ACCIDENTAL INHERITANCE: RETIREMENT ACCOUNTS AND THE HIDDEN LAW OF SUCCESSION

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Americans currently hold more than $9 trillion in retirement savings accounts. Those accounts, together with the family home, are the principal source of wealth for most working and retired Americans. But when a retirement accountholder dies prior to exhausting retirement savings, what governs the distribution of the account? Most often, not the accountholder's will or trust, but a one-page fill-in-the-blanks beneficiary designation form that the accountholder filled out, typically without advice of counsel, when she or he opened the account.

When accountholders fill out beneficiary designation forms, they are focused on starting a new job or beginning to save for retirement, not on estate planning. Yet the accountholder's beneficiary designations often trump express provisions in a will, trust instrument, prenuptial agreement, or divorce decree—documents prepared with inheritance in mind. Moreover, the accountholder may neglect to change the beneficiary designation to take account of changed life circumstances, causing his or her retirement assets to pass to a beneficiary he or she never would have chosen later in life. To make matters worse, although wills doctrine has developed a set of constructional rules to deal with changes of circumstance, those rules do not generally apply to beneficiary designation forms. The current legal framework often frustrates the intent of the accountholder.

This problem, which has already spawned a significant volume of litigation, will become exponentially worse over the coming decade, as more holders of substantial accounts reach the end of their life expectancy. Reform is critical. The financial intermediaries who currently draft beneficiary designation forms have little incentive to improve them because accountholders and employers are unlikely to choose providers based on the quality of their forms. Federal and state legislation is necessary to ensure that these assets are distributed consistently with accountholders' intentions.

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Introduction

Once upon a time, a will was the centerpiece of any decedent's estate plan. The decedent's assets passed through the probate process in accordance with the provisions of the will. The system was renowned for its delays and costs and, almost a half-century ago, spawned Norman Dacey's *How to Avoid Probate*, which topped the bestseller list.[1] Dacey's book accelerated "the nonprobate revolution,"[2] which has resulted in a marked increase in assets that pass outside the probate process, and which has reduced significantly the role of the will in passing assets from one generation to the next.

Today, the most significant nonprobate asset for most Americans is the retirement account. Individuals now hold more than $9 trillion in employer-sponsored defined-contribution plans and individual retirement accounts (IRAs).[3] Unlike other nonprobate assets—revocable trusts, payable-on-death (POD) brokerage accounts and bank accounts, and life insurance policies—the holders of retirement accounts typically establish them for purposes *other than identifying future beneficiaries of the assets.* Accountholders generally open retirement accounts as tax-sheltered savings vehicles, not as substitute wills. Employees often establish 401(k) retirement accounts while doing the paperwork associated with accepting a first job, when succession is far from the employee's mind. Similarly, people establish

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1 Dacey's book far outsold the second best selling book of the year—Masters and Johnson's *Human Sexual Response.* Edwin McDowell, *Book Notes*, N.Y. Times, Mar. 7, 1990, at C23.

2 This term was popularized in John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1984).

3 Inv. Co. Inst., The U.S. Retirement Market, Fourth Quarter 2011 (Apr. 2012).

IRAs when starting a business or when arranging retirement. In each case, the participant is confronted with a "beneficiary designation form" as a matter of course, generally without counsel, and at a time when the employee is not focused on succession. Moreover, participants may not look again at those forms for decades; many will have no idea whom they designated as beneficiaries and no idea how to find out.

Undoubtedly, many participants do not worry about these forms because they expect that they will subsequently prepare a will or revocable trust that disposes of all of their assets, including assets in any retirement plan. Others assume that they can change the beneficiary designation through other documents, such as prenuptial agreements or divorce decrees that incorporate property settlement agreements. But a number of states, by statute or case law, hold that a will, revocable trust, or other document purporting to dispose of retirement account proceeds—even if the instrument precisely identifies the account—is ineffective to dispose of those proceeds.[4] Other states address the issue with vague standards that require resolution through costly litigation. The Employee Retirement Income Security Act (ERISA), which applies to 401(k) and other accounts established as part of employer-sponsored plans, prohibits accountholders from changing a beneficiary designation in any manner other than by executing a change of beneficiary form.[5] These rules are designed to protect the financial institution holding plan assets from liability for distributing the assets to the beneficiary designated by the participant. They are also designed, at least in theory, to make it easier for the designated beneficiaries to receive the assets as quickly as possible. But the result is that the assets often pass in accordance with a beneficiary designation that might have been executed decades earlier; neither the sponsor nor a court is entitled to consider explicit language in other documents, such as the accountholder's will or revocable trust, that directs a different distribution of the account.

To make matters worse, the beneficiary designation forms typically provide limited options for the participant, and those options often exclude the distribution patterns preferred by people who give thought to distribution of their assets.[6] In addition, neither the custodian of the plan funds nor the participant's employer is likely to point out potential pitfalls in filling out the forms, and the plan participant may find it difficult or impossible to locate the default rule for distrib-

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4 *See infra* Part II.B.2.

5 *Id.*

6 *See infra* Part III.

uting plan assets at death. The result may be a form of accidental inheritance: The participant's retirement account—often the most significant asset the participant owns—could be distributed in ways that bear little resemblance to the participant's wishes.

This situation might be tolerable if only the "one percent" established 401(k) and IRA accounts. They, at least, are likely to pay for the best legal advice available. But these retirement accounts, along with the family home, represent the principal asset of most working and retired Americans. In 2011, seventy-one percent of American households headed by a person born during the 1950s held assets in a defined-contribution plan, an IRA, or both.[7] For many in this group, most of whom prepare beneficiary designation forms without the advice of counsel, the inadequacy of the current beneficiary designation system is a disaster waiting to happen.

Although the issues raised by inadequate beneficiary designations have already generated considerable litigation, that litigation represents only a taste of what is soon to come. Because these accounts have become staples of the legal landscape only recently, a relatively small percentage of current decedents have had the opportunity to accumulate account assets over the course of their entire working lives. This situation will change dramatically over the coming decade, however, leaving the families of deceased accountholders to bear the consequences of an inadequate beneficiary designation system.

Do these difficulties mean that we should abandon the reforms of recent decades and require all retirement-plan assets to pass through the decedent's probate estate? Of course not. As John Langbein observed more than a quarter-century ago, the nonprobate revolution occurred because people seek "dispatch, simplicity, inexpensiveness, privacy"—qualities incompatible with the traditional probate process.[8] For the vast majority of participants, the contract-based system is a cheaper and quicker method for transmitting wealth than the probate system and generates no significant difficulties.

To date, the academic literature has paid far too little attention to the difficulties created when accountholders fill out beneficiary designation forms without fully appreciating their importance or meaning and when accountholders fail to update those forms to account for significant life events. Our agenda is reform of the law governing

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7 Inv. Co. Inst., 2012 Investment Company Fact Book 108 (52d ed. 2012), *available at* http://www.ici.org/pdf/2012_factbook.pdf. The percentages for households headed by a person born during the 1960s and the 1970s are nearly identical. *Id.* at 109 fig.7.4.

8 Langbein, *supra* note 2, at 1116. Langbein observed that most transferors dismiss probate "as little more than a tax imposed for the benefit of court functionaries and lawyers," a tax that people sensibly avoid. *Id.* at 1117.

transmission of retirement assets. We believe the legal framework governing retirement accounts can do a better job of effectuating the intent of accountholders without sacrificing the efficiency gains associated with bypassing the probate process.

Part I explores the growing significance of retirement accounts as wealth transmission devices. Part II examines current state and federal law governing the disposition of retirement account assets and demonstrates that a seemingly innocuous error or oversight in filling out a beneficiary designation form can have disastrous consequences for accountholders and their intended beneficiaries. Part III identifies the difficulties generated by the current legal regime in which crucial significance attaches to a single form typically filled out by unsophisticated laymen at a time when they are not focused on or counseled about succession issues. Part IV suggests a number of reforms, which, separately or in conjunction with one another, would significantly ameliorate the problems we have identified. One of the simplest but most significant reforms we suggest are statutory forms for designating account beneficiaries. Sample forms are attached to this article as an Appendix. Part V details the practical problems reform efforts would have to surmount.

I
The Growing Importance of Retirement Plans as Wealth Transmission Devices

A. The Decline of Defined-Benefit Plans

Although American Express instituted the first private-sector pension plan in 1875,[9] the growth of employer-sponsored retirement plans was most rapid in the decades after World War II.[10] These plans offered retired employees fixed payments—or "defined benefits"—during retirement.[11] Firms used these plans to promote employee loyalty;[12] they were available only to employees who worked for the

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[9] William C. Greenough & Francis P. King, Pension Plans and Public Policy 27 (1976). For a brief history of early private pension plans, see Patrick W. Seburn, *Evolution of Employer-Provided Defined Benefit Pensions*, Monthly Lab. Rev., Dec. 1991, at 17–19.

[10] *See* Steven A. Sass, The Promise of Private Pensions: The First Hundred Years 179 (1997) (noting that "participation increased from 19 to 45 percent of the private-sector workforce between 1945 and 1970"); *see also* Alicia H. Munnell, Annika Sunden & Elizabeth Lidstone, Ctr. for Ret. Research at Bost. Coll., How Important Are Private Pensions? 2 (2002) (identifying period between 1949 and 1970 as the period of main expansion of private pensions).

[11] *See* Seburn, *supra* note 9, at 17 (describing various formulas for calculating benefits).

[12] *See* Sass, *supra* note 10, at 227 ("The plans helped these firms get diligent service out of blue-collar workers, secure career commitments from white-collar workers . . . .");

same employer for most of their working careers.[13] The plans also had significant tax advantages; even if the employee "earned" the retirement benefits while actively working, the benefits were not taxed until the employee retired and began to receive distributions, when the employee's income (and therefore tax rate) was likely to be lower.[14] The tax advantages were especially attractive at the high marginal income tax rates prevailing in the post-war years.[15]

Beginning in the 1970s, defined-benefit plans lost some of their appeal.[16] From the employee's standpoint, defined-benefit plans limited job mobility because an employee who changed jobs risked losing retirement benefits.[17] In addition, defined-benefit plans often tied the employee's retirement income to the financial solvency of his former employer, a fact that became all too painful with the failure of some major employers.[18]

Congress reacted to the insecurity of retirement benefits by enacting the Employee Retirement Income Security Act (ERISA) in 1974.[19] ERISA, however, made defined-benefit plans less attractive to

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Samuel H. Williamson, *The Development of Industrial Pensions in the United States in the Twentieth Century* 17 (World Bank, Policy Research Working Paper No. 1542, 1995) (explaining that employers created retirement programs to "create a stable, experienced work force that was reluctant to leave").

13 Many firms also used pension plans as a way to shed older workers whom the firms believed were less productive without leaving them penniless. Williamson, *supra* note 12, at 7–8.

14 James A. Wooten, The Employee Retirement Income Security Act of 1974: A Political History 25 (2004). Tax consequences to the employer were more complicated. If the employer simply set aside an account on its internal books to fund future pension costs, the employer would not be able to deduct moneys placed into the account. *Id.* at 24. However, by 1919, it was established that a firm could deduct contributions to a pension trust with its own set of books if the employer did not retain too much control over the trust. *Id.* at 25.

15 Stephen P. McCourt, *Defined Benefit and Defined Contribution Plans: A History, Market Overview and Comparative Analysis*, Benefits & Compensation Dig., Feb. 2006, at 1–2.

16 For an excellent account of the decline, see Edward A. Zelinsky, The Origins of the Ownership Society: How the Defined Contribution Paradigm Changed America 31–38 (2007).

17 Most defined-benefit plans incorporated a form of "cliff vesting": Until the employee worked for the employer for long enough to qualify for full vesting—often five or ten years—the employee would not have any pension rights if the employee were to leave the employer for another job. *See* Seburn, *supra* note 9, at 21 (citing a Bureau of Labor Statistics study that found that seventy-seven percent of employees surveyed were subject to vesting provisions).

18 *See* Wooten, *supra* note 14, at 4 ("Before ERISA, employees in an underfunded plan risked losing their pension if their firm terminated the plan or went out of business.").

19 For an account of one of the most notorious retirement plan collapses and its connection to ERISA, see James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 683 (2001). For another account suggesting that the United Automobile Workers

employers.[20] First, because the new statute required retirement benefits to "vest" in employees before retirement, the plans became less attractive as a means to promote employee loyalty. Second, ERISA's funding requirements made defined-benefit plans more cumbersome and expensive, especially compared with past practices, under which some employers paid retirement benefits out of current income rather than into a separate fund.[21] ERISA required the employer to deposit contributions into a common fund and to pay retirement benefits from the fund as they matured to individual employees.[22] The payout amount must be described in the plan documents[23] and usually takes the form of an annuity for the employee's life, the joint lives of the employee and a beneficiary, a specified term, or some variation of the three.[24]

B. *The Growth of Defined-Contribution Plans and IRAs*

ERISA's enactment contributed substantially to the gradual decline of defined-benefit plans and the concomitant growth of defined-contribution plans, which allow employees and employers to make fixed, tax-deferred contributions each year—known as "defined contributions"[25]—into retirement savings accounts set up and administered by the employer. These plans allow employees to build up a retirement "nest egg," but provide no guaranty of fixed annual payment. ERISA provides that at the accountholder's death, the accountholder's surviving spouse (if any) shall be the beneficiary of

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union was fully aware of the risks associated with the Studebaker pension plan at the time of its negotiations with Studebaker, see JOHN H. LANGBEIN, DAVID A. PRATT & SUSAN J. STABILE, PENSION AND EMPLOYEE BENEFIT LAW 81–82 (5th ed. 2010).

20 *See* EMP. BENEFIT RESEARCH INST., THE WORLD OF PENSIONS TEN YEARS AFTER ERISA 5–6 (1984) [hereinafter THE WORLD OF PENSIONS TEN YEARS AFTER ERISA].

21 *See* WOOTEN, *supra* note 14, at 278 (noting that toughening of funding standards increased the cost difference between defined-benefit and defined-contribution plans).

22 Prior law imposed funding requirements as a prerequisite for obtaining corporate tax benefits, but did not prevent an employer from maintaining an underfunded plan so long as the employer was willing to forego those tax benefits. *See id.* at 95–96 (discussing funding requirements).

23 ERISA requires that each beneficiary receive a "summary plan description," 29 U.S.C. § 1022 (2006), which requires, among other matters, "a statement describing any joint and survivor benefits provided under the plan, including any requirement that an election be made as a condition to select or reject the joint and survivor annuity." 29 C.F.R. § 2520.102-3(k) (2007). In addition, the statute requires the plan administrator to provide each beneficiary with a pension benefit statement that informs the beneficiary of total benefits accrued by that beneficiary. 29 U.S.C. § 1025(a)(1)(B) and (a)(2)(A).

24 *See generally* David A. Pratt & Sharon Reece, ERISA AND EMPLOYEE BENEFIT LAW 59–61 (2010) (discussing how benefits are paid).

25 In the alternative, employees can make after-tax "Roth" contributions to a 401(k) plan, which generate other tax benefits. For a general description, see Harvey B. Wallace II, *Retirement Benefits Planning Update*, 20 PROB. & PROP. 59, Jan./Feb. 2006, at 60–61.

any remaining assets, unless the spouse has properly waived that right.[26] Subject to that significant constraint, the plan participant may designate a beneficiary or beneficiaries who will receive the account proceeds if the plan participant dies before distribution of the account.

Before ERISA, a number of large employers had established "savings plans" or "capital accumulation" plans to enable employees to supplement the benefits they would receive under the employer's defined-benefit plans.[27] The employee would contribute funds (often matched by the employer) into an individual account that could be used during retirement, or, in some circumstances, before retirement.[28] When ERISA's enactment made defined-benefit plans less attractive to employers, many employers began to use the savings plan model as the primary vehicle for employee retirement savings, especially because, in 1978, Congress enacted § 401(k) of the Internal Revenue Code, authorizing tax deferral for an employee's contributions to a plan meeting a nondiscrimination test.[29]

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[26] 26 U.S.C. § 401(a)(11)–(13) (2006).

[27] *See* The World of Pensions Ten Years After ERISA, *supra* note 20, at 6 (stating that most employers preferred this method); Bankers Trust Co., Bankers Trust 1972 Study of Employee Savings and Thrift Plans 9 (1972) (surveying 212 savings plans covering 2,400,000 employees). By 1972, fifty-five of the top 100 industrial corporations had savings plans. *Id.* at 9.

[28] Often, the funds would be invested in the employer's stock. Bankers Trust Co., *supra* note 27, at 21 (noting that employer-company stock was the most widely used investment and that 68% of plans studied made investment in company stock mandatory for part or all of the accumulated contributions). Almost all plans allowed voluntary withdrawal of the employee's contributions before retirement but imposed a penalty for early withdrawals. The most common penalties were forfeiture of some of the employer's unvested contributions and suspension from the right to participate in the plan for some period of time. *Id.* at 31. A number of plans, however, permitted withdrawal without penalty in case of hardship, which was generally left to the discretion of a company committee that administered the plan. *Id.* at 33.

[29] The World of Pensions Ten Years After ERISA, *supra* note 20, at 15–16. Both defined-benefit plans and defined-contribution plans also generate tax benefits for employers. So long as the retirement plan (or the larger employee-benefits plan of which the retirement plan is a part) is a "qualified plan" under 26 U.S.C. § 401(a), the employer may take income tax deductions for contributions to the plan. 26 C.F.R. § 1.404(a)-3 (2007). In addition, employees who participate can defer income tax on contributions until the money is withdrawn from the account. 26 U.S.C. § 402(a) (2006). Many nonprofit organizations, who have no need for the income tax deduction, need not offer qualified plans under 401(a); those organizations instead will offer defined-contribution plans that comply with § 403(b) of the Code. 403(b) plans afford employees the same tax advantages as a qualified plan under 401(a). 26 U.S.C. § 403(b) (2006). On the other hand, some nonprofits have qualified plans because they want to offer employees the advantages of tax deferral, even though the organization is not eligible to maintain a 403(b) plan. *See* 26 U.S.C. § 403(b)(1)(A) (2006) (limiting use of 403(b) plans to nonprofit employers who qualify as 501(c)(3) charities).

Congressional enactments were almost entirely responsible for the shift from defined-benefit plans to defined-contribution plans.[30] From the employer's standpoint, defined contributions reduced the risk associated with pension-plan promises and made budgeting easier because the funding that the employer provides to defined-contribution plans does not vary with market investment returns and prevailing interest rates.[31] From the employee's perspective, defined-contribution plans increased job mobility because the employee could change employers without fearing an adverse impact on retirement benefits. Defined-contribution plans also provided employees with more control over investment decisions.[32]

While ERISA's primary focus was on protecting participants in employer-sponsored retirement plans, ERISA also authorized the creation of IRAs, which provide comparable advantages such as job mobility and control over investment decisions to members of the workforce not covered by employer-sponsored plans. IRAs also provide similar tax deferral advantages for the self-employed and persons not eligible to participate in employer-sponsored plans.[33] Although the Internal Revenue Code provides federal tax benefits for funds

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[30] *See* ZELINSKY, *supra* note 16, at 31–48 (detailing the shift from defined-benefit plans to defined-contribution plans). Professor Zelinsky notes that Congress did not set out to engineer this shift; instead, the shift was an unintended consequence of congressional enactments. *Id.* at 95–97. Other demographic factors—including the decline of unionized manufacturing industries, which typically favored defined-benefit plans—also contributed to the decline in defined-benefit plans. *Id.* at 33–34; *see also* Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Lessons from Private Pensions*, 92 CORNELL L. REV. 297, 302–03 (2007) (noting that ERISA's regulatory scheme bears more heavily on defined-benefit plans than defined-contribution plans).

[31] THE WORLD OF PENSIONS TEN YEARS AFTER ERISA, *supra* note 20, at 15–16.

[32] *Id.* at 7. Professor Zelinsky argues that the American culture of individualism was particularly receptive to the growth of individual accounts "owned" by the accountholder. ZELINSKY, *supra* note 16, at 97–101. Despite the advantages associated with defined-contribution plans, many argue that they are an inadequate substitute for defined-benefit plans because they shift the risk of investment losses from the employer to the employee. *See, e.g.*, Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53, 59–60, 90 (2004) ("[T]his progression [towards defined-contribution plans] has shifted the focus of decision-making from professionally trained investment managers to the retirement equivalent of Amateur Hour."). In addition, defined-contribution plans are plagued by low levels of employee participation because employees can choose not to participate. *See* Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 954 (2007) (stating that "roughly one-fourth to one-third of all employees covered by a defined-contribution plan opt not to participate"); *see also* Lawrence A. Frolik, *Protecting Our Aging Retirees: Converting 401(k) Accounts into Federally Guaranteed Lifetime Annuities*, 47 SAN DIEGO L. REV. 277, 286–87 (2010) (showing only a 43.2% participation rate in defined-contribution plans in 2006 among private sector employees, despite 53% eligibility).

[33] *See* 26 U.S.C. § 408(a) (2006) (defining "Individual Retirement Account").

deposited in IRA accounts, the accounts themselves are largely governed by state law.[34]

The shift in retirement-plan assets has been dramatic. In 1985, eleven years after the enactment of ERISA, IRAs and defined-contribution plans had caught on, but the total dollar value invested in IRAs and defined-contribution plans combined—about $750 billion—was less than the dollar value of assets held in privately-sponsored defined-benefit plans.[35] By the end of 2012, however, the total value of IRAs and defined-contribution plans combined had increased more than twelvefold to an estimated total of $10.5 trillion, almost four times the dollar value of privately-sponsored defined-benefit plans.[36]

C. *Estate-Planning Consequences of the Change*

So long as an employee's benefits in a traditional defined-benefit plan were paid out as annuities, the plan presented few estate-planning challenges. The employee's benefits were paid as annuities and were effectively used up by the employee's death (or, sometimes, by the death of the employee's spouse); there were no assets to pass on to future generations.

