With regard to default rules on the interpretation of wills, these norms are not applicable to will-substitutes. What remains to be resolved and what does not fit in this picture is the incoherent assessment of life insurance. Interestingly, the most used will-substitute in civil law jurisdictions is also the will-substitute that is most likely to benefit from exemptions. If there are policy reasons that support a privilege for providential transfers, then this privilege should be applied to any transfer aiming to provide maintenance for the beneficiary.

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Exploring Means of Transferring Wealth on Death: A Comparative Perspective

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I. A Blind Spot on the Legal Landscape

As we noted in the introduction to this volume, will-substitutes represent a complex area of the law that has hitherto been largely unexplored. In fact, aside from the US and Italy, will-substitutes have generally received little attention from succession lawyers, leaving much of this area under-theorised, and creating a gap between the practical and economic relevance of will-substitutes on the one hand, and their theoretical study on the other.[1]

For instance, we have seen that in France, legal scholarship has been 'in denial'.[2] The few works that have engaged with the topic are mostly concerned with anticipated succession, or the prohibition of succession pacts, rather than offering an in-depth analysis of will-substitutes.[3] In Germany, will-substitutes seem to have sparked academic interest in the 1950s and 1960s,[4] but in recent decades a greater focus has been placed on instances of anticipated succession.[5] By contrast, in Italy, academics have shown a continuing interest in the subject since the publication in the 1980s of Antonio Palazzo's book on 'anomalous successions'.[6] It would seem that, at that time, Italian legal scholarship in this field was primarily under the influence of German and French legal thinking; this was especially so for the

* The authors would like to thank Gregor Christandl for his comments on an earlier draft of this chapter.

[1] See, for instance, chs 3 and 4 above VI and I.

[2] Ch 7 above, p 178.

[3] See the works cited by Pérès in ch 7, above fn 20 and 21.

[4] See the authors cited by T Kipp and H Coing, *Erbrecht* (Tübingen, Mohr Siebeck, 1990) 438.

[5] For an exception, see PA Windel, *Über die Modi der Nachfolge in das Vermögen einer natürlichen Person beim Todesfall* (Heidelberg, R v Decker, 1998).

[6] A Palazzo, *Autonomia contrattuale e successioni anomale* (Naples, Jovene, 1983).

studies on anticipated succession in Germany and those focusing on the prohibition of succession pacts in France.[7] What is interesting to note, however, is that, in Italy, legal scholars have been somewhat ahead of legal practice, as most of the instruments discussed in literature over the past 30 or so years have little practical relevance.[8] While in the US, legal scholars have studied the topic for decades, this has not been the case in other common law jurisdictions. In England and Wales legal literature examining will-substitutes is rather limited,[9] but that may be partly due to the overarching issue that, for many years, legal scholars have neglected the law of succession.[10] Similarly in Canada, Australia, and New Zealand, relatively few authors have engaged with the subject.[11]

One reason for this relative lack of attention to the study of the modes of transfer of wealth on death other than wills or intestacy may lie in the fact that most of the instruments used in practice fulfil a number of different functions and are traditionally analysed in other contexts. Several will-substitutes can operate as purely *inter vivos* instruments, so that it is not always immediately evident that they also allow for a transfer of wealth on death. Therefore, they are usually placed outside the 'real' or 'proper' succession law. Indeed, although will-substitutes have always existed in some form or other,[12] it is still not easy to place them within a particular legal discipline, and hence they tend to go unnoticed. As a consequence, in many jurisdictions they belong to the most uncertain, intricate, and incoherent areas of private law.

Several contributors to this volume have noted that relatively little is known about the behavioural patterns of testators in their respective legal systems, that some of the individual instruments employed in practice are under-researched or not well understood,[13] and that their interaction with the law of succession has not yet been examined in sufficient detail. In many cases, the exact nature of certain legal devices is still debated and it is sometimes unclear precisely how they operate and what their legal consequences are.[14]

This does not mean that will-substitutes are not relevant in legal practice. Even though the will may sometimes be the only instrument expressly regulated by national succession laws, at least in some jurisdictions, the economic importance of will-substitutes would appear to have attained unprecedented importance, especially as certain forms of investment (eg, life insurance and pensions) have

[7] Ch 6 above, pp 131 f.
[8] ibid.
[9] See ch 3 above, p 51 f. The same is true of Scotland. See ch 4 above, pp 79 f.
[10] KGC Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law, volume I. Testamentary Formalities* (Oxford, OUP, 2011) x.
[11] An exception for Canada is AH Oosterhoff, *Oosterhoff on Wills and Successions*, 7th edn (Toronto, Carswell, 2011) and for Australia, R Croucher and P Vines, *Succession: Families, Property and Death*, 4th edn (Australia, LexisNexis Butterworths, 2013).
[12] See introduction above III.
[13] For examples, see chs 11 and 4 above, p 230 and pp 79 f.
[14] For examples see, for instance, chs 4 and 6 above, pp 79 f and p 139.

increased in popularity over the past decades.[15] This is true of the US, and also of Australia and New Zealand, where a 'non-probate revolution' has taken place.[16]

However, despite the fact that several contributions refer to a rise in the use of will-substitutes,[17] there seems to be a general lack of available statistical data concerning the use of the different instruments discussed and their overall economic relevance, and in many jurisdictions it is not known how much wealth is passed through wills. Nevertheless, several contributors were able to document significant increases in the use of individual mechanisms.[18]

II. Understanding Will-Substitutes

Although the term 'will-substitutes' is commonly used in the US, readers will have noticed that most legal systems analysed in this volume, including common law jurisdictions, do not employ a term of art that captures the array of instruments that in the eyes of a US lawyer fall under the heading 'will-substitutes'. Indeed, outside the US, the term 'will-substitutes' is hardly ever found in legal literature.[19] Most legal systems do not have another term of art that denotes the different devices functionally equivalent to wills. The reason for this might be that, as the contributions to this volume have shown, the instruments employed in practice vary in nature, so that it is perhaps not possible or even desirable to identify a term capable of capturing all of them. After all, most are instruments that are in and of themselves autonomous, often fulfilling a number of other functions aside from passing wealth on death.

Nonetheless, in some jurisdictions attempts have been made to identify terms that denote the many different instruments used to pass wealth on death. For instance, in Italy, where unlike in other civilian jurisdictions will-substitutes have long been at the centre of a lively scholarly debate, the instruments used have been referred to as '*istituti alternativi al testamento*', and more recently as part of the '*successioni anomale per contratto*' or the '*fenomeni parasuccessori*'.[20] Although by

[15] As to the magnitude in the US, see JH Langbein, 'Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers' (2012) 38 *American College of Trust and Estate Counsel Law Journal* 1, 12 ff.
[16] Ch 5 above VI.
[17] Chs 6, 7, 5 and 3 above III.B, I, VI and I.
[18] Although we do not have precise numbers, Pérès mentions that 60% of the French population has a life insurance policy. See ch 7 above, p 167. See further ch 6 above fn 33 for numbers on Italian life insurance and text after fn 47, for numbers on private pension plans. For numbers about the use of trusts in New Zealand, see ch 5 above fn 47 and registered private pension plans in Canada, ch 2 above I.D.i.a. See further ch 3 above I.
[19] This is true of the UK, but also of Australia and New Zealand. See ch 3 above VI.
[20] For details, see ch 6 above I.A. Christandl notes, however, that only the so-called *negozi transmorte* function as true will-substitutes.

the 1950s in Germany, Gustav Boehmer had used the term '*Testamentsersatz*',[21] it seems to have disappeared from German legal literature, clearing the way for the now more common expression '*lebzeitige Verfügungen auf den Todesfall*'.[22]

In the absence of a suitable expression capable of encapsulating the different devices that, like wills, can pass wealth on death, some contributors to this volume have discussed the topic in the context of transfers *that take place outside succession*, usually meaning outside substantive succession law, rather than procedural law, as is the case in the US.[23] In fact, the term 'non-probate transfers' is not particularly useful in the context of legal systems that do not have a probate procedure in place. Interestingly, the German Bundesgerichtshof has spoken of contracts in favour of third parties taking effect upon death as instruments that the testator can choose 'instead of testamentary dispositions' and that operate 'outside succession law'.[24] A similar expression is also found in the European Succession Regulation (Brussels IV),[25] which states in article 1(2)(g) that among the matters excluded from the scope of the Regulation are

> property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2).

The Regulation refers to transfers that take place otherwise than by succession,[26] the assumption being that these instruments are not currently captured by the law of succession of the individual Member States. To what extent this is the case will be discussed later.[27] Thus, will-substitutes are somewhat difficult to capture.

[21] G Boehmer, *Grundlagen der Bürgerlichen Rechtsordnung*, vol 2/2 (Tübingen, Mohr, 1952) 82 ff.

[22] Wieacker spoke of the 'lebzeitigen Zuwendungen auf den Todesfall'. F Wieacker, 'Zur lebzeitigen Zuwendung auf den Todesfall' in HC Nipperdey (ed), *FS Lehmann*, vol 1 (Tübingen, De Gruyter, 1956) 271 ff. Also common is the term 'Rechtsgeschäfte unter Lebenden auf den Todesfall'.

[23] See chs 6, 7 and 9 above, II, I and I.

[24] BGH 19 October 1983, (1984) *Neue Juristische Wochenschrift* 480, 481. See reference in ch 8 above III.C. W Marotzke in *von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (Berlin, De Gruyter, 2008) § 1922 BGB para 54 speaks of 'Sukzessionen am Erbrecht vorbei'.

[25] Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

[26] The same expression had already been used in the 1989 Convention on the law applicable to succession to the estates of deceased persons at art 1(2)(d). For an explanation of the article, see the Explanatory Report by Donovan Waters at 33 f. For an examination of the provision in the Regulation, see R Frimston, 'Chapter I: Scope and Definitions' in U Bergquist, D Damascelli, R Frimston, P Lagarde, F Odersky and B Reinhartz, *EU Regulation on Succession and Wills* (Cologne, Dr Otto Schmidt KG, 2015) 38, 45–47 and esp JP Schmidt 'Rechtsgeschäfte unter Lebenden auf den Todesfall' in A Dutta and J Weber (eds) *Internationales Erbrecht* (Munich, CH Beck, 2016) EU-ErbVO Art 1, paras 64 ff.

[27] See below at section IV.C.ii.

III. The Reality of Will-Substitutes

A. Types of Will-Substitute

The picture that emerges from the various contributions is complex, as the contributors have evinced different understandings of what should fall within the category of mechanisms that are functionally equivalent to wills.[28] Also, the instruments resorted to in the legal systems examined in this volume vary and, although some carry the same or a similar name, they may operate differently across jurisdictions. Below we provide an overview of the principal instruments that have been discussed in this book, in an attempt to identify certain patterns.

i. Life Insurance

There is little doubt that life insurance policies are taken out in all of the analysed jurisdictions and that they represent a highly popular and economically important type of will-substitute. They are widely used on the European continent,[29] but they also play a very important role in common law jurisdictions.[30] Only in Australia do they appear to be 'relatively rare', most likely due to the fact that superannuation pension schemes are not only compulsory for employees, but also enjoy certain tax privileges.[31]

In many jurisdictions, life insurance was already being used in the nineteenth century and at the beginning of the twentieth century.[32] Their emergence marks the transition from extended families to middle-class 'nuclear families' at the turn of the last century, as well as changes in lifestyle, in the composition of wealth, and the way in which care is provided for in old age.[33]

What makes life insurance policies, and more specifically beneficiary designations within such policies, will-substitutes is the fact that they allow for a person to nominate a beneficiary who will take the insurance proceeds directly upon death of the former. Though life insurance across different jurisdictions are far from being

[28] For an examination of the term, see introduction above II.

[29] See ch 6 above III.A; ch 7 above II.B; ch 9 above III.B; and ch 15 above III.B.iii.

[30] See chs 1, 2 and 12 above II.B, I.C.i and II.D. Data concerning England and Wales reveals a decrease in number. See ch 3 above II.C. For Scotland see ch 4 above VI.

[31] Ch 5 above at III.E.

[32] For England, see ch 3 above II.C; for Scotland, see ch 4 above VI; for New Zealand, see ch 5 above II.E; for Switzerland, see ch 9 above VI.B; for France, see ch 7 above II.B and for Germany, see ch 15 above III.B.iii, as well as R Zimmermann, *The Law of Obligations* (Oxford, OUP, 1996) 34 ff.

[33] For the importance of social factors to the law of succession, see MJ De Waal, 'Comparative Succession Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, OUP, 2008) 1077–79.

regulated in the same way, many legal systems have created a favourable environment, by explicitly exempting life insurance from the application of certain succession law rules. For instance, beneficiaries of such policies often enjoy privileges over creditors (eg, in Italy, the US, Canada, New Zealand, and Australia),[34] or over claims of family and dependants (especially in France, but also in England and Wales, Germany, and Switzerland).[35] In addition, they frequently benefit from tax privileges (eg, in France, Canada, and England and Wales, but not in the US),[36] which makes them highly desirable.

ii. Pension Schemes and Retirement Plans

While life insurance is used almost everywhere to pass wealth on death, private pension schemes and retirement plans of various kinds feature prominently in common law jurisdictions such as England and Wales, the US, and Canada.[37] In Australia, they are compulsory for every employee and, therefore, represent the most common will-substitute.[38] However, in New Zealand, they do not count among the instruments usually used to transfer wealth on death.[39]

Although the schemes and plans vary from jurisdiction to jurisdiction in terms of their structure and the type of death benefit they pay out, in most of the schemes, it is possible for a member of a pension scheme or plan to designate a beneficiary who will receive a death benefit payment, normally in the form of a pension or a lump-sum payment. The exception to this is England and Wales, and to some extent Australia, where such nominations are not generally binding on the scheme administrators, while remaining revocable until death.[40] Thus, pension nominations tend to operate like a will, though in the case of pensions, the choice of potential beneficiaries is often restricted by the respective schemes, in some cases to spouses or dependants.[41]

One of the reasons why investments in private pension schemes are popular in common law jurisdictions may be that they tend to enjoy considerable tax privileges,[42] and that the death benefits are passed outside probate, so that they do not in principle enter the estate. As a consequence, they are not generally available

[34] Ch 6 above III.A; ch 12 above II.D; ch 1 above IV.B; ch 2 above I.C; ch 5 above III.E.
[35] Ch 7 above II.B; ch 3 above II.C; ch 14 above V; ch 15 above III.D.iii; ch 9 above VI.B.
[36] Ch 7 above II.B; ch 2 above I.C.i; ch 3 above II.C; ch 1 above IV.A.
[37] See ch 3 above II.A, ch 1 above II.C and ch 12 above II.E, as well as ch 2 above I.D and E.
[38] Ch 5 above I.
[39] ibid.
[40] A Braun, 'Pension Death Benefits: Opportunities and Pitfalls' in B Häcker and C Mitchell (eds), *Current Issues in Succession Law* (Oxford, Hart Publishing, 2016) ch 10.
[41] This is true for Australia. See ch 5 above III.D. In England and Wales, it depends on each scheme. See ch 3 above II.A.i and iii.
[42] This is true of England and Wales, Canada and Australia. Although Australia has no estate tax, pensions enjoy a favourable tax regime in that benefits paid from superannuation funds are taxed less than other funds. For details, see ch 5 above III.D.

to the creditors of the deceased,[43] and are frequently, though not always, outside the scope of the power of courts under the family provision legislation.[44] Thus, similar to life insurance, they usually benefit from a favourable environment, partly because they offer a way to provide for the spouse or civil partner and other dependants.

