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Cinderella thought she'd found her Prince Charming—until the "happily ever after" failed to materialize. They harbored no ill will against each other, just realized over the years that a marriage should be built on more than a shoe size. So, they signed away their rights to each other's property, put the divorce decree in a safe deposit box, and moved on with their lives. Although they remained friends, when the tabloids broke the news of Charming's death in a tragic motorcycle accident a few years later, Cinderella was surprised to learn she was the named beneficiary for his retirement plan with Royalty, Inc. But Charming's evil stepbrother was quite disgruntled about his former sister-in-law getting the $1 million nest egg he thought should stay in the family. He sued the retirement plan, alleging that Cinderella waived her rights to Charming's retirement in their divorce decree, dragging them both into years of bitter litigation.

Cinderella's story is hardly a fairy tale; it is an increasingly common predicament faced by families and courts across the country. Hovering at the intersection of state family law and the Employee Retirement Income Security Act of 1974 (ERISA), the issue of whether a retirement plan beneficiary may waive his or her interest through an ordinary "non-qualified" divorce decree has created a definitive split among the federal circuit courts of appeal and state supreme courts.

On one side, courts that follow the statutory approach contend that ERISA itself addresses the issue. One ERISA provision provides that retirement plan benefits cannot be "assigned or alienated," and this includes waiver. Another provision provides that retirement plan administrators must distribute benefits according to the documents and

2. ERISA governs two types of retirement plans. "Defined benefit plans" may generally be thought of as old-fashioned pensions, whereby participants who meet eligibility and vesting requirements receive a monthly payment for their lifetime. See 29 U.S.C. § 1002(34). "Defined contribution plans" may generally be thought of as 401(k) plans and similar arrangements whereby participants and employers contribute to individual accounts intended for retirement, but no particular amount is guaranteed in the end. Id. § 1002(35). Collectively, the statute refers to both types as "employee pension benefit plans" or simply "pension plans." See id. § 1002(2)(A) (definition). To avoid any confusion over the colloquial use of the word "pension," and because the distinction is largely irrelevant for the issue presented, this note uses the term "retirement plans" to refer to both types collectively.
3. See, e.g., McGowan v. NJR Serv. Corp., 423 F.3d 241, 246 (3d Cir. 2005) ("Because this case is resolved by reference to the terms of ERISA and the [plan documents alone, federal common law should simply have no place in our analysis.").
instruments governing the plan.\textsuperscript{5} A third provision makes clear that state law (including family law) is preempted by ERISA.\textsuperscript{6} There are three explicit exceptions to these rules, including an exception for divorce decrees that are “qualified” under specific statutory criteria.\textsuperscript{7} According to the statutory approach, the beneficiary designation on file with the retirement plan controls who will receive the benefits of a deceased participant, unless the requirements of one of the statute’s explicit exceptions are fulfilled.

On the other side, the “federal common law waiver” approach is based on the premise that ERISA does not provide the answer.\textsuperscript{8} The “anti-alienation provision” does not apply because a “waiver” by a beneficiary is not an “assignment or alienation.”\textsuperscript{9} The “fiduciary duty provision” does not apply because it does not explain how plan administrators should determine who is entitled to benefits.\textsuperscript{10} And the “preemption” provision is irrelevant because it does not preempt federal law that is uniform and consistent across every state.\textsuperscript{11} Thus, because ERISA does not answer the issue presented, courts following this approach attempt to develop a federal common law standard for when a waiver is effected through a non-qualified divorce decree.

In \textit{Kennedy v. Plan Administrator for DuPont Savings & Investment Plan},\textsuperscript{12} the Fifth Circuit correctly adopted the statutory approach but overreached in its reasoning, thereby raising two potential problems. This Note explains the Fifth Circuit’s opinion and how the Supreme Court has refined the Fifth Circuit’s analysis to eliminate the pitfalls. It then concludes by describing an unresolved issue in the equitable treatment of retirement plan death benefits.

Part II gives an overview of the history of ERISA and the congressional policy objectives behind it. This section then describes the split among the circuit courts of appeal and state supreme courts, and examines ERISA’s preemption of state law, the only point shared by both approaches. Part III begins by analyzing what the Fifth Circuit

\begin{footnotes}
\footnote{Id. § 1104(a)(1)(D). "Documents and instruments governing the plan" include a "written instrument" pursuant to which a plan is established and maintained, as well as the written beneficiary designation filed by the participant. \textit{Id.} § 1102(a)(1).}

\footnote{Id. § 1144(a).}

\footnote{Id. § 1056(d)(2)-(4).}

\footnote{See, \textit{e.g.}, Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir. 1989) ("None of ERISA’s express provisions addresses the issue presented in this case. We therefore must ascertain the proper federal common law principles that should govern.").}

\footnote{See, \textit{e.g.}, Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 279 (7th Cir. 1990).}

\footnote{See, \textit{e.g.}, Manning v. Hayes, 212 F.3d 866, 872 (5th Cir. 2000).}

\footnote{See, \textit{e.g.}, Guardian Life Ins. Co. of America v. Finch, 395 F.3d 238, 242 (5th Cir. 2004).}

\footnote{497 F.3d 426 (5th Cir. 2007), aff’d, 129 S. Ct. 865 (2009).}
\end{footnotes}
did right in terms of the black letter law of ERISA, the policies underlying ERISA, and the general equities surrounding retirement plan death benefits. This section then highlights two problems with the Fifth Circuit’s approach, explains how the Supreme Court resolved these problems, and describes an issue raised, but not resolved, by the Supreme Court’s opinion. Part IV concludes that the result in Kennedy, as defined by the Fifth Circuit and refined by the Supreme Court, is the correct and common-sense approach to retirement plan death benefits.

II. BACKGROUND

A. The Intent and Purpose of ERISA

ERISA is “an intricate, comprehensive statute”\(^\text{13}\) regulating a wide variety of fringe benefits offered by private employers to their employees. As a reaction to historical abuses, the statute was designed to protect employee interests in these benefits.\(^\text{14}\) This principal objective is declared in the statute itself, which states it “protect[s] . . . the interests of participants in employee benefit plans and their beneficiaries”\(^\text{15}\) by “improving the equitable character and the soundness of such [private retirement] plans.”\(^\text{16}\)

Another principal goal of ERISA is to ease plan administration for employers by affording them a consistent procedure for processing claims and disbursing benefits, free from varying obligations under state laws.\(^\text{17}\) This encourages employers to offer benefits\(^\text{18}\) by minimizing their administrative and financial burdens—burdens they

\(^{13}\) Boggs v. Boggs, 520 U.S. 833, 841 (1997).

\(^{14}\) Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) (“ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.”); H.R. Rep. No. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639 (“The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans.”).


\(^{16}\) Id. § 1001(c).

\(^{17}\) Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 148 (2001) (“One of the principal goals of ERISA is to enable employers ‘to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.’” (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987))).

\(^{18}\) Fort Halifax Packing Co., 482 U.S. at 11 (“A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.”); H.R. Rep. No. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4640 (“In broad outline, the bill is designed to: . . . (5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.”).
would ultimately pass on to the beneficiaries in the form of higher costs.19

ERISA's specific provisions are intended to implement these general policies.20 For instance, the "plan documents rule" requires that every plan "shall be established and maintained pursuant to a written instrument"21 that must, among other things, "specify the basis on which payments are made to and from the plan."22 Many of ERISA's other provisions rest on this core principle, whereby the plan documents determine the scope and operation of each plan, generally facilitating certainty, which in turn allows for efficient and inexpensive administration. Most important for the issue presented, ERISA relies on the plan documents rule to impose a fiduciary duty on plan administrators to discharge their duties "in accordance with the documents and instruments governing the plan."23 Once benefits are thus defined and protected from the whims of the plan administrator, ERISA protects those benefits from third parties and the participant's own whims by prohibiting nearly any "assignment" or "alienation" of plan benefits.24

But bright-line rules inevitably cause inequity in some cases. For this reason, the Retirement Equity Act of 1984 (REA) was enacted to afford greater protection for participants' spouses,25 and to put to rest "any concern for the ability of individuals to freely and voluntarily relinquish certain rights in their former spouses' ERISA plan benefits upon divorce."26 The REA amended ERISA in two ways. First, it required every defined benefit plan27 to provide an annuity to any surviving spouse after a participant's death.28 This spousal interest cannot be waived or reassigned without the spouse's written consent.29

19. Egelhoff, 532 U.S. at 149–50 ("Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s] on plan administrators—burdens ultimately borne by the beneficiaries.'" (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990))).
22. Id. § 1102(b)(4).
23. Id. § 1104(a)(1)(D).
24. Id. § 1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.").
25. Boggs, 520 U.S. at 843. See generally id. at 842–47 (discussing the REA in more detail).
27. See supra note 2.
28. If the participant retires and begins receiving pension benefits before their death, this is called a "qualified joint and survivor annuity." 29 U.S.C. § 1055(a) (2000). If the participant dies before retiring, a smaller annuity called a "qualified preretirement survivor annuity" is required. Id. § 1055(a)(2).
29. Id. § 1055(c).
Second, and most important for the issue presented, REA created the concept of qualified domestic relations orders (QDROs). A QDRO allows a state court to sidestep ERISA's anti-alienation and preemption provisions and use retirement plan funds in awarding alimony or child support or when dividing marital property. To qualify as a QDRO, a domestic relations order issued under state law must meet certain requirements. Most notably, a QDRO must clearly specify how payments are to be made from the retirement plan and to whom. Retirement plan administrators must develop procedures for determining whether domestic relations orders they receive are QDROs and must notify the affected parties of their determination.

