



NEW YORK  
CITY BAR

**REPORT BY THE ESTATE AND GIFT TAXATION COMMITTEE  
AND THE SENIOR LAWYERS COMMITTEE  
IN SUPPORT OF THE NEW YORK STATE BAR ASSOCIATION  
PROPOSAL TO ENACT EQUITY FOR SURVIVING SPOUSES ACT**

The New York City Bar Association (City Bar), by and through the Estate and Gift Tax Committee and the Senior Lawyers Committee, has reviewed the New York State Bar Association (NYSBA) proposal to enact legislation known as the Equity for Surviving Spouses Act (ESSA) (the NYSBA Report)<sup>1</sup> and hereby endorses the NYSBA Report and its endorsement of ESSA for the reasons discussed below.

## **SUMMARY**

The NYSBA Report proposes legislation to amend the retirement and social security law, the education law, and the New York City Administrative Code in relation to enacting the “Equity for Surviving Spouses Act,” which would amend the terms of the eight defined benefit employer retirement plans for employees of the State of New York and/or New York localities, including the City of New York, to provide that: (1) a retired employee’s surviving spouse, if any, would be entitled by default to the survivor portion of the joint and 50% survivor annuity form of the retiree’s retirement benefits; and (2) an employee’s surviving spouse, if any, would be entitled by default to 50% of the employee’s lump sum death benefits. The surviving spouse could waive the right to receive benefits at least equal to those the surviving spouse would receive under either of the defaults by executing and filing with the plan a written consent on a plan form. ESSA would enhance the protections for surviving spouses of New York public employees, recognize that marriage is an economic partnership, and encourage public employees and their spouses to prepare together for the eventualities of old age and death.

The City Bar endorses the NYSBA Report proposing and endorsing ESSA (1) for the reasons stated herein and for the reasons discussed in the NYSBA Report itself, which also was approved by the NYSBA House of Delegates on January 19, 2024, (2) because ESSA is consistent with the practice of private employer retirement plans, federal employer retirement plans, and the public employer retirement plans of almost all of the fifty states, and (3) because ESSA is unlikely to increase New York government contribution obligations to any of the affected public employer retirement plans or to decrease any of those plans’ employee benefits.

---

<sup>1</sup> See <https://nysba.org/app/uploads/2023/02/Equity-fo-Surviving-Spouses-ACT-ESSA-1.19.24.pdf> (All websites last accessed on March 7, 2024).

### **About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

## **LAW & SECTIONS REFERRED TO IN ESSA**

ESSA would add the following subdivisions to the following Sections of the Retirement & Social Security Law pertaining to annuity and death benefits from New York public employer retirement plans:

- Subdivisions f, g, and h to Section 51;
- Subdivisions g, h, and i to Section 60;
- Subdivisions d, e, and f to Section 60-c;
- Subdivisions f, g, and h to Section 90;
- Subdivisions f, g, and h to Section 351;
- Subdivisions h, i, and j to Section 360;
- Subdivisions d, e, and f to Section 360-c;
- Subdivisions f, g, and h to Section 390;
- Subdivisions h, i, and j to Section 448;
- Subdivisions d, e, and f to Section 448-a;
- Subdivisions g, h, and i to Section 508;
- Subdivisions d, e, and f to Section 508-a;
- Subdivisions e, f, and g to Section 514;
- Subdivisions f, g, and h to Section 606;
- Subdivisions d, e, and f to Section 606-a;
- Subdivisions g, h, and i to Section 610; and
- Subdivisions twelve, thirteen, and fourteen to Section 657.

ESSA would add the following subdivisions to the following Sections of the Education Law pertaining to annuity and death benefits from New York public employer retirement plans:

- Subdivisions i, j, and k to Section 512; and
- Subdivisions five, six, and seven to Section 513.

ESSA would add the following subdivisions to the following Sections of the New York City Administrative Code pertaining to annuity and death benefits from New York City public employer retirement plans:

- Subdivisions d, e, and f to Section 13-148;
- Subdivisions one, two, and three to Section 13-177;
- Subdivisions e, f, and g to Section 13-243;
- Subdivisions c, d, and e to Section 13-261;
- Subdivisions g, h, and i to Section 13-346;
- Subdivisions e, f, and g to Section 13-369;
- Subdivisions f, g, and h to Section 13-370;
- Subdivisions d, e, and f to Section 13-542;
- Subdivisions g, h, and i to Section 13-543; and
- Subdivisions f, g, and h to Section 13-558.

