Lord Goff of Chieveley was an academic and a judge. In *Spiliada Maritime Corp. v Cansulex Ltd.* [1987] A.C. 460, 488B-C, he said: “I cannot conclude without paying tribute to the writings of jurists . . . [E]ven when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection . . .” Varuhas cites several cases which I decided at first instance. If I had had the benefit of some of his arguments, I might have made different decisions in some of those cases, and given better reasons in others. Any advocate or court considering these arguments will be greatly indebted to this scholarly, comprehensive and thoughtful work.

MICHAEL TUGENDHAT

FORMERLY ONE OF HER MAJESTY’S JUSTICES


In a system of law that recognises private property rights, the problem of succession to those rights on the death of an owner is inevitable; everyone dies. The law governing succession is therefore of enormous societal significance. It is also of deep personal and emotional importance. For a lawyer who specialises in succession, what we Americans call a “trusts and estates” lawyer, successful practice requires not only the usual adeptness at problem solving but also sensitivity to recurring dramas in human relationships. The lawyer is an important figure in the dramatis personae, serving not only as drafter and advocate, but also as amateur psychologist and family counsellor. For an owner, a succession plan is more than another transactional undertaking. The plan is the owner’s final expressive act, an enduring and emphatic last expression of the owner’s will.

And yet in both the UK and in the US first-rate scholarly work on succession law is rare. The hard problems of law and policy in succession do not readily capture the attention of aspiring scholars. In comparison to the great political questions of the day, which in American practice at least commonly devolve into litigated questions of public law to be decided by the courts, who wants to devote his or her life to thinking about property succession at death?

These two volumes, each a collection of essays on succession matters (a total of 27 essays plus two introductions), show that reports of the death of succession law scholarship are greatly exaggerated—or at least a little so. There remains life in the study of property succession at death.

In *Current Issues in Succession Law,* we find 11 essays that canvass a diverse array of problems in English succession law. Although these essays are about English law and practice, the underlying problems are structural; they go to fundamental questions of legal institutional design. In consequence, the analysis is informative even for those who study succession law elsewhere, most obviously by inviting comparison in the mind of the reader. In *Passing Wealth on Death,* we find a comparative study in the form of 16 essays canvassing the phenomenon of “will-substitutes” across a dozen or so jurisdictions. The subject of will-
substitutes is well known to Americans, but less familiar to those elsewhere and we Americans know little about the phenomenon abroad.

Let us begin with the *Current Issues* volume. As a book, it reads disjointedly. The essays could be read in almost any order with little improvement or diminishment of the reader’s experience. There is seldom thematic connection from one essay to the next. But perhaps this is not a fair criticism, as the essays were not meant to cohere thematically. The volume is by design a collection of 11 separate essays on 11 separate current issues in English succession law. Viewed from this perspective, the collection coheres (as promised by the title) as a snapshot of current issues in succession law.

The essays are strikingly doctrinal. Most are deep dives into current English law on the question at hand, offering careful exegeses of the opinions of one or another jurist in comparison to the opinions of another jurist, perhaps framed by the words of Parliament if there is a statute on point. The essays are preoccupied with what the law is; that is, they make chiefly positive or descriptive claims. The emphasis on description is especially pronounced in the two essays by practitioners, Emma Chamberlain and Penelope Reed, which are the least analytical of the bunch. But even in the more analytical essays, such as Rebecca Probert’s more interesting look at the family provision rules as amended a few years ago, the focus is on understanding the law – in this case, connecting the family provision rules to lifetime choices by the decedent. Likewise, in Lionel Smith’s careful examination of the current status of the non-delegation principle, the focus is on assessing the current vitality of the doctrine – in this case, recast by Smith as an authorial principle.

