

NOTE

DIVORCEES TURN ABOUT IN THEIR GRAVES AS EX-SPOUSES CASH IN: CODIFIED CONSTRUCTIVE TRUSTS ENSURE AN EQUITABLE RESULT REGARDING ERISA-GOVERNED EMPLOYEE BENEFIT PLANS

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A revocation-by-divorce statute essentially nullifies a devise in a divorced decedent's will when the devise bequeaths property to the decedent's ex-spouse and the will was executed during their marriage. Until recently, state revocation-by-divorce statutes unquestionably applied not only to wills but also to will substitutes, including ERISA-governed employee benefit plans. In 2001, the Supreme Court held in Egelhoff v. Egelhoff ex rel. Breiner that ERISA preempts traditional state revocation-by-divorce statutes as applied to ERISA-governed employee benefit plans. In the wake of the Egelhoff decision, plan administrators may automatically pay proceeds to the listed beneficiary, even an ex-spouse, regardless of the existence of a traditional state revocation-by-divorce statute. One solution to this preemption is the use of a constructive trust. Uniform Probate Code section 2-804(h)(2) imposes a constructive trust against an ex-spouse when the ex-spouse receives proceeds from an employee benefit plan because ERISA preempts a state revocation-by-divorce statute. The constructive trust is in favor of those persons who would take if the corresponding state revocation-by-divorce law were not preempted. This Note argues that state statutory constructive trusts adopting Uniform Probate Code section 2-804(h)(2) can resurrect the revocation-by-divorce doctrine as applied to ERISA-governed employee benefit plans. In doing so, constructive trusts would achieve an equitable result consistent with the law's treatment of other will substitutes as well as wills themselves. The Note begins by discussing the revocation-by-divorce doctrine and ERISA jurisprudence and explains how ERISA intertwines with traditional revocation-by-divorce statutes. The Note then reviews currently suggested methods to harmonize ERISA-governed employee benefit plans with the treatment of other will

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substitutes and contends that those proposals are inadequate because they undermine ERISA's goals. The Note concludes that state constructive trust statutes will avoid ERISA preemption while also furthering ERISA's goals.

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INTRODUCTION

When Harry met Sally, they fell in love and were married soon thereafter. Because he loved her, Harry named Sally as the primary beneficiary under his will, his life insurance policy, and his employee pension plan. After several years, however, the love was lost: Harry and Sally divorced, based in part on Sally's extramarital affair with Russell. In the divorce proceedings, both Harry and Sally individually acquired their respective shares of marital property. Dividing the assets, the divorce court saw fit to award Harry his own life insurance policy and employee pension plan. Harry succumbed to heart failure shortly after the divorce, leaving several heirs at his death, including his brothers and sisters. As it was, Harry died before getting around to changing the beneficiary designations on his insurance policy and employee pension

plan, so both still listed Sally as the primary beneficiary at the time of Harry's death. In the end, it appears Sally receives not only her fair share of property from the divorce but also some assets the divorce court saw fit to award Harry. Sally and her new husband, Russell, deposit Harry's assets in their joint bank account, and Harry's heirs walk away empty-handed.

Given the high divorce rate in the United States,¹ decedents frequently pass away leaving wills and other documents designating an ex-spouse as a beneficiary of property.² Married couples typically provide that their spouses are the primary beneficiaries in wills and other instruments covering personal property. When a couple obtains a divorce, it is in the interest of each divorcee to update his or her documents accordingly. Unfortunately, some divorcees neglect to change beneficiary designations before it is too late. These individuals pass away with wills and other instruments still listing their former spouses as beneficiaries. In these circumstances, courts have been forced to decide whether to enforce beneficiary designations.

Applying what is known as the revocation-by-divorce doctrine, courts have long held that when a divorced decedent's will was executed during his marriage and the will devises property to his ex-spouse, the devise is essentially nullified.³ Unless the testator's actions after his divorce manifested a clear intent to devise property to his ex-spouse, the ex-spouse will not receive the devised property from the decedent's estate.⁴ Wills, however, govern only the *probate* estate—"property owned by the decedent at death and property acquired by the decedent's estate at or after the decedent's death."⁵ In addition to probate property, an increasing number of individuals distribute considerable *nonprobate* assets at death through the use of will substitutes⁶ such as life

1. Provisional data from 2006 show a divorce rate of 3.6 per 1000 population. Nat'l Ctr. for Health Stat., Ctrs. for Disease Control & Prevention, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2006*, NAT'L VITAL STAT. REP., Aug. 28, 2007, at 1, tbl. A, available at http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_20.pdf (collating data from forty-four reporting states and the District of Columbia).

2. See, e.g., *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (involving a decedent who failed to change his beneficiary designation from his ex-wife to his children prior to his death); *Metro. Life Ins. Co. ex rel. GM Life & Disability Benefits Program*, 892 F. Supp. 671 (W.D. Pa. 1995) (involving a decedent who was married to his surviving spouse for over thirty years but failed to change the beneficiary designation from his ex-wife to his widow); *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003) (involving a decedent who failed to change his beneficiary designation from his ex-wife to his widow).

3. See *Vasconi v. Guardian Life Ins. Co. of Am.*, 590 A.2d 1161, 1164 (N.J. 1991).

4. *Richards v. Liles*, 435 A.2d 379, 382 (D.C. 1981) ("[I]t is so rare and so unusual for a testator . . . to desire or intend that his divorced spouse should benefit further under his will, that it is not improper or unreasonable to require that such a testator make that extraordinary desire and intention manifest by a formal republication of his will or by the execution of a new will." (citing *Caswell v. Kent*, 186 A.2d 581, 582-83 (Me. 1962))).

5. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.1(a) (1999).

6. Will "substitutes" are so named because "[t]hey function to pass property at death without being subject to the statutory formalities required for executing a will." LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 8-1 (4th ed. 2006).

The Restatement defines will substitutes as follows:

insurance policies and employee pension plans governed by contract terms listing beneficiaries.⁷ In 1990, recognizing the importance of will substitutes, section 2-804 of the Uniform Probate Code (“UPC”) extended the revocation-by-divorce doctrine to cover both wills and will substitutes.⁸

Until recently, state revocation-by-divorce statutes like UPC section 2-804 unquestionably applied to all will substitutes. However, in 2001, the Supreme Court held in *Egelhoff v. Egelhoff ex rel. Breiner* that the Employee Retirement Income Security Act (“ERISA”) preempts traditional state revocation-by-divorce statutes as applied to ERISA-governed employee benefit plans.⁹ The Court’s ruling created a rift between the treatment of employee benefit plan beneficiary designations and the treatment of beneficiary designations in wills and all other will substitutes. In the wake of the *Egelhoff* decision, plan administrators¹⁰ may automatically pay proceeds to the listed beneficiary, even an ex-spouse, regardless of the existence of a traditional state revocation-by-divorce statute. Revocation-by-divorce statutes remain applicable to wills and will substitutes other than ERISA-governed employee benefit

A will substitute is an arrangement respecting property or contract rights that is established during the donor’s life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor’s death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1(a) (2003).

7. See Lawrence W. Waggoner, *The Multiple Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 226 (1991).

8. Waggoner, *supra* note 7, at 228. The relevant portion of UPC section 2-804 reads as follows:

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

UNIF. PROBATE CODE § 2-804(b) (amended 1997), 8 U.L.A. 60 (Supp. 2007).

9. 532 U.S. 141, 143 (2001).

10. ERISA defines “administrator” as follows:

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16)(A) (2000).

ERISA defines “plan sponsor” as follows:

(i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

Id. § 1002(16)(B).

plans.¹¹ Given the policy rationale behind the revocation-by-divorce doctrine—that divorcees do not intend for ex-spouses to receive additional benefits at the divorcees' deaths, especially because any obligation to the ex-spouse was satisfied in the divorce proceeding—the Court's decision may enable unjust enrichment of the ex-spouse through receipt of proceeds from the decedent's employee benefit plans.¹²

Courts have used the longstanding constructive trust doctrine to prevent similar kinds of unjust enrichment.¹³ The doctrine affords courts the opportunity to give effect to the law that applies to the circumstances before them “but use equity to ensure that the property goes where equity directs.”¹⁴ The Restatement (Third) of Trusts explains:

A constructive trust is a relationship with respect to property usually subjecting the person by whom the title is held to an equitable duty to convey the property to another on the ground that the title holder's acquisition or retention of the property is wrongful and that unjust enrichment would occur if the title holder were permitted to retain the property.¹⁵

Traditionally, courts imposed constructive trusts in situations involving mistake, duress, undue influence, fraud, or breach of a confidential or fiduciary relationship.¹⁶ Nonetheless, over time these requirements have coalesced into the general concept of “unjust enrichment.”¹⁷ Today “there are numerous situations in which a constructive trust is imposed in the absence of fraud, as for example in the case of . . . an innocent donee of property in which another has an equitable interest.”¹⁸ Courts can use constructive trusts in a variety of situations, and judges have used the doctrine in the probate context.¹⁹ In fact,

11. See UNIF. PROBATE CODE § 2-804(b) (amended 1997), 8 U.L.A. 60.

12. Susan N. Gary, *Applying Revocation-On-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83, 120 (2004).

13. *Id.*

14. *Id.*

15. RESTATEMENT (THIRD) OF TRUSTS § 1, cmt. e (2003); see also RESTATEMENT (FIRST) OF RESTITUTION § 160, cmt. d (1937) (“In most cases where a constructive trust is imposed the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant . . .”).

