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Justin A. Kesselman

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Can State Law Remedies Revive Statutes Stricken by ERISA's Preemption Provision?

Justin A. Kesselman*

Since the United State Supreme Court's holding in Egelhoff that ERISA preempts state law revocation-on-divorce statutes, courts and legal scholars have attempted to fashion a way to apply the policies of these statutes to effect the presumed intent of an employee not to provide retirement plan benefits to a former spouse. This paper analyzes those efforts and contrasts the statutory remedy suggested in the Uniform Probate Code with the common law remedy of imposing a constructive trust on the recipient of those benefits. In this author's view, the constructive trust is the sounder approach, because it preserves the presumption embedded in ERISA that an ex-spouse's continued presence in the plan documents is an expression of the participant's intent. Although the statutory approach will often produce a similar result, it fundamentally changes the nature of the remedy by flipping the presumption and making it irrebuttable. By replacing a federal rule that errs on the side of the spouse with a state rule that errs against the spouse, the statutory remedy seems more likely to fall within ERISA's preemptive scope.

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INTRODUCTION

The Employee Retirement Income Security Act of 1974 (“ERISA”) is a comprehensive federal law regulating the administration of employee benefit plans.¹ ERISA contains an express preemption provision, causing the statute to supersede any and all state laws relating to qualified plans.² Another critical provision in the statute requires plan administrators to distribute plan benefits to the beneficiary named in the plan documents.³ But where the plan’s beneficiary form names an ex-spouse, state “revocation-on-divorce” statutes that apply to qualified retirement plans essentially instruct the plan administrator to pay someone else—a beneficiary determined under state law.⁴ In *Egelhoff v. Egelhoff ex rel. Breiner*, the United States Supreme Court held that such revocation-on-divorce statutes are preempted by ERISA, because they directly conflict with ERISA’s instructions and interfere with its underlying policy of uniform plan administration.⁵

Most states have a revocation-on-divorce statute on the books.⁶ These statutes provide that any provision in a will directing benefits to a surviving spouse is revoked by operation of law upon divorce as if the legatee had pre-deceased.⁷ In several states, as well as in the Uniform Probate Code, revocation-on-divorce statutes also reach nonprobate death-time transfers.⁸ The fact that an ex-spouse was never removed as the named beneficiary may be attributable to a variety of factors, includ-

1 Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 (2006) [hereinafter ERISA].

2 *Id.* § 1144(a).

3 *Id.* § 1104(a)(1)(D).

4 *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 142 (2001).

5 *Id.* at 148.

6 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1, cmt. o, illus. 12 (2012).

7 79 AM. JUR. 2D *Wills* § 551 (2012).

8 UNIF. PROBATE CODE § 2-804(h)(2) (2010); Susan Gary, *Applying Revocation-On-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83, 102 (2004).

ing procrastination, forgetfulness, or untimely death.⁹ The policy underlying these statutes is simple: to codify the presumption that most decedents would not want their ex-spouse to take at death.¹⁰ While this state public policy justification is compelling, *Egelhoff* teaches that it is insufficient to override a directly competing federal policy embodied in a federal statute.¹¹

Dissatisfaction with this result has given rise to two significant approaches that attempt to circumvent ERISA's preemption of revocation-on-divorce statutes. The first is the application of the common law remedy of constructive trusts. Under this approach, the plan administrator pays the named beneficiary, but courts retain the power to impose a constructive trust on the proceeds and order the recipient beneficiary to deliver the funds to another in equity.¹² Alternatively, the drafters of the Uniform Probate Code ("UPC") have proposed a statutory remedy in section 2-804(h)(2). The UPC provision bypasses the constructive trust's procedural safeguards and simply makes the ex-spouse beneficiary personally liable to the person who would have taken absent preemption of the revocation-on-divorce statute.¹³ Although these remedies differ in approach, the theory underlying their application has been the same: ERISA is only concerned with efficient, uniform plan administration—which is preserved—and not with who ultimately enjoys the benefits—which state law is free to control.¹⁴

This paper questions whether states can do indirectly what federal preemption prevents them from doing directly. A review of federal circuit court decisions reflects a split on whether ERISA forecloses the constructive trust remedy. Most of these decisions suggest that ERISA's interests end upon distribution, leaving the state free to redistribute the benefits to another person.¹⁵ A significant minority believes that this is an impermissible end-run around federal law, contending that states may not do indirectly what preemption prevents them from doing directly.¹⁶ The statutory solution, on the other hand, has yet to be tested.

Based on the Supreme Court's jurisprudence on the intersection of federal preemption and state probate law, it is entirely possible that one or both of these solutions will be found unacceptable intrusions on fed-

⁹ Gary, *supra* note 8, at 84.

¹⁰ See UNIF. PROBATE CODE § 2-804 cmt.

¹¹ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).

¹² *E.g.*, *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 716 (10th Cir. 1993).

¹³ UNIF. PROBATE CODE § 2-804(h)(2).

¹⁴ *Id.* § 2-804 cmt.

¹⁵ *E.g.*, *Guidry*, 10 F.3d at 716.

¹⁶ *E.g.*, *United States v. Smith*, 47 F.3d 681, 684 (4th Cir. 1995).

eral law.¹⁷ This paper examines the possibility of such a result, suggesting that the policies underlying ERISA go beyond uniform administration—specifically, that uniform administration is a mechanism for achieving the substantive purpose of protecting streams of retirement income for two classes of persons: participants and beneficiaries. State laws that divert those income streams from persons entitled to them under ERISA impermissibly “relate to” the federal statute and are thus subject to preemption.

Part I introduces the preemption problem by examining the federal and state laws that form the foundation of the present conflict and then revisits their previous collision in *Egelhoff v. Egelhoff*. Part II presents two important efforts to avoid the preemption implications of *Egelhoff*: constructive trusts and the UPC provision making ex-spouse beneficiaries personally liable upon receipt of plan proceeds. Part III.A examines whether the UPC provision is likely to survive ERISA preemption in light of Supreme Court jurisprudence, related federal legislation on retirement benefits, and the practical implications of the law. Part III.B considers the feasibility of constructive trusts through an examination of case law and the overall fit of the remedy.

I. BACKGROUND

A. ERISA

In 1974, in light of the growing prominence and importance of employee benefit plans, Congress enacted the Employee Retirement Income Security Act to uniformly regulate employee benefit plans “in the interests of employees and their beneficiaries.”¹⁸ In order to ensure that these plans were protected in a uniform way across jurisdictions, Congress included an express preemption provision, which declares that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.¹⁹ The Supreme Court has since interpreted the statute’s “relate to” language to encompass any state law that “has a connection with or reference to” an ERISA plan.²⁰

Whether a law “references” ERISA will often be readily apparent, as it must either specifically refer to or operate exclusively on ERISA-plans.²¹ For example, in *Mackey v. Lanier Collection Agency & Service*,

¹⁷ See generally *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001); *Boggs v. Boggs*, 520 U.S. 833, 854 (1997); *Free v. Bland*, 369 U.S. 663, 669 (1962).

¹⁸ ERISA, *supra* note 1, § 1001(a).

¹⁹ *Id.* § 1144(a).

²⁰ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

²¹ *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130-31 (1992).

Inc., the Supreme Court reviewed a Georgia statute that purported to bar garnishment of “[f]unds or benefits of a pension, retirement, or employee benefit plan or program subject to the provisions of the federal Employee Retirement Income Security Act of 1974.”²² The Court struck down the provision for expressly referring to ERISA and acting solely upon ERISA-qualified plans, even to the extent that it was consistent with the federal statute.²³

On the other hand, determining whether a law has “a connection with” ERISA calls for a more nuanced analysis, requiring courts to consider (a) “the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive” and (b) “the nature of the effect of the state law on ERISA plans.”²⁴ The leading example of preemption in this context is *Egelhoff*, discussed in greater detail in Part I.C.²⁵ First, let us consider the type of statute under review in *Egelhoff*, as that statute reflects the state-law policy at the heart of this paper.

B. Revocation-On-Divorce Statutes

Egelhoff involved a conflict between ERISA and a state revocation-on-divorce statute.²⁶ Revocation-on-divorce statutes stipulate that a provision in a will, and in some jurisdictions a nonprobate device, transferring property to a spouse at death is automatically revoked upon divorce—whereby the named recipient is considered predeceased.²⁷ The statute “in effect constructively notifies the divorcing spouse that his or her will is to be revoked by operation of law on the date the marriage is terminated.”²⁸ If the testator or principal fails to make subsequent changes to the will or nonprobate device, the property previously destined for the spouse will instead fall into the will’s residuary clause, vest in a contingent beneficiary, or be distributed to the decedent’s intestate heirs, as the case may be.²⁹

States deem this result desirable as a matter of public policy because it is more likely to effectuate the decedent’s intent—a guiding principal for the modern interpretation of testamentary and non-testa-

²² *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 828 n.12 (1988).

