The Supreme Court Flunks Again

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John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases:* Hillman *Doubles Down on* Egelhoff, **Vand. L. Rev**. (forthcoming, 2014), available at SSRN.

Nearly twenty-five years ago, Professor John Langbein published an article with the arresting title *The Supreme Court Flunks Trusts*. The article critiqued the U.S. Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), a decision which, as Professor Langbein explained, "rest[ed] on an elementary error in trust law" (P. 208) producing "a nonsense reading of ERISA" (P. 209). The article's reasoning was compelling, and particularly devastating was the article's conclusion (PP. 228-9):

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

In 2013, the Supreme Court flunked again, this time with the laws of succession and restitution. The case was *Hillman v. Maretta*, 133 S.Ct. 1943 (2013). Professor Langbein has again penned a valuable and withering critique. It is a must-read.

In order to understand *Hillman* and its flaws, a bit of doctrinal background is needed.

State probate codes have long contained a default rule of revocation on divorce: if a will is silent on the matter, a later divorce revokes a pre-divorce devise to the testator's (now ex-) spouse. Imagine the following scenario: Harry and Wilma are spouses; while married, Harry executes a will benefiting Wilma; later, Harry and Wilma divorce; later still, Harry dies, having failed to update his will. The revocation-on-divorce rule in the state's probate code revokes Harry's devise to Wilma. The rationale for the revocation-on-divorce rule is straightforward: to effectuate Harry's presumed intention.

The Uniform Probate Code, and the statutes of several states, extend the revocation-on-divorce rule of probate law into the realm of nonprobate transfers—transfers that occur, for example, through beneficiary designations of life insurance proceeds or the proceeds of pension plan accounts. The rationale for extending the revocation-on-divorce rule to nonprobate transfers is straightforward: these mechanisms of wealth transfer are functional substitutes for a will and should be governed by the same substantive rules.

Enter federal preemption. Section 514(a) of ERISA (the Employee Retirement Income Security Act of

1974) provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA-governed] employee benefit plan." 29 U.S.C. §1144(a).

In *Egelholff v. Egelhoff*, 532 U.S. 141 (2001), the U.S. Supreme Court was faced with a typical revocation-on-divorce scenario. David Egelhoff designated his wife, Donna, as the beneficiary of his pension benefits and life insurance proceeds. David and Donna later divorced. Two months after the divorce, David died in a car accident, not having changed his beneficiary designations. David's children from a prior marriage argued that the State of Washington's revocation-on-divorce statute (which, like Uniform Probate Code §2-804, extends the revocation-on-divorce rule to nonprobate mechanisms) revoked the designations benefiting Donna. A divided U.S. Supreme Court disagreed, holding that the state statute was preempted because the life insurance policy and pension plan were ERISA-governed. The Court supported its decision by pointing to the rationales for ERISA preemption, especially the desire for uniformity and ease of plan administration. But the effect of the decision—that the ex-spouse was entitled to the proceeds—was directly contrary to David's likely intention. See, e.g., Thomas P. Gallanis, *ERISA and the Law of Succession*, 65 Ohio St. L.J. 185 (2004).

In response to the danger of federal preemption of state wealth transfer law, the Uniform Law Commission inserted the following provision into the Uniform Probate Code's revocation-on-divorce statute (and into other UPC provisions that might be the subject of preemption):

> If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Uniform Probate Code §2-804(h)(2). This provision imposes a post-distribution constructive trust for the purpose of remedying unjust enrichment. As the Official Comment to subsection (h)(2) explains: "This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans."

We now come to *Hillman*, which was another standard revocation-on-divorce case. Warren Hillman named his wife, Judy, as the beneficiary of a life insurance policy governed by FEGLIA (the Federal Employees' Group Life Insurance Act of 1954), which has a preemption provision similar to ERISA's. The couple later divorced; Warren married Jacqueline; then Warren died without having revised his beneficiary designation. The plan administrator paid the proceeds to Judy as the named beneficiary. Jacqueline agreed that the state's revocation-on-divorce rule was preempted but sued Judy for the proceeds under the state's version of subsection (h)(2), the statutory constructive-trust remedy. In *Hillman*, the Court regrettably decided 8-0 that the statutory constructive-trust remedy was *also* preempted. Almost certainly, this result frustrated the donor's intention regarding succession to his property and unjustly enriched his former spouse.

In January 2014, the Uniform Law Commission revised the Official Comment to Uniform Probate Code §2-804 (the revocation-on-divorce provision) in response to *Hillman*. Here is the relevant excerpt from

the new Official Comment, which draws on Professor Langbein's article:

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

Having previously flunked trusts in *Bruch*, the Court has flunked succession and restitution in *Hillman*. Professor Langbein's article is well worth reading, and I recommend it highly. I also highly recommend another article to be published in the same Vanderbilt symposium: Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*. Professor Waggoner's article examines multiple areas in which federal law interacts with state wealth-transfer law, including revocation-on-divorce, the elective share, the validity of beneficiary designations, perpetual trusts, and Social Security survivor benefits. Professor Waggoner's article is available on SSRN.

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