16. RESTATEMENT (FIRST) OF RESTITUTION §§ 166, 168.

17. *Id.* § 160, cmt. d; see also Kelvin H. Dickinson, *Divorce and Life Insurance: Post Mortem Remedies for Breach of a Duty to Maintain a Policy for a Designated Beneficiary*, 61 MO. L. REV. 533, 569 n.119 (1996) (explaining that “[t]his formulation has been widely adopted” and providing a list of case law discussing the formulation).

18. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 462 (4th ed. 1989); see also *Proctor v. Sagamore Big Game Club*, 265 F.2d 196, 202 (3d Cir. 1959) (“[A] constructive trust may arise against one who has been unjustly enriched even though he has been guilty of no act of wrongdoing.”); *Smithberg v. Ill. Mun. Ret. Fund*, 735 N.E.2d 560, 565 (Ill. 2000) (“Although some form of wrongdoing is generally required for the imposition of a constructive trust, wrongdoing is not always a necessary element.” (citations omitted)).

19. See *In re Estate of Tolin*, 622 So. 2d 988 (Fla. 1993) (holding that although the testator ineffectively revoked a codicil to a will, a constructive trust should be imposed to effect the same result as if the testator indeed legitimately revoked the codicil).

“the most common use of constructive trust is to restore ownership of property in disputes within families.”²⁰

The constructive trust doctrine is historically a judicial remedy.²¹ Nevertheless, the drafters of the current UPC codified the constructive trust doctrine to apply if its revocation-by-divorce provision were to be preempted by federal law.²² Section 2-804(h)(2) of the UPC provides as follows:

If . . . any part of this section [2-804] is preempted by federal law with respect to . . . any . . . benefit covered by this section, a former spouse . . . who, not for value, received a payment . . . to which that person is not entitled under this section is obligated to return that payment . . . to the person who would have been entitled to it were this section or part of this section not preempted.²³

If an ex-spouse receives proceeds from an employee benefit plan because ERISA preempts a state revocation-by-divorce statute such as UPC section 2-804(b), section 2-804(h)(2) mandates that a constructive trust be imposed against the ex-spouse in favor of those persons who would take if the corresponding state law were not preempted.²⁴ Several states have adopted statutes similar or identical to section 2-804(h)(2).²⁵ As yet, no one has tested any of these statutes in the courts.²⁶

This Note defends the thesis that state statutory constructive trusts can resurrect the revocation-by-divorce doctrine as applied to ERISA-governed employee benefit plans in order to reach an equitable result consistent with the law’s treatment of other will substitutes as well as wills themselves. Part I discusses the revocation-by-divorce doctrine and ERISA jurisprudence and explains how ERISA intertwines with traditional revocation-by-divorce statutes. Part II reviews currently suggested methods to harmonize ERISA-governed employee benefit plans with the treatment of other will substitutes

20. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 594 (3d ed. 2002). Professor Laycock cites two cases for this assertion: *Herston v. Austin*, 603 So. 2d 976 (Ala. 1992), where the court imposed a constructive trust against a son in favor of his mother, and *Baizley v. Baizley*, 734 A.2d 1117 (Me. 1999), where the court imposed a constructive trust against a grandson forcing him to share property with the decedent’s other grandchildren.

21. RESTATEMENT (THIRD) OF TRUSTS § 1, cmt. e (2003) (“A constructive trust is . . . the result of judicial intervention and is remedial in character.”).

22. UNIF. PROBATE CODE § 2-804(h)(2) (amended 1997), 8 U.L.A. 61 (Supp. 2007).

23. *Id.*

24. *Id.*

25. For a state statute similar to UPC section 2-804(h)(2), see ARIZ. REV. STAT. ANN. § 14-2804(H) (2005), which imposes a constructive trust but does not expressly reference the possibility of federal preemption. For examples of state statutes identical to UPC section 2-804(h)(2), see COLO. REV. STAT. § 15-11-804(8)(b) (2006); MICH. COMP. LAWS ANN. § 700.2809(2) (West 2002); N.M. STAT. § 45-2-804(I) (1995); S.D. CODIFIED LAWS § 29A-2-804(h)(2) (2004); and UTAH CODE ANN. § 75-2-804(8)(b) (Supp. 2006). *See also* VA. CODE ANN. § 20-111.1(D) (Supp. 2007) (using nearly identical language as applied to “death benefits”). For a state statute drafted to avoid the issue altogether, see MONT. CODE ANN. § 72-2-814(8)(b) (2005), which imposes a constructive trust in circumstances pertaining to preemption by any federal law other than ERISA.

26. Gary, *supra* note 12, at 124. A recent Westlaw Keycite of state statutes that adopt UPC section 2-804 confirms this assertion.

and contends that those proposals inadequately address the issue because they undermine ERISA's goals, including nationwide uniformity and protection of plan participants. Finally, Part III argues that courts can successfully apply statutory constructive trusts to ERISA-governed employee benefit plans in order to effectuate close to the same result as traditional revocation-by-divorce statutes, because state constructive trust statutes will likely avoid ERISA preemption. Part III concludes that use of the constructive trust doctrine is a more desirable solution than other suggested methods because it ensures the achievement of ERISA's goals regarding efficient plan administration while also honoring the principle and intent behind the revocation-by-divorce doctrine.²⁷

I. TRADITIONAL REVOCATION-BY-DIVORCE STATUTES AND ERISA

This Part explores the complex law surrounding will substitutes, the revocation-by-divorce doctrine, and ERISA. Section I.A explains the development of the revocation-by-divorce doctrine. Section I.B describes the goals of ERISA and how revocation-by-divorce statutes intertwine with ERISA's provisions.

A. *The Revocation-by-Divorce Doctrine: Protecting Divorced Decedents' Presumed Intent*

This Section provides background on the revocation-by-divorce doctrine. The revocation-by-divorce doctrine developed as an expression of presumed testamentary intent and assumes that most divorced testators would prefer that an ex-spouse be denied property devised under a will executed before the couple divorced.²⁸ The rule "presumes that in most instances, if a devise made to an ex-spouse is left unchanged, it is because the testator either forgot to revoke the devise, or did not get around to doing so before his or her death."²⁹

27. This Note will not address the issues arising when an ex-spouse purportedly "waived" rights to a pension plan under a marital property settlement agreement when divorcing the deceased or discuss the merits of the "waiver" doctrine. *See, e.g.,* Clift v. Clift, 210 F.3d 268, 271 (5th Cir. 2000) (stating that under federal common law, a waiver is valid if, "upon reading the language in the divorce decree, a reasonable person would have understood that she was waiving her beneficiary interest"); *see also* George A. Norwood, *Who Is Entitled to Receive a Deceased Participant's ERISA Retirement Plan Benefits—an Ex-Spouse or Current Spouse? The Federal Circuits Have an Irreconcilable Conflict*, 33 GONZ. L. REV. 61 (1997) (exploring various approaches taken by courts and concluding plan administrators must distribute to the beneficiary listed on the plan documents instead of investigating possible "waivers" contained in agreements executed upon divorce of a plan participant).

This Note addresses solely the circumstances when an individual is awarded his own ERISA-governed plan in a property settlement agreement executed upon divorce (that is, the parties do not use a qualified domestic relations order as contemplated by ERISA, 29 U.S.C. § 1056 (2000)), but the individual fails to change the beneficiary designation from his ex-spouse after the divorce decree is entered. Thus when the individual dies, his ex-spouse remains the listed beneficiary of the plan proceeds.

