Reconciling ERISA Preemption and Tenets of Trust Common Law

Introduction

Congress undertook a mammoth undertaking in 1974 when it passed the Employee Retirement Insurance Security Act (ERISA). ERISA serves as a comprehensive manual dictating the requirements for funding, maintenance, and administration of employee benefits. The Act aims to provide clear rules of administration to employee benefit holders, known as plan participants, as well as to plan administrators and courts. To assure consistent and efficient administration, Congress intended ERISA to be the primary governing law over substantive and procedural rights of its plan participants. To that end, it enacted a broad preemption provision over any related state law.

ERISA doctrine is also steeped in the traditions of trust law. The principles of trust law hold at their core a focus on settlor intent rather than uniform administration. These two incongruent motivations can create interpretation problems for state and federal courts that must weigh the conflicting interests. This paper explores the intersections of these principles through the lens of the common law principle that divorce presumptively revokes a testamentary instrument. It looks at two landmark Supreme Court cases that limit this revocation upon divorce doctrine and indicate deference to ERISA's preemption clause. It then assesses two proposed equitable remedies before assessing the status of the infamous Slayer Rules under ERISA doctrine before concluding with recommendations.

This paper divides its analysis into eight parts. Part I provides an overview of ERISA's goals of consistent application and efficient administration, particularly how Section 514(a) aims to preserve these goals. Part II contrasts the preemption clause with another key feature of ERISA doctrine: its reliance on common law trust doctrine. Part III explores the "nonprobate revolution" of the 20th century and its interaction with the prevalent insurance and benefit plans covered by ERISA. Specifically, Part III discusses the statutory provisions codifying a will revocation upon divorce presumption and the contemporaneous nonprobate revolution.

Part IV looks at the Supreme Court's decisions in *Egelhoff* and *Hillman* and outlines subsequent criticisms from scholars. The following two parts examine two proposed solutions to ERISA preemption of will substitutes. Part V discusses the equitable remedy of the constructive trust and argues it is the preferable mechanism to preserve ERISA's administrative efficiency and trust doctrine, notwithstanding additional procedural burdens for beneficiaries. Part VI discusses whether the revocation upon divorce presumption can serve as a gap filler under ERISA as part of the federal common law. It argues that this is not the appropriate remedy because revocation upon divorce is not and should not be embedded in the federal common law. Part VII contextualizes the *Egelhoff* decision with regard to another feature of trust law doctrine: the infamous Slayer Rule. It examines post-*Egelhoff* case law and concludes that the Slayer Rule is likely

not preempted by ERISA because the rule, unlike revocation upon divorce doctrine, actually exists in the federal common law.

Finally, Part VIII concludes with a list of recommendations for ERISA's key stakeholders. Specifically, it urges attorneys to pay attention to the changing nature of wealth transfer in the age of the nonprobate revolution and related implications for divorced clients. It also suggests that courts and policymakers look critically at the *Egelhoff* and *Hillman* decisions and consider both state and federal statutory provisions dictating how to administer a decedent's ERISA benefits when the participant failed to remove an ex-spouse as a plan beneficiary.

I. ERISA's Broad Preemption Clause

In keeping with its goal of uniform administration, Congress enacted a broad preemption clause to ERISA. Specifically, Section 514(a) provides that Titles I and IV of the Act "shall supersede any and all State laws insofar as they may now or hereafter ***relate to*** any [ERISA qualifying] employee benefit plan".[1]

The Supreme Court has applied and upheld this broad preemption clause on numerous occasions. For example, in Shaw v. Delta Air Lines, the Court was tasked with determining the governing law of employee benefits in light of New York state law that forbade certain employment practices that federal law allowed. The Court determined that ERISA preempted state law

[1] 29 U.S.C. § 1144(a) (emphasis added)

references to such practices because "Congress indicated that [514(a)'s] scope was as broad as its language".[2] The Court in *Shaw* looked to legislative purpose by examining the Congressional record and stated, "the [preemption] principle is intended to apply in its broadest sense to all actions of State or local governments"[3].