Finally, ESSA would update statutory references in subdivisions b.1 and b.2 of Section 512 of the Education Law. It also would replace the term “blank” on which specified written designations are made with the term “form” in subdivisions aa and c of Sections 90 and 390 of the Retirement & Social Security Law. The above sections describe annuity and death benefits from New York public employer retirement plans.

To illustrate how ESSA amends these different provisions that pertain to eight New York Public employer plans described below the ESSA Modules are part of the NYSBA Report. The ESSA Modules illustrate how ESSA amends a retirement survivor annuity provision and a death benefit provision relating to one of the eight New York Public employer plans, the New York State Teachers’ Retirement System. The ESSA Modules also present the provision pertaining to ESSA’s scope of coverage and its effective date for all the plans.

## **NEW YORK PUBLIC EMPLOYER PLANS AFFECTED**

ESSA would affect the terms of the eight defined benefit New York public employer retirement benefit plans:

- New York State and Local Retirement System;
- New York State and Local Police and Fire Retirement System;
- New York State Teachers’ Retirement System;
- New York City Employees’ Retirement System;
- New York City Fire Pension Fund;
- New York City Board of Education Retirement System;
- New York City Police Pension Fund; and
- Teachers’ Retirement System of the City of New York.

### **I. The Substantive Provisions of the Equity for Surviving Spouses Act**

ESSA was developed by the NYSBA in response to concerns raised about the deficiency in protections for surviving spouses of New York public employees and former public employees who are members of a defined benefit New York public employer retirement plan. While mourning, a member’s surviving spouse may be devastated to learn that they will be entitled to no survivor or death benefits from the member’s retirement plans. In many cases those benefits could have been used to pay their expenses following the loss of their loved one. Some surviving spouses, as a result, may spend the remainder of their lives in destitution, while others face a dramatically reduced standard of living.

ESSA would help to remedy this deficiency by entitling surviving spouses by default to (1) the survivor portion of the joint and 50% survivor annuity form of the retiree’s benefits, meaning that the beneficiary would be entitled to annuity payments equal to 50% of the retirement annuity payments that were paid to the member during the member’s lifetime and (2) 50% of the employee’s lump sum death benefits. ESSA would further protect surviving spouses by only permitting their default benefits to be eliminated or reduced with the surviving spouse’s consent. This provision would reinforce the autonomy of surviving spouses in decisions that significantly impact their financial well-being.

All the eight defined benefit New York public employer retirement benefit plans affected by ERISA now provide a joint and 50% survivor retirement benefit option. Thus, ESSA would not require any of the plans to change their retirement benefit options.

## **II. ESSA is Consistent with the Approach of Major New York Protections for Surviving Spouses, the Constitutionality of Which Have Never Been Challenged**

There are five major protections for the surviving spouse of a decedent under New York law.

- *First*, EPTL § 5-3.1(a)(6) vests property, including up to \$25,000 in cash, bank accounts, and marketable securities, in the surviving spouse and exempts such property from claims of the decedent's creditors.
- *Second*, CPLR § 5206(b) entitles a decedent's surviving spouse to the benefits of the decedent's homestead exemption from the claims of the decedent's creditors.
- *Third*, SCPA § 1310 permits surviving spouses to dispense with probate and obtain up to \$45,000 of the decedent's cash-like assets. Those assets include, but are not limited to, retirement plan benefits that are payable to the decedent's estate.<sup>2</sup>
- *Fourth*, EPTL § 4-1.1 entitles the surviving spouse to at least \$50,000 of the decedent's estate property (after the deduction for the estate's debts, administrative expenses, and reasonable funeral expenses) not disposed of by a will or non-estate beneficiary designations, plus half of any additional such assets. Any retirement plan death benefits payable to the estate, are included in such assets. If the decedent has no surviving issue, the surviving spouse is entitled to all such property of the decedent.
- *Fifth*, EPTL § 5-1.1-A entitles the surviving spouse to elect to receive the greater of \$50,000 or one third of the decedent's net estate, plus property that is not in the decedent's estate but is property described as testamentary substitutes, which include property such as Totten Trust bank accounts, transfer on death securities, and retirement survivor and death benefits. For this analysis, it is irrelevant whether the decedent had any living issue.

