Whose Pension Is It Anyway - Protecting Spousal Rights in a Privatized Social Security System

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WHOSE PENSION IS IT ANYWAY?
PROTECTING SPOUSAL RIGHTS IN A PRIVATIZED SOCIAL SECURITY SYSTEM

JONATHAN BARRY FORMAN*

I. INTRODUCTION

The current Social Security system provides generous pension benefits to the spouses and surviving spouses of American workers. Lately, however, many analysts have called for reform of the current Social Security system in a way that could undermine those benefits. In particular, many recent Social Security reform proposals call for the complete or partial privatization of Social Security. The purpose of this Article is to consider how to protect spouses and surviving spouses under a privatized Social Security system.1

Proponents of complete or partial privatization of Social Security typically call for replacing all or a portion of the current system with a system of individual retirement savings accounts ("IRSA"s). All or a portion of the Social Security taxes that workers now pay to the federal government would go instead into IRSAs. Typically, these IRSAs would operate pretty much like today's Individual Retirement Accounts ("IRA"s)2 and employer 401(k)

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1. The larger question of whether or not to partially or fully privatize Social Security is beyond the scope of this Article.


savings plans. So far, however, relatively little thought has been given to the question of how to protect the spouses and surviving spouses of the workers who would be making contributions into these IRSA.

In short, the question is what, if any, spousal protections should be required of IRSA. This Article concludes that spousal protections should be required of IRSA and outlines how to structure those spousal protections in a way that would best ensure that the spouses and surviving spouses of covered workers end up with adequate retirement incomes. The analysis in this Article should also help enlighten the debate about Social Security in the lead article in this Symposium and in many of the articles critiqued therein.

At the outset, Part II of this Article provides an overview of the current Social Security system. Part III discusses the need for Social Security reform. Part IV discusses proposals that would replace all or a portion of Social Security with a system of IRSA, and Part V considers the nature of spousal rights that should be provided in IRSA.

Finally, Part VI concludes that IRSA distribution rules should be designed to help assure that individuals and couples will have adequate retirement incomes throughout their retirement years. Part VI then outlines a modest proposal for spousal protections under IRSA. In particular, Part VI recommends that IRSA distributions for married couples should typically take the form of indexed, joint and 75% survivor annuities. Part VI also recommends that the funds accumulated in IRSA during marriage should be automatically divided between divorcing spouses unless the court orders, or the parties agree, otherwise.

II. OVERVIEW OF THE SOCIAL SECURITY RETIREMENT PROGRAM

The Social Security system includes two related programs that provide monthly cash benefits to workers and their families. The Old-Age and Survivors Insurance ("OASI") program provides monthly cash benefits to retired workers and their dependents and to survivors of insured workers, and the Disability Insurance ("DI") program provides monthly cash benefits for disabled workers under
age sixty-five and their dependents. A worker builds protection under these programs by working in employment that is covered by Social Security and by paying the applicable payroll taxes. At present, about 96% of the work force works in covered employment. At retirement, disability, or death, monthly Social Security benefits are paid to insured workers and to their eligible dependents and survivors.

The OASI program is, by far, the larger of these two programs, and it is usually what people mean when they discuss Social Security. In 1996, for example, the OASI program paid more than $300 billion in benefits to almost thirty-eight million Americans. On the other hand, the DI program paid just over $29 billion in benefits to about six million Americans. Consequently, for the remainder of this Article, the term "Social Security taxes" will refer to OASI taxes, and the terms "Social Security benefits" and "Social Security retirement benefits" will refer to OASI benefits.

A. Social Security Taxes


7. See 1996 GREEN BOOK, supra note 6, at 5.


9. See id. at 69.


11. See SOCIAL SEC. & MEDICARE BDS. OF TRUSTEES, STATUS OF THE SOCIAL
Similarly, self-employed workers paid an equivalent Social Security tax of 10.7% of up to $68,400 of net earnings from covered self-employment. In short, 10.7% of covered earnings are used to finance Social Security retirement benefits. The Social Security taxable earnings cap ($68,400 in 1998) is indexed for inflation.

**B. Social Security Retirement Benefits**

Social Security retirement benefits are provided to workers who retire any time after reaching age sixty-two. Additional benefits are provided to their dependents and survivors.

1. **Worker Benefits**

   In general, Social Security benefits are related to the earnings history of the insured worker. Workers over age sixty-two are entitled to Social Security retirement benefits if they have worked in covered employment for at least ten years. Benefits are based on a measure of the worker's earnings history, known as the average indexed monthly earnings ("AIME"). Basically, the AIME measures the worker's career-average monthly earnings in covered employment.

   The AIME is linked by formula to the monthly retirement benefit payable to the worker at normal retirement age. The

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Another 0.85% of wages from both the employee and the employer goes to fund disability benefits, and 1.45% of each goes for Medicare.

12. Another 1.7% of earnings goes for disability insurance and another 2.9% goes for Medicare insurance. See id.


14. See 42 U.S.C. §§ 402(a), 414(a)(2) (1994). More specifically, benefits can be paid to workers, their dependents, or survivors only if the worker is "insured" for these benefits. See id. § 402(a)(1). Insured status is measured in terms of "quarters of coverage." See id. § 414(a). In 1998, a worker earned one quarter of coverage, up to a total of four, for each $700 of annual earnings reported from covered employment or self-employment. See 1998 Social Security COLA Determinations, supra note 10, at 58,765. Workers are fully insured for benefits for themselves and for their families if they have one quarter of coverage for every four quarters elapsing after 1950 (earned at any time after 1936), or after the year of reaching age 21, if later, up to the year in which they reach age 62. See 42 U.S.C. § 414(a). Fully insured status is required for eligibility for all types of benefits except survivor benefits. See id. § 402(a). A person must have at least six quarters of coverage to be fully insured. See id. § 414(a)(1). A person with 40 quarters of coverage (for example, 10 full years) is "fully insured" for life. See id. § 414(a)(2).


16. See id. § 415(a). At present, a worker's normal retirement age is 65, but the normal retirement age is scheduled to increase gradually to 67 after the year 2000 so that
monthly retirement benefit payable to a retired worker at normal retirement age (currently, age sixty-five) is known as the primary insurance amount ("PIA"). For a worker reaching age sixty-two in 1998, the PIA equals 90% of the first $477 of the worker's AIME, 32% of the AIME over $477 and through $2875, and 15% of the AIME over $2875. Of note, this progressive benefit formula favors workers with relatively low career-average earnings. Finally, Social Security benefits are indexed for inflation. In December of 1996, almost twenty-seven million retired workers were collecting Social Security retirement benefits, and the average benefit was $745 per month.

2. Auxiliary Benefits

Social Security also provides generous additional monthly benefits to dependents and survivors of covered workers. These so-called auxiliary benefit amounts are also based on a worker's PIA. For example, a sixty-five-year-old wife or husband of a retired worker is entitled to a monthly spousal benefit equal to 50% of the worker's PIA. Consequently, a retired worker and spouse generally can claim a monthly benefit equal to 150% of what the retired worker alone could claim. Also, a sixty-five-year-old widow or widower of the worker is entitled to a monthly surviving spouse benefit equal to 100% of the worker's PIA. In December of 1996, almost three million spouses of retired workers were collecting benefits averaging $384 per month. Similarly, over five million surviving spouses were collecting benefits averaging $707 per month.

the normal retirement age will be set at 67 for workers reaching 62 in or after 2022 (67 in or after 2027).

