

Louisiana Law Review

Volume 64 | Number 2

Recent Developments in the Law: A Faculty

Symposium

Winter 2004

Successions & Donations

J.-R. Trahan

Louisiana State University Law Center

Repository Citation

J.-R. Trahan, *Successions & Donations*, 64 La. L. Rev. (2004)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol64/iss2/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Successions & Donations

J.-R. Trahan*

TABLE OF CONTENTS

I. Successions	316
A. "Capacity" to Inherit: Children Conceived Post Mortem	316
B. Spousal Usufruct	329
1. In General (Testamentary & Legal): Security: Permissible Forms	329
2. Particular Types of Spousal Usufruct	334
a. Testamentary Spousal Usufruct: When Security is Required	334
b. Legal <i>Spousal Usufruct</i>	348
1) When Security is Required	348
2) Exclusion of the Usufruct Due to the Disposition of Community Property by Testament	355
C. Forced Heirship: "Permanently Incapable" Children: Expanded Definition	359
1. My Defense of the New Legislation	364
a. The Charges Made Against the Legislation Are Exaggerated	364
b. The Good that the Legislation Accomplishes is Worth its Cost	372
2. My "Friendly" Criticism of the New Legislation	375
II. Donations	375
A. Capacity to Donate: Interdiction & Inability to Understand	377
B. Consent to Donate: Vices: "Undue Influence"	384
Appendix A	395
Appendix B	397

Though this article, as its title suggests, concerns recent developments in the law of successions and donations, it does not fit the mold of typical "recent developments" pieces. For one thing, its arrangement is different. Instead of following the usual plan of

Copyright 2004, by LOUISIANA LAW REVIEW.

* James Carville Alumni Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University.

presentation, according to which the author discusses, first, legislative developments and, then, jurisprudential developments (or vice-versa), I have followed a "thematic" plan of presentation, one in which I move from legislative developments to jurisprudential developments and then back again as these developments may relate to the topic under discussion. For another thing, its content is different. A "recent developments" piece usually contains a more or less simple explication, together with a more or less (usually less) in-depth critique, of each of the pertinent developments. This article does have that, to be sure. But it has something extra—a little *lagniappe*, as we Cajuns would say. Of what this *lagniappe* consists varies. In most instances, the *lagniappe* is an account of the historical and juristic context of the development, that is, I review some of the history of and explain to some degree the nature of the juridical institution or institutions with which the development is concerned. In other instances, the *lagniappe* is an exhaustive critique of one or more aspects of the development. And in at least one instance, the *lagniappe* is an extended rebuttal of criticisms that have been directed at the development. All things considered, then, it might be more accurate to entitle this piece *Historical and Critical Essays Inspired by Recent Developments in the Law of Successions and Donations*.¹

I. SUCCESSIONS

A. "Capacity" to Inherit: Children Conceived Post Mortem

Throughout the history of the civil law tradition, which has stretched on for over two thousand years now, it has been the rule that in order for one to be able to inherit from some *de cuius*,² one must

1. These deviations from the "recent developments" norm are the result of a deliberate choice, not of an accident. They represent my attempt to satisfy the desire of the board of editors for a piece that, while it provides adequate coverage of the pertinent recent developments, is both more "readable" and more "scholarly" than the typical "recent developments" piece. It will be up to the reader, of course, to judge whether I have succeeded.

