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Private Retirement Benefits Earned during Marriage Characterized as Community Property and Do Not Automatically Remain Property of Surviving Spouse.

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CASENOTES

FAMILY LAW—Community Property—Private Retirement Benefits Earned During Marriage Characterized As Community Property And Do Not Automatically Remain Property Of Surviving Spouse.

Allard v. Frech,
754 S.W.2d 111 (Tex. 1988).

Billy L. Allard began working for the General Dynamics Corporation shortly after his marriage to Billie J. Allard in 1945.[1] During Mr. Allard's employment, he invested community funds in a private retirement plan established by General Dynamics.[2] Allard retired in May, 1982, and began receiving monthly retirement benefits in June, 1982.[3] Upon his wife's death

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1. Allard v. Frech, 754 S.W.2d 111, 113 (Tex. 1988).

2. *Id.* at 113. At the time Mr. Allard retired, his retirement plan had vested and was valued at $102,080. *See* Allard v. Frech, 735 S.W.2d 311, 313 (Tex. App.—Fort Worth 1987). Mr. Allard elected a benefit plan providing for lifetime benefits with a ten year minimum guaranteed, however, Mrs. Allard did not sign the election. *See Allard*, 754 S.W.2d at 113. The plan contained the following survivorship options:

> WITH —% CONTINGENT ANNUITANT OPTION: Benefit payments from the Plan as shown above will be continued for your lifetime and upon your death a monthly benefit of $— will be paid for the lifetime of —, your contingent annuitant, if surviving.
>
> WITH 50% JOINT AND SURVIVOR OPTION: Benefit payments from the Plan as shown above will be continued while both you and —, your joint annuitant, live but will be reduced to $— commencing with the first of the month following the date of your death or the death of your joint annuitant, which ever occurs first, and will be payable for the lifetime of the survivor.

See Petitioner's Exhibit No. 3, Allard v. Frech, 754 S.W.2d 111 (Tex. 1988)(No. C-6863) (General Dynamics Corporation Retirement Plan for Salaried Employees, certificate number S 0651). The option selected by Mr. Allard was as follows:

> WITH *10* YEARS CERTAIN AND LIFE OPTION: Benefit payments from the Plan as shown above will be continued during your lifetime but if you should die prior to having received payments for the specified period certain, payments will continue to your designated beneficiary for the balance of the specified period certain.

Id.

3. *Allard*, 754 S.W.2d at 113. In June, 1982, General Dynamics commenced paying Mr.

on April 11, 1983, Mrs. Allard's sister, Martha Parten Frech, offered a will into probate.[4] As executrix, Ms. Frech filed an "Inventory, Appraisement, and List of Claims" to which Mr. Allard subsequently objected.[5] The trial court, approving the inventory and list of claims, awarded the estate, as community property, a one-half interest in Mr. Allard's retirement benefits and one-half of all funds in a joint savings account.[6] The court of appeals affirmed the trial court's characterization of the retirement benefits and the bank account funds as community property.[7] The Texas Supreme Court granted Allard's application for writ of error to consider the method to be used in characterizing private retirement benefits upon death of the non-employee spouse.[8] Held - *Affirmed*. Private retirement benefits earned during marriage are characterized as community property and do not automati-

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Allard monthly retirement benefits in the amount of $1,008. *Id.* Mr. Allard also elected early retirement which provided that his monthly benefit payments of $969.13 included an additional temporary benefit of $38.50 per month. *See* Petitioner's Exhibit No. 3, Allard v. Frech, 754 S.W.2d 111 (Tex. 1988)(No. C-6863) (General Dynamics salaried employees retirement plan).

4. *Allard*, 754 S.W.2d at 113. Mr. Allard contested the will dated January 12, 1983, offered into probate by Martha Parten Frech. *Id.* Subsequently, Mr. Allard offered another will dated March 22, 1983, which the probate court rejected. *Id.*; *see also* TEX. PROB. CODE ANN. § 145 (Vernon 1980)(provides for creation of independent administrator); TEX. PROB. CODE ANN. § 3(q) (Vernon 1980)(defines independent executor).

5. *Allard*, 754 S.W.2d at 113. An inventory and appraisement is a verified instrument filed with the court clerk describing all property of an estate including real property located in Texas and all personal property. *See* TEX. PROB. CODE ANN. § 250 (Vernon 1980). The significance of the inventory is that the representative in the inventory specifies what property is separate and what property is community. *Id.* The "List of Claims" is a document which discloses all claims owing or due the estate of the deceased. *See id.* § 251.

6. *Allard*, 754 S.W.2d at 113. The issues addressed by the trial court were limited by agreement and concerned the characterization and value of certain property. *Id.* Although additional findings were made by the trial court, the parties did not challenge them. *Id.* On July 9, 1982, the Allards deposited $75,762.00 into a joint tenancy account at Gibraltar Savings Association. *See* Petitioner's Exhibit No. 14, Allard v. Frech, 754 S.W.2d 111 (Tex. 1988) (No. C-6863) (Gibralter Savings joint tenancy account card signed by Billy L. and Billie J. Allard). The signature card clearly stated that the account was a joint tenancy account with right of survivorship. *Id.*

7. *Allard*, 754 S.W.2d at 113. The Fort Worth Court of Appeals held that the trial court properly characterized the retirement benefits as community property and, therefore, Mrs. Allard's one-half interest in the benefits rightfully passed under her will to her daughter and grandchildren. *Id.* The court also held that the mere execution of a survivorship agreement is not a valid partition of community funds in the absence of a partition agreement or spousal gift. The court reasoned that the funds deposited in the joint savings account remained community property, thus one-half was subject to testamentary disposition by Mrs. Allard's will. *Id.*

8. *See* Allard v. Frech, 754 S.W.2d 111, 113 (Tex. 1988)(Texas Supreme Court has characterized spouse's interest in public benefits but not in private benefits).

cally remain the property of the surviving spouse.[9]

Article XVI, section fifteen of the Texas Constitution defines separate property as all property owned by a person before marriage[10] and that property subsequently acquired by devise,[11] descent,[12] or gift.[13] Property acquired during marriage, other than property defined as separate, is community property.[14] The classification of property generally arises upon

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9. *Allard*, 754 S.W.2d at 114. On October 1, 1988, Mr. Allard filed a petition for certiorari with the United States Supreme Court under Docket No. 88-717.

10. TEX. CONST. art. XVI, § 15. Section 15 provides:

> All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property.

Id. See generally Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEX. L. REV. 860, 862-63 (1966)(definition of community property in exclusionary terms); McKnight, *The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449, 457 (1982)(analysis of Texas Constitution article XVI, section 15); McKnight, *Matrimonial Property*, 26 SW. L.J. 31, 35 (1972)(no correlative constitutional definition of community property).

11. *See* TEX. PROB. CODE ANN. § 3(h) (Vernon 1980)(devise is testamentary disposition of personal or real property); *see also, e.g.*, Estate of Hanau v. Hanau, 721 S.W.2d 515, 518 (Tex. App.—Corpus Christi 1986)(disposition of corporate stock by will), *aff'd*, 730 S.W.2d 663 (Tex. 1987); Harper v. Swoveland, 591 S.W.2d 629, 630 (Tex. Civ. App.—Dallas 1979, no writ)(property devised by will vests in devisee at testator's death); Federal Underwriters Exch. v. Walker, 134 S.W.2d 388, 395 (Tex. Civ. App.—Austin 1939, writ dism'd by agr.)(property must be part of testator's estate to be devised).

12. *See* TEX. CONST. art. XVI, § 15 (property acquired by descent during marriage remains separate property). Descent is the acquisition of property by operation of law. *See* TEX. PROB. CODE ANN. § 45 (Vernon 1980)(descent and distribution provision); Dopps v. Dopps, 636 S.W.2d 723, 725 (Tex. App.—Corpus Christi 1982, no writ)(one-half interest in real property by descent and distribution vested in children as heirs at law); Anderson v. Anderson, 535 S.W.2d 943, 947 (Tex. Civ. App.—Waco 1976, no writ)(one-half of community funds in joint bank account automatically vested upon death in heirs at law); *In re* Copeland's Estate, 179 A.2d 475, 479 (Vt. 1962)(descent is taking by succession or devolution of property by law).

13. *See* TEX. CONST. art. XVI, § 15. A gift is a gratuitous and voluntary transfer of property. *See* Hilley v. Hilley, 161 Tex. 569, 575, 342 S.W.2d 565, 569 (Tex. 1961); *see also* Kiel v. Brinkman, 668 S.W.2d 926, 930 (Tex. App.—Houston [14th Dist.] 1984, no writ)(use of "free of cost" sufficient definition of gratuitous); Bradley v. Bradley, 540 S.W.2d 504, 511 (Tex. Civ. App.—Fort Worth 1976, no writ)(consideration in form of down payment not gift).

14. TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(definition of community property); *see, e.g.*, Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 832-33 (1923)(property and gains during marriage community property); Allen v. Allen, 704 S.W.2d 600, 604 (Tex. App.—Fort Worth 1986, no writ)(beauty salon capitalized with community funds deemed community property); Matter of Marriage of York, 613 S.W.2d 764, 770 (Tex. App.—Amarillo 1981, no writ) (business profits earned during marriage community property); Maben v. Maben, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ)(wife's earnings from separate business and husband's salary both community property); Meshwert v. Meshwert, 543 S.W.2d 877, 879 (Tex. Civ. App.—Beaumont 1976)(husband's business earnings community property), *aff'd*,

divorce or death where it is necessary to make a valuation and division of spousal interests in specific property.[15] Upon the death of a spouse, the deceased's property interest is subject to testamentary[16] or nontestamentary disposition.[17] Nontestamentary disposition of property may be accom-

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549 S.W.2d 383 (Tex. 1977); Horlock v. Horlock, 533 S.W.2d 52, 60 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd)(stocks acquired during marriage presumed community property); Logan v. Logan, 112 S.W.2d 515, 524-25 (Tex. Civ. App.—Amarillo 1937, writ dism'd)(all property earned during marriage including rents, profits, revenues held community property). *See generally* Bell, *The Evolution of the Community-Out-First Presumption: A Matter of Trust*, 24 S. TEX. L.J. 191, 201 (1983)(commingled property presumed community property); McKnight, *Matrimonial Property*, 21 SW. L.J. 39, 40-47 (1967)(general overview of definition, division, survivorship and control of community property).

