

COMMENTS

WAIVERS OF ERISA PLAN BENEFITS: PREVENTING JUDICIAL INTERPRETATIONS OF A COMPLEX STATUTE FROM FRUSTRATING THE STATUTE'S SIMPLE PURPOSE

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INTRODUCTION

A woman has just lost her husband. Among the many other things on her mind, she is worried about her financial security. She has just retired, and her recently deceased husband was two years from retirement. They had planned to fund their retirement through his money purchase pension plan.¹ She contacts his pension plan administrator to receive the death benefit payable upon her husband's passing. The plan administrator informs her that the pension plan documents show that the beneficiary is not her, but rather her husband's ex-wife. The surviving spouse informs the plan administrator that the ex-wife waived her right to the pension plan many years ago in a divorce agreement with her then-husband. Who receives the pension money?²

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¹A money purchase pension plan is a defined contribution pension plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). See 6 DAVID L. BACON & DAVID W. TUCKER, LABOR AND EMPLOYMENT LAW § 150.04[2] (2006) (discussing the attributes of money purchase pension plans).

²In this situation, ERISA partially protects the interest of the surviving spouse by requiring that a surviving spouse receive at least fifty percent of the pension plan balance as a qualified preretirement survivor annuity (QPSA). 29 U.S.C. § 1055(e)(2) (2000). See generally BACON & TUCKER, *supra* note 1, § 150.06[7] (providing an in-depth discussion of ERISA's survivor benefit rules). A QPSA must be provided to the surviving spouse of a vested participant in certain ERISA-defined benefit plans or money purchase pension plans who dies before the annuity starting date. 29 U.S.C. § 1055(a) (2000). In a situation where a living participant is already receiving pension

The answer to this question is the subject of a long-lived circuit split in the federal courts.³ At issue is “whether administrators of an ERISA plan are required to recognize a beneficiary’s waiver of his or her benefits.”⁴ The issue has been addressed in numerous federal appellate decisions over the last fifteen years. The majority view, known as the “federal common law approach,” holds that beneficiaries may effectively waive their rights to the benefits of an ERISA plan if the waiver meets certain criteria determined under federal common law.⁵ The “minority rule,” by contrast, contends that beneficiaries may not waive their rights to the benefits of an ERISA plan, and that the plan administrator therefore must pay the beneficiary listed in the plan documents.⁶

This Comment argues that the federal common law approach is the preferable rule to apply when evaluating waivers of benefits by ERISA plan beneficiaries. The federal common law approach better

benefits, ERISA contains a parallel provision for a qualified joint and survivor annuity (QJSA). *Id.* A QJSA requires that a surviving spouse continue to receive at least fifty percent of pension benefit payments received during the joint lives of the participant and spouse. *Id.* § 1055(d)(1). Thus, even if the beneficiary’s waiver is ineffective, the surviving spouse will still receive fifty percent of the benefit with the remaining fifty percent going to the named beneficiary.

³ See George A. Norwood, *Who Is Entitled To Receive a Deceased Participant’s ERISA Retirement Plan Benefits—An Ex-Spouse or Current Spouse? The Federal Circuits Have an Irreconcilable Conflict*, 33 GONZ. L. REV. 61, 65-71 (1998) (detailing the history of the circuit split); Keron A. Wright, Comment, “Stuck on You”: *The Inability of an Ex-Spouse to Waive Rights Under an ERISA Pension Plan* [McGowan v. NJR Serv. Corp., 423 F.3d 241 (3d Cir. 2005)], 45 WASHBURN L.J. 687, 694-95 (2006) (discussing the approaches of the Fourth and Sixth Circuits); Donald P. Carleen, *Refusal To Honor Beneficiary’s Waiver of Pension Benefits Is Upheld*, N.Y. L.J., Dec. 16, 2005, at 3, 5 (analyzing the circuit split in light of *McGowan*, a recent decision by the Third Circuit).

⁴ *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 244 (3d Cir. 2005), *cert. denied*, No. 05-853, 2007 WL 91575 (U.S. Jan. 16, 2007). “ERISA” refers to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2000).

⁵ *E.g.*, *Estate of Altobelli v. Int’l Bus. Machs. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996); *Mohamed v. Kerr*, 53 F.3d 911, 914-15 (8th Cir. 1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1327 (5th Cir. 1994); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281-82 (7th Cir. 1990) (*en banc*).

⁶ The Sixth Circuit is the only circuit whose decisions comprehensively support the minority view. See, *e.g.*, *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990) (stating that ERISA’s “clear statutory command” requires the court to give effect to the plain language of the plan). A recent Third Circuit decision held in favor of the minority view for certain ERISA plans. *McGowan*, 423 F.3d at 245-46. The Second Circuit has indicated its preference for the minority view in dicta. See *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993) (“It would be counterproductive to compel the Policy administrator to look beyond [beneficiary] designations into varying state laws regarding wills, trusts and estates, or domestic relations to determine the proper beneficiaries of Policy distributions.”).

serves ERISA's equitable purpose of safeguarding employees' rights to their plan benefits while remaining consistent with ERISA's statutory language. Part I provides an overview of ERISA and its relevant provisions. Part II reviews the minority rule by examining the three primary arguments advocated by its proponents. Part III examines the federal common law approach and the decisions of the circuits that support it. Finally, Part IV discusses the reasons why the federal common law approach should govern waivers of ERISA plan benefits by nonparticipant beneficiaries.

I. ERISA

The Employee Retirement Income Security Act of 1974⁷ (ERISA) is the principal federal statute that regulates employee benefit plans. ERISA is a wide-reaching statute that covers most employee benefit plans⁸ and affects a majority of the U.S. population.⁹

A. *Types of ERISA Plans*

There are two types of ERISA employee benefit plans: "employee *welfare* benefit plan[s]"¹⁰ (welfare plans) and "employee *pension* bene-

⁷ 29 U.S.C. §§ 1001-1461 (2000).

⁸ *See id.* § 1003 (defining ERISA's scope). The primary employee benefit plans that are not covered by ERISA include government plans, church plans, plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws," plans "maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens," and unfunded excess benefit plans. *Id.* § 1003(b).

⁹ *See* Craig Copeland, *Retirement Plan Participation and Retirees' Perception of Their Standard of Living*, EBRI ISSUE BRIEF (Employee Benefits Research Inst., Wash., D.C.), Jan. 2006, at 1, 31, available at http://www.ebri.org/pdf/EBRI_IB_01-2006.pdf ("[T]he extent of employment-based retirement plan use over workers' lifetimes is significantly greater than . . . 50 percent.").

¹⁰ 29 U.S.C. § 1002(1) (2000) (emphasis added). An employee welfare benefit plan is

any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . .

Id.

fit plan[s]”¹¹ (pension plans). Pension plans can be categorized further as either “defined contribution plan[s]” (also called “individual account plans”)¹² or “defined benefit plan[s].”¹³ Within this statutory structure, beneficiary waiver disputes most frequently arise in three contexts: employer-provided life insurance welfare plans,¹⁴ defined benefit pension plans,¹⁵ and money purchase pension plans.¹⁶ Beneficiary waivers rarely arise in connection with 401(k) plans because the ERISA provisions surrounding qualified preretirement survivor annuities (QPSAs) and qualified joint and survivor annuities (QJSAs)¹⁷ have led most 401(k) plans to include a provision requiring that the employee’s spouse receive the balance in the participant’s account upon the participant’s death, unless the spouse waives her rights in writing prior to the designation of an alternate beneficiary.¹⁸ Because not all

¹¹ *Id.* § 1002(2)(A). An employee pension benefit plan is: any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
 (i) provides retirement income to employees, or
 (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Id.

¹² *Id.* § 1002(34). A defined contribution plan is “a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.” *Id.* The distinguishing feature of defined contribution plans is that the employee bears the investment risk for the contributed funds and thus is not guaranteed a particular amount at retirement. BACON & TUCKER, *supra* note 1, § 148.05[1]. Examples of common defined contribution pension plans include money purchase pension plans, 401(k) plans, and profit sharing plans. *Id.*

¹³ 29 U.S.C. § 1002(35) (2000). A defined benefit plan generally is “a pension plan other than an individual account plan.” *Id.* A defined benefit plan guarantees the participant specified benefits upon retirement. BACON & TUCKER, *supra* note 1, § 148.05[2]. Hence, the employer bears the investment risk. *Id.*

¹⁴ *E.g.*, Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1322-23 (5th Cir. 1994).

¹⁵ *E.g.*, Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 277 (7th Cir. 1990) (en banc); Trs. of Iron Workers Local 451 Annuity Fund v. O’Brien, 937 F. Supp. 346, 347 (D. Del. 1996).

¹⁶ *E.g.*, McMillan v. Parrott, 913 F.2d 310, 310-11 (6th Cir. 1990).

¹⁷ See *supra* note 2 (discussing ERISA’s QPSA and QJSA requirements).

¹⁸ See 29 U.S.C. § 1055(a)-(b)(1)(C) (2000) (providing for QPSAs and QJSAs in most individual account plans).

ERISA provisions apply to each plan type, it is critical to know the ERISA plan type when analyzing a beneficiary waiver claim.