²³ *Id.* at 829-30.

²⁴ *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997) (citation omitted).

²⁵ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).

²⁶ *Id.* at 143.

²⁷ 79 AM. JUR. 2D *Wills* § 551 (2012).

²⁸ *Id.*

²⁹ *Id.*

mentary transfers at death.³⁰ Yet this public policy is ultimately a creature of the state law and although federal courts are generally deferential to state probate and family law, that deference must invariably yield in the face of conflicting policies emanating from federal statutes. Such a conflict was the precise issue presented in *Egelhoff*.

C. *Egelhoff v. Egelhoff*

In *Egelhoff v. Egelhoff ex rel. Breiner*, the Supreme Court considered whether a Washington state revocation-on-divorce statute related to ERISA in an impermissible way.³¹ The state statute revoked the designation of a spouse as beneficiary of any nonprobate asset automatically upon divorce. In the case, a plan participant, David Egelhoff, died having failed to change the beneficiary designation on his employer-sponsored retirement plan after divorcing his wife Donna. After David's death, the administrator paid the proceeds to Donna in accordance with the plan documents. David's children from a previous marriage, who were also his intestate heirs, sued Donna under the state revocation statute to recover the plan proceeds.³²

The Court held that such a redirection of the beneficial interest directly conflicted with ERISA's instructions that the plan be administered according to the plan documents. This conflict implicated both elements of the Court's "connection with" inquiry: (1) ERISA's objectives and (2) the state law's effect on the ERISA-plan.³³ With respect to the first element, the Court noted that one objective of ERISA is administrative efficiency—an objective which would be hampered if administrators were forced to "master the relevant law of 50 states" in order to distribute benefits to the correct person.³⁴ As to the second element, the state law's effect on ERISA was essentially to abrogate its express dictate by directing the administrator to pay a beneficiary determined by state rather than federal law.³⁵

³⁰ See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1132 (1984) ("Modern practice supplies only one theory that can reconcile [the law of] wills and will substitutes in a workable and honest manner: the rule of the transferor's intent.").

³¹ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).

³² *Id.* at 144. It should be noted that in *Egelhoff*, the defendant was not the plan administrator, but the ex-spouse, who had actually received the plan benefits. The Court, however, looked past the actual parties at issue to the potential impact that its ruling would have on plan administrators in making distributions to beneficiaries in the future. See *id.* at 141, 147-50.

³³ *Id.* at 147-52.

³⁴ *Id.* at 149-50.

³⁵ *Id.* at 147.

The persisting effect of *Egelhoff* is that revocation-on-divorce statutes requiring ERISA-plan administrators to pay someone other than the named beneficiary are expressly preempted by ERISA.³⁶ Yet because *Egelhoff* focused on the state law's effect on plan administrators, rather than beneficiaries, uncertainty has lingered as to the scope of ERISA preemption. Some courts, in extending preemption to constructive trust actions against distributed benefits, have held that *Egelhoff* mandates preemption where the cause of action is based on a state-law property right that conflicts with a beneficiary's federally created property right—regardless of whether the remedy is sought pre- or post-distribution.³⁷ Conversely, a number of other courts, commentators, and legislatures have suggested that ERISA's interest ends at distribution and have crafted solutions aimed at circumventing *Egelhoff's* impact.³⁸ Part II explores two of these solutions.

II. PROPOSED SOLUTIONS

A. Constructive Trust

The overriding objection to *Egelhoff* has been that it subverts the intent of the decedent, while unjustly enriching the beneficiary—his or her ex-spouse.³⁹ Specifically, people generally do not wish to provide post-mortem benefits to a former spouse.⁴⁰ The unjust enrichment arises from the assumption that the ex-spouse received his or her fair share in the divorce settlement, but receives a windfall as a result of the decedent's stale beneficiary designation.⁴¹ Some courts have responded to this injustice by imposing a constructive trust on the benefits.⁴²

A constructive trust is a “device used by equity to compel one who unfairly holds a property interest to convey it to another to whom it justly belongs.”⁴³ A classic example of the circumstances meriting the constructive trust is *Estate of Lakatos*.⁴⁴ There, one Roger Jacobs befriended an elderly Rose Lakatos, exploited her weakened intellect,

³⁶ See, e.g., *Hattem v. Schwarzenegger*, 449 F.3d 423, 430 (2d Cir. 2006).

³⁷ *Barnett v. Barnett*, 67 S.W.3d 107, 112-13 (Tex. 2001); *id.* at 127 (Enoch, J., concurring).

³⁸ See, e.g., MASS. GEN. LAWS ch. 190B, § 2-804(h)(2) (2012); *Hoult v. Hoult*, 373 F.3d 47, 54-55 (1st Cir. 2004); Sarabeth A. Rayho, Note, *Divorcees Turn 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, 396 (2007).

³⁹ See Rayho, *supra* note 38, at 383.

⁴⁰ Langbein, *supra* note 30, at 1135.

⁴¹ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 159 (2001) (Breyer, J., dissenting).

⁴² E.g., *Hoult*, 373 F.3d at 54-55.

⁴³ CARYL A. YZENBAARD ET AL., *BOGERT'S TRUSTS AND TRUSTEES* § 471 (2011).

⁴⁴ *Estate of Lakatos*, 656 A.2d 1378 (Pa. Super. Ct. 1995).

and persuaded her to appoint him as attorney-in-fact. Roger then used his position to misappropriate \$128,565 of her money for his own purposes, while leaving her to live in squalor. The court impressed Roger's ill-gotten gains with a constructive trust and ordered him to deliver them to Rose's estate.⁴⁵

In the wake of *Egelhoff*, a number of courts have considered whether constructive trusts might be an acceptable tool for diverting ERISA-plan proceeds from divorced-spouse beneficiaries to persons whom the decedent is presumed to have preferred to receive the benefit.⁴⁶ In order for the constructive trust to be imposed, the plaintiff must prove by clear and convincing evidence that the beneficiary's continued possession of the distributed benefits is unjust.⁴⁷ As in *Lakatosh*, if the injustice is so established, the beneficiary must then deliver the proceeds to the rightful owner.

The Supreme Court has only discussed the feasibility of constructive trusts on ERISA benefits once, in the pre-*Egelhoff* case of *Guidry v. Sheet Metal Works National Pension Fund*.⁴⁸ In that case, Guidry, the CEO of a labor union, brought an action against his pension fund to recover retirement benefits. The pension fund had refused distribution due to Guidry's criminal conviction for embezzling union funds. The district court imposed a constructive trust in favor of the union, but the Supreme Court reversed. The Court held that a constructive trust may not be imposed on plan benefits prior to distribution, because doing so would interfere with ERISA's mandate that "benefits provided under the plan may not be assigned or alienated."⁴⁹

However, a number of courts continue to apply constructive trusts to distributed proceeds, following the Tenth Circuit's decision in *Guidry* on remand.⁵⁰ The Tenth Circuit noted that since ERISA only purports to protect payments *payable* to the beneficiary, ERISA is not concerned with the fate of benefits once paid.⁵¹ The court buttressed its position by looking to Treasury Regulations promulgated under ERISA, which define "alienation" in terms of rights or interests acquired from a beneficiary that are "enforceable against the plan."⁵² The court held that

⁴⁵ *Id.*

⁴⁶ Compare *Pardee v. Estate of Pardee*, 112 P.3d 308, 314-16 (Okla. Civ. App. 2004) (impressing a constructive trust on distributed benefits), with *Staelens ex rel. Estate of Staelens v. Staelens*, 677 F.Supp.2d 499, 508 (D. Mass. 2010) (disagreeing with the *Pardee* court's claim that ERISA is not concerned with the fate of distributed benefits).

⁴⁷ YZENBAARD, *supra* note 43, §§ 472, 475.2.

⁴⁸ *Guidry v. Sheet Metal Works Nat'l Pension Fund*, 493 U.S. 365 (1990).

⁴⁹ *Id.* at 367 n.1 (quoting ERISA § 1056(d)(1) (1982)).

⁵⁰ *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 716 (10th Cir. 1993).

⁵¹ *Id.* at 712.