It is important to note that ERISA's broad preemption provision is not without controversy. Justice Scalia, for example, heavily criticized the vagueness of the "relate to" preemption. He contended that the Supreme Court's iteration of the "relate to" test did not adequately put plan administrators or participants on notice as to when ERISA would preempt state law. In California Division of Labor v. Dillingham Construction, Justice Scalia remarked in a concurring opinion, "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."[4]

II. ERISA Looks to Trust & Estate Doctrine

An equally vital cornerstone of ERISA is its basis in trust and estate law. After all, Section 403 of the Act mandates that, except as otherwise provided, "all assets of an employee benefit plan shall be held in trust…".[5]

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[2] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).
[3] *Id.* at 99 (quoting 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams)).
[4] *California Division of Labor Standards Enforcement v. Dillingham Consttruction, N.A.*, 519 U.S. 316, 335 (1997). *See also Aetna Health v. Davila*, 542 U.S. 200 (2004).
[5] 29 U.S.C.1103(a)

The Supreme Court emphasized ERISA's trust principles in what is arguably the most widely known ERISA opinion, Firestone Tire & Rubber Company v. Bruch.[6] *Firestone* defined the standard of review for denial of benefits. The Court set the standard as de novo when the plan does not award discretion to fiduciaries but, where the plan does provide for fiduciary discretion, courts review under a heightened standard. As Joshua Foster notes in his article on *Firestone*, "All of the sources that the Court cited stood for the proposition that trust law allows for a deferential standard of review when a trustee exercises discretionary powers".[7] These sources include the Second Restatement of Trusts and the Law of Trusts[8] and Trustees[9]. Just as it did in *Shaw*, the Supreme Court thoroughly reviewed the legislative history and determined that Congress imparted into ERISA several key elements of trust law.

It should be noted that, just as Shaw's preemption holding faces criticism, so too does Firestone's conflation of ERISA and trust law. Professor Langbien, for example, argues that whereas traditional trust and estate law is motivated by gratuitous intent without the expectation of reciprocation, health, pension, and benefit plans are more in line with contract law because

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[6] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).
[7] Joshua Foster, *ERISA, Trust Law, and the Appropriate Standard of Review*, 2 St. John's L.Rev. 82, 735, footnote 74 (2008).
[8] "where discretion is conferred upon the trustee…exercise is not subject to control by the court" Restatement Second of Trusts § 187 (1959) .
[9] "if the terms and extent of power are clear, the court will not do the trustee's work" George Gleason Bogert & George Taylor Bogert, Law of Trusts and Trustees § 560 (2d Rev.Ed. 1980) .

of their quid pro quo motivations.[10] He states, "there are important differences between the private trust and the pension trust, and ERISA is sometimes insensitive to these differences".[11]

III. The Nonprobate Revolution and Common Law's Revocation Upon Divorce

Trust and estate law is largely rooted in longstanding common law traditions, though state statutes differ widely. One notable provision in trust and estate law is that a change of circumstances can revoke a valid will or other instrument executed before that change of circumstances. This doctrine has roots in English common law and the main change of circumstance implicated was a testator's marriage[12]. In the colonial United States, several states adopted the common law doctrine that marriage was at least presumed to revoke a previously executed will.[13] With the rise of divorce in the latter half of the 20th Century however, policymakers believed that divorce also served as a change in circumstance that, at least presumably, would change the way an individual would structure his or her devises upon death. The Uniform Law Commission, a task force of the American Law Institute, recognized the need for a statutory provision codifying divorce as a

[10] John H. Langbein, The Supreme Court Flunks Trusts, 1990 Supreme Court Review 207 (1990).
[11] *Id.* at 211.
[12] For a woman in England, her marriage revoked a previous will, invalidating it. For a man, his will was revoked and invalidated upon his marriage that resulted in the birth of a child. Graunke & Beuscher, *The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator*, 5 Wis. L. Rev. 387 (1930).
[13] Durfee, *Revocation of Wills by Subsequent Change in Condition or Circumstances of the Testator*, 40 Mich. L. Rev. 406 (1942).

presumptive change of circumstance that revokes a will. When the commission first promulgated the Uniform Probate Code in 1969, it drafted Section 2-508 to state as follows[14]:

> If after executing a will the testator is divorced or his marriage is annulled, the divorce or annulment revokes any disposition of appointment of property made by will to the former spouse…unless the will expressly provides otherwise.

