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A Beneficiary requested a hearing to contest a Last Will and Testament. The Nominated Executrix of the Estate filed a Motion requesting funds from the Estate’s assets in order to pay for effective representation in opposing the will contest. Further, the Nominated Executrix asserted she was due these fees at the beginning of the probate process, and despite not having been appointed executrix under the Will. The Beneficiary argued the Estate may not recover advancements to the Nominated Executrix should the Beneficiary prevail in contesting the Will. The Beneficiary further argued the Nominated Executrix unduly influenced the Decedent during the signing of the Will. The Court reasoned that, while the probate court has sole jurisdiction to allow counsel fees in a will contest, an attorney who provides legal services to a fiduciary during the settlement of an estate is not a creditor of the estate but, rather, a creditor of the fiduciary. Therefore, the Nominated Executrix’s Motion for Advancement of Expenses was denied. The Court held she could seek reimbursement from the Estate for whatever costs and expenses she inurred in the will contest during the Final Account, unless the Court found the Nominated Executrix unduly influenced the Decedent during the signing the Will.

1. Estate Fees: Liability to Third Parties

Pursuant to Conn. Gen. Stat. § 45a-366 (2017), funeral expenses are the responsibility of the estate.
2. **Will Contest: Expenses of Defending**

Pursuant to Conn. Gen. Stat. § 45a-294(a) (2017), the court of probate having jurisdiction of the testate estate of any person shall allow to the executor his just and reasonable expenses in defending the will of such person in the probate court, whether or not the will is admitted to probate.

3. **Jurisdiction: Probate Court**

The Probate Court has sole jurisdiction to allow counsel fees in a will contest.

4. **Fees and Costs: Fiduciary**

An attorney who provides legal services to a fiduciary during the settlement of an estate is not a creditor of the estate but, rather, a creditor of the fiduciary.

5. **Fiduciary: Liability**

A claim in contract is against the fiduciary personally who then may seek reimbursement from the estate through an allowance to him in his account.

6. **Will Contest: Contesting of**

The court shall allow an executor just and reasonable expenses in defending the will whether or not it is admitted to probate, unless the court finds that the will was procured by undue influence exerted by the executor upon the testator.

**Opinion**

The Last Will and Testament of Richard Pivarnik (“Decedent”) was submitted to the Probate Court on March 10, 2017. Prior to the expiration of the hearing request deadline, see Conn. R. Prob. § 8.6(g)(1) (2015), Troy Pivarnik (“Pivarnik”), one of Decedent’s sons and a beneficiary under the Will, requested a hearing, which was held on May 9, 2017. He appeared through counsel who indicated that it was his intention to contest the Will.

[1] Several motions were then filed with the Court, which were heard on June 1, 2017. The first was a Motion for Reimbursement of Funeral Expenses, which was filed by Pivarnik. Inasmuch as funeral expenses are the responsibility of the Estate pursuant to Conn. Gen. Stat. § 45a-366 (2017), and there being no objection to payment of the same to Pivarnik, the Motion is GRANTED. However, all such expenses are to be submitted and processed for reimbursement through the Temporary Administrator who was previously appointed by the Court. See Conn. Gen. Stat. § 45a-316 (2017) (“[A] temporary administrator [shall] hold and preserve the estate until the appointment of an administrator or the probating of the will.”); see also Conn. Gen. Stat. § 45a-317(a) (2017) (The
temporary administrator shall collect the debts of the estate).

Linda Kell (“Kell”), who is nominated as executrix under the proposed Will, also filed a Motion for Advancement of Expenses. She requests that the Court approve a payment of $5000 from the Estate assets in order for her to retain an attorney to defend the will contest. Pivarnik filed an Objection to this Motion.

[2] Both Kell’s Motion, as well as the Objection thereto, were filed pursuant to Conn. Gen. Stat. § 45a-294(a) (2017), which provides, “[t]he court of probate having jurisdiction of the testate estate of any person shall allow to the executor his just and reasonable expenses in defending the will of such person in the probate court, whether or not the will is admitted to probate.”

It is Kell’s position that despite the fact that she has not been appointed as executrix under the proposed Will, she is still entitled to payment of her attorneys’ fees now, at the beginning of the probate process. She cites to Carr v. Carr, No. CV9978828, 1999 WL 492643, at *2 (Conn. Super. Ct. Jun. 28, 1999), which held that an executor’s interest vests from the moment of the testator’s death, and Kyek v. Estate of Nichols, No. FSTCV116011013S, 2012 WL 3194066, at *6 (Conn. Super. Ct. July 11, 2012), which upheld the payment of attorneys’ fees incurred by the fiduciary both before and after her appointment. Both cases arose out of will contests. Kell argues further, through her attorney, that it is the public policy of our State for the estate to pay the fiduciaries’ attorneys’ fees, and that a financial hardship would be imposed upon her if the Court does not grant her Motion. Finally, she argues that the Court has the equitable power to grant her Motion, presumably under Conn. Gen. Stat. § 45a-98(a)(7) (2017).

Pivarnik argued, through his attorney, that if the Motion is granted and he ultimately prevails after a trial it would be difficult, if not impossible, for the Estate to recover any monies advanced to Kell. She was the long-time companion of Decedent and has no other interest in his Estate. Pivarnik argued further that the basis of his claim is that she unduly influenced Decedent in the drafting and preparation of the proposed Will, citing Hannafin v. Carr, No. CV990078828S, 2000 WL 157943 (Conn. Super. Ct. Jan. 26, 2000). In that matter, the superior court upheld a probate court decree denying the nominated executrix’s fees incurred in a will contest when it was proven that the will in question was the result of undue influence exerted by the executrix. Id. at *4. The court held that in such a situation, the fees and expenses incurred were not “just and reasonable” under Conn. Gen. Stat. § 45a-294(a). Id. at *4.

The parties stipulated that there is neither precedent nor authority for the Court to allow an executors’ expenses to be advanced to him or her in a will contest. As a result, the Court has examined the nature of the attorney/executor relationship and how fees incurred arising out of the same are allowable under Conn. Gen. Stat. § 45a-294(a).
The probate court has sole jurisdiction to allow counsel fees in a will contest. *Atchison v. Lewis*, 131 Conn. 218, 224 (1944). However, an attorney who provides legal services to a fiduciary during the settlement of an estate is not a creditor of the estate but, rather, a creditor of the fiduciary. See *Burke v. Terry*, 28 Conn. 414, 415-16 (1859); *DiFrancesca v. Rousseau*, 36 Conn. Supp. 34, 35 (1979). As noted in Ralph H. Folsom & Michael P. Kaelin, Probate Litigation in Connecticut § 4.10 (3d ed. 2017), “Whenever an executor or administrator enters into a contract binding the estate, he or she incurs a personal liability since the estate is not a legal entity and cannot be the obligor. The administrator or executor is personally liable . . . for debts arising out of a Will contest . . . .”

However, such expenses may be recoverable by the executor from the estate. Gayle B. Wilhelm, Jessie A. Gilbert & Daniel G. Johnson, Settlement of Estates in Connecticut § 9.115 (3d ed. 2017), states:

> [1] legal fees incurred by the fiduciary in connection with the performance of duties owed to the estate are a personal expense of the fiduciary, but are reimbursable out of the funds of the estate if reasonable and necessary. . . . In practice, however, it is customary for the question of the reasonableness of attorney’s fees to be addressed by the probate court in connection with the accounting of the fiduciary . . . .

[5] In *In re Barnes’ Estate*, 20 Conn. Supp. 179, 181 (1956), the superior court held that a claim in contract is against the fiduciary personally who then may seek “reimbursement from the estate, through an allowance to him in his account.” The Court also notes that in *Kyek*, 2012 WL 3194066, at *3, one of the cases relied upon by Kell, the fees in question appeared on the final account for the estate.

[6] The Court finds that Kell may seek reimbursement from the Estate of whatever costs and expenses she incurs in this will contest in the Final Account. Conn. Gen. Stat. § 45a-294(a) expressly provides that the Court shall allow her just and reasonable expenses in defending the Will whether or not it is admitted to probate. The only limitation upon the allowance of such expenses would be if the Court found that the Will in question was procured by undue influence exerted by her upon Decedent. *Hannafin*, 2000 WL 157943, at *1.

The Motion for Advancement of Expenses is DENIED.

It is so ORDERED.

Dated at Stratford, Connecticut this 5th day of June 2017.

/\s/  
Kurt M. Ahlberg, Judge
§ 1. INTRODUCTION

Before 1974, retirement plans were regarded as contracts between the employer and the employee, and were primarily regulated by state law.¹ The Internal Revenue Code set federal standards for tax-qualified plans and other tax-favored retirement arrangements,² but most of the applicable rules were rules of state law.³ Since 1974, two complex federal statutes, the Employee Retirement Income Security Act of 1974, as amended (“ERISA”),⁴ and the Internal Revenue Code of 1986, as amended (“the Code”),⁵ have governed most private sector, employer-sponsored retirement plans.

Many retirement plan participants are married.⁶ As discussed below,
ERISA and the Code include special protections for spouses. Following a divorce, how are the couple’s retirement plan assets divided? This question has given rise to much litigation, discussed in Section 5 below.

When a retirement plan participant dies before receiving all of the amounts accumulated for him or her under the plan, it is necessary to determine who receives the unpaid balance. In the ideal case, the decedent has completed a beneficiary designation form (“BDF”) that complies fully with the plan’s requirements and the requirements of ERISA, and clearly identifies who is to receive the proceeds. In the problem cases, there is no BDF, the BDF does not comply with the plan’s or ERISA’s requirements, the BDF is vague, or the BDF has arguably been superseded by a later document or event, such as divorce. In such situations, what is the plan to do?

The law of inheritance upon death has developed over hundreds of years, and is almost exclusively a matter of state (rather than federal) law. Until relatively recently, most property passed on death to beneficiaries named in a will or, in the absence of a valid will, to the heirs in intestacy. A substantial body of law developed to deal with problematic issues of validity and interpretation, e.g., an ambiguous will, a will that did not comply fully with the Social Security administrative records).

9 See Retirement Topics – Death, INTERNAL REVENUE SERVICE, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-death (last updated Sept. 30, 2017) (“When a participant in a retirement plan dies, benefits the participant would have been entitled to are usually paid to the participant’s designated beneficiary in a form provided by the terms of the plan.”).
10 See Nicholas S. Marshall, Assembly Required: Retirement Benefits Must Be Integrated with Your Estate Plan, 52 ADVOCATE 15, 15 (2009) (“At a plan owner’s death, the assets held in a retirement plan generally are distributed pursuant to directions set forth in a beneficiary designation form signed by the plan owner. Alternatively, if the plan owner does not properly complete a beneficiary designation form, the post-death distribution scheme is provided by default distribution provisions of the agreement establishing the retirement plan.”).
statute of wills, or a will that contained legacies to a beneficiary who predeceased the testator.\textsuperscript{13}

In recent years, property is increasingly being held in forms that are not subject to the probate system.\textsuperscript{14} Many, perhaps most, wealth transfers on death today occur outside the probate system.\textsuperscript{15} In many cases, the value of the decedent’s nonprobate property greatly exceeds the value of the property that passes by will.\textsuperscript{16} This leads to two conclusions: first, the documents that govern the disposition of that property on death (a BDF for a retirement plan) should be drafted with as much care and specificity as a well-drawn will;\textsuperscript{17} second, the provisions of the will must be coordinated with the disposition of the nonprobate assets, and the various documents disposing of the nonprobate assets must themselves be coordinated.\textsuperscript{18}

Except for passing references, this article discusses only beneficiary designations under retirement plans that are subject to ERISA. Governmental

\textsuperscript{13} See Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates 328-51 (9th ed. 2013) (discussing mistakes and ambiguous language in wills).

\textsuperscript{14} See Langbein, Nonprobate Revolution, supra note 12, at 1108.

\textsuperscript{15} See id. (“Probate, our court-operated system for transferring wealth at death, is declining in importance. Institutions that administer non-court modes of transfer are displacing the probate system.”). Joint property, property held in trusts, transfer on death accounts, life insurance, retirement plans, and individual retirement accounts (IRAs) all pass outside the will, and are referred to collectively as nonprobate property or will substitutes. See id. at 1108-09.

\textsuperscript{16} See id. at 1108 (“The law of wills and the rules of descent no longer govern succession to most of the property of most descendants.”).

\textsuperscript{17} Sterk and Leslie explain the obstacles to modifying the standard BDF:

\begin{quote}
[...] empirical evidence is difficult to gather on this point, but anecdotal evidence suggests that the accountholder will face a significant bureaucracy problem. The provider’s customer service representative is unlikely to be a lawyer and is unlikely to be familiar with legal terms. For instance, one of the authors sought to set up an IRA account naming as beneficiaries “my issue by representation as defined in UPC § 2-106.” The form was returned as unacceptable. Another effort to designate as beneficiaries “one third to each of my three children, or their issue, per stirpes” also failed because the provider insisted on whole number percentages and 100 is not evenly divisible by three. Few lay accountholders will ever attempt to negotiate after failed efforts like these.
\end{quote}


\textsuperscript{18} As Langbein explains:

\begin{quote}
[...] in the wake of the nonprobate revolution, a decedent now effects many wealth transfers at death, through instruments that have been executed at different times and that may reflect different circumstances of family and property. As these circumstances change, there is considerable danger that the transferor may neglect to update one or more components of an estate that involves numerous instruments and institutions of transfer. This fragmentation of decedents’ estates requires that lawyers practicing in the field of estate planning look beyond probate property. In late-twentieth-century America, it is not enough simply to write someone a will. The client now has many “nonprobate wills” that the draftsman must consider and sometimes revise when drawing up the “probate will.”
\end{quote}

Langbein, Nonprobate Revolution, supra note 12, at 1140.
plans,\textsuperscript{19} church plans,\textsuperscript{20} plans covering only business owners,\textsuperscript{21} individual retirement accounts ("IRAs"),\textsuperscript{22} and certain plans, known as excess benefit plans,\textsuperscript{23} are exempt from ERISA coverage.

\section*{§ 2. RETIREMENT PLANS AND RETIREMENT PLAN ASSETS}

ERISA and the Code divide retirement plans into two mutually exclusive categories: defined contribution (or individual account) plans and defined benefit plans. A defined contribution plan is

a pension plan which provides for an individual account for each participant and for benefits based \textit{solely} upon the amount contributed to the participant’s account [by the employer and/or the employee], and any income, expenses, gains and losses, and any forfeitures of accounts of other participants\textsuperscript{24} which may be allocated to such participant’s account.\textsuperscript{25}

Today, a 401(k) plan is the most prevalent form of defined contribution plan.\textsuperscript{26}

A defined benefit plan is "a pension plan other than [a defined contribution] plan . . . ."\textsuperscript{27} The classic example of a defined benefit plan is one that, like Social Security, pays a monthly benefit at retirement that continues for the life of the plan participant, and offers a survivor benefit for the lifetime of a

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\footnotesize
\textsuperscript{19} The term "governmental plan" is defined as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. § 1002(32).
\textsuperscript{20} The term "church plan" is defined as "a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26." 29 U.S.C. § 1002(33)(A).
\textsuperscript{21} See 29 C.F.R. § 2510.3-3 (2017) (explaining that “the term ‘employee benefit plan’ shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan”).
\textsuperscript{22} See 29 U.S.C. §§ 1003(c), 1051(6), 1081(a)(7).
\textsuperscript{23} See 29 U.S.C. § 1003(b)(5). An excess benefit plan is defined as “a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies without regard to whether the plan is funded.” 29 U.S.C. § 1002(36).
\textsuperscript{24} Forfeiture generally occurs when a participant terminates employment before having a vested (non-forfeitable) right to 100% of his or her account. \textit{See generally} 29 U.S.C. § 1053 (minimum vesting standards).
\textsuperscript{25} 29 U.S.C. § 1002(34) (emphasis added).
\textsuperscript{26} \textit{See EMP. BENEFITS SEC. ADMIN., PRIVATE PENSION PLAN BULLETIN 3 (2016) (depicting the total number of defined contribution plans in 2014 as 640,334 and 533,769 of those as 401(k) type plans).}
\textsuperscript{27} \textit{See EMP. BENEFITS SEC. ADMIN., PRIVATE PENSION PLAN BULLETIN 3 (2016) (two exceptions to this general characterization are included in this section: “a pension plan which is not [a defined contribution] plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant— (A) for purposes of section 1052 of this title, shall be treated as [a defined contribution plan], and (B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as [a defined contribution] plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.”).}
surviving spouse.\textsuperscript{28} Generally, the amount of the benefit is based on the participant’s salary history and his or her length of service with the employer.\textsuperscript{29}

The last thirty years have seen the emergence of “hybrid” plans, which share some defined contribution characteristics and some defined benefit characteristics.\textsuperscript{30} A well-known example of this is the cash balance plan, which typically expresses the participant’s benefit as an account balance.\textsuperscript{31} However, these plans are technically defined benefit plans, as the benefit is not based solely upon the amounts contributed to the account, plus actual investment earnings (or losses) and forfeitures.

In 1974, when ERISA was enacted, the defined benefit plan dominated the landscape.\textsuperscript{32} Since then, the number of defined benefit plans, and the number of participants accruing benefits under defined benefit plans, has declined sharply.\textsuperscript{33} According to the Employee Benefit Research Institute (“EBRI”), in 1974-1975, 43.7% of private nonfarm wage and salary workers were participating in a defined benefit plan and there were 103,346 defined benefit plans; by 2003-2004, these numbers had declined to 16.8% and 26,000, respectively.\textsuperscript{34} As of 2014, the number of single employer defined benefit plans covered by the Pension Benefit Guaranty Corporation (“PBGC”)\textsuperscript{35} insurance

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\footnotesize
28 See Allan P. Blostin, Distribution of Retirement Income Benefits, 126 MONTHLY LAB. REV. 3, 5 (2003) (explaining that “[d]efined benefit plans must make an annuity available to retirees. An annuity provides monthly or annual payments for a specified number of years or for life. For married employees, the plan must offer a survivor annuity, which guarantees continued benefits to a spouse should the retiree die.”).

29 See id. at 3-4 (describing the three types of defined benefit formulas: the final pay formula, the career-average-pay formula, and the cash balance plan).

30 See EMP. BENEFIT RESEARCH INST., SPECIAL REPORT ISSUE BRIEF NO. 117, HYBRID RETIREMENT PLAN: THE RETIREMENT INCOME SYSTEM CONTINUES TO EVOLVE 3 (1996) (“Hybrid plans offer a compromise between conventional defined benefit plans and defined contribution plans.”).


33 Id. at 31-32 (explaining that “[t]he percentage of private pension participants in defined benefit plans has declined since at least 1975. In 1975, just after passage of the landmark pension legislation, the Employee Retirement Security Act of 1974, 71 per cent of active participants in private sector pension plans were in defined benefit plans . . . and by 2004, it had fallen to 28 per cent”).

34 EMP. BENEFIT RESEARCH INST., supra note 32.

35 The PBGC was established by ERISA, its purposes being (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under
program fell to 22,344, an all-time low.\textsuperscript{36} In 1985, PBGC insured more than 112,000 single employer plans.\textsuperscript{37}

The percentage of workers covered by a traditional defined benefit (DB) pension plan that pays a lifetime annuity, often based on years of service and final salary, has been steadily declining over the past 25 years. From 1980 through 2008, the proportion of private wage and salary workers participating in DB pension plans fell from 38 percent to 20 percent . . . In contrast, the percentage of workers covered by a defined contribution (DC) pension plan—that is, an investment account established and often subsidized by employers, but owned and controlled by employees—has been increasing over time. From 1980 through 2008, the proportion of private wage and salary workers participating in only DC pension plans increased from 8 percent to 31 percent . . . More recently, many employers have frozen their DB plans.\textsuperscript{38}

Total U.S. retirement assets were $25.3 trillion as of December 31, 2016.\textsuperscript{39} In 2011, retirement savings accounted for thirty percent of all household

plans to which this subchapter applies, and (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.


\textsuperscript{36} Pension Insurance Data Book, PENSION BENEFIT GUARANTY CORP. Table S-31 (2013), https://www.pbgc.gov/documents/2013-DATA-BOOK-FINAL.pdf (depicting the total insured single-employer program plans from 1980 to 2014, and showing that the number of total plans was at its lowest in 2014).


wealth in the United States. These assets were allocated as follows (in trillions of dollars):

<table>
<thead>
<tr>
<th></th>
<th>2016</th>
<th>2000</th>
<th>% of Total 2016</th>
<th>% of Total 2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual Retirement Accounts (IRAs)</td>
<td>7.9</td>
<td>2.6</td>
<td>31</td>
<td>22</td>
</tr>
<tr>
<td>Private sector defined contribution plans</td>
<td>7.0</td>
<td>3.0</td>
<td>28</td>
<td>25</td>
</tr>
<tr>
<td>Governmental Plans</td>
<td>5.5</td>
<td>3.0</td>
<td>22</td>
<td>27</td>
</tr>
<tr>
<td>Private sector defined benefit plans</td>
<td>2.9</td>
<td>2.0</td>
<td>11</td>
<td>17</td>
</tr>
<tr>
<td>Annuity Reserves</td>
<td>2.0</td>
<td>0.9</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>25.3</td>
<td>11.6</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

According to the U.S. Census Bureau, between 2000 and 2011:

the share of wealth held in retirement accounts increased from 18 percent to 30 percent . . . in 1984 . . . . [O]nly 2 percent was held in IRA and Keogh accounts. By contrast, in 2011, . . . IRA and Keogh accounts accounted for 15 percent, and 401K/Thrift Savings Plans, which became widely available in the early 1990s, accounted for 16 percent. 42

Under the traditional defined plans that prevailed when ERISA was drafted and enacted, and that were the focus of the changes enacted by ERISA, there was generally little scope for naming a beneficiary. 43 If the benefit was

65. This is compared to $904.7 million in 1975. Id. at 72.


42 Gottschalck, Vornovyskyy & Smith, supra note 40.

43 See, e.g., John H. Langbein, The Twentieth-Century Revolution in Family Wealth Transmission, 86 Mich. L. Rev. 722, 744-45 (1988) (The pension system “has been deliberately designed to promote lifetime exhaustion of the accumulated capital. . . . The mechanism by which pension wealth is consumed is annuitization”); Sudipto Banerjee, Annuity and Lump-Sum Decisions in Defined Benefit Plans: The Role of Plan Rules, EMP. BENEFIT RESEARCH INST., Issue Brief No. 381 (2013) (“Defined benefit (DB) retirement plans came into existence in the 1800s and through the 1960s paid out benefits in only one form: a fixed-payment annuity. Beginning in the 1970s, some defined benefit plans began to offer the...
payable as a single life annuity, it was considered fully paid when the participant died. If the plan provided for a survivor annuity to a surviving spouse, that annuity could be paid only to the surviving spouse. Accordingly, it is not surprising that the drafters of ERISA did not foresee an era when participants would accumulate substantial account balances under defined contribution plans and these account balances would be a major part of the participants’ estate plans. Congress simply did not anticipate the conflicts that have arisen between the state law rules that primarily govern estate planning, and the ERISA rules relating to beneficiary designations.

Today, a significant asset (in addition to a house and the value of Social Security benefits) for most Americans is a 401(k) account or an IRA holding assets transferred from such an account. Stewart Sterk and Melanie Leslie make an important point:

Unlike other non-probate assets—revocable trusts, payable-on-death (POD) brokerage accounts and bank accounts, and life insurance policies—the holders of retirement accounts typically have several options. Full or partial single-sum distributions, and as ‘hybrid’ pension plans expanded in the 1980s, so did distribution options, with the result that today most defined benefit plans offer some type of single/lump-sum option, in addition to the traditional annuity choice.”

See infra Section 4.1 (discussing the meaning of “qualified joint and survivor annuity” under ERISA). In explaining the estate planning consequences of the shift in retirement plan assets from defined benefit plans to defined contribution plans, Sterk and Leslie explain:

So long as an employee’s benefits in a traditional defined-benefit plan were paid out as annuities, the plan presented few estate-planning challenges. The employee’s benefits were paid as annuities and were effectively used up by the employee’s death (or, sometimes, by the death of the employee’s spouse); there were no assets to pass on to future generations. Defined-contribution plans and IRAs, by contrast, may have significant cash balances upon the death of the accountholder.

Id. at 175. See also David Pratt, Retirement in a Defined Contribution Era: Making the Money Last, 41 J. Marshall L. Rev. 1091, 1108-09 (explaining the prevalence of lump sum benefit distributions to defined contribution plan participants); John H. Langbein, Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, 38 ACTEC L.J. 1, 13 (2012) [hereinafter Langbein, Major Reforms] (“Within the defined benefit world, there has been a pronounced trend in recent years toward lump-sum distribution options, with the result that ever more defined benefit plan assets now flow into rollover IRAs.”).
establish them for purposes other than identifying future beneficiaries of the assets. Accountholders generally open retirement accounts as tax-sheltered savings vehicles, not as substitute wills. Employees often establish 401(k) retirement accounts while doing the paperwork associated with accepting a first job, when succession is far from the employee’s mind. Similarly, people establish IRAs when starting a business, or when arranging retirement. In each case, the participant is confronted with a “beneficiary designation form” as a matter of course, generally without counsel, and at a time when the employee is not focused on succession. Moreover, participants may not look again at those forms for decades; many will have no idea whom they designated as beneficiaries, and no idea how to find out.  

§ 3. ERISA

3.1 Introduction

ERISA has made analysis and planning more difficult, particularly by its preemption of state laws, even in situations where the state law does not conflict with the text or purpose of ERISA. As Professor Gallanis has noted, “[t]he proceeds of employee benefits are an increasingly important component of American wealth, and the collisions between the federal law of ERISA and the state law of succession to property will become more and more frequent.”

48 Sterk & Leslie, supra note 17, at 167-68.

49 See 29 U.S.C. § 1144 (“Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.”).

50 ERISA’s preemption clause of 1974 was inserted during the conference committee’s final negotiations; [t]he preemption language that had survived, without controversy, until the conference simply prevented the states from legislating about the “subject matters regulated by this Act.” The new language, preempting state laws relating to “any employee benefit plan” including matters not regulated by the Act, was disclosed when the conference committee report was filed ten days before Congress took final action on ERISA. The House and Senate sponsors of the bill made very different claims about the significance of the revised preemption clause. Representative Dent called the new clause the “crowning achievement of this legislation” because it eliminated the “threat of conflicting and inconsistent state and local regulation.” Senators Javits and Williams were less expansive, no doubt because they were rationalizing a change from a position they had held during the long period of drafting the legislation. Javits looked forward to a future refining of ERISA preemption, saying that the “desirability of further regulation-at either the State or Federal level—undoubtedly warrants further attention.” The conferees had created a Joint Pension Task Force and ordered it to study ERISA’s preemption of state law: Javits thought that this might lead to “appropriate modifications.”


51 Gallanis, supra note 1, at 192 (citation omitted).
In general, when implementing or interpreting a BDF for an ERISA retirement plan, there are five potentially applicable sources of guidance:

1. ERISA itself (e.g., the Qualified Joint and Survivor Annuity (“QJSA”) and Qualified Preretirement Survivor Annuity (“QPSA”) rules)\(^{52}\) and the preemption provision. The statute is supplemented by regulations and other guidance issued by the Internal Revenue Service (“IRS”) and the U.S. Department of Labor (“DOL”) and there is extensive case law;

2. Other federal laws, which are not preempted by ERISA;\(^{53}\)

3. State law governing nonprobate transfers on death;

4. Uniform laws, the most important of which in this context is the Uniform Probate Code (“UPC”).\(^{54}\) A UPC provision has the force of law only if it has been enacted by the state in question;\(^{55}\)

5. Restatements of the Law, the most important of which, in this context, is the Restatement (Third) of Property (Wills and Other Donative Transfers).\(^{56}\) A Restatement, while highly authoritative, does not have the force of law.\(^{57}\)

ERISA applies to employer-sponsored retirement and welfare plans,\(^{58}\)

\(^{52}\) See infra Section 4.

\(^{53}\) See 29 U.S.C. § 1144(d) (“Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.”).


\(^{56}\) As expressed within the Restatement’s introduction,

[This Restatement presents a comprehensive treatment of the American law of wills, will substitutes, intestacy, gifts, present and future interests, and other matters generally considered to be within the topic, including the construction of donative documents. The coverage includes subjects treated in the Restatement of Property and the Restatement Second of Property (Donative Transfers), as well as subjects not previously covered in those Restatements. Donative transfers are at the core of family estate planning. Family estate planning, however, calls for the application and utilization of many fields of law, fields such as federal and state tax law and corporate, partnership, agency, and domestic relations law. The treatment of the law of donative transfers proceeds with these and other relevant fields in background. This Restatement covers the rules pertaining to the gratuitous disposition of family property and could, in tandem with the Restatement of Trusts, be labeled the Restatement of Family Property Law.