28. Gary, *supra* note 12, at 84.

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

If the testator does wish to devise property to his ex-spouse, he must go through an additional step manifesting such intent, for example, republishing his will or executing a new will.³⁰

Many states have codified the revocation-by-divorce doctrine in some form.³¹ Instead of revoking the entire will, these statutes typically invalidate only the devise favoring the ex-spouse.³² Most state revocation-by-divorce statutes regarding wills are based on the former UPC section 2-508,³³ which cancels any provision for the ex-spouse contained in the decedent's will by treating the ex-spouse as if she predeceased the testator and giving effect to any alternative provisions in the will.³⁴ If no alternate provisions exist, then the property is disposed of as if the decedent died intestate.³⁵

Many individuals use will substitutes to manage their property distribution at death, which led some academics to call for expansion of the revocation-by-divorce doctrine to cover will substitutes.³⁶ In response to this "nonprobate revolution," the drafters of the current Uniform Probate Code promulgated UPC section 2-804, applying the revocation-by-divorce doctrine to all will substitutes.³⁷ The drafters of the current UPC were clear that they wished to

30. Gary, *supra* note 12, at 84. Under the UPC, an ex-spouse can rebut the presumption of the revocation-by-divorce doctrine if provided by "the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals" before or after the divorce. UNIF. PROBATE CODE § 2-804(b) (amended 1997), 8 U.L.A. 60 (Supp. 2007).

31. *E.g.*, ARK. CODE ANN. § 28-25-109(b) (2004); CAL. PROB. CODE § 6122 (West Supp. 2007); FLA. STAT. § 732.507(2) (2006); GA. CODE ANN. § 53-4-49 (1997); 760 ILL. COMP. STAT. 35/1 (2006); IND. CODE § 29-1-5-8 (1998); IOWA CODE ANN. § 633.271 (West Supp. 2006); KAN. STAT. ANN. § 59-610 (2005); LA. CIV. CODE ANN. art. 1608 (2000); MINN. STAT. ANN. § 501B.90 (West 2002); MO. REV. STAT. § 474.420 (2000); OKLA. STAT. tit. 84, § 114 (2001); WIS. STAT. ANN. § 854.15 (West 2001).

32. *E.g.*, W. VA. CODE ANN. § 41-1-6 (LexisNexis 2004).

33. Gary, *supra* note 12, at 85. There is slight variation among the statutes. For statutes that do not indicate that the will should be interpreted as if the ex-spouse predeceased the testator, see, for example, ARK. CODE ANN. § 28-25-109(b); IND. CODE § 29-1-5-8; IOWA CODE ANN. § 633.271; KAN. STAT. ANN. § 59-610; LA. CIV. CODE ANN. art. 1608; N.C. GEN. STAT. § 31-5.4 (2005); PA. CONST. STAT. ANN. § 6111.1 (West 2005); and WIS. STAT. ANN. § 767.266. For statutes that limit revocation to bequests, powers of appointment, and appointment as fiduciary, see, for example, CONN. GEN. STAT. § 45A-257c (2007); DEL. CODE ANN. tit. 12, § 209 (2001); IDAHO CODE ANN. § 15-2-508 (2001); NEB. REV. STAT. § 30-2333 (1995); N.H. REV. STAT. ANN. § 551:13(II) (2007); N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney Supp. 2007); OHIO REV. CODE ANN. § 2107.33 (LexisNexis 2002); TENN. CODE ANN. § 32-1-202 (2001); W. VA. CODE ANN. § 41-1-6 (LexisNexis 2004); and WYO. STAT. ANN. § 2-6-118 (2007).

34. UNIF. PROBATE CODE § 2-508 (amended 1997), 8 U.L.A. 122 (1983).

35. *See id.*

36. *E.g.*, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1136-37 (1984) ("The subsidiary rules [of wills] 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.").

37. Waggoner, *supra* note 7, at 228. The relevant portion of UPC section 2-804 reads as follows:

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:

unify the rules applicable to wills and will substitutes.³⁸ Hence, unless otherwise provided in a “governing instrument, a court order, or a contract relating to the division of the marital estate,”³⁹ the current UPC revokes any provisions in the decedent’s will in favor of the ex-spouse as well as any similar provisions in the decedent’s retirement plan, life insurance policy, or other will substitute.⁴⁰ Like the rationale for applying the revocation-by-divorce doctrine to wills, the UPC provision assumes a decedent would not want his nonprobate property to go to an ex-spouse.⁴¹ UPC section 2-804 was “the most comprehensive measure of its kind” at the time.⁴²

Today, a growing number of states extend the revocation-by-divorce doctrine to cover will substitutes.⁴³ The Restatement (Third) of Property also applies revocation-by-divorce principles to will substitutes.⁴⁴ Some state statutes extending the revocation-by-divorce doctrine to include instruments other than wills even predate the current UPC and represent a “patchwork” of provisions that treat a decedent’s property inconsistently from state to state.⁴⁵ However, most state revocation-by-divorce statutes that extend to will substitutes are similar or identical to the current UPC.⁴⁶

(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

UNIF. PROBATE CODE § 2-804(b) (amended 1997), 8 U.L.A. 60 (Supp. 2007).

38. UNIF. PROBATE CODE § 2-804 cmt.

39. *Id.* § 2-804(b).

40. Waggoner, *supra* note 7, at 228.

41. Gary, *supra* note 12, at 84.

42. Waggoner, *supra* note 7, at 227.

43. Gary, *supra* note 12, at 84.

44. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. p (1999).

45. Gary, *supra* note 12, at 100–01.

46. For statutes similar to the UPC, see, for example, 760 ILL. COMP. STAT. 35/1 (2006); MONT. CODE ANN. § 72-2-814 (2005) (extending revocation-by-divorce law to all will substitutes, except when preempted by ERISA); N.J. STAT. ANN. § 3B:3-14 (West 1983 & Supp. 2007); N.D. CENT. CODE § 30.1-10-04 (1996 & Supp. 2005) (extending revocation-by-divorce law to all will substitutes, except when preempted by ERISA); OHIO REV. CODE ANN. § 2107.33 (LexisNexis 2002); and WASH. REV. CODE § 11.07.010 (2006) (amended 2007). For statutes identical to the UPC, see, for example, ALASKA STAT. § 13.12.804 (2006); ARIZ. REV. STAT. ANN. § 14-2804 (2005); COLO. REV. STAT. § 15-11-804(2)(a) (2006); HAW. REV. STAT. § 560:2-804 (Supp. 2005); MICH. COMP. LAWS ANN. §§ 700.2807–09 (West 2002); N.M. STAT. § 45-2-804 (1995); S.D. CODIFIED LAWS § 29A-2-804 (2004); and UTAH CODE ANN. § 75-2-804 (1993 & Supp. 2006).

B. ERISA: Protecting Plan Participants' Interests

ERISA governs employee benefit plans,⁴⁷ which are a form of will substitute. Thus ERISA may govern employer-provided will substitutes such as pension plans, annuities, and insurance benefits.⁴⁸ These plans allow a participant to choose a beneficiary to receive some or all of the participant's vested benefit upon the participant's death.⁴⁹ They usually "allow a participant to name a primary beneficiary and a contingent beneficiary (in case the primary beneficiary dies before the participant). Moreover, they allow the participant to designate new beneficiaries at any time, with the new beneficiary designation replacing the previous designation on file with the plan administrator."⁵⁰

The goal of ERISA is to protect the interests of employees and their beneficiaries,⁵¹ in part by striving to ensure ease of plan administration.⁵² By enacting ERISA, Congress intended to create a national, uniform administration of employee benefit plans.⁵³ In order to develop such a uniform administration system, ERISA broadly preempts any state laws insofar as they "relate to" an ERISA-governed employee benefit plan.⁵⁴ The broad preemption provision manifests Congress's intent to have federal law, not state law, govern employee benefit plans.⁵⁵

47. 29 U.S.C. § 1003 (2000). ERISA defines "employee pension benefit plan" as follows:

[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Id. § 1002(2)(A). The U.S. Department of Labor estimates that ERISA plans "cover approximately 150 million workers and their dependents and include assets of approximately \$4.8 trillion." EMPLOYEE BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, EBSA ACHIEVES TOTAL MONETARY RESULTS EXCEEDING \$1.4 BILLION (2007), <http://www.dol.gov/ebsa/newsroom/fsFY06Results.html> (last visited Aug. 21, 2007).

48. See generally JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW (4th ed. 2006).

49. Norwood, *supra* note 27, at 62.

50. *Id.*

51. See LANGBEIN ET AL., *supra* note 48, at 77–87.

52. See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149–50 (2001) (noting that burdening plan administrators creates "burdens ultimately borne by the beneficiaries").

53. See *id.* at 148.

54. 29 U.S.C. § 1144(a) (2000) (explaining that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by the statute]").

55. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent) ("[T]he preemption of the field, . . . round[s] out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . .").

