, if Taxpayer receives a distribution of the proceeds of the IRA, she may roll over the distribution (other than amounts required to have been distributed or to be distributed in accordance with section 401(a)(9)) into one or more IRAs established and maintained in her name.⁵⁰⁸

Admittedly, in the hundreds of IRA to trust to spouse rulings, the surviving spouse is usually the trustee of the trust that was named as the beneficiary of the deceased participant's IRA and, as trustee, the spouse usually has sufficient power under the trust instrument to allocate and distribute the IRA passing to, and owned by, the trust to herself.⁵⁰⁹ In contrast, per the facts in PLR 201623001, the surviving spouse did not have control over the husband's IRA after his death, although the state court's ruling can be viewed as imposing a constructive trust on the IRA that was titled in the husband's name at death and re-titled as an inherited IRA in the son's name after the husband's death to the extent of the wife's community property ownership interest in that IRA.⁵¹⁰ The bottom line, however, is that in the hundreds of favorable IRA to trust to spouse rulings, the IRS has allowed a transfer or assignment of the named beneficiary's IRA to a non-named beneficiary of that IRA, the surviving spouse, with no adverse

508. I.R.S. Priv. Ltr. Rul. 201844004 (Nov. 2, 2018).

509. See I.R.S. Priv. Ltr. Rul. 201225020 (June 22, 2012); see I.R.S. Priv. Ltr. Rul. 201125047 (June 24, 2011); see I.R.S. Priv. Ltr. Rul. 200935045 (Aug. 28, 2009) (examples illustrating the usual outcome for spouses).

510. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

income tax consequences.⁵¹¹ Meanwhile, in PLR 201623001, the IRS does not permit the same result.⁵¹² Thus, in the hundreds of IRA to trust to spouse rulings in which the IRS allowed the surviving spouse to do a spousal IRA rollover even though the spouse was not the named beneficiary, the IRS did not appear to be too concerned with the actual IRA beneficiary designation or imposition of a plan documents rule.⁵¹³ Also note that in both PLR 201844004 and PLR 201623001, the deceased participant's IRA had already been transferred to an inherited IRA for the benefit of the named beneficiary, so there is no difference on that point. Yet in PLR 201844004, the IRS willingly considered the equities of the situation and showed compassion for the surviving spouse.⁵¹⁴ Not so in PLR 201623001, despite the fact that the surviving wife's interest in the decedent's IRA in PLR 201623001 was a direct *ownership interest* in the IRA as of the decedent's date of death, while the surviving spouse's interest in the decedent's IRA in PLR 201844004 (and in the hundreds of IRA to trust to spouse rulings) was not an actual ownership interest until she took post-death action with respect to the trust that became the owner of the IRA on the decedent's death.⁵¹⁵ Again, a common law or an anti-community property law bias is evident.⁵¹⁶

Compare the result in PLR 201623001 to the result in the *Boggs* case in terms of the rationale for finding federal preemption of community property.⁵¹⁷ Per the majority in *Boggs*, Congress did not intend for the participant's retirement plans to be distributed to able-bodied children in a younger generation but, instead, to make sure the participant and his spouse could fully use the participant's retirement plans during retirement.⁵¹⁸ In PLR 201623001, the IRS shows no concern for the retirement needs of the surviving wife.⁵¹⁹ Instead, it ruled in favor of the younger generation able-bodied son's right to the entire IRA.⁵²⁰

Section 408(g) is too broadly worded and was not carefully constructed.⁵²¹ A federal purpose exists for ignoring community property law with respect to contributions to IRAs.⁵²² But what federal purpose is

511. See I.R.S. Priv. Ltr. Rul. 201225020 (June 22, 2012); see I.R.S. Priv. Ltr. Rul. 201125047 (June 24, 2011); see I.R.S. Priv. Ltr. Rul. 200935045 (Aug. 28, 2009).

512. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

513. See *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 302–04 (2009).

514. See I.R.S. Priv. Ltr. Rul. 201225020 (June 22, 2012); I.R.S. Priv. Ltr. Rul. 201125047 (June 24, 2011); I.R.S. Priv. Ltr. Rul. 200935045 (Aug. 28, 2009).

515. See *id.*

516. See *id.*

517. See *id.*; see also *Boggs v. Boggs*, 520 U.S. 833, 844 (1997).

518. See *Boggs*, 520 U.S. at 841–44 (retirement plans are for participant and spouse, not able-bodied younger generation people).

519. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

520. *Id.*

521. See 26 U.S.C. 408(g) (2006).

522. See generally Robert Bloink & Williams H. Byrnes, *Community Property: When Federal-State IRA Rules Collide*, THINK ADVISOR, (Sept. 27, 2018, 1:11 AM), <https://www.thinkadvisor.com/2016/09/27/community-property-when-federal-state-ira-rules-co/> [perma.cc/33VL-32N9].

served by ignoring community property law with respect to distributions from IRAs based on state law property ownership?⁵²³ If a married person living in a community property state takes a distribution from his community property IRA, that community income is nearly always reported in a joint income tax return because the majority of married couples file joint federal income tax returns.⁵²⁴ Or, if the spouses in a community property state who have not altered community property ownership via a marital property agreement file separate income tax returns, they each must report one-half of the community income in their separate returns.⁵²⁵ Thus, married couples in community property states cannot play income tax games relating to distributions from IRAs during the participant's life even if the IRA is deemed community property.⁵²⁶ If anything, spouses in common law states have a greater ability to reduce their total income taxes payable by filing separate income tax returns, especially in cases in which one spouse has large IRA distributions and the other spouse has little income and a lot of deductible items.⁵²⁷

Again, assuming a secondary purpose of section 408(g) was to protect the federal government's right to income taxes with respect to distributions made from IRAs, one should examine the ability to avoid or reduce income taxes if the community property ownership of IRAs is respected in the case of distributions made after the participant's death.⁵²⁸ If the surviving spouse can always claim her community property one-half ownership interest in the participant's IRA when the participant dies, regardless of the beneficiary designation on file with the IRA custodian, distributions to the surviving spouse from her one-half of the IRA will be based on her life expectancy and not the life expectancy of the named beneficiary.⁵²⁹ Assuming the surviving spouse is in the same generation as the participant, allowing her to claim her community property ownership interest in the IRA will not result in cheating the IRS out of income taxes with respect to her half of the IRA.⁵³⁰ Because the participant retains the sole right to complete the beneficiary designation form for the IRA titled in his name, in a common law state, ignoring state law spousal inheritance rights that might apply to IRAs, the IRA participant in a

523. Jerry A. Kasner & Alvin J. Golden, *An Overview of Community Property Law*, ACTEC (Jan. 2009), https://www.actec.org/assets/1/6/A99_Kasner_Golden_Overview-of-Community-Property-Law.pdf [perma.cc/J7L5-WGTK].

524. See generally Robert W. Wood, *95% of Married Couples File Taxes Jointly, Should You Join the Other 5%?*, FORBES (Mar. 21, 2016, 8:44 AM), <https://www.forbes.com/sites/robertwood/2016/03/21/irs-says-95-of-marrieds-file-taxes-jointly-should-you-join-the-5/> [perma.cc/4BKH-4KHQ] (stating that majority of married couples file joint federal income tax returns).

525. See *U.S. v. Mitchell*, 403 U.S. 190, 197 (1971) (stating that couple in community property state filing separately each reports half of community property income and Form 1040 instructions).