Conversely, in civilian jurisdictions, private pension plans have only recently started to function as a means through which a plan member can pass wealth on death, as in the past they did not always offer the possibility of choosing the beneficiary of their death benefits.[45] In other words on death of the member, payments would sometimes be made directly and automatically to the spouse or to dependants, or be simply absorbed by the fund, without the member having any choice. For instance, in Italy, pension death benefits of private pension schemes would automatically pass to the surviving spouse, the children and the parents, so long as they were maintained by the plan holder, and, in their absence, the money would be kept in the fund.[46] However, since 1999, it is possible for a member of an Italian private pension scheme to nominate beneficiaries.[47] In Germany, the recently introduced 'Riester-Rente' theoretically allows the contracting party to nominate a beneficiary, but where the nominee is someone outside the circle of close family members, public subsidies and tax advantages are lost.[48]

iii. Bank and Other Savings Accounts

Certain types of bank account operate not just as a savings device, but can also represent a vehicle for passing wealth on death without the need for a will. For instance, in the US, the 'pay-on-death' bank accounts (PODs) are a popular type of account, alongside joint accounts, as well as trust and agency accounts. As the name suggests, PODs are bank accounts that are created in the name of the depositor and payable on his death to another person. They are, therefore, a type of asset-specific will, with transfer taking place outside probate.[49] In other common law jurisdictions, this type of account is not or, at least, not yet available. However, money can and is often held in a joint bank account,[50] with survivorship operating on death of one of the tenants, without the need for a will.

[43] See chs 1 and 12 above IV.B and II.E. In Scotland, the protection of creditors seems to be uncertain: ch 4 above VII.B.ii.
[44] This is the case in England and Wales. See ch 3 above III.E. For Australia, see ch 5 above III.G.
[45] In France, there have been several attempts to introduce private pension plans, which so far have failed for ideological and political reasons. See ch 7 above, p 167.
[46] Ch 6 above III.B.
[47] Under the Swiss social security system, a person can only nominate the beneficiary for certain types of insurance, part of the so-called third pillar. See ch 9 above VI.A, as well as R Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB' (2009) *successio* 7 ff.
[48] §§ 10a, 82 and 92 ff Einkommensteuergesetz.
[49] See ch 1 above II.D.
[50] See chs 2, 3 and 5 above I.B.i.a, II.D.iii and II.B and III.B.

One problem that has emerged regarding jointly held bank accounts is that, unlike the case with POD accounts, where the form discloses the depositor's intention to transfer title to the account only at the depositor's death, with joint accounts the intention of the transferor is not always evident. Where it is not expressed clearly, the surviving joint tenant may not obtain the benefit of the account, but may hold it on trust for the estate of the deceased.[51] In this respect, the US POD accounts appear to be a more secure estate planning instrument.[52]

An aspect to note is that bank accounts, whether POD accounts or joint accounts, do not necessarily enjoy the favourable treatment that other will-substitutes, such as life insurance and pension plans, benefit from. For instance, in England and Wales, joint bank accounts fall within the scope of the court's jurisdiction under the family provision legislation. In Australia, their use is constrained by notional estate provisions that protect family members from loss of support following the death of their spouse, partner or parent.[53] In New Zealand too they are vulnerable to claims under the Property (Relationships) Act 1976.[54] In some legal systems creditors may also be able to obtain the wealth held in a bank account.[55] For instance, in the US states where the Uniform Probate Code (UPC) § 6-102(b) is in force, it will operate to make the beneficiary of any such transfer potentially liable to the settlor's creditors, up to the value of the assets received.[56] Thus, transfers on death through bank accounts do not always operate entirely beyond the remit of succession laws.

Interestingly, Swiss legal practice offers a person the option of establishing a joint account (*compte joint*) containing a clause capable of excluding the heirs of the deceased from becoming a party to the contract with the bank (*Erbenausschlussklausel*). However, it appears that the validity of such clauses is quite controversial, and that in certain circumstances the transaction can be qualified as a gift *mortis causa*, so that inheritance rules would ultimately apply.[57]

Other civil law jurisdictions discussed in this volume do not recognise bank accounts with survivorship operating upon death. In Germany, bank accounts can be transferred via a gift that takes effect on death, but from a legal point of view, the transfer is regarded as a testamentary disposition, unless the donor has lost substantial control over the bank account during his or her lifetime. It is, however, possible for a person to enter into a contract with the bank in favour of third parties which takes effect on death. Such contracts are not usually treated

[51] In common law jurisdictions this is often the effect of the operation of a presumption, which operates however differently across legal systems. See ch 1 above II.D; ch 2 above I.B.i.a; ch 3 above II.D.iii; ch 5 above II.B and III.B; and ch 12 above II.C. The operation of the presumption is important for creditors, as the wealth will be available to estate creditors. See ch 12 above III.

[52] See chs 1, 3 and 12 above II.D, V.A and II.B.

[53] See ch 5 above I.

[54] ibid.

[55] For England and Wales, see ch 3 above II.D.iii and, for the US, see ch 12 above II.B and C.

[56] Ch 12 above II.B.

[57] Ch 9 above II.

as testamentary for the purpose of applying conventional succession laws, and are therefore a way of preventing the application of succession laws, though they cannot avoid the forced heirship regime.[58] Although in Italy it is theoretically possible to enter into similar third-party contracts with a bank, to date it is unclear whether these contracts will be regarded as void due to a potential conflict with the prohibition of succession pacts.[59] For this reason, unlike in Germany, in Italy, such third-party contracts are not a reliable will-substitute, except in the context of life insurance, where they are specifically regulated.[60]

iv. Modes of Passing Real Property on Death

Just as it is possible to hold a bank account jointly, real property too can be held in joint names, and in common law jurisdictions it is a common way of holding real property,[61] especially for couples. As mentioned in relation to joint bank accounts, one consequence of holding property as joint tenants rather than as tenants in common, is that on death of one of the tenants, the other acquires absolute title to the property directly and automatically by way of survivorship (*ius accrescendi*). However, as we have noted before in relation to joint bank accounts, although the interest passes automatically, assets are not entirely outside the reach of creditors or dependants.[62]

Somewhat similar is the operation of the French 'clause tontine', often stipulated for cohabitants or for spouses with a separate property regime.[63] This is a clause whereby two people who acquire property together stipulate that on the death of either, the property is deemed the sole property of the survivor with retroactive effect. Therefore, unlike in the case of joint ownership, where both are entitled to the entirety together right from the start, in the case of the *tontine* there was only ever one owner. Another difference is that severance is not possible so that the survivorship cannot be avoided. For this reason it is questionable whether the *clause tontine* is actually similar to a disposition in a will, which is why Pérès defines them as 'impure' will-substitutes.[64] Although they would appear to be quite uncommon in France, as they go against the desire to keep property in the family, according to Matthews they are not infrequently used by British buyers of French houses as a means of replicating the most important feature of English joint tenancy, to which they are of course accustomed, ie, *survivorship*.[65] Austrian law too has a similar mechanism called 'Wohnungseigentum der Partner im Todesfall', which is

[58] See ch 8 above III.C.

[59] Ch 6 above III.B.iv.

[60] Arts 1920 ff of the Italian C Civ.

[61] Chs 1, 2, 3 and 5 above II.F, I.B, II.D and II.B and III.B.

[62] See above at III.A.iii.

[63] Ch 7 above II.A.iv.

[64] ibid at II.A.iv.

[65] Ch 11 above IV.D.

a popular form of joint ownership of residential apartments whereby on death of one of the owners, the share accrues to the surviving partner.[66]

In Scottish law, joint tenancy of real property would appear to be available only to trustees and members of an unincorporated association. Nonetheless, similar results may be achieved through a 'special destination', which is very common for spouses and represents one of the main types of will-substitute in Scottish law.[67] As with joint tenancy, upon death of one of the co-owners, the interest of one person is carried by operation of law to the survivor. Unlike in the case of joint ownership, however, such a destination must be inserted into the conveyance by the transferor at the request of those who are seeking the creation of the special destination in their favour.

Also within the category of will-substitutes capable of passing an interest in land outside the conventional succession laws, and without the need for a will, fall Transfer-On-Death Deeds of Land (TODs), which are a fairly recent legal creature and unique to the US market. TODs provide that an individual owning an interest in land may designate one or more beneficiaries who will receive the interest on the owner's death outside probate, without the need to comply with formality requirements for wills.[68] While the owner is alive, the beneficiaries have no interest in the land, which distinguishes it from joint tenancies, the French *tontine*, the Austrian 'Wohnungseigentum der Partner im Todesfall', and the Scottish special destinations.

Finally, also within this category might fall the property entitlement claims of spouses, civil union partners and cohabitants in New Zealand, which operate as a means of transferring property to the surviving partner outside the will.[69] Although the transfer arises from an application for division made by the surviving spouse, and not from an act of *disposition* of the deceased, Peart qualifies these transfers as will-substitutes. This is because they offer a way to obtain and pass property outside succession laws, without the need for a will or the application of intestacy rules.[70]

v. Trusts

One of the oldest mechanisms for the transfer of wealth on death, especially in common law jurisdictions, are trusts, which can take various forms. Those that come perhaps closest to wills are revocable trusts, as they share most of the characteristics of the will, in that: they are not asset specific; they leave the settlor with considerable freedom to enjoy and dispose of the trust fund during his or her lifetime; and they remain revocable until the moment of the settlor's death. The advantage of a revocable trust over a will is that the settlor can determine the distribution of wealth on death, often for more than one generation, whilst at the same time also avoiding probate.

Although revocable trusts are very popular in the US, as well as in offshore jurisdictions,[71] this is, perhaps surprisingly, not true of other common law jurisdictions, such as Australia, Canada,[72] and England and Wales,[73] nor do they seem to be common in Scotland.[74] This might be explained partly because of tax reasons, but also because there is a risk that due to the reservation of powers, the trust will be considered a sham and thus be void, or that assets will be held not to have been effectively segregated from the settlor's creditors.[75] In other words, it is often unclear how far the settlor can reserve certain rights.[76]

That said, even when they are not revocable, *inter vivos* trusts remain an interesting estate planning device.[77] For instance, in New Zealand, certain types of discretionary trust function as will-substitutes where the settlor is the trustee (or retains powers to remove trustees) as well as the primary beneficiary, and can nominate new beneficiaries at any time.[78] Matthews notes that will-substitute effects are typical also of so called 'thin' trusts, popular in offshore jurisdictions, whereby property is held by a trustee for a beneficiary (often the settlor) for life, with the power for the beneficiary to appoint capital to himself, and subject thereto on trust for such person or persons as the beneficiary may appoint.[79]

As Christandl and Jakob have pointed out, both Italy and Switzerland have ratified the Hague Trusts Convention,[80] and trusts can potentially be used as will-substitutes, given that the Convention does not exclude the possibility of recognising trusts in which the settlor reserves certain powers.[81] However, for that to happen the choice of the law governing the trust would need to admit revocable

[66] Regulated in § 14 *Wohnungseigentumsgesetz* of 2002. For a commentary of the provision, see C Prader, *Manz Wohnrecht, WEG 2002*, 4th edn (Vienna, Manz, 2015) and H Würth, M Zingher, P Kovanyi and I Etzersdorfer, *Miet-und Wohnrecht*, vol 2, 23rd edn (Vienna, Manz, 2015) § 14 *Wohnungseigentumsgesetz*.

[67] Ch 4 above V.

[68] Ch 1 above II.E.

[69] See ch 5 above II.A.

[70] Interesting to note in this context are also marital agreements that establish a continued community of property that seems to be common in rural areas of Bavaria, and that avoid claw-back claims of compulsory heirs. See ch 8 above VI.B.

[71] Ch 1 above II.A and ch 11 above IV.A.

[72] Chs 2 and 12 above, p 32 and II.A. The only exceptions are *alter ego* and joint partner trusts. See MJ Rochwerg and LA Hemmings, 'Will Substitutes in Canada' (2008) 28 *Estates, Trusts & Pensions Journal* 50, 52–54.

[73] See ch 3 above, p 53.

[74] Ch 4 above, p 80.

[75] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd and others (Cayman Islands)* [2011] UKPC 17.

[76] Ch 3 above, p 53, ch 5 above, p 120, ch 12 above, pp 255 f.

[77] See ch 11 above IV.A.

[78] Unlike in England and Wales, in New Zealand, they seem to be fiscally neutral. Ch 5 above II.C.

[79] Ch 11 above IV.A.

