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(Dir.)

PREVISIÓN Y TRANSMISIÓN INTERGENERACIONAL DEL PATRIMONIO AL MARGEN DE LA SUCESIÓN

Encaje jurídico (¿y consolidación?) de los *will substitutes* en España

Colegio Notarial de Cataluña

Marcial Pons

MADRID | BARCELONA | BUENOS AIRES | SÃO PAULO

2022

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PRESENTACIÓN

El presente libro tiene su origen en la doble jornada homónima que se celebró en las sedes del Colegio Notarial de Cataluña (Barcelona) y del Ilustre Colegio Notarial de las Islas Baleares (Palma de Mallorca) los días 10 y 12 de diciembre de 2019, respectivamente. El evento fue un éxito, no solo por el elevado número de asistentes, sino también por el altísimo nivel de las ponencias y por el interés que despertaron las discusiones posteriores. La colaboración entre el Proyecto de investigación DER2017-82129P (IP: Elena Lauroba Lacasa), la Asociación Catalana de Especialistas en Derecho de Sucesiones (ACEDS) y MAPFRE permitió abordar las problemáticas desde una perspectiva privilegiada, partiendo de un triple punto de vista. Primero, el académico o teórico, relativo al encaje de los *will substitutes* en los sistemas sucesorios, con una aproximación multinivel: evolución e integración en el Derecho de Estados Unidos, proliferación en España y tratamiento por parte de los Derechos civiles españoles, con especial atención al catalán. Segundo, el de los operadores jurídicos del Derecho sucesorio, principalmente abogados y notarios, pero también asesores fiscales y jueces. Y tercero, el de los profesionales del sector asegurador y de la previsión social complementaria. Un diálogo recíprocamente enriquecedor del que cumplía publicar los materiales. Rápidamente obtuvimos la aprobación de los ponentes, pero nos sorprendió la pandemia, que agravó las dificultades clásicas (dilatación de plazos, imposibilidades sobrevenidas…). Ahora que finalmente la situación sanitaria empieza a estar bajo control, hemos conseguido completar la publicación, garantizando su utilidad y actualidad.

Unas jornadas y una obra de estas características solo se convierten en una realidad gracias a la implicación continuada de sus participantes. De entre ellos destaca, de manera específica, la labor de Sergio Sánchez Sierra, director de Formación y soporte a Desarrollo Comercial en MAPFRE, quien, además de coordinar las Jornadas y de escoger a los mejores ponentes del ámbito asegurador, ha contribuido a crear una sólida red de cooperación entre los actores implicados. Mención aparte merece también Mariele Violano, que gestionó con su habitual gentileza y eficacia el desplazamiento a Mallorca de todo el grupo. Por otra parte, quiero resaltar y agradecer el soporte del Colegio Notarial de Cataluña y del Ilustre Colegio de Notarios de las Islas Baleares. Ambos aportaron

su sede y facilitaron sobremanera la logística de las jornadas. Además, el Colegio Notarial de Cataluña ha incluido el libro en su prestigiosa colección de la editorial Marcial Pons, lo cual es toda una garantía, dada la impecable profesionalidad, una vez más, de Dolors Fisac y su equipo en la edición de los escritos. Por último, un sentido agradecimiento a los autores: Thomas P. Gallanis, Ángel Serrano de Nicolás, Antoni Vaquer Aloy, Paloma de Barrón Arniches, Lídia Arnau Raventós, Elena Lauroba Lacasa, Ramon Pratdesaba Ricart, Eduardo Saavedra Díaz y Alejandro Ebrat Picart. Además de la calidad de sus contribuciones, les doy las gracias por la paciencia, disponibilidad y entusiasmo que han mantenido a lo largo de todo el proyecto, minimizando las dificultades de la época en que lo hemos llevado a cabo.

