

# Will-Substitutes in the U.S. and in Spain

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*ABSTRACT: Globally, the use of will-substitutes to transmit property upon death has been on the rise. Will-substitutes, voluntary and freely revocable instruments that effectuate the post-mortem, gratuitous transfer of assets, operate outside the confines of traditional succession law. In the United States, the motives driving the proliferation of such mechanisms and the legal implications of their use have been extensively addressed by both the legislature and legal doctrine. In Spain, by contrast, the gradual adoption and growing use of will-substitutes has failed to garner similar scholarly interest and legal elaboration. In this article, written from the perspective of a continental lawyer, we will explore the characteristics of the American and Spanish succession law systems that have led to the unequal development of will-substitutes.*

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## I. INTRODUCTION

Currently, any work on succession law that aims to be thorough must look beyond classical models of succession (wills, intestacy, and inheritance contracts), and take will-substitutes into consideration—namely, those mechanisms that transfer property upon death outside the traditional schemes of succession law.

In recent decades, there has been a striking increase in the use of will-substitutes (life insurance policies, beneficiary designations in private pension plans, etc.). This phenomenon is taking place on a global scale, although individual jurisdictions may have different reasons for their use, depending on the legal context in which they arise.<sup>1</sup> In the United States, will-substitutes have become a part of the country's uniform law and are supported by the theoretical backing of a consolidated legal doctrine. Most notably, John H. Langbein's article, *The Nonprobate Revolution and the Future of the Law of Succession*,<sup>2</sup> began a legal debate that has continued for over thirty years.<sup>3</sup> By contrast, Spain's gradual adoption and growing use of the will-substitute has not been accompanied by similar scholarly interest and legal development.

This Article succinctly examines the characteristics of the American and Spanish succession law contexts that have led to the unsteady development of will-substitutes. To begin, Part II of the Article surveys will-substitutes in the United States from the perspective of a continental lawyer. It will focus on the main reasons for why these instruments have experienced a boom and identify those elements that define them conceptually. Part III of this Article highlights the traits of the Spanish succession law systems that may explain the uneven degree of development found there, and the main features of will-substitutes (applying the U.S. concept) that are increasingly utilized in practice.

1. The global phenomenon of will-substitutes and the current interest in its study are exemplified by works such as *PASSING WEALTH ON DEATH: WILL-SUBSTITUTES IN COMPARATIVE PERSPECTIVE* (Alexandra Braun & Anne Röthel eds., 2016), which has become a leading reference text on the subject in the field of comparative succession law.

2. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). The article is considered one of the most influential articles ever written about trusts and estates in the United States. See Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 61–62 (2015).

3. Thomas P. Gallanis, *Will-substitutes: A U.S. Perspective*, in *PASSING WEALTH ON DEATH: WILL-SUBSTITUTES IN COMPARATIVE PERSPECTIVE*, *supra* note 1, at 9–29.

## II. WILL-SUBSTITUTES IN THE U.S.

### A. MOTIVATING FACTORS FOR THE PROLIFERATION OF WILL-SUBSTITUTES

In the United States, will-substitutes enjoy great popularity, and the rise in their usage is attributable to many factors. This Section will first analyze the problems typically associated with the U.S. system of administration of a decedent's estate. Second, it will examine relevant socio-economic changes, paying special attention to financial intermediaries that specialize in offering alternative modes of transferring financial wealth on death. Finally, this Section will evaluate the role of the courts, which have indulgently accepted the validity of will-substitutes.

#### 1. Problems Concerning the Administration of Estates

Under Anglo-American common law systems, traditional *causa mortis* wealth transfer modes—testate and intestate succession—require judicial supervision. Regarding wills, the role traditionally performed in continental legal systems by the Latin Notary—the public officer who determines the capacity of the testator and authenticates the will *ante-mortem*—is filled by a *post-mortem* court-supervised process that decides whether the will is valid. This process is known as “probate,” from the Latin *probare*, meaning “to prove.”<sup>4</sup> Yet, the word “probate” is also used in a broader sense to refer to the whole administrative process of the decedent's estate (what is known as “probate administration”).<sup>5</sup> Generally speaking, an executor (named in the will) or an administrator (appointed by the probate court if the testator did not name an executor) is entrusted with the probate property as the fiduciary of the estate to administrate it and eventually distribute it among the beneficiaries.<sup>6</sup> Setting aside the procedural details of the probate system, which vary from state to state, it must be stressed that fiduciaries fulfill the typical functions of universal heirs under civil law, namely, the administration of the estate and the execution of the testator's intent. Hence, as opposed to civil law systems of universal succession, the role of the estate's beneficiaries is strongly limited during the probate process.<sup>7</sup>

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4. See THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND ESTATES 2 (6th ed. 2014).

5. *Id.* at 7.

6. *Id.*

7. A journal article published in 1948 pointed out the following paradox:

The countries of the continent of Europe are usually regarded as being fond of paternalistic governmental interference with private affairs, while in this country the traditional hostility to governmental meddling has tended to keep state supervision of private matters at a minimum. Yet, with respect to the transfer of property upon death, the roles are curiously reversed. While in Europe judicial or judicially supervised administration of decedents's estates constitutes a comparatively rare exception, it is in this country, at least theoretically, required in every case.

Max Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 538 (1948).

The judicialization of estates is one of the U.S. succession system's central characteristics; however, it also has historically been the main reason for much of its criticism.<sup>8</sup> Accordingly, the 1969 Uniform Probate Code ("UPC") sought "to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors."<sup>9</sup> However, by the time the UPC was enacted, the bad press surrounding the probate system had already infiltrated American society,<sup>10</sup> which perceived it as a confiscatory tool at the service of judges and lawyers.<sup>11</sup> Many associate the probate system with "delay, expense, and lack of privacy."<sup>12</sup>

The social discontent surrounding the probate system popularized the idea that probate was something to be avoided, and will-substitutes appeared to be the best way of accomplishing that.<sup>13</sup> Certainly, the donor may obviate the system by transmitting wealth in anticipation and in advance of future

8. Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 366 ("The probate process in American law is formal and bureaucratic to a degree almost unique among the world's legal systems.")

9. See UNIF. PROBATE CODE § 1-102(b)(3) (UNIF. LAW COMM'N 2010). As a matter of fact, UPC Article 3 (*Probate of Wills and Administration*) offers different options that adapt the degree of judicial intervention to the particular characteristics of every estate. The model is emphatically described as a "Flexible System of Administration of Decedents' Estates." See *id.* art. III general cmt. Furthermore, UPC Article 3 was amended in 1982 to include the so-called "succession without administration," an alternative to the system of flexible administration that is derived from civil law "and permits the heirs of an intestate or residuary devisees of a testator to accept the estate assets without administration by assuming responsibility for discharging those obligations that normally would be discharged by the personal representative." *Id.* art. III, pt. 3, subpart 2, prefatory note; see also *id.* §§ 3-312 to -322 (describing in detail the nature, scope, and application of this alternative system); Eugene F. Scoles, *Succession Without Administration: Past and Future*, 48 MO. L. REV. 371, 387 n.63 (1983) (explaining the 1982 amendment to the UPC that introduced succession without administration). Even though succession without administration was presented by its backers as an efficient option both in economic and temporal terms, it has not been formally adopted in the United States. See *id.* at 372-73. For a succinct description of the different procedures of estate administration provided for by the UPC, with particular emphasis on the pros of less intervention, see generally Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession Without Administration*, 50 S. TEX. L. REV. 449 (2009).

10. It is worthy to note that in 1965, a book titled *How to Avoid Probate!* became a bestseller; it has been published in five editions to date, the most recent in 1993. NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (5th ed. 1993).

11. We need not go back too far: In 2005, Professor John H. Langbein appeared before the Connecticut Legislature Committee to expose "The Scandal of Connecticut's Probate Courts." John H. Langbein, "The Scandal of Connecticut's Probate Courts," *Statement of Professor John H. Langbein to Conn. Legislature Committee*, YALE L. SCH. (Oct. 11, 2005), <https://law.yale.edu/yls-today/news/scandal-connecticuts-probate-courts-statement-prof-john-h-langbein-conn-legislature-committee>. Professor Langbein denounced Connecticut probate judges for using their influence to prevent the UPC (as well as any other reform aimed at simplifying the Connecticut probate system), from being enacted. *Id.* He attributed their obstinance to spurious economic interests, and famously declared: "Don't die in Connecticut." *Id.*

12. John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 43 (2009).

13. This is why they are also known as "nonprobate mechanisms" or "nonprobate transfers." See UNIF. PROBATE CODE art. VI.

succession, but it would prevent him or her from using and enjoying the assets during his or her lifetime because you cannot eat your cake and have it too (English version of the French adage “*donner et retenir ne vaut*”).<sup>14</sup> Thus, will-substitutes emerged with the dual purpose of preventing assets from becoming entangled in the probate estate and allowing the donor to retain control of them during his or her lifetime.