None of these protections require a detailed extensive facts and circumstances analysis to determine a spouse's rights upon the member's death. Instead, as discussed above, there must only be a determination of the extent of the decedent's property, except for the intestacy rules that also require a determination of whether the decedent left any living issue. In contrast, there are multiple enumerated factors that must be considered to make an equitable distribution of property when the spouses cannot agree on the distribution of assets in matrimonial actions. Dom. Rel. § 236(B) 5.d.

---

<sup>2</sup> See e.g., CLAIMANT'S AFFIDAVIT FOR BENEFIT UNDER SECTION 1310 SURROGATE'S COURT PROCEDURE ACT, TEACHERS RETIREMENT SYSTEM OF THE CITY OF NEW YORK FORM DB 14 (8/21), <https://www.trsnyc.org/memberportal/WebContent/forms/pdf/DB14> .

Since 1992, a surviving spouse's right of election under EPTL § 5-1.1-A(b)(1)(G) has permitted the surviving spouse of a member of any employer retirement plan to claim a portion of the member's plan benefits by treating such death benefits and survivor benefits as testamentary substitutes subject to the right of election. There has never been any challenge to the constitutionality of this or any of the other protections that apply to New York public employer retirement plan benefits. In addition, the New York public employer retirement plans often warn members about the existence of the right of election.<sup>3</sup>

In 1992, there were other significant expansions and enhancements to the right of election statute: (1) the minimum amount that could be elected was significantly increased, (2) the right of election could no longer be satisfied in part with trust income interests, (3) the right of election was no longer affected by whether there were surviving issue, and (4) the set of testamentary substitutes were substantially enlarged to include more assets, such as trust bank accounts. In 2005, there was an additional expansion to include transfer on death securities, such as brokerage and money market accounts, as testamentary substitutes. In 2018, the notice provisions for the exercise of the right of election were clarified.

The right of election is often of little utility to the surviving spouse of a member of a defined benefit New York public employer retirement plan. This is because if the member's benefit was a single life annuity benefit, there would be no survivor benefits to elect against, and if the member's benefit was a death benefit, the surviving spouse may not learn of the death benefits available in time to recover anything because no beneficiary notice now needs to be given to the surviving spouse. ESSA would remedy this by requiring defined benefit New York public employer retirement plans to pay by default a joint and 50% survivor benefit with the member's surviving spouse as the beneficiary and, to make a member's surviving spouse the default beneficiary of 50% of the member's lump sum death benefits. ESSA would further protect surviving spouses by only permitting their default rights to be eliminated or reduced with the surviving spouse's consent on a plan form. The form would have to set forth the surviving spouse's entitlement to the default benefit, and the consequences of consenting to an alternate form of benefit, or a different beneficiary. The ESSA remedies are similar to the tried-and-true protections for surviving spouses of members of private employer and federal employer retirement plans that have been in place for the past forty years.

ESSA would add a sixth major surviving protection under New York law to remedy the gap described in the existing protections without weakening any of those protections. As described above, this new protection would change plan defaults and only permit a surviving spouse's default rights to be eliminated or reduced with the surviving spouse's consent on a plan form. As a result, surviving spouses would have a right to greater benefits from public employer plans absent their consent than is now the case.

---

<sup>3</sup> See, e.g., Teachers Retirement System of the City of New York, *What is a spousal right of election, and how could it affect the distribution of benefits after the death of a TRS member?*, <https://www.trsnyc.org/memberportal/FAQs/faqbeneficiaries/Death-Benefits/What-is-a-spousal-right-of-election,-and-how-could>.

For example, the surviving spouse would have a right to a survivor benefit at least equal to that payable under a joint and 50% survivor benefit in which the spouse is the beneficiary, rather than a right to no such benefits under the current rules which permit a single life annuity retirement benefit leaving no retirement benefits for the surviving spouse to elect against. Thus, if the decedent left no other assets to elect against, the surviving spouse would now get nothing under the right to election. Furthermore, if the decedent, instead, left \$600,000 of non-retirement assets subject to the right of election, the surviving spouse would now have the right to obtain \$200,000, one-third of the \$600,000, under the right of election.