B. Purpose and Regulatory Scheme

“ERISA is an intricate, comprehensive statute”¹⁹ with dual purposes.²⁰ The first and primary purpose is “to promote the interests of employees and their beneficiaries in employee benefit plans.”²¹ The second purpose is to ensure “that ERISA plans be uniform in their interpretation and simple in their application.”²² The first purpose of ERISA can be regarded as protecting employees and the second as protecting employers.²³

ERISA pursues its objectives through a federal regulatory scheme of reporting and disclosure requirements²⁴ and fiduciary responsibility provisions²⁵ for all ERISA plans. Additionally, ERISA imposes participation, vesting, and funding requirements on pension plans.²⁶ In order to effect the administration and enforcement of ERISA’s regulatory scheme in light of state regulation of retirement benefits, Congress added an expansive preemption clause, which states that ERISA “shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan.”²⁷ The Supreme Court broadly inter-

¹⁹ *Boggs v. Boggs*, 520 U.S. 833, 841 (1997).

²⁰ *See McMahon v. Digital Equip. Corp.*, 162 F.3d 28, 35-36 (1st Cir. 1998) (setting out ERISA’s two primary purposes).

²¹ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); *see also* Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, in JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 68, 70 (3d ed. 2000) (explaining how the failure of Studebaker’s pension plan prompted concern about the security of pension benefits and thus influenced the enactment of ERISA). Promoting the interests of participants and their beneficiaries is a far-reaching objective with many components. *See* BACON & TUCKER, *supra* note 1, § 147.01 (setting forth ERISA’s purposes in detail).

²² *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990).

²³ *See Demars v. CIGNA Corp.*, 173 F.3d 443, 446 (1st Cir. 1999) (“In passing ERISA, Congress’s purpose was twofold: to protect employees and to protect employers.”). Classifying the second purpose of ERISA as protecting employers is an accurate, but simplified, statement. The rationale underlying the second purpose of ERISA is to protect employers, so that employers will be willing to sponsor ERISA plans.

²⁴ *See* 29 U.S.C. §§ 1021-31 (2000).

²⁵ *See id.* §§ 1101-14.

²⁶ *See id.* §§ 1051-85.

²⁷ *Id.* § 1144(a). The preemption provision was expanded by the Conference Committee just prior to Congress’s final approval of ERISA. *See* Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States To Regulate Managed Care?*, 74 TUL. L. REV. 951, 977-85 (2000). “The original House-passed version of

preted this provision when it held that ERISA preempts state law that either “conflicts with the provisions of ERISA or operates to frustrate its objects.”²⁸

This expansive preemption provision creates gaps where the state law addressing an issue is preempted, and ERISA does not itself contain specific rules on the issue.²⁹ Any gaps created by preemption are to be filled by a court-developed “federal common law of rights and obligations under ERISA-regulated plans.”³⁰ All the courts that have addressed the issue agree that ERISA preempts state law in connection with beneficiary waivers.³¹ The important question is whether

ERISA and the original Senate version both contained a limited preemption clause expressly tied to ERISA’s focus on pension regulation.” *Id.* at 978. The final version preempted “all State laws insofar as they . . . relate to any employee benefit plan.” *Id.* at 986 (quoting 29 U.S.C. § 1144(a) (1994)).

²⁸ *Boggs v. Boggs*, 520 U.S. 833, 841 (1997). Preemption is essential to achieving the second purpose of ERISA. See *supra* note 22 and accompanying text (identifying the second purpose of ERISA as providing for uniformity and simplicity in administration). The Supreme Court recognized the tie between expansive preemption and Congress’s objective of simple plan administration in *Fort Halifax Packing Co. v. Coyne*:

It is . . . clear that ERISA’s pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

482 U.S. 1, 11 (1987).

²⁹ ERISA’s wide-sweeping preemption “creates a ‘regulatory vacuum,’” which could lead to “situation[s] of ‘almost palpable unfairness’” unless the federal courts “develop federal common law remedies pursuant to ERISA in order to fill the vacuum.” Joshua A.T. Fairfield, Comment, *ERISA Preemption and the Case for a Federal Common Law of Agency Governing Employer-Administrators*, 68 U. CHI. L. REV. 223, 224 (2001). Fairfield argues that the federal courts should adopt a common law of agency “that conducts a fact-sensitive analysis of the relationship between the employee, the employer, and the insurer.” *Id.* at 225.

³⁰ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).

³¹ See, e.g., *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 257-58 (3d Cir. 2005), *cert. denied*, No. 05-853, 2007 WL 91575 (U.S. Jan. 16, 2007) (relying on *Boggs*, 520 U.S. at 841); *Estate of Altobelli v. Int’l Bus. Machs. Corp.*, 77 F.3d 78, 82 (4th Cir. 1996) (holding that the issue of beneficiary waivers is governed by federal common law without addressing the question of preemption); *Mohamed v. Kerr*, 53 F.3d 911, 913 (8th Cir. 1995) (noting that, while state law is preempted, “federal courts may look to state law for guidance in developing federal common law”); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994) (“[T]he designation of a beneficiary ‘relates to’ the provision of an ERISA plan to a sufficient degree to be preempted by that statute.”); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2d Cir. 1993) (rejecting the use of

ERISA specifically addresses beneficiary waivers, or if beneficiary waivers exist in one of the gaps created by preemption and should fall under the purview of federal common law.³²

C. ERISA Provisions Applicable to the Debate over Beneficiary Waivers

ERISA has numerous provisions,³³ two of which are particularly relevant to waivers by beneficiaries: the fiduciary duties provision and the anti-alienation provision.

1. Fiduciary Duties Provision

ERISA's fiduciary duties provision, § 1104, details the responsibilities of a plan fiduciary—the plan administrator or trustee, for example—as he performs his duties.³⁴ Section 1104(a)(1) provides, in relevant part, that

a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; . . . and (D) *in accordance with the documents and instruments governing the plan* insofar as such documents and instruments are consistent with [ERISA].³⁵

This provision, including the requirement that the plan administrator discharge his duties “in accordance with the [plan] documents,”³⁶ applies to the plan administrator's distribution of the death benefit after the participant dies.³⁷ Because the plan administrator must determine the proper beneficiary, the validity of a beneficiary's

state law where the plan administrator interpleads claimants); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 278 (7th Cir. 1990) (en banc) (“Because ERISA preempts state pension benefit laws, we must find the answer to this issue within ERISA itself or in the federal common law interpreting ERISA.” (citation omitted)); *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990) (“[ERISA's] preemption provision is to be construed broadly . . .”).

³² See *supra* notes 5-6 and accompanying text (discussing the two approaches courts have followed).

³³ See *supra* notes 19-26 and accompanying text (describing ERISA's structure and objectives).

³⁴ 29 U.S.C. § 1104 (2000).

³⁵ *Id.* § 1104(a)(1) (emphasis added).

³⁶ *Id.* § 1104(a)(1)(D).

³⁷ ERISA plan administrators must make death distributions to beneficiaries. See BACON & TUCKER, *supra* note 1, § 150.06[11][c].

waiver can become a contested issue in the death benefit distribution.³⁸

2. Anti-Alienation Provision

ERISA also contains an anti-alienation, or “spendthrift,” provision in § 1056(d).³⁹ The congressional policy behind this provision is “to safeguard a stream of income for pensioners . . . and their dependents.”⁴⁰ The provision requires “[e]ach pension plan [to] provide that benefits provided under the plan may not be assigned or alienated.”⁴¹ The stated exception to this provision condones only two types of transactions: (1) “any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment”⁴² and (2) the “assignment . . . of a right to any benefit payable with respect to a participant pursuant to . . . a qualified domestic relations order,” or QDRO.⁴³

³⁸ Determining the proper beneficiary can be a challenge when the beneficiary form on file with the plan administrator designates an ex-spouse who has subsequently waived her right to the benefits in a divorce property settlement. *See, e.g., Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 282 (7th Cir. 1990) (en banc) (holding that the divorcée effectively waived any interest in her husband’s pension and was not entitled to payment). Often, the plan administrator will file an interpleader action to determine the proper recipient of the death benefit. *E.g., id.* at 278.

³⁹ 29 U.S.C. § 1056(d) (2000).

⁴⁰ *Boggs v. Boggs*, 520 U.S. 833, 852 (1997) (quoting *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 376 (1990)). The Supreme Court in *Boggs* emphasized the objective of the anti-alienation provision by noting that it “can be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.” *Id.* at 851 (quoting JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 547 (2d ed. 1995)).

⁴¹ 29 U.S.C. § 1056(d)(1).

⁴² *Id.* § 1056(d)(2).

⁴³ *Id.* § 1056(d)(3)(A). As one treatise explains:

A QDRO is a judgment, decree or order (including approval of a property settlement agreement) made pursuant to a state domestic relations law (*i.e.*, divorce law) which relates to the provision of child support, alimony payments, or marital property rights. In order to be “qualified”, the QDRO must:

- Create or recognize the existence of an alternate payee’s right, or assign to an alternate payee the right, to receive all or a portion of a participant’s pension plan benefits.
- Not alter the amount or form or benefits otherwise payable under the terms of the plan.
- Specify the name and last known mailing address of the participant and any alternate payee covered by the QDRO.
- Specify the amount or percentage of the participant’s benefits to be paid to the alternate payee, or, alternatively, the manner in which the amount or percentage is to be calculated.
- Name the plan covered by the QDRO.