15. *See, e.g.*, Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983)(valuation and partition of retirement benefits at time of divorce); Taggart v. Taggart, 552 S.W.2d 422, 423 (Tex. 1977)(divorce suit involving division of military retirement benefits); Cearly v. Cearly, 544 S.W.2d 661, 662 (Tex. 1976)(divorce action in which wife sought partition of husband's contingent military pension); Busby v. Busby, 457 S.W.2d 551, 552 (Tex. 1970)(divorce action seeking partition of military benefits); Herring v. Blakeley, 385 S.W.2d 843, 846 (Tex. 1965)(divorce suit in which inventory of husband's assets included profit-sharing and annuity plan). Valuation of the husband's and wife's property also arises in estate matters due to death of spouse. *See, e.g.*, Maples v. Nimitz, 615 S.W.2d 690, 691 (Tex. 1981)(suit by wife's estate to recover community property retained by husband's estate); Valdez v. Ramirez, 574 S.W.2d 748, 749 (Tex. 1978)(characterization of nonemployee's interest upon death in community benefits); Williams v. McKnight, 402 S.W.2d 505, 506 (Tex. 1966)(determination of widow's interest in joint bank account funds); *see also* Greene, *Valuation and Inclusion of Community Property in the Gross Estate: A New Approach*, 15 HOUS. L. REV. 93, 96 (1977)(extent and valuation of deceased's estate); Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F. L. REV. 635, 636 (1975)(interests in retirement benefits valued upon dissolution of marriage, death of non-employee spouse, and death of employee spouse).

16. *See* TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1988). Section 37 provides for the distribution of a deceased's estate:

> When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law.

Id.; *see also* Najvar v. Vasek, 564 S.W.2d 202, 207 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). The disposition of property can be controlled by a deceased through a will. *Id.* In the absence of a will, the deceased's property passes to heirs at law by intestate succession. *Id.*; *see also* Huffman v. Huffman, 329 S.W.2d 139, 143 (Tex. Civ. App.—Fort Worth 1959) (deceased's property disposed of by law or by will), *aff'd*, 161 Tex. 267, 271-72, 339 S.W.2d 885, 889 (1960). *See generally* Bailey, *Intestacy in Texas: Some Doubts and Queries*, 32 TEX. L. REV. 497, 501 (1954)(historical analysis of intestacy law in Texas); Comment, *Contractual Wills: Do 1979 Probate Code Revisions Solve Procedural Problems?*, 12 ST. MARY'S L.J. 436, 437 (1980)(probate courts compelled to enforce "last" will).

17. *See* TEX. PROB. CODE ANN. § 450 (Vernon 1980 & Supp. 1988). Section 450 states in pertinent part:

> (a) any of the following provisions in an insurance policy, contract of employment . . . deposit agreement, employee's trust, retirement account . . . pension plan, trust agree-

plished by designation of a beneficiary under the Texas Probate Code,[18] creation of a trust,[19] or the qualification of property as a nonprobate asset.[20] In addition, nontestamentary disposition is accomplished by the creation of a joint tenancy with right of survivorship.[21] Establishing a joint tenancy with right of survivorship results, upon death of a joint owner, in the transfer of all ownership rights in the property to the surviving joint owner.[22] There-

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ment, conveyance of real or personal property, or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled, or owned by decedent shall be paid after his death to a person designated by the decedent . . .

Id.; Dickerson v. Brooks, 727 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)(language in note designating alternative payee held sufficient designation to qualify as nontestamentary transfer under section 450 of Texas Probate Code); Tramel v. Estate of Billings, 699 S.W.2d 259, 262 (Tex. App.—San Antonio 1985, no writ)(insurance proceeds nontestamentary asset under section 450 of Probate Code). *See generally* McLaughlin, *Joint Accounts, Totten Trusts, and the Poor Man's Will*, 44 TEX. B.J. 871, 872-75 (1981)(discusses available methods to effectuate nontestamentary disposition of property).

18. *See* TEX. PROB. CODE ANN. § 450(a)(3) (Vernon Supp. 1988)(procedural requirements for designation of beneficiary).

19. *See* TEX. PROB. CODE ANN. § 436 (Vernon 1980)(defines trust account as method of nontestamentary disposition of joint funds); Isbell v. Williams, 705 S.W.2d 252, 257 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.)(must comply with statutory requirements to exempt trust account as nontestamentary asset).

20. *See* TEX. PROB. CODE ANN. § 450(a) (Vernon 1980 & Supp. 1988). *See generally* Bell, *Community Property Trusts - Challenges by the Non-participating Spouse*, 22 BAYLOR L. REV. 311, 317 (1970)(valid trusts not testamentary disposition); Campfield, *Interspousal Transfers*, 32 SW. L.J. 1091, 1113 (1979)(analysis of tax consequences and ramifications of community property transfers); Note, *The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interests on Divorce*, 64 TEX. L. REV. 1301, 1363 (1986)(historical analysis of current Texas law governing treatment of trusts as separate property).

21. *See* TEX. PROB. CODE ANN. § 439 (Vernon 1980 & Supp. 1988)(detailing statutory requirements for creation of right of survivorship). The transfer of property pursuant to creation of a valid right of survivorship is a nontestamentary transaction not subject to testamentary law. *Id.* § 441 (Vernon 1980); *see also* Sheffield v. Dozier's Estate, 643 S.W.2d 197, 198 (Tex. App.—El Paso 1982, writ ref'd n.r.e.). In *Sheffield*, the court, in construing section 439 in conjunction with section 441 of the Texas Probate Code, held that funds in an account with right of survivorship remain property of the joint owner and do not pass to the decedent's estate. *Id.*; *see also* Warach & Wright, *Money, Money, Who Gets the Money? Or Joint Bank Accounts With Right of Survivorship*, 47 TEX. B.J. 237, 238 (1984)(discusses evolution of joint tenancies with right of survivorship in Texas and analyzes section 439 of Texas Probate Code). *But see* TEX. PROB. CODE ANN. § 46 (Vernon 1980)(property held in joint tenancy with no right of survivorship subject to testamentary disposition).

22. *See* TEX. PROB. CODE § 439(a) (Vernon 1980 & Supp. 1988). This section outlines the effect of survivorship rights and provides in pertinent part that

. . . sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party or parties.

fore, survivorship rights may be created in personal community property including, but not limited to, joint bank accounts[23] and retirement benefits.[24]

Historically, courts classified retirement benefits as gifts by employers; however, currently they are deemed earned compensation.[25] The purpose of retirement benefits is to provide income to an employee in his later years of

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Id.; *see also* Dickerson v. Brooks, 727 S.W.2d 652, 653 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)(valid right of survivorship created despite ambiguous writing); Alexander v. Bowens, 595 S.W.2d 176, 180 (Tex. Civ. App.—Tyler 1980, no writ)(execution of signature card created valid right of survivorship). *But see* Chopin v. Interfirst Bank Dallas, 694 S.W.2d 79, 84 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)(no survivorship rights created where parties failed to comply with section 439(a)). *See generally* Mennell, *Community Property with Right of Survivorship*, 20 SAN DIEGO L. REV. 779, 783-84 (1983)(right of survivorship transfers title upon death of joint owner); Mennell, *Survivorship Rights in Community Property*, 11 COMMUNITY PROP. J. 5, 6 (1984)(discussing advantages and disadvantages of right of survivorship). The most accepted advantage of survivorship is the avoidance of probate. *Id.* at 6-7.

23. *See* TEX. PROB. CODE ANN. § 46 (Vernon 1980)(identifying types of property in which survivorship rights may be created); *see also* Krueger v. Williams, 163 Tex. 545, 547, 359 S.W.2d 48, 49 (1962)(survivorship rights in investment share account); Shroff v. Deaton, 220 S.W.2d 489, 492 (Tex. Civ. App.—Texarkana 1949, no writ)(creation of survivorship rights in bank proceeds); Chandler v. Kountze, 130 S.W.2d 327, 331 (Tex. Civ. App.—Galveston 1939, writ ref'd)(deed conveying land with right of survivorship held valid). *See generally* Orgain, *Joint Tenancy in Corporate Shares: Problems of the Stock Transfer Agent*, 16 BAYLOR L. REV. 99, 109 (1964)(survivorship rights in stocks).

24. *See* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970)(military retirement disability benefits accrued during marriage held community property); Herring v. Blakeley, 385 S.W.2d 843, 846 (Tex. 1965)(annuity contract and profit sharing plan earned during marriage held community property subject to division at divorce); Angott v. Angott, 462 S.W.2d 73, 74 (Tex. Civ. App.—Waco 1970, no writ)(after divorce wife tenant in common in husband's retirement benefits earned during marriage); Williamson v. Williamson, 457 S.W.2d 311, 314 (Tex. Civ. App.—Austin 1970, no writ)(benefits of husband earned during marriage community property subject to distribution); Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd)(husband's interest in retirement plan is community asset divisible upon divorce). A husband and wife can create survivorship rights in community property where they partition the community into separate property and then enter into a survivorship agreement. *See* TEX. PROB. CODE ANN. § 46 (Vernon Supp. 1988)(statutory requirements for joint tenancy); *see also id.* § 439 (Vernon Supp. 1988)(required statutory language for survivorship agreement). *See generally* Arruebarrena, *Applying Louisiana's Community Property Principles to Pensions*, 33 LOY. L. REV. 241, 268 (1987)(voluntary and judicial partition of community property interest in pensions).

