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Protecting Spousal Rights in Private Pensions

by Jonathan Barry Forman

1. Introduction

What (if any) rights should the spouse of a retirement plan participant have? Under current law the answer can vary dramatically depending on the type of retirement plan in which the worker participates. Widely different rules apply to pension plans, to profit-sharing and stock bonus plans, and to individual retirement accounts (IRAs). In particular, while pension plans must offer automatic survivor annuities, profit-sharing and stock bonus plans need only provide a lump-sum death benefit, and IRAs are not required to provide any spousal guarantees. Indeed, public policy in this area seems almost incoherent.

The purpose of this paper is to consider whether there is a coherent and principled approach to decide the question of what rights (if any) nonparticipant spouses should have in the retirement plans of participant spouses. Section 2 explains the current spousal protection rules for the various types of retirement plans, and Section 3 discusses the need for spousal protections, while Section 4 outlines some of the recent reform proposals. Section 5 articulates the conflicting principles that have led to the present disjointed and incoherent spousal protection rules that govern the various types of retirement plans.

Finally, Section 6 discusses how to develop a coherent spousal rights policy and offers several possible models. In particular, this section considers whether it would be appropriate to extend the automatic survivor annuity regime to all types of retirement plans. It also considers a pension-sharing approach based on the so-called earnings sharing approach that has so frequently been suggested as a means of reforming the Social Security system.

2. Current Rules for Dividing Pensions

This section explains the current spousal protection rules that are applicable to the various types of retirement plans. Specifically, it explains the spousal protection rules that are applicable to pension plans, profit-sharing and stock bonus plans, and individual retirement accounts (IRAs).

2.1 Private Retirement Plans Covered by the Employee Retirement Income Security Act of 1974

The Employee Retirement Income Security Act of 1974 (ERISA) requires most private retirement plans to provide at least some protections for nonparticipant spouses (see generally Conison 1998; Lassila and Kilpatrick 1997; McGill et al. 1996). However, different rules apply to pension plans (including defined benefit plans and money purchase plans) and profit-sharing and stock bonus plans.

2.1.1 Pension Plans

Pension plans typically provide spousal protections in several ways. First, pension plans typically pay benefits in the form of an annuity over the life of the participant. Second, most pension plans are required to provide a qualified joint and survivor annuity (QJSA) option for retiring participants. Third, most pension plans are also required to provide a qualified preretirement survivor annuity (QPSA) option in case the worker dies before retirement. Fourth, a divorcing spouse of a pension plan participant can secure an interest in the participant spouse's pension by obtaining a qualified domestic relations order (QDRO).

2.1.1.1 Annuitization

At retirement pension plans typically pay out benefits as an annuity. In particular, most defined benefit plans pay benefits in the form of a single life annuity over the life of the participant or, alternatively, in the form of a joint and survivor annuity over the life of the participant and spouse. Some defined benefit plans, however, allow the participant to receive a lump-sum distribution instead of an annuity. For example, about 15% of the defined benefit plans of medium and large businesses allow the participant to select a lump-sum distribution (U.S. Department of Labor 1998, p. 114).

By spreading payments over a period of years, annuitization provides at least some spousal protection, even if the benefit is payable as a single life annuity over the life of the participant. However, this spousal protection may be lost when payouts take the form of lump-sum distributions, as these are often quickly dissipated (Atkins 1986; Woods 1993).

2.1.1.2 Qualified Joint and Survivor Annuities

Since the passage of the Retirement Equity Act of 1984 (REA), ERISA has required pension plans to provide a spouse with annuity payments of at least 50% of the participant's payments after the participant's death (ERISA §205; Internal Revenue Code (I.R.C.) §§401(a)(11), 417; Moss 1985; Watson 1991). All pension plans must provide these survivor benefits, unless the nonparticipant spouse consents to an alternative form of payment.

The most prevalent type of survivor benefit is the QJSA. A QJSA is an annuity for the life of the spouse that is not less than 50% (and not greater than 100%) of the annuity payable during the joint lives of the participant and spouse.

When the QJSA is selected, the participant will typically receive a lower monthly benefit during retirement to account for the likely increase in the number of years that the pension plan will have to make payments (Wiatrowski 1998; McGill et al. 1996, pp. 220–22). For example, the participant and spouse might receive a joint pension benefit that is about 90% of the single-life benefit. If the nonparticipant spouse dies first, the participant typically continues to receive that joint benefit. However, if the participant dies first, the typical surviving spouse benefit (50% of the joint benefit) would be about 45% of the single-life annuity benefit (45% = 50% × 90%).

All of the defined benefit plans of medium and large businesses provide for survivor benefits, and 98% provide QJSAs (U.S. Department of Labor 1998, p. 110). Although some plans offer only one joint and survivor option that pays the surviving spouse 50% of the participant's pension, many offer a choice of two or more alternative percentages (such as 50%, 67%, and 100%) to be continued for the nonparticipant spouse. For example, in 1995, 30% of the defined benefit plans of medium and large employers offered only the 50% joint and survivor annuity benefit, and 66% were given several options, usually 50%, 67%, or 100% of the basic pension, to select as survivor amounts.