526. See *id.*

527. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

528. 26 U.S.C. § 408(g) (2006).

529. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

530. See *id.*

common law state could leave the entire IRA to anyone, including a much younger beneficiary.⁵³¹ Under current laws, that much younger beneficiary could take distributions over his life expectancy, stretching the distributions over a long period of time, resulting in lower income taxes payable each year compared to the amount of income taxes payable by an older generation beneficiary, such as the participant's surviving spouse.⁵³² Because the deceased participant may name younger people as beneficiaries of his IRA, thereby lengthening the distribution period of the IRA after his death, why is it a problem to give the surviving spouse her community property ownership interest in the IRA on the participant's death?⁵³³ It is difficult to see how married IRA owners in community property states could game the system to avoid income taxes on IRA distributions using community property law.⁵³⁴ Income taxes will be paid on IRA distributions by the recipients of those distributions.⁵³⁵

PLR 201623001 is a harsh decision and can only be upheld based on a broad interpretation of section 408(g)—an interpretation broader than what was most likely intended by Congress.⁵³⁶ It is difficult to understand the IRS's tax concern if community property law had been observed in the case presented in PLR 201623001.⁵³⁷ If anything, the IRS potentially could have received larger amounts of taxable income if 50% of the IRAs titled in the husband's name had been allocated to the wife versus 100% to the son because the wife is much older than the son, and larger required minimum distributions would be payable to her.⁵³⁸

Switch the analysis to the case of the nonparticipant dying spouse prior to the participant.⁵³⁹ If the nonparticipant spouse dies first, her community property one-half interest in the IRAs titled in the participant's name is, arguably, a probate asset, distributable pursuant to her will.⁵⁴⁰ If she names someone other than the participant as the beneficiary of that interest, distributing her interest to her named beneficiary will trigger income taxes and, in some cases, an early distribution penalty for the participant.⁵⁴¹ Despite the favorable ruling in PLR 8040101, normally, if the participant takes a distribution from the IRA titled in his name to make the distribution

531. *See id.*

532. *See id.*

533. *See id.*; *see also* Robert S. Keebler, *Naming IRA Beneficiaries*, *ULTIMATE EST. PLANNER* (July 10, 2014), <https://ultimateestateplanner.com/2014/07/10/naming-ira-beneficiaries/> [perma.cc/5EZQ-M2RS] (describing the different ways to name IRA beneficiaries).

534. *See generally* S. Andrew Pharies, *Community Property Aspects of IRAs and Qualified Plans*, 13 *PROB. & PROP.* 33, 38 (1999) (outlining the *Boggs* decision in the context of community property).

535. *See* 28 U.S.C. § 408(d)(1) (2006).

536. *See id.* § 408(g); *see also* I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

537. I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

538. *Id.* (IRS ruled in favor of the son).

539. *Id.*; The author is switching the case facts for example purposes.

540. *See supra* Part V.

541. *See supra* Part V.

to the nonparticipant spouse's will beneficiaries, he will be taxed on that distribution.⁵⁴² And, if he is too young at the time of the distribution, he will also be subject to the early distribution penalty per section 72(t).⁵⁴³ Thus, practitioners in community property states who represent the wife's will beneficiaries in a case like that often prepare IRA agreements between the wife's will beneficiaries and the participant. The agreement recognizes the wife's will beneficiaries' interest in the IRA titled in the participant's name, but does not mandate an immediate distribution of that interest. The agreement also requires the participant to name the wife's will beneficiaries as the beneficiaries of that portion of the IRA titled in the participant's name. The agreement further requires the participant to make a net after-tax distribution of each IRA withdrawal in the appropriate shares to the wife's will beneficiaries if, as and when received in view of the fact that the income taxes on each IRA distribution will be imposed on the participant. In most cases, the IRS collects income taxes from the participant in these cases, so no income taxes are lost by the federal government when the nonparticipant spouse's community property ownership interest in IRAs titled in the participant's name is recognized if she dies first.⁵⁴⁴

Ownership matters in a death situation.⁵⁴⁵ As previously noted, a deceased person cannot continue to own anything or earn income.⁵⁴⁶ Thus, when a person dies, ownership changes hands.⁵⁴⁷ If the deceased person was married and living in a community property state at death, his death causes a partition of the community property.⁵⁴⁸ The surviving spouse is entitled to retain ownership of her one-half of the community property.⁵⁴⁹ Federal law should not deprive the surviving spouse of her ownership interest in community property for weak reasons like administrative convenience or theoretical risks to the government's collection of income taxes that do not really exist.⁵⁵⁰ Section 408(g) is one of the most poorly worded provisions in the Internal Revenue Code and the way it has been interpreted has had the

542. See I.R.S. Priv. Ltr. Rul. 8040101 (July 15, 1980).

543. See 26 U.S.C. § 72(t) (2006).

544. See I.R.S. Priv. Ltr. Rul. 8040101 (July 15, 1980).

545. See I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016).

546. See generally Elena Holodny, *Here's What Happens With Your Stuff After You Die*, BUS. INSIDER (July 3, 2018, 9:54 AM), <https://www.businessinsider.com/what-happens-with-finances-when-you-die-2015-9> [perma.cc/S82S-5ASZ] (citing the various transfer methods of an individual's property after death).

547. *Id.*

548. See generally Emily G. Irwin et al., *Community/Marital Property Rights of Spouses at Death*, http://www.minncle.org/attendeemats/29013/HO_IrwinNelsonSjoberg_CommunityMaritalPropertyRights.pdf [perma.cc/MF5T-CC6G] (last visited Oct. 8, 2018) (describing that "[i]n a community property state, upon the death of a spouse, the surviving spouse is the owner of one-half of community property regardless of how the property is titled").

549. *Id.*

550. *Id.*; see *Boggs v. Boggs*, 520 U.S. 833, 839 (1997).

effect of killing community property. For this reason, section 408(g) should be modified.⁵⁵¹

XI. THE PROBLEM WITH THE *BOGGS* DECISION

A. *A Focus on REACT*

As noted in the *Boggs* case, the U.S. Supreme Court held that ERISA preempts community property law in the case of undistributed pension plan benefits when the nonparticipant spouse predeceases the participant.⁵⁵² In addition to ERISA's preemption provision, another basis for the Court's ruling in *Boggs* was the spousal annuity provisions that the Retirement Equity Act of 1984 ("REACT") added to ERISA.⁵⁵³

Although ERISA, as originally enacted, included some spousal rights provisions, REACT greatly expanded and strengthened those provisions.⁵⁵⁴ REACT mandated that the surviving spouse of a participant in a qualified plan receive certain benefits on his death.⁵⁵⁵ In the case of defined benefit plans or pension plans, the surviving spouse is entitled to a retirement annuity for her life.⁵⁵⁶ In the case of defined contributions plans, such as 401(k) plans, the surviving spouse must be named as the participant's primary beneficiary.⁵⁵⁷ These spousal rights can be overridden if the participant waives them and the participant's spouse consents to that waiver by signing the necessary written documentation at the proper time and providing it to the plan administrator.⁵⁵⁸ However, these spousal rights per REACT are default rules that apply to all married participants of qualified plans and many plan participants do not waive them.⁵⁵⁹

Viewing the REACT provisions from the standpoint of marital property law, the REACT provisions were passed based on a common law mind set and the paternalism that underlies the common law marital system.⁵⁶⁰ When Congress passed REACT, President Ronald Reagan noted:

An end to inequities in the provision of pension benefits to women has been a top priority of my administration . . .