## 2. Financial Intermediaries and Socio-Economic Changes

Financial assets (such as life insurance policies, bank accounts, security accounts, or pension plans) have become common forms of wealth. They are sponsored and commercialized by financial intermediaries, which take existing wealth and reinvest it. Such intermediaries specialize in offering modes of transferring wealth *post mortem ad hoc* (will-substitutes), thus circumventing the probate system and turning them into powerful private competitors.<sup>15</sup> In fact, will-substitutes have grown in popularity as these intermediaries have made such alternatives both accessible and affordable by employing standard contracts that include the power to name and change beneficiaries until death.<sup>16</sup>

In conjunction with the rise of these financial intermediaries, the decline of the probate system may also be linked to those socio-economic factors that have caused the greatest influence on modes of wealth transfer. For example, an important part of intergenerational wealth transfer does not take place after death, but rather *inter vivos*, as might happen when a parent invests in a child's education; this is especially true in the United States where higher education is greatly privatized.<sup>17</sup> And then there is the increase in life expectancy, a phenomenon that has reduced the overall transfer of wealth *causa mortis*, given that people who live longer must spend more before death.<sup>18</sup> This is the same reason for the boom in the U.S. pension system during the second half of the twentieth century.<sup>19</sup> In other words, upon death, it is not unusual for an estate to be depleted, and if any assets remain, they are then most likely distributed by means outside the probate system.

## 3. Complacency of the Courts—the Present-Interest Test

With will-substitutes, as with succession itself, death acts as the basis for transfer. Likewise, as with testamentary succession, the donor can alter, amend, or revoke their terms, since he or she enjoys complete control over

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14. See MAX RHEINSTEIN & MARY ANN GLENDON, *THE LAW OF DECEDENTS' ESTATES* 612 (1971).

15. See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 749 (1988).

16. See Langbein, *supra* note 2, at 1119.

17. Langbein described the phenomenon as an “investment in skills” or as “wealth transfers through human capital.” See Langbein, *supra* note 15, at 723, 729–39.

18. *Id.* at 740, 743.

19. *Id.* at 739–40, 743–46.

the assets while alive. However, in the realm of succession, the law establishes pre-determined procedural requisites aimed at protecting third-party interests, as well as formal demands<sup>20</sup> designed to *facilitate the validation of the free and true will of the testator*.<sup>21</sup>

Assuming will-substitutes and wills are functionally equivalent, one would think that the same mandatory legal precautions, in terms of judicial administration and formal adjudication, ought to be required in order to validate a will-substitute. Nevertheless, the courts have tended toward allowing these instruments as long as the will-substitute can pass what is known as the “present-interest test.”<sup>22</sup> Failure to meet this test qualifies the will-substitute as a “testamentary disposition” and invalidates the instrument should it not meet the requirements of the will.<sup>23</sup> According to the *Restatement (Third) of Property: Wills and Other Donative Transfers*, “[t]he traditional explanation for why a will-substitute is not a will is that a will-substitute transfers ownership during life—it effects a *present* transfer of a *nonpossessory future* interest or contract right, the time of possession or enjoyment being postponed until the donor’s death.”<sup>24</sup>

Following this reasoning, will-substitutes are not testamentary dispositions and should not be treated as such when transferring a present interest; if the transfer of a present interest is verified, will-substitutes can be treated as gifts, contracts, or trusts. As long as they meet the respective requisites, they are legally valid.<sup>25</sup> As demonstrated by the *Restatement (Third) of Property*, said effects of disposition are limited to a revocable transfer of future possession or enjoyment of a right, which brings them substantially closer to the expectancy of the future beneficiaries of the will or the intestate inheritance.<sup>26</sup>

20. These basic requisites for validating and executing a will are essentially three: a written will, the testator’s signature, and the presence of credible witnesses. Generally speaking, these have remained immutable throughout the history of U.S. law, despite many in recent years calling for such requirements to be loosened. See WILLIAM M. MCGOVERN ET AL., *PRINCIPLES OF WILLS, TRUSTS AND ESTATES* 217–21 (2d ed. 2011). From state to state, legal differences exclusively affect requirements for signature and the presence of witnesses. See GALLANIS, *supra* note 4, at 126.

21. The italicized text summarizes the three functions that U.S. doctrine traditionally attributes to the formal requirements of a will: 1. Ritual function, which prevents the testator from acting in a reckless or trivial manner; 2. Probatory function, which allows for the *post mortem* validation of the testator’s will; and 3. Protective function, which helps prevent any undue influence upon the testator. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 *YALE L.J.* 1, 5–13 (1941).

22. Langbein, *supra* note 2, at 1126–29.

23. See generally Olin L. Browder, *Giving or Leaving—What Is a Will?*, 75 *MICH. L. REV.* 845 (1977) (critically analyzing case law about invalidated will-substitutes).

24. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1 cmt. a (AM. LAW INST. 2003).

25. See Grayson M.P. McCouch, *Will-substitutes Under the Revised Uniform Probate Code*, 58 *BROOK. L. REV.* 1123, 1125–26 (1993) (exploring the impact of the revised UPC on will-substitutes).

26. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.1 cmt. d (AM. LAW INST. 1999) (“Before the decedent’s death, a potential heir has no property interest but merely an ‘expectancy’ (an inchoate interest) in the decedent’s intestate estate.”).

It should come as no surprise, then, that the present-interest test was harshly criticized by scholars, who portrayed it as a heavy-handed attempt to end the unequal treatment of wills and will-substitutes, which are instruments that differ only in name.<sup>27</sup> Critics claimed that it was not necessary to formally characterize will-substitutes as present transfers in order to exempt them from the requirements of a will; instead, it was enough to simply recognize the donor's right to choose between a *post mortem* transfer of assets via the probate system—adhering to the rules of that system—or making that transfer through will-substitutes.<sup>28</sup> These alternative modes of transfer had already been thoroughly established by commercial interests and had managed to replicate the formal requirements of a will.<sup>29</sup> The present-interest test was, effectively, a word game, but it played a vital role: preserving the legal validity of established practice and bringing recognition to its social value.<sup>30</sup>

### B. WILLS VS. WILL-SUBSTITUTES

As we have seen, will-substitutes were not created by law but were born first from practice and the accompanying complacency of the courts with respect to socially accepted institutions. However, given their ascent in popularity, will-substitutes are now included in Articles 2 and 6 of the Uniform Probate Code as well as in the *Restatement (Third) of Property*,<sup>31</sup> both of which provide a legal framework that is consistent with other types of gratuitous transfers.<sup>32</sup> The *Restatement* articulates the general concept of a will-substitute:

27. Langbein, *supra* note 2, at 1128 (“What is the difference between the revocable and ambulatory interest created by a will, and a vested but defeasible interest in life insurance or pension proceeds? None at all, except for the form of words.”).

28. *Id.* at 1129–34.

29. *Id.* at 1132–34. See also John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 10, 17 (2012) (discussing the prevalence of will-substitutes in various industries and noting that “the nonprobate system replicates by contract the two main Wills Act formal requirements”).

30. Already in 1941, with respect to the eventual treatment as testamentary dispositions and the subsequent invalidity of designating a beneficiary in a life insurance policy, Gulliver and Tilson argued as follows:

[T]he invalidation of a life insurance trust as testamentary would have to depend on the conclusion that the designation of the beneficiary of a life insurance policy was testamentary. Any such conclusion would, of course, raise havoc with established practices of life insurance, an extremely widespread and valuable social institution.

Gulliver & Tilson, *supra* note 21, at 25.

31. See UNIF. PROBATE CODE arts. II, VI (UNIF. LAW COMM'N 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 (a) (AM. LAW INST. 2003).

32. Professor Langbein has commented on how will-substitutes are likely here to stay:

[T]here is no turning back, no possibility of restoring a probate-centered system of wealth transfer on death. Public suspicion of probate is too great, not to mention the power of the financial services industry. When, therefore, in the law revision process, we came to deal with the rise of the nonprobate system, we concentrated on improving it rather than impeding it.

(a) A will substitute is an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.

(b) To be valid, a will substitute need not be executed in compliance with the statutory formalities required for a will.<sup>33</sup>

Will-substitutes are conceived in relation to a will, both in terms of how they are aligned and how they differ. They are aligned because they share the same function of *post mortem* disposition of assets and because of their gratuitous nature. Moreover, the donor can revoke both during his or her lifetime, which allows for the enjoyment of assets until death. On the other hand, will-substitutes differ from wills in formality (since they do not share the same requirements) and procedure (given that they are administered outside of the probate system).<sup>34</sup>

Another trait that distinguishes will-substitutes from wills is that they are dually limited in nature. On the one hand, because they effect a present transfer, will-substitutes are unable to transfer assets acquired by the donor after the substitute has been created (*nemo dat quod non habet*).<sup>35</sup> On the other hand, each will-substitute is designed to facilitate the transfer of a determined type of asset (e.g., insurance capital, the remainder of a pension plan, a bank account, etc.).<sup>36</sup> Therefore, will-substitutes cannot act as a complete "substitute" for a will. A will continues to be necessary, or at least convenient, in order to pass along "residual" assets.<sup>37</sup> This explains why one of the most popular methods of modern-day estate planning is to combine a revocable *inter vivos* trust with a pour-over will,<sup>38</sup> which adds *post mortem* to the trust all

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Langbein, *supra* note 29, at 17 (footnote omitted).

33. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1. Alternatively, the UPC prefers the term "nonprobate transfers" to "will-substitute," as opposed to probatable *post mortem* transfers. See UNIF. PROBATE CODE arts. V–VI. It is curious to note that the inclusion of will-substitutes in the UPC undermines the very title of the code, given it no longer manages to encompass all its content.

34. What is more, the UPC labels them, without defining them, as nontestamentary. UNIF. PROBATE CODE § 6-101 ("A provision for a nonprobate transfer on death . . . is nontestamentary.").

35. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 cmt. a.

36. *Id.* As the lone exception, the revocable *inter vivos* trust can include heterogeneous assets, but, as with other will-substitutes, those assets must be in existence at the time of its execution (or, subsequently, when expressly assigned by the settlor). *Id.*

37. See GALLANIS, *supra* note 4, at 339 ("Will-substitutes tend to be asset-specific, so a will remains necessary for the decedent's other property.").

38. "A 'pour-over' devise is a provision in a will that (1) adds property to an *inter vivos* trust or (2) funds a trust that was not funded during the testator's lifetime but whose terms are in a trust instrument that was executed during the testator's lifetime." RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.8(a) (AM. LAW INST. 1999); see also UNIF. PROBATE



of the assets that were not transferred during the donor's life. Thus, the proliferation of will-substitutes in the United States has diminished the practical role of a will to merely carry out subsidiary transfers of wealth.

### C. CHIEF MODALITIES OF WILL-SUBSTITUTES

Both the *Restatement* and legal scholars identify the following as the most typical will-substitutes<sup>39</sup>: (1) revocable *inter vivos* trusts; (2) life insurance beneficiary designations; (3) private retirement plan beneficiary designations; (4) specialty bank accounts; (5) means of transferring financial securities or automobiles; and even (6) specific ways of effecting the transfer of real estate *post mortem*.

The use of revocable *inter vivos* trusts began growing in popularity in the 1950s, eventually becoming standard practice.<sup>40</sup> The trust is considered *inter vivos* and nontestamentary since the settlor creates it during his or her lifetime. The settlor reserves the right to use and enjoy the assets in question as well as the right to name and change beneficiaries. Often, the settlor will act as his or her own trustee, this is known as a self-declared trust.<sup>41</sup>

Life insurance policies, in their varying forms,<sup>42</sup> are another prominent will-substitute. The *post mortem* transfer is achieved under a third-party stipulation: the designation of a beneficiary.<sup>43</sup>

CODE § 2-511 (a) ("A will may validly devise property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator . . . if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust.").

39. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.1 cmts. b-j (listing various will-substitutes); see also Gallanis, *supra* note 3, at 12-18 (same).

40. The leading case that established the validity of revocable trusts was *Farkas v. Williams*. See *Farkas v. Williams*, 125 N.E.2d 600, 608-09 (Ill. 1955). Yet scholars championed for their admission as a will-substitute years prior. See C.W. Leaphart, *The Trust as a Substitute for a Will*, 78 U. PA. L. REV. 626, 627-28 (1930). Norman F. Dacey managed to popularize their use in his bestseller. See generally DACEY, *supra* note 10 (criticizing probate systems and advocating the use of revocable trusts). Today, they are so widespread that many authors present other will-substitutes as "revocable trust alternatives." See, e.g., MCGOVERN ET AL., *supra* note 20, at 428.

41. GALLANIS, *supra* note 4, at 344-45.

42. For more detail on the advantages and drawbacks of the most typical policies, written as they relate to succession planning, see JEFFREY N. PENNELL, WEALTH TRANSFER PLANNING AND DRAFTING ch. 9 (2005).

43. The growth of the U.S. life insurance market dates back to the nineteenth century and was of such a magnitude that "by the eve of the Great Depression there was roughly the equivalent of one life insurance policy for every man, woman and child living in the United States." 1 TIMOTHY ALBORN & SHARON ANN MURPHY, ANGLo-AMERICAN LIFE INSURANCE 1800-1914 xi (Timothy Alborn & Sharon Ann Murphy eds., 2013). In 1969, one scholar declared "[i]n view of the numbers of people involved, the life insurance beneficiary designation is the principal 'last will and testament' of our legal system." Spencer Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, in LIFE INSURANCE LAW IN INTERNATIONAL PERSPECTIVE 74, 76 (J. Hellner & G. Nord eds., 1969).

Private retirement funds deserve explicit mention since they are one of the most valuable assets to a large portion of society.<sup>44</sup> Upon death, a retiree may have drawn all available funds,<sup>45</sup> but if any remain, they can be transferred as a will-substitute to the beneficiary designated by the deceased.<sup>46</sup>

Certain types of bank accounts are also permissible as will-substitutes, most often in the form of a trust (“Totten trust”)<sup>47</sup> or as Payable-On-Death accounts (“POD-accounts”). As the term suggests, POD-accounts imply an agreement between a depositor and a bank, with the understanding that, upon the depositor’s death, the bank is to pass the account to a named beneficiary.<sup>48</sup> The origin of the POD formula—and its admissibility outside the formal rules and procedures of traditional will law—can be traced to the 1950s when the United States Treasury promoted it as a way of selling government bonds,<sup>49</sup> but it would later be extended to other assets. Thus, in addition to the aforementioned bank accounts, the UPC also recognizes Transfer-On-Death securities and in some states the formula can even be used to transfer automobiles *post mortem* in the form of a Transfer-On-Death Vehicle Registration as well as real estate with Transfer-On-Death Deeds of Land.<sup>50</sup>

The methods described above are known as pure will-substitutes, given that (1) they allow the donor to retain control over the assets (i.e., they are freely revocable), and (2) procedural and formal requirements of a will do

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44. American Express established the first retirement plan in 1875. WILLIAM C. GREENOUGH & FRANCIS P. KING, *PENSION PLANS AND PUBLIC POLICY* 27 (1976). However, they would not become popularized until after World War II. GALLANIS, *supra* note 4, at 352.

45. See PENNELL, *supra* note 42, ch. 10.

46. For an extensive overview of this type of will-substitute, see Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 167, 169 (2014).

47. The Totten trust gets its name from *In re Totten*, 71 N.E. 748 (1904). The constituent of the trust makes a deposit in a bank account in his or her own name, but “in trust” for a named beneficiary. “The depositor typically [maintains] exclusive control [over] the account until death,” at which point the remaining balance passes directly to the beneficiary. GALLANIS, *supra* note 4, at 353.

48. The UPC includes PODs in their original edition. UNIF. PROBATE CODE § 2-202(3)(i) (UNIF. LAW COMM’N 1969). For more on the debate surrounding POD accounts and whether or not they should be treated to the same standards as a will, see generally William M. McGovern, Jr., *The Payable on Death Account and Other Will-substitutes*, 67 NW. U. L. REV. 7 (1972).

49. Langbein, *supra* note 2, at 1112.

50. The UPC, as amended in 1989, extended the mechanism utilized by PODs to securities. See Richard V. Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 GA. L. REV. 789, 794 (1987). With respect to these, however, the term “TOD” (Transfer-On-Death) gained favor instead of POD, to avoid interpretations that might involve a liquidation of assets. See UNIF. PROBATE CODE § 6-305 (UNIF. LAW COMM’N 2010). To date, fourteen states have allowed this formula to be applied to the *post mortem* transfer of automobiles. GALLANIS, *supra* note 4, at 16 n.21. With respect to real estate, the Uniform Law Commission approved the *Uniform Real Property Transfer on Death Act* in 2009. UNIF. REAL PROP. TRANSFER ON DEATH ACT (UNIF. LAW COMM’N 2009).

not apply to them (i.e., they are *nonprobate transfers*).<sup>51</sup> Furthermore, U.S. law allows for types of co-ownership (e.g., joint tenancies and tenancies by the entirety of land), in which the deceased's share can be automatically transferred to the surviving co-owner.<sup>52</sup> These, however, are imperfect will-substitutes. This is because, despite permitting the *post mortem* disposition of assets outside the usual system of succession, they are predicated on an irrevocable *inter vivos* transfer.<sup>53</sup>

### III. WILL-SUBSTITUTES IN SPAIN

#### A. THE SEVEN SPANISH SUCCESSION LAW SYSTEMS: CONTRASTS AND COMMON GROUND

The first characteristic a comparative legal scholar might notice when studying Spanish succession law is the co-existence of several systems of succession, each with its own unique features and institutions. Thus, along with the provisions on succession law provided for in the Spanish Civil Code of 1889 (“SCC”),<sup>54</sup> which are directly applicable in eleven of the seventeen Spanish Autonomous Communities (as well as in Ceuta and Melilla, Spain's two autonomous cities in North Africa), six other systems of succession are simultaneously in force.<sup>55</sup>

Yet, while the SCC keeps regulation roughly as it was in the nineteenth century,<sup>56</sup> the Six Autonomous Communities of Spain with legislative powers to “preserve, modify and develop” their civil law have remodeled their systems of succession in recent decades. These regions are Aragon, the Balearic Islands, the Basque Country, Catalonia, Galicia and Navarre—the six regions where legislation already existed in 1978, when the current Spanish Constitution (“SC”) came into effect.<sup>57</sup>

51. GALLANIS, *supra* note 4, at 18–20.

52. Harry J. Rudick, *Federal Tax Problems Relating to Property Owned in Joint Tenancy and Tenancy by the Entirety*, 4 TAX L. REV. 3, 4–5 (1948).

