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A DISTINCTION WITHOUT A DIFFERENCE? ERISA PREEMPTION AND THE UNTENABLE DIFFERENTIAL TREATMENT OF REVOCAION-ON-DIVORCE AND SLAYER STATUTES

Abstract: The Employee Retirement Income Security Act of 1974 (ERISA) was enacted in large part to protect employee benefit plan participants. Yet ERISA's broad preemption clause may actually thwart this goal in certain cases by imposing unexpected consequences on participants who die before appropriately updating their beneficiary designations. For instance, although many state laws presume divorce to revoke the former spouse's beneficiary status, the U.S. Supreme Court's 2001 decision in *Egelhoff v. Egelhoff ex rel. Breiner* made clear that ERISA preempts such state-level wills doctrines, enabling a former spouse to benefit when the deceased participant likely intended otherwise. The rationale behind this broad preemption provision applies equally to other wills doctrines such as "slayer statutes," which prevent murderers from benefitting from their crimes. Therefore, it is likely impossible to confine the impact of this preemptive effect to the divorce realm. Moreover, in the wake of *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, decided by the U.S. Supreme Court in 2009, the federal common law no longer appears to be a valid solution to this problem of effecting the likely intent of deceased plan participants. Congressional action to amend ERISA is therefore necessary to avoid these inequitable results.

INTRODUCTION

If a wife murders her husband, she stands to answer for her crime through the criminal justice system.¹ But what is to be done with the husband's estate if under his will he leaves all of his property to his killer?² In the typical case, state "slayer statutes" prevent a murderer from benefitting from her crime by inheriting from the victim, and treat the murderous spouse as having predeceased the victim for inheritance

¹ See *In re Estate of Mahoney*, 220 A.2d 475, 476 (Vt. 1966); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003).

² See *Mahoney*, 220 A.2d at 477 (describing the various approaches taken by states when faced with this question).

purposes.³ Generally, this policy is broad enough to include transfers of nonprobate assets such as life insurance policies or revocable trusts.⁴ Yet, recent U.S. Supreme Court cases concerning the Employee Retirement Income Security Act (ERISA) have called into question whether slayer statutes can be harmonized with the broad preemptive effect of ERISA to apply to an employee benefit plan.⁵ As a result, the equitable outcome dictated by the slayer rule may now be far less secure than it once seemed.⁶

Disputes over ERISA plan benefits arising out of spousal homicide are relatively rare.⁷ Far more common, however, are instances in which spouses divorce but fail to update their estate plans—and their ERISA beneficiaries in particular—to reflect this changed status before death.⁸ States have almost uniformly adopted laws establishing a presumption that divorce revokes any bequests made to spouses in wills predating the divorce, and that the divorce renders such wills stale.⁹ Although a number of states have extended this revocation-on-divorce presumption to nonprobate assets such as insurance beneficiary designations, the landmark case *Egelhoff v. Egelhoff*, decided by the U.S. Supreme Court in 2001, prevented such laws from applying in the employee benefit plan context by finding that those laws are preempted by ERISA.¹⁰ Had the state law applied in *Egelhoff*, the deceased husband's benefits would have passed to his estate to be distributed via the probate process to his two children from a prior marriage.¹¹ Instead, the Supreme Court held that ERISA required that the former wife receive the benefits of the pension plan—despite already having received her share of the marital property under the divorce agreement—because

³ See, e.g., UNIF. PROBATE CODE § 2-803 (2008); see also JESSE DUKEMINIER ET AL., WILLS, TRUSTS, & ESTATES 149–51 (8th ed. 2009).

⁴ See *N.Y. Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (applying the slayer rule to insurance); UNIF. PROBATE CODE § 2-803 (2008) (extending the slayer statute to cover all probate and nonprobate assets).

⁵ See 29 U.S.C. § 1144(a) (2006); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 877 n.14 (2009); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 152 (2001).

⁶ See *Kennedy*, 129 S. Ct. at 877 n.14; *Egelhoff*, 532 U.S. at 152.

⁷ See *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris*, 217 F. Supp. 2d 759, 761 (E.D. Tex. 2002); Barry L. Salkin, *Slayer Statutes in the ERISA Context*, BENEFITS L.J., Summer 2010, at 4, 5 (noting that few such cases ever appear before the U.S. Circuit Courts of Appeal).

⁸ See Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPAC PROB. L.J. 83, 124 (2004).

⁹ See David S. Lebolt, *Making the Best of Egelhoff: Federal Common Law for ERISA-Preempted Beneficiary Designations*, J. PENSION PLAN. & COMPLIANCE, Fall 2002, at 29, 33–34.

¹⁰ See *Egelhoff*, 532 U.S. at 150.

¹¹ See *id.* at 145.

the husband had failed to change his pension beneficiary designation in the weeks between the divorce and his death.¹²

Egelhoff and the cases decided in its wake have called into question the limits of ERISA preemption, not only for revocation-on-divorce cases, but also for cases involving similar doctrines regarding the subsidiary law of wills.¹³ Although traditionally deferring to states for matters of family and probate law, ERISA's unusual preemption scheme has permitted it to extend broadly, preempting any state laws that "relate to" the administration of a plan governed by the statute.¹⁴ This leads to uncertain results for the slayer rule, as well as other wills doctrines such as those governing survivorship in cases of simultaneous death¹⁵ and those that relax the strict compliance rules to allow for substantial compliance or harmless error.¹⁶ These doctrines are all intended to effect the presumptive intent of the testator, and yet are all burdened by the preemption provisions of ERISA, a perverse result for a statute enacted with a similarly remedial goal.¹⁷

Part I of this Note provides an overview of ERISA's operation and the application of its broad preemption scheme.¹⁸ Part II examines the interaction of ERISA with the subsidiary laws of wills and will substitutes, culminating in the *Egelhoff* case.¹⁹ Part III explores *Egelhoff's* far-reaching effects in the state and federal court systems and its ramifications beyond the divorce realm; it then considers whether slayer statutes may properly be distinguished, particularly considering the effect of *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, decided by the U.S. Supreme Court in 2009.²⁰ Part IV discusses the federal common law approach in light of *Kennedy* and several other poten-

¹² See *id.* at 150.

¹³ See *id.* at 159–60 (Breyer, J., dissenting). The subsidiary law of wills refers to the "rules of construction and other rules applicable to testamentary dispositions." See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.2 (2003).

¹⁴ See 29 U.S.C. § 1144(a) (2006).

¹⁵ See *Estate of Morgan v. Estate of Morgan*, No. 50133-0-I, 2004 WL 500860, at *3–4 (Wash. Ct. App. Mar. 15, 2004).

¹⁶ See *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 566–68 (7th Cir. 2002).

¹⁷ See, e.g., JOHN H. LANGBEIN ET AL., PENSION & EMPLOYEE BENEFITS LAW 793–94 (4th ed. 2006) (questioning whether the courts are disproportionately concerned with ease of plan administration at the expense of protecting pension plan participants); Lebolt, *supra* note 9, at 35 (arguing that the states' "vast experience dealing with the questions of donative intent and family law that arise in matters of wealth transfer on death," coupled with the fact that revocation on divorce "further[s] the purposes of ERISA," makes preemption of such laws imprudent).

¹⁸ See *infra* notes 22–52 and accompanying text.

¹⁹ See *infra* notes 53–95 and accompanying text.

²⁰ See *Kennedy*, 129 S. Ct. at 878; *infra* notes 96–182 and accompanying text.

tial solutions to this problem, and ultimately concludes that without congressional action to amend ERISA, the equitable outcome of the slayer rule and other state-level subsidiary laws of wills may be similarly imperiled.²¹

I. OVERVIEW OF ERISA'S POLICIES AND PREEMPTION SCHEME

Congress passed the Employee Retirement Income Security Act (ERISA) in 1974 to protect employees who participate in employee benefit plans by establishing nationally uniform standards for such plans.²² A primary goal of ERISA was to “increase the likelihood that participants and beneficiaries . . . receive their full benefits,” protecting those who had paid into pension funds from potential employer collapse and pension plan underfunding.²³ The statute also requires that all pension plans “provide that benefits provided under the plan may not be assigned or alienated.”²⁴ Because employers are not obligated to offer their employees such plans, however, and fearing that onerous regulation might cause employers to forgo plan administration altogether, Congress also noted that an additional policy of ERISA was “to encourage the maintenance and growth of single-employer defined benefit pension plans.”²⁵ To effect that policy, Congress put forth a comprehensive scheme, in 29 U.S.C. § 1001b(c), to federalize and uniformly regulate such plans.²⁶ The statute further required plan administrators to establish and maintain plans “pursuant to a written instrument”²⁷ and to regulate plans “in accordance with the documents and

²¹ See *infra* notes 183–255 and accompanying text.

²² See Pub. L. No. 93-406, 88 Stat. 829, 832–33 (1974) (codified at 29 U.S.C. § 1001); see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987). Section 1002 defines “employee pension benefit plan” and “pension plan” as “any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, . . . [that] provides retirement income to employees, or results in a deferral of income by employees for periods extending to the termination of employment or beyond . . .” 29 U.S.C. § 1002 (2) (A) (2006). Similarly, “employee benefit plan” is defined as “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” *Id.* § 1002(3).

²³ *Id.* § 1001b(c). The impetus for the creation of ERISA is often traced to the highly publicized “Studebaker incident,” in which the closing of an Indiana automobile plant left many of its workers without their expected pensions after the plan had been grossly underfunded. See LANGBEIN ET AL., *supra* note 17, at 72–87.

²⁴ 29 U.S.C. § 1056(d)(1). This is also known as the spendthrift clause and is intended to ensure that participants are provided for during retirement. See DUKEMINIER ET AL., *supra* note 3, at 624; LANGBEIN ET AL., *supra* note 17, at 268–70.

²⁵ See 29 U.S.C. § 1001b(c)(2); see also Lebolt, *supra* note 9, at 32.

²⁶ See 29 U.S.C. § 1001b(c)(2); see also Lebolt, *supra* note 9, at 32.

²⁷ See 29 U.S.C. § 1102(a)(1).

plans governing them,” a requirement referred to as the “plan documents” rule.²⁸

This Part describes two defining features of ERISA.²⁹ The first is the statute’s broad preemption provision, which supplants any state laws that “relate to” the employee benefit field.³⁰ The second involves the 1984 amendments to ERISA’s statutory scheme enacted to protect a group overlooked by the statute’s original iteration: the non-employee spouses of ERISA plan participants.³¹

A. ERISA’s Broad Preemption Provisions

In order to further the policies set forth in 29 U.S.C. § 1001b(c)—particularly balancing employee and beneficiary protection against employer incentive to offer retirement plans—Congress included a broad preemption provision within ERISA’s statutory scheme.³² Preemption under ERISA takes two forms: conflict (or direct) preemption, which applies to those state laws that directly conflict with ERISA’s explicit requirements; and “relate-to” preemption, which is the more controversial theory for finding state laws preempted by ERISA.³³ This latter provi-

²⁸ See *id.* § 1104(a)(1)(D); see also *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 868 n.14 (2009) (demonstrating the power of the “plan documents” rule).