25. *See, e.g.*, Cearly v. Cearly, 544 S.W.2d 661, 662 (Tex. 1976)(benefits earned compensation); Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 833 (1923)(benefit not donation but compensation); Williamson v. Williamson, 457 S.W.2d 311, 314 (Tex. Civ. App.—Austin 1970, no writ)(benefits earned property right); Sterrett v. Sterrett, 228 S.W.2d 341, 344 (Tex. Civ. App.—Fort Worth 1950, no writ)(serviceman's allotment is compensation). *See generally* Dutton, *The Wife's Community Interest in her Husband's Qualified Pension or Profit-Sharing Plan*, 50 TEX. L. REV. 334, 335 (1972)(rejection by Texas courts that benefits are gifts); Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 37 BAYLOR L. REV. 107, 129 (1985)(benefits at one time considered gifts bestowed upon loyal employees).

life.[26] Essentially, two categories of retirement plans have developed over the decades: public plans[27] and private plans.[28] The right of an employee to receive benefits under his/her respective plan depends upon the terms and conditions of each plan.[29] The non-employed spouse's interest in private

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26. *See* McCarthy v. McCarthy, 453 U.S. 210, 227 (1981)(purpose of retirement pay is to provide for needs of retiree); Hisquierdo v. Hisquierdo, 439 U.S. 572, 573 (1979)(retirement pay intended to support employee in old age); *see also* 29 U.S.C. § 1001 (1982)(declares general policy behind enactment of ERISA created to regulate private retirement plans). Section 1002 defines various types of retirement plans which encompass welfare plans, employee welfare benefit plans, and employee pension benefit plans; all are established by employers to provide medical, hospital, disability and retirement income for employees. *Id.* § 1002. *See generally* Arruebarrena, *Applying Louisiana's Community Property Principle to Pensions*, 33 LOY. L. REV. 241, 245 (1987)(retirement plans function to provide employees retirement income).

27. *See* 29 U.S.C. § 1003 (1982). Section 1003 is comprised of two parts which exempt government established plans from regulation by ERISA. *Id.* A governmental plan includes plans established or maintained by the United States Government, state governments, political subdivisions, agencies or instrumentalities of the foregoing. *Id.* § 1002(32).

28. *Id.* § 1003(a). Section 1003(a) defines what type of plan is covered under ERISA which includes "any employee benefit plan if it is established or maintained (1) by an employer engaged in commerce or in any industry affecting commerce; or by any employee organization . . . engaged in commerce . . . or both." *Id.*; *see also* 26 U.S.C. § 401(a) (1982 & Supp. IV 1986); Comment, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 541-49 (1975)(discusses emergence of private retirement/pension plans in United States). Section 401 sets out the requirements necessary for retirement, pension, and profit-sharing plans to qualify for preferential tax treatment which permits an employer a deduction for contributions made to such plans. 26 U.S.C. § 401(a) (1982 & Supp. IV 1986). Additionally, advantages of establishing a qualified plan include deferred tax treatment for the employee participants. *See id.* § 401(k); *see also* M. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS 428 (1988)(under qualified plan employer claims deduction for contributions while employee not required to declare contribution as income).

29. *See* Arruebarrena, *Applying Louisiana's Community Property Principle to Pensions*, 33 LOY. L. REV. 241, 243 (1987). Factors considered by employers in calculating benefits include age, compensation and length of service. *Id.*; *see also* 29 U.S.C. § 1053 (1982)(outlines minimum vesting standards). A vested right is an employee's nonforfeitable right in benefits. *See, e.g.*, Stewart v. National Shopmen Pension Fund, 730 F.2d 1552, 1561-62 (D.C. Cir. 1984) (distinguishing between vesting and accrued benefit); Montgomery v. Lowe, 507 F. Supp. 618, 620-21 (S.D. Tex. 1981)(under ERISA vested means unconditionally vested); Ramirez v. Lowe, 504 F. Supp. 21, 22 (S.D. Tex. 1979)(employer must comply with ERISA minimum requirements for vesting), *aff'd mem.*, 639 F.2d 306 (5th Cir. Unit A 1980); *see also* Comment, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 571 (1975)(vesting creates nonforfeitable right). The two most popular qualified plans in the private arena are defined contribution and defined benefit plans. *See* J. MAMORSKY, EMPLOYEE BENEFITS HANDBOOK § 10.02 (rev. ed. 1987). A defined contribution plan is one that creates individual accounts for its participants; its benefits are based solely upon amounts contributed. *See* 29 U.S.C. § 1002(34) (1982)(definition of defined contribution plan). A defined benefit plan provides for specific benefits contingent on specific situations (i.e., an employee's death or retirement). *See id.* § 1002(35); *see also* Solomon, *Beyond Preemption: Accommodation of the Nonemployee Spouse's Interest Under ERISA*, 31 HASTINGS L.J. 1021,

retirement benefits derived from contributions of community earnings is therefore dependent upon the employed spouse's interest in the plan.[30]

In Texas, it is well established that personal wages of a husband and wife are community property.[31] Benefits which accrue from the contribution of community funds into a retirement plan are also defined as community property.[32] To create survivorship rights in community property, however, the property must first be partitioned.[33] Additionally, a survivorship agreement

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1032 (1980). Defined benefit plans specify amounts of future ascertainable income after retirement. *Id.* at 1033.

30. *See* Cowen v. Plsek, 592 S.W.2d 422, 423 (Tex. Civ. App.—Waco 1979, no writ) (wife's interest in matured vested benefits subject to division by court); Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd)(wife has interest in husband's benefits although subject to divestment); *see also* Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans*, 5 PEPPERDINE L. REV. 191, 220-22 (1978)(majority of private plans have extensive guidelines regarding entry participation and eligibility). Plans define the method used in calculating benefits taking into consideration extent of contributions, inflation and the plans earnings. *Id.* at 222. *See generally* Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 37 BAYLOR L. REV. 107, 114 (1985)(future benefits under a plan will vary according to contributions, investment, earnings, plan expenses, employee's age and retirement age).

31. *See* TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(defines community property); *see, e.g.*, Cearly v. Cearly, 544 S.W.2d 661, 662 (Tex. 1976)(income of either spouse during marriage is community property); Norris v. Vaughan, 152 Tex. 491, 501, 260 S.W.2d 676, 682 (1953)(rights or property acquired while married community property); Maben v. Maben, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ)(earnings of wife and salary of husband both community property). *See generally* McKnight, *Family Law - Husband and Wife*, 34 SW. L.J. 115, 126 (1980)(property obtained during marriage presumed community); Comment, *Community Property Rights and the Business Partnership*, 57 TEX. L. REV. 1018, 1039 (1979)(business profits community property).

32. *Cearly*, 544 S.W.2d at 661-662. In *Cearly*, the husband served in the Air Force for 19 years during 18 of which he was married. *Id.* The trial court granted the wife an interest in her husband's retirement benefits. *Id.* In determining the wife's interest, the court emphasized that benefits earned during marriage were community property and subject to division in divorce proceeding. *Id.* at 662; *see also* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970)(benefits classified as compensation and when earned during marriage constitute community property); Herring v. Blakeley, 385 S.W.2d 843, 846 (Tex. 1965)(benefits derived from contributions to profit-sharing plan during marriage held community property). *See generally* McKnight, *Family Code Symposium: Property Rights and Liabilities*, 13 TEX. TECH L. REV. 611, 735 (1982)(analysis of Texas Family Code section 5.01 community property); Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 37 BAYLOR L. REV. 107, 128-29 (1985)(nature of benefits as community property).

33. *See, e.g.*, TEX. PROB. CODE ANN. § 46 (Vernon 1980 & Supp. 1988)(statutory requirements for joint tenancy with right of survivorship); *id.* § 439 (statutory guidelines for creation of survivorship rights); TEX. FAM. CODE ANN. § 5.42 (Vernon 1975 & Supp. 1988) (statutory requirements for valid partition agreement); *see also* Williams v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966)(Texas Constitution requires partition of community into separate property prior to creating survivorship rights by agreement); Hilley v. Hilley, 161 Tex. 569,

must be signed by both the husband and wife.[34]

California courts have taken a different approach in addressing the characterization of non-employee spousal interests in retirement benefits where the marriage has ended due to divorce or death.[35] In characterizing the

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571, 342 S.W.2d 565, 566 (1961)(corporate stock classified community property subject to descent and distribution). In *Hilley*, the court was required to determine the character of stocks acquired with community funds upon the death of the husband. *Id.* Although the certificates recited survivorship language, the court held that in the absence of a valid partition any survivorship agreement was not effective. *Id.* at 579, 342 S.W.2d at 571; *see also* Jameson v. Bain, 693 S.W.2d 676, 678 (Tex. App.—San Antonio 1985, no writ)(must partition community property prior to creating survivorship rights therein); McCarver v. Trumble, 660 S.W.2d 595, 597 (Tex. App.—Corpus Christi 1983, no writ)(creation of survivorship rights requires conversion of community property into separate property by partition and subsequent execution of survivorship agreement).

34. *See Maples*, 615 S.W.2d at 695 (must partition community funds in joint account prior to signing survivorship agreement); Alexander v. Bowens, 595 S.W.2d 176, 178 (Tex. Civ. App.—Tyler 1980, no writ)(execution of joint-survivor account sufficient to create presumption of survivorship); Roberdeau v. Jackson, 565 S.W.2d 98, 100 (Tex. Civ. App.—Austin 1978, no writ)(use of "jointly" absent words of survival insufficient to create survivorship right); Carnes v. Meador, 533 S.W.2d 365, 369 (Tex. App.—Dallas 1975, writ ref'd n.r.e.)(no survivorship right created in checking account by use of "or to the survivor to sign"). Prior to August 31, 1987, the exact language required to create a right of survivorship was not fully known. *Compare* TEX. PROB. CODE ANN. § 439(a) (Vernon 1980)(previous provision did not express requisite language to create valid right of survivorship in funds on deposit in joint account) *with* TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1988)(current provision). An amendment to the Texas Probate Code section 439 expressed the following language required to create a right of survivorship: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate." TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1988). Section 439(a) further states that a survivorship agreement regarding a joint account will not be inferred. *See id. But see* Dickerson v. Brooks, 727 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)(valid survivorship notwithstanding failure of bank to title certificates as joint account with survivorship). *Compare* TEX. PROB. CODE ANN. § 439 (Vernon 1980 & Supp. 1988)(right of survivorship) *with* TEX. REV. CIV. STAT. ANN. art. 852a, § 6.09 (Vernon 1964) (Savings & Loan Act). Section 6.09 states:

> A husband and wife shall have full power to enter into a savings contract involving a savings account consisting of funds which are community property of their marriage so as to create a joint tenancy with right of survivorship as to such account . . . such contract shall constitute a partition of such community property or reciprocal gifts from the respective spouses, if the same is in writing . . . .