53. On the distinction between pure and imperfect will-substitutes see Langbein, *supra* note 2, at 1109–15.

54. CÓDIGO CIVIL (Civil Code), B.O.E., July 25, 1889 (Spain).

55. For a complete and updated analysis of the coexisting Spanish succession law systems see generally CARMEN GETE-ALONSO Y CALERA & JUDITH SOLÉ RESINA, TRATADO DE DERECHO DE SUCESIONES (Código Civil y Normativa Civil Autonómica: Aragón, Baleares, Cataluña, Galicia, Navarra, País Vasco) [TREATY ON SUCCESSION LAW (Civil Code and Civil Law of the Self-Governing Communities)] (2d ed. 2016).

56. Since 1889, just over one quarter of the original articles of Book III, Title III “*De las Sucesiones*” have been amended. Sergio Cámara Lapuente, *New Developments in the Spanish Law of Succession*, 4 INDRET 1, 7 (2007). For a chronological review of the most important post-constitutional reforms, see *id.* at 7–11.

57. According to article 149.1.8, the State shall have exclusive competence over,

[c]ivil legislation, without prejudice to the preservation, modification and development by the Self-governing Communities of their civil law, or special rights and traditional charters (*fueros*), whenever these exist. In any event, rules for the

## 1. Contrasts

These systems differ widely, both formally (allowable succession instruments) and materially (limits on the freedom to dispose *causa mortis*). In general, the Autonomous Communities' systems present more formal flexibility as they allow the use of succession instruments that the SCC prohibits. The SCC, because of the influence of French revolutionary law, continues to prohibit inheritance agreements;<sup>58</sup> instead, Autonomous legal systems have not only recognized the validity of these types of agreements but have also begun to increase their reach and potential.<sup>59</sup> The same is true with respect to *causa mortis* gifts (enforceable in the six Autonomous Communities that adhere to their own civil law) as well as joint wills (admissible in Aragon, Navarre and the Basque Country); the SCC has vetoed both of these succession instruments.<sup>60</sup> There are also important differences in the

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application and effectiveness of legal provisions, civil relations arising from the forms of marriage, keeping of records and drawing up to public instruments, bases of contractual liability, rules for resolving conflicts of law and determination of the sources of law in conformity, in this last case, with the rules of traditional charters (*fueros*) or special laws.

CONSTITUCIÓN ESPAÑOLA (Spanish Constitution), B.O.E. art. 149.1.8, Dec. 29, 1978 (Spain). The coexistence of private law systems in Spain is no longer viewed as a problem, but rather as evidence of the cultural richness of the country. Elena Lauroba, *Le Code Civil Québécois et le Code Civil Catalan* [THE QUEBEC CIVIL CODE AND THE CATALAN CIVIL CODE], 88 CAN. B. REV. 465, 475 (2009). However, the ambiguity of article 149.1.8 complicates the determination of the precise boundaries between state jurisdiction and autonomous competence. Thus, whereas according to the most restrictive thesis—the so-called “*foralistas*”—the Autonomous Communities may not legislate *ex novo* on matters of civil law that were not already included in their pre-constitutional law, in the opinion of the “*autonomistas*,” the competence of these Regions would only be limited by the matters listed in the last paragraph of article 149.1.8. For more on the distinction between these two types of thesis see Jesús Delgado Echeverría, *Los Derechos Civiles Forales en la Constitución*, REVISTA JURÍDICA DE CATALUNYA 651 (1979). The debate is still very much alive today. See, e.g., Pablo Amat Llombart, *La Competencia Legislativa en Materia de Derecho Civil del Artículo 149.1.8 de la Constitución Española: Disfunciones en Torno al Derecho Civil Valenciano e Interpretación del Tribunal Constitucional*, 4 INDRET (2017), <http://www.indret.com/pdf/1347.pdf>.

58. See CÓDIGO CIVIL (Civil Code), B.O.E. art. 1271, July 25, 1889 (Spain); *id.* arts. 658, 816. This prohibition is currently in crisis, not only because of harsh scholarly criticism, see, e.g., María Paz García Rubio & Margarita Herrero Oviedo, *Pactos Sucesorios en el Código Civil y en la Ley de Derecho de Galicia*, in 1 TRATADO DE DERECHO DE SUCESIONES [TREATY ON SUCCESSION LAW] 1301, 1325–28 (2d ed. 2016) (questioning the convenience of keeping the prohibition in current times); Rafael Sánchez Aristi, *Propuesta para una Reforma del Código Civil en Materia de Pactos Sucesorios*, in DERECHO DE SUCESIONES: PRESENTE Y FUTURO [SUCCESSION LAW: PRESENT AND FUTURE] 477, 477–537 (2006), but also because of the influence of *Regulation (EU) 650/2012 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*, which decrees that the effects of inheritance agreements must be granted according to governing law. See Council Regulation 650/2012, art. 25, 2012 O.J. (L 201) 107, 121.

59. See EUSKAL ZUZENBIDE ZIBILARI (Basque Civil Law), B.O.E. art. 100, June 25, 2015 (Spain); CODI CIVIL DE CATALUNYA (Civil Code of Catalonia), B.O.E. art. 431-1, July 10, 2008 (Spain).

60. See CÓDIGO CIVIL (Civil Code), B.O.E. arts. 620, 669, July 25, 1889 (Spain).

regulation of intestate succession, particularly in the way diverse legislatures have chosen to deal with the surviving spouse. For example, the SCC, Galicia, Aragon, the Balearic Islands, and Navarre all treat the surviving spouse as third in line for succession, after descendants and ascendants,<sup>61</sup> whereas Catalonia and the Basque Country consider a surviving spouse to be second in line after any descendants.<sup>62</sup> These differences in law become even starker with respect to the material limitations imposed on freedom of testation, namely the *legítimas* (i.e., the proportional amount of the decedent's estate that must pass to the forced heirs as determined by law). Indeed, "[i]n Spain, the maximum exponent of the diversity of legal systems is the greater or lesser flexibility of the *legítimas*,"<sup>63</sup> ranging from absolute party autonomy (as in Navarre, where testators are allowed to leave nothing to their children)<sup>64</sup> to reduced testamentary freedom (as in the eleven regions governed by the SCC, where two-thirds of the inheritance must pass to the testator's children).<sup>65</sup>

The diversity of Spanish succession law is both the main root of its complexity and the engine that drives its continuous development. Such diversity generates competition between legal systems, which is ultimately in the best interest of all citizens. As for the complexity, the coexistence of different systems of succession law in the same territory produces conflict of laws. The key factor for determining the Spanish succession applicable law is "civil residence" (*vecindad civil*), which is based on filiation, place of birth or time of continuous residence in a given territory.<sup>66</sup> Nevertheless, such legal

61. See *id.* arts. 943–44; LEY DE DERECHO CIVIL DE GALICIA (Statute of Civil Law of Galicia), B.O.E. art. 267, Jul. 19, 2006 (Spain); CÓDIGO DEL DERECHO FORAL DE ARAGÓN (Civil Code of Aragón), B.O.E. art. 517, Mar. 29, 2011 (Spain); COMPILACIÓN DEL DERECHO CIVIL DE BALEARES (Compilation of the Civil Law of Balears), B.O.E. art. 84, Oct. 2, 1990 (Spain); COMPILACIÓN DEL DERECHO CIVIL FORAL DE NAVARRA (Compilation of the Civil Law of Navarre), B.O.E. arts. 300–04, Mar. 7, 1973 (Spain).

62. See DERECHO CIVIL VASCO (Basque Civil Law), B.O.E. arts. 110–15, July 3, 2015 (Spain); LLIBRE QUART DEL CODI CIVIL DE CATALUNYA, RELATIU A LES SUCCESSIONS (BOOK FOUR OF THE CATALAN CIVIL CODE, ON SUCCESSIONS), B.O.E. art. 442–3, May 12, 2009 (Spain).

