I. Introduction

Will-substitutes, that is to say mechanisms that are functionally equivalent to wills, are very common in the US, where much of the wealth is transferred on death by means other than wills, and thus outside traditional probate procedures. This has led some authors to speak of a ‘non-probate revolution’.¹ The phenomenon has not only attracted widespread interest among legal scholars, but has also led to responses by both the drafters of the Uniform Probate Code (UPC) and the Restatement Third of Property, who have tried to accommodate will-substitutes within the law of donative transfers and to harmonise substantive laws governing wills and will-substitutes.²

Given similarities in the structure of their succession laws and the administration of estates, one might expect that developments in England and Wales are similar.³ The purpose of this chapter is to investigate whether this is the case, and to provide an assessment of the transfer of wealth on death in England by means other than by will or intestacy. It will emerge that, by comparison with the US, on this side of the Atlantic, legal scholars, as well as law reformers, have paid relatively

³ When reference is made to England in this chapter, this refers to England and Wales.
little attention to the phenomenon and the effect of the use of will-substitutes. This might suggest that will-substitutes do not play an important role in practice. This, however, is not the case. Even though in England one cannot quite speak of a ‘non-probate revolution’, the will does not represent the only mechanism by which people transfer wealth on death. Despite the fact that the rate of testation in England is probably higher than in several other European countries, testators in England are often members of a private pension scheme, have set up a trust, hold property in joint names, or have stipulated a life insurance policy. Thus, wills are complemented by other means of passing benefits on death. What is more, some of the mechanisms used have been in place for quite some time. That said, in recent decades, the transfer of wealth through instruments functionally equivalent to wills seems to have gained a new economic importance, due, especially, to investments in life insurance policies and private pension schemes.

Among the will-substitutes most commonly used in the US are revocable trusts, life insurance, pension accounts as well as various types of pay-on-death (POD) accounts. In England, the picture is somewhat different. Wills aside, most wealth appears to be transferred on death through private pension schemes, life insurance, as well as survivorship operating on death of a joint tenant. Some of the ‘mass-will-substitutes’ found in the US, such as transfer-on-death (TOD)...


5 J Finch, L Hayes, J Masson, J Mason and L Wallis, Wills, Inheritance, and Families (Oxford, Clarendon Press, 1996) 32 and 37: ‘Thus, taking the total picture of the transmission of property, it is clear that wills play a relatively small role in quantitative terms’.

6 For comparative figures see KGC Reid, MJ De Waal, and R Zimmermann (eds), Comparative Succession Law, volume 2. Intestate Succession (Oxford, OUP, 2015) 444. The latest figures from the English Judicial and Court Statistics of 2012 reveal that 41% of the people who died in 2012 left a will: Court Statistics Quarterly January to March 2013, www.gov.uk/government/uploads/system/uploads/attachment_data/file/207804/court-stats-q1-2013.pdf. The percentage seems to have remained more or less stable over the years. However, according to R Kerridge, ‘Intestate Succession in England and Wales’ in ibid, 323, 332, ‘almost 85% of those in respect of whose estate grants of probate or letters of administration were taken out actually died leaving valid wills’.

7 The term ‘life insurance’ is used so as to include both life assurance and life insurance policies.

8 One example is trusts, which were developed partly in order to cater for shortcomings in the succession law of the time. See Langbein, ‘Major Reforms of the Property Restatement and the Uniform Probate Code’, above n 2, 10–11. The donatio mortis causa too developed in order to avoid the technicalities of testamentary law. CV Margrave-Jones, Mellows: The Law of Succession, 5th rev edn (London, Butterworths Law, 1993) 520. And, by the 14th century, the common law had already fully developed the distinction between a tenancy in common and a joint tenancy, the latter allowing for the operation of the ius accrescendi, which was apparently related to a desire to overcome the technical problems of the conveyance and to avoid feudal dues. F Pollock and FW Maitland, History of English Law, vol 2, 2nd edn (1898) 20.

9 Langbein, ‘Major Reforms of the Property Restatement and the Uniform Probate Code’, above n 2, 10; McCouch, ‘Will Substitutes under the Revised Uniform Probate Code’ above n 2; Leslie and Sterk, above n 2, and ch 1 above, p 12. There is no agreement, however, as to which instrument is most relevant from an economic perspective.
registrations of securities or automobiles, POD bank accounts, or TOD deeds,\(^ {10}\) are not available here. Although revocable trusts are popular elsewhere,\(^ {11}\) in England, they do not seem to be as common. Perhaps this is partly due to their tax treatment, as well as the fact that there is a great deal of uncertainty as to how far settlors can reserve powers to themselves.\(^ {12}\)

This chapter explores some of the most common mechanisms used in England,\(^ {13}\) the rationale behind their use, as well as how the law deals with them and the consequences that arise from their proliferation. In doing so, it considers will-substitutes from different perspectives, including those of creditors and family members and dependants. It argues that the current state of the law in England is unsatisfactory and that it is time for a proper discussion involving non-probate transfers and their relationship with current succession laws.

**II. Principal Types of Will-Substitute**

### A. Private Pension Schemes

As is the case in the US,\(^ {14}\) in England, private pension schemes are a common mechanism for passing wealth on death. Together with homes, pensions often represent the most significant financial asset of a household.\(^ {15}\) Although the primary function of private pension schemes is to accumulate and invest savings so as to pre-empt the risk of insufficient or inadequate income on retirement, they can also lead to a payment of benefits on death of the member. The type of death

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\(^{12}\) See C McKenzie, ‘Having and Eating the Cake: A Global Survey of Settlor Reserved Power Trusts: Part 1’ (2007) *5 Private Client Business* 336, 339 who also shows that revocable trusts are common in offshore jurisdictions. See ch 11 below, p 238. As to the Canadian context, see ch 12 below, p 255.

\(^{13}\) This chapter will not explore the use of contracts to make wills, automatic accruer clauses in partnerships, or statutory succession in residential or agricultural tenancy.


benefit varies considerably depending on the pension scheme and on whether the member dies before or after retirement.

**i. Benefits in Case of Death in Service**

Where the member dies before retirement, pension schemes usually provide death benefits either in the form of a lump-sum payment, a dependant’s pension, or a combination of both. Generally speaking, dependant’s pensions may be paid to a spouse, civil partner, cohabitant, child or other dependant of the deceased.\(^\text{16}\) In most schemes the benefit automatically goes to the spouse or to a dependant, or, if there is no spouse or dependant within the category defined by the scheme, the pension goes to the estate, is absorbed into the fund or refunded.

In principle, lump-sum benefits can be paid to a wider category of people, though this depends on the scheme. Quite often potential beneficiaries include the member’s personal representatives, spouses, civil partners, relatives, nominees, those benefitting under a will, anyone financially dependent on the member, a charity, or a trust.\(^\text{17}\) The scheme’s rules usually allow the member to nominate the beneficiary of the lump-sum payment. However, irrespective of whether or not the scheme is contract or trust based, such nominations are not usually binding on the scheme administrators or trustees who, in the exercise of their discretion, can nominate someone else.\(^\text{18}\)

**ii. Benefits in Case of Death after Retirement**

Where the member dies after retirement, depending on the scheme, some death benefits may be payable in the form of a guaranteed pension. In this case, if the member dies before the end of the guaranteed period, any remaining payments will be paid to his or her estate, to be distributed according to the will or intestacy rules. Defined benefits schemes will often pay a proportion of the pension that the member was receiving when he or she died to his or her spouse or children.

Until recently, when a member of a defined contribution scheme retired, he could take up to 25 per cent of the pension pot, as a lump sum tax free; the remainder if taken as a lump sum was subject to onerous tax charges. Depending on the scheme, the effect of pension legislation was that the member had to invest the remaining 75 per cent by purchasing either a ‘compulsory purchase annuity’, a ‘drawdown pension’ or a combination of both. Since April 2015, everyone with a defined contribution pension fund who is aged 55 or over has complete freedom

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\(^{16}\) s 167 and sch 28, para 15 of the Finance Act 2004.


