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COMMENT

Community Property after *Hisquierdo v. Hisquierdo*

*MARIE STEFANINI NEWMAN and PATRICIA SCHULTHEISS**

I. INTRODUCTION

The division of property upon divorce in community property states[1] has been affected by the Supreme Court's decision in *Hisquierdo v. Hisquierdo*,[2] which was handed down in January 1979. *Hisquierdo* held that a Railroad Retirement Act pension, which under California community property law was the property of both spouses, divisible upon divorce, was the separate property of the spouse who earned it. This pre-emption of California community property law by the Railroad Retirement Act deprived the other spouse of any interest whatsoever in the pension benefits.

Jess H. Hisquierdo filed a petition to dissolve his marriage to Angela Hisquierdo in January 1975.[3] At the time of the dissolution of marriage hearing in 1975, Mr. Hisquierdo was fifty-five, and Mrs. Hisquierdo was fifty-three.[4] Mr. Hisquierdo had been employed by the Atchison, Topeka & Santa Fe Railroad from 1942 to 1975, and thereafter by the Los Angeles Union Passenger Terminal.[5] Both jobs entitled him to retirement benefits under the Railroad Retirement Act[6] when and if he reached age sixty.[7]

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1. Eight states have community property systems: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington. *See* FAM. L. REP. (BNA) ¶¶ 403:i; 405:i; 413:i; 419:i; 429:0003; 432:0002; 444:i; 448:i.

2. 439 U.S. 572 (1979).

3. *In re* Marriage of Hisquierdo, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), *rev'd*, 439 U.S. 572 (1979). They had been married in 1958 and separated in 1972. 19 Cal. 3d at 615, 566 P.2d at 225, 139 Cal. Rptr. at 591.

4. 19 Cal. 3d at 615, 566 P.2d at 225, 139 Cal. Rptr. at 591.

5. 439 U.S. at 578.

6. The Railroad Retirement Act of 1974, 45 U.S.C. § 231 (1976), set up a system of retirement and disability benefits for employees of the railroad industry in lieu of Social Security benefits. *See* 45 U.S.C. § 231q. Both employees and carriers pay a federal tax which funds the Railroad Retirement Account. 45 U.S.C. § 231n. The Railroad Retirement Board, established by § 231f of the Act, disburses benefits from the Account to eligible individuals. 45 U.S.C. § 231a. The Railroad Retirement Act was first passed in 1934, and was struck down a year later in Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935). Congress passed similar legislation in 1935, based on its power to tax and spend for the general welfare. However, the Railroad Retirement Board was enjoined from directing the railroad companies to file reports or furnish the information the Board would need to administer the 1935 Railroad Retirement Act in Alton R.R. Co. v. Railroad Retirement Bd., 16 F. Supp. 955 (D.D.C. 1936). Subsequent to this case, extensive negotiations resulted in passage of the Railroad Retirement Act of 1937. Amended many times, it remained in force until superseded by the Railroad Retirement Act of 1974. For the history of the acts, *see generally* D. SCHREIBER, THE LEGISLATIVE HISTORY OF THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE SYSTEMS (1978) [hereinafter cited as SCHREIBER].

7. 439 U.S. at 578. *See* Railroad Retirement Act of 1974, 45 U.S.C. § 231a (1976). The Court also pointed out

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The trial court's interlocutory judgment awarded Mr. Hisquierdo the couple's house and its furnishings, and awarded Mrs. Hisquierdo a small interest in a mutual fund and an automobile. Mr. Hisquierdo was also ordered to reimburse his wife for her half of the equity in their house, and a judicial lien in her favor was placed on the real estate.[8] However, the court refused to grant Mrs. Hisquierdo an interest in her husband's Railroad Retirement Act benefits, or an equivalent sum, on the ground that she had no community interest in those funds.[9]

Writing for a unanimous California Supreme Court, Justice Mosk reversed the trial court[10] and held that Railroad Retirement Act benefits constitute community property, divisible upon divorce.[11] Mr. Hisquierdo appealed to the Supreme Court.[12] Justice Blackmun, writing for a seven-person majority, held that the Railroad Retirement Act pre-empted California community property law.[13]

The result of the *Hisquierdo* decision is that a non-employee spouse[14] is not entitled to a community property interest in a Railroad Retirement Act pension fund partially or totally earned by an employee spouse during the marriage. The decision will impact most severely on women, who, generally, tend to earn less and work more erratically than men, and are unable to acquire as great an interest in a pension fund as men who work.[15]

This Comment will briefly discuss California's community property system, and the standards traditionally required by the Supreme Court for federal pre-emption of state property law. It will also examine the Supreme Court's interpretation of the Railroad Retirement Act which led the Court to conclude that the Supremacy Clause of the United States Constitution[16] demanded federal pre-emption in this case. It will discuss the *Hisquierdo* test for federal pre-emption, which the Supreme Court has since used to override state community property systems. Finally, it will evaluate whether the case was correctly decided.

II. BACKGROUND

A. California's Community Property System

The standards which California courts use upon divorce to decide which assets are community property, and to divide that property between the spouses, are set forth in state statutes[17] and the cases interpreting them.[18]

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that Angela Hisquierdo "had been gainfully employed for 35 years and had an expectation that upon her retirement she would be entitled to benefits under the Social Security Act." 439 U.S. at 579. Neither spouse claimed that Angela Hisquierdo's expectation of receiving those benefits was community property. *Id.* It is likely that the facts of this case did not elicit the Court's sympathy. The Court recognized that the "burden of marital dissolution may be particularly onerous for a spouse who, unlike respondent, has no expectation of receiving his or her own social security benefits." *Id.* at 590.

8. *Id.* at 579.

9. *Id.*

10. *In re* Marriage of Hisquierdo, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), *rev'd*, 439 U.S. 572 (1979).

11. Analyzing the California Supreme Court's opinion, Justice Blackmun noted that the court had held that "because the benefits would flow in part from petitioner's employment during marriage, they were community property even though under federal law petitioner had no enforceable contract right." 439 U.S. at 580.

12. The United States Supreme Court granted certiorari, 435 U.S. 994 (1978), to consider whether the award of Railroad Retirement Act benefits conflicted impermissibly with that Act under the standards laid out by the Court's Supremacy Clause cases. 439 U.S. at 581.

13. 439 U.S. at 590-91.

14. The term "non-employee spouse" is used throughout this Comment to refer to a spouse who never worked for the railroad industry, and thus has no direct interest in a Railroad Retirement Act pension. The term "employee spouse" is used to designate a spouse who worked for the railroad industry.

15. *See* TASK FORCE ON SEX DISCRIMINATION, CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, THE PENSION GAME: THE AMERICAN PENSION SYSTEM FROM THE VIEWPOINT OF THE AVERAGE WOMAN 50-56 (1979).

16. U.S. CONST. art. VI, cl. 2.

17. CAL. CIV. CODE § 687 (West 1954), §§ 4800-4812, 5100-5138 (West 1970). Section 687 defines community property as "property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." Section 4800 directs the court to divide the community property and quasi-community property of the parties equally. Quasi-community property is defined in § 4803 as property acquired by either spouse which would have been community property had the spouse who acquired it been domiciled in California at the time. Separate property is defined in §§ 5107 and 5108 as that "owned . . . before marriage, and that acquired afterwards by gift, bequest, devise, or descent."