551. See *infra* Part X; see I.R.S. Priv. Ltr. Rul. 201623001 (June 3, 2016); see 26 U.S.C. § 408(g) (2006).

552. *Boggs v. Boggs*, 520 U.S. 833, 852 (1997).

553. *Id.* at 841–44.

554. See Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984).

555. *Id.*

556. *Id.* (adding to ERISA a qualified joint and survivor annuity for surviving spouse of defined benefit (pension) plan participant).

557. *Id.* (adding to ERISA spouse as primary beneficiary of defined contribution plan participant).

558. *Id.* (providing waiver of spousal rights).

559. See *id.*

560. *Id.*; see *supra* Part III.

Existing pension rules, when originally enacted, did not fully anticipate the dual roles many women have come to play as both members of the paid labor force and wives and mothers during periods of full-time work in the home . . .

The Retirement Equity Act also clarifies that each person in a marriage has a right to benefit from the other's pension. No longer will one member of a married couple be able to sign away survivor benefits for the other . . .⁵⁶¹

Congress passed REACT in 1984 to protect both working women, who frequently earned less than working men at that time, and women who opted out of the paid labor force for periods of time to work in the home.⁵⁶² In view of the common law marital system in effect in the majority of states, women sustained an economic disadvantage.⁵⁶³ In a common law state, the husband owned 100% of his employee benefit plans, which were usually much larger than the employee benefits owned by his wife, if, in fact, she owned an interest in any such plans in her own right.⁵⁶⁴ In view of that economic disparity, society viewed wives as dependents of their husbands.⁵⁶⁵ Apparently, not all husbands voluntarily provided sufficient support for their wives upon their deaths, whether that was intentional or the result of making certain elections, such as selecting a single life annuity at retirement that hurt their wives.⁵⁶⁶ Thus, the federal government determined that it needed to mandate that surviving spouses, primarily surviving wives, were entitled to spousal benefits upon their husbands' deaths from the qualified employee benefit plans in which their husbands participated.⁵⁶⁷ President Reagan stated, "[n]o longer will one member of a married couple be able to sign away survivor benefits for the other."⁵⁶⁸ Actually, in passing REACT, the federal government signed away the ownership rights of millions of spouses—the nonparticipant spouses who predecease participant spouses and live in community property states.⁵⁶⁹

561. Gerhard Peters & John T. Woolley, *Statement on Signing the Retirement Equity Act of 1984*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=40284> [perma.cc/7RGT-244F] (last visited Oct. 8, 2018).

562. See, e.g., Edmund T. Donovan, *The Retirement Equity Act of 1984: A Review*, 48 SOCIAL SEC. BULLETIN 38 (May 1985), <https://www.ssa.gov/policy/docs/ssb/v48n5/v48n5p38.pdf> [perma.cc/89FJ-C7VR].

563. See *id.*; see also Scott Greene, Note, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 88–89 (1979) (discussing the rights of each spouse under the community property system).

564. *Id.* at 88.

565. *Id.*

566. See Donovan, *supra* note 562, at 41.

567. *Id.* at 41–42.

568. See Peters & Woolley, *supra* note 561.

569. See *supra* Part VII.

As previously noted, historically and especially after World War II, the husband was the sole breadwinner for the family.⁵⁷⁰ Married women were encouraged to “go home” after the war to open up jobs for returning GIs and to serve as “homemakers” for their husbands and children.⁵⁷¹ In the common law states, the husband owned virtually all of the assets accumulated during the marriage, including the employee benefit plans provided to husbands by their employers.⁵⁷² If the wife worked outside the home in 1984 when REACT was passed, she usually worked a part time, lower-paying job which caused her retirement plans to have less value than her husband’s retirement plans.⁵⁷³ It is easy to see why wives and children were considered “dependents” of husbands in the common law states.⁵⁷⁴

Long before REACT was passed, the legislatures in most common law jurisdictions determined that not all husbands were willingly providing the level of support necessary for their wives and children upon their deaths.⁵⁷⁵ Thus, state legislatures in the common law states passed laws that mandated that the husband leave at least a portion (often, one-third) of his assets to his wife upon his death.⁵⁷⁶ Compare that philosophy, which still exists in the common law states, to the philosophy and marital property ownership rules in the community property states.⁵⁷⁷

As previously noted, the community property marital system is much more egalitarian, and less paternalistic, than the common law marital system.⁵⁷⁸ Community property is based on the idea that marriage is a partnership and both spouses are considered equal partners in that marital partnership.⁵⁷⁹ While community property states differ, in general, spouses own all assets acquired during the marriage by either spouse, except gifts, inheritances, and assets acquired with separate property, as community property.⁵⁸⁰ This is true even if one spouse works a high-paying job and the other spouse works a low-paying job, or no job outside the home.⁵⁸¹ Pursuant

570. See Mettler, *supra* note 21.

571. See STRIKING WOMEN, *supra* note 25.

572. See Mettler, *supra* note 21.

573. See Guilder, *supra* note 28.

574. See Oliphant & Ver Steegh, *supra* note 22.

575. See generally *id.* (stating that husband had to support his wife to “counterbalance” her legal disabilities).

576. See Rick Geddes & Paul J. Zak, *The Rule of One-Third*, 31 J. LEGAL STUD. 119, 119 (2002).

577. See generally *id.* (comparing property division regimes).

578. See *Boggs v. Boggs*, 82 F.3d 90, 95 (5th Cir. 1996), *rev’d*, 520 U.S. 833 (1997) (asserting that the community property system “conceives of marriage as a partnership in which each partner is entitled to an equal share.”).

579. See Oliphant & Ver Steegh, *supra* note 22.

580. *Community Property Law*, IRM § 25.18.1.2.2, ¶ 3.

581. See, e.g., CAL. FAM. CODE § 751 (West 2017) (stating that the spouse’s interests in community property are coexisting and equal); see Kaycee Cuaira, *8 Things You Should Know If You Live in a Community Property State*, TOMORROW, <https://tomorrow.me/trust-worthy/planning-ahead/7-things-you-should-know-if-you-live-in-a-community-property-state/> [perma.cc/BH2R-AJHF] (last visited Nov. 20, 2018).

to community property law, both spouses are deemed to be contributing to the well-being and success of the marital partnership.⁵⁸² Therefore, both spouses share equally in the fruits of their labors as marital partners.⁵⁸³ Again, it does not matter if the asset acquired during the marriage is titled solely in the husband's name, solely in the wife's name, or in both spouses' names.⁵⁸⁴ Community property states are not title states.⁵⁸⁵ Ownership of assets is based on how and when the assets are acquired, rather than the title of the asset.⁵⁸⁶

In contrast, in the common law states, the contributions toward the marriage made by a stay at home spouse are basically ignored in determining ownership of the assets accumulated during the marriage.⁵⁸⁷ If, for example, the husband worked outside the home and the wife worked inside the home (not an unusual situation during the 20th century), all compensation paid to the husband—including his salary, bonuses, and employee benefits—were deemed to be owned 100% by the husband.⁵⁸⁸ In that case, even though the wife may have worked just as hard at home, taking care of the children and managing the home, she ended up owning no assets except, perhaps, one-half of the couple's home if titled in both spouses' names.⁵⁸⁹ In fact, because wives in common law states owned so few assets of their own, causing them to be more or less dependent on their husbands, the common law states passed laws mandating that a husband provide certain benefits to his wife upon his death.⁵⁹⁰

In addition to state laws mandating certain spousal inheritance rights on the death of the first spouse, federal law also attempts to fix the economic problems caused by the common law marital property system, but does so at the expense of the community property marital property system.⁵⁹¹ While these laws may have helped women in the past, the underlying theory demeans women in the long run because it treats married women as dependents of their husbands rather than as equal partners in the marital partnership.⁵⁹²

582. See *Community Property*, *supra* note 117, at § 40 (“Whatever is acquired during marriage by talent, toil, or other measure of productivity of either spouse is community property, and thus any spouse’s personal income during marriage is community property.”).