Despite the strides made by REA, some equitable outliers persist, and Kennedy illustrates one of the most troublesome. In a Kennedy-type dispute, a retirement plan participant designates his or her spouse as the beneficiary to receive survivor benefits upon the participant's death. The couple divorces at some point thereafter, but no QDRO is issued, and the participant never changes the beneficiary designation. Upon the participant's death, sometimes years later, benefits are therefore paid to the ex-spouse as the named beneficiary on file with the plan administrator. This result is challenged by the participant's heir apparent, who believes they should be entitled to the benefit by virtue of some language in the non-qualified divorce decree purporting to divest each spouse of any interest in the other's retirement savings or property in general. Thus, the issue in a Kennedy-type dispute is whether a non-qualified divorce decree constitutes a waiver of a beneficiary's rights to retirement plan death benefits.

The challengers would likely have a clear-cut case under state family law. Under state law, divorce decree language purporting to waive one spouse's interest in the other's retirement plan could constitute a valid waiver. In addition, some state statutes provide that a divorce decree automatically revokes any beneficiary designation in favor of

30. See id. § 1056(d)(3).
31. QDROs are explicitly excepted from these provisions. Id. §§ 1056(d)(3)(A), 1144(b)(7).
32. Id. § 1056(d)(3).
33. Id. § 1056(d)(3)(C)–(E).
34. Id. § 1056(d)(3)(C)(i)–(iv).
35. Id. § 1056(d)(3)(G)(i)–(ii).
36. Typically, the challenger is the participant's child or subsequent spouse.
37. See generally 1 Oldfather, ET. AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 4.10[5] (2004) (explaining that some jurisdictions require a waiver to specifically mention pension rights, while others will enforce a generally worded waiver).
the former spouse unless the designation is renewed after the divorce.\textsuperscript{38}

However, all of these state laws are preempted by ERISA’s “deliberately expansive”\textsuperscript{39} express preemption provision, which states that the statute “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”\textsuperscript{40} The Supreme Court has held that a state law\textsuperscript{41} relates to an ERISA plan “if it has a connection with or reference to such a plan.”\textsuperscript{42} To determine whether a state law has such a connection, the Court looks to the objectives of the statute and the effect of the state law on ERISA plans.\textsuperscript{43} Thus, “[t]he express preemption provisions of ERISA are designed to establish pension plan regulations as exclusively a federal concern.”\textsuperscript{44}

In a \textit{Kennedy}-type dispute, ERISA’s preemption of state law is the only point on which all courts ostensibly agree.\textsuperscript{45} Beyond this, the federal circuit courts of appeal and state supreme courts fall into two camps. Generally, the split is based on the answer to one question: whether ERISA addresses the dilemma posed by \textit{Kennedy}-like waivers in non-qualified divorce decrees and other contracts.\textsuperscript{46} Courts that follow the “federal common law waiver approach” assert that ERISA is silent on this issue; courts that follow the statutory approach conclude

\begin{itemize}
  \item \textsuperscript{38} See, \textit{e.g.}, \textsc{Unif. Probate Code} § 2-804 (2006); \textsc{Wash. Rev. Code} § 11.07.010(2)(a) (1994); \textsc{Tex. Fam. Code Ann.} § 9.302(a) (2006).
  \item \textsuperscript{39} \textsc{Pilot Life Ins. Co. v. Dedeaux}, 481 U.S. 41, 46 (1987).
  \item \textsuperscript{40} 29 U.S.C. § 1144(a) (2000). QDROs are explicitly excepted from the preemption provision. \textit{Id.} § 1144(b)(7).
  \item \textsuperscript{41} For preemption purposes, “state law” is defined as including “all laws, decisions, rules, regulations or other State action having the effect of law, of any State.” \textit{Id.} § 1144(c)(1).
  \item \textsuperscript{42} \textsc{Shaw v. Delta Air Lines, Inc.}, 463 U.S. 85, 97 (1983).
  \item \textsuperscript{44} \textsc{Metro. Life Ins. Co. v. Pressley}, 82 F.3d 126, 129 (6th Cir. 1996) (quoting \textsc{Alessi v. Raybestos-Manhattan, Inc.}, 451 U.S. 504, 523 (1981)). \textit{See also} \textsc{Pilot Life}, 481 U.S. at 45-46.
  \item \textsuperscript{45} \textsc{Brandon v. Travelers Ins. Co.}, 18 F.3d 1321, 1325 (5th Cir. 1994) (“Without exception, courts have held that ERISA preempts the application of state law under the circumstances of this case.”). However, agreement on the preemption issue is somewhat undermined by the use of state law to craft federal common law. \textit{See infra} notes 78–84, 156–171, and accompanying text.
  \item \textsuperscript{46} This is precisely the issue pinpointed by the Fifth Circuit in \textsc{Kennedy v. Plan Adm’r for DuPont Sav. \& Inv. Plan}, 487 F.3d 428, 429 (5th Cir. 2007) (“[T]he relevant inquiry is whether, in the light of the anti-alienation provision, the federal law governing the resolution of this action may be reasonably drawn from the text of ERISA itself, or must instead be developed as a matter of federal common law.”), \textit{aff’d}, 129 S. Ct. 865 (2009).\end{itemize}
that several provisions of ERISA combine to dictate a result that leaves no room for federal common law.

B. The Statutory Approach

Circuits and state supreme courts that follow the statutory approach assert that ERISA does not allow a named beneficiary to waive rights to plan benefits through a divorce decree or other contract. These courts generally point to two provisions of ERISA, and the policies underlying them, as a mandate that benefits must be paid to the named beneficiary, regardless of any attempt to waive that right to payment.\footnote{47}

First, these courts invoke the plan documents rule\footnote{48} and the fiduciary duties provision\footnote{49} to require ERISA plans to operate and pay benefits according to written plan documents and rules.\footnote{50} These courts consider this mandate as requiring plan administrators to \emph{only} follow the plan documents. Therefore, any effort to look beyond them is a violation of explicit statutory commands.\footnote{51} These courts bolster this interpretation with the policies underlying ERISA, explaining that their holdings afford simple, uniform administration and allow parties to avoid the expense of litigation because they can be certain of their rights at all times.\footnote{52}

Second, at least one court also asserts that ERISA’s anti-alienation provision\footnote{53} prohibits waivers. Although “waiver” is not expressly prohibited by the language of this provision, it could fit within the Trea-
sury Department regulation defining the type of prohibited “assignment or alienation.”\textsuperscript{54} As the Third Circuit recently explained:

ERISA’s silence with respect to the right to waive benefits supports the conclusion that such a right does not exist. \ldots \textsuperscript{55} [The QDRO provision, which recognizes the right to designate alternate payees under certain circumstances, gives rise to the strong implication that the designation of alternate payees under other circumstances is not consistent with the statutory scheme.\textsuperscript{55}]

There are two main examples of the statutory approach.\textsuperscript{56} In \textit{McMillan v. Parrott}, the Sixth Circuit confronted a dispute over retirement plan benefits that pitted the participant-decedent’s ex-wife against his widow, to whom he had been married for less than 24 hours, and his children from yet another marriage.\textsuperscript{57} The Sixth Circuit held that the former wife, as the named beneficiary, was entitled to the proceeds at issue.\textsuperscript{58} In addition to discussing the preemption of state law\textsuperscript{59} and the fiduciary duty provision,\textsuperscript{60} the court emphasized that four years passed between the participant’s divorce and his death, during which he could have changed the beneficiary designation at any time.\textsuperscript{61} “A participant is master of his own ERISA plan. \ldots \textsuperscript{62} Simply put, it was [the participant’s] designation which controls, not [the former wife’s] intent” in waiving the benefits.