A participant can elect to waive the QJSA (for example, in order to take a lump-sum distribution), but only if the nonparticipant spouse consents, in writing, before a notary public or plan representative. Spousal consent is also required for plan loans that use the participant's accrued benefits as security. But, spousal consent is not required for an involuntary cash-out of a participant's benefit (that is, if the value of the account is less than $5,000) or for distributions made to satisfy the minimum distribution rules.

Overall, the percentage of married participants selecting joint and survivor annuities has increased since the Retirement Equity Act of 1984 made QJSA the default. Nevertheless, only 62% of married and divorced participants starting their annuities in 1993–94 reported selecting joint and survivor annuities (Holden 1996; Holden 1999).[1] In particular, it appears that the nonparticipant spouse almost always consents to the form of the distribution that the participant desires. Moreover, at least with respect to small plans, there is a good deal of anecdotal evidence that the annuity form of distribution is "rare" if a lump-sum distribution is available (Helm and Goldstein 1990, p. 112).

[1]Similarly, of the more than five million married retirees receiving private pension annuities in 1994, just 59% reported that they had selected the joint and survivor annuity option, 38% reported that they did not, and 3% did not know or did not respond (U.S. Department of Labor 1995, pp. 101–2). Worse still, only 7% of the 513,000 divorced retirees receiving private pension annuities in 1994 reported selecting the joint and survivor option. For additional studies about participant choices between the QJSA and other forms of distribution, see King (1996) and Beller and McCarthy (1992).

2.1.1.3 *Qualified Preretirement Survivor Annuities*

Pension plans must also provide survivor benefits in case the worker dies before retirement (ERISA §205; I.R.C. §§401(a)(11), 417). Typically, a surviving spouse will receive an annuity equal to the minimum amount payable if the employee had retired on the day before death with a QJSA (U.S. Department of Labor 1998). Thus, the minimum benefit is roughly equal in value to 50% of the pension that the worker would have been entitled to if the worker had just retired. These QPSAs must start no later than the month in which the worker would have reached early retirement, but can be forfeited if the spouse does not survive until then.[2] Spousal consent is also required for any participant election to waive the QPSA benefit. Eighty-two percent of the defined benefit plans of medium and large businesses provide only the minimum required QPSA benefit (U.S. Department of Labor 1998, p. 111).

For defined contribution plans, the QPSA must be actuarially equivalent to at least 50% of the participant's vested account balance at death.

2.1.1.4 *Qualified Domestic Relations Orders and the Anti-alienation Rule*

ERISA also has an anti-alienation rule that generally prevents creditors from reaching the pension plan benefits of participants and their spouses (ERISA §206(d)(1); I.R.C. §401(a)(13)). This provision can also help ensure that the participant and spouse will continue to receive their pension benefits throughout retirement.

REA created an exception to the anti-alienation rule for assignments of pension benefits through QDROs. Under the QDRO exception a state court can issue a domestic relations order that assigns some or all of a participant's pension benefits to the participant's spouse or former spouse to satisfy support or marital property obligations (ERISA §206(d)(3)(A); I.R.C. §401(a)(13)(B); U.S. Department of Labor 1997; Baumer and Poindexter 1996). There are, of course, numerous procedural requirements, the most important of which is that the QDRO may not require the pension plan to provide any form of benefit that is not otherwise available under the plan.

[2]The additional cost of providing QPSAs is often absorbed by the employer at no cost to the employee. Alternatively, the additional cost for this benefit could be paid for by a small reduction in the pension ultimately payable to the participant or the surviving spouse (U.S. Department of Labor 1998, p. 102; Ott 1991, p. 14).

Most states treat pensions as marital property that can be distributed to either or both spouses at divorce (Baumer and Poindexter 1996; Throne 1988; Blumberg 1986). The courts typically try to achieve an equitable distribution of marital property. In that regard, absent evidence to the contrary, divorce law presumes that equal division of the marital property is the most equitable. Typically, that means that the value of each pension can be taken into account by the court, but as long as there is other marital property available, it may not be necessary for the court to issue a QDRO.

In cases where the duration of the pension-producing employment and the marriage are not the same, the courts often utilize the so-called 'coverture fraction' to determine what portion of the pension is marital property and what portion is the participant's individual property. The fraction is determined by dividing the number of years of simultaneous marriage and employment by the total employment time. For example, if an employee worked for 20 years on the job that resulted in the pension benefits but was married for just 12 of those years before divorce, the marital property share would be just 60% (60% = 12/20) of the value of the pension at divorce (Baumer and Poindexter 1996). Thus, the courts tend to view pensions as deferred compensation of the employee spouse that, but for the pension, would have been consumed by the couple or used to acquire additional marital assets.

Nevertheless, while there is a good deal of empirical evidence that divorcing parties, attorneys, and judges often consider pension benefits in the division of marital property, equitable division does not always occur (Krauskopf and Seiling 1996; Morris 1998). Indeed, many divorced spouses are unaware of QDRO protection and do not ask that the worker's pension be divided (Older Women's League 1998; Moss and Gottlich 1995).