2. This expression—the abbreviated form of the Latin phrase *is de cuius successione agitur*, which, literally translated, means "he of whose succession it is a question"—has long been used in many civil law jurisdictions, Louisiana included, to refer to the person whose succession has been opened and whose patrimony has devolved upon his successors. See, e.g., (i) France: 4–2 Henri & Léon Mazeaud et al., *Leçons De Droit Civil: Successions - Libéralités* no. 657, at 3 (Laurent Leveneur & Sabine Mazeaud-Leveneur revs., 5th ed. 1999); (ii) Spain: 5 Manuel Abaladejo, *Curso de Derecho Civil: Derecho de Sucesiones* no. 1, at 8 (1982)); (iii) Italy: 1 Giuseppe Grosso & Alberto Burdese, *Le Successioni* no 8, at 35–36, in 12 *Trattato di Diritto Civile Italiano* (Filippo Vassalli dir., 1977); (iv) Argentina: 1 Eduardo A. Zannoni, *Derecho delas Sucesiones* § 39, at 100 (2d ed. 1976); (v) Brazil: Silvio de Salvo Venosa, *Direito das Sucessões* no. 1.4, at 21–22

“exist” at the moment of his death.³ Furthermore, the property of “existence” has been predicated of persons who, at that moment, have already been born or, at the very least, have already been “conceived,”⁴ provided that, in this latter case, the person should later be born alive.

Back in 2001, the Louisiana Legislature altered these long-standing rules. Through Act 479 of that year, the legislators enacted a new provision of Title 9 of the Revised Statutes (the “Civil Code Ancillaries”) – § 391.1. According to that section, a child would be

(1991); and (vi) Louisiana: Succession of Hebert, 33 La. Ann. 1099, 1102 (1881); Kimball Allyn Cross, *A Treatise on Successions* § 2, at 1 (1891). Despite its ancient lineage and its technical superiority over other expressions such as “deceased” or the common law locution “decedent,” *see* Cross, *supra*, § 2, at 1–2, the expression *de cuius* may, I fear, soon pass into desuetude here in Louisiana. The revised Civil Code does not use it, but uses, instead, various technically inferior expressions, sometimes “deceased,” *see, e.g.*, La. Civ. Code art. 871 (rev. 1981), and, at other times, “decedent,” *see, e.g.*, La. Civ. Code art. 935 (rev. 1996). No Louisiana appellate court has used the expression since 1994. *See* Carl v. Naquin, 637 So. 2d 736, 738 (La. App. 1st Cir. 1994). And not long ago I heard of a third-year student enrolled in a “successions” class at my own law school (the supposed bastion of civil law instruction in Louisiana), who, when asked “What is a *de cuius*?” responded, “Never heard of it.” It won’t be long now.

3. Clear and direct authority for this proposition can be found at least as far back as the time of Pothier. *See, e.g.*, La. Civ. Code art. 939 (rev. 1997) (“A successor must exist at the death of the decedent.”); La. Civ. Code art. 947 (1825) (“In order to be able to inherit, the heir must exist at the moment that the succession becomes open.”); Digest of the Civil Laws Now in Force in the Territory of Orleans bk. III, tit. I, art. 65 (1808) (“Nevertheless, to be able to inherit, the heir must necessarily exist at the moment that the succession becomes open. Thus, he who is not yet conceived . . . is incapable of inheriting.”); Code Civil (France) art. 725 (1804) (“In order to inherit, the heir must necessarily exist at the moment that the succession becomes open.”); Robert J. Pothier, *Coutume d’Orléans* tit. XVII, no. 6 (“In order to be able to succeed from someone, it is necessary, before all else, to exist at the time at which the succession is opened. That is why those who, at the time of this opening, are not even yet conceived, can never claim to succeed.”). Prior to that time, the pertinent authorities, though they uniformly support this proposition, do so rather more obliquely. *See, e.g.*, Jean Domat, *Les Lois Civiles dans Leur Ordre Naturel* liv. I, tit. I, sect. II, nos. 1, 4, & 5 (“Every person can be an heir, be it by intestacy . . . or by a testament A still-born child, even though it was alive in its mother’s womb, does not succeed when some succession that concerns it, be this succession intestate or testamentary, has fallen A child who is born alive, though it should thereafter immediately die, is capable of a succession that has fallen in the interval between its conception and its death.”)