Defined-contribution plans and IRAs, by contrast, may have significant cash balances upon the death of the accountholder.[37] First, because these plans do not guarantee a steady stream of retirement income, accountholders will tend to be cautious to ensure that they do not outlive their money.[38] Second, many employees and self-employed individuals contribute to these plans not just to provide

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[34] *See* 29 U.S.C. § 1051(6) (2006) (exempting individual retirement accounts from ERISA's regulatory requirements, including those governing participation, vesting, and benefit accrual).

[35] In 1985, IRAs held a total of $241 billion in assets and defined-contribution plans held a total of $509 billion, compared to $813 billion held in defined-benefit plans. PETER BRADY ET AL., INV. CO. INST., THE U.S. RETIREMENT MARKET, THIRD QUARTER 2010 at 20 (2011), *available at* http://www.ici.org/pdf/ppr_11_retire_q3_10.pdf.

[36] Inv. Co. Inst., Quarterly Retirement Market Data, First Quarter 2013 (Jun. 26, 2013).

[37] Increasingly, this is true of modern defined-benefit plans, which often offer lump-sum distributions to employees who leave the employer's service either at or before retirement. *See* David Pratt, *Retirement in a Defined Contribution Era: Making the Money Last*, 41 J. MARSHALL L. REV. 1091, 1108–09 (2008).

[38] Some economists theorize that most intergenerational wealth transfers come about largely because property owners are risk-averse in the face of uncertainty about their own future needs and longevity. *See, e.g.*, Franco Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, 2 J. ECON. PERSP. 15 (1988) (detailing the life-cycle hypothesis). For skepticism about the life-cycle hypothesis, see Laurence J. Kotlikoff, *Intergenerational Transfers and Savings*, 2 J. ECON. PERSP. 41, 43 (1988) (estimating life-cycle wealth as only 21.9% of household wealth); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 308–09 (1994) (expressing doubt in the accuracy of the life-cycle hypothesis).

retirement income, but because the tax treatment afforded to the plans makes them attractive savings vehicles.

The estate-planning consequences of this shift are significant, but they are not universal across all types of employees. Contribution limits on IRAs and employer-sponsored plans limit their value to the very richest individuals, who would typically save or invest in amounts far higher than the limits allow.[39] In addition, the very rich are always likely to be in the maximum tax bracket, so tax deferral is not likely to reduce the tax rate they pay on money saved in retirement accounts.

By contrast, for anyone else with enough disposable income to consider saving, IRAs and employer-sponsored plans will usually be the most sensible savings vehicles. First, the tax code permits the saver to defer tax until retirement, when the saver may be in a lower marginal tax bracket.[40] Second, at least with employer-sponsored plans, employers might match some or all of the employee's contributions. Other than liquidity concerns, there is little reason for most savers to open individual bank or brokerage accounts until they exhaust the contribution limits for tax-advantaged retirement accounts. As a consequence, a retirement account, along with the family home, represents one of the two largest assets held by many individuals. Any sensible estate plan must account for retirement-plan assets.

II
Current Law Governing the Distribution of Retirement Account Assets

Employer-sponsored defined-contribution plans and individual retirement accounts share important features. When an employer establishes a defined-contribution plan, each employee has an individual account with the plan administrator selected by the employer. With an IRA, the accountholder chooses an account custodian.

In each case, at the accountholder's death, the administrator or account custodian typically distributes any remaining assets in accordance with a "contract" between the parties. The critical components

39 For 2013, the maximum deductible amount for individuals making qualified contributions to an IRA is $5500, while the maximum deferral for employees who participate in employer-sponsored 401(k), 403(b), and 457 plans is $17,500. Press Release, Internal Revenue Serv., IRS Announces 2013 Pension Plan Limitations; Taxpayers May Contribute Up to $17,500 to Their 401(k) Plans in 2013 (Oct. 18, 2012), *available at* http://www.irs.gov/uac/2013-Pension-Plan-Limitations. In addition, employee participants over the age of fifty may make an additional "catch-up" contribution of $5500. *Id.*

40 For instance, under 2013 rates, a married couple with income of $100,000 in taxable income pays a tax rate of 25% on marginal income. If the same couple were to retire with an income of $60,000, the marginal rate would be only 15%.[4L: Is the word "tax" missing from this sentence somewhere?] *See* Rev. Proc. 2013-15, 2013-5 I.R.B. 445.

of the contract are the beneficiary designation form filled out by the accountholder and the default provisions that apply when the accountholder has made no effective designation. These default provisions are not always set forth on the beneficiary designation form, but are located somewhere in the plan documents, typically in the summary plan description, which few accountholders will ever see.[41]

This framework generates significant advantages. First, and most obviously, the assets do not pass through the accountholder's probate estate, which avoids delay in distribution and the need to pay commissions to the fiduciary representing the accountholder's estate. Second, the framework keeps administrative costs down by limiting the inquiry required of the account custodian at the time of the accountholder's death.

Although the framework is generally efficient, it can generate conflict and significant expense in particular circumstances. An accountholder may divorce, marry, or have a child after filling out the beneficiary designation form, or a beneficiary may predecease the testator. In each of these circumstances, the accountholder may neglect to change the beneficiary designation prior to his or her death. Alternatively, the accountholder may attempt to change the beneficiary designation using a method other than filling out a change of beneficiary designation form, such as by a provision in a will, prenuptial agreement, or divorce decree. In either case, the distribution of retire-

[41] Several of the forms we studied inform the accountholder that if he or she dies without naming a beneficiary, or if no beneficiary survives the accountholder, the custodian or plan administrator will distribute the account proceeds as provided for in the contract or plan documents. *See, e.g.*, Colorado PERA 401(k) Beneficiary Designation Form [hereinafter Colorado PERA Form] (on file with the *New York University Law Review*) ("If no Primary or Contingent Beneficiary survives the Participant, the entire death benefit shall be paid according to the terms of the Plan."); Earl Industries IRA Beneficiary Designation Form [hereinafter Earl Industries Form] (on file with the *New York University Law Review*) ("If my primary and contingent beneficiaries predecease me or I fail to designate beneficiaries, amounts will be paid pursuant to the terms of the Plan Document or applicable state law."); IASIS Healthcare 401(k) Beneficiary Designation Form [hereinafter IASIS Form] (on file with the *New York University Law Review*) (silent as to the effect of failure of beneficiary designation); MTA 401(k) Beneficiary Designation Form [hereinafter MTA Form] (on file with the *New York University Law Review*) (stating that if no designated beneficiary is alive when payment is payable, "payment will be made in accordance with the contract"); Teamsters-UPS 401(k) Beneficiary Designation Form [hereinafter UPS Form] (on file with the *New York University Law Review*) (stating that if no secondary beneficiaries survive, payment will be made in accordance with the contract); Costco 401(k) Beneficiary Designation Form [hereinafter Costco Form] (on file with the *New York University Law Review*) (silent as to the effect of failure of beneficiary designation); Vanguard IRA Beneficiary Designation Form (on file with the *New York University Law Review*) [hereinafter Vanguard Form] (silent as to the effect of failure of beneficiary designation).

ment assets may spawn significant litigation and may ultimately result in frustration of the accountholder's final intent.

A. *The Accountholder Who Makes No Attempt to Change the Beneficiary Designation*

With surprising frequency, people neglect to alter their estate-planning documents after experiencing major life changes. When a decedent neglects to change her will, the results need not be catastrophic; wills law provides a number of doctrinal rules that enable a court to distribute probate assets consistently with the decedent's probable intent. These doctrines, however, do not uniformly apply to nonprobate assets such as retirement accounts.

The following section will consider four significant life changes that commonly occur after the execution of estate-planning documents: marriage, the birth of a child, divorce, and the death of a beneficiary. We first explain how wills law allows courts to effectuate the intent of testators who fail to revise wills in the face of these changes. We then explore the radically different outcomes that may occur when an accountholder has failed to change the beneficiary designation on his or her retirement account.

First, consider wills law. In most common-law property states,[42] statutes guarantee a surviving spouse at least a fraction of the testator's probate estate. Relevant state statutes fall into one of two categories: omitted-spouse statutes or elective-share statutes. Omitted-spouse statutes expressly apply only when a testator married after executing a will. These statutes seek to effectuate the testator's probable intent by giving the surviving spouse a fraction of the deceased spouse's probate estate.[43] Other common-law property states leave

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[42] In common-law property states, property is presumed to belong to the spouse who has earned or taken title to it. This is in contrast to community property states, where each spouse has a presumptive right to half of the property earned by either spouse during the marriage. *See* 2 AMERICAN LAW OF PROPERTY, 121 (1952) (comparing basic principles of community and common-law property systems).

[43] A few older omitted-spouse statutes simply provide that marriage revokes a premarital will. *See, e.g.*, R.I. GEN. LAWS § 33-5-9 (2011). *See generally* Foy v. Cnty. Comm'n, 442 S.E.2d 726, 730–31 (W. Va. 1994) (discussing the effect of such statutes, in a number of states, on wills executed before those statutes were repealed). The majority of omitted-spouse statutes are more finely tailored to ensure effectuation of the testator's intent. For example, UPC § 2-301 provides that the omitted spouse is entitled to her intestate share of assets not devised to the testator's children, unless it appears that the testator intended that the will be effective even if he or she subsequently married, the will was made in contemplation of marriage, or the testator provided for that spouse by nonprobate transfers. *See* UNIF. PROBATE CODE § 2-301(a)(1)–(3) (amended 2010), 8 U.L.A. 192 (2013). Premarital will statutes like UPC § 2-301 do not revoke the premarital will entirely, but instead preserve significant portions of that will—in particular, any share devised to the testator's issue. They are designed not to upset too much of the testamentary plan of a testator who

the problem to be resolved by the state elective-share statute.[44] Elective-share statutes protect *all* spouses, whether they married before or after the testator's will was executed. These statutes, which vary greatly in detail, give spouses the right to demand a fixed percentage of the deceased spouse's estate even if the deceased spouse attempted to disinherit the surviving spouse.[45] Although elective-share statutes are not necessarily designed to effectuate intent,[46] they may accomplish that result when a testator fails to revise his or her will after marriage.

States take a similar approach when a testator has a child after will execution. The majority of states have "omitted" or "pretermitted" child statutes that allow children born after the execution of a testator's will to claim an intestate share of the testator's probate estate if that result effectuates intent.[47]

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enters into a second or subsequent marriage without changing a will leaving many of his assets to his or her children. *See, e.g.*, 18 ME. REV. STAT. ANN. tit. 18-A, § 2-301 (2013); N.J. STAT. ANN. § 3B:5-15 (West 2007); UTAH CODE ANN. § 75-2-301 (LexisNexis 2013).

44 New York, for example, has no omitted-spouse statute. Spouses who married after the testator executed his or her final will may exercise their right of election. *See* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2007).

45 *See*, *e.g.*, UNIF. PROBATE CODE § 2-202 (amended 2010), 8 U.L.A. 149 (2013); ALASKA STAT. § 13.12.202 (2012); COLO. REV. STAT. § 15-11-202 (2012); HAW. REV. STAT. § 560:2-203 (2006); KAN. STAT. ANN. § 59-6a203 (2012); MINN. STAT. § 524.2-202 (2002); MONT. CODE ANN. § 72-2-221 (2011); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2007); N.D. CENT. CODE § 30.1-05-01 (2010); S.D. CODIFIED LAWS § 29A-2-202 (2004); UTAH CODE ANN. § 75-2-202 (LexisNexis 2013); W. VA. CODE ANN. § 42-3-1 (LexisNexis 2010).

46 Supporters of elective-share statutes invoke two justifications: the partnership theory and the support theory. *See, e.g.*, UNIF. PROBATE CODE art. 2, pt.2, general cmt. (amended 2010), 8 U.L.A. 140 (2013) (explaining that "[t]he main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership" and stating that "[a]nother theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate").

47 These statutes vary in scope and detail. Some permit all children not named in the deceased parent's will to receive a portion of the estate. *See, e.g.*, ARK. CODE ANN. § 28-39-407 (2012); N.H. REV. STAT. ANN. § 551:10 (LexisNexis 2006). However, the majority of states have enacted statutes limiting protection of children unintentionally omitted from a deceased parent's will to those born or adopted after execution of the will. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2302 (2012); COLO. REV. STAT. § 15-11-302 (2011); FLA. STAT. § 732.302 (1975); MD. CODE ANN., EST. & TRUSTS § 3-301 (LexisNexis 2011); MINN. STAT. § 524.2-302 (2012); MISS. CODE ANN. § 91-5-5 (West 1972); MO. ANN. STAT. § 474.240 (West 1992); MONT. CODE ANN. § 72-2-232 (2011); NEB. REV. STAT. § 30-2321 (2008); N.J. STAT. ANN. § 3B:5-16 (West 2007); N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2007); N.D. CENT. CODE § 30.1-06-02 (2010); OKLA. STAT. ANN. tit.84, § 131 (West 2013). Many states permit the omitted after-born to receive a share in the estate equal to that which he or she would have received if the testator had died intestate. *See, e.g.*, DEL. CODE ANN. tit. 12, § 301 (2007); 755 ILL. COMP. STAT. ANN. 5/4-10 (West 1993); IND. CODE § 29-1-3-8 (2011); IOWA CODE ANN. § 633.267 (West 1992); N.C. GEN. STAT. § 31-5.5 (2012); 20 PA. CONS. STAT. § 2507(4) (2012); TENN. CODE ANN. § 32-3-103 (2007); WASH. REV.

When a testator fails to change her will after a divorce, most states create at least a presumption that testamentary provisions for the ex-spouse are revoked.[48] Many states have gone further and adopted statutes modeled after § 2-804(b) of the Uniform Probate Code (UPC), which directs that divorce automatically revokes all testamentary provisions and nonprobate beneficiary designations in favor of an ex-spouse.[49]

Finally, all states have intent-effectuating, antilapse statutes that apply to create substitute will beneficiaries when a testator has failed

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CODE ANN. § 11.12.091 (West 2012). In Kansas, the birth of a child after will execution revokes the will in its entirety. *See* KAN. STAT. ANN. § 59-610 (2012). This is a distinctly minority approach.

The UPC creates an omitted-child share only in one of two circumstances: if the testator has other children and the will makes a provision for those children, or if the testator has no other children and his will does not leave substantially all of his estate to the child's other parent. UNIF. PROBATE CODE § 2-302 (amended 2010), 8 U.L.A. 194 (2013). In states that have adopted the 1990 version of the UPC, the surviving spouse would be entitled to 100% of the estate, and the omitted child would receive nothing if he is a descendant of both the accountholder and the spouse. *See, e.g.*, ALASKA STAT. § 13.12.302 (2012); ARIZ. REV. STAT. ANN. § 14-2302 (2012); COLO. REV. STAT. § 15-11-302 (2011); HAW. REV. STAT. § 560:2-302 (2006); IDAHO CODE ANN. § 15-2-302 (2009); IND. CODE ANN. § 29-1-3-8 (2011); ME. REV. STAT. ANN. tit.18-A, § 2-302 (2013).

48 *E.g.*, ARK. CODE ANN. § 28-25-109(b) (2012); CAL. PROB. CODE § 6122 (West 2009); CONN. GEN. STAT. ANN. § 45a-257c (West 2004); DEL. CODE ANN. tit. 12, § 209 (2007); FLA. STAT. ANN. § 732.507(2) (West 2010); GA. CODE ANN. § 53-4-49 (2011); IDAHO CODE ANN. § 15-2-508 (2009); IND. CODE ANN. § 29-1-5-8 (LexisNexis 2011); IOWA CODE ANN. § 633.271(1) (West 2013); KAN. STAT. ANN. § 59-610 (2012); KY. REV. STAT. ANN. § 394.092 (West 2010); LA. CIV. CODE ANN. art. 1608(5) (2008); MD. CODE ANN., EST. & TRUST § 4-105 (West 2011); ME. REV. STAT. ANN. tit. 18-A, § 2-508 (2013); MO. REV. STAT. § 474.420 (2000); NEB. REV. STAT. § 30-2333 (2008); N.H. REV. STAT. ANN. § 551:13(II) (LexisNexis 2006); N.C. GEN. STAT. ANN. § 31-5.4 (2012); OR. REV. STAT. ANN. § 112.315 (West 2011); 20 PA. CONS. STAT. ANN. § 2507(2) (West 2005); R.I. GEN. LAWS § 33-5-9.1 (West 2011); S.C. CODE ANN. § 62-2-507 (West 2007); TENN. CODE ANN. § 32-1-202 (2007); TEX. PROB. CODE ANN. § 69 (West 2012); WASH. REV. CODE § 11.12.051 (2012); W. VA. CODE ANN. § 41-1-6 (LexisNexis 2010); WYO. STAT. ANN. § 2-6-118 (West 2013).

49 *Compare* UNIF. PROBATE CODE § 2-804(b) (amended 2010), 8 U.L.A. 330 (2013), *with* ALASKA STAT. § 13.12.804(a)–(c) (2012), COLO. REV. STAT. § 15-11-804(1) to (4) (2013), HAW. REV. STAT. § 560:2-804(a)–(d) (2006), 755 ILL. COMP. STAT. 5/4-7(b) (West 2007), MASS. GEN. LAWS ANN. ch. 190B, § 2-804(a)–(d) (West 2012), MICH. COMP. LAWS §§ 700.2806–.2807 (2013), MINN. STAT. ANN. § 524.2-804(1)–(2) (West 2012), MONT. CODE ANN. § 72-2-814(1)–(2) (2011), N.J. STAT. ANN. § 3B:3-14 (West 2007), N.M. STAT. ANN. § 45-2-804(A)–(B) (LexisNexis 2012), N.Y. EST. POWERS & TRUSTS LAW § 5-1.4(a)-(c) (McKinney 2013), N.D. CENT. CODE § 30.1-10-04(1)–(2) (2010), OHIO REV. CODE ANN. §§ 2107.33, 5815.33(A)–(B)(1) (West 2007), OKLA. STAT. ANN. tit. 84, § 114 (West 2013), S.D. CODIFIED LAWS § 29A-2-804(a)–(b) (2004), UTAH CODE ANN. § 75-2-804(1)–(4) (LexisNexis 2013), VA. CODE ANN. §§ 20-111.1, 64.2-412 (2013), *and* WIS. STAT. ANN. § 854.15(1)–(4) (West 2012). One court has held that to the extent that this statute would apply to change beneficiary designations of nonprobate assets, it impairs the obligation of contracts entered before the statute's effective date in violation of the state constitution. Aetna Life Ins. Co. v. Schilling, 616 N.E.2d 893, 896 (Ohio 1993).

to direct an alternative distribution in the event a beneficiary predeceases her.[50] The majority approach, reflected in the UPC, is to "save" any bequest to close relatives and to create a substitute gift in that predeceased beneficiary's descendants.[51]

But, as the following sections demonstrate, state wills law does not cleanly apply to nonprobate accounts, which include retirement assets. First, states do not uniformly extend intent-effectuating wills doctrines to IRAs. Second, state law is simply inapplicable to employer-sponsored retirement accounts. Moreover, federal law creates additional complications that accountholders have trouble understanding. This mishmash of rules can wreak havoc on a testator's estate plan.

1. Individual Retirement Accounts

An IRA account is a private contractual arrangement between the individual accountholder and the account custodian she chooses. The custodian manages the funds and distributes them to the accountholder on retirement. If the accountholder dies before all the funds are distributed, the custodian will distribute any remaining assets in accordance with the contract terms. Those terms allow the accountholder to designate beneficiaries, and provide that, in the event there is no effective designation, the remaining assets shall be distributed as the custodial contract directs. When disputes arise about disposition of IRA assets, the disputes are governed by state law, which varies considerably in the treatment of these issues. As this section demonstrates, state law often operates to frustrate the likely intent of accountholders.

a. Marriage or Birth of a Child

Suppose Abby opens an IRA account at age twenty-eight and designates her sister Betty as the POD beneficiary. Six years later

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50 *See, e.g.*, CAL. PROB. CODE § 21110 (West 2011); MD. CODE ANN., EST. & TRUSTS § 4-403 (LexisNexis 2011); MASS. GEN. LAWS ANN. ch. 190B, § 2-603 (West 2013); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 2012); N.C. GEN. STAT. ANN. § 31-42 (West 2012); 20 PA. CONS. STAT. ANN. § 2514(9) (West 2005); TEX. PROB. CODE ANN. § 68 (West 2003).

51 UNIF. PROBATE CODE § 2-603 (amended 2010), 8 U.L.A. 241 (2013); *see also, e.g.*, ALA. CODE § 43-8-224 (LexisNexis 1996); ALASKA STAT. § 13.12.603 (2012); ARIZ. REV. STAT. ANN. § 14-2603 (2012); COLO. REV. STAT. § 15-11-603 (2013); DEL. CODE ANN. tit. 12, § 2313 (2007); FLA. STAT. ANN. § 732.603 (West 2010); HAW. REV. STAT. § 560:2-604 (2006); IDAHO CODE ANN. § 15-2-605 (2009); ME. REV. STAT. tit. 18-A, § 2-605 (2012); MINN. STAT. § 524.2-603 (2012); MONT. CODE ANN. § 72-2-613 (2011); N.J. STAT. ANN. § 3B:3-35 (West 2007); N.D. CENT. CODE § 30.1-09-05 (2010); VA. CODE ANN. § 64.2-418 (2012); WYO. STAT. ANN. § 2-6-106 (2013).