\(^{57}\) Courts will often look to the UPC or Restatement for guidance if the law is not clear.
such as group term life insurance,\(^5\) which are subject to certain exceptions, such as governmental and church plans.\(^6\) The substantive requirements of ERISA do not apply to IRAs, because IRAs are generally not employer-sponsored.\(^7\) Even IRAs that are employer-sponsored, such as SEPs and SIMPLE IRAs,\(^8\) are exempt from most of ERISA’s substantive rules, such as the QISA and QPSA rules.\(^9\) Accordingly, in interpreting a BDF for a plan that is not subject to the substantive rules of ERISA,\(^10\) ERISA preemption is not a concern, and applicable state law (or federal law in the case of federal plans) governs the interpretation of the BDF. In interpreting a BDF for an ERISA plan, the extent of the ability to use state law resources is doubtful because of the divergent ways in which different courts have (1) applied the ERISA preemption provisions and (2) resorted to sources other than ERISA, such as state law and federal common law.\(^11\)

As many commentators have noted, the enormous recent growth in IRA assets is attributable primarily to rollovers from employer plans.\(^12\) This leads to an anomaly. While the assets are in the employer plan, they are, unless the plan

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5. See 29 U.S.C. § 1002(3) (“The term ‘employee benefit plan’ or ‘plan’ means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.”).

6. See 29 U.S.C. § 103(b)(1)-(2) (“The provisions of this subchapter shall not apply to any employee benefit plan if – (1) such plan is a governmental plan . . . (2) such plan is a church plan.”). Many of the substantive rules of ERISA are also included in the Code as conditions of tax qualification. See, e.g., I.R.C. § 401 (titled “Qualified pension, profit-sharing, and stock bonus plans”). The major rules governing IRAs appear in I.R.C. §§ 408, 408A (titled “Individual retirement accounts” and “Roth IRAs,” respectively).


8. See id. (“A Simplified Employee Pension (‘SEP’) is an employer-sponsored plan that uses traditional IRAs as the funding vehicle. SEPs are governed by § 408(p). In this way, SEPs are hybrid plans—an IRA that is employer-sponsored. A SIMPLE IRA is a more recent creation under § 408(p). Like a SEP, it is an employer-sponsored IRA program.”).


10. ERISA also does not apply to an unfunded “excess benefit plan.” 29 U.S.C. 1003(b)(5).

11. The term “excess benefit plan” means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies without regard to whether the plan is funded. To the extent that a separate part of a plan . . . maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

29 U.S.C. § 1002(36). Most nonqualified deferred compensation plans for executives are “top hat” plans. See 29 U.S.C. § 1051(2) (“a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees”). See also 29 U.S.C. §§ 1081(a)(3), 1101(a)(1).

12. See 29 U.S.C. § 1144. See also infra Section 11.

13. See, e.g., John Sabelhaus & Daniel Schrass, The Evolving Role of IRAs in U.S. Retirement Planning, 15 INV. CO. INST. RESEARCH PERSPECTIVE, Nov. 2009, at 9, https://www.ici.org/pdf/per15-03.pdf (“In addition to trends in vesting, changes in the types of retirement plans that employers offer have also played a role in fueling IRA growth through increased rollovers.”).
is exempt from ERISA, subject to the QJSA and QPSA rules. Beneficiary
designations, beneficiary changes, and state law rules relating to their
interpretation and validity are potentially subject to ERISA and ERISA
preemption. As soon as the assets are rolled into an IRA, the spousal protections
disappear, and the provisions of the IRA documents govern the validity of any
beneficiary designation and the applicable state law. The IRA sponsor almost
always chooses the governing law and, unlike the IRA owner’s other estate
planning documents, the governing law may have no relation to where the IRA
owner lives.

3.2 The ERISA Plan Document Rules

ERISA requires that “[e]very employee benefit plan shall be established
and maintained pursuant to a written instrument,” which must “specify the
basis on which payments are made to and from the plan.” The plan fiduciaries
are obliged to act “in accordance with the documents and instruments governing
the plan insofar as such documents and instruments are consistent with the
provisions of [subchapter I] and subchapter III [of ERISA].” ERISA provides
no exemption from this duty when it comes to the payment of benefits.

Joe Canary’s testimony to the ERISA Advisory Council as Director of
the Office of Regulations and Interpretations of the Employee Benefits Security
Administration within the Department of Labor describes the U.S. Department of
Labor’s view:

Mr. Canary directed the Council’s attention to ERISA’s
requirements that, in determining to whom benefits should be
paid, plan fiduciaries are only to look to (i) the ERISA statute,
(ii) the plan’s governing documents, and (iii) the participant’s
beneficiary designation. This standard (known as the
beneficiary designation rule) should be considered in evaluating
ERISA preemption issues and the interplay between ERISA
and state laws. Furthermore, fiduciaries should only look
beyond the plan’s terms and the beneficiary designation when
the ERISA statute so requires.

This is not helpful given that these sources often do not address the
disputed issue. The fundamental purpose of ERISA—one that is surely more
important than administrative convenience and uniformity—is to pay benefits to

70 ADVISORY COUNCIL ON EMP. WELFARE & PENSION BENEFIT PLANS, CURRENT CHALLENGES AND
BEST PRACTICES CONCERNING BENEFICIARY DESIGNATIONS IN RETIREMENT AND LIFE INSURANCE
PLANS A-1 (2012) [hereinafter ADVISORY COUNCIL REPORT],
the correct person; ERISA should be interpreted to facilitate, not obstruct, that purpose. Over fifty years ago, Professor Corbin wrote: “when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience.”

3.3 State Law and ERISA Preemption

Even had ERISA contained no express preemption provision, ERISA would nevertheless have preempted inconsistent state law by implication, through the operation of the Supremacy Clause. U.S. Constitution, Article VI, § 2. As will be seen, however, the effect of § 514 is to preempt a broader range of state laws than would be preempted by the Supremacy Clause. ERISA preemption has proved to be astonishingly complex and highly contested, having provoked no less than fifteen Supreme Court cases—a remarkable quantum of judicial resources in view of the proportion of American law that ERISA (let alone its preemption section) represents.

Since 1997, the United States Supreme Court has directly addressed beneficiary designations under ERISA plans in three decisions: \textit{Egelhoff}, \textit{Boggs}, and \textit{Kennedy}. The Court more recently decided a fourth case; in \textit{Hillman}, the Court considered a different federal statute. If applied to ERISA benefits, that decision would determine the ultimate recipients of those benefits. Unfortunately, each of these decisions clearly reaches the wrong result, largely because the Court continues (1) to insist, wrongheadedly and in the face of considerable evidence to the contrary, that ERISA is a comprehensive and carefully crafted statute, and (2) to exalt simplicity of plan administration over implementing the intention of the plan participant. The copious litigation under ERISA reveals how many important issues are not addressed at all by

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\textsuperscript{72} Other federal statutes may also preempt state law. \textit{See e.g., Hillman v. Maretta}, 133 S. Ct. 1943, 1955 (2013) (The Court unanimously decided that the Federal Employees’ Group Life Insurance Act (FEGLIA) preempts state law.).


\textsuperscript{75} \textit{See Boggs v. Boggs}, 520 U.S. 833 (1997).


\textsuperscript{77} \textit{See infra} Sections 5.3, 5.4, 6.

\textsuperscript{78} \textit{See Hillman} 133 S. Ct. at 1951-52 (“FEGLIA [the Federal Employees’ Group Life Insurance Act of 1954] includes an ‘order of precedence’ . . . [which] require[s] that the insurance proceeds be paid first to the named beneficiary ahead of any other potential recipient.”).
ERISA,\(^{79}\) including many issues relating to the validity and interpretation of BDFs.

Subject to limited exceptions, ERISA provides that “the provisions of [subchapter I] and subchapter III [of ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.”\(^{80}\) According to Irish and Cohen,

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\text{it is clear that the inclusion of section 514(a) in ERISA was a mistake. Given well-established judicial doctrines of preemption, section 514(a) was unnecessary. And, while judicial doctrines have been molded by sensitivity to what is practicable and a reasonable balancing of competing interests, the categorical language and wider scope of section 514(a) has unavoidably at times called for unreasonable and impractical results. . . . Strict adherence to the literal scope and language of section 514(a), however, deprives courts of the flexibility that has proven crucially important in addressing questions of federal preemption and in the development of a “federal common law.” The literal approach also makes it embarrassingly clear that Congress enacted ERISA while still oblivious to numerous problems related to benefit plans that the states had already recognized and addressed. At least one of ERISA’s principal authors has consistently suggested that the apparent principle section 514(a) states is broader than the rule that ought to be enforced. . . . [The] primary shortcoming of section 514 is that, although it establishes a good starting point for thinking about ERISA preemption, it falls short both as a practical rule and as a guide to principled decision making.}^{81}
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The traditional interpretation of the Supreme Court’s ERISA preemption

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\(^{79}\) As Barker and O’Brien explain:

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\text{[t]he prime example of a non-uniform ERISA common law is found in the case law dealing with the ERISA statute of limitations for various participant benefit claims. . . . [T]he vast majority of the courts have decided to adopt the most analogous state law in the area where the case is brought. In other words, you adopt a different statute of limitations for a case brought in each different state of the union. . . . Once the court decides on which particular state’s law should apply, the fun really begins. The federal court first must decide which state law applies. . . . As goes without saying, the statute of limitations cases are a mess, and this ignores the question whether choice of law provisions in plans apply in the analysis.}
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\(^{80}\) 29 U.S.C. § 1144(a).

jurisprudence, which is not universally accepted, is that the Court initially interpreted preemption very broadly, then drew back, beginning with *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*[^82] which preceded the Supreme Court decisions that are discussed in detail below. In his opinion for a unanimous Court, Justice Souter stated:

> we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”[^83]

In that case, the Court upheld a New York statute that imposed surcharges on certain hospital and health maintenance organization (“HMO”) bills.[^84]

However, in the later cases discussed in this article, the Court, while paying lip service to this “starting presumption,” has held state laws preempted far more broadly than was necessary or appropriate.

### § 4. SPOUSAL RIGHTS UNDER ERISA[^85]

All pension plans (defined benefit, money purchase,[^86] or target benefit[^87])


[^83]: Id. at 654-55 (citations omitted).

[^84]: Id. at 668.

[^85]: These annuity rules apply to employer-sponsored plans that are qualified or are subject to 29 U.S.C. 1055, which explains the requirement of joint and survivor annuity and preretirement survivor annuity. See 29 U.S.C. § 1055. They do not apply to governmental plans, non-electing church plans, or most nonqualified plans. See 29 U.S.C. § 1003(b) (providing exceptions for certain plans). These rules apply to I.R.C. § 403(b) arrangements that are subject to ERISA; under the regulations, a § 403(b) plan is exempt from ERISA coverage if it is funded solely by employee contributions and employer involvement is limited. See 29 C.F.R. § 2510.3-2(f).

[^86]: A money purchase plan is “[a] type of defined contribution pension plan. A money purchase pension plan follows, in most respects, the defined contribution model (e.g., it contains individual accounts for each participant) although, for purposes of the Internal Revenue Code’s minimum funding rules, these
plans) must provide (1) a QISA as the required form of benefit, unless the participant, with the written consent of the spouse, elects otherwise; and (2) a QPSA for the surviving spouse in the event of the death of a vested participant prior to that participant beginning to receive payments, unless the spouse elects otherwise.

Plans that are not automatically subject to the annuity rules (such as 401(k) plans, profit sharing plans, and Employee Stock Ownership Plans (“ESOPs”)) must provide that, on the death of a married participant, the entire account balance will be paid to the surviving spouse, unless properly waived by the spouse. The plan may provide that survivor annuities will only be provided if the parties have been married for at least one year.

Thus, in designating beneficiaries of ERISA plan balances, the consent of the spouse will be required (1) for a non-spouse beneficiary designation of death benefits, and (2) in the case of a pension plan, for retirement distributions in a form other than a QISA. A consent to a beneficiary designation (as to the form of the benefit and/or the beneficiary) may be made specific as to the chosen designation or may be a blanket consent (in which case it would allow subsequent changes in the beneficiary designation). The designation of a trust, which benefits the surviving spouse, requires the waiver and consent procedures.
None of these rules apply to IRAs, even if the IRA was funded by a rollover from a pension plan. Thus, regular IRAs, SEPs, SIMPLE IRAs, and Roth IRAs are all exempt from these requirements.

Also, the rules do not apply to governmental plans, church plans, nonqualified deferred compensation, or deferred compensation plans of governmental or tax-exempt employers described in section 457 of the Code.

4.1 QJSA

Under a QJSA, periodic payments must be made to the married participant for life. Periodic payments must continue to the participant’s spouse, if he or she survives the participant, and must be between fifty percent and one hundred percent of the participant’s lifetime benefit. Under a change enacted by the Pension Protection Act ("PPA") in 2006, a plan subject to the QJSA requirements must also offer a qualified optional survivor annuity, i.e., an annuity

(i) for the life of the participant with a survivor annuity for the life of the spouse which is equal to the applicable percentage of the amount of the annuity which is payable during the joint lives of the participant and the spouse, and (ii) which is the actuarial equivalent of a single annuity for the life of the participant. Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

If the survivor annuity percentage under the QJSA is less than seventy-five percent, the applicable percentage is seventy-five percent. If the survivor percentage under the QJSA is seventy-five percent or more, the applicable percentage is fifty percent. A defined benefit plan may satisfy the QJSA requirement by making the distributions directly out of the plan trust, or by purchasing an annuity contract. Under a defined contribution plan, the participant’s benefit is equal to the vested (nonforfeitable) portion of his or her account balance. If the participant elects to receive an annuity, the plan will use

96 See 29 U.S.C. § 1055(c).
98 “In the event of a participant's death following the commencement of a distribution in the form of a QJSA, the remaining payments must be made to the surviving spouse under the QJSA.” Treas. Reg. § 1.401(a)-20, Q&A (9)(a) (2017).
his or her vested account balance to buy an annuity from an insurance company, as the plan itself cannot provide an annuity.

In general, under a defined benefit plan, the QJSA will be actuarially equivalent in value to the normal form of benefit, typically a single life annuity provided by the plan; though sometimes the plan will subsidize the QJSA. Under a defined contribution plan, the amount of each monthly payment will be the amount that can be purchased with the participant’s vested account balance.\(^{104}\) In addition, the IRS has issued a regulation that provides additional flexibility for defined benefit plans to allow participants to split their accrued benefits into separate distribution options, such as a partial lump sum payment and a partial annuity payment.\(^{105}\)

The QJSA and QPSA rules add considerable complexity to plan administration, and have given rise to much litigation. Are the rules necessary? As a leading treatise points out, “[s]everal empirical studies show that, unless their property is large enough to entail tax planning, spouses overwhelmingly strain to leave everything to the surviving spouse, commonly disinheriting children in the process.”\(^{106}\)

4.2 Selection of an Alternative Form of Benefit

The selection of an alternate form of benefit is possible only if several requirements are met. First, the plan must permit an alternative form of benefit, such as a lump sum or other form of installment distribution. Second, proper notice of all of the forms of benefit must be provided to the participant.\(^{107}\) Third, if a different form of benefit is to be selected, and the participant is married, not only must the participant select the different form in writing, but the participant’s spouse must also consent in writing to that different form, and the waiver must either be notarized or witnessed by a plan representative.\(^{108}\) In general, all of this must take place between thirty and 180 days prior to the date payments will begin, although the thirty-day minimum notice period may be waived.\(^{109}\)

The IRS and almost all of the cases take the position that a waiver included in a prenuptial agreement is ineffective because the waiving party is not

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\(^{104}\) Rev. Rul. 2012-3 clarifies the application of the QJSA and QPSA rules to deferred annuity contracts purchased under profit-sharing plans. Rev. Rul. 2012-3, 2012-8 I.R.B. 383. The ruling also provides a method for determining an “annuity starting date” for annuities purchased through qualified plans. \textit{Id.} (“The amount payable under the deferred annuity contract is fixed on the first day of the first period for which an amount is paid under the contract (the annuity starting date).”).

\(^{105}\) Treas. Reg. § 1.417(e)-1(d)(7).

\(^{106}\) \textit{PENSION AND EMPLOYEE BENEFIT LAW}, supra note 73, at 233.


\(^{109}\) I.R.C. § 417(a)(6)-(7); 29 U.S.C. § 1055(c)(7)-(8).
yet a spouse, as required by the statute.110

Because of the preemption of state law by ERISA, the
prevailing view is that an undertaking by the spouse to execute
a waiver after the marriage in an otherwise enforceable
prenuptial agreement cannot be enforced under state law,
whether via a constructive trust on the benefits, suit for specific
performance, breach of contract or otherwise.111

In a Kentucky case, the participant, Sandler, was remarried and had two children
from a prior marriage.112 He and his new wife executed a prenuptial agreement
in which each expressly waived any interest in the other party’s retirement
accounts.113 However, Sandler never changed his beneficiary designations and
never had his new wife submit a spousal waiver to the plan administrator.114
Sandler died, and the plan administrator filed an interpleader action.115 The
children sought recovery on a breach of contract theory, and contended that the
wife had an obligation to submit the requisite forms.116 The court ruled in favor
of the second wife and against the children.117

It is theoretically possible for the waiver to be included in a post-nuptial
agreement, but the spouse’s signature must be notarized or witnessed by a plan
administrator.118 In addition, the waiver would only be valid for 180 days.119

4.3 QPSA

Retirement plans are also required to provide a mandatory preretirement
death benefit, an annuity to the surviving spouse of a vested participant. This
annuity, payable for the spouse’s life, is generally required to be actuarially
equivalent to the survivor’s annuity that would have been payable to the spouse

110 See Treas. Reg. § 1.401(a)-20, Q&A (28) (2006) ("An agreement entered into prior to marriage does
not satisfy the applicable consent requirements.").
111 Virginia F. Coleman, Selected Issues in Planning for the Second Marriage, Planning Techniques for
Large Estates, SN048 ALI-ABA 1 (ALI-ABA Continuing Legal Education, May, 2008) (citations
omitted).
112 Greenebaum Doll & McDonald PLLC v. Sandler, 265 F. App’x 765, 767 (6th Cir. 2007).
113 Id. at 766.
114 Id. at 767.
115 Id. at 768.
116 Id.
Cox, 720 F.3d 715, 719-20 (8th Cir. 2013) (holding that a spousal disclaimer under a prenuptial agreement
was ineffective as to the plan because the agreement did not satisfy the acknowledgment requirement).
Provisions of the agreement in Cox contemplated future execution of a waiver, which suggested that the
wife did not waive her rights in the agreement itself. Id. at 719. The agreement also failed to inform the
wife in clear and express terms that she both had a spousal right to receive the funds in the plan and that
she was waiving that right. Id. Because any waiver of spousal rights to retirement benefits had to strictly
comply with ERISA’s consent requirements, the agreement was insufficient. Id.
118 I.R.C. § 417(a)(2); 29 U.S.C § 1055(c)(2).
119 I.R.C. § 417(a)(6)-7; 29 U.S.C § 1055(c)(7).
under a QJSA. Accordingly, the amount is essentially the actuarial equivalent of fifty percent of the participant’s vested accrued benefit, converted to a lifetime annuity. Under a defined contribution plan, the amount of the QPSA is the amount that can be purchased with fifty percent of the participant’s vested account balance. Profit sharing and 401(k) plans almost always sidestep the QPSA requirements by making the entire vested account balance payable to the surviving spouse.

An alternative form of death benefit can only be selected if it is available under the plan and is affirmatively elected by the participant or, if the plan so provides, by the surviving spouse after the participant’s death. If the participant is married or later marries, the alternative form of death benefit is payable only if the spouse consents. As with the waiver of a QJSA, there are notification requirements that must be satisfied, both as to content and as to timing.

The same policy questions apply to the QPSA as to the QJSA. The amount of the QPSA is often trivial. Mandatory employer-provided life insurance “would probably be larger than the typical QPSA annuity, especially for the widow of a younger worker whose pension accumulation was still modest at the time of death.”

4.4 Effect of a Rollover

Most retirement plan participants terminate employment with the sponsoring employer for a reason other than death. If the plan allows a distribution following termination of employment, as do almost all defined contribution plans and many defined benefit plans, then the participant will typically receive a lump sum distribution (with spousal consent, if required) which can be rolled over to an IRA. This has two consequences. First, for most individuals, the important BDF is the one for the IRA, not the one for the qualified plan. Second, there is no spousal protection for the funds in the IRA.

Qualified plan distribution and consent notices typically do not explain

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120 Treas. Reg. 1.401(a)-20, Q&A (4) (2006) (“If a participant selecting such an option dies, the surviving spouse must be able to receive the QPSA benefit described in section 417(c)(2) which is a life annuity, the actuarial equivalent of which is not less than 50 percent of the nonforfeitable account balance (adjusted for loans as described in Q&A 24(d) of this section). The remaining account balance may be paid to a designated nonspouse beneficiary.”).


124 See I.R.C. § 417(a).

125 PENSION AND EMPLOYEE BENEFIT LAW, supra note 73, at 236.

to a spouse, who is being asked to waive a QJSA, that he or she does not have a
say as to the disposition of the funds once they leave the plan. Furthermore, the
most prevalent type of employer plan today is the 401(k) plan, and under most
401(k) plans, the participant can choose to receive a distribution, once he or she
is entitled under the terms of the plan, without any need for spousal consent.

4.5 Issues In Connection With the QJSA and QPSA Rules

[1] Validity of Waiver

The election to waive the QJSA or QPSA must be in writing and
witnessed by either a notary or a plan representative.127 Noncompliance with this
requirement has been held to render the waiver ineffective.128 In one case,
dealing with a claim of ineffective notarization of a QPSA waiver, the court
stated, “we cannot adopt a substantial compliance doctrine as a matter of federal
common law in this case if it would conflict with ERISA’s literal requirement
that a spousal consent be ‘witnessed.’”129

For a waiver to be valid, the spouse or surviving spouse must have the
mental capacity to consent at the time the waiver is executed.130 ERISA also
requires that a spousal waiver designate another beneficiary, “which may not be
changed without” the spouse’s further consent.131 In the past, courts have found
agreements that did not satisfy this requirement to be ineffective.132

The pension rights that are waived are often very valuable, and may
represent much of the spouses’ total net worth. If the plan has complied with the
procedural requirements of ERISA and the Code, is the waiv er or consent
necessarily valid, even if the spouse (1) has incomplete information as to the
value of the benefits being waived, (2) is not advised by a competent advisor,
and/or (3) is pressured or coerced by the other spouse? The preamble to the
regulations under sections 401(a)(11) and 417 of the Code states:

section 417 . . . provides explicit safeguards to ensure informed
consent of the participant and the participant’s spouse. For

128 See Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863, 866 (11th Cir. 1997) (“[To]
allow a spouse’s acknowledged signature waiver to be effective absent the signature being witnessed by a
notary public or plan representative, is a precedential path we refuse to travel. To hold otherwise would
contravene the explicit waiver requirements of ERISA that Congress has enacted.”).
129 Butler v. Encyclopedia Britannica, Inc., 41 F.3d 285, 294 (7th Cir. 1994). But see also Burns v.
Orthotek, Inc. Emps.’ Pension Plan & Tr., 657 F.3d 571, 576-77 (7th Cir. 2011) (finding a beneficiary
designation form, which required spousal consent, to be valid despite the spouse’s signature not being
witnessed).
130 See Ponsetti v. GE Pension Plan, 614 F.3d 684, 694 (7th Cir. 2010) (finding that “the totality of the
circumstances [regarding the spouse’s incapacity at the time she supposedly signed the document] in this
case unambiguously undermines the validity of the consent form”).
example, section 417 requires witnessed or notarized spousal consent that acknowledges the effect of the election to waive the QJSA. This statutory structure reflects Congressional recognition that a distribution election with respect to annuity benefits is an important financial decision that affects the retirement security of the participant and the participant’s spouse.  

One may question the adequacy of these “safeguards.”

The IRS has issued sample language to waive the QJSA or QPSA. Each form contains an explanation of the nature of the rights being given up and the effect of the consent. Plan administrators’ use of the sample is voluntary.

In recent years, in non-ERISA contexts, legislatures and courts have insisted on adequate disclosure and other safeguards. For example, in Matter of Greiff, a widow sought the invalidation of a prenuptial agreement that waived her statutory right of election against her deceased husband’s estate. The court asked whether the special relationship between an engaged couple when they execute a prenuptial agreement can warrant a shift of the burden of proof of its legality and enforceability. The court directed the appellate court to consider whether the relationship between them, at the time the prenuptial agreement was executed, was such as to shift the burden to the proponents of the agreement to prove freedom from fraud, deception, or undue influence.

It is not clear that these state law safeguards should be preempted by ERISA, as they support the strong ERISA policy of protecting spouses. ERISA’s procedural requirements do not always provide such protection. Even if the state law safeguards are preempted, a court could refer to the guidelines in determining whether adequate disclosure has been made.

One recent case held that a waiver of the joint and survivor annuity benefit is invalid if the plan breached its fiduciary duty to disclose material information to the widow before she signed the waiver forms. The widow argued that her waiver was not knowing and voluntary. Neither she nor her husband read the documents and the plan representative did not explain the

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135 Id.
136 Id.
138 See id. at 753.
139 See id. at 755. See also UNIF. PROBATE CODE § 2-213 (amended 2010).
141 Id. at *6.
documents to them. The plan argued that the widow’s factual allegations were irrelevant, because the waiver, as executed, conformed on its face to the requirements of ERISA. The court ruled that a failure by plan representatives to disclose to the beneficiary material facts that the beneficiary should know for her own protection may constitute a breach of the fiduciary duty. If that duty is breached, the waiver is invalid. The court rejected the plan’s summary judgment motion, citing evidence that might allow a fact finder to determine that a breach had occurred. In a later decision in the same case, the court held that the waiver was invalid.

[2] Who is the Spouse?

ERISA provides protection only to a spouse who is legally married to the plan participant. The question of who qualifies as a spouse is generally determined by reference to the applicable state law. However, many difficult issues remain. It is not always self-evident that a “marriage” is valid under state law; for example, the marriage may be bigamous. In a 2006 case, Douglas and his first wife, Ann, stopped living together in 1982. In 1985, he married Rita. After Douglas died, both Rita and Ann claimed his Chrysler pension, life insurance, and benefits. Durden swore on his marriage certificate that he was divorced from Ann; additionally, Durden had named Rita as his dependent spouse. The 6th Circuit, applying Ohio law, ruled that the second spouse had the burden of proving that the prior marriage had been dissolved, which she failed to carry. The first wife was entitled to the benefits.

In Smith v. N.M. Coal 401(k) Plan, the plaintiff sued for benefits that she claimed were wrongly paid to her common-law husband’s children, instead of to her as his surviving spouse. “New Mexico itself does not recognize common-law marriages, but does recognize them if they are valid in another jurisdiction. Thus, New Mexico would recognize . . . [the] marriage if it were

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142 Id. at *7.
143 Id. at *11.
144 See id. at *15-18.
146 Id. at *17-18.
149 See DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden, 448 F.3d 918, 920 (6th Cir. 2006).
150 Id. at 921.
151 Id. at 920.
152 Id. at 921 (While Durden did not designate a beneficiary, “when no beneficiary is named, the surviving spouse is first in line of succession to receive the proceeds.”).
153 DaimlerChrysler Corp., 448 F.3d at 928.
154 See id.
155 See Smith v. New Mexico Coal 401(k) Plan, 334 Fed. App’x. 150, 151 (10th Cir. 2009).
deemed valid under Navajo law.\textsuperscript{157} Some of the employer’s records indicated that the participant was married, but other records indicated that he was divorced.\textsuperscript{158} The court held that the plan acted improperly in distributing benefits to his children, because the employer was in possession of conflicting information as to whether he had a spouse.\textsuperscript{159}

In \textit{Central States, Southeast & Southwest Areas Pension Fund v. Gray}, John and Susie Gray, a married couple, separated but never divorced.\textsuperscript{160} John later married Gwendolyn, who thought he was divorced.\textsuperscript{161} Susie also remarried.\textsuperscript{162} John died.\textsuperscript{163} Both Susie and Gwendolyn claimed the QPSA benefit.\textsuperscript{164} The court held for Gwendolyn, applying the marriage law of Texas, which the court found applicable.\textsuperscript{165} The court held that Gwendolyn was a “putative spouse,” because she married John in good faith, and under Texas law, a putative spouse has the same property rights as a lawful spouse.\textsuperscript{166} The court estopped Susie from making a claim as John’s wife because of her subsequent remarriage.\textsuperscript{167}

In \textit{Igoe v. 1199 SEIU Health Care Employees Pension Fund}, the court ruled that a husband, who had left the participant forty years before, was entitled to survivor benefits under the deceased wife’s pension plan\textsuperscript{168} as the husband never waived his rights to the benefits.\textsuperscript{169} The Surrogate’s Court had previously issued a decree finding that he had abandoned the wife and that he was therefore disqualified as a surviving spouse under state law.\textsuperscript{170} Under federal regulations, “spousal consent is not required to waive the spousal annuity if ‘the participant is legally separated or the participant has been abandoned (within the meaning of local law) and the participant has a court order to that effect.’”\textsuperscript{171} However, the

\begin{itemize}
\item \textsuperscript{157} Id. at 153 n.3 (citations omitted).
\item \textsuperscript{158} Id. at 151-52.
\item \textsuperscript{159} Id. at 159.
\item \textsuperscript{161} See id. at *2.
\item \textsuperscript{162} Id. at *1.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} See id.
\item \textsuperscript{165} See \textit{Central States}, 2003 WL 22339271, at *3-4.
\item \textsuperscript{166} See id. at *3.
\item \textsuperscript{167} See id. at *4. See also \textit{IBEW Pac. Coast Pension Fund v. Lee}, 462 F. App’x 546, 551 (6th Cir. 2012) (upon remand, the district court must make a factual determination as to “which woman was [the participant’s] spouse at the time of his death, and then determine the proper pension beneficiary”); \textit{DaimlerChrysler Corp. v. Durden}, 448 F. 3d 918 (6th Cir. 2006) (making a declaratory judgment as to which woman the participant was married to at the time of his death and therefore which woman was entitled to surviving spouse benefits).
\item \textsuperscript{169} Id. at *5.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. at *13 (citations omitted).
\end{itemize}
court order of abandonment was not obtained until after the participant’s death. 172

The Third Circuit had to decide which wife of a former NFL player was the real spouse entitled to the death benefit under the NFL retirement plan. 173 The player, Thomas Sullivan, left the first spouse, but they never divorced. 174 He allegedly married a second woman in another state. 175 The court determined that the second marriage was never legal since the first marriage had never ended. 176 The result was that his first marriage was still valid under the plan because the plan defined the spouse “according to applicable state law.”177

Because of changes in the recognition of marriage and spousal relationships, the plan should carefully define who is recognized by the plan as the spouse and which relationships are not recognized as creating a spousal relationship. Drafters must comply with the federal tax and ERISA requirements following the U.S. Supreme Court’s decisions in U.S. v. Windsor178 and Obergefell v. Hodges,179 and avoid requiring the plan to make extensive inquiries into factual proof of the existence or termination of relationships under the application of state laws regarding which spouse is the true spouse in the event of sequential or concurrent alleged marriages.