4. *See, e.g.*, Pothier, *supra* note 3, at no. 6; Digest, *supra* note 3, at art. 65. As it was originally used, the term no doubt referred to “fertilization and implantation” together, for, until recently, one could not be certain that the former had occurred until the latter, too, had occurred. But with the advent of modern “assisted reproduction” technologies, in particular, that of *in vitro* fertilization, these two once inseparable events can now be distinguished. And today, in at least some jurisdictions (Louisiana included, it seems), conception refers to fertilization alone. *See* La. Civ. Code art. 26 cmt. (b).

considered the legitimate child of the *de cuius* (and, therefore, presumably would be entitled to inherit from him) even though that child had not been born or even conceived as of the moment of the *de cuius*' death, provided that the following prerequisites were satisfied:

- (1) the child was produced by the union of the gametes of the *de cuius* and his wife⁵;
- (2) this union of gametes had been authorized by the *de cuius* in writing; and
- (3) the child was born within two (2) years of the *de cuius*' death.⁶

The effect of this new statute, clearly enough, was to accord capacity to inherit to yet another class of persons, what might be called "posthumously conceived children."

During its most recent session, the Louisiana Legislature amended the new statute. The amendments, which were enacted as part of Act No. 495, are reflected in the following chart:

<i>Original Version</i>	<i>Original Version with Amendments</i>	<i>Amended Version</i>
<p>§ 391.1. Child conceived after death of husband</p> <p>A. Notwithstanding the provisions of Civil Code Articles 184 and 185 to the</p>	<p>§ 391.1. Child conceived after death of husband-parent</p> <p>A. Notwithstanding the provisions of Civil Code Articles 184 and 185 to the</p>	<p>§ 391.1. Child conceived after death of parent</p> <p>A. Notwithstanding the provisions to the contrary of any law, any child conceived after the death of a</p>

5. As the phrase "the *de cuius* and his wife" implies, the statute deals only with cases in which (i) the persons whose gametes are united to produce the child were married and (ii) it is the husband who has died and the wife who has thereafter united their respective gametes and has then given birth to a child. The statute makes no provision for cases in which (i) the persons whose gametes are united to produce the child are merely "lovers" or, worse yet, strangers or (ii) it is the wife who has died and the husband who has thereafter united their respective gametes and (with the help of a "surrogate mother," of course) has then given birth to a child. Under current Louisiana law, contracts for "surrogate motherhood" are considered to be *contra bonos mores*; the same would probably be true (so one would hope) of contracts to produce a child out of wedlock.

6. It's worth noting that there is no requirement that the *de cuius* have "given up" his gametes while he was still alive. To the contrary, it's conceivable (pun intended) that his gametes might have been "harvested" from his body after his death.

contrary and in addition to the provisions of Civil Code Article 179, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the legitimate child of such decedent, provided the child was born to the surviving spouse, using the gametes of the decedent, within two years of the death of the decedent.

...

~~contrary and in addition to the provisions of Civil Code Article 179~~ any law, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the ~~legitimate~~ child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three ~~two~~ three years of the death of the decedent.

...

decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.

...

The amendment changes § 391.1 in four respects. First, the amendment eliminates from the statute’s “notwithstanding” clause the reference that the clause had theretofore contained those Civil Code

articles from which the statute derogates (179,⁷ 184,⁸ and 185⁹), replacing that specific reference with a more generic reference to “any law.” Second, the amendment eliminates the adjective “legitimate” before the noun “child,” so that, now, the statute no longer addresses the question whether a child born under its auspices is legitimate or illegitimate. Third, the amendment spells out the juridical effects that follow from the classification of the child as a “child of the decedent,” in particular, the child’s capacity to inherit from that decedent. Fourth, the amendment extends the deadline by which the child must be born, if it is to be considered a “child of the decedent,” from two years after the decedent’s death to three years after the decedent’s death.