\(^{18}\) Depending on whether or not the scheme is trust or contract based, distribution takes place through trustees or scheme administrators. When reference to trustees is made, this chapter intends to refer to both.
to access the whole of their pension fund as a lump sum, regardless of the size of the fund, though only the first 25 per cent will be tax free. Thus, members are no longer forced to invest the money in an annuity or a drawdown pension, though those options will still be available and most people will probably continue to invest in them.\textsuperscript{19}

Where upon retirement the member has invested the pension pot in a drawdown pension or an annuity, more benefits may be payable on death. Through an annuity, the member can provide for dependants by purchasing a guaranteed term annuity, a joint life annuity, or both. In the former, the insurance company will make the payments for a guaranteed period, even if the member dies, while in the latter the payment is made for the life of the beneficiary. In the case of drawdown pensions, death benefits can be provided in the form of a drawdown pension, a lump-sum payment or an annuity. In addition, since 2006, member value protection annuities are also available, providing a return of any unpaid capital on death as a lump sum.

Thus, pensions offer a variety of different possible ways of passing wealth on death of the member and often the amount of money passed is not insignificant.\textsuperscript{20} For instance, in occupational pension schemes, the lump sum is normally calculated as a multiple of the member’s yearly earning at the time of death, or a multiple of four times the yearly salary or greater. Most personal pensions will pay the full value of the pension fund, so that the amount can be considerable. In some instances both a lump sum and a dependant’s pension, of up to two-thirds of the member’s prospective pension plus return of member’s contributions with interest, is payable.\textsuperscript{21} NEST (National Employment Savings Trust) pension schemes only pay out a lump sum equal to the value of the member’s pension account if the member dies before retirement. It is then paid to the person nominated by the member, as the nomination is binding.

\textit{iii. The Distribution of Death Benefits}

We have seen that most pension schemes allow the member to nominate the beneficiary of the death benefit. These nominations are normally required to be


\textsuperscript{20} In determination Hawkins (PO-2753) the lump sum amounted to £31,559; in Childs-Hopkins (K00663) to £96,000; in Wheeler (PO-267) to £150,053; and in Tompkins (J00510) to £562,600.

in writing and signed by the member, and are generally revocable according to the
rules of the respective scheme, but cannot be expressed in a will. As noted above,
in many cases nominations are not binding on the trustees, which is why they are
frequently referred to as letters of wishes. In other words, unlike in other common
law jurisdictions, 22 the distribution is left to the discretion of the trustees.

When deciding who will receive a benefit, trustees must act in accordance with
the scheme and take into consideration not just the nominee(s) chosen by the
member, but all potential beneficiaries, as defined by the scheme. However, in
most cases they will simply abide by the nomination, unless the member’s circum-
stances have changed after the nomination was made. 23 Inevitably, this can lead
to situations where complaints are brought to the Pensions Ombudsman ques-
tioning the manner in which the discretion was exercised. 24 There are, however,
also pension schemes in which nominations are binding, as is the case with NEST
nominations, in which case the trustees will pay the person nominated by the
member. 25

The reason why most private pension schemes provide trustees with discre-
tion to choose the beneficiary of the lump-sum death benefit is to avoid any risk
of the payment being treated as part of the member’s estate for the purposes of
inheritance tax. 26 Although non-binding nominations are less like wills, pensions
still allow for a transfer of wealth on death, though as determined by the trustees.
Where they are binding, they are clearly a will-substitute.

B. Statutory Nominations

A mechanism, often mentioned in succession textbooks, is statutory nominations,
which represent a non-probate testamentary instrument provided by the legis-
lature. 27 Initially, the purpose behind these nominations was to grant poorer
members of society the possibility of transferring funds or investments held by
certain bodies, 28 such as industrial and provident societies, friendly societies and

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22 In Canada and in the US, beneficiary designations are binding. See ch 2 above, p 39 and ch 1 above,
p. 14. In Australia, it depends on the scheme. For further details, see A Braun ‘Pension Death Benefits:
Opportunities and Pitfalls’ in B Häcker and C Mitchell (eds), Current Issues in Succession Law (Oxford,
23 ibid, 247.
24 ibid, 252.
25 Recent changes to the HMRC Manual indicate that any nomination that is binding triggers
inheritance tax (IHT), irrespective of who is the beneficiary. See the HMRC guidance, ‘IHTM17052
(Pensions: IHT charges: general power over death benefi ts)’ www.hmrc.gov.uk/manuals/ihtmanual/
ihtm17052.htm.
Formalities in England and Wales’ in KGC Reid, MJ De Waal and R Zimmermann (eds), Comparative
of Succession, above n 4, 335.
27 In re Barnes [1940] Ch 267, 272–73.
trade unions, outside probate rules, by using a written nomination, rather than a will, which must be signed in writing before two witnesses.\textsuperscript{29} Although, at some point in the past some schemes allowed statutory nominations for relatively large sums,\textsuperscript{30} nowadays, they are only permitted for small sums of up to £5,000,\textsuperscript{31} which is probably one of the reasons why they are no longer as common in practice.\textsuperscript{32}

Unlike most pension nominations, statutory nominations are binding on the administrators of the scheme. In this sense, they are closer to wills, although unlike wills,\textsuperscript{33} statutory nominations can be validly made at the age of 16, and are expressly excluded from having to comply with formality requirements set out in section 9 of the Wills Act 1837. That said, the various statutes regulating such nominations usually require writing, and in many cases it must be attested by one or more witnesses, so that the differences in form are not as significant as they initially appear. In fact, where a statutory nomination complies with the formality requirements for wills, it may be proved as a will.\textsuperscript{34}

People can (and often) dispose of such investments by will instead of by statutory nomination,\textsuperscript{35} something that is not usually possible in the context of pensions. This allows testators to change their minds by simply revoking the will or by varying it through a codicil, though in this instance the advantages of a non-probate transfer are of course lost. However, a nomination made under a statutory provision takes precedence over a will, whether the will is made before,\textsuperscript{36} or after the nomination.\textsuperscript{37} Thus, once a statutory nomination is made, it may be revoked by a notice complying with the formalities for such a nomination, but it cannot be revoked by a will or codicil.\textsuperscript{38}

C. Life Insurance

Unlike pension schemes, which are primarily designed to provide for retirement, an important rationale behind life insurance has traditionally been to transfer

\textsuperscript{29} s 23 of the Industrial Provident Societies Act 1965; s 66 of the Friendly Societies Act 1974; s 17 of the Trade Union and Labour Relations (Consolidation) Act 1992; and sch 3 para 1(2) of the Trade Union (Nominations) Regulations 1977 (SI 1977/789) and the Trade Union (Nominations) (Amendment) Regulations 1984 (SI 1984/1290).
\textsuperscript{30} Until 1981, National Savings Certificates and deposits in the National Savings Bank up to £100,000 could be passed outside probate.
\textsuperscript{31} Miller, above n 4, 112.
\textsuperscript{32} In fact, National Savings Certificates and savings in the National Savings Bank pass under a nomination only if made before 1 May 1981. See Kerridge and Brierley, above n 4, 4. For details about their operation, see A Samuels, ‘Nominations in Favour of a Deceased to Take Effect on Death’ (1967) 31 Conveyancer & Property Lawyer 85.
\textsuperscript{33} An exception is made for minor soldiers in actual military service or by minor seamen at sea: s 11 of the Wills Act 1837.
\textsuperscript{34} Re Baxter’s Goods [1903] P 12.
\textsuperscript{35} Kerridge and Brierley, above n 4, 5.
\textsuperscript{36} Eccles Provident Industrial Co-operative Society Ltd v Griffiths, above n 28.
\textsuperscript{37} Bennet v Slater [1899] 1 QB 45.
\textsuperscript{38} Kerridge and Brierley, above n 4, 5; Margrave-Jones, above n 8, 362.
wealth and liquidity on death, particularly following the premature death of the policyholder. However, life insurance has also been increasingly regarded as a saving device, and in many cases this factor will be as important as the protection it affords. In other words, the transfer of benefits on death may not always be at the forefront of the mind of a person who takes out a life insurance policy.

