

ERISA and the Law of Succession

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Two trends in American law are on a collision course. The first is the federalization of employee benefit law under ERISA. The second is the extension of state succession law into the realm of nonprobate transfers. Recent Supreme Court decisions hold that ERISA trumps contrary state law, and Congress has shown no interest in limiting the statute's broad preemption. This Article advocates a second-best solution: the incorporation of substantive rules from the Restatement Third of Property and the Uniform Probate Code into the federal common law interpreting ERISA. The Article examines how this proposal would work in five areas of conflict: survivorship, antilapse, revocation on divorce, revocation by homicide, and the elective share. In each case, the Article demonstrates how the incorporation of Restatement or uniform law into federal common law would achieve the proper result.

Two important trends in American private law are on a collision course. The first trend is the federalization of employee benefit law. Before 1974, pensions were viewed as contracts between employer and employee.¹ As such, they were largely regulated by state law.² The qualified plan provisions of the Internal Revenue Code did set some federal standards,³ but most rules governing the creation and administration of pension plans were rules of state law. That all changed in 1974 when Congress enacted the Employee

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¹ See Patricia E. Dille, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1114–15 (1997) (describing the initial "gratuity theory" of pensions and how it gave way in the early and mid-twentieth century to the view that a pension was "part of a contractual agreement between employer and employee, not simply a gift").

² See, e.g., *Zimmerman v. Brennan*, 202 N.W.2d 923, 926 (Wis. 1973) ("[A]ctions under employee-benefit plans are typically grounded in contract for recovery of benefits."); *Cantor v. Berkshire Life Ins. Co.*, 171 N.E.2d 518, 521 (Ohio 1960) ("[Pension] arrangements will give rise to contractual rights enforceable by the employee . . ."); *In re Schenectady Ry. Co.*, 93 F. Supp. 67, 70 (N.D.N.Y. 1950) (viewing the pensions at issue as part of "the terms of the contract").

³ See WILLIAM C. GREENOUGH & FRANCIS P. KING, *PENSION PLANS AND PUBLIC POLICY* 59–63 (1976) (discussing the history of the Internal Revenue Code's impact on pension plans).

Retirement Income Security Act, known as ERISA.⁴ ERISA federalized pension law, establishing federal rules governing the creation, administration, and termination of most pension plans.⁵ To illustrate ERISA's scope, consider the main headings of the statute:

Title I. Protection of Employee Benefit Rights

Definitions

Part 1. Reporting and Disclosure

Part 2. Participation and Vesting

Part 3. Funding

Part 4. Fiduciary Responsibility

Part 5. Administration and Enforcement

Part 6. Group Health Plans

Part 7. Group Health Plan Portability, Access, and Renewability Requirements

Title II. Amendments to the Internal Revenue Code

Title III. Miscellanea

Title IV. Plan Termination Insurance⁶

Yet ERISA did more than federalize all of these aspects of pension law. It also occupied the field. Section 514(a) of ERISA provides in pertinent part that Titles I and IV, concerning the protection of employee benefit rights and pension plan termination, "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"⁷

The second and countervailing trend is the unification of the state laws governing probate and nonprobate transfers. At the forefront here are the Uniform Probate Code (hereinafter "UPC"),⁸ Article II of which was revised substantially

⁴ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified at 29 U.S.C. §§ 1001-1461 (2000)).

⁵ For the plans not covered by ERISA, see 29 U.S.C. § 1003(b) (2000).

⁶ JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 90 (3d ed. 2000).

⁷ 29 U.S.C. § 1144(a) (2000); see also 29 U.S.C. § 1104(a)(1)(D) (2000) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]") (emphasis supplied). For a concise introduction to ERISA preemption, see Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373, 392-403 (2001).

⁸ UNIF. PROB. CODE, 8 U.L.A. PTS. I & II (1998 & Supp. 2003).

in 1990,⁹ and the new Division II of the Restatement (Third) of Property: Wills and Other Donative Transfers (hereinafter “Restatement Third”), published in 2003.¹⁰ Division II of the Restatement Third and Article II of the UPC are premised on the functional similarity between wills and will substitutes—such as inter vivos trusts, life insurance policies, and pension plans, all of which readily serve as vehicles for the deathtime transmission of wealth, albeit outside of the probate process.¹¹ Because the Restatement Third and the UPC see these nonprobate transfers as functionally similar to transfers within probate, they have extended to these will substitutes—including pension plans—many of the rules of state law that traditionally applied only to wills.¹²

Put simply: what should happen when there is a collision between the federal law of ERISA and a state law governing nonprobate transfers? The decisions of the United States Supreme Court make it clear that, in such an event, ERISA’s preemption provision trumps the application of state law.