17. See id.
20. See Current Operating Statistics, supra note 8, at 73. Of note, Social Security disability benefits are computed in a similar fashion. In December 1996, over four million disabled workers were collecting DI benefits, and the average benefit was $704 per month. See id.
21. See 42 U.S.C. § 402(b) (wife), (c) (husband), (d) (child), (e) (widow), (f) (widower), (g) (mother and father), (h) (parents).
22. Auxiliary benefits are subject to a variety of limitations. In particular, under the so-called dual entitlement rule, when an individual can claim both a worker benefit and a benefit as an auxiliary of another worker, only the larger of the two benefits is paid to the individual. See id. § 402(k).
23. See id. § 402(b).
24. See id. § 402(e), (f). Also of note, widows and widowers can typically begin drawing benefits at age 60. See 1996 GREEN BOOK, supra note 6, at 15.
III. THE NEED FOR REFORM OF THE SOCIAL SECURITY SYSTEM

Social Security needs to be reformed for two principal reasons. First, Social Security is in financial trouble and will not be able to meet its future benefit commitments. Second, Social Security redistributes payroll tax revenues in many ways that are quite simply unfair.

A. Social Security Is in Financial Trouble

In 1995, the Trustees of the Social Security Funds estimated that Social Security is running a deficit equal to 2.17% of payroll, as computed over the traditional seventy-five-year projection period. That is, payroll tax rates need to be increased a little over 1% each on employees and employers in order to bring the system back into actuarial balance. The Trustees also estimated that Social Security benefits would exceed income starting around 2010 and that the Social Security system will be unable to pay its full benefit obligations after 2029.

In essence, the federal government must either raise Social Security taxes or cut Social Security benefits. Worse still, as shown in the following table, each year that action is delayed, the cost of bringing Social Security into balance goes up. In short, Social Security needs to be reformed, and the sooner it is reformed, the better.

26. See id.
28. See id. at 5-6.
REQUIRED TAX INCREASES OR BENEFIT CUTS

<table>
<thead>
<tr>
<th>Reform Starting Date</th>
<th>Required Increase in Payroll Tax Rate</th>
<th>Required Annual Percent Increase in Revenues or Cut in Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>2.19%</td>
<td>17.7%</td>
</tr>
<tr>
<td>2002</td>
<td>2.50</td>
<td>20.5</td>
</tr>
<tr>
<td>2012</td>
<td>3.12</td>
<td>25.5</td>
</tr>
<tr>
<td>2022</td>
<td>4.04</td>
<td>33.5</td>
</tr>
</tbody>
</table>

B. Social Security Unfairly Redistributes Payroll Tax "Contributions"

A casual observer of the current Social Security retirement system would see that it is a pay-as-you-go social welfare system that takes payroll taxes from current workers and redistributes those funds to current retirees and their families. On closer inspection, however, most experts agree that it is more appropriate to view Social Security from a lifetime perspective. That is, we should compare what a worker pays in Social Security taxes with the benefits that the worker can expect to receive at retirement.

Of course, even when we look at Social Security from a lifetime perspective, it is clear that Social Security redistributes massive amounts of money. There are clearly winners and losers. In particular, Social Security favors current retirees over future retirees, low-earners over high-earners, larger families over smaller families, married couples over unmarried individuals, one-earner couples over two-earner couples, and elderly retirees over elderly workers. In short, not everyone gets his or her “money’s worth” out of Social Security.


30. Indeed, the link between the Social Security retirement taxes paid by workers and the Social Security retirement benefits that they can expect to receive is actually quite loose and can vary dramatically based on such factors as family status, income, and age. See, e.g., Michael J. Boskin et al., Social Security: A Financial Appraisal Across and Within Generations, 40 Nat’l Tax J. 19, 26-30 (1987). That is, relative to a program in which each worker earned an actuarially fair rate of return on payroll taxes paid, the current Social Security retirement program results in significant transfers that favor some workers over others.

31. See, e.g., Forman, Promoting Fairness, supra note 1, at 937-48; Forman, What Can Be Done?, supra note 1, at 14-19.
Security.

Concerns about unfair redistribution have led many analysts to recommend sweeping changes to Social Security. Of course, whether or not a particular form of redistribution is unfair is a matter over which there is great dispute. At one extreme, defenders of the current system argue that Social Security is an insurance program, that redistribution is inherent in any insurance program, and that the redistribution that occurs in Social Security is all fair. At the other extreme, some analysts seem to believe that virtually all forms of redistribution are unfair. Not surprisingly, these critics are inclined to replace Social Security with a program that has little or no redistribution, perhaps by allowing workers to deposit their payroll tax "contributions" into their own private IRSAs.

Of course, most reformers fall somewhere in between these two extremes. Most analysts believe that some forms of redistribution are appropriate for a Social Security system, even though other forms of redistribution may strike these analysts as unfair. Not surprisingly, virtually all of the recent proposals to reform Social Security would retain some forms of redistribution while curtailing others.

IV. RECENT SOCIAL SECURITY REFORM PROPOSALS

Social Security reform recently has become a hot topic. Subpart A provides an overview of some of the major Social Security reform proposals, and Subpart B details one of the most prominent proposals calling for IRSAs.

32. See, for example, sources cited in Forman, Promoting Fairness, supra note 1, at 948-57.
35. For example, elsewhere I have argued against the way that Social Security's redistribution of payroll taxes favors married couples over unmarried couples and individuals. At the same time, however, I believe that Social Security should redistribute revenues in a way that favors individuals with low lifetime earnings. See, e.g., Forman, Social Security, supra note 1; Jonathan Barry Forman, Why Treat Today's Women as If It Were the 1930s?, L.A. TIMES, May 4, 1997, at M2.
A. An Overview of Recent Social Security Reform Proposals


In January of 1997, the 1994-1996 Social Security Advisory Council issued a long-awaited report on how to reform the Social Security system. The Council members were not able to achieve a consensus. Instead, three different reform proposals were offered for consideration. Under the so-called Maintain Benefits ("MB") approach supported by six of the thirteen Council members, the current Social Security system would remain pretty much as it is, except for a few changes around the margins.

On the other hand, a majority of the Advisory Council (seven of the thirteen members) did favor making some fairly major changes to Social Security. In particular, these seven Council members agreed that at least a portion of Social Security payroll tax contributions should be redirected into IRISAs that would invest in the stock market.

Under the so-called Individual Accounts ("IA") approach, these individual accounts would be held by the government, invested in secure equity funds, and annuitized on retirement. Alternatively, under the so-called Personal Security Accounts ("PSA") approach, these individual accounts would be held by financial institutions and their investment would be directed by individual workers.

