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Marriage, Property and [In]Equality: Remedying ERISA's Disparate Impact on Spousal Wealth

Congress is considering pension reform in the wake of the tremendous loss in market value of retirement plans during the current recession. This offers a historic moment to remedy an unintended but profound gender disparity embedded in the federal law governing retirement plans in this country.

The common perception is that contemporary law and policy aim to facilitate equality within marriage, including in the area of property ownership. For example, the law has embraced equitable distribution in reallocating property upon divorce.[1] Equitable distribution is grounded in a joint partnership theory of marriage that recognizes the contributions of both spouses, whether or not purely monetary. However, the Employment Retirement Income Security Act's (ERISA) structuring of retirement asset accumulation runs counter to this trend and in fact incentivizes the concentration of wealth in the hands of husbands rather than wives within intact marriages.[2]

There has been a movement over the past thirty years to transfer traditional pension obligations from employers to employees [3] through the use of a tax-

1. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.09 cmt. b (2008) (noting that "equitable distribution is the dominant rule" in the great majority of states).

2. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829.

3. Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, EMP. BENEFIT RES. INST. ISSUE BRIEF, Oct. 2004, at 1 ("[T]he number of private sector workers covered by a DB [defined benefit] plan decreased from 30.1 million in 1980 to 22.6 million in 1999 (a decline of about 25 percent) while those covered by a DC [defined contribution] plan increased from 14.4 million in 1980 to 46.9 million in 1999 (an increase of 225 percent over the same period)."), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_10-2004.pdf.

preferred vehicle known as a "defined contribution" plan.[4] The most widely-known defined contribution plan is the 401(k),[5] in which employees make pre-tax contributions and accrue savings tax-deferred. Americans are induced to use defined contribution plans as their primary savings vehicle for a number of reasons, including these significant tax incentives, the fact that many employers match contributions, and the protection against creditors offered by ERISA. As a result, Americans now hold $3.5 trillion in such plans.[6]

ERISA provides that employees may not assign or alienate their interest in a defined contribution plan.[7] The underlying policy rationale of this provision is to "protect an employee from his own financial improvidence" with respect to retirement accumulations.[8] This "spendthrift" provision effectively precludes a married couple from holding such defined contribution plans in joint names, resulting in a concentration of wealth in the hands of the spouse – typically the husband – that is more consistently in the labor market.[9] Thus, as

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4. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451 (2004); *see also* Alicia H. Munnell et al., *Why Are Healthy Employers Freezing Their Pensions?*, CENTER FOR RETIREMENT RES. AT B.C. ISSUE IN BRIEF, Mar. 2006, at 1, *available at* http://crr.bc.edu/images/stories/Briefs/ib_44.pdf (noting that reasons for employers to turn from defined benefit to defined contribution plans include: reducing total compensation to increase competitiveness in global markets, offsetting the increasing costs of health care, and limiting market risk and regulatory costs).

5. *See* 26 U.S.C.A. § 401(k) (West Supp. 2009).

6. *See* Investment Company Institute, *The U.S. Retirement Market, 2008*, 18 RES. FUNDAMENTALS, June 2009, at 2 fig.1, *available at* http://www.ici.org/pdf/fm-v18n5.pdf (listing statistics for December 2008). The figure at the end of 2007 was $4.5 trillion, before the market crashed. *Id.*

7. *See* 26 U.S.C.A. § 401(a)(13) (West Supp. 2009).

8. Ablamis v. Roper, 937 F.2d 1450, 1463 (9th Cir. 1991) (citing AT&T v. Merry, 592 F.2d 118, 124 (2d Cir. 1979)).

9. *See* LESLIE E. PAPKE ET AL., THE RETIREMENT SECURITY PROJECT, RETIREMENT SECURITY FOR WOMEN: PROGRESS TO DATE AND POLICIES FOR TOMORROW 4 (2008), *available at* http://www.retirementsecurityproject.org/pubs/File/RSP-PB_Women_FINAL_4.2.2008.pdf ("[W]omen near retirement are 5 percentage points less likely than men to have a pension or a retirement plan (such as a 401(k) and IRA). Women also have lower retirement assets than their male counterparts: the median female worker near retirement held $34,000 in a 401(k) plan or IRA whereas her male counterpart held $70,000."); *see also* Alicia H. Munnell, *Why Are So Many Older Women Poor?*, CENTER FOR RETIREMENT RES. AT B.C., JUST THE FACTS, Apr. 2004, *available at* http://crr.bc.edu/images/stories/Just%20the%20Facts/jtf_10.pdf?phpMyAdmin=43ac483c4de9t51d9eb41 ("Women have low lifetime earnings compared to men for three reasons . . . . First, they have lower wages. Even women who are employed full-time earn about 25 percent less than men. Second, they are more likely to work part-time, which reduces their hourly wage as well as their hours worked. About one quarter of all women work part-time, compared to about 10 percent of men, and are most likely to work part-time when they have

defined contribution plans become an increasingly significant percentage of household wealth, husbands have concomitantly larger shares of the family wealth held in their names alone.

Why does facilitating an equal allocation of retirement plan balances matter in intact marriages? First, the law has an expressive dimension and it should value caregiving and equality as a matter of fairness and justice. Money equals power within a relationship and power asymmetry yields inequality.[10] Encouraging a disproportionate accumulation of assets by the husband, even if unintended as a policy matter, signals that the spouse – typically the wife – who provides the bulk of the family caregiving makes a less valuable contribution.