ESSA, like the right of election statute, is based on the premise that in most cases it is more equitable for spouses to jointly decide how to dispose of each other's property if either passes away, than for one spouse to unilaterally decide. By remedying an overlooked gap within the right of election to New York public employer retirement plan benefits, ESSA would extend this widely accepted and broad equity principle.

ESSA is guided by the approach of the five existing New York State surviving spouse protections discussed above. None of the New York surviving spouse protections consider the duration of the marriage in determining the extent of the protection. ESSA would similarly impose no minimum duration of marriage requirement, and disregard the duration of the marriage, in implementing its provisions. All the protections essentially use the surviving spouse disqualifications of EPTL § 5-1.2 which states that "a husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that..." such spouse is not a surviving spouse based on the circumstances set forth in the statute. ESSA includes those conditions and adds the ERISA § 205(c)(2)(B) disqualification, (including those set forth in Treas. Reg. § 1.401(a)-20 Q & A-27), such as the inability to locate the spouse at the relevant time or times. ESSA Module, at 2 and 4.

### **III. ESSA is Consistent with the Practice of Private Employer Retirement Plans, Federal Employer Retirement Plans, and the Public Employer Retirement Plans of Almost All Fifty States**

ESSA is modeled on the federal Retirement Equity Act of 1984's enhancement of the initial surviving spouse protections of ERISA and the Internal Revenue Code of 1986, as amended (Code). ERISA § 205, and Code §§ 401(a)(11) and 417. Those have governed employer retirement plans of private employers for forty years and apply to approximately 100 million active members of such plans.<sup>4</sup> Similar provisions have applied to federal employment retirement plans for more than forty years. *See e.g.*, 5 USCS §§ 8339 and 8341 (Civil Service Retirement System). Only Alabama and Tennessee join New York in providing no ESSA-like protections to members of their defined benefit public employer retirement plans.<sup>5</sup>

---

<sup>4</sup> *Private Pension Plan Bulletin Abstract of 2021 Form 5500 Annual Reports Data Extracted on 7/27/2023*, U. S. Dept of Labor, Table A1 at 7. <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf>.

<sup>5</sup> See document titled *Summary of Plan Survey 11-3-2023*, which describes the requirements for the plans of all fifty states and is part of the NYSBA Report.

#### **IV. ESSA is Unlikely to Increase New York Government Contribution Obligations to any of the Affected Public Employer Retirement Plans or to Decrease Any of Those Plans' Benefits**

ESSA would impose some administrative burdens on the affected public employer retirement plans because the member's spouse may have to participate in the benefit election process in some circumstances, but those burdens are unlikely to materially affect government contribution obligations or the level of benefits from the affected plans. Such large burdens have not been observed for the private retirement plans covering 100 million active participants, the federal retirement plans covering more than three million participants, or almost all the states that provide ESSA-like surviving spouse protections.

Under current law, the default annuity retirement benefit from a New York public employer retirement plan is a single life annuity. There is no survivor beneficiary. The employee's spouse also has no right to notice before the retired employee's death regarding whether there are any survivor benefits, and if so, the identity of the employee's beneficiary or beneficiaries. ESSA would entitle the surviving spouse by default to survivor annuity payments of at least 50% of the lifetime annuity monthly payments to the retired employee under a joint and 50% survivor benefit. The spouse may consent, at any time during the spouse's marriage to the member, to receive smaller annuity payments or no annuity payments on a plan form explaining the spouse's default benefit rights. New York State law requires different plan benefit payment options to be actuarially equivalent. Thus, ESSA would not materially affect government contribution obligations or the level of plan benefits.

Under current law, the default beneficiary for a non-accidental death benefit from a New York public employee pension plan is the employee's estate, and the employee's spouse is entitled to no notice of the member's beneficiary or beneficiaries. Under ESSA, the surviving spouse would be entitled to at least 50% of the employee's non-accidental death benefit. The spouse may consent, at any time during the spouse's marriage to the member, to receive a smaller portion or none of the death benefit on a plan form explaining the spouse's default benefit rights. This change would have no fiscal implications because it does not affect the member's death benefit amount.