The applicability of the anti-alienation provision often arises in connection with beneficiary waivers of ERISA pension plan benefits. The issue is whether a waiver is an “assignment or alienation,” and thus only allowed if it satisfies one of the anti-alienation exceptions.⁴⁴ The first step in addressing this question is to define “assignment or alienation.” Although the Supreme Court has not directly addressed the definition of these terms, it has referred to a regulation defining an “assignment or alienation” as “[a]ny direct or indirect arrangement whereby a party acquires from a participant or beneficiary’ an interest enforceable against a plan to ‘all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.’”⁴⁵

II. THE MINORITY RULE

The United States Courts of Appeals for the Second, Third, and Sixth Circuits support the minority rule—not giving effect to a waiver of ERISA plan benefits by a beneficiary and, instead, relying solely on the beneficiary designated on the participant’s beneficiary form.⁴⁶ The minority view relies on three primary arguments: (1) the plan documents argument, (2) the efficiency and uniformity of administration argument, and (3) the anti-alienation argument.⁴⁷

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- Specify the number of payments or the period of time to which the QDRO relates.

BACON & TUCKER, *supra* note 1, § 150.08[5][b]. The Retirement Equity Act of 1984 added the QDRO, QPSA, and QJSA provisions to ERISA in order to protect the interest of spouses in each other’s pension benefits. *See* Pub. L. No. 98-397, 98 Stat. 1426 (codified in scattered sections of 29 U.S.C.) (stating the act’s purpose as amending ERISA to “provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home”).

⁴⁴ *See, e.g.,* McGowan v. NJR Serv. Corp., 423 F.3d 241, 249 (3d Cir. 2005), *cert. denied*, No. 05-853, 2007 WL 91575 (U.S. Jan. 16, 2007) (emphasizing that a waiver, though conceptually distinct from an “assignment or alienation[.]’ may nevertheless be prohibited”).

⁴⁵ *Boggs*, 520 U.S. at 851 (quoting 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1997)).

⁴⁶ *See supra* note 6 and accompanying text (citing relevant cases and observing that the Sixth Circuit is the only circuit whose decisions comprehensively support the minority view). The minority rule has also garnered support from the Department of Labor in an amicus brief to the Supreme Court of Texas. Brief for the Secretary of Labor, United States Department of Labor, as Amicus Curiae Supporting Petitioner at 12-13, *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003) (No. 01-0447), 2002 WL 32349562.

⁴⁷ *See McGowan*, 423 F.3d at 251 (Becker, J., concurring) (summarizing the majority opinion’s three primary arguments).

A. *The Plan Documents Argument: McMillan and Egelhoff*

The plan documents argument interprets ERISA's fiduciary duties provision, § 1104, as requiring plan administrators to pay the beneficiary listed on the beneficiary form without consulting any other documents to determine the correct beneficiary.⁴⁸ The first federal appellate court to endorse the minority rule based on the plan documents argument was the Sixth Circuit in *McMillan v. Parrott*.⁴⁹ *McMillan* is the paradigmatic beneficiary waiver case. Dr. Norman Parrott was a participant in "two vested ERISA [pension] plans."⁵⁰ At the time of his death, he was married to Claudia, who was his third wife.⁵¹ However, the designated beneficiary on his ERISA plan documents was Barbara, his second wife.⁵²

Dr. Parrott had filed his beneficiary form four years prior to his death, while he was still married to Barbara.⁵³ Later that same year, he and Barbara divorced, signing a property settlement agreement.⁵⁴ The agreement included "a broad waiver clause in which each spouse relinquished 'any and all' claims he or she might have against the other."⁵⁵

After Dr. Parrott's death, the plan administrator faced the question of which party was the proper beneficiary: Barbara or Dr. Parrott's estate?⁵⁶ The plan administrator sought a declaratory judgment from the district court to answer this question.⁵⁷ The district court responded with two rulings. First, Claudia, as the surviving spouse, was entitled to a QPSA for fifty percent of the plan benefits;⁵⁸

⁴⁸ See *id.* at 246 (arguing that the fiduciary duties provision "dictates that it is the documents on file with the Plan, and not outside private agreements between beneficiaries and participants, that determine the rights of the parties").

⁴⁹ 913 F.2d 310 (6th Cir. 1990).

⁵⁰ *Id.* at 310.

⁵¹ *Id.*

⁵² *Id.* at 311.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* Later in the opinion, the court noted that even if it were to adopt the federal common law approach, the waiver in the property settlement agreement would not be specific enough to be enforced because it did not "specifically refer to the spouse's rights as a beneficiary in an ERISA plan." *Id.* at 312.

⁵⁶ *Id.* at 311.

⁵⁷ *Id.*

⁵⁸ *Id.*; see also *supra* note 2 (discussing QPSAs). In summarizing the district court's decision, the Sixth Circuit cites Internal Revenue Code provisions 26 U.S.C. §§ 401(a)(11)(A), 417(c)(2) (2000). *McMillan*, 913 F.2d at 311. The language in the In-

and second, Barbara had waived her right to the other half of the plan benefits through the waiver clause in the property settlement agreement.⁵⁹

Barbara appealed the district court's ruling as to the waiver, and the Sixth Circuit reversed, holding that the divorce settlement was not an effective waiver of Barbara's rights as beneficiary.⁶⁰ The Court of Appeals based its holding on ERISA's requirement that the "plan administrator discharge his duties 'in accordance with the documents and instruments governing the plan.'"⁶¹ The court noted that both pension plans provided that "[e]ach Participant shall be given the opportunity in an original election to designate a Beneficiary and from time to time the Participant may file with the Plan Administrator a new or revised designation in such form as the Plan Administrator shall provide."⁶² The court then applied ERISA's plan documents requirement to the beneficiary language of the plan, and concluded that "the documents control, and those name Barbara Parrott."⁶³

The *McMillan* court's analysis is not unsupported. In *Egelhoff v. Egelhoff*, the Supreme Court used similar reasoning to hold that ERISA preempted a Washington statute that automatically revoked the designation of a spouse as the beneficiary of a nonprobate asset.⁶⁴ Specifically, the Court found that the Washington statute

runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan."⁶⁵

ternal Revenue Code closely parallels ERISA's QPSA provisions, 29 U.S.C. § 1055 (2000).

⁵⁹ *McMillan*, 913 F.2d at 311. Claudia, Dr. Parrott's children, and Dr. Parrott's estate reached a court-approved agreement dividing the remaining fifty percent of the plan benefits. *Id.*

⁶⁰ *Id.* at 312.

⁶¹ *Id.* at 311 (quoting 29 U.S.C. § 1104(a)(1)(D) (2000)); *see also supra* notes 34-38 and accompanying text (discussing ERISA's fiduciary duties provisions).

⁶² *McMillan*, 913 F.2d at 311.

⁶³ *Id.* at 311-12.

⁶⁴ 532 U.S. 141, 144, 150 (2001). *See generally* Jonathan Dotson, Comment, *Egelhoff v. Egelhoff: The Supreme Court's Latest Attempt To Clarify ERISA Preemption and the Decision's Effect on Texas State Law*, 54 BAYLOR L. REV. 503 (2002) (discussing ERISA's express preemption of state law and the effects of *Egelhoff*).

⁶⁵ *Egelhoff*, 532 U.S. at 147 (citations omitted) (quoting 29 U.S.C. §§ 1002(8), 1102(b)(4), 1104(a)(1)(D) (2000)).

Although the reasoning in *Egelhoff* is similar to the reasoning of the plan documents approach to beneficiary waivers, several circuits have declined to apply *Egelhoff* because its holding was based on the preemption of state law rather than the application of federal common law.⁶⁶

B. *The Efficiency and Uniformity of Administration Argument: Fox Valley*

The efficiency and uniformity of administration argument is an extension of the plan documents argument. The theory is that requiring the plan administrator to distribute the death benefit to the named beneficiary furthers one of ERISA's primary purposes: the simple and uniform administration of pension plans.⁶⁷ In his dissenting opinion in *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, Judge Easterbrook explained the benefits of such a bright-line rule: "Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."⁶⁸

C. *The Anti-Alienation Argument: McGowan*

The anti-alienation argument relies on ERISA's anti-alienation provision, § 1056(d).⁶⁹ Because that provision is limited to pension

⁶⁶ See, e.g., *Guardian Life Ins. Co. of Am. v. Finch*, 395 F.3d 238, 242 (5th Cir. 2004), cert. denied sub nom. *Finch v. Galaway*, 544 U.S. 1056 (2005) ("[T]he holding of *Egelhoff* is inapplicable to the present case because *Egelhoff* does not address the application of federal common law to ERISA plans. . . . This court sees no reason to extend the scope of *Egelhoff* to find that it preempts federal common law in addition to state statutes.").

⁶⁷ See *McMillan*, 913 F.2d at 312 (arguing that the plan documents approach "fulfills the intent of Congress that ERISA plans be uniform in their interpretation and simple in their application").