The most recent Supreme Court decision directly on point appeared in 2001 in the case of *Egelhoff v. Egelhoff*.¹³ David and Donna Egelhoff, residents of the State of Washington, were married and later divorced. During the marriage, David had named Donna as the beneficiary of two benefits sponsored by his employer: a pension plan and a life insurance policy. As employee benefits, both the pension and the life insurance were governed by ERISA. Two months after the divorce, David was seriously injured in a car accident and died. At his death,

⁹ For an overview of the 1990 revisions of Article II, see generally Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891 (1992).

¹⁰ See Press Release, American Law Institute, The American Law Institute Publishes Second Volume of Restatement of the Law Third, Property (Wills and Other Donative Transfers) (April 25, 2003), at <http://www.ali.org/ali/pr042203c.htm> (last visited June 21, 2003) (announcing the publication on April 22, 2003, of the Restatement Third’s second volume, addressing nonprobate transfers among other topics).

¹¹ See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (2003) (providing that “to the extent appropriate” nonprobate transfers should be “subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions”); UNIF. PROB. CODE Art. II, Pt. 7, general cmt., 8 U.L.A. PT. I 181 (1998 & Supp. 2003) (outlining changes made in the 1990 revision to Article II to harmonize the treatment of probate and nonprobate transfers); UNIF. PROB. CODE Art. II, Pt. 8, general cmt., 8 U.L.A. PT. I 206 (1998 & Supp. 2003) (same). See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (providing the seminal analysis of the growing use of nonprobate mechanisms to transfer wealth and how this trend should affect the law of probate).

¹² See RESTATEMENT THIRD, *supra* note 11, § 7.2 cmt. a (“[A] will substitute is therefore, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions.”); UNIF. PROB. CODE §§ 2-701 to -711, 2-801 to -804, 8 U.L.A. PT. I 181-222 (1998 & Supp. 2003) (providing rules of construction and other rules applicable to all governing instruments).

¹³ 532 U.S. 141 (2001). The following discussion of the facts is taken from *id.* 144–46.

Donna was still listed in the company's records as the beneficiary of the pension and the life insurance. David's children from an earlier marriage, who were also his heirs in intestacy, claimed, among other things, that they were entitled to the pension and life insurance proceeds by operation of Washington state law. The children invoked Section 11.07.010 of the Revised Code of Washington, which provided in pertinent part:

(2)(a) If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse failed to survive the decedent

. . . .

(5) As used in this section, "nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under only the following written instruments or arrangements other than the decedent's will:

(a) A payable-on-death provision of a life insurance policy, employee benefit plan, annuity or similar contract, or individual retirement account[.]¹⁴

By a vote of seven to two, the Supreme Court held that ERISA preempted the application of the Washington statute on these facts.¹⁵ Writing for the majority, Justice Thomas made two main points. First, the text of ERISA expressly preempts state laws to the extent that they "relate to" an employee benefit plan.¹⁶ The Washington statute relates to an employee benefit plan, and is thus preempted here, because it would require the benefits administrator to pay benefits to the beneficiaries chosen by state law (David's children), rather than to the one named in the beneficiary designation forms (Donna).¹⁷ Second, by requiring the benefits administrator to become familiar with the laws of a particular state, the Washington statute would interfere with a central goal of ERISA, namely the national uniformity of employee benefit administration.¹⁸

The Supreme Court's conclusion of law, that ERISA precluded the application of the Washington state statute, is consistent with the text of ERISA and the Court's earlier holdings. Yet the factual outcome of the case, that the divorced spouse received the pension and life insurance benefits, is extremely

¹⁴ *In re Estate of Egelhoff*, 989 P.2d 80, 84–85 (Wash. 1999), *rev'd*, 532 U.S. 141 (2001) (quoting WASH. REV. CODE § 11.07.010 (1993)).

¹⁵ *Egelhoff*, 532 U.S. at 146.