583. See *id.*

584. See Cuaira, *supra* note 581.

585. See *Community Property*, *supra* note 117, at § 19.

586. See *id.*

587. See *supra* Part II.

588. Mettler, *supra* note 21.

589. See *id.*

590. See Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticisms and Suggestions for Reform*, 67 CORNELL L. REV. 45, 46–50 (1981).

591. See Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. REV. 455, 457–58 (2003).

592. See *id.*

Assume a particular common law state requires the deceased spouse to leave one-third of his estate to his surviving spouse.⁵⁹³ Using a simple example, assume the husband lived and worked in a common law state and accumulated \$600,000 by the time of his death. Although the husband would have been the sole owner of that entire \$600,000 per applicable state law, he would have been required by state law to leave \$200,000 of what he owned to his wife upon his death. If that same husband had lived and worked in a community property state and accumulated \$600,000 as community property by the time of his death, his wife would have owned one-half of it, or \$300,000, in her own right, when her husband died. In summary, the historical basis of the common law marital system is paternalism, dependency, and individualism, while the historical basis of the community property marital system is equality and recognition of all contributions made by both spouses toward the marital partnership.⁵⁹⁴

If the community property marital system had been the marital system in effect in all fifty states and the District of Columbia in 1984, it is doubtful that Congress would have passed the spousal rights provisions in ERISA, as amended by REACT, because wives would have owned, in their own right, fifty percent of the qualified plan benefits accumulated by their husbands as plan participants.⁵⁹⁵

B. Criticism of *Boggs*

From the standpoint of a community property law practitioner, the Supreme Court's decision in *Boggs* clearly evidences a common law bias.⁵⁹⁶ In addition, there are many aspects of the majority opinion in *Boggs* that are either sloppy or overreaching.⁵⁹⁷

First, the Court does not present the facts in *Boggs* clearly.⁵⁹⁸ Isaac's employer provided four different employee benefits to Isaac: (i) a "savings plan" (presumably a defined contribution plan), (ii) an Employee Stock Ownership Plan ("ESOP"), (iii) a "true" pension plan (i.e., a defined benefit plan), and (iv) a group term life insurance plan.⁵⁹⁹ While all four plans were qualified plans under ERISA during the time when Isaac was working for his employer, the majority opinion in *Boggs* lumped the first three of these plans

593. The following statements are an illustration by the author for example purposes.

594. See generally Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990) (surveying the history of marital property laws and citing "legislation designed to remove disabilities the common law placed on married women, shed light on the origins of community property").

595. See *id.*; see also 29 U.S.C. § 1055 (1994).

596. See *supra* Part VII.

597. See generally *Boggs v. Boggs*, 520 U.S. 833, 834 (1997) (rejecting the strength of state law in the face of a "direct clash" between state and federal law).

598. *Id.* at 836–39.

599. *Id.* at 836.

together and referred to them all as “pension plan benefits,” although only one was a “true” pension plan.⁶⁰⁰

There are three crucial dates in the *Boggs* case: the date when Dorothy died (August 14, 1979); the date when Isaac retired (September 1, 1985); and the date when Isaac died (February 16, 1989).⁶⁰¹ The assets in *Boggs* differed—both in character and in value—on the three different dates.⁶⁰² The majority of the U.S. Supreme Court in *Boggs* framed the issue as based on the date when Dorothy died, but then supported its decision based on what happened after Isaac died.⁶⁰³ The majority in *Boggs* focused on the issue of what Dorothy could dispose of upon her death, while the dissent examined what the sons actually sought after Isaac’s death—primarily an accounting.⁶⁰⁴

More specifically, the opinions of the District Court, the Fifth Circuit and the Supreme Court all state that, at the time of Dorothy’s death, Isaac was a participant in the Bell System Savings Plan for Salaried Employees (the Savings Plan).⁶⁰⁵ Again, it appears that the Savings Plan was a defined contribution plan, although that fact is not clearly stated in any of the three opinions.⁶⁰⁶ All three opinions state that Isaac’s interest in the Savings Plan had a value when Dorothy died of \$42,388.57.⁶⁰⁷ Accordingly, Dorothy’s community property one-half interest in the Savings Plan was valued at \$21,194.29 in the Sworn Descriptive List of Assets (Inventory) filed in the succession proceedings for Dorothy’s estate.⁶⁰⁸ No information was provided regarding any of the other employee benefit plans as of Dorothy’s date of death.⁶⁰⁹ However, it is clear that, as of Dorothy’s date of death, Isaac was still working for South Central Bell and participating in one or more qualified employee benefit plans provided by his employer.⁶¹⁰

Although Isaac and Dorothy had been married for thirty years and Isaac had been working for South Central Bell the entire time by the date of Dorothy’s death, the facts as stated by the federal courts in the *Boggs* cases indicate that, when Isaac retired on September 1, 1985, a mere six years after Dorothy’s death, his retirement benefits had increased dramatically in value.⁶¹¹ At the time of Isaac’s retirement on September 1, 1985, Isaac’s

600. *Id.* at 834.

601. *Id.* at 835–36, 855.

602. *See id.*

603. *See id.* at 855.

604. *See id.* at 834, 872.

605. *Id.* at 836.; *see Boggs v. Boggs*, 82 F.3d 90, 94 (5th Cir. 1996), *rev’d*, 520 U.S. 833 (1997); *Boggs v. Boggs*, 849 F. Supp. 462, 463 (E.D. La. 1994), *rev’d*, 520 U.S. 833 (1997).

606. *See Boggs*, 849 F. Supp. at 463.

607. *See id.*

608. *See id.* at 462.

609. *See id.* at 463–64.

610. *Id.*

611. *Boggs*, 520 U.S. at 834–39; *Boggs v. Boggs*, 82 F.3d 90, 93–94 (5th Cir. 1996), *rev’d*, 520 U.S. 833 (1997).

interest in the Savings Plan was worth \$151,628.94.⁶¹² Compare that to the value of the Savings Plan six years earlier when Dorothy died on August 14, 1979: \$42,388.57.⁶¹³ Thus, in six years, Isaac's Savings Plan increased in value by more than 350%.⁶¹⁴ Note that the S & P 500 Index increased in value by 9.263%, annualized, over this same time period.⁶¹⁵ In addition, at the time of his retirement, Isaac also owned an interest in the Bell South ESOP that resulted in Isaac receiving 96 shares of AT&T stock.⁶¹⁶ AT&T common stock was trading at approximately \$6.83 per share in early September 1985, so Isaac's shares were worth approximately \$655.68 when he retired.⁶¹⁷ Further, Isaac was also a participant in a defined benefit plan, or pension plan, sponsored by his employer because the facts indicate that Isaac received a \$1,777.67 pension per month upon his retirement.⁶¹⁸ Still further, Isaac's employer sponsored a group term life insurance program for its employees because the three federal court opinions state that Sandra was named as the beneficiary of Isaac's insurance policy with the company.⁶¹⁹