To the extent the essays consider what the law ought to be, the framework for those normative claims is internal to the law; that is, the claims urge one or another path toward doctrinal coherence within the metes and bounds of precedent and statute. Thus, in answering how the common law forfeiture rule works, Ian Williams compares a constructive trust model with one in which the killer is disabled from obtaining any rights by reason of the killing. Williams passes judgment on which model has better explanatory power. So too, Ying Khai Liew undertakes to rationalise the mutual wills doctrine by reference to the differences between “qualified interest” and “absolute interest” situations; Ben MacFarlane undertakes to reconcile the promise-based strand of proprietary estoppel with the law of succession so that the respective bodies of doctrine might coexist peacefully; and Brian Sloan attends to whether the presumption of undue influence that attaches to a lifetime gift to a carer should apply to a testamentary gift.

Yet in an unexpected way – or at least unexpected to an American reader accustomed to study of private law motivated by social science – the doctrinal focus of the volume brings into sharp relief a striking familiarity across the essays in the basic problems they confront. This suggests significant overlap in the questions of legal institutional design to be confronted by lawmakers in crafting a sensible system of succession. The volume will thus be of interest to succession scholars in other jurisdictions for contrast and comparison.

For example, Roger Kerridge examines a series of reforms to English intestacy law, primarily but not exclusively toward increasing the spousal share. But coming up with a system of intestate succession is harder than one might first imagine. What disposition would the typical intestate decedent want? What if the evidence shows no majority position? What if the evidence shows that the answer is evolving? To what extent should policies other than the likely intent of the typical intestate decedent, such as a supposed deservingness among the decedent’s family or other dependents, inform a scheme of intestate succession? Kerridge’s description of the English law reformers’ difficulties with the spousal share if stepchildren are
present and with the possibility of a share for an unmarried cohabiting partner resonates with similar experiences in the US.

So too, Birke Häcker’s survey of interpretation and rectification of wills in English law, the latter called reformation in American law, is bound up in the fundamental difficulty of establishing the authenticity and meaning of a writing made during life but that is meant not to be given effect until death. By hypothesis, the best witness will be unavailable at the time the court considers such questions. The posthumous nature of this kind of litigation poses obvious challenges for legal institutional design. Because the line between resolving an ambiguity and correcting a mistaken term is so thin, it can be manipulated by lawyers and judges. The trend toward transparency by permitting rectification with appropriate evidentiary safeguards is a welcome development, albeit here too one will find that the leading English case, *Marley v Rawlings* [2014] UKSC 2; [2015] A.C. 129, is primarily doctrinal in method, whereas the leading American case, *In re Estate of Duke*, 352 P.3d 863 (Cal. 2015), decided by the California Supreme Court, also offers functional policy analysis.

Let us now pivot to *Passing Wealth on Death* by way of Alexandra Braun’s chapter in *Current Issues*. Braun is one of the editors of *Passing Wealth on Death* and she co-authored its introduction, its final chapter and a solo chapter earlier in the volume. The connection is that Braun’s essay for *Current Issues* urges adding will-substitutes to the English succession law research agenda. A will substitute is a legal arrangement other than a will by which a person may avoid intestacy in passing property at death. Braun’s focus in *Current Issues* is on private pension schemes and the difficulties occasioned by the absence of a clear statutory framework in English law on succession at death to pension assets. But the will substitute phenomenon is not limited to pensions, not even in England and Wales, as indicated by Braun’s solo chapter in *Passing Wealth on Death*.

The will substitute phenomenon is most evident and best understood in the US. In American practice, more property passes by will-substitutes – which include revocable trusts, life insurance, pension and other retirement accounts, and pay-on-death and transfer-on-death bank, brokerage and securities accounts – than passes by will and intestacy. Together these will-substitutes provide a private system of succession that competes with the public, court-supervised probate system. A typical American course on succession law, which in American law schools is commonly styled “trusts and estates”, includes a unit on will-substitutes.