²⁹ See *infra* notes 32–52 and accompanying text.

³⁰ See *infra* notes 32–40 and accompanying text.

³¹ See *infra* notes 41–52 and accompanying text.

³² See 29 U.S.C. § 1144(a).

³³ See LANGBEIN ET AL., *supra* note 17, at 758–61. Justice Scalia in particular has expressed concern with the current application of “relate-to” preemption as a test different from traditional notions of field preemption, and in several concurring opinions has noted his desire to apply the Court’s “established jurisprudence concerning conflict and field preemption” to such cases. See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 152–53 (2001) (Scalia, J., concurring); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring). In an earlier concurrence joined by Justice Ginsburg, Justice Scalia similarly opined:

I think it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on this statute was wrong; that the “relate to” clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies—namely, the field of laws regulating “employee benefit plan[s] described in section 1003(a) of this title and not exempt under section 1003(b) of this title,” 29 U.S.C. § 1144(a).

Dillingham Constr., 519 U.S. at 336. Field preemption as an approach to the “relate-to” problem is also supported by the legislative history. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98–99 (1983) (describing the legislative history of ERISA, including various senators’ remarks explaining that ERISA would “preempt the field” of employee benefits regulation).

sion, found in 29 U.S.C. § 1144(a), notes that ERISA supersedes all state laws that “relate to” employee benefit plans covered by ERISA.³⁴ As the U.S. Supreme Court explained in 1983 in *Shaw v. Delta Air Lines, Inc.*, a state law “relates to” an ERISA plan “if it has a connection with or reference to such a plan.”³⁵ The Supreme Court, despite “caution[ing] against an ‘uncritical literalism’ that would make preemption turn on ‘infinite connections,’”³⁶ has repeatedly noted that this provision is “clearly expansive” and has been interpreted in a broad fashion.³⁷

The primary rationale for ERISA’s broad preemption provision is uniform plan administration, under the theory that without predictable federal standards, plan administrators facing uncertainty will encounter increased costs, which will then be passed along to participants.³⁸ In addition, certain employers might simply opt out of offering pension plans to their employees altogether if faced with a “maze of different and conflicting state laws and regulations.”³⁹ In this sense, the desire for uniform plan administration may be viewed as an extension of ERISA’s overarching goal of protecting employee participants and their beneficiaries in the aggregate, although in individual cases the interests of plan administrators and participants are not always aligned.⁴⁰

B. *Protection of the Nonemployee Spouse*

ERISA’s protective measures extend beyond the employee participants themselves, as the statutory scheme vigorously protects the surviving spouses of participants.⁴¹ Although somewhat overlooked in ER-

³⁴ 29 U.S.C. § 1144(a).

³⁵ 463 U.S. at 96–97.

³⁶ *Egelhoff*, 532 U.S. at 147 (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995)).

³⁷ *Id.* at 146 (quoting *Travelers*, 514 U.S. at 655) (noting that ERISA’s “relate to” preemption provision is “clearly expansive” but not without limits); *Shaw*, 463 U.S. at 100 n.21 (“Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.”).

³⁸ See *Dedeaux*, 481 U.S. at 44–46.

³⁹ See Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL’Y 541, 546–47 (1998).

⁴⁰ See *Egelhoff*, 532 U.S. at 149–50 (“Requiring ERISA administrators to master the relevant laws of 50 states and to contend with litigation would undermine the congressional goal of ‘minimiz[ing] the administrative and financial burden[s]’ on plan administrators—burdens ultimately borne by the plan beneficiaries.” (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990))).

⁴¹ See 29 U.S.C. § 1055 (2006); *Boggs v. Boggs*, 520 U.S. 833, 843 (1997) (“Congress’ concern for surviving spouses is also evident from the expansive coverage of § 1055, as amended by REA[ct].”).

ISA's original iteration,⁴² nonemployee spousal protections became a crucial part of the ERISA framework with the passage of the Retirement Equity Act of 1984 (REAct).⁴³ REAct most notably extends a qualified joint and survivor annuity ("QJSA") to a nonemployee spouse when the participant dies after having reached retirement.⁴⁴ It also extends an analogous annuity known as a qualified preretirement survivor annuity ("QPSA") to a nonemployee spouse when the participant dies prior to retirement.⁴⁵ In addition, REAct amended § 1055 to make it difficult for a married participant to designate a non-spouse as the beneficiary.⁴⁶ To do so, a spouse must validly waive her interest, and such a waiver must be made during the marriage and not as part of an antenuptial agreement.⁴⁷

Moreover, REAct amended ERISA to curb its rigid application in divorce or other domestic relations issues.⁴⁸ Recognizing the increasing importance of employee benefit plans and their growing role in both the divorce and child support contexts, Congress drafted REAct to include a limited exception to ERISA's anti-alienation rule.⁴⁹ This exception, applicable only to certain qualified domestic relations orders ("QDROs"), permitted state courts to assign all or part of a participant's employee benefit plan to the nonemployee spouse within the context of a divorce decree.⁵⁰ QDROs are also expressly exempted from ERISA preemption under § 1144(b)(7).⁵¹ As a result, in this limited capacity, such state domestic relations orders dividing marital property during divorce can effectively modify beneficiary designations of former spouses provided that they meet all of the criteria set forth in § 1056(d)(3).⁵²

⁴² See LANGBEIN ET AL., *supra* note 17, at 271–72. See generally Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 IOWA L. REV. 431 (1991) (describing the pre-REAct deficiencies of ERISA's protections of non-employee surviving spouses).

⁴³ Pub. L. No. 98-397, 98 Stat. 1440–48 (codified at 26 U.S.C. §§ 401, 402, 414, 417); see also LANGBEIN ET AL., *supra* note 17, at 271–300, 794–95.

⁴⁴ See 29 U.S.C. § 1055(d) (defining qualified joint and survivor annuity).

⁴⁵ See *id.* § 1055(e) (defining qualified preretirement survivor annuity).

⁴⁶ See *id.* § 1055; *Boggs*, 520 U.S. at 843.

⁴⁷ 29 U.S.C. § 1055(c)(2)(A) (requiring written consent of a spouse for waiver). Prospective spouses are thus not eligible to consent, and any attempt to waive their interests in their fiancés' ERISA benefits through antenuptial agreements would fail accordingly. See *id.*; see also LANGBEIN ET AL., *supra* note 17, at 276.

⁴⁸ See LANGBEIN ET AL., *supra* note 17, at 282.

⁴⁹ See 29 U.S.C. § 1056(d)(1).

⁵⁰ See *id.*

⁵¹ *Id.* § 1144(b)(7).

⁵² *Id.* § 1056(d)(3). These requirements include: clearly identifying the names and addresses of the beneficiaries and any alternate payee and the plan to which the QDRO ap-

II. THE INTERSECTION OF ERISA PREEMPTION AND THE SUBSTANTIVE LAW OF WILLS

Designating a beneficiary under an ERISA plan is only one manner of transmitting property at death, a realm otherwise chiefly occupied by the states.⁵³ This Part explores state-level attempts to unify probate and non-probate property, thereby carrying out decedents' presumptive intent, and considers how ERISA preemption alters this analysis, often to the detriment of decedents who participated in ERISA plans.⁵⁴

A. State-Level Responses to the Increasing Importance of Employee Benefit Plans and Other Nonprobate Assets

The rise of employee benefit plans and the need for federal regulation via ERISA coincided with another remedial trend that was sweeping the country at the state level: a trend of revising outmoded probate laws to better reflect the presumptive intent of the testator and to unify the laws of wills and will substitutes.⁵⁵ A vast majority of the states, for instance, have now adopted statutes which presume that divorce revokes devises made to former spouses in wills executed before the divorce.⁵⁶ Such revocation-on-divorce statutes, many modeled upon the analogous provision of the Uniform Probate Code (UPC), are intended to carry out a decedent's presumptive intent, under the assumption

plies; making no attempt to modify the type of benefit offered by the plan; and making no attempt to require payment to a beneficiary named in another QDRO. *Id.*

⁵³ See Lebolt, *supra* note 9, at 35.

⁵⁴ See *infra* notes 55–95 and accompanying text. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (discussing the increasing role of nonprobate assets within the estate planning framework and recommending uniform application of subsidiary wills doctrines to probate and nonprobate assets alike). Probate property refers to any property that passes under a will or by intestacy, whereas nonprobate property involves property that passes at death via another mechanism. See DUKEMINIER ET AL., *supra* note 3, at 38–39. The term “will substitute” is used interchangeably with “nonprobate property,” and includes transfers such as life insurance, pension plan survivor benefits, and joint tenancies in realty or bank accounts. *Id.*

⁵⁵ See T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 185–87 (2004) (noting that the state-level trend toward unifying probate and nonprobate property under the substantive law of wills is on a “collision course” with the broad federal scope of ERISA preemption); Langbein, *supra* note 54, at 1108; see also Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 228–29 (1991) (discussing the Uniform Probate Code's efforts to effect the “likely intent” of the decedent).

⁵⁶ See UNIF. PROBATE CODE § 2-804 (2008); Eunice L. Ross & Thomas J. Reed, WILL CONTESTS, § 5:19 (2d ed. 2011) (listing the forty-five states with revocation-on-divorce rules in effect for probate transfers to former spouses).

that a decedent most likely would prefer not to transmit property to a former spouse.⁵⁷

Certain states, however, have taken this policy a step further, extending revocation-on-divorce to encompass the increasingly important realm of nonprobate property, which accounts for a significant share of the average person's assets.⁵⁸ Nonprobate assets, also known as will substitutes, are a form of property which passes at death by a mechanism other than the probate process, including joint tenancies, life insurance, and many other assets.⁵⁹ As a result, in a substantial minority of the states, a designation of a former spouse as a life insurance or pension plan beneficiary, if made before divorce, is presumed to be revoked upon divorce, a position endorsed by both the UPC and the *Restatement (Third) of Property: Wills and Other Donative Transfers*.⁶⁰ Because employee benefit plans are a common form of will substitute, clashes between the strict federal preemption scheme of ERISA and state regulation of the transmission of nonprobate property at death were virtually inevitable.⁶¹

⁵⁷ See Waggoner, *supra* note 55, at 228–29.

⁵⁸ See Langbein, *supra* note 54, at 1109 (“It would not be unusual for someone in mid-life to have more than a dozen will substitutes in force, whether or not he has a will.”); see also Gary, *supra* note 8, at 84 (describing the state-level statutory expansion of revocation-on-divorce into nonprobate assets as “fill[ing] a necessary gap in protection for divorced persons”).

⁵⁹ See DUKEMINIER ET AL., *supra* note 3, at 38–39.

⁶⁰ See UNIF. PROBATE CODE § 2-804 (2008); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.2 & cmt. (2003) (noting that substantive law of wills should apply to non-probate property “to the extent appropriate” so as to further “the policy of unifying the law of wills and will substitutes”). Section 2-804 of the UPC states:

[D]ivorce 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.