⁵² *Id.* at 708 (citing Treas. Reg. § 1.401(a)-(13)(c)(1)(ii) (1992)).

because post-distribution constructive trusts are enforced against the beneficiary rather than the plan, they are not preempted by ERISA.⁵³

B. UPC Section 2-804(h)(2)

The UPC provided another response, an “anti-*Egelhoff* provision,”⁵⁴ which some commentators have suggested essentially codifies the constructive trust remedy.⁵⁵ It reads,

If [the revocation-on-divorce rules provided in] this section [are] preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.⁵⁶

The UPC’s drafters justify the statute’s requirements by noting that

This provision respects ERISA’s concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.⁵⁷

This provision accepts *Egelhoff*’s mandate that plan administrators must distribute plan benefits to the beneficiary named in the plan documents. However, according to the provision’s drafters, ERISA’s interest terminates on distribution, leaving the states free to direct benefits to other persons.⁵⁸ The UPC thus suggests that states require the spouse to deliver received benefits to the person who would have taken had the revocation-on-divorce statute not been preempted. If the beneficiary fails to comply, he or she becomes personally liable to the rightful

⁵³ *Id.* at 710.

⁵⁴ Kent D. Schenkel, *Planning and Drafting Basics Under the New Massachusetts Uniform Probate Code*, 16 ROGER WILLIAMS U. L. REV. 535, 555 (2011).

⁵⁵ Rayho, *supra* note 38, at 393.

⁵⁶ UNIF. PROBATE CODE § 2-804(h)(2) (2010).

⁵⁷ *Id.* § 2-804 cmt.

⁵⁸ *See id.*

owner under state law.⁵⁹ The provision simply attempts to accomplish indirectly what federal preemption prevents the state from doing directly: revoking beneficiary status upon divorce. The next section asks whether this approach will work.

III. THE FEASIBILITY OF CIRCUMVENTING ERISA PREEMPTION

A. Can UPC Section 2-804 Do Indirectly What States Cannot Do Directly?

1. *Supreme Court Jurisprudence on Retirement Benefits Preemption*

Although UPC section 2-804(h)(2) and constructive trusts are creative solutions to the potential inequities caused by the *Egelhoff* decision, it is not entirely clear that they will work. These provisions essentially perform an end-run around *Egelhoff*, while purporting to satisfy ERISA's underlying objectives.⁶⁰ The theory is that the federal government's interest in ERISA is confined to the orderly and efficient administration of benefits plans—and once the benefits are paid, that interest is extinguished.⁶¹ The validity of these remedies, therefore, turns on whether Congress was concerned not only with the ensuring receipt of retirement benefits, but also with ensuring that the benefits were available for the recipient to use in retirement.

As previously noted, the key case addressing the collision of ERISA and revocation-on-divorce statutes was *Egelhoff*, which left open the question of whether distributed benefits are fair game.⁶² The Supreme Court has touched on the sanctity of distributed benefits in other contexts, and the Court's reasoning in *Free v. Bland* is particularly instructive.⁶³ There, a husband and wife were co-owners of U.S. Treasury Bonds. The applicable Treasury Regulations provided that upon the death of one owner, the surviving owner "will be recognized as the sole and absolute owner of the bond" and that "[n]o judicial determination . . . would . . . defeat . . . the rights of survivorship conferred by these regulations."⁶⁴ Mrs. Free predeceased her husband, bequeathing to her son from a previous marriage the majority of her estate. The son claimed a one-half interest in the bonds, pursuant to the will and Texas law giving spouses an undivided one-half interest in all community property. The trial court resolved the conflict between federal and state law

⁵⁹ *Id.*

⁶⁰ *Carmona v. Carmona*, 603 F.3d 1041, 1061 (9th Cir. 2010).

⁶¹ UNIF. PROBATE CODE § 2-804 cmt.

⁶² See generally *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).

⁶³ *Free v. Bland*, 369 U.S. 663 (1962).

⁶⁴ *Id.* at 667 (quoting 31 C.F.R. § 315.20, 315.61).

essentially by imposing a constructive trust: the court awarded “full title” to Mr. Free, but required him to pay over half of the bonds’ value to Mrs. Free’s son.⁶⁵

Before the Supreme Court, the son argued that the state law was not preempted by the Treasury Regulation because the latter’s fundamental purpose was to create a convenient payment system, rather than to determine who ultimately enjoyed the benefit.⁶⁶ Indeed, the Court recognized that the Treasury created the survivorship provision in order to bypass the probate process. Yet that purpose was merely a sub-part of a scheme aimed at facilitating the management of the national debt by making savings bonds more attractive to savers and investors.⁶⁷ In holding that the state law impermissibly impinged on the Treasury Regulation, the Court made the following observation:

Viewed realistically, *the State has rendered the award of title meaningless. . . .* If the State can frustrate the parties’ attempt to use the bonds’ survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the State has interfered directly with a legitimate exercise of the power of the Federal Government⁶⁸

This reasoning may apply with equal force in the current dispute over revocation-on-divorce statutes.⁶⁹ The drafters of the UPC suggest that the Federal Government is not interested in who ultimately receives the benefits, as long as state law does not interfere with the administrator’s duty to distribute those benefits to the beneficiary named in the plan.⁷⁰ Yet like the statute in *Free*, ERISA’s concern with administrative efficiency must be considered in the context of broader policy decisions underlying ERISA. ERISA was enacted to safeguard the interests of participants and beneficiaries—which was deemed best accomplished through efficient administration and uniform application.⁷¹

Free’s applicability to ERISA is evidenced by the Supreme Court’s opinion in *Boggs v. Boggs*.⁷² There, the Court held that ERISA preempted a state law that allowed a participant’s spouse, Dorothy Boggs, to transfer her interest in undistributed pension plan benefits by testamentary instrument. Dorothy died, predeceasing her husband and leav-

⁶⁵ *Id.* at 669.

⁶⁶ *Id.* at 668.

⁶⁷ *Id.* at 669.

⁶⁸ *Id.* (emphasis added).

⁶⁹ Compare *id.*, with UNIF. PROBATE CODE § 2-804(h)(2) (2010).

⁷⁰ UNIF. PROBATE CODE § 2-804 cmt.

⁷¹ See ERISA, *supra* note 1, § 1001(a).

⁷² *Boggs v. Boggs*, 520 U.S. 833 (1997).

ing her estate to her children. Louisiana community property law had given Dorothy a one-half interest in her husband Isaac's employer-sponsored retirement plan. After Dorothy's death, Isaac married Sandra who became the new beneficiary of Isaac's retirement plan. After Isaac's death, Sandra received annuity payments from Isaac's plan, but the children moved quickly to claim their rightful share under their mother's will—seeking to recoup both paid and unpaid plan benefits.⁷³

First, the Court rejected the children's claim for benefits payable to Sandra, because the state law on which their claim was based purported to act directly against the plan.⁷⁴ The children's second argument was that because the remainder of the claim only concerned the fate of benefits already distributed, the law did not implicate ERISA's concern with efficient administration of benefit plans.⁷⁵ The Court, relying on *Free*, rejected this argument as well, stressing that the critical inquiry was the diversion of retirement benefits—regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the benefit.⁷⁶ Either way, the claim was based on a theory that their interest originated in undistributed pension plan benefits, which the Court informed them was impossible given that “the axis around which ERISA's protections revolve is the concept of participant and beneficiary. When Congress has chosen to depart from this framework, it has done so in a careful and limited manner.”⁷⁷

Another argument advanced in favor of anti-*Egelhoff* provisions draws on Supreme Court language for the proposition that the Court has “nothing to say” about generally applicable laws that “do not make ‘reference to’ ERISA plans, ‘notwithstanding their incidental effect on ERISA plans.’”⁷⁸ Thus, it is suggested that because provisions like UPC section 2-804(h)(2) apply when *any* federal law—not just ERISA—preempts the state law, they are generally applicable.⁷⁹ Moreover, since UPC section 2-804(h)(2) does not affect the administration of benefits, its effect on ERISA is incidental.⁸⁰ But if we reassemble what the Supreme Court actually said about ERISA preemption in *Egelhoff* this point loses some of its force: “Unlike generally applicable laws regulating ‘areas where ERISA has nothing to say,’ . . . which we have upheld notwithstanding their incidental effect on ERISA plans . . . this

⁷³ *Id.* at 836-37.

⁷⁴ *Id.* at 844.

⁷⁵ *Id.* at 845.

⁷⁶ *Id.* at 853.

⁷⁷ *Id.* at 854.

⁷⁸ Rayho, *supra* note 38, at 394 (quoting *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147-48 (2001)).

⁷⁹ *Id.* at 393-94.

⁸⁰ *Id.*

statute governs payment of benefits, a central matter of plan administration.”⁸¹ Therefore, according to the Court, the critical inquiry in the preemption analysis is whether a generally applicable state law intrudes into an *area* where ERISA has something to say.