The rise of succession by way of will-substitutes raises hard questions of law, policy and sound practice. Must a will substitute comply with the testamentary formalities required for a will? Is a transfer by will substitute subject to the same substantive policy limits on freedom of testation, such as family and creditor protection, as transfer by will? Is a will substitute subject to the various subsidiary rules of the law of wills, such as revocation on divorce or forfeiture for killing? And how is a transferor to bring coherence to the transferor’s multitude of disparate transfers scattered across his or her will and various and often numerous will-substitutes?

Against the backdrop of decades of experience with these questions in American practice, *Passing Wealth on Death* undertakes to launch comparative study of the will substitute phenomenon. A comparative take on will-substitutes is an exciting and welcome development. The American literature, although fulsome, is almost entirely inward looking.

The volume is broken into two parts. First, in Part I, each chapter reports on the will substitute phenomenon in one or two identified jurisdictions. Thus we find reports on will-substitutes in Canada (by Angela Campbell), England and Wales (by Alexandra Braun), Scotland (by Daniel Carr), New Zealand and Australia (by
Nicola Peart and Prue Vines), Italy (by Gregor Christandl), France (by Cécile Pérès), Germany (by Anatol Dutta), and Switzerland and Liechtenstein (by Dominique Jakob). These reports follow an initial survey of will-substitutes in the US (by Thomas Gallanis), which functions as a kind of benchmark or baseline for the chapters that follow.

The chapters in Part I are uneven, or at least not easily comparable, but this was by design. The editors, Braun and Röthel, “refrained from establishing a rigid questionnaire”, preferring instead to invite the “contributors to identify the aspects and developments that they regard as most striking or important” (p. 6). For a first pass meant to identify the manner by which a newish phenomenon has manifested across jurisdictions, this was a sensible choice, one that was mindful of “the lack of common structures and existing doctrinal approaches” (p. 6). Accordingly, Part I of the volume is perhaps best thought of as a reference work rather than as an integrated set of comparative essays.

Nevertheless, reading all of Part I together suggests a variety of interesting questions and speaks to hypotheses about the phenomenon. For example, in the US the phenomenon is commonly explained as rooted in probate avoidance in light of the poor reputation for cost and delay of our probate courts. But the essays in Part I show that will-substitutes have arisen also in jurisdictions with esteemed probate courts and even in jurisdictions with universal succession. Thus, the explanation for the will substitute phenomenon cannot be found exclusively in probate avoidance. Instead, these jurisdictions lend support to the further but not mutually exclusive hypothesis that the phenomenon arose because accumulated wealth today predominately takes the form of liquid financial assets held by an institutional custodian. It is a small step from offering lifetime financial intermediation to offering a pay-on-death beneficiary designation, provided that the probate process does not have a monopoly on succession at death.

A recurring theme in the essays, which is a prominent problem of law and policy in American practice, is the applicability of default rules of construction (such as revocation on divorce or forfeiture for slaying the decedent) and mandatory limits on freedom of testation (such as spousal shares and creditor rights) to transfers by will substitute. Here we find striking disarray across the jurisdictions, just as there is disarray across the American states (the Gallanis essay elides this disarray by focusing on model laws such as the Uniform Probate Code), suggesting that this will be a fruitful area for scholarship and law reform.

The essays in Part II of the book are meant to begin just this sort of scholarship, with chapters on will-substitutes and succession of businesses (by Susanne Kalss), international investors (by Paul Matthews), creditor rights (one by Lionel Smith and another by Reinhard Bork), claims by family and carers (one by Jonathan Herring and another by Röthel) and a closing chapter that undertakes to synthesise (by Braun and Röthel). These chapters are uneven and, taken together, this Part of the book has an ad hoc quality to it.

But the will substitute phenomenon is in many jurisdictions new or at least only lately recognised. Thus it is hard to see how these essays could fit together tightly with so little prior foundational work. Against this backdrop, this Part succeeds as a proof of concept. It shows that there is much to be said about the will substitute phenomenon, in both law and policy, and the phenomenon should be on the research agenda of succession scholars across legal systems.

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