In \textit{McGowan v. NJR Service Corporation}, the Third Circuit considered a dispute between a participant and the retirement plan administrator that refused to recognize his ex-wife’s purported waiver contained in a property settlement agreement.\textsuperscript{63} The Third Circuit affirmed the district court’s order granting summary judgment to the plan administrator.\textsuperscript{64} In doing so, it pointed to the fiduciary duty\textsuperscript{65}

\begin{itemize}
\item[54.] \textit{McGowan}, 423 F.3d at 249 (citing 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1997)). See infra notes 105–108 and accompanying text.
\item[55.] \textit{Id.} at 249–50.
\item[56.] In addition, \textit{Metropolitan Life Insurance Co. v. Pressley}, 82 F.3d 126, 129 (6th Cir. 1996), applies the rule set by \textit{McMillan} and some district court cases have also applied the statutory approach. See, e.g., \textit{Zienowicz v. Metro. Life Ins. Co.}, 205 F. Supp. 2d 339 (D.N.J. 2002). Courts often cite \textit{Krishna v. Colgate Palmolive Co.}, 7 F.3d 11 (2d Cir. 1993), as another example of the statutory approach. \textit{Krishna} aligns with the statutory approach philosophically, but the precise issue there was preemption, not waiver.
\item[57.] \textit{McMillan}, 913 F.2d at 310.
\item[58.] \textit{Id.} at 312.
\item[59.] \textit{Id.} at 311. See supra notes 39–44 and accompanying text.
\item[60.] \textit{Id.} See supra note 23 and accompanying text.
\item[61.] \textit{Id.} at 311–12.
\item[62.] \textit{Id.} at 312.
\item[63.] McGowan v. NJR Serv. Corp., 423 F.3d 241, 243 (3d Cir. 2005). This unusual posture was caused because the participant divorced after he retired and the plan rules did not permit any changes to beneficiary designations after benefit payments began. \textit{Id.}
\item[64.] \textit{Id.} at 250.
\item[65.] \textit{Id.} at 245-48. See supra note 23 and accompanying text.
\end{itemize}
and anti-alienation provisions\textsuperscript{66} and emphasized that, although the statute dictated a "somewhat strange result," Congress had carefully crafted the detailed requirements contained in ERISA, and "[a]s such, our holding 'is a decision already made by legislation.'" \textsuperscript{67}

C. The Federal Common Law Waiver Approach

Courts that follow the federal common law waiver approach assert that ERISA is silent regarding whether a named beneficiary may waive rights to plan benefits through a divorce decree.\textsuperscript{68} In so holding, these courts usually refute the construction of the ERISA provisions discussed above. However, some opinions simply ignore one of these provisions, probably because that argument is not raised by the parties.\textsuperscript{69} The specific reasoning used by each court thus varies, but some broad disagreements with the statutory approach can be observed.

First, these courts find that the fiduciary duty provision\textsuperscript{70} "does not either expressly or implicitly purport to establish any methodology for determining the beneficiary of an ERISA plan or for resolving competing claims to insurance proceeds."\textsuperscript{71} Instead, it simply outlines a plan administrator's duties.\textsuperscript{72} Thus, these courts conclude that it is "a very thin reed" to support a finding that ERISA answers the question of how to determine the beneficiary of a retirement plan.\textsuperscript{73}

Second, these courts find the anti-alienation provision\textsuperscript{74} inapplicable because it "focus[es] on the assignment or alienation of benefits by a participant, not the waiver of a right to payment of benefits made by a designated beneficiary."\textsuperscript{75} This idea encompasses two independent
premises: (1) that waiver is not an assignment or alienation,76 and (2) that the anti-alienation provision does not apply to beneficiaries.77

Once they find that waiver is allowed under ERISA, these courts are left with a federal statute that offers no answers but bars them from supplementing their query with state law.78 Thus, they must develop a body of "federal" common law to fill in the gaps in the statute.79 These courts generally "have no trouble" borrowing state law to craft a federal common law standard for effective waivers.80 The Fifth Circuit adopted a Texas law "creating a presumption of waiver absent redesignation following divorce"81 but modified the rule to require that "any waiver of ERISA benefits be explicit, voluntary, and made in good faith."82 The Seventh and Eighth Circuits focus not just on explicitness, but on whether the purported waiver contains "terms specifically divesting the spouse's rights as a beneficiary under the policy or plan."83 In response, the Fifth Circuit rejected this "magic words" approach in favor of a "reasonable person" standard, finding waiver "if, upon reading the language in the divorce decree, a reasonable person would have understood that she was waiving her beneficiary interest."84

Ultimately, courts that follow the federal common law waiver approach are driven by the equities evoked in the particular facts of each case and by the desire to avoid giving retirement plan proceeds to an

76. See, e.g., id. This premise is less popular; courts following the federal common law waiver approach usually avoid this issue altogether and focus on the second premise.
77. See, e.g., id. at 279–80; Estate of Altobelli v. Int'l Bus. Mach. Corp., 77 F.3d 78, 81 (4th Cir. 1996); Keen v. Weaver, 121 S.W.3d 721, 727 (Tex. 2003); see also McMillan v. Parrott, 913 F.2d 310, 312 n.1 (6th Cir. 1990) (dismissing the issue as identified by Fox Valley "because we herein hold that the interest of [the named beneficiary] is controlled by the plan documents as they provided at the time of [the participant's] death").
78. As discussed above, even federal common law courts agree that ERISA's express preemption provision applies to the issue presented. See supra note 45.
79. See infra note 133 and accompanying text.
80. Manning v. Hayes, 212 F.3d 866, 872 (5th Cir. 2000).
82. Id. at 1327. See Guardian Life Ins. Co. of America v. Finch, 395 F.3d 238, 240 (5th Cir. 2004); Manning, 212 F.3d at 874; Clift ex rel. Clift v. Clift, 210 F.3d 268, 271 (5th Cir. 2000). But see Keen, 121 S.W.3d at 732 (Hecht, J., dissenting) (arguing against a "voluntary" requirement because it produces an illogical result that "ERISA precludes stripping one spouse of any interest in the other's pension plan in a contested divorce but not in an agreed divorce").
83. Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir. 1989). See also Fox Valley & Vicinity Constr. Workers Pension Fund, 897 F.2d 275, 281 (7th Cir. 1990) (stating the need for specificity in the waiver provision).
84. Manning, 210 F.3d at 871–72.
Many courts do not expressly declare this motivation, but it is quite evident in their reasoning and is often included among the criticisms set forth by proponents of the statutory approach.

III. ANALYSIS

A. The Fifth Circuit's Opinion in Kennedy

With this background in mind, this Note turns to the case that serves as the window into the issue presented. The facts as set forth by the Fifth Circuit in *Kennedy* are as follows. William Kennedy married Liv Kennedy in 1971. In 1974, he designated her as the sole beneficiary for his savings and investment plan (SIP), a retirement plan provided by his employer, DuPont, and governed by ERISA.

The Kennedys divorced twenty years later, in 1994. Pursuant to the non-qualified divorce decree, Liv Kennedy agreed to be divested of "all right, title, interest, and claim in and to . . . the proceeds therefrom, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [decedent's] employment." In 1997, a QDRO was issued to provide benefit-disbursement instructions for some of William Kennedy's non-SIP employee-benefit plans. However, no QDRO was ever approved or submitted with regard to the SIP. William Kennedy also never executed any documents replacing or removing Liv Kennedy as the SIP beneficiary.

