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This special issue of the *ACTEC Law Journal* offers an opportunity to examine the relationship between U.S. Supreme Court decisions and the law of trusts and estates. I have been asked to comment on this relationship from the perspective of a law reformer active in the American Law Institute and the Uniform Law Commission. However, the views in this essay are mine alone; I do not speak for the Institute or the Commission.

I want to focus my remarks on one of the most significant projects of trusts and estates law reform in recent decades: the harmonization of the default rules governing probate and nonprobate transfers. What impact has the U.S. Supreme Court had on this important project? The answer, as we shall see, is not salutary.

The distinction is often made in the law of trusts and estates between mandatory rules and default rules.[1] Mandatory rules apply irrespective of the donor's intention. The traditional Rule Against Perpetuities, for example, is a mandatory rule. Default rules, on the other hand, are intent-effectuating and yield to the donor's expression of a contrary intention. The rules of intestacy are default rules; a donor who does not want them to apply can circumvent them by writing a valid will.

The formal requirements for a valid will—typically writing, signature, and attestation—are mandatory rules. They apply to all testamentary transfers. They do not apply to valid nonprobate transfers, such as transfers effectuated through life insurance policies or pension plans, which are considered to be nontestamentary.

Formal requirements aside, most of the rules of wills law are default rules. An important question is whether the default rules of wills law should apply to nonprobate transfers. In a seminal article on the "Non-

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[1] Thomas P. Gallanis, *Default Rules*, *Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1515 (1999); *see also* Thomas P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1617-19 (2007).

probate Revolution," Professor Langbein answered this question in the affirmative: "The subsidiary rules are the product of centuries of legal experience in attempting to discern transferors' wishes and suppress litigation. These rules should be treated as presumptively correct for will substitutes as well as for wills."[2] The same position is taken by the *Restatement (Third) of Property*:

> Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions.[3]

As I indicated earlier, a major trend in trusts and estates law is the harmonization of the default rules applying to probate and nonprobate transfers. An example will illustrate the point: the default rule of revocation on divorce.

Under traditional statutes, a testator's divorce revokes provisions in the testator's will benefiting the testator's former spouse, unless the will provides to the contrary. In the language of the original version of the Uniform Probate Code (U.P.C.): "If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse . . . unless the will expressly provides otherwise."[4]

The modern trend, exemplified by the current version of the U.P.C., is to extend the revocation-on-divorce rule to nonprobate transfers. The current U.P.C. provides: "Except as provided by the express terms of a governing instrument . . . , the divorce or annulment of a marriage . . . revokes any revocable disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument."[5] The term "governing instrument" is defined in the U.P.C. to encompass both probate and nonprobate mechanisms:

> "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profitsharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment

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2 John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1136-37 (1984).

3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (AM. LAW INST. 2003).

4 UNIF. PROBATE CODE § 2-508 (pre-1990 version).

5 *Id.* § 2-804(b)(1)(A).

> or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.[6]

Complicating the project of default-rule unification is the fact that while the law of trusts and estates is largely state law, some federal statutes govern certain types of nonprobate transfers. The most obvious example of such a federal law is the Employee Retirement Income Security Act of 1974 (ERISA),[7] which governs employee benefits such as employer-sponsored pensions and life insurance.

Unfortunately, ERISA and similar statutes are being interpreted by the U.S. Supreme Court to frustrate the donor's intention and to make it impossible for state legislatures or state courts to complete the unification of the default rules of probate and nonprobate transfers.

Section 514(a) of ERISA provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA-governed] employee benefit plan."[8] The words "relate to" are broad, and the U.S. Supreme Court has interpreted them very broadly.

In 2001 in *Egelhoff v Egelhoff*,[9] the Court was faced with a typical revocation-on-divorce scenario. David Egelhoff designated his wife, Donna, as the beneficiary of his pension benefits and life insurance proceeds. David and Donna later divorced. Two months after the divorce, David died in a car accident, not having changed his beneficiary designations. David's children from a prior marriage argued that the state's revocation-on-divorce statute—which, like U.P.C. section 2-804, extends the revocation-on-divorce rule to nonprobate mechanisms—revoked the designations benefiting Donna. A divided Court disagreed, holding that the state statute was preempted because the life insurance policy and pension plan were ERISA-governed.[10] Donna was allowed to keep the life insurance proceeds and the pension benefits.[11]

The Court could have reached a different outcome while still respecting ERISA preemption. The Court could have held that ERISA pre-empted the state statute and then gone on in its decision to incorporate the revocation-on-divorce rule into federal common law.[12] Such an outcome would have respected not only the policy of nationally-uniform

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6 *Id.* § 1-201(18).

7 29 U.S.C. § 1001 (2006).