UNIF. PROBATE CODE § 2-804 (2008) (second alteration in original). The comment to Section 2-804 further explains that the section is “intend[ed] to unify the law of probate and nonprobate transfers,” and was expanded “to cover ‘will substitutes’ such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment).” UNIF. PROBATE CODE § 2-804 cmt. (2008).

⁶¹ See UNIF. PROBATE CODE § 2-804(h)(2) (2008). The drafters of the UPC foresaw such a conflict and attempted to circumvent it. See *id.* (stating that a former spouse is “obligated to return” the benefits received if ERISA preempts a state revocation-on-divorce law); see also Sarabeth A. Rayho, Note, *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans*, 106 MICH. L. REV. 373, 378 (2007).

B. *Boggs v. Boggs*: ERISA Preempts State Community Property Laws

The U.S. Supreme Court's decision in *Boggs v. Boggs* in 1997 reinforced the expansiveness of ERISA preemption and demonstrated the potential for conflict between ERISA and state laws governing the transfer of property at death.⁶² In this case, Sandra Boggs brought an action against her late husband Isaac Boggs's two sons by his first marriage to Dorothy Boggs, seeking declaratory judgment that she alone was entitled to his pension benefits.⁶³ Dorothy's will left her half-interest in Isaac's pension plan to the sons from their marriage; under Louisiana community property law she owned a half-interest in his earnings during the marriage and could convey that interest at death.⁶⁴ Sandra, however, contested her stepsons' interest in the property, arguing that Dorothy's conveyance was preempted by ERISA and was thus invalid.⁶⁵ The Supreme Court agreed, noting that "ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity."⁶⁶ Applying principles of conflicts preemption, the Supreme Court held that Sandra was the proper beneficiary of the plan.⁶⁷ Ultimately, *Boggs* signaled that the historical deference to state laws in areas of traditional state concern—such as probate and family law—was in jeopardy.⁶⁸

C. *Egelhoff v. Egelhoff*: *The Collision of Revocation-on-Divorce and ERISA Preemption*

In 2001, the U.S. Supreme Court again considered the limits of ERISA preemption in *Egelhoff v. Egelhoff ex rel. Breiner*, in which a Wash-

⁶² See *Boggs v. Boggs*, 520 U.S. 833, 835–41 (1997).

⁶³ *Id.* at 837. Marital property in Louisiana is held as community property. See DUKE-MINIER ET AL., *supra* note 3, at 469–71. Unlike the system of separate property employed by a majority of the states, where each spouse retains separate ownership of the assets owned before the marriage or earned during its duration, community property systems assign half of the combined total marital income to each spouse. *Id.* This entitles each spouse to dispose of his or her share as he or she so desires, including the right to alienate the property or transmit it at death. See *id.* See generally Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. REV. 455 (2003) (examining the largely unsuccessful Uniform Marital Property Act as a community property system which codifies the partnership theory of marriage).

⁶⁴ *Boggs*, 520 U.S. at 836–37.

⁶⁵ *Id.* at 837.

⁶⁶ *Id.* at 843.

⁶⁷ See *id.* at 844.

⁶⁸ See *id.* at 854–74 (Breyer, J., dissenting).

ington statute was challenged on the grounds that it was impermissibly related to the administration of employee benefit plans and was thus preempted by ERISA.⁶⁹ In that case, the decedent David Egelhoff died intestate two months after his divorce from petitioner Donna Rae Egelhoff, leaving two children from an earlier marriage.⁷⁰ Washington's intestacy statute, following the UPC's attempt to unify probate and nonprobate property for such purposes, declared that divorce revoked all probate and nonprobate transfers to the former spouse if the designation was made prior to the divorce.⁷¹ As a result, under state law, David's heirs at law were his two children from the previous marriage.⁷²

Through his employer, David had participated in a pension plan and had a life insurance policy, both of which were governed by ERISA.⁷³ Under both plans, David had named Donna as his beneficiary.⁷⁴ When the couple's assets were divided during the divorce proceedings, David was awarded full ownership of his pension and life insurance policies.⁷⁵ Two months after the divorce, however, David was killed in an accident.⁷⁶ Following the divorce and before his death, he had neglected to formally change the beneficiary of his policies, leaving Donna listed as his beneficiary under the plan documents on file with the plan administrators.⁷⁷

⁶⁹ 532 U.S. 141, 144 (2001).

⁷⁰ *See id.*

⁷¹ *See id.* (quoting WASH. REV. CODE § 11.07.010(2)(a) (1994)). The Washington Revised Code § 11.07.010(a)(2) provided:

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, having died at the time of entry of the decree of dissolution or declaration of invalidity.

WASH. REV. CODE § 11.07.010(2)(a) (1994).

⁷² *Egelhoff*, 532 U.S. at 144.

⁷³ *Id.*

⁷⁴ *Id.* In dissent, however, Justice Breyer notes that David did more than simply declare Donna his beneficiary—he instead named “Donna R. Egelhoff *wife*,” effectively designating a person who ceased to exist once the divorce took effect. *See id.* at 154–55 (Breyer, J., dissenting) (emphasis added). In so doing, Justice Breyer argued, David intended the benefit to be revoked upon divorce, which is precisely the result that the Washington statute would have yielded. *Id.*

⁷⁵ *Id.* at 159.

⁷⁶ *Id.* at 144 (majority opinion).

⁷⁷ *Id.*

After David's death, his two children from his previous marriage argued that they were the proper beneficiaries of his life insurance and pension plans based on the application of the Washington statute, which would revoke Donna's status as beneficiary upon divorce.⁷⁸ In two separate actions involving the life insurance and pension benefits, the trial courts granted summary judgment in favor of Donna, determining that ERISA preempted the Washington statute and that both the life insurance and pension plans should be paid to Donna under the plan documents.⁷⁹ On appeal, the life insurance and pension cases were consolidated, and the Washington Court of Appeals reversed.⁸⁰ The Supreme Court of Washington affirmed the Court of Appeals, concluding that the Washington statute's application was far broader than ERISA's domain, as it "does not apply immediately and exclusively to an ERISA plan, nor is the existence of such a plan essential to operation of the statute."⁸¹

The U.S. Supreme Court granted certiorari to resolve the preemption question that had divided state and federal courts.⁸² Ultimately, applying the "relate-to" preemption doctrine in spite of several Justices' reservations,⁸³ the Supreme Court concluded that ERISA did in fact preempt the Washington statute's revocation-on-divorce statute.⁸⁴ The Court emphasized the importance of uniform plan administration, noting that plan administrators should not be expected to keep abreast of the nuances of all fifty states to carry out their fiduciary obligation to pay benefits under the plan documents.⁸⁵ As a result, Donna, not the children who were David's heirs at law under Washington intestacy law, was entitled to the entirety of the life insurance and pension plan benefits.⁸⁶

Justice Breyer dissented from the *Egelhoff* majority, noting his concerns about both the inequity of the result and the limits of the majority's pronouncement.⁸⁷ The couple, having recently divorced, had allo-

⁷⁸ *Egelhoff*, 532 U.S. at 144–45.

⁷⁹ *Id.* at 145.

⁸⁰ *Id.*

⁸¹ *Id.* at 145 (quoting *In re Estate of Egelhoff*, 989 P.2d 80, 89 (Wash. 1999)).

⁸² *Id.* at 146; see also 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).

⁸³ See *Egelhoff*, 532 U.S. at 152–53 (Scalia, J., concurring); see also *supra* note 33.

⁸⁴ *Egelhoff*, 532 U.S. at 143, 146–47.

⁸⁵ *Id.* at 148.

⁸⁶ *Id.* at 146–47.

⁸⁷ *Id.* at 159–61 (Breyer, J., dissenting).

cated their assets in what they determined was an appropriate manner.⁸⁸ As Justice Breyer explained, the practical outcome of the decision yields the uncomfortable result of “permit[ting] a divorced wife, who already acquired, during the divorce proceeding, her fair share of the couple’s community property, to receive in addition the benefits that the divorce court awarded to her former husband.”⁸⁹ The state law’s result—permitting David’s children, rather than his former spouse, to receive the benefits of the insurance and pension plan—better reflected the decedent’s presumed intent.⁹⁰

In addition, Justice Breyer’s dissent raised serious concerns about the limits of the *Egellhoff* opinion on ERISA preemption, particularly with respect to other doctrines traditionally governed by state law.⁹¹ For instance, slayer statutes—state laws which prevent a murderous spouse from profiting by killing the other spouse—affect ERISA similarly to revocation-on-divorce provisions, as do those statutes governing survivorship presumptions in cases of simultaneous spousal death.⁹² The majority was dismissive of this concern, noting that slayer statutes were not before the Court and that even if they were, the Court might distinguish them from revocation-on-divorce because the former were “more or less uniform nationwide.”⁹³ Justice Breyer, however, observed that this purported uniformity did not in fact reflect the reality of the nation’s slayer statutes, which arguably exhibit even more variety among the states than revocation-on-divorce statutes.⁹⁴ As a result, Justice Breyer expressed his concern that the majority’s pronouncement in *Egellhoff* could not logically be cabined to exclude these similar doctrines.⁹⁵

III. THE LIMITS OF PREEMPTION: STATE AND FEDERAL COURTS’ RESPONSES TO *EGELHOFF*

This Part explores the viability of certain subsidiary wills doctrines as applied to ERISA plans in light of the U.S. Supreme Court’s decision in *Egellhoff v. Egellhoff ex rel. Breiner* in 2001.⁹⁶ In this Part, Section A ex-

⁸⁸ *Id.* at 159.

⁸⁹ *Id.*

⁹⁰ *See Egellhoff*, 532 U.S. at 158–59 (citing Langbein, *supra* note 54, at 1135).

⁹¹ *See id.* at 159–61.

⁹² *See id.* at 159–60.

⁹³ *See id.* at 152 (majority opinion).

⁹⁴ *See id.* at 160 (Breyer, J., dissenting).

⁹⁵ *See id.* at 159–60.

⁹⁶ *See* 532 U.S. 141, 152 (2001); *infra* notes 101–182 and accompanying text.

amines the treatment of slayer statutes in state and federal courts since 2001.⁹⁷ Section B discusses the similar effects on simultaneous death and substantial compliance doctrines, which have generally been found either not preempted or, in the alternative, preempted but saved under federal common law.⁹⁸ As Section C cautions, however, the U.S. Supreme Court's recent decision in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan* may have eliminated the federal common law solution as applied to these doctrines.⁹⁹ These ramifications of the *Kennedy* decision are then taken up in Part IV.¹⁰⁰

A. *Slayer Statutes*

Courts have traditionally viewed slayer statutes as immune to ERISA preemption,¹⁰¹ a position maintained in part by a number of courts even in the wake of *Egelhoff*.¹⁰² Such conclusions are often justified by reference to the longstanding tradition of slayer statutes and the widespread adoption of these types of laws throughout the country.¹⁰³ The

⁹⁷ See *infra* notes 101–140 and accompanying text.