¹⁶ *Id.* (citing 29 U.S.C. § 1144(a) (2000)).

¹⁷ *Id.* at 147.

¹⁸ *Id.* at 148–49.

troubling. The proper result—far more consistent with the probable intention of David, the property owner¹⁹—would have been achieved by applying the rule of revocation on divorce.

Yet the *Egelhoff* case is even more troubling than that. By emphasizing the broad sweep of ERISA preemption, the Court's decision opened the door to the wholesale nullification of attempts at the state level to unify the law of probate and nonprobate transfers. Put differently: *Egelhoff* was not simply about one state's rule of revocation on divorce. Rather, the case has implications for many other rules of state law—endorsed in the Restatement Third and codified throughout the UPC—that treat pension beneficiary-designation forms as the functional equivalent of a will.

So far, we have been talking about revocation on divorce. But there are four additional rules, now at risk, that attempt to harmonize the treatment of probate and employee benefit transfers. These are the rules governing survivorship, lapse, the elective share, and revocation by homicide.

The first of these rules governs survivorship. Imagine that we have an employee, Adam, who has named his brother, Benjamin, as the beneficiary of his pension. Adam dies. One day later, Benjamin dies. The terms of the plan provide that proceeds will be paid to the beneficiary if he or she survives the employee. The plan does not require any particular period of survivorship, so surviving by one instant is sufficient. Suppose that the relevant state law tracks Section 2-702 of the UPC (functionally the same as Section 3 of the Uniform Simultaneous Death Act), which requires survivorship by 120 hours.²⁰ The rationale for this provision, which is endorsed by the Restatement Third,²¹ is that it makes little sense—and would be inconsistent with Adam's wishes—for the proceeds to pass to Benjamin unless Benjamin is alive to enjoy them.²² Benjamin having died so soon after Adam, it makes more sense to treat Benjamin as predeceased. But if we apply the Supreme Court's decision in *Egelhoff*, the state-law provision would be preempted.

¹⁹ See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 228–29 (1991) (explaining the provisions of UPC § 2-804 in terms of the decedent's "likely intent").

²⁰ See UNIF. PROB. CODE § 2-702(b), 8 U.L.A. PT. I 182 (1998 & Supp. 2003) (providing that "for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event"); UNIF. SIMULTANEOUS DEATH ACT § 3 (1993), 8B U.L.A. 149 (1998 & Supp. 2003) (adopting the same rule).

²¹ See RESTATEMENT THIRD, *supra* note 11, § 7.2 cmt. c (stating that imposing a minimum 120-hour requirement of survivorship "usually better serves the donor's intent").

²² See Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1094–95 (1992) (discussing the rationale for § 2-702's 120-hour survivorship requirement).

The second rule at risk under *Egelhoff* governs lapse. Again imagine that our employee, Adam, has named his brother, Benjamin, as the pension beneficiary. When Adam dies, suppose that Benjamin is already dead, but Benjamin has three surviving children. The terms of the plan provide that proceeds will be paid to the beneficiary if he or she survives the employee. Having failed to survive Adam, Benjamin would be cut out—in formal terminology, the gift to Benjamin would lapse—and the proceeds would pass through Adam’s probate estate. Suppose that the relevant state law tracks the antilapse provisions of Section 2-706 of the UPC: where a governing instrument names a beneficiary who fails to survive but leaves descendants who do survive, a substitute gift is created in those descendants.²³ Thus, under state law, the proceeds would pass not through Adam’s probate estate but to Benjamin’s children who survive Adam. This result is endorsed by the Restatement Third because it accords with Adam’s probable intention;²⁴ indeed, the purpose of the state rule is to effectuate his likely intention. But if we apply the *Egelhoff* decision, the state statute would be preempted.

The third rule concerns a surviving spouse’s elective share. Again imagine that our employee, Adam, has named his brother, Benjamin, as the beneficiary of his pension plan. Adam retires and then meets and marries Eve.²⁵ Later, Adam dies. Under the terms of the plan, the remaining proceeds are to be paid to Benjamin as the named beneficiary. Yet most states (other than community-property jurisdictions) have statutes entitling a surviving spouse to elect a share of the decedent’s property.²⁶ As the Restatement Third explains, the purpose of

²³ See UNIF. PROB. CODE § 2-706(b)(1), 8 U.L.A. PT. I 190 (1998 & Supp. 2003) (“[I]f the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary’s surviving descendants.”).