2.1.2 *Profit-Sharing and Stock Bonus Plans*

2.1.2.1 *Avoiding the QJSA-QPSA Survivor Annuity Regime*

Profit-sharing and stock bonus plans are generally subject to the same ERISA rules that govern pension plans; however, profit-sharing and stock bonus plans can usually avoid the QJSA-QPSA survivor annuity regime. Specifically, a profit-sharing or stock bonus plan is not subject to the automatic survivor benefit rules if the plan provides that (1) the spouse of a participant is the beneficiary of the participant's entire account under the plan, (2) the participant's benefit is not paid in the form of an annuity, and (3) the participant's account does not include amounts transferred from another plan that was subject to the automatic survivor benefit rules (ERISA §205(b); I.R.C. §401(a)(11)(B)). In short, profit-sharing and stock bonus plans (including 401(k) plans)[3] can usually avoid providing survivor annuities if they instead provide the required death benefit.

Moreover, at retirement, these plans virtually always allow for payout in a lump sum, and no spousal consent is required. Indeed, relatively few profit-sharing and stock bonus plans even allow employees to choose the QJSA/QPSA form of payout. For example, in 1995 only about 17% of the savings and thrift plans of medium and large businesses allowed the participant to select annuity distributions, and only 30% even allowed them to select installment distributions (U.S. Department of Labor 1998, p. 144).

Also, prior to retirement, many of these plans allow participants to withdraw all or a portion of their individual accounts, and many plans allow them to borrow against their accounts. For example, in 1995 about 47% of the savings and thrift plans of medium and large businesses permitted withdrawals, and 44% permitted loans (U.S. Department of Labor 1998, pp. 132, 138).

All in all, as long as the plan provides the required death benefit, no spousal consent is required for any form of distribution or loan.

2.1.2.2 Qualified Domestic Relations Orders

Profit-sharing and stock bonus plans are, however, subject to the usual QDRO provisions.

2.2 Individual Retirement Accounts

Individual retirement accounts are not pension plans covered by ERISA, however. Consequently, they are not subject to the QJSA/QPSA rules applicable to pension plans or to the death benefit rule typically applicable to profit sharing and stock bonus plans. Spousal consent is not required for withdrawals or for the designation of a non-spouse beneficiary.[4]

IRAs are, however, subject to QDRO-like rules (I.R.C. §408(d)(6)). These rules also apply to Simplified Employee Pension IRA plans (SEP-IRAs) and to Savings Incentive Match Plans for Employees (SIMPLE) IRA plans.

3. The Need for More Spousal Protections

The issue of spousal rights in retirement plans is especially important now for two reasons. First, because Americans are both living longer and retiring earlier, there is a significant risk that millions of retirees will outlive their resources. In particular, many of these will be octogenarian widows, a group that is already among the poorest of Americans. The well-being of these elderly Americans will be placed in even further jeopardy when Social Security reform inevitably incorporates at least some benefit cuts. Second, the shift away from traditional pensions toward such new retirement plans as 401(k) plans and IRAs makes it even more important that a coherent set of spousal rights policies be developed to cover these new "pensions."

3.1 Poverty among Elderly Women

Although the economic status of individuals age 65 and over has improved substantially over the past few decades, women continue to face a much higher risk than men of poverty in old age. Retirement income security is even less certain for divorced women and for those who outlive their spouses.

At the outset it is worth remembering that women tend to live longer than men and that men tend to marry younger women. In that regard, the average life expectancy for a woman age 65 is about 19 years, versus about 15 years for men (U.S. Congress 1998, p. 1031). Moreover, Americans are retiring earlier and earlier (Forman 1998a, p. 292). The typical couple will spend about 15 years together in retirement, and the wife will live another 6 years as a widow (Iams and Sandell 1998, p. 37). Indeed, women are five times more likely to become widowed (Watson 1990, p. 31), and many of these women will find themselves living below the poverty level (Ott 1991; Weaver 1997; Hurd and Wise 1987).

Elderly divorced women are particularly at risk. They tend to have an exceptionally high incidence of poverty (around 30%), an unusually high incidence of serious health problems, and low Social Security benefits (Weaver 1997; Ferron 1997).

[3]So-called 401(k) savings plans allow workers to choose between receiving cash currently or deferring taxation by placing the money in a retirement account. These types of options are sometimes called cash or deferred arrangements (CODAs).

[4]Of course, IRAs may be inherited (for example, by a spouse). In that case they are generally subject to the same kind of distribution rules that apply to defined contribution plans (I.R.C. §408(a)(6)).

Despite their greater need for retirement income, women have not found much support in the private retirement system. In fact, there is a particularly large gender gap concerning retirement income. Whereas 46.5% of men over age 65 in 1995 received pension or annuity income, or both, averaging $11,460 per year, only 26.4% of women over age 65 that year received a pension or annuity, and these averaged just $6,684 per year (Employee Benefit Research Institute 1997, p. 63). Moreover, women age 50 or over are more likely to receive a pension benefit through their husbands (as spouses or survivors) than through their own savings or employment.