[80] Ch 6 above, p 148 and ch 9 above, p 205.

[81] Art 2 of the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985.

trusts and there is a risk that the trust will be considered a sham in the legal system in which recognition is sought. For this reason, they do not seem to be common in Italy.[82]

vi. Foundations

Like trusts, foundations, and especially private purpose foundations, can represent an interesting vehicle for the transfer of wealth on death of a person. Although in principle they are lifetime instruments that take immediate effect, they can be structured in a way that allows the founder to pass wealth to chosen beneficiaries, which in practice are often members of the founder's family.

Private purpose foundations are quite common in civil law jurisdictions, and increasingly also in offshore ones.[83] Although in Germany the admissibility of private and family foundations was debated for a long time, today they are widely accepted by legislatures and courts,[84] even though legal scholars have raised the concern that their use may lead to the creation of a private 'parallel world' of succession law.[85] Austria has permitted private purpose foundations since 1993,[86] whereas Switzerland has recognised them since the coming into force of the Swiss Civil Code in 1911, and Liechtenstein since 1937. By contrast, in Italy and France, private purpose foundations are not recognised and therefore cannot be used as a will-substitute.

Private foundations operate as will-substitutes where they allow the founder to be a beneficiary, or even the sole beneficiary, and to reserve extensive rights to himself or herself, such as a right to change the purpose of the foundation, or to revoke it. In such cases, a foundation may achieve more or less what certain trusts can achieve and can therefore function as a useful estate planning tool. However, according to Matthews, it is rare to find a system that allows the transfer to third parties of the founder's reserved rights (where such rights are lawful in the first place) or of the rights conferred upon beneficiaries.[87] Thus, at least from the perspective of international investors, the usefulness of foundations as will-substitutes is limited.

The contributions in this volume show that such private purpose foundations can differ in nature and that, while in some legal systems they can function as reliable will-substitutes, capable of pursuing a variety of different purposes, in others their use may be restricted. For instance, Swiss private purpose foundations can function as will-substitutes, but they entail certain risks, and the use of the

[82] See ch 6 above IV.A.
[83] P Panico, *Private Foundations: Law and Practice* (Oxford, OUP, 2014).
[84] Ch 8 above V.B.
[85] A Dutta, *Warum Erbrecht—Das Vermögensrecht des Generationenwechsels in funktionaler Betrachtung* (Tübingen, Mohr Siebeck, 2014).
[86] For an overview, see S Kalss, 'Privatstiftung' in S Kalss, C Nowotny and M Schauer, *Österreichisches Gesellschaftsrecht* (Vienna, Manz Kampfl, 2008) 1295 ff.
[87] Ch 11 above IV.C.

family foundation is restricted. They are also not immune from forced heirship claims.[88] By contrast, the Liechtenstein mixed family foundations would appear to be a much more attractive and flexible device.[89]

vii. Gifts Mortis Causa

Gifts *mortis causa* represent one of the oldest will-substitutes, dating back to Roman times and possibly predating the will.[90] Though known to most common law jurisdictions, at least in the US, as well as in Australia and in New Zealand, they are not often used.[91] The same is true of Scotland.[92] Although it is difficult to judge whether they are still relevant in practice, in England and Wales recent case law indicates that they have not fallen entirely into disuse.[93]

The English *donatio mortis causa* consists of a revocable gift made during a person's lifetime, in contemplation of the donor's impending death, but which takes effect only on his death. It is a useful device insofar as it does not require any formalities, though it requires delivery of the asset to the donee during the lifetime of the donor, and can only operate when there is an impending death. In other words, in order for the donation to be valid, the donor must be considering the probability of death in the near future, and not just sometime in the future, and for a specific reason. Upon his death, the donee is automatically entitled to the property which is usually already in his possession. Thus, the *donatio mortis causa* can only be employed in certain specific circumstances. In addition, it may not represent the most reliable will-substitute.[94] In fact, one difficulty with this instrument is that due to its informal nature, it is uncertain whether there is sufficient evidence to prove that such a donation was made.

Although in the course of the codification movements the *donatio mortis causa* was abolished in some civil law jurisdictions, such as in France and Italy,[95] it still exists in some civil law jurisdictions, though perhaps in a different form. For instance, the German BGB recognises the *Schenkungsversprechen von Todes wegen* (§ 2301 BGB), which has different requirements from the English *donatio mortis causa*.[96] Indeed, unless there is a lifetime loss of ownership of the gifted asset, the

[88] See ch 9 above III.D.
[89] ibid.
[90] H Lange and K Kuchinke, *Erbrecht*, 5th edn (Munich, CH Beck, 2001) 740.
[91] Ch 1 above II.H and ch 5 above, pp 108 f.
[92] Ch 4 above, p 80.
[93] Ch 3 above II.E.
[94] Even though in common law jurisdictions the *donatio mortis causa* seems to feature similar characteristics, there are also some differences, as only England and Wales allow for real property to be the subject matter of such a gift. See ch 5 above, p 108.
[95] In Italy, there was a proposal to introduce the *donatio mortis causa*. See bill no 1043 of 27 September 2006 discussed in A Braun, 'Testamentary Freedom and its Restrictions in French and Italian law: Trends and Shifts' in R Zimmermann (ed), *Testierfreiheit/Freedom of Testation* (Tübingen, Mohr Siebeck, 2012) 58, 77.
[96] See the discussion in ch 8 above III.B.

gift is clearly subject to succession law, thus requiring compliance with formality requirements.[97]

viii. Clauses in Partnership Agreements

Clauses in partnership agreements also show features of will-substitutes but only insofar as they affect the transfer of wealth upon death. Unlike a will they are not *dispositions* made by the testator himself, but are the result of an agreement between the partners. Hence, they cannot be unilaterally revoked. Nevertheless, they are a means of passing wealth on death insofar as, in principle, partnership shares cannot be freely disposed of through the use of a will. In other words, the testator cannot nominate his or her successor to the partnership by means of a will, so that clauses in partnership agreements are not technically a *substitute*, but rather do something that a will cannot. Partnership clauses are *necessary* in order to nominate a beneficiary of one's share upon death. Under German law,[98] and contrary to Italian law,[99] the nomination of the beneficiary does not of itself transfer the share into the hands of the nominated beneficiary, unless the beneficiary is also the sole testamentary or intestate heir.

Among the jurisdictions examined in this volume, such clauses seem to be especially popular in Germany, Switzerland and Italy.[100] Notwithstanding the fact that they differ in content and form, their specific importance probably relates to the high number of family-run small and middle-sized businesses, which traditionally favour the 'personalised' partnership to 'anonymised' corporations.

Besides the various different denominations, these clauses provide first for the continuation of a partnership upon the death of a partner, by preventing its termination ('continuation clauses'), and, secondly, for the nomination of a beneficiary of the deceased's share either by way of an accrual clause ('consolidation clause'), or by rendering the partnership share heritable ('succession clause' or 'successor clause').[101] The reasons why such clauses are used are to protect the interests of the surviving partners, as well as to secure the 'personal' nature of the partnership.[102]

As partnerships are strongly linked to family-run businesses, which generally enjoy societal support, legislatures as well as courts have often been willing to exempt the succession to partnership shares from rules of succession law, which would otherwise apply. However, partnership shares are not granted the same privileges as, for instance, life insurance.[103] Indeed, in Italy, recent tax law reforms

[97] § 2301 BGB.

[98] Ch 8 above VII.B. The same is true for Austria, see S Kalss and G Probst, *Familienunternehmen* (Vienna, Manz, 2013) paras 20/30 and 20/32.

[99] Ch 6 above III.C.

[100] See chs 6, 8 and 9 above III.C, VII.B and II. For Austria, where they seem to be common too, see Kalss and Probst, above n 98, paras 20/27 ff.

[101] For an overview, see ch 10 above V.A.

[102] Ch 6 above III.C, and ch 8 above VII.A and B.

[103] See above at III.A.i.

have put an end to former tax privileges and partnership shares are now included in the taxable estate.[104] German courts consider partnership shares in every respect as part of the estate, especially as far as compulsory shares are concerned.[105] Jakob reminds us that in certain circumstances a Swiss court may qualify succession clauses as testamentary dispositions, thereby rendering them subject to the rules of succession law.[106]

ix. Powers of Attorney and Mandates

Certain types of powers of attorney or mandates can also function as will-substitutes where they can last beyond the death of the attorney or mandator, though usually in an indirect way. Such instruments are common in Australia and take the form of irrevocable powers of attorney.[107] German law recognises both *trans-mortem* mandates, which do not expire upon death of the mandator, and *post-mortem* mandates, which only come into force upon death.[108] Certain types of mandates or powers of attorney would also seem to be recognised in Italy and Switzerland.[109]

Such powers of attorneys and mandates are increasingly recognised, partly due to the rise of 'enduring' or 'lasting' powers of attorney that help manage property and financial affairs in case of mental incapacity.[110] What the various powers of attorney and mandates have in common is that they do not technically *substitute* wills, insofar as they do not in and of themselves *transfer* or *dispose* of wealth upon death to a specific beneficiary. That said, they enable the attorney or mandatary to make dispositions for the grantee or mandator, after the latter's death and out of the estate. Indeed, for the property to be transferred, the attorney or mandatary still has to make a gift.

Hence, for a *post-mortem* mandate to serve as a will-substitute, it must enable the attorney to make dispositions. This is not, for instance, the case with the French *mandat à effet posthume*, as it does not allow for dispositions, at least not against the wishes of the heirs,[111] and, consequently, is not a typical will-substitute.[112] Conversely, in Germany, practitioners regularly recommend testators

[104] Ch 6 above III.C, fn 66.

[105] Ch 8 above VII.B, fn 43; for further law reforms see A Röthel, *Ist unser Erbrecht noch zeitgemäß?* (Munich, Beck, 2010) A 40 ff.

[106] Ch 9 above II, text after fn 17.

[107] Ch 5 above III.H.

[108] Mentioned in ch 8 above IV.B.

[109] Ch 6 above III.D.v, and ch 9 above II.

[110] See the country report by A Röthel, 'Private Vorsorge im internationalen Rechtsverkehr' in V Lipp (ed), *Handbuch der Vorsorgeverfügungen* (Munich, F Vahlen, 2009) §§ 22–31.

[111] See Cass Civ 1ère, 12 May 2010 no 09-10.556. A Leroyer, *Droit des Successions* 3th edn (Paris, Dalloz, 2014) para 438; P Malaurie and C Brenner, *Malaurie/Aynes: Les successions, les libéralités*, 6th edn (Paris, Dalloz, 2014) para 169; for a different assessment, see M Grimaldi, *Le mandat à effet posthume* (Issy les Moulineaux, Défrenois, 2007) 3.

[112] Ch 7 above I.

to complement wills with such *post-mortem* mandates.[113] The reason for this is that the mandatary can be given the power to act on behalf of the estate from the moment of death. In Australia, enduring powers of attorney can be used to alter the effect of a will.[114] In Italy, *post-mortem* mandates can be employed to function as a supplementary contract, for instance to savings accounts, which can therefore work more effectively.[115]

As mandates *post-mortem* or powers of attorney do not in and of themselves transfer wealth upon death, they would appear to create less tension with the otherwise applicable rules of succession law. Nonetheless, some frictions can arise. For instance, in Italy, courts are unsure about a possible clash with the prohibition of succession contracts.[116] While the Australian legislature is concerned that the interests of the beneficiary of the last will might be harmed,[117] German courts do not generally interfere, so long as the mandate remains revocable by the heirs.[118] Thus, mandates or powers of attorney do not necessarily fall outside the reach of succession law rules and in some ways are not entirely reliable.[119]

B. Trends and Common Fundamental Features

It is clear from the examination of the different modes of transfer listed above, that the mechanisms employed in practice vary greatly.[120] It would seem that US legal practice offers the greatest variety of instruments, several of which are not usually available elsewhere (eg, POD and TODs).[121] And, while Italian legal scholars have devised a number of different instruments, many are not actually used in practice.[122]

What is interesting to note is that, unlike what one might expect, there are no clear and uniform patterns within common and civil law jurisdictions. For instance, the picture emerging from the French contribution differs considerably from the

[113] See K-H Schramm in F Säcker, R Rixecker, H Oetker and B Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 6th edn (Munich, Beck, 2012) § 168 para 30 and in the context of family businesses, R Krause 'Family Business Succession Planning in Germany—Strategies for Intergenerational Transfer in a Globalized World' in I Stamm, P Breitschmid and M Kohli (eds), *Doing Succession in Europe* (Zurich, Schulthess, 2011) 299, 302.

[114] Ch 5 above III.H.

[115] Ch 6 above III.D.v.

[116] ibid.

[117] Ch 5 above III.H.

[118] Ch 8 above IV.B.

[119] See ch 6 above III.D.v and ch 9 above II.

[120] There are also other devices discussed by some of the authors, which are not included in the list above. See the many instruments discussed in Italian legal literature and examined by Christandl in ch 6 above III. See also contracts to make a will referred to in ch 4 above VIII and ch 5 above III.F, as well as instruments employed to transfer property of indigenous populations. See ch 2 and ch 5 above II.A and III.I.

[121] Ch 1 above II.D, E and G.

[122] Ch 6 above VII.

Italian study, and there are also interesting dissimilarities between Switzerland, Liechtenstein, and Germany. The same is true of common law jurisdictions. For instance, in Australia, the legal landscape is very different from the one we find in New Zealand, and even between the US and England and Wales, there are significant divergences in the type of instruments used.

That said, some instruments tend to be more characteristic of either the common law or the civil law jurisdictions. For instance, while trusts feature prominently in common law jurisdictions, foundations and contracts in favour of third parties with effect on death are more popular in civil law jurisdictions.[123] By contrast, other instruments are peculiar to particular legal systems, such as the New Zealand relationship property entitlement claims,[124] or the Scottish special destinations.[125] On the other hand, there are also some instruments that are employed almost everywhere, such as life insurance, which have become increasingly popular and often constitute the 'emblematic' will-substitute, especially in civil law jurisdictions.[126] Another trend seems to be the emergence of private pension schemes as will-substitutes, both in common and some civil law jurisdictions.