Second, limiting the ownership of defined contribution plans to a single spouse subjects the other spouse to greater risk in terms of the overall family wealth. Consider the following example. A husband has a much larger balance in his 401(k) than his wife has in hers due to his uninterrupted employment history. The husband is very tolerant of the market risk involved in investing in stock and his entire portfolio is so invested.[11] Assume that he has used his 401(k) as the primary family savings vehicle, given its favorable tax status, and it constitutes a significant percentage of the family's overall wealth. Federal retirement and tax policy has effectively concentrated the power to control the family's financial future in the hands of one spouse. While there are some restrictions on the husband's ability to control distribution of the defined contribution plan without his wife's consent under ERISA,[12] these are thin "protections" for the wife if the money has been lost in a market crash.

Even if the couple were to agree to equalize ownership of the family assets by transferring some of the husband's assets to the wife's 401(k) (or to an

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young children at home. Finally, women spend fewer years in the labor force. The typical woman is in the work force 32 years, compared to 44 years for the typical man.").

10. For an analysis of the expressive dimension of money within intact marriages, see Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113 (2008).

11. *See* Marjorie E. Kornhauser, Gender and Capital Gains Taxation (June 25, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1425664 ("Empirical evidence suggests that attitudes and behaviors regarding financial decisions—including capital gains—are gendered. Women, for example, being more risk averse than men, may have fewer capital gains because they invest in fewer risky assets, which are the type of assets that produce the biggest capital gains.").

12. *See* MICHAEL J. CANAN, 1 QUALIFIED RETIREMENT PLANS § 7:59, at 608 (2008) ("Plans not otherwise required to provide a [qualified pre-retirement annuity for the surviving spouse] because they are not subject to [Internal Revenue Code] § 412 must require that a married participant's balance (if not distributed prior to death) will be paid to the surviving spouse, unless waived by the spouse.").

Individual Retirement Account if she does not have a 401(k)), the husband could not do so without triggering a taxable event and causing both income taxation of the amounts withdrawn as well as the additional ten percent tax penalty associated with early withdrawals.[13]

Contemporary family law presumes an equal division of property upon divorce, premised on a partnership theory of marriage that gives value to non-financial contributions like caregiving. In fact, ERISA provides a mechanism, the court-ordered qualified domestic relations order or "QDRO," to implement an equal division of retirement assets without tax penalty in legal proceedings like divorce.[14] In essence, QDROs are an exception to ERISA's anti-alienation provision. However, QDROs are not readily available to couples in intact marriages, which do not typically involve ongoing legal proceedings to determine the property rights of the spouses.

In order to remedy this inconsistency and facilitate equality within intact marriages, Congress should amend ERISA to confer an immediate ownership interest in one-half of the assets in each spouse as they are earned and contributed by one spouse. Second, each half should then be allocated to a separate account, one in the husband's name and one in the wife's name.[15] While this second step may be somewhat inconsistent with the view of marriage as a partnership, it minimizes the risk that one spouse will dominate investment decisions with regard to the assets. In the alternative, ERISA should at least provide that each spouse's defined contribution plan be held in a joint account as a default rule.[16]

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13. 26 U.S.C.A. § 72(t) (West Supp. 2009) (requiring ten percent additional tax to be paid and listing exceptions (which do not include interspousal transfers) to the penalty). In addition, the wife would be limited in terms of how much of that transfer from her husband she could add to her own defined contribution plan. *See* 26 U.S.C.A. § 402(g)(1)(B) (West Supp. 2009) (limiting the annual contribution by a participant to $15,000 as of 2006).

14. *See* 26 U.S.C.A. § 401(a)(13)(B) (2008); § 414(p) (West Supp. 2009).

15. If the wife (or husband) were not working and thus not eligible for a defined contribution plan, this author's proposal would provide that a defined contribution plan be set up for her to hold her accumulation, akin to a "spousal IRA" for non-working spouses under current law.

16. While defined contribution plans are governed by federal law, marital property is generally governed by state law. ERISA has been found to preempt state law, even in areas like inheritance, property, and family law that are traditionally reserved to the states. *See* Egelhoff v. Egelhoff, 532 U.S. 141 (2001); Boggs v. Boggs, 520 U.S. 833 (1997). This author's proposal would admittedly introduce a significant change to the theory underlying property law regimes in separate property states. In those states, income is owned by the person who earns it and holds title to it until voluntarily shared with a spouse via deposit in a joint bank account, for example. This proposal would confer ownership of one-half of the assets upon contribution on the non-employee spouse, more akin to a community property theory which also confers an ownership interest on the non-earning spouse as soon as assets are

A less fundamental but equally important additional reform would be to allow married couples to equalize ownership by transferring unlimited amounts between their accounts without triggering income taxation and the ten percent early withdrawal penalty. This would be akin to the existing unlimited marital deduction as applied to transfers under the current federal gift tax.[17]

With these amendments, Congress could align federal pension law with the overall movement toward gender equality in marital property law.

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accumulated during marriage. This author will explore these issues and the testamentary implications of this proposal in a future paper.

17. 26 U.S.C.A. § 2523 (West 2002 & Supp. 2009).