Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers

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In late 2011, the American Law Institute published the third and final volume of the Restatement (Third) of Property: Wills and Other Donative Transfers. In March 2012, the Restatement's two reporters, Professors Lawrence W. Waggoner and John H. Langbein, presented the Joseph Trachtman Memorial Lecture at the annual meeting of The American College of Trust and Estate Counsel in Miami Beach. Introducing the two lecturers, ACTEC President Mary Radford described them as "two icons in our field, [who] have had a hand in every major development in trust and estate law that has occurred over the past three decades . . . ." In separate but coordinated talks, under the title "Restating and Renewing the Law of Donative Transfers," Professors Waggoner and Langbein discussed some of the main themes of the new Restatement and of related Uniform Law Commission initiatives. Professor Langbein's lecture, revised for publication, appears here; Professor Waggoner's appears in the following Article.

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Professor Lawrence W. Waggoner and I have just concluded a twenty-year project for the American Law Institute to restate the law of donative transfers. We much appreciate the opportunity that the 2012 Trachtman Lectures provides to reflect about some of the main themes of our Restatement and related initiatives of the Uniform Probate Code.

Our Restatement bears the somewhat long-winded title, *Restatement (Third) of Property: Wills and Other Donative Transfers*.[1] In our lectures we will be referring to it simply as the Property Restatement. The third and final volume of the work was published in the last days of 2011. The content of all three volumes is now accessible online.[2] The concluding volume covers class gifts, powers of appointment, future interests, and the rule against perpetuities. In our division of labor for these lectures, Professor Waggoner will be discussing that material. The two earlier volumes set forth the principles governing the law of wills, intestacy, the interpretation of instruments, and the nonprobate system. I will be focusing on certain of the initiatives developed in that material.

I. THE CONTEXT: A QUARTER CENTURY OF RENEWAL

The Property Restatement is part of a much larger cycle of renewal that has been underway over the last quarter century in the uniform laws and the Restatements, which are the main sources that shape the law of trusts and estates at the national level.

On the Restatement side, the cycle began in the late 1980s, when the American Law Institute ("ALI"), responding to major changes in the investment world, commissioned a revision of the fiduciary investing provisions of the Restatement of Trusts. Ed Halbach served as the reporter for that project, which was published in 1992 as the Restatement (Third) of Trusts: Prudent Investor Rule.[3] A few years later the ALI commenced work on a full Restatement (Third) of Trusts, which has been released in installments across the past decade.[4] The concluding volume of that Restatement has just been published. Last year the ALI also completed and published a new Restatement (Third) of Restitution and Unjust Enrichment, for which Andrew Kull has been the reporter.[5] Thus, all three Restatements that bear importantly on our field—property, trusts, and restitution—have been brought up to date.

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1 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (2012) [hereinafter PROPERTY RESTATEMENT].

2 *See infra* note 6.

3 RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (1992).

4 RESTATEMENT (THIRD) OF TRUSTS (2003-2012).

5 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011).

On the uniform laws[6] side, this past quarter century has been a period of astonishing productivity, resulting in two comprehensive codifications—the Uniform Probate Code and the Uniform Trust Code—and several clusters of other acts. The Uniform Law Commission is best described as a legislative drafting consortium of the state governments, operating in fields of law in which multi-state contacts or multi-state concerns make uniformity desirable. The commissioners are appointed pursuant to statute in each state, mostly by the governor,[7] and are a mix of practicing lawyers, legislators, judges, and law professors. Commissioners receive no compensation for their work; they serve strictly pro bono.

In the late 1980s, the Commission commenced a project to revise the substantive law portions of the Uniform Probate Code ("UPC"). The UPC was first promulgated back in 1969, and had been driven by the concern to simplify probate procedure for uncontested estates.[8] The 1969 Code also provided, in Article II, provisions governing intestacy, spousal shares, and the law of wills; and in Article VI, skeletal provisions devoted to will substitutes. The revision project that began in the late 1980s focused on those two areas. The revisions to Article II, completed in 1990, made major refinements to the UPC's law of intestacy, spousal shares, and wills, and in the constructional principles governing wills and will substitutes.[9] Professor Waggoner served as the reporter for that Article II project.

Alongside these Article II revisions, the late Richard Wellman and I served as reporters for revisions to Article VI dealing with nonprobate transfers. The main objective was to facilitate transfer-on-death beneficiary designations for securities and for mutual fund and brokerage accounts, in order to disentangle those transfers from agency accounts and from true lifetime transfers in joint tenancy. The resulting legislation was promulgated in 1989, both as revised Article VI of the UPC, and as a separate freestanding act, called the Uniform Transfer-on-Death Se-

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6 UNIF. LAWS ANN. (2011) *available at* http://www.uniformlaws.org (the full text of all uniform laws discussed in this article can be found online and in the multi-volume series which is updated annually and is also available online in the Westlaw database. Accordingly, I will not clutter this article with particular citations to the many uniform acts mentioned in text, except when citing to particular provisions.)

7 In some states, some commissioners are appointed by legislative officers. *See, e.g.*, 25 ILL. COMP. STAT. 135/5.07 (2012). In most states, the governor appoints commissioners. *See, e.g.*, CONN. GEN. STAT. § 2-80 (2012); VA. CODE ANN. § 30-196 (2012).

8 Regarding the objectives of the original UPC, see Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970).

9 *See* John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871 (1992).

curity Registration Act, for adoption in non-UPC states. That measure is now in force in all but three states.[10]

Subsequently, the Uniform Probate Code has been amended several times to take account of various developments, most notably amendments to the intestacy regime approved in 2008, which have sorted out the succession consequences of medical advances in human reproduction.[11] There are now about half a dozen ways to make a baby, mixing and matching egg, sperm, and womb from various contributors, living and dead. Sorting out the succession consequences for intestacy and for the construction of class gifts has been a daunting project. Professor Waggoner drafted the 2008 UPC amendments, and the Property Restatement carefully conforms its treatment of the construction of class gifts and trusts to follow the principles developed there.[12]

Several parts of the 1990 revisions to UPC Article II have been promulgated as freestanding acts for adoption in states that have not enacted the core Code, including such widely adopted measures as the Uniform Simultaneous Death Act (1991) and the Uniform Testamentary Additions to Trusts Act (1991). Similarly, a number of freestanding acts promulgated after the 1990 UPC[13] have also been incorporated into the UPC, including the Disclaimer of Property Interests Act (1999) and the Estate Tax Apportionment Act (2003).