Id. See generally Galvin, *Wills and Trusts*, 37 SW. L.J. 25, 37 (1983)(survivorship rights will not be inferred); Comment, *Probate Code Section 439(a): Conclusive or Rebuttable Presumption of Survivorship?*, 35 BAYLOR L. REV. 837, 840 (1983)(analysis of section 439(a) in light of interpretive case law).

35. *See, e.g.*, Phillipson v. Board of Admin., 473 P.2d 765, 768 (Cal. 1970)(determination of wife's interest in deceased husband's government pension), *disapproved on other grounds, In re* Marriage of Brown, 544 P.2d 561, 569 (Cal. 1976); Benson v. City of Los Angeles, 384 P.2d 649, 651 (Cal. 1963)(characterization of ex-wife's interest in widow's pension); Estate of Allen, 166 Cal. Rptr. 653, 654 (Cal. Ct. App. 1980)(determination of deceased non-employee's inter-

interests of non-employee spouses, California courts have developed the terminable interest rule.[36] According to the rule, the non-employee's interest in the employed's benefits terminates upon death of either spouse.[37] Although

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est in pension benefits). The California courts have also characterized the extent of spousal interests in divorce actions. *See, e.g., In re* Marriage of Gillmore, 629 P.2d 1, 3 (Cal. 1981) (employee spouses right to control distribution of retirement benefits affecting nonemployee spouse's community interest limited subsequent to divorce); *In re* Marriage of Brown, 544 P.2d 561, 562-63 (Cal. 1976)(pension rights divisible in divorce proceeding); *In re* Marriage of Fithian, 517 P.2d 449, 451 (Cal. 1974)(husband's military pension characterized as community upon divorce), *disapproved on other grounds, In re* Marriage of Brown, 544 P.2d 561, 569 (Cal. 1976); Waite v. Waite, 492 P.2d 13, 15 (Cal. 1972)(wife awarded one-half of husband's interest in California Judges' Retirement Fund), *disapproved on other grounds, In re* Marriage of Brown, 544 P.2d 561, 569 (Cal. 1976); *In re* Marriage of Lionberger, 158 Cal. Rptr. 535, 544 (Cal. Ct. App. 1979)(determination of ex-wife's interest in pension trust subsequent to divorce). *See generally* Culhane, *Toward Pension Equality: A Reexamination of California's Terminable Interest Doctrine*, 14 SW. U.L. REV. 613, 618 (1984)(provides indepth analysis of terminable interest doctrine).

36. *See* Estate of Allen, 166 Cal. Rptr. 653, 655 (Cal. Ct. App. 1980). In *Allen*, the court determined the tax consequences of an inheritance resulting from the death of a non-employee spouse. *Id.* at 654. The court, applying the terminable interest rule, reasoned that since the interest of the deceased terminated at death there was no interest that could pass, resulting in no taxable transfer. *Id.* The terminable interest rule is the common-law product of two holdings of the California Supreme Court, *Waite v. Waite*, 492 P.2d 13 (Cal. 1972), *disapproved on other grounds, In re Marriage of Brown*, 544 P.2d 561, 568 (Cal. 1976), and *Benson v. City of Los Angeles*, 384 P.2d 649 (Cal. 1963). The terminable interest rule is also termed the Benson-Waite rationale. *See* Culhane, *Toward Pension Equality: A Reexamination of California's Terminable Interest Doctrine*, 14 SW. U.L. REV. 613, 618 (1984)(thorough discussion of historical development and application of terminable interest doctrine); *see also* Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F. L. REV. 635, 638 (1975). Thiede discusses application of the terminable interest rule to public pension cases. *Id.* at 643-51. The terminable interest rule is also analyzed in its application to private retirement benefits, the public policy considerations involved, and possible conflict of laws in light of ERISA (Employee Retirement Income Security Act of 1974). *Id.*

37. *See Allen*, 166 Cal. Rptr. at 654 (non-employee spouse's interest in private pension benefits terminated upon death); *Waite*, 492 P.2d at 22 (wife's community interest continues only for her lifetime). In *Waite*, the husband obtained a divorce in Nevada and an order decreeing all benefits accrued under Judges' Retirement Law his separate property. *Id.* at 15. Plaintiff, the ex-wife, filed suit seeking one-half of interest in all benefits, which the court awarded to her and her heirs or devisees. The court affirmed the trial court's award as it applied to the plaintiff but not as to her heirs. The court, reasoning that benefits are intended solely for the retiree and spouse, held that the ex-wife's interest continues for her lifetime. *Id.* at 21-22; *see also* Culhane, *Toward Pension Equality: A Reexamination of California's Terminable Interest Doctrine*, 14 SW. U.L. REV. 613, 618 (1984)(analysis of *Benson v. City of Los Angeles*); Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 UCLA L. REV. 417, 443-82 (1978)(exhaustive review and analysis of California law and terminable interest rule); Solomon, *Beyond Preemption: Accommodation of the Nonemployee Spouse's Interest Under ERISA*, 31 HASTINGS L.J. 1021, 1051-1059 (1980)(thorough discussion of terminable interest rule, *Benson-Waite* and their distinctions). *But see* Reppy, *Update on the Terminable Interest Doctrine: Abolished in Califor-*

one Texas court has applied the terminable interest rule, the Texas Supreme Court has not adopted it.[38] Within the past decade, however, the court has addressed the issue of a non-employee spouse's right to the employed spouse's retirement benefits under a public plan.[39]

In *Valdez v. Ramirez*,[40] the Texas Supreme Court determined the character of a non-employee spouse's interest in the employed spouse's retirement benefits accrued under a public plan.[41] The court reasoned that the benefits were the employed spouse's "special community," not subject to intestate succession; therefore, the benefits were to be distributed pursuant to the terms of the retirement plan with her employer.[42] On motion for rehearing,

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nia; Adopted and Expanded in Arizona, 14 COMMUNITY PROP. J. 1, 2 (1987)(analyzes judicial erosion and statutory abolishment of terminable interest rule in California). Reppy discusses the enactment of section 4800.8 of the California civil code and asserts that this section abolished the application of the terminable interest rule where marriage is dissolved by divorce, not death. *Id.* at 3. The California legislature clearly expressed its opinion regarding the rule by stating "[i]t is the intent of the legislature to abolish the terminable interest rule set forth in *Waite v. Waite* . . . and *Benson v. City of Los Angeles* . . . in order that retirement benefits shall be divided in accordance with Section 4800." *Id.* (quoting 1986 CAL. STAT. 686, § 2).

38. *See* Lack v. Lack, 584 S.W.2d 896, 897 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). In *Lack*, a deceased fireman's ex-wife brought suit against the city pension fund and the fireman's widow (second wife). *Id.* The ex-wife asserted she was entitled to death benefits as community property since she was married to the deceased for 127 months during which community funds were contributed to the pension plan. *Id.* at 898. The court held that the ex-wife's interest in the death benefits ceased after divorce. *Id.* at 900. The court, careful to limit its holding to the facts at hand, reasoned that in light of the controlling statute, the terminable interest rule was applicable. *Id.*

39. *See* Valdez v. Ramirez, 574 S.W.2d 748, 749 (Tex. 1978)(characterized non-employee spouse's interest in employed's benefits under Federal Civil Service Retirement Act).

40. 574 S.W.2d 748 (Tex. 1978).

41. *Id.* at 749. Lillie Valdez was employed by the Civil Service for 352 months until her retirement in 1971. *Id.* Lillie Valdez and Tomas Valdez, Sr., were married 340 of the 352 months of her employment. In 1971, Lillie began receiving retirement benefits based on 352 months of service pursuant to 5 U.S.C.A. § 8331, Federal Civil Service Retirement Act. Tomas Valdez, Sr., in 1973, died intestate and was survived by two adult children from a previous marriage. *Id.* Tomas Valdez, Jr., and Olga Ramirez, as heirs of Tomas, Sr., brought suit to recover one-half of Lillie's benefits based on Tomas Valdez, Sr.'s, community interest in the benefits. *See id.* The trial court awarded Tomas, Jr., and Olga one-half of 340/352 in both the benefits received subsequent to Tomas, Sr.'s death and future benefits of Lillie Valdez. The San Antonio Court of Appeals affirmed the trial court. The Texas Supreme Court, however, reversed the lower courts. *Id.*

42. *See Valdez*, 574 S.W.2d at 751. The court reasoned that the interest of the non-employee spouse in benefits of the employed, absent a division or divorce, should not go to the heirs of the non-employee pursuant to section 45 of the Texas Probate Code, but rather, should go to the employee spouse under a joint survivorship provision exercised under 5 U.S.C. § 8339 of the Civil Service Retirement Act. *Id.* at 749. Section 45 of the Texas Probate Code provides that when marriage is dissolved by death, all community property of the wife and husband goes to the survivor unless there are children of the deceased, in which case one-half would go to the children. *See* TEX. PROB. CODE ANN. § 45 (Vernon 1980); *see also* 5 U.S.C.

the court expanded its holding, stating that the distribution of the benefits were regulated by federal law, and thus any conflicting state law was preempted.[43] Although the courts have resolved the issue of a non-employee's rights in benefits under a public plan, they have not, until recently, addressed the same issue under a private retirement plan.[44]

In *Allard v. Frech*,[45] the Texas Supreme Court held that private retirement benefits earned during marriage and joint bank account proceeds earned during marriage were community property, one-half of which was an asset of the deceased non-employee spouse's estate.[46] The court stated that benefits earned during marriage were properly classified as community property.[47] The *Allard* court distinguished *Valdez* on the basis that *Valdez* was decided under federal law and not state community property law.[48] The court emphasized that in *Valdez* the employee spouse had exercised a survivorship

