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# THE LAW AND THE SURVIVING SPOUSE: A COMPARATIVE STUDY

RICHARD W. POWER

Successful combination of freedom of testation and inter vivos disposition of property, on one hand, with recognition of the claims of the decedent's immediate family, on the other, is a challenging goal for the legislator. Solutions in Western countries, while tending to avoid extremes of flexibility and rigidity in permissible dispositions, present striking differences in their various techniques of compromising these competing interests. Foreign solutions to this problem may be a source for shaping the revision of the presently unsatisfactory solution of the American law. This paper, after preliminary discussion of the present defects of the American law and the general approach of the French law, will explore the present treatment of the surviving spouse under French law and the revisions in that regard that have recently been proposed by the Commission for the Revision of the Civil Code.

## I. UNDERLYING ATTITUDES AS FACTORS SHAPING THE SYSTEMS OF SUCCESSION

The idea of transmission of accumulated property through blood lines is one that has been accepted throughout the Western world. In the common law countries, though not imposed by law, it is accorded wide popular acceptance in practice and is reflected in the rules of intestate succession; in other parts of the Western world transmission through blood lines is to a large extent compelled by the laws of succession.

Systems of succession typically make some provision for the surviving spouse. Legislators have been and continue to be faced with the question of whether the survivor should be assured of nothing, of a right to support, or of a substantial share of the predeceasing spouse's property. That question naturally raises the companion inquiry of how the surviving spouse's rights should be integrated with those of the children. Should it be possible to give him everything to the exclusion of the children? Although fitting the surviving spouse into the pattern of the system of successions has been one of the most troublesome problems of legislators, in both civil and common law systems his claim has been recognized to an increasingly greater extent. On one hand, in the Western tradition of marriage, the surviving spouse's claim is very strong because of the unique relationship reflected in the common law by the

notion of identity of the spouses. Furthermore, the surviving spouse often is in need of or may at some future time be in need of funds for living expenses. Yet there is an awareness, perhaps even an apprehension, that property transmitted to the surviving spouse may soon find its way to a subsequent spouse upon remarriage or to the surviving spouse's relatives who are not related to the decedent spouse either by blood or affection. This consideration may in part account for the traditionally ungenerous treatment of the surviving spouse in regard to his indefeasible rights in both French law and the common law. Moreover, the common-law's device, dower, is also compatible with the perpetuation of economic power within a small group by such means as primogeniture.

Such scholars as Rheinstein,<sup>1</sup> Laube,<sup>2</sup> Cahn<sup>3</sup> and Macdonald<sup>4</sup> have questioned the present limits of freedom of testation in the United States. The principal American limitation is the statutory indefeasible share of the surviving spouse in separate property states (in some states only a widow), which permits the spouse to renounce his benefits, if any, under the will and to claim a share of the estate, typically the intestate share of one-third or one-half.<sup>5</sup> Despite such provision for surviving spouses, it may be urged that they have inadequate protection against disinheritance because of the possibility of defeasance of their rights by inter vivos gifts. Though the law varies widely even among separate property states as to the type of inter vivos transaction which will be upheld as against the surviving spouse, it is everywhere open to serious criticism.<sup>6</sup> Even in states where some substantial protection from inter vivos transfers exist,

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1. RHEINSTEIN, *THE LAW OF DECEDENTS' ESTATES* ch. 5 (2d ed. 1955); Rheinstein, *Book Review*, 59 *MICH. L. REV.* 806 (1961).

2. Laube, *Right of a Testator to Pauperize his Helpless Dependents*, 13 *CORNELL L. Q.* 559 (1928).

3. Cahn, *Restraints on Disinheritance*, 85 *U. PA. L. REV.* 139 (1937).

4. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960).

5. See generally Phipps, *Marital Property Interests*, 27 *ROCKY MT. L. REV.* 180 (1955).

6. See generally MACDONALD, *op. cit. supra* note 4, at 67-180. A helpful summary is contained in TURRENTINE, *CASES AND TEXT ON WILLS AND ADMINISTRATION* 27-32 (2d ed. 1962). Some courts look only to see if the predeceasing spouse had divested himself of legal title to property before his death; if so, the surviving spouse's interest has been defeated. Other courts look to see whether the transfer was "real" or "illusory;" still others have emphasized retention of control, holding that mere revocability of the prior transfer will subject assets to the wife's claim. Some cases have stressed the motive for the transfer, holding that a transfer can be upset by the surviving spouse if it is in fraud of his marital rights, a phrase that has proved to be so devoid of meaning as to be unsatisfactory. Nevertheless this latter test is the one adopted by the *MODEL PROBATE CODE* § 33(a) (Simes 1946). See also SIMES, *PUBLIC POLICY AND THE DEAD HAND* 1-31 (1955), suggesting that the techniques of the federal estate tax laws for including some inter vivos transfers in the estate for estate tax purposes could be utilized in working out statutory protections for the surviving spouse.

the law thereby may have been made uncertain and therefore unsatisfactory. The more realistic systems of the nine community property states accord a surviving spouse much greater protection because community property rights cannot generally be defeated either by the will of the predeceasing spouse or by a purported inter vivos gift.<sup>7</sup> Though statutes of separate property states accord the surviving spouse substantial protection from disinheritance by will through the indefeasible share, in virtually any separate property state a predeceasing spouse may make an absolute inter vivos transfer of property which will render worthless the surviving spouse's claim to an indefeasible share.<sup>8</sup> Practically, the more significant problems of protection from defeasance arise not in absolute inter vivos transfers but in transactions wherein the transferor retains some interest or control over the property. One might well ask why, unless for some reason it is infeasible or unwanted, the American spouse in non-community property states does not enjoy effective protection from inter vivos transfers.

As to the child in the United States, protection from disinheritance by will is scant. At most the parent need but mention in the will that he intends to disinherit the child.<sup>9</sup> There is, however, some additional de facto protection afforded by judges and juries who "correct" the law by a fictional finding of lack of testamentary capacity or undue influence in order to upset a will which disinherits children in favor of persons other than a surviving spouse, but existence of this kind of protection seems to support an argument in favor of change rather than maintenance of the status quo. There is no protection against inter vivos transfers, except possibly for a similar sort of de facto protection by judicial avoidance of the gift transaction. Regardless of the age or status of dependency of the child, only one or two states make any gesture toward curbing the power of a parent determined to disinherit him in favor of any person.<sup>10</sup> Many states' statutes nonetheless indicate some awareness of the problem while stopping far short of effective protection. Examples of this are pretermitted heir statutes, after-born heir statutes, and favored inheritance tax treatment of lineal descendants. Nonetheless, it is clear that legislatures have not demonstrated the same intention to protect the child that they show in the case of the spouse by the indefeasible share. Thus, a basic shift in legislative attitude must occur before the question of the quantum and method of protection of the child from disinheritance by will or inter

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7. 2 AMERICAN LAW OF PROPERTY § 7.22 (Casner ed. 1952).

8. See note 6 *supra*.

9. ATKINSON, WILLS 141 (2d ed. 1953).

10. See, *e.g.*, FLA. STAT. ANN. § 733.20 (1963); NEB. REV. STAT. § 30-103 (1943).

vivos gift will arise in this country. However, the presently increasing incidence of marriages to which are brought children of a previous marriage makes more urgent a reconsideration of and revised solution to the problem of equitable treatment of the surviving spouse and all of the children of the deceased.<sup>11</sup>

Professor Dunham's recent investigation of wills in Chicago indicates the need for working out the rights of the surviving spouse and children together.<sup>12</sup> In twenty-seven of twenty-eight wills examined in which testators were survived by spouses, everything was given to the spouse;<sup>13</sup> when the testator was survived by spouse and children, all twenty-two wills examined resulted in disinheritance of the children,<sup>14</sup> though not a permanent disinheritance. The significant, and not merely technical, disinheritance occurs if at all on the death of the survivor of the spouses.<sup>15</sup> In sixty-nine per cent of the wills of testators survived by children but not spouses, the children were given unequal amounts, but no child was excluded entirely, except in two wills in which provision was made instead for grandchildren. However, the findings of Cohen, Robson and Bates<sup>16</sup> are noted to the effect that "there is a rather strong feeling that parents should not be permitted to disinherit their children."<sup>17</sup>

Professor Dunham concludes that intestacy laws in Illinois providing for "the present statutory share of one-third of the estate for the surviving spouse, if there are children, is almost completely contrary to the expectations of the average testator."<sup>18</sup> He recognizes, however, that the law may not be constructed entirely by reference to the expectations and wishes of the average person. The lawmaker must also be concerned with the occasional "bad" man who deviates shockingly from the community's pattern. Thus, even if the premise that the intestacy laws should mirror the average person's disposition of property is generally accepted as sound, it is not an inescapable conclusion that the surviving spouse should take all in intestacy because in the sampling an overwhelming percentage of predeceasing spouses' wills left all to the survivor. The legislature may also properly be concerned with limiting the freedom of the survivor of the spouses in disposing of the property,

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11. MACDONALD, *op. cit. supra*, note 4, at 10-15.

12. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963).

13. *Id.* at 253.

14. *Id.* at 252.

15. *Id.* at 256.

16. COHEN, ROBSON & BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW 76 (1958).

17. Dunham, *supra* note 12, at 256.

18. *Id.* at 258.

for example, by giving the surviving spouse only a life interest in all of the property of the intestate predeceasing spouse. Perhaps the survivor should not be permitted to upset completely the expectation of the predeceasing spouse that the property will pass to the children upon the death of the survivor. Moreover, the size of the estate may be a consideration in determining how much should pass to the spouse, as recent English legislation has recognized.<sup>19</sup>

The Chicago study permits no definite conclusion as to the dimension of the problem of wrongful disinheritance of spouses and children.<sup>20</sup> No cases of shockingly inequitable treatment occurred in the limited sampling, but that is not to say that no problem exists. The policy question can be stated in terms of usually unneeded and occasionally undesirable restraints on one side to be balanced against vital safeguards in the unusual case of shocking deviation. A spouse's or child's feeling of security in knowing that he cannot be excluded from sharing in the property of his spouse or parent is arguably a significant purpose to be achieved by the rules of succession.

In his monumental study of the American law, *Fraud on the Widow's Share*, Professor Macdonald concludes that protection accorded the widow by a statutory indefeasible share of the deceased husband's estate is insufficient because it does not prevent evasive depletion of the estate by inter vivos gifts.<sup>21</sup> Accordingly, he proposes elimination of the indefeasible share and the creation of a right of spouses and dependent children to a maintenance allowance in case of need from the estate of the deceased spouse, or, if insufficient, from inter vivos gifts made by him. This proposal follows in many respects the pattern of recent legislation in England<sup>22</sup> and much of the British Commonwealth,<sup>23</sup> such legislation, however, fails to make provision for protecting the survivors from inter vivos gifts. While Professor Macdonald has demonstrated the inadequacy of the existing American system, and while his proposals protect the deceased's family from want, they may be criticized for

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19. The Administration of Estates Act of 1925, as amended by the Intestate's Act of 1952, provides that the surviving spouse takes the first £5000 of the deceased spouse's estate when issue survive, and the first £20,000 when a parent or issue of parents survive. As to the excess, the surviving spouse takes a life interest in one-half. The Administration of Estates Act, 1925, 15 Geo. 5, c. 31, as amended, Intestate's Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64.

20. Dunham, *supra* note 12, at 262.

21. MACDONALD, *op. cit. supra* note 4.

22. English Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, c. 45. See discussion in MACDONALD, *op. cit. supra* note 4, at 290-98 and materials cited therein at 291 n.3.