Jaume Tarabal Bosch

Barcelona, 14 de marzo de 2022

WILL SUBSTITUTES IN THE UNITED STATES: AN OVERVIEW*

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1. INTRODUCTION TO WILL SUBSTITUTES IN U.S. LAW[1]

In the United States, the time-honored way to transmit property at death is by writing a valid will or by relying on the applicable statute(s) of intestate succession. The court-supervised procedure to determine whether a will is valid —or whether, instead, the decedent has died intestate— is called «probate». The word «probate» —which, in English, can function as a noun, a verb, or an adjective— derives from the Latin verb *probare*, meaning «to prove», and its related parts of speech such as the noun from the past participle *probatum*, meaning «a thing proved»[2]. The court in which the probate procedure occurs is known by various names, depending on the U.S. jurisdiction: for example, it is a district court in Iowa[3], a surrogate's court in New York[4], or the probate division of a cir-

* An earlier version of this essay was delivered as a lecture at conferences on «Previsión y transmisión intergeneracional del patrimonio al margen de la sucesión: encaje jurídico [¿y consolidación?] de los *will substitutes* en España» in Barcelona on December 10, 2019, and in Palma de Mallorca on December 12, 2019. I am grateful to all of the conference organizers, especially Professor Jaume TARABAL BOSCH and D. Ramon PRATDESABA RICART, for the invitation.

** Disclosure: I served as associate reporter for the *Restatement Third of Trusts* and currently serve as executive director of the Uniform Law Commission's Joint Editorial Board for Uniform Trust and Estate Acts. In this essay, I speak in my individual capacity, not on behalf of the American Law Institute or the Uniform Law Commission.

[1] For a fuller treatment of will substitutes, see Thomas P. GALLANIS, «Will-Substitutes: A U.S. Perspective», in Alexandra BRAUN and Anne RÖTHEL (eds.), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (2016), on which this essay partly draws, and Thomas P. GALLANIS, *Family Property Law: Cases and Materials on Wills, Trusts, and Estates*, 2-11, 335-408 (8th ed. 2020).

[2] See *Oxford English Dictionary* s.v. «probate, *n.*» and «probate, *v.*».

[3] See *https://www.iowacourts.gov/iowa-courts/district-court*.

[4] See *http://nycourts.gov/courthelp/WhenSomeoneDies/index.shtml*.

cuit court in Illinois[5]. In this essay, I refer to this court as a «probate court». Regardless of nomenclature, the probate court also oversees a related procedure: the administration of the decedent's estate[6]. «Probate» and «administration» are so closely connected that, in informal parlance, the two words are synonyms.

Probate and administration are not always needed. There are ways to transmit property at death that do not require the involvement or supervision of a court. In these circumstances, U.S. law allows a property owner to use a «will substitute» to arrange for a «nonprobate transfer»[7]. A nonprobate transfer occurs outside of probate, with no court procedure. The property owner simply designates one or more beneficiaries to receive the property at the owner's death.

The best definition of a will substitute appears in the *Restatement Third of Property*. As defined by the *Restatement*, 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»[8]. A common example of a will substitute is a life insurance beneficiary designation. The owner of a life insurance policy can designate a beneficiary to receive the policy proceeds upon the owner's death. The proceeds are paid by the insurance company to the beneficiary, with no involvement of a probate court.

The law of will substitutes and wills in the United States is primarily state, not national, law. The United States has a federal system of government. Some matters are governed by the national government in Washington, D. C. Other matters are governed by the individual states. Will substitutes and wills are primarily in the latter category. (Later in this essay, we shall encounter an important exception). The law of succession and trusts, the law of property, the law of the family, the law of insurance —these are areas of state law. Each of the fifty U.S. states, plus the District of Columbia, has its own law. This makes it hard to generalize about «the U.S. law» governing will substitutes. Any general statement may not be true for all fifty-one jurisdictions.

This essay focuses on the uniform laws published by the Uniform Law Commission[9]. The Commission is a non-profit organization that develops

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[5] See *http://www.cookcountycourt.org/ABOUT-THE-COURT/County-Department/Probate-Division*.

[6] For a fuller treatment of probate and administration, see Sheldon F. Kurtz, David M. English and Thomas P. Gallanis, *Wills, Trusts and Estates,* 565-575 (6th ed. 2021).

[7] The seminal scholarly article is John H. Langbein, «The Nonprobate Revolution and the Future of the Law of Succession» (1984) 97 *Harvard Law Review* 1108-1141.