Abby marries Harry, and they subsequently have a child, Charlie. Abby neglects to change her beneficiary designation before she dies unexpectedly. Who will receive the proceeds of Abby's IRA? Chances are, Betty will receive the proceeds and neither Harry nor Charlie will have a claim. In most states, the prebirth and premarriage beneficiary designation will control the distribution of IRA proceeds even if that distribution frustrates the accountholder's intent, because omitted-child and omitted-spouse statutes apply only to probate assets.[52] If the state has a modern elective-share statute, such as the UPC's, the value of an IRA account and other nonprobate assets might be included in the augmented estate.[53] If Harry is entitled to elect, Harry's elective share will include a fraction of the value of the IRA, and Harry might be entitled to some of the IRA assets if necessary to satisfy his elective share, although the elective-share statute would not otherwise upset the beneficiary designation. If the state instead had a "fraudulent intent" type elective-share statute,[54] Harry might be able to convince

52 *See, e.g.*, UNIF. PROBATE CODE § 2-301 to -302 (amended 2010), 8 U.L.A. 192 (2013); ARIZ. REV. STAT. ANN. § 14-2301 to -2302 (2012); COLO. REV. STAT. 15-11-301 to -302 (2013); FLA. STAT. ANN. § 732.301–02 (West 2010); IDAHO CODE ANN. § 15-2-301 to -302 (2009); MASS. GEN. LAWS ANN. ch. 190B, § 2-301 to -302 (West 2012); MICH. COMP. LAWS § 700.2301–02 (2005); MINN. STAT. § 524.2-301 to -302 (2012); MONT. CODE ANN. § 72-2-331 to -332 (2011); NEB. REV. STAT. § 30-2320 to -2321 (2008); N.J. STAT. ANN. § 3B:5-15 to -16 (West 2007); N.M. STAT. ANN. § 45-2-301 to -302 (LexisNexis 2012); N.D. CENT. CODE § 30.1-06-01 to -02 (2010); S.C. CODE ANN. § 62-2-301 to -302 (2009); S.D. CODIFIED LAWS § 29A-2-301 to -302 (2004); *see also* Graves v. Summit Bank, 541 N.E.2d 974, 976–77 (Ind. Ct. App. 1989) (finding that omitted-spouse statute did not apply to IRA account).

In a community property state, Harry would have an interest in amounts Abby contributed to the account after the marriage. If the community property state adopts an "item" theory of community property, then the surviving spouse has a right to 50% of the account proceeds that were accumulated during the marriage. *In re* Estate of Kirkes, 273 P.3d 664, 665 (Ariz. Ct. App. 2012). If the community property state adopts an "aggregate" approach to community property, then the surviving spouse is entitled only to 50% of the community property in the aggregate. *Id.* In such a state, if the surviving spouse takes his fair share of community property from the estate as a whole, the court may honor a beneficiary designation that conveys community assets to a third person. *Id.* at 667–68.

53 In states following the UPC, the term "augmented estate" is defined as the sum of (1) the value of the probate estate, (2) the deceased spouse's nonprobate transfers to those other than the surviving spouse, (3) the deceased spouse's nonprobate transfers to the surviving spouse, and (4) the surviving spouse's own assets. UNIF. PROBATE CODE § 2-203(a) (amended 2010), 8 U.L.A. 85, 85 (2010); *see also* ALASKA STAT. § 13.12.203 (2012); COLO. REV. STAT. § 15-11-202(2) (2013); HAW. REV. STAT. § 560:2-203 (2006); KAN. STAT. ANN. § 59-6a203 (2012); MINN. STAT. § 524.2-203 (2012); MONT. CODE ANN. § 72-2-222 (2011); N.D. CENT. CODE § 30.1-05-02 (2010); S.D. CODIFIED LAWS § 29A-2-203 (2004); W. VA. CODE ANN. § 42-3-2 (LexisNexis 2010).

54 *See*, *e.g.*, MO. REV. STAT. § 474.150 (2000) ("Any gift made by a person . . . in fraud of the marital rights of his surviving spouse to share in his estate, shall . . . be treated as a testamentary disposition and may be recovered from the donee and persons taking from him . . . and applied to the payment of the spouse's share . . . ."); TENN. CODE ANN. § 31-1-105 (2007) ("Any conveyance made fraudulently to children or others, with an intent to

a court to include the value of an IRA in the elective-share calculation by establishing that the deceased spouse's transfers to the account were in fraud of the surviving spouse's elective-share rights.[55]

b. Divorce

Suppose, in the preceding example, Abby *did* change her beneficiary designation after marrying Harry. If Abby and Harry subsequently divorce, and Abby dies prior to removing Harry as her beneficiary, who will receive the proceeds of her IRA? Here, the answer varies. In jurisdictions that have adopted UPC § 2-804(b), the divorce automatically revokes all testamentary provisions and beneficiary designations (including IRA designations) in favor of an ex-spouse.[56] The proceeds will be distributed as if Harry had predeceased Abby. In other states, however, only testamentary provisions are automatically revoked on divorce,[57] and Harry would receive the account proceeds. The problem may be even more serious when an accountholder names a same-sex partner as account beneficiary; especially if the state does not recognize same-sex marriage, as there will be little basis for denying benefits to the ex-partner, even if the relationship has long since been dissolved.

c. Death of a Beneficiary Prior to Death of the Accountholder

Most beneficiary designation forms ask the accountholder to designate a primary beneficiary or beneficiaries as well as alternate beneficiaries, and most custodial agreements provide that if the primary beneficiaries die, the alternate beneficiaries will take.[58] If no designated beneficiaries survive the accountholder, then the funds shall be

defeat . . . the surviving spouse's distributive or elective share, is . . . voidable to the extent the other assets in the decedent's net estate are insufficient to fund and pay the elective share amount payable to the surviving spouse . . . .").

55 *See* Wellshear v. Mellor, 142 P.3d 994, 997–98 (Okla. Civ. App. 2006) (holding that surviving spouse was entitled to satisfy elective share in part from proceeds of IRA account where contributions to that account were made in fraud of her marital rights).

56 *See supra* note 49.

57 *See, e.g.*, Ark. Code Ann. § 28-25-109(b) (2012); Ga. Code Ann. § 53-4-49 (2011); Idaho Code Ann. § 15-2-508 (2009); Kan. Stat. Ann. § 59-610 (2012); Me. Rev. Stat. Ann. tit. 18-A, § 2-508 (2013); Mo. Rev. Stat. § 474.420 (2000); *see also* Graves v. Summit Bank, 541 N.E.2d 974, 977–79 (Ind. Ct. App. 1989) (finding that neither the accountholder's divorce nor a notation that his IRA was to be distributed in accordance with his post-divorce will were sufficient to change the beneficiary designation in favor of the accountholder's ex-spouse).

58 *See infra* Part III.B.1.

distributed as the custodial agreement directs.[59] This construct can have unanticipated consequences.

For example, suppose an accountholder designates her two children as primary beneficiaries of her account. Her daughter dies, survived by two children. If the accountholder had thought about it, she might have provided that her daughter's children should take her daughter's share. But if the custodial agreement provides that her son, as the other surviving beneficiary, is entitled to the entire account (as most do),[60] he will receive it to the exclusion of the accountholder's grandchildren.

Again, this approach is inconsistent with wills law. Most antilapse statutes would direct the court to distribute the daughter's share to the daughter's children absent evidence that the testator had a contrary intent. UPC § 2-706(b) attempts to rectify this disparity between will provisions and nonprobate beneficiary designations by extending antilapse provisions to assets held in nonprobate forms. But this model statute contains a critical flaw. Section 2-706(b)(4) directs that its antilapse provisions shall not apply if the document names an alternative beneficiary in the event of a primary beneficiary's death.[61] The comment to that section provides that a printed provision in a custodial agreement constitutes an alternate devise.[62] Most beneficiary designation forms provide that if one primary beneficiary predeceases the accountholder, that beneficiary's share will be distributed to other primary beneficiaries, and that provision will always control. In most cases, therefore, UPC § 2-706(b) will not create substitute beneficiaries for IRA accounts unless the accountholder takes affirmative steps to name substitute beneficiaries.

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59 Courts originally formulated this rule with respect to life insurance policies. Because insurance policies are contracts, the terms of the contract, not state default rules, govern the distribution of the funds. *See, e.g.*, Seitz v. Metro. Life Ins. Co., 397 N.W.2d 162, 164–66 (Mich. 1986). In practice, this rule has been extended to IRAs, although the issue has not been the subject of much litigation. *See, e.g.*, *In re* Estate of Praczkajlo, 542 N.Y.S.2d 131, 134–35 (Surr. Ct. 1989) (finding that the estate of the depositor, not the estate of the beneficiary, were entitled to proceeds of IRA account where the beneficiary predeceased the depositor); Smith v. Marez, 719 S.E.2d 226, 230 (N.C. Ct. App. 2011) (using default provisions of an IRA to distribute proceeds from the account); Franklin Templeton Bank & Trust v. Tigert, No. 05-09-01472-CV, 2011 WL 2507834 at *5–7 (Tex. App. June 24, 2011) (distributing proceeds from an IRA to the deceased's second wife per the custodial agreement).

60 *See infra* Part III.B.1.

61 UNIF. PROBATE CODE § 2-706(b)(4) (amended 2010), 8 U.L.A. 293 (2013).

62 UNIF. PROBATE CODE § 2-706 cmt. (amended 2010), 8 U.L.A. 294 (2013).

2. *Employer-Sponsored Retirement Accounts*

Many employers enable their employees to establish retirement accounts as part of an employee-benefits package. These retirement accounts—the most common of which are known as 401(k) or 403(b) accounts—are governed by the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides expressly that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[63] The Supreme Court has construed this preemption provision broadly to hold that plan administrators are required to distribute assets in accordance with the plan documents even if state law might command a different result.

In *Egelhoff v. Egelhoff*,[64] a Boeing employee had designated his wife as the beneficiary of his employer-sponsored retirement plan.[65] Two months before his death in an automobile accident, the couple had divorced.[66] The Washington Supreme Court held that, pursuant to a Washington statute, the divorce revoked the beneficiary designation.[67] The United States Supreme Court reversed, holding that ERISA preempted the Washington statute, and mandated distribution to the ex-wife in accordance with the plan documents.[68] ERISA requires that a plan be administered in accordance with plan documents,[69] that plan documents specify how distributions shall be made,[70] and that plan administrators make distributions to a beneficiary designated by a participant or by the terms of the plan.[71] As a consequence, the plan documents trump state laws and court judgments that might otherwise affect the distribution of ERISA-governed retirement-plan benefits.[72] In sum, if an employee neglects to change

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63 29 U.S.C. § 1144(a) (2006).[4L: 2012 USC seems to have gotten through Title 32, so these 2006 designations should be updated. . .I guess by troubleshoot would be the easiest?]

64 532 U.S. 141 (2001).

65 *Id.* at 144.

66 *Id.*

67 *Id.* at 145–46.

68 *Id.* at 147–52.

69 *See* 29 U.S.C. § 1102(a)(1) (2006) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument."); § 1104(a)(1)(D) (dictating that a fiduciary must discharge duties "in accordance with the documents and instruments governing the plan"). The default rule is that the employer is the administrator. However, administration involves ensuring compliance with ERISA and other relevant laws, so administration is usually delegated to an external administrator.

70 § 1102(b)(4).

71 *See* § 1002(8) (defining "beneficiary").

72 *See* Kennedy v. Plan Adm'r, 555 U.S. 285, 300 (2009) (finding that ERISA provides no exemption from the plan administrator's duty to act in accordance with the plan documents when it is time to pay out benefits).

the POD beneficiary of an employer-sponsored retirement account to reflect the employee's intent in light of changed circumstances, the beneficiary designation will control the distribution of the account, notwithstanding state laws that might effectuate intent.[73] Therefore, neither a subsequent marriage, the birth of a child, a divorce, nor the death of a beneficiary can affect the beneficiary designation. Any applicable omitted-spouse, omitted-child, or antilapse statutes, as well as state statutes that revoke beneficiary designations on divorce, are preempted by ERISA.

ERISA also introduces a second complication: The statute grants survivorship rights to an employee's spouse. Specifically, ERISA requires that plan documents provide for the distribution of a married participant's retirement benefits in the form of a Qualified Joint and Survivor Annuity (QJSA) for the lives of the employee and his or her spouse.[74] However, a defined-contribution plan is exempt from the QJSA requirement if it meets certain criteria, such as providing that the participating accountholder's "accrued benefit . . . is payable in full, on the death of the participant, to the participant's surviving spouse."[75] The plan participant cannot unilaterally modify or terminate the spouse's rights, but the spouse may waive his or her survivorship rights by executing a waiver in the presence of a notary or plan representative.[76]

The "plan documents" rule and statutory spousal rights combine to create difficulties for accountholders. Under ERISA, if a plan participant dies before retirement, the proceeds of any defined-contribution plan will first be distributed to the current spouse (unless the spouse has properly waived his or her rights); second, to any beneficiary designated by the plan participant on a beneficiary designation form; and third, in accordance with the default provisions set forth in the plan documents. If the plan participant divorces, then the participant's ex-spouse is no longer a spouse for purposes of the plan, and so he has no statutory right to benefits.[77] Therefore, as *Egelhoff* graphi-

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[73] *See* Egelhoff v. Egelhoff, 532 U.S. 141, 143 (2001) (holding that ERISA preempts a Washington statute that provides for automatic revocation of a spouse's status as the beneficiary of a nonprobate asset following divorce).

[74] 29 U.S.C. § 1055(a)(1), (d)(1) (2006).

[75] § 1055(b)(1).

[76] § 1055(c)(1)–(2).

[77] The spouse would retain rights after divorce if (1) the benefit is payable in QJSA form, (2) the participant retired, and (3) the spouse's right vested prior to the divorce. *See* Carmona v. Carmona, 544 F.3d 988, 993, 998 (9th Cir. 2008) (holding that where an employee passed away after retirement, his spouse at the time of his retirement had a vested survivorship interest in the QJSA unless the spouse waived her right before a plan administrator or notary public and consented to an alternate payee), *amended by* 603 F.3d 1041 (9th Cir. 2010).

cally illustrates, the primary legal effect of designating one's spouse as beneficiary by name is to ensure that the spouse will receive the assets if the couple divorces and the employee neglects to change the beneficiary designation prior to death![78]

Nonetheless, it is common for married employees to expressly designate their spouses as beneficiaries. There are probably several reasons for this. For one thing, many of the 401(k) forms are worded so as to actively encourage the accountholder to write in his or her spouse's name.[79] Other employees may designate their spouses out of ignorance of the spouse's ERISA rights. For still others, it would simply seem strange to name someone else as the primary beneficiary. Maybe the employee, who is given a stack of forms to fill out at the beginning of employment, simply fills out the life insurance form, the health insurance form, and the 401(k) beneficiary designation form in the same way. And before the Supreme Court's recent decision in *Windsor*,[80] it was essential that a plan participant who wished to designate his or her same-sex spouse as a beneficiary fill out a beneficiary designation form. But as *Egelhoff* makes clear, a subsequent divorce does not, without more, cancel the beneficiary designation, even if a state statute directs a contrary result.[81]

ERISA also has ramifications when an accountholder marries *after* designating a beneficiary. Recall that under state law an omitted spouse has no survivorship right to any of the proceeds of an IRA account (or a fraction of the value thereof) unless the state has a

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78 Expressly designating the spouse as a beneficiary may generate one other potential benefit. A "designated beneficiary," like the actual employee, may have the entire interest distributed, and, therefore, taxed, on a schedule stretched over his or her lifetime. *See* 26 U.S.C. § 401(a)(9) (2006) (discussing required distributions). A spouse whose claim is based on a beneficiary designation or a default provision in the plan documents qualifies as a "designated beneficiary." 26 C.F.R. § 1.401(a)(9)-4 (2013). By contrast, the regulation expressly provides that an individual (presumably including a spouse) who takes an interest by virtue of state law does not qualify as a "designated beneficiary" unless that individual is also a plan-designated beneficiary. *Id*. But both the statute and the regulation are silent as to whether a spouse who is the beneficiary solely because ERISA so provides qualifies as a designated beneficiary. Thus, expressly designating the spouse as a beneficiary could ensure that the surviving spouse is treated as a "designated beneficiary" and therefore has the right to defer taxation.

79 For example, the IASIS Healthcare form states, "I understand that if I name someone other than my spouse as a Primary Beneficiary, my spouse must consent, sign the bottom of this form and have it witnessed by either my Employer or a notary public." IASIS Form, *supra* note 41. This language prompts the accountholder to fill in his or her spouse's name on the primary beneficiary line.

80 United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding that the Defense of Marriage Act, which prohibited the federal government from recognizing same-sex marriages legally performed in states, was unconstitutional because it violated the Fifth Amendment).

81 *See supra* notes 64–68 and accompanying text.

modern elective-share statute.[82] Under ERISA, however, the new spouse automatically becomes the account beneficiary, regardless of what the plan participant's beneficiary designation directs.[83] Although the ERISA provisions granting spousal rights are not motivated by a concern for effectuating intent, the provisions may in fact comport with accountholders' intentions in many cases. In other cases, however, an accountholder might erroneously assume that the beneficiary designation will continue to control the account distribution. ERISA, however, provides no mechanism comparable to UPC § 2-301 for ascertaining and effectuating the accountholder's probable intent.

B. The Accountholder Who Attempts to Change a Beneficiary Designation but Fails to Comply with the Contract Provisions

The previous section examined the law that is applicable when an accountholder makes no attempt to modify his or her beneficiary designation when life changes occur. But even when accountholders take concrete steps to change a beneficiary designation, their efforts often fall short. First, accountholders may try but fail to comply with the precise procedures set forth in the custodial agreement or plan documents. Alternatively, an accountholder may attempt to change a beneficiary designation by executing a document other than the form required by the custodian or plan administrator. In both cases, the ensuing conflict can generate litigation and expense and lead to intent-defeating results.

1. Standard of Judicial Review when the Accountholder Attempts to Change Beneficiaries

Accountholders frequently have trouble understanding and following the custodian or plan's directives for changing the account beneficiary. Many courts, when confronted with an accountholder's inadequate attempt to change the beneficiary, will validate the attempted change if the accountholder's process "substantially complies" with the contractual directives.[84] But if a court is unwilling to forgive less than strict compliance with those procedures, the accountholder's intent will be frustrated. *Smith v. Marez*[85] provides an

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[82] *See supra* note 53 and accompanying text.

[83] *See supra* note 74.

[84] *See, e.g.*, *In re* Estate of Golas, 751 A.2d 229, 232–33 (Pa. Super. Ct. 2000) (invoking substantial compliance to affirm the award of proceeds of an IRA account to the executors of the accountholder's estate, instead of the first designated beneficiary, where terminally ill accountholder requested change of beneficiary forms but failed to receive them before his death).

[85] 719 S.E.2d 226 (N.C. Ct. App. 2011).

egregious example in which a court awarded the proceeds of two IRA accounts to the accountholder's wife of two months, ignoring beneficiary designations executed only a few months before the accountholder's death.

Smith had opened two IRA accounts and named three of his children as the POD beneficiaries in specified percentages.[86] The following year, after Smith was diagnosed with cancer, he executed a will devising $100,000 to his then-girlfriend, the plaintiff, and the residue of his estate to his children in specific percentages.[87] That same day, Smith executed the change of beneficiary forms, checking the boxes stating "I hereby revoke all prior beneficiary designations and designate the following beneficiary(ica) for my account[s]."[88] On the beneficiary designation line, Smith wrote, "To be distributed pursuant to my Last Will and Testament."[89] The next month, after being informed that his cancer was terminal, Smith married plaintiff and passed away two months later.[90]

A North Carolina appellate court held that the wife was entitled to the proceeds, reasoning that Smith had failed to comply with the custodian's procedures for changing beneficiaries because the contract required that Smith name "any 'person' or 'entity' as a beneficiary" and indicate specific percentages for distribution.[91] At the same time, because Smith checked the box revoking prior beneficiary designations, the account passed to his spouse, the default beneficiary in the custodial agreement.[92] The court rejected the children's argument that a substantial compliance standard should apply.[93]

The result almost certainly frustrated the accountholder's intent, in a case where the accountholder had received absolutely no warning that his beneficiary designation forms were in any way defective.[94]

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[86] *Id.* at 229.

[87] *Id.*

[88] *Id.* at 229, 232 (alterations in original) (internal quotation marks omitted).

[89] *Id.* at 232 (second alteration in original) (internal quotation marks omitted).

[90] *Id.* at 229.

[91] *Id.* at 232.

[92] *Id.*

[93] The custodial agreement directed that New York law applied, and New York courts apply a substantial compliance standard only when a custodian waives his or her right to insist on strict compliance by depositing the proceeds into court and requesting that the court determine the proper beneficiary. *See id*. at 230–31 (surveying relevant New York case law); *see also* McCarthy v. Aetna Life Ins. Co., 704 N.E.2d 557, 561 (N.Y. 1998) (holding that an insurer who has paid the proceeds of a policy into court and requested adjudication may still require proof of substantial, but not strict, compliance with the policy provisions).