23. See, *e.g.*, The Family Protection Act, 1900, 64 Vict. c. 20, as amended, 1947, 11 Geo. 6, c. 60, § 15 (N.Z.).

denying the family any other indefeasible rights in the deceased's property. The framers of the Continental codes, recognizing the need of integration of lifetime and at-death disposition of property, as does Macdonald, have at the same time established forced shares for reserve heirs—lineal relatives and in some countries the spouse. Thus, under Continental systems the family's interest in the deceased's property is far more secure than in the United States, and far more extensive than that which Macdonald would accord.

French law, the model of other Continental systems, offers much less opportunity for defeasance of family interests than does the American law. In France, as in American community property states, the spouse is typically protected by indefeasible rights in community property. More favored than the French spouse is the French child, who is protected from disinheritance by will and is also given effective protection against disinheritance by inter vivos transfers. The reserve share of the lineal descendants of the decedent or, in their absence, his parents or closest surviving lineal ancestor is the salient feature of the French system of successions, constituting a substantial modification of the rights of ownership in the Anglo-American conception. The extent of the restrictions imposed by the system of reserve portions depends upon the number and kind (ancestors or descendants) of reserve heirs which survive. If, for example, one parent but no children survives the deceased, the freely disposable portion of the deceased's property is three-fourths, making the parent's reserve share one-fourth.<sup>24</sup> When children or other descendants survive, they displace parents as reserve heirs. Thus, should three children survive, the freely disposable portion is one-fourth, three-fourths of the property being the children's reserve portion.<sup>25</sup> The object of the reserve is to protect the closest blood relatives of the deceased from dispositions by gift or will which he could otherwise have made to their detriment.<sup>26</sup> Significantly, inter vivos gifts and disposi-

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24. CODE CIVIL art. 914 (Fr. 63d ed. Dalloz 1964) (hereinafter cited as CODE CIVIL).

25. CODE CIVIL art. 913. This reserve portion may occasionally be modified by reason of the spouse's special portion. CODE CIVIL art. 1094.

26. For a general summary of the French law of testate and intestate successions, see AMOS & WALTON, INTRODUCTION TO FRENCH LAW 288-338 (2d ed. 1963). As to the nature, background and criticisms of the reserve see BOISSONADE, HISTOIRE DE LA RÉSERVE HÉRÉDITAIRE (1873); 3 PLANIOL, TREATISE ON THE CIVIL LAW pt. 2, §§ 3047-57 (11th ed. 1959); Charmont, *The System of Compulsory Partition of Estates*, in RATIONAL BASIS OF LEGAL INSTITUTIONS 430 (Wigmore & Kocourek ed. 1923); 4 RIPERT & BOULANGER, TRAITÉ DE DROIT CIVIL §§ 1819-60 (1959); WEDGEWOOD, THE ECONOMICS OF INHERITANCE 67-81 (1929). Reserve heirs have traditionally had a right to their shares of the succession in kind, subject to the deceased's power to select the property he wishes to pass to others as the freely disposable share. One reserve heir can be favored over another to the extent of the free share. *Ibid.*

tions by will are integrated in making a determination of the quantum of the indefeasible rights of reserve heirs.<sup>27</sup> To the extent that dispositions by gift or will exceed the freely disposable portion, they are subject to an action in reduction by reserve heirs whose shares have been impaired. Legacies are first reduced pro rata, and if the reserve is still impaired, inter vivos gifts may be recovered in inverse chronological order.<sup>28</sup> Obviously, the reserve operates simultaneously to put a limit upon the amount of property that can be transferred to those, such as a surviving spouse, who are not reserve heirs under the present system. It is immediately apparent that the system of reserve portions to a large extent fixes unalterably the pattern of succession in France and serves to reduce the will to an ancillary role, less frequently used in France as the principal instrument for transmission of property than in this country or in England.

In support of the French system, it is argued that the reserve portion of lineal relatives has a cohesive effect on the family and strengthens the fabric of society. This is Planiol's idea when he explains the basis of the forced share:

The moral obligation arises from the natural duties which tie persons descending one from the other; the respect of the children for the parents on one hand, and the paternal affection on the other. . . . The social interest is based on the fact that the family is the basic social group, which serves [as] a basis for all other groups but is the most important of them. The state is a nation and a nation is an agglomeration of families. Hence the state is directly interested in a proper organization, durability and stability of families.<sup>29</sup>

Thus, to Planiol the reserve is basic to the organization of society.<sup>30</sup>

Though one may object to having natural ties ripen into moral obligations enforceable in law, the community in France generally has approved imbuing the parental relationship with the legal consequences of forced heirship. Even in the United States, most people would regard disinheritance of a dutiful child by a whimsical or vindictive testator as being unfair or even monstrously cruel.<sup>31</sup> On the other hand, freedom of testation has at least superficial appeal in that it may be said to en-

27. CODE CIVIL arts. 913-14.

28. CODE CIVIL arts. 920-30.

29. 3 PLANIOL, *op. cit. supra* note 26, § 3049.

30. Planiol further explains that the obligation he refers to is not to be thought of as part of the policy which imposes mutual alimentary obligations between parents and children. *Ibid.*

31. That this is so is suggested by the results of a recent inquiry. COHEN, ROBSON & BATES, *op. cit. supra* note 16.



courage either self-reliance or respect for the parent on the part of the child. The real or supposed dangers of inherited wealth to the well-being of the offspring were best summed up long ago in Samuel Johnson's remark that primogeniture should be preserved because it prevented there being more than one fool in a family.<sup>32</sup> On a popular level American exaltation of self-reliance and emphasis on freedom of opportunity, class mobility and the self-made man have perhaps tarnished the image of the man who owes his status largely to inherited wealth with its aura of ease, unearned leisure and even decadence. To suggest that the child should not be subject to disinheritance may evoke an image of a dissolute and disrespectful son, slothful and unenterprising, secure in the knowledge that he cannot be disinherited save for grave misconduct toward his parent.

In sharp contrast to the democratic and laissez faire approach of the Anglo-American law allowing freedom of testation within wide limits stands the French system, with its emphasis on family property and blood ties, conceived to promote family solidarity and to conserve family property. Inherent in the system of children's forced succession to most of the deceased parent's property is an espousal of the proposition that the blood tie has a relatively more fixed, static quality when compared to the marital relationship, subject as the latter is to a great variety of arrangements as to its economic consequences, and perhaps more subject than the former to variation as to the form of personal relationship. Today in France the main channel for property transmission continues to be one in which property is forced from parent to child.<sup>33</sup> In each case, however,

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32. McMurray, *Modern Limitations on Liberty of Testation*, in RATIONAL BASIS OF LEGAL INSTITUTIONS 461 (Wigmore & Kocourek ed. 1923).

Western Auto Supply, one of the big enterprises operating by franchises to small businessmen who sell its products and use its name and sales methods, "frowns on inherited money because it thinks that people who have had to earn their own will know better how to manage a shop." *Time*, May 24, 1963, p. 90.

The classical economists, especially McCulloch, argued strongly against the legitim [forced share] and in favor of primogeniture as a social institution, on the double ground that division of property operated against the efficient exploitation and that the disinheriting of younger children gave them maximum incentive to make their own way in the world. A secure competence they regarded as disastrous both for society and for the individual who enjoyed it; and they urged that men would be spurred on to make best use of their powers only by need and by emulation of the rich. Inequality was defended as a means of accumulation of capital and primogeniture favored on the ground that although it might be bad for the heir by making him lazy it was good for the younger children and the community. According to McCulloch it was a positive privilege to be disinherited; but it never entered his head that the best thing would be to disinherit everybody.

Cole, *Inheritance*, 8 ENCYC. SOC. SCI. 35, 37 (1932).

33. See Merryman, *Policy, Autonomy and the Numerus Clausus in Italian and American Property Law*, 12 AM. J. COMP. L. 224 (1963) for a discussion of the social

the rights of each of the components of the immediate family—parents, spouse and children of the deceased—must be worked out with reference to the rights of the others and the right of the deceased to control transmission by will or gift of some of his property to them and to outsiders.

This system may seem strange to Americans, steeped in a tradition of freedom of testation and confirmed in a belief that inherited wealth carries with it a slight taint. Among Americans of moderate means the customary pattern, as Professor Dunham's study shows, is for property to pass to the surviving spouse and then to the children. The pattern is voluntary since there is no legal machinery to insure its being followed beyond the limits of the spouse's indefeasible share. Yet under typical intestacy statutes the surviving spouse's share varies depending upon whether children survive, and the amount of the children's share depends upon whether the spouse survives, thus suggesting that the French approach is not wholly alien to American law. Since children in the United States have no indefeasible rights, however, it is apparent that the Continental system of forcing integration of their rights with the rights of the surviving spouse remains untried in the United States, save for Louisiana. Integration of the rights of spouse, children and parents of the deceased seems the more reasonable when it is pointed out, as Wedgwood did in his argument for restricting inheritance rights, that this is the group among which a communal sharing of property is ordinarily confined.<sup>34</sup> Be that as it may, it could be argued that the concomitant rigidity of a system of forced heirship makes any adaptation of it beyond the spouse's indefeasible share unsuitable and unacceptable to Americans. Since forced heirship must have profound effects on social and economic institutions and a significance far beyond the prevention of hardship from disinheritance, it does not necessarily follow that forced heirship is suitable for the United States even though it may work well on the Continent. Though social and economic mobility has no doubt increased

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and economic consequences of the American system and the Italian system of forced heirship, the *legittima*, closely resembling the French. The author sees the development of our law of trusts and future interests as a natural response in a system in which disinheritance of children is permitted; by trusts a property owner can to some extent prevent his successors from giving away the family's wealth. A similarity between the trustee and the Italian property owner is perceived:

The Italian owner could with some accuracy be described as a kind of trustee of that part of his property which will be subject to forced heirship, with a life interest in a power to sell, reinvest and consume. He is not empowered to make gifts of this property during life or at death, and if he is extremely improvident he may be classified as a profligate and his power over the property further limited. . . .

*Id.* at 231.

34. WEDGEWOOD, *THE ECONOMICS OF INHERITANCE* 193 (1929).

in France in the last 150 years, it may be that such mobility is still much less than in the United States. A high degree of economic mobility is perhaps a reason for urging rejection of forced heirship so as to permit a parent to discriminate against a child who has attained wealth and in favor of one who has not. On the other hand, examination of the French and other civil law systems, their practical operation and effects, may well compel the conclusion that they are a promising source for shaping the revision of the American law as to the rights of the surviving spouse and children.

## II. THE FRENCH SYSTEM

A system of property transmission may be examined with reference to three questions as to the rights of surviving family of a deceased person: (1) what is the least amount of property that may be left to a person or group standing in a particular relationship to the deceased; (2) what amount of property, if any, will go to this person or group if the decedent has not purported to control the disposition of his property by will or gift, and (3) what is the maximum amount, if there is any limitation at all, of the decedent's property which may be given to a person or group. If these questions are answered regarding the surviving spouse, the outlines of a particular system are revealed, and the surviving spouse's position in the system of succession may be appraised.