[8] *Restatement Third of Property: Wills and Other Donative Transfers,* § 7.1(a) (2003).

[9] For background on uniform laws in the United States, including the Uniform Probate Code, see Thomas P. Gallanis, «Trusts and Estates: Teaching Uniform Law» (2014) 58 *Saint*

model statutes that can be adopted by a state legislature. The Commission's aim is to «provide [...] states with non-partisan, well conceived, and well drafted legislation that brings clarity and stability to critical areas of state statutory law»[10]. An example of such legislation is the Uniform Probate Code. Originally published in 1969 and amended most recently in 2021, the Uniform Probate Code governs, among other things, intestate succession, wills, and many aspects of will substitutes. Other examples of uniform legislation relevant to this essay include the Uniform Trust Code, published in 2000, and the Uniform Real Property Transfer on Death Act, published in 2009.

2. FORMALITIES AND THE PRESENT-TRANSFER TEST

Legislation in each of the U.S. states prescribes formal requirements for a valid will. Typically, the required formalities are writing, signature, and attestation: a properly executed will is in writing, signed by the testator, and attested by credible witnesses. The precise contours of these requirements vary from one U.S. state to another. The Uniform Probate Code requires a will to be «(1) in writing; (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (3) [...] signed by at least two individuals, each of whom signed within a reasonable time after the individual witnesses either the signing of the will [...] or the testator's acknowledgment of that signature or acknowledgment of the will»[11]. In 2008, the Uniform Law Commission amended the Uniform Probate Code to authorize notarization as an alternative to attestation: rather than being attested by witnesses, a will may be «acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments»[12].

With rare exceptions —for example, a gift *causa mortis*—[13] traditional U.S. law holds that a transfer of property occurring at the transferor's death is «testamentary», meaning that the instrument of transfer must comply with the formalities required of a will.

Will substitutes need not comply with the formalities of wills[14]. The reason is that will substitutes are considered to be *non*-testamentary.

Louis University Law Journal ,671-680. See also the website of the Uniform Law Commission, www.uniformlaws.org, which has the text of each uniform law and explains which jurisdictions within the U.S. have enacted the law —or enough of the law for the jurisdiction to be counted by the Uniform Law Commission as an enacting jurisdiction.

[10] See *http://www.uniformlaws.org/aboutulc/overview*.

[11] Uniform Probate Code [hereinafter «UPC»] § 2-503(a).

[12] UPC § 2-503(a)(3)(B).

[13] On gifts *causa mortis*, see Walter B. Raushenbush (ed.), *Brown on the Law of Personal Property,* 130-145 (3rd ed. 1975).

[14] See *Restatement Third of Property: Wills and Other Donative Transfers,* § 7.1(b) (2003) («To be valid, a will substitute need not be executed in compliance with the statutory formalities required for a will»).

They are deemed to effectuate a present transfer to the beneficiary, even if possession is postponed until the transferor's death and even if the transferor retains the right to revoke the transfer. The *Restatement Third of Property* explains:

> The 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. Anglo-American law recognizes that a nonpossessory future interest is an ownership interest even though it is subject to a power or other conditions that might not be permanently resolved until the interest takes effect in possession or enjoyment. Likewise, a contract right can be conferred on another even though the contract right is a right to possession or enjoyment of money or other property some time in the future and is subject to a power or other conditions that might not be permanently resolved until the contract right becomes enforceable [15].

In reality, the present transfer often is a fiction [16]. With many will substitutes, no enforceable interest passes to the beneficiary during the transferor's lifetime. Life insurance is a good example. The owner of a life insurance policy, while alive, ordinarily has full authority to cancel the policy or to revoke or amend the beneficiary designation. The named beneficiary has no enforceable interest. But the law deems the beneficiary to have a present interest for the useful purpose of avoiding the formalities for wills. Recognizing that the present transfer often is a legal fiction, the *Restatement Third of Property* offers an alternative justification for the validity of will substitutes:

> An alternative explanation is that will substitutes need not be characterized as effecting a present transfer to escape characterization as a will. Rather, the donor is free to transfer wealth on death either in the probate system or in the nonprobate system or in both. When using the nonprobate system, the donor uses its forms, which typically arise from the commercial practice of financial intermediaries. When using the state-operated transfer system of probate administration, the donor uses the forms appropriate to that system (for testation) or allows that system to operate by default (in the case of intestacy). The statute of wills does not require wealth transfers on death to occur by probate; the statute merely requires that probate transfers comply with the statute's formalities. Because the statute of wills does not govern nonprobate transfers, wealth holders may use these alternative wealth-transfer systems on death by means of will substitutes [17].