18. *See, e.g.*, Meyer v. Kinzer, 12 Cal. 247 (1859); Nilson v. Sarment, 153 Cal. 524, 96 P. 315 (1908). In *Meyer v. Kinzer*, the California Supreme Court explained California's community property statute:

> [The California] statute proceeds upon the theory that marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other.

12 Cal. at 251.

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The fundamental premise underlying community property is that husband and wife are equal partners in marriage. Each is deemed to make equal contributions to the marital community, and, therefore, shares equally in its assets.[19] This is true "irrespective of direct contributions to [the acquisition of property] or the condition of title."[20] However, property owned before marriage or acquired separately after marriage by gift or devise is not community property.[21]

Before considering *Hisquierdo*, the California Supreme Court had occasion to determine the applicability of its community property statute to the division of pension funds and retirement pay upon divorce. *In re Marriage of Fithian*[22] upheld the trial court's characterization of that part of the husband's federal military retirement pay earned during the marriage as community property.[23] The court noted that "the principle that retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military or private employment relationship,"[24] and that treating military retirement pay as community property does not frustrate the congressional military retirement scheme.[25] Military retirement pay represents compensation for past services, and is calculated solely on the basis of the number of years served on active duty and the rank attained prior to retirement; therefore, the court reasoned that it is divisible as community property to the extent that the serviceperson was married while on active duty.[26]

In re Marriage of Brown[27] dealt with the division upon divorce of non-vested[28] pension rights earned by the husband during his employment with General Telephone Company. Pension benefits are a form of deferred compensation for services rendered; the employee's right to such benefits is derived from the employment contract.[29] Thus, the court held that an employee has a contractual right to pension benefits even if they are not yet vested.[30] Since a contractual right is not a mere expectancy but a chose in action, a form of property, an employee acquires a property right to pension benefits when he or she begins to perform the employment contract.[31] The *Brown* decision reaffirmed the power of courts in community property states to divide the present value of pension rights between the spouses, or, if the value is too difficult to calculate because of the uncertainties of vesting, to retain jurisdiction and award each spouse an appropriate portion of each pension payment as it is made—a method of distribution which subjects both spouses to an equal risk that the pension will not vest.[32]

B. Standards for Federal Pre-Emption in Family Law Cases Involving Property

The United States Supreme Court has generally recognized that domestic relations should be governed by state, not federal, law.[33] Only on rare occasions, when a state family law conflicted sharply with a federal statute, has the Supreme Court declared the state law pre-empted. Federal law pre-empts only if state law is found to do "major damage" to "clear and substantial" federal interests.[34] Even where pre-emption has occurred,

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19. W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1-3 (2d ed. 1971) [hereinafter cited as DEFUNIAK & VAUGHN].

20. Prager, *The Persistence of Separate Property Concepts in California's Community Property System*, 1849-1975, 24 U.C.L.A. L. REV. 1, 6 (1976).

21. DEFUNIAK & VAUGHN, *supra* note 19, at 153-57.

22. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974), *cert. denied*, 419 U.S. 825 (1974), *reh'g denied*, 419 U.S. 1060 (1974).

23. *Id.* at 595, 517 P.2d at 450, 111 Cal. Rptr. at 370.

24. *Id.* at 596, 517 P.2d at 451, 111 Cal. Rptr. at 371.

25. *Id.* at 598-99, 517 P.2d at 453, 111 Cal. Rptr. at 372-73.

26. *Id.* at 604, 517 P.2d at 456-57, 111 Cal. Rptr. at 376-77.

27. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

28. The California Supreme Court defined a vested pension in *In re Marriage of Brown*:

> [A] pension right [is] vested if the employer cannot unilaterally repudiate that right without terminating the employment relationship . . . . In divorce and dissolution cases . . ., however, the term 'vested' has acquired a special meaning; it refers to a pension right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement . . . [a pension] right which survives the discharge or voluntary termination of the employee.

15 Cal. 3d at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635.

29. *Id.*, 544 P.2d at 565, 126 Cal. Rptr. at 637. Note, however, that *Brown* concerned a pension derived from private employment and a private pension program. The pension in *Hisquierdo* derived from a pension fund created by Congress. *See infra* text accompanying notes 89-91, discussing the non-contractual nature of the Railroad Retirement Act and other public pension programs.

30. *Id.* at 845, 544 P.2d at 565-66, 126 Cal. Rptr. at 637.

31. *Id.* at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.

32. *Id.* at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.

33. *See In re* Burrus, 136 U.S. 586, 593-94 (1890).

34. United States v. Yazell, 382 U.S. 341, 352 (1966).

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the Court has limited review under the Supremacy Clause to a determination of whether Congress has "positively required by direct enactment" that state law be pre-empted.[35]

Several United States Supreme Court cases prior to *Hisquierdo* dealt with federal pre-emption of state family and family-property laws.[36] In *Wetmore v. Markoe*,[37] the Court held that the United States Bankruptcy Act[38] did not pre-empt New York law under which alimony and child support included in a divorce decree are not considered a debt, but rather a legal determination of duty owing from husband to wife. As such, the obligation to pay alimony and child support survives an adjudgment of bankruptcy.[39]

In *McCune v. Essig*,[40] the federal homesteading law[41] was held to pre-empt Washington's community property law.[42] In that case, McCune (the husband) entered upon a homestead pursuant to the terms of the Act.[43] However, he died intestate before a patent to the land was issued, and his widow fulfilled the statutory requirements necessary to receive a patent to the land.[44] Years later, after the land had been conveyed to Essig, McCune's daughter claimed that under Washington's community property law, she was entitled to a one-half interest in the property as her father's heir under Washington's intestacy laws.[45] The Supreme Court rejected the daughter's argument; since the statute was clear as to whom the patent shall issue,[46] Washington's community property and intestacy laws were therefore deemed to be pre-empted.[47]

Washington's community property laws were later upheld in *Poe v. Seaborn*,[48] which required the Court to construe sections of the Revenue Act of 1926.[49] The Act levied a tax upon the net income of every individual, but did not define what constituted income.[50] When Mr. and Mrs. Seaborn each reported half of the total community income[51] as gross income, the Internal Revenue Service determined that all of the income should have been reported on Mr. Seaborn's return and consequently, that he owed additional taxes.[52] The Supreme Court held that local property law controlled and that the husband and wife were entitled to file separate returns, each treating half of the community income as his or her income.[53] Local property law was deferred to, even though, as the Court acknowledged, the

35. Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

36. United States v. Yazell, 382 U.S. 341 (1966); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); Poe v. Seaborn, 282 U.S. 101 (1930); McCune v. Essig, 199 U.S. 382 (1905); Wetmore v. Markoe, 196 U.S. 68 (1904).

37. 196 U.S. 68 (1904).

38. Bankruptcy Act, ch. 541, § 63, 30 Stat. 544 (1898), repealed by Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-411 (Supp. III 1979).

39. 196 U.S. at 76. The Court went on to say:

> The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and not make it an instrument to deprive dependent wives and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce.

Id. at 77.

40. 199 U.S. 382 (1905).

41. The Homestead Act, ch. 75, 12 Stat. 392 (1862), has been amended many times. The current version is at 43 U.S.C. §§ 161-302 (1976). Section 2291 (Homestead Act, ch. 127, § 2, 14 Stat. 67 (1866)) provides in pertinent part:

> No certificate shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry, or, if he be dead, his widow; or in case of her death, his heirs or devisee . . . prove[s] . . . that he, she, or they have resided upon . . . the same [land] he, she, or they, . . . shall be entitled to a patent, as in other cases provided by law.