[94] The court rejected another of the children's arguments—that the doctrine of dependent relative revocation, a staple of wills law, should apply to Smith's revocation of his first set of beneficiary designation forms. *Marez*, 719 S.E.2d at 232–33. According to this doc-

Perhaps a careful lawyer would have known that Smith's designation was not to "a person or entity," but the fine line between Smith's designation and a perfectly valid designation to "my estate" would almost certainly have been lost on any layperson, especially when the custodian never raised the defect, either before or after Smith's death.

In ERISA cases, federal courts have generally been more willing to apply the substantial compliance standard. Those courts take one of two routes: Either they hold that ERISA does not preempt state substantial compliance doctrine,[95] or they recognize substantial compliance doctrine as rooted in federal common law.[96]

2. *Changing the Beneficiary Designation by Executing a Document Other than a Change of Beneficiary Form*

Accountholders are often under the misimpression that they can change a beneficiary designation by executing a document other than the custodian or plan administrator's form. Our research reveals that accountholders, with surprising frequency, attempt to change account beneficiaries through wills or trusts, prenuptial agreements, or divorce settlement agreements or decrees. Although these attempts are sometimes, but not always, successful with respect to IRAs, they almost

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trine, when a testator's revocation of a will is conditioned on the mistaken assumption that another will shall take effect on his death, the court may disregard the revocation if doing so better effectuates the testator's intent. *Id.* at 233. Smith's children reasoned that he checked the box revoking his first beneficiary designations on the mistaken assumption that the new designations would be valid. *Id.* at 232–33. Because he was mistaken, they argued, the court should ignore the revocation and distribute the account proceeds in accordance with the first beneficiary designations. *Id.* The court rejected this argument because it could find no New York precedent extending dependent relative revocation to an IRA or insurance policy beneficiary designation. *Id.*

95 *See, e.g.*, Bank of Am. Pension Plan v. McMath, 206 F.3d 821, 830 (9th Cir. 2000) (holding that "ERISA does not preempt the application of California's doctrine of substantial compliance"); Prudential Ins. Co. v. Giacobbe, Civil No. 7-4113 (AET), 2009 WL 3644121, at *7–8 (D.N.J. Oct. 30, 2009) (applying substantial compliance doctrine but finding that the deceased's acts were insufficient to meet the standard); Harpole v. Entergy Ark., Inc., 197 F. Supp. 2d 1152, 1159–60 (E.D. Ark. 2002) (noting that under either state or federal law, substantial compliance doctrine would sustain an employee's attempt to change the beneficiary from his ex-wife to his son even though the employee failed to provide his son's social security number as required by the form). To the extent that these cases hold that a substantial compliance doctrine grounded in state law can be applied, they appear to be in conflict with *Egelhoff*, which was decided in 2001.

96 *See, e.g.*, Phx. Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 564–65 (4th Cir. 1994); Unum Life Ins. Co. v. Scott, 2012 WL 1068978, at *3–4 (D. Conn. 2012); Hartford Life Ins. Co. v. Einhorn, 676 F. Supp. 2d 116, 135–38 (E.D.N.Y. 2009). *But see* Schmidt v. Sheet Metal Workers' Nat'l Pension Fund, 128 F.3d 541, 544–47 (7th Cir. 1997) (upholding the lower court's refusal to apply the substantial compliance doctrine even though the plan administrator provided the employee with the wrong form and thus was entirely at fault for the employee's failure to complete the correct beneficiary designation change form).

always run afoul of ERISA's plan documents rule with respect to 401(k) and 403(b) accounts.

ERISA's treatment of these issues is, as a threshold matter, straightforward. Recall that the Supreme Court's decision in *Egelhoff* established that ERISA preempts state laws.[97] In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*,[98] the Supreme Court took *Egelhoff* one step further, making it clear that ERISA's plan documents rule defeats an employee's attempt to change a beneficiary designation by any means other than executing a beneficiary designation form. As in *Egelhoff*, the employee in *Kennedy* had designated his wife as the beneficiary of assets in his DuPont savings and investment plan, and the parties subsequently divorced.[99] In *Kennedy*, however, the employee took steps to remove his ex-wife as the survivor beneficiary; the divorce decree expressly provided that the wife was "divested of all right, title, interest, and claim in and to . . . any other rights related to any . . . retirement plan, pension plan, or like benefit program" existing by reason of the employee's present or future employment.[100] Despite this fairly clear provision, the Supreme Court held that the plan documents controlled, and that the plan administrator had properly distributed the account balance to the ex-wife.[101]

In reaching this result, the Court recognized that it was frustrating the employee's clear intent.[102] But the court interpreted ERISA as prioritizing administrative efficiency over those concerns. As the Court explained, "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."[103] Less certain rules would force plan administrators "to examine a multitude of external documents that might purport to affect the dispensation of benefits . . . and be drawn into litigation."[104]

The following sections explain what happens when owners of IRAs and 401(k)s attempt to change beneficiary designations through provisions in wills, trusts, prenuptial agreements, and divorce decrees. Again, state law governs the issue with respect to IRA accounts, while

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97 *See supra* notes 64–68 and accompanying text.
98 555 U.S. 285 (2009).
99 *Id.* at 289.
100 *Id.*
101 *Id.* at 299–300.
102 *Id.* at 286–87, 299–300.
103 *Id.* at 299–300.
104 *Id.* at 301 (internal quotations omitted).

ERISA applies to 401(k) accounts. Notwithstanding the clarity of the plan-documents rule, ERISA contains a few provisions that complicate matters. Those provisions are explained below where they are relevant.

a. By Will or Trust Provision

As *Kennedy* makes clear, a provision in a will or trust purporting to change the beneficiary of an employer-sponsored account is unenforceable.[105] The law applicable to IRAs is murkier. Courts uniformly agree that a testamentary provision devising "all" of the accountholder's property does not operate to change a beneficiary designation on an IRA account.[106] But when an accountholder expressly and specifically devises the proceeds of an IRA in his or her will, states vary in their approaches. Some states have statutes that expressly prohibit changing a beneficiary designation by will or trust.[107] In states that have left the determination to the courts, outcomes vary. Although a minority of states hold that a will provision that clearly describes the account can override the beneficiary designation form,[108] in most states courts rely on the boilerplate in the cus-

[105] *See supra* notes 94–104 and accompanying text.

[106] *See, e.g.*, McCarthy v. Aetna Life Ins. Co., 704 N.E.2d 557, 559 (N.Y. 1998); *cf. In re* Estate of Gloege, 649 N.W.2d 468, 474 (Minn. App. 2002) (holding that although a Minnesota statute authorizes an accountholder to change Transfer-on-Death registration by will, testator's will did not make an explicit reference to the accounts sufficient to change the beneficiary designation).

[107] *See, e.g.*, GA. CODE ANN. § 7-1-813 (2013); LA. REV. STAT. ANN. § 9:2499 (1986); N.D. CENT. CODE § 30.1-31-10 (2010). By statute, Washington State allows people to change beneficiary designations for nonprobate assets by will, *see* WASH. REV. CODE ANN. § 11.11.020 (West 2009), but excludes IRAs from the definition of "nonprobate assets," *see* WASH. REV. CODE ANN. § 11.11.010(7)(iv) (West 2009).

[108] *See, e.g.*, Nunnenman v. Estate of Grubbs, 2010 Ark. App. 75, at 3–4, 374 S.W.3d 75, 78 (2010) ("Arkansas holds that a change in beneficiary can in fact be accomplished in a will so long as the language of the will is sufficient to identify the [account] involved and an intent to change the beneficiary."); *In re* Estate of Polk, No. 185410, 2013 WL 2095806, at *7 (N.J. Super. Ct. App. Div. May 16, 2013) (affirming trial court's determination that accountholder wanted his will, not his beneficiary designation, to govern the distribution of his IRA account).

Despite New York's general rule that an IRA beneficiary designation cannot be changed by will, one New York court ordered IRA account proceeds to be paid to the accountholder's will beneficiary instead of the beneficiary specified by his beneficiary designation form. *In re* Estate of Morse, 568 N.Y.S.2d 689, 691 (Sur. Ct. 1991). In reaching this result, the court held that a custodian or life insurance company that deposits account proceeds in court waives the right to insist on strict compliance with the contract. Because the intent to change the beneficiary designation was clearly expressed in the accountholder's will, the court determined that the will provision trumped the beneficiary designation. *Id.* This case appears to have been overruled by *McCarthy v. Aetna Life Insurance Co.*, 704 N.E.2d 557, 561 (N.Y. 1998), where the court held that even if an insurance company waives its right to insist on strict compliance, a policyholder's attempt to todial contract directing that a beneficiary designation must be changed by filling out a new beneficiary designation form and delivering it to the custodian. These courts apply the life insurance rule to IRAs, and hold that a will or revocable trust provision devising IRA account proceeds does not trump language in the custodial agreement.[109]

Sometimes that language is so well buried that even the designated beneficiary's lawyer fails to uncover it. In one case, that failure led a court to give effect to the accountholder's will. In *Goter v. Brown*,[110] the decedent's will left his residuary estate, "including stocks, bonds and other financial securities held in brokerage accounts," to Ronald Goter.[111] The court held that this provision was effective to change the designation, because the excerpt from the custodial agreement furnished to the court by the designated beneficiary did not set forth a specific procedure for changing the designation.[112] The beneficiary then sought a rehearing, relying on a "previously unseen second page" of the account agreement that did prescribe a procedure for changing beneficiaries.[113] The court denied the rehearing, emphasizing the beneficiary's failure to produce the missing page to the trial court.[114]

b. By Prenuptial Agreement

Suppose an accountholder and his or her new spouse enter into a prenuptial agreement in which one spouse waives all rights to the other's retirement account. What impact, if any, will the agreement

change the beneficiary must substantially comply with those procedures. Therefore, a will provision designating the insurance proceeds to the policyholder's father could not override a previous beneficiary designation in favor of the policyholder's wife because "there [was] no evidence that decedent made any attempt to change the beneficiary designation" by following contractual procedures. *Id.*

109 *See, e.g.*, *In re* Brown, No. O.C. NO. 1435 IV OF, 2005 WL 3753142, at *1, *20 (Pa. Ct. C.P. Dec. 29, 2005) (holding that an attorney's attempt to "simplify" a client's estate by placing all of her assets in a revocable trust was insufficient to change ownership or beneficiary designation of an IRA account because the settlor failed to execute a change of beneficiary form); *In re* Estate of Taylor, No. 63761-4-I, 2010 WL 5464751, at *4 (Wash. Ct. App. Dec. 20, 2010) (holding that an accountholder's attempt to leave his IRA to his son by executing a provision in his will was invalid, despite the court's belief that the accountholder desired to leave his assets to his son and believed that his will would accomplish that change); *cf.* Cook v. Cook, 111 P.2d 322 (Cal. 1941) (analyzing the interaction between wills and beneficiary designation for a life insurance policy).

110 682 So. 2d 155 (Fla. Dist. Ct. App. 1996).

111 *Id.* at 156 (internal quotation marks omitted).

112 *Id.* at 157.

113 *Id.*

114 *Id.* at 157–58.

have on the distribution of the retirement account after the accountholder's death?

If the account is an IRA, the surviving spouse's waiver will probably be irrelevant, because the accountholder will have designated someone other than the spouse as the beneficiary.[115] It is therefore not surprising that there have been no cases requiring a court to determine whether a prenuptial agreement overrides an IRA beneficiary designation in favor of the accountholder's spouse.

A prenuptial agreement disclaiming the surviving spouse's interest in an IRA may become relevant if the accountholder neglected to fill out a beneficiary designation form, or if the designated beneficiaries all predeceased the accountholder. In the absence of a valid beneficiary designation, the default provisions in a custodial agreement control distribution, and most of these provisions designate the surviving spouse as the recipient. If, however, the surviving spouse previously waived the right to receive retirement account proceeds by executing a prenuptial agreement, the spouse will probably not receive the proceeds.[116]

Under ERISA, however, a new spouse automatically becomes the beneficiary of an employer-sponsored account, regardless of what the plan participant's beneficiary designation directs.[117] Accountholders frequently assume that a prenuptial agreement can extinguish the new spouse's rights to any retirement account proceeds. But federal courts agree that no matter how clearly a prenuptial agreement waives the new spouse's right to account proceeds, the spouse will be entitled to the proceeds on the employee's death.[118]

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[115] The agreement may, however, become relevant if it does not waive the surviving spouse's right to elect (which is unlikely), the spouse exercises that right, and the elective-share statute includes IRAs in the value of the estate.

[116] *See, e.g.*, *In re* Estate of Thies, 903 P.2d 186 (Mont. 1995) (effectuating a valid prenuptial waiver by precluding collection of retirement account proceeds); Kinkle v. Kinkle, 699 N.E.2d 41, 42 (Ohio 1998) (holding that a prenuptial agreement waiving a spouse's interest in a retirement account "controls over the beneficiary designation clause" of the account contract).

[117] For a thorough analysis of the intersection between state law and ERISA's family protection provisions, see Albert Feuer, *How the Supreme Court and the Department of Labor May Dispel Myths About ERISA's Family Law Provisions and Protect the Benefit Entitlements That Arise Thereunder*, 45 J. MARSHALL L. REV. 635 (2012).

[118] *See, e.g.*, Greenebaum Doll & McDonald PLLC v. Sandler, 256 F. App'x 765, 767 (6th Cir. 2007) ("There is little support for the notion that a prenuptial agreement by itself can satisfy ERISA's spousal-consent requirement."); Hagwood v. Newton, 282 F.3d 285, 290–91 (4th Cir. 2002) (noting that a prenuptial agreement generally cannot serve as a valid waiver of spousal rights as required by ERISA); Nat'l Auto. Dealers & Assocs. Ret. Trust v. Arbeitman, 89 F.3d 496, 502 (8th Cir. 1996) (same); Hurwitz v. Sher, 982 F.2d 778, 781 (2d Cir. 1992) (same); Robins v. Geisel, 666 F. Supp. 2d 463, 467–68 (D.N.J. 2009) (same); Ford Motor Co. v. Ross, 129 F. Supp. 2d 1070, 1073–74 (E.D. Mich. 2001) (same);

ERISA requires compliance with a very specific procedure to waive a spouse's statutory rights: The spouse's waiver must be made after marriage in a writing that names an alternate beneficiary and that is executed in front of a plan representative or notary public.[119] Going forward, the spouse must consent to any change of beneficiary designation.[120] By definition, prenuptial agreements fail to meet these exacting requirements: They are executed prior to marriage and therefore do not divest a spouse of statutory survivorship rights. Because parties' signatures to a postnuptial agreement are not usually notarized or affixed in the presence of a plan administrator, postnuptial agreements that attempt to waive the spouse's ERISA rights ordinarily are ineffective as well. In addition, couples may have difficulty complying with ERISA's exacting timing requirements.[121]

c. By a Provision in an Agreement Incorporated into a Divorce Decree

Divorcing couples usually think to include retirement assets in marital property distribution agreements. But frequently, accountholders either assume that a property settlement agreement assigning "ownership" of a retirement account or its proceeds is sufficient to revoke any prior beneficiary designation, or they simply neglect to fill out a new designation form. On the accountholder's death, what governs the distribution of the account—the beneficiary designation directing payment to the (now ex-) spouse or the property distribution agreement incorporated in the divorce decree?

First, consider IRAs. As mentioned previously, in states that have adopted statutes similar to UPC § 2-804, which revokes *all* beneficiary

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Zinn v. Donaldson Co., 799 F. Supp. 69, 73 (D. Minn. 1992) (same); Nellis v. Boeing Co., No. 91-1011-K, 1992 WL 122773, at *4 (D. Kan. May 8, 1992) (same). Some state courts that analyzed the issue before *Egelhoff* and *Kennedy* held that a specific waiver in a prenuptial agreement was valid. *See, e.g.*, *In re* Estate of Hopkins, 574 N.E.2d 230, 235 (Ill. App. Ct. 1991) (holding that a premarital agreement was a valid waiver under ERISA); Heineman v. Bright, 782 A.2d 365, 375 (Md. Ct. Spec. App. 2001) (same).

119 29 U.S.C. § 1055(c)(2)(A)(i) (2006); *see Nat'l Auto. Dealers*, 89 F.3d at 502 (holding that an agreement "signed before the marriage . . . failed to satisfy the waiver requirements of ERISA").

120 § 1055(c)(2)(A)(i) (2006).

121 The average accountholder might have difficulty finding and understanding the timing requirements embedded in § 1055(c)(7), which provides:

> For purposes of this subsection, the term "applicable election period" means—
>
> (A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the 180-day period ending on the annuity starting date, or
>
> (B) in the case of an election to waive the qualified preretirement survivor annuity, the period which begins on the first day of the plan year in which the participant attains age 35 and ends on the date of the participant's death.

designations in favor of an ex-spouse,[122] there is no conflict. But many state statutes limit the revocation on divorce rule to testamentary dispositions and appointments.[123] In these states, although divorce alone does not revoke a beneficiary designation in favor of the ex-spouse, a provision in the divorce decree that voids the designation may be given effect.[124] Here, the devil is in the details. It is quite difficult to predict whether a court will view a divorce agreement as sufficiently explicit to override the beneficiary designation.[125] For example, in *Painewebber Inc. v. East*,[126] the Maryland Court of Appeals held that the following language was inadequate to revoke the beneficiary designation:

> Each of the parties hereby expressly waives any legal right either may have under any Federal or State law as a spouse to participate as a payee or beneficiary regarding any interests the other may have in any pension plan, profit-sharing plan, or any other form of retirement or deferred income plan including, but not limited to, the right

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122 *See supra* note 49.

123 *See, e.g.*, sources cited *supra* note 57.

124 *See, e.g.*, DeRyke v. Teets, 702 S.E.2d 205, 207 (Ga. 2010) (holding that a beneficiary designation was overridden by a divorce agreement that "completely, clearly, and unambiguously expresses the intent of the parties that the beneficiary spouse is releasing any and all interest in the benefits at the time of the divorce"); Pinkard v. Confederation Life Ins. Co., 647 N.W.2d 85, 89–90 (Neb. 2002) (finding that language providing that a deceased spouse would "receive as his sole and separate property all right, title, and interest in his employee benefit plans" was sufficient to override a beneficiary designation); Stribling v. Stribling, 632 S.E.2d 291, 295 (S.C. Ct. App. 2006) (finding that a decree stating that the parties waive "*any interest* they may have in the other party's retirement" was sufficient to override a beneficiary designation); Estate of Anello v. McQueen, 953 P.2d 1143, 1145–46 (Utah 1998) (recognizing, prior to Utah's adoption of UPC § 2-804, the general rule that divorce does not automatically override a beneficiary designation but finding that a separation agreement stating that the parties took their own separate IRAs "free and clear of any claim or interest of the other party" clearly expressed the parties' intent to waive "both existing property interests and future expectancies").

125 *See* Maccabees Mut. Life Ins. Co. v. Morton, 941 F.2d 1181, 1185 (11th Cir. 1991) (concluding that although the ex-spouse waived her "rights acquired through the marital relationship" via a separation agreement, "her status as beneficiary was unrelated to the husband-wife relationship," and she thus did not waive her rights as a beneficiary to the proceeds of the IRA); Crawford v. Barker, 64 So. 3d 1246, 1248 (Fla. 2011) (enforcing a beneficiary designation distributing IRA account proceeds to an ex-spouse, despite the property settlement's declaration that the accountholder "retain[ed] the retirement money" in his IRA account); *In re* Estate of Rock, 612 N.W.2d 891, 893–95 (Minn. Ct. App. 2000) (affirming a district court decision that a divorce decree did not remove the deceased's ex-wife as the primary beneficiary of his IRAs); *In re* Estate of Bruce, 877 P.2d 999, 1002 (Mont. 1994) (holding that a property settlement agreement which did not refer to an ex-wife's interest as a beneficiary of an IRA "did not constitute a relinquishment of [her] inchoate interest in the . . . IRA as a beneficiary"); Hopf v. Hopf, Nos. 91-1006-FT, 91-1007-FT, 1991 WL 236558, at *1 (Wis. Ct. App. Sept. 24, 1991) (finding that a divorce agreement wherein an ex-spouse gave up "all right, title, and interest in and to the property awarded" to her husband was insufficient to override beneficiary designation).

126 768 A.2d 1029 (Md. 2001).

> either spouse may have to receive any benefit, in the form of a lump-sum death benefit, joint or survivor annuity, or pre-retirement survivor annuity pursuant to any State or Federal law, and each of the parties hereby expressly consents to any election made by the other, now or at any time hereafter, with respect to the recipient and the form of payment of any benefit upon retirement or death under any such pension plan, profit-sharing plan, or other form of retirement or deferred income plan.[127]

The agreement also contained a broad waiver stating that the ex-spouse "acknowledges that all personal property now in husband's possession belongs to the Husband" and "[t]o the extent that Wife may have any interest in such property, the Wife for herself, her heirs, representatives and assigns quit claims *any and all interest* that the Wife may have in such property."[128] In awarding the account proceeds to the ex-wife, the court reasoned that the waiver provisions were ineffective because, at the time of the divorce, the accountholder's wife had only an expectancy interest in the retirement fund. Thus, the provisions waiving her current property rights in the account were irrelevant—only a clear expression of intent to relinquish her expectancy interest would suffice.[129] As one court explained:

> [I]f the parties wish to specify in a marital settlement agreement that a spouse will not receive the death benefits or wish to specify a particular beneficiary, this should be done clearly and unambiguously. Otherwise . . . the spouse who receives the policy, plan, or account as part of the marital settlement agreement is free to designate whomever he or she chooses as the beneficiary.[130]

Other courts are in accord.[131] Thus, in states that have not extended the revocation-on-divorce statute to retirement accounts, careful drafting of the settlement agreement or divorce decree may not be enough to deprive the ex-spouse of IRA assets; the only safe way to avoid having an account pass to a former spouse is to change the beneficiary designation form, a precaution some lawyers apparently forget to take. As *Kennedy* illustrates, provisions in divorce decrees that attempt to delineate the parties' rights to employer-

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[127] *Id.* at 1032.