By 1990, forty-four states adopted some version of the Uniform Probate Code, codifying, at the very least, a presumption of revocation upon divorce or annulment.[15]

During the 1980's and 1990's, trust and estate doctrine responded to what Professor John Langbein refers to as "the nonprobate revolution"[16] that saw the rise of will substitutes. In a groundbreaking article, Professor Grayson McCouch defines will substitutes as:

> [devising instruments} that have the practical effect of a will – designating beneficiaries to receive property at the owner's death- outside the probate system. The main doctrinal obstacle to nonprobate transfers is the conventional view that all property owned by a decedent at death automatically becomes part of the probate estate subject to administration and can be disposed of only by will or intestacy. Accordingly, will substitutes ordinarily take the form of a gift, trust, contract, or other nontestamentary arrangement that technically operates as a lifetime transfer while leaving the transferor with substantially undiminished ownership rights (i.e., access to the property as well as power to revoke or amend the beneficiary designation) until death.[17]

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[14] Unif. Prob. Code § 2-508 (1982).
[15] Wilmit, Applying the Doctrine of Revocation by Divorce to Life Insurance Policies (1988).
[16] John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, Harv. L. Rev.1108, 1116 (1984).
[17] Grayson M.P. McCouch, Probate Law Reform and Nonprobate Transfers, 62 U. Mimai L. Rev. 757, 759 (2008).

The Uniform Law Commission again amended the Uniform Probate Code to reflect the heightened role of will substitutes in the nonprobate revolution. The drafters added "governing instrument" language to various provisions of the Uniform Probate Code, including to the testamentary instruments presumed to be revoked by divorce or annulment. Specifically, they added § 804(a)(2) applying the revocation upon divorce to will substitutes such as life insurance benefits.[18] The Uniform Probate Code and the states that adopted it extended the revocation upon divorce presumption to will substitutes for two reasons. First, practitioners felt it reflected traditional settlor intent that the ex-spouse should forfeit the right to inherit. Second, will substitutes such as life insurance policies became the dominant method of transferring wealth. As one scholar attests, "in view of the numbers of people involved, the life insurance beneficiary designation is the principal 'last will and testament' of [the] legal system".[19]

IV. Restrictions Set by the *Egelhoff* and *Hillman* Decisions

Concomitant with the rise in will substitutes was a trend in which life insurance plan participants neglected to amend their plan beneficiaries

[18] Revised 804 states: "Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate…the divorce or annulment of a marriage: (1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument." (UPC § 804(a)(2))

[19] Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance Law in International Perspactice* 74, 76 (1967).

(usually spouses) following divorce. Professor Susan N. Gary cites several explanations for this oversight, including "procrastination or forgetfulness".[20] Courts widely adopted that the statute intended such revocation to apply to ERISA plans such as life insurance plans. The Supreme Court rejected this interpretation in Egelhoff v. Egelhoff[21]. Egelhoff, who held an ERISA life insurance plan, died in an automobile accident, just two months after he divorced his second wife. The late Egelhoff lived in Washington, a UPC jurisdiction with a revocation upon divorce statute for probate and nonprobate assets[22]. His ex-wife, who was named as his life insurance beneficiary, argued that the UPC could not bar her from receiving her late husband's proceeds because his plan was preempted by ERISA. Given the short period of time between the couple's divorce and the plan participant's death, the Egelhoff fit as a model case for the UPC's default rule.[23] Nevertheless, the Supreme Court agreed with her because the Washington statute directly conflicted with ERISA's mandate that proceeds must be administered as prescribed by plan documents. The Court looked to its holding in Fort Halifax Packing and determined that such conflict "impose[s] precisely the burden that ERISA preemption was intended to avoid".[24]

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[20] Susan N. Gary, *Applying Revocation Upon Divorce*, 18 Quinnipiac Prob. L.J. 83, 85 (2004).
[21] *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).
[22] Wash. Rev.Code 11.07.010 (2)(a) (1994).
[23] See Wilmit, Applying the Doctrine of Revocation by Divorce to Life Insurance Policies, 73 Cornell L. Rev. 3, 653–654 (1988) ("These statutes also recognize that people have difficulty accepting their own death [and] reflect the view that the testator's failure to change his will after divorce is a delay in expressing a changed testamentary intent rather than a continued expression of that intent".)
[24] Egelhoff at 150 (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987).