63. Cámara Lapuente, *supra* note 56, at 29. For tables showing the differences between the seven succession systems with regard to *legítimas*, as well as legally established inheritance rights, see Sergio Cámara Lapuente, *Freedom of Testation, Legal Inheritance Rights and Public Order Under Spanish Law, in THE LAW OF SUCCESSION: EUROPEAN PERSPECTIVES* 269, 273–77 (M. Anderson & E. Arroyo i Amayuelas eds., 2011).

64. See DERECHO CIVIL FORAL DE NAVARRA (Civil Law of Navarre), B.O.E. art. 267, Mar. 7, 1973 (Spain).

65. See CÓDIGO CIVIL (Civil Code), B.O.E. art. 808, July 25, 1889 (Spain).

66. *Id.* art. 14. This, however, would be subject to a more nuanced interpretation should the succession have cross-border implications, thus falling under the scope of the European Succession Regulation. See Commission Regulation 650/2012, 2012 O.J. [L 201] 107. In such case, the general connecting factor for the purposes of determining the applicable law would be the "habitual residence of the deceased at the time of death," *Id.* at 120 art. 21, a concept that has nothing to do with the "civil residence" (*vecindad civil*), which applies only to Spaniards. According to ESR article 36, where the applicable law is the Spanish law, given that Spain comprises several territorial units each of which has its own rules of law in respect of succession, the Spanish internal conflict-of-laws

competition does benefit citizens, as, for example, when some Autonomous Communities enact reforms in civil law, later serving as a model for reform in other Spanish civil law systems.<sup>67</sup>

## 2. Common Ground

Despite several glaring contrasts, Spanish succession law systems share a great deal of common ground. For example: (1) Spanish law does not recognize trusts. Although, some argue that certain autonomous civil law systems may achieve equivalent succession functions through the use of other mechanisms.<sup>68</sup> To this end, it is important to note that Spain has not ratified the Hague Trust Convention,<sup>69</sup> and the Spanish Supreme Court has thus far refused to recognize the validity of trusts.<sup>70</sup> However, since the European Succession Regulation (“ESR”) went into effect in August 2015, when encountering international succession, Spanish authorities now must adapt,

rules should determine the relevant territorial unit whose rules of law are to apply. *Id.* at 124 art. 36. However, since only Spaniards have “civil residence” (*vecindad civil*), it is not entirely clear which Spanish law should apply to the non-Spaniard that has his or her habitual residence in Spain at the time of death. For more on applying the ESR in a state with more than one legal system like Spain, see M. Esperança Ginebra Molins, *Sucesiones Transfronterizas y Estados Plurilegislativos*, in *EL REGLAMENTO (UE) 650/2012: SU IMPACTO EN LAS SUCESIONES TRANSFRONTERIZAS [THE EU SUCCESSION REGULATION (EU 650/2012): ITS IMPACT ON CROSS-BORDER SUCCESSIONS]* 237–62 (M. Esperança Ginebra Molins & Jaume Tarabal Bosch eds., 2016) (Spain).

67. See Cámara Lapuente, *supra* note 56, at 1, 5. For the same argument, although not limited to succession law, see generally Esther Arroyo i Amayuelas, *Competència Autònica, Competència Entre Ordenaments Jurídics i Codificació del Dret Civil Català: Un Balanç*, 10 *REVISTA DE DRET HISTÒRIC CATALÀ [JOURNAL OF HISTORICAL CATALAN LAW]* 167 (2010) (explaining the characteristics and the implications of the Catalan civil law codification process).

68. See Á. Serrano de Nicolás, *Trust y Derecho de Sucesiones*, in E. ARROYO AMAYUELAS, *EL TRUST EN EL DERECHO CIVIL [THE TRUST IN CIVIL LAW]* 59–96 (2007).

69. Hague Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, 1664 U.N.T.S. 311.

70. A Supreme Court decision from April 30, 2008, is particularly illustrative of this fact. S.T.S., Apr. 30, 2008 (T.S., No. 338/2008) [Supreme Court] (Spain). The case deals with a married couple from the United States who, in 1971, jointly acquired a piece of property in Spain. Later, pursuant to Arizona state law, the husband had a will drawn up, leaving part of his assets in real estate to his wife, under the condition that she survived him by at least four months. The very same day, he created a trust in which he named himself and his wife trustees. The trust, which contained life insurance policies, included a clause stating that, upon his death, should he own any property rights in Spain, those rights would pass into the trust, the beneficiary of which was his wife. Given that Spain lacks a conflicts of law rule specifically dealing with trusts, the Supreme Court ruled it to be a successory instrument and declared U.S. law as being applicable. See *CÓDIGO CIVIL* (Civil Code), B.O.E. art. 9.8, July 25, 1889 (Spain) (“Succession *mortis causa* shall be governed by the national law of the deceased at the time of his or her death, whatever the nature of the property and the country in which it is located.”). However, given that in that particular case U.S. law could not be proven, Spanish law was applied, and because the trust does not exist in Spain, the court rejected its validity on the grounds that trusts are neither legally recognized nor compatible with Spanish succession law. The case appeared before the European Succession Regulation was applicable so that article 9.8 of the Civil Code was still utilized. See Commission Regulation 650/2012, 2012 O.J. (L 201) 107.

when necessary and to the extent possible, Anglo-American trusts to the nearest equivalent under Spanish law.<sup>71</sup> In theory, this adaptation should be possible given that Spanish law does not adhere to the principle of *numerus clausus* of property rights. What remains to be seen, though, is what the end result of such adaptations will be; (2) Succession law systems are rooted in Roman law, adopting a model of direct transfer of assets without intervention from any representative like one might find in common-law systems.<sup>72</sup> Under the Spanish systems, inheritance is passed along, both assets and debts, to the heirs, who simultaneously act as beneficiaries and estate distributors/liquidators. For this reason, the heir is known as universal successor—or more metaphorically—as the continuator of the personality of the decedent, because the heir assumes both rights and obligations related with succession;<sup>73</sup> and, (3) Another trait shared by all Spanish succession law systems is that voluntary succession—especially testamentary—is the most common form of succession.<sup>74</sup> In terms of comparative law, this diverges from most of the legal systems in Europe.<sup>75</sup> In fact, of all the European countries,

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71. According to art. 31:

Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

Commission Regulation 650/2012, art. 31, 2012 O.J. (L 201) 107, 123. See generally Jaume Tarabal Bosch, *Adaptación de Derechos Reales a Efectos Sucesorios*, in M. ESPERANÇA GINEBRA MOLINS & JAUME TARABAL BOSCH, EL REGLAMENTO (UE) 650/2012: SU IMPACTO EN LAS SUCESSIONES TRANSFRONTERIZAS [THE EU SUCCESSION REGULATION (EU 650/2012): ITS IMPACT ON CROSS-BORDER SUCCESSIONS] (Marcial Pons ed., 2014) (describing the meaning and effects of this provision in the ESR).

72. For a comparative legal study on the varying models of transfer of assets from the decedent to the beneficiaries, see generally YVES-HENRI LELEU, LA TRANSMISSION DE LA SUCCESSION EN DROIT COMPARÉ [THE TRANSMISSION OF SUCCESSION IN COMPARATIVE LAW] (1996) (Belg.).

73. See, for example, CODI CIVIL DE CATALUNYA (Civil Code of Catalonia), B.O.E. art. 411-1, July 10, 2008 (Spain): An heir inherits all legal rights of the decedent, receiving both assets and rights, and subrogating the responsibilities of the *de cuius*, which are not forgiven upon death. *Id.* An heir remains bound by the actions of the decedent and must take over any incumbent hereditary responsibilities. *Id.*

74. This trait has been highlighted often throughout history. With respect to Catalan law, see, for example, 1 RAMÓN MARÍA ROCA I SASTRE, ESTUDIOS SOBRE SUCESSIONES [STUDIES ON SUCCESSIONS] 100–28 (1981) (Spain) (describing the main traits of Catalan pre-constitutional civil law). It remains true today. See Cámara Lapuente, *supra* note 56, at 6–7.

75. In France, more than 90% of the population dies without a will; in Italy, nearly 85% die without a will, and in Germany, between 65% and 75% die without a will. Alexandra Braun, *Intestate Succession in Italy*, in 2 COMPARATIVE SUCCESSION LAW: INTESTATE SUCCESSION 67, 68 (Kenneth G.C. Reid et al. eds., 2015) (only 16% of estates probated by will in Italy); Cécile Pérès, *Intestate Succession in France*, in 2 COMPARATIVE SUCCESSION LAW: INTESTATE SUCCESSION, *supra*, at 33, 34 (only 10% of estates probated by will in France); Reinhard Zimmermann, *Intestate Succession in Germany*, in 2 COMPARATIVE SUCCESSION LAW: INTESTATE SUCCESSION, *supra*, at 181, 182 (only 25% to 35% of Germans die testate).