[128] *Id.* at 1034 (emphasis added).

[129] *Id.* at 1035.

[130] Crawford v. Barker, 64 So. 3d 1246, 1256 (Fla. 2011) (enforcing a beneficiary designation distributing IRA account proceeds to an ex-spouse, despite the property settlement's declaration that the accountholder "shall retain retirement money" in his IRA account). After the Florida Supreme Court's decision in *Crawford*, the Florida legislature enacted a statute, effective October 1, 2013, providing that divorce revokes various non-probate designations, including IRA designations. FLA. STAT. § 732.703 (2013).

[131] *See, e.g.*, cases cited *supra* note 125.

sponsored retirement accounts are generally ineffective.[132] However, ERISA does create one exception to this rule: If a state law divorce decree is a Qualified Domestic Relations Order (QDRO), the plan administrator must look outside the plan documents and distribute the account proceeds as directed by the QDRO.[133] A QDRO is a "judgment, decree, or order" that "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant."[134] To qualify as a QDRO, the judgment, order, or decree must assign to a payee (or payees) a right to receive the participant's benefits under a plan. It must contain the last known addresses of the participant and the payees, the amount or percentage of benefits payable to each payee, and the number of payments or period to which the order applies, and it must specify each plan to which the order applies.[135] Finally, the judgment, order, or decree must be filed with the plan administrator, who must, within a reasonable period, determine whether the order is a QDRO and notify the participant and each alternate payee of its determination.[136] Because courts often require strict compliance with the QDRO requirements, the slightest deviation can result in a judicial finding that a divorce decree is not a QDRO.[137]

For example, in *Metropolitan Life Insurance Co. v. Leich-Brannan*,[138] the court held that a divorce decree wherein the participant agreed to make his ex-spouse "his irrevocable beneficiary on all of his personal and group life insurance" was not a QDRO because the order did not clearly identify the insurance plan or state a specific

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132 *See supra* notes 94–104 and accompanying text.

133 *See* 29 U.S.C. § 1056(d)(3)(J) (2006) (instructing courts to treat as beneficiaries alternate payees under a QDRO).

134 § 1056(d)(3)(B)(ii).

135 § 1056(d)(3)(C).

136 § 1056(d)(3)(G)(i)(II). 29 U.S.C. § 1056(d)(3)(D) sets forth additional requirements: A QDRO cannot (1) require the plan to provide any type of benefit not otherwise provided, (2) require the plan to provide increased benefits, or (3) require benefits to be paid to an alternate payee which must be paid to another alternate payee under another QDRO.

ERISA requires the plan administrator to separately account for any benefits that might be payable to an alternate payee under the terms of the order during the first eighteen months that the benefit would be payable, if the order were a QDRO. § 1056(d)(3)(H)(i). The eighteen-month period is to provide "a time in which any defect in the original [Q]DRO could be cured." Trustees of Dirs. Guild of Am. v. Tise, 234 F.3d 415, 422 (9th Cir. 2000).

137 *But see* Metro. Life Ins. Co. v. Bigelow, 283 F.3d 436, 443 (2d Cir. 2002) (holding that ERISA does not require "literal compliance" with respect to QDROs entered prior to 1985).

138 812 F. Supp. 2d 729 (E.D. Va. 2011).

amount or percentage of insurance proceeds that were to be awarded to the ex-spouse.[139]

As a result of these mistakes, ex-spouses frequently are awarded benefits that they have expressly waived in writing. This has led to an explosion of litigation over whether the plan participant's estate can sue the ex-spouse in state court for breach of contract and the imposition of a constructive trust.[140] Several courts have held that ERISA preempts even the filing of this type of state law claim in a state law court. For instance, in *Melton v. Melton*,[141] the Seventh Circuit determined that "*Egelhoff* stands for the proposition that a state law cannot invalidate an ERISA plan beneficiary designation by mandating distribution to another person,"[142] and so ERISA preempted a state law that permitted the imposition of a constructive trust on ERISA proceeds.[143] Although several federal courts have held that the plan-documents rule does *not* preclude a state law constructive trust claim,[144] the Supreme Court's recent decision in *Hillman v. Maretta*[145] suggests that *Melton* may eventually become the law of the land. In *Hillman*, a federal employee neglected to change the beneficiary designation on his employer-provided life insurance policy after

139 *Id.* at 734, 736–37. Note that the plan-documents rule applies to all benefits with survivorship provisions in plans governed by ERISA. *See* Boyd v. Metro. Life Ins. Co., 636 F.3d 138, 142 (4th Cir. 2011) (applying the rule to an "employee welfare benefit plan").

140 The Supreme Court declined to address the question whether an estate administrator could sue to seek restitution from a spouse who waived retirement benefits in a divorce agreement. *See* Kennedy v. Plan Adm'r, 555 U.S. 285, 299 n.10 (2009). In his 1984 article, John Langbein, writing before the Supreme Court's ERISA preemption decisions, suggested that restitution law would make the recipient liable to disgorge the assets to the intended beneficiary. *See* Langbein, *supra* note 2, at 1139.

141 324 F.3d 941 (7th Cir. 2003).

142 *Id.* at 945 (citations omitted).

143 *Id.*; *see also* Carmona v. Carmona, 603 F.3d 1041, 1061–62 (9th Cir. 2010) (finding that ERISA preempted a constructive trust remedy); Langevin v. McMorrow, No. 10-P-1591, 2011 WL 2436748, at *2 (Mass. App. Ct. June 20, 2011) (awarding proceeds to designated beneficiary despite contrary language in a divorce agreement); Staelens v. Staelens, 677 F. Supp. 2d 499, 508 (D. Mass. 2010) (holding that an alleged "waiver" did not disturb an ex-wife's designation as beneficiary); Eddings v. Eddings, No. 09-5549, slip op. at 6 (N.D. Cal. Apr. 19, 2010) (holding plaintiff's claim preempted due to failure to file a QDRO).

144 *E.g.*, Estate of Kensinger v. URL Pharma, Inc., 674 F.3d 131, 138 (3d Cir. 2011); Hallingby v. Hallingby, 574 F.3d 51, 55 (2d Cir. 2009); Central States v. Howell, 227 F.3d 672, 678–79 (6th Cir. 2000); Flesner v. Flesner, 845 F. Supp. 2d 791, 800–01 (S.D. Tex. 2012); Partlow v. Person, 798 F. Supp. 2d 878, 880–81 (E.D. Mich. 2011); Estate of Hall v. Hall, No. 09-3522, slip op. at 4 (E.D. Pa. Sept. 3, 2009). Several state courts have reached the same conclusion. *E.g.*, Appleton v. Alcorn, 728 S.E.2d 549, 551 (Ga. 2012); Sweebe v. Sweebe, 712 N.W.2d 708 (Mich. 2008); Reed v. Reed, 810 N.W.2d 284, 289 (Mich. Ct. App. 2011); Brown v. Wright, No. 285509, slip op. at 2 (Mich. Ct. App. Sept. 15, 2009); Pardee v. Estate of Pardee, 112 P.3d 308, 313–16 (Okla. Civ. App. 2004).

145 133 S. Ct. 1943 (2013).

his divorce and remarriage, and the proceeds were subsequently distributed to his ex-wife.[146] The surviving spouse sued in state court citing a Virginia statute revoking all beneficiary designations in favor of an ex-spouse, and making the ex-spouse who received insurance proceeds liable in that amount to the person who would have received them under applicable law but for the beneficiary designation.[147] A unanimous Court held that that the constructive trust remedy provided for by the Virginia statute was preempted by the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), which contains no revocation on divorce provision but simply provides that an employee may designate a beneficiary anytime preceding his or her death.[148] The Court reasoned that the Virginia constructive trust provision interfered with FEGLIA "because it directs that the proceeds actually 'belong' to someone other than the named beneficiary by creating a cause of action for their recovery by a third party."[149]

Even if the Court does not extend *Hillman* to the ERISA context, which seems unlikely, the availability of a constructive trust remedy is no panacea for intended beneficiaries. An executor may have difficulty bringing a constructive trust action before the administrator has distributed assets to the designated beneficiary. The executor may be a grieving family member whose first order of business is not to settle the estate. Moreover, it is increasingly common for people to have several different employers over the course of a lifetime, and it may take the executor some time to determine the identity and location of each plan. In the time it takes the executor to identify decedent's retirement accounts, bring suit in state court and obtain a judgment, the beneficiary may have co-mingled, spent, or transferred the account proceeds.

III
The Tenuous Connection Between Beneficiary Designations and Intent of Accountholders: Of Forms, Foresight, and Formalities

As the preceding Part demonstrates, the terms of the "contract" between the accountholder and the account custodian play a critical

146 *Id.* at 1949.
147 *Id.* at 1947.
148 *Id.* at 1955. The Court's analysis would seem to apply equally to employee benefits governed by ERISA. *See id.* at 1952 ("It makes no difference whether state law requires the transfer of the proceeds . . . or creates a cause of action . . . that enables another person to receive the proceeds . . . . In either case, state law displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead.").
149 *Id*. at 1952.

role in the disposition of assets remaining in an IRA account or defined-contribution-plan account at the accountholder's death. Other instruments reflecting the accountholder's intent, including wills, revocable trust instruments, and the terms of divorce decrees, count for little in the face of the accountholder's failure to change the beneficiary designation form he or she filled out years earlier. Major life events, such as marriage, the birth of new family members, and the death of others, have little or no effect on distribution of the account unless the accountholder had the presence of mind to change the beneficiary designation. The apparent assumption is that the beneficiary designation remains the best evidence of the accountholder's intent with respect to the disposition of account assets.

In this Part, however, we examine a number of problems with that assumption. The preprinted instructions on the beneficiary designation forms are not generally transparent. Even if an accountholder understands the form, the accountholder will find it difficult to adapt the form to her own preferences. The accountholder generally prepares the forms when succession rights are not in the forefront of her mind. Further, the forms do not adequately prompt accountholders to foresee and account for significant life changes that might alter their preferences. The accountholder will often act without legal advice that might mitigate some of these difficulties. Finally, the absence of formalities surrounding execution increases the opportunity for chicanery by potential beneficiaries, and the absence of probate protection may make it difficult to recover assets wrongfully diverted from intended beneficiaries.

A. *Lack of Transparency*

We have examined the beneficiary designation forms for ten of the largest IRA providers in the United States[150] and for a selection of firms offering 401(k) plans to their employees.[151] Our research sug-

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150 American Funds, Charles Schwab, Edward Jones, Fidelity, ING, JP Morgan Chase, Merrill Lynch, Morgan Stanley Smith Barney, Vanguard, and Wells Fargo Advisors. These forms are on file with the authors and the *New York University Law Review*. Research has identified these ten as the companies most often selected as IRA providers. *See Firms Most Likely to Capture IRA Accounts*, MILLIONAIRE CORNER (Sept. 8, 2011[4L: couldn't verify timestamp on source]), http://millionairecorner.com/Content_Free/Firms-Most-Likely-to-Capture-IRA-Accounts.aspx. It is worth noting that Fidelity was by far the company most often selected as an IRA provider by those surveyed in the research. *Id.*

151 Because many firms provide their beneficiary designation forms only to their own employees, we could not easily obtain those forms from every employer, or from a select subset of employers. As a result, we focused on a selection of ten forms readily available online. These forms were derived from firms of different sizes and businesses, but, as demonstrated in the text below, showed less variation than the IRA forms we examined. The forms we examined were from the ADP Prototype Plan, Colorado PERA (managed

gests that an intelligent and careful nonlawyer reading these forms would have difficulty understanding the potential impact they could have on the distribution of account assets.

First, not a single one of the IRA forms mentions or discusses the effect that a will, revocable trust, or other dispositive instrument might have on the designation made on the form; the same is true for nine of the ten 401(k) forms we studied. Instructions on the back of the tenth 401(k) form expressly provides that "the Plan, in accordance with the Plan provisions, will pay Plan assets directly to the surviving qualified beneficiary, regardless of the terms of your Will."[152] Seven of the ten IRA forms provide instructions for changing beneficiary designation;[153] the other three—and all ten 401(k) forms—are silent on the issue.[154] A lawyer might well argue that an instruction about how to make an effective change of beneficiary designation should lead the reader to infer that a will or trust instrument would *not* be effective to change the designation, but it would be hard to expect an uncounseled accountholder to draw that inference. It is true that four of the IRA forms suggest consulting a tax or legal advisor,[155] but the other six make no mention of the need for legal advice. None of the 401(k) forms mentions the need for legal counseling.

Second, five of the ten IRA forms are silent as to the consequences of failing to designate a beneficiary or making an ineffective

by ING), Costco (managed by T. Rowe Price), Digital Insurance, Earl Industries (managed by American Funds), IASIS Healthcare, John Hancock, Metropolitan Transportation Authority (managed by Prudential), Sears Holdings, and Teamster-UPS.

152 Sears Holdings 401(k) Beneficiary Designation Form [hereinafter Sears Holding Form] (on file with the *New York University Law Review*).

153 One of the seven companies, Fidelity, permits online changes without so much as a signature. *See Beneficiary Designation Forms*, FIDELITY, http://personal.fidelity.com/accounts/services/content/irabene2.shtml (last accessed Sept. 14, 2013). The other six require written notice, often on a particular form. *See* Charles Schwab IRA Beneficiary Designation Form [hereinafter Charles Schwab Form] (on file with the *New York University Law Review*); ING IRA Beneficiary Designation Form [hereinafter ING Form] (on file with the *New York University Law Review*); JP Morgan Chase IRA Beneficiary Designation Form [hereinafter JP Morgan Form] (on file with the *New York University Law Review*); Merrill Lynch IRA Beneficiary Designation Form [hereinafter Merrill Lynch Form] (on file with the *New York University Law Review*); Morgan Stanley Smith Barney IRA Beneficiary Designation Form [hereinafter Morgan Stanley Form] (on file with the *New York University Law Review*); Wells Fargo Advisors IRA Beneficiary Designation Form [hereinafter Wells Fargo Form] (on file with the *New York University Law Review*).

154 *See* American Funds IRA Beneficiary Change Form [hereinafter American Funds Form] (on file with the *New York University Law Review*); Edward Jones IRA Beneficiary Designation Form [hereinafter Edward Jones Form] (on file with the *New York University Law Review*); Vanguard Form, *supra* note 41.

155 American Funds Form, *supra* note 154; Fidelity IRA Beneficiary Designation Form [hereinafter Fidelity Form] (on file with the *New York University Law Review*); Merrill Lynch Form, *supra* note 153; Wells Fargo Form, *supra* note 153.

designation. One IRA form explicitly provides that the account will be distributed to the accountholder's estate if no beneficiary is named.[156] Another provides for distribution to a surviving spouse, or in the absence of a surviving spouse, to children, and in the absence of both a spouse and children, to the estate.[157] Three others provide for distribution to the spouse, and in the absence of a surviving spouse, to the accountholder's estate.[158] The other five IRA plans do have default distributions built into the boilerplate of their multiple-page, fine-print custodial agreements, which an accountholder is unlikely to read.[159] But the beneficiary designation forms—the only forms dealing with beneficiary rights that the accountholder actually has to examine—provide absolutely no notice to the accountholder about what that default distribution would be (nor do they signal the existence of a default distribution).

For the 401(k) plans, the forms do inform the accountholder of the ERISA mandate that the spouse be the sole beneficiary unless the spouse waives that exclusive right, but only one of the forms explicitly indicates what the default distribution will be for unmarried accountholders.[160]

Third, the forms are woefully inadequate in explaining the potential consequences of divorce on a designation of the spouse as beneficiary. Of the IRA forms, only the Vanguard form—consistently the form best designed to effectuate the accountholder's probable intent—mentions the issue at all; that form helpfully gives the accountholder the option to name as beneficiary "the person I'm married to at the time of my death,"[161] but even that form does not indicate what would happen if the accountholder designates a spouse by name and subsequently divorces. Seven of the ten 401(k) forms include no discussion of divorce at all. Of the remaining three, one

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[156] Charles Schwab Form, *supra* note 153.

[157] American Funds Form, *supra* note 154.

[158] ING Form, *supra* note 153; JP Morgan Form, *supra* note 153; Merrill Lynch Form, *supra* note 153.

[159] Locating an updated copy of these documents may even be difficult for a lawyer. *See* Edward V. Atnally, *Estate Planning and Retirement Benefits: An Approach Toward Simplification, Part 1*, 23 Prob. & Prop. 22, 24 (2009) (advising practitioners to "obtain copies of . . . clients' beneficiary designation forms" as a first matter in planning an estate, while acknowledging this is "sometimes difficult").

[160] The back of the Sears Form lists a number of terms and conditions, including a provision that the default distribution would be to the accountholder's spouse, and, in the event there is not a surviving spouse, the accountholder's estate. Sears Holding Form, *supra* note 152. The instructions for the MTA and UPS Forms indicate that the plan will determine the default distribution, but do not provide information about the content of the plan's default distribution. MTA Form, *supra* note 41; UPS Form, *supra* note 41.

[161] Vanguard Form, *supra* note 41.

indicates that divorce will not revoke the beneficiary designation,[162] a second indicates that the designation will remain in effect even if "my marital status changes [unless I remarry],"[163] and a third highlights the fact that a remarriage will revoke the designation without saying a word about the effect of divorce.[164]

Fourth, all of the beneficiary designation forms require the accountholder to designate "primary" beneficiaries and either "contingent" or "secondary" beneficiaries. Most forms, but not all, explain that contingent or secondary beneficiaries will share in the account only "[i]f no primary beneficiary survives me."[165] Many of the forms, however, have room to designate only one,[166] two,[167] or three primary beneficiaries.[168] These forms leave accountholders with three or four children in a quandary about how to fill in the forms, and may lead some to name children as "secondary" or "contingent" beneficiaries simply because the forms include additional spaces for such beneficiaries.

B. Lack of Foresight

A typical nonlawyer filling out beneficiary designation forms is unlikely to focus on future changes in her own life or the lives of her beneficiaries that might have an effect on her preferred designation. As we noted earlier, when wills are at stake, statutes in most states attempt to account for a testator's inability to foresee future events.[169] Those statutes, however, do not generally apply to retirement accounts making it more important for the forms themselves to

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162 Colorado PERS 401(k) Beneficiary Designation Form [hereinafter Colorado PERS Form] (on file with the *New York University Law Review*).

163 IASIS Form, *supra* note 41.

164 Costco Form, *supra* note 41. A fourth, UPS-Teamsters, makes the same representation, but on a separate instruction sheet, not on the designation form itself. UPS Form, *supra* note 41.

165 *E.g.*, American Funds Form, *supra* note 154. *But see* Edward Jones Form, *supra* note 154 (including no discussion of effect of a designation as a contingent beneficiary).

166 One 401(k) form (John Hancock) provides space for only a single primary beneficiary. John Hancock 401(k) Beneficiary Designation Form [hereinafter John Hancock Form] (on file with the *New York University Law Review*).

167 Of the IRA forms, the American Funds Form, *supra* note 154, leaves room for two beneficiaries; four of the 401(k) forms (the ADP 401(k) Beneficiary Designation Form [hereinafter ADP Form] (on file with the *New York University Law Review*); the Costco Form, *supra* note 41; the Sears Holding Form, *supra* note 152; and the UPS Form, *supra* note 41) provide space for two beneficiaries.

168 Three IRA forms (the JP Morgan Form, *supra* note 153, the Merrill Lynch Form, *supra* note 153, and the Wells Fargo Form, *supra* note 153) provide space for three primary beneficiaries. Of the 401(k) forms, the Earl Industries Form, *supra* note 41, and IASIS Form, *supra* note 41, provide space for three beneficiaries.

169 *See supra* notes 42–51 and accompanying text.

prompt accountholders about problems that might arise and to include options designed to reflect the likely intent of most accountholders.[170]

In general, however, the forms do not attempt to compensate for the lack of foresight of the typical accountholder. They typically provide a limited range of options for beneficiary designations and do not suggest alternatives that might better reflect the intent of most accountholders. In particular, the options presented generally omit the conventional distributions mandated by intestate succession statutes and usually found in wills and trust instruments.

1. The Beneficiary Who Predeceases the Accountholder

Consider a common problem uncounseled accountholders are unlikely to anticipate: death of a beneficiary before the accountholder dies. Intestate-succession statutes always provide a share for surviving issue of deceased children.[171] As we have seen, when wills are involved, virtually every state has enacted an antilapse statute to ensure that when a beneficiary who is a close relative predeceases the testator, the beneficiary's surviving descendants take the beneficiary's share.[172] By contrast, only four of the ten IRA beneficiary designation forms and only one of the ten 401(k) forms even give the

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170 In his classic article, John Langbein concluded that there would be little occasion to apply antilapse statutes to nonprobate transfers because:

> [T]he financial intermediaries who operate the nonprobate system are careful enough in the wording of their transfer forms that some of the major subsidiary rules would have little applicability to the nonprobate system. These organizations have, for example, been sensitive to the lapse problem. Beneficiary designation forms usually encourage transferors to name contingent beneficiaries, and the forms stipulate payment to the transferor's estate when no beneficiary survives. Accordingly, there would be little occasion to apply the antilapse statute to the will substitutes.