There are many reasons for this gender gap in retirement income. In particular, women tend to earn less than men. Also, women tend to work for smaller companies that are less likely to have a retirement plan. Women also tend to spend more time away from the workplace to raise a family or care for an aging relative. For example, one study found a strong association between marital and fertility decisions and pension coverage (Even and Macpherson 1994).

On the other hand, because younger women today spend more time in the workforce and at more equal salaries, the financial security of women is likely to improve somewhat over time (Even and Macpherson 1994; Korcyzk 1994; Lumsdaine et al. 1994).

Still, even if women benefit from increasing pension coverage, they are likely to face a greater risk of poverty than men because of their longer life expectancies. Moreover, because relatively few private retirement plans are indexed for inflation, elderly women will often find their purchasing power diminished over the course of retirement (Watson 1990, p. 32). There is therefore a significant risk that millions of retirees will outlive their resources, and that octogenarian widows and divorcees will be among the hardest hit.

3.2 *The Shift to New "Pensions" without Spousal Protections*

Another major reason for concern stems from the shift away from traditional pensions toward new retirement plans, such as 401(k) plans and IRAs. As shown in Section 2, traditional pension plans typically pay out benefits in the form of joint and survivor annuities. However, these new "pensions" typically pay benefits in the form of lump-sum distributions that may be dissipated even before the death of the participant. Again, the danger is that surviving spouses will be left without adequate retirement incomes.

As of 1993 about 43% of private-sector workers were covered by at least one pension plan (Employee Benefit Research Institute 1997, p. 81). Defined contribution plans comprised 88% of these plans, up from 67% in 1975. Moreover, 42% of the active participants in private-sector plans had a defined contribution plan as their primary plan, up from just 13% in 1975. Similarly, in 1993, 88% of private employers with only one retirement plan sponsored only a defined contribution plan, up from 68% in 1984 (U.S. General Accounting Office 1996b, p. 4).

It is noteworthy that 401(k) plans are the fastest growing part of the defined contribution world. For example, their share of private retirement plans grew from 3% to 14% from 1984 to 1990. At the same time their share of employer-sponsored retirement plan participants grew from 19% to 46% (U.S. General Accounting Office 1997, p. 46; U.S. Department of Labor 1998, p. 4; U.S. General Accounting Office 1996a, p. 4). IRAs, too, are a relatively new phenomenon, and Roth IRAs are brand new, beginning in 1998.

No doubt these new retirement savings vehicles will help enhance the retirement income security of some workers. To the extent that they displace traditional pension plans, however, these new "pensions" may undermine the retirement income security of other workers and their spouses. As explained in Section 2, these new pensions are generally not subject to the QJSA/QPSA and spousal consent rules.

Ironically, it may be that the complicated QJSA/QPSA and spousal consent rules applicable to traditional pension plans may, themselves, have contributed to the trend toward 401(k) plans and other new pensions. Indeed, many employers and their advisors complain that the QJSA/QPSA regime is too complicated and should be repealed (Helm and Goldstein 1990).[5]

[5]Along the same lines, traditional defined benefit plans may also have been undermined by court decisions requiring those plans to ignore mortality differences between male and female employees. See Moore (1987) (using a statistical analysis of the age/death rate of women and men and comparing them with rates of pension investments); *City of Los Angeles Department of Water and Power v. Manhart,* 435 United States Reports 70 (1978) (finding that Title VII of the Civil Rights Act of 1964 prohibits an employer from requiring female employees to make larger contributions to its pension plan than male employees because of mortality table differentials between the sexes); and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,* 463 United States Reports 1073 (1983) (finding that Title VII prohibits an employer from paying lower monthly retirement benefits to a woman than to a man who has made the same contributions).

In summary, the shift from traditional pensions with survivor annuities to these new pensions, which typically pay benefits in the form of lump-sum distributions and do not require spousal consent, raises significant concerns that many surviving spouses will be left without adequate retirement incomes.

4. Some Recent Reform Proposals

Concerns about the adequacy of retirement incomes have led to a number of legislative proposals to expand the spousal protection rules governing the various kinds of private retirement plans. The most common proposals are to modify the joint and survivor annuity rules applicable to pension plans, to extend the spousal consent rules to more types of retirement plans, and to modify the rules for dividing retirement plans at divorce.[6]

4.1 Modify Joint and Survivor Annuities

Under the current joint and survivor annuity regime, a widow typically receives only about 40% of the amount received while the participant was alive. Many analysts have observed that surviving spouses would be better off if benefits were paid out in the form of a joint and two-thirds survivor annuity or, alternatively, in the form of a joint and 75% survivor annuity (Older Women's League 1998, p. 20, Gottlich et al. 1995, p. 619).[7] Consequently, many analysts have recommended that pension plans be required to offer a joint and 75% survivor annuity (Executive Office of the President and Office of Management and Budget 1999, Analytical Perspectives, p. 67) or a joint and two-thirds survivor annuity (Comprehensive Women's Protection Act 1997, §401; Older Women's League 1998, p. 20).

Along the same lines, it could make sense to increase the QPSA benefit from the 50% minimum benefit up to a two-thirds, 75%, or even a full annuity for the surviving spouse of a worker who dies before the annuity starting date (Gottlich et al. 1995).