Section 2292 (Homestead Act, ch. 127, § 2, 14 Stat. 67 (1866)) provides in pertinent part: "[I]n case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall enure to the benefit of such infant child or children."

42. 199 U.S. at 390.

43. *Id.* at 386. *See supra* note 41.

44. 199 U.S. at 386-87.

45. *Id.* at 387-88.

46. The Court said: "It requires an exercise of ingenuity to establish uncertainty in these provisions . . . . The words of the statute are clear, and express who in turn shall be beneficiaries." *Id.* at 389.

47. *Id.*

48. 282 U.S. 101 (1930).

49. I.R.C. §§ 951-952 (1926).

50. Section 953(a) defines net income as gross income, as defined in § 954(a), minus deductions allowed by § 937 and § 955. According to the Court, the "Act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income." 282 U.S. at 109.

51. The income comprised Mr. Seaborn's salary, along with interest on bank deposits and on bonds, dividends, and profits on sales of real and personal property. 282 U.S. at 109.

52. *Id.*

53. *Id.* at 118. The Court noted that the use of the word "of" in the statute denoted ownership, but that no broader significance should be given the phrase in the absence of fuller definition by Congress. *Id.* at 109.

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result was lack of uniformity in the incidence of taxation upon married people.[54]

In *Wissner v. Wissner*,[55] the Court found that California's community property law impinged upon the National Service Life Insurance Act of 1940.[56] The Act gave the insured the absolute right to designate and change the beneficiaries of the policy at will.[57] Here, the widow, who had been estranged from her husband, the insured, sued to recover one half of the proceeds of the insurance policy, the beneficiaries of which were the insured's parents. She claimed that the policy was community property, and that she was therefore entitled to one half of the proceeds.[58] The Court decided that if it allowed the widow to vindicate her state law claim, the soldier's choice would be nullified, and Congress' intention frustrated.[59] Because Congress had "spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other,"[60] state law had to be pre-empted.

Both *Free v. Bland*[61] and *Yiatchos v. Yiatchos*[62] involved conflicts between state community property laws and federal regulations governing United States Savings Bonds. In *Free v. Bland*, the husband, using community funds, had purchased several bonds which were issued to "Mr. *or* Mrs. Free."[63] Under Treasury Department regulations, when either co-owner dies, "the survivor will be recognized as the sole and absolute owner."[64] After Mrs. Free died, a controversy developed between her husband, who claimed that the Treasury regulations gave him exclusive ownership of the bonds, and her son, who, as principal beneficiary of his mother's will, claimed an interest by virtue of Texas community property laws.[65] The Court said that Texas law had to yield to federal regulations, because Texas law was in conflict with the very purpose of the Treasury regulations which establish an absolute right of survivorship regardless of state law.[66]

In *Yiatchos v. Yiatchos*, the husband purchased United States Savings Bonds with community funds which he made payable on his death to his brother.[67] Relying on Treasury regulations,[68] the brother, after the husband's death, sought to establish his ownership of the bonds, while the widow sought to vindicate her claim by asserting property rights under Washington's community property laws.[69] The Washington Supreme Court held that the husband's conduct in purchasing the bonds was a fraud on his wife's rights and a breach of his fiduciary duty to manage the community property for the benefit of the community.[70] The United States Supreme Court held that under the federal regulations Yiatchos' brother was entitled to the bonds unless the widow could show that the decedent had committed fraud or breach of trust tantamount to fraud;[71] the Court noted that the widow could have consented to a gift of community property to her brother-in-law or to the inclusion of the bonds in that portion of the estate which was her husband's property.[72] While upholding the supremacy of the federal regulations, the Court remanded the case to permit the widow an opportunity to prove the facts concerning her knowledge of and participation in the purchase of the bonds.[73]

United States v. Yazell[74] concerned a Small Business Administration disaster loan made to a Texas couple, who as security executed a chattel mortgage on their store's merchandise and fix-

54. *Id.* at 117-18. Implicit in the Court's holding was the willingness to disrupt a comprehensive federal scheme in order to uphold community property law.
55. 338 U.S. 655 (1950).
56. *Id.* at 661.
57. National Service Life Insurance Act, 38 U.S.C. § 802(g) (1940) (current version at 38 U.S.C. § 770(a) (1976)). According to the *Wissner* Court, this section of the 1940 Act was controlling. 338 U.S. at 658. It provided that the "insured shall have the right to designate the beneficiary or beneficiaries of the insurance, [within a designated class], . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries. . . . "
58. 338 U.S. at 657-58.
59. *Id.* at 659.
60. *Id.* at 658.
61. 369 U.S. 663 (1962).
62. 376 U.S. 306 (1964).
63. 369 U.S. at 664.
64. 31 C.F.R. § 315.61 (1959).
65. 369 U.S. at 665.
66. *Id.* at 667-68. The Court declared: "State law which prohibits a married couple from taking advantage of the survivorship provisions of United States Savings Bonds merely because the purchase price is paid out of community property must fall under the Supremacy Clause." *Id.* at 670.
67. 376 U.S. at 307-08.
68. 31 C.F.R. § 315.66 (1959).
69. 376 U.S. at 308.
70. *In re* Yiatchos' Estate, 60 Wash. 2d 179, 182, 373 P.2d 125, 127 (1962), *modified*, 376 U.S. 306 (1964).
71. 376 U.S. at 309.
72. *Id.*
73. *Id.* at 310.
74. 382 U.S. 341 (1966).

tures. After default on the loan, the government attempted to reach Mrs. Yazell's separate property. Mrs. Yazell moved for summary judgment on the ground that under Texas coverture law,[75] she lacked capacity to bind herself personally, unless she had first obtained a court decree removing her disability to contract.[76] Since she had not received such a decree, she argued that her separate property should be unreachable. The Court agreed, holding that in the absence of specific federal legislation, the federal interest in collecting a debt did not override Texas law.[77] It stated:

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.[78]

Here, the Court found that repayment of SBA loans did not present a federal interest sufficient to pre-empt state law.[79]

Thus, prior to *Hisquierdo*, pre-emption had been required in only four cases since 1904.[80] In *McCune v. Essig* and *Wissner v. Wissner*, the Court found that the federal statutory schemes in question were clearly intended to pre-empt any state action, thus establishing a standard that where federal law is comprehensive, state law may not intervene. In *Free v. Bland* and *Yiatchos v. Yiatchos*, the standard articulated was less rigorous. There, the Court defined the issue in terms of a conflict between a federal statute and a state law, and held that when such conflict occurs, state law must yield.