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§ 8339(1) (1982)(guidelines for computation of annuity); *id.* § 8339(j) (computation of married employee annuity); *id.* § 8341 (survivor annuities). The court stated that absent contract or law to the contrary, Texas Probate Code section 45 would control the disposition of a deceased spouse's community property. *See Valdez*, 574 S.W.2d at 749. Further, the court stated that nonprobate assets which are not subject to intestate distribution include property in intervivos trusts, property subject to a joint tenancy with right of survivorship, property transferred at death under terms of a contract, life insurance policies or contributory retirement funds; and annuity contracts established and maintained by federal statutes. *Id.* at 750. Since Lillie Valdez's benefits were payable as a result of her employment with the Civil Service, the court reasoned that awarding the children one-half of the benefits would be contrary to the policy, plan, and her contract under the Civil Service Retirement Act. *Id.*

43. *See Valdez*, 574 S.W.2d at 753. On motion for rehearing, Respondents Valdez, Jr., and Olga Ramirez asserted two points of error. *Id.* at 751. Their first point of error was that no joint survivorship annuity exists under section 8339. Second, they argued that Mrs. Valdez was incapable of creating a valid joint survivorship by agreement in community property under Texas law. *Id.* at 753. The court stated that although the Act fails to use the explicit term of survivorship, there is an implied creation of a joint survivorship annuity based on legislative intent. *Id.* at 751-52. Relying on *Free v. Bland*, 369 U.S. 663 (1962), the court reasoned the benefits were authorized by federal law and therefore preempted any conflicting state law. *Id.* at 753.

44. *See* Valdez v. Ramirez, 574 S.W.2d 748, 751 (Tex. 1978)(court resolved characterization of public retirement benefits).

45. 754 S.W.2d 111 (Tex. 1988).

46. *Id.* at 113. The court addressed the issue of characterization of retirement benefits under a private plan of the employee spouse where the marriage ended by death of a spouse. *Id.*

47. *Id.* at 114. The court in *Allard* recognized well-established Texas law that benefits acquired or earned during marriage are characterized as community property. *Id.* The court focused on Mr. Allard's failure to elect a survivorship provision. *Id.*

48. *Id.* at 113-14. In *Valdez*, the court held that benefits payable pursuant to the Federal Civil Service Retirement Act ("Act") preempted community property law and intestate distribution under section 45 of the Texas Probate Code. *Id.* at 114. In its discussion of *Valdez*, the *Allard* court stated that, under the Act, the employee's benefits were payable solely to an employee, surviving spouse, or minor children. *Id.*

option while in the instant case no survivorship election was made.[49] In *Allard*, the court found no reason to set aside community property law and refused to adopt the terminable interest rule, declaring the adoption of such a rule to be within the province of the legislature, not the courts.[50] The court also addressed the characterization of funds in a joint bank account,[51] holding that in the absence of a partition the joint tenancy account agreement was invalid and the funds remained community property.[52]

Justice Ray, concurring, supported the majority's decision to forego both the adoption of the terminable interest rule and the classification of retirement benefits as a non-testamentary asset.[53] Justice Ray reasoned that by neglecting to make a written agreement disposing of her community interest in the retirement benefits, Mrs. Allard failed to comply with the applicable section of the Texas Probate Code which permits nontestamentary disposition of assets.[54] Justice Ray concluded that adoption of the terminable interest rule was not a decision for the courts because the rule would effectively recharacterize a property right guaranteed by the Texas Constitution, and

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49. *See* Allard v. Frech, 754 S.W.2d 111, 114 (Tex. 1988). Although a survivorship option was available, Mr. Allard exercised an option providing for benefit payments which were guaranteed for ten years. *Id.* The court also focused on the fact that Mrs. Allard did not consent in writing to the option selected by Mr. Allard. *Id.*

50. *Id.* In response to Petitioner's assertion that the terminable interest rule be applied, the court states that a recent amendment to California Civil Code section 4800.8 abolished the terminable interest rule in California. *Id.*; *see also* CAL. CIV. CODE ANN. § 4800.8 (Deering Supp. 1988). This provision provides:

> The court shall make whatever orders are necessary or appropriate to assure that each party receives his or her full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, either of the following:
> (a) Order the division of any retirement benefits payable upon or after the death of either party . . . .
> (b) Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party . . . .

Id.

51. *See Allard*, 754 S.W.2d at 115. The court reasoned that in the absence of a spousal gift or partition agreement, a valid right of survivorship in the joint bank account was not created. *Id.* The court reiterated the requirement in Texas that to create a valid right of survivorship in community property, the community interest must be partitioned. *Id.*

52. *Id.*

53. *Id.* at 115 (Ray, J., concurring). Justice Ray agreed with the majority's statement that retirement plans are intended to benefit the employee and spouse and not their adult children. *Id.* Justice Ray asserted that neither Texas community property law nor the Probate Code resolved the issue. *Id.*

54. *See id.*; *see also* TEX. PROB. CODE ANN. § 450 (Vernon 1980 & Supp. 1988)(providing for the nontestamentary disposition of assets by designation of a beneficiary). *But see Allard*, 754 S.W.2d at 120 (Spears, J., dissenting and concurring). Justice Spears, joined by Justices Kilgarlin and Wallace, pointed out that Mrs. Allard was unable to make a designation because she was not a party. *Id.*

such a decision is properly left to the province of the legislature.[55]

Justice Spears, joined by Justices Wallace and Kilgarlin, concurred with the result reached by the majority regarding the character of the joint bank account proceeds, but dissented as to the characterization and disposition of the retirement benefits.[56] The dissent asserted two grounds for its argument.[57] First, under the Employee Retirement Income Security Act of 1974 ("ERISA"), federal law governs the disposition of private retirement benefits.[58] Second, the majority's holding contravened the specific purpose for which retirement plans were established.[59] The dissent reasoned that Allard's retirement benefits, although established and maintained under a private plan, were regulated by ERISA.[60] The dissent argued that ERISA contained specific preemption provisions to ensure that the uniform regulation of pension plans remained under federal control.[61] Further, the dissent

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55. *Id.* at 116. Justice Ray reasoned that the community interest of a non-employee spouse is constitutional in nature. *Id.* Thus, any recharacterization of these rights should not only be done by the legislature, but also must be accomplished within constitutional mandates. In concluding, Justice Ray asserted that, in light of a recent amendment to Texas Constitution article XVI, section 15, permitting disposition of community property by agreement, the result would have been the same in the absence of such an agreement concerning the benefits. *Id.*

56. *See Allard*, 754 S.W.2d at 118 (Spears, J., dissenting and concurring). The dissent argued that the majority, in awarding benefits to the deceased's heirs, defeats the purpose of retirement benefits, that being, to provide for an employee and spouse in elder years. *Id.* The dissent, citing *Valdez*, states that "retirement benefits, whether administered through a governmental or private pension plan, replace the employee's salary and frequently represent the primary source of financial support and security for the retired employee and his or her spouse." *Id.*

57. *Allard*, 754 S.W.2d at 116. On motion for rehearing, Justice Spears, joined by Justices Kilgarlin and Wallace, withdrew his original dissenting and concurring opinion of May 4, 1988, and substituted the present dissenting and concurring opinion. *Id.*

58. *See id.* at 116 (Mr. Allard asserted that Texas community property law was preempted by ERISA).

59. *See id.* The difference between the opinion withdrawn and the opinion substituted is that the prior dissent did not discuss preemption under ERISA, whereas the substituted opinion does. *Compare* Allard v. Frech, 31 Tex. Sup. Ct. J. 371, 373 (May 4, 1988)(Spears, J., dissenting and concurring) (withdrawn opinion) *with* Allard v. Frech, 754 S.W.2d 111, 116 (Tex. 1988)(Spears, J., dissenting and concurring) (substituted opinion on motion for rehearing).

60. *See Allard*, 754 S.W.2d at 117. The dissent first established that a plan that disburses retirement income is an employee pension benefit plan and is, therefore, comprehensively regulated by ERISA. *Id.* The dissent reasoned that because the General Dynamics plan provided for retirement income and General Dynamics was an industry in commerce, ERISA clearly applied. *Id.*; *see also* 29 U.S.C. § 1002(2)(A)(1) (1982)(defines pension plan and employee pension benefit plan); *id.* § 1002(12) (defines activity or industry affecting commerce); *id.* § 1003(a)(1) (defines types of benefit plans covered by ERISA).

61. *See Allard*, 754 S.W.2d at 116. Federal law regulating a specific type of activity supersedes state law in the benefits area under the supremacy clause. *Id.* (citing *Free v. Bland*, 369 U.S. 633, 666 (1962)). Judicial decisions in which state law is applied, involving an area

asserted that, with one exception,[62] ERISA mandates that private retirement benefits not be alienated nor assigned.[63] Reasoning that the exception was inapplicable,[64] the justices concluded that Mr. Allard should not have been divested of one-half of his retirement benefits by state community property law.[65]

Continuing its attack, the dissent asserted that the policy reasons underlying retirement benefits are in direct conflict with the majority's opinion.[66] Justice Spears emphatically distinguished between the division of retirement benefits in cases of divorce and to division of benefits upon death.[67] Acknowledging the problems in applying the terminable interest rule, Justice Spears criticized the majority for its willingness to circumvent the issue and asserted that the terminable interest rule should be applied in part.[68] Further, the dissent attacked the majority's refusal to acknowledge that Texas law recognizes retirement accounts as nonprobate assets.[69] In conclusion, the dissent argued that the divestiture of one-half of Mr. Allard's retirement

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previously preempted, may be nullified based on federal preemption. *See id.* (citing *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940)); *see also* 29 U.S.C. § 1144(a) (1982)(ERISA's preemption provision).

62. *Id.* at 117. Justice Spears acknowledged that one exception to the anti-alienation provision allows benefits to be alienated or assigned pursuant to a "qualified domestic relations order." *Id.* A qualified domestic relations order, for purposes of ERISA, is a domestic relations order that recognizes or creates a right in an alternate payee to receive all or part of the participant's benefits under a plan. *See* 29 U.S.C. § 1056(d)(3)(B)(i)(ii) (Supp. IV 1986).