Be that as it may, the proceeds of insurance policies often form an important means of providing for the family of a deceased person. In 2013, the average pay-out on a term life insurance policy was £51,500 and total claim pay-outs were £1.3 billion. The average claim payment for whole life insurance was £10,300 and the total payment amounted to £449 million. Although life insurance represents an important financial asset, funds held in insurer-administered life business fell in 2010 by 37 per cent to £150 billion, the lowest level since 1992, and have not really recovered since then. The reasons for this fall in popularity may include reduced benefits, as well as the risk that the insurance company may not pay out, or that a person may become unable to continue payments.

As is the case with pension schemes, there are different types of life insurance policies, all of which result in different consequences for creditors and dependants, as well as different tax implications. Among these, only ‘own life for the benefit of another’ policies operate as will-substitutes. Since the Contracts (Rights of Third Parties) Act was passed in 1999, a trust is no longer necessary for a beneficiary of such a life insurance policy to have a direct claim. Nevertheless, it is still advisable to include policies in trusts, as this is a way of avoiding inheritance tax. Tax considerations aside, if there is a trust, the proceeds are paid directly to the beneficiary without entering the deceased’s estate, and in principle, they are not available to the deceased’s creditors, nor do they fall into the ‘net estate’ for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975 (I(PFD) Act), unless the court invokes the anti-avoidance provision in section 10(7).

An express declaration of trust is not necessary where the policy falls under section 11 of the Married Women’s Property Act 1882 (MWPA). This provision

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39 Miller, above n 4, 311.
31 See ABI, ‘Funds held in Life and Pension products in 2012’, above n 14, 6, figure 5.
42 Research from Aegon in June 2013 shows that among the barriers are: the expenses; the complexity of the schemes; and the concern that money would not be paid out. Aegon Press Release 2013, www.aegon.com/en/Home/Investors/News/Press-Releases/‘Aegon UK Research Identifies the Barrier to buying protection’. However, statistics provided by the ABI for 2013 indicate that 98.4% of term life insurance policies and 99.9% of whole life insurance claims were paid. ABI, ‘270 families helped every day by Life, Critical Illness and Income Protection insurance payouts in 2013’, above n 40. These statistics represent 90% of the market.
43 For an account of the law prior to the 1999 Act, see Miller, The Machinery of Succession, above n 4, 316.
44 See below at section III.D.
45 For more details, see below at section III.E, and ch 14 below, p 299.
states that where a policy of assurance is effected by a person on his own life and expressed to be for the benefit of his wife and children or any of them, or by a woman on her own life and expressed to be for the benefit of her husband or children or any of them, this creates a trust in favour of the beneficiaries named in the policy.\textsuperscript{46} Where the MWPA does not apply, it is possible to declare a trust or to assign the policy to trustees to hold on trust for certain beneficiaries.

On the other hand, where there is no trust, the payment is payable to the personal representative, the money goes to the estate and is distributed according to the will or intestacy rules. It is, therefore, available to creditors and dependants and also subject to inheritance tax.

D. Holding Property in Joint Names

\textit{i. Introduction}

As is the case in other common law jurisdictions, under English law, where title to property is held in joint names (as opposed to tenancy in common) survivorship operates on death of one of the joint tenants. It follows, that the deceased’s title extinguishes and automatically vests in the surviving joint tenant who becomes absolutely entitled to the property. Survivorship operates such that absolute title is acquired outside probate procedures and thus directly. The right of survivorship can be removed through severance, though this cannot take place through a will.

Even though the legal title may be held in joint names and pass through survivorship on death of one of the tenants, it does not necessarily follow that the survivor is beneficially entitled to the property such that he may hold it on trust for the deceased’s estate. This depends on how and why the joint tenancy was established but the reasons for holding property jointly vary, the benefit of survivorship being just one of them.\textsuperscript{47} In principle, where a person gratuitously acquires or transfers property into the name of another person or into joint names, and there is lack of evidence of the intention of the purchaser/transferor, a presumption of a resulting trust operates, whereby the surviving tenant holds the legal title on trust for the estate of the first to die. This presumption can be rebutted, for instance, through proof of an intention to make a gift to the transferee. A gift is presumed, where the transfer is made by a husband to his wife or by a father to his children or someone standing in \textit{loco parentis}.\textsuperscript{48} However, pursuant to section 199 of the Equality Act 2010, this presumption of advancement will be

\textsuperscript{46} This applies also to civil partners, s 70 of the Civil Partnerships Act 2004.

\textsuperscript{47} According to CK Wehringer, ‘Joint Ownership—No Substitute for a Will’ (1967) 39 New York State Bar Journal 301, joint ownership is not an adequate substitute to a properly drawn will.

\textsuperscript{48} The presumption can be rebutted however: \textit{Simpson v Simpson} (The Times 11 June 1988). For differences with Canada, see ch 12 below, p 34.
abolished, though at the moment it is not clear when this legislative change will come into effect.49

All types of property can be held jointly, including land, bank accounts, life insurance and annuities, bonds, and shares. This chapter will only focus on land and on bank accounts, as these are a very common will-substitute.

ii. Joint Tenancy of Land

In England, joint tenancy is an important way of holding, and thus of passing real property on death, partly due to the dramatic rise in levels of home ownership and of house prices over the course of the past decades. Data obtained directly from the Land Registry reveals that the amount of land registered to joint proprietors has increased over the past 10 years, as have the applications to transfer title on the death of a joint proprietor, except for a drop in 2013. Husbands and wives often hold property, and in particular their home, as joint tenants50 and, judging from case law, it is not uncommon for parents to purchase or to transfer the property into joint names with one of their children.

As noted above, when a joint tenant dies, the surviving tenants become immediately entitled to the whole. For the purposes of the land register, the change in title is registered upon provision of a death certificate, a grant of probate, or a letter of administration.51 No fee is payable and there is no need for a lawyer to be involved, which means that the surviving tenant acquires absolute title quite quickly and at almost no cost.

Given that the parameters of the operation of presumed resulting trusts in the case of gratuitous transfers of land are uncertain, it is more likely that a joint tenant will obtain a beneficial title in the real property.52

iii. Joint Bank Accounts

Unlike in the US, in England, banks do not provide ‘account-specific wills’ in the form of POD bank accounts.53 Nonetheless, it is not uncommon for people to

50 According to Roger Kerridge, 80% of married couples hold their property as joint tenants: Kerridge, ‘Intestate Succession in England and Wales’, above n 6.
52 In this sense, see L Tucker, N Le Poidevin and J Brightwell, Lewin on Trusts, 19th edn (London, Sweet & Maxwell, 2014) 9–015 who refer to the uncertain effect of s 60(3) of the Law of Property Act 1925 (LPA) and of the HL decision in Stack v Dowden [2007] UKHL 17. This does not, however, hold true of cases of purchase in joint names.
53 For a detailed discussion see WM McGovern, ‘The Payable on Death Account and Other Will Substitutes’ (1972) 67 Northwestern University Law Review 7, 9. In Canada too they are not common, see ch 12 below, p 257.
transfer bank accounts into joint names with the intention that the surviving holder should benefit on death of the other.

There are few statistics on the number of joint bank accounts in the UK. Recent estimates show that there are more than 76 million personal current accounts held with banks in the UK and that the number is rising. Data from the Office of Fair Trading suggest that for 28 per cent of UK adults the main current account is a joint account. The proportion has risen to 30 per cent for households with a combined income of between £20,000 and £40,000 and to 36 per cent for households with a combined income above £40,000.

As noted above, although bank accounts may be held in joint names, this does not necessarily mean that on the death of one of the joint tenants, the survivor will enjoy the beneficial interest, especially if the intention of the transferor is unclear. There are many reasons for establishing or transferring accounts into joint names and the desire to benefit the other tenant on death through survivorship may not necessarily be the only one. A common motive for transferring an account into joint names is, in fact, administrative convenience.

Married couples normally hold bank accounts jointly to allow both parties to draw on the other’s funds in the account, as well as to benefit one another on death. There are, however, also cases in which an elderly person transfers an account into the name of a child, or a niece or nephew, with the intention that the transferee can undertake withdrawals or payments on their behalf, and assist with shopping, paying bills and other tasks. Where that is the case it can be difficult to determine whether the survivor was meant to benefit from the account on death or rather to hold it on trust for the estate, an issue that may lead to litigation.