William Kennedy died in 2001. After his death, Kari Kennedy, the couple's daughter and executor of William Kennedy's estate, demanded that the SIP administrator pay the retirement plan funds to the estate. She cited a Texas statute that invalidated a spouse's designation as a retirement plan beneficiary upon divorce. The admin-

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85. *See, e.g.*, Silber v. Silber, 786 N.E.2d 1263, 1269 (N.Y. 2003) ("Strict application of ERISA requirements, while likely serving the ends of uniformity, may not serve the ends of fairness . . . .").
89. *Kennedy*, 497 F.3d at 427.
90. *Id*.
91. *Id.* at 427–28.
92. *Id.* at 428.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id.* (citing *Tex. Fam. Code Ann.* § 9.302 (2006)).
istrator refused this demand, and paid the $400,000 SIP balance to Liv Kennedy, who also refused the estate's request to relinquish the funds.\textsuperscript{97}

The estate then sued the SIP administrator, asserting an ERISA claim and a state-law breach-of-contract claim.\textsuperscript{98} The estate argued that Liv Kennedy had waived her rights to the SIP benefits through the non-qualified divorce decree, which invalidated the SIP beneficiary designation, and therefore the administrator had incorrectly distributed the benefits.\textsuperscript{99}

In reversing the district court's grant of summary judgment to the estate, the Fifth Circuit delivered a relatively short opinion endorsing the statutory approach. First, the court pointed out that the anti-alienation provision applies only to retirement plans.\textsuperscript{100} By its terms, it does not apply to employer-sponsored "welfare plans," which include health, life, and disability insurance and other non-retirement fringe benefits.\textsuperscript{101} The court thus distinguished its previous opinions espousing the federal common law waiver approach\textsuperscript{102} because those cases involved welfare plans, and the anti-alienation provision was not at issue.\textsuperscript{103}

The court then brushed over the preemption analysis in its framing of the issue: "Because ERISA preempts state law for the issue at


\textsuperscript{98} Kennedy, 497 F.3d at 427. The SIP filed a third-party claim against Liv Kennedy, which was settled. Id.

\textsuperscript{99} Id.

\textsuperscript{100} Id. at 429. See 29 U.S.C. § 1002(2) (2000) (defining "pension plan" and "employee pension benefit plan"); 29 U.S.C. § 1056(d)(1) (2000) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988) ("[T]here is no ignoring the fact that, when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and not ERISA welfare plan benefits.") (emphasis in original).

\textsuperscript{101} See 29 U.S.C. § 1002(1) (2000) (defining "employee benefit welfare plan" and "welfare plan" as those providing "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services").

\textsuperscript{102} Specifically, the Fifth Circuit distinguished four cases: Guardian Life Ins. Co. of America v. Finch, 395 F.3d 238 (5th Cir. 2004); Manning v. Hayes, 212 F.3d 866 (5th Cir. 2000); Clift ex rel. Clift v. Clift, 210 F.3d 268 (5th Cir. 2000); and Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994).

\textsuperscript{103} Kennedy, 497 F.3d at 429.
hand, the relevant inquiry is whether, in the light of the anti-alienation provision, 'the federal law governing the resolution of [this action] may be reasonably drawn from the text of ERISA itself, or must be developed as a matter of federal common law.'

The court rejected the estate's argument that "waiver" differs from "assignment" or "alienation," citing a Treasury Department regulation that was endorsed in *McGowan* and *Boggs*. The regulation defines "assignment or alienation" as "[a]ny direct or indirect arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." The court concluded that Liv Kennedy's waiver contained in the non-qualified divorce decree was an "indirect arrangement" that gave the estate "an interest enforceable against the plan," and therefore the waiver was barred by the anti-alienation provision.

The court also rejected the estate's argument that two Fifth Circuit cases endorsed the federal common law waiver approach. The *Kennedy* court did not overrule those cases, but distinguished them because neither involved a waiver contained in a non-qualified divorce decree, and so neither implicated the QDRO provisions. The court then reasoned that "[i]n the marital-dissolution context, the QDRO provisions supply the sole exception to the anti-alienation provision." For support, the court cited *McGowan* and *Boggs*, wherein the Supreme Court noted how carefully Congress drafted the QDRO exception, and stressed that it is "not subject to judicial expa-
Finally, the Fifth Circuit held, "When, as here, ERISA provides a specific mechanism—the QDRO—for addressing the elimination of a spouse's interest in plan benefits, but that mechanism is not invoked, there is no basis to formulate a federal-common-law rule." 114

B. What the Fifth Circuit Did Right

The Fifth Circuit was correct to shun the federal common law waiver approach. Although the equitable aspects of the federal common law waiver approach are alluring, the statutory approach is better supported by the black letter law of ERISA, the public policies behind ERISA, and the general equities involved in retirement plan death benefits.

1. The Black Letter Law of ERISA

Three ERISA provisions strongly suggest that the federal common law waiver approach is inappropriate: the plan documents rule, the fiduciary duties provision, and the preemption provision. The plan documents rule requires ERISA plans to establish their rules and policies in a written plan document. 115 Based on that rule, the fiduciary duties provision requires plan administrators to discharge their duties in compliance with those governing documents. 116 The preemption provision establishes retirement plans as an exclusively federal sphere of regulation 117 by superseding all state laws that "relate to" such plans. 118 Analyzed in conjunction, and compounded with ERISA's silence regarding waiver, 119 these three provisions suggest that plan administrators should look only to the plan rules and the beneficiary designation on file, and nothing else, in determining who should receive retirement plan death benefits like those at issue in Kennedy. 120

113. Id. (quoting Boggs v. Boggs, 520 U.S. 833, 854 (1997)).
114. Id.
116. Id. § 1104(a)(1)(D). See supra note 23 and accompanying text.
118. 29 U.S.C. § 1144(a). QDROs, based on state family law, are explicitly excepted from the preemption provision. Id. § 1144(b)(7). See supra notes 31, 39–44 and accompanying text.
119. McGowan v. NJR Serv. Corp., 423 F.3d 241, 249–50 (3d Cir. 2005) ("ERISA's silence with respect to the right to waive benefits supports the conclusion that such a right does not exist.").
120. See Boggs v. Boggs, 520 U.S. 833, 847 (1997) (discussing the "strong implication" that community property claims are "not consistent with the statutory scheme" in light of the surviving spouse annuity and QDRO provisions).
The Supreme Court used this analysis in *Egelhoff* to hold a Washington statute preempted when it revoked previously executed beneficiary designations in favor of a spouse upon divorce from that spouse.\(^{121}\) The Court reasoned that the statute "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status," thereby "implicat[ing] an area of core ERISA concern."\(^{122}\) "In particular, it runs counter to ERISA's commands that . . . the fiduciary shall administer the plan 'in accordance with the documents and instruments governing the plan,' making payments to a 'beneficiary' who is 'designated by a participant, or by the terms of [the] plan.'"\(^{123}\)

The federal common law waiver approach also "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status"\(^{124}\) because it requires plan administrators to look beyond plan documents to determine the correct beneficiary.\(^{125}\) Therefore, the federal common law waiver approach violates the plan documents rule and fiduciary duties provision. In contrast, the statutory approach gives proper deference to the "clear statutory command"\(^{126}\) of the fiduciary duties provision because it defers to the documents on file with the retirement plan, rather than honoring outside agreements that would require plan administrators to look beyond, and perhaps even violate, the plan documents.\(^{127}\)

An even more troubling aspect of the federal common law waiver approach is the courts' use of state law to craft federal common law, the very state law held preempted just paragraphs before.\(^{128}\) This blatantly and inappropriately undermines ERISA's express preemption provision, producing the same result as if state law was never

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121. *Egelhoff* v. *Egelhoff* ex rel. *Breiner*, 532 U.S. 141, 144 (2001). WASH. REV. CODE ANN. § 11.07.010(2)(a) (West 1998) reads: "If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity." This section has since been amended to include state registered domestic partnerships. See Act of April 21, 2007, ch. 156, § 13, 2007 Wash. Legis. Serv. (West).

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

123. *Id.* (quoting 29 U.S.C. §§ 1002(8), 1104(a)(1)(D)) (internal citations omitted).

124. *Id.*

125. *Id.* at 141–42.


127. McGowan v. NJR Serv. Corp., 423 F.3d 241, 245–46 ("[T]he statute dictates that it is the documents on file with the Plan, and not outside private agreements between beneficiaries and participants, that determines the rights of the parties.").

128. See supra notes 78–84 and accompanying text.
preempted. Even if it were appropriate to craft federal common law to resolve the issue presented, it is exceedingly difficult to discern how "reincarnating" state law into the federal common law could be consistent with the policies of ERISA that mandate preemption of that same state law. Far from affording uniform administration, the federal common law waiver approach leaves plan administrators to sort out varying standards for "waiver" based on differing state laws.