The fact that ERISA bestows named plan beneficiaries with a federal property right in retirement benefits indicates that ERISA has something to say about who should enjoy those benefits. The Supreme Court has repeatedly stressed that “legislation of this type should be liberally construed . . . to protect funds granted by the Congress for the *maintenance and support of the beneficiaries thereof*.”⁸² In addition, *Boggs* and *Free* strongly suggest that the federal government’s interest in ERISA plans goes beyond their orderly administration and reaches the question of whose retirement benefits the law is intended to protect.⁸³ The Court in *Boggs* affirmed that ERISA is intended to protect *participants* and *beneficiaries* unless Congress expresses otherwise.⁸⁴ Until Congress does provide otherwise, *Boggs* seems to stand for the proposition that ERISA can preempt state law attempts to control post-distribution benefits.⁸⁵

When examined in its entirety, the theory underlying UPC section 2-804 is that upon divorce, the ex-spouse beneficiary’s interest is extinguished—which in turn creates an expectancy in someone determined by state law.⁸⁶ Yet *Boggs* rejected the notion that anyone other than participant or named beneficiary can develop a legitimate expectancy in plan funds.⁸⁷ By making a named beneficiary personally liable for receiving a federal entitlement, not only does 2-804(h)(2) reach into an *area* where ERISA has something to say, it has substantially more than “incidental” effect on ERISA plans by controlling the ultimate destination of benefits.

2. Congressional Intent in ERISA Preemption

ERISA is more than a convenient regulatory structure for timely payments; as *Boggs* suggests, it is a mechanism for protecting anticipated retirement benefits so that retirees have a steady stream of in-

⁸¹ *Egelhoff*, 532 U.S. at 147-48 (emphasis added) (citations omitted) (quoting Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 330 (1997)).

⁸² *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962) (citations omitted); *see also* *Lawrence v. Shaw*, 300 U.S. 245, 250 (1937); *Trotter v. Tennessee*, 290 U.S. 354 (1933).

⁸³ *Boggs v. Boggs*, 520 U.S. 833, 853 (1997); *Free v. Bland*, 369 U.S. 663, 669 (1962).

⁸⁴ *Boggs*, 520 U.S. at 845-46.

⁸⁵ *Id.* at 854.

⁸⁶ *See* UNIF. PROBATE CODE § 2-804(b)(2) (2010).

⁸⁷ *Boggs*, 520 U.S. at 834-35.

come.⁸⁸ This is one reason why ERISA-plan benefits are inalienable.⁸⁹ The legislative history to the anti-alienation clause illustrates that the provision's purpose was "to . . . ensure that the employee's accrued benefits are actually available for retirement purposes."⁹⁰ Furthermore, the fact that ERISA requires spouses to be named as beneficiaries represents a policy judgment on the part of Congress that spouses have a legitimate expectation of enjoying those benefits in retirement as well.⁹¹ Divorce, in and of itself, does not extinguish that right to benefits—certain steps must be taken by the beneficiary or plan participant to effect a change.⁹²

Perhaps Congress intended to carefully prescribe the circumstances where an ex-spouse can be deprived of his or her former spouse's retirement benefits. In fact, it has expressed this intention in other contexts. For instance, a divorced spouse of a worker has rights to social security benefits if the marriage lasted ten years or longer.⁹³ This benefit comports with the prevailing view that marriage should be viewed as a partnership, whereby each spouse is entitled to share as a partner in any economic benefits received by the partnership during the marriage.⁹⁴ In ERISA too, Congress has provided protections for an ex-spouse's interest in his or her former spouse's retirement plan by requiring that (1) any current spouse *must* be named as beneficiary on an ERISA-qualified plan; (2) the plan administrator must pay the named beneficiary if the participant has predeceased; and (3) that although the participant can change the beneficiary designation after divorce, this right is tempered by the ex-spouse's ability to receive the benefits through a Qualified Domestic Relations Order ("QDRO").⁹⁵

⁸⁸ *Id.* at 852 (noting that ERISA functions to protect pension benefits, "which are intended to provide a stream of income to participants and their beneficiaries.").

⁸⁹ *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) (holding that ERISA's anti-alienation provision reflected a "congressional policy choice, a decision to safeguard a stream of income for pensioners . . . even if that decision prevents others from securing relief for the wrongs done them.").

⁹⁰ H.R. REP. NO. 93-807, at 4734 (1974).

⁹¹ ERISA, *supra* note 1, § 1055(a)(2).

⁹² *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 303-04 (2009) (noting the plan documents rule requires the administrator to pay the ex-spouse unless the participant changes the designation or the beneficiary disclaims her interest in accordance with plan rules).

⁹³ 42 U.S.C. § 416(h) (2006); 20 C.F.R. § 404.331 (2011).

⁹⁴ *See Shari Motro, Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 Nw. U. L. REV. 1623, 1631-33 (2008).

⁹⁵ *See ERISA, supra* note 1, § 1056(d)(3)(A). Of course, the QDRO remedy is not available for social security benefits, which makes the spousal-protection justification more compelling in that context. The broader point is that Congress has generally not taken the position that divorce operates to nullify spousal support rights.

Thus Congress has deliberately provided mechanisms for allowing an ex-spouse to be protected during advanced years, either by an unchanged beneficiary designation or by a QDRO. In light of the ancillary protection of social security benefits, it is possible to discern a congressional policy in ERISA beyond mere uniform plan administration, but of protecting income streams to retirees that develop a legitimate expectancy in that income—which includes not only participants and their spouses, but also their ex-spouses.

On the other hand, the Social Security Act contains an anti-assignment provision specifically providing that “none of the moneys *paid* . . . shall be subject to execution, levy, attachment, garnishment, or other legal process.”⁹⁶ Similarly, the Veterans Benefits Act also explicitly exempts paid proceeds from garnishment.⁹⁷ In contrast, ERISA is ambiguous as to the fate of paid benefits.⁹⁸ Therefore, because Congress clearly knows how to craft statutory language distinguishing between distributed and undistributed funds, its failure to include express language in ERISA protecting paid benefits suggests that ERISA was perhaps not meant to offer such protection. Furthermore, if Congress were overly concerned with the rights of ex-spouse beneficiaries, its decision to allow plan participants to prevent an ex-spouse from receiving benefits through a simple change on the beneficiary designation form is certainly curious.

More likely, Congress wanted a clear expression of intent from the plan participant. Upon divorce, ERISA returns to the plan participant the right to direct benefits to whomever he or she pleases. The UPC provision effectively curtails this right. Not only is the participant foreclosed from directing benefits to his ex-spouse, but perhaps more importantly, the participant may not provide for any relative of that ex-spouse.⁹⁹ Suppose, for instance, that when “H” and “W” get married, W already has a child, “C,” from another relationship. H names W as primary beneficiary on his employer-sponsored retirement plan, and names C as contingent beneficiary. H and W are married for ten years, in which time, H forms a close bond with C. H and W divorce, but H maintains a relationship with C and genuinely wants to provide for C after his death. The facial problem is that upon H’s death, the UPC will not allow even C to keep the plan proceeds that H intended for him to

⁹⁶ 42 U.S.C. § 407(a).

⁹⁷ 38 U.S.C. § 5301 (“[S]uch payments made to, or on account of, a beneficiary shall be exempt from . . . seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.”).

⁹⁸ ERISA, *supra* note 1, § 1056(d)(1) (“Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.”).

⁹⁹ UNIF. PROBATE CODE § 2-804(h)(2) (2010).

receive.¹⁰⁰ Even more troubling, however, is the fact that the UPC doesn't even allow C to admit evidence of H's intent.¹⁰¹

Although congressional intent in ERISA may be ambiguous as to paid benefits, ERISA unambiguously grants specific rights to certain classes of persons. While statutes like UPC section 2-804(h)(2) do aim to "protect ERISA's objectives by respecting the interests of plan participants," it should not be forgotten that participants had a far simpler method for advancing this interest themselves: changing the beneficiary designation.¹⁰² The UPC presumes that the participant simply forgot or procrastinated, but unlike a proceeding to establish a constructive trust, provides no mechanism for demonstrating this intent. This approach can lead to reasonably anticipatable anomalies such as the hypothetical above, where the UPC thwarts rather than furthers the participant's intent.