2. The Committee for Economic Development

Also in 1997, the Committee for Economic Development issued a report on Social Security reform in which it advocated leaving the basic Social Security system pretty much intact but creating a second tier of privately owned, personal retirement accounts ("PRA"s). Both employers and employees would be required to contribute 1.5% of payroll to these PRAs, and the self-employed would be required to contribute the entire 3%. These mandatory accounts would receive

37. See 1 id. at 25-27.
38. See 1 id. at 28-29.
39. See 1 id. at 30-33; see also Reports of the Technical Panel on Trends and Issues in Retirement Savings, in 2 ADVISORY COUNCIL ON SOC. SEC., supra note 36, at 87-90 (discussing individual Social Security retirement accounts).
40. See COMMITTEE FOR ECON. DEV., supra note 29, at 49-54.
41. See id. The Committee for Economic Development's proposal for mandatory individual retirement savings accounts looks a lot like the Mandatory Universal Pension System ("MUPS") recommended by The President's Commission on Pension Policy in
preferential tax treatment just like other employer-sponsored pension plans.

3. Chilean-Style Privatization

A number of analysts suggest that we should privatize Social Security, specifically by completely replacing the current Social Security system with a system of IRSAs. Proponents of privatization typically point to the country of Chile, which began to privatize its Social Security system in 1981. Under Chile's new Social Security system, workers are required to contribute at least 10% of their salary to IRSAs held by private pension funds of their choosing. Contributions to these individual accounts are exempt from tax, and the accounts are also tax-exempt, but withdrawals are taxable. There are about twenty different companies that manage these new IRSAs, subject to extensive regulation by the government.

The Chilean example is already being followed by a number of other countries, including Peru, Colombia, Argentina, Uruguay, and Mexico. For that matter, the World Bank has begun to encourage most countries to include IRSAs in their Social Security systems. Replacing a portion of Social Security with IRSAs has also found a good deal of support in Congress, in academic circles, and in the

1981. See President's Comm'n on Pension Pol'y, Coming of Age: Toward a National Retirement Policy 41-52 (1981). Basically, the MUPS proposal would have required employers to contribute 3% of wages to individual accounts for workers. See id. The proposal drew little interest at the time.

42. See, for example, the sources cited supra in note 34.


45. See, e.g., World Bank, Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth 233-54 (1994) (promoting a multipillar retirement system).

46. See, e.g., Bipartisan Comm'n on Entitlement and Tax Reform, Final Report to the President 26, 40, 221-22 (1995) (favoring a personal investment plan option for all workers in lieu of 1.5% of the payroll tax); Borden, supra note 34, at 10-14; Kerry, Simpson Offer Plan to Reform Social Security, Make Other Changes, 22 Pens. & Ben. Rep. (BNA) 1243 (May 22, 1995).

B. The Personal Security Accounts Proposal

This Subpart offers a more in-depth look at how a typical proposal to replace a portion of the Social Security system with IRSAs would work. Specifically, this Subpart explains the PSA proposal recently recommended by five of the thirteen members of the 1994-1996 Advisory Council on Social Security.49

Under the PSA plan, the current Social Security system would be replaced with a two-tiered system. The first tier would provide a flat retirement benefit for all workers, and the second tier would provide workers with privately owned individual retirement savings accounts, referred to as PSAs. This so-called PSA plan was designed to be implemented on January 1, 1998, but has not yet been enacted. It would be fully effective for workers under the age of twenty-five; workers between twenty-five and fifty-four would receive a mix of benefits; and current retirees and workers age fifty-five and older would continue to be covered by the current Social Security system (albeit with a few minor changes).

1. A First-Tier Flat Benefit

Under the first tier, workers under age twenty-five in 1998 who work at least thirty-five years in covered employment would receive a flat dollar benefit equivalent to $410 monthly in 1996 dollars.50 These benefits would be financed by employer Social Security contributions that would continue to be excludable from the employee's income. Consequently, the resulting first-tier benefits would be fully taxable.

Workers age twenty-five to fifty-four would receive a composite first-tier benefit that would include their accrued benefit under the current Social Security system and a prorated share of the new first-tier flat benefit. As with younger workers, the first-tier flat benefits of these workers would be fully taxable. In addition, half of the rest of their composite first-tier benefits would be taxable, reflecting the


49. See 1 ADVISORY COUNCIL ON SOC. SEC., supra note 36, at 30-33.

50. Workers with less than 35 years of covered employment would earn half of the flat benefit in 10 years, with a 2% increment for each additional year of work up to 25 years.
share of benefits financed by previously excluded employer contributions.

2. A Second-Tier Individual Retirement Savings Account

Under Tier Two, the plan would create PSAs that would be dedicated to retirement savings. These PSAs would be financed by reallocating five percentage points of the employee's share of Social Security taxes. Every worker under age fifty-five in 1998 would participate in the 5% payroll reallocation and receive PSA benefits based on their accumulations plus interest. Individuals could begin withdrawing funds from their PSAs at age sixty-two, and any funds remaining in their accounts at death could be passed on to their estates. The proceeds from PSA accounts (including the inside build up) would not be taxable. In short, PSAs would be financed with (already income-taxed) employee contributions; the accounts themselves would be tax-exempt; and distributions from the accounts would also be tax-free.

V. APPROACHES TO PROVIDING SPOUSAL RIGHTS IN INDIVIDUAL RETIREMENT SAVINGS ACCOUNTS

This Part considers various approaches that could be used in designing spousal rights for any Social Security reform that includes IRSAs. At the outset, however, it is worth reiterating that Social Security currently provides spouses with an additional monthly benefit equal to roughly 50% of the worker's benefit, and it provides surviving spouses with a monthly benefit equal to roughly 100% of the worker's benefit. Subpart A outlines a variety of alternative approaches that could serve as models for IRSA spousal rights, and Subpart B explains some of the spousal rights protections that have been included in recent IRSA proposals.

A. Approaches for Spousal Rights in IRSAs

This Subpart outlines a variety of approaches that could serve as models for IRSA spousal rights. Although there is a range of plausible approaches, the most pertinent rules are those that currently apply to private pension plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA").

1. Co-Ownership, Partnership, and Trust Models

Alternative models for IRSA spousal rights could be based upon such diverse legal arrangements as co-ownership, partnerships, or trusts. With respect to co-ownership, consider the gamut of possible arrangements for a joint bank account. These arrangements can run from requiring both signatures for each and every withdrawal to allowing either signatory to withdraw the full balance of the account at any time without notice to the other. Similarly, at death, co-ownership can result in anything from an equal split of the account balance to a survivor-takes-all regime. Hence, any of a range of co-ownership approaches could serve as a model for spousal rights in IRSAs.

Another approach would be to imagine marriage as an equal partnership and subject IRSAs to the usual partnership rules. In that regard, however, it is worth noting that Tulane University Law Professor Marjorie Kornhauser has found little empirical evidence to support the traditional view of marriage as an equal partnership between a man and a woman. Trust law could form yet another alternative model for IRSA spousal rights. A worker might be compelled to use IRSA accumulations for the exclusive benefit of the couple. Presumably, some kind of breach of trust action would result from any misuse of the accumulated IRSA funds.

2. The Defined Benefit Plan Model

Alternatively, IRSA spousal rights could be modeled after the spousal protections now required of private pension plans. In that regard, many private pensions take the form of defined benefit plans. A defined benefit plan provides retirement benefits calculated by a prescribed formula specified in the plan. The benefit formula is typically expressed as a straight-life annuity. For example, a plan might provide that a worker could retire with a pension equal to 2% of his final pay for each year of service. In that case, a thirty-year worker whose final pay was $100,000 a year would retire with a pension of $60,000 a year for life ($60,000 = 2% \times 30 \times $100,000).