In the absence of a clear intention, and unless the presumption of advancement applies, a resulting trust usually operates such that the transferee holds the account

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55 ibid, Annex C table 9/1.
56 ibid, Annex C table 9/3.
58 Reasons of administrative convenience were found in Marshall v Crutwell (1875) LR 20 EQ 328; Lloyd v Pogge (1872) 8 Ch App 88; and Hoddinott v Hoddinott (1949) 2 KB 406. For a discussion, see NA Clayton, ‘Joint Accounts and Reasons of Convenience’ (1989) 4 Journal of International Banking Law & Regulation 146.
59 JE Todd and LM Jones, Matrimonial Property (London, HMSO, 1972) report that 21% of married couples interviewed had a joint account. See also K Rowlingson and S McKay, Attitude to Inheritance in England (Bristol, The Policy Press, 2005) 66, who reveal that 71% of those interviewed had ownership (including joint ownership) in the form of savings and investments in bank accounts or building societies.
60 Langbein, ‘The Nonprobate Revolution’, above n 1, 1112.
61 The complications that can arise if the intention is not clear are illustrated in the recent decision in Drakeford v Cotton [2012] EWHC 1414 (Ch).
on trust for the transferor and later for his or her estate.\textsuperscript{62} This presumption can be rebutted,\textsuperscript{63} where the transferor clearly intended to make an immediate gift to the transferee, so that both can make withdrawals during their lifetime and in their own interest, or to make a gift on death.\textsuperscript{64} In such instances, the gift to the transferee has been described as ‘an immediate gift of a fluctuating and defeasible asset consisting of the chose in action for the time being constituting the balance in the bank account’.\textsuperscript{65}

Where an intention to benefit the transferee on death is found, it is questionable whether the transaction is of a testamentary nature, thus requiring the formalities of a will, an aspect that will be discussed later.\textsuperscript{66} In fact, in practice, the transfer of a bank account into joint names usually requires only the filling in of a form, and some banks allow for applications to be made online or over the phone.

\section*{E. The \textit{Donatio Mortis Causa}}

One way of benefiting someone on death, other than by will, is by way of a \textit{donatio mortis causa}. This is probably one of the oldest will-substitutes available in England. The doctrine was introduced into English law through the ecclesiastical courts and it became prominent after the Statute of Frauds of 1677 abolished nuncupative wills.\textsuperscript{67} Although the modern relevance of the \textit{donatio mortis causa} is debatable, recent case law shows that the device is still in use today.\textsuperscript{68}

The \textit{donatio mortis causa} consists of a revocable gift made during a person’s lifetime, in contemplation of the donor’s impending death, but which takes effect only on his death.\textsuperscript{69} Given that the \textit{donatio mortis causa} takes effect on death and remains revocable until then, it is in many ways similar to a will. It does not, however, require the formalities imposed on wills. Further, the subject matter of the gift must be delivered to the donee during the donor’s lifetime,\textsuperscript{70} and the donor must be considering the probability of death in the near future and not just sometime

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\textsuperscript{62} According to Tucker et al, above n 52, para 9-87, a motive of convenience will not in general be inferred where cheques are drawn regularly by the provider of the money to the exclusion of the other holder; also it is more difficult in cases of a deposit account than in the case of a current account.
\textsuperscript{63} The presumption was rebutted in \textit{Aroso v Coutts \& Co} [2002] 1 All ER (Comm) 241; [2001] WTLR 797, though not in \textit{Sillett v Meek} [2007] EWHC 1169 (Ch); [2009] WTLR 1065.
\textsuperscript{64} Such an intention to benefit the nephew only on death of the aunt was found in \textit{Young v Sealey} [1949] 1 Ch 278.
\textsuperscript{66} See below at section IV.D.
\textsuperscript{68} \textit{Vallee v Birchwood} [2014] Ch 271 (Ch) and \textit{King v Chiltern Dog Rescue} [2016] Ch 221 (CA).
\textsuperscript{69} Margrave-Jones, above n 8, 10, 520–21. For a complete account, see A Borkowski, \textit{Deathbed Gifts: The Law of donatio mortis causa} (Oxford, Blackstone Press, 1999).
\textsuperscript{70} Delivery of the actual subject matter of the gift is not essential where the donee is given the means of obtaining that subject matter, such as a key to a box or title deeds concerning land.
\end{small}
in the future, and for a specific reason.\textsuperscript{71} Thus, its scope is restricted. Although until recently, only tangible property was capable of forming the subject matter of a \textit{donatio mortis causa},\textsuperscript{72} since the decision of the Court of Appeal in \textit{Sen v Headley}, in England, land can also become the subject matter of a valid \textit{donatio mortis causa}.\textsuperscript{73}

The \textit{donatio mortis causa} is revocable until the donor’s death, by express revocation or by resuming the property,\textsuperscript{74} but cannot be revoked by a subsequent will.\textsuperscript{75} Where the donor recovers from the illness or survives the event from which he had contemplated death, revocation is automatic.\textsuperscript{76}

\section*{III. The Reach of Provisions Regulating Succession}

\subsection*{A. Introduction}

For the purposes of formalities, in the US, will-substitutes are treated as non-testamentary.\textsuperscript{77} However, in many other respects they are considered as functionally equivalent to wills, and default provisions applicable to wills are therefore frequently extended. The same applies to many of the provisions aimed at protecting the interests of third parties, though the approach is not yet uniform.\textsuperscript{78} Unlike in the US, in England, there has never been a comprehensive debate about how to treat instruments that allow for a transfer of wealth on death outside probate, and whether or not the law of wills should apply to them. As a consequence, the state of the law is often equivocal and the approach frequently piecemeal.

\subsection*{B. Formality Requirements for Wills}

As noted above, the \textit{donatio mortis causa} is generally seen as a form of testamentary disposition that does not have to comply with the formalities prescribed by section 9 of the Wills Act 1837.\textsuperscript{79} For this reason, it is sometimes described as an
anomaly or as having an ‘amphibious’ nature\textsuperscript{80} and, more recently, suggestions have been made that it ought to be kept within its proper bounds, so as ‘not to allow [the \textit{donatio mortis causa}] to be used as a device in order to validate ineffective gifts’.\textsuperscript{81} Statutory nominations also represent an exception, though introduced by statutory law. However, as noted above, both mechanisms operate in a limited context and have specific requirements.\textsuperscript{82}

In England, courts have addressed the question of the applicability of section 9 of the Wills Act 1837, in relation to pension scheme nominations and joint bank accounts, and in both contexts have come to the conclusion that the Act was not applicable.

In the case of pension schemes, the only two decisions addressing the question have focused principally on the type of control that the deceased exercised over the money invested in the scheme during his or her lifetime, and thus on whether or not he could assign his rights under the scheme.\textsuperscript{83} Although in both cases the pension nominations were seen to present certain testamentary characteristics, they were considered to fall outside the scope of the said provision.\textsuperscript{84} The Privy Council suggested, however, that where the interest of the member of the scheme is absolute and indefeasible, the nomination would be captured by the Wills Act.\textsuperscript{85} Nevertheless, given that nowadays nominations are often mere letters of wishes that do not bind trustees, the problem no longer carries the same relevance.