The Uniform Law Commission's other major codification project in our field, the Uniform Trust Code, was drafted across the later 1990s and promulgated in 2000. David English served as the reporter and continues to oversee amendments to it. The Trust Code has been adopted in 23 states and the District of Columbia, and it is under active consideration in many others. Together with two widely-enacted specialized trust laws, the Uniform Prudent Investor Act of 1994 and the revised

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10 Unif. Probate Code §§ 6-301 to -311 (2010). *See generally* Richard V. Wellman, *Transfer-on-Death Security Registration: A New Title Form*, 21 Ga. L. Rev. 789 (1987). *See also* Unif. Law Comm'n, Guide to Uniform and Model Acts, Record of Passage of Uniform Acts and Model Acts as of September 30, 2011 (2011) *available at* www.uniformlaws.org/Shared/Publications/GUMA_2011web.pdf at 33, 36 (enactment figures for the Uniform Transfer-on-Death Security Registration Act and other acts).

11 Unif. Probate Code §§ 2-118 to -121, 2-705. *See also* Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC L.J. 30 (2009) (discussing how the UPC has been amended to accommodate children born from assisted reproduction for intestacy and class-gift purposes).

12 *See* Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property* (Univ. Mich. Public Law, Working Paper No. 266, 2012), *available at* http://ssrn.com/abstract=2006627.

13 The Uniform Statutory Rule Against Perpetuities Act (1986), which was promulgated before the 1990 revisions to the UPC, was also re-codified as part of the Code. *See* Unif. Probate Code §§ 2-901 to -906.

Principal and Income Act of 1997, the Trust Code constitutes the first comprehensive codification of the law of trusts anywhere in the Anglo-American world.[14]

A fuller account of uniform trust and estate legislation during this great cycle of revision would include the Transfers to Minors Act (1986), the Custodial Trust Act (1987), the Health-Care Decisions Act (1993), the Guardianship and Protective Proceedings Act (1997), the Anatomical Gift Act (2006), the Power of Attorney Act (2006), and the Prudent Management of Institutional Funds Act (2006). Most recently, the Statutory Trust Entity Act (2009) has made available a model statutory regime for asset securitization and other business trusts.

II. THE PROCESS

Why has all this Restatement and uniform law activity in trusts and estates been occurring? The short answer is that changing circumstances in the field have required it. I have already mentioned the changes in reproductive technology that underlie the recent revisions in intestacy and class gift rules. Similarly, the challenges of the gerontological revolution are what have motivated the Custodial Trust Act, the Guardianship Act, and the Power of Attorney Act. Changes in gender relations and concerns about gender equity are responsible for the trends in intestacy and forced share law, increasing spousal shares in various circumstances. The changes in trust investment law found in the Prudent Investor Act and the revised Principal and Income Act responded to profound changes in the theory and practice of investment, changes documented in the empirical studies that gave rise to modern portfolio theory.[15]

I want to emphasize that the driving force behind the Restatements and the uniform laws in our field has been the organized trusts and estates bar. On the uniform laws side at the operational level, a body called the Joint Editorial Board for the Uniform Trust and Estate Acts—the JEB for short—has been providing the direction. The JEB is composed of members from three organizations—ACTEC; the ABA Section of Real Property, Trust and Estate Law; and the Uniform Law Commission—together with nonvoting participants from the American Association of Law Schools and other groups. Proposals for legislation

[14] Regarding the trend toward statute in trust law, see John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007).

[15] I have discussed these developments in John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996). For evidence that the enactment has resulted in increased use of equities in trust portfolios, see Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007).

touching the probate and trust world that come from any of the sponsoring organizations or elsewhere get referred for consideration to the JEB. The Commission treats JEB approval as a prerequisite for drafting a uniform law in our field.

When the Commission does decide to draft a uniform law, the influence of the trust and estate bar remains pervasive. The Commission appoints a drafting committee, composed of commissioners, to work with a reporter, who is commonly a specialist academic. The ABA Section invariably designates a representative to participate. The drafting process extends across a period of at least two years, during which the committee meets twice a year to review successive drafts. In the intervals, these drafts are circulated for review and suggestion to the ACTEC state laws committee, to the ABA Section, to state bar groups, and to any other organization that has expressed interest. Once each year, the then-current draft act is presented for line-by-line review at a plenary meeting of the full Uniform Law Commission.[16]

Once the Commission has given final approval to an act, enactment efforts begin at the state level. Here, too, the trusts and estates bar exercises what amounts to a veto power over enactment in that jurisdiction, because the relevant committee of the state legislature will not act without state bar association endorsement, and the bar association's support depends on the wishes of its trust and estate section.[17]

The ALI follows a broadly comparable process for Restatement drafting, with the important difference that Restatements, lacking statutory authority, are spared the enactment phase. In the ALI process, a reporter or reporters, usually specialist law professors, are appointed as drafters. Successive drafts are circulated to two panels of expert advisors and to the ALI's Council, which is composed of state and federal judges and leading practitioners and academics. These groups meet with the reporters for deliberation regarding each draft. The final draft

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[16] *See* UNIF. LAW COMM'N., *ULC Drafting Process*, http://www.uniformlaws.org/Narrative.aspx?title=ULC Drafting Process (last visited Dec. 26, 2012).

[17] Schanzenbach and Sitkoff characterize the ALI/uniform law process as "top down" law reform, and they contrast it with "bottom up" legislation "driven by local lawyers and bankers . . . spurred on by a desire to attract or retain trust business." Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC L.J. 314, 314-15 (2010). The point is developed in Robert H. Sitkoff, *Top-Down Versus Bottom-Up Law Reform in Trusts and Estates: Future interests and Perpetuities*, JOTWELL TR. & EST., Nov. 22, 2010, *available at* http://trustest.jotwell.com/top-down-versus-bottom-up-law-reform-in-trusts-and-estates-future-interests-and-perpetuities.

undergoes review and approval at a plenary session of the entire ALI membership.[18]

These deeply inclusive drafting and deliberative processes are designed to make uniform laws and Restatements into truly collaborative products.