The Uniform Probate Code validates will substitutes by declaring them to be non-testamentary. Section 6-101 of the Uniform Probate Code provides in pertinent part: «A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory

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[15] *Restatement Third of Property: Wills and Other Donative Transfers,* § 7.1, comment a (2003).

[16] See LANGBEIN, «Nonprobate Revolution», 1128 («The odor of legal fiction hangs heavily over the present-interest test»).

[17] *Restatement Third of Property: Wills and Other Donative Transfers,* § 7.1, comment a (2003).

note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary» [18].

3. PURE *VERSUS* IMPERFECT WILL SUBSTITUTES; PRINCIPAL TYPES OF WILL SUBSTITUTES IN THE U.S.

Professor John LANGBEIN has emphasized the distinction between «pure» and «imperfect» will substitutes [19]. A pure will substitute confers no legal rights on the beneficiary while the transferor is alive. In this respect, a pure will substitute is akin to a will.

A prototypical example of a pure will substitute is a life insurance beneficiary designation. As mentioned above, the owner of the life insurance policy, while alive, ordinarily has full authority to cancel the policy or to revoke or amend the beneficiary designation. The named beneficiary has no enforceable interest.

Other examples of pure will substitutes include similar «pay on death» or «transfer on death» beneficiary designations —for instance—, with respect to pension and retirement accounts, bank accounts, securities, or automobiles or other vehicles, such as boats. Perhaps the newest «transfer on death» mechanism applies to land. More than half of the jurisdictions in the U.S. now authorize «transfer on death deeds» of interests in land [20]. Some of these jurisdictions do so because they have enacted the Uniform Real Property Transfer on Death Act, published by the Uniform Law Commission in 2009. Other jurisdictions have statutes predating or differing from the uniform act. Under all of these statutes, whether uniform or non-uniform, an individual owning an interest in land may execute and record a transfer on death deed, designating one or more beneficiaries. The deed operates akin to a beneficiary designation for a life insurance policy. While the transferor is alive, the beneficiary or beneficiaries have no interest in the land, and the deed is revocable by the transferor. If the deed remains unrevoked, then at the transferor's death the property passes outside of probate to the beneficiaries who survive the transferor as specified in the deed. The transfer is not testamentary, hence need not comply with the formalities for wills.

The above examples of pure will substitutes are asset-specific. The beneficiary designation applies to the specified asset. But a pure will substitute need not govern only one specified asset.

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[18] UPC § 6-101.

[19] See LANGBEIN, «Nonprobate Revolution», 1109.

[20] For discussion, see Susan N. GARY, «Transfer-on-Death Deeds: The Nonprobate Revolution Continues» (2006) 41 *Real Property, Probate & Trust Journal,* 529-570.

The revocable trust is a pure will substitute capable of holding a portfolio of assets. A trust is revocable when the person creating the trust —the «settlor»— retains, or is deemed to retain[21], the power to revoke it. In a typical revocable trust arrangement, the settlor retains not only the power to revoke the trust but also the lifetime right to the trust's income and, in many instances, discretionary access to the trust's principal. The trust's other beneficiaries have no enforceable interest in the trust while the settlor is alive[22]. After the settlor dies, the assets remaining in the trust are used for the benefit of —or, depending on the terms of the trust, are distributed to— the surviving beneficiaries. No probate court is needed.