The issue of whether section 9 of the Wills Act applies has also arisen in relation to joint bank accounts. The only English case in which the question has been discussed is \textit{Young v Sealey},\textsuperscript{86} where Romer J concluded that, even though the intention was for the transferee to benefit only on death of the transferor, the disposition was not invalid by reason of failure to comply with the requirements of the Wills Act.\textsuperscript{87} Romer J was sympathetic towards the position of earlier Canadian and Irish cases, in which such bank accounts were regarded as testamentary.\textsuperscript{88}

\textsuperscript{80} \textit{Sen v Headley}, above n 73, 647; \textit{Re Beaumont} [1902] 1 Ch 889, 892.
\textsuperscript{81} Jackson LJ in \textit{King v Chiltern Dog Rescue}, above n 68, [52].
\textsuperscript{82} See above section II.B.
\textsuperscript{84} For a critical discussion of the arguments employed by the courts see Braun, above n 22, pp 239–44, and WJ Chappenden, ‘Non-Statutory Nominations’ (1972) \textit{Journal of Business Law} 20.
\textsuperscript{85} This is why the PC in \textit{Baird v Baird}, above n 83, distinguished the Canadian Supreme Court decision in \textit{Re Machmnes} [1935] 1 DLR 401. \textit{Theobald on Wills}, above n 83, 25. For details, see Braun, above n 22, 241.
\textsuperscript{86} \textit{Young v Sealey}, above n 64.
\textsuperscript{87} MC Cullity, ‘Joint Bank Accounts with Volunteers’ (1969) 85 \textit{Law Quarterly Review} 530, 542 seems to think that Romer J clearly preferred the view that the transaction was testamentary but did not feel confident enough to reach that conclusion.
\textsuperscript{88} Case law across common law jurisdictions is conflicting. Although there was a trend in some common law jurisdictions to regard joint bank accounts as testamentary (see the Canadian cases \textit{Hill v Hill} (1904) 8 OLR 710 and \textit{Larondeau v Larondeau} [1954] 4 DLR 24, and the Irish case \textit{Owens v Greene} [1932] IR 225 which was, however, overruled in \textit{Lynch v Burke and Allied Irish Banks plc} [1995]}
However, he was of the view that it was difficult to take the same approach at first instance, especially as it would have defeated the deceased’s express intention, and as he was unsure as to whether there were any unreported cases on the issue.\textsuperscript{89}

C. Other Provisions Applicable to Wills

Formality requirements aside, it is unclear whether and to what extent other rules applicable to wills, such as those concerning capacity, revocation of wills, lapse, forfeiture, undue influence or the interpretation and rectification of wills, are applicable to will-substitutes. The current state of the law would appear to be incoherent on this point.

We know that, as is the case with wills, some statutory nominations are revoked by a subsequent marriage of the nominator,\textsuperscript{90} but it is not clear what happens where property is transferred by other means. A MWPA trust of a life insurance policy is not automatically invalidated by the divorce of a married couple and the same holds true of an express trust.\textsuperscript{91} A divorce or remarriage does not per se affect a joint tenancy or a gift made mortis causa. As far as pension nominations are concerned, the fact that many of them are not binding means that even if the scheme rules are silent, trustees can simply pay out to another beneficiary, though they do not have to. In fact, it may well happen that the trustees decide, even against the express intention of the member of the scheme, that the former spouse will take a benefit under the pension.\textsuperscript{92} But what happens when the nomination is binding? There is no clear answer.

It is also uncertain whether the rules on lapse extend to these mechanisms. Statutory nominations fail if the nominee predeceases the nominator,\textsuperscript{93} and the same is true in the case of a donatio mortis causa,\textsuperscript{94} but what about other types of will-substitute? While some pension schemes allow for more than one nominee to be nominated and generally advise members to establish an order of preference, where the nomination is binding and there is only one nominee who predeceases the member, the question poses itself. That said, where the nomination is remitted to the discretion of the trustees, they can take into account changing circumstances.
Insurance policies too may require the holder to select a contingent, and where the policy is held on trust, the problem does not arise.

Finally, it is uncertain to what extent forfeiture rules operating in case of unlawful killing apply to will-substitutes, as there is little authority on the point.\(^{95}\) In the case of a joint tenancy, forfeiture would seem to lead to a severance of the joint tenancy, and thus a tenancy in common.\(^{96}\) Forfeiture rules also seem to apply to life insurance,\(^{97}\) and pensions,\(^{98}\) so that the person committing a crime against the deceased cannot benefit,\(^{99}\) but case law is scarce and not always authoritative.

D. Protecting the Interests of Creditors

Most of the mechanisms discussed in this chapter operate such that a direct transfer to the beneficiary occurs and the property does not, therefore, fall within the estate.\(^{100}\) It follows that, in principle, creditors cannot satisfy their credit against this property. This is certainly the case for pension death benefits, which are generally unavailable, irrespective of whether or not the estate is insolvent, unless payment is made to the estate. Similarly, wealth transferred through statutory nominations is also unavailable to creditors.\(^{101}\)

Life insurance policies of a person’s own life for the benefit of another are available to creditors, so long as they are not held on trust which, as noted above, is advisable for a number of reasons. That said, where there is a trust, should the policyholder become bankrupt, the protection depends on the nature of the trust. If a non-statutory trust is created at an undervalue, and the policyholder becomes bankrupt within two years, the courts can ignore the existence of the trust and use the assets to pay the bankrupt’s creditors. Full protection from bankruptcy only exists when a non-statutory trust has been in force for at least five years.\(^{102}\)


\(^{96}\) *Re K* [1985] Ch 85 (Ch) 100, 100. For the position under Australian and New Zealand law see ch 5 above, p 129.

\(^{97}\) *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 (CA). The trust had become incapable of being performed and the insurance money formed part of the estate of the insured.


\(^{99}\) The Forfeiture Act 1982 also applies to the *donatio mortis causa*: s 2(1)(a)(iii).

\(^{100}\) For details about the protection of creditors in English law, see ch 13 below, pp 271 ff.

\(^{101}\) In *Bennet v Slater* [1899] 1 QB 45 it was suggested that if the member happened to die insolvent, his executor or administrator might recover the money so paid from the nominee, but this was rejected by the court. The creditor might, however, act against the nominee. See Miller, *The Machinery of Succession*, above n 4, 113.

If bankruptcy occurs between two and five years, protection will be available, provided that the policyholder was solvent at the time he created the trust. Where the trust is effected under the MWPA, protection of the policy proceeds on bankruptcy is available from the start, unless the creditors can show that the policy was taken out with the intention to defraud them, in which case they would be able to obtain the premiums paid. After the creditor’s claims have been satisfied, any amount left over is held for the beneficiaries.

Conversely, property transferred through a *donatio mortis causa* is liable for the payment of debts if all other assets are exhausted. For jointly held property, survivorship is automatic so that, in principle, the deceased’s interest in the joint tenancy does not form part of their estate and is not therefore available to creditors. In relation to estates that are insolvent, however, the law has recently changed. For insolvency administration orders presented after the commencement of the Insolvency Act 2000, a trustee in bankruptcy may make an application to court and apply for an order requiring the surviving joint tenant to pay to the trustee an amount not exceeding that which would restore the trustee’s position to what it would have been had the deceased been determined bankrupt immediately before his death. Unless the circumstances are exceptional, the court must assume that the interests of the deceased’s creditors outweigh all other considerations.

Thus, the rights of creditors are not always equally protected under each mechanism, an issue that also arises in the US. A further problem is that, due to the fact that property is passed on death through different mechanisms and the transfer is fragmented, a creditor may have to deal with several beneficiaries and not just the personal representative.

### E. Protecting the Interests of Family Members and Dependents

As is explained elsewhere in this volume, in England, a dependant may present an application to court for a discretionary order for maintenance out of the estate of the deceased, to be brought within six months of the date when the grant of

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103 s 11 of the MWPA and s 423 of the Insolvency Act 1986. *Holt v Everall* (1876) 2 Ch D 666. See also ch 13 below, p 273.

104 Kerridge and Brierley, above n 4, 509; Miller, above n 4, 291. Critical of this view is S Warnock-Smith ‘Donationes Mortis Causa’ and the Payment of Debts’ (1978) *Conveyancer & Property Lawyer* 130. In the case of secret trusts, creditors would still seem to be able to get their hands on the estate, as the deficiency must be borne rateably by the part bound by the trust. *Re Maddock* [1902] 2 Ch 220.

105 s 3(4) of the Administration of Estates Act 1925. Kerridge and Brierley, above n 4, 475. However, the interest of the deceased as an equitable tenant in common does devolve to the personal representative.

106 s 12(1) of the Insolvency Act 2000, which has inserted a new s 421A into the Insolvency Act 1986.

107 s 421A (3) of the Insolvency Act 2000. For details see, esp Kerridge and Brierley, above n 4, 539–40.

108 Ch 1 above, p 21.

109 See ch 14 below, p 285.

representation was taken out. This may not be effective, however, where little or nothing is left in the estate.

Since 1975, the scope of such discretionary orders has been extended so as to include wealth transmitted through a *donatio mortis causa*, statutory nominations and property the deceased owned jointly, be that real or personal property. Conversely, death benefits under pension schemes are not, in principle, subject to such court orders, unless the member’s estate is entitled to payment of any death benefits. This is somewhat surprising considering the fact that pension death benefits can sometimes be of considerable value and that, in the case of divorce or dissolution of a civil partnership, pension sharing is now possible.