III. REFORMATION AND HARMLESS ERROR

I turn now from process to substance, and back to the Property Restatement. Most of what a Restatement does, as the name implies, is to restate the familiar. The main task is to organize, to set forth, and to explain as clearly as possible the rules and principles that are understood to govern the field in question. Restatements become instruments of reform only incidentally. Sometimes this happens when there is discordance in the cases on a particular topic, and a choice has to be made and explained. A good example in the Property Restatement is the decision to disaffirm the old plain meaning rule, that is, the rule forbidding the court to consult extrinsic evidence when interpreting the meaning of a will or other instrument of transfer. American jurisdictions have been divided on the point, with the trend being toward admissibility. The Property Restatement endorses admissibility, providing that "all relevant evidence . . . may be considered . . . ."[19]

Perhaps the signature reform of the early volumes of the Property Restatement has been the provision encouraging the trend toward a reformation doctrine in cases of mistaken content—cases in which, for example, the typist has accidentally dropped a paragraph, or the drafter has misrendered the name of a devisee.[20] Courts of equity have long exercised a jurisdiction to reform (in English law, to rectify) mistaken writings.[21] Prove that a scrivener misrendered the metes and bounds in a deed or in a trust, and equity will order the provision rewritten to make the writing conform to what it was meant to say.[22] But until lately, courts have resisted extending this doctrine to comparable mistakes in wills, primarily because doing so would appear to enforce a term that was not contained in the will when executed, hence in tension with the formal requirements of the Wills Act. In recent years, how-

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18 *See* Am. Law Inst., *Drafting Cycle*, http://www.ali.org/index.cfm?fuseaction=projects.drafting (last visited Dec. 26, 2012).

19 Property Restatement, *supra* note 1, § 10.2 & cmt. d.

20 The classic case of this sort is Mahoney v. Grainger, 186 N.E. 86 (Mass. 1933).

21 Authority is discussed in Property Restatement, *supra* note 1, §12.1, cmt. c, Reporter's Note 4.

22 Restatement (Third) of Restitution and Unjust Enrichment §§ 12-13, Reporter's Notes (2011) (collecting authority).

ever, courts have begun to extend the reformation remedy to mistakes in wills,[23] and the Property Restatement has endorsed that trend.[24]

The breakthrough took place in *Snide*,[25] the New York Court of Appeals case decided in 1981. *Snide* was one of the recurrent switched will cases, those sad situations in which two testators, commonly husband and wife, are doing a coordinated round of estate planning—sometimes at the lawyer's office, sometimes elsewhere. In the shuffle of papers being signed, John mistakenly signs the will prepared for Mary, and Mary signs the one for John. Under older law, both wills are void, because neither has been signed by the relevant testator.[26] John did not sign the "John" will, and the "Mary" will that he did sign, being self-evidently somebody else's will, lacks testamentary intent. In *Snide*, the court had the courage to excuse the mistake. It said that "because what has occurred is so obvious, and what was intended so clear," it would be wrong to "nullify . . . this testamentary scheme."[27] Reformation in such a case entails replacing the terms of the "Mary" will that John mistakenly signed with the terms in the "John" will that he thought he was signing.

The rationale for reformation starts with the fundamental policy value of the law of donative transfers: implementing transferor's intent.[28] The Wills Act formal requirements—written terms, signature, and attestation—are meant to be intent-serving, by assuring that the will is genuine, and that it evidences the terms that the testator wanted.[29] Refusing to cure some obvious error, such as the mistaken terms in the switched will cases, causes the Wills Act to invalidate the will and thus defeat the testator's intent. Section 12.1 of the Property Restatement tries to mediate this tension by applying reformation to a mistake or an omission in a will, but only on condition that the proponent of such a claim prove the mistake by our highest civil standard of proof, that is, by clear and convincing evidence. In 2008, the Uniform Law Commission amended the Uniform Probate Code to incorporate the Restatement's

[23] *E.g.*, *In re* Estate of Ikuta, 639 P.2d 400 (Haw.1981) (substituting "youngest" for "old[e]st" to correct well-proven scrivener's error).

[24] PROPERTY RESTATEMENT, *supra* note 1, § 12.1.

[25] Snide v. Johnson (*In re* Snide), 418 N.E.2d 656 (N.Y. 1981).

[26] *E.g.*, *In re* Pavlinko's Estate, 148 A.2d 528 (Pa.1959); Nelson v. McDonald, 16 N.Y.S. 273 (N.Y. Gen. Term 1891).

[27] *Snide*, 418 N.E.2d at 657.

[28] "The donor's intention is given effect to the maximum extent allowed by law." PROPERTY RESTATEMENT, *supra* note 1, § 10.1.

[29] For discussion, see John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491-503 (1975) [hereinafter Langbein, *Compliance*]; Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2-13 (1941).

reformation rule, giving the rule a statutory basis in enacting jurisdictions.[30]

The Uniform Probate Code made a somewhat comparable move back in the 1990 revision of Article II, in dealing with execution blunders, that is, with cases in which some innocuous defect in complying with one of the Wills Act formalities has occurred. The prototypical example is the case in which, under a Wills Act that requires the two attesting witnesses to sign in each other's presence, one of them steps out of the room to powder her nose before the other has completed signing. Under traditional law, the will is void, no matter how overwhelming the evidence that the will was genuine and that the testator executed it with intent that it govern. The UPC's harmless error rule, Section 2-503, excuses a defect in formal compliance if the proponent of the instrument "establishes by clear and convincing evidence that the decedent intended" the document as his or her will. In the Property Restatement, we have absorbed that rule as a rule of construction for jurisdictions in which there is no statutory provision.[31] The Restatement rule follows the prominent New Jersey case, *Ranney*,[32] in reasoning that because the purpose of the Wills Act formalities is to implement the testator's intent, in a case in which the evidence of intent is overwhelming, the purpose of the statute is better served by validating than by nullifying the instrument.