[3] Who Is a Survivor or a Surviving Spouse?

The UPC includes a rule of construction that devisees or heirs must survive the decedent by 120 hours or more in order to be treated as surviving. 180 This originally applied only to transfers by will or intestacy, but the Revised Uniform Death Act, the revised UPC, and many state laws expand the 120-hour requirement to all donative documents, including will substitutes that require the donee to survive the donor. 181 Some states have adopted versions of the Uniform Simultaneous Death Act; other states follow the UPC provision. 182

ERISA does not address whether or when a designated beneficiary “survives.” In a situation involving questions of survival, an ERISA plan should presumably look to state law, assuming that neither the plan nor the beneficiary

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172 Id.
174 Id. at 55.
175 Id. at 56.
176 See id. at 57.
177 Id. at 56.
180 UNIF. PROBATE CODE § 2-702(a).
181 See generally UNIF. PROBATE CODE § 2-702; UNIF. DETERMINATION OF DEATH ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1980).
182 See UNIF. PROBATE CODE § 2-702 cmt. (“See the Comment to Section 2-804 for a discussion of the ERISA preemption question.”).
designation specifically addresses the issue.\textsuperscript{183} In one case, the 120-hour rule under state law was held to be preempted by ERISA.\textsuperscript{184} As with a will or trust, the order of deaths can directly affect the distribution of benefits. Accordingly, the plan or the BDF should specify the presumptions that are to apply in the event of two deaths in rapid succession.

In \textit{Carmona v. Carmona}, involving (remarkably) a contest between the 8th and 9th wives of the deceased plan participant, the winner was the woman who was his wife when he retired, not the woman to whom he was married when he died.\textsuperscript{185} The joint and survivor annuity vested in his then wife, and could not, under the terms of the plan, be assigned to a subsequent spouse, although the designated survivor annuitant waived all interest in the pension plan during the divorce.\textsuperscript{186} The court held that when a participant retires and goes into pay status with a joint and survivor annuity, the named spouse has a vested interest in that survivor annuity.\textsuperscript{187}

In \textit{Jenkins-Dyer v. Drayton}, “[t]he Plan’s terms provided that if the participant died without naming a beneficiary, the account would transfer first to the participant’s spouse, and if he did not have a spouse, to his children.”\textsuperscript{188} The court addressed the plaintiff’s allegations that the defendant and the participant were not married, and thus that the defendant was not entitled to the benefits.\textsuperscript{189} The court found that the allegation that no marriage ceremony took place, if true, could invalidate the marriage outside of statutory grounds enumerated by state law.\textsuperscript{190} The plaintiff’s claim to the plan benefits depended entirely on whether the participant was legally married when he died.\textsuperscript{191} That question was governed by Texas state law.\textsuperscript{192} The evidence that the defendants submitted, which the plaintiff had not refuted except with her own conjecture and suspicion, demonstrated that the participant was married to the defendant when he died.\textsuperscript{193}

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\textsuperscript{183} \textit{Cf.} \textit{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 7.2, cmt. c (providing language from the Uniform Simultaneous Death Act and citing to the UPC and state statutes based on the Revised Uniform Simultaneous Death Act).


\textsuperscript{185} \textit{Carmona v. Carmona}, 603 F.3d 1041, 1048 (9th Cir. 2010).

\textsuperscript{186} Id. at 1059-60.

\textsuperscript{187} Id. at 1048.


\textsuperscript{189} See id. at 1342.

\textsuperscript{190} See id. at 1345-46 (“The marriage may only be challenged by non-enumerated reasons if there is no presumption of validity; in other words, if there was no marriage ceremony at all, and the presumption therefore is not in effect.”).

\textsuperscript{191} See id. at 1346.

\textsuperscript{192} Id. at 1345.

\textsuperscript{193} \textit{Jenkins-Dyer}, 134 F. Supp. 3d at 1349.

Unless he or she has agreed otherwise (e.g., in a prenuptial agreement), a surviving spouse in any state other than Georgia will be protected either by community property laws or by the right to elect against the deceased spouse’s estate. \(^{194}\) State law almost exclusively governs marital property and succession law. Why does federal law intrude?

Laying aside the tensions of federalism and focusing on the merits of the QJSA, what is the rationale for constructing a forced-share system that is limited to a single type of property, pension wealth? Why, for example, is there no comparable provision imposing an asset-specific forced-share regime on, say, FDIC-insured bank accounts and certificate of deposit? \(^{195}\)

In community property states, the non-participant spouse generally has an immediate interest in pension benefits accrued during the marriage. However, as noted below, the U.S. Supreme Court has held that, with respect to plans subject to ERISA, state community property laws are preempted with respect to the distribution of plan benefits. \(^{196}\) A court order dividing benefits in accordance with state community property law could be enforced if it meets the requirements for a QDRO.

In all the non-community property states other than Georgia, a surviving spouse has the right to elect a statutory share of the deceased spouse’s estate, if that is greater than the amount that he or she would otherwise receive. \(^{197}\) The amount of the elective share varies from state to state and in UPC jurisdictions, the amount of the elective share depends on the length of the marriage. \(^{198}\)

Complex case law has arisen concerning the question of whether to apply ERISA § 514(a) to preempt state law in circumstances in which ERISA supplies no substantive regulation. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees . . . . The federal courts have been less certain about whether to defer to state probate law . . . . It is to


\(^{195}\) PENSION AND EMPLOYEE BENEFIT LAW, supra note 73, at 233-34.

\(^{196}\) See Boggs v. Boggs, 520 U.S. 833, 836 (1997); infra Section 6.

\(^{197}\) See DUKEMINIER & SITKOFF, supra note 13, at 513-14.

\(^{198}\) UNIF. PROBATE CODE § 2-203(b). Sometimes, elective share statutes treat retirement accounts in bizarre ways. For instance, New York’s statute treats one hundred percent of IRA assets as testamentary substitutes for elective share purposes, but only fifty percent of the value of qualified plan assets. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b)(1)(G) (McKinney 2011).
be hoped that the federal courts will continue to show sensitivity to the primary role of state law in the field of probate and non-probate transfers. To the extent that the federal courts think themselves unable to craft exceptions to ERISA’s preemption language, it is open to them to apply state law concepts as federal common law. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption. Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA’s concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.199

§ 5. ERISA AND DIVORCE

5.1 Background

ERISA requires each pension plan to provide that plan benefits generally may not be assigned or alienated.200 The Internal Revenue Code imposes a similar requirement on qualified plans.201 Despite the fact that many marriages end in divorce,202 and that orders dividing pension benefits in divorce were common before ERISA, ERISA was silent on the entire topic. The question thus arose as to whether ERISA preempted state court domestic relations orders (“DROs”), providing for the division of pension benefits on divorce.

Although the case for preemption would have seemed particularly strong, both because a state court order dividing up a pension account would appear to “relate to” a plan in the ordinary sense, and because ERISA § 206(d)(1) sets forth a strict anti-alienation rule, . . . courts rapidly and almost—but not quite—universally declined to preempt state domestic relations orders.203

The federal courts generally held that there was an implied exception to ERISA

199 UNIF. PROBATE CODE § 2-804 cmt. (citations omitted).
202 See Swanson, supra note 8.
203 PENSION AND EMPLOYEE BENEFIT LAW, supra note 73, at 778.
preemption for DROs. In addition, the IRS ruled that the anti-alienation rules did not preclude enforcement of state law DROs in certain circumstances. However, some cases held that ERISA did preempt such orders.

This was an unsatisfactory situation, but it was not until the enactment of the Retirement Equity Act of 1984 (“REA”) that Congress enacted an exception to the anti-assignment and preemption rules for QDROs. Under these REA changes, a pension plan must “provide for the payment of benefits in accordance with the applicable requirements of any [QDRO].” According to testimony given to the ERISA Advisory Council, the most common cause for disputes as to the correct beneficiary is divorce.

The basic requirements for a valid QDRO, under ERISA and the Code, are as follows. First, the order must be a DRO, namely, a judgment, decree, or order (including approval of a property settlement agreement). A property settlement agreement between the parties is not sufficient; the agreement must be approved by or incorporated in an order of a court or agency of competent jurisdiction.

Second, the order must (1) “[relate] to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant;” (2) be made “pursuant to a State domestic

204 See, e.g., Cartledge v. Miller, 457 F. Supp. 1146, 1158 (S.D.N.Y. 1978) (holding an implied exception to ERISA’s anti-assignment or alienation provision is justified); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), aff’d, 632 F.2d 740 (9th Cir. 1980) (holding ERISA does not preempt California community property laws); Am. Tel. and Television Co. v. Merry, 592 F.2d 118 (2d Cir. 1979) (holding that a garnishment order is impliedly excepted from alienation and assignment provision of ERISA).
206 See, e.g., General Motors Corp. v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976) (holding that the benefits covered by ERISA were not subject to garnishment).
208 Id. at section 104 (b) (adding the qualification to 29 U.S.C. § 1144(b) that subsection (a) (covering ERISA’s preemption of state law) shall not apply to QDROs). See also 29 U.S.C. § 1056(d)(3)(A) (providing that the anti-assignment, anti-alienation provision does not apply to a QDRO); 29 U.S.C. § 1144(b)(7) (the codified added qualification); I.R.C. § 414(p) (2015) (defining a QDRO as a domestic relations order “which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan” and which additionally specifies certain facts and does not alter the amount or form of benefits).
210 ADVISORY COUNCIL REPORT, supra note 70, at 14 (“According to Ms. Maitland, the most common disputes relating to beneficiary designations involve cases of divorce. Similarly, Thomas Hohl of FMR Corp., stated that the most difficult issues relating to the administration of beneficiary designations arise in connection with disputes involving former spouses. Mr. Richter testified that most of the beneficiary disputes involve cases where there has been a divorce and/or multiple marriages with children from prior marriages.”).
212 See id.
relations law (including a community property law);” and (3) “[create] or [recognize] the existence of an alternate payee’s right to, or [assign] to an alternate payee the right to, receive all or any portion of the benefits payable with respect to a participant under a plan . . . .”

Thus, if the parties agree that one spouse is to have no share in the other spouse’s benefits, that agreement cannot form the basis for a QDRO, which may effectively make the agreement nugatory. The Court noted that a beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO, for a QDRO by definition requires that it be the “create[ion] or recogni[tion of] the existence of an alternate payee’s right to, or assign[ment] to an alternate payee [of] the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.”

Thus, anomalously, a spouse who completely waives any share of the other spouse’s pension benefits, presumably in return for a larger share of the other assets, is in a stronger position than one who does receive a share. Without a change of beneficiary by the participant spouse, the QDRO is enforceable but the waiver is not.

Third, the alternate payee must be the participant’s spouse, former spouse, child, or dependent. A QDRO may, under some circumstances, order payment to an agent of the alternate payee.

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214 29 U.S.C. § 1056(d)(3)(B)(ii)(II); I.R.C. § 414(p)(1)(B)(ii). For example, see DOL Advisory Opinion 1990-46A, in which the plan participant and his wife resided in a community property state. U.S. DEP’T OF LABOR, Advisory Opinion 1990-46A (Dec. 4, 1990), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1990-46a. The wife died, and her estate obtained an order, in a probate proceeding, directing the plan to divide and segregate her community property interest in the participant’s benefits. Id. The DOL opined that the order was not a QDRO because the order was not made pursuant to a domestic relations law and thus was not enforceable against the plan. Id.


216 See infra Section 5.4 for a discussion of the Supreme Court’s decision in Kennedy.


218 See id. at 304.

219 29 U.S.C. § 1056(d)(3)(K) (defining “alternate payee” as “any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant”); I.R.C. § 414(p)(8). In Owens v. Auto. Machinists Pension Tr., 551 F.3d 1138, 1146-47 (9th Cir. 2009), the Court held that a pension plan must recognize a QDRO under Washington state law because the payee maintained a “quasi-marital” relationship with the plan participant for more than thirty years and was his dependent.

220 STAFF OF JOINT COMM. ON TAXATION, 100TH CONG., EXPLANATION OF TECHNICAL CORRECTIONS TO THE TAX REFORM ACT OF 1984 AND OTHER RECENT TAX LEGISLATION 222 (Joint Comm. Print 1987). Payment could be made to a guardian, trustee or custodian, or to a state welfare agency, as agent for an alternate payee who is a minor or legally incompetent. See U.S. DEP’T OF LABOR, Advisory Opinion 2001-06A (June 1, 2001); U.S. DEP’T OF LABOR, Advisory Opinion 2002-03A (June 7, 2002), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2002-03a.
In addition to satisfying the above requirements, a QDRO must clearly specify certain factual information:

1. The QDRO must clearly specify “the name and last known mailing address (if any) of the participant and the name and mailing address each alternate payee covered by the order,”
2. “the amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which that amount or percentage is to be determined,”
3. “the number of payments or period to which the order applies;” and
4. “each plan to which the order applies.”

In addition to satisfying the positive requirements listed above, a QDRO must also satisfy three negative requirements:

1. The order “does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan;”
2. the order “does not require the plan to provide increased benefits (determined on the basis of actuarial value),” and
3. the order “does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.”

A pension plan is neither required nor permitted to follow the terms of a DRO that is not a QDRO. Thus, if an order is not a DRO, or if it is a DRO but not a QDRO, the general anti-alienation rule applies, and the plan may not make payments, under the order, to a person other than the participant.

5.2 Status of Former Spouse Under a QDRO

It is important, in drafting a QDRO, to address the possibility that the participant will die before the alternate payee has received all benefits otherwise payable to him or her under the QDRO. If the QDRO is silent, the alternate payee will generally not be entitled to receive any survivor benefit from the plan.

To the extent provided in the QDRO, the former spouse of the

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224 29 U.S.C. § 1056(d)(3)(C)(iii); I.R.C. § 414 (p)(2)(C). For instance, payments to the alternate payee might cease at the age of majority in the case of a child, or on remarriage if the alternate payee is the participant’s former spouse.
225 29 U.S.C. § 1056(d)(3)(C)(iv); I.R.C. § 414 (p)(2)(D). If the plan(s) can be identified from the order, the fact that the order does not use the plan’s precise name is immaterial.
participant (but no other alternate payee) will be treated as the participant’s surviving spouse, and any other spouse of the participant will not be treated as a spouse, for purposes of the QJSA and QPSA rules.230

It is also prudent to spell out in the QDRO the precise extent of the alternate payee’s right to survivor benefits. Defining the survivor benefits by reference to, or the same as, the alternate payee’s share of the benefits payable during the participant’s life may result in ambiguity and litigation. For example, in Davenport v. Office of Personnel Management, Patricia’s former husband, Richmond, died before beginning to receive his pension.231 Had Richard retired on the date of his death, Patricia would have received 39.15 percent of her ex-husband’s pension, and he and his new wife would have received 60.85 percent.232 The court held that Patricia was entitled to 78.3 percent, not 39.15 percent (as the Office of Personnel Management (“OPM”) had determined) of the survivor annuity.233

OPM’s interpretation of the QDRO in this case would result in a precipitous drop in Patricia’s income from almost one-half of Richard’s retirement annuity to a survivor annuity of only about half that amount. We can discern no hint that the parties intended to make Patricia’s rights turn so dramatically on whether Richard was retired or dead.234

5.3 In re Estate of Egelhoff

Washington state has enacted a statute which provides that the designation of a spouse as the beneficiary of a nonprobate asset, including a life insurance policy, employee benefit plan, or IRA is revoked upon divorce.235 David Egelhoff designated his wife, Donna Rae, as the beneficiary under a life insurance policy and a pension plan, both of which were governed by ERISA.236 Subsequently, the couple divorced.237 A document incorporated in the divorce decree awarded Donna Rae substantial assets and awarded David “100% of his Boeing retirement 401K and IRA.”238 Six months after the dissolution, David died intestate.239 His ex-wife Donna Rae remained the named beneficiary under both his life insurance policy and his pension plan.240

232 Id. at 1386.
233 Id.
234 Id. at 1387.
237 Id.
238 Id. at 83.
239 Id.
240 Id.
David’s children from a previous marriage filed suit in state court seeking (1) a judgment that Donna Rae had waived her rights as the named beneficiary of the retirement plan, and (2) damages from her for converting the proceeds of the life insurance policy that were paid to her as the named beneficiary.\(^{241}\) The Supreme Court of Washington held for the children, on the basis that the Washington statute, although applicable to employee benefit plans, did not refer to ERISA plans to an extent that required that ERISA preempt the Washington statute.\(^{242}\) “In areas involving traditional state regulation, ‘the starting presumption [is] that Congress does not intend to supplant state law.’ Petitioner has the considerable burden of overcoming this presumption.”\(^{243}\)

The Washington Court of Appeals concluded that the effect of the state law upon an ERISA plan was “‘too slight to overcome the presumption against preemption of state family and family property law.’”\(^{244}\) The Supreme Court of Washington agreed.\(^{245}\)

[The Washington statute] does not require distribution of benefit plan assets to a third party, nor does it in any way direct payment of proceeds. It merely invalidates designation of a former spouse as beneficiary of a non-probate asset by creating the legal fiction that the spouse predeceased the now-deceased owner. While the underlying circumstances to which the distribution scheme of an ERISA plan must be applied is altered, the plan administrator is not required to follow provisions for distributing the proceeds other than those in the plan. There is no diversion of plan benefits. Under federal preemption analysis, we conclude that the nexus between participant and beneficiary in this case is not compromised.\(^{246}\)

The U.S. Supreme Court reversed and remanded.\(^{247}\) The children argued that ordinary ERISA preemption analysis should not apply because the state statute allowed employers to opt out;\(^{248}\) it involved areas of traditional state

\(^{241}\) Egelhoff, 989 P.2d at 83-84.

\(^{242}\) Id. at 92.

\(^{243}\) Id. at 89.

\(^{244}\) Id. at 90.

\(^{245}\) Id.

\(^{246}\) Egelhoff, 989 P.2d at 91 (citations omitted).


\(^{248}\) Id. at 150. In response to that argument, the court explained,

> [e]ven though the Washington statute’s cancellation of private choice may itself be trumped by specific language in the plan documents, the statute does “dictate the choice[s] facing ERISA plans” with respect to matters of plan administration. Plan administrators must either follow Washington’s beneficiary designation scheme or alter the terms of their plan so as to indicate that they will not follow it.

Id. (citation omitted). Within a footnote the court explained further that,

under the text of ERISA, the fiduciary “shall” administer the plan “in accordance
regulation; and if ERISA preempted this statute, it also must preempt state slayer statutes. The Court rejected these arguments.

In an opinion by Justice Thomas, the Court held that ERISA preempted the Washington statute because the statute had a connection with, and therefore related to, ERISA plans, as the Washington statute (1) governed the payment of benefits, which was a “central matter” of plan administration; and with the documents and instruments governing the plan.” The Washington statute conflicts with this command because under this statute, the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow.

Id. at 151, n.4 (citation omitted). The court stated additionally:

[It is not enough for plan administrators to opt out of this particular statute. Instead, they must maintain a familiarity with the laws of all 50 States so that they can update their plans as necessary to satisfy the opt-out requirements of other, similar statutes. They also must be attentive to changes in the interpretations of those statutes by state courts. This “tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction” is exactly the burden ERISA seeks to eliminate.]

Id. at 151. (citation omitted).

249 Egelhoff, 532 U.S. 141 at 151 (“There is indeed a presumption against pre-emption in areas of traditional state regulation such as family law. But that presumption can be overcome where, as here, Congress has made clear its desire for pre-emption. Accordingly, we have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans.”) (citations omitted).

250 Id. at 152 (“In the ERISA context, these ‘slayer’ statutes could revoke the beneficiary status of someone who murdered a plan participant. Those statutes are not before us, so we do not decide the issue. We note, however, that the principle underlying the statutes—which have been adopted by nearly every State—is well established in the law and has a long historical pedigree predating ERISA. And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.”) (citations omitted). See also Slayer Statute, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining slayer statute as a “statute that prohibits a person’s killer from taking any part of the decedent’s estate through will or intestacy”).

251 Id. at 150-52.

252 His opinion was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, Souter, and Ginsburg. Id. at 142.

253 Id. at 150.

254 Egelhoff, 532 U.S. 141 at 148. Professor John Langbein states that:

[t]he [Egelhoff] Court’s contention that ERISA “governs the payment of benefits, a central matter of plan administration,” deserves careful probing. The question that needs asking is whether ERISA should be treated as governing every aspect of the payment of benefits, including matters about which ERISA is silent, such as interpreting the meaning of beneficiary designations. ERISA is a regulatory statute enacted to protect promised benefits against forfeiture on account of overreaching plan design or plan maladministration. ERISA was not designed to do the interpretive work of state wealth transfer law, that is, to resolve constructional problems concerning the transferor’s intent. . . . The beneficiary designations in the plan documents in Egelhoff say, “Pay Donna,” but they do not address the question of interpretation that Washington wealth transfer law does address, which is whether the true meaning of that designation is, “Pay Donna, except in the event that Donna and I should be divorced at the time of my death.” Justice Breyer emphasized that “whether a designation that (here explicitly) refers to a wife remains valid after divorce” is a question that “[t]he documents themselves do not answer . . . any more than they describe what is to occur in a host of other special
(2) interfered with nationally uniform plan administration by requiring administrators to “familiarize themselves with state statutes.”

Justices Breyer and Stevens, dissenting, pointed out that:

administrators have to familiarize themselves with state law in any event when they answer such routine legal questions as whether amounts due are subject to garnishment, who is a “spouse,” who qualifies as a “child,” or when an employee is legally dead. And were that “familiarizing burden” somehow overwhelming, the plan could easily avoid it by resolving the divorce revocation issue in the plan documents themselves, stating expressly that state law does not apply. The “burden” thus reduces to a one-time requirement that would fall primarily upon the few who draft model ERISA documents, not upon the many who administer them. So meager a burden cannot justify pre-empting a state law that enjoys a presumption against pre-emption.

Their dissent also expressed the view that there was no “direct” conflict between the Washington statute and ERISA; the Washington statute furthered ERISA’s ultimate objective—developing a fair system for protecting employee benefits. The Washington statute transfers an employee’s pension assets at death to those individuals whom the worker would likely have wanted to receive them. . . . In forbidding Washington to apply that assumption here, the Court permits a divorced wife, who already acquired, during the divorce proceeding, her fair share of the couple’s community property, to receive in addition the benefits that the divorce court awarded to her former husband. . . . As a result, Donna will now receive a windfall of approximately $80,000 at the expense of David’s children. The State of Washington enacted a statute to prevent precisely this kind of unfair result. But the Court, relying on an inconsequential administrative circumstances (e.g., mental incompetence, intoxication, ambiguous names, etc.).”.


255 Egelhoff, 532 U.S. 141 at 148-49. Courts had previously disagreed about whether similar statutes were preempted by ERISA. Compare Manning v. Hayes, 212 F.3d 866, 870 (5th Cir. 2000) (finding preemption), and Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904, 907 (10th Cir. 1991) (finding preemption), with Emard v. Hughes Aircraft Co., 153 F.3d 949, 964 (9th Cir. 1998) (finding no preemption by ERISA).

256 Egelhoff v. Melmeyer, 532 U.S. at 157 (Breyer, J., dissenting) (citations omitted).

257 Id. at 154 (Breyer, J., dissenting).
burden, concludes that Congress required it. \textsuperscript{258}

Justices Breyer and Stevens also stated in their dissent:

\textquote{The majority simply denies that there is any blank to fill in and suggests that the plan documents require the plan to pay the designated beneficiary under all circumstances. . . . The plan documents themselves do not answer the question any more than they describe what is to occur in a host of other special circumstances (e.g., mental incompetence, intoxication, ambiguous names, etc.).} \textsuperscript{259}

As John Langbein wrote in 2012:

\textquote{As a matter of state law, the job of unifying the constructional law of probate and nonprobate transfers is largely done, but sadly, federal law has been thoughtlessly undoing some of the achievement. . . . ERISA, the federal statute governing pension and other employee benefit plans, has a zanily broad preemption provision, which suppresses all state law that “relate[s] to” any employee benefit plan . . . [In Egelhoff], the U.S. Supreme Court interpreted ERISA’s preemption provision to defeat state law not only as regards matters that ERISA regulates, such as pension benefit accrual formulas, but also matters about which Congress gave no thought and expressed no interest in ERISA, such as the state divorce-revocation statute in Egelhoff. . . . Following similar reasoning, courts have held that ERISA preempts such routine and fundamental features of state wealth transfer law as the 120-hour rule for survivorship under North Carolina’s simultaneous death statute, and the four-month Montana nonclaim statute for presenting creditor claims in probate.} \textsuperscript{260}

The principal object of ERISA is to protect plan participants and beneficiaries. \textsuperscript{261} The primary purpose in interpreting a BDF, as with a will, should be to ascertain and, if possible, implement the intent of the owner of the assets. As in Egelhoff, thoughtless application of preemption to displace state law often unnecessarily thwarts that intent. As John Langbein wrote in 2012:

\textquote{the Court took the position that it would rather inflict unjust enrichment than “burden” the plan administrator with looking

\textsuperscript{258} Id. at 158-59 (Breyer, J., dissenting).
\textsuperscript{259} Id. at 156 (Breyer, J., dissenting).
\textsuperscript{260} Langbein, \textit{Major Reforms}, supra note 46, at 19-20 (citations omitted).
up local law on the point. Even if the Court had been correct that the language of ERISA compelled preemption in this case, the Court ignored an easy way to get the right result in *Egelhoff* and similar cases: Retain preemption, but absorb the divorce revocation principle as articulated in the UPC and the Property Restatement as a matter of federal common law under ERISA.262

5.4 *Kennedy*

In *Kennedy*, the Supreme Court addressed whether a plan administrator must give effect to a waiver of benefits in a divorce decree, if it is in conflict with the beneficiary designation on file with the plan.263 The Court held that retirement plans may rely on the plan terms and BDFs in determining the proper recipient of survivor benefits.264 Thus, in many situations, and absent receipt of a valid QDRO, a plan administrator may ignore a divorce decree and pay out a survivor benefit in accordance with the plan’s terms and the beneficiary designation forms on file. In 1971, William Kennedy married Liv, and in 1974 he designated her the beneficiary under DuPont’s savings plan.265

William and Liv divorced in 1994, subject to a decree that Liv “is . . . divested of all right, title, interest, and claim in and to . . . [a]ny and all sums . . . the proceeds [from], and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [William’s] past or present or future employment.”266

Upon the divorce, William did not remove Liv as the beneficiary.267 However, “he did execute a new beneficiary-designation form naming his daughter . . . as the beneficiary under DuPont’s Pension Plan.”268 Liv was also granted a QDRO under the pension plan.269 When William passed, his daughter asked that the savings plan funds be distributed to his estate, but the plan administrator relied on William’s BDF and paid approximately $ 400,000 to

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262 Langbein, *Major Reforms*, supra note 46, at 20 (citations omitted). “[T]he factual outcome of the case, that the divorced spouse received the pension and life insurance benefits, is extremely troubling. The proper result—far more consistent with the probable intention of David, the property owner—would have been achieved by applying the rule of revocation on divorce.” Gallanis, supra note 1, at 188-89 (citation omitted).
263 *Kennedy*, 555 U.S. at 288.
264 Id.
265 Id. at 289.
266 Id. (alterations in original) (citations omitted).
267 Id. at 289.
268 *Kennedy*, 555 U.S. at 289.
Liv. 270

The Court unanimously held that Liv’s waiver did not violate the ERISA anti-alienation provision, but that the administrator properly distributed benefits to her. 271 Since the waiver was not a QDRO, the plan required the decedent to change the plan beneficiary or the spouse to expressly disclaim the benefits and, in the absence of either event, the administrator was required to distribute the benefits to the spouse as the named beneficiary. 272 “[B]y giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into expressions of intent, in favor of the virtues of adhering to an uncomplicated rule . . . .” 273 Liv was William’s designated beneficiary. 274 “The plan provided a way to disclaim an interest in the [savings and investment plan] account, which Liv did not follow.” 275 “[T]he cost of less certain rules would be too plain. Plan administrators would be forced ‘to examine a multitude of external documents that might purport to affect the dispensation of benefits’ and be drawn into litigation like this over the meaning and enforceability of purported waivers.” 276

The Estate’s suggestion that a plan administrator could resolve these sorts of disputes through interpleader actions merely restates the problem with the Estate’s position: it would destroy a plan administrator’s ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court. 277

Professor Gary suggests, convincingly, that it is at least arguable that divorcing spouses assume that their divorce agreement resolves all property issues between them. The fact that the disposition of benefits in a plan governed by ERISA will depend on the precision of the language used in the agreement makes clear that family law lawyers need to be more careful when assisting their clients but also suggests that Congress should provide a better solution. The fact that cases raising this issue continue to arise indicates the enormity of the problem. Although a plan participant can name a new beneficiary following a divorce, in a striking number of cases the participant neglects to do so. Perhaps the failure to take the

270 Kennedy, 555 U.S. at 289-90.
271 Id. at 304.
272 Id. at 303-04.
273 Id. at 301.
274 Id. at 289.
275 See Kennedy, 555 U.S. at 303.
276 Id. at 301.
277 Id.
necessary step was the result of procrastination, but it may also be a lack of understanding of the legal rules. If the divorce decree specifically states that a spouse receives the spouse’s retirement plans and the same decree includes a waiver of all rights in that plan by the other spouse, it may well be that the plan participant thought the matter had been resolved. Even if the settlement agreement merely recites a broad waiver of all property rights in property now belonging to the former spouse, both spouses may reasonably assume that their former spouse will not later be entitled to benefits.  