In its recent intestacy report, the English Law Commission considered making pension benefits (including both lump-sum payments and dependant’s pensions) available to family members, but then decided not to recommend changes, even though the present law can cause hardship in individual cases, and despite the fact that just over half of the consultees favoured reform (and only one-quarter opposed reform). The decision was based on the argument that ‘only 50 per cent of the over 65 population have a pension and most of these pensions are worth less than £20,000’. Whether these figures are accurate is questionable, particularly in light of the discussion above. Be that as it may, it would seem that the Law Commission’s real concern was to avoid courts overriding the discretion vested in pension trustees. However, not all pension schemes confer a discretionary power on the trustees and the nomination may be binding on them.

Life insurance benefits too seem to be outside the reach of courts. Although in the past, the Law Commission had considered recommending the extension

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111 s 4 of the I(PFD) Act. In its recent report on Intestacy, the Law Commission suggested courts should be granted the power to extend this time limit. Law Com No 331, above n 15, paras 7.83 and 7.96.

112 s 8(2) of the I(PFD) Act. The change was recommended by the Law Commission in the *Second Report on Family Property: Family Provision on Death* (Law Com No 61, 1974) para 136.

113 See s 8(1) of the I(PFD) Act.


115 Unless a nomination is made pursuant to an ‘enactment’. See *Goenka v Goenka* [2014] EWHC 2966 (Ch).


118 See above at section II.A.

119 Law Com No 331, above n 15, para 7.119. It is interesting to note that already in the Working Paper No 42 on *Family Law: Family Property Law* (1971), the Law Commission had asked for views as to whether courts should be given the power to substitute their own discretion for that of the trustees of a pension fund (see para 3.71) but it accepted that the case for interference had not been made out. See Law Com No 61, above n 112, para 213.
of powers of avoidance to benefits payable under insurance policies, the 1975 I(PFD) Act limited it to the amount of the premium. If premiums are made less than six years before the death of the deceased, an order may be granted requiring the beneficiary of the proceeds of the policy to pay a sum of money as an order under section 2 of the I(PFD) Act.

Thus, in England, dependants will not be able to access pension death benefits or insurance proceeds through the family provision legislation. Given the amount of wealth invested in such financial instruments, this seems problematic. However, litigation under the I(PFD) Act is expensive so that it may not always be desirable to bring a claim. Nevertheless, ‘[t]he court can take account of benefits derived from a pension fund in assessing the resources available to claimants and to other beneficiaries of the estate.’

IV. Rationale Behind the Use of Will-Substitutes

A. Changes in the Investment of Wealth

It is difficult to provide an accurate account of the reasons underlying the choice of how wealth is passed on death, as there is little empirical data available. The motives can vary depending on the type of will-substitute used and sometimes there may be more than one reason underpinning a particular choice. Much, therefore, is speculative. Nevertheless, some information can be gleaned from an examination of the advantages and disadvantages of the most popular devices, both from the perspective of the deceased and the potential beneficiary.

When exploring the rationale behind the proliferation of will-substitutes, one needs to bear in mind that, the *donatio mortis causa* aside, the distribution of wealth on death is not necessarily the primary objective of the mechanisms discussed in this chapter. For instance, the objective of pension schemes is mainly to provide for the retirement of the member. Life insurance, too, is often perceived as a valuable saving device, and only secondarily as a way to benefit someone on death. As noted above, the decision to transfer property into joint names may also be motivated by reasons of administrative convenience. To some extent, therefore,
the transmission of benefits on death may be an auxiliary or additional motive or even just a useful by-product of the arrangement. In fact, many of these mechanisms can do more than a will.125 Also, generally speaking, pension death benefits and life insurance proceeds can only be allocated in accordance with the provisions of the respective schemes, ie, through nominations. This means that, at least in England, it may not even be open to a testator to use a will in order to dispose of such benefits and proceeds.

It follows, that the phenomenon discussed in this chapter is partly the result of changes in the way we hold and invest wealth. Given that it is now common to invest in financial assets, it is inevitable that we dispose of the wealth so invested in ways foreseen by the individual financial providers, rather than by a will. In fact, many of these mechanisms represent a method of passing wealth that is restricted to the type of asset that the particular financial intermediary happens to offer. This means that, at least in England, will-substitutes cannot be understood merely as a means of avoiding the traditional modes of transfer and the rules, whether procedural or substantive, applicable to wills, especially where using the will is not even an option.126

B. Avoiding Some of the Effects of Probate

It is well known that in the US, the most commonly cited reason for the proliferation of will-substitutes is the desire to avoid probate and supervised administration, so as to reduce fees and delays in the administration of the estate and to preserve privacy.127 In England, the desire to circumvent probate procedure does not seem to feature so prominently among persons’ motivations.128 ‘This is most likely due to differences in the probate procedure on both sides of the Atlantic. In fact, the English system of administration of estates involves minimum court interference with the personal representative and does not require participation of a legal practitioner, which makes it generally less expensive.129

That said, even in England, time may be a factor in preferring a non-probate transfer. Although for the majority of people (62 per cent) the probate process

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125 See ch 11 below, p 232.
126 See also ch 4 below, pp 81 ff.
128 Miller, The Machinery of Succession, above n 4, 111, 291. The same seems to be true of Canada: see ch 2 above, pp 44 ff and ch 12 below, p 525.
129 Research carried out by YouGov indicates that the average cost of gaining professional help with probate is £2,500: see ‘The use of probate and estate administration services’, January 2012, www.legalservicesboard.org.uk/Projects/reviewing_the_scope_of_regulation/yougov_research.pdf, 5. Furthermore, the fee payable to the Probate Service is £45, and where the value of the estate is £5,000 or less, no charge is made.
would seem to be complete within six months, \( ^{130} \) personal representatives cannot be compelled to distribute the estate before the expiration of one year from the death. \( ^{131} \) Also, since an application under the I(PFD) Act can be made up to six months after the grant, where a claim is likely, distribution will not normally be made within this period. Conversely, non-probate transfers often lead to a direct and, therefore, speedier transfer, providing the survivor with immediate resources. This is certainly true of life insurance, of property held jointly, as well as of donationes mortis causa, but not necessarily true of pensions.

Another effect of probate is that the will becomes public. Hence, if a person prefers to keep the identity of the beneficiary confidential, it might be best to resort, for instance, to a life insurance policy or a joint bank account. \( ^{132} \)

Finally, as is well known, a function of probate is to protect creditors. As noted above, pension schemes and, to some extent, life insurance policies shelter assets from creditors on death. Even so, whether this is an incentive for using them is doubtful, though from the perspective of the member and the nominee, it is certainly a helpful side effect. In any case, the existence of a lifetime cap allowance for pension schemes reduces the likelihood that a member will invest all of his wealth in a private pension scheme. \( ^{133} \) As for life insurance policies, payments are only protected if the policy is held on trust and it is unclear how often that is the case. And payments under statutory nominations are only of limited value.

C. Tax Advantages

Unlike in the US, where tax avoidance is not the main rationale for the popularity of non-probate mechanisms, \( ^{134} \) in England, tax mitigation is a primary concern for estate planners and testators. In the UK, if the estate (including any assets held in trust and gifts made within seven years of death) is valued over the current inheritance tax threshold of £325,000, \( ^{135} \) inheritance tax is generally payable at 40 per cent, \( ^{136} \) though dispositions in favour of a spouse or civil partner with a permanent home in the UK are not taxed. A person whose estate exceeds the

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130 ibid, 52.
131 s 44 of the Administration of Estates Act 1925.
133 For details see Braun, above n 22, 236.
134 See ch 1 above, p 20. In the US, will-substitutes are subject to estate tax. However, in 2015, the US federal estate tax exemption amount is $5.43 million.
135 Married couples and civil partners are entitled to double the allowance, passing on assets to their children or other relations worth up to £650,000 before a tax charge is triggered. It should be noted that the current government has announced an increase in the threshold to £500,000 per person. The move, which was outlined in the Conservative Manifesto, will be effective as of 6 April 2017.
136 Or at 36% if the estate qualifies for a reduced rate as a result of a charitable donation.
threshold may, therefore, have an incentive to search for alternative means of transferring their wealth.