⁹⁸ See *infra* notes 141–165 and accompanying text.

⁹⁹ See 129 S. Ct. 865, 870–77 (2009); *infra* notes 166–182 and accompanying text.

¹⁰⁰ See *infra* notes 183–255 and accompanying text.

¹⁰¹ See, e.g., *New Orleans Elec. Pension Fund v. Newman*, 784 F. Supp. 1233, 1238 (E.D. La. 1992); *Mendez-Bellido v. Bd. of Trs. of Div. 1181, A.T.U. N.Y. Emps. Pension Fund & Plan*, 709 F. Supp. 329, 331 (E.D.N.Y. 1989); see also LANGBEIN ET AL., *supra* note 17, at 320–22. For example, in *Mendez-Bellido* the court explained that:

[A] state law prohibiting a killer from profiting from her crime is not preempted by ERISA. This common law rule is rooted in public policy and has broad application to insurance policies, wills and intestacy. The application of this rule to pension plans governed by ERISA will not affect the determination of an employee's eligibility for benefits, . . . nor will it impact on the method of calculating the amount of benefits due.

709 F. Supp. at 331.

¹⁰² See, e.g., *Life Ins. Co. of N. Am. v. Camm*, No. 4:02-cv-00106-DFH-WGH, 2007 WL 2316480, at *3–6 (S.D. Ind. Aug. 6, 2007); *Atwater v. Nortel Networks, Inc.*, 388 F. Supp. 2d 610, 614–15 (M.D.N.C. 2005); *Conn. Gen. Life Ins. Co. v. Riner*, 351 F. Supp. 2d 492, 497 (W.D. Va. 2005), *aff'd by* 142 F. App'x 690 (4th Cir. 2005); *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris*, 217 F. Supp. 2d 759, 761–62 (E.D. Tex. 2002).

¹⁰³ See *N.Y. Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (“It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired.”); see also *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889) (“[A] widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.”).

Egellhoff majority hints at this position in dicta when dismissing the concern that its holding would require invalidating slayer laws.¹⁰⁴

Despite the Supreme Court's dicta in *Egellhoff* purporting to distinguish slayer statutes from revocation-on-divorce laws applied to non-probate assets, the distinction—and the rationale for treating these types of statutes differently—is difficult to discern.¹⁰⁵ Federal district courts and state courts grappling with the issue have generally, but not uniformly, accepted the dicta in *Egellhoff*, but have hedged their rulings by giving an alternate basis for preventing slayers from profiting from their wrongful deeds: the federal common law.¹⁰⁶

1. Slayer Statutes Found Not Preempted by ERISA

One of the first slayer statute cases considered in the wake of *Egellhoff* was *Administrative Committee for the H.E.B. Investment & Retirement Plan v. Harris*, decided by the U.S. District Court for the Eastern District of Texas in 2002.¹⁰⁷ The plan administrators in *Harris* brought an action for declaratory judgment to determine the eligible beneficiary after the participant Mary Harris was killed by her husband Alfred.¹⁰⁸ Mary had designated Alfred as the sole beneficiary under her employer-sponsored retirement plan and did not name a contingent beneficiary.¹⁰⁹ Under Texas law, however, a slayer convicted of bringing about the death of the insured is barred as a beneficiary, which would disqualify Alfred from receiving the benefits.¹¹⁰ Instead, the funds are to be paid to contingent beneficiaries, or if none are named, then to the insured's nearest rela-

¹⁰⁴ See *Egellhoff*, 532 U.S. at 152.

¹⁰⁵ See *id.* at 159–60 (Breyer, J., dissenting); see also LANGBEIN ET AL., *supra* note 17, at 796–97.

¹⁰⁶ See, e.g., *Camm*, 2007 WL 2316480, at *3–6 (“[T]his court has the option of not deciding the preemption question because here the result would be the same under both the state statute and ERISA aided by federal common law.”); *Atwater*, 388 F. Supp. 2d at 614–15 (“As the convicted murderer of the plan participant, [the husband] would have been barred from recovering the deceased’s ERISA benefits under either North Carolina’s slayer statute or under federal common law.”); *Riner*, 351 F. Supp. 2d at 497 (concluding that the Virginia slayer statute is not preempted by ERISA, or in the alternative, that the slayer rule is incorporated into federal common law); *Harris*, 217 F. Supp. 2d at 761–62 (concluding that the Texas slayer statute or federal common law would both prevent the slayer from taking from his victim’s estate); *Mack v. Estate of Mack*, 206 P.3d 98, 110–11 (Nev. 2009) (concluding that the Nevada slayer statute not preempted by ERISA). *But see* *Ahmed v. Ahmed*, 817 N.E.2d 424, 426 (Ohio Ct. App. 2004) (concluding that ERISA preempts Ohio slayer statute).

¹⁰⁷ See 217 F. Supp. 2d at 760–62.

¹⁰⁸ *Id.* at 760.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 760–61 (quoting TEX. PROB. CODE ANN. § 41(d) (West 1980)).

tives.¹¹¹ Because Mary did not designate any contingent beneficiaries, her children stood to receive the benefits from the policy under Texas law.¹¹²

The *Harris* court, noting that “fortunately for the state of marital relations in America, a plethora of cases discussing ERISA preemption when one spouse kills another spouse does not exist,” still found support from several pre-*Egelhoff* cases,¹¹³ as well as *Egelhoff* itself,¹¹⁴ to conclude that ERISA did not preempt the Texas slayer statute.¹¹⁵ The court went on to determine that even if ERISA did preempt the slayer statute, the result would be identical under federal common law.¹¹⁶ To bolster this argument, the court highlighted the tradition of applying federal common law to fill gaps in federal statutes.¹¹⁷ It also noted that “the traditional deference given to state law in the area of family law supports a decision to borrow from state law when determining the federal common law for these issues.”¹¹⁸

Similarly, the court in *Connecticut General Life Insurance Co. v. Riner*, decided by the U.S. District Court for the Western District of Virginia in 2005, hedged its ruling with respect to the preemption question.¹¹⁹ In that case, after Douglas Riner was convicted of murdering his wife Denise, the insurance company brought an interpleader action to determine who should receive the benefits of Denise’s ERISA plan.¹²⁰ Acknowledging that the preemption question was not settled, the court based its ruling—that Douglas was barred from benefitting—on the Virginia statute, or alternatively on the identical outcome dictated by federal common law, declining to reach the preemption issue.¹²¹ The court noted that “[n]either Virginia’s slayer statute nor federal common law” would permit the slaying spouse to benefit from the homicide by receiv-

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *See, e.g., Newman*, 784 F. Supp. at 1236–37; *Mendez-Bellido*, 709 F. Supp. at 331.

¹¹⁴ The *Harris* court noted that in *Egelhoff*, “seven Justices joined an opinion that, in dicta, hinted that these Justices thought that ERISA did not preempt state slayer statutes.” *Harris*, 217 F. Supp. 2d at 761 (citing *Egelhoff*, 532 U.S. at 152).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Harris*, 217 F. Supp. 2d at 761; *see Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98–99 (1983). Federal common law may be applied when a federal statutory scheme includes gaps, permitting the courts to fill in such gaps to carry out the overall congressional intent behind the statutory scheme. *See id.*

¹¹⁸ *See Harris*, 217 F. Supp. 2d at 761.

¹¹⁹ *See* 351 F. Supp. 2d at 497.

¹²⁰ *Id.* at 494.

¹²¹ *See id.* at 497.

ing the deceased spouse's ERISA benefits, and concluded that Congress "could not have intended" otherwise when it created ERISA.¹²²

In 2009, the Nevada Supreme Court also endorsed the view that slayer statutes are not preempted by ERISA in *Mack v. Estate of Mack*.¹²³ In that case, the court faced a slightly different twist on the typical slayer case, in which a murderous spouse seeks to inherit from the victim's estate.¹²⁴ Instead, Darren Mack, found guilty of murdering his wife Charla Mack, attempted to preclude his wife's estate from claiming the agreed-upon share of his pension benefits as ordered by the trial court during the divorce proceedings.¹²⁵ The trial court judge had issued an oral ruling, but before it was memorialized in writing, Darren had killed Charla and had shot the judge who had issued the agreement.¹²⁶ Darren was found guilty of Charla's murder and the attempted murder of the judge who presided over their divorce.¹²⁷ The Nevada Supreme Court concluded that Congress could not have intended to permit murderers to profit from their crimes and held that Darren could not use his wife's murder to evade his financial obligations to her estate.¹²⁸

2. *Ahmed v. Ahmed*: Ohio Courts Find Preemption of the Slayer Statute

A minority of courts has concluded that the *Egellhoff* opinion, despite its intimations to the contrary, must nevertheless be interpreted as preempting slayer statutes.¹²⁹ In *Ahmed v. Ahmed*, in 2004, the Ohio Court of Appeals concluded that the Ohio slayer statute was preempted by ERISA.¹³⁰ In that case, Lubaina Ahmed was killed by her husband Nawaz, leaving two sons, Ibtisam and Ahsan.¹³¹ As a physician, Lubaina was enrolled in her employer-sponsored life insurance policy, which was

¹²² *Id.*

¹²³ See 206 P.2d at 110–11.

¹²⁴ See *id.* at 101, 104–05.

¹²⁵ See *id.*

¹²⁶ *Id.* at 104.

¹²⁷ *Id.* After being attacked by Darren, Judge Weller was replaced by a new judge for the remainder of the case. *Id.* at 104 n.4. The new judge permitted Judge Weller's oral order to be memorialized in writing as a qualified domestic relations order ("QDRO"). *Id.*

¹²⁸ See *id.* at 110. Although the *Mack* court's opinion does not attempt to distinguish or directly mention *Egellhoff*, most likely because the oral division of marital property was later declared a valid QDRO, it does adopt the position taken in the majority of district courts to have considered the issue, implicitly endorsing the slayer statute dicta in *Egellhoff*. See *id.* (citing *Atwater*, 388 F. Supp. 2d at 614; *Riner*, 351 F. Supp. 2d at 497; *Harris*, 217 F. Supp. 2d at 761; *Newman*, 784 F. Supp. at 1236; *Mendez-Bellido*, 709 F. Supp. at 331).

¹²⁹ See *Ahmed*, 817 N.E.2d at 426.