By that method of analysis the position of the surviving spouse in French law will be examined first as it exists today,<sup>35</sup> and then as the Commission for the Revision of the Civil Code<sup>36</sup> has proposed to revise it. A preliminary word as to the Commission's recommendations is appropriate. A proposed augmentation of the rights of the surviving spouse is the most significant change that the Commission has made in the area of gifts and successions. In explaining the proposal the Commission declares that "the spouse is, indeed, in the matter of devolution of property the great beneficiary of the reform."<sup>37</sup> The rationale for the proposed change is stated as follows:

The most important reform of the rules of succession concerns the surviving spouse who, under our present legislation, is not a successor in full ownership except in the absence of

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35. Important changes were made in 1957 and 1963.

36. See Houin, *Reform of the French Civil Code and the Code of Commerce*, 4 AM. J. COMP. L. 485 (1955) for an outline of the origins of the Commission, its mode of operation and objectives.

37. 2 AVANT-PROJET DE CODE CIVIL, PRÉSENTÉ A MONSIEUR LE GARDE DES SCAUX MINISTRE DE LA JUSTICE PAR LA COMMISSION DE RÉFORME DU CODE CIVIL, DEUXIÈME PARTIE 21 (1962) (hereinafter cited as COMMISSION).

legitimate parents and [legitimate or] illegitimate children; this situation is not consonant with the present-day conception of the modern family which seldom embraces more than the partners to the marriage and the issue born of the marriage; it seems only right that the spouse should be made an heir before distant relatives of the deceased, and that he should be put in the status of one who shares along with the closest relatives. The proposed provisions accord to the surviving spouse in every case a right of succession in full ownership and make him a true heir.<sup>38</sup>

No basic change in the present outlines of a child's (or descendant of a deceased child's) share in intestacy and his reserve share is contemplated by the Commission's proposals. Frequent reference must be made to the children's position in the scheme of succession and, indeed, to the positions of ancestors, collateral relatives and strangers to the blood of the deceased spouse to understand the position of the surviving spouse.

#### A. *Minimum Rights of the Surviving Spouse*

1. Pension Alimentaire. In considering minimum rights of the surviving spouse under French law, situations can easily be imagined under the present scheme where he or she has none.<sup>39</sup> For example, consider the situation of a middle-aged woman who, having inherited from her parents sufficient property to provide for her support, marries a retired businessman. In the contract fixing their marital property rights, the couple adopts the usual community property arrangement limited to gains during the marriage (community of acquests). Because the husband is retired, there may well be no gains. We may further suppose that the husband, the predeceasing spouse, has by will or gift disposed of all his property in favor of remote relatives or strangers, a permissible disposition under French law when he is not survived by reserve heirs. Or supposing he is survived by such heirs, *e.g.*, children of a former marriage, they succeed to most of his property, having indefeasible rights except in cases of grave misconduct toward the deceased. The freely disposable portion may be left by will partly to them and partly to friends. The surviving spouse would then take nothing. She is not a reserve heir nor indeed an heir at all, and there is no community property.

In the above example the wife had inherited property from her family. The widow (or widower) has no indefeasible rights in the deceased

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38. *Id.* at 69.

39. There is no distinction on the basis of sex as to rights of a surviving spouse in French law.

husband's separate property (or his share of any community property) unless she is left in need. In that case article 205 of the Civil Code<sup>40</sup> accords the surviving spouse a claim for support—a *pension alimentaire*—against the succession of the deceased spouse that is superior to all other rights in the estate except the claims of creditors.<sup>41</sup> The French spouse's claim is itself looked upon as a claim of a creditor, the code providing that the succession *owes* support to the surviving spouse left in need. The surviving spouse as creditor does not, however, stand on equal footing with other creditors of the deceased, nor is his right protected against defeasance by the predeceasing spouse's inter vivos gifts to third parties,<sup>42</sup> a frailty it shares with the American spouse's right to an indefeasible share. In view of the elaborate safeguards in French law against defeasance of the reserve share by inter vivos transfer, it is perhaps surprising that no analogous protection is afforded the spouse.

While article 205 speaks of the succession as being obligated, it is the heirs and legatees, as in the case of other obligations of the deceased, who owe support. As in Anglo-American law, the succession or estate is not a legal entity and hence is not capable of being an obligor.<sup>43</sup> The allowance, superior to rights of inheritance, is borne by all the heirs, and in case of insufficiency, proportionately by specific legatees.<sup>44</sup>

The *pension alimentaire* has the obvious merit of forcing provision for a surviving spouse so as to prevent his becoming a public charge or a burden upon relatives. At the same time it denies him more than support when such minimal rights are arguably appropriate, as when the marriage was of short duration, when the predeceasing spouse left children

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40. "Children owe support to their father and mother and other ascendants who are in need. The succession of the predeceasing spouse is likewise obligated in the same circumstances to the surviving spouse. Such a claim must be made within one year after death or before completion of any partition of the deceased's property." CODE CIVIL art. 205.

41. With rare exceptions such as Maine in the case of widows and Florida in the case of minor children, such a right to support is unknown in American law except during the period of administration by virtue of family allowance statutes. FLA. STAT. ANN. § 733.20 (1963); ME. REV. STAT. ANN. ch. 156, § 14 (1954). See notes 22-23 *supra* and accompanying text as to the right of support accorded the surviving spouse and dependent children by the English Inheritance (Family Provision) Act and other legislation throughout much of the British Commonwealth.

42. 4 RIPERT & BOULANGER, *op. cit. supra* note 26, § 1757.

43. While in the case of a statutory right to support claimed from a person, *e.g.*, a parent's claim under article 205 for support from an adult child, and not the succession, article 208 provides that the pertinent considerations in setting the allowance are the needs of the claimant and the fortune of the person owing support. The only limit on the amount of the succession which may be absorbed by the *pension alimentaire* seems to be the need of the surviving spouse. CODE CIVIL art. 208.

44. CODE CIVIL art. 205.

of a prior marriage or when the usual sentiments did not attend the relationship.

Unlike the *pension alimentaire*, the American spouse's forced share of a fixed portion of the predeceasing spouse's property, if it is intended primarily as a means of providing support, will often be excessive or insufficient, depending upon the wealth of the predeceasing spouse. As the only restriction on freedom of disposition of separate property in regard to the surviving spouse under the present French system, the *pension alimentaire* imposes a modest and needed restriction. The existence of the surviving spouse's right to support answers in some measure the argument that the spouse should be a reserve heir, as under the German system which, however, accords no support allowance.<sup>45</sup> The proposals of the Commission follow the German pattern by eliminating the *pension alimentaire* of the surviving spouse and according him a reserve share.

2. Rights in Community Property. The French spouse's right in community property is distinct from the right to support from the deceased spouse's succession and is typically of greater practical significance among propertied classes. The merit of the realistic approach of a community property system and the wisdom of permitting the spouses to determine the economic consequences of their marriage have been often and persuasively discussed.<sup>46</sup> Most commonly the surviving spouse in France, as in community property jurisdictions in the United States, succeeds to one-half of the community property. In the great majority of cases in which the parties have entered into a marriage contract fixing property rights, this consists of a community of acquets—gains to the community, by the activities of the spouses and income from separate property. This is by far the most usual regime when any substantial amount of property is brought to the marriage. If there is no marriage contract adopting a separation of property or a marital property regime, as there often is not among persons of modest means, by article 1393 there results the statutory community which consists of all property and income therefrom except real property brought to the marriage or acquired by gift thereafter.<sup>47</sup> However, article 1387 gives the parties to the marriage complete freedom to contract in making their conventions regarding property, thereby permitting them to avoid the statutory community.<sup>48</sup>

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45. BÜRGERLICHES GESETZBUCH §§ 2303-38 (Ger. 21st ed. Palandt 1962).

46. See, e.g., RHEISTEIN, *THE CODE AND THE FAMILY IN THE CODE NAPOLEON AND THE COMMON LAW WORLD* 139 (Schwartz ed. 1956).

47. CODE CIVIL art. 1393. See CODE CIVIL arts. 1401-08 for a definition of what property is included in the community absent agreement otherwise. It has been recommended that the statutory community be changed to a community of acquets. RHEISTEIN, *op. cit. supra* note 46, at 154.

The spouses, by article 1520, may vary in any manner the otherwise equal division upon dissolution of the community, and article 1526 provides that by the marriage contract the parties may agree that the survivor of them shall take all of the community property, however that may be defined. If such a convention is adopted, the predeceasing spouse's half does not become part of the succession subject to the rights of reserve heirs.<sup>49</sup> The conventional marital property regime must be elected, if at all, at the time the marriage is entered into; once done or omitted it can never be changed.<sup>50</sup> Likewise, the statutory community regime resulting from the absence of a convention as to property cannot be changed.<sup>51</sup> While article 1421 accords to the husband alone the right to manage community property, article 1422 prohibits him from depleting that property by making gifts of it without the consent of the wife,<sup>52</sup> even denying to him power to make gifts to their children.<sup>53</sup>

It becomes clear that once a community property regime has been established, each spouse acquires rights which cannot be defeated by the other. However, since the parties are not required to adopt such a regime, but may instead choose to keep their existing property and future gains separate,<sup>54</sup> it is possible that the surviving spouse will have no rights

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48. "The Law does not regulate the conjugal association as to property except in the absence of a special convention, which the spouses can make as they see fit, subject to the modifications that follow, so long as it is not contrary to good morals." CODE CIVIL art. 1387. Another article further articulates this freedom: "The spouse can modify the legal community by any sort of convention not contrary to article 1387, 1388, 1389, and 1390." CODE CIVIL art. 1497.

49. See text accompanying notes 101-07 *infra* for restrictions on property arrangements between parties of a marriage when there are children of a prior marriage.

50. CODE CIVIL arts. 1395, 1520, 1526. The Commission for Revision of the Civil Code has recommended that postnuptial changes be permitted with judicial control under some circumstances. COMMISSION art. 360.

51. This element of rigidity is not present in American community property systems; in nearly all community property states spouses have power by mutual assent to convert community property into separate property of either the husband or wife at any time. In Texas, however, the constitution prohibits changing of separate property into community property. TEX. CONST. art. XVI, § 15 (1948); see 2 AMERICAN LAW OF PROPERTY §§ 7.26-27 (Casner ed. 1952).

52. CODE CIVIL arts. 1421-22. Similar protection for the wife exists in most American community property states, although the prohibition is often less clear cut. It is said that the husband, as manager of community property, can make reasonable gifts of community property to third persons if done without a fraudulent intent to defeat the wife's rights. This statement imports a host of uncertainties common to transactions involving marital rights in which fraudulent intent is an element. See 2 AMERICAN LAW OF PROPERTY § 7.22 (Casner ed. 1952); Huie, *Community Property Laws as Applied to Life Insurance*, 18 TEXAS L. REV. 121 (1940).

53. Prior to 1942 this article provided that the husband could not make gifts of the community's real property, nor of anything but specific items of personalty unless all or a portion of the personalty was for the benefit of the children of the spouses.

54. A special sort of separate property regime now fallen into disuse is the dotal regime, whereby property is transferred, typically by the wife's parents, to the husband for his administration during the marriage, the income to be applied for living expenses.

whatsoever in community property. His or her sole right may be to a *pension alimentaire*. It may also happen that rights in community property are without value, as when fortune has failed to smile on the couple except, perhaps, to the extent of preserving the separate property of the predeceasing spouse in which the survivor has no indefeasible rights. Again the significance of the *pension alimentaire* is evident, assuring the surviving spouse that he or she will never be left in need to the extent the predeceasing spouse leaves assets in excess of his debts. Bearing on the circumstance of need may be the existence of indefeasible rights in community property. Beyond this the surviving spouse has no rights under the existing law when the predeceasing spouse has chosen to make use of the freedom of disposition the law affords in order to prevent any property from passing to the survivor. The Commission for Revision of the Civil Code makes the revolutionary proposal that the spouse be given indefeasible right by making him a reserve heir, in effect treating him as an additional child.