Defined benefit plans typically provide spousal protections in

52. See Marjorie E. Kornhauser, Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law, 69 TEMP. L. REV. 1413, 1419-20 (1996). My own experience seems to echo Professor Kornhauser's findings. For example, certain property in my own marriage also seems to escape the partnership characterization. In particular, I only rarely get to drive my wife's 1972 Chevrolet Chevelle SuperSport (red with white racing stripes).
several ways. First, most defined benefit plans pay benefits in the form of an annuity. Second, all defined benefit plans must provide a survivor annuity option. Third, all defined benefit plans must provide a survivor annuity in case the worker dies before retirement. Fourth, a divorcing spouse can secure an interest in the other spouse’s pension plans by obtaining a qualified domestic relations order ("QDRO").

a. Annuitization

Most defined benefit plans pay out benefits in the form of a single life annuity covering the retiree or, alternatively, in the form of a joint and survivor annuity covering the retiree and spouse. Some defined benefit plans, however, allow the retiree to receive a lump-sum payment instead of an annuity. About 10% of the defined benefit plans of medium and large businesses allow the retiree to select a lump-sum distribution.

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 retiree. On the other hand, there is a good deal of evidence that lump-sum distributions are quickly dissipated.

b. Qualified Joint and Survivor Annuities

Since the passage of the Retirement Equity Act of 1984 ("REA"), ERISA has required defined benefit plans to provide a


54. Joint and survivor annuities are discussed infra in Part V.A.2.b.


spouse with annuity payments of at least 50% of the retiree’s payments after the retiree’s death. All defined benefit plans must provide these survivor annuities, unless the spouse consents to an alternative form of payment. The most prevalent type of survivor benefit is the so-called “qualified joint and survivor annuity” (“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 retiree and spouse. Although some plans offer only one joint and survivor option that pays the surviving spouse 50% of the retiree’s pension, most offer a choice of two or more alternative percentages (for example, 50%, 67%, and 100%) to be continued for the spouse.

When a QJSA is selected, the retiree will typically receive a lower benefit during retirement to account for the likely increase in the number of years that the pension plan will have to make payments. Consequently, monthly benefits must be lower under a QJSA than under a single life annuity for the worker, that is, unless the employer chooses to subsidize the surviving spousal benefit. In a way, this consequence can pit the retiree and spouse against each other: the larger the surviving spouse benefit, the smaller the benefit that can be enjoyed while the retiree is alive.

Not surprisingly, a relatively low percentage of workers choose to take their benefits in the form of joint and survivor annuities. According to Census data, 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. Worse still, only 7% of the 513,000 divorced retirees receiving private pension annuities in 1994 reported selecting the joint and survivor option.

The percentage of married retirees selecting joint and survivor annuities has increased since the Retirement Equity Act of 1974 made QJSA the default. Nevertheless, only 62% of married and divorced retirees starting their annuities in 1993-1994 reported selecting joint and survivor annuities.

All this evidence stands in sharp contrast to the current Social Security system. At the end of 1994, Social Security paid monthly benefits to over 26 million retired workers, to more than 3 million spouses of retired workers, and to more than 5 million survivors of retired workers.

c. Qualified Preretirement Survivor Annuities

Defined benefit plans must also provide survivor benefits in case the worker dies before retirement. 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. 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 so-called “qualified preretirement survivor annuities” (“QPSA”)s must start no later than the month in which

64. See id.
65. See id; see also Karen C. Holden, Determinants of Joint and Survivor Benefit Choices: Effects of Changing Work and Marital Patterns, in THE CENTER FOR PENSION AND RETIREMENT RESEARCH CONFERENCE 1996, at 35 (Miami University, Miami, Ohio, May 31-June 1, 1996) [hereinafter Holden, Determinants of Joint and Survivor Benefit Choices] (reporting evidence that suggests, among other things, that married men were more likely to choose the QJSA option after the passage of ERISA); Karen C. Holden, Women as Widows Under a Reformed Social Security System, in PROSPECTS FOR SOCIAL SECURITY REFORM (Pension Research Council, Wharton School of the University of Pennsylvania, 1997 Symposium, May 12-13, 1997) (reporting evidence that suggests, inter alia, that married men seem to be more likely to choose against the QJSA when their wives have their own pensions and that men in their second marriages may also be less likely to select QJSAs favoring their second wives).
66. See Current Operating Statistics, supra note 8, at 75.
68. See BUREAU OF LABOR STATISTICS, supra note 55, at 114.
69. The benefit can be further reduced to take into account the appropriate early retirement adjustment.
the worker would have reached early retirement, but can be forfeited if the spouse does not survive until then.\textsuperscript{70} Eighty-one percent of the defined benefit plans of medium and large businesses provide only the minimum required QPSA benefit.\textsuperscript{71}

d. 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 retirees and their spouses.\textsuperscript{72} This provision helps ensure that the retiree and spouse will continue to receive their pension benefits throughout retirement.

Moreover, since the enactment of the REA, there is an exception to the anti-alienation rule that allows state courts to split a worker's pension so as to assure adequate support for a worker's (ex-) spouse or dependents after a divorce or other family-related proceeding. Pertinent here, state courts can issue a so-called QDRO that provides that a spouse or ex-spouse is entitled to receive all or a part of a worker's pension benefits.\textsuperscript{73} Unfortunately, many spouses are unaware of QDRO protection and so do not ask that the worker's pension be divided.\textsuperscript{74}

3. The Defined Contribution Plan Model

A defined contribution plan is a pension plan in which the employer's contribution is prescribed and the benefit depends on the contribution plus the investment return. Individual accounts are set up for the participants, and the benefit at retirement depends on the balance in those accounts at retirement. For example, an employer


\textsuperscript{71} See BUREAU OF LABOR STATISTICS, supra note 55, at 123.


\textsuperscript{74} See Moss & Gottlich, supra note 73, at 283-84.
might contribute 10% of an employee's salary each year to a defined contribution plan. At retirement, the balance in the employee's account would be equal to those sums plus the investment earnings thereon.

So-called 401(k) savings plans are also considered defined contribution plans. These plans allow workers to choose between receiving cash currently or deferring taxation by placing the money in a retirement account, and they are sometimes called cash or deferred arrangements.

At retirement, defined contribution plans must allow the employee to withdraw the entire balance of an employee's account in the form of a lump sum, but employees are often allowed to choose alternative forms of payout, such as a lifetime annuity or installments over a specified period. About 30% of the plans of medium and large businesses allow the retiree to select annuity distributions, and 48% allow them to select installment distributions.

Also, prior to retirement, many plans allow workers to withdraw all or a portion of their individual accounts, and many plans allow workers to borrow against their accounts. For example, about 47% of the plans of medium and large businesses permit withdrawals, and 48% permit loans.