In two cases where state property laws were upheld,[81] the Court found the wording of the federal statutes to be unclear and ambiguous. *United States v. Yazell* articulated a test for pre-emption: where Congress has spoken with clarity and enacted specific provisions, and "major damage" would be done to "clear and substantial" federal interests, pre-emption must occur.[82]

III. Analysis

The United States Supreme Court in *Hisquierdo v. Hisquierdo* reversed a California Supreme Court decision holding that federal Railroad Retirement Act benefits were subject to community property distribution upon the dissolution of a marriage.[83] The Court held that the purpose of the Act, to assure employees that pensions would be available to them upon retirement, together with the statutory scheme itself, mandated that California community property law be pre-empted by the federal act under the authority of the Supremacy Clause.[84]

While the Court recognized that marriage was within the temporal control of the states,[85] it relied upon its decisions in *McCune v. Essig*, *Wissner v. Wissner*, *Free v. Bland*, and *Yiatchos v. Yiatchos* to hold that state community property law must be pre-empted because of the substantial damage which would otherwise be done.[86] The Court found *Hisquierdo* to be analogous to those four cases because it too presented a conflict between federal and state rules regarding allocation of a federal entitlement. The Court reasoned that because compulsory federal taxes finance railroad retirement benefits, the benefits closely parallel the land homesteaded in *McCune*. In addition, the Court found that the provisions of the Railroad Retirement Act protecting a beneficiary against attachment and anticipation were similar to the statutory scheme at issue in *Wissner*.[87]

The Court described the Act as resembling both a private pension plan and a social welfare plan by creating two tiers of benefits: the upper tier of

75. At the time of the loan, Texas law provided that a married woman could not bind her separate property unless she had first obtained a court decree removing her disability to contract. Tex. Rev. Civ. Stat. Ann. art. 4626 (Vernon 1925).
76. 382 U.S. at 346-47.
77. *Id.* at 352.
78. *Id.*
79. *Id.* at 353.
80. Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905).
81. Poe v. Seaborn, 282 U.S. 101 (1930); Wetmore v. Markoe, 196 U.S. 68 (1904).
82. United States v. Yazell, 382 U.S. 341, 352 (1966).
83. 439 U.S. 572, 590-91 (1979).
84. *Id.*
85. *Id.* at 581.
86. *Id.* at 581-83.
87. *Id.* at 582-83.

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benefits resembles a private pension plan because of the correlation between benefits paid and an employee's career service and earnings; the lower tier of benefits corresponds exactly to those the employee would expect to receive were he or she covered by the Social Security Act.[88] Furthermore, the Railroad Retirement Act provides for a worker's spouse to receive individual benefits which terminate if the spouse and the employee are absolutely divorced.[89] Also, the Court found that Railroad Retirement Act benefits, unlike Social Security benefits, are not contractual in nature. Congress may alter or terminate them as it sees fit.[90] This was so even though the Railroad Retirement Act, unlike the Social Security Act, does not explicitly reserve to Congress the right to "alter, amend, or repeal any provision" of the Act.[91]

Writing for the majority, Justice Blackmun found that Congress, in enacting section 231m of the Act, setting forth a flat prohibition against attachment and anticipation,[92] meant to ensure that Railroad Retirement Act benefits actually reach the beneficiary. To the Court, section 231m represents a clear choice by Congress to protect the benefits from legal process. Under the standards articulated by the Court, such a congressional policy must pre-empt all state law with which it conflicts.[93] Therefore, because Congress made no exception for a non-employee spouse with a community property award, the non-employee spouse was not permitted to reach the benefits to vindicate such an award.[94] In fact, the Court reasoned that the creation of a separate annuity for non-employee spouses which terminates upon absolute divorce[95] indicated congressional intent that the employee's retirement benefits would belong solely to the employee.[96] Therefore, it held that a non-employee spouse is not entitled to any portion of an employee spouse's annuity.

The Court also looked to the legislative history of the Act to glean congressional intent.[97] During revision of the Railroad Retirement Act in 1974, it was proposed that a divorced spouse receive a

88. *Id.* at 574-75.
89. *Id.* at 575.
90. *Id.*
91. Social Security Act, 42 U.S.C. § 1304 (1976). The Court found that this right was reserved to Congress because the Railroad Retirement Act indirectly incorporated this language from the Social Security Act, and because the minimum benefit is the same as would have been received under the Social Security Act. *See* 45 U.S.C. § 231b(a)(1) (1976).
92. 439 U.S. at 576. The Railroad Retirement Act of 1974, 45 U.S.C. § 231m (1976), provides:

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . .

The Court noted that this section was added in 1955 to make "it clear that the railroad retirement and unemployment benefits are still exempt from Federal or State taxation, garnishment and attachment, a clarification made necessary by an inadvertent oversight in last year's new tax law and doubts raised in several States." 101 CONG. REC. 11,772 (1955), *cited at* 439 U.S. 572, 584 n.17 (1979).
93. 439 U.S. at 584.
94. *Id.* at 585.
95. 45 U.S.C. § 231d(c)(3) (1976).
96. 439 U.S. at 584.
97. The Act entitles railroad industry employees to an annuity if they meet the criteria specified in § 231a:

> (a)(1) The following-described individuals, if they shall have completed ten years of service and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title—
>
> (i) individuals who have attained the age of sixty-five;
>
> (ii) individuals who have attained the age of sixty and have completed thirty years of service;
>
> (iii) individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individuals shall be reduced by 1/180 for each calendar month that he or she is under age sixty-five when the annuity begins to accrue;
>
> (iv) individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty; and
>
> (v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

Its sponsors felt that the Act would encourage older workers to retire by providing them with the means "to enjoy the closing days of their lives with peace of mind and physical comfort," and so would "assure more rapid advancement in the service" and also more jobs for younger workers. H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935), *cited at* 439 U.S. at 573-74. Lee M. Eddy, Vice President, Order of Railroad Telegraphers, testified in favor of the original bill. He was concerned about certain defects in the railroads' private pension plans. *See* SCHREIBER, *supra* note 6, at 4. Eddy felt that the Act would provide railroad employees with the assurance that when they reached retirement age, a fund would exist from which their annuities would be paid which was not subject to discontinuance through the unilateral action of the employer. SCHREIBER, *supra* note 6, at 4-5.

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separate benefit similar to that received by a divorced spouse under the Social Security Act.[98] This proposal was rejected by the labor-management negotiation committee and later by Congress, because of the precarious financial condition of the Railroad Retirement Account.[99] The Court interpreted this as a careful and deliberate decision by Congress to award the annuity to the employee spouse alone.[100] Furthermore, Congress's objective of encouraging older employees to retire would be frustrated by automatic reductions in the amount of the annuity the employee spouse receives.[101] Thus the Court rejected Angela Hisquierdo's contentions that Congress could not have intended the harsh result which left her without compensation for her contributions to the marital community, and that section 231m merely "restate[s] the Government's sovereign immunity from burdensome garnishment suits."[102]

In support of its holding that a non-employee spouse cannot reach an employee spouse's benefits for a community property settlement, the Court relied heavily on the fact that Congress had recently codified a distinction between alimony and support awards on the one hand, and community property awards on the other, in amendments to the Social Security Act. The Court found that these amendments expressly override section 231m and allow garnishment for alimony, spousal support and child support claims; they also provide that for the purposes of the amendments, "alimony" does not include community property settlements.[103] The Court determined that at least part of the reason for enacting the amendments was to save the Government money through reductions in Aid to Families with Dependent Children (AFDC) payments brought about by the ability of neglected spouses and children to garnish money directly from the Government.[104] The Court went on to state that it was "therefore logical to conclude that Congress, in adopting [section 662(c)], thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that community property claims, which are not based on need, could not do so."[105]

The Court rejected Angela Hisquierdo's contention that she could leave the benefit scheme intact by receiving an offsetting award taken out of other currently available community assets.[106] The Court determined that this remedy suffered from the same infirmities as did attachment.[107] In

98. 439 U.S. at 585. *See* Social Security Act, 42 U.S.C. §§ 402(b), 416(a) (1976 & Supp. IV 1980).