If one were to try to group these instruments together, one could say that some mechanisms represent financial instruments that provide a person primarily with an investment opportunity. For instance, life insurance, retirement and pension plans, and, to some extent, bank accounts, represent saving mechanisms, which provide for future events such as retirement, old age and illness, while also offering the option of passing a benefit on death of the person making the investment, often for the maintenance of dependants. Other mechanisms explored in this volume, though also representing investment opportunities, are primarily modes of holding, managing, and preserving property rights, such as joint tenancies, trusts, and foundations,[127] the latter two also representing instruments for the segregation of assets. Among those instruments aimed at preserving wealth, also count various clauses in partnership agreements and companies. Conversely, the *donatio mortis causa* does not have ancillary purposes, other than to benefit the donee on death of the donor. Finally, one could also distinguish between those instruments through which the person can *dispose* of wealth on death, and those that in and of themselves are not capable of effecting a *transfer* of wealth, but that allow for the succession process to be structured in a certain way. These include powers of attorney or clauses in partnership agreements.

[123] Chs 6 and 8 above II.B and III and III.C and V.B.

[124] See ch 5 above II.A.

[125] Ch 4 above V.

[126] See ch 6 above III.A; ch 7 above II.B; and ch 9 above VI.B.

[127] Among these is also the Italian *patto di famiglia*. For an analysis of the *patto di famiglia*, see ch 6 above V.

It follows from the above analysis that, in many ways, most of the instruments examined in this volume perform more functions than a will. In other words, their main purpose may not necessarily be that of determining the distribution of wealth on the death of a person. Nevertheless, they can also be used to pass wealth or, as we noted, to structure the distribution and transfer of wealth on death, which is the function they share with the will. In doing so, they do not establish an heir or legatee, but simply identify a beneficiary, usually of a particular set of assets, rather than the entire estate. Hence, the beneficiary does not succeed to an inheritance or a legacy, though functionally the benefit often looks just like a legacy under a will. Indeed, most modes of transfer examined in this book are *asset-specific*. As a consequence, for instance, beneficiary designations in a life insurance, or nominations in retirement schemes, cannot be used to transfer assets other than those invested in the life insurance policy or the pension plan. The same applies to contracts entered into, for instance, with a bank in favour of third parties that take effect on death.[128]

Another interesting aspect to note is that some of the instruments explored in the volume are contractual in nature. This is, for example, true for powers of attorney and clauses in partnerships. Moreover, in Italy as well as in Germany, contracts in favour of third parties with effect on death represent a very common will-substitute that can be employed in order to transfer different types of wealth: wealth invested in a bank account, a life insurance, or in a pension plan etc. In that sense they can serve a similar function to that served by beneficiary designations in the US or Canada, which are employed in different contexts, from insurance, to banking and pensions.

Finally, it has also emerged that some of the instruments have changed over time. For instance, pensions have shifted from being an instrument primarily designed to provide for retirement in old age or ill health, to being an instrument that is capable of passing a considerable amount of wealth to chosen beneficiaries (under favourable conditions).[129] Conversely, life insurance has almost developed in the opposite direction. Originally, they were conceived of primarily as a device operating on death of the contracting party, and were therefore regarded as pure 'risk' or 'gambling' contracts.[130] However, as several contributors have highlighted, modern day insurance policies also serve lifetime purposes and often operate primarily as 'saving devices'.[131] As a consequence, the transfer of wealth upon death represents one, but not necessarily the only, important feature of life insurance policies.

[128] Ch 8 above III.C.
[129] This is, for instance, also true of complementary private pension plans in Italy. See ch 6 above III.B.
[130] For France, see ch 7 above II.B, text at fn 54.
[131] See below at IV.B.i.

IV. Rationale Behind the Use of Will-Substitutes

A. Introduction

In most parts of the Western world, the 'paradigm' instrument for the transfer of wealth on death foreseen by the legislature is the will. The law of wills therefore represents the 'gold standard' or the 'benchmark',[132] against which will-substitutes tend to be compared. Hence, the legal discourse is likely to be centred on what will-substitutes can or cannot do and, in particular, on which rules applicable to wills they *avoid*.[133]

One of the most interesting questions in this context is in fact why people might pass wealth on death through means other than wills. As has already emerged above, many of the instruments analysed fulfil more than one function with the possibility of passing benefits on death often being a secondary purpose. Hence, it is difficult to determine which of these functions is the key factor driving testators to choose one instrument over another. The examination of the rationale behind will-substitutes is not an easy task and it is one that leads into uncertain territories, especially given the lack of empirical data or of sociological studies carried out in this field. Little is known about the subjective motives of those who use these instruments, and much is therefore speculative. Moreover, explicit or apparent reasons may hide less apparent or implicit ones. While one instrument may be used for a particular purpose in one legal system, in another that same instrument may be employed for very different purposes. Even within the same legal system, the use of individual devices may be motivated by very different reasons, such that it is often difficult to generalise. Also, in the majority of the cases, motives are more likely 'many and varied'.[134]

Nevertheless, it is certainly possible to identify features which from the perspective of a testator may render individual mechanisms particularly advantageous. Generally speaking, these can be classified into two broad categories: financial advantages and non-financial ones. As to the former, some will-substitutes may be attractive from an economic perspective due to the tax advantages they offer,[135] or because they reduce procedural costs (eg, the cost of probate or the cost of preparing a will).[136] They may also be popular because they simplify the transfer of wealth (by making it more direct,[137] less formal[138] and less time-consuming),[139]

[132] Ch 7 above III.B.
[133] See below at V.A.
[134] Ch 5 above IV; see also ch 1 above I; ch 3 above IV.
[135] Ch 2 above II.A; ch 3 above IV.C; ch 5 above IV; ch 9 above I; ch12 above I.A. But see ch 6 above VII.
[136] Ch 1 above I; ch 12 above I.A; but see ch 3 above IV.B for England and Wales.
[137] Ch 3 above IV.B for England and Wales, and ch 4 above II.C for Scotland.
[138] Ch 1 above I; ch 2 above II.A, and ch 4 above II.D.
[139] For the US and Canada, see ch 12 above I.A.

provide greater flexibility, or greater predictability,[140] especially where they can shield the beneficiaries from claims of creditors,[141] as well as family members and dependants.[142]

However, there are also non-financial factors that may encourage a person to choose one instrument over another, and these can be just as important. Will-substitutes may, for instance, be used in order to obtain and provide family members and dependants with higher yields,[143] to exercise control over future generations,[144] to preserve wealth within the family,[145] and to avoid the dissipation of assets[146] as well as the potential fragmentation of businesses.[147] They might also be used to guarantee confidentiality and privacy,[148] to allow a freer choice of governing laws,[149] or to promote family values and dynastic identity.[150] Hence, will-substitutes may serve a range of financial, as well as non-financial goals.

One might feel tempted to express a value judgement over the potential reasons or explanations just listed, and to categorise the reasons into 'good' and 'bad', or into 'welcomed' and 'unwelcomed', or even 'dubious' explanations. Sometimes it may not be easy or possible to refrain from such evaluations.[151] Depending on whether one takes the perspective of a testator, beneficiary, heir, dependant, creditor, investor, a financial adviser, or financial provider, will-substitutes may look just like another way of 'investing and passing wealth' on death,[152] or a means of avoiding rules that would otherwise be applicable.[153]

[140] Jakob in ch 9 above, p 196, states that 'the wealth distribution becomes more predictable and controllable, as a monitored step-by-step transfer of the assets is possible'.

[141] For Canada, see ch 2 above II.2.

[142] Ch 12 above I.D for Canada and the US. For the US, see also ch 1 above IV.C; ch 9 above I, and III.D for Switzerland, and ch 3 above III.E and IV.D for England and Wales.

[143] Ch 5 above IV and ch 3 above IV.A.

[144] Ch 5 above IV for New Zealand and ch 4 above II.B for Scotland.

[145] Here see ch 8 above V.B on perpetual dispositions through the use of foundations. By contrast, Jakob reports that in Switzerland, the trend of foundations goes not towards perpetuation but rather towards the distribution of all foundation assets to the beneficiaries. See ch 9 above III.A, text before fn 21.

[146] See ch 9 above I. On fragmentation of assets, see also Christandl in ch 6 above V, who points however at the fact that the will-substitutes available in Italy cannot really avoid fragmentation, not even the *patto di famiglia*.

[147] Ch 10 above III and ch 6 above V.

[148] Ch 1 above I; ch 2 above II.A; ch 3 above IV.B; ch 4 above II.B; and ch 12 above, fn 6.

[149] Ch 12 above, fn 6 for the US. See also ch 4 above, text at fn 17.

[150] Ch 9 above VII with regard to foundations; see also ch 6 above III.C with regard to family businesses.

[151] For instance, while Dutta in ch 8 above VIII thinks that will-substitutes should be regarded with suspicion, Jakob in ch 9 above VII advocates switching from a 'negative' avoidance-based approach to a 'constructive' one.

[152] This is more likely to be the common law perspective: see ch 3 above IV; ch 11 above V; and ch 14 above III.

[153] See, esp the analysis from the German and French perspective described in chs 8 above V and 7 above I. In contrast, see ch 9 above VII and ch 11 above V.

However, value judgements are frequently based on the assumption that all choices are conscious and rational, which may not always be the case. In fact, one aspect that has emerged from the contributions is that there is not always a clear estate planning strategy behind the use of particular instruments. The idea that people are perfectly aware of the (at least perceived) limitations of the will and the law applicable to wills, or the procedural aspects of the transfer on death, as well as of the various benefits of other available instruments, may actually be misleading. This is partly due to the fact that with some of these instruments, the estate planning features are not at the forefront of the person's mind. While someone writing a will usually intends to distribute assets on death and to benefit another person, pension schemes are often entered into when a person is first employed, and the idea of succession is remote.[154] Where, as in Australia, pension schemes are compulsory, an employee has no choice about whether or not to join the scheme. The circumstances for a person who sets up a trust or a foundation are likely to be different, as they would normally employ the services of a financial or legal adviser, who may alert the client to the need to also plan his or her succession.

We have further learned that there may be instances in which a will cannot be used, even if the deceased would have wanted to. For instance, in Germany and Italy, it is not possible to dispose of shares in partnerships through a will.[155] The same is true of death benefits of English private pension schemes, which require the scheme member to complete a nomination form as provided by the respective scheme.[156] We should also not forget that sometimes it is the government, the legislature, or the courts themselves that create a favourable environment in order to encourage citizens to use a certain device, for instance, through tax incentives or more favourable formality requirements,[157] or by exempting beneficiaries from claims made by creditors, family members, or dependants. It is, therefore, difficult to provide a definitive assessment of the true motivations behind the use and proliferation of will-substitutes. In fact, one could read the use of a particular instrument both as an attempt to avoid certain rules and, at the same time, as an expression of different needs, and yet equally legitimate. Even in the US, it would seem that the rise of will-substitutes is not just to be explained as a result of simple dissatisfaction with the efficiency of the probate procedures.[158]

In order to fully capture the phenomenon of will-substitutes, and the breath of different characteristics they feature, it is perhaps more useful to distinguish between motives that are essentially related to the specific traits of some of the instruments examined (below at IV.B), and motives that are related to the nature and effect of the current law of wills and succession more generally (below at IV.C).

[154] See ch 3 above IV and ch 12 above I.A.

[155] Ch 8 above VII.B.

[156] Ch 3 above II.A.iii.

[157] See ch 3 above IV.

[158] Ch 4 above, text after fn 7.

The latter include the procedural aspects of the transfer of wealth, which might be perceived as limiting or outdated, and which some testators or estate planners may want to avoid. Of course, one difficulty with this is that one sought after characteristic of a will-substitute may at the same time also represent a perceived disadvantage of the will and its related rules, so that it is not always possible to draw a clear distinction. Nevertheless, it is important not to view will-substitutes merely as mechanisms of avoidance,[159] especially since people may be wrong about the consequences, and assume that they can escape certain rules, when in reality they cannot.[160]

B. Motives Related to the Specific Nature and Characteristics of Certain Will-Substitutes

One of the reasons why people use certain will-substitutes is that usually they can offer something that wills cannot, and are at times also more 'sophisticated'.[161] In a way, the 'more' they offer lies in the fact that they are different from wills. After all, if they were too similar, what would be the point of using them?[162]

Generally speaking, most will-substitutes are less 'death-related' and, therefore, perhaps less emotive than wills. As Thomas Atkinson put it some years ago, '[a] superstitious prejudice against wills is found in many persons past middle age. Apparently they think that testamentary preparation for disposition of their property at their death will somehow hasten their demise'.[163] Will-substitutes do not usually force people to go through the tragic rituals of will-making, so that they can evade the sense of definite end that accompanies a will.[164] As noted earlier, they are often entered into at an early stage of a person's life, when they first start a job or have a family, and they are not yet in the mindset of planning their succession. One could, for instance, argue that for some people, the decision to use a life insurance has more to do with the lifetime aspects of the life insurance, and that the effects that take place upon death are a mere 'add on'. A similar argument could be made about joint bank accounts. Several contributions have shown that it is common for couples to hold bank accounts jointly, and the reason for that may be in the first instance administrative convenience,[165] rather than a conscious

[159] See ch 3 above IV; ch 4 above II; ch 9 above VII; and ch 12 above I.A.

[160] See, for instance, the part concerning claims of family members and dependants, below at IV.C.ii.b.

[161] See ch 11 above IV.

[162] See Christandl in ch 6 above, p 132: '[T]hey [will-substitutes] would not present sufficient advantages that would set them apart from wills'.

[163] TE Atkinson, *Handbook of the Laws of Wills* (St Paul MN, West Publishing Co, 1937) 122.

[164] A Zoppini, 'Contributo allo studio delle disposizioni testamentarie "in forma indiretta"' (1998) 52 *Rivista Trimestrale di Diritto e Procedura Civile* 1077, 1080, fn 6; D Clark (ed), *The Sociology of Death: Theory, Culture, Practice* (Oxford, Blackwell, 1993).