¹³⁰ See *id.*

¹³¹ *Id.*

governed by ERISA.¹³² Before her younger son Ahsan's birth, Lubaina named her husband Nawaz as the beneficiary of the policy, with her elder son Ibtisam named as the contingent beneficiary.¹³³ Lubaina failed to update the plan after Ahsan's birth to name him as a second contingent beneficiary.¹³⁴

Because Nawaz had been convicted of Lubaina's murder, Ohio's slayer statute treated him as having predeceased her.¹³⁵ The result under Ohio law would therefore convey the benefit of the entire policy to Ibtisam, the sole eligible beneficiary under the will, leaving Ahsan without a share of the sizeable policy.¹³⁶ Instead, however, the court concluded that ERISA preemption applied under *Egelhoff*, and applying federal common law incorporating the slayer rule, determined that the policy was to be paid to Lubaina's estate—which the two brothers would share equally.¹³⁷

Critics of *Ahmed* have suggested that the court's broad interpretation of *Egelhoff* stemmed in large part from a desire to avoid harming Lubaina's younger son, Ahsan.¹³⁸ Without finding ERISA preemption, Ahsan would effectively be prevented from sharing in the nonprobate asset comprising a large portion of his mother's estate.¹³⁹ The convoluted rationale of the *Ahmed* court may thus be partly attributable to the desire to treat both sons equally following the loss of their mother.¹⁴⁰

B. Other Doctrines: Simultaneous Death and Substantial Compliance

In addition to slayer statutes and revocation-on-divorce provisions, other aspects of state probate law may now face ERISA preemption scrutiny in the wake of *Egelhoff*.¹⁴¹ Courts have been divided about such

¹³² *Id.* at 426–27.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Ahmed*, 817 N.E.2d at 427.

¹³⁶ *Id.* at 428.

¹³⁷ *See id.* at 433.

¹³⁸ *See, e.g.*, Daniel J. Hoffheimer & Julia B. Meister, *Ahmed v. Ahmed: The Ohio Slayer Statute, Common Law, and ERISA Preemption*, 16 PROB. L.J. OHIO 53, 54 (2005); Peter S. Lin, *Murdering the Slayer Statute Under the Pretense of ERISA Preemption: Ahmed v. Ahmed*, 58 TAX LAW. 767, 779–80 (2005).

¹³⁹ *See* Lin, *supra* note 138, at 779–80.

¹⁴⁰ *See id.*; *see also* *Camm*, 2007 WL 2316480, at *4–5 (distinguishing *Ahmed*, where “the choice between federal and state law would result in distribution of the life insurance proceeds to different innocent claimants”).

¹⁴¹ *See, e.g.*, *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 566–67 (7th Cir. 2002) (substantial compliance); *Estate of Morgan v. Estate of Morgan*, No. 50133-0-I, 2004 WL 500860, *3–4 (Wash. Ct. App. Mar. 15, 2004) (simultaneous death).

doctrines, with some applying federal common law to yield a federal version of the preempted state law,¹⁴² and others simply concluding that the statute was not preempted.¹⁴³

1. Simultaneous Death

The simultaneous death of both spouses poses another set of problems in determining who should acquire each deceased spouse's property.¹⁴⁴ For instance, in *Estate of Morgan v. Estate of Morgan*, an unpublished Washington Court of Appeals decision from 2004, the court grappled with whether ERISA preempted a Colorado statute dictating the survivorship requirements in the event of simultaneous spousal death.¹⁴⁵ Following the deaths of spouses Casey and Karen Morgan at the hands of Casey's brother, Karen's estate sued Casey's estate for wrongful death and to claim the benefits of Karen's life insurance policy.¹⁴⁶ Casey had permitted his unstable brother, who had a fascination with guns and demonstrated violent tendencies, to live with them despite Karen's fears that the brother would harm them.¹⁴⁷ In 1999, Casey's brother gained access to Casey's unlocked gun and ammunition and, beginning with Karen, shot and killed both spouses.¹⁴⁸

Through her employer, Karen had participated in ERISA-governed life insurance and employee stock ownership plans, with Casey named as the beneficiary and her parents named as secondary beneficiaries if Casey did not survive her.¹⁴⁹ The disposition of Casey's and Karen's estates thus depended largely upon which survivorship provision applied, because the medical evidence appeared to indicate that Karen predeceased Casey by a matter of minutes.¹⁵⁰ In Colorado, which follows the revised Uniform Simultaneous Death Act, a spouse must survive for 120

¹⁴² *Johnson*, 297 F.3d at 565–66.

¹⁴³ *Morgan*, 2004 WL 500860, at *3–4.

¹⁴⁴ See *DUKEMINIER ET AL.*, *supra* note 3, at 80, 86. At common law, survival by a split second was all that was legally required in order to inherit, a presumption later modified under the Uniform Simultaneous Death Act (USDA). See *id.* at 80. Under the USDA, each spouse was deemed to have predeceased the other for purposes of testamentary transfers were there no sufficient evidence of survival. *Id.* Finally, the UPC and USDA were again modified, replacing the no sufficient evidence rule with the “120 hour rule,” which treats a spouse who dies within five days of the other spouse as having predeceased, permitting the property to pass to each spouses' secondary taker and avoiding double probate. See *id.* at 86.

¹⁴⁵ See 2004 WL 500860, at *3–4.

¹⁴⁶ *Id.* at *1–2.

¹⁴⁷ *Id.* at *1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at *2.

¹⁵⁰ See *id.* at *3–4.

hours in order to inherit from the other spouse, which in this situation would have rendered Karen's parents the proper beneficiaries of the plans.¹⁵¹ ERISA, however, is silent with respect to simultaneous death, and Casey's parents used this silence to assert that they were entitled to the proceeds of Karen's insurance as Casey's heirs.¹⁵² The court, dismissing the estate's *Egelhoff* objections in a footnote, ultimately concluded that the Colorado law "did not violate ERISA" and that Karen's parents, not her in-laws, were the proper beneficiaries of her ERISA plans.¹⁵³

2. Substantial Compliance

A similar issue may arise when courts grapple with attempts to change beneficiaries in ERISA plans that fail to comply with the formal requirements, yet clearly communicate the participant's intent to make such a change.¹⁵⁴ Under wills law, the doctrine of substantial compliance permits such errors to be disregarded if the testator substantially complies with the formalities of the relevant state's Wills Act and it is demonstrated by clear and convincing evidence that the document reflected the testator's intent.¹⁵⁵ With respect to ERISA plans, however, some courts have concluded that ERISA preempts the application of a state's version of substantial compliance, turning instead to the federal common law to fill in this gap.¹⁵⁶

For instance, in *Metropolitan Life Insurance Co. v. Johnson*, decided in 2002, the U.S. Court of Appeals for the Seventh Circuit used federal common law to apply a version of the substantial compliance doctrine after determining that the Illinois substantial compliance law was pre-

¹⁵¹ See *Morgan*, 2004 WL 500860, at *3 & n.2 (citing COLO. REV. STAT. § 15-11-702(2) (2010) (codifying the 120-hour rule)). The 120-hour rule, created to address the problems of the previous USDA's no sufficient evidence standard for survival, similarly serves to effect the testator's presumed intent, assuming that the testator would prefer to see her estate go to her secondary taker rather than her spouse's. See *DUKEMINIER ET AL.*, *supra* note 3, at 80, 86. For an example of the inadequacies of the prior version (requiring no sufficient evidence of survival) that prompted this revision, see *Janus v. Tarasewicz*, 482 N.E.2d 418, 419-24 (Ill. 1985).

¹⁵² *Morgan*, 2004 WL 500860, at *3.

¹⁵³ See *id.* at *4 & n.8. The court further concluded that a separate provision permitting plan administrators to retain discretion to determine beneficiaries under the plan entitled Karen's parents to claim the funds even without deciding the preemption question. See *id.*

¹⁵⁴ See *Johnson*, 297 F.3d at 563-67.

¹⁵⁵ See *DUKEMINIER ET AL.*, *supra* note 3, at 253. Under the UPC, adopted in a minority of jurisdictions, the "harmless error" rule (or "dispensing power") advocated by Professor Langbein goes one step further, requiring only clear and convincing evidence of testamentary intent. See UNIF. PROBATE CODE § 2-503 (2008); *DUKEMINIER ET AL.*, *supra* note 3, at 261-63.

¹⁵⁶ See *Johnson*, 297 F.3d at 563-69.

empted by ERISA.¹⁵⁷ In that case, Jimmie Johnson attempted to change the beneficiary of his ERISA-governed life insurance policy from his former spouse Mildred to his children born to another woman during his marriage to Mildred.¹⁵⁸ While filling out the appropriate form, however, he made several errors, including mistakenly checking the wrong box to designate a plan in which he did not participate and listing an incorrect address.¹⁵⁹ At his death, Jimmie's employer informed Mildred that she was the beneficiary, but Jimmie's children contested this, referring to Jimmie's change of beneficiary form to claim that they were the proper beneficiaries under the insurance plan.¹⁶⁰

Mildred urged the court to apply the Illinois doctrine of substantial compliance, arguing that it was not preempted by ERISA and that Jimmie's change of beneficiary request did not constitute substantial compliance.¹⁶¹ Jimmie's children, on the other hand, argued that ERISA preempted the Illinois statute and encouraged the court to apply federal common law and adopt the more lenient standard for substantial compliance set forth by the U.S. Court of Appeals for the Fourth Circuit in *Phoenix Mutual Life Insurance Co. v. Adams* in 1994.¹⁶² The Seventh Circuit in *Johnson* ultimately found the children's argument persuasive, and concluded that ERISA did in fact preempt the Illinois substantial compliance law.¹⁶³ As a result, the court adopted the Fourth Circuit's *Phoenix Mutual* articulation of substantial compliance as the federal common law.¹⁶⁴ In applying that standard, the Seventh Circuit concluded that Jimmie's attempted change of beneficiary was therefore effective.¹⁶⁵

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 560–61 & n.1.

¹⁵⁹ *Id.* at 560–61.

¹⁶⁰ *Id.* at 561.

¹⁶¹ *Id.* at 564 & n.5. Illinois' substantial compliance standard would have required Jimmie's children to "establish: (1) the certainty of [his] intent to change his beneficiary; and (2) that [he] did everything he reasonably could have done under the circumstances to carry out his intention to change the beneficiary." *Id.*

¹⁶² See *Johnson*, 297 F.3d at 567 (citing *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 559 (4th Cir. 1994)). Under this theory of substantial compliance, Jimmie's children needed only to demonstrate that Jimmie "(1) evidence[d] his . . . intent to make the change and (2) attempt[ed] to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy." *Id.* at 564.

¹⁶³ See *id.* at 566 ("Given the Supreme Court's latest word on ERISA preemption in *Egelhoff*, we believe that a state law affecting the designation of a beneficiary is sufficiently 'related to' an ERISA plan such that a state law doctrine of substantial compliance is preempted by ERISA.").

¹⁶⁴ *Id.* at 567–69.