99. 439 U.S. at 585 & n.18.

100. *Id.* at 585.

101. *Id.*

102. *Id.* at 585-86.

103. 42 U.S.C. § 659 (1976) and 42 U.S.C. § 662 (Supp. I 1977). Section 659 provides:

> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States . . . to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

After passage of § 659, confusion arose in the lower courts as to whether community property was included within the definition of "alimony." As a result, in 1977 Congress added a definitional amendment, § 662, which stipulated that for purposes of § 659, "alimony" did not include community property settlements. 439 U.S. at 587, n.20. Section 662(c) provides:

> The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

See infra text accompanying notes 170-74.

104. 123 CONG. REC. 9,015 (1977). Senator Nunn introduced and explained the 1977 amendments. In doing so, he discussed the savings to the federal government over the preceding two years which he expected to continue due to garnishment.

105. 439 U.S. at 587. *See also infra* notes 175-76 and accompanying text.

106. 439 U.S. at 588. Angela Hisquierdo sought a remedial offset under the authority of *In re* Milhan, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), *cert. den.*, 421 U.S. 976 (1975). This case which applied California community property law to military retirement benefits was reopened and reversed after *Hisquierdo. Rev'd*, 97 Cal. App. 3d 41, 158 Cal. Rptr. 523 (1979).

107. 439 U.S. at 588. That is, the Court felt that the statutory scheme would be upset and the employee spouse's economic security jeopardized, as it would be from a regular, periodic deduction from the benefits themselves.

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addition, the section 231m prohibition against anticipation prevented Mrs. Hisquierdo from seeking an offsetting award.[108] The Court stated three reasons why an offsetting award would frustrate the anti-anticipation provision. First, it would allow Mrs. Hisquierdo to receive her interest in advance of the date Congress had set for interest to accrue.[109] Second, the uncertainties surrounding the payment of benefits and the amount thereof could make a lump sum award unfair.[110] Third, because Congress has the right to alter the terms of the Act, any lump sum offset would frustrate congressional ability to do so without unduly penalizing future recipients of the benefits.[111]

In his dissent, Justice Stewart, joined by Justice Rehnquist,[112] attacked the majority's opinion. He found "nothing in the Act to suggest that Congress meant to insulate these pension benefits from the rules of ownership that in California are a normal incident of marriage."[113] Noting that Congress ordinarily acts "against the background of the total *corpus juris* of the states,"[114] the dissent emphasized the importance of an accurate understanding of the state substantive law in the area where pre-emption is claimed.[115] He dismissed the majority's suggestion that a community property settlement was a benefit for a divorced spouse.[116] Justice Stewart pointed out that a "community property settlement merely distributes to the spouses [sic] property which . . . he or she already owns,"[117] and that the California Supreme Court had decided to treat pension benefits as property even though such benefits were not formally vested.[118]

Justice Stewart emphasized the high standards necessary for federal pre-emption in the area of family property law,[119] and distinguished those cases relied upon by the majority[120] which held that federal law pre-empted the state community property law in question.[121] He asserted that the finding of pre-emption in *Wissner* and *Bland* was based on "explicit provisions of federal law [which] not only conflicted with principles of state law but also created property rights at variance with the rights that normally would have been created by local property law."[122] The Railroad Retirement Act, he pointed out, contained no express provisions governing the ownership rights that might attach to the pension interest of a married employee.[123]

Justice Stewart attacked the Court's conclusion that Congress intended to pre-empt state community property law by titling the benefit in the

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108. *Id.* Provisions which create a restraint on anticipation usually arise within the context of spendthrift trusts. A spendthrift trust is created to provide a fund for the maintenance of the beneficiary, and at the same time to secure it against his or her improvidence or incapacity. BLACK'S LAW DICTIONARY 1256 (5th ed. 1979). A leading commentator on spendthrift trusts has defined the restraint on anticipation as an instruction that the "interest of a sole beneficiary shall not be paid to him before a certain date." E. GRISWOLD, SPENDTHRIFT TRUSTS § 512 (2d ed. 1947) [hereinafter cited as GRISWOLD].

109. 439 U.S. at 589. The Court noted that in Hetrick v. Reading Co., 39 F. Supp. 22 (D.N.J. 1941), "the prohibition against anticipation was applied in this sense. The court held that a defendant employer could not offset a tort claim by the amount the plaintiff expected to receive in Railroad Retirement Act disability benefits." *Id.* at 588 n.22. *But see infra* notes 166-69 and accompanying text.

110. 439 U.S. at 589. The Court stated that the unfairness could arise in a number of ways. If the employee spouse died before collecting any benefits, his or her beneficiary could suffer if the lump sum award of community property to the non-employee spouse exceeded the lump sum death benefits provided for in § 231e of the Act. Also, if the employee left the railroad industry before retirement, he or she might lose certain supplemental benefits provided for in § 231a(b)(iv). Another possibility is that Congress could alter the terms of the Act to the detriment of the employee spouse. *Id.*

111. *Id.* at 589-90.

112. At the time *Hisquierdo* was decided, Justice Rehnquist was the only member of the Supreme Court who had practiced law in a community property state (California and Arizona). It is logical to infer, therefore, that he was more familiar than were his colleagues with the law as it relates to community property.

113. *Id.* at 591 (Stewart, J., dissenting).

114. *Id.*, citing Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966), which cited H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953).

115. *Id.* at 592, *citing* Perez v. Campbell, 402 U.S. 637, 644 (1971); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). In *Merrill Lynch*, the Court discussed the standards for federal pre-emption: "Our analysis is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " 414 U.S. at 127; *see also* Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963).

116. 439 U.S. at 592 (Stewart, J., dissenting). *See supra* text accompanying notes 19-21.

117. 439 U.S. at 593.

118. *Id.* at 594.

119. *Id.* at 594-95. *See supra* text accompanying notes 33-35.

120. *Id.* at 595-96. *See* cases cited *supra* note 80.

121. 439 U.S. at 595-96.

122. *Id.* at 596.

123. *Id.* at 597.

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employee spouse and providing a separate annuity for the non-employee spouse.[124] He conceded that the anti-attachment provision, section 231m, was the only provision of the Act which might arguably conflict with California community property law.[125] But, Justice Stewart reasoned, such provisions are generally designed to prevent creditors from reaching the benefits; under community property law, spouses are co-owners, not creditors of each other.[126] Upon dissolution of the marriage, "the community property is divided, not adjudicated as indebtedness."[127] Furthermore, he considered the prohibition against garnishment and attachment inapplicable here because those "terms govern remedies, not ownership rights, and the remedies themselves traditionally have been unavailable in an action grounded upon the theory that the property at issue 'belongs' to the claimant."[128] Justice Stewart also noted that because the Hisquierdos lived in a community property state, the pension as property belonged to both spouses. Because division of the property between co-owners should not be interpreted as an "assignment," the section 231m prohibition against assignment should be inapplicable in community property states.[129]

Justice Stewart found the majority's reliance on the prohibition against anticipation as unpersuasive as its other arguments.[130] At common law, Justice Stewart explained, the restraint against anticipation was used to prevent creditors from compelling the trustees of a fund to make lump sum payments before they came due.[131] He disagreed with the Court's conclusion that by considering the pension fund in making a community property settlement, a judge was anticipating the payment of the benefits.[132] Justice Stewart also attacked the majority's suggestion that the prohibition against anticipation "was designed to preserve congressional 'freedom to amend the Act.' "[133] He was not persuaded by the majority's reasoning that Congress was free to amend the Railroad Retirement Act because it contained no explicit provision which reserved this power to Congress.[134] Justice Stewart concluded that the legislative history, in fact, suggested that the opposite was true.[135]

IV. Evaluation

Confronted with an ambiguous statute, and notions of federalism which require that "major damage" be done to "clear and substantial" federal interests before the Supremacy Clause requires that state community property law be overridden,[136] the *Hisquierdo* Court should have decided the case on the basis of California community property law.