Although most of the state statutes extending the revocation-by-divorce doctrine to nonprobate property are worded broadly enough to cover beneficiary designations for ERISA-governed assets, such statutes do not exclusively target such assets. Nevertheless, the Supreme Court held that these statutes are unenforceable against ERISA plans.⁵⁶ ERISA does not specifically address the revocation-by-divorce doctrine. State statutes cannot revoke beneficiary designations of employee benefit plans covered by ERISA because such state statutes are preempted under ERISA's broad "relate to" preemption provision.⁵⁷ Therefore, a court cannot directly apply traditional revocation-by-divorce statutes to ERISA-governed employee benefit plans.⁵⁸ The *Egelhoff* majority reasoned there would be too much of a burden on plan administrators if they could not rely on the plan documents to determine the beneficiary entitled to the plan proceeds and instead were forced to learn the laws of all fifty states on the subject.⁵⁹ To allow otherwise, the Court asserted, would interfere with ERISA's goal of efficient, nationally uniform plan administration.⁶⁰

Egelhoff leaves states uncertain how to construct statutes that "facilitate the fair and orderly distribution of property at death and effectuate a decedent's intent to the extent possible."⁶¹ *Egelhoff* presents a potential barrier to the unification of the state law of probate and nonprobate transfers, threatening those state laws—already endorsed in the Restatements and in the current UPC—that treat ERISA-governed beneficiary designation documents the same as all other will substitutes.⁶² Ultimately, "[t]he courts . . . seem to be caught between the uniformity goal of preemption and the desire to reach just results, which in the field of donative transfers involves honoring the donor's intentions."⁶³

II. CURRENTLY SUGGESTED METHODS DO NOT ADEQUATELY HARMONIZE ERISA-GOVERNED EMPLOYEE BENEFIT PLANS WITH THE TREATMENT OF OTHER WILL SUBSTITUTES

In response to *Egelhoff*, courts and commentators tried to develop various methods to remain true to its holding yet also honor traditional revocation-by-divorce principles as applied to ERISA-governed employee benefit plans. This Part concludes such attempts have not been successful. Section II.A argues that although some courts have turned to federal common law regarding the revocation-by-divorce doctrine, judges have not uniformly applied it, thus frustrating ERISA's central concerns regarding ease of plan administration.

56. See Gary, *supra* note 12, at 109.

57. *Egelhoff*, 532 U.S. at 141.

58. See *id.*

59. See *id.* at 148–49.

60. See *id.* at 149.

61. Gary, *supra* note 12, at 113.

62. See T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 189 (2004).

63. Lebolt, *supra* note 29, at 31.

Section II.B explores the possibility of congressional amendment of ERISA, concluding that Congress is not receptive to ERISA reform efforts. Finally, Section II.C examines the possibility that employers themselves could change the plan documents but argues that the likelihood of successfully altering the habits and forms of so many U.S. employers is extremely low.

A. *Federal Common Law: Reincarnating State
Law Thwarts ERISA's Goals*

After *Egelhoff* ruled that state revocation-by-divorce statutes did not apply to ERISA-governed employee benefit plans, federal courts were left with little guidance as to what law to apply instead.⁶⁴ Some courts chose to fill the gap by relying on federal common law.⁶⁵ This Section argues, however, that federal common law has become an unworkable solution, because the lack of nationwide uniformity in its application is in direct conflict with ERISA's goals and the *Egelhoff* ruling.

Federal common law is a purportedly uniform body of law applied by federal courts in matters of uniquely federal concern.⁶⁶ Courts using federal common law assert, in conformity with the *Egelhoff* reasoning, that "applying federal common law promotes national uniformity" in the administration of ERISA-governed employee benefit plans.⁶⁷ In contrast, applying individual state revocation-by-divorce statutes requires plan administrators to be familiar with multiple state laws, thus interfering with ERISA's goal of nationally uniform plan administration.⁶⁸

In general, however, the application of federal common law presents problems. First, as the *Egelhoff* Court itself noted, family law matters are traditionally left to the states and are therefore inappropriate subjects for federal law.⁶⁹ Normally, "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States."⁷⁰ Thus the creation of federal common law on this subject is fundamentally at odds with a basic role of the states, although *Egelhoff* did clarify

64. As stated in *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), because *Egelhoff* held that state revocation-by-divorce statutes are preempted by ERISA, "[t]he more difficult issue is whether, having established that the state law is preempted, the federal law governing the resolution of this and similar cases may be reasonably drawn from the text of ERISA itself, or must instead be developed as a matter of federal common law." *Id.* at 870.

65. See, e.g., *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558 (7th Cir. 2002) (applying federal common law regarding "substantial compliance" in executing a change of beneficiary form); *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003) (applying federal common law regarding an ex-spouse's "waiver" of interest in a decedent's ERISA-governed employee benefit plan).

66. *Barany v. Buller*, 670 F.2d 726, 731 (7th Cir. 1982) (noting federal common law is created when a federal rule of decision is "necessary to protect uniquely federal interests" or when "Congress has given the courts the power to develop substantive law").

67. *Keen*, 121 S.W.3d at 726.

68. *Id.* at 725–26 (citing *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148–49 (2001)).

69. *Egelhoff*, 532 U.S. at 151.

70. *In re Burrus*, 136 U.S. 586, 593–94 (1890).

that ERISA should preempt conflicting state family law.⁷¹ Second, federal common law should be created sparingly.⁷² “There long has been a strong presumption against the federal courts fashioning common law to decide cases,” because the Rules of Decision Act in the Judiciary Act of 1789 “seems to deny the existence of federal common law” and “commands that in the absence of positive federal law, federal courts must apply state law.”⁷³ But federal common law has developed nevertheless for issues relating to distinctive federal interests for which the “interstate or international nature of the controversy makes it inappropriate for state law to control.”⁷⁴

While courts have tried to use federal common law to achieve the same effect as the traditional revocation-by-divorce doctrine,⁷⁵ they have failed to employ it consistently.⁷⁶ As one court noted, “to ensure uniformity in ERISA jurisprudence . . . federal common law should be consistent.”⁷⁷ If federal common law were consistent regarding revocation-by-divorce principles, *Egelhoff*'s ease-of-administration concerns would be alleviated.⁷⁸ Yet federal common law on this subject is not uniform, because different states and circuits have their own versions of federal common law.⁷⁹ For this reason, ERISA plan administrators are “faced with the daunting task of interpreting federal common law, state case law, and even state statutes when determining the proper beneficiary” of an ERISA-governed employee benefit plan after the divorce and death of the plan participant.⁸⁰ In the absence of congressional guidance, a federal court can look to the law of the state in which it sits in

71. See *Egelhoff*, 532 U.S. at 151; see also *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985) (“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.”).

72. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994).

73. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1, at 354 (4th ed. 2003).

74. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

75. For example, courts have developed federal common law with respect to waiver. See, e.g., *Clift v. Clift*, 210 F.3d 268, 271–72 (5th Cir. 2000). For a brief discussion of various courts' treatment of waiver, see Suzanne Soliman, Note, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 STETSON L. REV. 397, 408 (2007). Soliman points out that “several states have taken the position that a property settlement agreement incorporated into a dissolution decree may revoke a beneficiary's claim to any policy or benefit held in an ex-spouse's name.” *Id.* She notes, however, that “most jurisdictions have established that a release in a property settlement agreement is not sufficient to override specific language designating an ex-spouse as a beneficiary.” *Id.*

76. Gary, *supra* note 12, at 119.

77. *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 567 (7th Cir. 2002).

78. See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149–50 (2001).

79. See *Keen v. Weaver*, 121 S.W.3d 721, 723 (Tex. 2003) (acknowledging a court split in Texas regarding an ex-spouse's “waiver” of interest in a decedent's ERISA-governed plan: one court of appeals adopted a state statute as federal common law and the other appellate court refused to incorporate state law as federal common law); see also *Norwood*, *supra* note 27, at 81–82 (explaining irreconcilable differences in decisions across circuits and among states with respect to the federal common law regarding an ex-spouse's “waiver” of interest in an ERISA-governed plan).

80. *Norwood*, *supra* note 27, at 81.

order to form federal common law governing ERISA,⁸¹ so long as it does not frustrate specific policy objectives of the federal legislation.⁸² Yet while one of ERISA's goals is efficiency of administration, and while *Egelhoff* expressly notes that requiring an employer to learn the laws of all fifty states is contrary to that goal,⁸³ some courts, in cases where traditional revocation-by-divorce principles would otherwise apply, have pulled federal common law principles directly from the states of the circuit in which they sit.⁸⁴ Unfortunately, “[s]uch an approach presents the same obstacles to national uniformity that ERISA preemption was designed to prevent, requiring plan administrators to determine complex choice-of-law questions, and then to interpret and apply varying state laws.”⁸⁵ Quite plainly, federal common law should not be a backdoor vehicle for implementing state law.