#### B. *Family Rights When the Deceased Has Made No Disposition*

The spouse's rights in cases where the predeceasing spouse has made no gifts and left no will must now be examined, together with situations where he has made dispositions by gift or will of less than the maximum permitted under the circumstances. Here, as always, the surviving spouse left in need has a right to a *pension alimentaire*. In these situations, however, his need will be affected by his rights to a life interest (*usufruit*) or to full ownership (*pleine propriété*) of a portion or all of the property of the succession, as well as by possible rights in community property. Rights to a *pension alimentaire* and in community property are, of course, independent of rights which arise when the predeceasing spouse dies intestate and of rights the surviving spouse may have as a donee or legatee of the property of the predeceasing spouse.

It will become apparent that here, unlike the situation examined above where the predeceasing spouse has sought to limit as much as pos-

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Upon dissolution of the marriage, the property reverts to the wife or her heirs. Frequently a dotal regime was combined with a community property regime. The term "dot" is also used, of course, to signify gifts of parents of either husband or wife though not under the statutory dotal regime. CODE CIVIL arts. 1540-73. See generally 4 RPERT & BOULANGER, *op. cit. supra* note 26, pt. 1, ch. 3.

The parties to the marriage might also arrange their property rights by an antinuptial contract known as institution *contractuelle*, a hybrid arrangement partaking partly of the nature of a contract and partly that of a will. One of the future spouses irrevocably undertakes to leave to the other spouse all or part of his estate. The institution *contractuelle* may include a spouse's separate property and property to be acquired in the future. CODE CIVIL arts. 1082-84; see 4 RPERT & BOULANGER, *op. cit. supra* note 26, §§ 3765-67.



sible the survivor's rights, his rights are determined according to which relatives survive with whom he is in competition. Preliminarily, it must be observed that the rights of the spouse can never impugn the rights of reserve heirs—the lineal descendants of the deceased spouse or, in their absence, his parents or closest surviving lineal ancestor.<sup>55</sup> The surviving spouse's rights when the deceased spouse has not exercised all or part of the power to dispose of property by gift or will which the law accords him in the particular circumstances are set forth in article 767.<sup>56</sup>

1. Children Surviving. First to be considered is the surviving spouse's position when the predeceasing spouse is survived by children or descendants of deceased children.<sup>57</sup> If there are one or more children of the marriage, the surviving spouse, not legally separated by reason of his fault at the time of death,<sup>58</sup> takes a life interest in one-quarter of the succession.<sup>59</sup> That interest may readily be criticized as insufficient, and

55. Lineal ancestors other than parents are heirs only if the deceased was not survived by brothers and sisters or their descendants. CODE CIV. art. 750. Hence they are reserve heirs only in the same circumstances.

56. CODE CIVIL art. 767. That is to be contrasted with the situation where the predeceasing spouse has sought to limit the survivor's rights as much as possible. See notes 39-54 *supra* and accompanying text.

Article 767 presently sets the share of the surviving spouse as follows:

When the deceased leaves neither relatives within the degree capable of taking the succession, nor illegitimate children, or if he leaves only collaterals other than brothers and sisters or their descendants, the property of the succession belongs in full ownership to the undivorced spouse who survives him and against whom does not exist a judgment of separation.

When the deceased leaves in one line no relative within the permissible degree, or if he leaves in this line only collaterals other than brothers or sisters or their descendants, half of his succession passes, notwithstanding the provisions of article 753, to the undivorced spouse against whom there does not exist a judgment of separation.

The undivorced surviving spouse who does not succeed in full ownership and against whom there does not exist any judgment of separation has in the succession of the predeceasing spouse a life interest (*droit d'usufruit*) which is

Of a quarter, if the deceased leaves one or more children of the marriage;

Of the portion of the legitimate child taking the least, not to exceed one-quarter, if the deceased has children born of a preceding marriage;

Of one-half, if the deceased leaves illegitimate children or their descendants, brothers and sisters, descendants of brothers and sisters or ancestors. . . .

CODE CIVIL art. 767.

57. The code provides for unlimited representation in the case of lineal descendants. CODE CIVIL art. 740.

58. Such separation does not affect the right to support. CODE CIVIL art. 205.

59. The spouse's rights in this situation have been so fixed since 1891, such rights coming into the code simultaneously with the *pension alimentaire*. Before 1891 the spouse acquired no interest except in the most unlikely circumstances that the deceased spouse left no relatives within the twelfth degree of consanguinity, in which case he took the entire succession.

If the deceased has children living of a prior marriage, article 767 imposes special limitations. See text accompanying notes 101-07 *infra*. The spouse is not an heir; his right is said to be against the succession and not in the succession. He is an irregular successor (*successeur irregulier*) as is the state in cases of escheat under French law.

the Commission for the Revision of the Civil Code has proposed that the spouse's rights in this situation be increased to full ownership in not less than one-fourth.<sup>60</sup>

It has been said that the surviving spouse takes as a presumptive donee.<sup>61</sup> That is, his life interest (or full interest in some cases, as will be seen) is what the predeceasing spouse would have given him had not death intervened. The presumption is not, however, that the predeceasing spouse would have given the survivor all the law would permit, but rather, the interests *ab intestat* specified in article 767. Regardless of whether reserve heirs survive or not, nothing prevents complete extinction of the surviving spouse's rights under that article by inter vivos or testamentary dispositions of the predeceasing spouse. It must also be noted that all gifts made to the spouse<sup>62</sup> inter vivos or by will are counted in the calculation of the spouse's life interest under article 767, reducing it pro tanto or extinguishing it entirely.<sup>63</sup> Thus the interest accorded the sur-

The Commission for Revision of the Civil Code proposes making the surviving spouse an heir. COMMISSION art. 768.

In the context of determining the surviving spouse's interest in the succession, the calculation of such interest is based upon the predeceasing spouse's share of community property and his separate property undisposed of by gift or will, to which are added, for the purpose of this calculation only, advancements to heirs. CODE CIVIL art. 767, para. 8. (Advancements are lifetime gifts intended to count toward the intestate or reserve share that the heir will take upon the death of the donor; an advancement may be made either to a reserve heir or a collateral heir.) This is the mass of property on which the maximum extent of the life interest (one-quarter or one-half) is calculated. The extent of property over which the life interest can be exercised (as distinguished from calculated) does not include advancements, absolute gifts, legacies, nor the reserve portion. For example, if a predeceasing spouse leaving two children had made advancements to each of them of 250,000 francs, and had not disposed of 100,000 francs at the time of his death, while the surviving spouse's life interest would be calculated on the basis of 600,000 francs (twice 250,000 plus 100,000) and could therefore be as much as 150,000 francs (one-fourth of 600,000), it could in this instance be enjoyed only as to property not transferred by the deceased—the 100,000 francs he possessed at death. Because the surviving spouse is not a reserve heir, in regard to him property which the deceased has disposed of by gifts or will has ceased to be part of the succession and he can claim no interest in it. Unlike the advancement, the absolute gift or legacy is not included in the fictional reconstruction to determine the maximum amount in which the spouse may have a life interest.

By changing one fact in the above example so as to make the advancements to each child 200,000 francs (instead of 250,000), the decedent spouse would possess 200,000 francs at death and the surviving spouse would enjoy the maximum life interest of 150,000 francs, since an amount in excess of this remains undisposed of at the death of the predeceasing spouse.

60. COMMISSION art. 769.

61. 3 COLIN & CAPITANT, COURS DE DROIT CIVIL FRANCAIS § 954 (10th ed. de la Morandière 1950).

62. By article 1096 all interspousal lifetime gifts are revocable. CODE CIVIL art. 1096. The Commission's proposal would subject interspousal gifts to ordinary rules governing gifts. COMMISSION art. 986; see discussion in COMMISSION 97.

63. The maximum which the predeceasing spouse can give inter vivos or by will to the survivor is always greater than the amount the survivor would take under article 767. If no reserve heirs survive, there is no limitation on gifts inter vivos or by will to

vivor under the particular circumstances cannot be tacked onto gifts or legacies so as to allow the spouse a total of more than the interest he is entitled to by article 767. The only means by which the predeceasing spouse can benefit the survivor to the fullest extent is by gifts or legacies to the maximum permitted in the particular circumstances.

To illustrate the extent of the spouse's right, let us suppose that a deceased husband has left property comprised of his separate property and his share of community property of a total value of 100,000 francs.<sup>64</sup> He is survived by a wife and one child, whose reserve share is one-half of the succession, or 50,000 francs.<sup>65</sup> The other half, the free share (*quotité disponible*) of 50,000 francs, may be disposed of by gift or will. Let us further suppose that a legacy of 40,000 francs from the free share has been left to a friend. Since the wife's life interest (here, in one-quarter) can never impinge upon the rights of a reserve heir, and since much of the free share has been exhausted by the legacy of 40,000 francs to the friend, the life interest of the wife is in only 10,000 francs—the amount which is not part of the reserve and which has not been given to the friend. The reversionary interest (*neu propriété*) in this amount passes to the son as the sole heir in addition to his reserve.<sup>66</sup> It will not pass to the wife unless the husband gives it to her, even though with the reversion she might still receive something less valuable than her life in-

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any person. Paragraph 10 of article 767 provides that the surviving spouse may not exercise his right thereunder if he has received gifts in excess of the value of his rights under article 767, even though such gift was intended to favor him without diminishing his rights. However, there is a recent decision to the effect that this does not apply when the donor spouse has manifested his wish that the gift should be in addition. Judgment of May 10, 1960 of the Cour de Cassation (Ch. civ., 1ère sect. civ.), Dalloz 63.38. If the gift is worth less than his rights under article 767, he can claim only the balance between the gift and the value of his interest under that article. Valuation questions arise in equating the value of outright gifts of land or chattels with life interest accorded by the article. CODE CIVIL art. 767.

While the spouse has no right to demand it, if the heirs agree, and furnish sufficient sureties, the life interest may be converted into a life annuity of equivalent value. CODE CIVIL art. 767, para. 11. If the heirs are in disagreement, such conversion is in the discretion of the court.

64. See example in 3 COLIN & CAPITANT, *op. cit. supra* note 61, § 956.

65. CODE CIVIL art. 913. That article is actually phrased with reference to the free share: "Gifts, either inter vivos or by will, cannot exceed half of the property of the one making the disposition if he leaves at death a single child, one-third if he leaves two children, one-fourth if he leaves three or more." *Ibid.*

The adopted child (or his descendants) has a right to the usual reserve share from the adopting parent, and loses such right as to his natural parents. CODE CIVIL art. 356. As to the reserve share of illegitimate children, see not 78 *infra*.

66. To the extent that the predeceasing spouse survived by a child or children makes no disposition of the free portion, the entire succession passes to the children subject to the surviving spouse's life interest in one-quarter. CODE CIVIL art. 745.

terest in a quarter of the succession on which her right is calculated.<sup>67</sup>

Assuming the facts of the previous example except that the couple had two children instead of one, the interest of the surviving spouse would be completely defeated. While the calculation of her life interest remains the same, there is no property on which it can be exercised because the free share (one-third when two children survive) of 33,333 francs has been exceeded in the attempted legacy to the friend of 40,000 francs;<sup>68</sup> the rights of reserve heirs cannot be impaired for her benefit.