The spread of malpractice liability for professional negligence in trust and probate matters is a background factor that may have contributed to the greater willingness of the courts to remedy mistakes.[33] In former times, when a court voided a will for an execution blunder, or refused to reform a term that the drafter mistakenly omitted or garbled, the loss fell on the intended beneficiaries. Now, however, in cases in which a lawyer drafted the defective instrument or supervised the execution ceremony that miscarried, the tort system risks shifting the loss to the lawyer. Remedying the mistake prevents the loss from arising in the first place.

In scholarly writing about the reformation doctrine and the harmless error rule, Professor Waggoner and I have emphasized that invalidating a genuinely intended transfer on account of an innocuous formal

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[30] *See* UNIF. PROBATE CODE § 2-805 & cmt. at 238 (2010) (explaining that this section is based on UNIFORM TRUST CODE § 415 which is based on PROPERTY RESTATEMENT, *supra* note 1, § 12.1).

[31] PROPERTY RESTATEMENT, *supra* note 1, § 3.3.

[32] *In re* Will of Ranney, 589 A.2d 1339, 1344-45 (N.J. 1991).

[33] For the malpractice situation as of the early 1980s, when the changes got underway, see Gerald P. Johnston, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629 (1982).

defect works unjust enrichment.[34] The person who was meant to take does not, and a person who was not meant to take gets the resulting windfall. Thus, the old rules refusing to reform a will and refusing to excuse trivial execution errors are in tension not only with the core value of the law of donative transfers, enforcing intent, but also with the core principle of the law of restitution, preventing unjust enrichment.[35]

IV. THE CHALLENGES OF THE NONPROBATE REVOLUTION[36]

The deepest trend now affecting the day-to-day reality of gratuitous transfers in the United States is the nonprobate revolution, by which I mean the burgeoning use of will substitutes to transfer property on death. The Uniform Probate Code and the Property Restatement are centrally concerned with the problems of accommodating the will substitutes within the law of donative transfers.

A. The Will Substitutes

Will substitutes are modes of transfer that operate outside the state-operated transfer system of probate administration, hence largely outside the law of wills and intestacy. In contemporary practice, there are five major types of will substitute: (1) the revocable inter vivos trust; (2) life insurance; (3) various types of pay-on-death (POD) bank accounts; (4) transfer-on-death (TOD) securities accounts; and (5) pension accounts, primarily of the individual-account variety. Each of these types is associated with and supported by its own industry—respectively, the trust industry, which is composed of trust companies and trust and estate lawyers; the insurance industry; the commercial banking industry; the securities industry; and the various financial-service providers who have come to constitute the pension industry.

Will substitutes are not new. There is a sense in which the nonprobate system extends all the way back to the fourteenth century, when the trust device first emerged in English law. A major purpose of the

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[34] John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 525-26, 572-77, 589-90 (1982); *see also* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) for Probate Lawyers*, 28 PROB. & PROP., Jan./Feb. 2004, at 28, 31.

[35] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11, cmt. a (2011).

[36] *See generally* Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123 (1993); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) [hereinafter Langbein, *Nonprobate*].

early trust was to evade the many shortcomings of the succession law of that time.[37] Into the nineteenth century, the trust was closely connected to conveyancing, that is, to the transfer of interests in real estate, but thereafter the trust changed character and became a device for the management of financial assets.

This change in the character of the trust was associated with a profound shift in the nature of personal wealth, away from land and toward financial assets.[38] Roscoe Pound pointed to that development in a wonderful aphorism that I have often quoted: In a commercial age, Pound said, wealth consists largely of promises.[39] Most modern wealth (by which I mean private wealth, disregarding claims against government, so-called entitlements[40]) takes the form of contract rights against financial intermediaries.

How did the financial service entities such as banks and mutual fund companies come to be competitors of the probate system? Financial intermediation is intrinsically administrative. "Administrators intermediate between savers and borrowers, between passive owners and active users of capital. Pooling wealth and servicing the resulting liabilities involves recurrent transactions and communications. Once a bureaucracy appropriate to those tasks is in operation, only a [modest] adaptation is [needed] to extend [the] functions and procedures [of the intermediary] to include the transfer of account balances on death."[41]

The association of the will substitutes with particular types of financial administration helps explain a distinctive and structurally troublesome feature of the nonprobate system: Apart from the revocable trust, the other main will substitutes—sometimes called mass will substitutes[42]—are asset-specific. That is, each type is a transfer system that is limited to the particular type of asset that the particular type of financial intermediary happens to offer and to service: Insurance companies transfer insurance accounts arising under insurance policies, banks transfer bank account balances, and so forth.

The reason that this feature of the mass will substitutes is troublesome is that there is seldom any estate planning logic to asset-specific transfers. In the probate and trust world, we do not use a separate will or trust for each asset. We know how to make a specific devise when one is wanted, but our default norm is to consolidate assets of all types

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37 *See* William F. Fratcher, "Trust," in 6 INT'L ENCYC. COMP. L. § 9, at 12 (1972).

38 John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988) [hereinafter Langbein, *Family Wealth*].

39 ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922).

40 *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

41 Langbein, *Nonprobate*, *supra* note 36, at 1119.

42 *Id.* at 1109.

under the residuary clause of one instrument of transfer, the will or the trust. If there is to be good estate planning with respect to most nonprobate assets, the estate planner has to coordinate many separate transfers. It is not uncommon for a propertied person to have a dozen or more will-like beneficiary designations in effect on various banking, investment, insurance, and pension accounts. Dealing with this multiplicity of transfers—coordinating them into a sensible plan, and keeping beneficiary designations up to date in accord with changing circumstances[43]—has become a central problem of modern estate planning.