Courts have the authority, in appropriate circumstances, to create federal common law under ERISA but not to revise the text of the statute. ERISA's plan documents rule, fiduciary duty, and preemption provisions clearly manifest congressional intent to enact "an intricate, comprehensive statute" completely covering the payment of benefits, "an area of core ERISA concern." The federal common law waiver approach disregards this "considered congressional policy choice" and undermines the black letter law. As the venerable Judge Easterbrook eloquently explained:

129. Keen v. Weaver, 121 S.W.3d 721, 730 (Tex. 2003) (Hecht, J., dissenting) ("This Court simply circumvents preemption by allowing state law to be reincarnated as federal common law. The result is the same, practically speaking, as if state law were not preempted at all.").

130. Id.

131. Krishna v. Colgate Palmolive Co., 7 F.3d 11, 14 (2d Cir. 1993) ("Even when it is appropriate for a federal court to create federal common law, it may use state common law as the basis of the federal common law only if the state law is consistent with the policies underlying the federal statute in question . . . .") (quoting Nachwalter v. Christie, 805 F.2d 956, 959-60 (11th Cir. 1986)); Keen, 121 S.W.3d at 726-27 (endorsing the federal common law waiver approach but "disagree[ing] with the [lower court's] formulation of federal law as a mere conduit for applying individual state statutes" because "[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").

132. Strong v. Omaha Constr. Industry Pension Plan, 270 Neb. 1, 15-18, 701 N.W.2d 320, 332-33 (2005) (Connolly, J., dissenting) ("A myriad of tests has been developed for determining whether language in a divorce decree was sufficient to act as a waiver."). See supra notes 78-84 and accompanying text.

133. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) ("It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.") (quoting 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Javits)).


135. Boggs, 520 U.S. at 841.


ERISA is full of unyielding rules, designed to simplify administration. Rules have their flaws; loopholes and overbreadth, both producing unpalatable outcomes in the event of unanticipated circumstances, are among them. But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation. Congress and pension plans elected to use rules rather than standards; patterns of avoidance mean that we transmute the approach Congress chose into the one it rejected.138

Federal common law waiver courts attempt to refute the fiduciary duties portion of this analysis in several ways, all of which are unavailing. First, these courts assert that plan administrators may look outside the plan documents in determining who should receive benefit payments, pointing to the QDRO provisions as an example of such authorization.139 But this reasoning is misleading because following QDRO instructions is paying benefits according to plan documents for one of two reasons. In one sense, QDROs become plan documents when a plan administrator receives them and determines that they are "qualified."140 This is supported by the fact that QDROs are not effective until lodged with a plan.141 Thus, "honoring 'qualified' orders on file reinforces rather than undermines the inference that [retirement] plans may not look beyond written instructions."142 In another sense, even if QDROs are not "plan documents" themselves, paying benefits according to QDRO instructions is complying with plan documents, because those documents must, under the terms of ERISA, allow administrators to follow QDRO instructions.143

141. Fox Valley, 897 F.2d at 283 (7th Cir. 1990) (Easterbrook, J., dissenting) (“[This is] something 29 U.S.C. § 1056(d)(3)(G)(i), (ii)(II) implies in establishing procedures for plans to evaluate orders once they have been lodged.”). See also Mills v. Mills, 790 F.Supp. 172 (S.D. Ohio 1992) (refusing to enforce a QDRO that was not first presented to the plan).
142. Fox Valley, 897 F.2d at 283 (Easterbrook, J., dissenting).
Second, at least one court asserts that the fiduciary duty provision does not "establish any methodology for determining the beneficiary of an ERISA plan." This, too, is simply false. The fiduciary duty provision supports the most straightforward "methodology" of all: follow the rules set by the plan and the participant's intent as properly manifested by his or her beneficiary designation. Not only is this "methodology" simple and easy to understand, it also has the virtue of being flexible. If a plan administrator wants to recognize the supposed "waiver" in a non-qualified divorce decree, it need only include that rule in its plan documents. Conversely, if a plan administrator chooses not to recognize these supposed waivers, an action which is not expressly required by ERISA, courts should not force them to do so.

2. The Public Policies and Legislative Intent Underlying ERISA

In addition to betraying the "unyielding rules" enacted by Congress, the federal common law waiver approach also undermines the public policies underlying ERISA and the legislative intent behind the statute. The statutory approach espoused by the Fifth Circuit in *Kennedy* preserves the integrity of these policies.

The statutory approach supports the principal policy of promoting and protecting participants' interests. This is accomplished by giving participants total control over their retirement plan proceeds.

When a participant is unavailable to declare his or her wishes, as is

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144. Manning v. Hayes, 212 F.3d 866, 872 (5th Cir. 2000). See supra notes 70-73 and accompanying text.

145. Keen v. Weaver, 121 S.W.3d 721, 733 (Tex. 2003) (Hecht, J., dissenting) ("ERISA provides a general rule that is 'simple and easy to apply' for participants, beneficiaries, and plan administrators alike: look to the beneficiary designation, except in very specific cases.").

146. See Brief Amicus Curiae of AARP in Support of Neither Party at 14, Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009) (No. 07-636) ("The plan also could have resolved this matter and protected itself if it had more detailed plan provisions."); see also Kennedy, 129 S. Ct. at 875 n.10 (leaving open "any questions about a waiver's effect in circumstances in which it is consistent with plan documents"); 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, 101 (1998) (suggesting ERISA retirement plan rules be amended in this way to circumvent the issue presented altogether).

147. Fox Valley, 897 F.2d at 283 (Easterbrook, J., dissenting).

148. See McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir. 1990) ("A participant is master of his own ERISA plan.").
usually the case with retirement plan death benefits,\textsuperscript{149} the courts should look to the source that most clearly identifies those wishes: the beneficiary designation they filed with the plan, usually on a form provided by the plan for that purpose. By filing a beneficiary designation, participants should be able to reasonably expect that it will be followed. The federal common law approach substitutes a court's judgment for the participant's wishes or does not even consider them at all.\textsuperscript{150}

This idea is well illustrated in \textit{Kennedy}. If William Kennedy so wished, he could have changed his beneficiary designation or obtained a QDRO to ensure his ex-wife, Liv Kennedy, would not receive his retirement plan death benefit. Although he had seven years to take one of these steps, and he knew how to accomplish both,\textsuperscript{151} he did neither. Because no one can confirm his true intent after his death, the best approach "to promote the interests of employees"\textsuperscript{152} is to err toward his most clearly manifested intent—the beneficiary designation on file with the plan.

The statutory approach also promotes the interest of beneficiaries in an important way by "ensur[ing] that all interested parties, including participants, beneficiaries, and plan administrators, can identify their rights and duties with certainty" at all times.\textsuperscript{153} Because "[a] participant is master of his own ERISA plan"\textsuperscript{154} and can cut off a beneficiary at any time by simply changing the designation,\textsuperscript{155} secure

\textsuperscript{149} McGowan v. NJR Service Corp., 423 F.3d 241 (3d Cir. 2005), is an anomaly on this point. See supra note 63.

\textsuperscript{150} McMillan, 913 F.2d at 312 (disapproving of the federal common law waiver approach's focus on the ex-spouse's intent in executing a purported waiver, rather than the participant's designation).

\textsuperscript{151} During the seven years between his divorce and death, William Kennedy changed a separate beneficiary designation to name his daughter, Kari Kennedy, and sought a QDRO authorizing payment of other ERISA-governed benefits to Liv Kennedy. Petitioner's Brief on the Merits at 3-4, Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009) (No. 07-636).


\textsuperscript{153} McGowan, 423 F.3d at 246 (quoting Estate of Altobelli v. Int'l Bus. Mach. Corp, 77 F.3d 78, 82 (4th Cir. 1996) (Wilkinson, C.J., dissenting)). See also Altobelli, 77 F.3d at 82 (Wilkinson, C.J., dissenting) ("Reliance on the face of written plan documents also furthers another of ERISA's central goals, that of enabling beneficiaries and employees to learn their rights and obligations at any time." ) (quoting Curtis-Wright Corp. v. Shoonejongen, 514 U.S. 73, 74 (1995)); McMillan, 913 F.2d at 312 ("Such a holding also allows the parties to be certain of their rights and obligations."). Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 284 (7th Cir. 1990) (Ripple, J., dissenting) (noting that the fiduciary duties provision "embodies a strong federal policy that all parties—participant, trustee, and beneficiary—be able to ascertain their rights and liabilities with certainty").

\textsuperscript{154} McMillan, 913 F.2d at 312.