The surviving spouse's life interest in one-quarter seems particularly ungenerous when only one child survives and the freely disposable portion is one-half. But regardless of the extent of the right, since it is defeasible, its effectiveness as a means of providing support is far from complete. The survivor may find his only rights to be a support allowance in case of need and in community property, if any.

That the spouse's right under article 767 is merely a life interest in an inflexibly fixed amount when children survive indicates that it is presently conceived as a means of providing support, and not as a channel for transmitting family property.<sup>69</sup> This feature it shares with the Anglo-American device of dower. Unlike dower, as to which inchoate rights can be acquired at marriage or any time thereafter when the husband becomes seized of real property, the spouse's right can, as we have seen, be destroyed by inter vivos or testamentary disposition of the freely disposable share of the deceased's property. Further, a dower interest is limited to real property, while the interest of the French spouse under article 767 applies indifferently to all property. Dower rights operate only in favor of the wife, while the rights of the surviving spouse in French law are the same regardless of sex. Again unlike dower, the surviving spouse's interest in the succession becomes progressively larger as the relatives with whom such spouse is in competition become more remotely related to the deceased spouse.<sup>70</sup>

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67. The friend's legacy of 40,000 francs is excluded from the calculation of the spouse's right. If the husband had not left 40,000 francs to the friend, the base for calculation would be 100,000 francs and the wife's life interest would be in 25,000 francs. See note 59 *supra*.

68. The amount of the legacy in excess of the free share (40,000 less 33,333) will not be given effect over the objections of the children, the reserve heirs.

69. Since 1917, however, the spouse's interest has not ceased upon remarriage even when descendants survive.

70. If brothers and sisters, but not parents or descendants, survive, and the deceased spouse has made no gifts or legacies, the brothers and sisters take everything, subject to the surviving spouse's life interest in one-half. CODE CIVIL art. 750. If any property has been disposed of by the deceased (and here all of it may be disposed of in favor of any person), the portion as to which the surviving spouse can exercise his rights is pro tanto reduced. See the first example in the text at note 59 *supra*, where 40,000 francs had been given to a stranger. Regardless of whether brothers and sisters survive,

2. No Lineal Descendants Surviving. The surviving spouse's interest under article 767, always defeasible by inter vivos gift or will, is increased to a life interest in one-half of the succession when no legitimate children or their descendants survive the deceased, but he is survived by any of the following: illegitimate children or their legitimate children; brothers and sisters or their descendants; lineal ancestors in both lines. A 1957 revision of article 767 resulted in a striking enlargement of the surviving spouse's interest *ab intestat* in the succession. The spouse now succeeds to full ownership if the predeceasing spouse leaves no lineal relatives (including illegitimate children), brothers or sisters or their descendants.<sup>71</sup> From 1925 until 1957 the spouse in this situation took a life interest in the entire succession and the closest ordinary collaterals (those other than brothers and sisters and their descendants, who are preferred collaterals) in each line through the sixth degree of consanguinity shared equally in the reversionary interest. After 1930, if there were no collaterals in one line capable of taking, the surviving spouse took one-half outright.<sup>72</sup>

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if parents survive, being reserve heirs, their share (one-fourth each in full ownership) will not be diminished to protect the surviving spouse's life interest since the latter can never impair the right of reserve heirs. Brothers and sisters, if any, take the other half, assuming gifts or legacies have not consumed it, subject to the spouse's life interest (CODE CIVIL art. 748), and if no brothers and sisters survive, the entire succession goes to the surviving parents, subject to the spouse's life interest in one-half. CODE CIVIL art. 753. If but one parent survives, the spouse takes the other half in full ownership.

71. If only brothers and sisters of the half blood, or an ancestor in but one line survives, the surviving spouse takes one-half of the succession outright. CODE CIVIL art. 767.

72. Subject to the rights of the surviving spouse, if any, intestate succession is as follows: when no lineal descendants survive, the parents share equally with brothers and sisters and their descendants (CODE CIVIL art. 748); if but one parent survives, the brothers and sisters take three-quarters. CODE CIVIL art. 751. Brothers and sisters take all to the exclusion of more remote lineal ascendants (CODE CIVIL art. 750), the nearest of whom in each line then sharing equally. If an ancestor in but one line survives, he takes all unless the spouse survives, in which case it is shared equally. Thereafter, the surviving spouse takes all, and if none, the succession is split in half and the nearest surviving collaterals in each line, through the sixth degree of consanguinity, share equally. If there are none in one line, then the entire succession goes to the line with such collaterals surviving. CODE CIVIL art. 755. Determination of consanguinity is made by the civil law system of counting from the deceased to a common ancestor and back down to the person whose degree of relationship is to be determined. (Lineal relatives and descendants of brothers and sisters can take beyond the sixth degree.) Since 1917 succession has been limited to the sixth degree unless the deceased at the time of his death lacked the mental capacity to make a will, in which case succession was permitted to the twelfth degree from the adoption of the code until 1917.

Primogeniture was abolished in the wake of egalitarian influences after the French Revolution. See discussion in 4 RIBERT & BOULANGER, *op. cit. supra* note 26, § 1477. Since there is no doctrine of ancestral property, unless a gift is made upon a condition of return (*succession anormale*) it is apparent that when the succession is split in two equal parts, one for each line, property may pass out of the blood line of the ancestor from whom it was acquired by the deceased. For criticism of the system of splitting

Since the surviving spouse is now preferred to ordinary collaterals, there is a sharp difference in result depending upon whether, for example, an uncle or a nephew survives to compete with the surviving spouse. If the predeceasing spouse, survived by a brother or his descendants, disposes of none or less than half of his property, the surviving spouse has a life interest in one-half of the succession—a seemingly niggardly treatment of the spouse.<sup>73</sup> The brother or the nephew takes the entire succession in intestacy subject only to the spouse's life interest in one-half. However, when only an uncle survives, the spouse now takes all in full ownership, an unreasonably disparate treatment of the spouse in these two similar situations. Regardless of whether it is an uncle or a nephew who survives, neither being reserve heirs, the predeceasing spouse can give any amount of the succession to his spouse, or to anyone else for that matter. Though he may have wanted the spouse to take everything, he may have neglected to make disposition in favor of the spouse, procrastinating in a transaction which often invites distasteful thoughts of death. Under the proposals of the Commission for Revision of the Civil Code the present objections are eliminated, the spouse being preferred to the exclusion of all collaterals.<sup>74</sup>

3. Commission's Proposal. Since the Commission does not wish to disrupt the existing system as it pertains to descendants, its basic approach is to assimilate the surviving spouse into the pattern by treating him as an additional child, resulting in a concomitant reduction in the children's shares.<sup>75</sup> For example, when a spouse and one child survive and the predeceasing spouse has not purported to dispose of any property, the Commission's proposal would result in the spouse's taking one-half and the child's taking one-half, just as though two children and no spouse had survived, the two children sharing equally the entire succession. Thus, the surviving spouse succeeds to some property in full ownership *ab intestat* regardless of the kind of relatives of the deceased with whom

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the succession equally between the paternal and maternal lines (*la fente*) see ROUAST, *COURS DE DROIT CIVIL APPROFONDI* 46 (1955).

73. CODE CIVIL art. 750.

74. COMMISSION art. 771.

75. Proposed article 769 embraces the essential change:

When the deceased leaves legitimate children or their descendants, the surviving spouse has a right in the succession to the share of the legitimate child taking the least, but not less than one-quarter of the succession.

The shares of children or descendants are, in this case, reduced proportionately in the amount necessary to create the share of the spouse.

*Id.* art. 769.

When a spouse and illegitimate children survive, it is provided that the spouse takes one-half and the illegitimate children share the other half. When but one illegitimate child and the spouse survive, the child takes one-third and the spouse two-thirds. *Id.* art. 775.

he is in competition. There is, however, one departure from the idea of assimilation of the spouse as an additional child: the spouse can never take less than one-quarter regardless of the number of children surviving—a notion directed toward assuring the spouse a fixed minimum aliquot portion which has been carried over from the present law as to the spouse's rights to a life interest. The proposed treatment would, naturally, be accompanied by the disappearance from the code of the spouse's rights as presently set forth under article 767.

When there are no surviving children and the spouse is in competition with one or both of the parents of the deceased spouse, the Commission has proposed an intestate share of one-quarter for each parent, and the balance of three-quarters or one-half to the surviving spouse, depending on whether one or both parents survive.<sup>76</sup> In this situation the surviving spouse would in effect displace the brothers and sisters of the deceased spouse, who have under the present code exactly the rights which the Commission proposes to accord the spouse. When neither parent of the predeceasing spouse survives, the surviving spouse would take everything to the complete exclusion of grandparents, brothers and sisters and more remote collateral relatives of the deceased.<sup>77</sup> It is evident that these proposals go far beyond the improvements made in the surviving spouse's position by the 1957 amendments of article 767. The spouse would then enjoy the status of a child except that, unlike a child, he would share one-half or one-quarter of the succession with the parents of the predeceasing spouse when no children survive.

### C. *Surviving Spouse's Maximum Rights*

1. Spouse in Competition with Children. Finally it must be inquired what the maximum rights in property are that the predeceasing spouse is permitted to transmit to the survivor. Here again the amount depends upon who survives to compete with the spouse. If no reserve heirs survive, everything may be disposed of by inter vivos gift or will in favor of any person, including the surviving spouse.<sup>78</sup> If, however, the

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76. *Id.* art. 770.

77. *Id.* art. 771.

78. The reserve heirs' rights are established by articles 913-915, the first two of which set forth the portion of property (ordinary disposable portion) which can be disposed of by gift or will when one, two, and three or more legitimate (or legitimate and illegitimate) children, or, if none, ancestors or an ancestor, survive the deceased. CODE CIVIL arts. 913-15. The illegitimate child's share in intestacy is fixed at half of the legitimate child's share when both legitimate and illegitimate children survive. CODE CIVIL art. 758. When both survive, illegitimate children, since 1896, have been expressly accorded a reserve share of that proportion which they would have taken in intestacy, in this case, one-half. CODE CIVIL art. 913. When illegitimate children only survive, they do not cut the parents of the deceased as reserve heirs, as do legitimate children. In such case,

surviving spouse is in competition with children, their reserve shares as established by article 913 must be borne in mind: gifts inter vivos or by will cannot exceed half of his property if the deceased has left one child, one-third if he leaves two children, and one-quarter if he leaves three or more.<sup>79</sup> The situation is complicated by article 1094 which modifies the rights of reserve heirs in some situations by providing for a special disposable portion for the surviving spouse when the deceased spouse is survived by descendants. Though a 1963 revision of article 1094 has brought about important changes, complexities remain.