The first change—the extension of the scope of the “notwithstanding” clause to “any law”—reflects the legislature’s recognition that § 391.1 derogates from more “law” than just the three Civil Code articles that were enumerated in that clause as it was originally written. To these articles, one can add several others, for example, (i) Articles 25¹⁰ and 26,¹¹ which concern the onset of “natural personality”; (ii) Articles 939 and 940, which concern capacity to inherit; and (iii) Articles 1472 and 1474, which concern capacity to receive donations. In addition to these other Civil Code articles, § 391.1 derogates from various special private law statutes, such as the Trust Code (in particular, § 1891, which concerns “class trusts”¹²) and perhaps even a public law statute or two, such as the Internal Revenue Code (in particular, § 2402, which concerns “estate tax” exemptions¹³). The list goes on. Having recognized that the

7. La. Civ. Code art. 179 (“Legitimate children are those who are either born or conceived during marriage or who have been legitimated as provided hereafter.”).

8. La. Civ. Code art. 184 (“The husband of the mother is presumed to be the father of all children born or conceived during the marriage.”).

9. La. Civ. Code art. 185 (“A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage. A child born three hundred days or more after the dissolution of the marriage is not presumed to be the child of the husband.”).

10. La. Civ. Code art. 25 (“Natural personality commences from the moment of live birth and terminates at death.”).

11. La. Civ. Code art. 26 (“An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception . . .”).

12. La. R.S. 9:1891 (2004) (“ . . . a person may create an *inter vivos* or testamentary trust in favor of a class consisting of some or all of his children, grandchildren, [etc.] . . . , although some members of the class are not yet in being at the time of the creation of the trust, provided at least one member of the class is then in being . . .”).

13. La. R.S. 47:2402 (2004) (“The following shall be exempt from the tax imposed in this Part: (1) Inheritances, legacies, and donations and gifts made in contemplation of death, to a direct descendant by blood or affinity, or ascendant,

original “notwithstanding” clause was woefully underinclusive, the legislature, to its credit, decided that the clause had to be “fixed.” The “fix” it chose was simple and elegant: instead of listing each piece of legislation from which § 391.1 derogates, simply use the catch-all phrase “any law.”

The second change—suppression of the term “legitimate”—no doubt stems, at least to some degree, from the legislature’s new-found (some would add “politically correct”) sensitivity toward illegitimates, a sensitivity that recently led the legislature to demand that references to legitimacy and illegitimacy be expunged from *all* legislation. In this instance, at least, the elimination of such a reference is entirely defensible. From the very beginning, the principal, if not sole, concern of § 391.1 has undoubtedly been to assure that a child born in accordance with it can inherit from “the decedent.” Now, when it comes to the right to inherit, the distinction between legitimates and illegitimates is of no moment: since 1981, the successions law of Louisiana has drawn no such distinction, that is to say, illegitimates have inherited on an equal footing with legitimates since that time.¹⁴

The purpose of the third change—the specification of the juridical effects of the child’s status as “child of the decedent”—was, one suspects, simply to make clearer the real point of § 391.1, namely, that a child born under it can inherit from him whose “gametes” were used to create the child. As the statute was originally written, it said nothing, at least not expressly, about any of the child’s “rights,” not even those related to successions; to the contrary, one was left to infer that the child had such rights from the statute’s classification of the child as the “legitimate child of the decedent.”¹⁵ The amendment merely makes this inference explicit.

or surviving spouse of a decedent . . . (e) To the total amount or value of the inheritance, legacy, donation or gift made in contemplation of death to a surviving spouse of a decedent if the time of death occurs during calendar year 1992 or thereafter.”).

14. See La. Civ. Code art. 888 & cmt.; see also Frederick W. Swaim, Jr. & Kathryn Venturatos Lorio, Successions and Donations, 10 La. Civ. Law Treatise § 2.09, at 32 (1995).