Justices Breyer and Stevens dissented in Egelhoff, prioritizing ERISA's focus on the equitable doctrine of trust law over its preemption clause. Justice Breyer argued there was no direct conflict because the settlor, by adding "my wife" on the beneficiary line, only intended the beneficiary to claim the proceeds in her capacity as his wife. Justice Breyer's dissent clearly focuses on settlor intent, the fundamental inquiry of trust law. He also looked to the equitable doctrine of unjust enrichment. He pointed out that Egelhoff's ex-spouse had "already acquired, during the divorce proceeding, her fair share of the couple's community property" and that she was now receiving a windfall after the divorce.[25]

Considering the fact that trust law can look different depending on particular state law provisions, it might make sense that courts hearing ERISA cases defer to Section 514's broad preemption clause. The justification is that ERISA holds efficient and consistent administration as its core purpose. Professor Colleen E. Middill explains that deferring to ERISA advances this goal because "plan administration is…less burdensome when fiduciaries can rely with certainty…of the written document that establishes the plan and ignore conflicting state laws".[26] Garrick Pursley argues along similar lines that "[preemption] is justified as an efficiency generating tool of judicial administration that allows the parties to skip several intermediate

[25] *Id.* at 1334. (Breyer dissenting).
[26] Colleen E. Medill, The Federal Common Law of Vicarious Fiduciary Liability under ERISA, 44 U. Mich. J. L.Reforn 249, 264 (2011).

procedural steps."[27] Pursley reasons that this reduces litigation time and conserves resources.[28] Another legal realist consideration that might explain the deference awarded to ERISA is a desire to keep employee benefit litigation in federal rather than state court.[29]

Regardless of the arguably shaky ground under which lies the *Egelhoff* decision, it is clear that ERISA's broad preemption clause applies to ERISA pension and life insurance plans. In the wake of the Egelhoff decision, both federal and state courts attempted to circumvent distribution to the plan participant's ex-spouse. Additionally, the American Law Institute (ALI) attempted to proffer a statutory solution by approving an amendment to the Uniform Probate Code. Together with the Uniform Law Commission, the ALI rather ingeniously enacted UPC § 804(h)(2) statutory remedy for restitution where ERISA's preemption clause bestows plan proceeds upon one who would not so inherit under state law. The statute states as follows[30]:

> If this section or any part of this section is preempted by federal law with respect to any property, or any other benefit…a former spouse…is obligated to return that payment, item of property, or any other benefit to which that person is not entitled…to the person who would have been entitled to it were [the section] not preempted

For states that adopted § 804, it seemed like an ideal remedy to the *Egelhoff* problem. After all, restitution for unjust enrichment is a

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[27] Garrick B. Pursley, *Rationalizing Complete Preemption After Beneficial National Bank v. Anderson: a New Rule, a New Justification*, Drake L. Rev. 371, 376 (2006).
[28] *Id.* at 378.
[29] For an analysis, see *Removal to Federal Court: The Practitioner's Tightrope*, 63-Nov J. Kan. B.A. 22 (1994).
[30] Unif. Probate Code § 2-804(amended 1997), 8 U.L.A. 60 (Supp. 2007).

longstanding equitable remedy in trust law. The statute also aimed to address ERISA's administrative concerns by making the restitution a post-distribution obligation. The drafters reasoned that Section 804 would not burden plan administrators, who would just distribute plan proceeds to the listed beneficiary, in accordance with ERISA. It was then the erroneous beneficiary's obligation to distribute the proceeds to the equitable beneficiary. Simply put, Section 804 would impose neither a heightened fiduciary obligation on plan administrators nor delay their distributions. Several UPC states adopted § 804(h)(2), prohibiting an ex-spouse from retaining benefits where ERISA preempted state laws. Courts largely upheld the statute in ERISA cases.