Langbein, *supra* note 2, at 1137. At the same time, however, Langbein was prescient enough to recognize that "we can point to a variety of situations in which business practice does not correct for the want of uniform subsidiary rules." *Id.* Retirement beneficiary designation forms (in their infancy at the time Langbein wrote) appear to be one occasion where business practice has not led to uniformity that makes sense for accountholders.

171 *See*, *e.g*., UNIF. PROBATE CODE § 2-103(a)(1) (amended 2010), 8 U.L.A. 104 (2013) (providing for distribution "to the decedent's descendants by representation"); UNIF. PROBATE CODE § 2-106 (amended 2010), 8 U.L.A. 108 (2013) (defining "by representation"). Note that the UPC's intestate succession provisions do not directly give a deceased child's exact share to that child's issue. Instead, if multiple children have predeceased the decedent, the law combines the shares belonging to the deceased children, and redistributes those shares equally among all descendants of deceased children in the same generation.

172 *See supra* notes 50–51; *see also* Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 324 (1988) (noting that all states, except Louisiana, have antilapse statutes). These statutes reverse the common law rule that devises to deceased beneficiaries "lapse." *See generally* Susan F. French, *Antilapse Statutes*

accountholder the option of providing for issue of deceased designated beneficiaries.[173] They provide explicitly that if any designated "primary" beneficiary predeceases the accountholder, the account will be divided among surviving primary beneficiaries—precisely the opposite result from that dictated by wills law. Moreover, these forms do not indicate that the rule they provide is only a default rule. They do not even flag this problem, let alone explain to the accountholder how the accountholder could provide for issue of deceased designated beneficiaries. Of the forms that do provide choices for accountholders, one gives the accountholder the option to provide for "per stirpes" or "per capita" distribution without providing any explanation of what those Latin words mean.[174]

2. *Divorce*

We have already seen, in discussion of *Kennedy v. Plan Administrator*,[175] how ERISA can frustrate a 401(k) accountholder's intentions by distributing 401(k) assets to a former spouse named as a beneficiary even when the spouse, as part of a divorce settlement, has expressly waived her right to the account. Unfortunate results like the one in *Kennedy*, however, are a direct (and unintended) product of the beneficiary designation forms presented by the employer to the accountholder/employee. William Kennedy named his then-wife Liv as a beneficiary,[176] probably because the form asked him to name a beneficiary, and it is likely that the beneficiary who naturally came to mind when he filled out the form was his current wife. Nowhere in the decision, however, does it say that the form explained the relative advantages and disadvantages of naming one's spouse as a benefi-

Are Blunt Instruments: A Blueprint for Reform, 37 HASTINGS L.J. 335, 337 (1985) (exploring development of antilapse statutes).

173 Fidelity Form, *supra* note 155; Morgan Stanley Form *supra* note 153; Vanguard Form, *supra* note 41; Wells Fargo Form, *supra* note 153; MTA Form, *supra* note 41. The MTA Form authorizes a "per stirpes" distribution, although it does so on a page separate from the beneficiary designation. MTA Form, *supra* note 41.

174 Morgan Stanley Form, *supra* note 153. The ING form may be the most cryptic of any form. The form nowhere gives the accountholder the option to make a "per stirpes" designation and explicitly includes a survivorship requirement for primary beneficiaries. ING Form, *supra* note 153. At the same time, the form in bold type proclaims: "PER STIRPES BENEFICIARY DESIGNATIONS—The Custodian shall accept as complete and accurate all written instructions provided in good order by the estate/executor with regard to the identification of the beneficiaries and the allocations thereto." *Id*. That language seems designed to insulate the custodian from liability if the accountholder designates no beneficiary, and the account passes to the estate as a result of a default designation.

175 *See supra* notes 98–104 and accompanying text.

176 *Id*. (discussing *Kennedy*).

ciary.[177] If the form had explained those advantages, it is hard to image a rational accountholder would have named an opposite-sex spouse, by name, as beneficiary.[178]

Forms that lead the accountholder to name a spouse as the primary beneficiary of an ERISA-governed account present the most egregious example of how designation forms take too little account of potential life changes. With respect to IRA accounts governed by state law, the situation is somewhat better: Statutory provisions sometimes, but not always, hold that divorce revokes a designation in favor of an ex-spouse.[179] In states where a divorce does not revoke a designation, a spouse's express waiver, if sufficiently explicit, may be enforceable even if the decedent never changed the designation form.[180] But few accountholders would expect that a waiver of, for example, "all claims to my spouse's assets" would be insufficient to displace a beneficiary designation.

3. *A Comparison with Wills*

Lack of foresight is a problem not limited to retirement accounts. Wills and other more traditional vehicles for transferring wealth at death do not update themselves.[181] With wills and trusts, however, several factors mitigate the problem of significant life changes.

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[177] There are two potential advantages of affirmatively designating a spouse rather than allowing the spouse to rely on statutory protection. First, an affirmative designation would protect against potential change in law eliminating the statutory share (in the unlikely event that Congress eliminated the spouse's statutory rights without requiring the participant to execute new beneficiary designation forms). Second, an affirmative designation would allow the spouse to qualify as a beneficiary for minimum distribution purposes, potentially extending the tax deferral afforded the retirement account. *See supra* note 78 (discussing express designation).

[178] By contrast, because of uncertainty about the validity of the DOMA provision authorizing states to deny effect to acts, records, or other states' judicial proceedings regarding same-sex marriages, 28 U.S.C. § 1738C (2006), together with the possibility that an accountholder might move from a state that recognizes same-sex marriages to one that does not, an accountholder has good reason to designate a same-sex spouse by name as beneficiary, even after the Supreme Court's decision in *Windsor*. *See* United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (invalidating federal DOMA statute in part based on state authority to define marriage).

[179] *See, e.g.*, UNIF. PROBATE CODE § 2-804 (amended 2010), 8 U.L.A. 330 (2013) (governing the revocation of nonprobate transfers by divorce); 760 ILL. COMP. STAT. 35/1 (2007) (divorce revokes revocable provisions in nontestamentary instruments other than Totten trusts); TEX. FAM. CODE ANN. § 9.302 (West 2006) (providing that divorce revokes IRA designations).

[180] *See* Storozynski v. Storozynski, 781 N.Y.S.2d 141, 142–43 (App. Div. 2004) (permitting ex-wife to take account because waiver was not sufficiently explicit). *But see* Diversified Inv. Advisors, Inc. v. Baruch, 793 F. Supp. 2d 577, 581 (E.D.N.Y. 2011) (noting that other New York precedent requires a less exacting definition of explicit).

[181] *See* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 (2009) (discussing stale wills).

First, lawyers typically draft wills and trusts, and they do so in ways that account for life changes. For instance, a well-drafted will generally avoids significant devises to named children—or to children as a class—without accounting for the possibility that more children might be born or that some children might predecease testator. As a result, well-drafted wills often devise property to the testator's "issue," a multi-generational class that permits descendants of deceased children to share in testator's estate.[182] By contrast, most beneficiary designation forms never suggest that option to accountholders.

Second, statutory gap fillers—primarily antilapse statutes—help to avoid or minimize frustration of a testator or trust settlor's intent. Many jurisdictions apply antilapse statutes only to wills.[183] And even jurisdictions with broader provisions, like those that follow the current UPC, permit boilerplate in a beneficiary designation to override the statute's antilapse provision.[184]

Third, because most individuals do not write wills until they are ready to think seriously about inheritance issues, intestate succession plays a larger role in dealing with succession rights of relatively young testators.[185] Intestate succession, unlike contract designations, ensures that estate beneficiaries change automatically upon major life events such as marriage, divorce, or the birth of children. By contrast, the hypothetical unmarried and childless twenty-five-year-old who fills out beneficiary designation forms locks in those beneficiaries (except with regard to ERISA's spousal protection provisions) until the accountholder remembers to execute change-of-beneficiary forms.

C. *Bureaucratic Obstacles to Modifying the Standard Form*

Suppose an accountholder understands the deficiencies in the provider's forms. Can the accountholder provide his or her own statement indicating how the account should be distributed at death? None

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182 STEWART E. STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, ESTATES AND TRUSTS 310 (4th ed. 2011). *See generally* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 867 (8th ed. 2009) (noting that the word "children" is sometimes used carelessly when "issue" or "descendants" would better fit testator's intent).

183 *See, e.g.*, Tait v. Cmty. First Trust Co., No. PR-2011-91, slip op. at 1 (Ark. Dec. 6, 2012) (holding antilapse statute inapplicable to inter vivos trust); Baldwin v. Branch, 888 So. 2d 482, 484 (Ala. 2004) (holding that because antilapse statute mentions only wills, it does not apply to trusts).

184 *See supra* notes 61–62 and accompanying text.

185 People procrastinate about writing wills for a variety of reasons, including the complexity of wills and the instinct to put off unpleasant tasks. *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 903–10 (2012).

of the ten IRA forms suggests this alternative to the accountholder. Suppose, however, the accountholder takes the initiative to provide her own form with a different disposition. Will the provider honor the form?

Empirical evidence is difficult to gather on this point, but anecdotal evidence suggests that the accountholder will face a significant bureaucracy problem. The provider's customer service representative is unlikely to be a lawyer and is unlikely to be familiar with legal terms. For instance, one of the authors sought to set up an IRA account naming as beneficiaries "my issue by representation as defined in UPC § 2-106." The form was returned as unacceptable. Another effort to designate as beneficiaries "one third to each of my three children, or their issue, per stirpes" also failed because the provider insisted on whole number percentages and 100 is not evenly divisible by three. Few lay accountholders will ever attempt to negotiate after failed efforts like these.

The reluctance of providers to permit accountholders to vary the terms of the provider's printed form is, to some extent, understandable. The providers seek to administer the designation and distribution process with minimal involvement of lawyers, and are reluctant to have nonlawyers exercise discretion about what designations to accept. But if providers are unwilling to permit modification of their own forms, it becomes even more important that those forms make it easy for the accountholder to make designations that reflect their probable intent—a standard most current forms fail to meet.

D. Accountholder Inattention

The preceding sections demonstrate that most current beneficiary designation forms would confound even the most attentive layman opening a 401(k), 403(b), or IRA account. But there are strong reasons to believe that the typical person opening an account will not be all that attentive to these forms.

First, in most cases the accountholder does not open the account with succession rights in mind. Instead, the accountholder opens the account to obtain tax deferral on savings for retirement—savings most accountholders expect to use, not to pass on to successors.[186]

[186] *See* Colleen E. Medill, *Challenging the Four "Truths" of Personal Social Security Accounts: Evidence from the World of 401(k) Plans*, 81 N.C. L. Rev. 901, 920 (2003) (noting that persons of modest means are likely to consume their accounts during their retirement years). As Professor Medill notes, higher-income workers may also view the tax deferral opportunity of 401(k) plans as a mechanism to accumulate wealth for future generations, but she does not suggest that those workers consider succession rights when establishing the accounts. *Id.*

In this respect, people who designate retirement accounts beneficiaries are unlike purchasers of life insurance, or even persons who open POD or Transfer on Death (TOD) accounts with banks or brokerage firms. People who open bank or brokerage accounts do not have to name successor beneficiaries; if they do not name those beneficiaries, the assets will pass through the accountholder's will. An accountholder who establishes a POD or TOD account makes an affirmative choice to bypass the probate process. Similarly, a purchaser of life insurance inevitably focuses on who should receive the proceeds on death. By contrast, the employee who opens a 401(k) account does not initiate discussion of succession rights; instead, the employee is confronted with the beneficiary designation forms as part of the routine of setting up the account.[187] As a result, the accountholder is unlikely to be prepared to give due consideration to her choice of beneficiaries.

Second, because the accountholder often fills out the forms at a time when estate planning is not on his or her radar screen, the accountholder may not give much thought to the beneficiary designations, assuming that she will change the designations later as life events warrant. A twenty-five-year-old unmarried employee opening an IRA or 401(k) account has little reason to fret over beneficiary designations. At the time the account is opened, its value may be near zero. On top of that, the employee may reasonably expect that important life events such as marriage or the birth of children will make the current designation largely irrelevant. As a result, the reasonable accountholder will expend little time puzzling over the beneficiary designation forms. Many employees will take multiple jobs over the course of a career, and will establish new 401(k) accounts with each job. Those employees might never think to revise the beneficiary designations on accounts with former employers. Yet the designations will continue to be binding unless the employee initiates a process of revising them.[188]

Third, the accountholder does not fill out beneficiary designation forms in isolation. They are part of a package of forms necessary to establish the account. As a result, the accountholder is unlikely to

[187] If an employer has created a plan that enrolls all employees unless they opt out, a plan permitted under current law, 26 U.S.C. § 401(k)(13)(c) (2006), the employee may not fill out the forms at all.

[188] As two scholars have noted about employee choices with respect to another aspect of retirement plans—investment choice—"[o]nce employees make their initial choices, they are unlikely to reexamine or modify those choices." Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Lessons from Private Pensions*, 92 CORNELL L. REV. 297, 308 (2007). Of course, even wills may become stale over time if the testator does not revise them. *See generally* Hirsch, *supra* note 181.

focus as closely on any one of the forms as might be the case if that were the only form before her. Instead, the accountholder's primary focus may be on getting through the forms as quickly as possible.

The formalities necessary to execute a will are designed in part to ensure that the testator appreciates the gravity of the decisions he or she is making.[189] By contrast, the circumstances surrounding execution of beneficiary designation forms for establishing retirement accounts make it likely that the accountholder will not focus on the importance of the designations.

E. The Role of Lawyers

Many of the problems with beneficiary designation forms arise because accountholders, especially young accountholders, typically fill out the forms without the benefit of legal advice. Unfortunately, even if an accountholder were to consult a lawyer to coordinate the client's estate plan, the lawyer could not overcome all of the difficulties catalogued in the preceding sections. A lawyer can take steps to reduce the likelihood that the accountholder's intent will be frustrated, but cannot protect against the accountholder's subsequent unwitting errors.

Before turning to the limitations facing a capable estate planner, what should be apparent by now is that a lawyer who drafts a will or revocable trust for a client without ascertaining whether the client holds retirement-plan assets is doing the client a significant disservice by misleading the client into thinking that all assets will pass through the will or trust instrument. Yet many lawyers, especially those who do not specialize in estate planning, may be unaware of the problems associated with retirement assets. The burgeoning case law suggests that far too few lawyers understand the intricacies of estate planning with respect to retirement-plan assets.

A lawyer who does ascertain that a client holds retirement-plan assets cannot generally draft a will or trust instrument that overrides a beneficiary designation, but the lawyer can take steps to ensure that the beneficiary designation form is filled out in a way that fits into the testator's estate plan. Often, the lawyer will conclude that the accountholder's best alternative is to designate a trust as beneficiary of the plan assets.[190] In some circumstances, the lawyer might arrange for designation of the accountholder's estate. But in any event, the

[189] In a classic article, Gulliver and Tilson denominated this the "ritual" function of wills formalities. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941).

[190] One disadvantage of naming a trust as the beneficiary is that if the trust has multiple beneficiaries, the oldest beneficiary's life expectancy will be used to determine the period

lawyer will be in a better position than a client to persuade the account custodian to accept an alternative designation form. At the very least, the lawyer can attempt to integrate the retirement-plan assets with the client's other assets for estate-planning purposes.

The problem is that a lawyer can do little to anticipate future changes the accountholder might make. The accountholder is unlikely to make future changes to a will or trust instrument that upset a carefully crafted estate plan. A testator who has gone to a lawyer to draft a will is unlikely to undo the lawyer's handiwork by executing a subsequent homemade will. The client who knows enough to go to a lawyer to draft a first will is likely to understand that she should go to a lawyer to make modifications.[191]

By contrast, an accountholder can unwittingly undo an estate plan by taking a new job and establishing a new retirement plan, by rolling over a 401(k) plan into an IRA (as many employees do upon retirement), or by switching IRA providers.[192] All of these events will be accompanied by preparation of new beneficiary designation forms, and there is little assurance that the client will think to consult the lawyer before filling out those forms. Therefore, a client who consults a lawyer to prepare an estate plan does not necessarily insulate herself against the possibility that beneficiary designation forms will frustrate her intentions about inheritance.

F. Summary

The existing framework for succession of retirement accounts relies on the attentiveness and comprehension of lay accountholders confronted with often counterintuitive forms thrust in front of them by institutions with little incentive (and no obligation) to clarify or explain those forms. Moreover, the framework relies on those same accountholders to anticipate how future events might affect their preferences about disposition of their accounts. As retirement accounts become more significant in the wealth transfer process, the deficiencies in this framework will become more apparent. We now turn to the critical question: What can be done to improve the situation?

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over which income tax payments can be stretched. *See* Treas. Reg. 1.401(a)(9)-4, Q&A (5) (2004).

[191] There are, of course, notorious counterexamples, such as television journalist Charles Kuralt, who wrote a letter, later construed as a holographic codicil, disposing of land in Montana to his apparent mistress of thirty years, a mistress he kept secret from his wife and children. *In re* Estate of Kuralt, 15 P.3d 931 (Mont. 2000).

[192] *See* Colleen E. Medill, *Transforming the Role of the Social Security Administration*, 92 CORNELL L. REV. 323, 357 (2007) (noting that when older workers change employers, they tend to roll over their 401(k) plans to an IRA or to their new employers' retirement plans).

IV
Potential Reforms

One could address the problems with retirement-plan designations by treating IRA, 401(k), and 403(b) plan assets as probate assets, requiring all of the accounts to pass through the accountholder's estate. That solution, however, would throw out the baby with the bathwater. Accountholders and their beneficiaries derive significant benefits from the treatment of retirement accounts as nonprobate assets: quicker distribution and potentially lower costs. Reform of the system need not sacrifice these benefits. More modest changes would address the current difficulties while generally preserving the nonprobate treatment of retirement-plan assets.

Our recommendations focus on increasing the likelihood that each accountholder's beneficiary designation form reflects the accountholder's intent. We have attached, as an appendix, sample beneficiary designation forms designed to achieve that objective.

We start by examining improved rules of construction—an obvious solution to inadequate beneficiary designations—and explain why that solution would be suboptimal. We then turn to a series of other approaches that, either individually or in conjunction with one another, have the potential to ameliorate the difficulties we have identified in Part III.

A. Rules of Construction

In other areas of succession law, legislatures and courts have dealt with potentially intent-frustrating language in dispositive instruments by adopting rules of construction or rules of law designed to advance the decedent's probable intent when circumstances have changed in ways the decedent did not anticipate. As we have seen, the UPC's antilapse provisions already apply to retirement accounts,[193] but in their current form, they are of limited efficacy because express language in the beneficiary designation form displaces the antilapse provisions.[194] The UPC could cure this problem by amending § 2-706(b) to provide that language included on a preprinted form is not a sufficient indication of intent contrary to the application of this section.[195]

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[193] See supra note 61 and accompanying text.

[194] *See supra* notes 61–62 and accompanying text.

[195] The language would be parallel to current § 2-706(b)(3), which provides that general language of survivorship does not constitute "sufficient indication of an intent contrary to the application of this section." Unif. Probate Code § 2-706(b)(3) (amended 2010), 8 U.L.A. 292 (2013).

However, rules of construction provide a suboptimal approach to the problems generated by beneficiary designation forms. These rules operate at the back end, cleaning up messes that arise when accountholders sign forms without completely understanding their implications. But they do nothing to increase transparency to the accountholder. At best, they provide better-educated guesses about what the accountholder would have wanted if the accountholder had understood the forms. And by their very nature, rules of construction involve litigation and delay in distribution, sacrificing one of the primary efficiency advantages of the nonprobate system.

More robust rules of construction operate paternalistically. They achieve for the accountholder what most people would want or what the drafter of rules believes most people should want.[196] But if the rules override language on printed forms, they inevitably operate to frustrate the wishes of people who understand and are satisfied with the printed form language. Consider, for instance, an antilapse statute that would override printed form language. Confronted with a preprinted form indicating that if any of the "primary" beneficiaries predecease the accountholder, the account will be divided among the surviving primary beneficiaries, what should a lay accountholder do if the accountholder wants precisely the result described on the preprinted form? The accountholder would have no way to know that the legislature has determined that the preprinted form language is inadequate, and therefore no reason to include additional language expressing an intention to impose a survivorship requirement. But if the accountholder simply fills out the form, the antilapse statute will override her preferences.[197]

Moreover, even an extensive list of constructional rules would be unlikely to address the full panoply of problems presented by beneficiary designation forms. What rule, for instance, would apply when an accountholder, limited to space for two "primary" beneficiaries, lists one of her three children as a "secondary" beneficiary? Because rules

196 The debate over the Uniform Probate Code's rules for construction of future interests has centered on what most decedents should or do want, a question that has provoked considerable scholarly debate. *See, e.g.*, Laura E. Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 HASTINGS L.J. 667, 700 (1997) (criticizing UPC provision supposedly designed to effectuate intent because "[t]here is no consensus on the critical question of what the settlor's intent is when the instrument creating the trust fails to require survival").

197 The problem would be similar to the one currently faced by the married holder of a 401(k) account confronted with a form asking her to name a "primary" beneficiary. The natural inclination of the accountholder might be to name her spouse, not realizing that the designation is unnecessary, and would serve only to guarantee that the spouse will share even if the couple subsequently divorces! *See supra* note 78 and accompanying text.

of construction represent both an incomplete approach to confusing forms and an approach that threatens to distort the intent of many accountholders, we suggest that reform should focus instead on developing a form the accountholder will understand.