The potential for injustice is compounded by the fact that the named beneficiary—who is required to receive the benefit under federal law—is then whipsawed by state law and forced to disgorge the benefit, even though the beneficiary would have been entitled to damages had the administrator directly paid the person who ultimately received it.¹⁰³ This point can also be illustrated by a hypothetical. Suppose "H" and "W" get married and H names W as beneficiary on his ERISA-governed life insurance plan. They then get divorced, and H does not change the beneficiary designation. H dies and the plan administrator, instead of distributing the proceeds to W, delivers the proceeds to the H's estate. Under ERISA, W has the right to obtain a judgment against the plan administrator for mismanagement of the plan funds and recover damages.¹⁰⁴

Suppose instead, however, that the plan administrator does pay W, who receives a check for \$10,000. She contacts the plan administrator, and asks whether the money belongs to her. The plan administrator confirms that indeed federal law requires him to pay her. Assured that it is hers, she spends it. Next comes H's estate, claiming that she had no right to the money under state law and she must deliver it over to the estate. Now, because of federal preemption, she has no action against the plan administrator for wrongfully telling her that the money was hers, as the administrator can't be held liable under state law for following a federal law. Yet perversely, W also has no defense against the estate because state law says that *she is* personally liable under state law

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Rayho, *supra* note 38, at 395.

¹⁰³ ERISA, *supra* note 1, §§ 1109(a), 1132(a)(1).

¹⁰⁴ *Id.*

for receiving money that she had a federal right to receive. W, the beneficiary, would have been better off had the administrator breached his or her fiduciary duty by paying the estate directly. Surely this cannot be the result that Congress intended.

3. *Why the UPC Provision Is Not a “Codified Constructive Trust”*

Some commentators have suggested that 2-804(h)(2) essentially codifies the equitable remedy of constructive trusts.¹⁰⁵ One problem with this justification—which will be discussed in Part III.B—is that it glosses over the uncertainty as to whether the constructive trust remedy will survive ERISA preemption in its own right. Secondly, although it may achieve the same result, codifying the principle fundamentally alters the nature of the remedy by imposing an irrebuttable presumption that the ex-spouse was unjustly enriched. Conversely, when the constructive trust remedy is applied, the unjust enrichment must be proven by clear and convincing evidence by the party seeking the remedy. If that burden is met, the recipient must disgorge the benefit and deliver it to its rightful owner.¹⁰⁶

The use of constructive trusts is based on a theory of unjust enrichment: the reaping of benefits from wrongdoing is determined to be against public policy. In the context of estate planning, the remedy is most commonly applied where the wrongdoing consists of fraud, undue influence, or homicide.¹⁰⁷ In some instances, codifying the rule poses little risk of upsetting the equitable principles that underlie it. Slayer statutes, for example, forbid a person from inheriting from the person they were convicted of slaying.¹⁰⁸ Thus if a person has already been convicted of murder or voluntary manslaughter, it is unlikely that further judicial review will shed light on the equities of the probate.

Some commentators have argued that if UPC section 2-804(h)(2) were uniformly adopted, it would avoid ERISA preemption for the same reasons that the *Egelhoff* Court suggested slayer statutes might avoid ERISA.¹⁰⁹ In *Egelhoff*, the Court suggested that slayer statutes

¹⁰⁵ See, e.g., Rayho, *supra* note 38, at 390-92.

¹⁰⁶ Compare UNIF. PROBATE CODE § 2-804(h)(2) (2010) (stating that a former spouse, or any person not entitled to a benefit, is obligated to return the benefit or be liable for the amount of the benefit), with YZENBAARD, *supra* note 43, § 472 (explaining possible conditions precedent that may be required of the plaintiff before return of the benefit or property).

¹⁰⁷ See YZENBAARD, *supra* note 43, §§ 473-78.

¹⁰⁸ *Id.* § 478.

¹⁰⁹ Katherine A. McAllister, Note, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-On-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, 1494-95 (2011).

were distinguishable from the revocation-on-divorce statute at issue insofar as the former may not interfere with ERISA “because the statutes are more or less uniform nationwide.”¹¹⁰ Assuming that this is true, it would tend to address ERISA’s concerns with administrative efficiency, as distributions would remain uniform and plan administrators would not have to “master the relevant law of 50 states.”¹¹¹ Additionally, the Court has held elsewhere that it will not sanction attempts by wrongdoers to use federal preemption as a shield from state law—and slayer statutes remain consistent with that principle.¹¹²

Yet it is unclear that the theory underlying slayer statutes can be easily transmuted to revocation-on-divorce provisions such as UPC section 2-804(h)(2). First, unlike slayer rules, 2-804(h)(2) does not have a “long historical pedigree predating ERISA.”¹¹³ Second, unlike a slayer, an ex-spouse is not profiting from a misdeed—his or her own, or anyone else’s for that matter. Surely, he or she is benefiting from a favorable law, but that is not necessarily unjust. Despite the UPC’s irrebuttable presumption that distributions to a former spouse (and that former spouse’s relatives) thwart a plan participant’s intent, it should be kept in mind that the former spouse’s name has been voluntarily left in the plan documents as the beneficiary.¹¹⁴ Concededly, more often than not, the continued presence of the former spouse’s name on the form indicates that the form became stale upon dissolution of the marriage, and therefore no longer carries out the decedent’s intent.¹¹⁵ Theoretically an injustice arises because the participant would not have intended for his ex-spouse to receive the benefits of his plan and the spouse has already received everything he or she is entitled to in the divorce settlement.¹¹⁶

Yet there may be situations where allowing an ex-spouse—or a child of an ex-spouse—to receive benefits does no injustice whatsoever, such as amicable divorces or where the participant sought to provide for the ex-spouse’s child.¹¹⁷ Removing the issue from judicial review not only relieves the objectors of their burden of proving injustice by clear and convincing evidence under traditional constructive trust doctrine; it

¹¹⁰ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 152 (2001); see McAllister, *supra* note 109.

¹¹¹ See *Egelhoff*, 532 U.S. at 149-150.

¹¹² See, e.g., *Yiatchos v. Yiatchos*, 376 U.S. 306, 307 (1964) (recognizing a fraud exception to the plan documents rule in the Treasury bonds context).

¹¹³ *Egelhoff*, 532 U.S. at 152.

¹¹⁴ But see UNIF. PROBATE CODE § 2-804 cmt. (2010) (unjust enrichment justifies liability).

¹¹⁵ Gary, *supra* note 8, at 83-84.

¹¹⁶ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 159 (2001) (Breyer, J., dissenting).

¹¹⁷ See *Luff v. Luff*, 359 F.2d 235, 241 (D.C. Cir. 1966) (Leventhal, J., dissenting).

forecloses the opportunity of named beneficiaries to prove that the participant intended to leave them on the form. Of course, revocation statutes applying to wills operate identically and seek to further the same policy.¹¹⁸ The difference is that qualified retirement plans are governed by a federal statute giving the named beneficiary a right to the funds, suggesting that Congress sought to err in favor of the spouse.¹¹⁹ While constructive trusts retain the presumption in favor of the spouse, the UPC statute turns the presumption against the spouse and makes it irrebuttable—ostensibly undermining federal law.

4. *Reliance on UPC Section 2-804(h)(2)*

The case for preemption is strengthened upon examination of the practical effects of 2-804(h)(2) on ERISA plans. As in *Free*, the statute “render[s] the award of title meaningless,” by simply requiring the recipient of benefits to reimburse a person to be determined by state law.¹²⁰ This too may “interfere directly with a legitimate exercise of power by the Federal Government,” by subverting the statute’s effect of protecting retirement income for those with a federally created interest in it.¹²¹ Given that it is unclear whether federal courts will honor 2-804(h)(2), states should be cautious in deciding whether to adopt it.¹²²

Practitioners should also be cautious before relying on the UPC provision even when it has been adopted in their jurisdiction. For instance, in *Staelens ex rel. Estate of Staelens v. Staelens*, the estate of a plan participant was precluded from recovering plan proceeds from the ex-spouse beneficiary.¹²³ The U.S. District Court for the District of Massachusetts cited language from *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, indicating that ERISA was interested in “ensur[ing] that beneficiaries get what’s coming quickly”¹²⁴ and then commented that “[i]t is difficult to believe that these interests would simply fall by the wayside once funds had been distributed.”¹²⁵ Nonetheless, Massachusetts has since adopted 2-804(h)(2) into its general laws.¹²⁶ Although *Staelens* is not a death-knell for the application of UPC section 2-804(h)(2) in Massachusetts, the co-existence of contra-

¹¹⁸ 79 AM. JUR. 2D *Wills* § 550 (2012).

¹¹⁹ ERISA, *supra* note 1, § 1104(a)(1)(D) (directing the administrator to follow the plan documents).

¹²⁰ *Free v. Bland*, 369 U.S. 663, 669 (1962).

¹²¹ *Id.*

¹²² *Compare Staelens ex rel. Estate of Staelens v. Staelens*, 677 F. Supp. 2d 499, 508 (D. Mass. 2010), with MASS. GEN. LAWS ch. 190B, § 2-804(h)(2) (2012).

¹²³ *Staelens*, 677 F. Supp. 2d at 510-11.