Defined contribution plans are generally subject to the same ERISA rules that govern defined benefit plans; however, most defined contribution plans are not subject to the QJSA and QPSA rules as long as they provide that if the worker dies, the spouse will receive the balance of the individual account. During the worker's life, though, the worker is relatively free to make withdrawals from the account (or borrow against the account) and need not even secure spousal consent. The danger is that such withdrawals (or loans) could leave the spouse with little or no retirement benefits. Nevertheless, despite the growing importance of defined contribution plans in general, and 401(k) plans in particular, Congress recently

76. See BUREAU OF LABOR STATISTICS, supra note 55, at 133.
77. See id. at 147.
80. See BUREAU OF LABOR STATISTICS, supra note 55, at 135.
refused to extend the spousal consent protections to 401(k) plans.\textsuperscript{82}

 Defined contribution plans are, however, subject to the QDRO provisions. Also, there are numerous other special rules for spouses. For example, one provision allows the surviving spouse to delay the commencement of distributions until the date on which the worker would have reached age seventy and a half.\textsuperscript{83}

4. The Individual Retirement Account Model

IRAs are not pension plans covered by ERISA. Consequently, they are not subject to ERISA's QJSA and QPSA rules. They are, however, subject to QDRO-like rules.\textsuperscript{84} Moreover, IRAs may be inherited (for example, by the spouse), and the distribution rules are similar to those covering defined contribution plans.\textsuperscript{85} It is also worth noting that special rules allow certain individuals to set up so-called spousal IRAs and make deductible IRA contributions on behalf of non-working spouses.\textsuperscript{86}

5. The Earnings Sharing Model

Another model for IRSA spousal rights is known as earnings sharing.\textsuperscript{87} In its simplest form, earnings sharing would eliminate the current Social Security system's spouse and surviving spouse benefits. 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

\begin{footnotesize}


\textsuperscript{84} See id. § 408(d)(6).

\textsuperscript{85} See id. § 408(a)(6).

\textsuperscript{86} See id. § 219(c).

\end{footnotesize}
earnings credits each of them accrued before or after the marriage. The earnings sharing approach has often been suggested as a means of dividing current Social Security benefits between spouses.

Something like earnings sharing could be applied to IRSAs. Each IRSA of a married worker could be split between the two spouses when contributions are made, at divorce, at retirement, or at death.

6. A Two-Tier System

Another way to protect spouses and surviving spouses might be to provide a first-tier Social Security benefit that was sufficient to make it unnecessary to impose any restrictions at all on the second-tier IRSAs. With a high enough first-tier benefit for spouses and other retirees, one simply would not have to worry about spousal protections for second-tier IRSA benefits.

B. Spousal Rights Under Various Reform Proposals

This Subpart considers changes in spousal rights that have been suggested in several of the recent Social Security reform proposals.


a. Changes to Spousal Benefits Under the Current Social Security System

The Social Security Advisory Council recently recommended "increasing Social Security's survivor benefits to the higher of the decedent's benefit (that is, the present-law survivor's benefit), or 75% of the combined benefit that the survivor and decedent spouse were receiving when both were alive." In support of this change,

88. For example, consider a couple in which the primary worker earned $45,000 in a given year and the secondary worker earned $5000. Under the current Social Security system, the primary worker is credited with $45,000 of earnings, and the secondary worker is credited with just $5000 of earnings. Under earnings sharing, each would be credited with $25,000 of earnings for that year for purposes of computing benefits.

89. See, for example, Forman, *Promoting Fairness*, supra note 1, at 949-50, and the sources cited therein. Alternatively, one could provide an expanded welfare program underneath a proportional earnings-related Social Security program.

90. In that regard, most experts already favor raising the current level of benefits under Supplemental Security Income, our nation's welfare program for the elderly and the disabled. For example, in 1992, a bipartisan panel of experts recommended increasing the federal benefit standard to 120% of the poverty guideline for one person, and keeping the federal benefit standard for a couple at 150% of the standard for an individual. See *SSI Modernization Project Final Report of the Experts*, 55 SOC. SEC. BULL. 22, 23 (1992).

91. 1 ADVISORY COUNCIL ON SOC. SEC., *supra* note 36, at 19. The proposal would
the Council relied on statistical studies that "suggest that it costs retired survivors about three-fourths as much to live as it takes retired couples." 92 All in all, raising the surviving spouse benefit would provide needed income assistance to poor widows and widowers.93

To partially pay for the cost of increasing the benefits for surviving spouses, the Council recommended cutting the spousal benefit from 50% to 33% of a worker's benefit (or to a flat dollar amount).94 This change, which has also been endorsed by the Committee for Economic Development,95 would reduce marriage penalties, ideally without having too harmful an impact on retired couples.

The MB plan made no other significant recommendations with respect to spousal benefits. On the other hand, both the IA plan and the PSA plan recommended adding a second-tier of IRSAs on top of the basic Social Security system, and, consequently, both considered the issue of spousal rights for IRSAs.

b. Spousal Benefits Under the Individual Accounts Plan

Under the IA plan, future Social Security benefits would be cut to match the projected shortfall in future Social Security revenues.96 The IA plan would then collect an additional 1.6% of covered payroll from workers and deposit those additional contributions into a new second-tier of individual retirement savings accounts.

When a worker elected to retire (at any time after age sixty-two), the accumulated funds in these individual accounts would be converted to single or joint minimum guarantee indexed annuities. The minimum guarantee provision would assure that something would be payable even if the individual died immediately. For example, the IA plan suggests that an amount equal to at least one year's worth of annuity might be paid to the estate of a worker who died soon after retirement. As for married workers, the IA plan

usually increase the surviving spouse benefit by 12.5%. Recall that couples usually receive a benefit equal to 150% of the worker's PIA. Seventy-five percent of that benefit is 112.5% of the worker's PIA (112.5% = 75% x 150%). That would be a 12.5% increase over the current 100%-of-PIA surviving spouse benefit.

92. See id. at 142-45 (statement of Edith U. Fierst).
93. See 1 id. at 19.
94. See COMMITTEE FOR ECON. DEV., supra note 29, at 50.
95. See 1 ADVISORY COUNCIL ON SOC. SEC., supra note 36, at 28-29. For example, the IA plan would cut future benefits by raising the normal retirement age to 70. See, e.g., 1 id. at 182.
would follow the usual rules for defined benefit plans; that is, a married worker would have a choice (with consent of the spouse) on whether to take a single-life or a joint and survivor annuity.

Also, if a worker died before reaching retirement age, the accumulated funds would inure to the surviving spouse and would be payable (in the form of an annuity) when the surviving spouse became eligible for widower's benefits at age sixty. If the worker died without leaving a surviving spouse, the accumulated funds would go to the worker's estate. Finally, it appears that QDRO-like rules would allow courts to split individual accounts at divorce or separation.97

c. Spousal Benefits Under the Personal Security Accounts Plan

The PSA plan would cut future Social Security benefits more dramatically, and add a second tier of PSAs on top of a reformed and reduced Social Security first tier.98 PSAs would be funded by allocating 5% of payroll from employees and putting it in individual retirement savings accounts.