ESSA is unlikely to materially affect the New York public employer contribution obligations or the benefits payable by the affected plans.<sup>6</sup>

---

<sup>6</sup> There may be some speculative plan cost increases resulting from the cost-of-living adjustments (COLAs), which are limited to plan members and their surviving spouses, ESSA may result in two kinds of benefit option changes. First, a single life annuity may be changed to a joint and survivor annuity in which the surviving spouse is the beneficiary. This would result in no plan cost change because the surviving spouse, like the member, is eligible for COLAs. Second, the beneficiary of a joint and survivor annuity may be changed from an individual other than the surviving spouse to the surviving spouse. This may result in a plan cost increase because the surviving spouse is entitled to a COLA. Such a speculative cost difference would appear to be very small because the surviving spouse's COLA may not exceed \$540 per year. Such a speculative cost increase would result from ESSA achieving its goal of encouraging surviving spouse beneficiary designations. This is why beneficiary COLAs are limited to surviving spouses.

## V. The substantive provisions of ESSA and the Anti-Diminishment Provisions of the New York State Constitution

The substantive provisions of ESSA described above likely do not violate Section 7 of Article V of the New York State Constitution (the “anti-diminishment provision”), which provides that after July 1, 1940, “membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.”<sup>7</sup>

The anti-diminishment provision was proposed by the Constitutional Convention of 1938 in part as a reaction to the Court of Appeals dicta in *Roddy v. Valentine*, 268 N.Y. 228, at 232 (1935). *Roddy* addressed the right of a New York public employer retirement plan to reduce plan benefits after the member’s retirement. *Roddy* did not address the division of pension benefits between a plan member and the member’s current or former spouse. The dicta described retirement benefits from a New York public employer plan as a revocable “expectancy” until the member satisfied the plan’s retirement conditions. Thus, before the enactment of the anti-diminishment provision, state and local governments could reduce or eliminate the retirement benefits of those plan members who had not yet retired. The anti-diminishment provision prevented such reduction or eliminations after the provision’s effective date. REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL FIFTH TO AUGUST TWENTY-SIXTH, 1938, at 1405-1406 (1938) (setting forth a memorandum in favor of such provision).

In 1984, the New York Court of Appeals addressed the question of whether the anti-diminishment provision was consistent with the Equitable Distribution Law (L 1980, ch. 281) that required a portion of a New York public employer retirement plan member’s benefits be paid to the member’s former spouse. *Majauskas v. Majauskas*, 61 N.Y.S.2d 481 (1984). In *Majauskas*, the Court unanimously held that the anti-diminishment provision did not prohibit the Equitable Distribution Law from dividing benefit annuity payments between a plan member and the member’s former spouse. The Court summarily held that this division did not violate the anti-diminishment provision because “the pension of the employee spouse **is not diminished** [by the Equitable Distribution Law division] **in the sense that the pension fund will pay any lesser amount.**” *Id.* at 493 (emphasis added). Thus, the Court focused on whether any of the plan’s benefit payments attributable to the member’s plan participation would be reduced, rather than whether the payments received by the member would be reduced.<sup>8</sup>

---

<sup>7</sup> See NYSBA Report at 7 for a briefer discussion of the constitutionality of ESSA.

<sup>8</sup> The *Majauskas* Court also summarily dismissed the relevance of the *Caravaggio v. Retirement Bd. of Teachers' Retirement Sys.*, 36 N.Y.2d 348 (1975) holding that a separation agreement with respect to a member’s plan benefits could not be enforced. The agreement was executed and incorporated into a Mexican judgment of divorce in 1969 before the 1980 enactment of the Equitable Distribution Law. The *Caravaggio* holding was based on the applicable anti-assignment laws, and did not mention the anti-diminishment provision. In *Kaplan v. Kaplan*, 82 N.Y.2d 300 (1993), the Court of Appeals unanimously overruled *Caravaggio* for separation agreements pursuant to the Equitable Distribution Law. *Kaplan*, like *Caravaggio*, did not mention the anti-diminishment provision. The decision had no effect on prenuptial or postnuptial agreements which, other than separation agreements, remain ineffective under the anti-assignment provisions as discussed in *Caravaggio*.