15. Insofar as the original statute contained no special provision regarding the effects of the child’s status as “legitimate child of the decedent,” the general rule regarding the effects of that status, one must suppose, would have been applicable, at least to the effects specified by that rule were not inconsistent with the situation of the posthumously conceived child. Now, one of the effects that are, as a general rule, attached to legitimate status is the right of inheritance, in particular, the right of the child to inherit from the person as to whom he is legitimate. Indeed, in view of the fact that the posthumously conceived child’s father is, by definition, already dead at the time of the child’s birth, this may well be the only effect of legitimate status that is not inconsistent with the situation of such a child. For example,

The reason for the fourth change—the extension of the “birth deadline” from two to three years after the decedent’s death—is “political.” It reflects the legislature’s desire to accord an extra measure of grace, to grant still another concession, to those widows who might want to avail themselves of the benefits of § 391.1.

Though no one could have doubted that § 391.1 stood in need of reform, one can certainly doubt that *this* is that reform. In my judgment, what was needed was not the liberalization of that section, but rather its complete suppression.

It is obvious that, at least in the society of which we are a part, the two persons who cooperate in the act of procreation normally cooperate as well in rearing the child who results from that act. What is perhaps not so obvious, though it can nevertheless not be doubted, is that this pattern is the norm for *all* cultures.¹⁶ Now, that this pattern is *normal* does not, of course, mean that it is *normative*. To determine whether it is the latter, one must, of course, have resort to some sort of ethical theory.

On the topic of the “ethics” of *post mortem* conception, a good bit has already been written,¹⁷ much of it by persons who are better

inasmuch as the child’s father is dead, the child, of course, could not possibly demand alimentary support from the father, owe alimentary support to the father, or serve as the father’s curator.

16. See Claude Lévi-Strauss, *The Family, in Man, Culture and Society* 261 (Harry L. Shapiro ed. 1956), reprinted in *Studies in Social and Cultural Anthropology* 128, 129–30 (John Middleton ed. 1968) (“[T]he accumulation of data made obvious the following fact: the kind of family features in modern civilization by monogamous marriage, independent establishment of the young people, warm relationship between parents and offspring, et cetera, while not always easy to recognize behind the complicated network of strange customs and institutions of savage peoples, is at least conspicuous among those which seem to have remained on—or returned to—the simplest cultural level The observer working in the field has no trouble identifying the married couples, closely associated by sentimental bonds and economic co-operation as well as by the rearing of children born from their own union Thus, after they had claimed for about fifty years that the family, as modern societies know it, could only be a recent development and the outcome of a slow and long-lasting evolution, anthropologists now lean toward an opposite conviction, i.e., that the family, consisting of a more or less durable union, socially approved, of a man, a woman, and their children, is a universal phenomenon, present in each and every type of society.”).

17. See, e.g., Carson Strong, *Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State*, 14 J.L. & Health 243, 258–61 (1999–2000); Gloria J. Banks, *Traditional Concepts and Non-Traditional Conceptions: Social Security Survivor’s Benefits for Posthumously Conceived Children*, 32 Loy. L.A. L. Rev. 251, 298–304 (1999); Andrea V. Corvalan, Comment, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 Alb. L.J. Sci. & Tech. 335, 362–63 (1997); Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 Hous. L. Rev. 967, 994–1003 (1996); Barry

acquainted with ethical theory than am I.¹⁸ Though at least a few of the authors who have addressed the problem have arrived at the same conclusion as I have—that the practice of *post mortem* conception is morally objectionable—none of them, to my knowledge, has yet set forth an argument in support of this conclusion that fully coincides with my own. What follows is an admittedly tentative and summary exposition of that argument.