The Sixth Circuit refuses to develop federal common law to address the issues stemming from ERISA preemption of traditional revocation-by-divorce statutes, and it has thereby created a circuit split.⁸⁶ The Sixth Circuit caused the rift by holding that ERISA section 1104(a)(1)(D) not only requires that plan proceeds be paid directly to the designated beneficiary but it furthermore bars any inconsistent federal common law permitting broader inquiry.⁸⁷ The court's view considers state revocation-by-divorce statutes to be in *direct conflict* with ERISA section 1104(a)(1)(D).⁸⁸ The Sixth Circuit is alone in this construction.⁸⁹

Some respond to this splintered jurisprudence by proposing that federal common law should incorporate the Restatements or UPC, which generally reflect a conglomeration of the majority views in state law.⁹⁰ As one commen-

81. *Waterfowl Ltd. Liab. Co. v. United States*, 473 F.3d 135, 143–44 (5th Cir. 2006).

82. *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 207 (2d Cir. 2006).

83. *Egelhoff*, 532 U.S. at 149–50.

84. *See Tinsley v. Gen. Motors Corp.*, 227 F.3d 700, 704 (6th Cir. 2000) (relying on law drawn from the states comprising its circuit to develop federal common law regarding forgery and undue influence in the designation of beneficiaries in a dispute over ERISA plan proceeds); *Clift v. Clift*, 210 F.3d 268, 270–71 (5th Cir. 2000) (noting the practice of several federal circuits using state law to develop federal common law in disputes between a designated ex-spouse beneficiary and other claimants to ERISA plan proceeds).

85. *Keen v. Weaver*, 121 S.W.3d 721, 726–27 (Tex. 2003).

86. For a discussion of the split, see *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000). The court notes that “[a] majority of the circuit courts to have considered the issue have recognized that ERISA does not expressly address the circumstances, if any, in which a non-beneficiary may avoid the payment of life insurance benefits to the named beneficiary” and thus “these courts have held that the issue is governed by federal common law.” *Id.* at 870–71 (citing *Clift v. Clift*, 210 F.3d 268, 269–71 (5th Cir. 2000), and *Hill v. AT&T Corp.*, 125 F.3d 646, 648 (8th Cir. 1997)).

87. *McMillan v. Parrott*, 913 F.2d 310, 311–12 (6th Cir. 1990); *see also Metro. Life Ins. Co. v. Pressley*, 82 F.3d 126, 130 (6th Cir. 1996) (unenthusiastically noting that *McMillan* dictated the disposition of the case and that the panel was “not free to reject it in favor of some other approach”).

88. *See, e.g., John Hancock Mut. Life Ins. Co. v. Glover*, 10 F. Supp. 2d 762, 765 (E.D. Mich. 1998); *In re Estate of MacAnally*, 20 P.3d 1197, 1203 (Colo. App. 2000).

89. *Manning*, 212 F.3d at 871 (“The Sixth Circuit is the only circuit to unambiguously employ this minority approach.”).

90. *Lebolt*, *supra* note 29 (arguing federal common law should be created from the Restatement and supplemented by the UPC where the Restatement is silent).

tator explains, creating federal common law from the Restatement “(1) is intent-enforcing, furthering one of the primary purposes of ERISA itself[—]the protection of the interests of plan participants and their rightful beneficiaries; and (2) provides uniformity, thereby effectuating the overarching purpose of ERISA preemption.”⁹¹ A federal common law incorporating the Restatement and UPC would reflect a traditional revocation-by-divorce doctrine whereby divorce would automatically revoke an ex-spouse’s claim to ERISA plan proceeds if the beneficiary designation was created prior to the divorce.⁹² Although use of the Restatement or UPC would likely solve the problem of uniformity regarding the revocation-by-divorce doctrine, no court has yet adopted this approach.

B. Amendment of ERISA: Little Hope of Congressional Action

A simple, and perhaps ideal, solution to the problems arising from ERISA preemption is for Congress to amend ERISA to explicitly authorize application of the traditional revocation-by-divorce doctrine. In fact, some have expressly argued that “Congress should allow states to apply [revocation-by-divorce] statutes to ERISA plans and not require that transfers under ERISA plans be treated differently from all other transfers at death.”⁹³ Congress could also simply rewrite ERISA itself to contain a traditional revocation-by-divorce provision, thereby preempting any state law to the contrary. No doubt congressional amendment of ERISA would be the most straightforward solution. If Congress took action to amend ERISA, the courts would have an unambiguous authority for applying the revocation-by-divorce principle to cases involving ex-spouses and other claimants to ERISA-governed employee benefit plan proceeds.

Unfortunately, Congress has shown no interest in solving the problems surrounding ERISA preemption.⁹⁴ For example, ERISA’s “relate to” provision

91. *Id.* at 30.

92. UNIF. PROBATE CODE § 2-804(b) (amended 1997), 8 U.L.A. 60 (Supp. 2007); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. p (1999). While using the Restatement or the UPC as federal common law would be uniform, it may not be a genuine reflection of the contemporary nationwide view on the revocation-by-divorce doctrine. Gallanis, *supra* note 62, at 196 (noting that using the UPC and Restatements to mold federal common law regarding the revocation-by-divorce doctrine, “although elegant, requires an important caveat [because] . . . [t]he substantive rules articulated by the Restatement Third and the UPC sometimes reflect minority, rather than widely-accepted, positions”).

93. Gary, *supra* note 12, at 126. To achieve this result, Congress could add a probate provision similar to the Qualified Domestic Relations Order (“QDRO”) exception for divorce. ERISA preempts “all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.” 29 U.S.C. § 1144(c) (2000). While “this language apparently would include claims based on divorce decrees issued by state courts, subsection (b)(7) explains the preemption clause ‘shall not apply to qualified domestic relations orders.’” *Carland v. Metro. Life Ins. Co.*, 935 F.2d 1114, 1119 (10th Cir. 1991) (quoting § 1144(b)(7)).

94. Gallanis, *supra* note 62, at 195–96. Many recent Supreme Court cases interpret ERISA’s preemption provision. *See, e.g.*, *Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 334 (2003) (holding that generally applied state laws having some effect on insurers do not fall within the insurance exception to ERISA preemption); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 373 (2002) (holding a state statute requiring HMOs to provide independent review of disputes between

preempts state claims for wrongful denial of medical care under employer-provided health insurance, including common law actions such as breach of contract, wrongful death, and malpractice.⁹⁵ ERISA therefore mandates an exclusively federal remedy.⁹⁶ But this has left some injured patients with no apparent claim against qualified health care insurers for refusal of care.⁹⁷ Since the late 1980s, Congress has known about the issue⁹⁸ but has failed to amend ERISA accordingly,⁹⁹ despite the urging of the Supreme Court,¹⁰⁰ lower courts,¹⁰¹ and several commentators.¹⁰² Given Congress' reluctance to amend

primary care physicians and HMOs was not preempted by ERISA); *Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 334 (1997) (holding a state wage law is not preempted by ERISA); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 841 (1988) (holding ERISA preempts a state statute prohibiting wage garnishment under an ERISA-governed plan); *see also* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1105-06 (1988) (observing ERISA's expansive preemption "has wreaked aimless interference upon state regulation of areas such as health insurance that are quite peripheral to pension policy" and that "[n]either a substantial string of Supreme Court cases nor occasional Congressional repair has been able to cure the mess").

95. 29 U.S.C. § 1132 (West 2000 & Supp. 2004).

96. *Id.*

97. *See Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 53 (D. Mass. 1997). In *Andrews-Clarke*, a plan participant sued the plan administrators for the wrongful death of her alcoholic husband who had been refused entry to a rehabilitation program even though the plan did allow for such a program. *Id.* at 51-52. Failure to receive treatment caused the husband to commit suicide. *Id.* The court found that ERISA preempted the participant's cause of action and therefore left her without damages. *Id.* at 53. The court's opinion condemns Congress' failure to amend ERISA, contending that the outcome of *Andrews-Clarke* is "yet another illustration of the glaring need for Congress to amend ERISA to account for the changing realities of the modern health care system." *Id.* (footnote omitted). The court observes the increased difficulty for Congress to correct flawed statutes such as ERISA than to pass them "in the first place . . . because interests coalesce around the advantageous aspects of the status quo." *Id.* at 64-65 (omission in original) (quoting Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HAR. J. LEGIS. 35, 99 (1996)).