63. *See* 29 U.S.C. § 1056(d)(1) (1982)(provision prohibiting alienation or assignment of benefits).

64. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring). Justice Spears reasoned that the order divesting Mr. Allard of one-half of his interests did not fall within the defined parameters of a "qualified domestic relations order." *Id.*

65. *Id.* The dissent asserted that section 1056(d)(3) did not preclude application of section 1056(d)(1) which prohibits the alienation of benefits. *Id.* Because section 1056(d)(1) applied, there was a conflict between the federal prohibition and the state court order, thus requiring federal preemption of the state law. *Id.*

66. *See Allard*, 754 S.W.2d at 119 (Spears, J., dissenting and concurring) (majority's opinion contravenes purpose of retirement plans).

67. *Id.* The dissent, in distinguishing between division of retirement benefits prompted by either divorce or death, asserted that upon divorce each spouse must continue to live and division of the benefits is necessary to ensure continued financial support. *Id.* Conversely, in the case of death, the dissent reasoned that the deceased's need for continued financial support ceases. *Id.*

68. *See Allard*, 754 S.W.2d at 119-20 (Spears, J., dissenting and concurring). The dissent states that the terminable interest rule is a product of two common-law cases, *Benson v. City of Los Angeles* and *Waite v. Waite*. *Id.* Acknowledging the inequity in applying the *Benson* prong, the dissent argued that only the *Waite* prong should be adopted in the instant case. *Waite* held that upon death of a non-employee spouse his/her community interest in the retirement benefits terminates. *Id.*

69. *See id.* at 120. The dissent, relying on the *Valdez* decision, asserted that the Texas Supreme Court has previously recognized retirement benefits as nonprobate in nature. *Id.* In

benefits was an unjust deprivation of his rights pursuant to his retirement contract.[70]

The ultimate issue in *Allard* was not the character of retirement benefits earned during marriage,[71] but rather the alienability of those benefits upon the death of the non-employee spouse.[72] First, the majority's use of authorities in support of its decision, although controlling where the division of retirement benefits is premised on divorce, lacks both logical and equitable foundation in the instant case.[73] Second, the majority, in failing to follow the *Valdez* decision, not only contravened its own reasoning, but also departed from precedent.[74] Third, despite the dissent's flawed reasoning in applying section 1056(d)(3) under ERISA, its conclusion that section 1056(d)(1) governed the disposition of Mr. Allard's benefits was valid.[75] Fi-

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addition, Justice Spears stated that retirement accounts are expressly defined as nonprobate assets by the Texas Probate Code section 450. *Id.*

70. *See Allard*, 754 S.W.2d at 120 (Spears, J., dissenting and concurring). The dissent argued that under section 5.22(a) of the Texas Family Code, Mr. Allard retained sole right of management and control over the retirement plan provided he did not act to defraud his wife's interest. *Id.* The dissent reasoned that, absent evidence of fraud on the part of Mr. Allard, his contract to receive benefits should have been enforced so as to govern the disposition of his retirement benefits. *Id.*

71. *See Allard*, 754 S.W.2d at 114. The majority reaffirmed that retirement benefits earned during marriage are unquestionably characterized as community property. *Id.*; *see also* Valdez v. Ramirez, 574 S.W.2d 748, 749 (Tex. 1978)(public retirement benefits earned during marriage held community property). In *Valdez*, the court states that "a settled marital property rule in Texas is that a spouse has a community property interest in that portion of the retirement benefits of the opposite spouse earned during their marriage." *Id.* (citing *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977)); *see also* TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(general definition of community property).

72. *Compare Allard*, 754 S.W.2d at 113 (determination of method used in dealing with benefits where marriage ends by death) *with* Valdez v. Ramirez, 574 S.W.2d 748, 749 (Tex. 1978)(extent to which deceased spouse's interest can pass to heirs or surviving spouse). *But cf. Allard*, 754 S.W.2d at 112 (majority states case involves characterization of retirement benefits).

73. *See Allard*, 754 S.W.2d at 114. The majority, to support its holding that one-half of Mr. Allard's benefits should pass to his deceased wife's estate, relied on divorce cases which did not address the issue of division of benefits premised on death. *Id.* The majority cites three cases, all of which deal solely with division of benefits in divorce proceedings. *See id.* (citing *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977); *Cearly v. Cearly*, 544 S.W.2d 661, 662 (Tex. 1976); *Busby v. Busby*, 457 S.W.2d 551, 554-55 (Tex. 1970)).

74. *See Allard*, 754 S.W.2d at 114. The court asserted that its own decision in *Valdez* was distinguishable from the instant case. *See id. But see Valdez*, 574 S.W.2d at 749 (relevant facts analogous to instant case).

75. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring on motion for rehearing). Justice Spears correctly asserted that Mr. Allard's private retirement plan was governed by federal law under ERISA. *Id*; *see also id.* at 116 (Phillips, C.J., concurring on motion for rehearing). Chief Justice Phillips concurred solely because the Petitioner failed to argue preemption by federal law in a timely manner. *Id.*

nally, the dissent's purported adoption of the terminable interest rule, although asserted by the majority as an issue within the province of the legislature, is a workable solution notwithstanding a recent constitutional amendment to article XVI, section fifteen of the Texas Constitution allowing spouses to transfer community property to the surviving spouse by agreement.[76]

In *Allard*, the support used by the majority addressed the division of retirement benefits in cases of divorce and not the division of retirement benefits premised on death of a spouse, as was the case in *Allard*.[77] The majority's reasoning was valid in respect to divorce cases because it is both logical and equitable to divide retirement benefits characterized as community property to ensure the continued support of each spouse.[78] However, the majority's rationale, although applicable in divorce cases, is erroneous when applied to division of benefits premised on death because neither the obligation nor the need to support the deceased spouse continues.[79]

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76. *Id.* at 119 (Spears, J., dissenting and concurring). The dissent asserted that California has had problems in applying the terminable interest rule which is the product of two California Supreme Court cases. *Id.* The problem, the dissent observed, is with the *Benson* prong of the rule, not the *Waite* prong, which the dissent concludes should be applied in the instant case. *Id.* at 119-20.

77. *See Allard*, 754 S.W.2d at 114. In *Taggart v. Taggart*, the court addressed the issue of the partition of unmatured military retirement benefits in a hearing subsequent to the divorce proceeding. Taggart v. Taggart, 552 S.W.2d 422, 423 (Tex. 1977). In *Cearly v. Cearly*, the court resolved the issue of characterization and division of military benefits once again in a divorce proceeding. Cearly v. Cearly, 544 S.W.2d 661, 666 (Tex. 1976). Finally, in *Busby v. Busby*, the court determined the character of disability retirement benefits and the division of those benefits where the husband and wife were divorced. Busby v. Busby, 457 S.W.2d 551, 552 (Tex. 1970).

78. *See Allard*, 754 S.W.2d at 119 (Spears, J., dissenting and concurring) (continuing need to support each spouse subsequent to divorce); *see also Taggart*, 552 S.W.2d at 424 (Yarbrough, J., dissenting)(division of benefits in divorce cases should be just and appropriate to reach equitable disposition of assets between parties); *Cearly*, 544 S.W.2d at 661. The *Cearly* court stated that "[t]he court granting the divorce can and should take [retirement benefits] into consideration in exercising its broad power under . . . section 3.63 of the Texas Family Code, to the end that an order might be entered that is just and equitable under the circumstances." *Id.* The majority's holding that retirement benefits are community property and subject to division in divorce proceedings is consistent with the policy underlying retirement plans that retirement benefits are intended to provide sustenance for an employee and spouse. *See* McCarthy v. McCarthy, 453 U.S. 210, 227 (1981)(purpose of retirement pay to provide for needs of retiree); Valdez v. Ramirez, 574 S.W.2d 748, 750 (Tex. 1978)(purpose of Civil Service Retirement Act to provide security and financial support to employee and immediate family). *See generally* Arruebarrena, *Applying Louisiana's Community Property Principle to Pensions*, 33 LOY. L. REV. 241, 245 (1987)(function of retirement benefits to supply employee with income).

79. *See Allard*, 754 S.W.2d at 119 (Spears, J., dissenting and concurring)(financial support of spouse ceases upon death). *Compare id.* at 119 (Spears, J., dissenting and concurring) (need for spousal support ends at death) *and Valdez*, 574 S.W.2d at 752 (joint survivorship

The majority in *Allard* erred in not following the *Valdez* decision because the reasoning and facts are indistinguishable from the instant case.[80] First, the majority failed to recognize that in both *Allard* and *Valdez* the marriages ended due to death of a non-employee spouse.[81] Second, the majority did not acknowledge that in *Valdez* the retirement benefits were also earned by one spouse during marriage and characterized as community property.[82] Finally, the majority erred in not following *Valdez* because in both cases the alienation of the benefits was prohibited by federal law.[83] Thus, the major-

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annuity provides for a fifty percent reduced payment to support surviving spouse) *with Taggart*, 552 S.W.2d at 424 (Yarbrough, J., dissenting) (equity among parties should be reached when dividing benefits in divorce proceeding) *and Cearly*, 544 S.W.2d at 665 (court in divorce proceeding should strive to reach equitable division of benefits among parties). The division of benefits upon death of a spouse and the subsequent alienation of those benefits to a young adult is in direct contravention with the stated policy and purpose, respectively, of retirement plans and retirement benefits. *See Allard*, 754 S.W.2d at 114 (court divested employee of one-half of his retirement benefits in favor of wife's estate). *But see* Hisquierdo v. Hisquierdo, 439 U.S. 572, 573 (1979)(retirement benefits intended to support employee in old age); 29 U.S.C. § 1002 (1982)(purpose of retirement plans to provide medical, hospital, disability, retirement income for employees).