⁶⁸ 897 F.2d 275, 283 (7th Cir. 1990) (Easterbrook, J., dissenting). The beneficiary waiver issue is an example of a question impacted by theories of statutory interpretation. See Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1439 (2000) (citing *Fox Valley* as an example of a case that reflects the divergent theories of statutory interpretation of Judges Easterbrook and Posner). Judge Easterbrook is well known for his textualist view of statutory interpretation. *Id.* at 1409. In contrast, Judge Posner, who joined the majority in *Fox Valley*, is recognized as taking a pragmatic view of statutory interpretation. *Id.*

⁶⁹ 29 U.S.C. § 1056(d) (2000); see also *supra* notes 39-45 and accompanying text (discussing ERISA's anti-alienation provision).

plans,⁷⁰ this argument applies only to such plans. As of the writing of this Comment, *McGowan v. NJR Service Corp.*⁷¹ is the most recent beneficiary waiver case decided by a federal appellate court based on the anti-alienation argument.

Although the Third Circuit adopted the minority rule in *McGowan*, the nature of the opinion provides insight into the complex and uncertain law surrounding beneficiary waivers. Judge Van Antwerpen wrote the main opinion holding in favor of the minority rule, and he was persuaded by all three of the common arguments: anti-alienation, plan documents, and efficiency and uniformity of administration.⁷² Judge Becker concurred with the principal opinion's approval of the anti-alienation argument, but he rejected the other two arguments.⁷³ Judge Fuentes, rejecting all three arguments, dissented.⁷⁴ The result was a 2-1 decision in favor of the minority rule, with a controlling holding based on the anti-alienation argument. Since this argument can apply only to pension plans, the Third Circuit's analysis supports the minority rule concerning pension plan beneficiary waivers and the federal common law rule with respect to welfare plan beneficiary waivers.⁷⁵

The factual situation in *McGowan* is different from that in *McMillan*.⁷⁶ Shortly before he retired from New Jersey Natural Gas

⁷⁰ 29 U.S.C. § 1056(d)(1) ("Each *pension plan* shall provide that benefits provided under the plan may not be assigned or alienated." (emphasis added)).

⁷¹ 423 F.3d 241 (3d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3407 (U.S. Jan. 3, 2006) (No. 05-853).

⁷² *Id.* at 245-50.

⁷³ *Id.* at 253-55 (Becker, J., concurring).

⁷⁴ *Id.* at 255-60 (Fuentes, J., dissenting).

⁷⁵ The only position the Third Circuit panel clearly adopted was in support of the minority rule for pension plan beneficiary waivers. The *McGowan* opinion could be interpreted to suggest the federal common law approach for welfare plans, because the anti-alienation argument applies only to pension plans. *Supra* note 70 and accompanying text. However, this is not the Third Circuit's holding in *McGowan*, and it is not clear that the judges considered the impact of their reasoning on welfare plan beneficiary waivers.

⁷⁶ *McGowan* "arises in [the] unusual factual context" of an attempted change to the survivor beneficiary of a QJSA after the participant has retired and annuity payments have commenced. Brief for the United States as Amicus Curiae Supporting Denial of Certiorari at 7-8, *McGowan v. NJR Serv. Corp.*, No. 05-853 (U.S. Jan. 16, 2007), available at <http://www.usdoj.gov/osg/briefs/2006/2pet/6invt/2005-0853.pet.ami.inv.pdf>. The factual situation in *McGowan* does not lend itself to the application of the federal common law rule because, unlike waivers outside the postretirement QJSA context, ERISA contains specific provisions detailing the requirements for a spouse to waive an interest in a QJSA. See 29 U.S.C. § 1055 (2000 & Supp. III 2003); see also Brief of the United States as Amicus Curiae, *supra*, at 10 ("[A] federal common law rule requiring

Company (NJNG), McGowan elected to receive the retirement benefits he had accrued in NJNG's retirement plan "in the form of an 'automatic surviving spouse option,' creating a 50% survivor annuity for Rosemary," who was his wife at the time.⁷⁷ Two years later, in conjunction with their divorce, Rosemary and McGowan entered a "Marital Settlement Agreement," in which Rosemary "waiv[ed] any and all rights, title, interest or claims . . . to all bank accounts, life insurance policies and any right to the New Jersey Gas Company Employee Pension Plan of the Husband."⁷⁸ McGowan then contacted the plan administrator to change the "named survivor beneficiary" from Rosemary, his second wife, to Shirley, his first wife.⁷⁹ McGowan presented the plan administrator with a form, which Rosemary had signed, that reflected Rosemary's consent to the change in beneficiary. But the plan administrator refused the request.⁸⁰ Three years later, McGowan again sought a change, this time to benefit Donna, his third and current wife.⁸¹ After the plan administrator again denied his request, McGowan sued to compel the plan "to recognize Rosemary's waiver and the subsequent nomination of Donna as the new beneficiary."⁸²

the plan to recognize the waiver in this situation would affirmatively conflict with ERISA by purporting to determine rights to a survivor's annuity in a manner not authorized by the QJSA provisions in 29 U.S.C. § 1055 (2000 & Supp. III 2003) or the QDRO provisions in 29 U.S.C. 1056(d)(3)."). Despite its unique factual circumstances, *McGowan* is relevant to the subject of this Comment because the *McGowan* court did not premise its analysis on the QJSA waiver provisions, but rather on arguments generally applicable to the waiver of ERISA benefits.

⁷⁷ *McGowan*, 423 F.3d at 243.

⁷⁸ *Id.* Note the specificity of the waiver in *McGowan* compared to the broader waiver in *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990) ("[E]ach spouse relinquished 'any and all' claims he or she might have against the other."). See *supra* note 55 (discussing the need for a waiver to be sufficiently specific in order to be enforced). Judge Fuentes closed his dissenting opinion in *McGowan* with the following observation:

Although in some cases there may be a dispute over whether particular language in a divorce settlement is specific and definite enough to constitute waiver of a pension benefit, there is no serious dispute here as to whether Rosemary's waiver was insufficient. It clearly identified the Plan and waives all rights to benefits under the Plan. Accordingly, I would give effect to Rosemary's waiver.

McGowan, 423 F.3d at 260 (Fuentes, J., dissenting).

⁷⁹ *Id.* at 243.

⁸⁰ *Id.* The administrator's reason for the denial was that "the Plan did not permit changes to [McGowan's] prior contingent beneficiary election once he started receiving benefit payments." *Id.*

⁸¹ *Id.*

⁸² *Id.* at 244.

The district court granted summary judgment in favor of the plan, and the Third Circuit affirmed, relying on the minority rule and the anti-alienation argument.⁸³ The court held that, although “as a general matter . . . ‘waiver’ is not the same thing as assignment or alienation,” Rosemary’s beneficiary waiver “creates an ‘indirect arrangement’ whereby the Plan benefits are transferred to Donna, who in turn gains an ‘interest enforceable against the plan.’”⁸⁴ Using the definition of an assignment or alienation that the Supreme Court had referenced in *Boggs*,⁸⁵ the court found that the waiver was an assignment or alienation in contravention of ERISA’s anti-alienation provision.⁸⁶ The court bolstered its conclusion that a beneficiary waiver is an alienation with an analysis of ERISA’s QDRO provisions.⁸⁷ Judge Van Antwerpen reasoned that “the QDRO provision, which recognizes the right to designate alternate payees under certain circumstances, ‘give[s] rise to the strong implication that’ the designation of alternate payees under other circumstances (i.e. through waivers) is ‘not consistent with the statutory scheme.’”⁸⁸ Judge Becker, in his concurring opinion, observed that

Congress saw QDROs as the only means by which a participant or beneficiary could assign or alienate his or her interest in the plan. This is confirmed by the language from the 1984 Senate Report noting that, absent a QDRO, the participant’s first spouse is still entitled to benefits upon the participant’s death.⁸⁹

The reasoning employed by Judges Van Antwerpen and Becker in *McGowan* is representative of the anti-alienation argument in the minority rule decisions.

⁸³ *Id.* at 244, 250; *see also supra* note 75 and accompanying text (describing the limited nature of the Third Circuit’s holding).

⁸⁴ *McGowan*, 423 F.3d at 248, 249 (quoting 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1997)).

⁸⁵ *Boggs v. Boggs*, 520 U.S. 833, 851 (1997); *see also supra* note 45 and accompanying text (discussing the Supreme Court’s reference in *Boggs* to 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1997)).

⁸⁶ *McGowan*, 423 F.3d at 248.

⁸⁷ *Id.* at 249-50; *id.* at 251-52 (Becker, J., concurring).

⁸⁸ *Id.* at 250 (quoting *Boggs*, 520 U.S. at 847). Judge Van Antwerpen’s statement is not a clear implication of the Supreme Court’s discussion in *Boggs*. *See McGowan*, 423 F.3d at 252 n.8 (Becker, J., concurring) (“While I . . . believ[e] that Judge Van Antwerpen correctly interprets the Supreme Court’s discussion of the QDRO provision in *Boggs* . . . I feel constrained to note that the Supreme Court’s congressional silence jurisprudence is somewhat of a patchwork.” (citations omitted)).