Spain has one of the highest usages of wills.<sup>76</sup> The most common type of will is the notarial will, which is executed before a *Notario Público* (Public Notary). The Public Notary is a public servant who fulfills two essential functions for the Spanish succession law systems: (1) to ascertain the capacity and free will of a testator; and, (2) to certify the authenticity of the resulting instrument.<sup>77</sup> The Public Notary keeps possession of the will and registers it in the so-called *Registro de Actos de Última Voluntad* (General Registry of Last Wills and Testaments).<sup>78</sup> Thus, since the Public Notary proves the validity of notarial wills *ante mortem*, they do not need to be judicially (nor notarilly) certified after the testator's death.<sup>79</sup> Furthermore, courts grant notarial wills a presumption of validity, so that contests in the *post mortem* period on grounds of a testator's lack of capacity or undue influence are unlikely to succeed.<sup>80</sup> On the other hand, having a notarial will drawn up is relatively inexpensive, considering the momentousness of the act and its technical complexity.<sup>81</sup>

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76. To date, the most thorough analysis of frequency statistics for the use of wills in Spain is presented by Jesús Delgado Echeverría in his study *Una Propuesta de Política del Derecho en Materia de Sucesiones por Causa de Muerte*. See Jesús Delgado Echeverría, *Una Propuesta de Política del Derecho en Materia de Sucesiones por Causa de Muerte* [A Policy Proposal on the Law in Matters of Succession Upon Death], in *DERECHO DE SUCESIONES: PRESENTE Y FUTURO*, *supra* note 58, at 13, 103–15. In his statistical discussion, the author highlights the annual rise in the number of notarial wills registered in Spain (rising from 370,161 in 1984 to 584,848 in 2002). *Id.* at 106. This was truncated by the 2007 economic crisis (in 2009, registered notarial wills equaled 565,740), but the most recent numbers point to a recovery: 2014 saw 617,099 voluntary succession instruments registered (wills and inheritance agreements—in those Autonomous Communities where these are recognized). In 2015 that number had risen to 634,642; and in 2016 it reached 645,960. See *Búsqueda y obtención de datos*, CONSEJO GENERAL DEL NOTARIADO, <http://www.notariado.org/liferay/web/cien/estadisticas-al-completo> (last visited Apr. 17, 2018).

77. As is widely known, the Spanish *Notarios Públicos* have little to do with the public notaries of common law. For a comparative analysis of the functions of the Latin Notary, see generally Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945 (1998).

78. As regulated by REGLAMENTO DE LA ORGANIZACIÓN Y RÉGIMEN DEL NOTARIADO (Regulation on the Notary Organization and System), B.O.E., June 7, 1944 (Spain).

79. The typical exception to this being the holographic will: since it is written, dated and signed in the handwriting of the testator with no participation of the notary, it must be certified by a notary after the testator's death. See LEY DEL NOTARIADO DE 28 DE MAYO DE 1862 (Notary Law of May 28, 1862), B.O.E. arts. 61–63, May 29, 1862 (Spain).

80. In executing the will, the *Notario Público* shall note that, in his opinion, the testator has the necessary legal capacity to make a will. See CÓDIGO CIVIL (Civil Code), B.O.E. art. 696, July 25, 1889 (Spain). According to case law, “the notarial certification on the testator's legal capacity, given the seriousness and the prestige of the notarial institution, is considered particularly sure, amounting to a *iuris tantum* presumption of energetic aptitude, which can only be contested with clear evidence to the contrary.” S.T.S., Apr. 10, 1987 (R.J., No. 2549) (Spain); see also S.T.S., June 21, 1986 (R.J., No. 3788) (Spain).

81. Independent of the value of the testator's assets, notarial wills can cost as little as €36, or around \$40. *Wills and Inheritances*, CONSEJO GENERAL DEL NOTARIADO, <https://www.notariado.org/liferay/web/notariado/testamentos-y-herencias#T2> (last visited Apr. 17, 2018).



B. IS THERE ROOM FOR WILL-SUBSTITUTES IN SPAIN?

Regardless of social, economic and regional background, wills enjoy great popularity in Spanish law.<sup>82</sup> Spanish judicial intervention in succession matters is minimal, limited to controversial cases, and rarely related to the validity of a will. Because of this, there is no need in Spain for probate avoidance. Nonetheless, Spain has not been immune to socio-economic changes that, as we discussed earlier, are at the root of the will-substitute boom in the United States. In Spanish society, inheritance does not always constitute the primary source of economic support for individuals; instead, education is more often the key to establishing one's livelihood.<sup>83</sup> Furthermore, the worldwide increase in life expectancy,<sup>84</sup> from which Spain is no exception,<sup>85</sup> is not necessarily tied to the full retention of mental and physical faculties. More often, as a person ages, there is a proportional increase in the need for special care and a decrease in ability to govern and manage one's estate.<sup>86</sup> And this is in an age when estates are no longer principally composed of land that passes from generation to generation, but rather consist of financial assets (e.g., investment funds and life insurance policies).<sup>87</sup> On the other hand, for the general Spanish labor force, an important asset might be a surviving spouse or orphan social security pension and the complementary pension plans, all of which are assets that have little to do with traditional succession law.<sup>88</sup> Undoubtedly, Spain also has its mechanisms for distributing assets *post mortem* outside of succession law.<sup>89</sup> With this in mind, the question becomes: Do any of these ways of passing along assets approximate U.S. will-

82. See Delgado Echeverría, *supra* note 76, at 86.

83. Sandra Camacho Clavijo & Alejandra de Lama Aymá, *La Sucesión "Mortis Causa" (I)*, in *TRATADO DE DERECHO DE SUCESIONES [TREATY OF SUCCESSION LAW]* 81–119, 87–89 (2d ed. 2016).

84. *Life Expectancy Increased by 5 Years since 2000, But Health Inequalities Persist*, WORLD HEALTH ORG. (May 19, 2016), <http://www.who.int/mediacentre/news/releases/2016/health-inequalities-persist/en> (describing a global increase in life expectancy between 2000 and 2015).

85. *Salud: Esperanza de Vida*, INSTITUTO NACIONAL DE ESTADÍSTICA (July 4, 2017), [http://www.ine.es/ss/Satellite?L=es\\_ES&c=INESeccion\\_C&cid=1259926380048&p=1254735110672&pagename=ProductosYServicios/PVSLayOut](http://www.ine.es/ss/Satellite?L=es_ES&c=INESeccion_C&cid=1259926380048&p=1254735110672&pagename=ProductosYServicios/PVSLayOut) (demonstrating that between 1994 and 2016, life expectancy for men in Spain increased by 6 years and life expectancy for women increased by 4.3 years).

86. See Á. Serrano de Nicolás, *Planificación Sucesoria: El Testamento en la Sucesión Anómala y las Transmisiones "Parasucesorias,"* in *I CONFLICTOS EN TORNO A LOS PATRIMONIOS PERSONALES Y EMPRESARIALES [CONFLICTS RELATING TO PERSONAL AND BUSINESS ESTATES]* 3–53 (Garrido Melero & Fugardo Estivill eds., 2010) (highlighting the reasons why estate planning is highly advisable).

87. *Id.* at 10.

88. See 4 JOSÉ LUIS LACRUZ BERDEJO, *ELEMENTOS DE DERECHO CIVIL: SUCESIONES [ELEMENTS OF CIVIL LAW: SUCCESSIONS]* 7 (José Luis Lacruz Berdejo ed., 2009).

89. See generally K.J. ALBIEZ DOHRMANN, *NEGOCIOS ATRIBUTIVOS "POST MORTEM" [DISTRIBUTED TRANSACTIONS POST MORTEM]* (1998) (outlining different means of distributing assets *post mortem* in Spain); Cámara Lapuente, *supra* note 56, at 27; Serrano de Nicolás, *supra* note 86, at 25–33.

substitutes? And if so, are they treated consistently by the Spanish law of succession systems?

C. GENUINE WILL-SUBSTITUTES IN SPAIN: REMARKS ON LIFE INSURANCE AND PENSION PLAN BENEFICIARY DESIGNATIONS

As we discussed in the first section of our work, the concept of will-substitutes in the United States is precisely defined. In their purest form, will-substitutes can be described as voluntary and freely revocable instruments that effectuate gratuitous transfers *post mortem* and that are not testamentary. If we apply this to Spanish law, the following examples would fall outside the given definition:

- (1) Non-voluntary legal transfers: e.g., subrogation rights under an urban lease contract granted to certain persons linked to the deceased lessee;<sup>90</sup> survivors' benefits under the Social Security Law, namely, the statutory surviving spouse or cohabitant's pension and orphan's pension;<sup>91</sup> and benefits that pass as a *post mortem* effect of a matrimonial property regime.<sup>92</sup>
- (2) Transfers made *inter vivos* rather than *post mortem*: e.g., gratuitous transfers realized in anticipation of succession, such as *inter vivos* donations to future forced heirs.<sup>93</sup>
- (3) Non-revocable instruments: gifts of ownership, while retaining the usufruct (life interest)<sup>94</sup> and/or the right to dispose of the property;<sup>95</sup> inheritance contracts;<sup>96</sup> *Tontine* clauses whereby the

90. See LEY 29/1994, DE 24 DE NOVIEMBRE, DE ARRENDAMIENTOS URBANOS [Law 29/1994, of November 24, on Urban Rent Law], B.O.E. art. 16, Nov. 25, 1994 (Spain).