¹⁶⁵ *Id.*

C. *The Federal Common Law Solution in Light of Kennedy*

Although many commentators have proposed the use of federal common law—informed by the *Restatement* or the Uniform Probate Code—as a solution to the *Egelhoff* problem,¹⁶⁶ a recent U.S. Supreme Court case appears to have curbed the availability of such a response.¹⁶⁷ In 2009, the U.S. Supreme Court decided *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, ending the practice of using federal common law waivers to give effect to divorce decrees that divided interests in ERISA-governed policies without constituting a valid qualified domestic relations order (“QDRO”).¹⁶⁸

In *Kennedy*, the Supreme Court clarified a point on which the circuits had split: whether a divorce decree that failed to qualify as a QDRO under § 1056(d) could nevertheless permit a named beneficiary of an ERISA-governed plan to waive those benefits through the application of federal common law and obligate the plan administrators to pay benefits in accordance with this waiver.¹⁶⁹ Under ERISA’s express language, QDROs were crafted as a rare exception to the antialienation provision of the statute, imposing strict requirements to meet the narrow exception.¹⁷⁰ QDROs, unlike other state-level decisions regarding the division of probate and non-probate assets, were also expressly exempted from the reach of ERISA’s preemption provisions.¹⁷¹ The circuit courts had nevertheless grappled with whether a divorce decree pur-

¹⁶⁶ See, e.g., Gallanis, *supra* note 55, at 196–98; Gary, *supra* note 8, at 114–20. See generally Lebolt, *supra* note 9 (advocating for the creation of federal common law to address *Egelhoff* inequities); Andrew L. Oringer, *A Regulatory Vacuum Leaves Gaping Wounds—Can Common Sense Offer a Better Way to Address the Pain of ERISA Preemption?* 26 HOFSTRA LAB. & EMP. L.J. 409 (2009) (proposing that the federal common law be applied more robustly as an equitable solution when other remedies are preempted by ERISA).

¹⁶⁷ See *Kennedy*, 129 S. Ct. at 874–75; Patricia L. Vannoy, Note, *RIP: The Federal Common Law Waiver Approach to Retirement Plan Death Benefits Finally Rests in Peace After Kennedy v. Plan Administrators for DuPont Savings & Investment Plan*, 88 NEB. L. REV. 204, 215–34 (2009); see also *Federal Common Law Does Not Apply in Light of Plan Documents Rule*, 38 COMPENSATION PLAN. J. 336, 336 (2010).

¹⁶⁸ See 129 S. Ct. at 870–77; *supra* notes 48–52 and accompanying text.

¹⁶⁹ See, e.g., *McGowan v. NRJ Serv. Corp.*, 423 F.3d 241, 244–48 (3d Cir. 2005) (concluding that plan administrators are not permitted to recognize the waiver); *Estate of Altobelli v. Int’l Bus. Machs. Corp.*, 77 F.3d 78, 80 (4th Cir. 1996) (concluding that “ERISA does not address this topic directly, so federal courts may resolve it by developing federal common law”); see also Vannoy, *supra* note 167, at 211–15 (describing the various approaches taken by the courts before *Kennedy*).

¹⁷⁰ See 29 U.S.C. § 1056(d)(1) (2006). This subsection dictates that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” *Id.*

¹⁷¹ See *id.*

porting to divide a divorcing couple's assets could validly waive the former spouse's status as a beneficiary under the participant's ERISA plan if it did not constitute a QDRO.¹⁷² In practical terms, such arrangements served an identical purpose, but because they involved a departure from ERISA's text in order to effect the presumptive intent of the decedent, they brought *Egelhoff* concerns back into sharp focus.¹⁷³

The Court in *Kennedy* abrogated cases on both sides of the circuit split, electing a middle ground which significantly diminished the effectiveness of the federal common law waiver.¹⁷⁴ The Court determined that the waiver "is not rendered invalid by the text of the anti-alienation provision."¹⁷⁵ At the same time, however, the Court crafted an additional argument against this practice by determining that the waiver did not alter the plan administrators' fiduciary obligation to "manage ERISA plans 'in accordance with the documents and instruments governing' them" and that the administrators had thus "properly disregarded" the purported waiver.¹⁷⁶ The Court thus demonstrated its commitment to a strict application of the plan documents rule.¹⁷⁷

The *Kennedy* decision leaves open several questions.¹⁷⁸ First, it notes that the "conclusion that § 1056(d)(1) does not make a nullity of the waiver leaves open any questions about the waiver's effect in circumstances in which it is consistent with plan documents," hinting that in certain limited circumstances, a common law waiver might not be entirely ineffective.¹⁷⁹ Second, like *Egelhoff*, the *Kennedy* opinion declines to address the application of the holding to slayer cases.¹⁸⁰ Third, the Court expressly reserved judgment on whether an alternative state

¹⁷² See *Kennedy*, 129 S. Ct. at 870 (citing *McGowan*, 423 F.3d at 248–50; *Altobelli*, 77 F.3d at 80–82).

¹⁷³ See *id.* at 876. The *Kennedy* Court clarified that enforcing QDROs, although an exception to the antialienation rule, should not be seen as a departure from the plan documents rule. *Id.* Instead, QDROs are to be considered plan documents themselves. *Id.* Thus, the enforcement of a QDRO does not conflict with the obligation of plan administrators to administer ERISA plans in accordance with the plan documents. *Id.*

¹⁷⁴ *Id.* at 874–75.

¹⁷⁵ *Id.* at 868. This is contrary to what some commentators had assumed prior to *Kennedy*. See, e.g., Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 JOHN MARSHALL L. REV. 919, 922 (2007).

¹⁷⁶ See *Kennedy*, 129 S. Ct. at 868.

¹⁷⁷ See *id.* at 875–76.

¹⁷⁸ See *id.* at 874–77 & nn.10–14.

¹⁷⁹ See *id.* at 874–75 & n.10.

¹⁸⁰ *Id.* at 877 n.14. ("The Estate also contends that requiring a plan administrator to distribute benefits in conformity with plan documents will allow a beneficiary who murders a participant to obtain benefits under the terms of the plan. The 'slayer' case is not before us, and we do not address it.")

remedy such as a constructive trust might be available to the intended beneficiary when preemption applies and the federal common law approach fails.¹⁸¹ Nevertheless, the reasoning of the *Kennedy* holding calls into question the federal common law approach to the slayer issue.¹⁸²

IV. SLAYER STATUTES AND REVOCATION-ON-DIVORCE LAWS: IS THE DISTINCTION TENABLE?

Although *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan* approaches its analysis from a plan documents rather than a preemption perspective,¹⁸³ the factual circumstances surrounding that case invite comparisons to *Egelhoff v. Egelhoff ex rel. Breiner*.¹⁸⁴ In both cases, the Court's application of ERISA prevented funds from the deceased participant's employee benefit plan from being disbursed according to the decedent's likely wishes following divorce.¹⁸⁵ Instead, ERISA's preemption and plan documents rules compelled an outcome granting the benefits to the former spouse, contrary to what the participant likely intended.¹⁸⁶ Indeed, the Supreme Court's unanimous opinion in *Kennedy* demonstrates an explicit reliance on *Egelhoff* and *Boggs v. Boggs* in reaching its conclusion.¹⁸⁷ As a result, *Kennedy* is potentially applicable to both the analogous revocation-on-divorce problem as seen in *Egelhoff* and to other cases under which ERISA and the subsidiary laws of wills conflict.¹⁸⁸

This Part asserts that the distinction between revocation-on-divorce and slayer statutes for preemption purposes is untenable, and further argues that the distinction for purposes of the federal common law solution, although less obviously problematic, may still prove unfeasible.¹⁸⁹ In addition, Section C examines several other solutions to this

¹⁸¹ See *id.* at 875 n.10. See generally Rayho, *supra* note 61 (describing the benefits of the constructive trust in a post-*Egelhoff* ERISA preemption framework).

¹⁸² See *Kennedy*, 129 S. Ct. at 875 n.10.

¹⁸³ See 129 S. Ct. 865, 876–77 (2009). Only divorce decrees that meet the requirements of a QDRO fall under the limited exception to preemption under § 1144(b)(7). 29 U.S.C. § 1144(b)(7) (2006). All others are expressly preempted. *Id.*

¹⁸⁴ See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 144 (2001).

¹⁸⁵ See *Kennedy*, 129 S. Ct. at 870; *Egelhoff*, 532 U.S. at 159 (Breyer, J., dissenting).

¹⁸⁶ See *Kennedy*, 129 S. Ct. at 870; *Egelhoff*, 532 U.S. at 159 (Breyer, J., dissenting).

¹⁸⁷ See *Kennedy*, 129 S. Ct. at 876–77 (citing *Egelhoff*, 532 U.S. at 143 (majority opinion)); *Boggs v. Boggs*, 520 U.S. 833, 850 (1997).

¹⁸⁸ See *Egelhoff*, 532 U.S. at 159–60 (Breyer, J., dissenting).

¹⁸⁹ See *infra* notes 191–209 and accompanying text.

problem and concludes that Congressional amendment of ERISA is the most appropriate manner of responding to this difficulty.¹⁹⁰

A. *Distinguishing Between Slayer Statutes and Revocation-on-Divorce Laws for Preemption Purposes Is Untenable*

Following *Kennedy*, the determination of whether slayer statutes can be distinguished from revocation-on-divorce laws takes on an increasing importance, as the federal common law solution to the revocation-on-divorce problem has now been largely eroded.¹⁹¹ Whether one spouse murders the other or a spouse dies after a divorce division of assets but before changing the beneficiary, the application of preemption would thwart the decedent's likely intent.¹⁹² Nevertheless, the Supreme Court has been unwilling to consider the equities at stake in such cases and has interpreted ERISA preemption in its broadest terms.¹⁹³ It seems difficult to justify a distinction between the doctrines for purposes of preemption, making it likely that a slayer case brought before the Supreme Court would yield a result consistent with *Kennedy*.¹⁹⁴

In attempting to distinguish these doctrines, courts have observed that the federal tradition of barring slayers from taking is deeply rooted in American jurisprudence, making incorporation of the federal common law in such cases arguably more appropriate than in the divorce instance.¹⁹⁵ Slayer statutes are intended to promote the fundamental maxim that killers should not be permitted to profit from their crimes, and are in essence a form of avoiding unjust enrichment.¹⁹⁶ Preemption of revocation-on-divorce statutes does lead to inequitable results, but that outcome is less outrageous than the result of preemption in the slayer case.¹⁹⁷ Moreover, the ease with which the undesirable result could have been avoided is far greater in the revocation-on-divorce

¹⁹⁰ See *infra* notes 210–255 and accompanying text.

¹⁹¹ See *Kennedy*, 129 S. Ct. at 876–77.

¹⁹² See Lebolt, *supra* note 9, at 59.

¹⁹³ See *Egelhoff*, 532 U.S. at 159–60 (Breyer, J., dissenting); Lebolt, *supra* note 9, at 31.

¹⁹⁴ See Thomas E. Lund, *Filling the Void: Incorporation of State Law Principles in Plan Documents*, BENEFITS L.J., Winter 2009, at 29, 31–32.

¹⁹⁵ See *N.Y. Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886); *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

¹⁹⁶ See *In re Estate of Mahoney*, 220 A.2d 475, 477 (Vt. 1966); Robert D. McClure, Note, *Thou Shall Not Kill (Thy Spouse): A Recent Exception to the ERISA Preemption Doctrine*, 29 J. FAM. LAW 129, 130 (1990).