The IRS has confirmed that plan documents can include a provision that automatically revokes a participant’s designation of a spousal beneficiary designation upon divorce.  

§ 6. ERISA AND INHERITANCE: BOGGS

Community property rules apply to more than one fourth of the U.S. population. In general, federal courts are reluctant to hold that a federal statute preempts state family law:

[O]n the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has “positively required by direct enactment” that state law be preempted. A mere conflict in words is not sufficient. State family and family-property law must do “major damage” to “clear and substantial” federal interests before the Supremacy Clause will demand that state law be overridden.

Isaac Boggs’ first wife Dorothy died in 1979. A year later, Isaac married Sandra. In 1985, upon his retirement, he received from his employer’s retirement plans: (1) a lump sum distribution, which he rolled over into an IRA;

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278 Susan N. Gary, Applying Revocation-On-Divorce Statutes To Will Substitutes, 18 QUINNIPIAC PROB. L.J. 83, 124 (2004) (citations omitted). See also Stefanie Trilling, DOL Should Not Issue Affirmative Duty for Beneficiary Designation, Witnesses Say, 39 PENS. & BENEFITS REP. (BNA) No. 35, at 1663 (Sept. 4, 2012) (“In some cases, it is nearly impossible [for the plan] to find out whether a participant has gotten a divorce, because some people purposefully do not inform the plan administrator in order to keep an ex-spouse covered by their health benefits.”).


280 See ANDERSEN & BLOOM, supra note 194 at 281 (“Community property is the law in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. Wisconsin has adopted the Uniform Marital Property Act (which uses different terminology but basically adopts the same system). . . . In these states, couples have various ways to ‘opt out’ of the system that otherwise applies. In contrast, Alaska allows couples to choose to hold assets as community property.”).


282 Boggs, 520 U.S. at 836.

283 Id.
(2) shares of stock from the company’s ESOP; and (3) a monthly annuity from the company’s defined benefit plan. Isaac died in 1989, and Sandra, as his surviving spouse, began receiving monthly pension payments.

Under Louisiana community property law, Dorothy had an ownership interest in Isaac’s retirement benefits, part of which she bequeathed to their three sons. Two of the three sons filed an action in state court, requesting the appointment of an expert to compute the percentage of the retirement benefits they would be entitled to as a result of Dorothy’s will. They also sought a judgment awarding them a portion of the IRA, the ESOP shares, the monthly annuity payments received by Isaac during his retirement, and Sandra’s survivor annuity payments. In response, Sandra Boggs filed a complaint seeking a declaratory judgment that ERISA pre-empts the application of Louisiana’s community property and succession laws, to the extent that those laws recognized the sons’ claim to an interest in the disputed retirement benefits.

The District Court granted summary judgment in favor of the sons, and the United States Court of Appeals for the Fifth Circuit affirmed. "The [Fifth Circuit] stressed that Louisiana law affects only what a plan participant may do with his or her benefits after they are received and not the relationship between the pension plan administrator and the plan beneficiary.”

The Supreme Court paid lip service to the primary role of the states in family law and succession issues.
None can dispute the central role community property laws play in the nine community property States. It is more than a property regime. It is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship. . . . The community property regime in Louisiana dates from 1808 when the territorial legislature of Orleans drafted a civil code which adopted Spanish principles of community property. Louisiana’s community property laws, and the community property regimes enacted in other States, implement policies and values lying within the traditional domain of the States. These considerations inform our pre-emption analysis.295

Nevertheless, the Supreme Court reversed and held that ERISA preempted the state law far more broadly than was necessary to avoid a conflict with ERISA’s survivor annuity rules.296 In an opinion by Justice Kennedy,297 the Court held that (1) ERISA preempted Louisiana law to the extent that the state law allowed Dorothy to make a testamentary transfer of her interest in a portion of the annuity payable to Sandra, and (2) ERISA also preempted Louisiana law to the extent that it allowed Dorothy to make a testamentary transfer of her interest in benefits that had already been distributed by the plans (Isaac’s monthly annuity payments, the IRA, and the ESOP shares).298 The Court held that it need not interpret ERISA’s preemption clause, but could simply apply conventional conflict preemption principles, asking whether Louisiana’s community property law conflicts with ERISA and frustrates its purposes.299 “ERISA’s solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse’s heirs and legatees to have a community property interest in the survivor’s annuity.”300 “States are not free to change ERISA’s structure and balance.”301 The QDRO rules did not help, because a court order regarding an attempted testamentary transfer does not constitute a QDRO.302

In Boggs, none of the plans was a party to the dispute. The dispute was between Isaac’s widow and the sons he had with his first wife.303 The Court

295 Id. at 839-40 (citation omitted).
296 See id. at 844, 854.
297 The opinion was joined by Justices Stevens, Scalia, Souter, and Thomas, and in part by Chief Justice Rehnquist and Justice Ginsburg. See id. at 835.
298 See id. at 839-55.
299 See Boggs, 520 U.S. at 859.
300 Id. at 843.
301 Id. at 844.
302 See id. at 866-68. In the divorce context, court orders dividing pension benefits pursuant to community property law can qualify as QDROs under the usual QDRO rules and no longer raise any preemption issues. See 29 U.S.C. §§ 1056(d)(3), 1144(b)(7).
303 Boggs, 520 U.S. at 836.
stated that “[i]t does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed benefits.”

Justice Breyer dissented on the basis that ERISA did not preempt the testamentary aspect of Louisiana’s community property law, at least not in these circumstances, because Louisiana community property law did not “relate to” an ERISA plan.

Justice Breyer explained,

[my reason in part lies in the fact that the state law in question involves family, property, and probate—all areas of traditional, and important, state concern . . . . When this Court considers preemption, it works ‘on the ‘assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”

Justice Breyer also said, “it is possible that Louisiana law would permit

304 Id. at 834. Justice Breyer disagreed:

[consider the 96 shares of stock and $150,000 cash that Isaac received from the plans when he retired. Dorothy’s bequest affects those assets—the stock and the cash—not while they remain in [the company’s] pension plan funds, but only after they have emerged from the plan in the form of a distributed payment. . . . That being so, I do not understand why or how ERISA could be concerned about Dorothy’s creation of a will, which affected the retirement assets only after Isaac received them. I recognize that Isaac did not use the $150,000 to buy a new house, or to pay for medical expenses, or to gamble; rather, he put the money into an IRA. But no one has explained why that fact—which in all likelihood reflects the exigencies of tax law, see 26 U.S.C. § 408(e)(1)—should make any difference here.

Id. at 865-66 (Breyer, J., dissenting).

305 See id. at 859 (Breyer, J., dissenting). Justice Breyer’s opinion was joined by Justice O’Connor and (in part) by Chief Justice Rehnquist and Justice Ginsburg. See id. at 854.

In addition to creating the QDRO, REA added a regime of mandatory survivor annuity benefits in ERISA-regulated retirement plans. The legislative history behind REA reveals that these annuity provisions were intended to enhance the rights of surviving nonparticipant spouses in both common law and community property jurisdictions. The REA additions were not intended to curtail any existing rights that nonparticipant spouses in community property jurisdictions already possessed under state law. . . . In other words, by creating greater security through mandatory survivor annuities for nonparticipant surviving spouses, including those in community property jurisdictions, Congress intended to supplement, not supplant, their existing community property rights in their spouses’ pension benefits.


306 Boggs, 520 U.S. at 861 (Breyer, J., dissenting) (citations omitted).
Dorothy (or her heirs) to collect not the pension benefits themselves, but other
nonpension community assets of equivalent value.”\textsuperscript{307} “In applying such a law, a
Louisiana court might allocate property so that federally granted property rights,
such as Sandra’s right to a survivor annuity, are fully protected.”\textsuperscript{308}

I cannot understand why Congress would want to preempt
Louisiana law if (or insofar as) that law provides for an
accounting and collection from other property—\textit{i.e.}, property
other than the annuity that § 1055 requires the BellSouth plans
to pay to Sandra. The survivor annuity provision assures Sandra
that she will receive an annuity for the rest of her life. Louisiana
law (on my assumption) would not take from her either that
annuity or any other asset that belongs to her. The most one
could say is that Sandra will not receive certain other assets—
assets that belonged to the Dorothy-Isaac community and that
Isaac had no right to give to anyone in the first place.\textsuperscript{309}

Only Justice O’Connor joined this portion of Justice Breyer’s dissent. “The
rejection of Part II-B-3 of Breyer’s dissent by seven justices has implications
beyond community property. . . . [T]he Uniform Probate Code directs state
probate courts to set off a surviving spouse’s pension benefits derived from the
decedent against the surviving spouse’s forced-share entitlement.”\textsuperscript{310} This
suggests that the UPC system will be preempted.

According to Professor Gallanis, there are three potential solutions to
the problems caused by ERISA preemption of state inheritance laws.\textsuperscript{311} The first
potential solution is that Congress could amend ERISA.\textsuperscript{312} This is the best
solution, even though it is very hard to amend major legislation, even when said
statute produces clearly unsatisfactory results.\textsuperscript{313} This is because powerful forces
(generally employers and their representatives), like the status quo. The second
potential solution is to encourage employers to incorporate state law into the plan
documents.\textsuperscript{314} The third potential solution is for “federal courts [to]
icorporate rules governing nonprobate transfers into federal common law and then use
those federal rules to interpret ERISA. This solution is more complex than the
first two discussed above.”\textsuperscript{315} Professor Gallanis concludes that of the three
solutions, “the first solution is the ideal, but the third solution is the most

\textsuperscript{307} Id. at 870 (Breyer, J., dissenting).
\textsuperscript{308} Id. at 871 (Breyer, J., dissenting) (citation omitted).
\textsuperscript{309} Id. at 872 (Breyer, J., dissenting).
\textsuperscript{310} PENSION AND EMPLOYEE BENEFIT LAW, supra note 73, at 265.
\textsuperscript{311} See Gallanis, supra note 1, at 193-97.
\textsuperscript{312} Id. at 193.
\textsuperscript{313} See id. at 195.
\textsuperscript{314} See id. at 193.
\textsuperscript{315} Id. at 194.
§ 7. CLAIMS FOR RESTITUTION OR A CONSTRUCTIVE TRUST

7.1 Introduction

The UPC treats a probate or nonprobate disposition in favor of an ex-spouse as revoked, and the property passes to any contingent beneficiary named in the instrument or to the decedent’s estate. Most states have similar laws for probate (and in some states, for nonprobate) transfers.

Egelhoff establishes that such laws are preempted by ERISA. That result defeats the purpose of these laws, which is to effectuate the intent of the testator. Does the Court place too much importance on its concern for uniform administration of multistate plans? The Court’s decision has been criticized by those who believe that “[b]ecause states have vast experience dealing with the questions of donative intent and family law that arise in matters of wealth transfer on death, and because divorce revocation statutes further the purposes of ERISA, it would have been wiser for the courts to defer to state experience in these areas.”

UPC § 2-804(h)(2) attempts to avoid the effects of ERISA preemption by providing that, if federal law preempts a state divorce-revocation statute, the ex-spouse “is obligated to return” the property or benefit that passed to him or her, “or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.” The official comment to UPC § 2-804(h)(2) explains:

[This provision respects ERISA’s concern that federal law...]

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316 Gallanis, supra note 1, at 195. See infra Section 8.
317 See UNIF. PROBATE CODE § 2-804(b) (“Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage: revokes any revocable disposition or appointment of property made by a divorced individual to his [or her] former spouse . . . and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual’s former spouse . . . .”) (emphasis added); UNIF. PROBATE CODE § 2-804(a)(5) (“Relative of the divorced individual’s former spouse’ means an individual who is related to the divorced individual’s former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.”).
318 PENSION AND EMPLOYEE BENEFIT LAW, supra note 73, at 776-77 (citing David S. Lebolt, Making the Best of Egelhoff: Federal Common Law for ERISA-Preempted Beneficiary Designations, 288 J. PENSION PLANNING & COMPLIANCE 29, 38 (2002). See also Gallanis, supra note 1, at 189 (criticizing Egelhoff’s “nullification of attempts at the state level to unify the law of probate and nonprobate transfers”).
319 UNIF. PROBATE CODE § 2-804(h)(2).
Language in Boggs suggests, and a later Supreme Court decision in a non-ERISA case seems to hold,\(^{321}\) that this provision will not survive ERISA preemption. In Boggs the Court found it irrelevant to the preemption analysis that the respondents “sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits.”\(^{322}\)

Nevertheless, in a subsequent opinion, Kennedy, the Court included a tantalizing footnote:

‘[n]or do we express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed. Compare Boggs v. Boggs, 520 U.S. 833, 853, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) (“If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit”), with Sweebe v. Sweebe, 474 Mich. 151, 156-159, 712 N.W.2d 708, 712-713 (2006) (distinguishing Boggs and holding that “while a plan administrator must pay benefits to the named beneficiary as required by ERISA,” after the benefits are distributed “the consensual terms of a prior contractual agreement may prevent the named beneficiary from

\(^{320}\) UNIF. PROBATE CODE § 2-804 cmt. “The drafters of the UPC predicted these conflicts and tried to resolve them. In each of the five scenarios we have explored—revocation on divorce, survivorship, lapse, the elective share, and revocation by homicide—the UPC’s drafters inserted” the language quoted above. Gallanis, supra note 1, at 192. See also Brief Amicus Curiae of AARP in Support of Neither Party at 15-16, Kennedy v. Dupont Sav. & Inv. Plan, 555 U.S. 285 (2009) (No. 07-636), 2008 WL 2032268 at *15-16 (“AARP does not mean to suggest that the most probable intent of Mr. Kennedy was to designate his estate rather than his ex-spouse as his beneficiary, and that it was by mere oversight, carelessness, or lack of knowledge, that he failed to change his beneficiary designation. Nor do we suggest that these situations are uncommon. What we urge is that requiring plan administrators to use monies belonging to other participants to investigate and resolve a deceased participant’s ‘true intentions,’ and, no matter the resolution, spend more of those other participant’s monies to then litigate the same question, places the burden of the participant’s mistake in the wrong place. Instead, the estate should be seeking a remedy in state court by seeking to enforce the waiver and requiring the former Mrs. Kennedy to surrender other assets, if she indeed was the improper beneficiary of the plan’s distribution.”).

\(^{321}\) See generally, Hillman, 133 S. Ct. at 1955 (holding that a provision which renders a former spouse liable for insurance proceeds, when a divorce revokes a beneficiary designation, is pre-empted by federal law).

\(^{322}\) Boggs, 520 U.S. at 854.
retaining those proceeds”); Pardee v. Pardee, 2005 OK CIV App. 27, ¶20, 27, 112 P.3d 308, 313-314, 315-316 (2004) (distinguishing Boggs and holding that ERISA did not preempt enforcement of allocation of ERISA benefits in state-court divorce decree as “the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed”).323

In 2012, the Third Circuit allowed such an action to proceed.324 In Estate of Kensinger v. URL Pharma, a 401(k) plan participant’s estate sued the decedent’s former wife and his employer.325 The court noted that, in light of Kennedy, the plan administrator must pay the 401(k) plan proceeds to the former spouse notwithstanding her waiver, because the participant had never replaced her as the designated beneficiary.326 It then ruled that the estate may sue to recover the funds distributed to the former spouse, finding that neither of the policy considerations underlying the Supreme Court’s decision in Kennedy, simple plan administration and avoidance of double liability, are implicated in a suit for the recovery of plan benefits from a former spouse.327 These benefit designation suits “will be litigated as an ordinary contracts dispute.”328

In 2007, Sarabeth Rayho argued that state law constructive trusts are a viable tool to resolve the problem of ERISA-preempted state revocation-by-divorce statutes.329 According to Professor Susan Gary,

[i]f evidence shows that the former spouse already received a fair share of the marital property in the divorce and the decedent spouse would likely have intended his or her remaining assets to go to other beneficiaries, then the court can impose a constructive trust on the amount paid. The court can direct that the proceeds be paid to the former spouse as required

323 Kennedy, 555 U.S. 285, 299 n.10.
325 Id. at 135.
326 Id. at 135.
327 Id. at 136.
329 See Sarabeth A. Rayho, Note, Divorcees Turn About in Their Graves as Ex-Spouses Cash in: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans, 106 MICH. L. REV. 373, 390 (2007). (“[T]he constructive trust doctrine currently represents the most realistic resolution to ERISA preemption of state revocation-by-divorce statutes, because it achieves equal treatment of ERISA-governed plans and all other will substitutes and at the same time accomplishes ERISA’s goals of administrative efficiency and protection of plan participants.”).
under ERISA and the terms of the plan documents, but can impose a constructive trust on the proceeds.  

7.2 Hillman

_Kensinger_ and _Andochick_ have both been implicitly overruled by a 2013 non-ERISA decision, _Hillman v. Maretta_, which was decided under the Federal Employees’ Group Life Insurance Act (“FEGLIA”). The petitioner’s husband, Warren Hillman, participated in a life insurance program established under FEGLIA. In 1996, the decedent, Warren Hillman, named his then-wife, the respondent, as his beneficiary. The husband later divorced the respondent in 1998. However he did not change the beneficiary designation even after he married the petitioner. After Warren Hillman died in 2008, the Office of Personnel Management paid the policy proceeds to the respondent. Under a state revocation on divorce statute, the trial court ordered the respondent to pay the proceeds to the widow. The Virginia Supreme Court found that the state law was preempted by FEGLIA, and reversed the trial court’s order. The U.S. Supreme Court affirmed.

Justice Sotomayor wrote for a unanimous Court that “[o]ur reasoning in _Wissner_ and _Ridgway_ applies with equal force here . . . . In FEGLIA, as in these other statutes, Congress ’spok[e] with force and clarity in directing that the proceeds belong to the named beneficiary and no other.’” Additionally, Professor Lawrence Waggoner comments that, [t]he strength of the Court’s opinion in _Hillman_ makes it unrealistic to think that the Court would allow federal common law to change that result. Although Justice Breyer, dissenting in _Egelhoff_, could find no rationale for preempting the Washington divorce-revocation statute, he was silent regarding the Virginia divorce-post-distribution statute in _Hillman_.

330 Gary, _supra_ note 278, at 121.
331 See _Hillman_, 133 S. Ct. at 1947 (FEGLIA “establishes a life insurance program for federal employees.”). The decision in _Hillman_ has been subjected to withering criticism. See Langbein, _Destructive Federal Preemption, supra_ note 254, at 1696; Lawrence W. Waggoner, _The Creeping Federalization of Wealth-Transfer Law_, 67 VAND. L. REV. 1635, 1646 (2014).
332 _Hillman_, 133 S. Ct. at 1949.
333 Id.
334 Id.
335 Id.
336 Id.
337 See _Hillman_, 133 S. Ct. at 1949.
338 Id.
339 Id. at 1955.
340 Id. at 1951-52 (citations omitted).
Neither he nor any other Justice dissented in Hillman.341

In holding that state law was preempted by FEGLIA, the Court relied on two earlier Supreme Court decisions, Wissner and Ridgway. First, in Wissner, the Court held, by a 5-3 majority, that California community property law was preempted by the National Service Life Insurance Act of 1940,342 concluding that “Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.”343 Justice Minter, joined by Justices Frankfurter and Jackson, dissented by concluding that the purpose of the statute was to protect the beneficiary against claims by creditors.344

I am not persuaded that either the choice of beneficiary or the exemption provision should carry the implication of wiping out family property rights, which traditionally have been defined by state law. . . . I cannot believe that Congress intended to say to a serviceman, “You may take your wife’s property and purchase a policy of insurance payable to your mother, and we will see that your defrauded wife gets none of the money.” Certainly Congress did not intend to upset the long-standing community property law of the states where it was not necessary for the protection of the Government in its relation to the soldier or to the integrity of the fund from “attachment, levy, or seizure.”345

In Ridgway, the insured serviceman and his first wife were divorced.346 He was ordered to keep life insurance policies for his three minor children.347 He remarried and changed his beneficiary so that under the Servicemen’s Group Life Insurance Act of 1965 (SGLIA), the policy proceeds would be paid to his lawful spouse at the time of death.348 The Supreme Judicial Court of Maine, reversing the superior court, imposed a constructive trust in favor of the first wife and her children.349 The Maine court concluded that the order of beneficiary precedence set forth in the federal law “does not reflect any federal interest in permitting a serviceman to evade the responsibility to provide for his minor

341 Waggoner, supra note 331, at 1641 (citations omitted). Noting that the dissenting opinions in Wissner and Ridgway were well-reasoned, Waggoner stated, “[t]he dissenters in both cases argued that the only purpose of Congress in stating that the insured had the right to name the beneficiary was to protect the interest of the beneficiary from the claims of creditors.” Id. at 1642 n. 27. See Ridgway v. Ridgway, 454 U.S. 46, 78-79 (1981); Wissner v. Wissner, 338 U.S. 655, 662. (1950). “The Hillman Court could easily have adopted the analysis of the dissenters in Ridgway and Wissner and held that Hillman was not governed by those cases.” Waggoner, supra note 331, at 1642 n. 27.
342 Wissner, 338 U.S. at 659.
343 Id. at 658 (emphasis added).
344 Id. at 662 (Minton, J., dissenting).
345 Id. at 663-64 (Minton, J., dissenting).
346 Ridgway, 454 U.S. at 48.
347 Id.
348 Id. at 48-49.
349 Id. at 50.
children imposed both by virtue of his voluntary agreement and by the express provision of a valid state court decree.”

That court further concluded that the anti-attachment provision of the federal law “has no application to the instant case since its purpose is to protect the proceeds of the insurance from the claims of creditors.”

The Appellate Court pointed out that it was concerned “not with the claim of a creditor but with the claims of minor children who assert an equitable interest in the proceeds arising from their deceased father’s voluntary agreement and a valid judicial decree.”

Thus the accomplishment of the objectives of the federal statute “is neither obstructed nor interfered with by imposing a constructive trust on the insurance proceeds.”

The United States Supreme Court reversed the lower court’s decision, holding that the case was controlled by *Wissner*. Federal law prevailed over, and displaced, inconsistent state law.

According to the Court, Congress was to blame.

We recognize that this unpalatable case suggests certain “equities” in favor of the respondent minor children and their mother. . . . A result of this kind, of course, may be avoided if Congress chooses to avoid it. It is within Congress’ power. Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence. That is Congress’ choice. It remains effective until legislation providing otherwise is enacted.

In his dissent, Justice Stevens wrote that

[although *Wissner* left open the question presented in this case, there is nothing in the language of the SGLIA or its legislative history that evidences an intent by Congress to repudiate this distinction between commercial and family obligations. The federal interest incorporated within exemption statutes is an interest in preventing federally supported benefits from satisfying claims of commercial creditors. . . . Claims based on familial obligation, however, are of a different character, and indeed may be precisely the type of claim for which the federal benefit was intended. Absent some indication that Congress

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351 *Id.*
352 *Id.*
353 *Id.*
354 *Ridgway*, 454 U.S. at 55-56.
355 *Id.* at 60.
356 *Id.* at 62-63.
intended the standard exemption provision contained in the SGLIA to bar a minor child’s claim for support, I am unwilling to conclude that this provision of the statute pre-empts the application of state law in this case. . . . In a freely negotiated child custody and support settlement, Ridgway agreed to maintain his former wife as the beneficiary of the policy for the benefit of his minor children. Ridgway himself made that choice; the question presented in this case, therefore, is whether any provision of the statute espouses a federal interest in permitting him to change his beneficiary in derogation of an accepted obligation to provide support for his children. I can find no section of the statute that expresses such an interest.357

In January 2014, the Official Comment to UPC § 2-804 (the revocation on divorce provision) was revised in response to Hillman:

[The Court’s decision in [Hillman] has many unfortunate consequences. First, the decision frustrates the dominant purpose of wealth transfer law, which is to implement the transferor’s intention. The result in [Hillman], that the decedent’s ex-spouse remained entitled to the proceeds of the decedent’s life insurance policy purchased through a program established by FEGLIA, frustrates the decedent’s intention. Second, the [Hillman] decision ignores the decades-long trend of unifying the law governing probate and nonprobate transfers. The revocation-on-divorce rule has long been a part of probate law (see, e.g. pre-1990 Section 2-508). In 1990, this section extended the rule of revocation on divorce to nonprobate transfers. Third, the decision in [Hillman] fosters a division between state- and federally-regulated nonprobate mechanisms. If the decedent in [Hillman] had purchased a life insurance policy individually, rather than through the FEGLIA program, the policy would have been governed by the Virginia counterpart of this section.358

§ 8. THE ERISA ADVISORY COUNCIL REPORT

In 2012, the ERISA Advisory Council359 issued a report that constitutes the most detailed empirical account of beneficiary designation practices and problems.360 The Council identified the following as instances where beneficiary

357 Id. at 78-80 (Stevens, J., dissenting) (citations omitted).  
358 UNIF. PROBATE CODE § 2-804 cmt.  
359 “[T]he Advisory Council on Employee Welfare and Pension Benefit Plans, usually referred to as the ERISA Advisory Council . . . was established under Section 512 of ERISA to advise the Secretary of Labor.” ADVISORY COUNCIL REPORT, supra note 70, at i.  
360 Id. at 1.
disputes commonly arise:

1. in instances where “[p]articipants fail to change beneficiary designations to reflect life events;”\(^\text{361}\)

2. in instances where “[b]eneficiaries allegedly murdered the participant;”\(^\text{362}\)

3. in instances of “[s]imultaneous death of the participant and the designated beneficiary... questions can arise concerning the impact of survivorship rules on the receipt of benefits. In addition, the impact of state laws on these questions is unclear;”\(^\text{363}\)

4. in instances where the plan has lost the beneficiary designation or has stale designations because of a change in service providers, administrators or other reasons, “benefits under the plan may not flow to the intended beneficiary;”\(^\text{364}\) and

5. there may also be instances where the “[e]lected beneficiary designation is impermissible under the terms of the plan, thereby resulting in questions as to whom the benefit should be paid under the terms of the plan.”\(^\text{365}\)

“Because of legal requirements and historical practices, the beneficiary designation... is one of the few employee benefit transactions that remain almost entirely based on paper records.”\(^\text{366}\)

Beneficiary designations also have a “life” that is much longer than the typical election made by participants under their benefit plans. A beneficiary election can remain on file for decades without review by the participant, which increases the likelihood that the designation may not reflect the current intent of

\(^{361}\) Id. at 3. The Advisory Council report cites testimony by Nancy Maitland, Vice President and Senior Legal Counsel, T. Rowe Price Group Inc.: “among the defined contribution plans that her firm handles, only approximately 40 percent to 60 percent of the participants had completed beneficiary designation forms.” Id. at 5. This is consistent with a 2014 survey conducted by Rocket Lawyer that found that 64% of Americans do not have wills, including 90% of those aged 18-34 and 80% of those aged 35-54. See Rocket Lawyer, Rocket LawyerDelivers No Excuses Estate Planning for April “Make-a-Will Month,” (Apr. 8, 2014), http://www.marketwired.com/press-release/rocket-lawyer-delivers-no-excuses-estate-planning-for-april-make-a-will-month-nyse-nlsn-1897029.htm. “Susan Diehl, President of PenServe Plan Services Inc., indicated that due to automatic enrollment [in retirement plans,] there are fewer beneficiary designation forms being completed by participants, thereby increasing the number of participants with no beneficiary designations on file.” ADVISORY COUNCIL REPORT, supra note 70, at 5.