At retirement, workers would be permitted to purchase annuities with some or all of the funds accumulated in their PSAs, but they would not be required to do so.99 As for married couples, each worker's account would be separate from any accounts the spouse might be accumulating. Spouses would be allowed to inherit each other's accounts,100 and, presumably, PSA accounts could be split at divorce or separation under the usual QDRO rules.101 Beyond that, it would appear that a spouse would have no inherent rights in a worker's account, not even the right to information about the balance.102 Proponents of the PSA plan seem to believe that spouses would be protected largely by the Council's recommended increase in the first-tier Social Security surviving spouse benefit and by the increased IRSA balances that would come from the PSA plan's allocation of a larger share of payroll taxes to IRSAs (that is, 5% of payroll rather than the 1.6% allocated under the IA plan).103

97. See 1 id. at 150 (statement of Edith U. Fierst).
98. See 1 id. at 30-33.
99. See 1 id. at 117 (statement of Joan T. Bok et al.).
100. See 1 id. at 124 (statement of Joan T. Bok et al.).
101. See 1 id. at 150 (statement of Edith U. Fierst).
102. See 1 id. at 72 (statement of Robert M. Ball et al.).
103. See 1 id. at 122-24 (statement of Joan T. Bok et al.).
2. The Committee for Economic Development Personal Retirement Account Proposal

The Committee for Economic Development would also cut future Social Security benefits to meet the projected shortfall in revenues, and add a second tier of PRAs on top of the reduced and reformed Social Security first tier. These PRAs would be funded by requiring workers to contribute another 3% of payroll to those accounts.

At retirement, the funds accumulated in these individual accounts could be withdrawn only gradually, presumably through forced annuitization of account balances. No early withdrawals or borrowing before retirement would be permitted. PRAs would also be subject to the usual ERISA rules governing private pension plans, 401(k)s, and IRAs, revised as needed. Presumably, that means that PRAs would be subject to the usual defined contribution plan rules (for example, QDROs).

3. Other IRSA Proposals

a. Spousal Benefits Under Chilean Individual Accounts

Workers have been making contributions to individual retirement savings accounts in Chile since 1981. At retirement, a worker may choose from two general distribution options. The worker can either buy a lifetime annuity that is indexed for inflation and has survivor benefits, or the worker can leave the funds in the account and make scheduled withdrawals, subject to limits based on the life expectancy of the retiree and the retiree's dependents. Widows and disabled widowers (but not other widowers) receive 60% of the worker's pension, and smaller benefits are available to certain orphans and dependent parents.

b. Spousal Benefits Under Other Privatization Proposals

Another approach would be to allow workers to have different

104. See COMMITTEE FOR ECON. DEV., supra note 29, at 35-54.
105. See id. at 51; see also Steuerle, supra note 48, at 1357 (suggesting annuitization of account balances, as well).
106. See COMMITTEE FOR ECON. DEV., supra note 29, at 51.
107. See id.
108. See supra Part IV.A.3.
109. See Kritzer, supra note 43, at 47.
110. See id.
distribution options, depending upon the amount of funds that have accumulated in the IRSA. Limits would be placed on some basic amount needed to protect beneficiaries from poverty, but beyond that basic amount different rules would apply.

For example, under one proposal, basic balances would be available under three options:

1. A 100% payout to purchase from the private insurance industry a minimum-wage life annuity, which would be required to include disability and survivors' benefits;

2. Withdrawals as desired with only one constraint—the amount remaining in the account after withdrawal must always be at least 110% of the amount necessary to purchase a life annuity guaranteeing a minimum wage income;

3. A combination of (1) and (2) with the purchase of a partial annuity and voluntary withdrawals up to 110% of the amount necessary to purchase the remaining minimum-wage annuity. ¹¹¹

On the other hand, distributions out of accumulated funds in excess of basic balances would not be restricted in any way. Finally, to ensure maintenance of minimum required basic fund balances, transfers from excess balances to the basic fund would be automatic. ¹¹²

VI. HOW TO PROVIDE SPOUSAL PROTECTIONS UNDER INDIVIDUAL RETIREMENT SAVINGS ACCOUNTS

Subpart A discusses some of the key issues that arise with respect to providing IRSA spousal rights. Next, Subpart B outlines a modest proposal for IRSA spousal rights. Finally, Subpart C considers the needs of nontraditional couples.

A. Key Issues with Respect to Providing IRSA Spousal Rights

This Subpart discusses some of the key issues that arise with respect to providing spousal rights under IRSAs. As a backdrop, the Subpart compares the current Social Security system with a hypothetical system of IRSAs. First, this Subpart shows that Social Security currently provides subsidized spousal benefits, but IRSAs would not. Second, this Subpart shows that Social Security has marriage penalties, but IRSAs would not. Finally, this Subpart shows that Social Security currently forces married couples to take benefits

¹¹¹ See BORDEN, supra note 34.
¹¹² See id.
in the form of a joint and two-thirds survivor annuity, but IRSAs might not.

1. Social Security Currently Subsidizes Spousal Benefits, but IRSAs Would Not

Part II showed that Social Security currently provides generous spouse and surviving spouse benefits and that these benefits are over and above the benefits that are earned by individual workers. For example, a single worker with no dependents can receive a benefit at normal retirement age of just 100% of the worker’s PIA, while a worker with a spouse (who has also reached normal retirement age) can receive a benefit equal to 150% of the worker’s PIA. Similarly, a surviving spouse of a worker can continue to receive a benefit equal to 100% of the worker benefit after the worker has died. In some cases the surviving spouse may live a long time after the worker’s death.

To come up with the money for spousal benefits, the benefits provided to individual workers must be less than actuarially fair. In essence, workers subsidize the Social Security benefits provided to spouses and surviving spouses. Moreover, because of Social Security’s progressive benefit formula, workers with high lifetime earnings subsidize the benefits of other workers and their families.

The net effect of these provisions is that the Social Security system is pretty good for women in general, and for married women in particular. Women are the principal recipients of spousal benefits, women tend to live longer than men, and women tend to have lower lifetime earnings than men. Of particular importance is the fact that for millions of elderly widows, these subsidized Social Security benefits are the only thing standing between them and poverty.

On the other hand, with IRSAs, there would be no redistribution at all. Payroll contributions and the earnings on those contributions would remain in individual accounts, and no money would ever be taken from a worker’s account to provide benefits for other workers.

or their families. Of course, it might make sense to compel individual workers to share their retirement accounts with their own spouses, divorced spouses, surviving spouses, and other survivors. But there would be no redistribution from a worker's account to unrelated spouses or to unrelated workers with lower lifetime earnings. Indeed, it may well be that it is this very lack of redistribution to unrelated workers and families that poses the biggest stumbling block to replacing all, or even a portion of, Social Security with IRSAs. Because there would be no redistribution at all under IRSAs, there would be no redistribution to those elderly Americans whose own account balances would provide inadequate retirement incomes. In particular, we need to be concerned about the millions of elderly widows who would be in poverty today but for the redistributive surviving spouse benefits provided by the current Social Security system.

Nevertheless, the lack of redistribution under IRSAs should not be an absolute bar to their adoption. At the very least, however, it would necessitate beefing up the first-tier retirement benefits of those elderly retirees whose IRSA account balances cannot provide adequate retirement incomes.\(^{114}\)

2. Social Security Has Marriage Penalties, but IRSAs Would Not

Marriage per se does not affect the Social Security tax liabilities of the individual workers who marry, but it can greatly affect their benefits. There are significant marriage penalties and bonuses, and couples with equal total earnings may receive dramatically different amounts of benefits, depending upon how much is earned by each spouse.\(^{115}\)

On the other hand, with IRSAs, there would be no marriage penalties at all. Marriage simply would have no impact on the balance in an individual worker's account. Again, it might make sense to compel individual workers to share their retirement accounts with their own spouses, divorced spouses, and surviving spouses. But there would be no redistribution to other workers or their spouses, nor would there be any loss of benefits to the worker and the worker's family. Payroll contributions and the earnings on those contributions would be distributed only to the worker and the worker's family, and no money would ever be taken from a worker's

\(^{114}\) See supra Part V.A.6.