¹²⁴ *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 301 (2009).

¹²⁵ *Staelens*, 677 F. Supp. 2d at 508.

¹²⁶ MASS. GEN. LAWS ch. 190B, § 2-804(h)(2).

vening federal and state law does obscure the rights of participants, beneficiaries, and would-be objectors.¹²⁷

Ultimately, ERISA's preemption provision "displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements,"¹²⁸ and therein lies the problem with UPC section 2-804(h)(2). While the law technically complies with ERISA's requirements by letting the plan administrator pay the named beneficiary, it nonetheless falls within ERISA's sphere by depriving that person of using those benefits in retirement where a fundamental underpinning of ERISA is protecting income streams for retirees.¹²⁹ The drafters of the UPC have taken the understandable position of creating provisions designed to carry out the probable intent of the decedent.¹³⁰ Yet clever state law drafting cannot cure flawed federal legislation, and the Supreme Court has thus far declined to re-write ERISA to produce the "right" result.¹³¹ If Congress perceives that its laws are producing the wrong results, it is in the best position to provide an appropriate remedy.¹³²

B. Can Constructive Trusts Reach Distributed ERISA Benefits?

1. *Why Constructive Trusts Might Work*

An alternative proposal for combating the *Egelhoff* problem has been to apply the equitable remedy of constructive trusts. This approach is appealing, because unlike the UPC's one-size-fits-all rule, the constructive trust doctrine allows the court to consider all of the evidence on a case-by-case basis. The Supreme Court has discussed—and approved—the imposition of constructive trusts on distributed ERISA-plan benefits in at least one circumstance. In *Sereboff v. Mid Atlantic Medical Services, Inc.*, a fiduciary of an ERISA-qualified health plan sought reimbursement of medical expenses paid to a beneficiary after the beneficiary received tort-compensation for injuries from a third party.¹³³ The Court held that plan fiduciaries have the explicit right,

¹²⁷ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149 n.3 (2001) (noting when the costs of delay and uncertainty are passed on to beneficiaries, it tends to thwart ERISA's objective of efficient plan administration).

¹²⁸ *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

¹²⁹ See *Boggs v. Boggs*, 520 U.S. 833, 852 (1997).

¹³⁰ See UNIF. PROBATE CODE § 2-804 cmt. (2010) (dubbing ex-spouses "unintended beneficiaries.").

¹³¹ See *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376-77 (1990).

¹³² *Id.*

¹³³ *Sereboff v. Mid Atl. Med. Serv. Inc.*, 547 U.S. 356, 359-60 (2006).

under ERISA, to enforce the terms of a plan by obtaining post-distribution equitable relief—which included seeking a constructive trust.¹³⁴

Sereboff did not turn on whether the trust was imposed pre- or post-distribution, but on whether ERISA's terms permitted the fiduciary to take this type of action.¹³⁵ Thus it can be fairly inferred from *Sereboff* that ERISA's interest can extend beyond distribution, as the law defines not only the type of relief that may be sought post-distribution, but also who may invoke the relief and for what reason.¹³⁶ While *Sereboff* involved a mistaken distribution, the case illustrates that Congress took care to prescribe the particular circumstances where post-distribution equitable relief is available. This suggests that the fate of distributed benefits is not an area where ERISA has "nothing to say," and consequently, judicially grafting circumstances for equitable relief onto the statute may therefore "relate to" ERISA in an impermissible way.¹³⁷

Additionally, the Court held in *Mertens v. Hewitt Associates* that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize remedies that it simply forgot to incorporate expressly.'" ¹³⁸ While *Sereboff* demonstrates that Congress has provided circumstances where post-distribution equitable relief may be available, such an opportunity was not extended to expecting heirs seeking recovery from a decedent's ex-spouse beneficiary. Therefore under *Mertens*, the failure to provide the participant's estate with a remedy against such ex-spouse beneficiaries would seem to be "strong evidence" that Congress did not intend for such a remedy to be available.¹³⁹ On the other hand, the Court has explicitly reserved judgment as to whether courts may independently impress a post-distribution constructive trust in favor of persons not specifically identified by ERISA as having a federal entitlement to the funds.¹⁴⁰

In other contexts, the Court has placed significant weight on the existence of express post-distribution protections in federal retirement benefit statutes. In *Wissner v. Wissner*, for example, the Court considered whether a state community property law granting the decedent's

¹³⁴ *Id.* at 364.

¹³⁵ *Id.* at 359, 369.

¹³⁶ *See id.* at 364 (interpreting ERISA, *supra* note 1, § 1132(a)(3) to permit post-distribution remedies).

¹³⁷ *See id.*

¹³⁸ *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 254 (1993) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985)).

¹³⁹ *See id.*

¹⁴⁰ *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 299 n.10 (2009).

widow a right to insurance proceeds could support an action to recover such proceeds after they had been paid to the decedent's parents, who had been named as beneficiaries pursuant to the National Service Life Insurance Act ("NSLIA").¹⁴¹ The Court focused on two characteristics of the NSLIA: (1) the Act's anti-alienation provision expressly applied to paid proceeds; and (2) only the plan participant was empowered to choose the beneficiary. The Court reasoned that it was clear that "Congress ha[d] spoken with force and clarity in directing that the proceeds *belong* to the named beneficiary and no other. . . . Whether directed at the very money received from the Government or an equivalent amount, [allowing recovery] nullifies the soldier's choice and frustrates the purpose of Congress."¹⁴²

The same reasoning was again applied in *Ridgway v. Ridgway*—there in the context of the Servicemen's Group Life Insurance Act of 1965 (SGLIA).¹⁴³ In *Ridgway*, the decedent was obligated under a state divorce decree to maintain insurance policies for the benefit of his three children. However, upon remarriage he designated his new wife as beneficiary on his SGLIA plan. The Supreme Judicial Court of Maine ordered that a constructive trust be imposed on life insurance proceeds in favor of the children. The U.S. Supreme Court reversed, again supporting its decision by pointing out that the SGLIA required that benefits be paid to the beneficiary named in the plan documents and that the Act's anti-attachment provision expressly applied to paid proceeds.¹⁴⁴ However, while an express provision protecting paid benefits seems sufficient to block a constructive trust, the Court has not held that such a provision is required.

In determining whether to impose a constructive trust on plan distributions to ex-spouses, courts will generally examine whether "the ex-spouse received his or her fair share in the divorce and [whether] the decedent likely did not intend for the ex-spouse to receive the ERISA plan proceeds."¹⁴⁵ If so, the court has "discretion to impose an equitable constructive trust on the assets in favor of other claimants to the proceeds."¹⁴⁶ Such "other claimants" might include the estate, secondary beneficiaries, legatees, or heirs. This arrangement would not affect administration of the plan: the administrator would still distribute the proceeds to the ex-spouse named as beneficiary, who would have legal

¹⁴¹ *Wissner v. Wissner*, 338 U.S. 655, 656-58 (1950).

¹⁴² *Id.* at 658-59.

¹⁴³ *Ridgway v. Ridgway*, 454 U.S. 46, 55-56 (1981).

¹⁴⁴ *Id.* at 60-62.

¹⁴⁵ See Rayho, *supra* note 38, at 390.

¹⁴⁶ *Id.*

title to those proceeds.¹⁴⁷ The ex-spouse would then be obligated to deliver the funds to whomever the court deemed as having equitable title.¹⁴⁸

One suggestion for why this avoids preemption focuses on the language in ERISA declaring that the federal statute “shall supersede all laws as they may or hereafter relate to any employee benefit plan.”¹⁴⁹ In a recent law review article that has been cited in both state and federal trial court decisions, Sarabeth Rayho argues that because constructive trusts are *equitable remedies*, rather than *laws*, the preemption provision is not triggered.¹⁵⁰ While intriguing, this distinction is unlikely to stick in light of the fact that ERISA defines laws as “all laws, decisions, rules, regulations, or other State action having the effect of law.”¹⁵¹ A constructive trust clearly fits within this definition, as evidenced by the Supreme Court’s holding in *Guidry* that ERISA preempted the use of constructive trust on undistributed plan benefits.¹⁵²

Another argument has been proffered in a probing article by T.P. Gallanis.¹⁵³ Professor Gallanis suggests that the most likely solution to the “mess” caused by *Egelhoff* would be the development of federal common law based on constructive trust principles found in the UPC and Restatement Third of Property.¹⁵⁴ A federal common law solution is necessary, explained Gallanis, because a state remedy is unlikely to survive ERISA preemption:

Constructive trusts are creatures of state law, and the decisions of the Supreme Court have made it clear that ERISA’s preemption provision trumps the application of contrary state law. In *Egelhoff* and in the 1997 case of *Boggs v. Boggs*, the Supreme Court specifically rejected the possibility that state law could be used to award the property to a person other than the beneficiary required by ERISA. Thus, remedies arising from state law, such as the constructive trust provisions of the UPC, are ineffective against ERISA’s broad preemption.¹⁵⁵

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 391.