\(^{362}\) ADVISORY COUNCIL REPORT, supra note 70, at 5.

\(^{363}\) Id. note 70, at 5.

\(^{364}\) Id.

\(^{365}\) Id.

\(^{366}\) Id. at 4.
Numerous interested parties submitted written comments or testified at hearings of the Council. The following is a summary of some of those comments.

Vicki Blanton of American Airlines testified on behalf of the American Benefits Council:

[a]t American [Airlines] we note the beneficiary designation on the participant’s quarterly statements and it is also noted on the online access every time the participant accesses his or her account. This places the information in front of the participant on a regular basis and, hopefully, works as a reminder when their (sic) need to update because their beneficiary designations are out of date. Our [third party administrator] also handles searches for “lost” beneficiaries or beneficiaries for whom we have no contact information. However, it is important to note that new rules should NOT require the plan administrator to actively and affirmatively reach out to plan participants upon the occurrence of certain life events (e.g., marriage, divorce, birth of child). This would place an undue burden on the plan administrator and such a requirement would be fraught with risk due, in part, to the fact the plan administrator often does not learn of the occurrence of the life event in a timely manner.

Robert Richter of SunGard, a major provider of retirement plan documents and services, testified on behalf of the American Society of Pension Professionals and Actuaries (ASPPA):

[i]n the vast majority of arrangements, the service provider has little involvement with beneficiary designations. The employer, as the plan administrator, is responsible for the distribution,

367 ADVISORY COUNCIL REPORT, supra note 70, at 6.

Several witnesses were asked about the practice of invalidating old beneficiary designations during re-solicitation initiatives and encouraging participants to submit new beneficiary designations. The uniform view among the witnesses was that this practice should not be encouraged or adopted because in some cases participants who submitted an earlier beneficiary designation may not be able to submit a new designation. For example, this might occur upon the incapacity or the inability of the participant to obtain spousal consent which had been obtained earlier and filed with the plan or service provider holding the original beneficiary designation.

Id.

368 See id. at 5.

What actions do we expect from plan administrators? We want them to (1) provide plan information regarding death benefits, (2) make designation forms readily available and easy to understand, (3) remind participants to review and update designations as necessary, and (4) review designations upon receipt to ensure they are complete and unambiguous. It’s difficult to imagine a system that will achieve all these desired results and eliminate all disputes over death benefits. Nevertheless, improvements can be made. Plan administrators could put into place best practices and make more effective use of technological solutions.

Plan administrators might consider whether it would be prudent to explain to participants the plan’s default beneficiary provisions and suggest that if those default provisions satisfy their needs, that they not complete a designation form (other than perhaps to provide information on the beneficiaries so they can be located). Most beneficiaries may be satisfied with the plan’s default beneficiaries and this would reduce the number of designations that the plan must handle and would eliminate the need of participants to immediately change designations when there has been a change in their family status. Best practices for handling forms would include a review of the forms to make sure they are complete and consistent with the above requirements. If a plan administrator receives a designation form that is not complete or accurate, then there should be a consistent practice of rejecting the designation until it is complete and unambiguous. This includes the completion of all optional information that is requested on the form (e.g., address, dates of birth, etc.). This makes it critical that the form being used by the plan administrator be consistent with the practices being used to review such forms upon receipt.

It would be best practice if plan sponsors were to periodically remind participants to review their beneficiary designations (regardless of whether the designations were specifically made or were effectively made by use of plan default provisions). There does not appear to be any consistent method on how and

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371 Id. at 6.
372 Id. at 7.
when to provide such reminders.373

In its report, the Advisory Council recommended that DOL:

1. Develop educational materials to help plan participants understand the importance of beneficiary designations, how they work and the importance of updating them when life events occur. 374

2. Develop suggestions and guidance for employers, plan administrators and service providers on how to improve plan design and administrative practices to diminish disputes in the area of payments based on beneficiary designations. The Council identified proactive decisions and actions . . . that have been effective in reducing potential disputes in a number of areas, including: (a) responsibility for administering beneficiary designations; (b) plan provisions on the designation of default beneficiaries; (c) plan provisions to address common situations that give rise to beneficiary disputes; (d) procedures for locating beneficiaries; (e) review and acceptance of beneficiary designations; (f) procedures to ensure that participants are aware of beneficiary designation status and (g) procedures for the maintenance and updating of beneficiary designation forms.375

373 Id. at 8.
374 ADVISORY COUNCIL REPORT, supra note 70, at 2. The Advisory Council report states: [b]ased on the testimony received, the Council notes that the requirements governing the content for summary plan descriptions (SPDs) do not currently require the inclusion of information about beneficiary designations. The Council highlights this issue for DOL as a possible opportunity to provide more effective education for both plan sponsors and plan participants, and also may be appropriate for regulatory action. The Council believes that plan sponsors should be encouraged to include this information as part of the plan enrollment process as well as in plan communications on an ongoing basis. . . . Witnesses agreed that notifying participants of the importance of updating their beneficiary designations when there is a life-changing event is extremely important. However, most witnesses did not believe that DOL should require plan sponsors to contact participants after life changing events to request an updated beneficiary designation. This would be a tremendous hardship on most employers, especially in the case of large employers who are less likely to be aware of when many life changing events occur.

Id. at 6-7.

375 Id. at 2.

Many witnesses stated that the use of electronic forms has resulted in fewer mistakes such as incorrect addition of amounts (or percentages) split among designees. Electronic forms also require more information such as addresses and Social Security numbers which assist in locating beneficiaries. However, should a participant wish to designate someone other than a spouse in a plan which requires
3. Issue guidance for plans, plan administrators and plan fiduciaries regarding beneficiary designation disputes. Such guidance should cover the following areas: (a) the availability and applicability of the ERISA claims procedure for beneficiary designation disputes, including review of the definition of adverse benefit determination; (b) the ability of plans to charge participant accounts for dispute resolution costs when there is a dispute over the proper payment of benefits to a beneficiary; and (c) retention of beneficiary designations and related documents, including spousal waivers.  

Several witnesses pointed out that, in a plan that provides for automatic enrollment, participants who have not made an affirmative election to enroll in the plan are unlikely to submit a completed beneficiary designation form.  

Under Section 503 of ERISA, every employee benefit plan must establish and maintain reasonable procedures governing the filing of employee benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations. Ms. Maitland confirmed that the most common procedure for resolving beneficiary claims is through the plan’s claims review procedures. Ronald Dean urged the Council to consider as a “best practice” [sic] the use of full administrative review in a beneficiary dispute, noting that [i]t is up to the plan to interpret its rules and to find facts related to benefits.  

The report also stated that the testimony demonstrated that there are important issues involving disposition of death benefits after divorce pursuant to QDROs. The Council acknowledged that these issues merit further study by DOL.  

The Advisory Council report notes that,  

[i]f no beneficiary designation is made, the beneficiary is  

spousal consent, then spousal consent must be provided via a paper form. For example, T. Rowe Price permits a participant to designate a person other than a spouse electronically, but the participant is told that the designation is not effective until T. Rowe Price receives the paper spousal consent. Also, currently, there does not appear to be an electronic process that meets notarization requirements.
usually determined by the terms of the plan document. Retirement plan documents typically include default beneficiary provisions that apply in the event the retirement account owner fails to designate a beneficiary. . . . Many individuals rely on these defaults at the time of plan enrollment and the Council heard testimony about the advisability of encouraging participants to use the default when it reflects their intent. Mr. Richter felt that the default provisions will often match the participant’s intent and advocated more aggressive communication of plan defaults to participants to encourage reliance on the default designations where appropriate. This avoids the potential need to change beneficiary designations for changes in family status, especially divorce. Mr. Dean thought this also could work well for participants. However, it appears that few plans follow this practice. . . .381

§ 9. EXECUTING OR AMENDING A BDF

9.1 Introduction

John Langbein noted in 1984 that pension accounts and other will substitutes, when properly created, are functionally indistinguishable from a will—each reserves to the owner complete lifetime dominion, including the power to name and to change beneficiaries until death. These devices I shall call “pure” will substitutes, in contradistinction to “imperfect” will substitutes (primarily joint tenancies), which more closely resemble completed lifetime transfers. The four pure will substitutes may also be described as mass will substitutes: they are marketed by financial intermediaries using standard form instruments with fill-in-the-blank beneficiary designations.382

The Restatement of Property describes a will substitute as follows:

(a) A will substitute is an arrangement respecting property or contract rights that is established during the donor’s life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor’s death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor. (b) To be valid, a will substitute need not be executed in

381 Id. at 10.
382 Langbein, Nonprobate Revolution, supra note 12, at 1109.
Because each of these “pure” will substitutes is functionally indistinguishable from a will, courts originally struggled with a basic conceptual problem: if the transfer operates just like a will, how can it be valid if the document effecting the transfer does not satisfy the formal requirements for a will? Early cases typically upheld their validity by finding some “present interest” in the transferee, acquired during the lifetime of the transferor, which distinguished the will substitute from a will.384

Beneficiary designations have traditionally been required by the plan, or by procedures adopted under the plan, to be in writing and to be signed by the plan participant and state law often imposes similar requirements.385 This reflects

383 RESTATEMENT (THIRD) OF PROP. WILLS AND OTHER DONATIVE TRANSFERS § 7.1. See UPC § 6-101, discussing nonprobate transfers on death:

[a] provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary.


384 See, e.g., Farkas v. Williams, 125 N.E. 2d 600, 609 (Ill. 1955) (holding the trust to be an inter vivos transfer and not a testamentary disposition since the trust intended to give the beneficiary a present interest in the property). See also Restatement (Third) of Prop. Wills and Other Donative Transfers § 7.1 cmt. a.

[The traditional explanation for why will substitutes are not wills is the present-transfer theory. A will substitute need not be executed in compliance with the statutory formalities required for a will because a will substitute effects a present transfer of a nonpossessory future interest or contract right, the time of possession or enjoyment being postponed until the donor’s death. An alternative explanation is that will substitutes need not be characterized as effecting a present transfer to escape characterization as a will. Rather, the donor is free to transfer wealth on death either in the probate system or in the nonprobate system or in both. When using the nonprobate system, the donor uses its forms, which typically arise from the commercial practice of financial intermediaries. When using the state-operated transfer system of probate administration, the donor uses the forms appropriate to that system (for testation) or allows that system to operate by default (in the case of intestacy). The statute of wills does not require wealth transfers on death to occur by probate; the statute merely requires that probate transfers comply with the statute’s formalities. Because the statute of wills does not govern nonprobate transfers, wealth holders may use these alternative wealth-transfer systems on death by means of will substitutes.

Id.

385 See, e.g., N.Y. Est. Powers & Trusts § 13-3.2 (McKinney 1992) (dealing with the rights of named beneficiaries of annuity or insurance policies and pension, retirement, death benefit, stock bonus and profit sharing plans). “[T]he rights of persons so entitled or designated and the ownership of money, securities or other property thereby received shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy.” Id. at § 13-3.2(a). A designation that is to take effect on death (of the person making the designation or another) must be written, signed and (1) in the case of a plan, agreed to by the employer or made in accordance with the plan’s rules, or (2) in the case of insurance, agreed to by the insurer. Id. at § 13-3.2(e). See also Androvette v. Treadwell, 532 N.E. 2d 1271,
the two main formal requirements for a traditional will, writing and signature, but like holographic (handwritten) wills, generally dispenses with witnesses. However, many plans now permit beneficiary designations or changes to be made online or by telephone.

In contrast to the law of wills, neither ERISA nor state laws include a list of formal requirements for executing a valid BDF. Recent Supreme Court decisions and DOL statements suggest that a plan administrator is always required to pay the benefits to the persons named in the most recent BDF prepared and filed in accordance with the plan’s requirements unless a QDRO dictates a different result. This cannot be the whole story.

According to the Restatement, “[a]lthough a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions.”

The rationale is that:

[s]ubstantive restrictions on testation constitute important policies restricting disposition of property after the owner’s death that should not be avoidable simply by changing the form of the death-time transfer. By contrast, rules of construction and other interpretative devices aid in determining and giving effect to the donor’s intention or probable intention and hence should apply generally to donative documents. . . . Historically, some of the rules of construction were formulated only for wills because wills then constituted the principal means of transmitting property at death. Some rules of construction were placed in the probate code, which led the legislature to draft them as rules applicable to wills. As will substitutes have proliferated and become alternative means of passing property at death, legislatures and courts have sometimes been slow to expand the scope of these rules to transactions to which they

1271 (N.Y. 1988) (mem.), holding that an unsigned change of beneficiary was void, and O’Shea v. First Manhattan Co. Thrift Plan & Tr., 55 F.3d 109, 113 (2nd Cir. 1995), holding that the requirement that the beneficiary designation be in writing was preempted by ERISA with respect to an employer plan.


See Albert Feuer, Who Is Entitled to Survivor Benefits from ERISA Plans?, 40 J. Marshall L. Rev. 919, 1022 (2007) (“With the exception of the two statutory designations, for spousal survivor benefits and QDROs, ERISA does not set forth the conditions a beneficiary designation must fulfill to satisfy the requirement that an ERISA plan be established and maintained pursuant to a written document.”).

See supra Sections 5.3, 5.4; supra note 70.

Restatement (Third) of Prop. Wills and Other Donative Transfers § 7.2.
should be fully applicable in policy. This Restatement (along with the Restatement Third, Trusts, the Revised Uniform Probate Code, and the Uniform Trust Code) moves toward the policy of unifying the law of wills and will substitutes.391

As Professor Langbein wrote:

[t]ransferors use will substitutes to avoid probate, not to avoid the subsidiary law of wills. The subsidiary rules are the product of centuries of legal experience in attempting to discern transferors’ wishes and suppress litigation. These rules should be treated as presumptively correct for will substitutes as well as for wills.392

9.2 Signature and Attestation

The traditional law of wills requires the will to be signed by the testator, and the signature witnessed by or acknowledged before at least two competent witnesses.393 About half of the states recognize holographic wills, i.e., wills that are written and signed but not witnessed.394 Oral (nuncupative) wills are recognized only in very limited situations.395

In Harmon, the court granted MetLife’s motion for summary judgment and rejected the claim of the policyholder’s widow, Patricia Harmon, for life insurance benefits.396 The court said that MetLife could properly rely on evidence of an online or telephonic beneficiary change, despite not having “any original beneficiary designation paperwork.”397

Becker involved an attempted change of beneficiary by phone.398 The court held that the district court erred in finding that the decedent was required to abide by the language contained in the forms to change his beneficiary designation from his ex-wife.399 The court held that the ex-wife was improperly awarded summary judgment, as the plan documents permitted unmarried participants to change their beneficiary designations by telephone.400 Whether the participant strictly or substantially complied with the plan documents is a

391 Id. § 7.2 cmt. a.
392 Langbein, Nonprobate Revolution, supra note 12, at 1136-37.
393 See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-2.1; UNIF. PROBATE CODE § 2-502(a).
394 See ANDERSEN & BLOOM, supra note 194, at 131 (noting that the requirements for a valid holographic will vary from state to state).
395 See id. at 117.
397 Id. at 878.
398 Becker v. Williams, 777 F.3d 1035, 1037 (9th Cir. 2015).
399 Id. at 1042.
400 Id. at 1041-42.
question of state law.\footnote{Id. at 1041.} On remand, the District Court found that the son failed to establish either strict compliance or substantial compliance by the participant, and awarded the benefits to the ex-wife.\footnote{Becker v. Williams, 168 F. Supp. 3d 1325, 1333 (W.D. Wash. 2016).}

According to the ERISA Advisory Council,

\[m\]any witnesses stated that the use of electronic forms has resulted in fewer mistakes such as incorrect addition of amounts (or percentages) split among designees. Electronic forms also require more information such as addresses and Social Security numbers which assist in locating beneficiaries. However, should a participant wish to designate someone other than a spouse in a plan which requires spousal consent, then spousal consent must be provided via a paper form. For example, T. Rowe Price permits a participant to designate a person other than a spouse electronically, but the participant is told that the designation is not effective until T. Rowe Price receives the paper spousal consent. Also, currently, there does not appear to be an electronic process that meets notarization requirements.\footnote{ADVISORY COUNCIL REPORT, supra note 70, at 9.}

\begin{section}{9.3 Intention}

In order for a document to be a valid will, the testator must intend it to be a will. “Testamentary intent means the intent that the document or transaction control events (normally the disposition of property) at the maker’s death, but create no rights or powers until that time.”\footnote{ANDERSEN & BLOOM, supra note 194, at 86.} Presumably, the same principle applies to making or revising a beneficiary designation. Generally, the facts that the owner has used the forms, and followed the procedures laid down in the plan are evidence that the individual intended to name or change a beneficiary.

The basic purpose of ERISA is “to protect . . . the interests of participants in employee benefit plans and their beneficiaries. . . .”\footnote{29 U.S.C. § 1001(b).} A paramount participant interest that ERISA seeks to protect is the participant’s interest in having payment made to his or her intended beneficiary.\footnote{See 29 U.S.C. § 1001(a).} When pension property has a survivorship feature, that feature is part of the participant’s ownership interest, and one of the things that an owner can do is transfer that interest gratuitously. In the field of gratuitous transfers, “the intention of the donor—the objectives that it appears the donor was endeavoring to achieve—[is] the touchstone in interpreting the [donative] instrument. . . .”\footnote{RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS ix (AM. LAW INST., Tentative}
If the intentions of the participant (the donor) are defeated, other protections are useless—the solvency of a plan, the vesting of benefits and the right to payment are all irrelevant if payment is made to the wrong beneficiary. Therefore, ERISA’s decision to protect the participant’s ownership interest necessarily imports recognition of his or her donative intent.

9.4 Capacity

In order to make a valid will, the testator must generally be at least eighteen years old and have adequate mental capacity. Under the Restatement, a person must also have mental capacity in order to make or revoke a donative transfer:

[i]f the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

In general, the fiduciary implementing the beneficiary designation is entitled to assume that the individual is competent, unless he or she has evidence to the contrary, and unless and until the decision is challenged by a third party. Determinations of competence are rarely straightforward and are always resolved by reference to the nature and significance of the decision in question. The issue is always: competent to do what? In Ortelere, a pre-ERISA case, the participant died two months after electing a single life annuity under a pension plan, so that no survivor benefit was payable to her widower. The court held, by a 4-2 majority, and over a strong dissent, that incapacity to exercise contractual rights could exist despite intellectual or cognitive ability to understand. “Contracts of a mentally incompetent person who has not been adjudicated insane are voidable.” According to the court, there should be relief

Draft No. 1, 1995).

See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-1.1; UNIF. PROBATE CODE § 2-501 (“An individual 18 or more years of age who is of sound mind may make a will.”).

RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.1(b) (AM. LAW INST. 2003).

See, e.g., Robert P. Roca, Determining Decisional Capacity: A Medical Perspective, 62 FORDHAM L. REV. 1177, 1195 (1994) (“the process of assessing decisional capacity has two principal components: (1) the psychiatric history and mental status examination—to determine whether a diagnosable psychiatric disorder is present—and (2) specific inquiry into the patient’s understanding of and reasoning about the decision at hand—to determine whether psychiatric symptoms are disabling decision-making”).


See Id. at 462.

Id. at 464.
only if the other party knew or had notice of the mental illness. Here, the retirement system was, or should have been, fully aware of the teacher’s mental condition.

Plan terms often give plan administrators considerable discretion in the design and interpretation of BDFs. Thus, these questions may be moot in the common situation where the fiduciary decides the validity of a beneficiary designation, under the deferential arbitrary and capricious standard of judicial review. In 2006, the Eighth Circuit used that standard to defer to the plan’s holding that a beneficiary designation could be effective even if the participant left blank the relation of the beneficiary to him. However, there was a remand to consider whether the participant had sufficient capacity to execute the designation or whether he was under undue influence, although the court did not discuss how to make either determination.

In Baker, the court used Missouri’s test for determining whether a participant had sufficient capacity to change his beneficiary. Under Missouri law, a grantor has sufficient mental capacity if he understands the “ordinary affairs of life, the value and extent of [his] property,” and the people to whom he gives property. The party seeking to establish that a grantor lacked mental capacity has the burden of establishing that fact. “Mr. Baker was forgetful and had an imperfect memory, but he knew the nature and extent of his property, the names of his relations, and the disposition that he wished to make of his property.”

9.5 Execution of BDF by Agent Under Durable Power of Attorney

Under the Uniform Power of Attorney Act, which has been adopted (with or without variations) in twenty-five states, an agent under a power of attorney may (1) “create or change a beneficiary designation,” or (2) “waive the

414 Id. at 465.
415 Id. at 465-66.
417 See Alliant Techsystems, Inc. v. Marks, 465 F.3d 864, 868-71 (8th Cir. 2006).
418 Id. at 873.
420 Id. (citations omitted).
421 Id. at 465.
422 Id. at *23.
principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan,” or (3) disclaim property “only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject.”

Additional restrictions may apply.

Generally, a plan will refuse to accept a BDF signed by an agent unless the power specifically authorizes the agent to execute or change the BDF. State law varies with respect to the circumstances in which a third party may refuse to accept a power of attorney, and the consequences of such a refusal.

One interpretation is that ERISA, rather than state law, governs beneficiary designations for ERISA plans, and would preempt attempts to use a POA not authorized by plan terms to change plan designations. A durable power of attorney, unlike a health care proxy, is generally effective immediately, even if the principal is still competent. It is not unreasonable for a plan to require, as a prerequisite to accepting a power of attorney, evidence of incapacity.

According to testimony given before the ERISA Advisory Council, it is not common to see a plan document address whether a change in beneficiary designation may be made pursuant to a power of attorney. Further, POA forms

424 UNIF. POWER OF ATT’Y ACT § 201(a) (2006).
425 Pension Comm, Heileman-Baltimore Local 1010 IBT Pension Plan v. Bullinger, No. HAR 92-204, 1992 U.S. Dist LEXIS 17325, at *5-7 (D. Md. Oct. 29, 1992) (“[B]ecause ERISA is silent with respect to the question of whether a general Power of Attorney can authorize an attorney-in-fact to alter a pensioner’s designated beneficiary, the Court must interpret the Power of Attorney within the interstices of ERISA, applying federal common law . . . [T]he power of attorney makes no reference to monthly pension payments, or to the altering of his pension’s beneficiary.”); Clouse v. Phila., Bethlehem & New England RR. Co., 787 F. Supp. 93, 98 (E.D. Pa. 1992) (“[D]raftsmen of both plans and powers of attorney can take account of the issue raised in this case by (a) specifically mentioning in powers of attorney the authority to change beneficiary designations under employee benefits plans and (b) specifically recognizing the possibility of (a) in the plans themselves. This regime would be on the analogy of what title insurance companies routinely require of powers of attorney at real estate closings. At least in this District, title companies will accept only powers of attorney specific to the subject property. The need for such unambiguous documents also exists for ERISA plans, which cover no less grave subjects for their beneficiaries.”). See also RESTATEMENT (SECOND) OF AGENCY § 37 (AM. LAW INST. 1958) (“Unless otherwise agreed, general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates.”).
426 See generally Albert Feuer, How Should ERISA Plans Handle Powers of Attorney and Court-Appointed Guardians and the Absence of Such Agents for Participants Lacking Capacity?, 54 TAX MGMT. MEM. (BNA) No. 18, at 351 (Sept. 9, 2013) (discussing the potential issues that may arise when an ERISA plan participant or beneficiary becomes disabled or otherwise incapacitated, including the extent to which ERISA plans must or may follow powers of attorney and guardian directives).
427 See UNIF. POWER OF ATT’Y ACT § 102 (2) (“‘Durable’, with respect to a power of attorney, means not terminated by the principal’s incapacity”); UNIF. HEALTH-CARE DECISIONS ACT § 2(b) (1993) (“An adult or emancipated minor may execute a power of attorney for health care, which may authorize the agent to make any health-care decision the principal could have made while having capacity.”).
428 See ADVISORY COUNCIL REPORT, supra note 70.
are typically only accepted if they are valid under the state law, and even then, complications may arise. Steve Gorin recommended that some guidance be given to plan sponsors on what types of provisions should be in [POAs]. He noted that many of his fellow practitioners used a POA fashioned after the model reflected in the Uniform Durable Power of Attorney Act that was acceptable in most states, with some states requiring more specific language to allow for beneficiary designation changes. He recommended giving fiduciaries assurances that they can rely on POAs otherwise approved under state law.

9.6 No Undue Influence, Duress or Fraud

Although the Supreme Court in Hillman said that the FEGLIA life insurance proceeds “belong to the named beneficiary and no other,” and although Treasury regulations provide that the survivor of any U.S. government security registered in survivorship form is the “sole and absolute owner,” those propositions surely cannot stand if the beneficiary designation would have been initially invalid due to incapacity, undue influence, or defective execution.

A provision in a will is invalid to the extent that it was included as the result of undue influence, duress, or fraud. Under the Restatement, a donative transfer is also invalid to the extent that it was so procured. The burden of establishing wrongdoing is on the party contesting the validity of a donative transfer. “In some circumstances, the contestant’s case may be aided by a presumption of invalidity.”

In Tinsley, a pre-Egelhoff case, the plaintiff challenged a change of beneficiary for a life insurance policy on the ground that it was procured by undue influence. The Sixth Circuit held that ERISA preempted the Michigan case law of undue influence and that federal common law controlled the case.