⁸⁹ *McGowan*, 423 F.3d at 251-52 (Becker, J., concurring) (footnote omitted).

III. THE FEDERAL COMMON LAW APPROACH

The Fourth, Fifth, Seventh, and Eighth Circuits have adopted the federal common law approach—ruling that ERISA does not specifically address beneficiary waivers and applying federal common law to give effect to beneficiary waivers if the waivers meet certain criteria.⁹⁰ These courts have rejected the plan documents argument, the efficiency and uniformity argument, and the anti-alienation argument (the latter being relevant only in pension plan cases).⁹¹ Instead, they apply federal common law to decide whether the waiver is effective.⁹²

A. Requirements for an Effective Waiver

The federal common law rule that the courts have applied to determine whether a beneficiary waiver is effective has been consistent across these circuits.⁹³ “That rule is that a named ERISA beneficiary may waive his or her entitlement to the proceeds of an ERISA plan . . . , provided that the waiver is explicit, voluntary, and made in good faith.”⁹⁴ Previously, there had been some differences in the interpretation of the federal common law rule,⁹⁵ but those differences have been resolved.⁹⁶

⁹⁰ See *supra* note 5 (citing cases adopting the federal common law approach). Nearly all of the state appellate courts that have addressed the issue have held in favor of the federal common law approach. *E.g.*, *MacInnes v. MacInnes*, 677 N.W.2d 889, 893 (Mich. Ct. App. 2004); *Strong v. Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 328-29 (Neb. 2005) (per curiam); *Silber v. Silber*, 786 N.E.2d 1263, 1268-69 (N.Y. 2003); *Keen v. Weaver*, 121 S.W.3d 721, 724-27 (Tex. 2003). See generally Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005) (discussing the role of state courts in the development of federal common law).

⁹¹ See, *e.g.*, *Estate of Altobelli v. Int'l Bus. Machs. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996) (rejecting the plan documents, efficiency and uniformity, and anti-alienation arguments).

⁹² *E.g.*, *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir. 1990) (en banc); *Trs. of Iron Workers Local 451 Annuity Fund v. O'Brien*, 937 F. Supp. 346, 350-51 (D. Del. 1996).

⁹³ *Mohamed v. Kerr*, 53 F.3d 911, 914-17 (8th Cir. 1995) and *Brandon v. Travelers Insurance Co.*, 18 F.3d 1321, 1326-27 (5th Cir. 1994) perform a thorough analysis of the federal common law approach across the circuits and reach a similar formulation of the general federal common law rule.

⁹⁴ *Manning v. Hayes*, 212 F.3d 866, 874 (5th Cir. 2000).

⁹⁵ In *Estate of Altobelli v. International Business Machines Corp.*, Chief Judge Wilkinson noted the differences in the federal common law rule in his dissenting opinion:

[P]lan administrators will have to assess whether the waiver is executed with sufficient specificity to trump the beneficiary designation in the plan documents. Courts have reached contradictory conclusions in such situations. Compare *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989) (term stating

B. *Rejecting the Plan Documents Argument*

The courts that reject the plan documents argument have a simple refrain: ERISA “does not either expressly or implicitly purport to establish any methodology for determining the beneficiary of an ERISA plan.”⁹⁷ The plan documents argument is premised on a combination of three different ERISA sections.⁹⁸ The most critical, § 1104, is a section on plan administrators’ fiduciary duties, not a section on distributions to beneficiaries.⁹⁹ Judge Becker, concurring in *McGowan*, noted that the fiduciary duties provision “simply embodies the common-sense notion that a plan administrator should not take actions that are inconsistent with the plan’s guidelines.”¹⁰⁰ Judge Becker bolstered this argument by sagely pointing out that “[n]othing in the language [of § 1104] prohibits the administrator from consulting other documents, insofar as those documents do not conflict with the language of the plan. Indeed, an administrator must consult

that husband “shall have as his own, free of any interest of [his wife], his interest in the profit-sharing plan of his employer” held not to waive wife’s beneficiary interest in plan), *with Fox Valley*, 897 F.2d at 275 (term stating that the parties “waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party” held to waive wife’s beneficiary interest in pension plan).

77 F.3d at 83 (Wilkinson, C.J., dissenting).

⁹⁶ See *Mohamed*, 53 F.3d at 915 (noting that the issue driving the difference in the federal common law rule has been resolved and that case law now “makes it clear that the law does not require that the word ‘beneficiary’ appear in the language of the agreement in order for a beneficiary interest to be divested”); see also *Clift v. Clift*, 210 F.3d 268, 270-72 (5th Cir. 2000) (analyzing *Lyman* and *Fox Valley* in its determination of the language sufficient to constitute a waiver under the federal common law rule and coming to the same conclusion as *Mohamed*).

⁹⁷ *Manning*, 212 F.3d at 872; see also *Fox Valley*, 897 F.2d at 280 (“ERISA is silent on the issue of what constitutes a proper waiver . . .”).

⁹⁸ These provisions are 29 U.S.C. §§ 1002, 1102, 1104 (2000). See *supra* note 65 and accompanying text (setting out the plan documents argument).

⁹⁹ See *supra* notes 34-38 and accompanying text (discussing § 1104). Section 1104 alone “is a very thin reed upon which to find complete conflict preemption.” *Manning*, 212 F.3d at 872.

¹⁰⁰ *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 254 (3d Cir. 2005) (Becker, J., concurring), *cert. denied*, No. 05-853, 2007 WL 91575 (U.S. Jan. 16, 2007); see also *Manning*, 212 F.3d at 872 (“Section 1104 defines the fiduciary duties owed by the plan administrator to plan participants and beneficiaries.”). The title of § 1104(a), “Prudent man standard of care,” 29 U.S.C. § 1104(a) (2000), lends additional support to the argument that § 1104 is intended to protect plan participants from rogue plan administrators rather than to describe detailed procedures for how plan administrators should carry out their daily tasks.

other documents to determine whether a participant has obtained a valid QDRO.”¹⁰¹

In the wake of *Egelhoff*, some argue that the view that the plan documents approach does not specifically address beneficiary waivers has been invalidated.¹⁰² But this argument confuses the preemption of state law with the preemption of federal common law, and there is no reason to believe *Egelhoff* intended the latter.¹⁰³ Given ERISA’s broad preemption clause, there will be many cases in which ERISA “relates to” an issue but does not specifically address the issue; this is where the need for federal common law arises.¹⁰⁴

C. *Rejecting the Efficiency and Uniformity of Administration Argument*

The efficiency and uniformity of administration argument claims that plan administrators will be overburdened by having to look at property settlement agreements and decide if they contain a valid waiver of a beneficiary’s rights to ERISA plan benefits.¹⁰⁵ There are two primary counterarguments to this view. First, “[n]o such additional burdens will be imposed because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits.”¹⁰⁶ Second, since there

¹⁰¹ *McGowan*, 423 F.3d at 254 (Becker, J., concurring). Judge Becker explained: [T]he provision authorizing QDROs explicitly states that such orders are exempt from ERISA’s anti-alienation clause but says nothing whatsoever about § 1104(a)(1)(D). This suggests that Congress simply did not see a conflict between the requirement that plan administrators perform their duties “in accordance with the documents and instruments governing the plan” and the requirement that they give effect to a transfer of benefits pursuant to a QDRO

Id.; see also *supra* note 43 (defining a QDRO as a “judgment, decree or order . . . made pursuant to a state domestic relations law” and listing QDRO qualification criteria).

¹⁰² See, e.g., *Guardian Life Ins. Co. of Am. v. Finch*, 395 F.3d 238, 242-43 (5th Cir. 2004), *cert. denied sub nom. Finch v. Galaway*, 544 U.S. 1056 (2005) (discussing *Egelhoff*’s effect on beneficiary waivers); see also *supra* notes 64-66 and accompanying text (discussing *Egelhoff* and its applicability to beneficiary waivers).

¹⁰³ See *Finch*, 395 F.3d at 242 (“This court sees no reason to extend the scope of *Egelhoff* to find that it preempts federal common law in addition to state statutes.”).

¹⁰⁴ See *Manning*, 212 F.3d at 870-71 (noting that the need to apply federal common law arises when ERISA does not specifically address an issue).

¹⁰⁵ See *McGowan*, 423 F.3d at 247 (“It cannot be denied that requiring administrators to review contractual language under an amorphous ‘reasonable person’ standard will create a risk of litigation and administrative burdens”).

¹⁰⁶ *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 282 (7th Cir. 1990) (en banc). In fact, *Fox Valley* “arose from just such an investiga-

appears to have been no significant litigation in the circuits adopting the federal common law approach over plan administrators' improper interpretation of waivers, perhaps the task presents no serious difficulty for plan administrators.¹⁰⁷ If administrative burdens are minimal, the efficiency and uniformity of administration argument provides little support for choosing the minority rule over the federal common law approach.