¹⁹⁷ See *Addison v. Metro. Life Ins. Co.*, 5 F. Supp. 2d 392, 394 (W.D. Va. 1998) (citing *New Orleans Elec. Pension Fund v. DeRocha*, 779 F. Supp. 849, 850 n.7 (E.D. La. 1991)) (stating that slayer statutes prevent distributions that are “morally repugnant as well as a clear violation of reasonable public policy principle”); Lebolt, *supra* note 9, at 59–61.

case, where the participant could have simply filled out a change of beneficiary form.¹⁹⁸ In the slayer context, by contrast, the slain participant cannot be faulted for neglecting to update a beneficiary form.¹⁹⁹

Nonetheless, the distinction between slayer statutes and revocation on death provisions articulated in dicta by the *Egelhoff* majority does not reflect the reality of the slayer statute framework.²⁰⁰ Like revocation-on-divorce principles, slayer rules vary widely from state to state.²⁰¹ As a result, from a uniform plan administration perspective, the slayer rule would require plan administrators to master the same set of conflicting state laws, rendering the slayer rule unlikely to escape ERISA's preemptive effect.²⁰²

B. Kennedy *Might Not Foreclose a Federal Common Law Solution for the Slayer Problem*

Even if the courts ultimately do reject the notion that slayer statutes are sufficiently different from revocation-on-divorce statutes to evade preemption, it might still be possible to permit such statutes as a

¹⁹⁸ See *Kennedy*, 129 S. Ct. at 877 (“The plan provided an easy way for [the participant] to change the designation, but for whatever reason he did not.”); Norwood, *supra* note 82, at 78. One author further argues that:

If the participant wants to change his or her beneficiary designation after a divorce, the participant simply has to file a new beneficiary designation form with the plan administrator. If the participant chooses, for whatever reason, not to submit a new beneficiary designation form after a divorce, the participant is on notice that his or her ex-spouse remains the named beneficiary and will receive some or all of his or her plan benefits upon the participant's death.

Norwood, *supra* note 82, at 78. For an alternative perspective casting doubt on this fault-based assumption, see Gary, *supra* note 8, at 124 which notes that due to a “lack of understanding of the legal rules,” participants often believe that they do not need to change beneficiary designations following a divorce on the mistaken assumption that the divorce decree itself enacts this change.

¹⁹⁹ See Norwood, *supra* note 82, at 78.

²⁰⁰ See *Egelhoff*, 532 U.S. at 159–60 (Breyer, J., dissenting).

²⁰¹ See Salkin, *supra* note 7, at 9 (describing the manners in which state slayer statutes vary). In Wisconsin, for instance, a spouse may knowingly opt out of the protection of the slayer statute entirely, permitting a spouse to ensure that his or her mentally ill spouse will not be denied an inheritance following violence related to the illness. See WIS. STAT. ANN. § 854.14(6)(b) (West 2008). Other variations emerge when distinguishing between intentional and unintentional killings, or preventing the killer's heirs from being named as substitute takers after the slayer has been barred. See *DUKEMINIER ET AL.*, *supra* note 3, at 149–51.

²⁰² See *Egelhoff*, 532 U.S. at 159–60 (Breyer, J., dissenting).

matter of federal common law while avoiding the *Kennedy* problem.²⁰³ *Kennedy* arguably does not foreclose the application of the federal common law in a spousal homicide situation.²⁰⁴ A primary distinction between these two scenarios is that ERISA already provides a mechanism for divorcees to modify the distribution of benefits under an employee benefit policy: the qualified domestic relations order (QDRO).²⁰⁵ ERISA, however, is silent with respect to slayers.²⁰⁶ Such silence, coupled with almost inescapable preemption in the wake of *Egelhoff*, makes this rule a prime candidate for federal common law to fill in the resulting gap.²⁰⁷

Nevertheless, even the slayer cases have become increasingly difficult to square with the Supreme Court's opinion in *Kennedy*, as the plan documents themselves would still be at odds with the ultimate beneficiary identification.²⁰⁸ If the Court continues its stringent application of the plan documents rule as articulated in *Kennedy*, the federal common law may be unavailable as a remedy in the context of the slayer rule or the many other state law doctrines regarding succession.²⁰⁹

C. Other Possible Solutions to Preserve the Subsidiary Law of Wills in the ERISA Framework

With federal common law an uncertain solution in light of *Kennedy*, slayer statutes and other subsidiary laws of wills as applied to will substitutes should be pegged to something more substantial if their equitable results—and the overarching goal of unifying the law of wills and will substitutes—are to be realized.²¹⁰ In addition, if results such as those in *Egelhoff* are to be avoided, more substantial modifications to

²⁰³ See *Kennedy*, 129 S. Ct. at 877 n.14 (declining to address whether the plan documents rule would similarly extend to the slayer case).

²⁰⁴ See *id.*

²⁰⁵ See 29 U.S.C. § 1056 (2006).

²⁰⁶ *Addison*, 5 F. Supp. 2d at 393.

²⁰⁷ See *Ahmed v. Ahmed*, 817 N.E.2d 424, 426 (Ohio Ct. App. 2004).

²⁰⁸ See *Kennedy*, 129 S. Ct. at 877 n.14.

²⁰⁹ See *Egelhoff*, 532 U.S. at 159–60 (Breyer, J., dissenting); *Federal Common Law Does Not Apply in Light of Plan Documents Rule*, *supra* note 167, at 336 (discussing *Matschiner v. Hartford Life & Accident Ins. Co.*, 622 F.3d 885, 887–89 (8th Cir. 2010)).

²¹⁰ See, e.g., Gary, *supra* note 8, at 124 (noting the need for Congressional action to cure the revocation-on-divorce problem); Lund, *supra* note 194, at 32; Rayho, *supra* note 61, at 389–90. *But see* Salkin, *supra* note 7, at 5 (predicting that because slayer statutes so rarely interact with ERISA concerns, “[i]n all likelihood, neither the application of the plan document rule of *Kennedy* or the ERISA preemption principles of *Egelhoff* to a state slayer statute will ever come before the Supreme Court”).

ERISA itself are likely necessary.²¹¹ This Section discusses several avenues by which these improvements could arise, including: modifying divorce decrees at the state probate court level to comply with QDRO requirements; altering the plan documents governing such plans to incorporate these endangered doctrines; permitting a state cause of action for intended beneficiaries to recover the funds paid to former spouses or slayers; reconsidering the Supreme Court's ERISA preemption jurisprudence in accordance with Justice Scalia's earlier recommendations; or amending ERISA itself to address these issues.²¹²

1. Improve Ordinary Divorce Decrees' Adherence to QDRO Requirements

The simplest solution for the revocation-on-divorce issues encountered in both *Egelhoff* and *Kennedy* would be to encourage judges who issue divorce decrees purporting to divide a divorcing couple's pension plans to be cognizant of the QDRO requirements set forth in § 1056(d).²¹³ Valid divorce decrees existed in both *Kennedy* and *Egelhoff*, both of which attempted to alter the allocation of the spouses' pension benefits, but because they did not meet the QDRO requirements they failed to validly modify the plan documents.²¹⁴ As the Court noted in *Kennedy*, however, a QDRO should be considered part of the plan documents with respect to the plan administrator's obligation to enforce plan documents, permitting a valid QDRO divorce decree to escape both the plan documents and the preemption problems.²¹⁵ The set of information required to render a domestic relations order "qualified" may be highly specific; yet, the components themselves—such as addresses of beneficiaries, and the names of the specific plans affected by the order—are relatively straightforward and would not appear to impose an unreasonable judicial or administrative burden.²¹⁶

²¹¹ See Gallanis, *supra* note 55, at 193–97; Gary, *supra* note 8, at 124–26.

²¹² See *infra* notes 213–255 and accompanying text.

²¹³ See 29 U.S.C. § 1056(d)(3) (2006) (describing the requirements for a valid QDRO). Alternatively, judges or advocates at the state level could be encouraged to inform the parties to a divorce that the arrangement still requires action in order to finalize the change of beneficiary, which might reduce the possibility of participants being misinformed about the effect of the divorce decree. See Gary, *supra* note 8, at 124.

²¹⁴ See *Kennedy*, 129 S. Ct. at 869; *Egelhoff*, 532 U.S. at 144.

²¹⁵ See *Kennedy*, 129 S. Ct. at 876. QDROs are explicitly excluded from ERISA's broad preemptive scheme. 29 U.S.C. § 1144(b)(7).

²¹⁶ See 29 U.S.C. § 1056(d)(3). In addition, to attain qualified status, a domestic relations order must not attempt to obligate the plan to provide a benefit not otherwise pro-

Because this solution addresses divorce alone and does not affect the treatment of slayer statutes, simultaneous death provisions, and other subsidiary law of wills, this would prove inadequate.²¹⁷ Until ERISA itself is modified, however, increasing the percentage of divorce decrees that meet QDRO requirements would reduce the sting of at least one of the statute's greatest inequities.²¹⁸

2. Modification of ERISA Plan Documents to Incorporate a Uniform Approach to Subsidiary Laws of Wills

A more comprehensive way to avoid these undesirable collisions between ERISA and the subsidiary law of wills would be for plan administrators to alter the plan documents themselves.²¹⁹ Plan administrators could simply incorporate a particular state's substantive laws governing wills or will substitutes, adopt the UPC or the *Restatement* approach, or craft their own approaches to such issues within the plan document itself, bringing them into line with the plan documents requirements under *Kennedy*.²²⁰

Commentators are divided with respect to the feasibility of this approach.²²¹ Some question the likelihood that plan administrators would assume this additional obligation on their own.²²² By crafting and maintaining their own standards for these issues, however, plan administra-

vided under its terms, increase the benefits to be paid by the plan, or redirect payments previously designated to another alternate beneficiary under an earlier QDRO. *Id.*

²¹⁷ See Vannoy, *supra* note 167, at 209–10.

²¹⁸ See Gary, *supra* note 8, at 124.

²¹⁹ See *DUKEMINIER ET AL.*, *supra* note 3, at 431; see also *Egelhoff*, 532 U.S. at 157 (Breyer, J., dissenting) (noting that the additional burden on plan administrators could be reduced “by resolving the divorce revocation issue in the plan documents themselves, stating expressly that state law does not apply”).

²²⁰ See Lund, *supra* note 194, at 34–36. Lund provides the following as a model plan document provision:

Effect of Divorce. If the participant's marriage ends by the entry of a decree of divorce, dissolution of marriage or annulment, a designation of the participant's spouse as beneficiary made by the participant prior to such entry will be applied as if the participant's former spouse had predeceased the participant; provided that this provision will not apply if the participant and such former spouse subsequently marry and are married at the participant's death.

Id. at 34.

²²¹ Compare Lund, *supra* note 194, at 36 (noting that plan administrators would be well served to address such issues directly so as to avoid litigation), with Gallanis, *supra* note 55, at 196 (expressing skepticism about plan administrators' acceptance of such a proposal), and Rayho, *supra* note 61, at 389 (same).