[165] Ch 2 above I.B.i.a and ch 3 above II.D.iii.

choice to benefit the surviving partner on their death. The same does not, however, apply to American PODs, which are bank accounts set up with the sole purpose of benefiting someone exclusively with effect from death of the account holder.

Aside from the mere 'symbolic' or 'emotional' attractiveness of will-substitutes, most of them involve specific lifetime effects that distinguish them from wills and that explain their attractiveness, some of which we will examine below.

i. Will-Substitutes as Saving and Investment Devices

As we noted earlier, some of the instruments analysed, such as life insurance and pension plans, are investment products and function as saving mechanisms, the primary purpose of which is to provide for future uncertain events. Their usefulness as a savings device lies not merely in the yields they generate, but also in the fact that money so invested cannot be easily taken out. The possibility of designating a beneficiary to receive the proceeds or death benefits often appears to be a welcomed side effect or advantage. This is even more so the case with pension schemes whose raison d'être is primarily to provide for retirement.[166] In a sense, the underlying motive of the scheme member in joining a pension scheme or plan is even less 'altruistic', than is the case with life insurance, as the person entering the plan is primarily providing for him or herself.[167] This is especially true where the scheme is compulsory.[168]

The fact that wealth is passed on through life insurance and pension schemes is thus also a consequence of the fact that nowadays families tend to invest their wealth differently, and no longer just in real estate.[169] Since much of the wealth is invested in financial assets, it is therefore only natural that when disposing of wealth held in such instruments, the person uses the mechanism that the financial providers offer, ie, a beneficiary designation or nomination form.[170] As Gallanis put it, 'completing these forms is faster and easier than writing a will and is essentially costless'.[171] In other words, the decision not to dispose of these assets through a will may have nothing to do with the characteristics of the will itself, or the law applicable to it.

One reason why wealth is increasingly invested in certain financial products may be that we live longer and we need more than just wealth to provide for our retirement; we also need private modes of providing for old age and care. In fact, at least in Europe, provision for old age and care has become increasingly *privatised.*

[166] For Canada, see ch 2 above I.D and ch 12 above I.A. See also ch 3 above IV for England and Wales.

[167] DB Bernheim, 'How Strong are Bequest Motives? Evidence Based on Estimates of the Demand for Life Insurance and Annuities' (1991) 99 *Journal of Political Economy* 899.

[168] Ch 5 above II.D.

[169] JH Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission' (1988) 86 *Michigan Law Review* 722, 728.

[170] Ch 3 above II.A and B and ch 4 above II.E.

[171] Ch 1 above, p 11.

It follows that the success of will-substitutes is also a by-product of an ageing society in which people are likely to need more means for their retirement, and for a longer period of time, but are also required to organise their own welfare and to accumulate assets for that purpose.[172] In addition, these instruments can offer a way to provide dependants with increased revenue, and in the case of pensions the scheme members can sometimes even determine whether the beneficiary gets a lump-sum payment or a pension. This is a choice the will does not offer.

ii. Will-Substitutes as a Way of Holding, Managing and Preserving Property

Other will-substitutes, such as trusts, foundations and joint tenancies represent ways of holding and, in some cases, also of managing and preserving property. Although these instruments can operate as will-substitutes, this is not their sole or primary purpose. They each produce specific and significant lifetime effects.

A will does not impact on the way in which the testator holds his or her property during lifetime; it only declares what shall happen upon death to the property that is left. By contrast, during a person's lifetime, wealth held jointly,[173] held on trust,[174] transferred to a family foundation,[175] or held in a partnership[176] is already governed by the rules on joint ownership, by the trust deed, foundation or partnership rules. The wealth is dedicated to a specific purpose, even though the transfer is revocable.[177] Those who acquire or transfer property in joint names, settle wealth on trust, establish a foundation, or invest in a partnership, become a joint tenant, settlor, a founder, and partner already during lifetime, and this inevitably affects how a person can dispose of their wealth.

In the case of trusts, foundations and partnerships, a 'structure' is established that can provide 'continuity and stability'.[178] In some cases, the whole purpose behind it is to shield assets from creditors and family members and dependants, and to pursue a variety of additional purposes. Among these also count the possibility for the founder or settlor to constitute a 'privately created succession regime',[179] and to potentially *control* the distribution and management over

[172] See J Finch and J Mason, *Passing on. Kinship and Inheritance in England* (London, Routledge, 2000) 136. Conversely in the US, it would seem that 'planning for old age is private no more': MA Case, 'When Someday is Today: Carrying Forward the history of Old Age and Inheritance into the Age of Medicaid' (2015) 40 *Law & Social Inquiry* 499, 501.

[173] For Canada, see ch 2 above I.B; for the US, ch 1 above II.F; for Australia and New Zealand ch 5 above II.B and III.B; for England and Wales, see ch 3 above II.D, as well as ch 11 above IV.E; and for Scotland, see ch 4 above III and IV.

[174] See, esp ch 1 above II.A; ch 5 above II.C; and from the perspective of investors, see ch 11 above IV.A.

[175] See, esp ch 9 above III and IV. See further ch 11 above IV.C.

[176] See ch 6 above III.C.

[177] See the introduction, above at II.

[178] Ch 5 above III.C.

[179] Ch 8 above V.B.

generations. The settlors or founders are also often keen to avoid fragmentation and dissipation of assets.[180]

As noted earlier, trusts and private purpose foundations function as true will-substitutes only where they leave space for active interference of the settlor or founder, so as to allow him or her to determine beneficiaries on his or her death. The reservation of powers is not only a way of financially controlling the trust and foundation, but can also entail a symbolic effect. Jakob reminds us that family foundations 'have the potential to transport more than just property'.[181] Kalss points in the same direction by highlighting that corporate property is 'special property'.[182]

However, even though trusts and foundations can operate as will-substitutes, the prospect that they allow for a 'private succession law', in the sense that the succession is organised and designed also for future generations,[183] appears to be only one of their many possible advantages. Of course, much is speculative, but given their substantial and symbolic lifetime effects, one should not overestimate the weight given to possible effects these instruments can have on death.

C. Motives Linked to the Functioning of Succession Law

Despite the fact that the transfer of wealth may not always be at the forefront of the mind of those resorting to a will-substitute, many contributions have left no doubt that will-substitutes can be used to avoid the consequences that ensue from transferring wealth by means of a will. Sometimes a person may intend to completely avoid succession law rules from applying (without wanting to resort to an instrument that would involve losing immediate control over the assets), and at other times people may try to avoid just one of the consequences of the application of succession rules. For instance, in Germany, foundations allow a founder to deviate from the succession law rules against perpetuities, but not other provisions.[184] Finally, in some instances, the intention may be to 'modify' or perhaps 'temper' the effect of certain rules, rather than to 'avoid' them entirely.[185]

Any discussion on avoidance strategies presupposes that will-substitutes are not subjected to 'ordinary' succession law, which—as the contributions to this book have shown—is not always true. For instance, provisions such as those in place to protect family members and dependants have been extended so as to capture certain will-substitutes.[186] As far as creditor rights are concerned, some instruments

[180] Ch 5 above IV. This is a concern business owners often have. For ways of tackling the risk of fragmentation and termination of a partnership or corporation see ch 10 above V.

[181] Ch 9 above VII.

[182] Ch 10 above I.

[183] Ch 8 above V.B. See also ch 4 above I, text before fn 7.

[184] Ch 8 above V.B.

[185] Ch 8 above VI.

[186] See below at IV.C.ii.b. See also ch 15 above III.

are treated more favourably than others.[187] Thus, the picture is far from uniform. However, it is certainly true that conventional succession law rules are not automatically and necessarily extended to will-substitutes. Depending on the respective legal environment and the type of instrument employed, will-substitutes can therefore deviate from wills in several respects including, but not limited to, the following: the way the estate is administrated and transferred upon death;[188] the required formalities;[189] the applicability of default rules such as those on the revocation and construction of wills;[190] hotchpot rules;[191] rules on unworthiness and forfeiture;[192] admission of binding effects;[193] liability to creditors;[194] duties towards family members and dependants;[195] and, last but not least, different tax implications.[196]

Although each and every one of these differences may theoretically constitute a reason why an individual chooses to use a particular will-substitute, some aspects are more important than others. In fact, looking at the various contributions collected in this volume, it would seem that, by and large, testators or estate planners are unconcerned with rules on unworthiness or forfeiture, or those on the construction and rectification of wills. These are aspects that at least most testators will be unaware of, or care very little about. Also, and this is perhaps more unexpected, the various contributions reveal that the avoidance of formalities prescribed for wills does not really play an important role in the decision-making process,[197] nor does it seem to be a concern to most authors.[198] In some legal systems the formalities required for will-substitutes are even stricter or more demanding than those foreseen for wills, at least in jurisdictions where oral or holograph wills are admitted.[199] Even in jurisdictions where holograph wills are not recognised, courts may have discretionary powers which allow them to admit documents to probate that do not satisfy the formal requirements for execution of a will, for example, in Australia and New Zealand.[200] In any event, most will-substitutes require at least some

[187] See above at III.A. See also chs 12 and 13 above II and IV.

[188] Ch 1 above II.

[189] Though the requirements are not as different, and formality is therefore not as big a factor as expected. See below at n 197.

[190] Ch 4 above VIII.D; ch 6 above VI.D; ch 5 above IV and but see ch 1 above V.

[191] See ch 3 above III.E and ch 6 above II.B.

[192] Ch 6 above VI.C; but see ch 5 above V for Australia.

[193] Ch 6 above I.B.

[194] Ch 6 above IV.B; ch 12 above I.E.

[195] Chs 14 and 15 above V and III. For New Zealand, see ch 5 above V.

[196] Ch 2 above II.A; ch 3 above IV.C; ch 5 above IV; from the perspective of international investors, see ch 11 above III; but see also ch 1 above IV.A.

[197] Ch 8 above III. See further ch 2 above II for Canada and ch 4 above II.D for Scotland, as well as ch 6 above VI.B for Italy.

[198] Ch 2 above II.B. See further ch 6 above VI.B.

[199] See KGC Reid, MJ De Waal and R Zimmermann, 'Testamentary Formalities in Historical and Comparative Perspective' in KGC Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law, volume 1. Testamentary Formalities* (Oxford, OUP, 2011) 437 ff.

[200] See N Peart, 'Testamentary Formalities in Australia and New Zealand' in Reid, De Waal and Zimmerman, ibid, 329, 349.

formalities and these do not usually differ that significantly from those required for wills.

Much more prominent would appear to be other considerations such as: (i) changing the way in which the transfer of wealth takes place, that is to say the procedural implications of the administration and transfer of the estate; and (ii) sheltering assets from claims of third parties, including creditors, family members and dependants, as well as tax authorities. Both of these considerations will be discussed below.

i. Will-Substitutes as a Means of Changing the Way in which Property is Transferred

We have learned that, in the US, will-substitutes have primarily developed as a probate avoidance instrument, due to the fact that the probate procedure is costly, time-consuming and overall cumbersome.[201] The mere fact that will-substitutes are explicitly defined as arrangements under which rights shift 'outside probate' or are named 'nonprobate transfers' or 'nonprobate wills' demonstrates the strong link between the emergence of will-substitutes and probate procedures. Even though Gallanis has pointed out that other considerations too may play an important role,[202] much of the attractiveness of will-substitutes stems from the—at least perceived—disadvantages of the probate process.

Interestingly, this is not true of all jurisdictions that have probate procedures in place. Neither in England and Wales, nor in Australia or New Zealand, does probate avoidance feature so prominently among the reasons for choosing a will-substitute.[203] The same applies to Canada, where probate appears to be a 'relatively rapid and straightforward affair'.[204] That said, there are some aspects of the probate process that a testator may want to avoid, even in a legal system where overall the procedure is not as cumbersome, expensive, or lengthy as in the US. For instance, by avoiding probate one can achieve a direct transfer of the wealth to the beneficiary, without it passing through the hands of a personal representative, and the transfer can thus be kept confidential, which, for a variety of reasons, may be an attractive prospect.[205] Given that it is direct, sometimes, it may also be quicker.

Civil law jurisdictions do not usually have a probate procedure but even in Germany we are told that, upon closer inspection, the transfer of an estate may give rise to difficulties a testator may wish to avoid. For instance, where a will

[201] See ch 1 above I.

[202] Notably the fact that will-substitutes are cheaper, quicker and easier to create than wills and the fact that they can often override the rights of creditors and dependants. See ch 1 above I. See further ch 4 above II.

[203] Ch 3 above IV and ch 5 above IV.

[204] For Canada, see ch 2 above II.A. In Scotland, too it does not seem to represent a problem. See ch 4 above II.

[205] Ch 3 above IV.B, but also ch 4 above II.F. See further ch 2 above II.A.

is contested, court proceedings may be necessary, which may induce some people to grant a *post-mortem* or *trans-mortem* mandate, to enable a mandatary to distribute the assets after the death of the mandator, thereby reducing the risk of a will contest.[206]

Thus, to conclude, one rationale behind the use of at least certain will-substitutes may be a desire to avoid the involvement of a personal representative (which is the case in common law jurisdictions) and/or court proceedings, and thus any form of state control or intervention.[207] At least with certain devices, we have seen that there is an underlying desire to *privatise* the succession process,[208] in order to obtain greater control over how wealth is passed and thus over the timing of the distribution.

ii. Will-Substitutes as a Means of Sheltering Assets from Claims of Third Parties

Besides wanting to obtain greater control over how and when the transfer takes place, testators may also desire greater control over who gets the property and how much. This can be achieved with greater certainty, where it is possible to isolate the assets from claims of creditors or family members and dependants.

a. Rights of Creditors

One of the functions of succession law is to protect creditors and to ensure that the deceased's debts are paid. Due to the fact that some of the instruments analysed allow for a transfer outside the traditional structures of succession laws, creditors may not have access to the wealth which is transferred and may be left empty-handed. However, the extent to which the desire to shelter assets from creditor claims plays a primary role is often unclear.[209] In some cases it may well represent the primary motive for investing or holding wealth in a particular way, but in others it may simply be a welcome secondary consequence.