\textsuperscript{155} The statute protects only current spouses as beneficiaries, through REA's provisions for qualified joint and survivor annuities and qualified preretirement survi-
knowledge about the participant’s expressed intent, as expressed by his or her designation, is the most a beneficiary can receive before the participant dies and the interest becomes collectable.

Yet under the federal common law waiver approach, beneficiaries cannot clearly identify their rights because the vague “magic words” standard\textsuperscript{156} is fact-intensive and unpredictable.\textsuperscript{157} Far from promoting beneficiaries’ interest in certainty, courts following the federal common law waiver approach apply different standards and sometimes come to significantly different conclusions. For example, the very similar property settlement agreement terms in \textit{Lyman} and \textit{Fox Valley} produced opposite outcomes.\textsuperscript{158} In \textit{Lyman}, the Eighth Circuit found a term stating that the decedent “shall have as his own, free of any interest of [the wife], his interest in the profit-sharing plan of his employer” was insufficient to waive the beneficiary designation of the wife.\textsuperscript{159} But in \textit{Fox Valley}, the Seventh Circuit held that a term stating the parties “waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party” was a valid waiver.\textsuperscript{160}

Outcomes can conflict even within a circuit. The Eighth Circuit came to opposite conclusions, despite similar waiver provisions,\textsuperscript{161} in \textit{Mohamed v. Kerr}\textsuperscript{162} and \textit{National Automobile Dealers & Associates Retirement Trust v. Arbeitman}.\textsuperscript{163} In \textit{Mohamed}, the wife “could not get away fast enough” after her husband was diagnosed with Alzheimer’s Disease, and admitted that the illness prompted her decision to initiate their divorce.\textsuperscript{164} The court found these facts “especially compelling for [its] conclusion” that the wife had waived her interest under the non-qualified divorce decree.\textsuperscript{165} In \textit{Arbeitman}, decided just fifteen months later, the property settlement agreement language was very similar to that in \textit{Mohamed}, but the Eighth Circuit

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\textsuperscript{156} See supra notes 25–29 and accompanying text. This protection does not apply to participants’ former spouses (e.g. Liv Kennedy) or children (e.g. Kari Kennedy).
\textsuperscript{157} See supra notes 83–84 and accompanying text.
\textsuperscript{158} Id. at 81 (comparing these two outcomes).
\textsuperscript{159} Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir. 1989).
\textsuperscript{160} Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 277, 282 (7th Cir. 1990).
\textsuperscript{162} 53 F.3d 911 (8th Cir. 1995).
\textsuperscript{163} 89 F.3d 496 (8th Cir. 1996).
\textsuperscript{164} \textit{Mohamed}, 53 F.3d at 916.
\textsuperscript{165} Id.
\end{flushleft}
distinguished its previous holding on factual grounds, including the couple’s “amicable relationship” after the divorce. 166

With such varying standards and outcomes, the federal common law waiver approach also undermines ERISA’s principal policy of uniform, efficient administration. 167 These courts claim to afford uniformity through supposedly consistent federal common law, 168 but when courts borrow from various states’ law to develop federal common law, there can be no consistency. 169 Ultimately, just as “[u]niformity is impossible . . . if plans are subject to different legal obligations in different States,” 170 uniformity is impossible if plans are subject to different legal obligations in different federal circuits. 171

The statutory approach supports this policy of uniform, efficient administration. 172 When the time is right to distribute benefits, plan administrators, regardless of their location, need only consult the plan documents and the beneficiary designation in their files. As Judge Easterbrook explained in his Fox Valley dissent, “Rules requiring payment to the named beneficiary yield simple administration, avoid double liability, and ensure that beneficiaries get what’s coming to them without the folderol essential under less-certain rules.” 173

Finally, the statutory approach reduces litigation and therefore minimizes administrative and financial burdens placed on plan administrators and passed along to beneficiaries. A simple rule mandating payment according to plan documents gives parties a simple, quick

166. Arbeitman, 89 F.2d at 501.
167. See supra notes 17–19 and accompanying text.
168. See, e.g., Guardian Life Ins. Co. of America v. Finch, 395 F.3d 238, 242 (5th Cir. 2004) (“[A]pplying federal common law to determine if an ERISA plan’s beneficiary waived her rights can be seen as promoting, rather than undermining, rational uniformity.”).
169. Keen v. Weaver, 121 S.W.3d 721, 732 (Tex. 2003) (Hecht, J., dissenting) (“While application of some federal common law does not theoretically threaten uniform plan administration in the same way fifty states’ laws would, as a practical matter uniformity is impaired by the differences in federal common law in the circuits due to the way in which it is derived—by reference to states’ laws.”).
171. See Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 876 (2009) (“What goes for inconsistent state law goes for a federal common law of waiver that might obscure a plan administrator’s duty to act in accordance with the documents and instruments.”) (internal quotation omitted).
172. McGowan v. NJR Serv. Corp., 423 F.3d 241, 246 (3d Cir. 2005) (“Our holding is not only required by the terms of [the fiduciary duty provision], but it is also necessary to promote one of the principal goals underlying ERISA—ensuring that ‘plans be uniform in their interpretation and simple in their application.’”) (quoting McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir. 1990)).
173. Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 283 (Easterbrook, J., dissenting). See also McMillan, 913 F.2d at 312 (quoting Fox Valley for this proposition).
answer and allows them to avoid expensive litigation.\textsuperscript{174} By contrast, the federal common law approach actually generates litigation with its various, unpredictable "magic words" standards.\textsuperscript{175}

3. The General Equities Involved in Retirement Plan Death Benefits

As discussed above,\textsuperscript{176} equitable solutions to the issue presented are inappropriate because "the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties."\textsuperscript{177} However, assuming arguendo that it could be appropriate to consider the equities of the issue presented, the statutory approach is also more equitable than the federal common law waiver approach, in addition to being simple, clear, and easy to apply.

Despite good intentions,\textsuperscript{178} the federal common law waiver approach is not actually equitable. A recent Seventh Circuit case is just one example of the injustices that can result.\textsuperscript{179} In \textit{Melton ex rel. Melton} v. \textit{Melton}, a dispute arose between a deceased participant's 14-year-old daughter and his ex-wife (her former stepmother). Under the terms of her parents' divorce, the daughter should have been the beneficiary of her father's life insurance policies as long as he owed child support.\textsuperscript{180} However, her former stepmother was the named beneficiary when her father died.\textsuperscript{181} The daughter argued that her stepmother had waived her interest in the decedent's life insurance

\textsuperscript{174}. \textit{McGowan}, 423 F.3d at 246 ("This in turn limits costly disputes over the effect of outside documents on the distribution of plan benefits." (quoting \textit{Altobelli v. Int'l Bus. Mach. Corp.}, 77 F.3d 78, 82 (4th Cir. 1996) (Wilkinson, C.J., dissenting)); \textit{McMillan}, 913 F.2d at 312 ("If the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation ... ").)

\textsuperscript{175}. \textit{Altobelli}, 77 F.3d at 83 (Wilkinson, C.J., dissenting) ("Uncertainties over the interpretation of external documents will produce conflicts among parties asserting rights to plan benefits, miring plan assets in expensive litigation.").

\textsuperscript{176}. \textit{See supra} notes 67, 133–138 and accompanying text.

\textsuperscript{177}. \textit{Guidry v. Sheet Metal Workers Nat. Pension Fund}, 493 U.S. 365, 376 (1990). \textit{See also} \textit{Altobelli}, 77 F.3d at 84 (Wilkinson, C.J., dissenting) ("What seem like small equitable steps in a particular case may lead to large administrative headaches in the aggregate.").

\textsuperscript{178}. \textit{See supra} notes 85–86 and accompanying text.

\textsuperscript{179}. \textit{Melton ex rel. Melton} v. \textit{Melton}, 324 F.3d 941 (7th Cir. 2003).

\textsuperscript{180}. \textit{Id.} at 943. This is a common divorce decree provision, intended to ensure a certain amount of money will be available for children's support even in the event that the payor parent dies before the child support obligation ends. \textit{See generally} \textbf{1 Oldfather, et. al., Valuation and Distribution of Marital Property § 41.05[2] (2004) ("In many jurisdictions a support order may require a parent to maintain life insurance for the benefit of the children.")}

\textsuperscript{181}. \textit{Melton}, 324 F.3d at 944.
proceeds in their non-qualified divorce decree. The court held that the stepmother had not waived her interest because the decree contained “a blanket revocation” and did not “expressly identify [the decedent’s] ERISA-regulated employee group term life insurance.” Thus, a minor child with a legitimate, court-ordered need for her father’s support was denied equity under the federal common law waiver approach.