91. See LEY GENERAL DE LA SEGURIDAD SOCIAL [General Social Security Law], B.O.E. arts. 219–225, Oct. 31, 2015 (Spain). See also generally EUROPEAN COMM'N, YOUR SOCIAL SECURITY RIGHTS IN SPAIN (2013) (giving complete information in English about social security rights in Spain).

92. See CODI CIVIL DE CATALUNYA (Civil Code of Catalonia), B.O.E. art. 232–5(5), July 29, 2010 (Spain). According to the Civil Code of Catalonia, upon termination of the separation of property regime by death, the surviving spouse may claim compensation by reason of work, provided the rights assigned by the deceased, in the testate succession or in anticipation of his death, or the rights assigned to the surviving spouse in the intestate succession, do not cover the amount which should accrue to said spouse. *Id.*

93. Compulsory shares may, of course, be satisfied during the deceased's lifetime by way of donations to the forced heirs. See, e.g., CODI CIVIL DE CATALUNYA (Civil Code of Catalonia), B.O.E. art. 451–8, July 10, 2008 (Spain); CÓDIGO CIVIL (Civil Code), B.O.E. art. 819, July 25, 1889 (Spain).

94. See DOHRMANN, *supra* note 89, at 128–31; Á. Serrano de Nicolás, *Nuevos Posibles Cauces para la Transmisión de la Empresa Familiar en el Derecho Sucesorio Catalán*, in Á. SERRANO DE NICOLÁS, LA EMPRESA FAMILIAR Y SU RELEVO GENERACIONAL [THE FAMILY BUSINESS AND ITS GENERATIONAL TRANSFER] 55, 98–99 (2011).

95. See, e.g., CODI CIVIL DE CATALUNYA (Civil Code of Catalonia), B.O.E. arts. 531–20, 561–21, July 10, 2008 (Spain).

96. See *id.* art. 431–18.

spouses or cohabitants who jointly acquire property stipulate that upon the death of either, the survivor shall become sole owner.<sup>97</sup>

By contrast, life insurance and pension plans' beneficiary designations are instruments that perfectly fit the definition of a will-substitute. Moreover, the demand for life insurance policies and pension plans has skyrocketed in recent years, especially given their favorable fiscal benefits,<sup>98</sup> portending an important development for the immediate future.<sup>99</sup>

In Spain, both life insurance and pension plans complement mandatory Social Security,<sup>100</sup> which is the reason why their use has been encouraged. Both have a contractual nature and are regulated by the state, under its exclusive authority in commercial law.<sup>101</sup> As such, articles 82–100 of the Insurance Contract Act of 1980 (“ICA”)<sup>102</sup> regulate life insurance contracts, while the Real Legislative Decree 1/2002<sup>103</sup> addresses pension plans.

When in the form of insurance for death (i.e., the insurance contract under which the capital or an insured amount is paid to the designated beneficiary in case of the insured's death), life insurance is the most genuine will-substitute under Spanish law.<sup>104</sup> The beneficiary may be designated by will but can also be named in the insurance policy or later by written declaration reported to the insurer.<sup>105</sup> Furthermore, the designation is freely revocable at any time before the insured's death.<sup>106</sup> As a result, during the insured's

97. See *id.* art. 231-15.

98. See LEY 35/2006, DE 28 DE NOVIEMBRE, DEL IMPUESTO SOBRE LA RENTA DE LAS PERSONAS FÍSICAS (Act 35/2006, of November 28, on Personal Income Tax Law), B.O.E. art. 51, Nov. 28, 2006 (Spain) (stating that contributions to private pension plans can be offset against taxable income in Spain up to certain annual limits).

99. Annual reports published by INVERCO (Asociación de Instituciones de Inversión Colectiva y Fondos de Pensiones) related to family saving plans show that, compared to the European average, Spanish families have very few investments in pension plans and insurance. See LAS INSTITUCIONES DE INVERSIÓN COLECTIVA Y LOS FONDOS DE PENSIONES: INFORME 2016 Y PERSPECTIVAS 2017 [GROUP INVESTMENT INSTITUTIONS AND PENSION FUNDS: 2016 REPORT AND 2017 PROSPECTS], INVERCO 6 (2017), <http://www.inverco.es/archivosdb/ahorro-financiero-de-las-familias-iics-y-fp-2016.pdf>. Notwithstanding, the use of these instruments continues to grow. *Id.* at 15.

100. See CONSTITUCIÓN ESPAÑOLA (Spanish Constitution), B.O.E. art. 41 n. 311, Dec. 29, 1978 (Spain); LEY GENERAL DE LA SEGURIDAD SOCIAL [General Social Security Law], B.O.E. art. 15, Oct. 31, 2015 (Spain).

101. See CONSTITUCIÓN ESPAÑOLA (Spanish Constitution), B.O.E. art. 149.1.6, Dec. 29, 1978 (Spain).

102. LEY DE CONTRATO DE SEGURO (Insurance Contract Act), B.O.E. arts. 82–100, Oct. 17, 1980 (Spain).

103. See LEY DE REGULACIÓN DE LOS PLANES Y FONDOS DE PENSIONES (Law on the Regulation of Pension Plans and Funds), B.O.E., Dec. 13, 2002 (Spain).

104. Under a life insurance contract, the insured (*asegurado*) and the policyholder (*tomador*) do not need to be the same person. However, in considering life insurance contract beneficiary designations as a will-substitute, we are assuming they are.

105. LEY DE CONTRATO DE SEGURO (Insurance Contract Act), B.O.E. art. 84, Oct. 17, 1980 (Spain).

106. *Id.* art. 87.

lifetime, the designated beneficiary holds no rights but merely an expectation. However, on the insured's death, the beneficiary retains the right to directly demand payment from the insurer.<sup>107</sup> Spanish legal doctrine characterizes this right as the "*derecho propio del beneficiario*,"<sup>108</sup> in order to stress the autonomous nature of the right, which stems from the contract and is directly enforceable against the insurer.<sup>109</sup> Hence, at no point does the insurance benefit pass into the insured's estate (the exception to this being in cases of absence or conflict of designation, as, for example, when the beneficiary predeceases the insured).<sup>110</sup>

The idea of providing an autonomous right for the beneficiary originated in Article 428 of the 1885 Spanish Commercial Code,<sup>111</sup> which guided practice in the field of life insurance precisely to fulfill providence functions outside of the typical parameters of *causa mortis* succession. Breaking the link between the beneficiary and the insured's estate managed to protect the beneficiary from the historic outlawing of donations between spouses (abrogated in 1981),<sup>112</sup> as well as from potential claims made by the forced heirs of the insured. Several theories exist attempting to explain the special role of the beneficiary's right outside of succession law. Amongst them, the notion of labeling the agreement as a contract conferring a right on a third party has prevailed.<sup>113</sup> Because the beneficiary acquires the right from the promisor (insurer), it is not transferred via the estate of the insured. This explains why the unsatisfied forced heirs of the insured can make no claim on the capital paid to the beneficiary.<sup>114</sup> Nonetheless, in naming a beneficiary, the rights are not born of magic, but rather stem from the premiums paid by the insured. This disbursement of premiums constitutes a genuine transfer of

107. *Id.* art. 88.

108. *See, e.g.*, F.J. Tirado Suárez, *Artículo 88. El Derecho Propio del Beneficiario*, in *LEY DE CONTRATO DE SEGURO: COMENTARIOS A LA LEY 50/1980, DE 8 DE OCTUBRE, Y A SUS MODIFICACIONES 2010* [INSURANCE CONTRACT LAW: COMMENTS ON LAW 50/1980, OF OCTOBER 8, AND ITS 2010 AMENDMENTS] 2322–76 (Fernando Sánchez ed., 2010) (commenting on the nature and scope of the right of the beneficiary under ICA art. 88).

109. *LEY DE CONTRATO DE SEGURO* (Insurance Contract Act), B.O.E. art. 88, Oct. 17, 1980 (Spain).

110. *Id.* art. 84.

111. *CÓDIGO DE COMERCIO* (Commercial Code), B.O.E. art. 428, Oct. 16, 1885 (Spain). This is why Spanish legislation on life insurance is considered a pioneer in comparative law, which would eventually recognize the right of beneficiaries in similar terms. *See, e.g.*, Danish Insurance Contracts Act 1930 § 102 (Act. No. 129/1930) (Den.) (allowing third-party beneficiaries); *CODICE CIVILE* (Civil Code), art. 1920 (It.) (allowing third-party beneficiaries); *see* Tirado Suárez, *supra* note 108, at 2325.

112. Currently, the Spanish Civil Code states that spouses can transfer assets and rights by any means and may enter into any type of contract together. *CÓDIGO CIVIL* [C.C.] [CIVIL CODE], B.O.E. art. 1323, July 25, 1889 (Spain).