B. Magnitudes

Most wealth transfer on death today occurs through the nonprobate system, for the simple reason that most personal wealth is now held in financially intermediated account forms that invite nonprobate transfer. The trend toward such forms of wealth has produced financial services industries of stupendous size. Let me give you some data. For the trust world our data is skimpy, because the data is limited to trust assets administered by institutional trustees that are part of the Federal Reserve System. That data therefore excludes assets administered by individual trustees and by institutions outside the Federal Reserve System. As of year-end 2010, institutions reporting to the Federal Reserve held roughly $870 billion in trust accounts.[44]

Trust assets, immense though they are, are dwarfed by the assets held in those forms of financial intermediation that have given rise to the mass will substitutes. At year-end 2010, there was $18.4 trillion of life insurance in force in the United States; benefit payments that year totaled $108 billion.[45] The American mutual fund industry held $13.1 trillion in assets under management at year-end 2010.[46] In that year, 45 percent of U.S. households owned mutual fund shares.[47]

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43 *See infra* notes 82-92 (regarding the danger that a stale beneficiary designation will lead to an intent-defeating result in consequence of ERISA preemption).

44 For 2006, the figure was $760 billion. For that number and the sources from which it was compiled, see generally Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC L.J. 314, 315-16 (2010). The 2010 figure in text, based upon the same sources for the later year, has been calculated by Professor Sitkoff at my request, and with my gratitude.

45 Am. Council of Life Insurers, 2011 Life Insurers Fact Book 49, 66, 67, tbls. 5.1, 7.1 & 7.2 (2011), *available at* http://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/2011%20Fact%20Book.pdf.

46 Inv. Co. Inst., 2011 Investment Company Fact Book, 8-9 & fig.1.1 (51st ed. 2011), *available at* www.ici.org/pdf/2011_factbook.pdf [hereinafter ICI Fact Book].

47 Inv. Co. Inst., Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2011, ICI Research Perspective, Oct. 2011, at 1, *available at* www.ici.org/pdf/per17-05.pdf.

Retirement plan assets in the United States at year-end 2010 amounted to $17.8 trillion.[48] In 1987, when I last had the pleasure of presenting the Trachtman Lecture on another topic, I had occasion to mention that most private pension wealth was held in defined benefit plans, and that most of those plans did not give rise to transfer-on-death account balances, because the benefits were paid as lifetime annuities that expired on the death of the plan participant and his or her spouse.[49] Across the intervening quarter century, there has been a radical transformation of the private pension system. Today, most retirement assets are held in individual account plans, that is, in defined contribution plans and in IRAs.[50] These are plan types in which an account balance may and commonly does remain on the death of the participant and spouse. Such plans invariably provide for the plan to transfer that balance pursuant to a plan-provided beneficiary designation, and if the participant has not executed such a designation, then according to plan terms that function as a plan-specific intestacy scheme.

The prevalent form of defined contribution pension plan today, the 401(k), did not exist until the early 1980s.[51] At year-end 2010, 401(k) plans held over $3 trillion in assets.[52] IRA accounts, which are now found in almost 40 percent of American households,[53] contained an aggregate $4.8 trillion at year end 2010.[54] Much of those assets are rollover proceeds, which originated in other retirement plans. Within the defined benefit world, there has been a pronounced trend in recent years toward lump-sum distribution options, with the result that ever more defined benefit plan assets now flow into rollover IRAs.[55]

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48 Inv. Co. Inst., The U.S. Retirement Market, First Quarter 2011, *U.S. Total Retirement Market Assets* tbl.1 (June 29, 2011), *available at* www.ici.org/pdf/ret_11_q1_data.pdf. [hereinafter ICI, *Total Assets*].

49 Langbein, *Family Wealth*, *supra* note 38, at 745.

50 ICI, *Total Assets*, *supra* note 48, at tbl.1. Of the $17.8 trillion in retirement plan assets, only $2.4 trillion is held in defined benefit plans, compared to $10.3 trillion in defined contribution and IRA accounts. The rest is in certain funded governmental plans and insurance company plans. The DC figure combines 401(k) and 403(b) plans, IRAs, and the federal government's DC plan for federal workers.

51 *See* Emp. Benefit Research Inst., Facts From EBRI, *History of 401(k) Plans: An Update* (Feb. 2005), *available at* www.ebri.org/pdf/publications/facts/0205fact.a.pdf.

52 Inv. Co. Inst., 401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2010, ICI Research Perspective, Dec. 2011, at 2, *available at* www.ici.org/pdf/per17-10.pdf.

53 Inv. Co. Inst., The Role of IRAs in U.S. Households' Saving for Retirement, 2011, ICI Research Perspective, Nov. 2011, at 1, *available at* www.ici.org/pdf/per17-08.pdf.

54 ICI, *Total Assets*, *supra* note 48, at 1 & tbl.1.

55 "Of U.S. households owning traditional IRAs in May 2010, an [Investment Company Institute] household survey found that 55 percent (or 21 million U.S. households) had traditional IRAs that included rollover assets . . . . In their most recent rollover, the

I must be clear about the significance of these stupendous figures. They show the gross asset base of types of financial intermediation that invite nonprobate transfers. I have not been able to locate data on the actual amounts being transferred on death by means of nonprobate beneficiary designations. My data also needs to be corrected to offset some double counting in the asset totals, for example, to correct for the overlap in mutual fund and pension data. Fifty-four percent of defined contribution plan assets and forty-seven percent of IRA assets are invested in mutual funds.[56] These offset figures remind me of Edward Zelinsky's astute observation that the financial services industry has been the "sales force" of the defined contribution world.[57] The industry has also become a sales force for the nonprobate system. Financial service firms and their sales personnel actively promote probate avoidance (and in the case of life insurance, creditor avoidance) as a desirable feature of their investment products, exploiting the long-standing residual hostility to probate[58] in the public at large.

Another factor that motivates the financial services firms to offer transfer-on-death services is that these firms are mostly compensated in ways that correlate with the amount of assets they have under management. Offering transfer-on-death services helps a firm retain the assets in an investor's account until the investor's death. Moreover, because the assets in question are already with that firm, the firm has a practical advantage after the investor's death in competing to retain management of the assets when ownership passes to the transferees.