²⁴ See RESTATEMENT THIRD, *supra* note 11, § 5.5 cmt. f (“Antilapse statutes establish a strong rule of construction, designed to carry out presumed intention.”); *id.* § 7.2 cmt. f (“[T]he principles of § 5.5 . . . apply to a will substitute that requires the donee to survive the donor.”).

²⁵ By marrying Adam after his retirement, Eve is not eligible for a spousal annuity under federal pension law. On such spousal annuities, see generally LANGBEIN & WOLK, *supra* note 6, at 577–87. But even if an annuity were involved, the UPC’s elective share remains a more thoughtful and comprehensive approach to spousal protection. This can easily be illustrated if we imagine that, at the time of the marriage, Eve was working and was a year or two from retirement. In such an event, Adam—but still not Eve—would be entitled to a federal spousal annuity. *Id.* at 585. This lopsided result would not occur under the UPC’s elective-share provisions, which were specifically designed to handle the late-in-life remarriage. See generally Waggoner, *Multiple-Marriage Society*, *supra* note 19, at 247–48 (explaining the UPC’s marital-partnership theory and the adoption of an accrual-type elective share system in § 2-201); John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse’s Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 319–20 (1987) (giving an example of how the accrual-type elective share would provide for the surviving spouse of a late-in-life remarriage).

²⁶ See Langbein & Waggoner, *Redesigning*, *supra* note 25, at 304–06 (analyzing the elective share and comparing it to community-property regimes).

these statutes is to protect the spouse from disinheritance.²⁷ Traditionally, the elective share applied only to property passing through probate and did not extend outside of probate to pension or life insurance proceeds.²⁸ However, newer statutes, such as the UPC,²⁹ treat probate and nonprobate transfers alike for purposes of the elective share.³⁰ The obvious and worthy rationale for this approach—as explained in the commentary to the Restatement Third³¹—is to prevent the decedent from using nonprobate mechanisms to bypass, hence nullify, the surviving spouse’s elective share.³² So is Eve entitled to a portion of Adam’s remaining pension benefits? The answer under state law would be yes, but the answer under ERISA and *Egelhoff* would be no.

The fourth and final rule is that of revocation by homicide, also known as the slayer rule. Again imagine that our employee, Adam, has named his brother, Benjamin, as the beneficiary of his pension. Benjamin feloniously and intentionally kills Adam. Is Benjamin still entitled to the pension benefits? Under the laws of many states,³³ the Restatement Third,³⁴ and the

²⁷ See RESTATEMENT THIRD, *supra* note 11, § 9.1 cmt. b (“The purpose of the elective share is to grant the decedent’s surviving spouse an appropriate protection against being disinherited.”); see also Waggoner, *Multiple-Marriage Society*, *supra* note 19, at 236–42 (“Disinheritance of a surviving spouse brings into question the fundamental nature of the economic rights of each spouse in a marital relationship and the manner in which society views the institution of marriage.”); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 47 (1994) (“No matter what the decedent’s intent, the separate-property states recognize that the surviving spouse has a claim to some portion of the decedent’s estate.”).

²⁸ See Waggoner, *Multiple-Marriage Society*, *supra* note 19, at 239–41 (discussing the traditional elective share).

²⁹ See UNIF. PROB. CODE § 2-205, 8 U.L.A. PT. I 105 (1998 & Supp. 2003) (including the decedent’s nonprobate transfers to others in the augmented estate, hence subject to the surviving spouse’s elective share).

³⁰ For some examples of non-UPC statutes treating pension assets as subject to the surviving spouse’s elective share, see N.C. GEN. STAT. § 30-3.1 to -3.4 (2001 & Supp. 2003) (providing for the transfer of pension and insurance proceeds by way of the elective share); VA. CODE ANN. § 64.1-16.1 (Michie 2002) (same).

³¹ See RESTATEMENT THIRD, *supra* note 11, § 9.2 cmt. b (explaining that the “objective” of the UPC’s augmented estate is to “assur[e] that the surviving spouse obtains a fully equal share of the marital assets”).