¹⁴⁹ *Id.* n.114 (quoting ERISA, *supra* note 1, § 1144(a)).

¹⁵⁰ *Id.*

¹⁵¹ ERISA, *supra* note 1, § 1144(c)(1).

¹⁵² *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 372, 376-77 (1990).

¹⁵³ T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 193 (2004).

¹⁵⁴ *Id.* at 196.

¹⁵⁵ *Id.* at 193.

At the time, Gallanis's suggestion of a federal common law solution was plausible given that (1) the Supreme Court had expressly approved the creation of federal common law under ERISA; and (2) ERISA's preemption provision declares that the federal statute shall supersede any state law, and is silent as to its effects on competing federal law.¹⁵⁶

However, the Supreme Court's subsequent holding in *Kennedy* seems to have evaporated the distinction between state and federal common law for preemption purposes. In *Kennedy*, the decedent named his wife as beneficiary of his ERISA-governed employee benefits plan.¹⁵⁷ Subsequently, the two divorced, pursuant to which Mrs. Kennedy signed a waiver of her rights to her ex-husband's benefit plans. Mr. Kennedy later died having failed to change the beneficiary designation. Federal common law validated Mrs. Kennedy's waiver of benefits, but since the waiver didn't meet ERISA's requirements, the question arose as to whether federal common law was preempted by ERISA's plan documents rule. The Court answered in the affirmative, holding that "[w]hat goes for inconsistent state law goes for a federal common law of waiver."¹⁵⁸

Thus the viability of constructive trusts as an end-run around *Egelhoff* is unlikely to turn on whether the trust is imposed under state or federal common law. Importantly however, in a footnote, the *Kennedy* Court explicitly left open the question "as to whether the Estate could have brought an action in state or federal court against [Mrs. Kennedy] to obtain the benefits after they were distributed."¹⁵⁹ This suggests that regardless of whether a constructive trust is imposed under state or federal common law, the critical question that has yet to be answered by the Court is whether ERISA was intended to protect paid benefits. Perhaps the Court is waiting for the issue to be sufficiently litigated in the lower courts before rendering a decision. As the next section attempts to illustrate, the growing fissure among the circuit courts on this issue may soon force the Court to provide an answer.

2. *A Court Divided: The Untenable Split in Circuit Authority*

A narrow majority of circuit courts—encompassing the First, Second, Third, Sixth, and Tenth Circuits—have been receptive to the constructive trust remedy when applied to distributed plan benefits.¹⁶⁰ As noted above, the leading case is *Guidry* on remand in the Tenth Circuit, which held that because ERISA's anti-alienation provision expressly re-

¹⁵⁶ ERISA, *supra* note 1, § 1144(a) (emphasis added).

¹⁵⁷ *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 289 (2009).

¹⁵⁸ *Id.* at 303.

¹⁵⁹ *Id.* at 299 n.10.

¹⁶⁰ See *infra* notes 175-82 and accompanying text.

fers to benefits payable, rather than paid, ERISA's preemptive force dissolves upon distribution.¹⁶¹ States, therefore, are free to redirect benefits from the beneficiaries to other persons.

Federal appellate case law on the ability of expecting heirs to obtain a post-distribution constructive trust remedy is limited, but a recent case from the Third Circuit is directly on point. In *Estate of Kensinger v. URL Pharma, Inc.*, William Kensinger participated in a retirement plan sponsored by his employer.¹⁶² As required, Kensinger designated his wife Adele as beneficiary. Later, the two divorced and Adele waived her interest in all retirement benefits in the divorce decree (which did not qualify as a QDRO or valid *plan* waiver). William then died having neglected to change the beneficiary designation on his plan documents. William's estate brought an action against Adele to recover the distributed benefits. The district court, relying on the Supreme Court's holdings in *Kennedy* and *Boggs*, held that actions against distributed plan benefits were preempted by ERISA because such actions would "directly undermine one of ERISA's core objectives: providing certainty regarding the final distribution of ERISA benefits."¹⁶³

The Third Circuit reversed.¹⁶⁴ The court distinguished *Boggs*, noting that although the Court prohibited an action against distributed benefits, the Court's holding was limited to situations where the theory of the case hinged on a state-law interest in those benefits arising before they were distributed. In *Kensinger*, the estate's claim was confined to its interest in the distributed proceeds.¹⁶⁵ Additionally, the court emphasized that *Kennedy* explicitly left unsettled the fate of distributed benefits.¹⁶⁶ In light of this ambiguity, the court looked to other circuit authority and observed that the majority of circuits have applied the reasoning of *Guidry* on remand that ERISA's interest in plan benefits terminates on distribution. The Third Circuit, finding the Tenth Circuit's logic persuasive, sided with the majority.¹⁶⁷

As *Kensinger* noted, a majority of circuits have permitted actions against distributed plan benefits. The Tenth Circuit's reasoning was adopted by the First Circuit in *Hoult v. Hoult*, which held that ERISA did not bar creditors from accessing distributed plan proceeds.¹⁶⁸ The

¹⁶¹ *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 710-11, 716 (10th Cir. 1993).

¹⁶² *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131, 132-33 (3d Cir. 2012).

¹⁶³ *In re Estate of Kensinger*, No. 09-6510, 2010 WL 4445752, at *4 (D. N.J. Nov. 1, 2010).

¹⁶⁴ *Kensinger*, 674 F.3d at 139.

¹⁶⁵ *Id.* at 132.

¹⁶⁶ *Id.* at 134.

¹⁶⁷ *Id.* at 135-38.

¹⁶⁸ *Hoult v. Hoult*, 373 F.3d 47, 54-55 (1st Cir. 2004).

Second Circuit followed suit in *United States v. Jaffe*, where a benefits recipient was ordered to make restitution after defrauding a federally insured bank.¹⁶⁹ Jaffe argued that requiring him to repay the bank out of distributed plan funds violated ERISA's anti-alienation clause. The Second Circuit disagreed, holding that ERISA only protects funds from alienation while they are in the hands of the plan administrator.¹⁷⁰ Lastly, in *DaimlerChrysler Corp. v. Cox*, the Sixth Circuit held that although one of ERISA's principal purposes is protecting retirement income streams, "once the benefit payments have been disbursed to a beneficiary, creditors may encumber the proceeds."¹⁷¹

While not dealing directly with the question of whether an estate can bring an action to recover retirement benefits as the rightful beneficiary, the cases out of the First, Second, and Sixth Circuits give rise to a reasonable inference that the courts would rule similarly should such a case reach them. On the other hand, these cases could be also interpreted as affirming the status of the named beneficiary as the rightful beneficiary. None of the cases question the right of the recipient to the benefits; rather, the courts simply enforce creditors' rights against those recipients. Because the rights of creditors necessarily rest on the right of the debtor to the property, these cases are implicitly recognizing the beneficiary's federally created property interest.¹⁷² Left open, therefore, is the question of who would have prevailed had there been competing claims between the estate of the plan participant and the creditors of the beneficiary.

This distinction somewhat weakens the majority relied upon by *Kensinger*. The Third Circuit's opinion suffers from other flaws as well. The first problem involves the court's attempt to distinguish *Boggs* by noting that the estate's right to the plan funds was not based on a pre-distribution interest. This assertion is belied by the facts of the case. The estate's right to plan-proceeds was based on *Kensinger's* ex-wife's waiver of benefits in the divorce decree. This occurred before the distribution occurred. Thus as far as state law is concerned, the ex-wife's right to retain funds terminated upon the waiver, making the estate the de facto beneficiary in the absence of a change on the form.¹⁷³ Therefore, *Kensinger* is actually quite similar to *Boggs*.¹⁷⁴

¹⁶⁹ *United States v. Jaffe*, 417 F.3d 259, 267 (2d Cir. 2005).

¹⁷⁰ *Id.*

¹⁷¹ *DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 974 (6th Cir. 2006).

¹⁷² See 7 C.J.S. *Attachment* § 65 (2004) ("In order to be subject to attachment . . . the defendant must have some right or title to such property.").

¹⁷³ *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131, 137 (3d Cir. 2012).

¹⁷⁴ Compare *id.*, with *Boggs v. Boggs*, 520 U.S. 833, 854 (1997).