²²² See, e.g., Gallanis, *supra* note 55, at 196; Rayho, *supra* note 61, at 388.

tors would fulfill their fiduciary obligations to administer plans in accordance with the governing documents without sacrificing equitable results.²²³ For instance, if plan documents were to note that a valid divorce decree would automatically revoke a beneficiary designation of a former spouse—the result endorsed by the UPC, the *Restatement*, and a number of states—then the administrative burden of applying such doctrines would likely prove similar to the effects of the current QDRO system.²²⁴ Thus, the additional burden may be overstated when compared to the litigation costs associated with the inevitable suits against unjustly enriched former spouses.²²⁵

3. Application of Constructive Trusts to Avoid Unjust Enrichment

Because the problem of the slayer and the ex-spouse is one fundamentally related to the equitable doctrine of unjust enrichment, several commentators have argued that it would be appropriate, absent congressional action to amend ERISA, to turn to equity to address these situations.²²⁶ State courts have frequently used constructive trusts in the slayer statute context.²²⁷ This remedy permits the courts to avoid redrafting the decedent's will by giving legal title to the slayer while reserving equitable title for the benefit of the next taker under the will or intestacy.²²⁸ As a result, constructive trusts would also provide an appropriate response to issues of substantial compliance, simultaneous death, or many of the other wills law doctrines likely to interact with the broad application of ERISA preemption.²²⁹

Such actions are cumbersome, as they require a state-level suit to be brought after the funds have been paid to the beneficiary listed under the plan documents.²³⁰ The primary benefit of such an approach, however, is that it does not interfere with uniform plan administration, thereby avoiding the most common criticism of other proposed ERISA modifications.²³¹

²²³ See Lund, *supra* note 194, at 34–36.

²²⁴ See 29 U.S.C. § 1056(d)(3)(G) (2006); UNIF. PROBATE CODE § 2-804 (2008); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.2 & cmt. (2003).

²²⁵ See Lund, *supra* note 194, at 34–36.

²²⁶ See, e.g., Gary, *supra* note 8, at 120–23; Rayho, *supra* note 61, at 390–97.

²²⁷ See, e.g., *Mahoney*, 220 A.2d at 477–78; *Abbey v. Lord*, 336 P.2d 226, 230–32 (Cal. Ct. App. 1959).

²²⁸ See, e.g., *Mahoney*, 220 A.2d at 477–79; *Abbey*, 336 P.2d at 230–31.

²²⁹ See Gary, *supra* note 8, at 120–23; Rayho, *supra* note 61, at 390–91.

²³⁰ See Gary *supra* note 8, at 123.

²³¹ See Rayho, *supra* note 61, at 390–91.

Even under the constructive trust framework, however, evasion of preemption is not guaranteed.²³² The *Kennedy* court expressly declined to answer whether the presumptively intended beneficiary would be precluded from asserting a claim against the former spouse in state or federal court to recoup the benefits of the plan.²³³ As a result, following *Kennedy*, the constructive trust doctrine joins the federal common law response as an uncertain solution to this problem.²³⁴

4. Reconsideration of ERISA Preemption Jurisprudence

Several Justices of the U.S. Supreme Court have expressed their disagreement with ERISA preemption both in general and as applied in cases analyzing the clash of ERISA and state wills laws, leaving open the faint possibility that the preemption problem could be alleviated to some degree by the Supreme Court itself.²³⁵ Some of the most egregious results—such as preemption of state slayer statutes—would potentially be avoidable were the Court to accept Justice Scalia’s request that it “simply acknowledge that [its] first take on this statute was wrong” and revisit the meaning of preemption.²³⁶ Justice Scalia further opined “that the ‘relate to’ clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies—namely, the field of laws regulating ‘employee benefit plan[s]’”²³⁷ Such an approach appears to be endorsed by ERISA’s legislative history and could provide an avenue for concluding that many of the subsidiary laws of wills that do not directly conflict with ERISA are outside the statute’s reach.²³⁸

²³² See *Kennedy*, 129 S. Ct. at 875 n.10.

²³³ See *id.* (“Nor do we express any view as to whether the Estate could have brought an action in state or federal court against [the former spouse] to obtain the benefits after they were distributed.”).

²³⁴ See *id.*

²³⁵ See, e.g., *Egelhoff*, 532 U.S. at 153–54 (Breyer, J., dissenting); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring). In another case, Justice Ginsburg wrote separately to lend her voice to “the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.” *Aetna Health Inc. v. Davilla*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (alteration in original) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring)).

²³⁶ See *Dillingham Constr.*, 519 U.S. at 336.

²³⁷ See *id.* (alteration in original).

²³⁸ See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98–99 (1983) (describing the legislative history of ERISA, including various senator’s remarks explaining that ERISA would “preempt the field” of employee benefits regulation).

The problem of determining exactly what constitutes a conflicting statute or one that occupies the field of employee benefit plans, however, would persist irrespective of the preemption scheme applied.²³⁹ Moreover, a unanimous Court decided *Kennedy*, reaffirming the Court's determination that strict adherence to the plan documents constituted "good and sufficient reasons for holding the line, just as we have done in cases of state laws that might blur the bright-line requirement to follow plan documents in distributing benefits," and that "[w]hat goes for inconsistent state law goes for a federal common law of waiver that might obscure a plan administrator's duty" to follow plan documents.²⁴⁰ In addition, neither Justice Scalia nor Justice Ginsburg joined Justice Breyer in *Egelhoff*, indicating that this appearance of a desire for ERISA reconsideration among the Justices may be illusory.²⁴¹ Nevertheless, permitting ERISA to back away from its overbroad "relate to" preemption scheme—and its many perverse effects—would be a first step toward reconciling ERISA and state laws of succession.²⁴²

5. Amendments to ERISA

Ultimately, the most appropriate and comprehensive method of ERISA amelioration would be to amend the statute itself.²⁴³ Congress could amend ERISA in several ways to lessen the conflicts between the subsidiary law of wills—intended to effect the presumptive intents of decedents—and the laws governing pension plans, designed to protect the benefit plans of those same people.²⁴⁴

Minor changes to the QDRO provision itself, for instance, could increase the number of divorce decrees that qualify under its terms, bringing divorced participants' likely intents into line with the actual workings of ERISA.²⁴⁵ One commentator has argued that the practical effect of a divorce decree purporting to reallocate pension benefits may be to cause participants to believe that their entitlements to each other's pension plans are extinguished.²⁴⁶ By modifying the QDRO provision, this intuitive result would be ratified.²⁴⁷ Additionally, any domestic

²³⁹ See *Egelhoff*, 532 U.S. at 144–60.

²⁴⁰ *Kennedy*, 129 S. Ct. at 876–77.

²⁴¹ See *Egelhoff*, 532 U.S. at 152–53.

²⁴² See Gary, *supra* note 8, at 124–27.

²⁴³ See, e.g., Gallanis, *supra* note 55, at 193–96; Gary, *supra* note 8, at 124.

²⁴⁴ See Lebolt, *supra* note 9, at 62.

²⁴⁵ See 29 U.S.C. § 1056 (2006).

²⁴⁶ See Gary, *supra* note 8, at 124.

²⁴⁷ See *id.*

relations order received by a plan administrator must go through the analysis set forth in § 1056(g), which creates a process for determining the qualified status of such domestic relations orders.²⁴⁸ This indicates that the additional burden of expanding QDROs to cover most—if not all—domestic relations orders would not impose a significantly larger burden on plan administrators, who are already statutorily charged with thoroughly reviewing such designations.²⁴⁹

Alternatively, Congress could promulgate guidelines for slayer cases, revocation-on-divorce, and simultaneous death and survivorship, or could expressly permit the courts to look to the Uniform Probate Code or *Restatement* in reaching these decisions.²⁵⁰ This is not without precedent in ERISA jurisprudence; QDROs were themselves enacted under REAct to “ratify a judicial exception” to ERISA’s strict antialienation rule.²⁵¹ Many courts are already taking matters into their own hands with respect to the slayer statute, rendering it a functionally similar judicial exception in need of analogous ratification.²⁵²

Finally, Congress could amend ERISA to modify its preemption scheme, bringing it more in line with standard preemption jurisprudence.²⁵³ There is evidence in ERISA’s legislative history that the “relate-to” preemption provision was not originally intended to be a new class of preemption but rather to follow standard patterns of preemp-

²⁴⁸ See 29 U.S.C. § 1056(d)(3)(G); see also Lebolt, *supra* note 9, at 43–44. Section 1056(d)(3)(G)(i) provides:

In the case of any domestic relations order received by a plan—
(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan’s procedures for determining the qualified status of domestic relations orders, and
(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

29 U.S.C. § 1056(d)(3)(G)(i). In addition, § 1056(d)(3)(H)(i) mandates that while the qualified status is being determined, plan administrators must “separately account for the amounts (hereinafter in this subparagraph referred to as the ‘segregated amounts’) which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.” *Id.* § 1056(d)(3)(H)(i).

²⁴⁹ *Id.* § 1056(d)(3). This may leave open the question of how to treat domestic relations orders that were not provided to plan administrators in a timely manner to determine qualified status, which is likely a common scenario.

²⁵⁰ See Gary, *supra* note 8, at 124–25 & n.277.

²⁵¹ See LANGBEIN ET AL., *supra* note 17, at 282.

²⁵² See *id.*; *supra* notes 101–128 and accompanying text.

²⁵³ See *Dillingham Constr.*, 519 U.S. at 336 (Scalia, J., concurring).

tion jurisprudence.²⁵⁴ By narrowing ERISA's preemptive approach in this manner and avoiding the confusion of "relate-to" preemption, the statute would permit states to maintain their sovereignty over the traditional sphere of family law, an area in which states are better equipped to handle evolving issues of succession.²⁵⁵

CONCLUSION

Protection of employee benefit plan participants—one of ERISA's principal goals—is falling victim to an overzealous preemption scheme. By declaring state laws governing inheritance in the divorce context to be preempted, undermining plan participants' likely intent, recent ERISA jurisprudence threatens to swallow not only the state laws governing revocation-on-divorce but also a variety of other state laws developed through states' extensive experience in the wills law realm. Even slayer statutes, which prevent murderers from inheriting from their victims, now seem incapable of escaping ERISA preemption. Although there are several stopgap measures potentially available to the courts, to the plan administrators, and to the presumptively intended beneficiaries who are prevented from claiming expectancies from the plan administrators directly, the most effective solution requires Congress to amend ERISA. These amendments may affect uniform plan administration to a degree, but the additional administrative burden seems grossly overstated when compared to the inequitable results. Maintaining ERISA in its current state constitutes little more than an abandonment of its founding principle.

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²⁵⁴ See *Shaw*, 463 U.S. at 98–99.

²⁵⁵ See *Lebolt*, *supra* note 9, at 35; see also *Egelhoff*, 532 U.S. at 155 (Breyer, J., dissenting).