Gallanis has shown that, in the US, where there is a trend towards harmonising the law of wills and will-substitutes, the approach taken to creditor rights in the context of will-substitutes is not yet uniform and their interests remain inadequately protected. Aside from revocable trusts, in most US states, creditors of the deceased person are denied access to wealth transferred through will-substitutes. Although the UPC aims to protect creditors of the deceased via the general provision in § 6-102(b), which can make non-probate beneficiaries liable for the debts of the deceased up to the value of the assets they receive, the provision is in force in only a small number of states. Conversely, Canadian law lacks any general

[206] Ch 8 above IV.A and B.
[207] Ch 5 above IV.
[208] See above at IV.B.ii and Dutta, *Warum Erbrecht*, above n 85. See further DJ Feder and RH Sitkoff, 'Revocable Trusts and Incapacity Planning: More than Just a Will Substitute' (2016) 24 *Elder Law Journal* (forthcoming) II.A.
[209] Ch 3 above IV.D. According to L Smith in ch 12 above I.A, avoidance of creditors' rights is not normally why people use will-substitutes in Canada and the US.

provision of the kind contained in the UPC. That said, both in the US and Canada, in many cases will-substitute assets are independently protected by legislation from creditors' claims, for policy reasons relating to the protection of retirement savings and, in the case of life insurance, of dependants.[210] In this sense, will-substitutes do not necessarily represent a threat to creditors in and of themselves.

By contrast, it would seem that in Scotland, there is more potential for will-substitutes to prejudice the rights of creditors.[211] In England and Wales, creditors can get hold of some assets, but not of others and the reasons for that are not always clear.[212] It would also seem that will-substitutes are more likely to be challenged under German than under English insolvency law, partly due to the high cost of English court proceedings as well as the uncertain outcome.[213]

In France, Pérès mentions that creditor rights are set aside both in the case of the *tontine* and of life insurance, which represents the most important will-substitute in France. In Italy too, benefits transferred by a life insurance contract enjoy the special privilege of being protected against the claims of both the insured's and the beneficiary's creditors.[214] As a consequence, where the estate is insolvent, the beneficiary of a life insurance, who is also the heir of the deceased, may disclaim the inheritance, without losing the benefits under the insurance contract.[215] Whether the same applies to death benefits paid under Italian private pension schemes is still unclear.

Thus, overall, the protection of the interests of creditors is not always guaranteed, and some of the most common will-substitutes are exempted from creditor claims, leaving the estate without sufficient assets to answer all claims. However, the question of creditor protection is not just relevant for cases where the estate is insolvent. A general problem for all creditors is that they have to find out about the existence of other instruments, besides the will, and have to identify the various beneficiaries against whom to bring a claim,[216] which makes the whole process much more cumbersome and costly for creditors.

b. Rights of Family Members and Dependants

Common law, as well as civil law, jurisdictions know of specific rights in the estate granted to family members and dependants, either in the form of discretionary 'family provisions claims', or in the form of statutory fixed rights, such as the US 'elective share',[217] the German 'compulsory share' or the Romanic 'forced heirship'.[218]

[210] Ch 12 above III.
[211] Ch 4 above II.F.
[212] Ch 3 above III.D.
[213] Ch 13 above IV.B.ii.c.
[214] Ch 6 above III.A.
[215] Ch 6 above III fn 37.
[216] See ch 3 above III.D and ch 6 above IV.C.
[217] See ch 1 above VI.A, text after fn 114.
[218] See ch 14 above III and ch 15 above III.

Despite technical differences and divergences in how testamentary freedom is considered, the way in which jurisdictions approach will-substitutes and the rights of family members and dependants, is not as different as one might expect. The analysed jurisdictions are similar, insofar as they refrain from establishing a general provision or rule that covers all types of will-substitute. Notwithstanding differences in the entitlements of family members, the jurisdictions analysed in this volume generally approach will-substitutes as specific ways of transferring wealth. They either extend the provisions protecting the rights of family members only to some types of will-substitute (eg, in England and Wales, the US, and Canada),[219] or establish that only exceptional types of will-substitute are entirely or partly sheltered from claims of family members (eg, in Germany, France, Italy, and Switzerland concerning life insurance).[220] Even though this fragmented approach reflects the asset-specific nature of most will-substitutes, many contributors in this volume have described the state of the law as 'incoherent', 'problematic', or 'unsystematic',[221] and have called for a 'reintegration' of will-substitutes into succession law.[222] This is in line with a growing trend towards expanding rather than reducing the 'strength' of rights of family members and dependants in relation to will-substitutes.[223]

Yet, another striking similarity between the jurisdictions is the focus on the intention of the deceased when deciding whether or not to treat will-substitutes as part of the law of succession. Whereas civilian jurisdictions mainly rely on the *time* at which the benefit was passed, without looking at the intention,[224] common law jurisdictions generally require there to be clear proof of the deceased's *intention* to defeat the claims of the dependants.[225] Only where that is the case, will they be able to get hold of the assets. This appears to be one of the reasons why on the European continent, claw-back claims concerning will-substitutes are 'standard procedures', whereas there does not seem to be much litigation on this under the English family provision legislation.[226] However, even where claw-back claims are common, will-substitutes still have an indirect effect on the rights of family members and dependants because it is more difficult to trace where the assets have ended up.[227] Thus, as is the case with creditors, the fragmented transfer of wealth has an effect also on family members and dependants.

In the context of the rights of family members and dependants, several contributors considered will-substitutes as a means of 'avoiding', 'evading', or

[219] Ch 3 above III.E; ch 14 above II.A; ch 1 above IV.C; ch 2 above II.B.
[220] See ch 8 above VI; ch 7 above III.A; ch 6 above VI.A; ch 9 above III; and ch 15 above V.
[221] See ch 1 above VII; ch 3 above III; ch 4 above IX; ch 5 above V; ch 7 above III; ch 12 above III; ch 15 above V.
[222] Ch 7 above III; ch 8 above VII; ch 14 above V.
[223] Ch 1 above IV.C; ch 2 above II.B; ch 5 above III.G; ch 12 above I.D, as well as ch 15 above III.B.
[224] See ch 15 above III.A.ii.
[225] See ch 3 above III; ch 5 above III.G; ch 14 above V.
[226] See ch 14 above V and ch 15 above III.A.iii.
[227] Ch 6 above VI.A, text after fn 114.

'bypassing' those rights.[228] That said, much like the case with the avoidance of creditor rights, whether the deceased actually uses a will-substitute in order to infringe the claims of family members or dependants is not always clear. After all, many of them benefit family members anyway, though often in a manner different from that established by conventional succession laws. Also, it would seem that, at least in European continental legal systems, will-substitutes do not present a major danger to the rights of family members, due to the anti-evasion rules that are in place.[229] In that sense they are often better off than creditors. As for common law jurisdictions, the avoidance of dependants' claims seems to be a concern in England and Wales,[230] and New Zealand,[231] but less so in Australia[232] and Canada.[233]

c. Tax Liabilities

One final point to mention, as a possible rationale behind the use of will-substitutes, is the desire to avoid or reduce payment of taxes.[234] Several contributions to this volume leave no doubt that tax considerations play an important role in explaining certain developments, as they can work both as an incentive and a disincentive. For instance, while in New Zealand the fiscal environment has rendered trusts a particularly attractive device,[235] in Australia, stamp duty and capital gains tax have operated as a significant disincentive for settling property on trust.

Tax incentives certainly play a role in England and Wales and explain, for instance, the significant investments in private pension schemes, as well as the lack of popularity of revocable trusts.[236] In Canada too, tax considerations seem to inform choices to join certain retirement schemes[237] and this is true even though no Canadian jurisdiction currently levies an inheritance tax on estates, but rather imposes probate fees that are tied to the value of the estate. Although Australia and New Zealand do not levy estate tax, testators may still want to avoid capital gains or income tax. By contrast, in the US, will-substitutes are subject to transfer

[228] See ch 3 above IV.D; ch 4 above IX; ch 5 above I and V; ch 8 above VI; ch 9 above VII, as well as ch 14 above V.
[229] Ch 15 above III.C.
[230] Ch 3 above IV.D and ch 14 above V.
[231] Ch 5 above V.
[232] Ch 5 above IV. The notional estate provisions prevent will-substitutes from defeating meritorious family provision claims.
[233] Ch 2 above II.B.
[234] For a general discussion, in particular from an investor's perspective, see ch 11 above III.
[235] Ch 5 above II.C.
[236] Ch 3 above IV.C. See also J Finch, L Hayes, J Masson, J Mason and L Wallis, *Wills, Inheritance, and Families* (Oxford, Clarendon Press, 1996) 35, who mention that tax explains the reduction in the number of discretionary trusts. In this sense, see also ch 11 above IV.A. In Scotland '[t]he use of will-substitutes to evade taxation is likely to be a prime objective, though the extent to which this is realistic is questionable'. See ch 4 above II.F, at fn 37.
[237] Ch 2 above I.D.

taxation, so that tax avoidance does not play the same role.[238] That said, the federal tax exemption in the US is relatively high.[239]

However as Matthews states, 'even in the civil law world the imposition of tax—or the availability of reliefs—in specified situations is a well-known instrument of policy, and decisions taken there can be as much tax driven as in the common law countries'.[240] Perhaps unsurprisingly, in Liechtenstein and Switzerland, tax planning is a significant driver behind the use of certain will-substitutes, especially for those who view them as a form of investment.[241] Tax plays a role in other jurisdictions, too. This is, for instance, shown by the contribution by Pérès. Nevertheless, she also reports that some of the devices remain in use even though, in recent times, certain tax advantages that were granted in the past were eliminated. For instance, in the past, marital property arrangements were tax efficient and clearly used for that reason, but even though since 2007 this has changed,[242] they continue to be quite popular. Similarly tax considerations used to play a considerable role in the context of life insurance, but this is also no longer true. Despite this, they represent the most common will-substitute in France. In Italy, consolidation clauses in partnerships (*clausole di consolidazione*) have enjoyed widespread use as a means of avoiding inheritance tax, but they remain popular even after a tax reform has changed the tax treatment. Conversely, private pension schemes continue to have important tax implications in Italy. Thus, although tax considerations can play an important role, it does not follow that where tax privileges are removed, people automatically stop using them. This would support the argument that tax considerations represent one among many possible reasons for choosing one mechanism over another.

V. Consequences and Potential Tensions

Two aspects that we have not yet addressed are the potential pitfalls for the person who has chosen to use a will-substitute, and the challenges these mechanisms present for legal systems as a whole, and, in particular, for the operation and functioning of their succession law.

[238] Ch 1 above I and IV.

[239] In 2015, the US federal estate tax exemption amount is $5.43 million. By comparison, in England, the current tax threshold is £325,000. See ch 3 above IV.C, at fn 135.

[240] Ch 11 above, p 234.

[241] Ch 9 above I.

[242] See ch 7 above II.A.iii.

A. Consequences for the Testator

Having addressed the advantages that the various instruments explored in this volume offer to the person who intends to pass wealth on death, it is time to examine whether will-substitutes are necessarily a 'blessing'.[243]

On the one hand, one could see it as a welcome expression of the private autonomy of a person that he or she can chose to pass wealth on death through a variety of different means and not just through the use of a will. On the other hand, this reasoning only holds true, so long as the mechanisms that are available are reliable and operate in ways that actually allow the person to fulfil his or her wishes, as well as guaranteeing that those wishes actually reflect his or her intentions. As is well known, wills are regulated by a number of intent-effecting rules that are aimed at protecting testators and ensuring that their wishes are realised. Among these count, for instance, the rules on capacity and those on formalities, as well as provisions on lapse, automatic revocation, unworthiness, and rectification and construction of wills, which are often founded on the presumed intention of the testator. In addition, some legal systems also have a probate procedure in place, one of the functions of which is to ascertain the validity of the will. However, there is no such procedure for will-substitutes and this may expose the person using them to certain risks, especially where the formalities for will-substitutes are lower.[244] In the US, for instance, this has been described as problematic, with the most recent scholarship urging improvements to beneficiary-designation forms in order to better effect the donor's wishes.[245]

There may also be other pitfalls in place due to the fact that many will-substitutes have developed in legal practice and are often not specifically regulated, so that it is not necessarily clear whether they are actually recognised as being valid.[246] For instance, Christandl notes that, in Italy, will-substitutes are constantly exposed to the danger of being caught by the trap of the prohibition of succession pacts, which makes many of them unreliable estate planning devices.[247] Similarly, in

[243] Ch 3 above V.

[244] ML Leslie, 'Frustration of Intent in the Wealth Transmission Process' (2014) *Onati Socio-legal Series* 4(2) 283, 302. The authors concludes that, '[b]ecause financial institutions have a vested interest in laws that emphasize efficiency and dispatch over the effectuation of intent, and because estate planning lawyers have only limited abilities to minimize these problems, the problem of intent-frustration is unlikely to be resolved any time soon' (303).

[245] ibid. See, esp MB Leslie and SE Sterk, 'Revisiting the Revolution: Reintegrating the Wealth Transmission System' (2015) 56 *Boston College Law Review* 61. See further SE Sterk and MB Leslie, 'Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession' (2014) 89 *New York University Law Review* 165. For a discussion of possible perils, see also ch 3 above V.

[246] Writing in the 1930s, Thomas Atkinson stated that at that point in time, certain schemes used in the US were without sound theoretical basis and frequently failed in practice: Atkinson, above n 163, 123. Since then, things have changed considerably. See ch 1 above II.

[247] Ch 6 above VII.