C. The Relations of the Probate and Nonprobate Systems

In the scholarly literature, I have spoken of the nonprobate modes of transfer as free-market competitors of the state-operated system of transfer on death.[59] A prospective transferor can use the state system of probate, or the private systems operated by Vanguard, Metropolitan Life, Wells Fargo, and the like. We see similar choices in the spread of arbitration: Parties in dispute can use the state system of courts, judges,

vast majority of these households (85 percent) transferred their entire retirement plan balances into traditional IRAs." ICI FACT BOOK, *supra* note 46, at 114 & tbl.7.16.

56 *Retirement Assets Total $17.5 Trillion in Fourth Quarter 2010*, INV. CO. INST., http://www.ici.org/pressroom/news/ret_10_q4 (last visited Dec. 26, 2012) (fourth quarter 2010 data for plan types).

57 EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA 96-97(2007) ("The financial services industry . . . became the sales force for the defined contribution paradigm . . . .").

58 Norman F. Dacey's book, HOW TO AVOID PROBATE (1965), sold 2.5 million copies across five editions, the last in 1993. *See* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 437 (8th ed. 2009).

59 Langbein, *Nonprobate*, *supra* note 36, at 1109.

and procedures, or the parties can contract out of the state system in favor of private providers. Education provides comparable choices: You can send your child to a public school, or to a private one. In law-and-economics terms, your decision to use private transfer-on-death services is a Coasean[60] determination to contract out of the state system of probate administration.

The image of Darwinian struggle between state and non-state transfer systems should not, however, be exaggerated. The state has been playing an important hand in encouraging the growth of the nonprobate system, both by allowing nonprobate transfers, and by devising varieties of state-operated transfer that work in tandem with the free-market providers to facilitate probate avoidance. Consider, for example, the procedures for transferring title to a decedent's motor vehicle. Typically, these state statutes allow the department of motor vehicles to transfer the title on receipt of an affidavit from a survivor, who attests that the decedent did not otherwise leave assets requiring probate.[61] Moreover, in most states, there is a similar, affidavit-based procedure for small estates that allows a survivor to collect and distribute other assets belonging to a decedent when the total involved is below a statutorily set ceiling.[62] These measures reinforce the nonprobate system by allowing expeditious transfer of assets that have traditionally been probate property.

The probate system also supports the nonprobate system by serving a standby role for troubled transfers. Nonprobate beneficiary designations all but invariably name the transferor's probate estate as the final contingent distributee. Thus, if the beneficiaries designated on an account form "predecease the transferor or cannot be identified, the financial intermediary remits the fund to probate distribution. . . . Likewise, if the proper course of distribution is for some reason doubtful, or if contest threatens, financial intermediaries can force the probate (or other) courts to decide the matter,"[63] either by interpleading or by refusing suspect claims and forcing the claimants to contest. In consequence, the nonprobate system "execute[s] easy transfers and shunt[s] the hard ones over to probate. . . . In the nonprobate system, genuine disputes still reach the courts, but routine administration does not."[64]

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60 *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). Regarding Coasean contracting around the state system, see Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. Mich. J.L. Reform 855, 874-77 (2012).

61 *E.g.*, Cal. Veh. Code § 5910 (West 2012).

62 The various state statutes pertaining to small estate procedure are conveniently collected and their main provisions categorized in Jeffrey A. Schoenblum, 2012 Multistate Guide to Estate Planning 4001-4135 (2012).

63 Langbein, *Nonprobate*, *supra* note 36, at 1120.

64 *Id.*

What increasingly happens, therefore, when a modest or moderate wealth-holder dies is that Vanguard, Met Life, and Wells Fargo transfer the main assets, the DMV transfers the car, and anything that's left passes under an affidavit-based small-estate procedure, or by private agreement among the survivors.[65] Until lately, probate was still necessary to clear title when a decedent died owning real property,[66] but nonprobate transfer forms have now been extended even there. Following experience with transfer-on-death deed legislation in Missouri[67] and elsewhere,[68] in 2009 the Uniform Law Commission promulgated the Uniform Real Property Transfer on Death Act,[69] which allows the owner of real property to execute and record a revocable beneficiary designation effective to transfer the property on the owner's death.

If you want to understand the contraction in demand for estate planning services among moderate wealth-holders, combine the elimination across the last generation of federal estate tax exposure for such persons with the rise of the nonprobate system and you have much of the explanation. For better or worse, and in my view it is worse, nonprobate all too often means nonlawyer. The ease with which an account owner can fill out a financial institution's beneficiary designation form seems to imply that professional estate planning guidance is no longer needed. The focus on avoiding probate deflects attention from considerations that laypersons often do not apprehend, such as the desirability

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65 Empirical studies summarized in 1971 found the rates of probate administration varied from state to state, from a low of 15 percent of deaths to a high of forty percent. Robert L. Fletcher, *Probate in England: A Blueprint for the Future?*, 46 WASH. L. REV. 619, 624 (1971) (reviewing WILLIAM FRATCHER, PROBATE CAN BE QUICK AND CHEAP: TRUSTS AND ESTATES IN ENGLAND (1968)). "[W]hen the decedent owns no real property, the family ordinarily divides up the estate in private. . . . The transfer never comes to the attention of the probate court, because no one entitled to demand a judicial proceeding under a will or under the intestate distribution law feels aggrieved enough to do so." Langbein, *Compliance, supra* note 29, at 509 n.85. In that article I referred to this process as "private probate," *id.*at 510 n.85, but a better term would be "private nonprobate."

66 "Ownership of realty is the factor most likely to determine whether a death will lead to a probate proceeding." Langbein, *Nonprobate, supra* note 36, at 1119.

67 MO. REV. STAT. § 461.025 (2012).

68 It is reported that 13 states had legislation of this sort before promulgation of the 2009 *Uniform Real Property Transfer on Death Act. See* Dennis M. Horn & Susan N. Gary, *Death Without Probate: TOD Deeds*-The Latest Tool in the Toolbox, 24 PROB. & PROP., Mar./Apr. 2010, at 13, 14. Gallanis counts 12 and identifies them with dates of enactment, beginning with Missouri in 1989. Thomas P. Gallanis, *Frontiers of Succession*, 43 REAL PROP. TR. & EST. L.J. 419, 429 n.54 (2008). *See generally* Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529 (2006) (providing a careful scholarly study of the development of transfer on death deeds as of 2006).