Yet other observers argue that the current QJSA/QPSA regime is already too complicated and burdensome. If it were up to them, they would repeal the current joint and survivor annuity rules (Helm and Goldstein 1990).

4.2 Extend Spousal Protections to Defined Contribution Plans and IRAs

Another recent proposal has been to extend spousal consent protections to 401(k) plans. For example, a bill that passed the Senate in 1997 would have required written spousal consent for all distributions and loans from all 401(k) plans. That provision was strongly opposed by industry and was dropped from the final legislation (Cosgrove 1997a; Cosgrove 1997b; Kaye 1997). Nevertheless, the proposal continues to have significant support (Comprehensive Women's Protection Act 1997, §501; Older Women's League 1998, p. 20).

4.3 Improve Pension Division upon Divorce

Another recent proposal would require that all retirement plans be divided equally at divorce unless the court orders, or the parties agree, otherwise (Comprehensive Women's Protection Act 1997, §103; Gottlich et al. 1995, p. 619; Older Women's League 1998, p. 20). This

[6]A number of the spousal protection proposals discussed here were included in a bill that was recently introduced by (former) Senator Carol Moseley-Braun (D-Ill.) in the Senate and by Congresswoman Barbara Kennelly (D-Conn.) in the House (the Comprehensive Women's Pension Protection Act, S. 320 and H.R. 766, 1997). Among other things, their bill would (1) modify the joint and survivor annuity requirements so that pension plans would be required to provide either surviving spouse with two-thirds of the benefit received while both were alive (unless the nonparticipant spouse consents to an alternative form of payment); (2) require that 401(k) plans be covered by the same spousal consent protections as defined benefit plans with respect to lump-sum distributions; and (3) require that divorcing spouses automatically split their pensions 50/50 unless otherwise stipulated in a QDRO.

There are, of course, numerous other pension reform proposals that have been suggested as ways of helping women, including making vesting easier, eliminating or restricting Social Security integration, promoting pension plan portability, increasing participation (for example, by covering part-time workers), requiring cost-of-living adjustments for all pensions, and using voluntary savings plans to supplement, not supplant, traditional employer-sponsored pensions (Gottlich et al. 1995; Moss 1985).

[7]Many have also suggested that the Social Security system be modified so that married couples receive the equivalent of a joint and 75% survivor annuity. In that regard, one study found that a $1 reduction in the couple's Social Security benefit could finance about a $1.45 increase in the survivor's benefit (Iams and Sandell 1998, p. 37).

automatic division rule would apply to all retirement plans, including 401(k) plans and IRAs.

On the other hand, other analysts complain that even the current QDRO requirements are lengthy, detailed, and unnecessarily complex (Helm and Goldstein 1990, p. 113). These critics want to simplify the QDRO rules, not extend them to more types of retirement plans.

5. Back to First Principles

Before trying to develop a set of recommendations about what rights (if any) a nonparticipant spouse should have in a participant spouse's retirement plans, it makes sense to articulate the conflicting principles that have led to the disjointed and incoherent spousal protection rules that now govern the various types of retirement savings vehicles.

At the outset it is worth noting that all retirement plans reflect the deferred compensation of the participant spouse. From the nonparticipant spouse's point of view, however, a dollar is a dollar is a dollar. In short, from the nonparticipant spouse's point of view, all retirement plans are *functionally* equivalent. Nevertheless, the private retirement system has widely different spousal protection rules for the various types of retirement savings vehicles: survivor annuity and consent rules for pension plans, a death benefit for profit-sharing and stock bonus plans, and no particular spousal protections for IRAs.

This almost schizophrenic treatment of spousal rights in the various types of retirement plans reflects the conflict among three principles that our society holds dear: the principle of individual autonomy, the principle of retirement income adequacy, and the marital partnership principle. Under the principle of individual autonomy, we believe that the government has no business telling workers what to do with their earned income. Under the principle of retirement income adequacy, however, we believe that the government should enact paternalistic retirement savings policies to ensure that workers and their families will have adequate incomes throughout their retirement years. Finally, under the marital partnership principle, we believe that husbands and wives should share their earnings and their savings.

When it comes to spousal rights in retirement plans, these three principles overlap and, sometimes, even conflict. Morever, as we will see, the widely differing treatment of spouses by the various types of retirement plans follows naturally from our different conceptions about those plans and not from any logical analysis about their functional equivalence.

If we are ever to develop a coherent public policy with respect to spousal rights, we need to base it on one or more of these three conflicting principles. This section next considers what kind of spousal protection is suggested by each of these three principles. It concludes by considering whether the three conflicting principles can be integrated to form the basis for a coherent public policy with respect to spousal rights in private retirement plans.

5.1 The Principle of Individual Autonomy

First, as a general proposition we believe that the government has no business telling individual workers what to do with the money that they earn. In our laissez-faire system workers can save or spend their earned income in any way they please. This is the principle of individual autonomy.