The court reasoned:

Since ERISA does not contain any provisions regulating the

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429 See id. at A-12.
430 Id.
432 RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3(a).
433 Id. at § 8.3.
434 Id. at § 8.3 cmt. b.
435 Id.
437 Id.
problem of beneficiary designations that are forged, the result of undue influence, or otherwise improperly procured, it appears that federal common law must apply to Tinsley’s claims. Furthermore, because there is no established federal common law in this circuit dealing with forgery and undue influence in the designation of beneficiaries, we look to state-law principles for guidance.\textsuperscript{438}

The court formulated the following criteria:

\[\text{Undue influence is generally defined as influence that is sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor’s inclination and free will. . . . An individual’s influence is undue when it restrains a testator from disposing of property in accordance with the testator’s own wishes and judgments and substitutes the wishes or judgments of another.}\textsuperscript{438}\]

The court stated further:

\[\text{Courts have looked at a number of factors to determine whether undue influence has been exerted in a given case, including the physical and mental condition of the benefactor, whether the benefactor was given any disinterested advice with respect to the disputed transaction; the “unnaturalness” of the gift; the beneficiary’s role in procuring the benefit and the beneficiary’s possession of the document conferring the benefit; coercive or threatening acts on the part of the beneficiary, including efforts to restrict contact between the benefactor and his relatives; control of the benefactor’s financial affairs by the beneficiary; and the nature and length of the relationship between the beneficiary and the benefactor. . . . As our summary of the law suggests, the inquiry into the exercise of undue influence is a highly fact-intensive one. . . . Moreover, as a result of the subtle and often covert ways in which undue influence may be exercised, it must often be proven by means of circumstantial evidence.}\textsuperscript{440}\]

In \textit{Harmon}, the court found insufficient evidence to support the widow’s claims that the deceased’s daughter either changed the beneficiary designation or unduly influenced him into changing it.\textsuperscript{441} The court also said that the insurer

\textsuperscript{438} Id. at 704 (citations omitted).
\textsuperscript{439} Id. at 704-05 (citations omitted).
\textsuperscript{440} Id. at 705 (citations omitted) (grant of summary judgment reversed; plaintiff had presented sufficient evidence to raise a genuine issue of material fact as to whether the decedent was unduly influenced).
need not base its decision on “a preponderance of the evidence,” but it need only rely on “more than a scintilla” of evidence.442 The plan granted the administrator discretionary authority to interpret the terms of the plan and to render benefit decisions, subject only to review for abuse of discretion.443

Several decisions have concluded, based on Kennedy,444 that a plan administrator could rely on a beneficiary designation in circumstances that suggested that the designation was the result of undue influence.445 One court upheld payment under a life insurance policy in accordance with the beneficiary designation, despite a claim that the decedent changed the beneficiary designation while in a confused and disoriented state and under the influence of his stepson and daughter.446 The court ruled that the defendants were not required to consider external circumstances, given the clear distribution instructions in the beneficiary designation form.447 Such cases lend credence to the claim that Kennedy represents a triumph of convenience over equity.448

9.7 Beneficiary Who Kills the Participant

442 Id. at 887.
443 Id. at 885.
444 See generally Kennedy 555 U.S. 285 (considering whether a plan administrator must give effect to a waiver of benefits in a divorce decree, if it is in conflict with the beneficiary designation on file with the plan).
445 See e.g., Dunlap v. Ormet Corp., No. 5:08CV65, 2009 U.S. Dist. LEXIS 22346, at *20 (N.D. W. Va. Mar. 19, 2009) (“under Kennedy, if the plan sets forth procedures that comply with ERISA’s requirements, and if the plan administrator follows those procedures, no duty may be imposed upon the plan administrator to examine external documents which could create ambiguities concerning the dispensation of benefits”). See also Young v. Anderson, No. 08-14621, 2009 U.S. Dist. LEXIS 35458, at *8-9 (E.D. Mich. Apr. 27, 2009) (Decedent’s daughter claimed that his brother exerted undue influence in obtaining the designation and that she was the proper beneficiary. She had a state court order directing that the benefit be held in constructive trust by the brother for her benefit. The court held that her remedy was an action in state court relative to the constructive trust. “Here, the relevant Plan document, the application, clearly designated Anderson as the beneficiary. There is nothing in the document to indicate any error of any kind. Ford is therefore entitled to rely on the application. Ford’s decision to pay Anderson is correct under the plan documents rule and was not arbitrary or capricious . . . . At the end of the day, Young’s recovery lies against Anderson, not Ford. Anderson is directed by the probate court order to pay the benefits he receives from Ford to Young. If Anderson is not complying with the probate court order, Young’s remedy lies in the state court, not federal court. This does not appear to conflict with ERISA.”). See Sweebe v. Sweebe, 712 N.W.2d 708, 712 (Mich. 2006) (holding that “while a plan administrator must pay benefits to the named beneficiary as required by ERISA,” after the benefits are distributed “the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds.”). See generally Guardian Life Ins. Co. of Am. v. Bowes, No. 6:11-cv-00040, 2012 U.S. Dist. LEXIS 55475 (W.D.Va. Apr. 20, 2012) (applying federal common law and the doctrine of substantial compliance); Sun Life Assurance Co. of Can. v. Tinsley, NO. 6:06-CV-00010, 2007 U.S. Dist. LEXIS 25172 (W.D.Va. Apr. 4, 2007), affirmed 266 Fed. Appx. 228 (4th Cir. 2008) (applying federal common law, citing the 6th Circuit decision Tinsley, and finding clear and convincing evidence of undue influence).
447 Id. at *22.
Under both the Restatement and the UPC, the felonious and intentional killing of the decedent revokes any revocable disposition to the killer under a BDF. 449 Under the Restatement, the provisions of the victim’s BDF give effect as if the slayer predeceased the victim:

V designated K as the beneficiary of a lump-sum death benefit of V’s pension plan. The terms of the plan gave V the right to change the beneficiary. K feloniously and intentionally killed V. K forfeits the right to the lump-sum death benefit, which passes as if K predeceased V. This rule applies as a matter of state law to pension plans when the question arises under state law, and as federal common law to pension plans when the question arises under federal law. 450

Under the UPC, “[p]rovisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by that section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.” 451

Most states have “slayer” statutes or case law to the same effect; the details vary significantly. 452 The federal courts have generally refused to treat slayer statutes as preempted. 453 Some courts have sidestepped the issue by applying a slayer statute as federal common law. 454 The Supreme Court refused to address the issue in Egelhoff, though urged to do so.

In two recent cases, the courts granted an interpleader request by a plan fiduciary to determine the applicability of the slayer rule. 455

449 UNIF. PROBATE CODE § 2-803; RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.4. 450 RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.4 illus. 4.
451 UNIF. PROBATE CODE § 2-803(e).
452 See ANDERSEN & BLOOM, supra note 194, at 253.
454 See, e.g., Ahmed v. Ahmed, 817 N.E. 2d 424, 426 (Ohio Ct. App. 2004); Connecticut General Life Ins. Co. v. Riner, 351 F. Supp. 2d 492, 487 (W.D.Va. 2005). See also Estate of Burkland v. Burkland, No. 11-5024, 2013 U.S. Dist. LEXIS 11327 at *11 (E.D. Pa. Jan. 13, 2013) (The court held that the primary beneficiary was precluded from receiving the insurance proceeds under both Pennsylvania’s Slayer’s Act and the federal common law, because she was the convicted murderer of the deceased. The plaintiff was entitled to the proceeds, because he was the “contingent beneficiary” under the plan documents); Mitchell v. Robinson, No. 1-11cv130 SNLJ, 2011 U.S. Dist. LEXIS 147226, at *12 (E.D. Mo. Dec. 22, 2011) (ERISA preempted the state slayer statute but “this Court may still apply the principles of Missouri’s slayer law in adjudicating plaintiffs’ ERISA claim.”).
Why preempt the divorce-revocation statute but not the slayer statute?

The Court in *Egelhoff* responded to this question by suggesting that the principle underlying the slayer statutes “is well established in the law and has a long historical pedigree predating ERISA.” It is not clear that slayer statutes have any greater historical pedigree than do divorce revocation laws. The Court also suggested that “because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.” However, as Justice Breyer pointed out in his dissenting opinion, slayer statutes do vary from state to state.

“Indeed, the ‘slayer’ conflict would seem more serious, not less serious, than the conflict before us, for few, if any, slayer statutes permit plans to opt out of the state property law rule.”

According to the Restatement Reporter’s Note, eleven states have statutes based on the revised UPC, eight states have statutes based on the original UPC, and twenty-six states (and Washington D.C.) have a rule not based on either.

“For example, some states require that there be a conviction, at least if the slayer is still alive, . . . others do not. . . . An Ohio court that faced the question after the Supreme Court’s decision in *Egelhoff*, concluded that Ohio’s slayer statute was preempted by ERISA.” The Ohio Court of Appeals ruled, “we cannot distinguish slayer statutes from the statute at issue in *Egelhoff*.”

 “[S]layer statutes affect the administration of ERISA plans in the same manner as the statute discussed in *Egelhoff*.”

9.8 Strict Compliance or Substantial Compliance

Employees often fill out beneficiary designation forms or change-of-beneficiary forms without the benefit of counsel. The forms can also be confusing and can lead to defective execution

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456 PENSION AND EMPLOYEE BENEFIT LAW, supra note 73, at 779.

457 *Egelhoff*, 532 U.S. at 160.

458 RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.4 cmt.

459 PENSION AND EMPLOYEE BENEFIT LAW, supra note 73, at 779 (citations omitted).

460 *Ahmed*, 817 N.E.2d at 429.

461 Id. at 430 (Federal common law determined who received the life insurance proceeds, and barred the father from receiving them. The policy’s plain language did not allow distribution to the contingent beneficiary because the primary beneficiary (the participant’s husband) did not predecease the insured. The “no surviving beneficiary” clause was not triggered. The policy did not provide for distribution under the current facts. Thus, the proceeds had to go to the deceased mother’s estate.).
of the correct form or to correct execution of the wrong form. Although the Fourth Circuit in Singer said that, in fashioning federal common law, the “courts do not look to the law of a particular state,” the same circuit, in a later case, Phoenix Mutual Life Insurance Co. v. Adams, said that “federal courts may draw on state common law in shaping the applicable body of federal common law.” The court in Phoenix endorsed the following statement of federal common law of substantial compliance: “[A]n insured substantially complies with the change of beneficiary provisions of an ERISA life insurance policy when the insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.” Although Phoenix was a pre-Egelhoff case, the Fifth and Seventh Circuits have applied the Phoenix test in post-Egelhoff cases. Applying the Phoenix test, the Seventh Circuit found that an unsigned change-of-beneficiary form was valid on the ground that the failure to sign was a “careless error.”

The plan may expressly provide that a BDF is valid only if it complies in every respect with the plan’s requirements. Alternatively, the plan may set forth a substantial compliance standard. If the plan is silent, which standard applies? For an IRA or non-ERISA plan, the answer is found in state law. If the plan is an ERISA plan, state law is arguably preempted by ERISA, and the plan administrator may be given broad discretion by the plan. However, it would surely be preferable for the answer to be determined by resort to a well-established legal principle, rather than deciding on an ad hoc basis.

Under the UPC and many state laws, strict compliance with the procedural requirements of an insurer or plan sponsor is not always required. Instead, a court will apply a substantial compliance or harmless error standard, in order to effectuate the participant’s intent. In 2012, Professor Langbein wrote about the UPC’s harmless error rule:

In scholarly writing about the reformation doctrine and the

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462 Waggoner, supra note 331, at 1648-49 (citations omitted).
463 See UNIF. PROBATE CODE § 6-101(1) (“This subsection includes a written provision that: (1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent’s death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later . . . .”).
464 For an example of a situation where insistence on strict compliance produced an unfair result, see Schmidt v. Sheet Metal Workers’ Nat’l Pension Fund, 128 F.3d 541, 546 (7th Cir. 1997); Aetna Life Ins. Co. v. Wise, 184 F.3d 660, 663 (7th Cir. 1999). Case law on substantial compliance with insurance policy change of beneficiary requirements is collected in 78 A.L.R.3d 466 (1977) and 19 A.L.R.2d 5 (1951).
harmless error rule, Professor Waggoner and I have emphasized that invalidating a genuinely intended transfer on account of an innocuous formal defect works unjust enrichment. The person who was meant to take does not, and a person who was not meant to take gets the resulting windfall. Thus, the old rules refusing to reform a will and refusing to excuse trivial execution errors are in tension not only with the core value of the law of donative transfers, enforcing intent, but also with the core principle of the law of restitution, preventing unjust enrichment.465

In ERISA plan beneficiary designation cases, there are two possibilities for applying the substantial compliance doctrine: as a matter of state law, on the theory that designating a beneficiary is sufficiently remote from the purposes of ERISA to escape ERISA preemption; or, if preemption does defeat state law, then as a matter of federal common law. There is support for both positions.466

Phoenix adopted the view that the substantial compliance doctrine must take the form of federal common law.467 The court held that a participant’s change in life insurance designation was effective even though the designation form was incomplete.468 The district court held that ERISA preempted South Carolina’s substantial compliance law and that a federal common law doctrine of substantial compliance applied.469 Because the court found that the participant intended to change his beneficiary from Jack to Rosita, and that he took reasonable steps to do so, the court awarded the proceeds to Rosita.470 The appeals court affirmed the judgment.471 The court rejected the application of a state common law substantial compliance doctrine, and instead adopted the following federal doctrine from the lower court decision: there is substantial compliance if “the insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.”472

In Johnson, the participant received a letter from the plan accepting the beneficiary change even though the form checked off the wrong insurance plan, referred to his divorced wife as a separated wife and used his mother’s address as

465 Langbein, Major Reforms, supra note 46, at 9-10 (citations omitted).
467 Phoenix, 30 F.3d at 559–60.
468 See id. at 567.
469 Id. at 556.
470 Id.
471 Id.
472 Phoenix, 30 F.3d at 564. See also Feuer, supra note 388, at 1023.
his address. The Seventh Circuit treated *Egelhoff* as controlling on the question of whether ERISA preempted state substantial compliance law. However, both in that case and in *Davis*, the court applied the substantial compliance doctrine as federal common law.

Even where the substantial compliance doctrine is recognized as federal common law, there will be cases where the evidence of the participant’s intent is held to be too weak to satisfy the requirements of the doctrine. In *Giacobbe*, the insured, under an ERISA plan, attempted to change the beneficiary designation from his spouse to his parents and brother, but neglected to supply their Social Security numbers, as required by the form. The court refused to find substantial compliance, reasoning that the “[d]ecedent had the opportunity and ability to fully complete the change of beneficiary form yet he failed to do so.”

Plan documents, like insurance policies, generally require delivery of a beneficiary designation to the appropriate person (typically the plan administrator or the employer) in order for it to be effective. In several cases, courts have held that the institution can waive compliance with its procedural requirements so that, in some of the cases, the benefits passed under the decedent’s will rather than under the beneficiary designation. The test applied by the courts is a facts and circumstances test, so this introduces uncertainty and increases the risk of litigation.

One witness told the ERISA Advisory Council that between fifteen percent and forty percent of all beneficiary designations fail due to mathematical errors, failure to sign, or failure to date. Requiring minimum contact information for beneficiary designations would be very helpful in identifying a beneficiary or determining whether a beneficiary predeceased the participant. That witness also suggests that requested safe harbor standards provide a life event checklist to all plan participants, whether requested or not, that would replace previous beneficiary directions if completed properly and returned to the plan.

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474 *Id.* at 566.
475 See *id.* at 564-65; *Davis v. Combes*, 294 F.3d 931, 941 (7th Cir. 2002).
478 *Id.* at *8.
481 *Id.*
482 *Id.*
Another witness said that some, but not all, multiemployer plans responded in a survey that they would accept a beneficiary designation as long as it was received before the participant’s death, provided the beneficiary’s name was clearly stated and the form was signed by the participant.\textsuperscript{483} She said that other plans refused to honor a beneficiary designation if the form was incomplete or if it contained errors or had omissions.\textsuperscript{484} To avoid these issues, she testified that many of the plans reviewed the designation form when submitted to ensure accuracy and proper completion while others reviewed the form at retirement or other termination of employment.\textsuperscript{485}

A third witness confirmed, “the need for plan documents to define ‘substantial compliance’ with plan provisions regarding beneficiary designations (signature, relationship, date, etc.), - in case the designation is incomplete or contains inconsistent information.”\textsuperscript{486}

In 1991, Dennis Hall submitted a beneficiary designation form to MetLife, naming his son as the beneficiary.\textsuperscript{487} In 2010, he completed and signed, but did not submit, a form naming his wife as the sole beneficiary.\textsuperscript{488} In January 2011, he executed a will providing that “[a]ny and all life insurance and benefits shall be distributed to [his wife] Jane Marie Hall.”\textsuperscript{489} He died later that day, without submitting an updated beneficiary designation form to MetLife.\textsuperscript{490} After his death, MetLife distributed the proceeds to his son, on the ground that the 1991 beneficiary designation was the most recent valid document naming a beneficiary, as the plan explicitly provided that beneficiary designation forms must be submitted to MetLife within thirty days of signature.\textsuperscript{491} The Eighth Circuit stated that, in situations where an ERISA plan administrator has discretion to interpret the terms of the plan, the substantial compliance doctrine does not impede a plan administrator from requiring strict compliance with the terms of the plan.\textsuperscript{492} “MetLife reasonably determined that the will was inadequate to effect a change in beneficiary.”\textsuperscript{493} The will “did not expressly address the distribution of assets that were not part of the estate.”\textsuperscript{494}

While the substantial compliance doctrine may be appropriate in some situations, “the doctrine does not operate to interfere with discretion granted to a plan

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{483} Id. at app. A-10-11.
  \item\textsuperscript{484} Id.
  \item\textsuperscript{485} ADVISORY COUNCIL REPORT, supra note 70, at app. A-10-11.
  \item\textsuperscript{486} Id. at app. A-13.
  \item\textsuperscript{487} Hall v. Metro. Life Ins. Co., 750 F.3d 995, 996 (8th Cir. 2014).
  \item\textsuperscript{488} Id.
  \item\textsuperscript{489} Id. at 996-97.
  \item\textsuperscript{490} Id. at 997.
  \item\textsuperscript{491} Id.
  \item\textsuperscript{492} Id. at 997-98.
  \item\textsuperscript{493} Id. at 998.
  \item\textsuperscript{494} Id.
\end{itemize}
\end{footnotesize}
administrator by an ERISA plan.” 495 The fact that “a court may decide as a matter of common law to excuse technical non-compliance with the terms of an ERISA plan does not mean that an administrator with discretion under an ERISA plan is forbidden to enforce strict compliance with plan requirements.”496 “In exercising its discretion, an administrator might choose to excuse technical errors in beneficiary-designation forms . . . or it might elect to enforce strictly the terms of the plan.”497 “MetLife reasonably exercised its discretion in rejecting [the will and the November 2010 beneficiary form.”498 “[A]llowing an administrator to require technical compliance with policy provisions protects the administrator from ‘paying the wrong person and being forced to pay twice.’”499

In Ruiz, Ms. Rizo properly named her nieces and nephews as her beneficiaries in 2008.500 In 2011, when she no longer worked for the company, she called the employer and the employer told her that, because she was not an active employee, she could write a letter to update her beneficiary designation.501 Alternatively, she could submit new Beneficiary Designation Cards.502 Following these oral instructions, she submitted a dated and signed letter including all of the information mentioned to her and naming her friend, Arlene Ruiz, as her beneficiary.503 However, she also submitted new Beneficiary Designation Cards.504 Instead of dating and signing the cards, Ms. Rizo wrote “‘as stated in letter. ‘”505 Ms. Rizo died the day after Publix received the letter and cards.506

The Plans paid the death benefits to the niece and nephew, in accordance with the 2008 designations.507 When Ms. Ruiz filed a claim for the benefits, the Plans denied the claim because properly completed Beneficiary Designation Cards, naming her as the beneficiary, were not filed.508 The denial referenced the summary plan descriptions’ language about how to make a beneficiary designation, including a requirement that the participant signed the card.509 Ms. Ruiz sued the Plan, claiming that the letter was sufficient.510 The

495 Id. at 1000.
496 Id.
497 Hall, 750 F.3d at 1000.
498 Id.
499 Id.
501 Id. at 1296.
502 Id.
503 Id.
504 Id.
505 Ruiz, 248 F.Supp. at 1296-97 (citation omitted).
506 Id. at 1296.
507 Id.
508 Id. at 1297.
509 Id.
510 Ruiz, 248 F.Supp. at 1297.
court rejected her claim, and concluded that the niece and nephew were the correct beneficiaries. Using the *Kennedy* opinion as a guide, the court concluded that it does not matter if a participant substantially complies with designation procedures. Instead, a designation will not be changed unless the plan’s specific requirements are precisely followed.

In *Reiman*, the participant had designated his mother as the beneficiary of his retirement account in 1991. He later signed an undated form designating his fiancée as his beneficiary. The court awarded the benefits to the fiancée, finding that the form bearing her name was in substantial compliance with the plan’s requirements for designating a beneficiary.

### 9.9 Harmless Error

Under the Restatement, “[a] harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.” The harmless error rule also “applies to the creation, revocation, or amendment of a will substitute, including the designation or change of the beneficiary.”

“The purpose of the statutory formalities... is to determine whether the decedent adopted the document as his or her will. The formalities are meant to facilitate this intent-serving purpose, not to be ends in themselves.”

The trend toward excusing harmless errors is based on a growing acceptance of the broader principle that mistake, whether in execution or in expression, should not be allowed to defeat intention nor to work unjust enrichment... The purposive question is whether the evidence regarding the overall conduct of the testator establishes, in a clear and convincing manner, that the testator adopted the document as his or her will. In applying this standard to particular cases, a hierarchy of sorts has been found to emerge among the formalities. The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless under the principle of this Restatement. Only a harmless error in executing a document can be excused under this Restatement. Among the defects in execution that

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511 *Id.* at 1304.
512 *Id.* at 1302–04.
514 *Id.* at *1, *8.
515 *Id.* at *10-11.
516 *Restatement (Third) of Prop.: Wills and Donative Transfers* § 3.3.
517 *Id.* at § 7.2 cmt. d.
518 *Id.* at § 3.3 cmt. a.
can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will. A particularly attractive case, for excusing the lack of the testator’s signature is a crossed will case, in which, by mistake, a wife signs her husband’s will and the husband signs his wife’s will. Because attestation makes a more modest contribution to the purpose of the formalities, defects in compliance with attestation procedures are more easily excused.\footnote{Id. at § 3.3 cmt. b.}

The Uniform Probate Code Section 2-503 has a similar rule:

\begin{quote}
[a]lthough a document or writing added upon a document was not executed in compliance with [the statutory formalities for executing a will], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent’s will, or (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.\footnote{UNIF. PROBATE CODE § 2-503.}
\end{quote}

In \textit{Schmidt}, the court refused to apply a harmless error rule to an attempt to change the beneficiary of a retirement plan.\footnote{Schmidt v. Sheet Metal Workers’ Nat’l Pension Fund, 128 F.3d 541, 546 (7th Cir. 1997).} The plan sent the wrong form to the participant.\footnote{Id. at 544.} The Seventh Circuit affirmed the district court’s decision that the plan was not estopped from requiring the correct form, because oral representations that contradict the written terms of a pension plan cannot be given effect.\footnote{Id. at 546.} The court also held that the son failed to show a breach of fiduciary duty because only the trustees of the plan, not the employee who made the error, owed a fiduciary duty to the participant.\footnote{Id. at 546-47.} The trustees did not make the misstatement, nor did the plaintiff show that the trustees had failed to exercise reasonable care in hiring and training her.\footnote{Id. at 548.} “Under the harmless-error rule of Comment \(d\), [the participant’s] intent would not have been defeated. \textit{Schmidt} was an ERISA case, but the harmless-error rule of Comment \(d\) could have been applied as federal common law.”\footnote{RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.2 n. 5.}
9.10 Can a BDF Be Superseded by a Later Will?

As Sterk and Leslie explain,

research reveals that accountholders, with surprising frequency, attempt to change account beneficiaries through wills or trusts, prenuptial agreements or divorce settlement agreements or decrees. Although these attempts are sometimes, but not always, successful with respect to IRAs, they almost always run afoul of ERISA’s plan documents rule with respect to 401(k) and 403(b) accounts.527

Most cases involving ERISA plans hold that the will and state testamentary law are preempted,528 on the basis that to allow a plan’s beneficiary designation provision to be overridden by state testamentary law would frustrate the congressional objective of preventing inconsistent state laws from regulating employee pension plans. This line of reasoning is consistent with the Supreme Court’s holdings in Egelhoff529 and Kennedy.530

In one case that did not cite ERISA, even though it appears to involve an ERISA welfare plan, the named beneficiary was the insured’s former spouse, who divorced him when he contracted multiple sclerosis.531 She prevailed over the insured’s father, who was named in the will and who supported and cared for him through his long illness.532 Neither the divorce decree nor the property settlement mentioned the life insurance policy, but the settlement included a general release by the wife of any claim to the husband’s property.533 The court said that the paramount factor is the intent of the insured and that

[while the act or acts constituting substantial compliance may vary, they do not include general testamentary statements in a will. . . . In the instant case, there is no evidence that decedent made any attempt to change the beneficiary designation during the seven years between his separation from plaintiff and his death. Nor is there any record evidence that decedent was physically or mentally incapable of attempting to substantially comply with the requirements of the policy. In the absence of such evidence, the court is restrained from holding that it was the decedent’s stated intention that his father receive the

527 Sterk & Leslie, supra note 17, at 190-91.
528 See, e.g., MacLean v. Ford Motor Co., 831 F.2d 723, 728 (7th Cir. 1987).
529 See Egelhoff, 532 U.S. at 150-51.
530 See Kennedy, 555 U.S. at 302-04.
532 Id.
533 Id.
According to the Restatement:

When the financial intermediary or payor receives notice of the inconsistent beneficiary designation contained in the subsequent will before paying the beneficiary of record on the account, the financial intermediary or payor should pay the proceeds as directed under the will, notwithstanding the failure of the account owner to comply with the account term specifying account-specific procedures for revocation or alteration. If the financial intermediary or payor is uncertain about the priority or effectiveness of the attempted revocation or alteration by will, the financial intermediary or payor may discharge its responsibilities by interpleading and/or paying the proceeds into court.

If the institution pays the named beneficiary before learning of the later will, its good faith reliance would be a defense to a claim under the will.

In such circumstances, that intended beneficiary is remitted to an action in restitution against the account-designated beneficiary who received the payment. . . . The principles set forth in this Comment also apply to circumstances in which the account owner attempts to modify the beneficiary designation by a subsequent instrument other than a validly executed will. Because such an instrument does not comply with the formalities required for a will to assure that the document represents the owner’s donative intent . . . the proponent of such an instrument bears the burden of proving by clear and convincing evidence that the instrument reflects the account owner’s donative intent. The party alleging revocation bears the burden of proving that an asserted revocation actually referred to the will substitute in question. Thus, a mere residuary clause in a later will or a comparable provision in a later revocable inter vivos trust does not revoke an earlier beneficiary designation in a will substitute.

According to Sterk and Leslie:

[u]ndoubtedly, many participants do not worry about these forms because they expect that they will subsequently prepare a

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534 Id. at 560-61.
535 RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.2 cmt. e.
536 Id. (citations omitted).
will or revocable trust that disposes of all of their assets, including assets in any retirement plan. Others assume that they can change the beneficiary designation through other documents, such as prenuptial agreements or divorce decrees that incorporate property settlement agreements. . . . [ERISA] prohibits accountholders from changing a beneficiary designation in any manner other than by executing a change of beneficiary form. These rules are designed to protect the financial institution holding plan assets from liability for distributing the assets to the beneficiary designated by the participant. They are also designed, at least in theory, to make it easier for the designated beneficiaries to receive the assets as quickly as possible. But the result is that the assets often pass in accordance with a beneficiary designation that might have been executed decades earlier; neither the sponsor nor a court is entitled to consider explicit language in other documents, such as the accountholder’s will or revocable trust, that directs a different distribution of the account.537

9.11 Incorporation of State Law Rules into the Plan

If it were feasible, an effective solution would be for the plan administrator to update the plan documents to include desired state law rules (e.g., revocation-by-divorce, rules as to survivorship, and rules of construction). The rules could be included in the plan itself or in plan procedures adopted by the administrator pursuant to authority conferred by the plan. The plan administrator is then following plan terms rather than the independent requirements of state law.

One commentator at the ERISA Advisory Council observed:

Mr. Richter recommended dealing with some of these issues by plan design – that is, by writing plan provisions to require automatic revocation of designation upon divorce, automatic revocation of designation if a beneficiary murders the participant; and setting forth the rules for dealing with simultaneous deaths. Mr. Richter did stress that if a plan were to include such provisions that the plan should be very specific as to the processes that the plan would use. . . . [Ms. Blanton] stated that such provisions were clearer than relying on state law, provided certainty and uniformity and resulted in far fewer beneficiary disputes than would occur without such default rules . . . . Witnesses generally agreed that, although plans did not have a significant number of claims where questions of

537 Sterk & Leslie, supra note 17, at 168 (citation omitted).
ERISA preemption and state law arose, the preemption issues that did arise could be resolved through plan drafting. The witnesses also generally agreed that plans should consider whether these types of provisions should be incorporated into their plan provisions based on, among other factors, the workforce, plan industry and plan size.\footnote{538}{ADVISORY COUNCIL REPORT, supra note 70, at app. A-12-13.}

In her testimony to the ERISA Advisory Council, Vicki Blanton, on behalf of the American Benefits Council stated:

At one point in my career, I worked on governmental plans and at the time, a State law nullified the beneficiary designation of a spouse in the event of a divorce. This nullification provided a lot of certainty and resulted in far fewer beneficiary disputes than would occur without this “default” rule. Other State laws prohibit a beneficiary from collecting the benefit in the event they were responsible for the death of the participant (“slayer statutes”). Still other State laws dictate the hierarchy that applies in the event of the simultaneous death of the participant and the beneficiary. These types of defaults can be very helpful in plan administration and helps [sic] eliminate many of the disputes that would otherwise arise. We think it would be helpful for the Department of Labor (the “Department”) to publish guidance that would allow for some defaults, but allow the defaults to be overridden by plan language.\footnote{539}{Blanton, supra note 369, at 2.}

Realistically, few administrators are likely to take the opportunity to incorporate state law rules into the plan, so guidance from the DOL is a more likely option. The fear is that the DOL guidance would be unduly restrictive.