The Supreme Court, however, restricted the remedy in Hillman v. Maretta[31]. The *Hillman* case addressed ERISA preemption indirectly as the proceeds at issue were from a decedent's life insurance party governed not by ERISA but by the Federal Employees' Group Life Insurance Act (FEGLIA), which also has a broad preemption clause.[32] The decedent had neglected to change the beneficiary of his life insurance policy after his divorce from the listed beneficiary. His daughter argued that, because Virginia law adopted UPC § 804(h)(2), the Court could find both that (1) Virginia's revocation upon divorce presumption was preempted by FEGLIA and that (2) notwithstanding the preemption, the Court can apply Virginia law and

[31] *Hilmann v. Maretta*, 569 U.S. 483 (2013).
[32] 5 U.S.C. § 8705(a).

demand Hillman's ex-wife return the life insurance proceeds to the daughter who would have received the proceeds had federal law not preempted state law. The Supreme Court rejected the daughter's proposition, holding that ERISA preempted both Virginia's revocation upon divorce presumption and its restitution provision.

The *Hillman* decision faced wide criticism from scholars.[33] Professor Thomas Gallanis comments, "[the Hillman result] frustrated the donor's intention regarding succession to his property and unjustly enriched his former spouse".[34] Notably, the Hillman decision was an 9-0 holding, with neither Justice Breyer nor Stevens echoing their *Egelhoff* dissent. This seemed to more or less erode any hope of statutory remedy for the revocation upon divorce to withstand ERISA's preemption clause. It also indicates that the scale tilts in favor of preemption over trust principles in ERISA doctrine.

VI. Constructive Trusts as a Remedy

Constructive trusts entail two steps. First, fiduciaries distribute the proceeds to the legal but unintended beneficiary (for example, the ex-spouse listed as a life insurance beneficiary). Second, that recipient transfers the proceeds to the equitable beneficiary. As Sarabeth Rayho argues, the constructive trust serves as the only method that "harmonize[s] ERISA-

[33] See John Langbein, *Destructive Federal Presumption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 Vanderbilt Law Review 1665 (2014).
[34] Thomas Gallanis, The Supreme Court Flunks Again. JOTWELL (April 14, 2014).

governed employee benefit plans with the treatment of other will substitutes.[35]

The constructive trust is arguably what § 804 (h)(2) tries to accomplish. The drafters of the UPC likely intended the constructive trust to be immediately enforceable by federal courts hearing ERISA cases. After *Hillman*, it is clear that an equitable beneficiary (one who would succeed to the nonprobate benefits were the benefit plan not preempted by ERISA) has to initiate a subsequent state court proceeding to enforce the constructive trust. This puts an added burden on both the legal and equitable beneficiaries and seems to run counter to settlor intent. However, because so many states codify the constructive trust, either through § 804 or a similar provision, the legal beneficiaries might be hesitant to contest the constructive trust. One reason for this is that constructive trust statutes can provide that an unintended beneficiary who thwarts the purpose or delays proper distribution to the equitable beneficiary might have to pay associated costs and fees.[36] Rayho points out that, on a macro level, constructive trust remedies are far less costly than the alternative: litigating lengthy appeals to codify revocation upon divorce into federal common law.[37]

VI. Federal Common Law as a Remedy

[35] Sarabeth A. Rayho, *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 (2016).
[36] The UPC for example provides that, if the unintended beneficiary does not distribute the proceeds, he/she is still obligated to pay the rightful beneficiary, including interest .UPC § 804.
[37] Rayho, supra note 153;

Estate attorneys were understandably outraged at the *Egelhoff* holding's incongruence with the widely recognized revocation upon divorce presumption. Scholarship in the wake of *Egelhoff* argued that the Supreme Court erred in attributing revocation upon divorce to the realm of *state law*. Rather, estate professors and attorneys believe the Court neglected to look to the *federal common law* for evidence of revocation upon divorce. They reasoned that, because ERISA is a federal law, Congress intended courts to apply federal common law as "statutory gap fillers" when ERISA is silent as to an issue[38].