In England, private pension schemes are generally considered a tax-sheltered savings vehicle.\footnote{Research carried out for the savings and investment company ‘Standard Life’ reveals that almost 2 out of 5 of UK adults (39\%) are aware of the tax efficiency of pensions, with an increase of 10\% compared with 2012. Standard Life, ‘Consumers becoming more switched on to tax benefits of pensions’, Article of 6 May 2013, ukgroup.standardlife.com/content/news/new_articles/2013/060513 TaxBenefitsofPensions.xml.} Contributions into the fund receive tax relief, and there is no capital gains or income tax on the funds in the scheme. Prior to the 2015 pension changes, a deceased member’s defined contribution pension could be paid out as a lump sum tax free if the member died before the age of 75 and before he had touched his pension pot. Otherwise, if the member was over the age of 75 when he died, or had already started to take benefits from his pension pot, it was taxed at 55 per cent. This 55 per cent tax charge was abolished with effect from 6 April 2015. Under the new legislation,\footnote{These changes do not apply to defined benefits schemes.} the question as to whether or not tax is payable on a lump sum depends only on the age of the member when he or she dies. If the member dies before the age of 75, his or her beneficiary can take the whole pot as a tax-free lump sum, or use it to provide a regular pension through a flexi-access drawdown arrangement or annuity, which is tax free. If the member dies after the age of 75, the beneficiary can take the whole pot as a lump sum, but will be taxed at 45 per cent (although the government is expected to review this).\footnote{The Government has launched a consultation as to whether there is a case for reforming pensions tax relief. CM 9102 entitled ‘Strengthening the incentive to save: a consultation on pensions tax relief’, 8 July 2015.} With effect from 6 April 2016, if the defined contribution pot is used to provide a pension (through a drawdown arrangement or by purchasing an annuity), it will be taxed at the beneficiary’s income tax rate. If they choose to take regular smaller lump sums, they too will be taxed as income. There are, therefore, considerable tax advantages to taking out a pension, though this does not apply to the new NEST scheme.\footnote{NEST Adviser News, April 2013, www.nestpensions.org.uk/schemeweb/NestWeb/includes/public/docs/NEST-adviser-news-april-2013.PDF.pdf, 3.}

Life insurance held on trust is also seen as a tax saving device.\footnote{For details about the tax regime, see J Lowe, Giving and Inheriting (London, Which? Books, 2011) 134.} They can help to avoid inheritance tax, as they prevent the life insurance proceeds from potentially pushing the value of the estate over the tax threshold.\footnote{Houseman’s Law of Life Assurance, above n 91, para 15.25.} By contrast, benefits transferred through statutory nominations form part of the nominator’s estate for the purposes of inheritance tax. As for property transferred through a donatio mortis causa, it would seem that the personal representative can reclaim the tax from the donee if the estate has insufficient assets to pay the tax.\footnote{Margrave-Jones, above n 8, 535. However, Simon’s Taxes, binder 8, part 10.112 seems to indicate the contrary. See also C Whitehouse and L King, A Modern Approach to Wills, Administration and Estate Planning (with Precedents), 3rd edn (Bristol, Jordan Publishing Limited, 2015) 90, para 3.28.}
Transferring real property into joint names does not in and of itself avoid the imposition of inheritance tax. If the deceased person owned property jointly with a person who is not their spouse or civil partner, inheritance tax may be payable on their share of the joint property. This will be the case if the total value of their estate or property is higher than the threshold mentioned earlier, or where the transfer was not intended to be a gift but motivated by reasons of convenience. Thus, although tax considerations may have fuelled the interest in some mechanisms, such considerations are not applicable to all mechanisms.

D. Other Potential Reasons

Tax considerations aside, there are other potential reasons why people may choose modes of transfer on death other than wills. For instance, although it is arguable that the formalities required for wills (ie, signed, in writing and witnessed by two adults) are not too burdensome, it may be desirable to use a less formal mode, such as a donatio mortis causa or a statutory nomination, especially since English courts have been stringent in their interpretation of formality requirements, with only slight deviances resulting in wills declared void. It is, therefore, possible to assume that some testators may intend to minimise the risk of litigation and to prevent their testamentary dispositions from being contested on grounds of lack of formality (lack of undue execution), as well as lack of capacity or want of knowledge and approval, or on the basis of forgery or undue influence. It is indeed often more difficult to contest some of the dispositions carried out through the mechanisms discussed in this chapter. That said, generally speaking, the avoidance of formality requirements does not seem to play a major role.

Another reason, or at least a helpful consequence of using a pension scheme or a life insurance policy to transfer wealth on death, could be to shelter assets from

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144 For details about bank accounts, see L King, ‘Joint Bank Accounts and Inheritance Tax’ (2013) 3 Private Client Business 97. Where a single account was transferred into joint names, the personal representatives often argue that there was a tenancy in common so as not to pay tax over the whole account.
145 Ibid.
146 See above section II.D.iii.
147 s 9 of the Wills Act 1837.
149 That there is no shortage of probate disputes, see P Reed, ‘Capacity and Want of Knowledge and Approval’ in B Hacker and C Mitchell (eds), Current Issues in Succession Law (Oxford, Hart Publishing, 2016) 169.
150 However, a donatio mortis causa may be set aside for fraud or undue influence. See Miller, The Machinery of Succession, above n 4, 291.
claims under the I(PFD) Act. Whether this represents an incentive is doubtful, at least in the case of pensions, which are generally motivated by different considerations.

V. Problems and Perils of the Current State of the Law

The developments examined in this chapter show that in England, testators enjoy considerable freedom in exercising their private autonomy on death, and, in particular, in the choice of instruments they want to use. Though, in principle, this is to be welcomed, it sometimes comes at a price for the deceased, third parties and the legal system more generally: for instance, where the freedom undermines the functions of probate or the operation of substantive rules. We have already noted that some mechanisms, such as life insurance and pension plans, allow the deceased to shield property from claims of creditors and dependants.\(^{151}\) Although there may be public policy considerations for treating wealth in a pension scheme or life insurance differently from wealth transferred by other means,\(^{152}\) these considerations are rarely spelt out clearly and the lack of a principled approach can lead to potential injustices. A transfer of wealth on death outside the realm of succession law can also have consequences for the deceased’s wishes and the functioning of the administration of the estate more generally.

A. Defeating the Intention of the Deceased

Some of these mechanisms discussed entail the risk that the wealth a person has accumulated is not distributed according to their wishes. For example, in respect of pension death benefits, sometimes the distribution can even go against the wishes expressed by the member.\(^{153}\) And, as we noted earlier, in the case of joint bank accounts, the intention of the deceased is often difficult to ascertain—a risk that does not seem to exist with POD bank accounts common in the US—and the surviving tenant may end up holding the property on trust for the estate. These outcomes come into tension with one of the cardinal principles of the law of succession, namely that succession law is to fulfil the intention of the deceased.\(^{154}\)

\(^{151}\) See above at section III.D. Langbein, ‘The Nonprobate Revolution’, above n 1, 1125: ‘[T]he nonprobate system disperses assets widely and facilitates transfer without creditors’ knowledge.’

\(^{152}\) For the position in Canada see ch 12 below, p 264. Interestingly, in Cairnes (Deceased), Re [1983] 4 FLR 225; (1982) 12 Fam Law 177, 230 counsel for the plaintiff argued that public policy demands that as many of these [pension] funds nominated should fall into the net provided by the 1975 Act.

\(^{153}\) For details see Braun, above n 22, 247 ff.