D. *Rejecting the Anti-Alienation Argument*

The circuits adopting the federal common law approach have rejected the anti-alienation argument by asserting that a waiver is not an assignment or alienation.¹⁰⁸ "Waiver does not involve a transfer of

tion." *Id.* The efficiency argument primarily concerns additional work—identifying waivers and determining if they are effective. Both sides of the argument acknowledge that there would be some additional administrative work in beneficiary waiver situations, such as additional actuarial calculations, but "[t]hese kinds of calculations are *de rigueur* for plan administrators." *McGowan*, 423 F.3d at 255 (Becker, J., concurring). Judge Becker argued that minor administrative inconvenience is not a persuasive efficiency argument. *Id.*

¹⁰⁷ Although this is difficult to observe directly, the best argument that waiver interpretation imposes a significant administrative burden is the development of federal common law in response to *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). *See supra* notes 95-96 (discussing the *Lyman* issue and its resolution); *McGowan*, 423 F.3d at 247 (pointing only to *Lyman*-related litigation as evidence of increased administrative burden). With the resolution of the *Lyman* issue, however, this increased burden does not remain a concern. Anecdotal evidence seems to support the conclusion that there are no longer significant administrative costs involved in reviewing purported waivers:

Must a plan take every purported waiver into court in order to figure out whether it applies to the beneficiary designation? We don't have a satisfying response to this objection, other than to note [that] in our own practice we have been able to solve dozens of beneficiary disputes without yet having been forced into an interpleader action. We acknowledge, however, that, while one can theoretically assert that the plan's cost in determining the correct payee can be charged against the proceeds otherwise payable to the beneficiary, as a practical matter there will be some costs that cannot be avoided if the plan is forced to examine divorce decrees.

Who Is the Payee, Part VIII: Altobelli v. IBM and the Other Beneficiary Waiver Cases, ERISA LITIG. REPTR., Aug. 1996, 14, 17 [hereinafter *Who Is the Payee*].

¹⁰⁸ *See, e.g., Fox Valley*, 897 F.2d at 279 ("These provisions focus on the assignment or alienation of benefits by a participant, not the waiver of a right to payment of benefits made by a designated beneficiary."). In addition to distinguishing waivers from assignments, some of the early federal common law decisions, such as *Fox Valley*, attempt to discredit the anti-alienation argument by asserting that the anti-alienation provisions apply only to participants, not to beneficiaries. *Id.* *Boggs* seems to suggest that the anti-alienation provision applies equally to participants and beneficiaries. *McGowan*, 423 F.3d at 258 (Fuentes, J., dissenting).

rights; it is merely a relinquishment.”¹⁰⁹ The most plausible counter-argument is that, in certain situations, a waiver combined with a subsequent beneficiary designation functions as an indirect assignment.¹¹⁰ Judge Easterbrook noted this possibility in his *Fox Valley* dissent: “The designated beneficiary may give away the money the instant she receives it. Waiver is an anticipatory gift, to whoever is next in line under the Fund’s rules”¹¹¹ Judge Fuentes, dissenting in *McGowan*, recognized the problem with this argument: “[S]uch a reading allows third-party actions to invalidate what would otherwise be valid waivers. Indeed, the majority would appear to prohibit all waivers, even though, in many cases, there will be no ‘renomination’ at issue.”¹¹²

An examination of ERISA policy further supports a rejection of the anti-alienation argument. In *Estate of Altobelli v. International Business Machines Corp.*, the Fourth Circuit observed that waiver is consistent with ERISA’s purposes:

We agree with the Seventh Circuit [in *Fox Valley*] that the anti-alienation clause does not apply to a beneficiary’s waiver. As the Supreme Court has noted, the purpose of the clause is “to safeguard a stream of income for pensioners (and their dependents . . .).” To bar a waiver in favor of the pensioner himself would not advance that purpose.¹¹³

Furthermore, the courts have interpreted the legislative intent behind the anti-alienation provision to be the protection of plan benefits from creditors and “unscrupulous predators preying upon participants and beneficiaries by offering inadequate immediate gratification in exchange for the long-term benefits ERISA is designed to guarantee.”¹¹⁴ “These concerns are not nearly as strong with respect to waiver” as they are with respect to assignment, where the benefits are transferred to a third party.¹¹⁵ The anti-alienation argument does not provide support for a bright-line rule preventing the recognition of all beneficiary waivers of ERISA plan benefits.

¹⁰⁹ *McGowan*, 423 F.3d at 256 (Fuentes, J., dissenting).

¹¹⁰ See *supra* note 84 and accompanying text (describing such a scenario in *McGowan*).

¹¹¹ *Fox Valley*, 897 F.2d at 282-83 (Easterbrook, J., dissenting).

¹¹² *McGowan*, 423 F.3d at 257 (Fuentes, J., dissenting). Judge Fuentes noted that if the combination of waiver and renomination is what results in the violation of the anti-alienation provision, then only the renomination should be invalidated. *Id.*

¹¹³ 77 F.3d 78, 81 (4th Cir. 1996) (quoting *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 376 (1990)) (internal citation omitted).

¹¹⁴ *McGowan*, 423 F.3d at 256 (Fuentes, J., dissenting).

¹¹⁵ *Id.*

IV. THE OPTIMAL APPROACH

The federal common law approach is the best approach to beneficiary waivers of ERISA plan benefits because it is in accord with ERISA's statutory language and provides equitable results consistent with ERISA's purpose. Moreover, from a practical perspective, the federal common law approach is the best of the available options and does not generate the absurd consequences of the minority rule.

A. *The Federal Common Law Approach Provides Equitable Results That Are Consistent with ERISA's Primary Purpose*

The federal common law approach is preferable to the minority rule because it is consistent with the overriding purpose of ERISA: to ensure that employees "receive the pensions and other benefits that they were led to believe they would receive upon retirement."¹¹⁶ By adhering to this principle, ERISA is intended to generate equitable outcomes, an aim that is reflected in both the legislative history and the statute itself. The legislative history indicates that ERISA "is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income."¹¹⁷ ERISA's § 1001, titled "Congressional findings and declaration of policy," clearly states that Congress enacted the statute because "it is . . . desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided *assuring the equitable character of such plans* and their financial soundness."¹¹⁸ The Retirement Equity Act of 1984 (REA) confirms ERISA's equitable focus by stating that REA's purpose in amending ERISA was to "pro-

¹¹⁶ Ryan P. Barry, Comment, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735, 735 (1999) (citing *Welfare and Pension Plan Legislation: Hearings on H.R. 2 and H.R. 462 Before the H. Subcomm. on Labor of the Comm. on Educ. and Labor, Part 2*, 93d Cong. 1 (1973) (statement of Rep. John H. Dent, Chairman, Subcomm. on Labor)). According to one of ERISA's co-sponsors, Senator Jacob K. Javits, ERISA is "a pension 'bill of rights.'" 120 CONG. REC. 29935 (1974) (statement of Sen. Jacob K. Javits). ERISA's focus on providing benefits to those expecting the benefits underlies numerous ERISA provisions. See *Boggs v. Boggs*, 520 U.S. 833, 852 (1997) ("Besides the anti-alienation provision, Congress has enacted other protective measures to guarantee that retirement funds are there when a plan's participants and beneficiaries expect them.").

¹¹⁷ H.R. REP. NO. 93-807, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4676.

¹¹⁸ 29 U.S.C. § 1001(a) (2000) (emphasis added).

vide for greater *equity* under private pension plans for workers and their spouses.”¹¹⁹

The greatest benefit of the federal common law approach is that it furthers ERISA’s primary purpose by ensuring that plan participants and beneficiaries receive the benefits they are expecting. Suppose, for example, that an ex-spouse who previously waived any claim to retirement benefits now seeks those benefits at the expense of a surviving spouse.¹²⁰ The deceased spouse and the surviving spouse likely planned their retirement with the expectation that the surviving spouse would receive the benefits at issue upon the deceased spouse’s death. In contrast, the ex-spouse could not reasonably expect to receive the benefits after having waived any claim to them. Applying the federal common law approach guarantees that the person with the reasonable expectation of receiving the benefits actually receives them.

There are several colorable responses to the expectations argument. First, one might argue that, although ERISA’s primary purpose is to ensure that participants and beneficiaries receive the benefits they are expecting, the person whose expectations might otherwise be frustrated is the surviving spouse, and a surviving spouse is neither a participant nor a beneficiary. While this argument may be technically accurate, it ignores the fact that ERISA places the spouses of participants in a protected class. The QPSA and QJSA demonstrate Congress’s intent to protect participants’ spouses.¹²¹ Moreover, the argument ignores the fact that not recognizing the waiver would thwart the participant’s expectation that the benefits would be available to support the surviving spouse.

The second counterargument one might make is that, in some cases, the participant’s decision not to change the beneficiary designated in the plan documents indicates that the participant intended the ex-spouse to remain a beneficiary, and that this imputed intention

¹¹⁹ Pub. L. No. 98-397, 98 Stat. 1426 (codified in scattered sections of 29 U.S.C.) (emphasis added).

¹²⁰ See *supra* notes 1-2 and accompanying text (discussing this scenario).