The 1963 revision of article 1094 has virtually removed the basis for criticism that the predeceasing spouse cannot be generous to the survivor.<sup>80</sup> Nonetheless, the recent change is not an abandonment of the idea that family property must move principally from parent to child. That article now provides three alternative limitations on the dispositions which may be made in favor of the surviving spouse. First, the predeceasing spouse may give him what he could have given a stranger (anyone other than the spouse); this amount therefore depends upon the number of children surviving.<sup>81</sup> Second, he may give the surviving spouse one-quarter in full ownership and a life interest in the remaining three-quarters. This is a more valuable interest than the first alternative unless the deceased spouse is survived by only one or two children and the surviving spouse is elderly; in the latter instances outright ownership of one-half or one-third might be more valuable. As a final alternative, the predeceasing spouse can give the survivor a life interest in all his property. Thus, the reserve portion may be subjected to a special and in most cases augmented disposable share when the spouse and children survive. If no disposition is made of the free share either to the spouse or to third persons, the children will, of course, take it, subject only to

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and also when brothers and sisters survive, the illegitimate children take in intestacy three-quarters of the share they would have taken had they been legitimate (hence they would take three-quarters of the succession). CODE CIVIL art. 759. Their reserve share is likewise three-quarters of the legitimate's reserve share under the particular circumstances. CODE CIVIL art. 913. When illegitimate children and ordinary collaterals survive, such children take the entire succession in intestacy. CODE CIVIL art. 760. All the foregoing applies only to illegitimate children legally recognized. CODE CIVIL art. 338. Children of adulterous and incestuous relationships cannot be legally recognized (CODE CIVIL art 342), a disability which the Commission proposes to abolish. In some situations, however, such offspring would still have only a right to support from the deceased parent. COMMISSION art. 773.

Article 915 sets forth the reserve rights of illegitimate children when no legitimate children survive. See note 93 *infra*.

79. Descendants of deceased children represent them.

80. The pre-1963 limitation on dispositions which could be made in favor of the surviving spouse is harshly criticized in 4 RIPERT & BOULANGER, *op. cit. supra* note 26, § 1900.

81. CODE CIVIL art. 913.



the spouse's life interest in one-quarter under article 767.

The significance of the recent changes may be assessed in light of the provisions which they supersede. Article 1094 formerly provided that when children or their descendants were in competition with the surviving spouse, the maximum amount which could be disposed of in favor of the spouse was full ownership in a quarter of the property of the deceased and a life interest in another quarter, or a life interest in one-half.<sup>82</sup> In effect, the former law permitted the predeceasing spouse to increase by one-fourth of his property the amount which the surviving spouse would take over and above the life interest in one-quarter, the amount the survivor would have taken, and would still take, by article 767 had the predeceasing spouse made no disposition of his property. Like the life interest under article 767, the limit of the spouse's special disposable share when children survived was fixed at one-quarter outright and a life interest in another quarter, regardless of the number of children surviving. When one child and the spouse survived, the curious result was that the predeceasing spouse could not use up the entire ordinary disposable portion of one-half in favor of the survivor. A reversionary interest (*nue propriété*) in one-quarter of the husband's property could not be disposed of in her favor, but could be disposed of in favor of anyone else. It would perhaps shock those accustomed to the American law, its mandatory restrictions on freedom of testation directed solely toward channelling property to a surviving spouse, to encounter a system which mandatorily channelled property away from the spouse. Under the 1963 amendments, however, the maximum permissible interest which may be given to the spouse always includes the ordinary disposable share. By so providing, the children's position will be improved if property is kept away from an outsider, since property given to the surviving spouse will constitute part of the property subject to the rights of the same reserve heirs, the children, upon the surviving spouse's death. Furthermore, the children's future right to a reserve in property received by the surviving spouse will be seen to be well protected against the blandishments of a subsequent spouse should the surviving spouse remarry.<sup>83</sup> Obviously, to the extent the surviving spouse is given a life interest, the permissible extent of which was greatly increased in 1963, the value of the children's reserve will be reduced by its postponement.<sup>84</sup>

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82. Lifetime and at-death transfers are integrated in determining the property to which the fractions are applied.

83. See notes 101-07 *infra* and accompanying text.

84. CODE CIVIL art. 1094. When there is a gift of a life interest to the spouse in more than half of the deceased spouse's property, any child may as to his interest, after furnishing appropriate sureties, require the life interest to be converted into an

The concurrence of the spouse's special disposable share and the ordinary disposable share has given rise to troublesome problems because the two shares are not cumulative. Under the 1963 revision it would seem that whenever the predeceasing spouse has made dispositions in favor of the surviving spouse to the limit of any of the three alternatives,<sup>85</sup> no disposition can be made in favor of a stranger. Concurrence of the two shares can still raise questions when the special disposable share has not been completely utilized. Again, when the predeceasing spouse survived by children makes gifts of the ordinary disposable share to persons other than his spouse to the extent permitted by article 913, he may by so doing have exhausted the special disposable share.<sup>86</sup>

As an example of the problems of concurrence, let us assume that the husband, the predeceasing spouse, survived by three children, had made a gift to the wife of a life interest in one-half of his property, a common gift by antenuptial contract. Thereafter he made a gift to a third party. For purposes of calculation, the gift to the wife must be converted, with reference to her life expectancy, to its value in full ownership. If its value so measured equals or exceeds the ordinary disposable portion (one-quarter when three children survive) such portion has been held to be exhausted, and no further gifts to third parties may be made.<sup>87</sup> Thus, if the wife's age was such to cause her life interest in one-half to be worth half the value of the property in full ownership, the wife's interest would be valued as one-fourth of the property in full ownership, and would extinguish the ordinary free share. Under the reasonable assumption that the husband has utilized first the special disposable portion, it seems that a reversionary interest (*nue propriété*) in one-quarter should remain of the ordinary free share. It has been accepted in such situations, however, that gifts in favor of the spouse and third persons not only cannot be cumulated, but in combination cannot exceed the limits of the smaller of the two types of free shares. This result has obtained only when the dispositions were not made simultaneously to the spouse and the third party. In situations other than those where a gift of a life interest to the spouse must be revalued in full ownership, the essence of the interaction of articles 913 and 1094 has been that both ordinary and special free

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annuity. This does not apply to the dwelling occupied by the spouse and its furnishing. Children are also given protection against misuse of the property by the surviving spouse. *Ibid.*

85. See text accompanying note 81 *supra*.

86. CODE CIVIL art. 913. Gifts of life interests to a stranger from the ordinary free share may be treated as gifts in full ownership of equal value for the purpose of determining whether the free share has been exceeded. CODE CIVIL art. 917.

87. Judgment of August 2, 1853, of the Cour de Cassation, Dalloz 53.1.300, Sirey 53.1.728; Judgment of December 20, 1871, Toulouse (Dalloz 73.2.17, Sirey 72.2.97.)

shares must be kept within their respective limits and that when combined they must be within the permissible limits either of the ordinary or the special disposable share.

By the Commission's proposal, the surviving spouse is not only made an heir but a reserve heir.<sup>88</sup> This follows the concept previously encountered in the Commission's proposals for treatment of the spouse when no disposition has been made, *i.e.*, the assimilation of the spouse as an additional child. Under the proposal, when children survive, the spouse's rights as *réservataire* are the same as those of the child taking the least, ignoring the extent to which one child may be favored over another by the freely disposable share.<sup>89</sup> For example, if one child survived, the situation would be as though two children survived under the existing system, one of the "children" being the spouse; the child and the spouse would each have a reserve of one-third, and the final third would constitute the free share. Unlike his intestate share, the spouse's reserve share would be less than one-quarter when three or more children survive. Consistent with the Commission's other proposals to treat the spouse like an additional child, it proposes the abolition of the special disposable share, thus making only the ordinary free share applicable to the spouse as it is to everyone else, including children. In every case the spouse could then be given, in addition to his reserve, a free share equal to that established by the present article 913. The benign simplification which would result from the almost comprehensive assimilation of the spouse to a child, eliminating such complicated features of the present law as article 767 and the special disposable share, requires no emphasis. At least the 1963 revision follows the Commission in one respect, however, in that it permits any property which can be given to a stranger to be given to the spouse.

The 1963 revision of article 1094 accords the spouse a greater maximum interest—one-quarter outright and a life interest in three-quarters—than the proposals of the Commission in most situations where more than one child survives. To state the relative positions with greater precision is not possible because of the variable factor, the surviving spouse's age. It is clear, however, that the legislature has leaned in favor of permitting an abundant provision for the spouse by a life interest, rather than augmenting his possible interest in outright ownership although this too has been increased. While it is the latter alternative which the Commission has chosen, this difference can be overemphasized since, as has been noted, the surviving spouse's property, including property acquired from the pre-

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88. COMMISSION art. 884.

89. *Id.* art. 886.

deceasing spouse, is subject to a reserve in favor of the children on his death. Under the Commission's proposal the maximum interest that could be disposed of in favor of the spouse would be his reserve share, counting him as an additional child, plus the free share. Thus, the spouse's maximum would be two-thirds when one child survives, one-half when two survive and seven-sixteenths when three survive.<sup>90</sup>

2. The Spouse in Competition with Ancestors and Collaterals. When no legitimate children or their descendants survive, each line in which an ancestor survives is entitled to one-quarter of the succession by virtue of article 914, which provides that the freely disposable share cannot exceed one-half when the deceased is survived by an ancestor in both paternal and maternal lines, and three-quarters if he leaves an ancestor in but one line.<sup>91</sup> The nearer surviving ancestor in each line excludes the more remote survivors of that line. Strangely, however, when that ancestor is more remote than the parent of the deceased and the deceased's brothers and sisters or their descendants survive, the ancestor's reserve is lost because brothers and sisters succeed to the exclusion of such ancestor. Thus, since brothers and sisters are not reserve heirs, the entire succession may be given to the surviving spouse when, for example, a brother and a grandmother survive, but only three-quarters when the grandmother but not the brother survives! The reason is that when an ancestor is eliminated as an heir,<sup>92</sup> he is a fortiori eliminated as a reserve heir.<sup>93</sup> In

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90. Nothing prevents the legislator from taking an additional step by making the spouse a reserve heir. Were this to be done, however, the retention of the special disposable share in the revision of article 1094 would suggest either further modification of that article or modification of the Commission's technique of assimilating the spouse to an additional child. The direction of the 1963 revision has doubtless disappointed those who subscribe to the Commission's position that the spouse should be given protection against defeasance equivalent to the child's.

91. In this situation it was noticed that the surviving spouse had a right to a life interest in one-half of the succession if the predeceasing spouse had not defeated this right by disposing of his property in favor of others. CODE CIVIL art. 767.

92. "In case of the prior death of the father and mother of a person dying without lineal descendants, his brothers, sisters or their descendants are called to the succession to the exclusion of the ancestors and other collaterals." CODE CIVIL art. 750.

93. Similarly, parents are eliminated as reserve heirs when children survive, except that special provision is made for the concurrence of parents and illegitimates as reserve heirs:

When, in the absence of legitimate children, the deceased leaves both one or more illegitimate children and ancestors in one or both lines, gifts *inter vivos* or by will cannot exceed half of the property of the one so disposing if there is but one illegitimate child; one-third if there are two, and one-quarter if there are three or more. The property thus reserved will pass to the ancestor in the amount of one-eighth of the succession, and the balance to the illegitimate children.

CODE CIVIL art. 715. In such case all property not in the reserve can be given to the wife, and, in addition, the predeceasing spouse can cut down the ancestor's interest to a life interest in one-eighth.

short, to be a reserve heir, one must first be an heir.