\(^{115}\) See, e.g., Forman, Social Security, supra note 1, at 554-55, 559-60; Forman, What Can Be Done?, supra note 1, at 16-18.
account to provide benefits for unrelated workers or unrelated families.

3. Social Security Forces Married Couples to Take Benefits in the Form of a Joint and Two-Thirds Survivor Annuity, but IRSAs Might Not

While IRSAs look a lot like bank accounts, Social Security looks more like a joint and survivor annuity program. At retirement, a worker covered by Social Security is not allowed to withdraw the balance of some bank account, real or hypothetical. Instead, at retirement, Social Security provides monthly benefits over the course of the worker's life. In short, Social Security pays benefits in the form of an annuity. Moreover, Social Security benefits are indexed for inflation.

Also, if a worker is married, Social Security pays monthly benefits over the joint lives of both husband and wife. For example, consider a one-earner couple with both spouses aged sixty-five. While both the worker and the spouse are alive, they can retire and claim a monthly benefit equal to roughly 150% of what the worker alone could claim. If the spouse dies, the worker can continue to claim 100% of the worker benefit. Similarly, if the worker dies, the surviving spouse can claim a benefit equal to 100% of the worker benefit. At bottom, Social Security provides the couple with a joint and survivor annuity. More specifically, the Social Security benefit looks like a joint and two-thirds survivor annuity. The "two-thirds" survivor component reflects the fact that the survivor benefit (100% of the worker's PIA) is two-thirds of the married couple's benefit during life (150% of the worker's PIA for a worker plus spouse).\(^{116}\)

In short, Social Security provides a forced, indexed, joint and two-thirds survivor annuity to married couples. This design ensures at least a modest income stream for most beneficiaries throughout their lives. In particular, it is this design that has kept millions of elderly widows out of poverty.

On the other hand, it is not at all clear that IRSAs would be required to pay out benefits in a way that mimics Social Security. In the simplest case, there might be no limitations on withdrawals (or borrowing) from IRSA accounts. Literally, there might be nothing to stop a worker from withdrawing and dissipating the balance of the account. Moreover, there might be no opportunity to purchase an annuity, let alone an indexed annuity. And there might be no

\(^{116}\) Mathematically, \(\frac{2}{3} = \frac{100\%}{150\%}\).
requirement that a joint and survivor annuity be purchased, let alone a joint and two-thirds survivor annuity.

Alternatively, IRSAs could fall under the usual ERISA rules governing pensions. But would that be enough? First, most private pensions are not even required to pay benefits out in the form of annuities. Second, private pensions are not required to provide indexed annuities, nor is there a real private market for indexed annuities.117

Third, private pension plans are not required to provide joint and two-thirds survivor annuities. Generally, only defined benefit plans must provide survivor annuities at all, and then only joint and 50% survivor annuities.118 Moreover, with spousal consent even this form of distribution can be, and presumably frequently is, waived.119 For that matter, neither joint and survivor annuities nor spousal consent are even required in connection with distributions from most defined contribution plans and IRAs. All in all, private pension plans are not required to, nor do they in fact, pay benefits out in the form of indexed, joint and two-thirds survivor annuities.

B. A Modest Proposal for IRSA Spousal Rights

All this leads to the conclusion that there should be significant spousal rights in any IRSA proposal enacted by the federal government. These spousal rights should be designed to achieve two goals. First and foremost, spousal rights under IRSAs should help ensure that all Americans have adequate incomes throughout their retirement years. Second, spousal rights under IRSAs should help promote gender equity. Before outlining a modest proposal for spousal protections under IRSAs, Section 1 briefly discusses the issue of gender equity.

117. The Treasury Department has started to issue indexed T-bills, and that could help facilitate the development of a market for indexed annuities. It is also worth noting that TIAA-CREF, the mega-pension that provides pension benefits to thousands of university professors, does offer a payout regime that mimics an indexed annuity. See generally Joel M. Dickson, The Role of Inflation Indexed Bonds, in PROSPECTS FOR SOCIAL SECURITY REFORM (Pension Research Council, Wharton School of the University of Pennsylvania, 1997 Symposium, May 12-13, 1997) (providing statistics on inflation-protected securities).
118. See supra Part V.A.2.
1. Whose Pension Is It Anyway?

When I started the research for this Article, I thought that I would spend a lot more time writing about the issue of gender equity. In the pension context, the question of gender equity is this: What rights should spouses have in each other's pensions? In short, whose pension is it?

Surely, that is the kind of question that has generated this Symposium. Most likely, however, such questions are best left to philosophers—like deciding how many angels can dance on the head of a pin. More realistically, the “right” answer will vary from marriage to marriage. Alternatively, perhaps there should be a presumption that, all other things being equal, a married couple's IRSAs belong equally to each of the two spouses. In any event, at this juncture, it should be sufficient simply to conclude that each spouse needs to have significant rights in the other's IRSAs, if only to ensure that they both have adequate incomes throughout their retirement years.

2. A Modest Proposal for Spousal Rights in IRSAs

At the outset, it seems safe to assume that Social Security will not be wholly privatized. Rather, Social Security seems destined to be reduced and reformed, and a second tier of IRSAs might be added on top. These IRSAs should incorporate significant spousal protections. In particular, significant limits should be placed on distributions out of the basic amount needed to protect individuals and couples from poverty. However, beyond that basic amount, more relaxed distribution rules could apply.

120. See, e.g., Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 NW. U. L. REV. 1 (1996); Staudt, supra note 5.

121. Would the philosopher want to keep track of the relative monetary and nonmonetary benefits derived from payroll and household work? Perhaps there should be a presumption that the higher earned income of the primary wage earner would not be possible without an equally valuable increase in the household work of the secondary earner.

And what about other aspects of marriage? Would a philosopher try to reach a solution that equalized the utility of the two spouses? If so, should husbands compensate wives for the pain of childbirth? Would wives need to compensate husbands for the utility inherent in longer life expectancies?

122. Cf. Kornhauser, supra note 52 (critiquing the 50/50 partnership model of marriage). For that matter, within any given marriage, the “right” way to split a pension might vary from year to year, or perhaps from day to day.
a. Limit IRSA Distributions to Ensure a Basic Annual Income Throughout Retirement

Taken together, both pieces of the reformed two-tier Social Security system should ensure that all individuals and couples have adequate incomes throughout their retirement years. More specifically, the target should be to ensure that all elderly citizens have incomes at least equal to the poverty level, if not 125% of the poverty level, and their benefits should remain at that level throughout their lives.

To meet that target, individuals and couples would need to have the equivalent of an indexed annuity that is targeted at, say, 125% of the poverty level. Consequently, significant limits should be placed on IRSA distributions to the extent necessary to meet the targeted level.