69 UNIF. REAL PROP. TRANSFER ON DEATH ACT (2009) (codified as UNIF. PROBATE CODE §§ 6-401 to -417 (2010)).

of planning for contingencies such as lapse or incapacity. Moreover, some nonprobate assets present distinctive planning challenges of their own, notably in choosing among the various distribution options for retirement[70] and insurance accounts.

D. Goals of the Law Revision Projects

A main reason that I have been directing your attention to the size of the nonprobate system is to make clear that there is no turning back, no possibility of restoring a probate-centered system of wealth transfer on death. Public suspicion of probate is too great,[71] not to mention the power of the financial services industry.

When, therefore, in the law revision process, we came to deal with the rise of the nonprobate system, we concentrated on improving it rather than impeding it. Four objectives emerged. First, in revising Article VI of the Uniform Probate Code, we took the steps that I have already mentioned to smooth out the forms of transfer for bank accounts and for securities, brokerage, and mutual fund accounts. Second, again in the Code, we improved the protections for creditors to restrain nonprobate transfers from being used to defeat a decedent's debts.[72] Third, in both the Code and the Restatement, we took steps to clarify that the Wills Act does not govern nonprobate transfers, and accordingly, that Wills Act formal requirements do not apply.[73] As a matter of ordinary business practice, the financial services firms that operate the mass will substitutes invariably require beneficiary designations to be in writing and to be signed by the transferor. In this way, the nonprobate system replicates by contract the two main Wills Act formal requirements, writing and signature, but dispenses with attestation.

Fourth, in the UPC and the Restatement, we undertook to unify the rules of construction across the two transfer systems. The most prominent example is the divorce revocation rule. In most states, either by statute or case law, it has long been settled that if John executes a will devising property to his spouse Mary, and John and Mary thereafter divorce, Mary will not take under the will. The law presumes that John's devise to Mary was impliedly conditioned on the persistence of the marriage, and should be treated as revoked on divorce (except, or course, in the rare case in which the will expressly foresees the divorce and specifies that the devise remain in force). In many states, the divorce revocation statute spoke only to wills, not having foreseen and addressed the

70 *See generally* NATALIE CHOATE, LIFE AND DEATH PLANNING FOR RETIREMENT BENEFITS (7th ed. 2011).

71 *See* DACEY, *supra* note 58, at 6-9.

72 UNIF. PROBATE CODE § 6-102.

73 UNIF. PROBATE CODE § 6-101; PROPERTY RESTATEMENT, *supra* note 1, § 7.1.

identical problem in the will substitutes. When, therefore, John's life insurance policy or his TOD security account named Mary as the beneficiary, she would take. What we did in the UPC was to extend expressly the divorce revocation statute to the will substitutes.[74] Our guiding principle was to treat functionally comparable transfers alike. We did the same with the UPC slayer statute, which denies any benefit, probate or nonprobate, to a designated beneficiary who feloniously and intentionally kills the transferor.[75] Similarly, the UPC makes the 120-hour rule for survivorship applicable both to probate and to nonprobate transfers,[76] and it extends the UPC's antilapse regime to both.[77]

The Property Restatement recognizes these statutory developments and deduces from them a constructional principle for situations in which a state's statute law or case law still speaks by terms only to probate transfers, namely, that will substitutes should be "to the extent appropriate, subject . . . to rules of construction and other rules applicable to testamentary dispositions."[78]

The Restatement also confronts the problem that arises when a testator attempts to change a nonprobate beneficiary designation by a later will. The terms of most account agreements permit the account owner to alter the beneficiary designation but require that it be done by executing a particular form and filing that form with the institution that administers the account. Cases arise in which the account owner misunderstands this requirement and attempts to redirect nonprobate assets by will.[79] The courts have mostly held that the provision in the later will is ineffective, for fear that doing otherwise would expose the financial institution to the risk of double payout. The Restatement takes the view that the better solution is to honor the later instrument, in order not to defeat the transferor's intent, but to protect the financial institution's good faith reliance on its account record. In the case in which the institution pays the beneficiary of record before learning of the later inconsistent designation in the will, the good faith reliance of the institution should be a defense to a claim arising under the will. "In such circumstances, that intended beneficiary is remitted to an action in restitution

[74] The Uniform Probate Code's divorce revocation statute pertains to any transfer under a "governing instrument," UNIF. PROBATE CODE § 2-804(b), a term defined term under UNIF. PROBATE CODE § 1-201(18) to include life insurance.

[75] UNIF. PROBATE CODE § 2-803(b) (2010).

[76] UNIF. PROBATE CODE § 2-702(a)-(c); UNIF. SIMULTANEOUS DEATH ACT §§ 2-4 (1993).

[77] UNIF. PROBATE CODE § 2-707(a)(8), (b), cmt.

[78] PROPERTY RESTATEMENT, *supra* note 1, § 7.2.

[79] *E.g.*, Cook v. Equitable Life Assurance Soc'y, 428 N.E.2d 110, 111-12 (Ind. Ct. App. 1981).

against the account-designated beneficiary who received the payment."[80]

E. ERISA Preemption

As a matter of state law, the job of unifying the constructional law of probate and nonprobate transfers is largely done, but sadly, federal law has been thoughtlessly undoing some of the achievement. Recall that life insurance policy in which John has named Mary as the primary beneficiary, but neglected to update the beneficiary designation after they divorce. Suppose John chanced to buy that policy not directly through his local Met Life agent, but under a group contract that Met Life issued to John's employer. In that case, even if John lives and dies in a state that has enacted a UPC-type divorce-revocation statute[81] expressly defeating the claim of an ex-spouse under a beneficiary designation executed before the divorce, Mary will take anyhow. The reason is that ERISA, the federal statute governing pension and other employee benefit plans, has a zanily broad preemption provision, which suppresses all state law that "relate[s] to" any employee benefit plan.[82] In 2001 in the *Egelhoff* case,[83] which involved the application of a state divorce-revocation statute to ERISA plan benefits, the U.S. Supreme Court interpreted ERISA's preemption provision to defeat state law not only as regards matters that ERISA regulates, such as pension benefit accrual formulas,[84] but also matters about which Congress gave no thought and expressed no interest in ERISA, such as the state divorce-revocation statute in *Egelhoff*. Thus, if ERISA governs the plan (and ERISA does govern almost all private-sector pension plans and employer-provided life insurance), ERISA defeats state law. Following similar reasoning,