³² See UNIF. PROB. CODE Art. II, Pt. 2, general cmt., 8 U.L.A. PT. I 100 (1998 & Supp. 2003) (explaining the UPC’s aim of preventing fraud when the “decedent seeks to evade the spouse’s elective share by engaging in various kinds of nominal inter-vivos transfers”).

³³ See Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 805 n.12 (1993) (listing only six states that do not have a slayer statute: Delaware, Maryland, Massachusetts, Missouri, New Hampshire, and New York).

³⁴ See RESTATEMENT THIRD, *supra* note 11, § 8.4 cmt. k (applying the slayer rule to “any revocable disposition or appointment of property made by the victim to the slayer in a donative document”).

UPC,³⁵ the answer would be no: by killing Adam, Benjamin has caused the beneficiary designation in his favor to be revoked. Yet ERISA has no equivalent of the slayer rule; instead, ERISA provides that benefits should be paid to the person named in the plan documents,³⁶ so Benjamin would still be entitled to the proceeds. The absurdity of this result was brought to the attention of the U.S. Supreme Court when it was hearing the *Egelhoff* case,³⁷ but the majority opinion declined to address concerns about the preemption of the slayer rule, observing that “[t]hose statutes are not before us, so we do not decide the issue.”³⁸

Yet the issue cannot be avoided. The proceeds of employee benefits are an increasingly important component of American wealth,³⁹ and the collisions between the federal law of ERISA and the state law of succession to property will become more and more frequent.

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 following language into the relevant Code section:

If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, 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.⁴⁰

³⁵ See UNIF. PROB. CODE § 2-803(c)(1)(i), 8 U.L.A. PT. I 51 (Supp. 2003) (“The felonious and intentional killing of the decedent revokes any revocable disposition or appointment of property made by the decedent to the killer in a governing instrument.”).

³⁶ See 29 U.S.C. § 1002(8) (2000) (defining “beneficiary” as “a person designated by a participant, or by the terms of an employee benefit plan”).

³⁷ See Brief of Amici Curiae National Conference of State Legislatures et al. at 15–16, *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (No. 99-1529); Brief of Amici Curiae State of Washington et al. at 13–14, *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (No. 99-1529).

³⁸ *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001).

³⁹ According to the Employee Benefit Research Institute “[a]s of year-end 2001, total retirement plan assets [in the United States] amounted to \$10.69 trillion.” Employee Benefit Research Institute, *Retirement Plan Assets: Year-End 2001* 1 (2002), at <http://www.ebri.org/facts/0902fact.pdf> (last visited May 29, 2003).

⁴⁰ UNIF. PROB. CODE §§ 2-702(f)(2), 2-706(e)(2), 8 U.L.A. PT. I 124, 184, 192 (1998 & Supp. 2003); UNIF. PROB. CODE §§ 2-803(i)(2), 2-804(h)(2), 8 U.L.A. PT. I 52, 56 (Supp. 2003).

Put simply: the idea was to create a constructive trust,⁴¹ an equitable remedy that would require the winner under federal law to transfer the property or its value to the winner under state law. Although clever, the idea of using a constructive trust was bound to be unsuccessful given the current legal landscape. Why? Constructive trusts are creatures of state law, and the decisions of the Supreme Court have made it clear that ERISA's preemption provision trumps the application of contrary state law. In *Egelhoff* and in the 1997 case of *Boggs v. Boggs*,⁴² the Supreme Court specifically rejected the possibility that state law could be used to award the property to a person other than the beneficiary required by ERISA.⁴³ Thus, remedies arising from state law, such as the constructive trust provisions of the UPC, are ineffective against ERISA's broad preemption.⁴⁴

Let us now examine potential solutions to this mess—in fact, three solutions, each of which takes the fact of preemption under current law as a given.

The first potential solution is for Congress to amend ERISA. This might be done in one of two ways. Congress could amend the substantive provisions of ERISA to incorporate the rules of revocation on divorce, survivorship, lapse, elective share, and revocation by homicide discussed here. Alternatively, Congress could amend ERISA's preemption provision to permit state legislatures to use constructive trusts in the area of succession, as attempted in the UPC; employee benefits administrators would distribute proceeds according to the terms of ERISA and the plan documents, then state law could require the recipient to transfer the property to its rightful owner.