\(^{154}\) Langbein, ‘The Nonprobate Revolution’, above n 1, 1136–37. See also ch 1 above, p 29.
Another aspect, caused by the absence of a formal probate procedure for these mechanisms, is that there is no court assessment of whether the disposition reflects the genuine intention of the deceased. This means that, in principle, it will be more difficult to contest the beneficiary designation, especially where the decision is made by a trustee. Although this may be in the interest of the deceased, who may well have chosen the device for that particular reason, there is a risk that he or she was unduly influenced. In other words, some of these mechanisms lack intention-effectuating doctrines, such that testamentary freedom may be undermined to some extent.\footnote{ML Leslie, ‘Frustration of Intent in the Wealth Transmission Process’ (2014) 4(2) Onati Socio-Legal Series 283, 302. Also, some pension schemes limit the choice of members. For details see Braun, above n 22, 237.}

There is also room for mistakes due to a lack of transparency of the rules, and a lack of uniform and standardised procedural requirements for certain instruments.\footnote{Braun, above n 22, 237.} Indeed, the products offered by pensions and life insurance providers are often very different, as are the rules concerning the nomination or revocation of beneficiaries. What is more, the interaction between these rules and the rules for wills is often uncertain, and as a result, there is potential for litigation.\footnote{For details concerning the interaction of pension nominations and wills see Braun, above n 22, 255. As for Canada, see ch 12 below, p 263.}

\ \section*{B. Increasing the Complexity of Estate Planning and the Administration of the Estate}

There is little doubt that the proliferation of different mechanisms for the transfer of wealth renders estate planning more difficult and complex.\footnote{KD Schenkel, ‘Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival’ (2008) 41 Creighton Law Review 155.} Since each mechanism is governed by different rules and the tax implications vary considerably, it is hard to manage the planning without external help.\footnote{See, however, Langbein, ‘Major Reforms of the Property Restatement and the Uniform Probate Code’, above n 2, 16, according to whom ‘[f]or better or worse, and in my view it is worse, non-probate all too often means non-lawyer’.} This may ultimately increase costs for the testator.

The administration of the estate by the personal representative too may become more complicated. Even though some of the assets transferred do not qualify as probate assets, they count as part of the participant’s taxable estate. In fact, the personal representative must complete forms that pose questions about the deceased’s assets, including pensions, joint accounts and insurance policies, so as to allow HMRC to determine what will be included in the estate for tax purposes.\footnote{Personal representatives have to fill in either a full Inheritance Tax Account IHT 400, or an IHT205 and/or an IHT 207 form, if the estate is an excepted estate.}
Also, some of the wealth transferred outside probate is available to pay debts.\textsuperscript{161} The extent to which personal representatives will be aware of these dispositions is unclear, and some benefits may remain unclaimed.\textsuperscript{162} Finally, the work of the courts too might be rendered more arduous, for instance, in the context of applications under the family provision legislation.

\section*{VI. Conclusion}

According to John Langbein, in the US, the states have been playing an important hand in encouraging the growth of the non-probate system.\textsuperscript{163} From a review of the few decisions regarding the applicability of section 9 of the Wills Act to pension scheme nominations and joint bank accounts, it would seem that, in England, courts have taken a favourable view towards alternative modes of transfer of wealth on death.\textsuperscript{164} This is mirrored by recent changes to the tax regime of defined contribution pension schemes, indicating that the British Government supports the transfer of wealth on death through pension schemes.

Nevertheless, unlike in the US, in England, law reformers have shown little interest in the developments in this area and the mechanisms discussed in this chapter are not usually examined from the perspective of succession law, or as part of a more general phenomenon of transfers outside probate. Legislative interventions in this context have so far been piecemeal and there has been no attempt to integrate non-probate mechanisms into succession law in a more systematic manner, as is the case in the US.\textsuperscript{165} This does not necessarily mean that England ought to follow the American example and create two separate but parallel systems: a non-probate system existing alongside the probate one.\textsuperscript{166} However, at the moment, the problem in England is that it is still unclear where will-substitutes fit on the map of legal transfers, ie, whether they belong to lifetime or \textit{mortis causa} transactions.

This inertia might be explained by the fact that so far, relatively few cases have reached the courts, and the phenomenon has not attained the economic

\textsuperscript{161} See above at section III.D.

\textsuperscript{162} £400 million is the amount of unpaid money in life assurance and pension schemes. See Unclaimed Assets Register, www.uar.co.uk/.

\textsuperscript{163} Langbein, ‘Major Reforms of the Property Restatement and the Uniform Probate Code’, above n 2, 15.

\textsuperscript{164} See above at section III.B.

\textsuperscript{165} While English law has statutory provisions in place for statutory nominations of modest value, it does not regulate nominations in pension schemes, which can be of considerable value. See Braun, above n 22, 233–4.

\textsuperscript{166} See the criticism by Schenkel, ‘Testamentary Fragmentation and the Diminishing Role of the Will’, above n 158, 179.
significance it has in the US, where the financial industries seem to have been far more creative in developing new instruments.\textsuperscript{167} Also, as some of these devices straddle the boundaries between lifetime and \textit{mortis causa} dispositions, and given the fact that most of them are so different in nature, any decision as to whether or not to treat them like wills and to apply relative provisions by analogy must be taken with great care. Nonetheless, these arguments cannot justify the lack of attention this area has hitherto received in this country, both from legal scholars and law reformers. It is, therefore, to be hoped that when considering reform of the law of wills, the English Law Commission will take the opportunity to also consider will-substitutes.\textsuperscript{168}

\textsuperscript{167} Though see the array of mechanisms discussed by Paul Matthews in ch 11 below.
\textsuperscript{168} The Law Commission’s announcement that it will work on wills from 2016 does not explicitly mention whether it will also investigate the extent to which the law of wills is to be applied to functionally similar dispositions taking effect on death.
Wales managed to repulse the Norman English by 1100. Wales at that time was effectively ruled by a number of welsh Princes, but only under the tacit acceptance of the English Monarch. In 1216 they agreed to make Llewelyn the Great the Sovereign Prince of Wales. ‘Brythoniaid’ can still, in certain contexts, be substituted for ‘Cymry’ (indeed, ‘Britons’ of old should not be conflated with the more contemporary use of the hijacked term to refer to what is essentially an English-centred body politic). English grew in influence, displacing all the pre-Anglisc languages in England and most of Wales, Scotland, and Ireland. The transitions in Wales, Ireland, and Scotland from Celtic languages to English were long and slow, with periods of Celtic revival and wane. Substitutes Jamie Vardy and Daniel Sturridge scored as England came from behind to beat Wales 2-1 in Thursday’s ‘Battle of Britain’ at Euro 2016. Gareth Bale had put Wales ahead with a first-half free-kick, but Roy Hodgson’s half-time changes proved crucial as England roared back after the break. Vardy smashed home on 56 minutes before Sturridge struck in injury-time to see England leapfrog their opponents to move top of Group B. Chris Coleman knew a win over England would have seen Wales reach the last 16 and made three changes to the side that beat Slovakia with Wayne Hennessey fit to start in goal; Joe Ledley in midfield and Hal Robson-Kanu up front. Tudor England effectively absorbed Wales into it â€“ and Wales had no choice but to join England. Edward I had conquered Wales by 1283. The most rebellious. This area, about a third of Wales, was ruled as if it was part of England. As in England, the Principality was divided into shires which were governed by men appointed by the king. The more important towns in the principality were Aberystwyth, Harlech, Caernarvon and Conway. Two-thirds of Wales was still governed by what were called the ‘Marcher Lords’. This was land that had been conquered by the Norman’s during the 11th and 12th centuries. In 1485, Henry Tudor defeated Richard III at the Battle of Bosworth. Henry was a Welshman and the involvement of Welsh soldiers at Bosworth played a signi The Statute of Wills (32 Hen. 8, c. 1 â€“ enacted in 1540) was an Act of the Parliament of England. It made it possible, for the first time in post-Conquest English history, for landholders to determine who would inherit their land upon their death by permitting devise by will. Prior to the enactment of this statute, land could be passed by descent only if and when the landholder had competent living relatives who survived him, and it was subject to the rules of primogeniture. When a landholder died England’s Euro 2020 campaign got off to a winning start as Raheem Sterling’s goal secured victory over Croatia at Wembley. Sterling repaid England manager Gareth Southgate’s faith in him, sliding in the winner after 57 minutes following a perfect pass from man-of-the-match Kalvin Phillips. Croatia arrived at Wembley with confidence bolstered by their record of important wins over England in the past, most notably that World Cup semi-final triumph in 2018. Here, they looked a shadow of the impressively gifted side that performed so brilliantly in Russia and will be bitterly disappointed that they failed to give England keeper Pickford any serious moments of anxiety.