Prior to *Egelhoff*, circuit courts had often looked to federal common law when issues arose unanticipated by ERISA. The Ninth Circuit held as such in Scott v. Gulf Oil Corporation when it found that ERISA did not preempt an employee's fraudulent contract claim[39]. The court stated that "Congress intended for the courts, borrowing from state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal common law to govern ERISA suits."[40] Following *Egelhoff*, courts continued to implement federal common law doctrine as ERISA gap fillers[41]. This eventually led to a circuit split concerning waivers

[38] Colleen E. Medill, The Federal Common Law of Vicarious Fiduciary Liability under ERISA, 44 U. Mich L.Reform 249 (2011).
[39] *Scott v. Gulf Oil Corp*., 754 F.2d 1499 (9th Cir. 1985).
[40] *Id*. at 1502.
[41] *See Metro Life Insurance v. Johnson*, 297 F.3d 558 (7th Cir. 2002).

of beneficiary rights in prenuptial agreements or QDROs[42]. The Supreme Court expanded Egelhoff's scope to such waivers in Kennedy v. Plan Administrators. In *Kennedy*, the decedent's ex-spouse had waived her interest in her husband's life insurance plan but her name still appeared on the beneficiary form. The Supreme Court upheld *Egelhoff*'s strict adherence to ERISA's plan document as the governing instrument. It awarded to the ex-spouse her husband's benefits, disregarding her waiver, which arguably fell into federal common law. Just as in *Hillman*, the Kennedy decision was an 9-0 majority.

While the *Kennedy* decision arguably thwarts ERISA's aims to align with settlor intent under trust law, it is not clear that looking to federal common law is the best spprosch for ERISA jurisdprudence. After all, applying federal common law still requires federal court to devote considerable resources to ERISA cases so it would not advance ERISA's ultimate goal of efficiency. Furthermore, no iteration of federal common law will account for the nuances contained across states' individual statutes. Indeed, because state law varies so much, even the UPC might reflect only the minority view of the revocation upon divorce.[43] Finally, allowing too many gap fillers arguably lessens ERISA's freestanding jurisprudence. If ERISA is

[42] Patricia L. Vannoy, *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 (2009).
[43] See Thomas Gallanis, *ERISA and the Law of Succession*, 65 Ohio St L.J. 185, 196 (2004).

intended to be all encompassing, then perhaps a better alternative for its shortcomings is to lobby to amend the statute.[44]

VII. The Slayer Rule's Traction in Federal Common Law

It is unclear how the Supreme Court would apply *Egelhoff* and *Kennedy* to some of the oldest rules of common law. In his *Egelhoff* dissent, Justice Breyer seemed particularly concerned about the implications for the well-known Slayer Rule[45]. The Slayer Rule is a hallmark of common law trust doctrine: an equitable principle barring an individual who kills their spouse from recovering the proceeds. Justice Breyer noted that ERISA was silent as to the Slayer Rule and expressed concern that Egelhoff decision would apply ERISA's broad preemption clause, allowing the killer to inequitably receive a plan participant's spousal benefits. In dictum, the majority dismissed these concerns and suggested that ERISA's preemption would not apply to Slayer Rule cases for two reasons. First, the court stated that slayer rule claims are "well established in the law and have a long history predating ERISA". Second, the court asserted that the Slayer Rule statutes are "more or less uniform nationwide".

These arguments did not convince Justice Breyer for obvious reasons. For one thing, the presumption of revocation upon divorce also predates ERISA. Additionally, the majority's contention that states adopt a uniform

[44] For the view that Congress should just amend ERISA to codify state succession laws of the governing instrument, see Gary, supra.
[45] *See Knives Out*. Directed by Rian Johnson. Santa Monica: Lionsgate, 2019.

approach to the slayer rule is false. Contrary to the majority's assertion, there exists wide variations among state statutes. For example, some states follow the Third Restatement of Property[46] and allow killers to retain their equitable share of what they owned in joint tenancies with their spouses. The justification goes: the killer retains the right to sever joint tenancy and thus retains the fractional interest in jointly held property. On the other hand, some states hold that the killer forfeits that right and that all jointly held property passes to the spouse's estate[47]. Another substantive difference in application of the Slayer Rule is the weight given to murder-suicides.