The second potential solution is to encourage employers who offer employee benefit plans to incorporate the rules we have been discussing into the plan documents.⁴⁵ This approach solves the problem of preemption of state law, because ERISA itself requires plan administrators to discharge their duties “in accordance with the documents and instruments governing the plan.”⁴⁶

⁴¹ On constructive trusts, see generally AUSTIN W. SCOTT, WILLIAM F. FRATCHER & MARK L. ASCHER, *SCOTT ON TRUSTS* § 462 (4th ed. 1987 & Supp. 2002).

⁴² 520 U.S. 833, 844 (1997).

⁴³ *Egelhoff*, 532 U.S. at 149 n.3 (arguing that such an approach would simply cause the “costs of delay and uncertainty” to be “passed on to beneficiaries, thereby thwarting the ERISA's objective of efficient plan administration”); *Boggs*, 520 U.S. at 842–43 (rejecting the respondents' argument that state law does not conflict with ERISA where the law “affect[s] only the disposition of plan proceeds after they have been disbursed” by the plan to the named beneficiary).

⁴⁴ See also *Melton v. Melton*, 324 F.3d 941, 944–45 (7th Cir. 2003) (holding that ERISA preempts an attempt to use Illinois constructive-trust law to shift life insurance proceeds away from the named beneficiary).

⁴⁵ This suggestion was made during the question-and-answer session at the symposium. The idea is intriguing and certainly merits discussion. I thank the questioner for raising it.

⁴⁶ 29 U.S.C. § 1104(a)(1)(D) (2000).

The third potential solution rests on the insight that ERISA's preemption clause is not triggered if the statute is interpreted according to federal common law.⁴⁷ It is well settled that federal courts have the power to create federal common law under ERISA.⁴⁸ Thus, the third solution proposes that federal courts incorporate rules governing nonprobate transfers into federal common law and then use those federal rules to interpret ERISA. This solution is more complex than the two discussed above. How would it operate? A good illustration is provided by a recent case in the U.S. Court of Appeals for the Seventh Circuit: *Metropolitan Life Insurance Co. v. Johnson*,⁴⁹ decided in July 2002. Jimmie Johnson was an employee of General Electric. In 1996, he attempted to change the beneficiary of his employer-sponsored life insurance, but in completing the form he made a number of errors, including checking the box for a policy in which he was not enrolled rather than the policy in which he was enrolled. The question for the court: was the new beneficiary designation form effective? The prevailing case law in the Seventh Circuit held that strict compliance with the necessary formalities was required in order to make the new form effective.⁵⁰ Johnson's would-be beneficiary argued that the court should take note of Illinois insurance law, which contains a doctrine of substantial compliance: as long as the owner of an insurance policy substantially complies with the requirements of the form, a change-of-beneficiary form will be effective.⁵¹ In light of *Egelhoff*, the judges of the Seventh Circuit held that the Illinois doctrine of substantial

⁴⁷ On federal common law, see generally ERWIN CHERMERINSKY, FEDERAL JURISDICTION ch. 6 (3d ed. 1999); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 60 (6th ed. 2002); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263 (1992).

⁴⁸ Any number of citations might be proffered to support this statement. For two recent U.S. Supreme Court decisions, see *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 377 (2002); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

⁴⁹ 297 F.3d 558 (7th Cir. 2002). The following discussion of the facts is taken from *id.* at 560–61. See also *Administrative Committee for the H.E.B. Investment and Retirement Plan v. Harris*, 217 F. Supp. 2d 759 (E.D. Tex. 2002) (using the slayer rule as a rule of federal common law to interpret ERISA).

⁵⁰ *Metropolitan Life*, 297 F.3d at 566; see also *Schmidt v. Sheet Metal Workers' National Pension Fund*, 128 F.3d 541 (7th Cir. 1997) (holding that a pension beneficiary designation, written on the wrong form but clearly evidencing the decedent's intention, was ineffective). *But see Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 564–65 (4th Cir. 1994) (adopting substantial compliance as federal common law).