The Appellate Division of the New York Supreme Court addressed the constitutionality of a different division of benefit annuity payments between a plan member and the member's current or former spouse under the Equitable Distribution Law in *McDermott v. McDermott*, 119 A.D.2d 370 (2d. Dept. 1986), appeal dismissed 69 N.Y.2d 1028 (1987). In *McDermott*, the Second Department affirmed the constitutionality of requiring plan benefits to be paid as a joint and survivor annuity with survivor benefits for the member's former spouse. Consequently, the member would receive smaller payments during the member's life after actuarial adjustments were made to reflect that the payments under a joint and survivor annuity end on the date of death of the survivor of the member and the member's spouse, whereas payments under a single life annuity must end on the date of the member's death even if the spouse survives the member.

The basis for the *McDermott* decision was the observation that “[t]he limitation of the husband's choices merely protects the [former] wife's co-ownership rights **without reducing the benefits which will be paid pursuant to the contract.**” *Id.* at 383 (emphasis added). The Court cited the debate of the 1938 Constitutional Convention of the significance of the anti-diminishment provision, which the Court regarded to have “centered upon the fiscal consequences to municipalities of transforming a legislative grant into a contractual relationship and focused upon the fiscal consequences.” *Id.* at 381. The dissent joined this constitutional analysis. *Id.* at 406. The Court's constitutional analysis in *McDermott*, as in *Majauskas*, therefore focused on whether the accrued benefit would be reduced, rather than on whether the amount of the benefit ultimately received by the member would be reduced, as occurred in both decisions.

What the anti-diminishment provision prevents, then, is a reduction by the public employer of the benefits set forth in the pension plan contract, *McDermott* at 382. The enactment of ESSA provisions would not reduce the benefits set forth in the pension plan contract but would instead protect the surviving spouse of a New York public employee by ensuring an interest for the surviving spouse in the benefits paid under the pension contract. The *Majauskas* holding made it clear that an equitable distribution award of an interest in payments set forth in the pension contract to a nonmember spouse does not unconstitutionally diminish or impair the plan member's benefits. *Majauskas* at 493. ESSA would entitle a surviving spouse to an interest in the survivor portion of the joint and 50% survivor annuity form of the retiree's retirement benefits, and a 50% interest in the member's lump sum death benefits, and would not unconstitutionally diminish or impair the benefits paid set forth in the pension contract.

The *ratio decidendi* of the constitutionality holdings of both *Majauskas* and *McDermott* disregarded the manner of the division of a member's benefits from a New York public employer retirement plan with the member's spouse or former spouse. Instead, as discussed by *Majauskas* at 493 and *McDermott* at 381, the Courts' reasoning is based solely on treating the anti-diminishment provision as prohibiting New York public employer retirement plans from reducing the value of the plan benefit payments on behalf of the member. Thus, *Majauskas* held there was no violation when the division from the marital dissolution did not change the plan benefit payments. Similarly, *McDermott* held there was no constitutional violation when the division from the marital dissolution resulted in a change in the plan benefit payments, but the expected payments under the permissible benefit options had the same actuarial value as the expected payments under a single life annuity. In both decisions, the member received smaller benefit payments. In *Majauskas* there was no change in the end date of the payments. In *McDermott* there was a change

in the end date from the date of death of the member to the date of death of the survivor of the member and the member's spouse.

ESSA, like the Equitable Distribution Law, would not violate the anti-diminishment provision. ESSA's requirement that a member's surviving spouse be entitled to at least one-half of the member's death benefit, absent the spouse's consent, would be less burdensome to the member than under the facts set forth in *Majauskas* in which the benefits paid the member were diminished. In *Majauskas*, the Court approved the division of the plan's lifetime payments between the member and the member's spouse. Similarly, ESSA provisions entitling a retirement plan member's surviving spouse to at least the survivor portion of the member joint and 50% survivor retirement benefit, absent a consent by the surviving spouse, is like the *McDermott* fact pattern in which the Court followed the reasoning of *Majauskas* and approved the constitutionality of the division of the plan's benefits between the member and the member's spouse. Thus, it is not surprising that there has been no challenge to the 1992 (post-*McDermott*) provision permitting the surviving spouse of a member of a New York public employer retirement plan to elect to obtain a portion of such member's plan benefits.