113. Tirado Suárez, *supra* note 108, at 2329–31.

114. *See, e.g.*, S.T.S., Mar. 14, 2003 (J.T.S., No. 243/2003) (Spain) (finding the capital paid to the beneficiary is not part of an estate).

assets, an indirect donation in favor of the beneficiary.<sup>115</sup> As such, the ICA enables forced heirs and creditors to demand reimbursement from the beneficiary for the premiums paid by the policyholder in fraud of their rights.<sup>116</sup>

With regard to pension plans, the Real Legislative Decree 1/2002, The Law of Regulations of Plans and Funds for Pensions (“TRLPPF”) empowers the participant (the one for whom the plan is created) to name beneficiaries (persons entitled to receive the benefits) in case of death. *A priori* it would seem that, given the similarities between pension plans and life insurance (namely, that both are providential contracts that forecast specified contingencies), the designation of a beneficiary can create—upon the death of the participant—a non-successory, autonomous right in favor of the beneficiary, just as occurs after a life insurance policyholder dies. However, under Spanish law, pension plans do not qualify as insurance contracts.<sup>117</sup> In fact, because of rules provided for in TRLPPF,<sup>118</sup> upon the death of the participant, the pension plan benefits must be integrated in his or her estate.<sup>119</sup> As such, the beneficiary enjoys no protection from the preferential rights of the forced heirs and creditors. The TRLPPF, which focuses on aspects of financial regulation, winds up leaving the potential effects of pension plans on the realm of succession as an open question. Some scholars have argued that a pension plan beneficiary designation should be qualified as a devise and that a nontestamentary designation would be null given that it would not meet the formal conditions required of *causa mortis* transfers.<sup>120</sup>

115. Tirado Suárez, *supra* note 108, at 2340–45.

116. LEY DE CONTRATO DE SEGURO (Insurance Contract Act), B.O.E. art. 88, Oct. 17, 1980 (Spain).

117. See, e.g., F. Sánchez Calero, *Delimitación y Notas Características de los Planes de Pensiones*, in RÉGIMEN JURÍDICO DE LOS PLANES Y FONDOS DE PENSIONES [LEGAL SYSTEM OF PENSION PLANS AND FUNDS] 13–34 (F. Sánchez Calero et al. eds. 1989).

118. In particular, article 8.4 of TRLPPF, which states that ownership of any contributions to pension plans belongs to the participants. See LEY DE REGULACIÓN DE LOS PLANES Y FONDOS DE PENSIONES (Law of Regulations of Plans and Funds for Pensions), B.O.E. art. 8.4, Dec. 13, 2002. For this reason, unlike in the case of life insurance policies where the insuring entity collects premiums, with pension plans, the participant owns the assets into which he or she has made contributions. This prevents pension plan beneficiary designations from being qualified as stipulations conferring a right to a third party, given the absence of a promisor. *Id.*

119. See JUAN PABLO PÉREZ VELÁZQUEZ, LOS PLANES DE PENSIONES Y LOS PLANES DE PREVISIÓN ASEGURADOS: SU INCLUSIÓN EN EL CAUDAL HEREDITARIO [PENSION PLANS AND INSURANCE PLANS: THEIR INCLUSION IN INHERITENCE] 132 (2007); Juan Pablo Pérez Velázquez, *Efectos de la Revocación Testamentaria y de la Renuncia de la Herencia Sobre la Designación del Beneficiario del Plan de Pensiones* [The Effects of Testamentary Revocation and the Renunciation of Inheritance on the Designation of the Pension Plan Beneficiary], 2 REVISTA DE DERECHO CIVIL 193, 193–95 (2015); Juan Pablo Pérez Velázquez, *La Previsión Social Voluntaria y la Herencia*, 57 INTER NOS 21, 23 (2011); Rafael La Casa García, *Contribución al Estudio de Algunas Cuestiones Controvertidas del Régimen Jurídico-Privado de los Planes de Pensiones* [Contribution to the Study of Controversial Questions Regarding the System of Private Legal Pension Plans], 139 REVISTA ESPAÑOLA DE SEGUROS 395, 424 (2009).

120. See VELÁZQUEZ, *supra* note 119, at 19

Others argue that the designation could constitute a case of *causa mortis* donation, establishing an exception to the general rule prohibiting this type of donation,<sup>121</sup> thus creating a genuine Spanish will-substitute. All in all, the system still requires conceptual precision, especially considering the sharp rise in the use of such mechanisms.

To be sure, regulation of life insurance in Spain—unlike regulations pertaining to pension plans—is part of a long tradition and is fairly well-delineated under Spanish succession law.<sup>122</sup> Nevertheless, we must point out that unlike succession law, the regulation of both life insurance and pension plans falls under national jurisdiction and is primarily commercial in nature. Moreover, it is well known that when the State legislates for all of Spain, they are not necessarily taking into account the particularities of the Autonomous Communities civil law systems.<sup>123</sup> To this end, it is not difficult to find inconsistencies between the regulation of commercial will-substitutes as regulated by the State and the rules of succession law under the Autonomous succession systems. Just to give one example, the Galician, Catalanian and the Aragonese systems render testamentary dispositions in favor of the spouse as null in the event of separation, matrimonial annulment, or divorce.<sup>124</sup> We find no such rule, however, in the realm of the SCC or the ICA.<sup>125</sup> As such, it makes little sense for testamentary dispositions in favor of spouse X to become automatically null upon divorce (in the succession law systems that have this rule), and for designations made in life insurance policies and pension plans to be treated differently. Coordinating national commercial rules with the specifics of the autonomous systems of succession is no easy task, but it could be useful to begin by analyzing the efforts made under U.S. succession law in order to standardize the default rules as they apply to wills and to will-substitutes.<sup>126</sup>

121. CÓDIGO CIVIL (CIVIL CODE), art. 620, July 25, 1889 (Spain); see La Casa García, *supra* note 119, at 431–37.

122. For more on the specific relationship between succession law and life insurance contract law, see generally MARÍA DEL PINO ACOSTA MÉRIDA, *SEGURO DE VIDA Y DERECHO DE SUCESIONES* [LIFE INSURANCE AND SUCCESSION LAW] (2005); Carmen Callejo Rodríguez, *Notas de Derecho Sucesorio Sobre el Seguro de Vida para Caso de Muerte* [Notes on Succession Law Regarding Life Insurance in Case of Death], 13 *REVISTA DE DERECHO PRIVADO* 27 (2006).

123. Arroyo i Amayuelas, *supra* note 67, at 175.

124. See LEY DE DERECHO CIVIL DE GALICIA (Statute of Civil Law of Galicia), B.O.E. art. 208, Jul. 19, 2006 (Spain); CODI CIVIL DE CATALUNYA (Civil Code of Catalonia), B.O.E. art. 422-13, July 10, 2008 (Spain); CÓDIGO DEL DERECHO FORAL DE ARAGÓN (Civil Code of Aragón), B.O.E. art. 438, Mar. 29, 2011 (Spain); COMPILACIÓN DEL DERECHO CIVIL FORAL DE NAVARRA (Compilation of the Civil Law of Navarre), B.O.E. arts. 300–04, Mar. 7, 1973 (Spain).

125. According to article 85 of the ICA, the spouse's designation as beneficiary will be determined upon the insured's death. This rule is applicable, however, only in cases in which the spouse has been referred to in general terms (i.e., not using the individual's name). LEY DE CONTRATO DE SEGURO (Insurance Contract Act), B.O.E. art. 85, Oct. 17, 1980 (Spain).

126. Current versions of the UPC and of the *Restatement (Third) of Property* name this as one of their primary objectives: “The proliferation of will-substitutes and other inter-vivos transfers

## IV. CONCLUSION

In general, U.S. will-substitutes formulated a determined response to the previous difficulty of estate administration and will validation. This was not a problem in Spain, however, as the notarial process has been efficient on its own, creating a favorable environment with few judicial challenges. This may explain why Spanish law has not been confronted by a “non-probate revolution,” and also why a general doctrine regarding will-substitutes has yet to develop in Spain. Still, there are socio-economic factors—as in the United States—that have led to the rising use of mechanisms that conform to the U.S. concept of will-substitutes. The utilization of instruments like life insurance contracts and pension plans is bolstered by the State, given its important complementary role to Spanish mandatory Social Security. Perhaps it could be said that such mechanisms do not act as “substitutes” for a will, yet we can emphatically say that the current use of wills is only one of many instruments a person may use to transfer wealth on death while keeping control of those assets during his or her lifetime.

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was recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison.” UNIF. PROBATE CODE art. II, prefatory note (UNIF. LAW COMM’N 2010). “This Restatement . . . moves toward the policy of unifying the law of wills and will-substitutes.” RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003); see also Gallanis, *supra* note 3, at 23–26 (exploring the dominant trend in U.S. succession law of harmonizing the default rules governing wills and will-substitutes).