For example, imagine two workers, Husband, who earns an average of $40,000 a year over the course of his career, and Wife, who earns an average of $20,000 a year. After taxes, Husband and Wife can pretty much do whatever they want with their money. For example, Husband can spend $1,000 on a refrigerator or a vacation, or Husband can invest that $1,000 in a bank, the stock market, or an education. It's really none of the government's business.

More to the point, if Husband takes $1,000 and puts it in a bank account, the government does not tell him when he can withdraw that money or whom he must share it with if he withdraws it. The principle of individual autonomy keeps the government from interfering with Husband's free choice about how and when he spends his money.

Now, here's the kicker. Because we basically think of IRAs as glorified bank accounts, they, too, are primarily governed by the principle of individual autonomy. With relatively few exceptions,[8] the IRA rules do not tell Husband when he can withdraw "his" money or what he should do with it. Absent a QDRO-like order, Husband can pretty much take the whole balance of his account and blow it in Las Vegas if he wants. The principle of individual autonomy is also the primary principle governing 401(k) plans and most other defined contribution plans.

In essence, the principle of individual autonomy suggests that there should be no spousal rights in a partici-

[8]The IRA rules do penalize early withdrawals, and the minimum distribution rules also apply (I.R.C. §§72(t), 401(a)(9)).

pant's pension. In fact, many analysts believe that the principle of individual autonomy should govern all forms of retirement savings. These analysts would repeal the QJSA/QPSA regime and leave the allocation and distribution of retirement savings to the contractual arrangements between the spouses.

5.2 *The Principle of Retirement Income Adequacy*

Second, we believe that, left to their own devices, many individuals will not save enough for their own retirement. Consequently, we have empowered our government to enact paternalistic Social Security and pension policies to ensure that workers will, in fact, save for their own retirement (Thompson 1998; Weiss 1991). This is the principle of retirement income adequacy.

For example, Social Security collects payroll taxes from virtually all workers and uses those receipts to pay benefits to virtually all retirees and their dependents. Private pension policy also has many paternalistic features. For example, the limitations on early withdrawals and loans help ensure that retirement savings will be available to meet retirement needs.

Indeed, most of the spousal protections applicable to pension plans stem from paternalistic governmental efforts to achieve adequate retirement incomes for the spouses of plan participants. Both the QJSA/QPSA survivor annuity regime and the QDRO rules help ensure that nonparticipant spouses will have adequate retirement incomes. Consequently, when Husband contributes $1,000 to a pension plan, he surrenders some choice about it. At least a portion of that money gets locked into a survivor annuity, unless Wife consents otherwise. Similarly, if Husband contributes $1,000 to a profit-sharing or stock bonus plan, the money will be subjected to the death benefit regime applicable to those plans, and vice versa for Wife's contributions to ERISA-covered plans.

In short, under the retirement income adequacy principle the basic idea is to pool the couple's retirement savings in a way that ensures that both spouses would have adequate incomes throughout their retirement years.

Of course, if the government really wanted to ensure that participants and their spouses have adequate incomes throughout their retirement years, there is much more that it could do. For example, it could bar early withdrawals and plan loans altogether; it could mandate that all retirement plans pay out benefits in the form of annuities (perhaps even joint and 75% survivor annuities for married couples); and it could mandate that pension benefits be indexed for inflation.

Indeed, if retirement income adequacy were the only principle guiding government action, the government would find it relatively easy to ensure that every American would have an adequate retirement income. This goal could be achieved, for example, by expanding the current Social Security system or by mandating some type of universal private pension system (President's Commission on Pension Policy 1981; Furman 1999).

5.3 *The Marital Partnership Principle*

Finally, according to the marital partnership principle, spouses are thought to be equal partners in the deferred compensation that is saved during the course of their marriage.[9] For example, absent evidence to the contrary, our divorce courts presume that an equal division of marital property is the most equitable. Consequently, at least for couples with long marriages, their retirement savings are typically split 50/50.

However, where the duration of the pension-producing employment and the marriage are not the same, the courts often utilize the so-called coverture fraction to determine what portion of the pension is marital property and what portion is the participant's individual property. For example, if an employee worked for 20 years on the job that resulted in the pension benefits but was married for just 12 of those years before divorce, the marital property share would be just 60% (60% = 12/20) of the value of the pension at divorce. Consequently, the spouse would be entitled to 30% of the pension (half of the 60% that is marital property), and the participant would get 70% (the 40% that is not marital property plus half of the 60% that is marital property).

6. Implications and Models

6.1 *Toward a Coherent Spousal Rights Policy*

6.1.1 *A Simple Example*

A simple example should clarify the various approaches for dividing retirement savings between spouses.

[9]It is worth noting, however, that there is relatively little empirical evidence showing that marriages in the real world actually operate as an equal partnership between a man and a woman (Kornhauser 1996).

Consider a couple that has been married for 12 years, with Husband age 65 and Wife age 60. Husband has earned an average of $40,000 a year over the course of his career. Over the past 20 years Husband has accumulated $100,000 of retirement savings. Wife has earned an average of $20,000 a year over her career and has no retirement savings. Who gets Husband's $100,000 in retirement savings?