B. A Statutory Default Designation

The most modest reform of the current system would mandate a statutory default designation and prominent disclosure of that designation to the accountholder. This reform is modest because it would not constrain accountholders intent on making a different designation and would enable accountholders to obtain speedy and efficient distribution of assets. The statutory default designation would operate only in cases of default.

Of course, ERISA already mandates that a married accountholder's spouse be the default beneficiary for 401(k) and 403(b) accounts.[198] That mandate reflects policy concerns similar to those that underlie elective-share statutes.[199] Although we think those concerns are laudable, ERISA's implementation raises some questions that are outside the focus of this article. For current purposes, we assume that the spouse will retain a claim on the account of a married testator.

ERISA, however, does not require any particular default beneficiary for unmarried accountholders, and state law generally includes no mandates for any accountholders. Under current law, the plan documents, prepared on behalf of the accountholder's employer, dictate how assets will be distributed if the accountholder's beneficiary designation is defective in any way, or is ineffective because the designated beneficiaries have not survived the testator. The beneficiary designation forms need not, and typically do not, inform the accountholder about the content of the default designation. Instead, with IRAs the default designation is generally buried in the fine print of the multiple-

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198 29 U.S.C. § 1055(c) (2006).

199 Elective-share statutes entitle a surviving spouse to a share of the decedent spouse's estate, even when the decedent seeks to disinherit the surviving spouse. *See, e.g.*, N.Y. Est. Powers & Trusts § 5-1.1-A (McKinney 2013); Unif. Probate Code § 2-202 (amended 2010), 8 U.L.A. 149 (2013). Elective-share statutes have been justified both on the theory that the spouses acquired assets as "partners" during the marriage, and on the theory that each spouse is entitled to support from the other's assets. *See* Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 Emory L.J. 487, 487 (2000) (noting that the UPC's elective-share provision rests on the partnership theory). For an argument that the UPC implements both a support theory and a partnership theory, see Stephanie J. Willbanks, *Parting Is Such Sweet Sorrow, But Does It Have to Be So Complicated? Transmission of Property at Death in Vermont*, 29 Vt. L. Rev. 895, 926 (2005).

page custodial agreement. With employer-sponsored plans the default designation will appear in the plan documents, which the employer has a right to amend without notice to the accountholder. Moreover, custodians have not converged on a uniform default designation. Yet there is no reason to believe that employees of different firms or persons who open IRA accounts with different providers have materially different preferences. In addition, especially when accountholders do not even know who the default beneficiary might be, there is no reason to believe that competition will cause providers to converge on an optional default designation. Under these circumstances, a mandatory statutory default designation appears preferable to the current laissez-faire approach. The more difficult problem is choosing the default designation.

1. *The Estate as Default Beneficiary in an Ideal World*

Were it not for the potential impact of creditors and taxes, mandating that the accountholder's estate be the default beneficiary would be most likely to effectuate the accountholder's intent and would also enhance coordination of the accountholder's assets.

Consider a decedent who dies with a will and one or more ineffective beneficiary designations. This situation is unlikely to arise if the will was prepared by a competent estate planner and the account was established *before* the will was executed; the estate planner would have taken care to integrate the retirement account and the will. In most cases, then, the situation will arise when the lawyer who prepared the will was not well-versed in asset coordination. That lawyer is most likely to have drafted the client's will as if the retirement assets were part of the client's estate. Treating the assets as part of the estate would, then, be most likely to effectuate the plan the lawyer and client have developed. Now suppose the account was established *after* the client executed her will and included no effective designation. The will—the last document the client executed concerning distribution of her assets—provides the best evidence of the client's intentions about distribution of her assets.

Now consider a decedent who dies intestate with an ineffective beneficiary designation. The state legislature has enacted its intestate succession statute to reflect the presumed intention of the decedent. What reason is there to assume that the account custodian is in a better position to assess the presumed intent of a silent accountholder than is the state legislature?

Aside from effectuating the decedent's wishes, making the estate the default beneficiary would generate other, less obvious, advantages: It would enhance the personal representative's ability to represent the decedent's interests and coordinate the estate's assets and liabilities, including tax liabilities. As a third party beneficiary to the contract between the accountholder and the account custodian, the default beneficiary would enjoy standing to challenge a suspect beneficiary designation.[200] The personal representative, as the embodiment of the deceased accountholder, is in the best position to advance such a challenge. If there were otherwise any doubt about that standing, a statute could expressly confer standing on the personal representative as default designee. Moreover, in those cases where the default designation becomes effective, the personal representative would be in a position to allocate the appropriate share of estate taxes to the various beneficiaries of the accountholder's gross estate.[201]

2. *The Impact of Taxes and Creditor Claims*

Naming the estate as default beneficiary, however, could expose retirement accounts to creditor claims and increased tax liability. As a result, under current law, naming the estate as default beneficiary would not generally be in the interest of the estate's ultimate beneficiaries.

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200 ERISA explicitly confers on any beneficiary the right to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (2006).

With respect to IRAs, governed by state law, third party beneficiary theory is unclear about who would have standing. For instance, in *Kinkle v. Kinkle*, 699 N.E.2d 41 (Ohio 1998), the court indicated that, despite an IRA contract provision naming the surviving spouse as default beneficiary, the surviving spouse could not be treated as a third party beneficiary if the parties were not married at the time of the designation. The court noted first the absence of evidence that decedent even knew the spouse at the time of the creation of the IRA, and second, decedent's failure to name the spouse as a beneficiary. *Id.* at 44. The court ultimately held that decedent's children, not his wife of three months, was entitled to his IRA, relying on a prenuptial agreement by which the wife waived claims to the IRA. *Id.*

201 Determining who should bear what share of tax liability is a question not free from doubt under current law. Federal law imposes on the executor the responsibility for paying the estate tax, 26 U.S.C. § 2002 (2006), and explicitly requires proportionate contribution from some nonprobate assets, 26 U.S.C. §§ 2206, 2207, 2207B (2006), but not from retirement accounts. On the other hand, the code does give the federal government a lien for estate taxes against all assets that form part of the gross estate. 26 U.S.C. § 6324 (2006). That provision, however, says nothing about allocation of estate tax liability among beneficiaries of the gross estate. One might take the approach of the Uniform Estate Tax Apportionment Act, enacted in several states and incorporated into the Uniform Probate Code, and conclude that "[t]he determination of who should bear the ultimate burden of the estate taxes is left to state law." UNIF. PROBATE CODE art. 3, pt. 9A, general cmt. (amended 2010), 8 U.L.A. 373 (2013); *see also* Douglas A. Kahn, *The 2003 Revised Uniform Estate Tax Apportionment Act*, 38 REAL PROP. PROB. & TR. J. 613, 623 (2004). The issue, however, is not free from doubt.

First, consider creditor claims. If the accountholder's estate obtains retirement-plan assets, the accountholder's creditors will be entitled to reach those assets. That would not present a disadvantage if the accounts themselves were also treated as an asset of the accountholder, available at the accountholder's death to pay the accountholder's debts. But, in fact, the rights of creditors to retirement account assets are plagued by uncertainty and confusion. During the accountholder's lifetime, federal bankruptcy law exempts 401(k), 403(b), and IRA accounts from the bankruptcy estate,[202] effectively insulating those accounts from creditor claims. Once the accountholder dies, however, the status of creditor claims against those accounts is less certain. With respect to IRAs, state law generally governs, and the sparse state law that does exist is divided about whether creditors can reach IRA assets.[203] Moreover, some (but not all) courts have held that if the account is rolled over into an "inherited IRA," federal bankruptcy law continues to insulate the account even from the creditors of the ultimate beneficiary![204] In light of the uncertainty, there is at least some possibility that excluding account assets from the accountholder's estate will insulate those assets from the accountholder's creditors. Presumably, most accountholders would prefer to have their accounts pass to their chosen beneficiaries rather than their creditors, undermining the premise that naming the estate as the default beneficiary would effectuate the intent of most accountholders.

In addition, accountholders enjoy the benefits of income tax deferral on funds contributed to 401(k) accounts or traditional IRAs. Tax becomes due, however, when the funds are distributed to the accountholder or the accountholder's beneficiaries. If the accountholder dies before the account has been completely distributed, the account beneficiaries must generally take distribution, and

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[202] 11 U.S.C. § 522(b)(3)(C) (2006); 11 U.S.C. § 522(d)(12) (2006). *See generally* Rousey v. Jacoway, 544 U.S. 320 (2005) (exempting rollover IRAs from a bankruptcy estate even before enactment of § 522(d)(12)).

[203] *Compare* Commerce Bank, N.A. v. Bolander, 239 P.3d 83 (Kan. Ct. App. 2007) (account assets available to creditors), *with In re* Gallet, 765 N.Y.S.2d 157 (N.Y. Sur. Ct. 2003) (account assets not available), *and* Estate of Davis, 217 Cal. Rptr. 734 (Cal. Ct. App. 1985) (trusts are not counted among estate's assets).

[204] *See In re* Chilton, 674 F.3d 486 (5th Cir. 2012) (holding that because inherited IRAs remain exempt from taxation by reason of 26 U.S.C. § 408(e), they remain exempt from the inheritor's bankruptcy estate). *But see In re* Clark, 714 F.3d 559 (7th Cir. 2012) (rejecting the approach in *Chilton* and holding that assets are not exempt after the death of the original accountholder).

incur income tax liability, relatively quickly after the accountholder's death.[205]

Section 401 of the Internal Revenue Code, however, includes an exception that benefits many beneficiaries: If the accountholder has designated a beneficiary of the account, distributions can be spread over the life expectancy of the beneficiary, which may be far longer than five years.[206] There is, however, a catch: To take advantage of the exception, the designated beneficiary must be an individual or a qualifying trust.[207] If the designated beneficiary is the accountholder's estate, the estate's beneficiaries cannot take advantage of the exception; they must take distributions more quickly. This rule makes it less attractive to name the estate as the account's default beneficiary.

As a matter of policy, we believe creditors should have equal rights to estate assets and retirement-plan assets, and that the tax law should provide the same tax treatment to estate beneficiaries and to beneficiaries named on plan documents. If, however, we assume that current debtor-creditor and tax law is immutable, the default designation would better effectuate accountholder intent if it were to keep account assets out of the accountholder's probate estate. The best alternative would be to name as default beneficiaries "those persons who would share my estate if I were to die intestate, in the proportions specified by the intestate succession statute of the state of ___."[208] In many cases, those persons will be the accountholder's spouse and children, but the designation would be effective even in those cases where the accountholder's closest relatives were nephews,

[205] The precise time period depends on whether the accountholder has started taking distributions at the time of her death. If the accountholder has not yet started taking distributions, the account must generally be distributed to the beneficiaries within five years of the accountholder's death. *See* 26 U.S.C. § 401(a)(9)(B)(ii) (2006). If the accountholder has already started to take distributions, the account must be distributed within the period of the accountholder's life expectancy using the age of the accountholder as of her last birthday before death. *See* 26 C.F.R. § 1.401(a)(9)-5, A-5 (2007).

[206] *See* 26 U.S.C. § 401(a)(9)(B)(iii) (2006) (stating that distribution is permissible over the remaining life expectancy of designated beneficiaries when death occurs before the required beginning date); 26 C.F.R. § 1.401(a)(9)-5, A-5(a)(1) (2007) (stating that distribution is permissible over the remaining life expectancy of a designated beneficiary when death occurs after employee's required beginning date); *see also* Atnally, *supra* note 159, at 25 (discussing these provisions).

[207] *See* 26 C.F.R. § 1.401(a)(9)-4, A-3 (2007) (stating that only individuals or qualifying trusts may be designated beneficiaries; an estate may not be a designated beneficiary); 26 C.F.R. § 1.401(a)(9)-4, A-5 (2007) (setting forth rules for qualifying trusts).

[208] The applicable regulations do not require beneficiaries to be specified by name "so long as the individual who is to be the beneficiary is identifiable under the plan. The members of a class of beneficiaries capable of expansion or contraction will be treated as being identifiable if it is possible[ ] to identify the class member with the shortest life expectancy." 26 C.F.R. § 1.401(a)(9)-4, A-1 (2007).

nieces, or siblings. The state legislature has enacted its intestate succession statute to reflect the presumed intention of the decedent.[209] What reason is there to assume that the account custodian is in a better position to assess the presumed intent of a silent accountholder than is the state legislature?

C. Standardized (and Improved) Designation Forms

A more significant reform, one with potential to address more of the difficulties presented by existing law, would be to develop a standardized beneficiary designation form. The standard form for 401(k) and 403(b) accounts would differ from the standard IRA form to reflect the difference in spousal rights, but otherwise, the forms would be identical in objective and design. The form would not mandate or preclude the selection of any particular beneficiaries (other than the spouse in accounts governed by ERISA). Instead, the form's objective would be to increase the likelihood that the designations will reflect the accountholder's intention. The form should be designed to make it as easy as possible for an accountholder to achieve typical estate-planning goals. As we have demonstrated, current beneficiary designation forms generally fall wide of the mark.

1. The Content of the Form

First, the form should incorporate antilapse principles and other constructional principles derived from the law of wills (such as revocation upon divorce),[210] and should permit accountholders to opt out of those principles only when they signify that they understand the consequences of opting out. Will construction principles have developed to effectuate the intent of most testators,[211] and there is little reason to believe that retirement accountholders have preferences significantly different from the class of testators; indeed, many retirement accountholders will also be testators.

Second, the form should eliminate designation of primary and secondary beneficiaries by name, except as a last resort. Instead, the

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[209] Intestate-succession statutes reflect the testator's presumed intent to provide for family members in the distribution of property. *See generally* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000) (discussing how intent informs intestacy statutes).

[210] *See supra* notes 48–49 and accompanying text.

[211] As the drafters of the Restatement (Third) of Property: Wills and Donative Transfers have put it, "[t]he foundational constructional preference is for the construction that is more in accord with common intention than other plausible constructions." RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 11.3(c) (2001); *see also id.* cmt. a (noting that rules of construction "are devices that *attribute* intention to *individual* donors in particular circumstances on the basis of *common* intention").

form should encourage accountholders to designate beneficiaries by category, such as "to my issue" (or children, if the form incorporates antilapse principles), or "to any spouse to whom I am married at the time of my death."[212] These designations are more likely to account for changes in the accountholder's life circumstances and therefore more likely to effectuate the accountholder's intent.

Third, the form should indicate expressly that any will or revocable trust instrument executed by the accountholder will not operate to pass the assets in the account, and should recommend that the accountholder consult a lawyer to ensure coordination of the accountholder's estate plan.

We advance a fourth suggestion more tentatively, both because its provisions would be more radical and because it poses modest litigation risk. The standard form could permit (and perhaps encourage) the accountholder to give any executor under the accountholder's will a power, but not a duty, to receive the account balance and distribute that balance to the will beneficiaries in such amounts as they would have received if the account balance had been included in the accountholder's probate estate.[213] Including such a provision would accomplish two objectives: First, it would signal to the accountholder, when she fills out the beneficiary designation form, that coordination with her will is not automatic; second, it would facilitate that coordination by the executor. Giving the executor coordination power would deal with the problem of the accountholder who opens a new IRA account (or transfers money from an existing IRA or 401(k) account) after executing her will without thinking about the effect the beneficiary designation might have on her overall estate plan. Of course, even if the accountholder were to give the power to the executor, the executor would not have to exercise the power if the accountholder's tax or other objectives would best be effectuated by direct distribution to the designated beneficiaries. The executor could choose between allowing the designation to stand or capturing the account assets for the estate. Depending on which alternative appears to best effectuate the accountholder's intentions to avoid delays in distribution, the form would require the executor to exercise the power within sixty days after receiving notice of the accountholder's death.

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212 Even introductory Trusts & Estates casebooks (including our own) emphasize the advantages of multigenerational class gifts. *See, e.g.*, DUKEMINIER, SITKOFF & LINDGREN, *supra* note 182, at 867; STERK, LESLIE & DOBRIS, *supra* note 182, at 310.

213 *Cf.* John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 75–76 (2009) (noting the possibility that a personal representative might be named a beneficiary under a nonprobate device without having nonprobate property pass through the probate estate).

A variant on this suggestion would confer coordination power on the trustee of the accountholder's revocable trust. The difficulty here is that, although an accountholder generally dies with only one last will,[214] the accountholder might have multiple revocable trusts. As a result, it would be difficult to draft a form conferring power on the trustee of any subsequently-created revocable trust.

Conferring coordination power on an executor or trustee creates a risk of litigation by those harmed by the executor's decision to exercise, or not to exercise, the power.[215] We believe, however, that appropriate language on the form can minimize this risk.

2. *Potential Objections*

Three objections may be raised to the kind of form we have described, but none are persuasive. First, a form that requires the account custodian to locate the accountholder's children, to figure out whether the accountholder died married, or to figure out whether any deceased child left surviving issue, would place a new and unwarranted burden on the custodian. Perhaps these added burdens would cause custodians to raise fees or leave the market. In the vast bulk of cases, however, the burden would be insubstantial. The form itself could ask for names and addresses of children and spouses (just as most current forms ask for names and addresses of primary and secondary beneficiaries). Family members will cooperate in locating others not named on the form itself. In the rare case where controversy

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[214] It is, of course, true that on occasion courts probate two separate documents executed at different times when the documents are not inconsistent with one another. *See* Estate of Johnson v. Johnson, 154 Cal. Rptr. 586, 591 (Ct. App. 1979) (holding that the trial court was correct in reading two wills together where the second was not wholly inconsistent with and did not revoke the prior will); Bradshaw v. Bangley, 75 S.E.2d 609, 612–13 (Va. 1953) (stating that when a later will does not revoke a prior will they are to be construed together as one).

[215] Will beneficiaries might contend that the executor had an obligation to exercise a power in their favor, while designated (or default) beneficiaries might contend that the executor had an obligation not to exercise the power. Each group might argue that the executor's decision breached a duty to treat beneficiaries impartially. For a discussion of that problem in an analogous situation—the executor's exercise of the QTIP election—see Mark L. Ascher, *The Quandary of Executors Who Are Asked to Plan the Estates of the Dead: The Qualified Terminable Interest Property Election*, 63 N.C. L. REV. 1, 34–39 (1984).

Litigation might be most likely when the executor would benefit personally from her election (or failure to elect), especially if one were to conclude that, in making the election decision, the executor acts in a fiduciary capacity—where acting in self-interest would conflict with duty of loyalty principles. *See id.* at 43–47 (discussing the potential conflict of interest in a fiduciary's QTIP election decision); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 546 (2005) (discussing function of the "no further inquiry rule" which prohibits fiduciaries from profiting from their position, other than by accepting commissions).

arises, a statute could dictate the procedures the custodian should follow and insulate the custodian from liability if he follows those procedures.[216]

A second objection might focus on the delay beneficiaries might suffer if the custodian is required to investigate the accountholder's family tree. This delay might be exacerbated if the form gives the executor a power to capture the assets for estate beneficiaries. But the delay would be modest. Few beneficiaries walk out of the funeral and immediately demand the decedent's IRA or 401(k) accounts. At the very least, the sensible ones will consult their tax advisors to see whether there are advantages to "rolling over" the account into a new IRA in the name of the beneficiary.[217] The executor would be seeking some of the same tax advice in deciding whether to capture the account balance for the estate beneficiaries or to have the balance pass directly to the beneficiaries named on the account. And a statute (or the form itself) could impose a time limit on the executor's exercise of coordination power. Whatever delays remain would be a small price to pay for effectuating the accountholder's intent.

The third objection might focus on the state's role in implementing a standardized form: Why should the state influence or dictate the form to be used instead of allowing market forces to work without state interference? The answer to this objection should be evident. Information asymmetries make it unlikely that market competition will generate efficient forms.[218] Potential IRA accountholders are

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[216] Even with probate proceedings, in many states, a personal representative's responsibility is only to provide notice by publication to heirs whose names and addresses are not listed in the probate petition. *See, e.g.*, 755 Ill. Comp. Stat. 5/6-10 (West 1993). California Probate Code § 8110 requires a person petitioning to administer decedent's estate to inquire a bit further and to serve notice personally on "[e]ach heir of the decedent, so far as known to or reasonably ascertainable by the petitioner." Cal. Prob. Code § 8110(a) (West 2013). A statute might place similar limits on account custodians, and insulate them from liability if they satisfy the statutory requirements.

[217] *See* Steven R. Lifson, *Practical Planning Ideas for Distributions from IRAs and Qualified Plans*, 37 J. Marshall L. Rev. 807, 834 (2004) (emphasizing the need to consider tax consequences of distribution decisions); Jose J. Valcarce, *To Roll or Not to Roll: An Analysis of Factors to Consider in Deciding Whether to Retain Retirement Assets in an Employer's Qualified Plan or Whether to Roll Them to an IRA*, 7 Hous. Bus. & Tax L.J. 272, 283–84 (2007) (stating that "[t]ypically a rollover by the surviving spouse to an IRA will provide greater tax-deferral benefit" when choosing between keeping a qualified plan or a rollover to an IRA).