By contrast, the statutory approach is equitable because it honors participants’ intentions as manifested in their beneficiary designations and their reasonable expectations in believing this formal plan document will be honored instead of “extraneous” documents like divorce decrees, property settlements, or other contracts. The equity of this approach is grounded in the fact that people understand the purpose and importance of beneficiary designations. The importance of keeping your beneficiary designations current is not a secret reserved for the nation’s ERISA experts; it is a common topic in the mainstream media. Also, participants have plan administrators at their disposal to help navigate plan provisions to effect their wishes. And in the divorce context, spouses are often represented by an attorney familiar with the collateral effects of property settlement agreements. Most of these attorneys advise their clients to review and change beneficiary designations as a matter of course after a marriage is dissolved. With such widespread knowledge and accessible resources, it is not unfair to hold participants accountable for their beneficiary designations.

C. What the Fifth Circuit Did Wrong

Although the Fifth Circuit was correct to choose the statutory approach over the federal common law waiver approach, its analysis is troubling on two points. First, the Fifth Circuit’s conclusion that QDRO provisions are the only exception to the anti-alienation provision available in the divorce context may leave divorcing spouses

182. Id. The daughter also argued that ERISA did not preempt Illinois state family law, and therefore her parents’ divorce decree should control; the Seventh Circuit rejected this argument. Id.

183. Id. at 946.


186. Id. at 13 (citing articles about the issue in various legal publications as well as mainstream publications such as the Los Angeles Times, Kiplinger, USA Today, and the Wall Street Journal).

without any method to waive claims upon their ex-spouse's retirement plans. This is because it is not clear that a QDRO may effect such a bare waiver with a corresponding reassignment. ERISA defines a QDRO as a domestic relations order that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." Thus, the statute itself says that a QDRO must involve an "alternate payee," defined as "any spouse, former spouse, child, or other dependent of a participant." A bare waiver is by definition a transaction not involving any alternate payee, and therefore the statute suggests that QDROs cannot be used to effect waivers. Because QDROs are "the sole exception" available to divorcing spouses under the Fifth Circuit's analysis, the anti-alienation rule would bar all attempts to effect a waiver in Kennedy and similar cases.

Second, the Fifth Circuit's interpretation of the anti-alienation rule as proscribing any and all "indirect arrangements" by which a beneficiary could be separated from retirement plan benefits may leave beneficiaries without any method to disclaim benefits, that is, to refuse them so that they pass to the next beneficiary in line. Generally, a beneficiary may execute a disclaimer because the beneficiary wants to avoid burdens associated with the property, adverse tax consequences caused by the property, or the possibility of turning the property over to creditors. Regardless of the reason, courts have long protected a beneficiary's ability to disclaim, reasoning that freedom of choice requires the ability to avoid unwanted burdens. This has developed into an axiom: "The law is certainly not so absurd as to force a man to take an estate against his will." This idea has been translated into the realm of ERISA, too. Although the Internal Revenue Code does not explicitly authorize disclaimers of retirement plan benefits, the In-
ternal Revenue Service has taken the position that the anti-alienation rule is not violated if the disclaimer complies with both I.R.C. § 2518 and applicable state law. Thus, retirement plans typically allow disclaimers if they are qualified under the Internal Revenue Code. This widespread and judicially supported practice might be jeopardized under the Fifth Circuit’s interpretation of prohibited assignments and alienations if their reasoning is extended to exclude disclaimers as “indirect arrangements” by which someone gains an “interest enforceable against the plan.”

D. The Supreme Court Opinion in Kennedy

The Supreme Court granted certiorari to resolve the issue presented—what it called a split “over a divorced spouse’s ability to waive pension plan benefits through a divorce decree not amounting to a QDRO.” After an unusual request for supplemental briefs from the parties, Justice David Souter delivered a unanimous opinion in Kennedy on January 26, 2009. The Court affirmed the Fifth Circuit but used only the fiduciary duties provision and preemption as grounds. In essence, the Court split the issue in two: whether Liv Kennedy waived her rights to her ex-husband’s SIP benefits in their non-qualified divorce decree, and whether the plan administrator was required to acknowledge that waiver. Although at first glance this approach may seem to introduce unnecessary complication, the dissected holding was necessary to alleviate the potentially problematic implications of the Fifth Circuit’s reasoning for disclaimers and waivers.

In addressing the first part of the issue, the Court rejected the Fifth Circuit’s treatment of the non-qualified divorce decree waiver as a violation of the anti-alienation rule because it was an “indirect arrangement” through which William Kennedy’s estate received “an in-

196. I.R.S. Gen. Couns. Mem. 39,858 (Sept. 9, 1991), 1991 WL 776304 (concluding that a qualified disclaimer is not a prohibited “assignment or alienation” because the rules governing them are consistent with the congressional purposes underlying ERISA).


199. Kennedy, 129 S. Ct. at 870.


202. See supra section III.C.
terest enforceable against the plan.” The opinion supported this holding in several ways. First, it pointed out the “odd usage” in considering an estate to be the “transferee of its own decedent’s property,” and in considering an interest “acquired” when the waiver occurs years before any estate or beneficiary exists to acquire it. Second, the opinion expressed concern that neither spousal waivers of annuities authorized by REA nor qualified disclaimers authorized by the Internal Revenue Code would be allowed under the Fifth Circuit’s interpretation of the anti-alienation rule, although they are “plainly not barred.” Third, the Court drew a parallel between the anti-alienation rule and spendthrift trust provisions, the corollary in the law of trusts that “serves as ERISA’s backdrop.” It concluded, “[T]he general principle that a designated spendthrift can disclaim his trust interest magnifies the improbability that a statute written with an eye on the old law would effectively force a beneficiary to take an interest willy-nilly.” Fourth and finally, the Court deferred to the Treasury’s interpretation of its own regulation. As the Treasury explained in its amicus brief, “[N]o party ‘acquires from’ a beneficiary a ‘right or interest enforceable against the plan’ pursuant to a beneficiary’s waiver of rights where the beneficiary does not attempt to direct her interest in pension benefits to another person.”

The Court also rejected the Fifth Circuit’s position that the QDRO provisions are “the sole exception to the anti-alienation provision.” However, the Supreme Court explained, “a beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO . . . . There is no QDRO for a simple waiver; there must be some succeeding designation of an alternate payee.” For these two reasons, the Court decided that “the better view” is that Liv Kennedy waived her interest in

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203. Kennedy, 129 S. Ct. at 871. See Kennedy, 497 F.3d at 430 (citing 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (2006)).
204. Kennedy, 129 S. Ct. at 871.
205. See supra notes 25–29 and accompanying text.
207. Kennedy, 129 S. Ct. at 871.
208. Id. at 871–72 (citing Beck v. PACE Int’l Union, 551 U.S. 96, 101 (2007)).
209. Id. at 872.
211. Id. at 873.
212. Id.
213. Id. (citing 29 U.S.C. § 1056(d)(3)(B)(i)(I), part of the statute that spells out the requirements for a QDRO). But see 26 C.F.R. § 1.401(a)-13(g)(4)(ii) (2008) (“A QDRO may provide that the current spouse waives all future rights to [qualified preretirement survivor annuity] or [qualified joint and survivor annuity].”).
William Kennedy’s SIP benefits through their non-qualified divorce decree, and that waiver was not barred by the anti-alienation rule.214

The Court then turned to the second part of its dissected issue, “whether the plan administrator was required to honor Liv’s waiver with the consequence of distributing the SIP balance to the Estate.”215 The analysis here was largely a straightforward application of the statutory approach. The Court spelled out ERISA’s requirements that all plans be established pursuant to a written instrument216 specifying the basis on which payments are made217 and that plan administrators fulfill their duties “in accordance with the documents and instruments governing the plan.”218 The Court then invoked the policy underlying these requirements: establishing a uniform administrative scheme to aid claims processing and benefits payment219 rather than forcing administrators “to examine a multitude of external documents”220 and either initiate or defend litigation centered on those documents.221 This led the Court to conclude, “The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule.”222 The Court then acknowledged that plan administrators look outside plan documents to evaluate and enforce QDROs, but doing so is “enforc[ing] plan documents, not ignor[ing] them,”223 and is “a far cry” from discerning whether a federal common law waiver has been effected.224