Nonetheless, there is ample case law holding that ERISA does not preempt state law codification of the Slayer Rule because federal common law incorporates the rule.[48] Importantly, these cases did not base their decisions on whether the Slayer Rule statute was uniform across all states. Rather they held that the Slayer Rule had traction in federal common law irrespective of state law. This was readily apparent in the Ohio case of Ahmed v. Ahmed where the court applied the federal common law's Slayer Rule, ordering the killer to pay his spouse's estate rather than the Ohio version which would have treated the killer as predeceasing his spouse.[49] Such variations among state laws bolsters the conclusion that the real

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[46] Restatement (Third) of Property: Wills & Other Donative Transfers § 8.4 (2003) ("Homicide – The Slayer Rule")
[47] See *In re Estate of Mahoney*, 220 A.2d 475, 476 (Vt. 1966).
[48] *See Conn. Gen. Life Ins. Co. v. Riner*, 351 F. Supp. 2d 492, 497 (W.D. Va. 2005); *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris*, 217 F. Supp. 2d 759, 761–62 (E.D. Tex. 2002); *Mack v. Estate of Mack*, 206 P.3d 98, 110–11 (Nev. 2009)
[49] *Ahmed v. Ahmed*, 817 N.E. 2d 424 (Ohio App. 2004).

determinant in allowing application of common law in ERISA cases is whether the doctrine exists in federal common law. In *Kennedy*, the decedent's estate argued that the majority's holding could have undesirable consequences for the Slayer Rule. Once again, the Supreme Court did not take the bait. It stated curtly, "the slayer rule is not before us and we do not address it" before citing to *Egelhoff*.[50] This might serve as further evidence of the Supreme Court's implicit recognition of the Slayer Rule's place in federal common law.

VIII. Recommendations for Stakeholders

While ERISA's broad preemption clause is widely accepted, this paper attempts to shed light on some of that doctrine's shortcomings and gray areas, with the hope that key stakeholders will improve their practices. The implications of *Egelhoff* and *Hillman* are important for trust and estate attorneys, policymakers, and federal courts. Trust and estate attorneys should make sure to discuss with their clients the implications of designating beneficiaries in a will substitute. Specifically, the attorney should be certain that, if their clients elect to designate their spouses as beneficiaries, they should inform their clients about the need to update these will substitutes in the event that the marriage ends. Law professors should recognize the intersections of ERISA, trust & estate, probate, contract, and insurance law

[50] *Kennedy*, 555 U.S. 285 n. 14 (2009).

and bear these in mind when preparing students for legal practice who will be affected by the interplay among these different areas of law.

Policymakers should contextualize the *Egelhoff* and *Hillman* holdings and think through legislative solutions. State lawmakers should consider expediting the constructive trust procedures to alleviate the burden on equitable beneficiaries and successfully carry out settlor intent. Federal lobbyists and Congressional representatives also have the opportunity to enact meaningful change by amending ERISA to expressly apply relevant state law to equitable principles such as the revocation upon divorce doctrine. This will require careful drafting so as not to equate the deference to state law as an incorporation of federal common law as might be appropriate for the equitable Slayer Rule.

Lower courts applying ERISA should prioritize preemption but also recognize the latitude they have for applying equitable principles of trust law that can be found in federal common law. The Slayer Rule, for instance, appears to be the rare example of a valid ERISA gap filler. Finally, the Supreme Court might want to revisit its *Egelhoff* decision. In recent years, the Supreme Court has allocated a significant portion of their docket to hearing ERISA cases. Indeed, because a major goal of the Roberts court seems to be revisiting precedent that is subject to criticism or confusion[51], it seems likely that the Court might grant certiorari and clarify the doctrine.

[51] See Lee Epstein, *The Decision to Depart (or Not) from Constitutional Precedent: an Empirical Study of the Roberts Court*, 90 NYU L. Rev. 4, 1115 (2008).

Given the uncertainty of the Slayer Rule's status, the Court might consider codifying the *Egelhoff* dictum that the rule has a basis in federal common law.