8 *Id.* § 1144(a).

9 532 U.S. 141, 144 (2001).

10 *See id.* at 150.

11 *See id.* at 152.

12 *See* Thomas P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 193-97 (2004).

pension law but also the policy of honoring the intention of the decedent. However, this was the path not taken.

In response to the danger of federal preemption of state wealth transfer law, the Uniform Law Commission inserted the following provision into the U.P.C.'s revocation-on-divorce statute and into other U.P.C. provisions that might be the subject of preemption:

> If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a 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.[13]

This provision imposes a post-distribution constructive trust for the purpose of remedying unjust enrichment. As the Official Comment explains:

> 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.[14]

In 2013, the Court decided *Hillman v Maretta*,[15] another revocation-on-divorce case. Warren Hillman named his wife, Judy, as the beneficiary of a life insurance policy governed by FEGLIA (the Federal Employees' Group Life Insurance Act of 1954), which has a preemption provision similar to ERISA's. The couple later divorced; Warren married Jacqueline; then Warren died without having revised his beneficiary designation. The plan administrator paid the proceeds to Judy as the named beneficiary. Jacqueline agreed that the state's revocation-on-divorce rule was preempted but sued Judy for the proceeds under the state's version of subsection (h)(2), the statutory constructive trust rem-

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13 UNIF. PROBATE CODE § 2-804(h)(2). *See also id.* §§ 2-110 (elective share), 2-702 (survival by 120 hours), 2-706 (antilapse), 2-803 (slayer rule).

14 Id. § 2-804(h)(2) cmt.

15 133 S. Ct. 1943 (2013).

edy. In *Hillman*, the Court unanimously decided that the statutory constructive trust remedy was preempted.[16]

The Uniform Law Commission responded to *Hillman* by revising the Official Comment to U.P.C. section 2-804 (the revocation-on-divorce provision):

> The Court's decision in *Hillman* has many unfortunate consequences. First, the decision frustrates the dominant purpose of wealth transfer law, which is to implement the transferor's intention. The result in *Hillman*, that the decedent's ex-spouse remained entitled to the proceeds of the decedent's life insurance policy purchased through a program established by FEGLIA, frustrates the decedent's intention. Second, the *Hillman* decision ignores the decades-long trend of unifying the law governing probate and nonprobate transfers. The revocation-on-divorce rule has long been a part of probate law (see, e.g. pre-1990 Section 2-508). In 1990, this section extended the rule of revocation on divorce to nonprobate transfers. Third, the decision in *Hillman* fosters a division between state- and federally-regulated nonprobate mechanisms. If the decedent in *Hillman* had purchased a life insurance policy individually, rather than through the FEGLIA program, the policy would have been governed by the Virginia counterpart of this section.[17]

These criticisms of the Court's decision are well-founded. Of particular disappointment is that the justices vigorously dissenting in *Egelhoff* simply gave up in *Hillman*. Perhaps they did not consider the game worth the candle, the result affecting only the law of trusts and estates and not the grand law of the Constitution. That is a shame.

More than twenty-five years ago, Professor Langbein published an article with the arresting title "The Supreme Court Flunks Trusts."[18] The article critiqued the U.S. Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*,[19] a decision which, as Professor Langbein explained, "rest[ed] on an elementary error in trust law . . . [producing] a

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16 *Id.* at 1955.

17 UNIF. PROBATE CODE § 2-804(h)(2) cmt. For other critiques of *Hillman*, see John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665 (2014); Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635, 1639-46 (2014).

18 John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207 (1990).

19 489 U.S. 101 (1989); Langbein, *supra* note 18, at 208.

nonsense reading of ERISA."[20] Particularly devastating was the article's conclusion:

> *Bruch* is such a crude piece of work that one may well question whether it had the full attention of the Court. I do not believe that [the justices] would have uttered such doctrinal hash if they had been seriously engaged in the enterprise. . . .
>
> I understand why a Court wrestling with the grandest issues of public law may feel that its mission is distant from ERISA. The Court may increasingly view itself as having become a supreme constitutional court, resembling the specialized constitutional courts on the Continent. If so, the time may have come to recognize a corollary. If the Court is bored with the detail of supervising complex bodies of statutory law, thought should be given to having that job done by a court that would take it seriously.[21]

Having flunked the law of trusts in *Bruch*, the U.S. Supreme Court has flunked the law of succession (and the law of restitution) in *Egelhoff* and *Hillman*. These recent decisions frustrate the decedent's intention and also frustrate the harmonization of the intent-effectuating default rules governing probate and nonprobate transfers. A Court willing to pay attention to the goals and policies of trusts and estates law is sorely needed.

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[20] Langbein, *supra* note 18, at 208-09.
[21] *Id.* at 228-29.