The Court bolstered this conclusion with two of its recent preemption cases—Boggs225 and Egelhoff.226 Based on these cases, the Court reasoned, “What goes for inconsistent state law goes for a federal common law of waiver that might obscure a plan administrator’s duty to act in accordance with the documents and instruments.”227 The implications for Kennedy were then clear:

Under the terms of the SIP Liv was William’s designated beneficiary. The plan provided an easy way for William to change the designation, but for

214. Kennedy, 129 S. Ct. at 873.
215. Id. at 875.
216. Id. (citing 29 U.S.C. § 1102(a)(1)).
217. Id. (citing 29 U.S.C. § 1102(b)(4)).
218. Id. (citing 29 U.S.C. § 1104(a)(1)(D)).
219. Id. (quoting Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 148 (2001)).
221. Id.
222. Id. at 875.
223. Id. at 876.
224. Id.
227. Kennedy, 129 S. Ct. at 877 (internal quotation omitted).
whatever reason he did not. The plan provided a way to disclaim an interest in the SIP account, but Liv did not purport to follow it. The plan administrator therefore did exactly what [the fiduciary duty provision] required: "the documents control, and those name [the ex-wife]." 228

E. A Lingering Question

One hole remains in the equitable fabric of the statutory approach. The Kennedy Court held that the Liv Kennedys of the world can waive an interest in their ex-spouses' retirement plans through a non-qualified divorce decree. However, such waivers are effectively meaningless unless they can be enforced, and Kennedy firmly establishes that waivers cannot be enforced by suing the plan administrator for direct payment of benefits. What is missing from Kennedy is whether enforcement may be had in some other way.229

The most likely enforcement method is a state-law constructive trust claim asserted by someone like Kari Kennedy directly against the ex-spouse who purportedly waived their interest in the retirement plan funds but accepted the funds anyway.230 As long as such a claim is asserted after the plan administrator pays the funds to the ex-spouse, the weight of lower court authority says that ERISA does not prevent it.231 The key is asserting the claim after the retirement plan

228. Id. at 877 (citing McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir. 1990)).
229. The Court expressly acknowledged that it left this issue undecided. Id. at 875 n.10 ("Nor do we express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed.").
230. See generally Sarabeth A. Rayho, 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, 106 Mich. L. Rev. 373, 378 (2007) (arguing 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"). It should perhaps be noted that any attempt to treat a property settlement agreement under general contract law and sue for breach of that contract would be converted into a constructive trust claim under the "familiar rule of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 367 (2006) (citing Barnes v. Alexander, 232 U.S. 117, 121 (1914)).
231. Kickham Hanley P.C. v. Kodak Retirement Income Plan, 558 F.3d 204, 209-16 (2d Cir. 2009); DaimlerChrysler Corp. v. Cox, 447 F.3d 967, 974 (6th Cir. 2006) ("This circuit, along with a majority of the other circuits, has held that once benefit payments have been disbursed to a beneficiary, creditors may encumber the proceeds."); Hoult v. Hoult, 373 F.3d 47, 54-55 (1st Cir. 2004) ("Once benefits are distributed to the beneficiary, a creditor's rights are enforceable against the beneficiary, not against the plan itself . . . ."); United States v. All Funds Distributed To, or o/b/o Weiss, 345 F.3d 49, 57 (2d Cir. 2003) ("Only once the proceeds of the pension plan have been released to the beneficiary's hands, can creditors and others pursue claims against the funds and the funds' owner(s)."); United States v. Jackson, 229 F.3d 1223, 1225 (9th Cir. 2000) (holding that the district court erred
funds are paid, so the plan is not involved in the litigation and the policy favoring uniform and efficient plan administration is no longer implicated. Thus, this method allows courts to determine who should be entitled to the funds under all of the facts and circumstances—including a purported waiver—without needing to address who is entitled to benefits under the terms of the plan. Where appropriate, this framework allows courts to produce an equitable result without undermining ERISA's express provisions or policies. Moreover, this method makes common sense. After all, the real dispute in a case like *Kennedy* is between the ex-spouse and the estate; the plan administrator is simply caught in the middle.\(^{232}\)

by ordering restitution be paid out of undistributed ERISA retirement plan proceeds, but noting the “irony” therein: “If the district court had not ordered Jackson to leave his funds in the ERISA plan, and if Jackson had voluntarily cashed out his plan, the distributed funds would have been available for immediate payment of restitution.”), *overruled in part by* United States v. Novak, 476 F.3d 1041, 1057–58 (9th Cir. 2007); Cent. States, Se. & Sw. Areas Pension Fund v. Howell, 227 F.3d 672, 678–79 (6th Cir. 2000) (“[O]nce 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.”); Robbins v. DeBuono, 218 F.3d 197, 203–04 (2d Cir. 2000) (citing 26 C.F.R. § 1.401(a)-13(c)(1)(i) (1997), the same regulation cited by the Fifth Circuit in *Kennedy* as support for its ultimately rejected “implied assignment” rationale and agreeing with the majority view that ERISA “protects benefits only while they are held by the plan administrator and not after they reach the hands of the beneficiary”), *overruled on other grounds by* Wojchowski v. Daines, 498 F.3d 99, 101 n.3 (2d Cir. 2007) (“Our opinion in the instant case does not affect the ERISA holding in *Robbins*.”); Emard v. Hughes Aircraft Co., 153 F.3d 949, 955 (9th Cir. 1998) (“ERISA does not preempt [state] law permitting the imposition of a constructive trust on insurance proceeds after their distribution to the designated beneficiary.”); Guidry v. Sheet Metal Workers Intern. Ass'n, Local No.9, 10 F.3d 700, 716 (10th Cir. 1993) (“There is a distinction in the law between benefits in the plan and benefits paid and received by the participant under the plan. . . . We therefore hold, under the facts of this case, that ERISA provides no protection to funds paid to, and received by, the plan participant.”), *on remand from* 493 U.S. 365 (1990), *aff'd en banc*, 39 F.3d 1078 (10th Cir. 1994); Metro. Life Ins. Co. v. Mulligan, 210 F.Supp.2d 894, 898–900 (E.D. Mich. 2002) (reasoning that ERISA preempted the state law that would revoke ex-spouse's designation as life insurance beneficiary, but denying summary judgment on an interpleader claim to consider the decedent's children's claim for a constructive trust); NCNB Financial Svcs., Inc. v. Shumate, 829 F.Supp. 178, 180 (W.D.Va 1993) (“[O]nce the line of actual receipt is crossed, as it undoubtedly is in this case, ERISA no longer protects funds despite their origination in an ERISA-qualified pension plan.”); Pardee v. Personal Representative for Estate of Pardee, 112 P.3d 308, 314–16 (Okla. Civ. App. 2004) (“The prevailing view is that ERISA does not protect pension funds after the beneficiary receives the funds.”).

An example of when it might be *inappropriate* to force an ex-spouse to forfeit waived benefits would be where the decedent had subsequently renewed the beneficiary designation in favor of the ex-spouse. See supra text accompanying note 38.

232. An example of when it might be *inappropriate* to force an ex-spouse to forfeit waived benefits would be where the decedent had subsequently renewed the beneficiary designation in favor of the ex-spouse. See supra text accompanying note 38.

IV. CONCLUSION

The Fifth Circuit was correct to adopt the statutory approach in *Kennedy* because ERISA's plan documents rule, fiduciary duties rule, and preemption provisions, the policies underlying ERISA, and the general equities surrounding retirement plan death benefits make clear that the federal common law waiver approach was poorly reasoned. However, the Fifth Circuit's analysis overreached the mark by broadly rejecting the federal common law waiver approach. This overreach placed beneficiaries' ability to disclaim benefits at risk and threatened to leave divorcing spouses with no method to effectively waive claims upon each other’s retirement plans.

The Supreme Court rectified this oversight by holding that Liv Kennedy waived her interest in her ex-husband's SIP benefits in their non-qualified divorce decree, but that the plan administrator was duty-bound to pay her the account balance as the named beneficiary on file with the plan. This distinction laid to rest the convoluted and confused federal common law waiver approach, but left one more gap in the equitable scheme. To close this gap, courts should allow estates and alternate beneficiaries to enforce waivers like Liv Kennedy's by suing the ex-spouses directly under a state law constructive trust theory.

Of course, the most practical implication of *Kennedy* is so commonsense as to be almost overlooked: divorcing spouses, and all retirement plan participants, generally should regularly ensure their beneficiary designations are up-to-date. This will avoid the issue presented entirely and allow a happily-ever-after ending.