The *Majauskas* and *McDermott* holdings are consistent with the holdings of other courts regarding the scope of the anti-diminishment provision for which the benefit payments received by the member coincided with the benefits paid by the retirement plan. *McDermott* described this principle as "prohibit[ing] the Legislature from altering the formula by which the amount of retirement benefits is determined." Two earlier Court of Appeals decisions focused on such determinations. Neither decision pertained to a division of benefits between the member and the member's current or former spouse.<sup>9</sup>

## **VI. The ESSA Transition Rules Give Plans Extensive Time to Implement the ESSA Changes**

In both *Majauskas* and *McDermott*, it was apparently irrelevant to the constitutionality that, as mentioned by the courts, (1) the members had been members of the public employer retirement plans for many years before July 19, 1980, the effective date of the Equitable Distribution Law (L.

---

<sup>9</sup> In *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1 (1958), the Court held that the anti-diminishment provision prohibited a plan from using an updated mortality table (with longer expected lifetimes) to determine a member's monthly retirement benefit payments from the accumulated plan contributions of an individual who was a plan member as of the effective date of the update, because such usage would have reduced the plan payments to the member and was not prescribed by the statute governing the plan when the individual first became a plan member. *Id.* at 11-12. The dissent was based on the assumption that the statute governing the plan prescribed at the time the individual became a plan member that the annuity benefits arising from the member's accumulated plan contributions would be determined using the most up-to-date mortality tables. *Id.* At 14-15.

In *Kleinfeldt v. New York City Employees' Retirement System*, 36 N.Y.2d 95 (1975), the Court held that the anti-diminishment provision prohibited a plan from reducing the amount of compensation used to compute the amount of the member's retirement annuity payments for an individual who was a member as of the effective date of the reduction, because that provision would have reduced each of those benefit payments. *Id.* at 100-02.

1980 ch. 281 § 47); and (2) retirement benefits earned before the effective date were subject to the Equitable Distribution Law.<sup>10</sup>

Similarly, the constitutionality of the surviving spouse protections of ESSA is not affected by the fact that ESSA rights do not depend on when a member joined a public employer retirement plan, or when the member's benefits were earned, except as described in the transition rules below. On the other hand, ESSA rights are subject to domestic relations orders, whether those orders favor the member's current spouse, former spouse, or the member's children. ESSA Module, at 6.

The transition period to implement the ESSA rules would be far greater than the thirty-day period applicable to the Equitable Distribution Law,<sup>11</sup> the thirty-nine-day period applicable to the 1992 addition of retirement plan benefits (including those from New York public retirement plans) to the testamentary substitutes that are subject to the right of election. EPTL § 5-1.1-A(b)(1)(G),<sup>12</sup> or the one-hundred-thirty-one-day period applicable to the extensive REACT changes.<sup>13</sup>

ESSA, in contrast, would take effect for all benefit payments that commence after December 31 of the year immediately after the year ESSA is enacted, except for payments made pursuant to a benefit designation form executed on or before December 31 of the year immediately after the year ESSA is enacted. This period, like the twenty-month transition rule for Section 7 of Article V of the New York State Constitution (the anti-diminishment provision), recognizes that plans may not be able to adjust to a new set of requirements within a thirty-day or forty-day transition period used without any constitutional challenge.

## **VII. ESSA does not appear to violate the exemption of state and local retirement public employer plans from ERISA's provisions**

ESSA does not violate the exemption of state and local retirement public employer plans from ERISA's provisions. ESSA contains no references to ERISA. Thus, there is no ERISA issue, even though many ESSA provisions are similar to the ERISA provisions pertaining to surviving spouse protections.