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80 PROPERTY RESTATEMENT, *supra* note 1, § 7.2, cmt. e, citing RESTATEMENT OF RESTITUTION § 126 (1937), which has now been superseded by RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 48 (2011). Comment e continues:

> When the financial intermediary or payor receives notice of the inconsistent beneficiary designation contained in the subsequent will before paying the beneficiary of record on the account, the financial intermediary or payor should pay the proceeds as directed under the will, notwithstanding the failure of the account owner to comply with the account term specifying account-specific procedures for revocation or alteration. If the financial intermediary or payor is uncertain about the priority or effectiveness of the attempted revocation or alteration by will, the financial intermediary or payor may discharge its responsibilities by interpleading and/or paying the proceeds into court.

PROPERTY RESTATEMENT, *supra* note 1, § 7.2, cmt. e.

81 UNIF. PROBATE CODE § 2-804(b) (2010); *see supra* note 74.

82 Employment Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, § 514(a), 88 Stat. 829, 897 (1974).

83 Egelhoff v. Egelhoff, 532 U.S. 141 (2001).

84 *E.g.*, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).

courts have held that ERISA preempts such routine and fundamental features of state wealth transfer law as the 120-hour rule for survivorship under North Carolina's simultaneous death statute,[85] and the four-month Montana nonclaim statute for presenting creditor claims in probate.[86]

The Court's reasoning in *Egelhoff* was that Congress wanted to spare ERISA plan fiduciaries from the supposed burden of having to comply with different states' laws when administering an employee benefit plan in which the plan participants and beneficiaries might be domiciliaries of different states.[87] So, the Court took the position that it would rather inflict unjust enrichment than "burden" the plan administrator with looking up local law on the point.

Even if the Court had been correct that the language of ERISA compelled preemption in this case,[88] the Court ignored an easy way to get the right result in *Egelhoff* and similar cases: Retain preemption, but absorb the divorce revocation principle as articulated in the UPC and the Property Restatement as a matter of federal common law under ERISA.[89]

Another path that would reconcile ERISA's interest in uniform plan administration with the state law policy manifested in the divorce revocation statute would be to allow preemption, but to limit its effect to plan-level distribution, allowing the person entitled under the relevant state law to recover against the distributee in a state law cause of action. The Uniform Probate Code's divorce-revocation statute carefully preserves this option, providing that the distributee "is obligated to return [the] payment to the person who would have been entitled to it" in the absence of preemption.[90]

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85 Harleysville Life Ins. Co. v. Harrelson, No. 7:10-CV-00051-DAN, 2011 WL 4544047, at *1, *4 (E.D. N.C. Sept. 29, 2011) (following *Egelhoff*, 532 U.S. at 148).

86 Bd. of Trs. of W. Conf. of Teamsters Pension Trust Fund v. H. F. Johnson, Inc., 830 F.2d 1009 (9th Cir. 1987).

87 *Egelhoff*, 532 U.S. at 148 (Washington divorce revocation statute "interferes with nationally uniform plan administration.").

88 Justice Breyer on behalf of himself and Justice Stevens, filed a strong dissent from the court's reasoning on the matter. *See id.* at 153-60 (Breyer, J., dissenting).

89 Recommended in David S. Lebolt, *Making the Best of Egelhoff: Federal Common Law for ERISA-preempted Beneficiary Designations*, 28 J. PENSION PLAN. & COMPLIANCE 29 (2002); *accord* T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J.185, 189 (2004). Regarding the federal common law of ERISA, see, e.g., Morais v. Cent. Beverage Corp. Union Emp. Supp. Retirement Plan, 167 F.3d709, 711(1st Cir.1999) ("[I]t is well settled that federal common law applies . . . to interpret the provisions of an ERISA benefit plan . . . .") (citing Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 585, 587 (1st Cir. 1993); Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 178 (1st Cir. 1995)).

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

In a case decided in 2009 dealing with another of ERISA's supposed conflicts with state property and succession law—whether to enforce an ex-spouse's waiver of plan benefits under a state-law marital property agreement after she collected the plan proceeds under a stale beneficiary designation—the Supreme Court noticed but refused to "express any view as to whether [the intended beneficiary] could have brought an action in state or federal court . . . to obtain the benefits after they were distributed."[91] Quite recently in one of these waiver cases, the Third Circuit took this opening to conclude that "to the extent that ERISA is concerned with the expeditious payment of plan proceeds to beneficiaries, permitting suits against beneficiaries after benefits have been paid does not implicate any concern of expeditious payment or undermine any core objective of ERISA."[92] It remains open to other courts to resolve such conflicts in this way, preventing rather than inflicting unjust enrichment.

The phenomenon evidenced in so many ERISA cases of reckless federal impairment of well-considered state law in an area of traditional state responsibility is deeply dispiriting. Professor Waggoner, in his lecture, will discuss another example arising from the Generation Skipping Tax. I am reminded of the old joke, "Where does an elephant sleep?" The answer is, "Wherever it wants." But responsible lawmaking should be based on something better than the reckless exercise of power.

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

92 Estate of Kensinger v. URL Pharma, Inc., 674 F.3d 131, 136-37 (3d Cir. 2012) (citing *Kennedy*, 555 U.S. at 301). The Third Circuit decision relied upon three state court decisions enforcing such a waiver against a plan-designated beneficiary who has collected from the plan: Alcorn v. Appleton, 708 S.E.2d 390, 392 (Ga. Ct. App. 2011); Sweebe v. Sweebe, 712 N.W.2d 708, 712 (Mich. 2006); Pardee v. Pardee, 112 P.3d 308, 315-16 (Okla. Civ. App. 2004).