The argument takes as its starting point the nature of what might be called a “good father.” Such a father is one who, once he has helped to create a child, “takes responsibility” for it, that is to say, who contributes to its nurture, care, and upbringing—who helps “rear” it. This rearing entails a number of elements. The first, and perhaps most basic, element is “support”: the good father, to the extent he is able, participates with his wife—the mother of the child—in supplying the material needs of the child, be it in kind or by way of generating income with which the means of meeting those needs can be purchased. The second element is “education”: the good father, to the extent he is able, participates with his wife in teaching the child what it needs to know in realize its potential as a person, both as an individual and as a member of the community. The knowledge that the father helps to impart is not only academic, but also practical, not only material, but also spiritual, not only secular, but also religious. Not only that, but the education to which he contributes is as much a matter of “showing” (through “doing”) as it is of “telling.” By virtue of his interaction with his wife and with other women, on the one hand, and with other men, on the other, in the presence of the child, he provides the child with a “male” role

Brown, *Advanced Reproductive Technologies Symposium: Reconciling Property Law with Advances in Reproductive Science*, 6 *Stan. L. & Pol’y Rev.* 73, 80 (1995); John A. Robertson, *Symposium: Emerging Paradigms in Bioethics: Posthumous Reproduction: Introduction*, 69 *Ind. L.J.* 1027, 1028–35 (1994). These articles and comments represent just the tip of the iceberg.

Among the few authors who contend that *post mortem* conception is morally objectionable, most base their arguments on either (i) the supposed immorality of the medical procedures that it entails (though sperm can be harvested surgically, it is, in fact, almost always harvested onanistically and, in any event, the insemination takes place outside the context of an actual physical union between the procreators) or (ii) the supposed “best interest” of the child (a child’s interests are best served by his being reared in a two-parent family). I certainly concur in both of these arguments. But neither argument really gets at what, in my judgment, is the fundamental moral flaw in *post mortem* conception.

18. I am not, by any means, a “professional ethicist.” Though I have received advanced training in philosophy, my work was concentrated in the areas of philosophy of religion and history of philosophy. If I had better judgment, I might, then, refuse to dive in to this ethical debate, for fear that I might soon find myself in over my head. The only alternative, unfortunately, is for me to remain silent when I feel conscience-bound to speak.

model, a model that will be of critical importance to the child in developing his or her own gender identity as time passes. And by virtue of his interaction with his wife in the presence of the child, he provides the child with yet another important social model—a living model of what a “husband” is and does within the marital relationship, thereby helping to prepare the child for his or her own entry into this most important of social institutions some day in the future. The third element—that which is perhaps the most difficult to define—is “relationship”: the good father, to the extent he is able, enters into an interpersonal relationship with his child, one characterized by mutual “sharing” at the level of emotions and affections. But for the fact that the relationship is asymmetrical in terms of power (the child is subordinate to the father), it might be described simply as “friendship.” What the father gives the child through this relationship is, one might say, the gift of his very self.

Now, this “good father” constitutes the ideal (the Greek philosophers would have called it a *telos*) on which every actual father sets his sights, save when his judgment is inflamed by passion or corrupted by self-interest, for it represents the “good” for all fathers (and every person, of course, naturally pursues his good). If one is to be a father, properly so called, this, then, is the end toward which he must (“ought” to) strive. It follows, then, that such a man is obligated to do what this “good father” would do, that is, to rear his child or, to be more specific, to support his child, to educate him, and to enter into relationship with him.¹⁹ In short, he has a “duty” to do these things, one that he owes to his child.²⁰

19. I recognize that, at this point in my argument, I am, at least in some sense, trying to derive an “ought” from an “is,” something that for many philosophers, especially those in the English empiricist-analytical tradition, is illegitimate. Like many other neo-Aristoteleans and neo-Thomists, I do not share this point of view. See, e.g., Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 56–59 (2d ed. 1984).