⁵¹ *Metropolitan Life*, 297 F.3d at 564–65 (citing *Aetna Life Ins. Co. v. Wise*, 184 F.3d 660, 663–65 (7th Cir. 1999) for the proposition that a change of beneficiary will be effective under Illinois law where “the party asserting that a change has occurred [has established] (1) the certainty of the insured's intent to change his beneficiary; and (2) that the insured did everything he could have reasonably done under the circumstances to carry out his intention to change the beneficiary”); see also *Dooley v. James A. Dooley Assoc. Employees Ret. Plan*, 442 N.E.2d 222, 226–27 (Ill. 1982) (applying substantial compliance).

compliance, as a rule of state law, was preempted.⁵² But they went on to incorporate the doctrine of substantial compliance into federal common law and then used that to interpret ERISA.⁵³ They held that Johnson had substantially complied with the requirements of the change-of-beneficiary form, hence the form was effective. Following the model of *Metropolitan Life*, federal courts could theoretically incorporate other aspects of the state law of nonprobate transfers into the federal common law of ERISA. Yet an important question remains: how should federal courts respond if state law varies from one jurisdiction to another? Here, too, the Seventh Circuit's decision in *Metropolitan Life* is instructive. As the court stated, "We recognize... the need to ensure uniformity in ERISA jurisprudence, and [] the principle that 'federal common law should be consistent across the circuits.'" ⁵⁴ Thus, the Seventh Circuit did not transform 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.⁵⁵

Of these three solutions, which one is the best? In my judgment, the first solution is the ideal, but the third solution is the most realistic.

The first solution—amending ERISA, particularly so as to permit state legislatures to use UPC-style constructive trusts in the area of succession—is the most satisfying. It would maintain the uniformity of employee benefit administration, which is a significant federal concern, while respecting the succession law of individual states, some of which have chosen to unify their treatment of probate and nonprobate transfers while other states have not so chosen. The unfortunate reality, however, is that Congressional amendment of

⁵² *Metropolitan Life*, 297 F.3d at 566.

⁵³ *Id.* at 567–69.

⁵⁴ *Id.* at 567 (quoting *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 564 (4th Cir. 1994)).

⁵⁵ By way of example: this approach was informally discussed at the Association of American Law Schools' conference on "Defining the Family in the Millennium" in March 2001; it is explicitly put forward by the commentary to the UPC (*see* UNIF. PROB. CODE § 2-804 cmt., 8 U.L.A. PT. I 57 (Supp. 2003) ("Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.")); and it is advocated in David S. Lebolt, *Making the Best of Egelhoff: Federal Common Law for ERISA-Preempted Beneficiary Designations*, 28 J. PENSION PLANNING & COMPLIANCE 29 (Fall 2002) (arguing for the approach in the context of divorce and homicide but not addressing the other three areas of conflict—lapse, survivorship, and elective share—examined in the present article).

ERISA will not occur in the foreseeable future. Despite extensive litigation and considerable confusion about the scope of ERISA preemption,⁵⁶ Congress has repeatedly declined to solve the problem. There is no reason to think it will act in the short or medium term.

In the face of Congressional inaction, we are forced to consider the second and third solutions. The second solution—encouraging employers to re-write their plans to incorporate the state-law provisions discussed in this Article—sounds good at first blush but ultimately will not succeed, for two reasons. First, exhortations will not be fully effective, because not all employers will choose to amend their plans. Second, administrators may only follow the terms of plan documents “insofar as such documents and instruments are consistent with” ERISA.⁵⁷ Thus, amendments to the plan would only be effective for matters on which ERISA has no substantive provision to the contrary, an example being revocation on divorce; ERISA has no rule on the subject, so a rule in the plan would be effective as a gap-filler. Yet where ERISA has substantive requirements, they cannot be overridden by the terms of an individual plan. For example, plan amendments would not be able to implement a UPC-style elective share, because ERISA has its own rules governing spousal rights.⁵⁸ In short, employer amendment of plans may work in some circumstances, but not in all.

We are therefore left with the third solution: incorporation of state-law principles, such as those articulated in the Restatement Third and the UPC, into federal common law. This solution, although elegant, requires an important caveat. The substantive rules articulated by the Restatement Third and the UPC sometimes reflect minority, rather than widely-accepted, positions. This is easy to