The fact that ancestors are entitled to a reserve may result in preserving some or most of this property in the family, since the ancestor's reserve share will upon his death become part of the succession which may be subject to the reserve shares of the ancestor's lineal descendants. In the case of the ancestor's reserve share, however, there is no special disposable share in favor of the spouse. In a curious reversal of the situation when a spouse and one child survive (where it was seen that some property can be left to anyone but the spouse), here all of the free portion (one-half or three-quarters) can be given to the surviving spouse or anyone else, and something in addition can be given to the spouse that cannot be given to anyone else. By article 1094 the predeceasing spouse may cut down the reserve share of the ancestor in each line from a quarter in full ownership to a life interest in one-quarter when, and only when, he disposes of the reversionary interest in favor of his wife. Although this provision has been criticized as giving too little to the ancestor,<sup>94</sup> it should be borne in mind that the ancestor would take nothing at all when children survive.<sup>95</sup>

The Commission has proposed, concerning the spouse's reserve share when in competition with parents, that the spouse be given a reserve of one-quarter, and the parents or the survivor of them be given a reserve of one-quarter—in effect, reducing by half the parents' present rights as reserve heirs when both survive.<sup>96</sup> Under this modification the predeceasing spouse could not, however, as under article 1094, cut down the parents' reserve to a life interest in one-quarter. Consequently there would be a freely disposable share of one-half in every case when the deceased is survived by his spouse and one or both parents. In all other cases—that is, those in which the deceased is survived by a spouse but not by parents or descendants—the spouse's reserve share and the freely disposable share would each be one-half.<sup>97</sup> Ascendants other than par-

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94. Bell-MacDonald, *French Laws of Succession*, 2 INT'L & COMP. L.Q. 415, 425 (1953).

95. The present provision adopted in 1930 is, nevertheless, more generous than the previous one of 1900 which permitted one spouse to give the survivor a life interest in the ancestor's reserve share. This effectively destroyed the ancestor's reserve in most cases, since the ancestor was usually older than the surviving spouse and predeceased him.

Prior to 1957 when the surviving spouse's rights were enlarged by preferring him to ordinary collaterals, the ancestor of the one line in which ancestors survived took a life interest in one-third of the property which he did not take outright. In such a case the ancestor took one-half and the collateral took one-half, their interests being equally subject to the spouse's life interest in one-half. The ancestor's additional life interest in one-sixth was borne by the collateral.

96. COMMISSION art. 887.

97. *Ibid.*

ents would be deprived of their status as reserve heirs and take in intestacy only in the absence of a surviving spouse and brothers and sisters or their descendants.<sup>98</sup> In intestacy situations,<sup>99</sup> brothers and sisters as a group would share equally with the parents or parent, changing the present provision which gives brothers and sisters three-quarters when only one parent survives.<sup>100</sup> Reflecting concern for the demotion on the successional hierarchy of grandparents or more remote ascendants, proposed article 568 gives such ascendants a right to subsistence from the surviving spouse who accepts the succession, as well as from brothers and sisters of the deceased who would presently be obligated to furnish subsistence to an ancestor by article 205. Consistent with the status of the surviving spouse as *réservataire*, the proposed scheme eliminates the spouse's right to a *pension alimentaire* from the succession of the predeceasing spouse. It could occur that the spouse's reserve share was insufficient for his support, the free share not being disposed of in his favor, thus putting him in a less favorable position than under the present law. In most instances, however, the spouse's position would be much improved under the proposal to prefer him to the exclusion of grandparents in intestacy, and to accord him, instead of them, a reserve share when no brothers and sisters survive.

In all other cases where the predeceasing spouse is survived only by collateral relatives, who have no reserve share, there is no restriction on the amount that can be transferred to the surviving spouse by will or inter vivos gift; the predeceasing spouse has complete freedom of disposition. The Commission does not propose to change this.

#### D. *The Second Spouse: Protection of Children of a Prior Marriage*

The sophistication of the French system is well illustrated by the present treatment of the second or subsequent spouse when there are living children of a prior marriage. It has been noticed that all legitimate children, regardless of whether born of the deceased spouse's first or subsequent marriage, have equal rights as reserve heirs and share equally in intestacy. The second or subsequent spouse who competes with children of a prior marriage of his partner finds his rights severely limited.

The thoroughness with which the rights of the surviving spouse are limited when he is competing with children *d'un autre lit* is first suggested by the provision of article 767 which puts a double restriction on the sur-

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98. *Id.* art. 764.

99. *Id.* art. 762.

100. CODE CIVIL art. 750.

vivor's life interest *ab intestat* (ordinarily in one-quarter when children of the marriage survive): (1) his life interest is in a portion equal to the share of the child of the deceased spouse taking the least in full ownership, and (2) it can never exceed one-quarter.<sup>101</sup> The first restriction can operate only when the deceased leaves four or more children, making each child's reserve share less than one-quarter, the total reserve constituting three-quarters of the deceased's property. The second restriction, made necessary only because of the first, will operate only when the deceased leaves not more than three children, and will accord the spouse the usual life interest in one-quarter even though the smallest child's share may exceed that amount. Not only is the survivor's life interest in the succession restricted, but also the special disposable share is limited by article 1098 to the amount that could be given to a stranger, that is, one-half, one-third or one-quarter depending on whether one, two or three or more children survive.<sup>102</sup> The second spouse is thus deprived of the alternatives of article 1094, *i.e.*, receiving a quarter outright and life interest in three-quarters or a life interest in all of the deceased spouse's property.<sup>103</sup>

The effect of the above restrictions is in most cases not nearly so significant as the treatment of a gift to the second spouse of property brought to the community in calculating the special disposable share. When children of a prior marriage survive, articles 1496 and 1527 deny to the spouse of the remarried person benefits by reason of a community property regime, legal or conventional, beyond the limits of article 1098. That is, the benefits of a community property regime are treated as gifts and counted toward the subsequent spouse's free share, limited by article 1098 to the ordinary disposable share. Thus the usual freedom of the spouses to make gifts in contemplation of marriage and to adopt any sort of community property regime is here severely curtailed. When there are no children of a prior marriage and when one party to the marriage receives more than he contributes, as is usually the case, such benefit is not

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101. The child taking the least is the one who had not been favored at all or to a lesser extent than any other, by means of the ordinary disposable share. Of course such share may have been given to an outsider or to the surviving spouse or may have passed by intestacy to the children equally.

102. Before 1963 the limit was a portion equal to the share of the child taking the least and never to exceed one-quarter.

103. A new provision of article 1098 permits the child to limit the subsequent spouse's (stepparent's) interest to the gift made under that article. By the child's so availing himself, the surviving spouse is forced to give up his interest under article 767 (a life interest in not more than one-fourth of the succession) which he could otherwise have combined with a gift under article 1098. The interest under article 767 would, of course, have been reduced to the extent of the value of the gift. CODE CIVIL arts. 767, 1098.

treated as a gift between spouses subject to reduction if the limit of the special disposable share has been exceeded, but rather is merely a benefit received by acceptance of the particular marital property arrangement that has been entered into. What would be unobjectionable were there not children of a prior marriage may, in this case, be treated as an excessive gift subject to recovery by the children of the first marriage in an action in reduction upon the death of their remarried parent.<sup>104</sup> Benefits resulting from the marital property system will be applied in the calculation of what, if anything, remains of the free share under article 1098. To the extent that the benefits of the community regime are less than such free share, the children cannot complain.

The wisdom of the special treatment of the subsequent spouse is apparent when it is remembered that in the usual case in which all children and surviving spouse are of the same marriage, community property, any property passing to the surviving spouse by antenuptial agreement, and the special disposable share will be part of the succession of the survivor and subject to the rights of the children as reserve heirs upon his death. Hence the benefit received by one spouse upon adoption of the particular marital property arrangement does not diminish the rights of children which may be born of that marriage. The effect is simply that the children take as reserve heirs of the other parent, *i.e.*, the acquirer of property rights under the marriage contract or the statutory community regime. In the case of remarriage of a parent, children of the first marriage will, of course, have no rights upon the death of the second spouse of their remarried parent. Furthermore, the property in which the second spouse is given an interest because of a community property regime may have been acquired during the first marriage, thus enhancing the claim of the children of that marriage.

It is fair and realistic to treat the subsequent spouse as a stranger vis-à-vis the children of the prior marriage. In the absence of special rules it would be possible for the reserve share of the children to be impaired whenever the marriage which produced them has been dissolved, a parent remarries, and, for example, the statutory community is adopted as to the second marriage. The Commission does not propose relaxation of this protection, and the substance of articles 1496 and 1527 would continue to apply in the calculation of the surviving spouse's reserve share. The maximum amount which such a surviving spouse could claim indefeasibly under the Commission's proposal would be one-third, one child

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104. Since the amount of the succession is not known until death, and consequently it is not known whether the free share has been exceeded, the action in reduction can be instituted only after the opening of the succession. CODE CIVIL art. 920.



of a prior marriage of the deceased spouse surviving, the total reserve portions thus being two-thirds of the succession.<sup>105</sup>

While property brought to the community by a remarried person is treated as a gift (as is property acquired by gift which falls into the community during the second marriage in regard to children of a prior marriage), savings from income, even of separate property, and gains accountable to the efforts of the spouses are not subject to special rules.<sup>106</sup> Such property, even though it be the income of separate property of the remarried spouse, is acquired during the second marriage and is sufficiently associated with it so that it would be unfair to deprive the second spouse of his usual community property rights.<sup>107</sup> The second spouse's right to a *pension alimentaire* is, of course, not affected by survival of children of a first marriage.

While one might deplore the complications injected into an already complex system by having special rules as to a subsequent spouse's rights when there are children of a prior marriage, it must be remembered that it is in this situation where tensions and discord most commonly occur.<sup>108</sup> Thus the Commission has not proposed elimination of protection of the children of the first marriage, except as such children's rights will be altered by making the subsequent spouse a reserve heir.<sup>109</sup>

### III. THE FRENCH SYSTEM IN PERSPECTIVE

The promulgators of the Code Napoleon created a system of successions of great complexity; the law in this regard was conceived as promoting the stability of society by preserving family solidarity and conserving family property. Today the system of the framers of the code remains basically intact.

However, from the changes in the surviving spouse's situation since 1891 can be detected some modification of the concept of the promulga-

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105. It is interesting to note that this is often the spouse's indefeasible share under statutes of American separate property states.

106. CODE CIVIL art. 1527.

107. The concurrence of the two spouses' shares when there are children of the first marriage presents a problem suggestive of the problem of concurrence of the spouse's special share and the ordinary disposable share, but without the complexity of the latter. In the American law a similar problem exists as to the coordination of dower rights of first and subsequent wives when a marriage has terminated without fault of the wife. If the first spouse has received the maximum permitted gift (one-quarter plus life interest in the remaining three-quarters), the free share in favor of the spouse has been completely exhausted, and nothing can be given or will pass *ab intestat* to the subsequent spouse. To the extent that the special free share has not been used to the benefit of the first spouse, it may be used in favor of the second, within the limitation of article 1098, which limits the second spouse to the ordinary disposable share. 4 REPERT & BOULANGER, TRAITÉ DE DROIT CIVIL § 1919 (1959).

108. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960).

109. COMMISSION 31.

tors of the code in 1804 that family property should be transmitted through blood lines. The spouse has now assumed an important rôle in the successional scheme as one to whom significant amounts of the deceased spouse's property will pass by operation of the law in situations which occur with considerable frequency. The interest which may be disposed of in favor of the spouse when children survive has recently been increased to the extent of a life interest in an additional half of the predeceasing spouse's property. Still, while the share accorded the surviving spouse in the succession has been gradually increased in many situations, no new indefeasible rights have been accorded him; his modest life interest in one-quarter of the succession when children survive has not been increased since its inception in 1891. The principal channel of property transmission continues to be from parent to child under a system of forced heirship and not from predeceasing spouse to surviving spouse. For a fair appraisal of the surviving spouse's position it must be recognized that he is a reserve heir of his parents and children, thereby acquiring indefeasible rights in his family's property, if any. Thus when marriages occur among persons of the same economic class, the present French system may not hold the surviving spouse in such disfavor as would first appear. Writers have, however, criticized the failure to make the spouse a reserve heir<sup>110</sup> as under German,<sup>111</sup> Swiss<sup>112</sup> and Italian<sup>113</sup> codes.