Under current law the result would depend on the *type* of retirement savings vehicle. Under a pension plan the default is the QJSA/QPSA 50% survivor annuity regime. Under a profit-sharing or stock bonus plan, the spouse gets a death benefit. Finally, IRAs offer no particular spousal protections.

Alternatively, if the principle of individual autonomy were to govern, Husband would keep all $100,000. It would simply be none of the government's business.

If, instead, the principle of retirement income adequacy were to govern, retirement plans would often be divided based on the relative needs of husbands and wives. In particular, life expectancies would be extremely important, and most spouses would be required to take their benefits in the form of a joint and survivor annuity. For example, imagine if Husband's $100,000 is used to purchase a joint and survivor annuity. In present value terms Wife would get most of the $100,000 because she is younger than Husband, and so she is likely to collect benefits long after he has died. Indeed, according to pertinent IRS regulations, Husband has a life expectancy of 15 years, but Wife has a life expectancy of 21.7 years, and together they have a joint life expectancy of 24.6 years.[10]

Under the marital partnership principle, however, Husband would get $70,000, and Wife would get $30,000. Under the coverture rule, only 60% of Husband's $100,000 of retirement savings is marital property (12 years of marriage/20 years of work leading to these retirement savings). Wife would get half of that $60,000, and Husband would get the rest (the 40% that is not marital property plus half of the 60% that is marital property).

6.1.2 Toward a Solution

It is probably impossible to completely reconcile these three conflicting principles for the division of retirement savings, but it may be possible to confine each to a different portion or aspect of retirement savings. Current law applies different spousal protection rules to different *types* of retirement savings plans. But it would make better sense to instead apply different spousal protection rules for different *amounts* of retirement savings.

[10]U.S. Internal Revenue Service, Treasury Regulations §1.72–9 Tables I and II (1986).

6.2 A Mandatory Survivor Annuity Regime

One approach would be to focus on the principle of retirement income adequacy.[11] In the context of the present voluntary retirement savings system, the government might want to require husbands and wives to use at least a portion of their retirement savings to ensure that both spouses have adequate incomes throughout their retirement years. This goal could perhaps best be accomplished by mandating that couples use at least a basic portion of their retirement savings to purchase a joint and survivor annuity, perhaps even one that is indexed for inflation. Beyond the basic amount of retirement savings needed to purchase this annuity, however, more relaxed distribution rules might apply.

For example, at retirement, couples could be required to purchase an indexed joint and survivor annuity that, together with Social Security, would assure them an annual income equal to at least 125% of the poverty level (Forman 1998b, pp. 1681–84). In 1999 the poverty level for a married couple is $11,060 (U.S. Department of Health and Human Services 1999). Consequently, assuming a target of 125% of the poverty level, a married couple retiring in 1999 would need $13,825 in 1999 ($13,825 = 125% × $11,060) and appropriately inflation-adjusted amounts in subsequent years. For many couples Social Security will already provide a good chunk of the minimum benefit of 125% of the poverty level, leaving only the balance to be made up from the couple's purchase of an inflation-adjusted annuity.[12]

More relaxed rules might be applied to retirement savings in excess of the basic amount needed to meet the 125% of the poverty level standard. If the principle of individual autonomy were allowed to govern these extra savings, each spouse would be pretty much free to use

[11]As already mentioned, at the farthest extreme the principle of retirement income adequacy could be used to justify an expanded Social Security system or a mandatory private pension system.

[12]These annuities could be sold by the government, or alternatively the government could help create a private market for them.

his or her respective savings as he or she chose. Alternatively, if the marital partnership principle were allowed to govern, then each spouse would have significant rights in the other spouse's extra retirement savings.

Finally, similar protections could be designed to protect spouses of workers who died before retirement and to protect divorced spouses. The key would be to design benefits that generally ensured that surviving spouses and ex-spouses also would have adequate incomes throughout their retirement years.

6.3 A Pension-Sharing Regime

Another approach would be to focus on the marital partnership principle. Within the context of the present voluntary retirement savings system, the government might simply mandate that all retirement savings vehicles be shared equally between a husband and wife. Under this "pension-sharing" approach the retirement savings of married workers could be split between the two spouses when contributions are made, at divorce, at retirement, or at death.

Such a pension-sharing approach could operate along the lines of the so-called earnings-sharing approach that has so often been offered as an alternative to Social Security's current system of spousal benefits (U.S. Department of Health and Human Services 1985; U.S. Congressional Budget Office 1986; Fierst and Campbell 1988). Under Social Security earnings sharing, Social Security's current system of spouse and surviving spouse benefits would be repealed. Instead, each spouse in a married couple would be credited with one-half of the couple's combined earnings during marriage. In the end each spouse's Social Security benefit would be based on one-half of the married couple's earnings credits during marriage plus whatever earnings credits each of them accrued before or after the marriage.

For example, consider a couple in which the primary worker earned $40,000 in a given year and the secondary worker earned $10,000. Under the current Social Security system, the primary worker is credited with $40,000 of earnings, and the secondary worker is credited with just $10,000 of earnings. Under earnings sharing, each would be credited with $25,000 of earnings for that year for purposes of computing benefits.