⁵⁶ For examples of recent U.S. Supreme Court cases interpreting ERISA’s preemption provision in other contexts, see *Kentucky Ass’n. of Health Plans, Inc. v. Miller*, 123 S.Ct. 1471, 1475 (2003) (holding that state laws of general application that have some bearing on insurers do not fall within the insurance exception to ERISA preemption); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 373 (2002) (holding that an Illinois statute requiring HMOs to provide independent review of disputes between primary care physicians and HMOs regulated insurance and thus was not preempted by ERISA); *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A.*, 519 U.S. 316, 334 (1997) (holding that California’s prevailing wage law does not “relate to” ERISA plans and is not preempted by ERISA); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 841 (1988) (holding that ERISA preempts a Georgia state statute enacted to forbid garnishment of wages under an ERISA-regulated plan). See also Daniel Fischel & John H. Langbein, *ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1105–06 (1988) (observing that ERISA’s “overbroad” preemption provision “has wreaked aimless interference upon state regulation of areas such as health insurance that are quite peripheral to pension policy” and that “[n]either a substantial string of Supreme Court cases nor occasional Congressional repair has been able to cure the mess”).

⁵⁷ 29 U.S.C. § 1104 (a)(1)(D) (2000).

⁵⁸ See generally LANGBEIN & WOLK, *supra* note 6, at 577–87 (discussing spousal annuities required by ERISA as amended by the Retirement Equity Act of 1984).

illustrate. Imagine the same facts as in *Egelhoff* except that the beneficiary designations named not Donna but a son born to Donna by another man. The UPC and Restatement Third would apply the rule of revocation-on-divorce not only to the former spouse (Donna) but also to any relatives of the former spouse who are not relatives of the decedent (Donna's son).⁵⁹ Substantively, this result is correct because it best effectuates the most likely intention of the property owner (David), who has little reason to wish to benefit a relative who is not his.⁶⁰ Yet the UPC and Restatement Third provisions are comparatively new, and their approach is currently in the minority; most states still follow the traditional approach of applying revocation-on-divorce to the former spouse only.⁶¹ It is somewhat troubling to incorporate into federal common law rules of state law that have not achieved widespread acceptance among state legislatures. The ideal solution—our first solution, above—would not require this. It would leave to individual states the decision whether to unify the treatment of probate and nonprobate transfers. But we do not live in that ideal world; Congress is not likely to amend ERISA's preemption provisions. Accordingly, the question we must keep in mind is: which solution is practicable and works better than the current regime in which ERISA preempts all conflicting state laws? The third solution, using Restatement and uniform law as federal common law, meets that test. The rules of the Restatement Third and the UPC, even when they are in the minority, are designed to achieve the correct result. That is far superior to the status quo under *Egelhoff*, where substantively incorrect results are the regrettable but inevitable products of overbroad preemption.

⁵⁹ See UNIF. PROB. CODE § 2-804(b)(1), 8 U.L.A. PT. I 54 (Supp. 2003) (“[T]he 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 in a governing instrument *and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.*”) (alterations in original) (emphasis supplied); RESTATEMENT THIRD, *supra* note 11, § 4.1 cmt. o, illus. 12 (“If the controlling revocation statute provides only that the devise to [the former spouse] is revoked, the court should effectuate the purpose of the statute by extending its terms to revoke the devise to [the former spouse]’s children.”); *id.* § 7.2 cmt. f (“The principles of § 4.1(b) on revocation caused by the dissolution of marriage fully apply to revocable will substitutes.”).

⁶⁰ See UNIF. PROB. CODE § 2-804 cmt., 8 U.L.A. PT. I 56 (Supp. 2003) (explaining that because “the former spouse’s relatives are likely to side with the former spouse . . . seldom would the transferor have favored” leaving any gift to the relatives unrevoked, so “[t]his section, therefore, also revokes these gifts”); RESTATEMENT THIRD, *supra* note 11, § 4.1 cmt. o, illus. 12 (stating that a statute limited to the former spouse should be extended to relatives of the former spouse, as this is necessary to “effectuate the purpose of the statute”).

⁶¹ See RESTATEMENT THIRD, *supra* note 11, § 4.1 cmt. o (observing that “[m]ost revocation statutes . . . limit the scope of the revocation to provisions in favor of the *former spouse*”).

CONCLUSION

As employee benefits play a larger and larger role in the transmission of wealth,⁶² the number of conflicts between ERISA and state succession law will only increase. This Article discusses three solutions and presents one that is realistic for the foreseeable future: the incorporation of Restatement and uniform law into federal common law, which can then be used to interpret ERISA. This approach aims to steer federal pension law and state succession law, currently on a collision course, onto something approaching parallel lines.

⁶² *See supra* note 39.