80. *Compare Allard*, 754 S.W.2d at 113 (disposition of private retirement benefits upon death of non-employee spouse) *with Valdez*, 574 S.W.2d at 749 (disposition of public retirement benefits at death of non-employee spouse). In *Valdez*, the court, applying Texas law, reasoned that public retirement benefits earned during marriage were community property. *See Valdez*, 574 S.W.2d at 749. However, because the benefits were subject to the employee's sole management and control, the court reasoned that the benefits were special community under the Texas Family Code, section 5.22(a). *Id.* at 750-51; *see also Allard*, 754 S.W.2d at 114 (court characterized private retirement benefits earned during marriage as community property).

81. *See Allard*, 754 S.W.2d at 113. Mrs. Allard died on April 11, 1983. *Id.* The court determined the method to be used in dealing with private retirement benefits where marriage terminates by death of a non-employee spouse. *Id.*; *cf. Valdez*, 574 S.W.2d at 749. Tomas Valdez, Sr., died intestate during 1973. *Valdez*, 574 S.W.2d at 749. The question faced by the court was whether a community interest of the deceased spouse in the employed spouse's public benefits could pass to heirs via intestate distribution. *Id.*

82. *Compare Allard*, 754 S.W.2d at 113 (benefits derived from contribution of community funds to private retirement plan established by Mr. Allard's employer) *with Valdez*, 574 S.W.2d at 749 (benefits based on Lillie Valdez's 352 months of employment as civil servant 340 months of which she was married).

83. *Compare Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring) (ERISA prohibits alienation or assignment of retirement benefits) *with Valdez*, 574 S.W.2d at 750 (Civil Service Retirement Act prohibits payment of benefits to persons other than employee surviving spouse or minor child). The dissent in *Allard* asserted that ERISA section 1056(d)(1) prohibits, under federal law, the alienation or assignment of the employee's private retirement benefits. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring); *see also* 29 U.S.C. § 1056(d)(1) (1982)(ERISA anti-alienation provision). In *Valdez*, the court asserted that section 8341 of the Civil Service Act applied and prohibited the alienation of the employee's benefits. *See Valdez*, 574 S.W.2d at 750; *see also* 5 U.S.C. § 8346 (1982)(anti-assignment provision). "The Act's policy of retaining the benefits in the hands of the intended recipients is

ity, in distinguishing rather than following the *Valdez* decision, departed from its own reasoning.[84]

In *Allard*, the dissent correctly concluded that the disposition of Mr. Allard's retirement benefits was regulated by federal law.[85] The dissent's rationale that section 1056(d)(1) prohibited the alienation of Mr. Allard's

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exhibited in the protections of 5 U.S.C.A. § 8346(a) which provides: The money mentioned by [the Civil Service Retirement Act] is not assignable, either in law or equity . . . ." *See Valdez*, 574 S.W.2d at 750 n.5.

84. *See Allard*, 754 S.W.2d at 113-14. In *Allard*, the majority affirmed the court of appeals decision, stating they correctly distinguished *Valdez*. *Id.* at 114. The *Allard* majority stated that *Valdez* not only involved a retirement plan governed by federal law but also involved the presence of a survivor's annuity. *Id.* Mr. Allard's failure to elect a survivor's annuity was irrelevant because the underlying reasoning in *Valdez* resulted in the enforcement of the employed's contractual right to select the method of payment, not the method of payment selected. *Id.*; *see also Valdez*, 574 S.W.2d at 750-51. It is arguable that the *Allard* majority erred in its assertion that election of a survivor's annuity was pertinent to the outcome of the instant case and having established that the disposition of Mr. Allard's retirement benefits is governed by federal law under ERISA, the established precedent of *Valdez* should have been applied in the instant case. *Compare* Allard v. Frech, 754 S.W.2d 111, 113 (Tex. 1988)(disposition of private retirement benefits upon death of non-employee spouse) *with* Valdez v. Ramirez, 574 S.W.2d 748, 750 (Tex. 1978)(disposition of public retirement benefits upon death of non-employee spouse).

85. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring). The retirement plan in the instant case provides retirement income to its participants and was established by General Dynamics, an employer engaged in commerce. *Id.* Thus, the plan is subject to regulation under ERISA. *Id.*; *see also* 29 U.S.C. § 1003(a) (1982)(defines coverage of ERISA). This section states in part that ERISA applies "to any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce." *Id.*; *see also* Pilot Life Ins. Co. v. Dedeaux, __ U.S. __, __, 107 S. Ct. 1549, 1552, 95 L. Ed. 2d 39, 46 (1987)(broad construction of scope of ERISA). The Court, in its interpretation of ERISA, stated "we have observed in the past that the express preemption provisions of ERISA are deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). The intent of Congress that ERISA comprehensively regulates private retirement plans under federal law is evidenced by enactment of section 1144(a). *See Pilot Life Ins. Co.*, __ U.S. at __, 107 S. Ct. at 1551, 95 L. Ed. 2d at 45-46. Section 1144(a) provides in part that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a) (1982)(preemption provision of ERISA). A major area of conflict exists between ERISA's anti-alienation provision and community property law of states. *Id.* at 257. The Supreme Court of the United States has enumerated two tests to determine if the conflict between the state and federal law rises to a level that mandates preemption. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (conflict sufficient requiring preemption if impossible to comply with both state and federal law); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)(conflict exists where state law hinders accomplishment of objectives and purposes of Congress). In the instant case, the divestment of the employed's retirement benefits is in direct conflict with the avowed purpose of ERISA. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring). *See generally* Comment, *Community Property Interests in ERISA Pension Plans*, 21 HOUS. L. REV. 253, § 254 (1984)

retirement benefits was well-founded because the benefits in the instant case were payable under a private plan regulated by ERISA.[86] Although the dissent's application of section 1056(d)(1) was correct,[87] it is arguable that the dissent erred in its concomitant application of both section 1056(d)(3) and section 1056(d)(1) because, at the time of Mrs. Allard's death, section 1056(d)(3) did not exist.[88]

(state community property law preempted where right conferred by state conflicts with federal law and purpose of federal statute).

86. *See Allard*, 754 S.W.2d at 117. ERISA section 1056(d)(1) prohibits, under federal law, the alienation or assignment of the employee's private retirement benefits. *See* 29 U.S.C. § 1056(d)(1) (1982)(ERISA's anti-alienation provision). In *Shaw v. Delta Air Lines, Inc.*, the United States Supreme Court addressed the unsettled question of whether private retirement plans regulated by ERISA are governed by state law or federal law, holding that state law relating to such plans was preempted by ERISA. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95-100 (1983). Prior to *Shaw*, there were varying results regarding the issue of preemption under ERISA. *See* Savings & Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038, 1039 (7th Cir. 1983)(Wisconsin family court order awarding wife one-half interest in husband's savings fund preempted by ERISA); General Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980)(section 1056(d)(1) prohibits both involuntary and voluntary alienations or assignments). *But see, e.g.*, Stone v. Stone, 632 F.2d 740, 742-43 (9th Cir. 1980)(state court order directing plan to pay community interest share of employer's benefits not preempted by ERISA); Cody v. Riecker, 594 F.2d 314, 315 (2nd Cir. 1979)(relying on decision in *Merry* that garnishment to enforce state court support order not preempted under ERISA); American Tel. and Tel. Co. v. Merry, 592 F.2d 118, 121 (2d. Cir. 1979)(state laws that only remotely or peripherally relate to benefit plans not preempted).

87. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring) (arguing that section 1056(d)(1) prohibits alienation of benefits in instant case); *see also, e.g.*, *Shaw*, 463 U.S. at 98 (ERISA's preemption broad in scope); *Ex Parte* Burson, 615 S.W.2d 192, 196 (Tex. 1981)(divorce decree awarding ex-wife portion of Air Force disability benefits under state law preempted by federal law); *Ex Parte* Johnson, 591 S.W.2d 453, 454 (Tex. 1979)(state court order awarding ex-spouse interest in Navy disability benefits based on state law preempted by federal statute). The court reasoned that Congress intended the benefits were for use by the retiree and held "that the award to relator's spouse of 50 percent of his anticipated future disability benefits from the Veterans' Administration conflicts with the clear intent of Congress that these benefits be solely for the use of the disabled veteran." *Id.* at 456; Anthony v. Anthony, 624 S.W.2d 388, 390 (Tex. App.—Austin 1981, writ dism'd)(court implies that state law preempted where federal statute explicitly prohibits alienation of benefits). Congressional intent is clear that ERISA should preempt state law. *See* Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 449 (1987) (in-depth analysis of ERISA).

88. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring). The dissent correctly reasoned that section 1056(d)(1), which was enacted in 1974 and was in effect when Mrs. Allard died on April 11, 1983, was the controlling provision. *See* 29 U.S.C. § 1056(d)(1) (1982)(provision prohibiting alienation or assignment of retirement benefits under ERISA); *see also* 29 U.S.C. § 1061 (1982)(effective date of ERISA September 2, 1974); Act of Sept. 2, 1974, Pub. L. No. 93-406, Title I, § 206, 88 Stat. 864, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639. The dissent erred in its inclusion of section 1056(d)(3) in its reasoning that the anti-alienation provision of ERISA applied because section 1056(d)(3) was not effective until January 1, 1985, more than twenty months after Mr. Allard's death. *See Allard*, 754 S.W.2d at

A workable solution to the issue addressed by the *Allard* court would be the adoption, in part, of the terminable interest rule.[89] Adoption of the *Waite* prong of the terminable interest rule would automatically terminate the decedent's community interest in the employed spouse's retirement benefits and the benefits would remain the separate property of the employee spouse.[90] In fact, to avoid inequitable division and unjust divestiture of the