¹²¹ See *supra* note 2 (discussing ERISA’s QPSA and QJSA provisions). The QPSA and QJSA provisions reveal that Congress wanted to provide a participant’s spouse the right to at least fifty percent of the participant’s plan benefits at the expense of other rightful beneficiaries. How Congress might have viewed the rights of surviving spouses vis-à-vis named beneficiaries who waived any claim to benefits is debatable.

renders reasonable an ex-spouse's expectation of benefits.¹²² This argument presumes without justification that the decision not to change the beneficiary in the plan documents was a conscious one. Further, the argument depends on the additional improbable assumption that, although the participant and ex-spouse have signed a divorce agreement with a specific waiver of ERISA plan benefits, the participant changed his mind *and* neither the participant nor the ex-spouse thought it was necessary to take any action to ensure the ex-spouse received the benefits—other than to not change the beneficiary who had been designated on the predivorce plan documents. While the objections to the expectations argument are plausible, ultimately they are unpersuasive.

The federal common law approach honors the intentions of the parties and generates equitable outcomes.¹²³ The minority rule consistently disregards the intentions of participants and beneficiaries in favor of the plan documents, thereby creating inequitable outcomes.¹²⁴ While the adherence to plan documents and the simple administration of ERISA plans are important goals of the legislative scheme, they are not the primary reasons why Congress enacted ERISA. The minority rule opts for strained interpretations of ERISA's detailed provisions while ignoring its primary purpose, and the opinions written by judges who advocate for the minority rule clearly emphasize the preeminence of simple administration and adherence to plan documents over equitable outcomes. In his dissenting opinion in *Fox Valley*, Judge Ripple stated, "ERISA's command that a plan be administered in accordance with the plan's documents must be our primary concern in fashioning a waiver rule."¹²⁵ This reasoning disregards ERISA's primary purpose in favor of its secondary goals.

¹²² See Norwood, *supra* note 3, at 96-97 (discussing the problem of determining the participant's intentions when the ex-spouse asserts that the participant intended the ex-spouse to remain the beneficiary despite a waiver in a divorce agreement).

¹²³ The federal common law test, unlike the minority bright-line rule, looks to the intent of the parties. See *supra* note 94 and accompanying text (setting out the requirements under federal common law for an ERISA beneficiary to waive her entitlements); see also, e.g., *Estate of Altobelli v. Int'l Bus. Machs. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996) ("Congress's provision for QDROs reveals that, in some situations, it deems the intent of the parties sufficiently important to override the policy of simplified administration.").

¹²⁴ See, e.g., *Altobelli*, 77 F.3d at 82 (Wilkinson, C.J., dissenting) ("Here, the equities of the majority's disposition seem tempting, but ERISA's provisions compel a contrary outcome.").

¹²⁵ *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 284 (7th Cir. 1990) (en banc) (Ripple, J., dissenting).

B. *The Federal Common Law Approach Conforms to ERISA's
Statutory Language and Legislative History*

In addition to being compatible with ERISA's primary purpose, the federal common law approach is consistent with ERISA's language and its legislative history. Specifically, the federal common law approach is not in conflict with ERISA's plan documents and anti-alienation provisions.

1. Addressing the Plan Documents Argument

The plan documents provision does not prevent the use of the federal common law approach. As Judge Becker recognized in *McGowan*, the plan documents provision is concerned with fiduciary duties and does not prevent the use of outside documents.¹²⁶ Judge Becker observed that the allowance for outside documents in effecting QDROs shows that Congress did not see a conflict between the plan documents provision and the use of outside documents in deciding who should receive payment of ERISA benefits.¹²⁷ Furthermore, *Mackey v. Lanier Collection Agency & Service, Inc.* indicates that the Supreme Court did not see a conflict between the plan documents provision and requiring plan administrators to consult garnishment orders in determining who should receive ERISA welfare plan benefits.¹²⁸

The plan documents provision is purely a fiduciary duties provision and is not relevant to the determination of whether a non-participant waiver of benefits should be recognized. The attempts to make the statutory language relevant to the analysis of nonparticipant waivers require an unduly broad interpretation of the plan documents provision that precludes the plan administrator from consulting any outside documents. This interpretation is untenable, given that both

¹²⁶ 423 F.3d at 254 (Becker, J., concurring); *see supra* notes 100-101 and accompanying text (providing Judge Becker's explanation of why ERISA provisions allow the consultation of additional documents).

¹²⁷ *McGowan*, 423 F.3d at 254 (Becker, J., concurring).

¹²⁸ 486 U.S. 825, 831-32 (1988) ("Unfortunately, ERISA itself offers no express answer as to whether welfare benefit plan trustees must comply with garnishment orders like those respondent is seeking to enforce. In our view, however, certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits.").

Congress and the Supreme Court have sanctioned actions that require plan administrators to consult outside documents.

2. Addressing the Anti-Alienation Argument

The anti-alienation provision also does not preclude adopting the federal common law approach to the waiver of ERISA plan benefits. Beyond the clear-cut position that a waiver simply is not an assignment or alienation,¹²⁹ at least two other arguments suggest that the anti-alienation provision does not prevent waivers: (1) the REA's legislative history calls into question any definition of an assignment or alienation under ERISA that includes waivers; and (2) the IRS's internal position is that disclaimers by named beneficiaries of ERISA pension plans after the participant's death do not violate ERISA's anti-alienation provision.

Legislative history indicates that the Congress enacting the REA did not view a QDRO as conflicting with ERISA's anti-alienation provision. The Senate Committee Report on the REA states that "[i]n the case of a [QDRO], the bill *clarifies* that such order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA."¹³⁰ The use of "clarifies" indicates that the 1984 Congress did not view the anti-alienation provision as applying to QDROs, even prior to the adoption of the REA.¹³¹ Significantly, this suggests that the 1984 Congress viewed the anti-alienation provision as containing certain inherent exceptions.¹³² Moreover, this interpretation of ERISA's legislative history weighs heavily against the argument that the 1984 Congress intended QDROs to be the only ex-

¹²⁹ See *supra* notes 108-112 and accompanying text (citing opinions that distinguish waivers from alienations and assignments).

¹³⁰ S. REP. NO. 98-575, at 3 (1984), as reprinted in 1984 U.S.C.C.A.N. 2547, 2549 (emphasis added).

¹³¹ But see *Mackey*, 486 U.S. at 839-40 (cautioning that determining the intent of a prior Congress based on the belief of a subsequent Congress is potentially "hazardous" (quoting *United States v. Price*, 361 U.S. 304, 313 (1960))).

¹³² The 1984 Congress's use of "clarifies" suggests inherent exceptions to the anti-alienation provision when one considers that the 1984 Congress's action closely followed case law recognizing an exception to the anti-alienation provision for intra-familial transfers. See, e.g., *Tenneco, Inc. v. First Va. Bank of Tidewater*, 698 F.2d 688, 690 (4th Cir. 1983) ("A judicial exception has been carved out of this seemingly absolute prohibition. If the debt is support due the employee's spouse or children, his interest in the plan is subject to garnishment. The exception is premised upon the statute's broad purpose to provide protection for employees and their families, so that intra-familial transfers are not to be viewed in the same light as an involuntary transfer for the benefit of a third-party creditor." (citations omitted)).

ception to the anti-alienation provision with respect to divorce situations.

The IRS's General Counsel Memorandum (GCM) 39,858 states that disclaimers by named beneficiaries of ERISA pension plans after the participant's death do not violate ERISA's anti-alienation provision.¹³³ This internal IRS position, while not authoritative, is persuasive in its argument that disclaimers are not assignments or alienations.¹³⁴ GCM 39,858 concludes that "a disclaimer of benefits under a qualified plan does not constitute a prohibited 'assignment or alienation' of plan benefits" under ERISA.¹³⁵ It notes that numerous areas of the law agree that waivers and disclaimers are not transfers,¹³⁶ and it finds "no evidence that Congress intended to preclude a spouse from disclaiming or renouncing benefits under a qualified plan payable after the participant's death."¹³⁷

C. *Assessing the Available Approaches to Beneficiary Waivers*

Although the minority rule and the federal common law approach are the two primary positions on the issue of beneficiary waivers, there are several intermediate approaches between the pure minority rule¹³⁸ on one hand, and the pure federal common law approach¹³⁹ on the other. The spectrum of intermediate approaches includes (1) the minority rule plus the use of constructive trusts,¹⁴⁰ (2) the *McGowan*

¹³³ I.R.S. Gen. Couns. Mem. 39,858 (Sept. 23, 1991).

¹³⁴ See *Who Is the Payee*, *supra* note 107, at 16-17 ("[T]he drafters of the GCM . . . concluded that a valid disclaimer should not be regarded as a [sic] alienation for purposes of ERISA.")

¹³⁵ I.R.S. Gen. Couns. Mem. 39,858 ("Because the disclaimant is regarded as never having accepted or received the disclaimed property, the disclaimer is not considered to involve a transfer of property by the disclaimant.")

¹³⁶ In support of its conclusion, GCM 39,858 found that a disclaimer is not considered a transfer under the Bankruptcy Code, the Uniform Probate Code, or trust law. *Id.*

¹³⁷ *Id.* Specifically, GCM 39,858 states that "Congress determined that the spouse . . . should be involved in making choices with respect to retirement income on which the spouse may also rely. . . ." *Id.* (quoting S. REP. NO. 98-575, at 12 (1984)).

¹³⁸ See *supra* note 6 and accompanying text (describing the minority rule).

¹³⁹ See *supra* note 5 and accompanying text (describing the federal common law approach).