ESSA includes three essential surviving spouse protection provisions similar to those introduced by the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (REACT), which amended ERISA and the Code to provide that:

- *First*, a member's surviving spouse would be the beneficiary of the member's

---

<sup>10</sup> The *Majauskas* court's factual recital stated that the member married and became a plan participant in 1973 at 486, but mentioned neither fact in its discussion of the constitutionality of the equitable distribution provisions at 493. Similarly, the *McDermott's* court's factual recital stated in 1986 that the member was employed by the plan sponsor for most of the member's thirty-three marriage and employed by the n the plan became a plan participant in 1973 at 384, but mentioned neither fact in its discussion of the constitutionality of the equitable distribution provisions (those provisions did not become effective until 1980) at 381-383 and 392.

<sup>11</sup> L. 1980 ch. 281 § 47.

<sup>12</sup> That right of election addition was enacted on July 24, 1992 and was effective for designations after September 1, 1992. L. 1992 ch. 595 §§ 10, 25.

<sup>13</sup> Retirement Equity Act of 1984, Pub. L. No. 98-397 § 302, 98 Stat. 1426, at 1451 (1984).

- default retirement annuity benefit, which is a joint and 50% survivor annuity.
- *Second*, a member's surviving spouse would be the default beneficiary of 50% of the member's lump-sum death benefit.
  - *Third*, the member could not elect a retirement benefit or a death benefit that would provide the surviving spouse, if any, with smaller payments than those the surviving spouse would receive under the respective defaults without the spouse's written consent on a plan form describing the benefit being waived by the spouse.

ESSA follows the REACT waiver approach and disregards free-standing prenuptial or antenuptial waivers that are not part of separation agreements.<sup>14</sup> Moreover, ESSA waivers would have to be executed during the marriage of the surviving spouse and the member. The spouse could only consent to waive the default benefit when the spouse has the right to obtain plan benefit information in the spouse's capacity as a default beneficiary before executing the waiver on a plan form.<sup>15</sup>

Plans are given relief when plan benefits are paid, in whole or in part, to the wrong person if the plan fiduciaries comply with the prudent person standards of NY RETIRE & SOC SEC. § 177.9(b) governing investment decisions by New York public employer plan fiduciaries, *see* ESSA Module, at 2 and 4, rather than with the ERISA § 404(a) prudent man standards governing the corresponding REACT provisions of ERISA. In general, the applicable fiduciary standards with respect to the plan ESSA duties are not determined by reference to the ERISA fiduciary standards, but by similar standards. As is the case with ERISA § 205(c)(6), the plans would not need to make a second payment of such amounts to the surviving spouse. *See* ESSA Module, at 2, 4-5. On the other hand, ESSA would not permit plans to stop annuity payments to quickly recoup any overpayments. Instead, ESSA would limit such recoupment to 10% of each annuity payment to the surviving spouse. This 10% recoupment payment limit is identical to the one that applies to ERISA plan fiduciaries seeking to recover inadvertent overpayments to innocent plan participants. ERISA § 206(h)(4). Again, these relief provisions are not determined by reference to the ERISA fiduciary standards, but they are similar to the ERISA relief provisions.

## CONCLUSION

ESSA's provisions are similar in concept to the features of the current New York protections for surviving spouses. ESSA is unlikely to increase New York government contribution obligations to any of the affected public employer retirement plans or to decrease any of those plans' employee benefits. The substantive and transition provisions of ESSA, like those of the current protections for New York surviving spouses, are likely constitutional. ESSA does not violate the exemption of state and local retirement public employer plans from ERISA's provisions. ESSA is consistent, moreover, with the practice of the public employer retirement plans of all the states other than Alabama and Tennessee.

ESSA would remedy an inequitable gap in the current protections for surviving spouses of New York public sector employees by providing those individuals with protections similar to those

---

<sup>14</sup> *See* discussion of *Kaplan*, *supra* note 8.

<sup>15</sup> *Cf.* Treas. Reg. § 1.401(a)-20 Q & A-28.

provided to New York surviving spouses of employees of private employers, and the federal government. ESSA would apply a tried-and-true approach used for approximately forty years by private and federal employer retirement plans to better protect families across New York State.

For these reasons, the City Bar, by and through the undersigned committees, endorses the NYSBA Report proposing and endorsing ESSA.

Kevin Matz, Chair  
Estate and Gift Taxation Committee

Diane Fener, Co-Chair  
Senior Lawyers Committee

Jean Bleich, Co-Chair  
Senior Lawyers Committee

March 2024