It is likely that Isaac was a participant in the ESOP and in the defined benefit plan at the time of Dorothy's death even though only the Savings Plan was included in the inventory filed for Dorothy's estate.⁶²⁰ Indeed, the Supreme Court's decision rests on the premise that Isaac was a participant in a "pension plan" at the time of Dorothy's death.⁶²¹ However, one cannot help but notice the huge increase in the total value of Isaac's employee benefits from the date of Dorothy's death on August 14, 1979 to Isaac's retirement on September 1, 1985, and doubt that the facts as stated in the federal court opinions are correct.⁶²²

Certain activities took place (i) when Dorothy died, (ii) when Isaac retired, and (iii) when Isaac died.⁶²³ When Dorothy died, her will was admitted to probate.⁶²⁴ As part of the succession proceedings for Dorothy's estate, the filed inventory reflected Isaac's savings plan and Dorothy's community property ownership interest in Isaac's savings plan.⁶²⁵ Per Dorothy's will, Isaac was given one-third of Dorothy's estate outright, plus

612. See *Boggs*, 849 F. Supp. at 463.

613. *Id.*

614. *Id.*

615. *S&P 500 Return Calculator, with Dividend Reinvestment*, DQYDJ (Oct. 4, 2018) <https://dqydj.com/sp-500-return-calculator> [perma.cc/ZN83-N32M] (period of Aug. 1979 to Sept. 1985).

616. *Boggs*, 849 F. Supp. at 464.

617. YAHOO! FIN., <https://finance.yahoo.com/quote/T/history?period1=494398800&period2=496904400&interval=1d&filter=history&frequency=1d> [perma.cc/HX9G-H2FH] (last visited Oct. 4, 2018) (AT&T stock data for Sept. 1985).

618. *Boggs*, 849 F. Supp. at 463–64.

619. *Id.* at 464.

620. See *id.*

621. *Boggs v. Boggs*, 520 U.S. 833, 856 (1997).

622. See *id.*

623. *Id.* at 835–36, 855.

624. See *Boggs*, 520 U.S. at 836.

625. *Id.* at 836–37.

a usufruct, similar to a life estate, in the other two-thirds of Dorothy's estate, with the naked ownership, akin to a remainder interest, in the couple's three sons.⁶²⁶ Thus, even though Dorothy's date of death is treated as the crucial date of the issue decided by the Supreme Court in *Boggs*, nothing actually happened at that time that (i) affected Isaac's control, use and enjoyment of his employee benefit plans, or (ii) interfered with the administration of any of Isaac's employee benefit plans by the plan administrator.⁶²⁷

When Isaac retired, he took a lump sum distribution of his savings plan and rolled it over to an IRA rollover.⁶²⁸ He also took shares of AT&T stock in kind from the ESOP.⁶²⁹ Thus, those two benefits ceased to be part of a qualified plan upon Isaac's retirement.⁶³⁰ Isaac began receiving \$1,777.67 per month from his pension plan, representing his part of a joint and survivor annuity.⁶³¹ Obviously, the group life insurance plan paid no benefits at the time of Isaac's retirement.⁶³²

When Isaac died, his IRA rollover was worth \$180,778.05.⁶³³ Sandra was the 100% primary beneficiary of Isaac's IRA rollover per the beneficiary designation on file with the IRA custodian.⁶³⁴ In addition, as a result of Isaac's death, Sandra began receiving a survivor annuity from Isaac's pension plan (most likely in the amount of \$1,777.67 per month, based on general statements from the federal courts' opinions).⁶³⁵ Sandra also received the insurance proceeds from the group life insurance policy on Isaac's life because she was the named beneficiary of that policy.⁶³⁶

After Isaac died, two of the sons filed a lawsuit in the Louisiana state court, seeking an accounting of the various plan benefits provided to Isaac by his employer to identify and quantify the portion that was distributable to them on Isaac's death per Dorothy's will.⁶³⁷ And as noted, Isaac's second wife, Sandra, filed a declaratory judgment action in the federal district court, alleging that ERISA preempts Louisiana's community property laws.⁶³⁸

Ignoring federal law for a moment, it is clear that the employee benefits accrued during Isaac's thirty year marriage to Dorothy were community property under state law.⁶³⁹ In fact, if a married person is living in a

626. *Id.*

627. *See id.*

628. *Id.* at 836.

629. *Id.*

630. *Id.* at 847-48.

631. *Id.* at 836.

632. Brief for the United States as Amicus Curiae Supporting Petitioner, *Boggs v. Boggs*, 520 U.S. 833 (1997) (No. 96-79), 1997 WL 714742, at *13.

633. *Boggs*, 520 U.S. at 836.

634. *Id.* at 837.

635. *See id.*; *see also Boggs v. Boggs*, 82 F.3d 90, 94 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997).

636. *See* Brief for Petitioner, *supra* note 632, at *2.

637. *Boggs*, 520 U.S. at 837.

638. *Id.*

639. *See id.* at 836.

community property state, his compensation of every type, including employee benefits provided by an employer, is classic community property.⁶⁴⁰

In the *Boggs* case, Dorothy's actual ownership interest in Isaac's employee benefit plans was relatively small based on the stated facts.⁶⁴¹ Nevertheless, Dorothy's interest in Isaac's plans was an *ownership* interest.⁶⁴² Ownership interests are, or ought to be, weightier interests than federally created income interests, especially those not well thought out and passed into law due to a common law bias.⁶⁴³ In addition, ownership interests ought to be given more weight and consideration than administrative concerns.⁶⁴⁴

As a result of the *Boggs* decision, Sandra received 100% of Isaac's employee benefits, even the portion that had been owned by Dorothy at the time of her death.⁶⁴⁵ That result makes little sense from a pure ownership standpoint in view of the underpinnings of community property law.⁶⁴⁶

Perhaps, an analogy would be helpful to explain to those coming from a common law perspective what community property means (ignore both state and federal spousal distribution requirements for purposes of the analogy).⁶⁴⁷ Per the facts in *Boggs*, at the time of Dorothy's death, Isaac's savings plan had a total value of \$42,388.57. Under Louisiana community property law, Isaac owned one-half, or \$21,194.29, and Dorothy owned one-half, or \$21,194.29. Suppose that Dorothy and Isaac had lived in a common law state during their entire marriage instead of in a community property state. Suppose Dorothy died first. Suppose also that, at the time of Dorothy's death, Dorothy owned an interest in a "savings plan" provided by her employer valued at \$21,194.29. Suppose further that, at the time of Dorothy's death, Isaac owned an interest in a savings plan provided by his employer valued at \$21,194.29. Suppose that, upon her death, Dorothy gave Isaac a lifetime annuity in her savings plan and left the remainder interest in her savings plan to her children on Isaac's death. Suppose also that Isaac married Sandra after Dorothy's death. Although it is not relevant to this hypothetical, assume further that Isaac gave Sandra a lifetime annuity in his savings plan upon his death. Assume that some amount remained to be distributed from Dorothy's savings plan upon Isaac's death. In a case like

640. See LA. CIV. CODE ANN. art. 2369.2 (West 1995).

641. See *Boggs*, 520 U.S. at 836–37.

642. *Id.* at 838.