Secondly, in supporting its position that ERISA's interest ends at distribution, the Third Circuit relied on the Ninth Circuit's decision in *United States v. Jackson*.¹⁷⁵ The facts of *Jackson* are not important, because as the *Kensinger* court recognized, *Jackson* was partially overruled by *United States v. Novack*.¹⁷⁶ What the Third Circuit failed to mention was that any remaining value in the *Jackson* opinion was completely vitiated by *Carmona v. Carmona*.¹⁷⁷ Previously, in a pre-*Egelhoff* decision, *Emard v. Hughes Aircraft Co.*, the Ninth Circuit stated that ERISA "would not prohibit the imposition of a constructive trust on insurance proceeds after their distribution to the beneficiary."¹⁷⁸ However, in *Carmona*, the court noted that *Emard* did not survive *Egelhoff*.¹⁷⁹ Thus the court concluded that a constructive trust could not be impressed on distributed pension proceeds, and "[a]ny alternative rule would allow for an end-run around ERISA's rules and Congress's policy objective of providing for certain beneficiaries, thereby greatly weakening, if not entirely abrogating, ERISA's broad preemption provision."¹⁸⁰

The Fourth Circuit has also interpreted the Supreme Court's *Guindry* decision to prohibit actions against distributed plan benefits.¹⁸¹ In *United States v. Smith*, the court asserted that one "purpose of ERISA is to safeguard a stream of income for pensioners" and where "funds are paid pursuant to the terms of the plan as income during retirement years, ERISA prohibits their alienation."¹⁸² The court buttressed this position by drawing from another Supreme Court case, *Hisquierdo v. Hisquierdo*.¹⁸³ Although that case was decided under the Railroad Retirement Act (RRA), the "RRA contains anti-alienation provisions substantially similar to those in ERISA."¹⁸⁴ Because *Hisquierdo* held that even distributed proceeds were inalienable,¹⁸⁵ the Fourth Circuit reasoned that the same rule should apply to distributed ERISA-plan bene-

¹⁷⁵ *United States v. Jackson*, 229 F.3d 1223 (9th Cir. 2000), *overruled in part* by *United States v. Novack*, 476 F.3d 1041 (9th Cir. 2007).

¹⁷⁶ *Novack*, 476 F.3d at 1058.

¹⁷⁷ *Carmona v. Carmona*, 603 F.3d 1041, 1061-62 (9th Cir. 2010).

¹⁷⁸ *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 954 (9th Cir. 1998), *overruled in part* by *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2006).

¹⁷⁹ *Carmona*, 603 F.3d at 1062.

¹⁸⁰ *Id.* at 1061.

¹⁸¹ *United States v. Smith*, 47 F.3d 681, 682-83 (4th Cir. 1995), *superseded by statute*, Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1230 (amended 2000).

¹⁸² *Smith*, 47 F.3d at 683.

¹⁸³ *Id.*; *See Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), *superseded by statute*, 45 U.S.C. § 231m (amended 1983).

¹⁸⁴ *Smith*, 47 F.3d at 683.

¹⁸⁵ *See id.*

fits, holding that “[t]he government should not be allowed to do indirectly what it cannot do directly.”¹⁸⁶

The Seventh Circuit also precludes courts from using constructive trusts to circumvent ERISA preemption. In *Melton v. Melton*, the decedent’s ex-wife was named as beneficiary on his ERISA-governed life insurance plan.¹⁸⁷ The decedent’s daughter challenged the ex-wife’s right to the proceeds and requested that the court impose a constructive trust in the daughter’s favor. The Seventh Circuit declined the invitation, holding that ERISA determines who the *rightful* beneficiary is by referring to the form designation and a constructive trust remedy that redirected paid proceeds to a state-law designated person was preempted.¹⁸⁸ Courts applying *Melton* have affirmed that ERISA protects distributed proceeds: “A constructive trust would violate ERISA’s preemptive force even if it applied after the funds from the policy were actually distributed.”¹⁸⁹

The reasoning of the Fourth, Seventh, and Ninth Circuits is persuasive if one believes that Congress went through the trouble of including anti-alienation and preemption clauses in ERISA to ensure that fund recipients could use their retirement benefits in retirement. This position, however, is far from certain; the Tenth and Third Circuits have flatly rejected it, and the First, Second, and Sixth Circuits have at least called it into question by broadly permitting creditor claims against distributed benefits. This fractious split in circuit authority suggests that the issue is ripe for Supreme Court review. The following section suggests that the Court consider not only whether ERISA’s objectives reach distributed benefits, but also whether constructive trusts redirecting benefits to expecting heirs serve the remedy’s equitable principles.

3. *Will a Constructive Trust “Do Equity?”*

Although there is disagreement on the appropriateness of post-distribution constructive trusts, it should also not be forgotten that a constructive trust is an equitable remedy. The Supreme Court has warned that “courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text.”¹⁹⁰ Moreover, commandeering the funds from one who has received them as a result of a federal entitlement and then—absent any

¹⁸⁶ *Id.* at 684.

¹⁸⁷ *Melton v. Melton*, 324 F.3d 941, 943-44 (7th Cir. 2003).

¹⁸⁸ *Id.* at 945.

¹⁸⁹ *Reliastar Life Ins. Co. v. Keddell*, No. 09-C-1195, 2011 WL 111733, at *2 (E.D. Wis. Jan. 12, 2011).

¹⁹⁰ *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 376 (1990).

evidence of wrongdoing—transferring those funds to a person with no preexisting rights to them also seems far afield from traditional notions of equity.¹⁹¹

The equities calculus may differ, however, where the deceased plan participant's estate seeks to recover plan proceeds through a constructive trust, because it is essentially doing so as successor-in-interest to the decedent. On one hand, this might better comport with the federal law on a theory that the participant also had a federal entitlement to the funds. On the other hand, those who “slumber on their rights” are generally foreclosed from pursuing equitable relief.¹⁹² If the estate is successor-in-interest to the decedent, it is at least questionable whether the estate should be able to benefit from the constructive trust where the decedent formerly slumbered on his rights by failing to change the beneficiary designation. After all, the need for an equitable remedy only arose because the participant neglected to exercise his right to change the designation on the plan form.

CONCLUSION

Can a state law do indirectly what federal preemption prevents it from doing directly? That is the precise and intended effect of UPC section 2-804(h)(2).¹⁹³ If *Egelhoff* stands for the proposition that ERISA's objectives are limited to uniform plan administration, then 2-804(h)(2) will likely stand. Yet, if ERISA's reach extends to protecting income streams for retirees, then 2-804(h)(2) is likely to fall. This is because ERISA creates a federal property right in plan proceeds for participants and beneficiaries—and no one else.¹⁹⁴ Whereas ERISA suggests that Congress intended to err on the side of the ex-spouse, the UPC supplants this federal rule with a state rule that errs against the ex-spouse on a theory driven by a competing state policy.

Yet even if 2-804(h)(2) falls, the question remains as to whether a court may impress distributed plan benefits with a constructive trust. This remedy may be more reasonable than its statutory counterpart by virtue of the fact that its imposition necessitates a proceeding to weigh the equities of allowing the divorced spouse to retain the distribution. Thus rather than replacing a federal rule with a state rule, courts seem to be transforming the federal rule into a standard in those instances

¹⁹¹ See 30A C.J.S. *Equity* § 99 (2012) (“Equity will not permit that to be done by indirection which, because of public policy, cannot be done directly.”).

¹⁹² *Cook v. Equitable Life Assurance Soc’y of the U.S.*, 428 N.E.2d 110, 116 (Ind. Ct. App. 1981).

¹⁹³ UNIF. PROBATE CODE § 2-804(h)(2) cmt. (2010).

¹⁹⁴ See *Boggs v. Boggs*, 520 U.S. 833, 854 (1997).

where the rule fails to carry out congressional intent.¹⁹⁵ That is, in permitting a participant to deprive an ex-spouse of benefits, Congress has expressed an intention that the participant choose the ultimate beneficiary. Accordingly, by requiring an affirmative act to change the designation, Congress embedded ERISA with a presumption that the continued presence of an ex-spouse on the form is to be construed as an expression of the participant's intent. Paying the person named merely carries out the participant's presumptive wishes.

Because the constructive trust only applies upon a clear and convincing rebuttal of that presumption, it furthers the federal policy and stands on surer footing than its statutory counterpart—despite the fact that the application of each remedy has been largely justified on similar grounds. Practically speaking, however, since the constructive trust is by its nature a judicial remedy and the nation's judiciary is far from reaching a consensus on its applicability, it is likely that this area will remain exceedingly murky until Congress revises ERISA or the Supreme Court defines the statute's boundaries more precisely.

¹⁹⁵ See generally *Legal Theory Lexicon 026: Rules, Standards, and Principles*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html (last modified Apr. 15, 2012) (last visited June 29, 2013).