In contrast to the pure will substitutes, an «imperfect» will substitute creates enforceable rights in the beneficiary or beneficiaries while the transferor is alive. The prototypical example of an imperfect will substitute is joint tenancy. Joint tenancy is a form of co-ownership, typically of land but also sometimes used with respect to securities and automobiles and other vehicles, such as boats. By way of illustration, suppose that *A* transfers *A*'s land to *A* and *B* as joint tenants. While *A* and *B* are alive, they share equal ownership of the land. *A* cannot revoke the transfer to *B*[23]. A defining feature of joint tenancy is that the co-owners have a «right of survivorship». This means that when a joint tenant dies survived by one or more other joint tenants, the decedent's interest passes automatically and outside of probate to the survivor(s). If *A* dies and is survived by *B*, *A*'s interest in the land passes automatically to *B*. No probate court is needed. Joint tenancy is a will substitute —but it is an imperfect will substitute. *B* had an enforceable interest in the land even while *A* was alive. The same is true if the property held in joint tenancy is in an asset other than land, such as shares of stock, a car, or a boat.

Joint bank accounts, like joint tenancies, typically have a right of survivorship among the account holders. When one account holder dies, the decedent's funds in the joint account automatically belong to the surviving account holder(s). No probate court is needed. It is worth noting, however, that, except in a very few U.S. states, the funds in a joint account are not owned in joint tenancy. A deposit into the account does not create enforceable rights in that deposit in the other account holder(s) while the

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[21] The traditional rule was that a trust was irrevocable unless the settlor reserved the power to revoke it in the terms of the trust. See *Restatement Second of Trusts* § 330 (1959). The Uniform Trust Code reverses the presumption and provides that a trust is revocable unless the terms of the trust expressly provide that the trust is irrevocable. See Uniform Trust Code [hereinafter «UTC»] § 602(a). The *Restatement Third of Trusts* takes an intermediate position: If the settlor has failed to state in the terms of the trust whether the trust is revocable, the question is one of interpretation; there is a presumption that the settlor intended to retain a power of revocation if the settlor retained an interest in or power of appointment over the trust property. See *Restatement Third of Trusts* § 63(2) and comment c (2003).

[22] See, for example, UTC § 603(b) («To the extent a trust is revocable [...], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor»).

[23] Unless a resulting trust is declared, on which see *Scott and Ascher on Trusts,* ch. 43 (5th ed. 2009).

depositor is alive. Instead, while the depositor is alive, the depositor is the owner of his or her contributions to the account[24].

To summarize: There are eight principal types of will substitutes in the United States. These are (1) life insurance beneficiary designations; (2) pension and retirement account beneficiary designations; (3) pay on death bank account beneficiary designations; (4) transfer on death beneficiary designations for securities or automobiles or other vehicles; (5) transfer on death deeds of land; (6) revocable trusts; (7) joint tenancies, and (8) joint bank accounts.

4. APPLICATION OF THE SUBSTANTIVE LAW OF WILLS TO WILL SUBSTITUTES

Having explored the principal types of will substitutes in the United States, I now turn to the current position of will substitutes in U.S. law. An important trend in the U.S. law of succession has been the application of the substantive law of wills to will substitutes[25].

I use the term «substantive law» in contrast to formal requirements. The formal requirements for a valid will —typically writing, signature, and attestation— do not apply to will substitutes, which, as we have seen, are considered to be non-testamentary.

Formal requirements aside, an important question is whether the substantive law of wills should extend to will substitutes. In his seminal article on the «Nonprobate Revolution», Professor LANGBEIN answered this question in the affirmative: «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»[26]. The *Restatement Third of Property* takes the same position. It states in pertinent part: «Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions»[27].

U.S. succession law has moved significantly in the direction of extending the substantive law of wills to will substitutes. An example will illustrate the point. The example concerns the rule of revocation on divorce.

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[24] See, for example, UPC § 6-211(b) («During the lifetime of all parties, sums deposited into an account belong to the parties in proportion to the net contribution of each, unless there is clear and convincing evidence of a different intent»).

[25] This part of the essay draws on GALLANIS, «Will Substitutes», 23-24. See also John H. LANGBEIN and Lawrence W. WAGGONER, «Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code» (1992) 55 *Albany Law Review,* 871, 875.

[26] LANGBEIN, «Nonprobate Revolution», 1136-1137.

[27] *Restatement (Third) of Property: Wills and Other Donative Transfers,* § 7.2 (2003).