Switzerland, certain private purpose foundations bear the risk that they might be considered illicit, and the validity of joint bank accounts with a clause excluding the heirs of the deceased from becoming party to the contact with the bank (*Erbenausschlussklausel*) is also quite controversial.[248] Hence, where the state of the law is ambiguous, will-substitutes can be unreliable.[249]

Moreover, will-substitutes may not quite achieve what was intended. We mentioned earlier that, where the intention of a person setting up a joint bank account is not clearly expressed, the surviving tenant may well end up holding the surplus on trust for the estate, rather than taking beneficially,[250] and the intention to benefit the transferee may be frustrated. It may also be the case that the person using the instrument believes that the instrument carries certain advantages (eg, that it shields the assets from potential claims of creditors or family members and dependants) when in fact that is not the case. For instance, in New Zealand, the insured's intention can be defeated if the surviving spouse or partner elects to apply for a division of relationship property under the Property (Relationships) Act 1976.[251] Similarly, in certain circumstances, French law treats the *tontine* and life insurance as gifts and subjects them to conventional succession rules.[252]

One final aspect to consider is that the use of different devices to dispose of one's wealth can actually render estate planning more complex, thus necessitating the involvement of a legal or financial adviser, which can result in higher costs.[253] In fact, although some will-substitutes can lead to a transfer that in some cases is simpler and quicker, and therefore possibly less expensive, the higher the number of instruments used, the more difficult it may get. It may happen that the person forgets whether they have designated a beneficiary in the life insurance or pension scheme, and who the beneficiary may be, especially since those schemes are sometimes joined early in the life of a person. In other words, cases of accidental succession may occur,[254] and funds may remain unclaimed. But complexity may not be the only problem. It has recently been suggested that a further issue is that estate planning is increasingly being carried out by those who 'do not have the expertise or the incentive to properly advise the client',[255] such as employees of a bank or insurance company. Thus, the increased choice of instruments comes at a cost.[256]

[248] Ch 9 above II.
[249] See also ch 2 above I.E, text before fn 79.
[250] See above at III.A.iii.
[251] Ch 5 above II.E.
[252] Ch 7 above III.A.ii.
[253] Ch 4 above II.
[254] Sterk and Leslie, 'Accidental Inheritance', above n 245.
[255] KD Schenkel, 'Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival' (2008) 41 *Creighton Law Review* 155, 162.
[256] ibid.

B. Impact of the Use of Will-Substitutes on the Operation of Succession Laws

Succession law, whether procedural or substantive in nature, is designed to fulfil a number of different functions. The fact that the mechanisms discussed in this volume may, to a greater or lesser extent, allow for a transfer outside the realm of conventional succession structures and provisions inevitably bears consequences for the operation of such rules. This can create tensions with policy considerations underlying current laws governing succession.

One potential effect of the transfer of wealth on death by means other than wills is that the scope of the application of current succession laws becomes more narrow, unless their reach is extended so as to capture the instruments discussed above. In addition, there are also a number of other direct and indirect effects that stem from the fact that rules of probate, as well as substantive provisions, can be bypassed.

Among the direct effects of the use of will-substitutes is the fact that the transfer, though in some cases becoming simpler and more direct (eg, in that no personal representative is involved and that they are often less formal), is in other respects rendered more opaque.[257] This is primarily a consequence of the fact that the transfer becomes increasingly fragmented, which can be problematic, as we said above, for third parties, such as creditors or family members and dependants.[258] Not only might they need to ascertain whether the deceased has made a will, but also which other instruments he or she may have used to pass wealth on death, and whom the beneficiaries of those transfers are. For instance, forced heirs might run into difficulties when determining the exact basis on which their share has to be determined.[259] Also, it may be more difficult for them to contest the validity of a will-substitute[260] and to enforce their rights through litigation, especially as financial institutions pay or transfer the assets without providing notice to the heirs or dependants.[261]

The use of will-substitutes might also complicate matters for personal representatives and heirs who are required to pay the debts of the deceased. Not only is wealth passed on in certain ways that are unavailable for the payment of the debts of the deceased, they may still count as part of the taxable estate, and therefore may need to be factored in.[262] It is also unclear who is responsible for coordinating assets to make sure that liability for taxes and debts is allocated properly.[263]

[257] Ch 6 above VI.A.
[258] Schenkel, above n 255.
[259] Ch 6 above VI.A.
[260] See ch 3 above III.C.
[261] According to Leslie and Sterk, this increases the likelihood that a 'wrongdoer' will dissipate the decedent's assets before the beneficiary realises that he or she has a valid claim. Leslie and Sterk, 'Revisiting the Revolution', above n 245, 113.
[262] Ch 3 above IV.C.
[263] Leslie and Sterk, 'Revisiting the Revolution', above n 245, 95 speak of problems with asset coordination both during lifetime and on death.

The development of will-substitutes also creates potential tensions as far as the coordination of will-substitutes with the rules of wills is concerned.[264] For instance, in England and Wales, it is unclear whether, and to what extent, a will has an effect on the distribution of pension death benefits.[265] But frictions may also arise with core principles and doctrines of the law of wills. For instance, Christandl mentions the tensions that the use of will-substitutes gives rise to with regard to the rules on unworthiness to inherit and those regulating the revocation of wills.[266] There is also an underlying conflict with the principle of universal succession due to the fact that the transfer is increasingly fragmented.[267]

Finally, the use of will-substitutes may also have an indirect impact. For instance, in some jurisdictions the use of will-substitutes seems to have influenced developments in the law of wills. For instance, according to Lawrence Friedman:

> The rise of will substitutes has, in turn, affected the law of wills itself. This is probably a key reason why the law of wills has become less formal and formalistic. After all, now one can draw up a document that looks like a will, sounds like a will, and acts like a will, but isn't a will.[268]

VI. The Perception and Treatment of Will-Substitutes

A. Will-Substitutes in Legal Scholarship

We noted earlier that the proliferation of will-substitutes has largely occurred in a discrete manner, and that in most jurisdictions succession lawyers have paid relatively little attention to them.[269] However, where they have been discussed, what was the focus of the legal discourse and what was the narrative? In other words, how have legal scholars examined the use of will-substitutes and the rationale behind it?

It is interesting to note that the legal discourse involving will-substitutes has developed differently in the various jurisdictions, which is particularly apparent in civil law jurisdictions, despite the fact that the legal practice of will-substitutes does not necessarily differ that much. For instance, in Italy, the theoretical discussion seems to have primarily focused around the prohibition of succession pacts,[270]

[264] Ch 3 above III and ch 12 above I.C. See also ch 6 above VII.
[265] Ch 3 above III.E.
[266] Ch 6 above VI.C and D
[267] Kipp and Coing, above n 4, 445. See ch 7 above, p 160.
[268] LM Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (Stanford CA, Stanford University Press, 2009) 100 f.
[269] Above at I.
[270] Ch 6 above VII.

with legal scholars discussing the various instruments as potential ways to circumvent it. Although the prohibition also features in the French Civil Code, and the literature exploring its scope is rich, there is relatively little discussion about will-substitutes as such. In Germany, where succession pacts are generally permitted, much of the academic debate involving will-substitutes seems to have centred around § 2301 BGB, and the question of how to draw a clear distinction between lifetime and testamentary dispositions. Even though the provision is widely studied in scholarly literature and is under continuous scrutiny,[271] it would seem to represent one of the most 'obscure' parts of German succession law.[272] That said, in Germany, the debate has also focused on the principle of universal succession and the protection of interests of family members and dependants. By contrast, in the US, the story of will-substitutes is primarily narrated as a story about the limits of the probate system and of attempts to get round it. Much less focus is placed on other motives that may drive testators towards the use of will-substitutes, such as the avoidance of rights of creditors or dependants, which do play a role.[273]

As to the way in which will-substitutes are perceived, it is interesting to note that will-substitutes are frequently studied as avoidance mechanisms. Indeed, several contributions in this volume have described or approached will-substitutes as instruments aimed at avoiding the operation of certain succession law rules.[274] This seems to be especially true of authors reporting on developments in civil law jurisdictions. In the US too, will-substitutes are mostly discussed as probate avoidance instruments. Conversely, in other common law jurisdictions this approach would seem to be less prominent, and there is less talk of *suspicion* or *hostility* towards their propagation or use.[275] The same applies in Scotland.[276] In other words, in these jurisdictions, will-substitutes are more directly discussed as expressions of the private autonomy of a person. This difference in approach might be partly due to the fact that, at least in principle, testamentary freedom is generally more restricted in civil law jurisdictions.

B. The State of the Art of the Law

Will-substitutes have also received little attention from legislatures and the courts have been faced with the difficult task of having to tackle some of the consequences of the use of will-substitutes without much guidance. Several of the instruments discussed in this volume are products developed in legal practice or by financial providers, who regulate their use unless and until the legislature

[271] See ch 8 above III.B and C.
[272] For an interesting discussion, see Windel, above n 5.
[273] Ch 1 above, p 5.
[274] See ch 8 above III–VI; ch 9 above VII. As well as ch 7 above I, text after fn 21.
[275] Ch 14 above, pp 284 and 291, but see also chs 2, 3, 5, 11 and 12.
[276] Ch 4 above II.E.

intervenes.[277] In some cases academics and courts have provided the legal framework for instruments that have emerged in such a way. For example, Dutta has shown that the German Bundesgerichtshof has developed the rules allowing succession clauses in partnership agreements, which were later recognised by the legislature.[278] Other instruments have emerged in legal practice, such as types of *post-mortem* mandates or powers of attorney, even though legal scholars were, and sometimes still are, unsure about their validity.[279]

Overall, the attitude among the various legal systems towards will-substitutes has been quite positive. Several have encouraged their use, or at least the use of certain instruments, by granting, for instance, tax and formal privileges, or by exempting them from claims of creditors or family members and dependants.[280] This is certainly the case in the US, where the state has been 'playing an important hand in encouraging the growth of the nonprobate system',[281] and has been willing to widen the range of will-substitutes.[282] If we look at the privileges granted to certain pension plans, something similar could be said of England and Wales.[283] Pérès confirms that, in France, will-substitutes have been 'allowed to thrive',[284] which is particularly apparent if one considers the position taken in relation to life insurance.[285] Similarly, in Canada, registered plans are incentivised by tax advantages.[286]

At times, legal systems have also tried to mitigate their use, for instance, by levying tax,[287] or by extending the reach of provisions pertaining to succession law, and applicable to wills, to will-substitutes.[288] For instance, in Canada, some provinces have established statutory regimes that allow courts to retrieve the value of dispositions made by will-substitutes, in the context of dependants' relief or will variation claims.[289] In France, 'barriers' have been imposed on will-substitutes,

[277] Leslie and Sterk, 'Revisiting the Revolution', above n 245, 61 write that although Langbein had predicted that financial intermediaries would develop forms designed to ascertain and implement the intention of deceased persons and that legal doctrine would adapt the gap-filling rules developed in wills law for use with nonprobate transfers, this seems not to have happened in all instances.

[278] Ch 8 above, pp 191 f.

[279] Ch 6 above III.D.v and ch 9 above, p 197.

[280] See above at III.A.i–ii, about the favourable climate towards life insurance and private pension schemes. For instance, in Italy, pension schemes were protected from claims of creditors. For details, see G Christandl, 'Vertragliche Sondererbfolge. Der Pensionsfonds im italienischen Recht' in FA Schurr and M Umlauft (eds), *FS Eccher* (2016, forthcoming). English and Scottish statutory nominations are an example of where the legislature has encouraged the use of instruments less formal than the will. See ch 3 above II.B and ch 4 above VII.A.

[281] Langbein, 'Major Reforms of the Property Restatement and the Uniform Probate Code', above n 15, 15. See also ch 12 above, p 252.

[282] Ch 2 above III and ch 12 above II.

[283] See the discussion above, p 328. See also ch 3 above II.A.ii.

[284] Ch 7 above I, text after fn 21.

[285] Ch 7 above II.B.

[286] Ch 2 above I.D.

[287] See ch 5 above V.

[288] See above V.B.

[289] Ch 2 above II.B.

for instance, by allowing the claw-back of certain property into the estate of the deceased.[290] Other legal systems have general anti-evasion rules built into their succession law, such as Germany.[291]

The reason, why legal systems may have tolerated or even encouraged the use of certain will-substitutes, may be explained on the basis of policy or economic reasons.[292] Among these might be the need to encourage people to provide for their retirement and/or their dependants. This explains, for example, why life insurance and pension plans do not only often enjoy tax privileges, but are also generally exempted from claims of creditors of the deceased.[293] That said, Christandl has noted that, in Italy, one reason for treating life insurance differently has also been to protect the insurance companies themselves from such claims.[294] In other words, financial providers have an interest in being able to make pay-outs quickly and without incurring any liability. By paying directly the person nominated in the insurance contract, they can avoid the hassle of having to determine the heir. The importance of the economic arguments have also been highlighted by Pérès in relation to life insurance and the decision of the French courts to treat modern life insurance contracts as chance-event contracts.[295] Finally, the fact that several will-substitutes involve the presence of a third party (ie, a financial provider or a trustee) and require at least some formalities, may also be a reason why legal systems have tolerated lower formality standards for some will-substitutes.

However, it is important to note that the approach taken by individual legal systems has not necessarily been coherent. Not surprisingly, therefore, several authors in this volume are of the view that the current state of the law is unsatisfactory.[296] Although legislatures may have intervened in relation to some instruments and in certain respects, they may not have done so in others. For instance, Pérès reports that in France, the assimilation of the rules applicable to life insurance to the conventional rules of succession law is 'far from perfect'.[297] A similar fragmented picture emerged from our examination of the rights of creditors[298] and that of family members and dependants.[299] Thus, will-substitutes are in some regards treated as wills and submitted to the same provisions and requirements, and in others, they follow different rules. Moreover, in several jurisdictions the reasons

[290] Ch 7 above III.

[291] Ch 8 above III.B.

[292] Ch 6 above, pp 155 f; ch 7 above, p 171; and ch 12 above, p 264.

[293] Ch 12 above, p 264.

[294] Ch 6 above, p 139.

[295] See ch 7 above, pp 170 f. But see also the argument of the English Law Commission which preferred to extend the reach of family provision legislation to pension death benefits because that would mean interfering with the discretion of trustees. See ch 3 above, p 68.