The four cases[137] relied on as precedent for federal pre-emption of state community property law[138] are distinguishable from *Hisquierdo*. In each case, the relevant statute created either clear and explicit conflicts with the state community property law in question, or impinged upon a comprehensive federal scheme.[139] But the statutory provisions in *Hisquierdo* were not clearly in

124. *Id.* at 597-98.
125. *Id.* at 598.
126. *Id.* at 599. The question of whether a former spouse is a creditor has also been considered in the context of ERISA. Virtually every court which has considered the issue has held that under ERISA a former spouse is not a creditor and may levy against the spouse's pension to enforce a support obligation. *See* Operating Engineers Local 488 Pension Fund v. Zamborsky, 650 F.2d 196 (9th Cir. 1981), which cites cases from several jurisdictions in support. The rationale for these decisions is protection of dependents and the state's interest in enforcing support agreements. ERISA's anti-assignment and alienation provisions were included only "to protect a person and those dependent on him from the claims of creditors, not to insulate a breadwinner from the valid support claims of spouse and offspring." Mallory v. Mallory, 179 N.J. Super. 556, 559 (Ch. Div. 1981) (*citing* Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978)).
127. 439 U.S. at 599.
128. *Id. See generally* J. Rood, A Treatise on the Law of Garnishment (1896); S. Kneeland, Law of Attachments (1885).
129. 439 U.S. at 599-600.
130. *Id.* at 600.
131. *Id.* at 601. *See also* Griswold, *supra* note 108.
132. 439 U.S. at 601.
133. *Id.* at 602.
134. *Id.*
135. *Id.* Justice Stewart pointed out that the legislative history suggests that the Act was passed to provide security for railroad industry employees whose benefits under private pension plans had often been considered discretionary. The Act's drafters wanted to guarantee workers an absolute right to their pensions. Therefore, the anti-attachment provision did not relate to Congress' possible termination or reduction of Railroad Retirement Act pensions. H.R. Rep. No. 1711, 74th Cong., 1st Sess. 10-11 (1935).
136. 439 U.S. at 581. U.S. v. Yazell, 382 U.S. 341, 352 (1966).
137. Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905).
138. *See* 439 U.S. at 582-83.
139. *See supra* text accompanying notes 40-47, 55-73.

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conflict with state property law; nor was the benefits scheme so comprehensive as to override local law. Thus, pre-emption should not have occurred. As Justice Stewart said, "In the Railroad Retirement Act of 1974 Congress did not with 'force and clarity' direct that the employee's pension benefits should not be subject to the substantive community property law of California."[140]

In *Hisquierdo*, the Court relied on certain aspects of the Railroad Retirement Act[141] to support its holding that it was in clear conflict with state community property law and therefore pre-empted the state law.[142] Initially, the Court examined the legislative history and purposes of the Act.[143] It concluded that the Act was intended to implement the federal policy of providing greater economic security to retiring railroad industry employees, thereby encouraging older workers to retire.[144] But this articulation of federal policy by the Court merely restated the obvious: that pensions are intended to provide a retirement income to employees.[145] This policy is not so compelling as to justify pre-empting state substantive domestic property law.[146]

The Court also determined that Railroad Retirement Act benefits were not contractual inasmuch as Congress had reserved the power to alter or terminate them at any time.[147] This reservation of power by Congress is not express, however; rather, it was inferred by analogy from the Social Security Act, where an express reservation of power appears.[148] The Court's presumptions about and interpretation of the contractual nature of Railroad Retirement Act benefits seem illogical. It is more logical to assume that because Congress made an explicit statement in the Social Security Act,[149] it would have made a similarly explicit statement in the Railroad Retirement Act had it intended to reserve the power to amend or repeal at will.[150]

The Court's conclusion that the benefits are not contractual is also inconsistent with the legislative history and purposes of the Act as interpreted by the majority itself.[151] The purposes of the Act indicate that a beneficiary of this federal pension plan acquires at least some contractual right to the benefits. Retention of the power to terminate is contrary to Congress' concern for railroad employees' financial security and peace of mind.[152] However, even if the benefits are, in fact, non-contractual, California would still be free to treat the employee spouse's interest therein as community property.[153] As the dissent notes, if a state is free to treat even a non-vested expectancy interest as property,[154] then that characterization should stand unless the state property law conflicts in other ways with federal policies and laws.

The Court's finding that section 231d(c)(3) of the Railroad Retirement Act, creating a separate annuity for non-employee spouses, indicated a congressional intent to designate the Act's retirement benefits to the employee spouse alone, is also questionable.[155] The Court concluded that to allow the non-employee spouse to appropriate a portion of the employee spouse's benefits would deprive the employee of a congressional entitlement to benefits.[156] The Court thus imputed a meaning to section 231d(c)(3) which is stated nowhere in the Act itself. This interpretation results from a strained reading of a section of the Act which has nothing to do with the property rights of divorcing spouses in the pension fund.[157]

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140. 439 U.S. at 597.
141. *See supra* text accompanying notes 84-111.
142. 439 U.S. at 590.
143. *Id.* at 584-85. *See supra* notes 97-111 and accompanying text.
144. 439 U.S. at 584-85.
145. *Id.* at 590.
146. *Id. See supra* text accompanying notes 33-81.
147. 439 U.S. at 575 n.6.
148. *Id. See also supra* text accompanying notes 90-91.
149. Social Security Act, 42 U.S.C. § 1304 (1976).
150. This interpretation of the two acts is consistent with the maxim of statutory construction, "Expressio unius est exclusio alterius." Mention of one thing implies exclusion of another. If something is expressed in one statute and not in another, the exclusion in the second is deliberate.
151. *See supra* notes 97-101 and accompanying text.
152. *See* 439 U.S. at 602 (Stewart, J., dissenting). Justice Stewart pointed out that legislative history suggests that the Railroad Retirement Act was intended to provide security to workers whose pension benefits under private plans were often at the employer's discretion.
153. *Id.* at 591. *See* Herb v. Pitcairn, 324 U.S. 117 (1945) (affirming the principle that the Supreme Court will not review judgments of state courts which rest on adequate and independent grounds). Justice Stewart noted that since California courts routinely deal with problems in assessing the value of community property, difficulties in assessment cannot provide a basis for federal pre-emption. 439 U.S. at 603 (Stewart, J., dissenting). The same observation applies to courts in any community property state.
154. *See supra* text accompanying note 31.
155. 439 U.S. at 584-85.
156. *Id.*
157. The plain language of § 231d(c)(3) does not support the Court's interpretation: "The entitlement of a spouse of