\section{10. OTHER DEFECTIVE, INCOMPLETE, AND AMBIGUOUS BENEFICIARY DESIGNATIONS}

\subsection{10.1 Determining the Participant’s Intent}

In 2011, seventy-one percent of American households headed by a person born during the 1950s held assets in a defined-contribution plan, an IRA, or both. For many in this group, most of whom prepare beneficiary designation forms without the advice of counsel, the inadequacy of the current beneficiary designation system is a disaster waiting to happen.\footnote{540}{Sterk & Leslie, supra note 17, at 169 (citing INV. CO. INST., 2012 INVESTMENT COMPANY FACT BOOK: A REVIEW OF TRENDS AND ACTIVITIES IN THE U.S. INVESTMENT COMPANY INDUSTRY, 108 (52d ed. 2012), https://www.ici.org/pdf/2012_factbook.pdf.) The percentages for households headed by a}
We have examined the beneficiary designation forms for ten of the largest IRA providers in the United States and for a selection of firms offering 401(k) plans to their employees. Our research suggests that an intelligent and careful nonlawyer reading these forms would have difficulty understanding the potential impact they could have on the distribution of account assets.\footnote{Id. at 201-02 (citations omitted).}

According to the Restatement: “the controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is given effect to the maximum extent allowed by law.”\footnote{Restatement (Third) of Prop.: Wills and Donative Transfers § 10.1.} Additionally, “[i]n seeking to determine the donor’s intention, all relevant evidence, whether direct or circumstantial, may be considered, including the text of the donative document and relevant extrinsic evidence.”\footnote{Id. at § 10.2.} Further, “[t]he text of a donative document must be read in its entirety. Each portion, whether it be a word, phrase, clause, sentence, paragraph, article, or some other portion, is connected to a whole. The donor is presumed to intend that the various portions complement or modify each other.”\footnote{Id. at cmt. b.}

The Supreme Court in \textit{Kennedy} took a very different approach, probably without realizing the full implications:

[The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: “simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what’s coming quickly, without the folderol essential under less-certain rules.” And the cost of less certain rules would be too plain. Plan administrators would be forced “to examine a multitude of external documents that might purport to affect the dispensation of benefits,” . . . and be drawn into litigation like this over the meaning and enforceability of purported waivers. The Estate’s suggestion that a plan administrator could resolve these sorts of disputes through interpleader actions merely restates the problem with the Estate’s position: it would destroy a plan administrator’s ability to look at the plan documents and records conforming to them to get clear distribution

\footnote{Inv. Co. Inst., 2012 Investment Company Fact Book 109 fig.7.4.).}
This approach resembles the traditional, rigidly formalistic approach to determining the validity of wills, and suffers from the same defects. Straightforward administration is a valid goal, but is it more important than trying to effectuate the participant’s intent as to who should receive his or her pension benefits? The Supreme Court’s approach would be less troubling if it were limited to unambiguous BDFs. If the BDF is ambiguous, the Kennedy approach gives the fiduciaries no help as to what they should do. “In reaching this result, the Court recognized that it was frustrating the employee’s clear intent. But the Court interpreted ERISA as prioritizing administrative efficiency over those concerns.”

10.2 Who Are Children?

Under the UPC, a class gift that uses a term of relationship (such as children or issue) to identify an individual’s descendants generally includes a child of assisted reproduction, a gestational child, an adoptee and a child born to parents who are not married to each other, and their respective descendants, if appropriate, in accordance with the rules for intestate succession regarding parent-child relationships. The term generally does not include a stepchild.

In Herring, Hunter’s spouse predeceased him. He had no surviving parents and no biological or legally adopted children, so the plan administrator distributed the benefits, which totaled more than $300,000, to Hunter’s siblings. Citing their close relationship with Hunter, the fact that Hunter left his estate to them, and the fact that Hunter referred to them as his “beloved sons” in his will, his stepsons claimed that they were entitled to the benefits under the Texas doctrine of “equitable adoption.”

The plan administrator concluded that

the term “children” meant biological or legally adopted children, based on (1) the need for a uniform standard for determining who were “children” under the Plan; (2) the administrative need for a practical and objective mechanism to avoid potentially burdensome and expensive investigations into a claimant’s status; and (3) her conclusion that the exclusion of stepchildren was most likely to align with the expectations of

545 Kennedy, 555 U.S. at 301 (citations omitted).
546 Sterk & Leslie, supra note 17, at 191 (citation omitted).
547 UNIF. PROBATE CODE § 2-705(b).
548 Herring v. Campbell, 690 F.3d 413, 415 (5th Cir. 2012).
549 Id.
550 Id.
the majority of plan participants.551

The Court of Appeals stated: “[n]othing in the Plan or ERISA required the Plan Administrator to incorporate the concept of equitable adoption into the Plan definition of ‘children.’”552

10.3 Reforming Donative Documents to Correct Mistakes

According to the Restatement:

[a] donative document, though unambiguous, may be reformed to conform the text to the donor’s intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor’s intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.553

The UPC includes a similar provision:

[i]he court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor’s intention if it is proved by clear and convincing evidence what the transferor’s intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.554

10.4 Beneficiary Who Predeceases the Plan Participant

Under the traditional law of wills, a bequest to a beneficiary who died before the testator would lapse.555 State legislatures concluded that this often was not what the testator intended, where the beneficiary was a close relative of the testator, and enacted anti-lapse statutes, which prevent the gift from lapsing unless the will expresses a contrary intent.556 The statutes originally applied only to wills, but the UPC and many states have now extended them to will substitutes such as BDFs.557

551 Id. at 416.
552 Id.
553 RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1.
554 UNIF. PROBATE CODE § 2-805.
555 DUKEMINIER & SITKOFF, supra note 13, at 351.
556 See id. at 357 (“The theory behind the antilapse statutes is one of presumed intent. The idea is that, for certain predeceasing devisees, the testator would prefer a substitute gift to the devisee’s descendants rather than for the gift to pass in accordance with the common law of lapse.”).
557 See UNIF. PROBATE CODE § 2-706 (a)(1) (applies anti-lapse doctrine to “beneficiary designations”
Assume that the plan participant signs a BDF and a will on the same day. In each case, she names as beneficiaries “my children, in equal shares.” Assume further that neither the will nor the BDF specifically provides for the possibility that a child might predecease her. After the will and BDF are signed, a child dies, leaving a widow and two children (the participant’s grandchildren). The participant then dies. Under the UPC and most state laws, the bequest to the deceased child under the will would not lapse, but would pass to the deceased child’s descendants, the participant’s grandchildren. The UPC appears to apply the same rule to the plan benefits, but its anti-lapse provisions do not apply if the document names an alternate beneficiary to take if a primary beneficiary dies. Under a typical BDF the benefits would be payable to the surviving primary beneficiaries, the participant’s living children. ERISA would preempt application of an anti-lapse principle if the plan were subject to ERISA.

The comment to [section 2-706] provides that a printed provision in a custodial agreement constitutes an alternate devise. Most beneficiary designation forms provide that if one primary beneficiary predeceases the accountholder, that beneficiary’s share will be distributed to other primary beneficiaries, and that provision will always control. In most cases, therefore, UPC § 2-706(b) will not create substitute beneficiaries for IRA accounts unless the account holder takes affirmative steps to name substitute beneficiaries.

The UPC provides the following example:

G is the owner of a life-insurance policy. When the policy was taken out, G was married to S; G and S had two young children, A and B. G died 45 years after the policy was taken out. S predeceased G, A survived G by 120 hours and B predeceased G leaving three children (X, Y, and Z) who survived G by 120 hours. G’s policy names S as the primary beneficiary of the policy, but because S predeceased G, the secondary (contingent) beneficiary designation became operative. The secondary (contingent) beneficiary designation of G’s policy states: “equally to the then living children born of the marriage of G and S.” The printed terms of G’s policy provide: “If two or more persons are designated as beneficiary, the beneficiary will be the designated person or persons who survive the Insured, and if more than one survive, they will share equally.” Solution:

under which the beneficiary must survive the decedent). “Beneficiary designation’ refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.” UNIF. PROBATE CODE § 1-201(4).

558 UNIF. PROBATE CODE § 2-706(b)(4).
559 Sterk & Leslie, supra note 17, at 184 (citation omitted).
The printed clause constitutes an “alternative beneficiary designation” for purposes of subsection (b)(4), which supersedes the substitute gift to B’s descendants created by subsection (b)(2). A is entitled to all of the proceeds of the policy.560

10.5 Minimizing the Risk of an Outdated BDF

Like a will, a BDF may be completed many years before it takes effect on the individual’s death. It may no longer represent the individual’s actual intent; however, the best evidence of that intent is generally assumed to be the most recent BDF (like the most recent will).

It is good practice for the plan fiduciaries to notify plan participants on a regular basis as to who their beneficiaries are, not only under retirement plans but also under group term life insurance plans. Indeed, the need may be even more acute under an insurance plan, as the employee typically does not pay for the coverage and does not receive regular statements. According to a recent study:

108 million Americans have life insurance coverage through their workplace, compared with 102 million covered by individual life insurance. This is the first time the number of people covered by workplace life insurance has surpassed those covered by individual since LIMRA has been tracking U.S. life insurance ownership in 1960.561

One way of reminding participants to keep their BDFs up to date is during the annual enrollment process; the enrollment system could list the current beneficiaries and ask the participant to indicate whether he or she wishes to change any of them.

Ronald Dean, testifying on behalf of the National Employment Lawyers Association, stated that ensuring that participants maintain up-to-date beneficiary designations is purely a matter of personal responsibility. He noted that often the most diligent and careful individuals fail to maintain current beneficiary designations. He also stated that in many divorce cases, family law attorneys fail to remind their clients about changing beneficiary designations, and when the lawyers do so, the beneficiary designation update is included on a long list of

560 UNIF. PROBATE CODE § 2-706, cmt. ex. 1.
“things you should do after your divorce.” He stated that, unfortunately, such advice is often overlooked or forgotten by participants. Mr. Dean noted that it would be beneficial if DOL, plan sponsors and service providers provided educational information and reminders for participants regarding the need to complete and update beneficiary forms.562

Unfortunately, many people fail to keep documents updated;

With surprising frequency, people neglect to alter their estate-planning documents after experiencing major life changes. When a decedent neglects to change her will, the results need not be catastrophic; wills law provide a number of doctrinal rules that enable a court to distribute probate assets consistently with the decedent’s probable intent. These doctrines, however, do not uniformly apply to nonprobate assets such as retirement accounts.563

§ 11. SUPPLEMENTING ERISA WITH FEDERAL COMMON LAW

The Supreme Court has stated that gaps in ERISA relating to contract and tort law must be filled by federal common law, not by the law of an individual state.564 However, in 1993 the Court cautioned that “[t]he authority of courts to develop a ‘federal common-law’ under ERISA is not the authority to revise the text of the statute.”565 Courts must therefore limit federal common law to cases where it is necessary to “fill true gaps in the statute—when the creation of a subsidiary or collateral rule is necessary to carry out an explicit congressional directive. . . .”566

One major difficulty is identifying what the federal common law is on a particular question. Thus, for example, with respect to questions concerning the validity of a BDF, “[t]he problem with mandating the use of federal common law is that there is no preexisting body of federal common law that deals with these questions. As a result, the federal courts are forced to fashion federal common law from scratch . . .”.567

562 ADVISORY COUNCIL REPORT, supra note 70, at 7.
563 Sterk & Leslie, supra note 17, at 178.
564 See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (“The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.”); Firestone, 489 U.S. at 110.
567 Waggoner, supra note 331, at 1646-47.
Without creating federal common law, the courts could not interpret the meaning of any ERISA plan. The ability to resort to federal common law does not ultimately rely on Congressional intent:

"The second broad category of cases in which federal common law presently operates consists of those instances in which federal courts are called upon to create law to fill the interstices of a pervasively federal framework. The need for interstitial lawmaking arises as a consequence of the practical reality that it is impossible for Congress to draft any statute in sufficient detail so that it is completely comprehensive and comprehensible."

"The process of filling interstices . . . is at some fundamental level an inquiry into congressional intent . . . . But the enterprise of ascertaining this intent is somewhat artificial because the issues raised in disputes over federal common law competence often are matters that Congress simply did not contemplate or, for whatever reason, chose to ignore."

According to one 2001 article, "To date, there seem to be more cases dealing with the ERISA common law than with the actual statutory language. At last look, there are over two thousand federal decisions discussing some aspect of the ERISA common law." Another article points out that ERISA has a rich history of judicially-created federal common law. Examples where the federal courts have incorporated state law principles or doctrines as ERISA federal common law include the contract interpretation doctrine of contra proferentem, state laws establishing statutes of limitations, state law principles governing corporations, common law trust principles, and common law remedies available in equity.

How should federal courts act if, as is often the case, state law varies from one jurisdiction to another? The Seventh Circuit stated: "We recognize . . . the need to ensure uniformity in ERISA jurisprudence, and of the principle that 'federal common law should be consistent across the circuits.'" The court did

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569 Id. See also Bruce Khula, ERISA Plan Language Trumps Federal Common Law, SIXTH CIR. APP. BLOG (Feb. 16, 2011), http://www.sixthcircuitappellateblog.com/recent-cases/erisa-plan-language-trumps-federal-common-law/ (discussing how "the Sixth Circuit ruled that the language of ERISA and the insurance policy must be followed before a court may resort to the application of federal common law").
572 Johnson, 297 F.3d at 567.
not turn the Illinois case law on substantial compliance into federal common law.

Rather, the judges took the essence of substantial compliance and made it a uniform doctrine. So what might be the source, where necessary, of a uniform federal common law of succession to property? Two likely sources of law are the Restatement Third and the UPC. In fact, the idea of converting the law of the Restatement and the UPC into federal common law for the purpose of interpreting ERISA has a certain elegance and has been the subject of considerable discussion.573

Courts have held that they can look to federal common law when determining the beneficiary entitled to proceeds under an ERISA plan.574 In Manning, a case decided before Egelhoff but agreeing with its conclusion that ERISA preempts the divorce revocation statutes, the Fifth Circuit noted, “[t]he more difficult issue is whether, having established that the state law is preempted, the federal law governing the resolution of this and similar cases may be reasonably drawn from the text of ERISA itself, or must instead be developed as a matter of federal common law.”575

According to a 2011 decision of the Sixth Circuit, a court must follow the language of ERISA and the insurance policy before a court may resort to federal common law. The court observed, “[w]hile courts do sometimes resort to federal common law to identify beneficiaries under ERISA plans, the text of the plan is the much preferred source.”576

The Supreme Court has not had the opportunity to confirm the use of federal common law on questions of initial validity, but it is difficult to imagine that the Court would reject the application of such law in cases of mental incapacity or undue influence. Invalidity due to mental capacity or undue influence is universal law. It is hoped that the Court would also confirm the use of federal common law of substantial compliance in

573 Gallanis, supra note 1, at 195 (citation omitted). See, e.g., Lebolt, supra note 318, at 30 (“Creating federal common law in this manner produces a superior outcome to those reached by courts that have faced this predicament, because it (1) is intent-enforcing, furthering one of the primary purposes of ERISA itself the protection of the interests of plan participants and their rightful beneficiaries; and (2) provides uniformity, thereby effectuating the overarching purpose of ERISA preemption.”).

574 See Manning, 212 F.3d at 874; Cliff v. Cliff, 210 F.3d 268, 270 (5th Cir. 2000); Rhoades v. Casey, 196 F.3d 592, 598 (5th Cir. 1999); Hill v. AT&T Corp., 125 F.3d 646, 648 (8th Cir.1997); Estate of Altobelli v. Int’l Bus. Machs. Corp., 77 F.3d 78, 80 (4th Cir. 1996); Mohamed v. Kerr, 53 F.3d 911, 913 (8th Cir. 1995); Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1325 (5th Cir. 1994); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 278 (7th Cir. 1990) (en banc); Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir. 1989). See also Melton v. Melton, 324 F.3d 941, 945 (7th Cir. 2003) (“ERISA is silent on the issue of what constitutes a valid waiver of interest and we therefore turned to federal common law and Illinois state law to fill the gap.”).

575 Manning, 212 F.3d at 870.

cases of defective execution. Nearly all states follow such a doctrine for defective execution of life insurance beneficiary designations. Because the Court has not spoken on issues of initial validity, it is even possible that the Court would hold that state laws on these questions are not preempted in the first place, on the ground that state laws on mental capacity and undue influence—and perhaps substantial compliance as well—do not conflict with Congress’ scheme in enacting ERISA, FEGLIA, and similar federal statutes.577

§ 12. THE ESTATE AS BENEFICIARY

Retirement plan benefits are nonprobate assets, so they are not generally subject to probate (if the participant left a will) or to state law intestacy rules (if the participant dies without a will, or if the will did not effectively dispose of all of the assets). However, the estate may become a beneficiary, either because the participant so designates or because it is the default beneficiary under the plan. If the estate is a beneficiary, the participant’s will or the laws of intestate succession distribute the benefits.

Mandating that the account holder’s estate be the default beneficiary would often effectuate the account holder’s intent, and would also enhance coordination of the account holder’s nonprobate assets.578 However, there would be possible drawbacks.579

577 Waggoner, supra note 331, at 1649 (citations omitted).
578 Sterk & Leslie, supra note 17, at 216-17 (citations omitted).

Aside from effectuating the decedent’s wishes, making the estate the default beneficiary would generate other, less obvious, advantages: It would enhance the personal representative’s ability to represent the decedent’s interests and coordinate the estate’s assets and liabilities, including tax liabilities. As a third party beneficiary to the contract between the account holder and the account custodian, the default beneficiary would enjoy standing to challenge a suspect beneficiary designation. The personal representative, as the embodiment of the deceased account holder, is in the best position to advance such a challenge. If there were otherwise any doubt about that standing, a statute could expressly confer standing on the personal representative as default designee. Moreover, in those cases where the default designation becomes effective, the personal representative would be in a position to allocate the appropriate share of estate taxes to the various beneficiaries of the account holder’s gross estate.

Id.

579 Id. at 213. (“One could address the problems with retirement-plan designations by treating IRA, 401(k), and 403(b) plan assets as probate assets, requiring all of the accounts to pass through the account holder’s estate. That solution, however, would throw out the baby with the bathwater. Accountholders and their beneficiaries derive significant benefits from the treatment of retirement accounts as nonprobate assets: quicker distribution and potentially lower costs. Reform of the system need not sacrifice these benefits.”). See Melanie B. Leslie & Stewart E. Sterk, Revisiting the Revolution: Reintegrating the Wealth Transmission System, 56 B.C. L. REV. 61, 116-19 (2015), for some suggested changes.
First, the participant may wish to avoid the delay and publicity of probate. Second, a participant may wish to postpone the payment of plan benefits and thereby maximize the income tax deferral provided by tax-favored retirement accounts. Under the minimum distribution rules for tax-qualified plans and IRAs, benefit payments after the participant’s death can be made over an extended period (e.g., the life expectancy of a “designated beneficiary”) if the beneficiary is one or more individuals or a qualifying trust. For no very coherent reason, if the participant’s estate is the beneficiary, it must receive all distributions by the end of the calendar year, which includes the fifth anniversary of the participant’s death. Third, the decedent’s probate estate is liable for the payment of claims against the estate. Retirement plan assets, unless payable to the estate, may be protected against creditor claims.

Despite the practical and conceptual difficulties, not least the preference of each financial institution to continue using its own forms and procedures, the increasing value of nonprobate assets in general, and retirement plan assets in particular, there is the importance of developing a mechanism for helping plan participants, particularly those without access to expert advice, to ensure that their beneficiary designations are correct and well-coordinated.

§ 13. CONCLUSION

This article suggests that in many cases ERISA plan benefits are paid incorrectly following death or divorce. This is often due to lack of understanding or lack of care on the part of the plan participant, or lack of access to good advice. However, this is still a problem forty-three years after the enactment of ERISA and appears unlikely to improve any time soon. The article also suggests that the Supreme Court has exacerbated the problem by giving insufficient thought to the effects of preempting state laws in areas where the states, not the federal government, have the longstanding expertise.

Congress has shown little recent interest in amending ERISA, and few employers seem inclined to address the problems by including language in their plans. Accordingly, the best hope, as suggested by Professor Gallanis, is that the federal courts, including the Supreme Court, will begin to appreciate the undesirability of the current situation and to apply preemption and federal common law with a greater appreciation of the consequences of their decisions.

580 See I.R.C. § 401(a)(9).
581 See I.R.C. §§ 408(a)(3), 408A(c)(5).
582 Treas. Regs. §§ 1.401(a)(9)-4 Q&A (4)(b), Q&A (3) (only individuals or qualifying trusts may be designated beneficiaries; an estate may not be a designated beneficiary). See also Treas. Regs. §§ 1.401(a)(9)-4 Q&A (5)(a), Q&A (b)(1)-(3) (setting forth rules for qualifying trusts).
583 See, e.g., Elaine H. Gagliardi, Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers, 41 REAL PROP. PROB. & TR J. 819, 864 (2007) (“The law among states varies substantially regarding whether the state offers complete or partial protection for retirement plans.”).
584 See Gallanis, supra note 1, at 194.
WHAT SHOULD WE DO WITH NORMAN BATES?
PROPOSING REFORM TO THE UNIFORM PROBATE CODE TO ALLOW INHERITANCE IN CASES OF LEGAL INSanity
DECLAN J. MURRAY*

I. Introduction

The legal system in the United States of America contains a number of broadly accepted moral propositions, among these, the idea that it is unjust to allow one to profit from a wrongful act1 and the idea that it is unjust to punish a person to whom we cannot impose blame.2 These specific propositions are brought to bear in the form of laws related to unjust enrichment, specifically section 2-803 of the Uniform Probate Code (“UPC”)3 and the insanity defense.4

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1 See Carla Spivack, Killers Shouldn’t Inherit From Their Victims—Or Should They?, 48 GA. L. REV. 145, 161 (2013) (“The moral basis for Slayer Rules lies in the maxim that a wrongdoer may not benefit from his wrong.”).


3 See generally UNIF. PROBATE CODE § 2-803 (amended 2010) (Entitled “Effect of Homicide on Intestate Succession, Wills, Trusts, Joint Assets, Life Insurance, and Beneficiary Designations,” section 2-803 states that “[a]n individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to the decedent’s estate.”).

4 While this defense goes by a number of different names and may be more properly and compassionately referred to as a defense of not guilty by reason of mental disease or defect, see, e.g., WIS. STAT. § 971.06 (2017) (referring to the insanity defense as a plea of “[n]ot guilty by reason of mental disease or defect”), colloquial phrases like “insanity defense,” “insanity plea,” and “insane” have been used throughout this Note. This is for the sake of brevity, to encompass the wide range of differing phrases and terms used in
However, on occasion, these moral propositions come into conflict. The UPC is silent on what should occur when a legally insane person stands to inherit from someone they killed. This Note seeks to rectify this conflict by proposing that the UPC “slayer statute,” section 2-803, be amended to specifically allow inheritance in cases where a person kills while legally insane. Case law on this specific situation is sparse and statutory help is nearly nonexistent. This puts judges in the uncomfortable position of having to interpret and apply the law where none exists, essentially forcing them to “make a determination that the legislature should have made.” While concerns about killers inheriting from their victims are legitimate, the insanity exception is designed to be narrow, just as the insanity defense offers a narrow exception to criminal liability. This Note’s proposed amended statute would not open the door to inheritance to the conniving son or scheming wife, who has been the subject of many an Agatha Christie novel or episode of CSI: Crime Scene Investigation.

This Note will explore the interaction and conflict between legal insanity and slayer statutes through a number of sections: beginning with a discussion of the policy considerations behind slayer statutes and the insanity defense, followed by a discussion of how different courts have analyzed this issue, and concluding with the proposed language of the amended statute, as well as a discussion of its import. This proposition seeks to further the policy considerations underlying both the slayer statute and the insanity defense, as well as to provide a statute that is more conducive to uniform interpretation.

II. Policy Considerations Underlying Slayer Statutes and the Insanity Defense

A. Slayer Statutes

The vast majority of the fifty states—all except Maryland and New Hampshire—and Washington D.C. have some statute, generally known as a “slayer statute” or “slayer rule,” barring or limiting a killer’s ability to inherit property from his or her victim. Many of these statutes were adopted from the different jurisdictions and to delineate between the medical concept of mental illness and the legal concept of legal insanity.

5 See Slayer Statute, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining slayer statute as a “statute that prohibits a person’s killer from taking any part of the decedent’s estate through will or intestacy”).


7 Agatha Christie was a best-selling novelist and deemed “the Queen of Crime.” J.C. Bernthal, QUEERING AGATHA CHRISTIE: REVISITING THE GOLDEN AGE OF DETECTIVE FICTION 1 (2016). Her name has become synonymous with her crime fiction works. Id.


9 See ALA. CODE § 43-8-253 (2017); ALASKA STAT. § 13.12.803 (2017); ARIZ. REV. STAT. ANN. § 14-2803 (2017); ARK. CODE ANN. § 28-11-204 (2017); CAL. PROB. CODE §§ 250-258 (2017); COLO. REV. STAT. § 15-11-803 (2017); CONN. GEN. STAT. § 45a-447 (2017); DEL. CODE ANN. TIT. 12, § 2322
UPC slayer statute. While this Note is specifically concerned with changes to the UPC slayer statute, the principles underlying these changes can be applied in most jurisdictions. The relevant section of the UPC states that “[a]n individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to the decedent’s estate . . . .” Some states have more specific statutes than the UPC, but the general idea tends to be quite similar.

The purposes of these statutes are to protect the testator’s intent, to prevent one from profiting from his or her wrongful act, to further the orderly transition of property, and to “prevent crime through deterrent mechanisms, such as increasing the costs and decreasing the benefits of committing crime.”

The argument that a slayer statute protects the testator’s intent is a fairly simple one: when a person kills another person, regardless of the circumstances,
we can assume with some certainty that the victim no longer wishes for his or her killer to inherit his or her property.\(^{17}\) However, the situations at issue in this Note are cases where the killer is legally insane,\(^ {18}\) and the potential change in the testator’s intent is less clear. It is conceivable, in the case of a mentally ill child who kills his or her parent while in a delusional or psychotic state, that the parent may still want the child to inherit from them.\(^ {19}\) When faced with the possibility that the testator’s intent has changed, it would be safer to abide by the will, an official document of the testator’s intent,\(^ {20}\) rather than making a determination based on the belief that their intent may have changed.

The unjust enrichment justification—that slayer statutes seek to prevent a person from profiting from his or her wrongful act—is not persuasive in this instance. Unjust enrichment is not just a moral proposition, it also seeks to deter.\(^ {21}\) By removing the possibility of profiting from an unjust act, we also remove a potential motive for that unjust act. A person who is legally insane, by definition, is incapable of taking the deterrent purpose of a slayer statute into account, essentially negating the purpose altogether.\(^ {22}\) It could also be argued that, in the case of insanity, the same moral wrong is not implicated. The killer is a sick individual in need of treatment, not a greedy individual who cannot wait to get his or her hands on the inheritance.\(^ {23}\)

Another policy underlying slayer statutes is that a killing interrupts the orderly transfer of property.\(^ {24}\) This argument holds that slayer statutes protect the “rational property transfer law system,”\(^ {25}\) in addition to having a deterrent function and an intent protection function. Carla Spivack quotes Mary Louise Fellows’ argument that a slayer has “potentially interrupted the normal dispositions of property by interfering with ownership rights, donative freedom, and transfers conditioned on survivorship.”\(^ {26}\) However, as Spivack notes, “Fellows agrees with the majority of states that have restricted the application of Slayer Rules to killings that are felonious and intentional . . . .”\(^ {27}\) If the main concern is the orderly transfer of property then an unintentional killing would be just as disruptive as an intentional killing. The fact that the majority of states

\(^{17}\) See Spivack, supra note 1, at 160.

\(^{18}\) See infra Section II-C.

\(^{19}\) Spivack, supra note 1, at 160.

\(^{20}\) Will, BLACK’S LAW DICTIONARY (defining will as “[t]he legal expression of an individual’s wishes about the disposition of his or her property after death; esp., a document by which a person directs his or her estate to be distributed upon death”).

\(^{21}\) Seiver, supra note 6, at 387.

\(^{22}\) See infra notes 39-43.

\(^{23}\) But see Seiver, supra note 6, at 387 (Seiver argues that in instances where the killing is not motivated by greed, the same moral interest is implicated.).

\(^{24}\) See Spivack, supra note 1, at 163-65.

\(^{25}\) Id. at 164 (citation omitted).

\(^{26}\) Id. (quoting Mary Louise Fellows, The Slayer Rule: Not Solely a Matter of Equity, 71 IOWA L. REV. 489, 494 (1986)).

\(^{27}\) Id. at 164.
differentiate between unintentional and intentional killings indicates that moral and ethical concerns play a larger role in this jurisprudence. In fact, as Spivack notes, in the situations that are her primary concern—killings by abused or mentally ill children or spouses—the orderly transfer of property has already been disrupted. Allowing inheritance in these instances “does not create a windfall; rather, it declines to further disrupt the already violated norm.”