[296] See Braun in ch 3 above VI, and Pérès in ch 7 above IV. See Carr in relation to nominations in ch 4 above VII.B.i.

[297] Ch 7 above III.B.

[298] Above at IV.C.ii.a.

[299] This is certainly true of civil law jurisdictions: see above at III.C.ii.b, as well as ch 15 above III.A.ii. However, see also ch 3 above III.E.

for treating some instruments differently from others are not clear.[300] The lack of a systematic approach may, however, be due to the fact that the instruments used vary in nature and involve very different issues. Hence, a uniform answer may not only be unfeasible, but perhaps also undesirable.

Conversely, in the US, in the beginning courts tended to treat will-substitutes as lifetime instruments, but this was strongly criticised by John Langbein who highlighted the legal fiction this involved and the distortions of legal doctrines it provoked,[301] advocating instead a uniform law of succession. As far as formalities are concerned, in the US, two systems have developed, one for probate and one for non-probate transfer, while other default rules have been harmonised, at least to a large extent. That said, as Gallanis pointed out in his contribution,[302] a counter-trend against harmonisation has taken place at the federal level, and it is unclear what the future holds. Be that as it may, the developments in the US appear to be the exception rather than the rule. No other jurisdiction examined in this volume has made an attempt to harmonise the law of wills and will-substitutes.

What other options do legal systems have? If will-substitutes are perceived as avoidance instruments, one possibility to temper their use could be to reform existing succession laws by 'improving' or changing procedural or substantive provisions that some people may try to avoid.[303] However, as noted above,[304] will-substitutes are not just the result of a desire to avoid succession laws. Therefore reform of existing laws alone may not 'solve' the issues that currently arise.

It would further be possible to create a special set of rules for will-substitutes, inspired by the rules applicable to wills, and to apply them to instruments that pass wealth with effect on death.[305] In other words, will-substitutes could be treated as a separate and special group. The problem with this is that will-substitutes vary in nature and the fact that they pass wealth on death is just one of the many features most of them have.

The better option would seem to be to simply apply the rules applicable to wills by analogy to will-substitutes which, as we saw, is partly what some jurisdictions have been doing, though not always in a systematic manner.[306] This approach

[300] See ch 3 above III and ch 4 above IX. See further ch 15 above, p 322 where Röthel argues that '[i]f there are policy reasons that support a privilege for providential transfers, then this privilege should be applied to any transfer aiming to provide maintenance for the beneficiary'.

[301] JH Langbein, 'The Nonprobate Revolution and the Future of the Law of Succession' (1984) 97 *Harvard Law Review* 1108, 1109.

[302] Ch 1 above VI.

[303] In the US, one response to the nonprobate revolution has been to reform probate. GMP McCouch, 'Probate Law Reform and Nonprobate Transfers' (2008) 62 *University of Miami Law Review* 757. According to Schenkel, the response should rather be to exempt wills from probate: Schenkel, above n 255, 156.

[304] See above at IV.

[305] To some extent this is done in France where specific forfeiture rules where developed that apply to life insurance and that mimic the laws on intestacy. See ch 7 above III.B.

[306] See ch 3 above III.

seems to be favoured by several authors in this volume.[307] One argument in favour of this option is that by treating functionally similar devices alike, greater coherence or consistency could be achieved, and therefore greater fairness obtained for creditors and family members and dependants. Moreover, as Langbein argued a few years ago: 'The subsidiary rules are the product of centuries of legal experience in attempting to discern transferors' wishes and suppress litigation. These rules should be treated as presumptively correct for will-substitutes as well as for wills'.[308] This is indeed the direction law reformers have taken in the US (even though there is a counter-trend taking place). However, unless all will-substitutes were to be automatically subject to succession law, this approach would require clear criteria in order to decide which rules to extend and to which instruments.

VII. Conclusions

A. What Will-Substitutes Teach Us

Will-substitutes tell us something about how testators think and feel about estate planning, their desires and fears and also about what they perceive to be the shortcomings of current succession rules. For instance, the developments show that testators may want to combine lifetime effects with the transfer of benefits on death, and to provide for family members and dependants in ways different from a disposition in a will. This is, for instance, possible through life insurance and pension schemes. The use of will-substitutes would also suggest that people tend to shy away from anything that is too 'death-related'.[309]

The success of certain mechanisms further indicates that some testators may want to be able to bind themselves.[310] On the other hand, others may want to increase their control over the distribution and destination of their wealth, for instance, through the use of foundations and trusts, but also obtain greater certainty as to who gets the property and how it is passed to future generations.

The response to will-substitutes also reveals that legal systems are sometimes prepared to tolerate circumventions of succession rules if it is in the interest of society or of financial providers.[311] As we have seen, they may indeed offer incentives where there are policy and economic reasons at play.[312]

[307] Ch 3 above VI; ch 6 above, text after fn 118; ch 7 above III; ch 8 above VII, as well as ch 15 above V. See further Röthel, *Ist unser Erbrecht noch zeitgemäß?*, above n 105.

[308] Langbein, 'The Nonprobate Revolution', above n 301, 1136 f.

[309] See Atkinson, above n 163.

[310] See ch 6 above III.C.

[311] See above n 294.

[312] Ch 7 above, pp 170 f.

Will-substitutes further reveal what the transfer of wealth looks like in practice. They teach us, for instance, that through the increase in use of will-substitutes, the transfer upon death has become fragmented and has therefore inevitably been rendered more complex, even in legal systems that enshrine the principle of universal succession.[313] The phenomenon further shows that conventional succession rules have certain limitations[314] that could be reformed and that the current laws fail to meet certain perfectly legitimate needs of testators.[315]

Will-substitutes also highlight that it is difficult to draw a clear line between *mortis causa* and *inter vivos* dispositions and that some instruments do not fit neatly into one category or another. As Ashbel Gulliver and Catherine Tilson pointed out many years ago, '[s]uch problems arise most frequently as a result of a person's use of the form of an inter vivos transaction with the objective of producing some of the major consequences normally following the execution of a will'.[316] In fact, some will-substitutes are in a 'no-man's land', as they straddle the boundary between lifetime and *mortis causa* dispositions. Particularly problematic in this sense are, for instance, joint tenancies, revocable trusts, but also the gift *mortis causa*, as well as foundations, as they produce both lifetime and *mortis causa* effects. This explains why some authors in this volume have resorted to a terminology first used by Langbein, who distinguishes between 'pure' and 'impure' will-substitutes.[317]

B. Will-Complements Rather than Will-Substitutes

One aspect that has emerged from the contributions in this volume is that the instruments that are used to pass wealth on death often can or do obtain outcomes that wills cannot usually achieve.[318] For example, will-substitutes allow for certain lifetime effects, provide for the maintenance of dependants, facilitate asset segregation, increase the control over the future disposition and management of wealth, and facilitate the preservation of assets, including businesses. Some will-substitutes also render the transfer more direct, confidential, speedy, and at times, less expensive.

However, the analysis has also shown that the will too can do things that most will-substitutes cannot. For instance, the will allows for the transfer of all of one's

[313] Ch 7 above I.

[314] For instance, in New Zealand the courts take a liberal approach to family protection claims and awards are unpredictable, so that testators may want to choose a device that gives them greater control. Ch 5 above II.C.

[315] eg the use of clauses in partnership agreements seems to respond to a perfectly legitimate need to preserve a business, which is often in the interests of the entire family.

[316] AG Gulliver and CJ Tilson, 'Classification of Gratuitous Transfers' (1941) 51 *Yale Law Journal* 1.

[317] Ch 1 above, p 3 and ch 7 above II.A and B.

[318] See above, p 340.

present and future assets, while most of the mechanisms discussed in this volume are asset-specific and can only be employed to transfer wealth that is held in a particular way or that is invested in a particular form. The only other instrument that comes close to fulfilling a similar function is the trust, but even then a 'pour-over' will is usually necessary because the trust requires segregation of assets. Moreover, in the case of a will, the owner can normally secure secrecy of his intentions during lifetime, and remains free to enjoy and dispose of his wealth in any way he or she sees fit. This, as we have seen, is not possible with most of the instruments we have analysed in this volume. Only certain trusts allow the settlor to maintain a similar freedom and control. Many of the other mechanisms require surrender of some of the control during lifetime. Thus, in order to gain control over the future destinations of assets, it is sometimes necessary to give up a certain amount of control during lifetime. Furthermore, in most legal systems the will is generally simple to make, relatively cheap, and has the advantage of being regulated by a clear set of default rules, which provide the testator with legal certainty.[319] By contrast, some of the mechanisms discussed in this volume are not regulated in a systematic manner and in many jurisdictions it is still unclear whether, and to what extent, they are to be treated as lifetime or testamentary dispositions. This may indeed depend on the specific terms of the agreement entered into with the bank, pension scheme, life insurance etc. To some extent, will-substitutes can, therefore, be unreliable.[320]

Hence, it is perhaps not surprising that in a number of legal systems explored in this volume, wills remain a popular device.[321] For instance, in England and Wales, the official rate of testation seems to be around 41 per cent, and is about the same in the US, where approximately 60 per cent die intestate. The numbers of those leaving a will are lower in France (10 per cent) and in Italy (15 per cent), as well as in Germany (25–35 per cent) but higher in Spain (50 per cent), in Australia and New Zealand (50 per cent) and in Canada (50 per cent).[322] Exactly how much wealth is transferred by will is, however, unclear as we lack data for most legal systems.

In any event, a high or low level of testation is not necessarily an indicator of whether will-substitutes are successfully employed. In fact, even in the US, will-substitutes have not completely displaced wills or probate administration, and it has been argued that they should not be viewed as irreconcilable opposites 'but rather as complementary components of an increasingly varied and complex

[319] Schenkel, above n 255, 182: 'Although post-death administration is undeniably simplified, the pre-death process of estate planning now requires more documentation, techniques, and tasks than ever before. Ironically, the will, the instrument whose undesirable post-death characteristics spawned the turn towards alternative techniques, offers the simplest and most efficient mechanism for channeling a person's testamentary desires'.

[320] See above at III.A.i–vi and viii–ix.

[321] Clear exceptions are France and Italy. For numbers on different jurisdictions see KGC Reid, MJ De Waal and R Zimmermann, 'Intestate Succession in Historical and Comparative Perspective' in KGC Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law, volume 2. Intestate Succession* (Oxford, OUP, 2015) 442, 444.

[322] For Canada, see ch 2 above fn 110.

system of death-time transfers'.[323] Thus, the will may in many cases just be one among a larger pool of instruments to which a person can resort to pass benefits on death.

This means that, to some extent, the expression 'will-substitutes' is a misnomer.[324] The term tells us what these instruments may do, but not what they are and how they operate, ie, their legal nature. Further, it may give the impression that they necessarily 'substitute' or replace the will, when in reality they often *complement* the will, operate where a will could not be used,[325] or work with the will to pursue a common objective.[326] Even where they are used as a substitute to dispose of certain assets, they can never be a substitute for disposing of the whole estate.

C. Denying or Facing Reality?

What has emerged from our analysis is that there may be a variety of different reasons why someone uses a certain will-substitute. Sometimes the choice is guided by specific characteristics of a will-substitute rather than by a desire to avoid any particular rule of succession law, and sometimes they go hand-in-hand. Where avoidance is the driving factor, the most common concerns seem to be escaping the complexity and costs related to the transfer of wealth by will, or shielding the transfer from third-party claims.

What is interesting to note, however, is that will-substitutes are a phenomenon common to all jurisdictions, irrespective of whether or not: (i) estate tax is payable or of the particular tax regime applying in a legal system; (ii) there is a system of probate in place; (iii) the legal system has opted for forced heirship provisions or a system of family provision claims; (iv) the legal system prohibits succession pacts or inheritance contracts; or (v) there are stringent formality requirements for wills.

This suggests that there are needs that extend beyond the specific advantages of each individual will-substitute or the shortcomings of the will and related procedural and substantive norms. These may be a more general result of the fact that we live longer, invest differently, plan differently, have more complex family structures, and that, at least in Europe,[327] care and provision for retirement is increasingly privatised. Indeed, the success of some will-substitutes seems to depend on a number of factors, including the following: the investment and

[323] McCouch, above n 303, 760.

[324] Another author, who has looked at will-substitutes from the perspective of private international law, has introduced the term 'succession substitutes', which he defines as being wider than 'will-substitutes'. J Talpis, 'Succession Substitutes' (2011) 356 *Recueil des cours de l'Académie de droit international de La Haye* 9, 24 ff, 43 f. However, this term does not seem to be particularly accurate either.

[325] Ch 1 above, p 5; ch 3 above I; and ch 9 above VII.

[326] See what Dutta says about succession clauses in partnerships in ch 8 above VII.

[327] For the US, see Case, above n 172.

saving patterns of a particular population; the nature and role of social security and retirement systems of the individual jurisdictions; the type of business structures; and the importance of private ownership in land (family homes). In other words, at least in this field of succession law, the cultural, social and economic background plays an important role, even though there are clear common trends among the jurisdictions studied.[328] Thus, there may be need for more flexibility and consequently more than one instrument to pass wealth on death.

Clearly, will-substitutes are not just a temporary phenomenon, and it is time that the issues that their use inevitably raises are addressed in a proactive manner. Whether the time is ripe for legislative reform is not clear. However, there is no doubt that this area requires a more in-depth discussion and further studies,[329] including empirical and sociological investigations. Will-substitutes represent a chance to rethink some of the existing principles and doctrines, and to investigate whether current succession rules are still at pace with our time. At the same time, they also offer an opportunity to remind us of what is unique to wills, what drives succession law, and what legal systems consider to be inherent and special to it.

[328] See what we said about life insurance, above at section III.A.i.

[329] According to Christandl, in Italy, the discussion needs a fresh start and should focus on what actually happens in practice. See ch 6 above VII. Campbell too believes that further research is worthwhile: ch 2 above III. See further Braun in ch 3 above VI; Carr in ch 4 above IX; and Pérès in ch 7 above IV.