20. The proposition that the parents—the father included—have a duty to participate in rearing their common offspring finds support in a wide variety of writings on Christian ethics. See, e.g., Kant, *The Science of Right* § 28 (W. Hastie trans.), in 42 *Great Books of the Western World: Kant* 397, 420 (Robert Maynard Hutchins & Mortimer J. Adler eds., 1978); Emil Brunner, *Justice and the Social Order* 145–146 (1945); 2 St. Thomas Aquinas, *Summa Theologica*, pt. 3, Q. 30, art. 2, at 2177–78 (Fathers of the English Dominican Province trs., Benzinger Bros. ed. 1947); Code of Canon Law arts. 1113 (1917); Code of Canon Law arts. 793 & 1136 (1983); Thomas P. Doyle, O.P., *The Moral Inseparability of the Unitive and Procreative Aspects of Human Sexual Intercourse*, 3 *Marriage Studies: Reflections in Canon Law and Theology* 54, 63–66 (1985); *Congregation for the Doctrine of the Faith, Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day II*, A, 1 (1987); *Catechism of the Catholic Church* no. 2221, at 594, & no. 2228, at 595–96 (1995). St. Thomas’ treatment of this point is classic:

Because the would-be father owes this duty to rear his offspring, he acts wrongly if, at the time at which he decides to pursue fatherhood, he has no intention of fulfilling this duty. Few would deny, I think, that if a certain “position” or “status” entails certain responsibilities, then anyone who would presume to occupy that position or to attain that status must be prepared to fulfill those responsibilities or, to put the point the point negatively, that anyone who is not prepared to fulfill those responsibilities has “no business” occupying that position or attaining that status.²¹ A person who would act in violation of this maxim is not unlike Kant’s hypothetical

Marriage or wedlock is said to be true by reason of its attaining its perfection. Now perfection of anything is two-fold; first, and second. The first perfection of a thing consists in its very form, from which it receives its species; while the second perfection of a thing consists in its operation, by which in some way a thing attains its end. Now the form of matrimony consists in a certain inseparable union of souls, by which husband and wife are pledged by a bond of mutual affection that cannot be sundered. And the end of matrimony is the begetting *and upbringing* of children: the first of which is attained by conjugal intercourse; the second by the other *duties of husband and wife*, by which they help one another in *rearing their offspring*.

St. Thomas, *supra* this note, at 2177–78 (emphasis added). The same point is made, though with somewhat greater development, by Kant:

. . . [F]rom the fact of procreation in the union thus constituted [i.e., of man and woman in marriage], there follows the *duty of preserving and rearing children* as the products of this union. Accordingly, children, as persons, have, at the same time, an original congenital right—distinguished from mere hereditary right—to be reared by the care of their parents till they are capable of maintaining themselves

For what is thus produced is a person And hence, in the practical relation, it is quite a correct and even a necessary idea to regard the act of generation as a process by which a person is brought without his consent into the world and placed in it by the responsible free will of others. This act, therefore, attaches an obligation to the parents to make their children—as far as their power goes—contented with the condition thus acquired. Hence parents cannot regard their child as, in a manner, a thing of their own making; for a being endowed with freedom cannot be so regarded. Nor, consequently, have they a right to destroy it as if it were their own property, or even to leave it to chance; because they have brought a being into the world who becomes in fact a citizen of the world, and they have placed that being in a state which they cannot be left to treat with indifference, even according to the natural conception of right.

Kant, *supra* this note, at 420.

21. A few examples may help to illustrate this basic maxim of “common sense” practical reason. Imagine, first, someone who enters into a marriage but yet has no intention of ever having sexual relations with his spouse. Wouldn’t such conduct be universally condemned as immoral and perhaps even incomprehensible? Next, imagine someone who runs for public office—say, a seat in the legislature—but yet has no intention of ever attending a single legislative session. Again, would not such conduct leave us outraged, puzzled, or both?

"lying promisor," who promises a certain performance when he knows full well that he will not keep it.²² To take up some role to which duties are attached without, in so doing, intending to perform those duties is the moral equivalent of making just such a "lying promise." In both cases, the obligor's conduct borders on fraud.