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117 (Spears, J., dissenting and concurring)(dissent's inclusion of section 1056(d)(3) in its reasoning); *see also* 29 U.S.C. § 1056(d) (1982)(amended by Retirement Equity Act of 1984, Pub. L. No. 98-397, § 104, 98 Stat. 1433). Section 1056(d) was amended by adding paragraph (3) which provides for an exemption from the anti-alienation provision. *See* 29 U.S.C. § 1056(d)(3) (1982 & Supp. IV 1986). The effective date of section 1056(d)(3) is applicable to plans after December 31, 1984. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, § 302, 98 Stat. 1451, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 1451. Section 1056(d)(3) provides that the anti-alienation provision [1056(d)(1)] does not apply if the alienation or assignment of all or part of a participant's retirement benefits is pursuant to a "qualified domestic relations order." *See* 29 U.S.C. § 1056(d)(3) (Supp. IV 1986). The dissent reasoned that, in the instant case, the order divesting Allard of fifty percent of his benefits was not a "qualified domestic relations order" because it did not accord the marital property rights of Mrs. Allard nor provide for child support payments to a dependent of Mr. Allard. *See Allard*, 754 S.W.2d at 117 (Spears, J., dissenting and concurring). The dissent has failed to consider the full definition of a "qualified domestic relations order." *Compare id.* (dissent's definition of qualified domestic relations order) *with* 29 U.S.C. § 1056(d)(3) (Supp. IV 1986)(complete definition of qualified domestic relations order). A qualified domestic relations order includes but is not limited to any order which relates to marital property rights of a child, former spouse or spouse of a participant, "and is made pursuant to a state domestic relations law (including a community property law)." 29 U.S.C. § 1056(d)(3)(B)(ii) (Supp. IV 1986). It is arguable, therefore, that had section 1056(d)(3) been effective at the time of Mrs. Allard's death, the order divesting Mr. Allard of fifty percent of his benefits could have constituted a "qualified domestic relations order," thus exempting the award in the instant case from the prohibition of alienation or assignment under section 1056(d)(1). *See* 29 U.S.C. § 1144(b)(7) (Supp. IV 1986)(exemption of qualified domestic relations order); *see also* Ball v. Revised Retirement Plan, Etc., 522 F. Supp. 718, 720-21 (D. Colo. 1981)(state domestic relations order authorizing assignment of employed's benefits for support exempt from anti-alienation provision of ERISA); Cartledge v. Miller, 457 F. Supp. 1146, 1156-57 (S.D.N.Y. 1978)(anti-alienation provision of ERISA not applicable where state court seeks enforcement of alimony and child support).

89. *See* Allard v. Frech, 754 S.W.2d 111, 115 (Tex. 1988)(Ray, J., concurring). Justice Ray asserted that there is no solution to the issue addressed by the court in the instant case either by application of the Texas Probate Code or community property principles. *Id. But see id.* at 119 (Spears, J., dissenting and concurring, joined by Justices Kilgarlin and Wallace). The dissent asserts that if in fact state law were controlling in the instant case, policy and logic would require the adoption of the terminable interest rule. *Id.*

90. *See Allard*, 754 S.W.2d at 119-20 (Spears, J., dissenting and concurring, joined by Justices Kilgarlin and Wallace). The dissent argued that the *Waite* prong of the terminable interest rule would automatically terminate the deceased non-employee spouse's community interest in the employed's retirement benefits and thus, the benefits would become the separate property of the employed. *See id.* at 119. In *Waite*, the court reasoned that retirement benefits are intended solely for the retiree to support himself and spouse. *See* Waite v. Waite, 492 P.2d 13, 22 (Cal. 1972), *disapproved on other grounds, In re* Marriage of Brown, 544 P.2d 561, 569 (Cal. 1976). The *Waite* court, considering the purpose of retirement benefits, held that the ex-

employee spouse's retirement benefits, Wisconsin has codified the *Waite* prong of the terminable interest rule.[91] The Texas legislature recently promulgated an amendment to the Texas Constitution to accommodate the recharacterization of community property.[92] Article XVI, section fifteen of the Texas Constitution was amended in 1987 permitting, in essence, the recharacterization of community property by mere agreement.[93] In light of this amendment, it is arguable that the archaic common-law requirement mandating a partition[94] is no longer a prerequisite to the valid creation of

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wife's community interest continues only for her lifetime. *Id.*; *see also* Solomon, *Beyond Preemption: Accommodation of the Nonemployee Spouse's Interest Under ERISA*, 31 HASTINGS L. J. 1021, 1056-59 (1980)(analysis of *Waite* and terminable interest rule).

91. *See* WIS. STAT. ANN. § 766.62(5) (West Supp. 1988). This provision enacted as part of Wisconsin's Marital Property Act to classify deferred employment benefits provides that "[t]he marital property interest of the nonemployee spouse in a deferred employment benefit plan terminates at the death of the nonemployee spouse if he or she predeceases the employee spouse." *Id.*; *see also* Adelman, Hanaway & Munts, *Departures From the Uniform Marital Property Act Contained in the Wisconsin Marital Property Act*, 68 MARQ. L. REV. 390, 400 (1985)(compares Uniform Marital Property Act with Wisconsin's Act). The authors state that "[t]he provision (766.62(5)) is designed to prevent the non-employee spouse from willing away fifty percent of the benefits to a third party . . . thereby ensuring that the surviving employee spouse may rely on receiving all the benefits." *Id.*

92. *See* TEX. FAM. CODE ANN. § 5.43 (Vernon Supp. 1988). This section provides that after September 1, 1987, parties by premarital agreement may contract with regard to rights and obligations of the parties' property wherever and whenever located or acquired and disposition of property on death, marital dissolution, or separation. *Id.* § 5.43(a)(1),(3); *see also* TEX. FAM. CODE ANN. § 5.52 (Vernon Supp. 1988). This section provides that "at any time, the spouse may partition or exchange between themselves any part of their community property, then existing or to be acquired, as they may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes his or her separate property." *Id.*; *see also* TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1988). This section states that "spouses may agree in writing that all or part of their community property which is titled or held with indicia of title becomes the property of the surviving spouse on the death of a spouse." *Id.*

93. *See* TEX. CONST. art. XVI, § 15. The 1987 amendment to article XVI, section 15 provides that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." *Id.*; *see also* Recent Developments, *Family Law - Overview of Significant 1987 Legislation Passed in the 70th Session of the Texas Legislature*, 19 ST. MARY'S L.J. 495, 496 (1987)(summary of 1987 amendment as it effects community property rights).

94. *See* Maples v. Nimitz, 615 S.W.2d 690, 695 (Tex. 1981). The court concluded that mere execution of signature agreement attempting to operate as a one-step partition of the community's funds is impermissible under the Texas Constitution article XVI, section 15. *Id.* Texas law requires that the community funds be partitioned prior to creation of survivorship rights in such property. The court in reaching its conclusion stated "it is a very old principle of law that the husband and wife cannot, by mere agreement, partition and transfer their community property to each other and effect a change of the class of the estate which the constitution fixes upon the property." *Id.*; *see also* Williams v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966)(reaffirms requirement that to create survivorship rights and comply with con-

survivorship rights in community property, including but not limited to joint bank account proceeds and retirement benefits.[95] Despite the recent amendment to the constitution, to ensure that retirees have a source of income in retirement, public policy advocates the adoption of the *Waite* prong of the terminable interest rule.[96]

The issue in *Allard* was not the characterization of private retirement benefits, but rather, the alienability of those benefits. Although the support used by the majority was well-founded in respect to divorce cases, the same reasoning was erroneous when applied to the division of benefits premised on death of a spouse because neither the obligation nor the need to support the deceased spouse continues. The majority should have applied the *Valdez* court's analysis in rendering its decision in the instant case because the reasoning and facts were indistinguishable.

By distinguishing rather than following the *Valdez* rationale, the court has elected a procrustean approach in addressing the alienability of private retirement benefits and has departed from its own reasoning. The dissent, notwithstanding its concomitant application of both section 1056(d)(1) and 1056(d)(3), soundly reasoned that in the instant case the disposition of private retirement benefits was governed by ERISA. Despite the recent amend-

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stitutional mandates community property must first be partitioned); Hilley v. Hilley, 161 Tex. 569, 579, 342 S.W.2d 565, 571 (1961)(established requirement of partition of community property prior to creation of survivorship rights).

95. *See* TEX. CONST. art. XVI, § 15 (Vernon Supp. 1988). Since the Texas Constitution has been amended to permit the transfer or creation of survivorship rights in community property by agreement, it appears that an actual partition is no longer required. *Id.* The assertion that a partition is no longer mandated by the constitution nor common law is evidenced also by the recent amendments to the Texas Probate Code. *See* TEX. PROB. CODE ANN. § 46(b) (Vernon 1975). This section prior to its amendment in 1987 provided that:

> A written agreement between spouses and a bank, savings and loan, credit union, or other financial institution may provide that existing funds or securities on deposit and funds and securities to be deposited in the future and interest and income thereon shall by that agreement be partitioned into separate property and may further provide that the property partitioned by that agreement be held in joint tenancies and pass by right of survivorship.

Id. But see TEX. PROB. CODE ANN. § 46(b) (Vernon Supp. 1988). Section 46(b) as amended in 1987 states "spouses may agree in writing that all or part of their community property which is titled or held with indicia of title becomes the property of the surviving spouse on the death of a spouse." *Id.*; *see also* McKnight, *Matrimonial Property*, 13 ST. MARY'S L.J. 448, 468-71 (1982)(analyzes *Hilley*, *Williams* and *Maples* in light of constitutional amendments supporting recharacterization of community property absent a partition).

96. *See Allard*, 754 S.W.2d at 115 (Ray, J., concurring) (public policy and equitable considerations warrant application of these [terminable interest rule] doctrines); *see id.* at 119 (Spear, J., dissenting and concurring) (contravenes purpose of retirement plans to divest surviving spouse of retirement income). *Contra Allard*, 754 S.W.2d at 114 (court ignores own precedent that divestment of retirement benefits is contrary to public policy and decided in instant case to divest retiree of fifty percent of monthly retirement income).

ment to the Texas Constitution permitting the characterization of community property by agreement and notwithstanding federal preemption, adoption of the terminable interest rule would provide security and guidance to those Texans, both contemplating and in the midst of retirement. Unfortunately, the court, unwilling to offer residents peace of mind, has provided a decision that is not only unsound but also one that compels the lower courts to unjustly deprive retirees of their life savings.

Darryl J. Silvera