For couples, this limitation would mean designing a system that would provide the equivalent of an indexed, joint and survivor annuity that is targeted at 125% of the poverty level. For example, in 1998 the poverty level for a single individual is $8,050, and the poverty level for a couple is $10,850.123 Like current Social Security benefits, these numbers are adjusted for inflation each year. It should also be noted that the poverty level of a single individual is roughly 75% of the poverty level for a married couple. Consequently, assuming a 125%-of-the-poverty-level target, a couple retiring in 1998 would need the equivalent of an indexed, joint and 75% survivor annuity that paid $13,562.50 in 1998 ($13,562.50 = 125% times $10,850) and appropriately adjusted amounts into the future.

The first-tier Social Security benefit could provide a good chunk of this minimum 125%-of-the-poverty-level benefit. The balance could come from the second-tier IRSA account, for example, by purchasing an indexed, joint and survivor annuity either from the federal government or from the private insurance industry.

At the outset, it would make sense to increase the surviving spouse benefit in the current Social Security system, perhaps along the lines proposed by the Social Security Advisory Council. That is, it would make sense to increase "Social Security's survivor benefits to the higher of the decedent's benefit (that is, the present-law survivor's benefit), or 75% of the combined benefit that the survivor

123. See U.S. Dep't of Health and Human Servs., Annual Update of the Health and Human Services Poverty Guidelines, 63 Fed. Reg. 9235, 9236 (1998). The poverty income guidelines used here are those applicable to all states (except Alaska and Hawaii) and the District of Columbia.
and decedent spouse were receiving when both were alive" (in short, a joint and 75% survivor annuity).\textsuperscript{124}

Meeting this 125%-of-the-poverty-level target would also require significant restrictions on IRSA accumulations and distributions. Specifically, basic balances should be available under just three options:

1. A 100% payout to purchase an indexed, joint and 75% survivor annuity that, when coupled with the first-tier Social Security benefit, results in sufficient annual income to meet the 125% of poverty standard;
2. Withdrawals as desired with only one constraint: the amount remaining in the account after withdrawal must always be at least 110% of the amount necessary to purchase an annuity guaranteeing the 125%-of-poverty standard;
3. A combination of (1) and (2).

In short, the IRSAs of a married couple should be geared towards purchasing an indexed, joint, and 75% survivor annuity.\textsuperscript{125}

Before moving on, it should be noted that millions of Americans may not reach retirement with sufficient Social Security plus IRSA benefits to reach the targeted level of benefits. There are millions of poor elderly Americans today, despite the current redistributive Social Security system. Shifting to a two-tier Social Security system with IRSAs will not automatically eliminate poverty among the elderly, much less push them all to a standard of living equal to 125% of the poverty level. In short, the approach outlined in this Subsection would exhaust the balances in the IRSA accounts of millions of Americans.

b. Limit Excess IRSA Distributions to Protect Spousal Rights

For those individuals and couples who retire with IRSA balances that are more than sufficient to meet the basic, targeted benefit level, there still might be reasons to impose restrictions on withdrawals. Indeed, it could make sense to compel annuitization of excess balances for all but the most extraordinarily large accounts, and it could make sense to compel the same joint and 75% survivor

\textsuperscript{124} 1 ADVISORY COUNCIL ON SOC. SEC., supra note 36, at 19. This kind of result could be achieved directly, or perhaps in connection with a broader scheme to move the entire Social Security system towards earnings sharing. See, e.g., Forman, Social Security, supra note 1, at 557.

approach that was applicable to the basic balances. Alternatively, IRSAs could be subjected to the usual QJSA/QPSA regime (albeit with 75% survivor annuities).\textsuperscript{126} At the very least, spouses should be entitled to information about their spouses' IRSAs, and should be required to give consent to any significant withdrawals.

c. Split IRSAs at Divorce

The default in the current QDRO regime should be changed, at least for IRSAs. The funds accumulated during marriage in IRSAs should be divided between divorced spouses unless the court orders or the parties agree otherwise.\textsuperscript{127}

d. Other Restrictions on IRSAs

Except for assignments to spouses at divorce or separation, and for assignments to significant others,\textsuperscript{128} ERISA's anti-alienation rule should generally apply to IRSAs. It would probably also make sense to limit withdrawals and loans from IRSAs unless the account had an extraordinarily large balance. These restrictions would help build and preserve the accumulated funds to ensure that they would be available to meet basic retirement income needs.

C. What to Do About Nontraditional Couples

The United States legal system treats married couples quite differently than nontraditional couples. In particular, these laws often ignore the very real needs of nontraditional couples to share in each other's economic resources during life and at death.\textsuperscript{129} Indeed, when it comes to private pensions, ERISA's anti-alienation rule can actually undermine the ability of a worker to make adequate provision for loved ones. For example, a gay worker under a defined benefit plan cannot elect a QJSA with a partner, nor can two siblings who live together ensure such a benefit.

The Retirement Equity Act of 1984 provided an exception to the anti-alienation rule to allow QDROs that enable state courts to split pensions at divorce or separation. But nontraditional couples cannot secure QDROs either. Of course, an unmarried worker can assign the balance of a defined contribution plan or IRA to a significant

\textsuperscript{126} Perhaps that kind of spousal protection should be provided for all defined contribution plans and IRAs. \textit{Cf. id.}

\textsuperscript{127} \textit{See id.; Moss & Gottlich, supra note 73, at 290; Steuerle, \textit{supra} note 48, at 1357.}

\textsuperscript{128} \textit{See infra Part VI.C.}

other at death, but that is scant and effervescent protection, at best.

In short, adequate protection for nontraditional couples requires more than current law allows. With respect to IRSAs, one solution would be for the federal government to allow workers to assign up to half of their annual IRSA contributions to appropriately defined partners or family members. Alternatively, the federal government could let state law and state courts make the necessary allocations.

Unfortunately, the prospects for adoption of either of these solutions seem particularly dim today. After all, it was just in 1997 that a Republican Congress passed and a Democratic President signed the so-called “Defense of Marriage Act.”¹³０ The federal tiger does not lose its stripes so quickly.

Does this mean that we should abandon the idea of IRSA spousal rights altogether? I think not. It seems appropriate to assure adequate retirement incomes and equity for spouses today, even if we must wait until tomorrow to do the right thing for nontraditional couples.

VII. CONCLUSION

If the federal government decides to use IRSAs to replace or supplement Social Security, it must ensure that the spouses and surviving spouses of workers are afforded adequate retirement incomes throughout their retirement years. Specifically, IRSAs should be required to distribute at least basic benefits in the form of an indexed, joint, and 75% survivor annuity that would ensure that couples and survivors have adequate retirement incomes. For couples whose IRSA balances are sufficient to ensure that they will have adequate incomes throughout their retirement years, the usual QJSA/QPSA regime could be applied, albeit with survivor annuities that provide a benefit at least equal to 75% of the joint annuity (unless the spouse consents to an alternative distribution). Finally, at divorce, the funds accumulated in IRSAs during marriage should be divided between divorced spouses (unless the court orders, or the parties agree, otherwise).

¹³０ The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), was passed by Congress, but let’s not forget that it was signed by President Bill Clinton.