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Congress' decision not to award a divorced spouse a separate annuity was interpreted by the Court as a deliberate decision to award the retirement annuity to the employee spouse alone.[158] The Court, however, contradicted itself in an attempt to justify this conclusion. The Court first stated that the Railroad Retirement Act embodied a community concept by providing a separate benefit for a spouse.[159] But in the same paragraph, the Court stated that the decision not to provide a benefit to a divorced spouse was a deliberate rejection of community property principles.[160] This conclusion was undermined by the Court's own recognition of the precarious financial condition of the Railroad Retirement Account.[161] Thus, the Court itself acknowledged that the divorced non-employee spouse is deprived of benefits not because Congress rejected the community concept, but because Congress determined that there were not sufficient funds available to continue such benefits. In fact, it is logical to suppose that Congress terminated the separate award upon absolute divorce because it assumed that the non-employee spouse could vindicate his or her claim through community property law.[162]

The Court relied heavily upon the language of section 231m which protects the benefits from legal process "notwithstanding any other law . . . of any State" to argue that such benefits are protected from state community property law.[163] The Court buttressed this argument by asserting that "[e]ven state tax-collection laws must bow to its command."[164] It is clear, however, that Congress added the clause to ensure that neither federal nor state tax collectors would be able to encroach on the distribution of benefits, not to prevent spouses, who are co-owners in community property states, from vindicating their ownership rights.[165]

The Court also asserted that a non-employee spouse could not be the co-owner of an interest which the employee spouse does not yet own.[166] But our federalist system gives the states the right to create substantive property rights even in mere expectancies.[167] The Court ignored this state right.

Section 231m was intended to protect benefits from creditors, and should not be used to prevent a co-owner from vindicating his or her ownership rights. A non-employee spouse is not a creditor of the employee spouse; nor does he or she receive a "benefit" by acquiring an interest in a pension fund through a community property settlement.[168] The non-employee spouse merely receives that proportion of the benefits attributable to his or her contributions to the marital community.[169]

The Court stressed the fact that Congress had codified a distinction between alimony and support awards on the one hand, and community property awards on the other, when it passed certain amendments to the Social Security Act.[170] Those amendments permitted garnishment of federal benefits for alimony, spousal and child support claims, but explicitly defined alimony so as to exclude community property settlements.[171] An examination of several lower court cases[172] indicates that the amendments were a response to disagreement over whether the United States Government was amenable to legal process and garnishment proceedings for community property settlements.[173] The cases did not question the right

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an individual to an annuity under section 231a(c) of this title shall end on the last day of the month preceding the month in which (A) the spouse or the individual dies, (B) the spouse and the individual are absolutely divorced. . . ."

158. 439 U.S. at 584-85.

159. *Id.* at 584.

160. *Id.*

161. *Id.* at 585.

162. *See In re* Marriage of Hisquierdo, 19 Cal. 3d 613, 618, 566 P.2d 224, 227, 139 Cal. Rptr. 590, 593 (1977), *rev'd*, 439 U.S. 572 (1979). *See* 439 U.S. at 586, where the Court disposes of such a claim by Angela Hisquierdo.

163. 439 U.S. at 585.

164. *Id.* at 584.

165. *Id. See supra* note 92.

166. 439 U.S. at 589-90.

167. *Id.* at 591 (Stewart, J., dissenting). *See supra* text accompanying note 153.

168. 439 U.S. at 593-94 (Stewart, J., dissenting).

169. *Id.* at 593. *See supra* text accompanying notes 19-21.

170. 439 U.S. at 587. *See* 42 U.S.C. §§ 659, 662(c) (Supp. IV 1980).

171. 42 U.S.C. §§ 659, 662(c) (Supp. IV 1980). *See* 439 U.S. at 576-77.

172. Marin v. Hatfield, 546 F.2d 1230 (5th Cir. 1977); Kelley v. Kelley, 425 F. Supp. 181 (W.D. La. 1977); Williams v. Williams, 338 So.2d 869 (Fla. App. 1976); United States v. Stelter, 553 S.W.2d 227 (Tex. Civ. App. 1977), *rev'd*, 567 S.W.2d 797 (Tex. 1978).

173. *United States v. Stelter*, 553 S.W.2d 227 (Tex. Civ. App. 1977), *rev'd*, 567 S.W.2d 797 (Tex. 1978) involved an ex-wife who instituted garnishment proceedings against the United States to recover a portion of her former husband's military retirement pay awarded her in a divorce decree. The Texas Court of Civil Appeals held that Dorothy Stelter could garnish the United States. On appeal, the Texas Supreme Court reversed on the ground that the United States

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of the non-employee spouse to sue the employee spouse for a portion of the benefits pursuant to a community property award, and no explicit showing of an intent to prohibit such suits was made. Thus, the conclusion that Congress intended by these amendments to cut off the right of a non-employee spouse to pension benefits for a community property settlement is attenuated at best, particularly without a more explicit showing of intent.[174]

A more logical interpretation of sections 659 and 662(c) is that they concern only the United States Government's amenability to legal process for garnishment of moneys payable by it to the employee spouse.[175] The restrictive definition of alimony, limiting it to its common law meaning of spousal support exclusive of community property settlements, was probably used only to protect the government from burdensome garnishment suits for community property.[176]

Throughout its discussion of garnishment for alimony awards, the Court proceeded on the assumption that only those in dire need are awarded alimony.[177] In fact, need is only one of the reasons why alimony may be awarded.[178] The Court assumed that needy persons in community property states would be awarded alimony and would be able to garnish benefits to satisfy the alimony award.[179] This assumption ignores the reality that alimony is not awarded where there is an inability to pay.[180] It also ignores one state's laws. Texas does not allow permanent alimony;[181] the only way for a non-employee spouse in Texas to have any income is to demonstrate his or her community interest in a pension acquired during the marriage.

V. Conclusion

The *Hisquierdo* Court pieced together a makeshift interpretation of the Railroad Retirement Act requiring pre-emption of California community property law. Summarizing the inadequacies in the majority's reasoning, the dissent wrote:

> From the Court's own review of the Railroad Retirement Act, it is apparent . . . that the asserted federal conflict with California community property laws—far from being grounded upon the concrete expressions that ordinarily are required to support a finding of federal pre-emption . . . is patched together from statutory provisions that have no

had not consented to be sued in a garnishment proceeding to vindicate community property claims. Note that Texas does not allow permanent alimony. Tex. Fam. Code Ann. § 3.59 (Vernon Supp. 1982). In Williams v. Williams, 338 So.2d 869 (Fla. App. 1976), a divorced husband complained of an order for writ of garnishment subjecting his United States retirement benefits to a payment to his former wife. The court held that liquidated arrearages due Katharina Williams under a Texas divorce decree could be considered alimony for purposes of § 659, and so were amenable to garnishment. *Marin v. Hatfield*, 546 F.2d 1230 (5th Cir. 1977), arose when an ex-husband refused to pay his former wife that portion of his military retirement benefits granted her in a Texas divorce decree; the former wife sought to garnish the United States. The court acknowledged that the United States has by statute waived immunity for enforcement of alimony obligations, but denied the wife alimony on other grounds. Military retirement benefits were also at stake in *Kelley v. Kelley*, 425 F. Supp. 181 (W.D. La. 1977), in which a former wife sued her ex-husband and the United States. The court held that the statute giving consent for the United States to be sued did not apply where the plaintiff was making a claim for community property, not child support or alimony.