98. For example, Congress unsuccessfully tried encouraging the development of federal common law to remedy ERISA's shortcomings. *See* H.R. REP. NO. 101-247, at 55-56 (1989) (detailing the Budget Committee conclusion that the legislative history of ERISA showed Congress wanted courts, through federal common law, to develop "appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA," for improper medical claims processing by insurance groups), *as reprinted in* 1989 U.S.C.C.A.N. 1906, 1948.

99. The unenacted Patients' Bill of Rights Act of 2004 proposed to, among other things, amend ERISA by introducing a cause of action against health plan fiduciaries for "fail[ure] to exercise ordinary care in making a decision" to refuse care to a patient. H.R. 4628, 108TH CONG. § 402 (2004).

100. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (supporting the "rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime" (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003))).

101. *See Cicio v. Does*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part) ("[T]he injury that the courts have done to ERISA will not be healed until the Supreme Court reconsiders the existence of consequential damages under the statute, or Congress revisits the law to the same end."), *vacated sub nom.*, *Vytra Healthcare v. Cicio*, 124 S. Ct. 2902 (2004); *Andrews-Clarke*, 984 F. Supp. at 53 (urging amendment to ERISA to eliminate self-insured distinction regarding medical insurance so as to allow more stringent review of medical claims).

102. *See, e.g.*, L. Darnell Weeden, *ERISA's Preemption Ruling Prevents a Patient from Suing an HMO Under State Malpractice Law: After Aetna Health, Inc. v. Davila Who Will Grant the Working Middle Class a Meaningful Right to Be Heard?*, 7 U. PA. J. LAB. & EMP. L. 715, 745

ERISA to create a refusal of medical care cause of action, even under heavy judicial and public pressure, the likelihood that Congress will amend ERISA in the near future with respect to the revocation-by-divorce preemption issue is slim.

*C. Reform of the Plan Documents:
Too Difficult to Facilitate National Change*

Perhaps the most basic solution to the issue surrounding ex-spouses designated as beneficiaries in ERISA plans is for the administrators themselves to update the plan documents to include a revocation-by-divorce clause. By encouraging employers to alter their policies, the updated documents would best reflect the likely intent of divorced decedents and would achieve ERISA's goal of protecting plan participants.¹⁰³

Nonetheless, the practical implications of facilitating a change in *all* U.S. employers' ERISA plans are overwhelming. There are not nearly enough administrative resources to ensure every employer updates its plan documents or enough employer resources to enforce such an expansive project. Moreover, ERISA itself requires plan administrators to conform to the terms of the plan documents "insofar as such documents and instruments are consistent with" ERISA.¹⁰⁴ If plan administrators must investigate whether every plan participant is divorced and whether the plan document lists the participant's ex-spouse as the primary beneficiary, the new plan provision could thwart ERISA's goal of ease of administration.¹⁰⁵

III. APPLYING STATUTORY CONSTRUCTIVE TRUSTS TO ERISA-GOVERNED
EMPLOYEE BENEFIT PLANS ENSURES AN EQUITABLE RESULT

This Part argues that state statutory constructive trusts are a viable tool to resolve the problem of ERISA-preempted state revocation-by-divorce statutes. Section III.A asserts that constructive trusts adequately realign the treatment of ERISA-governed employee benefit plans with that of wills and all other will substitutes, because courts often use constructive trusts in circumstances of unjust enrichment—a result that is exactly what the revocation-by-divorce doctrine is designed to prevent. Section III.A further argues that, in order to maximize efficiency and avoid excessive litigation costs, the constructive trust doctrine should be codified in state statutes. Section III.B contends that, once codified, these state constructive trust statutes will not be preempted by ERISA, because such statutes neither directly

(2005) (urging passage of Patients' Bill of Rights Act to "wipe out the vast regulatory vacuum created by ERISA's . . . preemption rationales"); Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of Aetna Health Inc. v. Davila*, 54 CATH. U. L. REV. 1039, 1070–75 (2005) (urging passage of federal legislation providing patients with the right to independent medical review).

103. See LANGBEIN ET AL., *supra* note 48, at 77–87.

104. 29 U.S.C. § 1104(a)(1)(D) (2000).

105. See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149–50 (2001).

interfere with ERISA nor hinder its goals. Finally, Section III.C maintains that the constructive trust doctrine currently represents the most realistic resolution to ERISA preemption of state revocation-by-divorce statutes, because it achieves equal treatment of ERISA-governed plans and all other will substitutes and at the same time accomplishes ERISA's goals of administrative efficiency and protection of plan participants.

*A. The Constructive Trust Doctrine Seamlessly Applies to
ERISA-Governed Employee Benefit Plans*

This Section asserts that constructive trusts may be appropriately applied to ERISA-governed plan proceeds if equity so demands. It further argues that codified constructive trusts represent the most efficient way to achieve such equitable results. The constructive trust doctrine is an equitable doctrine that courts employ in cases of unjust enrichment. According to the Restatement, a constructive trust relationship exposes “the person by whom the title is held to an equitable duty to convey the property to another on the ground that the title holder’s acquisition or retention of the property is wrongful and that unjust enrichment would occur if the title holder were permitted to retain the property.”¹⁰⁶ For example, a court may impose a constructive trust upon “an innocent donee of property in which another has an equitable interest.”¹⁰⁷

Issuing ERISA plan proceeds to a decedent’s ex-spouse as the designated beneficiary may constitute unjust enrichment.¹⁰⁸ If, upon factual analysis of the circumstances, a court determines that the ex-spouse received his or her fair share in the divorce and that the decedent likely did not intend for the ex-spouse to receive the ERISA plan proceeds, the court should have the discretion to impose an equitable constructive trust on the assets in favor of other claimants to the proceeds.¹⁰⁹ These claimants may be the secondary beneficiaries listed on the plan documents or the decedent’s heirs who would take under intestacy.¹¹⁰ Under the constructive trust doctrine, the plan administrator would pay the benefit plan proceeds to the designated beneficiary—the ex-spouse—as required by ERISA.¹¹¹ While the ex-spouse would have legal title to the plan proceeds according to the plan documents, a court

106. RESTATEMENT (THIRD) OF TRUSTS § 1, cmt. e (2003); *see also* RESTATEMENT (FIRST) OF RESTITUTION § 160, cmt. d (1937); Dickinson, *supra* note 17, at 569 n.119 (explaining that “[t]his formulation has been widely adopted” and providing a list of case law discussing the formulation).

107. SCOTT & FRATCHER, *supra* note 18, § 462; *see also supra* notes 13–18 and accompanying text.

108. *See Egelhoff*, 532 U.S. at 159 (Breyer, J., dissenting) (noting that by preempting a state revocation-by-divorce statute, “the Court permits a divorced wife, who *already* acquired, during the divorce proceeding, her fair share of the couple’s community property, to receive in addition the benefits that the divorce court awarded to her former husband”); *see also* Gary, *supra* note 12, at 121.

109. Gary, *supra* note 12, at 121.

110. *Id.*

111. *Id.*

could determine that he or she did not have equitable title.¹¹² The court could then order the ex-spouse, as an equitable trustee, to deliver the proceeds to other claimants by imposing the constructive trust.¹¹³

An equitable constructive trust entered against an ex-spouse in effect allows courts to reach the same result they would have reached had ERISA not preempted state revocation-by-divorce statutes. ERISA does not preempt the application of constructive trusts,¹¹⁴ because constructive trusts are a judicial *equitable remedy*.¹¹⁵ A few courts have considered the application of the constructive trust doctrine as a judicial intervention in cases regarding beneficial interests in an ERISA-governed employee benefit plan, and most have allowed the claims of would-be beneficiaries seeking assets from an ex-spouse.¹¹⁶

While ERISA does not preempt the use of constructive trusts as a judicially imposed equitable remedy, constructive trusts should be codified into state law in order to reduce litigation costs.¹¹⁷ The constructive trust doctrine is historically a judicial remedy, but UPC section 2-804(h)(2) codifies the doctrine to resurrect its revocation-by-divorce provision if that provision is subsequently preempted by federal law.¹¹⁸ While currently “[a] court can tailor its decision to the situation” and arrive at an equitable result using the judicial constructive trust remedy, litigation is required “to resolve the [factual] question of who has an equitable right to the proceeds.”¹¹⁹ In each dispute, if a court chooses to use the constructive trust as an equitable judicial solution, it

112. *Id.*

113. *Id.*

114. 29 U.S.C. § 1144(a) (2000) (providing that ERISA “shall supersede any and all *State laws* insofar as they may now or hereafter relate to any employee benefit plan [covered by the statute]” (emphasis added)).

115. RESTATEMENT (THIRD) OF TRUSTS § 1, cmt. e (2003) (“A constructive trust is . . . the result of judicial intervention and is remedial in character.”).