¹⁴⁰ See Norwood, *supra* note 3, at 97-101 (suggesting an application of the minority rule plus the use of constructive trusts to prevent unfair results); see also *Unicare Life & Health Ins. Co. v. Craig*, 157 F. App'x. 787, 792 (6th Cir. 2005) (Gibson, J., concurring) (suggesting the use of a constructive trust to remedy a possibly inequitable outcome resulting from an analogous ERISA dispute).

rule (the federal common law rule for welfare plans and the minority rule for pension plans),¹⁴¹ and (3) the federal common law approach without allowing renomination after a waiver.¹⁴²

Although the intermediate approaches have a number of benefits worth noting, these benefits ultimately are outweighed by their attendant problems. The minority rule plus the use of constructive trusts under state law prevents unfair results and has additional advantages. First, the “plan administrator’s responsibilities are uniform and uncomplicated,”¹⁴³ because the plan administrator only needs to pay the beneficiary specified on the beneficiary form. Second, an equitable outcome remains available because a state court can apply a constructive trust to “fashion an equitable result.”¹⁴⁴

While at first glance this approach is appealing, further examination reveals several flaws. One is that the process of administering and obtaining plan benefits is not simple in practice. Take, for example, an inequitable case in which a constructive trust will ultimately be applied to the plan assets. Under the federal common law rule, the plan administrator would look at the proposed waiver, determine its validity under established federal common law, and distribute the plan benefits to the appropriate beneficiary. Under the constructive trust rule, the plan administrator will pay the plan benefits to the wrong person. Then the proper beneficiary will have to rush to file a state constructive trust claim, wait while litigating the claim, and later—finally—receive the plan benefits.

The second, and most important, flaw of the constructive trust approach is that imposing a constructive trust is inconsistent with the minority rule.¹⁴⁵ The rationale behind the minority rule is that ERISA

¹⁴¹ See *supra* note 75 and accompanying text (discussing *McGowan* and its implications).

¹⁴² See *supra* note 112 and accompanying text (noting that invalidating a renomination may prevent a waiver from violating the anti-alienation provision).

¹⁴³ Norwood, *supra* note 3, at 100. Norwood also notes an additional benefit for the administrator—he would no longer be a party to litigation disputing the proper recipient. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Dotson, *supra* note 64, at 535 (“If allowed, the imposition of a constructive trust is nothing more than a back door method of frustrating ERISA’s purpose of protecting named plan beneficiaries.”); see also T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 193 (2004) (“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.”).

speaks directly to the waiver and disallows it.¹⁴⁶ If ERISA directly addresses an issue, then any state law on the issue, including constructive trust law, is preempted.¹⁴⁷ Thus, constructive trust law cannot be applied, even after the plan benefits have been distributed. The Supreme Court in *Boggs* emphasized this in its concluding paragraph: “It 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 pension plan benefits. Their state-law claims are pre-empted.”¹⁴⁸ Thus, the minority rule plus the use of constructive trusts under state law is not a viable approach to the problem of beneficiary waivers.

Although it is the least flawed of the intermediate approaches, the *McGowan* rule, applying the federal common law rule for welfare plans and the minority rule for pension plans, is also unsound. First, it does not appear that any other court or any commentator has explicitly supported this interpretation as a solution.¹⁴⁹ Second, although there are reasons why Congress chose not to apply ERISA’s anti-alienation provision to welfare plans (there are sufficient differences between the two types of ERISA plans), this solution remains unnecessarily complex. It would require participants, beneficiaries, plan administrators, and the courts to distinguish between the two plan types and learn how to function properly under two sets of rules. Having two sets of rules not only directly contradicts ERISA’s goal of uniform and simple administration, but it is also a suboptimal solution, in light of the uniformity of the federal common law approach.

The same arguments that are marshalled against the *McGowan* rule can be applied to the third intermediate option: the federal common law approach without allowing renomination after a waiver. Additional complexity would result from plan administrators having to track which plan participants have been the recipients of waivers, and then having to disallow those participants from electing new

¹⁴⁶ See *supra* Part II (showing why this is the case under either the plan documents argument or the anti-alienation argument).

¹⁴⁷ See *supra* notes 27-32 and accompanying text (explaining ERISA’s preemption of relevant state law).

¹⁴⁸ *Boggs v. Boggs*, 520 U.S. 833, 854 (1997); see also *Dotson*, *supra* note 64, at 534 (quoting the same statement in *Boggs* as a bar on the use of constructive trusts in this context).

¹⁴⁹ This rule is an interpretation of the divided opinion in *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3d Cir. 2005), *cert. denied*, No. 05-853, 2007 WL 91575 (U.S. Jan. 16, 2007). See *supra* note 75 and accompanying text (synthesizing *McGowan*’s holding).

beneficiaries. Moreover, not allowing plan participants to elect new beneficiaries is an unsustainable outcome. A plan participant, when alive, can achieve the same result as the prohibited “indirect assignment” by transferring the plan benefits to the intended recipient after receiving the benefits and, when deceased, can achieve this result by executing a testamentary instrument that passes the benefits to the intended recipient. In summary, the intermediate approaches do not provide an adequate solution to the problem of beneficiary waivers.

D. *The Federal Common Law Approach Avoids Absurd Results*

The federal common law approach avoids the absurd results generated by the minority rule. Applying the minority rule and its underlying rationale creates numerous potential perversities, including being prevented from finding a beneficiary willing to accept the plan benefits or having to give the plan benefits to a named beneficiary who has murdered the plan participant. To illustrate the first potential problem, assume that the beneficiary who waives her right to the plan benefits absolutely refuses to accept the benefits.¹⁵⁰ Under the minority rule, the plan administrator could not recognize the waiver and would have to give the unwanted benefits to the disclaiming beneficiary. As one commentator noted: “What is a plan to do: sneak by the beneficiary’s house at night, jimmy open a window, and pour the cash into the bedroom?”¹⁵¹

The absurdity of the rationale behind the minority rule is elucidated when one considers the situation where a named beneficiary murders a participant. Nearly every state has a “slayer statute” that prevents a murdering heir from receiving property as a result of the murder.¹⁵² However, using the interpretation of either the plan documents provision or the anti-alienation provision necessary to support the minority rule would ultimately lead to the murderer receiving the participant’s ERISA benefits. The minority rule interpretation of the plan documents provision is that a plan administrator must pay the beneficiary named on the beneficiary form. Thus, there would be a

¹⁵⁰ While at first glance one might question the likelihood of a scenario where a beneficiary would refuse benefits, it is not an uncommon situation. A beneficiary might choose to disclaim benefits because of tax consequences, possible disqualification from public assistance for a disabled beneficiary, or purely emotional reasons.

¹⁵¹ *Who Is the Payee*, *supra* note 107, at 16.

¹⁵² *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001); *see also* Jeffrey G. Sherman, *Mercy Killing and the Right To Inherit*, 61 U. CIN. L. REV. 803, 844-56 (1993) (providing an overview of slayer statutes).

direct conflict between the beneficiary under ERISA and the slayer statute. ERISA's preemption provision would preempt the slayer statute, and the murderer would receive the benefits.¹⁵³

The minority rule's interpretation of the anti-alienation provision would lead to the same result. Under a slayer statute, the murderer relinquishes his rights to the participant's benefits. Applying the same analysis that the proponents of the minority rule apply to beneficiary waivers, the slayer statute would qualify as an "indirect arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan."¹⁵⁴ Again, the slayer statute would be in direct conflict with ERISA and would be preempted.

The federal common law approach avoids the absurdity of the murderer receiving the participant's ERISA benefits by interpreting the plan documents and anti-alienation provisions in a less strained and stringent manner. It might, for example, allow one to conclude that there is no direct conflict between those provisions and state slayer statutes.¹⁵⁵ Alternatively, even if one were to take a broad view of ERISA preemption and conclude that the slayer statutes were preempted by ERISA, the federal common law approach would allow for the judiciary to create federal common law replicating the slayer statutes.¹⁵⁶

CONCLUSION

The federal common law approach to waivers of ERISA plan benefits by beneficiaries provides the best balance of ensuring an equitable outcome for participants and beneficiaries while allowing for uniform and simple plan administration. The federal common law looks to the parties' intentions to ensure that the individual counting on receiving ERISA plan benefits to provide for her retirement actually receives those benefits. It is able to do this without jeopardizing uniformity because the federal common law for deciding whether to give effect to beneficiary waivers is well settled and consistent across the

¹⁵³ This issue was noted in *Egelhoff*, but the Court explained: "Those statutes are not before us, so we do not decide the issue." 532 U.S. at 152.

¹⁵⁴ 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1997).

¹⁵⁵ Cf. *Egelhoff*, 532 U.S. at 152 (leaving open this possibility).

¹⁵⁶ See Gallanis, *supra* note 145, at 189-98 (discussing the problem of increasing conflicts between ERISA and state succession law, and finding the development of federal common law to be the most plausible solution).

circuits. The uniformity of this theory allows for simplicity in application and, therefore, ensures that plan administrators are not overburdened by interpreting possible waivers. In light of these advantages, the federal common law approach should be universally adopted for assessing the validity of ERISA benefit waivers.