Finally, we come to the deterrent purpose of the slayer statute. It is a long-standing proposition in our laws that one should not profit from his or her wrongful act. This purpose is served by the slayer statute. Slayer statutes deter those who wish to use murder as a way of acquiring their inheritance by removing the incentive, specifically, by taking away that inheritance. The hope is that disinheriting those who kill will dissuade the evil family member willing to do anything to get his or her hands on grandma’s money from killing. Removing the potential reward aims to reduce the occurrence of the undesirable action. However, this deterrent purpose is less useful in the specific instances implicated by this Note. Those who are legally insane may have limitations in acting rationally, and therefore, may not be able to appreciate the deterrent purpose. A person who was going to kill his or her relative, only to stop when he or she realizes the potential loss of inheritance, would have a hard time meeting the definition of legal insanity. All legal insanity tests that are currently in use contain an element of an inability to control oneself or an inability to appreciate the wrongfulness of their criminal act. A person who is able to stop himself or herself from killing upon the consideration of a potential financial penalty would seem to be able to appreciate the consequences and wrongfulness of his or her action, to control that action, and to conform his or her conduct to the law. A person capable of such thoughts and considerations is unlikely to fit the legal definition of insanity, even if he or she suffers from some mental illness or infirmity.

B. The Insanity Defense

The verdict of not guilty by reason of mental disease or defect, more commonly called the insanity defense, has a long and controversial history in our legal system. The idea that the insane should not be punished in the same

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28 Id.
29 See Spivack, supra note 1, at 164-65.
30 Id. at 165.
31 While the unjust enrichment purpose and deterrent purpose may seem similar, there is an important distinction between them. The prevention of unjust enrichment is reactionary; it is meant to punish a person after they have committed their wrong act. The deterrent purpose, on the other hand, is proactive; it seeks to prevent the action before it occurs, through the threat of a reactionary and punitive sanction. While these purposes have to work in concert to be effective, they are distinctly separate.
32 See Spivack, supra note 1, at 161.
33 See infra notes 39-43.
34 Id.
35 Though the controversy surrounding the insanity defense is worth noting, it is not within the scope of
manner as the sane dates back to the Dooms of Alfred from the ninth century, and cries for its abolition are surely just as dated.

It is important to note that legal insanity is different from the layman’s idea of insanity. There are generally four tests for legal insanity currently in use: the McNaughten Rules, the Irresistible Impulse Test, the Substantial Capacity Test (also known as the Model Penal Code Test), and the Appreciation Test.

The McNaughten Rules states: “a person is not criminally responsible for an act when a mental disability prevented the person from knowing either (1) the nature and quality of the act or (2) whether the act was right or wrong.” The Irresistible Impulse Test applies when a person’s illness prevents them “from controlling potentially criminal conduct.” It is often combined with the McNaughten Rules. The Substantial Capacity Test applies when a person’s disease causes him or her to lack “substantial capacity either to appreciate the criminality of [his or her] conduct or to conform [his or her] conduct to the law.” Finally, the Appreciation Test requires “proof by clear and convincing evidence that at the time of the crime, the defendant suffered from a severe mental disease or defect preventing him or her from appreciating the wrongfulness of the conduct.” All of these tests require that those who invoke them be somehow unable to control their conduct, or unable to appreciate the wrongfulness of that conduct.

It should also be noted that the insanity defense is invoked much less frequently than many people think. Jonas Robitscher and Andrew Ky Haynes, in a 1982 article for the Emory Law Journal, cite a 1979 study that found that college students estimated 37% of people indicted for felonies in Wyoming plead insanity and 44% of those pleas were successful; in reality only 0.5% pled insanity, and only one of those pleas was successful. While the use of the insanity defense has become more common over time, the fact that its usage and success is much less common than the public perceives it to be is significant to this Note. See generally Robitscher, supra note 2, for a discussion of arguments both for and against retaining the insanity defense.

36 The Dooms of Alfred provide that “‘if a man be born dumb or deaf, so that he cannot acknowledge or confess his offenses,’ his father must pay his forfeitures.” Id. at 10. (citation omitted)
37 See id. at 9-10.
38 In Durham v. U.S., the Supreme Court created a test for legal insanity known as the Durham Rule; a defendant “is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” 214 F.2d 862, 874-75 (D.C. Cir. 1954). This test is no longer used in any jurisdiction. Durham Rule, BLACK’S LAW DICTIONARY. See infra notes 39-43.
39 McNaughten Rules, BLACK’S LAW DICTIONARY.
40 Irresistible Impulse Test, BLACK’S LAW DICTIONARY.
41 Id.
42 Substantial-Capacity Test, BLACK’S LAW DICTIONARY.
43 Appreciation Test, BLACK’S LAW DICTIONARY.; see also 18 U.S.C. § 17 (2016).
44 Robitscher, supra note 2, at 49. While the rate of insanity pleas has increased in some jurisdictions, it remains a much lower rate than the study participants estimated. Id.
show the narrow scope of the proposed amendment.45

Not every state recognizes the insanity defense. Four states—Idaho, Kansas, Montana, and Utah—do not recognize a verdict of not guilty by reason of insanity.46 In these states, the legislatures have made it explicitly clear that it is not their intent to allow the insane to avoid criminal punishment as a result of their insanity; the legislatures depart from the longstanding axiom that the insane do not deserve the same punishment as the sane.47 As such, it is unlikely that these states would be amicable to the interpretation of the UPC present in the case law discussed in Section III, or the proposed statutory amendments discussed in Section IV.

C. Intersection Between Insanity Defense and Slayer Statutes

“Where murder and inheritance overlap, we often find family.”48 This maxim is a sensible one; generally, inheritance takes place between relatives, meaning that murder implicating inheritance will generally take place between relatives as well. However, it is easy to lose sight of the reality of this situation. A combination of murder, inheritance, and family easily lends itself to fanciful scenarios—thoughts of devious villains who twirl their moustache while plotting to kill dear old grandmother in order to secure her estate, all the while being chased by a handsome investigator with a mysterious past. However, those cases are more at home in the pages of a novel, or the twists of a noir thriller, than in our world. Sadly, the reality tends to be quite grim:

[...]he sociopathic child who kills a grandparent to hasten an inheritance is an anomaly. In reality, murders within a family are usually a product of that family’s harmful, often violent, dynamics, from which, because of the failures of state and society, a family member sometimes can find no escape except murder. Most women who kill their husbands or partners do so to protect themselves or their children from violence. Most children who kill a parent act to stop severe and prolonged abuse by that parent; most other parricides are acutely mentally

45 See infra Section IV.
46 See IDAHO CODE § 18-207(1) (2017) (s “Mental condition shall not be a defense to any charge of criminal conduct.”); KAN. STAT. ANN. § 22-3220 (2010) (repealed 2011); MONT. CODE ANN. § 46-14-102 (2017) (allowing the introduction of “[e]vidence that the defendant suffered from a mental disease or disorder or developmental disability . . . to prove that the defendant did or did not have a state of mind that is an element of the offense.”); UTAH CODE ANN. § 76-2-305(1)(a) (2017) (“It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.”). See also Natalie Jacewicz, With No Insanity Defense, Seriously Ill People End Up In Prison, NPR (August 5, 2016), https://www.npr.org/sections/health-shots/2016/08/05/487909967/with-no-insanity-defense-seriously-ill-people-end-up-in-prison.
47 See Robitscher, supra note 2, at 10 (explaining that the “idea that the insane should not be punished for otherwise criminal acts has been firmly entrenched in the law for at least one thousand years.”).
48 Spivack, supra note 1, at 147.
ill. Most mothers who kill their children suffer from postpartum psychosis, a severe mental illness with symptoms including visual and auditory hallucinations and delusions. In many of these cases, social, political, economic, and cultural factors have combined to block the suffering relative’s escape, sometimes leaving murder as the only way out.49

In order to fully appreciate these facts, it is necessary to consider the people who are impacted by this change. Individuals who kill the testator while insane are a group of people who are more often in need of help and protection than they are in need of punishment. Often times the dynamics that lead to the mental instability that makes an insanity defense appropriate are the result of some kind of breakdown in the family structure.50 In many cases these people, the mentally ill, the neglected, and the abused, have already been failed by the system.51

Additionally, it is not the modus operandi of our system of laws to punish the sick for being sick. In Robinson v. California, the Supreme Court held a law criminalizing narcotics addiction unconstitutional.52 In a concurring opinion, Justice Douglas stated, “however insanity is defined, it is in end effect treated as a disease. While afflicted people may be confined either for treatment or for the protection of society, they are not branded as criminals.”53 Justice Douglas further stated, “[w]e would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.”54 While this Note deals with the probate process, which does not specifically implicate Eighth Amendment concerns, it implicates a similar moral concern. One of the purposes of slayer statutes is “to prevent crime through deterrent mechanisms, such as increasing the costs and decreasing the benefits of committing crime.”55 If we find it wrong to subject a person who is

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49 Spivack, supra note 1, at 148.
50 See id.
51 See generally Eisold, supra note 16, at 876-78 (Eisold recounts the facts of a Wisconsin case where a man (Van Lare) who suffered from delusions killed his wife the morning he was to begin treatment, which his family had sought for some time. Prior attempts to get treatment were frustrated by a combination of Van Lare’s unwillingness to subject himself to treatment, and psychiatrists’ belief that Van Lare did not pose a serious threat to himself or others.).
52 See generally Robinson v. California, 370 U.S. 660, 667 (1962) (“We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.”). But see Powell v. Texas, 392 U.S. 514, 532 (1968) (explaining that the case “does not fall within [Robinson’s] holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in Robinson”).
53 Robinson, 370 U.S. at 668-69 (Douglas, J., concurring).
54 Id. at 678 (Douglas, J., concurring).
55 Eisold, supra note 16, at 875.
sick to criminal punishment, if doing so is in fact “barbarous,” it would seem strange to subject such a person to a punishment that is, in part, designed to deter criminal activity.

D. Other Policy Considerations

Concerns for those with an interest in the probate process other than the slayer and the decedent are not trivial. It is understandable that some may have an issue with a statutory construction that allows those who kill while insane to inherit because it ignores those who are otherwise aggrieved. A slaying spouse may inherit while the children or immediate family of the deceased do not collect. This is dealt with through other parts of the legal system. The Restatement (Second) of Torts, section 283B, states: “[u]nless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.” As such, “insanity or other mental deficiency” is not a defense in a tort suit for wrongful death, intentional infliction of emotional distress, or any similar tort claim that may be brought by the aggrieved. Because of this, those impacted by the death would still have an avenue to collect for the harm that they have suffered.

III. Analysis of Relevant Statutes and Cases

A. New Jersey Slayer Statute and In re Vadlamudi’s Estate

The seminal case is In re Vadlamudi’s Estate. “On February 14, 1981 Amita Vadlamudi killed her husband Desapathi with an axe.” She was tried by bench trial in September of 1981, and was “found not guilty by reason of insanity.” “The evidence . . . included the reports of three psychiatrists and a practicing licensed psychologist.” “All of the doctors and the psychologist were of the opinion that at the time she killed her husband Amita was suffering from a ‘brief reactive psychosis’ and did not know that her act of killing was
The court was forced to consider how to apply the New Jersey slayer statute, which was adopted from the UPC. In coming to a decision, the judge’s research “failed to disclose any reported cases in New Jersey or in the other 12 states that have enacted statutes adapted from section 2-803 of the Uniform Probate Code which pass directly” on the question at issue in Vadlamudi. This led to reliance on the statute itself. The court stated: “[i]t is an established principle of statutory construction that, absent an explicit statement of a contrary legislative intent, statutes are to be construed with reference to the principles of the common law . . . .” In looking to the common law, the court examined New Jersey law prior to the passage of N.J. Stat. Ann. 3A:2A-83. This was articulated by Campbell v. Ray,

it is not against the public policy of this State to permit one who has killed while insane subsequently to take a share of the estate of the deceased or the proceeds of a policy of life insurance on the life of the deceased of which the insane killer is beneficiary.

Looking at the common law principles, the court in Vadlamudi stated that “[i]f a homicide was accidental or committed by the beneficiary in self-defense or while legally insane, the killing was not ‘intentional’ for purposes of

Psychosis is a form of Brief Psychotic Disorder; Brief Psychotic Disorders are characterized by the “[p]resence of one (or more) of the following symptoms. At least one of these must be (1), (2), or (3): 1. Delusions. 2. Hallucinations. 3. Disorganized speech (e.g. frequent derailment or incoherence). 4. Grossly disorganized or catatonic behavior.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 95 (5th ed. 2013). The episode during which the symptoms occur must be “at least 1 day but less than one month, with eventual full return to premorbid level of functioning.” Id. The DSM-V also requires that “[t]he disturbance is not better explained by major depressive or bipolar disorder with psychotic features or another psychotic disorder such as schizophrenia or catatonia, and is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition.” Id. A Brief Psychotic Disorder is characterized as Brief Reactive Psychosis “[i]f symptoms occur in response to events that, singularly or together, would be markedly stressful to almost anyone in similar circumstances in the individual’s culture.” Id. The diagnostic criteria go on to state that the “essential feature” of this disorder is the “sudden onset” of the symptoms, defined as a “change from a nonpsychotic state to a clearly psychotic state within 2 weeks . . . .” Id.

64 Vadlamudi, 443 A.2d at 1114.
66 Vadlamudi, 443 A.2d at 1115.
67 Id. at 1116.
68 Id.
disqualifying a beneficiary from succession to property of the decedent . . . .” 70
In the opinion of the court, this combination of factors meant that a person who
kills “while legally insane cannot be, as a matter of law, one ‘who intentionally
kills’ within the meaning of [N.J. Stat. Ann. 3A:2A-83].” 71

After ruling on the issue of whether a person who kills while insane is
necessarily barred from inheritance under the slayer statute, 72 the court in
Vadlamudi then needed to determine if the criminal court’s finding of insanity is
dispositive. The court found that “[t]here are no reported cases prior to
enactment of the statute wherein an acquittal of a homicide in a criminal trial by
reason of insanity obviated the necessity of trial or hearing on the insanity issue
in a civil action.” 73 Additionally,

[r]esearch by the court reveals no case law in any jurisdiction
which has permitted a killer to acquire property from the victim
on the sole ground that he had been acquitted by reason of
insanity in a criminal proceeding, absent an express statutory
 provision affording conclusive effect to an acquittal . . . . 74

The court further stated that this was because “different considerations as well as
a different burden of proof enter into the finding of guilty in the criminal
prosecution.” 75 Therefore, while the slayer statute did not preclude inheritance in
a case where a person killed while insane, the decision of whether the killer was
insane in the probate context is left to the civil court.

B. Illinois Slayer Statute and Dougherty v. Cole

In 2010, the Appellate Court of Illinois was presented with an issue
similar to that in Vadlamudi in the case Dougherty v. Cole. 76 On June 7, 2008,
Jack Cole suffered from a severe manic episode, during which he beat and
stabbed his mother to death in her home. 77 Jack Cole was charged with first
degree murder. 78 A psychiatric evaluation revealed that, at the time of the killing,
“Jack suffered a severe manic episode with psychotic features and, as a result of
those symptoms, was incapable of appreciating the criminality of killing his
mother.” 79 Jack Cole was found not guilty by reason of insanity. 80 Jack’s sister

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70 Vadlamudi, 443 A.2d at 1116-17.
71 Id. at 1117 (citation omitted). There is no evidence that similar analysis of the current New Jersey Slayer Statute, N.J. Stat. Ann. 3B:7-1.1, would lead to a different result. See supra note 65.
72 Vadlamudi, 443 A.2d at 1116-17.
73 Id.
74 Id.
75 Id.
77 Id. at 18.
78 Id.
79 Id.
80 Id.
Alycia, in her capacity as the administratrix of the estate, brought suit seeking, in part, to bar Jack from inheriting by way of Illinois’ slayer statute. Illinois applies a different standard than New Jersey. The Illinois slayer statute disinherits “[a] person who intentionally and unjustifiably causes the death of another . . . .” Jack Cole, cited Vadlamudi in making his argument. In applying the Illinois statute, the court looked to the legislative intent by reviewing the legislative history. The court referenced Illinois’ 1969 slayer statute, which read: “[a] person who is convicted of the murder of another shall not inherit from the murdered person.” The modern statute, however, does not contain any specific reference to criminality. The court in Dougherty felt that the legislative history of the Illinois statute indicated a desire to bar those who kill while insane. Jack Cole himself testified that he intended to kill his mother, but only did so at the direction of a voice inside his head telling him that his mother was the enemy. The court eventually held that “[w]here, as here, an individual was insane for criminal purposes but nevertheless cognizant he was killing a person, the Slayer Statute will prevent him from benefitting from his actions.”

The Illinois statute focuses on the word “unjustifiably” rather than “feloniously.” A clear shift in the intent is found between these words. Black’s Law Dictionary defines the word “felonious” as “[o]f, relating to, or involving a felony. . . . Constituting or having the character of a felony.” This necessarily requires that a “felonious” act have some relation to or character of a criminal offense. Conversely, one can imagine any number of “unjustifiable” acts that do not in any way relate to or have the character of a crime. Additionally, in this case, there was clear legislative history with regards to the law in question, meaning that there was no need to rely on common law ideas. This statute, however, differs from the relevant UPC section in an important way, as it intentionally does not contain any reference to criminal activity. This indicates that the process of determining a slayer in Illinois is meant to be entirely separate from the criminal court’s decision regarding criminal liability. However, a statute that utilizes the UPC framework, which contains the word “feloniously,” or the Connecticut framework, which specifically enumerates a

81 Dougherty, 934 N.E.2d at 17.
82 755 ILL. COMP. STAT. 5/2-6 (2017) (emphasis added).
83 Dougherty, 934 N.E.2d at 19.
84 Id.
85 Id. at 21 (citation omitted).
86 See 755 ILL. COMP. STAT. 5/2-6.
87 Dougherty, 934 N.E.2d at 21-22.
88 Id. at 21.
89 Id. at 22.
90 See 755 ILL. COMP. STAT. 5/2-6.
91 Feloniously, BLACK’S LAW DICTIONARY.
92 See id.
93 See UNIF. PROBATE CODE § 2-803. The word “feloniously” implies a criminal law element.
number of criminal statutes,\textsuperscript{94} does bear on the criminal law sphere.

The difference between New Jersey and Illinois lies in the structure of their slayer statutes, and in the presence of specific statutory and legislative history related to the statutes.\textsuperscript{95} Illinois specifically divorces its slayer statute from the criminal justice system,\textsuperscript{96} while New Jersey and the UPC make a finding of guilt by a criminal court dispositive.\textsuperscript{97}

\textbf{C. Mississippi Slayer Statute and \textit{Estate of Armstrong v. Armstrong}}

In 2015, the Supreme Court of Mississippi was called to decide if the state’s slayer statute barred inheritance in cases of legal insanity or incompetence. In that case, John Armstrong, who had been diagnosed with and treated for paranoid schizophrenia\textsuperscript{98} since 1989, killed his mother by hitting her in the head with a brick.\textsuperscript{99} After an examination ordered by the Mississippi Circuit Court, John Armstrong was found incompetent to stand trial.\textsuperscript{100} In the initial movement to have the killer barred from inheriting, the chancellor stated that “it would be a perversion of justice” to allow the killer to inherit.\textsuperscript{101} However, the Mississippi Supreme Court overturned the lower court ruling, determining that Mississippi should side with most states, which require willful conduct in order to apply the slayer statute, defining “willful” as “intentionally, knowingly, deliberately, and purposely.”\textsuperscript{102} The court determined that, “[b]ecause an insane person lacks the requisite ability willfully to kill another person, the Slayer Statute is not applicable in cases where the killer is determined to be insane at the time of the killing.”\textsuperscript{103}


\textsuperscript{95} Dougherty, 934 N.E.2d at 19.

\textsuperscript{96} See 755 ILL. COMP. STAT. ANN. 5/2-6.

\textsuperscript{97} See UNIF. PROBATE CODE § 2-803(g) (amended 2010); N.J. STAT. ANN. § 3B:7-1.1.

\textsuperscript{98} See AM. PSYCHIATRIC ASS’N, supra note 63, at 99. The DSM-V lists the symptoms of schizophrenia as including delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms like diminished emotional expression or motivation. Id. At least two of these symptoms must be present for a diagnosis. Id.

\textsuperscript{99} Estate of Armstrong v. Armstrong, 170 So.3d 510, 511 (Miss. 2015).

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 512.

\textsuperscript{102} Id. at 516.

\textsuperscript{103} Armstrong, 170 So.3d at 516.
IV. Proposed Statute and Analysis

A. Proposed Amended Uniform Probate Code Slayer Statute

There are four possible ways in which the UPC could be amended: (1) amending section 2-803(a) Definitions; (2) amending section 2-803(b) Forfeiture of Statutory Benefits; (3) amending section 2-803(g) Felonious and Intentional Killing; How Determined; or (4) adding a new subsection. Any of these approaches would create a statutory scheme that substantially reflects the policy rationale underlying slayer statutes, and our society’s views on mental illness. It should be noted that UPC section 2-803(g) specifically states that “[a]fter all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent’s killer for purposes of this section.”\(^{104}\) This section prevents the re-litigation of the issue of legal insanity when an insanity defense fails at trial.

The first proposed amendment is found in section 2-803(a) Definitions. This section lays out the definitions of certain terms within the subsection.\(^{105}\) UPC section 2-803(a) could be amended by adding a subsection entitled “section 2-803(a)(4) Feloniously and Intentionally.” This proposed subsection would read, “for the purposes of this section an individual who is found, by a preponderance of the evidence, to have killed while insane is not one who kills feloniously and intentionally.” This is straightforward and to the point as far as accomplishing the goals discussed throughout this Note. Additionally, it is easy to interpret, and leaves little leeway. It should be mentioned that UPC section 2-803(g) reflects that, in the absence of a criminal conviction, the court should determine if a person killed another feloniously and intentionally by a preponderance of the evidence standard.\(^{106}\) As a result, that standard is utilized within these proposed amendments. It is expected that each jurisdiction would modify the language of this subsection, or any of the following subsections, to reflect the standard of proof generally applicable in probate court or disinheritance proceedings in that jurisdiction.

The next section which could potentially be revised is section 2-803(b), Forfeiture of Statutory Benefits. Currently this subsection reads:

\[\text{[a]n individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to the decedent’s estate, including an intestate share, an elective share, an omitted spouse’s or child’s share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent’s intestate estate passes as}\]

\(^{104}\) UNIF. PROBATE CODE § 2-803(g).

\(^{105}\) See UNIF. PROBATE CODE § 2-803(a).

\(^{106}\) UNIF. PROBATE CODE § 2-803(g).
if the killer disclaimed his [or her] intestate share.\textsuperscript{107}

Section 2-803(b) would be amended to read, with italics indicating the new language: “[an] individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article.] excepting instances where such individual shows, by a preponderance of the evidence, that they were legally insane at the time the decedent was killed.”\textsuperscript{108} This would directly exempt those who kill while insane from the slayer statute.

The third section that could be revised, Section 2-803(g), Felonious and Intentional Killing; How Determined, would be amended to read, with italics indicating the new language:

\begin{quote}
[a]fter all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent’s killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. \textit{In the absence of a conviction, an individual found, by a preponderance of the evidence, to have been legally insane at the time the decedent was killed, is not one who feloniously and intentionally kills for the purposes of this section.} If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent’s killer for purposes of this section.\textsuperscript{109}
\end{quote}

It is expected that each jurisdiction substitute whatever burden of proof they find appropriate, or whichever is generally applied to affirmative defenses in probate court proceedings. This amendment to section 2-803(g) applies to how the court determines if a person “feloniously and intentionally” kills, rather than to the section as a whole. This would limit the change solely to the determination of whether a person feloniously and intentionally kills under section 2-803, rather than exempting a person who kills while legally insane from section 2-803 altogether, which could potentially impact other provisions or sections that interact with section 2-803.

The final option is to add another clause to UPC section 2-803. A new
section, “section 2-803(j) Impact of a Finding of Legal Insanity on Transfer,” would be added to the UPC. This would take the language from the amended section of 2-803(g) and create its own section.

Section 2-803(j) Impact of a Finding of Legal Insanity on Transfer would read: “an individual found, based on a preponderance of the evidence, to have been legally insane at the time the decedent was killed, is not one who feloniously and intentionally kills for the purposes of this section.” Again, the preponderance of the evidence standard could be replaced with the standard of evidence controlling the jurisdiction in question.

B. Impact of the Proposed Amendments

Though the United States consists of numerous jurisdictions, each with its own legal and regulatory histories and schemes, model and uniform codes like the UPC have the potential to create uniformity amongst the states. However, any move towards uniformity must be paired with a healthy skepticism, and awareness of possibly unforeseen consequences. The proposed changes to the UPC would clarify analysis of the impact of legal insanity on disinheritance through slayer statutes. Additionally, given that there is only one case in a UPC jurisdiction dealing with this issue, the amended section would ensure that all jurisdictions that utilize the UPC would be in line with, or at least made aware of, the existing case law.

Understandably, there may be jurisdictions that are hesitant to change. This amendment would give those jurisdictions an opportunity to respond as they deem necessary. Currently, a jurisdiction that uses UPC section 2-803, based on the only case law available, would seem to have enacted a statute that allows for inheritance in cases where a potential beneficiary kills his or her benefactor while legally insane. The only judicial interpretation of how legal insanity impacts the UPC slayer statute, Vadlamudi, comes from a probate case from Middlesex County, New Jersey decided in 1982, something that could easily, and understandably, be overlooked by legislators. Amending the UPC in this way would allow a jurisdiction that does not wish to grant inheritance in these cases clear notice of the implication of the statute, as well as the ability to make their slayer statute reflect the true intent of the legislature.

110 See infra section IV-A.
111 See generally Vadlamudi, 443 A.2d. at 1115 (“[The Court’s] research has failed to disclose any reported cases in. . . states that enacted statutes adapted from [section] 2-803 of the Uniform Probate Code which pass directly on these issues.”).
113 See generally Vadlamudi, 443 A.2d.
The proposed statutory changes would all operate in a similar way; like in Vadlamudi, one who kills while legally insane would not be disinherited. Utilizing the standard of proof that is generally required for an affirmative defense in a probate or disinheritance proceeding in the jurisdiction in question serves to achieve the desired outcome, while minimizing the impact of the amendment on the general function of the probate court.

C. Comments on the Finality of Criminal Trial Court Decisions

Vadlamudi raised the issue of the finality of the trial court’s decision, specifically, whether the trial court’s finding of insanity is dispositive on the issue with regards to the slayer statute. The court in Vadlamudi stated that the laws of New Jersey “generally [hold] that an acquittal of criminal or quasi-criminal charges does not have preclusionary consequences in respect to a subsequent civil action based on the same conduct.” Additionally, the court notes that the slayer statute specifically states a conviction is dispositive, but does not state that an acquittal is similarly dispositive. Instead, the court notes that the statute states: “[i]n the absence of a conviction of intentional killing the court may determine . . . whether the killing was intentional for purposes of this section.” This reflects the fact that there is a different burden of proof in civil and criminal proceedings. Though the court in Vadlamudi does refer to New Jersey law and precedent, it firmly roots its construction in the language of the statute, indicating that this interpretation is more in line with the intent of the UPC, and therefore would seem to control in jurisdictions utilizing the UPC.

The amended UPC provision would respect the finality of a conviction in a trial court just as it currently does. This amendment is not designed to allow a defendant to essentially re-litigate the issue of their legal sanity or insanity. This amendment is designed to provide a very narrow exception to disinheritance that is only available in a select few cases.

V. Conclusion

Currently the UPC is not entirely clear on the impact of legal insanity on inheritance. This is an issue because “[w]here murder and inheritance overlap, we often find family.” Sadly, in these instances we often find cases of abuse and mental illness as well. Those who are mentally ill are unable, by the definition of legal insanity, to have the intent to hasten the receipt of their inheritance. In fact, intent to do so would show that a person is not legally

114 See id. at 1117.
115 Id. (citations omitted).
116 See id.
117 Id. (citation omitted).
118 See Vadlamudi, 443 A.2d at 1114-17.
119 Spivack, supra note 1, at 147.
120 See id. at 148.
121 Supra notes 39-43.
insane. The slayer statute promotes protection of the testator’s intent\textsuperscript{122} and aids in preventing one from profiting from their own wrongdoing,\textsuperscript{123} furthering the orderly transition of property.\textsuperscript{124} Slayer statutes also aim “to prevent crime through deterrent mechanisms, such as increasing the costs and decreasing the benefits of committing crime.”\textsuperscript{125} If our goal is preventing a conniving relative from inheriting, disinheriting those who kill while insane does not serve that purpose. In fact, none of the policy goals that slayer statutes seek to advance are truly served through disinheritance of those who kill while legally insane.\textsuperscript{126} By amending the UPC slayer statute to specifically allow inheritance in cases of legal insanity, we can bring the clear meaning of the statute in line with the case law,\textsuperscript{127} in line with general ideas underlying our legal system, and in line with the goal of creating outcomes that are more equitable for all parties involved.

\textsuperscript{122} Spivack, supra note 1, at 159-61.
\textsuperscript{123} Id. at 161-63.
\textsuperscript{124} Id. at 163-65.
\textsuperscript{125} Eisold, supra note 16, at 875.
\textsuperscript{126} Supra section II-A and II-C.
\textsuperscript{127} See generally Vadlamudi, 443 A.2d (the singular case from a UPC jurisdiction clearly passing on the issues under consideration in this Note).
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