116. *See* *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 954 (9th Cir. 1998) (permitting “the imposition of a constructive trust on insurance proceeds before their distribution to the designated beneficiary”); *Metro. Life Ins. Co. v. Mulligan*, 210 F. Supp. 2d 894 (E.D. Mich. 2002) (agreeing with the ex-spouse that ERISA preempted the state revocation-by-divorce statute but denying the ex-spouse summary judgment because of a constructive trust claim brought by the decedent’s children); *Kmatz v. Metro. Life Ins. Co.*, No. 1:04-CV-436, 2006 WL 1209362 (S.D. Ohio May 4, 2006) (recognizing a constructive trust claim but ultimately rejecting such claim because under Ohio law no unjust enrichment occurred). *But see* *Melton v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003) (broadly refusing a constructive trust claim against a second ex-spouse where the first marriage’s divorce decree ordered the decedent to list his child from his first marriage as beneficiary, because “ERISA preempts Illinois state law with respect to determining the rightful beneficiary” of an ERISA-governed insurance policy).

117. For a discussion of why codified constructive trusts are not preempted by ERISA, see *infra* Section III.B.

118. *See supra* notes 21–23 and accompanying text. For examples of codification of judicial equitable remedies, see 35 U.S.C. § 283 (2000), which codifies equitable injunctive relief in patent rights cases, and U.C.C. § 2-302 (2000), which codifies the equitable doctrine of unconscionability in contracts cases.

119. Gary, *supra* note 12, at 123.

must first examine the decedent's likely intent and establish whether the divorce proceedings arrived at a fair division of assets.¹²⁰

Codifying constructive trusts with respect to the revocation-by-divorce doctrine eliminates the need for such an in-depth, fact-based inquiry and thus reduces the costs of litigation.¹²¹ Absent evidence that the decedent did in fact wish for the ex-spouse to receive the proceeds, the court may presume the decedent's intent was to withhold the proceeds from the ex-spouse, much like traditional revocation-by-divorce statutes presume a decedent's intent with respect to wills and all other will substitutes.¹²² The burden would be on the ex-spouse to produce contrary evidence—for example, by showing the decedent re-executed the beneficiary designation or by showing an agreement between the decedent and the ex-spouse providing for such an arrangement.

B. State Constructive Trust Statutes Are Not Preempted by ERISA

UPC section 2-804, including its constructive trust provision, has been adopted in some states,¹²³ and, although yet to be tested in any court,¹²⁴ such statutes will likely escape preemption by ERISA. Because ERISA requires only that a plan be administered “in accordance with the documents and instruments governing the plan,”¹²⁵ a constructive trust statute affecting plan proceeds *after* payment to a plan-designated ex-spouse would not directly

120. *Id.* at 121.

121. Because ERISA-governed employee benefit plans traditionally provide for periodic payments, however, a court might encounter practical difficulties when enforcing a constructive trust against an ex-spouse, thereby increasing litigation costs. The ex-spouse may attempt to block a victorious claimant's access to the proceeds as the plan administrator makes each payment over time. A successful claimant, however, may be able to thwart the ex-spouse's evasion through garnishment or other court-ordered remedy. *See* DaimlerChrysler Corp. v. Cox, 447 F.3d 967, 974 (6th Cir. 2006) (finding that once a pension plan administrator sends benefit payments to a beneficiary and relinquishes control of the payments, the attachment of those funds by a creditor does not constitute an impermissible alienation prohibited by ERISA); *Hoult v. Hoult*, 373 F.3d 47, 54 (1st Cir. 2004) (affirming a lower court's deposit order requiring a beneficiary to place ERISA proceeds in a bank account for the benefit of his daughter-creditor); *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 706 (10th Cir. 1993) (finding that immediate garnishment of proceeds at the moment of payment did not contradict a previous Supreme Court decision barring imposition of a constructive trust on an ERISA plan administrator). *But see* *United States v. Smith*, 47 F.3d 681, 682–84 (4th Cir. 1995) (barring alienation of postretirement annuity payments after distribution to the beneficiary, but not if the proceeds are preretirement lump sum payments). The court itself may use its contempt power to ensure an ex-spouse follows its constructive trust order. *See* *Jones v. Am. Airlines, Inc.*, 57 F. Supp. 2d 1224, 1239–40 (D. Wyo. 1999) (“[T]here is a possibility that [a party] may choose to enforce the constructive trust by means of a contempt proceeding or other action.”); *Petersen v. Vallenzano*, 858 F.Supp. 40, 40–41 (S.D.N.Y. 1994) (holding a debtor in contempt for failure to comply with a constructive trust order). Unfortunately, depending on how determined the ex-spouse is, there could be continued conflict over a decedent's ERISA plan proceeds.

122. *See* Gary, *supra* note 12, at 84.

123. *See supra* note 25.

124. Gary, *supra* note 12, at 124. A recent Westlaw Keycite of state statutes that adopt UPC section 2-804 confirms this assertion.

125. 29 U.S.C. § 1104(a)(1)(D) (2000).

conflict with ERISA.¹²⁶ As one court explained, “once the benefits of an ERISA employee welfare benefit plan have been distributed according to the plan documents, ERISA does not preempt the imposition of a constructive trust on those benefits.”¹²⁷ Because statutory constructive trusts alleviate concerns regarding the burden on administrators and the interests of plan participants, such state statutes are in line with the spirit of the *Egelhoff* ruling.¹²⁸ Furthermore, state statutory constructive trusts are consistent with the blackletter law of the *Egelhoff* ruling, because such trusts would not be invalidated by ERISA’s “relate to” preemption analysis set forth by the Court.¹²⁹ Such state statutes do not make reference to an ERISA plan, and they are not impermissibly “connected with” ERISA. Statutory constructive trusts are not used as an end run around ERISA and *Egelhoff*: instead, they ensure the goals of ERISA are met and *Egelhoff*’s ruling is honored while achieving the equitable realization of the decedent’s most likely intent.

ERISA’s preemption provision states that ERISA “shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan” governed by ERISA.¹³⁰ The *Egelhoff* Court explained that “relate to” preemption is clearly expansive but “cannot be taken to extend to the furthest stretch of its indeterminacy.”¹³¹ The Court elaborated that a state law is preempted by ERISA’s “relate to” language if it has a connection with, or reference to, an ERISA-governed employee benefit plan.¹³²

A statute makes “reference to” ERISA plans if it acts exclusively on such plans or if the existence of ERISA is essential to the statute’s operation.¹³³ The *Egelhoff* Court accepted that traditional revocation-by-divorce statutes do not make “reference to” ERISA plans.¹³⁴ Similarly, a constructive trust statute fashioned after UPC section 2-804(h)(2) would not reference

126. See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147–48, 150 (2001) (stating that a traditional revocation-by-divorce statute directly conflicts with ERISA because such a state statute requires an administrator issue plan proceeds to someone other than the listed beneficiary on the plan documents). The Supreme Court has held that ERISA’s anti-alienation provision, 29 U.S.C. § 1056(d)(1), coupled with ERISA’s protection of surviving spouses, 29 U.S.C. § 1055, directly conflicts with a state law allowing a nonparticipant ex-spouse to transfer by testamentary instrument a community-property interest in undistributed pension plan benefits where the remarried deceased plan participant is survived by his subsequent spouse. *Boggs v. Boggs*, 520 U.S. 833 (1997). This Note focuses more broadly on the circumstances arising when the would-be beneficiary of a decedent’s ERISA-governed employee benefit plan may not be a surviving spouse.

127. Cent. States, Se. & Sw. Areas Pension Fund v. Howell, 227 F.3d 672, 678–79 (6th Cir. 2000) (holding courts have “discretion to impose a constructive trust upon those benefits in accordance with applicable state law if equity so requires”).

128. See *Egelhoff*, 532 U.S. at 149–50.

129. See *id.* at 146–52.

130. 29 U.S.C. § 1144(a) (2000) (emphasis added).

131. *Egelhoff*, 532 U.S. at 146 (internal quotation marks omitted).

132. *Id.* at 147.

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

134. *Egelhoff*, 532 U.S. at 147.