6.3.1 The General Idea

Something like earnings sharing could easily be applied to most private retirement plans. Instead of creating a single account or record for each worker, plan sponsors and IRA trustees could be required to create two separate accounts—one for the worker and another for the spouse—and accrue half of the benefits in each of the two accounts. In effect the spouse would be treated as another employee of the plan sponsor. Alternatively, a single account could be set up jointly for the husband and wife, and that account could be split at divorce, retirement, or death.

6.3.2 Period for Sharing and Eligible Years

Retirement savings could be shared only for the years of marriage and not for years when the couple is not married. The period for sharing could be in increments of single calendar years, with marital status on the last day of the calendar year being determinative.

6.3.3 Proof of Marriage and Divorce

Obviously, keeping track of who was married, to whom, and for how long would be a challenge, but it would not be an insurmountable one. One approach would be for the federal government to maintain a central records system. This could be accomplished, for example, if officials who perform marriages or grant divorces were required to provide prompt notice to the federal government, which could then make the information available to the parties concerned.

6.3.4 Payout at Retirement

At retirement each spouse would have one or more retirement savings vehicles. Presumably, generous rollover rules would allow each individual to combine his or her many different participant and spousal accounts and accruals. Moreover, spouses should be allowed to combine their savings and accrued benefits to purchase joint and survivor annuities. Indeed, in order to ensure adequate incomes for both spouses throughout their retirement years, perhaps minimum-level joint and survivor annuities should be required.

6.3.5 Inheritance for Surviving Spouses of Married Couples

When one partner to the marriage died, the surviving spouse would be guaranteed the right to inherit half (or perhaps even all) of the other spouse's accrued retirement savings. Alternatively, the surviving spouse's share might be allowed to vary depending upon the adequacy of the surviving spouse's own accrued retirement benefits and the length of the marriage.

6.3.6 Division at Divorce

If retirement accruals are divided annually, then no further action would be required at divorce. Still, we might want to permit courts to issue QDRO-like orders in order to achieve the equitable division of the couple's marital property.

Alternatively, divorce might be the operative time for dividing individually accrued pension benefits. In that event division according to the coverture formula would be appropriate, unless a different division were needed to achieve an equitable division of the couple's marital property.

6.4 A More Realistic Spousal Consent Alternative

Realistically, this country seems too committed to the principle of individual autonomy to adopt either a mandatory survivor annuity or a pension-sharing regime at this time. Nevertheless, some expansion of spousal rights in retirement plans is needed in order to help ensure that all workers and their spouses will have adequate incomes throughout their retirement years. Moreover, it would make sense to have pretty much the same set of rules applicable to virtually all types of retirement savings vehicles. After all, at retirement all retirement plans are pretty much functionally equivalent. Accordingly, it would make sense to have a consistent set of spousal protections with respect to retirement, death, and divorce.

6.4.1 At Retirement: Spousal Consent and Joint and Survivor Annuities

It could make sense to extend the spousal consent rules to all retirement plans, including 401(k)s and IRAs. These rules could be applied to all distributions, withdrawals, and loans. If necessary, the government could help keep track of marriages and divorces and make that information available to plan administrators and IRA trustees.

Moreover, the QJSA/QPSA regime could be extended to all, or at least to more, types of retirement plans. It might even be appropriate to require that all types of retirement plans offer a joint and 75% survivor annuity option.

For that matter the government might even want to help make it possible for every couple to buy an indexed joint and survivor annuity that, together with Social Security, would assure them an annual income equal to at least 125% of the poverty level. These annuities could be sold by the government, or, alternatively, the government could help create a private market for them.

6.4.2 At Death: Preretirement Survivor Annuities or Inheritance

At the death of a participant, it could make sense to ensure that the surviving spouse is entitled to at least half of the participant's retirement savings or, alternatively, is entitled to receive a preretirement survivor annuity of an equivalent value.

6.4.3 At Divorce: Automatic Division of Accrued Benefits

Finally, at divorce, it could make sense to automatically divide the couple's combined retirement savings—equally, unless the court orders, or the parties agree, otherwise. For example, on receipt of the appropriate notice, an IRA trustee would simply create two equal accounts for the former husband and wife.

7. Conclusion

What rights should a nonparticipant spouse have in a participant's retirement plan? The current system applies widely differing spousal protection rules to pension plans, profit-sharing and stock bonus plans, and IRAs. The current system is both disjointed and incoherent, and it is unlikely to meet the needs of present and future retirees and their spouses.

Building from first principles, this paper has offered three alternatives. First, the government might want to mandate that participants and their spouses use at least a basic portion of their retirement savings to acquire indexed joint and survivor annuities that, together with their Social Security benefits, would ensure that they have adequate retirement incomes throughout their lives. Second, the government might want to require participants to share their retirement savings through some kind of pension-sharing regime. Finally, the government might simply want to expand the spousal protection rules that currently apply to pension plans and extend those rules to such "new" pensions as 401(k) plans and IRAs.

What is needed is a coherent set of spousal protections that can help guarantee that all Americans will have adequate retirement incomes. There are advantages and disadvantages each of the three alternatives described here. But the need for reform is clear, and the time for action is now.

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