643. See *id.* at 839–41; but see *id.* at 854 (reasoning that Congress departs from the original framework in a limited and careful manner).

644. See *id.* at 838 (explaining that the goal for ERISA is to sustain uniformity in the administration of pension plans).

645. See *id.* at 854 (reversing the decisions of the lower courts in favor of Sandra).

646. See *id.* at 839–840; see also Emilia Pirgova, *Can the Texas Economic Contribution Statute Be Reconciled with the Inception of Title Doctrine?*, 12 TEX. WESLEYAN L. REV. 655, 660 (2006).

647. See Featherston, *supra* note 30; see *Boggs v. Boggs*, 520 U.S. 833, 833 (1997).

that, viewed from a common law marital property perspective, no one would expect Isaac's second wife, Sandra, to have any claim to any part of what remained of *Dorothy's* savings plan on Isaac's death.⁶⁴⁸ That is the essence of the community property marital system of ownership.⁶⁴⁹ That is why REACT and the decision in *Boggs* with respect to Isaac's Savings Plan amounts to a taking of something Dorothy owned in her own right and giving that asset to Sandra.⁶⁵⁰ It may be what REACT requires, but it may also be an unconstitutional taking of property.⁶⁵¹ It certainly reflects a common law bias.⁶⁵²

In addition, the *Boggs* decision goes well beyond ERISA requirements because it overrides community property law with respect to assets that were no longer held in a qualified plan when Isaac died.⁶⁵³ As noted, Isaac rolled over his savings plan to an IRA rollover before he died and took the AT&T stock in kind from the ESOP.⁶⁵⁴ Although the Supreme Court couched the issue in terms of whether Dorothy could dispose of her community property interest in Isaac's undistributed pension plan benefits, the savings plan and the ESOP stock were not undistributed pension plan benefits when Isaac died.⁶⁵⁵ ERISA should not have applied to those assets.⁶⁵⁶

In regard to the sons' claims for an accounting in *Boggs*, the majority apparently did not perceive any difference between a plan administrator having to provide an accounting and a recipient of already distributed plan benefits having to provide an accounting.⁶⁵⁷ The majority also did not consider that, by the time of Isaac's death and the sons' lawsuit, the QJSA was the only qualified plan still in existence.⁶⁵⁸ The majority's decision, which was based on ERISA preemption, was held to apply to assets that were clearly not qualified plans subject to ERISA when Isaac died, namely, the IRA rollover and the stock distributed out of the ESOP.⁶⁵⁹

Because Dorothy's will gave Isaac one-third of her estate, outright, and a usufruct (a life estate) in the remaining two-thirds of her estate, nothing in Dorothy's will interfered with Isaac's enjoyment of the savings plan, or any other employee benefit plan in which Isaac was a participant, during Isaac's

648. The forgoing hypothetical was created for the purposes of this article; see generally Pirgova, *supra* note 646 (comparing and contrasting the principles of common law and community property laws, and emphasizing the importance of title in the common law system).

649. See Featherston, *supra* note 30.

650. See *Boggs*, 520 U.S. at 842.

651. See *id.* at 874 (Breyer, J. dissenting) (citing *Hodel v. Irving*, 481 U.S. 704, 717 (1987)); see also *Babbitt v. Youpee*, 519 U.S. 234, 244–45 (1997)).

652. See *supra* Part III; see also *Babbitt*, 519 U.S. at 244–45 (analyzing the holding in *Irving*).

653. See *Boggs*, 520 U.S. at 838–39 (holding that ERISA preempts state community property law).

654. *Id.* at 836.

655. See *id.* at 836–37.

656. See *id.* at 873–74 (Breyer, J. dissenting).

657. *Id.* at 853 (majority opinion).

658. *Id.*; see 29 U.S.C. § 1055(d) (1994).

659. See *id.* § 1055(a)(1), (b).

life.⁶⁶⁰ In addition, Dorothy's will did not interfere in any way with the plan administrator's administration of the savings plan, or any other employee benefit plan in which Isaac was a participant, during Isaac's life.⁶⁶¹ By the time Isaac died, the only qualified plan governed by ERISA in which Isaac was a participant was the true pension plan.⁶⁶²

Note that when Isaac retired, in order for him to take a lump sum distribution from his savings plan and roll it over into an IRA rollover in his name, Sandra had to give signed and written consent.⁶⁶³ One must assume that Sandra did that.⁶⁶⁴ Why was not Sandra's consent a waiver of her ERISA claims with respect to the Savings Plan and the ESOP?⁶⁶⁵

The lawsuit filed by the sons requested certain action after Isaac's death.⁶⁶⁶ Yet the Supreme Court based its decision on the facts as of Dorothy's date of death and not the facts as of Isaac's date of death.⁶⁶⁷ Actions taken by Isaac after Dorothy's death and prior to his own death were ignored in terms of the opinion rendered.⁶⁶⁸ Arguably, only the sons' request relating to the true pension plan, i.e., their potential claims to any portion of the pension paid to Isaac beginning at his retirement and of the survivor's pension which was being paid to Sandra after Isaac's death, interfered with ERISA plan benefits.⁶⁶⁹ The rest of what the sons' requested after Isaac died had nothing to do with a qualified plan under ERISA and would not have interfered with the plan administrator's management of the qualified plans Isaac participated in during his life.⁶⁷⁰ Despite the majority's opinion, there is no provision in ERISA that would require Isaac to leave 100% of the stock he received after it was distributed from the ESOP, or any of his IRA rollover, to Sandra.⁶⁷¹ ERISA does not apply to IRAs or to stock not held in qualified plans.⁶⁷² Further, ERISA does not prevent state law accounting claims with respect to assets that are not qualified plan assets.⁶⁷³

660. *Boggs*, 520 U.S. at 855–56.

661. *See id.*

662. *See id.*; 29 U.S.C. § 1055(b) (1994).

663. *Id.* § 1055(c)(2).

664. *See Boggs v. Boggs*, 520 U.S. 833 (1997).

665. *See* 29 U.S.C. § 1055(c)(1)(A) (1994).

666. *See Boggs*, 520 U.S. at 837.

667. *Id.* at 851–52; *see also id.* at 865 (Breyer, J. dissenting).

668. *See Boggs*, 520 U.S. at 836–87; *see also id.* at 854 (reasoning that ERISA provisions were meant to help the living).

669. *Id.* at 862 (Breyer, J., dissenting).

670. *Id.*

671. *Id.*

672. *See generally* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1169 (2006) (IRAs and stocks not in qualified plans are governed by an individual and not his employer thus, not qualified under ERISA.).

673. *See id.* at 859.