ERISA-governed employee benefit plans.¹³⁵ Such a statute acts on *any* federal law, not solely ERISA, and operates notwithstanding the existence of ERISA.¹³⁶

A court determines whether a statute has a “connection with” ERISA by consulting (i) the nature of the effect of the state law on ERISA plans in light of (ii) the objectives of ERISA.¹³⁷ The *Egelhoff* Court focused on whether a traditional revocation-by-divorce statute had an impermissible “connection with” ERISA-governed plans and concluded that ERISA preempted such a statute because it ran counter to the “central matter of plan administration”—that proceeds are paid to the individual listed as beneficiary¹³⁸—and because it interfered with the principal ERISA goals of nationally uniform and efficient plan administration.¹³⁹

Unlike revocation-by-divorce statutes, state statutory constructive trusts would have minimal effect on ERISA plans, because ERISA involvement terminates upon payment of the plan proceeds.¹⁴⁰ The Supreme Court has upheld generally applicable laws “where ERISA has nothing to say,”¹⁴¹ that is, where state statutes do not make “reference to” ERISA plans, “notwithstanding their *incidental* effect on ERISA plans.”¹⁴² The traditional revocation-by-divorce statute in *Egelhoff* directly affected the beneficiary payment of proceeds required by the plan documents: it bound plan administrators to research whether a decedent was divorced and, if so, to issue payment to someone other than the ex-spouse beneficiary prescribed by the governing instrument.¹⁴³ A statutory constructive trust, however, would not interfere with plan administration. Only after the administrator paid out proceeds to the designated ex-spouse beneficiary would a judge impose any necessary constructive trust.¹⁴⁴ Thus the “nature of the effect” of a state

135. See UNIF. PROBATE CODE § 2-804(h)(2) (amended 1997), 8 U.L.A. 61 (Supp. 2007).

136. See *id.* UPC section 2-804(h)(2) provides as follows:

If . . . any part of this section [2-804] is preempted by *federal law* with respect to . . . any . . . benefit covered by this section, a former spouse . . . who, not for value, received a payment . . . to which that person is not entitled under this section is obligated to return that payment . . . to the person who would have been entitled to it were this section or part of this section not preempted.

Id. (emphasis added). For example, section 2-804(h)(2) also applies to the federal regulations relating to United States Treasury bills held in the name of the decedent and the ex-spouse by right of survivorship. See WAGGONER ET AL., *supra* note 6, at 10–24 to 10–25.

137. *Egelhoff*, 532 U.S. at 147.

138. *Id.* at 147–48.

139. *Id.* at 148–50.

140. *Pardee v. Pers. Representative for Estate of Pardee*, 112 P.3d 308, 314 (Okla. Civ. App. 2004) (“The prevailing view is that ERISA does not protect pension funds after the beneficiary receives the funds.”).

141. *Egelhoff*, 532 U.S. at 148 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 330 (1997)).

142. *Id.* at 148 (emphasis added).

143. *Id.*

144. UNIF. PROBATE CODE § 2-804(h)(2) (amended 1997), 8 U.L.A. 61 (Supp. 2007).

statutory constructive trust on ERISA-governed employee benefit plans would be negligible.

Statutory constructive trusts also protect ERISA's objectives by respecting the interests of plan participants.¹⁴⁵ First, much like the rationale for the revocation-by-divorce doctrine, the judiciary can use constructive trusts to recognize an expression of the decedent's presumed intent. The state constructive trust statute assumes that most divorced plan participants would prefer courts deny an ex-spouse property issued according to a beneficiary designation instrument that the decedent executed before the couple divorced.¹⁴⁶ Second, use of constructive trusts protects the interests of a plan participant's dependents—for example, by recognizing that the needs of a surviving spouse and children from a decedent's second marriage should trump the designation of an ex-spouse on a beneficiary form.¹⁴⁷

Likewise, state statutory constructive trusts are consistent with ERISA's objectives of uniform and efficient plan administration. ERISA section 1104(a)(1)(D) requires that an employer administer a plan "in accordance with the documents and instruments governing the plan."¹⁴⁸ The *Egelhoff* Court was concerned with the ease of administration of ERISA-governed employee benefit plans, and the Court ruled conclusively that plan administrators should be able to rely on the plan documents with no obligation to check state laws in determining the beneficiary to a plan.¹⁴⁹ The constructive trust doctrine would not block this right of employers: employers would still efficiently and uniformly distribute the plan proceeds to the designated beneficiaries, with no additional responsibilities. A court could then impose a statutory constructive trust without undermining ERISA or its goals.¹⁵⁰

C. Constructive Trusts are Superior to Other Suggested Solutions to the ERISA Preemption Problem

Because ERISA's broad "relate to" provision likely would not preempt state constructive trust statutes, the imposition of statutory constructive trusts is preferable to the other suggested solutions to ERISA preemption of state revocation-by-divorce statutes. First, as noted in Part II, the creation of

145. See LANGBEIN ET AL., *supra* note 48, at 77–87.

146. See UNIF. PROBATE CODE § 2-804 (amended 1997), 8 U.L.A. 60.

147. See *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 955 (9th Cir. 1998) (permitting "the imposition of a constructive trust on insurance proceeds after their distribution to the designated beneficiary"); *Metro. Life Ins. Co. v. Mulligan*, 210 F. Supp. 2d 894 (E.D. Mich. 2002) (agreeing with the ex-spouse that the state revocation-by-divorce statute was preempted by ERISA but denying the ex-spouse summary judgment because of an equitable constructive trust claim brought by the decedent's children).

148. 29 U.S.C. § 1104(a)(1)(D) (2000).

149. *Egelhoff*, 532 U.S. at 149–50.

150. See *Pardee v. Pers. Representative for Estate of Pardee*, 112 P.3d 308, 313 (Okla. Civ. App. 2004) (noting postdistribution funds do not raise the same ERISA-related administrative burden concerns as predistribution funds); see also *Egelhoff*, 532 U.S. at 150 n.3 (noting the burden placed on an administrator if it must retain plan proceeds while claimants resolve a dispute in court).

federal common law is troubled by concerns regarding efficient plan administration, and this gave rise to a circuit split.¹⁵¹ State constructive trust statutes would provide a means for the courts to avoid such debate altogether. The use of constructive trusts conforms to the Sixth Circuit's approach that plan administrators must always pay proceeds directly to a designated beneficiary.¹⁵² State statutory constructive trusts, however, would also allow courts that favor creating federal common law to reach an equitable result by applying the state constructive trust statutes of the jurisdiction in which they sit. Courts in favor of using federal common law may eventually adopt the revocation-by-divorce provisions of the UPC or Restatements as a uniform nationwide rule of law. Until that time, however, state constructive trust statutes represent an alternative tool that courts may use to achieve equity in revocation-by-divorce cases involving ERISA-governed employee benefit plans.¹⁵³

Notwithstanding the constructive trust doctrine's amenability to the various courts' views on federal common law, the issue need never be raised. Because ERISA does not preempt state constructive trust statutes, there is no need for any court to address the application of federal common law at all. Rather, each jurisdiction may freely apply the state statute to the circumstances of each case. These statutes would not force plan administrators to investigate the diverse federal common law of the many American jurisdictions. Nor would these statutes require an employer to change its administration based on a hodgepodge of law: the employer would instead be able to follow solely the plain language of the plan documents.

Statutory constructive trusts are preferable to the other two alternative strategies. Given the slim chance of congressional action to amend ERISA, constructive trust statutes would give states a tool to deal with the problem on their own. And, while employers may be resistant to altering the plan documents themselves, the use of constructive trusts would allow administrators to continue to efficiently pay out proceeds according to the existing, standard language of the plan document. Further, rewriting the plan documents would place a significant burden on employers, because they would then have to conduct a factual inquiry into a decedent's marital status and beneficiary listing before issuing plan proceeds. Constructive trusts allow employers to continue to enjoy ease of administration with no additional responsibility.

151. See *supra* Section II.A.

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

153. Constructive trust statutes will result in higher litigation costs than the uniform adoption of federal common law because of the expense of separate lawsuits against ex-spouses, but it will take many judicial opinions across jurisdictions to definitively adopt the Restatement or UPC as federal common law. Even then, disagreements on interpretation of the Restatement and UPC provisions could ensue. Given the jumbled state of the law, state constructive trusts represent a practical approach that courts could immediately embrace.

CONCLUSION

Given the Supreme Court's ruling in *Egelhoff*, constructive trusts represent a viable mechanism for realigning ERISA-governed employee benefit plans with the treatment of wills and other will substitutes. Constructive trusts remedy unjust enrichment, which the traditional revocation-by-divorce doctrine is designed to prevent. In order to be most effective and avoid excessive litigation costs, state legislatures should codify the constructive trust doctrine, preferably using the UPC as a model. Once codified, state constructive trust statutes likely will not be preempted by ERISA's "relate to" provision, because such statutes do not directly interfere with ERISA or hinder its goals. Furthermore, of all the suggested solutions to ERISA preemption of state revocation-by-divorce statutes, the constructive trust doctrine represents a true resolution, because it achieves equal treatment of ERISA-governed plans and all other will substitutes yet also accomplishes ERISA's goals of administrative efficiency and protection of plan participants.