The reserve share of the parent makes a reasonable allocation which does not unduly limit the interests which may be given to the spouse. The proposals of the Commission provide a reserve share for parents and for the spouse in those situations in which parents alone would have a reserve share under the present law. Parents would continue to have no rights to a reserve when in competition with children of the deceased. In terms of need, the parent, because of the greater probability of advanced age and incapacity to earn a living, may have a better claim than the spouse or child. However, neither in French nor American law is such a rationale apparently fully accepted, for under neither system do parents share in intestacy when in competition with the children of the deceased. Perhaps the child's need is greater than the parent's; nevertheless, neither in France nor the United States is there favored treatment for the minor or otherwise dependent child.<sup>114</sup> The law in this regard may represent a

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110. 4 RIPERT & BOULANGER, *op. cit. supra* note 107, § 1711.

111. BÜRGERLICHES GESETZBUCH § 2303 (Ger. 21st ed. Palandt 1962).

112. CODE CIVIL art. 470 (Swiss 1907).

113. CODICE CIVILE art. 540 (Italy 1942).

114. Consider, however, FLA. STAT. ANN. § 733.20 (1963), providing that when a parent has died testate and survived by a child under eighteen not provided for in the

compromise of competing interests without any well-articulated rationale. Or it may be that the preference for property to descend rather than ascend is a reflection of the parent's desire to help his child succeed to his position, thus perpetuating the position of his family.

The Commission's primary object is the improvement of the position of the surviving spouse by making him not only an heir but a reserve heir who shares equally with children and who is preferred to all collaterals. Simplification of a system which requires even experienced lawyers in France constantly to refer to the code in answering routine questions would be an important by-product. Decades before the Commission began its deliberations, the system developed under the German law, while leaning on the French system already a century old, demonstrated that the benefits from a system which recognizes the claim of a surviving spouse to share in the deceased's property can be enjoyed under a system less complex than the French.

The Commission recognizes the tendency of the modern family unit to include the spouse but not to include adult brothers and sisters or grandparents within the family unit. Its proposals display an awareness that the position of the spouse in the family has changed since the time the code was promulgated and move toward even closer integration of the rights of the immediate family. Social mobility and geographical mobility are factors to which we may attribute some of the change in popular attitudes toward the family. Today in both France and the United States popular attitudes would subordinate the claims of collateral relatives in the deceased's property to those of the spouse. By the Commission's proposals each spouse is in effect received into the family of the other and treated as an appropriate member, indeed the only member as to his reserve portion, to take a substantial part of that family's property. Contrary to the traditional concept, property would not always move through blood lines, but some or all would pass to the spouse by intestacy and some would be forced to the surviving spouse even when he is in competition with the descendants, ancestors or brothers and sisters of the deceased.

It is desirable for the law to be harmonious with popular attitudes, expectations and patterns of conduct unless there is some overriding

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will, the court may make provision for such child until its eighteenth birthday, but not to exceed the share such child would have taken in intestacy. In the words of the statute, "This provision is designed to afford reasonable protection to a dependent minor child who has been excluded from the provisions of the parents' [sic] will under circumstances which deprive it of an effective legal substitute for the continuing obligation of the parent, while living, for support and maintenance during the period of its minority."

policy to be served by having it otherwise. That the law in France no longer reflects the community's judgment is indicated by the popular sentiments concerning the rights to the undisposed paintings and drawings of the late Pierre Bonnard, the renowned artist.<sup>115</sup> In 1930 he married Marthe de Melliny, née Marie Boursin, without entering into a contract fixing property rights; the statutory community regime therefore ensued. There were no children. At the time of Marthe's death in 1942 there were in the studio hundreds of paintings and drawings, finished and unfinished and worth a fortune. When Bonnard discovered that Marthe's heirs, four nieces, could claim all of her half of the community property, he forged an instrument which purported to be signed by her and which left all her property to him. The forgery did not finally succeed since he did not bother to imitate her handwriting and dated it after her death. By his will he left all the works of art to his nephew, who was to establish a museum. If the art works were treated as community property, Pierre Bonnard would not share in Marthe's half of the community property, except to the extent of a life interest in one-half under article 767, since community property is subject to the usual rules governing successions. Bonnard would take nothing in full ownership when his wife was survived by descendants of brothers and sisters or, for that matter, until 1957, when his wife was survived by ordinary collaterals within the sixth degree in both lines. Litigation continued for more than a decade after Bonnard's death between the nephew, legatee under Bonnard's will, and the heirs of the wife, her nieces. The legatee of Pierre Bonnard finally prevailed because it was held that a spouse under a community property regime acquires no rights in works of art created by the other before their sale or publication, a premise that could have the undesirable effect of reducing a surviving spouse's rights in many situations, *e.g.*, if Pierre Bonnard had been the first to die. It was evident that popular opinion was an influence upon the court in the final disposition of the matter. Although feelings were probably intensified because of the nature of the property, the celebrated case indicates the disparity between the existing law and popular attitudes. It points up the need to enact the Commission's proposals, which prefer the spouse to the exclusion of all collateral relatives in intestacy.

Finally, it must be emphasized that the Commission's proposals do not seriously disrupt the basic system of forced heirship—the reserve shares of children. Since there seems to be no widespread feeling that the reserve should give way to freedom of disposition within wider limits,

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115. *Time*, March 9, 1959, p. 21; *Newsweek*, Jan. 7, 1957, p. 48.

one would not expect the Commission to propose a change in this regard, nor do the legislative changes of 1963 move significantly in this direction. Despite the fact that attitudes toward the family have undergone changes since the era of the promulgation of the code, the bonds of the family remain very strong in France. Under the proposals the maximum reduction of a child's reserve share, occasioned by the spouse's being made a reserve heir, would occur when the spouse and one child survive, the child's reserve in such case being cut from one-half to one-third.<sup>116</sup> The child, however, would recover at least half of the reduction by virtue of his reserve share upon the death of the surviving parent.

#### IV. CONCLUSIONS

What is to be gained for the American lawyer and legislator by the examination of the French system? Most conclusions can be stated only tentatively, at least until there has been more extensive investigation of the practical operation of the French system, including such matters as the success of evasive devices, if any, that are resorted to in order to defeat the forced share. It is clear that we do not want the needless complexities and plethora of detail of the existing French system. For this reason we may wish to look particularly at the proposals of the Commission, which can perhaps be taken as a distillate of the French experience. From an examination of them, it may be inferred, first of all, that reasonable protection from disinheritance of spouse and reasonable protection of children are not mutually exclusive; it is possible to protect both simultaneously. It is also possible to add the refinement of preferring the spouse to the child in the case of small estates by giving him everything up to a certain amount, as is currently done in cases of intestacy in England.<sup>117</sup> But to say that we can protect both child and spouse is not to face the basic question, heavy with implication for the social and economic structure, of whether we want to protect children as well as spouses from disinheritance. Whether the reserve system promotes family solidarity as its advocates claim can be judged, if at all, only by those familiar with the practical operation of the system and the social background in which it functions. It can be as plausibly urged that the reserve system is a product rather than a cause of family solidarity; it could be both. We can, however, focus upon much narrower considerations: whether it is wiser for an undeserving or well-to-do child occasionally to share in his parent's property so that the "bad" parent cannot disinherit the deserving

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116. COMMISSION arts. 769, 885.

117. The Administration of Estates Act, 1925, 15 Geo. 5, c. 23, as amended, Intestate's Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64.

child. The detriment of protecting the unworthy child, it is submitted, is more than offset by protection from capricious, malicious or otherwise wrongful disinheritance afforded the worthy child. The law should be less concerned with occasional undeserved rewards than an occasional withholding from a deserving child that which custom, reflecting basic human impulses, usually accords. The price of this protection is to limit freedom of disposition, but the price is not complete rigidity since, as has been shown, the reserve system does not necessarily mean one of equality. The property owner under the existing and proposed French systems can still control the disposition of at least a quarter of his property by gift or will.

Some other defects in the American law could be remedied by borrowing from the French law without necessarily making the momentous policy decision involved in whether children should be forced heirs. The French system indicates a cure for the present lack of integration of inter vivos and testamentary gifts in determining the surviving spouse's rights to an indefeasible share. Presumably the policy decision to protect the surviving spouse was made long ago, and such integration would but give him the protection legislators intended to confer. On the other hand, perhaps legislators would favor as a sort of compromise the present vagueness of the law in regard to inter vivos transactions which will defeat the spouse's statutory share. Vagueness gives latitude to the judge in giving weight to those factual elements in the particular case which will lead to a result consonant with the community's notions of fairness. It is submitted, however, that vagueness cannot be justified on those grounds; uncertainty produces litigation and imposes a hardship on conscientious persons, both donors and donees, because they cannot be certain that unobjectionable and good faith arrangements will be upheld. If integration of lifetime gifts should be adopted, appropriate formalities would have to be developed, indicating need for inquiry into practical operations of gift transactions under the French system.

The reserve system seems an appealing solution in the situation in which a remarried person disposing of his property prefers his subsequent spouse, the stepparent, to the children of his first marriage. In this fertile source of family disharmony and litigation under American law, we may profit from an adaptation of the French system. As in the case of integration of inter vivos gifts in determining the surviving spouse's indefeasible share, restrictions could be put on property transmitted to a subsequent spouse without necessarily adopting a system of forced heirship as to children. What is needed in this situation are special rules which, while recognizing the legitimate claims of both the spouse and the

children, recognize also that the interests of the subsequent spouse and children of a prior marriage are probably antagonistic. Statutes of a handful of states provide for devolution of property acquired from predeceasing spouse to his heirs upon the death of the surviving spouse;<sup>118</sup> such statutes do not purport to prevent the surviving spouse from disposing of such property by will or gift in favor of a subsequent spouse. More generally, nothing prevents the predeceasing remarried spouse from cutting out the children to the profit of the subsequent spouse, nor from transferring everything inter vivos to the children to the detriment of the subsequent spouse, the stepparent. The French treatment of the subsequent spouse shows that it is possible to put a special restriction on gifts and legacies to the subsequent spouse when there are children of a prior marriage. Even without altering the power of the parent to disinherit his children, unfairness to children in this situation could be substantially alleviated. Here again, investigation of formalities in the French system would be necessary. When children of both marriages survive, there exists a special argument for establishment of a system of reserve shares to insure that neither group is favored unduly. On the other hand, it might be urged that this is a case where discretion is needed since the younger group of children may have greater need. Perhaps the answer is to accord dependent children a right to support from the estate which would operate independently of their reserve shares.

The more the American lawyer and legislator are aware of and conversant with the solutions of foreign legal systems, the better they are equipped for an era when our law is, as a matter of reason, logic and necessity, becoming increasingly attentive to foreign solutions. It is to be hoped that when American legislatures consider changes in the law of succession, they will look to the French experience and consider it as an invaluable source for shaping revisions.

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118. CAL. PROB. CODE §§ 228-29; OHIO REV. CODE ANN. tit. 21, § 2105.06 (Anderson 1953); OKLA. STAT. tit. 84, § 213(2) (1961); Annot., 49 A.L.R.2d 391 (1956).

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