In the realm of future interests, there are situations in which the question is whether a contingent remainder interest is destructible or not.⁶⁷⁴ The question of whether a contingent remainder interest will vest or not implicates valuable property rights, including the right to dispose of property.⁶⁷⁵ Some jurisdictions allow a “wait and see” approach before ruling on the issue.⁶⁷⁶ If this approach had been followed in *Boggs*, a case involving significant property rights, arguably only one portion of the sons’ cause of action would have been preempted by ERISA: their request for an accounting of the pension plan payments made to Isaac during his life and those payments made to Sandra after Isaac’s death.⁶⁷⁷ However, even that ignores the argument, based on community property law (i.e., the theme of this article), that *Dorothy’s* ownership interest in “Isaac’s” pension plan should not have to be distributed to Sandra upon Isaac’s death.⁶⁷⁸

The Supreme Court in *Boggs* also determined that the Qualified Domestic Relations Order (“QDRO”) provisions added to ERISA by REACT could not be applied in a death context.⁶⁷⁹ Congress added the QDRO provisions ten years after ERISA in response to its failure to consider the need to address the ownership of qualified plans in the event of a divorce.⁶⁸⁰ Marriages terminate by both divorce and death.⁶⁸¹ Ownership issues arise upon death as well as divorce.⁶⁸² Of course, Congress felt that it was addressing ownership issues in REACT when it added the spousal rights provisions.⁶⁸³ However, as noted, those provisions are based on a common law mindset.⁶⁸⁴ The Congresspersons from community property states should have addressed community property ownership at death as part of REACT and argued for provisions similar to the QDRO provisions in a death context.⁶⁸⁵

The saddest part of the *Boggs* decision is that it rewards getting divorced and penalizes staying married.⁶⁸⁶ If Isaac’s first wife, Dorothy, had obtained a divorce from Isaac, she could have secured her community property one-half ownership interest in all of Isaac’s qualified plans as of that time by

674. See Michael Rosenhouse, *Contingent Remainders—Destruction of Contingent Remainder*, 18 ILL. LAW & PRAC. ESTATES § 37 (2018).

675. See T. P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 516–17 (2003).

676. *Id.* at 551.

677. See *Boggs*, 520 U.S. at 836–37.

678. See *id.* at 864–65 (Breyer, J., dissenting).

679. *Id.* at 847–48.

680. *Id.* at 849–50.

681. LA. CIV. CODE ANN. art. 101 (West 2016).

682. See *Boggs*, 520 U.S. at 850.

683. *Id.* at 849–50.

684. See *id.* (reasoning that Congress departs from the original framework in a limited and careful manner).

685. See *id.* at 839.

686. *Id.* at 868 (Breyer, J., dissenting).

obtaining a QDRO.⁶⁸⁷ Instead, she stayed married to Isaac until her death, and lost her half of the community property that she and Isaac accumulated during their thirty year marriage to each other.⁶⁸⁸ In addition, assuming a typical disposition by Sandra upon her death to her own children, not only did Sandra, as the second wife of Isaac, win big as a result of the *Boggs* decision, but her children won a complete victory over the children of Isaac and Dorothy—the children of the parents who actually accumulated the bulk of the plan benefits in the first place.⁶⁸⁹ Somehow, this does not seem fair or right. Congresspersons from community property states need to review the *Boggs* decision and the REACT provisions and consider changing the law.⁶⁹⁰

XII. ONE POSSIBLE SOLUTION

The Supreme Court's decision in the *Boggs* case, based on ERISA preemption and the spousal rights provisions added to ERISA by REACT, and the federal courts' and IRS's decisions in the various section 408(g) cases and rulings, have had the effect of killing community property.⁶⁹¹ In a Congress operating from a common law bias, killing community property may have been precisely what was intended and it is certainly not a surprising result.⁶⁹² However, before property rights as significant as community property are deemed to be preempted by federal law, congressional intent should be patently clear.⁶⁹³

Consider section 408(g) of the Code: Which particular federal tax concerns necessarily require preemption of community property law in terms of the ownership of IRAs?⁶⁹⁴ Perhaps the contribution limit provisions should remain as is, but little else appears to require overriding the community property ownership rights of spouses of named IRA owners.⁶⁹⁵ Income taxes on distributions from an IRA ought to be based on the ownership of the IRA since, typically, the owner of assets pays income taxes on the income earned by those assets.⁶⁹⁶ It is difficult to see how community property ownership of IRAs could result in avoiding income taxes on distributions from IRAs.⁶⁹⁷

687. *See id.*

688. *See id.*

689. *See id.* at 836–37 (majority opinion).

690. *See supra* Part I.

691. *Boggs*, 520 U.S. at 844 (holding federal law preempts state law, requiring the annuity be paid to the surviving spouse as the sole beneficiary).

692. *See supra* Part III.

693. *See supra* Part I.

694. *See supra* Part X.

695. *See supra* Part X.

696. *See supra* Part X.

697. *See supra* Part X.

Next, consider the facts and issues in the *Boggs* case.⁶⁹⁸ The primary issue concerned the ownership and disposition rights of the nonparticipant spouse in the case in which she predeceases the participant.⁶⁹⁹ Federal law may at least require suppression or delay in the effective date of the nonparticipant spouse's community property ownership and disposition rights—at least while the participant is living.⁷⁰⁰ Do those concerns necessarily require the drastic result in the *Boggs* case: giving the first spouse's ownership interest in the participant's qualified plans to the second spouse when the participant dies?⁷⁰¹ Recall from the facts in *Boggs* that Dorothy's purported testamentary disposition of her community property one-half interest in Isaac's qualified plans actually had no adverse effect on either Isaac or the administrator of Isaac's qualified plans while Isaac was living.⁷⁰² Isaac actually received the various employee benefits to which he was entitled during his life, unreduced by Dorothy's community property ownership interest.⁷⁰³ It was only on Isaac's death that the "conflict" between federal law and state law ripened.⁷⁰⁴ By that time, the only qualified plan still in existence was the true pension plan.⁷⁰⁵ At that point, the conflict boiled down to the spousal rights granted to Isaac's second wife, Sandra, by federal law (REACT) versus the property ownership rights granted to Isaac's first wife, Dorothy, under state law.⁷⁰⁶ Obviously, the U.S. Supreme Court determined that whatever portion of Isaac's pension plan benefits had been owned by Dorothy had to be distributed to Sandra because of the REACT provisions added to ERISA.⁷⁰⁷ That result is understandable when viewed from a common law marital property mindset but is offensive when viewed from a community property perspective.⁷⁰⁸

Suppose, however, that a new Congress were to determine that Dorothy's property ownership rights are just as important as Sandra's annuity rights as the surviving second wife of Isaac.⁷⁰⁹ To meet ERISA's stated goal of simplifying the administration of qualified plans, the solution might be a probate court order issued on the death of the nonparticipant spouse.⁷¹⁰ Such an order will be referred to as a "probate QDRO."⁷¹¹ Just as in the termination

698. *Boggs v. Boggs*, 520 U.S. 833, 836 (1997).

699. *Id.* at 841, 844.

700. *See supra* Part IX.

701. *See supra* Part IX.

702. *Boggs*, 520 U.S. at 851–52.

703. *Id.* at 836–38.

704. *Id.*

705. *Id.*

706. *Id.* at 841, 844.

707. *Id.* at 844.

708. *See supra* Section XI.B.

709. *See supra* Section XI.B.

710. *See supra* Part IX.