[218] The beneficiary designation form shares many qualities with a contract of adhesion, where "the adhering party is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them." Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1179 (1983). Because consumers who sign contracts of adhesion do not read or understand the terms, those terms rarely appear salient to consumers, so market forces are unlikely to generate efficient terms. *See* Russell Korobkin, *Bounded Rationality, Standard Form*

unlikely to think about beneficiary designation forms when choosing account custodians or to shop around once confronted with the custodian's standard form. Employers, as repeat players, might have some leverage with 401(k) or 403(b) custodians, but they have little financial stake in the forms the custodian uses. Furthermore, decisionmakers choosing custodians may have little legal sophistication on estates issues.[219] Moreover, small employers, faced with the high cost of individually-tailored defined-contribution plans, have increasingly turned to mass-marketed "prototype plans" for which the provider has obtained preapproval from the IRS.[220] By contrast, account custodians have a stake in the forms used, and an overwhelming interest in reducing administrative costs. It is no wonder that the market-generated forms overwhelmingly exalt this one value above all others. Moreover, the standardized forms we suggest would in no way restrict the substance of the designation the beneficiaries could make; the forms would be designed only to increase the likelihood that the designation reflects the beneficiary's wishes.

We do not suggest that we have developed the perfect forms. As we have noted, in light of the spousal rights featured by ERISA plans, but not IRAs, slightly different forms would be necessary for different types of accounts. In any event, we would be delighted if others refined our suggestions. But we believe a short, readily understandable form is an attainable objective. We have attached two examples in an appendix.

D. *Requiring Updates*

One way to ensure that beneficiary designations reflect the accountholder's life changes is to require that the custodian obtain periodic updates, perhaps once every five years. The custodian would send the existing designation to the accountholder and ask the accountholder to fill out a new form making any necessary changes. An accountholder satisfied with the existing form could simply sign and return it. Periodic updates would ease the burden on custodians

Contracts, and Unconscionability, 70 U. CHI. L. REV. 1203, 1234–36 (2003); *see also* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1995) (asserting that "[c]ompetition is likely to degrade the quality of preprinted terms").

219 Professor Rakoff has emphasized that even when the parties to a form contract are businesses, the adhering party may act reasonably in failing to read and "shop" for many of the terms in the form contract. Rakoff, *supra* note 218, at 1250–55. For an employer choosing among plan providers, the language in beneficiary designation forms may be relatively unimportant compared to facts of cost and ease of plan administration.

220 *See* Rev. Proc. 2005-16, 2005-10 I.R.B. 674, *available at* http://www.irs.gov/pub/irs-drop/rp-05-16.pdf (setting forth procedures for IRS approval of prototype plans).

seeking to locate the designated beneficiaries and would reduce the need for using antilapse provisions because beneficiaries designated within the past five years are more likely to be alive than those designated when an account was established, perhaps twenty years earlier.

Requiring the custodian to request updates every five years represents a trivial burden. Indeed, ERISA already requires administrators of ERISA plans to furnish updated summary plan descriptions to participants every fifth year if there have been any changes during that five-year period.[221] Ensuring that the accountholder fills out the update form, rather than treating it as junk mail and depositing it in the trash, presents more of a challenge. One way to grab the accountholder's attention would be a heading that provides: "Failure to submit an updated designation form increases the risk that your account will be subject to probate costs or additional taxes at your death"—a statement that technically would be true, at least in some cases, if failure to update the designation increased the likelihood that the assets would pass to the accountholder's estate.[222] And, of course, it would also make sense to require the account custodian to send multiple mailings of the update form to those accountholders who do not respond to prior mailings.

E. Implementing a Notification Period

Before a will is admitted to probate, the executor must ensure that all of the decedent's intestate heirs receive notice of the probate proceeding.[223] Notice gives those heirs an opportunity to appear and challenge the will.[224] If they do not appear, they are foreclosed from subsequent challenges.[225] Notice, coupled with the prospect of predis-

[221] 29 U.S.C. § 1024(b)(1) (2006). Even if there has been no modification, the statute requires the administrator to furnish a summary plan description every ten years. *Id.*

[222] A more dramatic approach would be to make ineffective any designation more than five years old and to notify the accountholder of that fact, creating a stronger incentive to return the update form.

[223] *See, e.g.*, CAL. PROB. CODE § 8110 (West 2013); COLO. REV. STAT. ANN. § 15-12-403 (West 2011); HAW. REV. STAT. § 560:3-403 (West 2006); MICH. COMP. LAWS ANN. § 700.3403 (2013); MINN. STAT. ANN. § 524.3-403 (West 2012); UTAH CODE ANN. § 75-3-306 (West 1993).

[224] *See* FLA. STAT. ANN. § 733.212(3) (West 2010) ("Any interested person on whom a copy of the notice of administration is served must object to the validity of the will . . . on or before the date that is 3 months after the date of service of a copy of the notice . . . or those objections are forever barred."); *In re* Towndrow's Will, 138 P.2d 1001, 1004 (N.M. 1943) (stating that the purpose of notice is to give interested parties the opportunity to pursue any course available to them, such as contesting the will).

[225] *In re* Allen's Estate, 169 P. 364, 365 (Cal. 1917) ("The probate of a will is a proceeding in rem, binding on all persons interested in the will who, being constructively notified to appear at the probate, might have come in, and who, had they come in, would have been heard for or against the will.").

tribution challenge, increases the likelihood that when challenges prove successful, assets are still available to the persons entitled to share in the estate.

By contrast, under current law, an account custodian has no obligation to notify heirs, or any close family members, before distributing the account assets to the designated beneficiaries. As a result, even if family members were to prove that the designation was tainted by incapacity, undue influence, or outright fraud, there might not be any money available to satisfy their claims.

One need not duplicate the formalities associated with probate to require the custodian to notify a narrow group of family members—decedent's spouse and children—before distributing account assets. Once notified, those family members would have a short period, not longer than sixty days, to contest any distribution. In the common case where the accountholder designates the spouse and children as beneficiaries, the notice requirement could be deemed waived altogether, and in other cases, the short delay would cause only limited inconvenience while preserving a remedy in cases of wrongdoing.

F. Encouraging Lawyer Consultation

In today's online world, it may seem quaint to suggest the beneficiary designation process should be encumbered with formalities or should require lawyer involvement. Indeed, some IRA custodians have moved in the opposite direction—enabling accountholders to designate beneficiaries online, without even a signature. But the oft-identified "ritual" and "protective" function of formalities have not disappeared, as some states have recognized in imposing wills formalities or notarization requirements for revocable trusts.[226] Wills formalities and notarization, however, would do nothing to address the most serious problems surrounding current beneficiary designation forms: confusion about the meaning of the forms, counterintuitive rules of construction, and inadequate harmonization between beneficiary designations and other wealth transmission documents.[227] The reforms suggested so far would alleviate many of these problems. But for many accountholders, especially those with significant assets both in and out of their retirement accounts, the optimal solution would be to fill out beneficiary designations with the benefit of legal advice. One

226 *See, e.g.*, FLA. STAT. §736.0403 (West 2010) (requiring same formalities as for execution of a will); N.Y. EST. POWERS & TRUSTS § 7-1.17 (McKinney 2013) (requiring witnesses or a notary).

227 Requiring an accountholder to notarize her signature would, however, have at least two advantages: It would increase awareness that the form is an important one, and it would ensure that the accountholder herself has signed the form.

way to provide incentives for beneficiaries to obtain counsel would be to provide a safe harbor for designations made after consultation with a lawyer.

For instance, if statutes otherwise required notice to designated relatives before distribution to beneficiaries, the statute might exempt designations accompanied by a lawyer certification that: "I have consulted with the holder of this account, and have ensured that the designations on this form are in harmony with the accountholder's overall estate plan." If the designation form made accountholders aware that consultation with a lawyer would avoid delay at the time for distribution, more accountholders would likely seek advice before completing the forms.

V
Implementation Issues

The preceding sections establish first that the legal status quo governing retirement accounts will frustrate the intentions of many retirement accountholders and second that modest reforms would ameliorate the problems that plague current beneficiary designation. Most of the suggestions we have advanced could be implemented voluntarily by sponsors of 401(k) and 403(b) accounts and by custodians of IRA accounts. No statutes or case law preclude use of a more effective beneficiary designation form. Sponsors and account custodians are free to amend their documents to ensure notice to close relatives and to require accountholders to submit periodic updates of beneficiary designation forms.

Realistically, however, sponsors and account custodians have limited incentive to improve the quality of the forms they use. With employer-sponsored plans, employees are a captive audience with no power to shop for plans with better forms. Although consumers can choose from a wide array of IRA providers, few will have either the expertise or the interest to engage in comparative shopping of beneficiary forms.

As a result, reform is likely to entail some legislative action. At its most modest, that action might be to free the plan sponsor or account custodian of liability for wrongful payments only if the plan documents include particular provisions designed to effectuate accountholder intent and to protect beneficiaries against erroneous payments. That kind of legislation would not mandate a standardized form but would create incentives to use an "approved" form. Alternatively, legislation could mandate particular forms and require updates and notice to beneficiaries. Because of the bifurcated regulation of retirement assets, both state and federal legislation would be required.

A. State Law

If account custodians have a legitimate concern about legislation to reform IRA beneficiary designation forms, it centers on uniformity. Providers have nationwide operations, and if inconsistent state regulation were to emerge, custodians would be faced with developing different forms for different markets. Moreover, choice of law problems might arise if a resident of one state opened an account in another state that required a particular form.

Uniformity problems, however, would arise only if states enacted inconsistent regulations. If a few states, or even one, mandated specific form provisions while the rest did not, account custodians could develop forms that would satisfy the requirements in every state.

Perhaps the best way to enact uniform reform legislation is through amendment to the Uniform Probate Code. The UPC already deals with retirement accounts, and includes provisions, particularly with respect to the effect of divorce, that effectuate intent far better than current law. On the other hand, the UPC does not distinguish adequately between retirement accounts and other nonprobate transfers. As a result, it gives parties too much leeway to contract around its default provisions. This leeway may be critical with respect to lawyer-supervised devices like revocable trusts, but makes much less sense with respect to beneficiary designations executed by uncounseled retirement accountholders.

Because of the extensive review process that accompanies adoption of amendments to Uniform Laws, the UPC appears to be the best alternative for reform of the beneficiary designation process. Although the approaches we have suggested would effectuate the intent of more accountholders without generating significant costs and delays, we readily concede that refinements suggested by other scholars and practitioners might improve on our approaches.

Although incorporation into the UPC might be the optimal mechanism for implementing reform, uniform legislation is probably unnecessary. Legislation in any state with a significant population would be likely to trigger reform in all states. If account custodians prefer training their personnel to deal with a single form across the country, they would be likely to adopt a form required legislatively by any state, so long as it is not inconsistent with the legal requirements imposed in other states.

B. Federal Law

State law changes, however comprehensive, would have no impact on 401(k) accounts or other retirement assets governed by ERISA. The Supreme Court has made it clear that, except in the case of qualified domestic relation orders, neither state statutes nor explicit waivers can limit the right of a designated beneficiary to collect account assets at the accountholder's death.

As the Court has emphasized, ERISA obligates the plan administrator to act "in accordance with the documents and instruments governing the plan."[228] ERISA's spousal waiver provision constrains the accountholder's power to channel assets to persons other than a spouse.[229] Beyond that limitation, however, ERISA does not address the form or substance of beneficiary designations, leaving plan sponsors free to craft forms for their own convenience, regardless of whether those forms are likely to effectuate the intent of accountholders.

Reform of beneficiary designation forms for accounts governed by ERISA, then, would require amending ERISA. Amendment could take either of two forms. First, Congress could amend ERISA itself in accordance with the suggestions we have advanced. Congress could, for instance, mandate by statute a specific beneficiary designation form, require periodic updates, and require notification to beneficiaries before distribution of the account balance. Second, Congress could legislate in broad terms, requiring only that beneficiary designation forms be designed to enable accountholders to make informed choices. Congress could then direct the Secretary of Labor to promulgate regulations implementing the statutory requirement.[230]

Neither alternative is clearly superior. A statutory mandate might avoid regulatory capture issues, and would eliminate challenges over the scope of any regulation the Secretary might enact. On the other hand, a regulatory approach would increase flexibility if new and unanticipated problems arise.

Conclusion

At their inception, 401(k) accounts and IRA accounts—both developed in the shadow of ERISA—were designed to provide

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228 29 U.S.C. §1104(a)(1)(D) (2006). The statute does qualify the statement by requiring that the documents and instruments be consistent with the provisions of ERISA. *See* Kennedy v. Plan Adm'r, 555 U.S. 285, 300–01 (2009).

229 29 U.S.C. §§ 1055(b)(1), 1055(c)(2) (2006).

230 29 U.S.C. § 1135 (2006) already confers on the secretary power to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title."

modest retirement supplements to (or substitutes for) social security and designed benefit pension plans. Undoubtedly, the general expectation was that, like social security and defined-benefit pensions, the benefits would be consumed during the lifetime of the beneficiary or the beneficiary's spouse. As a result, it is not surprising that neither plan sponsors nor legislators focused much attention on the optimal design of beneficiary designation forms.[231]

Over the last three decades, however, these accounts have, in the words of Edward Zelinsky, "changed America."[232] They have become, along with the family home, the primary source of wealth for many middle-class and upper-middle-class Americans. Although many accountholders expect to transfer that wealth at death, most do not appreciate that the ultimate beneficiaries will not be those designated in a will, trust instrument, or intestate succession statute. Instead, the wealth will transfer to the persons listed on a poorly designed, hastily filled out, and often stale beneficiary designation form.

Confusion over transmission of defined-contribution-plan assets has already reached the United States Supreme Court on more than one occasion. But cases like *Egelhoff* and *Kennedy* are the tip of the iceberg. Because current beneficiary designation forms typically exalt administrative convenience for the provider over all other values, legislative and judicial deference to beneficiary designations has already frustrated the intent of countless holders of IRA and 401(k) accounts. The explosion in the number and size of these accounts will magnify these difficulties in the coming years, as an increasing number of accountholders reach their life expectancy. Information asymmetries make it unlikely that market competition among account providers will generate a succession system that better reflects accountholder intent.

Reform is both necessary and possible. We have identified the problem areas and suggested tentative solutions. Too many trillions are at stake to do nothing.

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231 As Professor Zelinsky has noted in another context, it is "anachronistic to criticize ERISA's drafter for lacking . . . foresight. Those drafters were pension lawyers, not seers. In the world in which they framed ERISA, the cash balance plan was literally inconceivable." ZELINSKY, *supra* note 16, at 77.

232 The subtitle of his book is "How the Defined Contribution Paradigm Changed America." *Id.*

Appendix

IRA Beneficiary Designation Form

Important: At your death, state law may require that your retirement plan assets be distributed in accordance with the designation on this form *even if you have executed a document, such as a will or revocable trust instrument, that purports to distribute the funds in this account.* If you later decide to change the beneficiary designations for this account, you must do so by requesting and filling out [custodian's] change of beneficiary designation form. *Attempts to name or change the beneficiaries under this account by any other method, such as executing a will, trust or prenuptial, postnuptial, or divorce agreement, may not be valid.* You should seek legal advice if you are concerned about coordinating distribution of your retirement plan assets with other assets you may own.

Accountholder Information:

Name of Accountholder: ______________________________

Date of Birth: ______________________________________

My Beneficiaries:
Indicate the percentage of your retirement plan assets to be distributed to the designated beneficiaries upon your death. The total must equal 100%.

Important: If one or more of your beneficiary designations cannot be given effect, the funds allocated to those designated beneficiaries will be distributed proportionately among your other designated beneficiaries. In the event that *none* of your beneficiary designations can be given effect, the proceeds from this retirement account will be distributed to whoever is entitled by law to receive your estate [generally, these will be those people who are entitled to take under your will, or, if you leave no valid will, your closest relatives]. If you would like to name different alternative beneficiaries, you should seek legal advice.

My Spouse
☐ To the person to whom I am married at the time of my death ___%

My Children
☐ To my children in equal shares ___%

If you name your children in equal shares, *also choose* one of the following:

- ☐ If one or more of my children die before I do, the share of any deceased child shall be given to his or her surviving descendants, if any. If any child of mine dies before I do and is *not* survived by descendants, his or her share shall be divided equally among my surviving children.

- ☐ If one or more of my children die before I do, the share of any deceased child shall be divided equally among my other surviving children.

My Grandchildren
☐ To my grandchildren in equal shares ___%

If you name your grandchildren in equal shares, *also choose* one of the following:

- ☐ If one or more of my grandchildren die before I do, the share of any deceased grandchild shall be given to his or her surviving descendants, if any. If any grandchild of mine dies before I do and is *not* survived by descendants, his or her share shall be divided equally among my surviving grandchildren.

- ☐ If one or more of my grandchildren die before I do, the share of any deceased grandchild shall be divided equally among my other surviving grandchildren.

Entities
☐ To the executor or administrator of my estate, to be distributed in accordance with my will, or, if I have no will, by intestate succession ___%

☐ To a trust ___%
If you name a trust as the beneficiary, indicate:

The name of the trust: ______________________________________

Whether the trust is a living trust or created in your will: _________

Other Named Individuals or Entities

Use this section if you want to name your children or grandchildren in unequal shares, or if you want to give all or part of your account to some person or entity not described above, such as a charity. For each individual you list, check the box marked "or descendants" if the beneficiary is an individual and you want the individual's descendants to take his or her share if the individual dies before you do. If you name an entity, or if you do not want the individual's descendants to take his or her share, do not check the box. If you do not check the box, a predeceased individual's share will be ratably distributed to your other beneficiaries.

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

Signature of Accountholder:

______________________________________ **Date: ____/___/________**

401(k) Beneficiary Designation Form

Important: At your death, your retirement plan assets will be distributed in accordance with the designation on this form *even if you have executed a docment, such as a will or revocable trust instrument, that purports to distribute the funds in this account.* If you later decide to change the beneficiary designations for this account, you must do so by requesting and filling out [plan administrator's] change of beneficiary designation form. *Attempts to name or change the beneficiaries under this account by any other method, such as executing a will, trust or prenuptial, postnuptial, or divorce agreement, will not be valid.* You should seek legal advice if you are concerned about coordinating distribution of your retirement plan assets with other assets you may own.

Accountholder Information:

Name of Accountholder: ______________________________

Date of Birth: ______________________________________

My Beneficiaries:
Indicate the percentage of your retirement plan assets to be distributed to the designated beneficiaries upon your death. The total must equal 100%.

Important: Under federal law, the person to whom you are married at the time of your death is entitled to all of the proceeds of your retirement account, even if you do not designate your spouse as a beneficiary. Your spouse may waive these rights. If your spouse is willing to waive these rights, your spouse must execute the waiver at the end of this form, in accordance with the instructions provided.

If you are not married at the time of your death, or if your spouse waives federal statutory rights, the proceeds of your account will be distributed to the beneficiaries you designate. If one or more of your beneficiary designations cannot be given effect, the funds allocated to those designated beneficiaries will be distributed proportionately among your other designated beneficiaries. In the event that *none* of your beneficiary designations can be given effect, the proceeds from this retirement account will be distributed to whoever is entitled by law to receive your estate [generally, these will be those people who are entitled to take under your will, or, if you leave no valid will, your closest relatives]. If you would like to name different alternative beneficiaries, you should seek legal advice.

My Spouse

☐ To the person to whom I am married at the time of my death ___%

My Children

☐ To my children in equal shares ___%

If you name your children in equal shares, *also choose* one of the following:

☐ If one or more of my children die before I do, the share of any deceased child shall be given to his or her surviving descendants, if any. If any child of mine dies before I do and is *not* survived by descendants, his or her share shall be divided equally among my surviving children.

☐ If one or more of my children die before I do, the share of any deceased child shall be divided equally among my other surviving children.

My Grandchildren

☐ To my grandchildren in equal shares ___%

If you name your grandchildren in equal shares, *also choose* one of the following:

☐ If one or more of my grandchildren die before I do, the share of any deceased grandchild shall be given to his or her surviving descendants, if any. If any grandchild of mine dies before I do and is *not* survived by descendants, his or her share shall be divided equally among my surviving grandchildren.

☐ If one or more of my grandchildren die before I do, the share of any deceased grandchild shall be divided equally among my other surviving grandchildren.

Entities

☐ To the executor or administrator of my estate, to be distributed in accordance with my will, or, if I have no will, by intestate succession ___%

☐ To a trust ___%

If you name a trust as the beneficiary, indicate:

The name of the trust: ______________________________________

Whether the trust is a living trust or created in your will: _________

Other Named Individuals or Entities
Use this section if you want to name your children or grandchildren in unequal shares, or if you want to give all or part of your account to some person or entity not described above, such as a charity. For each individual you list, check the box marked "or descendants" if the beneficiary is an individual and you want the individual's descendants to take his or her share if the individual dies before you do. If you name an entity, or if you do not want the individual's descendants to take his or her share, do not check the box. If you do not check the box, a predeceased individual's share will be ratably distributed to your other beneficiaries.

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

☐ ____________________________________ or ☐ descendants ___%
[Name or Entity]

Your authorization:

I designate the beneficiary(ies) specified above to receive benefits under the plan upon my death.

Signature: ______________________________ **Date:** ____/___/________

Waiver of Spouse's ERISA Rights

[Important: Your spouse must sign this waiver in front of a notary or your plan representative. We strongly recommend that your spouse sign in front of a notary.]

I am the spouse of the participant, and I understand that, by law, I am entitled to 100% of the proceeds of the account if I am married to the accountholder at the time of the accountholder's death. I hereby approve of and consent to the above beneficiary designation. I understand that I am waiving all or part of my right to receive death benefits that would otherwise be payable to me from this retirement account.

X____ Date __/__/______

Spouse's signature — must be witnessed by a notary public

Subscribed and sworn before me on the ________ day of ______________, the year _______________.

State of ______________, County of ___________________________.

My commission expires __________________________________.

Signature of notary:

X____ Date ______/__/_____