174. The legislative history of § 662(c), the definitional amendment, indicates that it was enacted merely to alleviate confusion in the lower courts. Simply, the federal government's immunity to garnishment suits involving community property awards was affirmed. *See supra* note 104, and 439 U.S. at 599-600 n.4 (Stewart, J., dissenting). Congress decided to waive the federal government's sovereign immunity to legal process for alimony and child support claims after concluding that to do so would alleviate potential and actual welfare payments to neglected spouses and children. 439 U.S. at 587 n.20. *See supra* text accompanying note 105. Although alimony is not always tied to need, many recipients of welfare and AFDC could be removed from the public assistance rolls if there were a mechanism through which existing support obligations could be enforced. 439 U.S. at 587. Community property settlements may satisfy the same goal, but need is not usually a factor when a community property settlement is made. 439 U.S. at 587. When Congress excluded community property from the definition of alimony, it may have been limiting the cases in which the federal government would be amenable to legal process to those which were most urgent.

175. *See supra* note 104.

176. *See* 439 U.S. at 599-600 n.4 (Stewart, J., dissenting).

177. 439 U.S. at 587.

178. Factors taken into account by courts when awarding alimony include: the payor spouse's ability to pay; the recipient spouse's needs; the fault of the parties; the parties' ages and health; the duration of the marriage; the couple's standard of living; what one party gave up when he or she married the other; the property of the parties, and the parties' respective contributions to its accumulation; the parties' other financial responsibilities. H. Clark, The Law of Domestic Relations in the United States 441-47 (1968).

179. 439 U.S. at 590.

180. *See supra* note 178.

181. Tex. Fam. Code Ann. § 3.59 (Vernon Supp. 1981).

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> relationship at all to substantive property rights. Indeed, the federal 'policies' the Court perceives amount to little more than the commonplace that retirement benefits are designed to provide an income on retirement to the employee. There is simply nothing in the Act to suggest that Congress meant to insulate these pension benefits from the rules of ownership that in California are a normal incident of marriage.[182]

Confronted with this lack of clear conflict or comprehensive scheme, the Court should have adopted a statutory interpretation which left the state law intact.

The Court in *Hisquierdo* articulated the test traditionally used in pre-emption cases stating that state family law has had to yield when "Congress has 'positively required by direct enactment' that state law be pre-empted,"[183] and that pre-emption is mandated when "the right as asserted conflicts with the express terms of federal law and . . . its consequences sufficiently injure the objectives of the federal program to require nonrecognition."[184] Yet the Court did not apply this test for pre-emption to the federal program at issue. The Railroad Retirement Act's terms requiring disposition of benefits upon divorce are neither express nor direct.[185] Moreover, the division of pension benefits under California community property law would not have disrupted the federal statutory scheme.[186]

Despite this weakness, the Court relied on *Hisquierdo* in two significant 1981 decisions: *McCarty v. McCarty*[187] and *Ridgway v. Ridgway*.[188] In *McCarty*, the Court held that federal law precluded California courts from dividing military retirement pay pursuant to state community property law. The Court reasoned that California's application of community property concepts to military retirement pay conflicted with federal law in two respects: first, retirement pay differs from a pension because, unlike a pension, it is not deferred compensation for services performed during the marriage, but rather is current compensation for continuing, although reduced, services; and second, retirement pay is a personal entitlement payable to the retired serviceperson for life.[189]

In a common law case from Maine, *Ridgway v. Ridgway*,[190] the Court held that the Servicemen's Group Life Insurance Act (SGLIA), which gives members of the armed forces the right to designate and change the beneficiaries of their government life insurance policies, pre-empted a state court decree in a divorce proceeding that awarded the proceeds of the policy to the former spouse and children of the serviceperson. The Court said that *Wissner* controlled, protecting the serviceperson's right to designate his or her beneficiary.[191] The statute included an anti-attachment provision to which the Court applied its interpretation of the anti-attachment provision in *Hisquierdo*. "What was said of the statute under consideration in *Hisquierdo* . . . is applicable without qualification here. . . . We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment provision."[192]

It is unclear what direction the Court will take in future cases involving possible pre-emption of state family-property law because the Burger Court's willingness to pre-empt in decisions involving distribution of assets upon divorce contrasts sharply with its usual deference to state interests. As the Ninth Circuit recently noted: "With respect to preemption the Supreme Court's emphasis varies from time to time. At times the preemption doctrine has been applied with nationalistic fervor while during other periods with generous tolerance of state involvement in areas already to some extent the subject of national concern."[193] It is possible that the Supreme Court will require any program of pension benefits enacted at the federal level to pre-empt state community property law. Application of loose pre-emption standards could lead to wholesale pre-emption of state community property laws by federal legislation, thereby stripping community property of

182. 439 U.S. at 591 (Stewart, J., dissenting).
183. *Id.* at 581, *quoting* Wetmore v. Markoe, 196 U.S. 68, 77 (1904).
184. 439 U.S. at 583.
185. *See supra* text accompanying notes 137-40.
186. *See supra* text accompanying notes 151-53.
187. 453 U.S. 210 (1981).
188. 454 U.S. 46 (1981).
189. 453 U.S. at 221-32.
190. 454 U.S. 46 (1981).
191. *Id.* at 55-56.
192. *Id.* at 61.
193. Morseburg v. Balyon, 621 F.2d 972, 976 (9th Cir. 1980), *cert. den.*, 449 U.S. 983 (1980).

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any practical significance. One commentator calls the *Hisquierdo* decision:

> [A] stab in the back [for American community property law]. . . . It cuts at the very heart of community property: the principle of equal ownership of gains by either spouse during marriage. Unless the system is subjected to a major overhaul, there is no more equality for the marriage subject to this alleged intermeddling by Congress. . . . [C]ongress would have no reason at all to throw such kind of monkey wrench into the marital property machinery of the eight community property states. Prior to *Hisquierdo*, the state courts had almost always found no such hostility on the part of Congress when it enacted statutes calling for the payment of federal funds to married persons. . . . [S]ince numerous federal statutes . . . take account of the existence of community property in some states and make special provision to accommodate [it], there was every reason to believe that Congress had an intent *not* to disturb community property law.[194]

Whatever the long-term effects of *Hisquierdo* on American community property law may be, the short-term implications are clear. The language in *Hisquierdo* characterizing the retirement benefits as the exclusive entitlement of the employee spouse prohibits including their value among the assets to be divided upon dissolution of the marriage. The language is conclusive in community property states since it characterizes the benefits as the employee spouse's separate property.[195]

By recognizing the Railroad Retirement Act benefits as community property, better results would have been reached. Such a decision would have properly recognized and affirmed the value of contributions made by both partners to the marriage, particularly where one partner's contributions were primarily non-financial. In addition, because both partners would receive either a guaranteed income or lump-sum settlement of the Act's benefits, a number of post-divorce financial disputes would probably be eliminated, thereby providing some relief to our overburdened court system.

194. Reppy, *Learning to Live with Hisquierdo*, 6 COMMUNITY PROP. J. 5, 5, 7-8 (1979).

195. It may also be conclusive in equitable distribution states, although in some of those states, separate property may be considered in making an equitable division of marital property. For a discussion of equitable distribution, *see* Comment, *Equitable Distribution of Property in New Jersey*, 28 RUTGERS L. REV. 447 (1974). For a list of states which have enacted equitable distribution, *see* [Reference File] FAM. L. REP. (BNA) ¶¶ 400:iii-400:v. However, if Congress' intent that the benefits be paid solely to the employee spouse is to be effectuated, benefits should theoretically be unreachable in equitable property divisions.

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