711. Maunsel W. Hickey et al., *Retirement Plans and IRAs*, 1 LA. PRAC. EST. PLAN. § 4:14 (2017–2018 ed.); *see also In re Marriage of Shelstead*, 58 Cal. Rptr. 2d 522, 525 (Cal. Dist. Ct. App. 1996)

of a marriage by divorce, the probate QDRO would specifically identify the nonparticipant spouse's ownership interest in the participant's qualified plans at the time of her death.⁷¹² Unlike in the case of a regular QDRO, the probate QDRO would not name the nonparticipant spouse as alternate payee but, instead, would cause the nonparticipant spouse's ownership interest to be held as a separate share and would identify the nonparticipant spouse's death beneficiaries as the alternate payees of that separate share.⁷¹³ In addition, because of ERISA's goal of providing retirement income to qualified plan participants, the nonparticipant spouse's death beneficiaries would not have the right to receive any distributions from their separate share of the participant's qualified plan while the participant is still living and participating in the plan.⁷¹⁴ However, the participant's right to continue to benefit from the nonparticipant spouse's share of his qualified plans would cease upon his death or upon his removing that share from the qualified plan, whether via a rollover to an IRA or a withdrawal.⁷¹⁵ The probate QDRO would at least offer the possibility of recognizing and preserving the nonparticipant spouse's community property ownership interest in the participant's qualified plans by treating that ownership interest as a separate share, potentially available to the death beneficiaries of the nonparticipant spouse, but subject to full use by the participant during his life.⁷¹⁶ As noted, the probate QDRO would preclude the nonparticipant spouse's death beneficiaries from interfering in any way with the administration of the participant's qualified plans as long as the participant's plan benefits remain in the qualified plan.⁷¹⁷ Once the participant dies, however, the nonparticipant spouse's separate share of the participant's plan would become distributable to her death beneficiaries, rather than to the participant's surviving spouse or the participant's chosen death beneficiaries.⁷¹⁸ The participant's surviving spouse would have spousal rights in the participant's separate share of his qualified plan, just not in the nonparticipant spouse's separate share of the qualified plan.⁷¹⁹ If the participant acts during his life to remove his plan benefits from the qualified plan, the provisions of ERISA should no longer apply to those benefits.⁷²⁰ At that point, the interest of the nonparticipant spouse's death beneficiaries fully

(finding that a QDRO can require a qualified plan to distribute the share belonging to the nonparticipant spouse who predeceases the plan participant so long as the QDRO provides the identify and address of the nonparticipant spouse's death beneficiaries and the means of determining an alternative beneficiary).

712. See *In re Marriage of Shelstead*, 58 Cal. Rptr. 2d at 527.

713. See *id.* at 524, 530.

714. See *id.* at 529.

715. See *id.* at 525.

716. See *id.* at 528.

717. See *id.*

718. See *id.* at 528–29.

719. See *id.* at 529.

720. *Hoult v. Hoult*, 373 F.3d 47, 53–54 (1st Cir. 2004).

vest, and they could claim their inheritance.⁷²¹ That is more or less the same result that would occur immediately on the death of the nonparticipant spouse had the nonparticipant spouse died owning an interest in an IRA, including an IRA rollover from a qualified plan, or an after-tax investment account holding benefits withdrawn from a qualified plan during the participant's life.⁷²²

A probate QDRO recognizes both community property ownership rights and various federal goals that Congress deemed important in initially passing ERISA and in amending ERISA to include the spousal rights provisions per REACT.⁷²³ The main point is that a second wife, who marries a participant who has already accumulated some or all of his qualified plans while married to his first wife who predeceased the participant, should not receive an annuity from assets that were owned by the first wife.⁷²⁴

To protect administrators of qualified plans, the probate QDRO would need to be obtained from a court having competent jurisdiction over the nonparticipant spouse's estate.⁷²⁵ As noted, the nonparticipant spouse's community property ownership in the participant's retirement plans is arguably a probate asset by default.⁷²⁶ Therefore, the probate QDRO would normally be issued by the local probate court having jurisdiction over the probate estate of the nonparticipant spouse.⁷²⁷ Provisions could be included in the new federal law probate QDRO rules to prevent a probate QDRO from providing that the nonparticipant spouse owns more than a community property one-half ownership interest in the participant's qualified plans at the time of her death.⁷²⁸ It is possible for the non-participant spouse to own less than one-half of the participant's qualified plans (for example, if the participant accumulated a portion of his qualified plans prior to his marriage to that spouse).⁷²⁹ The new probate QDRO provisions could specifically provide that a marital property agreement between the participant and his spouse characterizing the nonparticipant spouse as owning more than a community property one-half interest in the participant's qualified plans, even if approved by a state court, would not be respected.⁷³⁰ That sort of "gaming" could be prohibited to protect federal law concerns.⁷³¹

721. See *In re Marriage of Shelstead*, 58 Cal. Rptr. 2d at 529.

722. See *id.* at 526.

723. See *supra* Part IX; see generally Jason V. Owens, *Qualified Domestic Relations Order (QDRO): What They Do and When They Do It*, LYNCH & OWENS, P.C. (May 1, 2017), <https://www.lynchowens.com/blog/2017/may/qualified-domestic-relations-orders-qdro-what-th/> [perma.cc/HM9B-GH54] (describing the basics of QDROs).

724. See *Boggs v. Boggs*, 520 U.S. 833, 872–73 (1997).

725. See *In re Marriage of Shelstead*, 58 Cal. Rptr. 2d at 531.

726. *Id.* at 525.

727. *Id.* at 531.

728. See *id.*

729. See Hickey et al., *supra* note 711.

730. See *In re Marriage of Shelstead*, 58 Cal. Rptr. 2d at 525.

731. See *id.*

A probate QDRO would go a long way toward alleviating the concerns of the administrators of qualified plans.⁷³² The burden to obtain the probate QDRO would be on the legal representative of the estate of the nonparticipant spouse and not on the plan administrator.⁷³³ The cost of obtaining the probate QDRO would also be on the legal representative, and would not be borne by the qualified plan.⁷³⁴ The legal representative could be required to present the probate QDRO to the plan administrator within a specified time period after the death of the nonparticipant spouse.⁷³⁵ Other safeguards for the plan administrator could be included as well.⁷³⁶

There are many other potential solutions to the problem the *Boggs* case has caused.⁷³⁷ If congresspersons from community property states have the political will to represent their married constituents, they will surely come up with a fair and reasonable solution.⁷³⁸

XIII. CONCLUSION

Certain federal laws, such as ERISA, including the spousal rights provisions added by REACT, and section 408(g) of the Internal Revenue Code, both as worded and as interpreted by federal judges and federal agents, are killing community property.⁷³⁹ Community property may already be on its death bed in the context of qualified plans and IRAs.⁷⁴⁰ No doubt, crafting federal law to accomplish federal goals relating to retirement plans, while also recognizing and giving effect to community property law, is no easy task.⁷⁴¹ It does not appear however, that very much effort has been put into doing that.⁷⁴² Instead, a common law bias—or anti-community property bias—pervades federal law.⁷⁴³ That bias will continue to kill community property unless Congress examines the issues and makes significant changes to existing law.⁷⁴⁴ Conceivably, there are ways that community property can be recognized and given effect while still preserving the federal government's interest in the efficient administration of qualified plans and the collection of income taxes.⁷⁴⁵ Congress is charged with doing that under our dual system

732. *See id.* at 529–30.

733. *See id.*

734. *See id.*

735. *See id.*

736. *See id.*

737. *See supra* Part I.

738. *See supra* Part I.

739. *See supra* Parts VII–VIII.

740. *See supra* Part VII.

741. *See supra* Part VII.

742. *See supra* Part VII.

743. *See supra* Part III.

744. *See supra* Part III.

745. *See supra* Part XII.

of government.⁷⁴⁶ Otherwise, we will end up with the tyranny of the majority and the taking of valuable property without due process, based on mostly non-substantive concerns or imaginary concerns.⁷⁴⁷ Millions of married people living in community property states who own retirement plans worth millions and, perhaps, billions of dollars deserve better treatment than they have received to date.⁷⁴⁸

746. *See supra* Part I.

747. *See supra* Part I.

748. *See supra* Part I.