Viewed in the light of these considerations, *post mortem* fatherhood shows its unethical face. When the *post mortem* father-to-be decides to participate in the act of procreation, he cannot possibly have it in his mind that he will in fact discharge all of his duties toward his future child. At most, he may intend to and then take steps to discharge his duty of *support*, for example, by leaving the future child a legacy or at least here in Louisiana by simply counting on the remnant of the law of forced heirship to do its job. But to discharge his duty of education or his duty of relationship, he must, of course, still "be around" when and after the child enters the world, something that, by definition, he will not do because he cannot do. Such a man cannot and will not possibly reach the *telos* of the good father and, what's worse, he *knows* that he can't and won't when he decides to become a father. He is, in the words of Maggie Gallagher, the "ultimate deadbeat dad."²³

22. Immanuel Kant, *The Metaphysic of Morals* § 2, in 42 Great Books of Western Philosophy: Kant 251, 269, 272 (Robert Maynard Hutchins ed., 1952).

23. Maggie Gallagher, *The Ultimate Deadbeat Dads*, Newsday 28, Feb. 1, 1995 (part of *New York Forum About Sperm*).

According to the critics, if it is wrong for a dying father to make plans to participate in "artificial" *post mortem* conception because his doing so would entail a breach of his "duty to rear" the child that results from this procedure—, then it must also be wrong for a dying father to participate in "natural" *ante mortem* conception—because his doing so would entail a breach of his "duty to rear" the child that results from that procedure. Put another way, the critics' point is this: if it's wrong for a man to reproduce when, thanks to his having been diagnosed with some terminal illness or condition, he knows he won't "be around" to help rear the resulting child, then not only should he refrain from laying plans for *post mortem* conception, but he should also stop having sex with his wife in the meantime. This latter possibility, the critics suggest, is absurd (and not a little cruel).

What the critics fail to recognize is that the *ante mortem* scenario is complicated in a way that the *post mortem* scenario is not: in the former, but not the latter, the father finds himself subject to a *second* duty, one that he owes to his *wife* in his capacity as her *husband*, a duty that may, in some circumstances, outweigh the "duty to rear" he owes his offspring. This other duty is the so-called "conjugal debt." Under both secular law (at least in Louisiana and other civil law jurisdictions) and divine law, each spouse owes a duty to engage in sexual relations with the other. See, e.g., La. Civ. Code art. 98 ("Married persons owe each other fidelity . . .") & cmt. (b) ("As used in this Article, the term 'fidelity' refers not only to the spouses' duty to refrain from adultery, but also to their mutual obligation to submit to each other's reasonable and normal sexual desires."); Code of Canon Law can. 1135 (1983) ("To each spouse belongs an equal duty and right to that which pertains to the community of conjugal life.") (my translation); The Code of Canon

It may be objected that this argument fails to take proper account of the *reason* for the would-be *post mortem* father's failure to fulfill his duty to rear. He has, it might be argued, a legitimate "excuse," namely, that his inability to fulfill that duty is "beyond his control." Unlike the typical "deadbeat dad," this one would very much like to assume that duty and, one must suppose, would in fact fulfill that duty if only he could.

Though no one could deny that such a distinction can be drawn between the would-be *post mortem* father and the typical "deadbeat dad," I *do* deny that this distinction makes any difference. This distinction is not, as my hypothetical interlocutor supposes, one of "kind," so that the would-be *post mortem* father, unlike the typical deadbeat dad, can be regarded as entirely *free of fault*. Rather, it is a distinction of "degree": the would-be *post mortem* father is simply *less culpable* than is his more typical counterpart. But culpable he most certainly still is. The maxim formulated earlier, according to which one who is not prepared to fulfill the responsibilities attached to a certain position or status has "no business" occupying that position or attaining that status, makes no distinction regarding "why" one might not be prepared to fulfill those responsibilities. The "wrong" that such a person commits has nothing to do with the reason for his not "doing his job"; rather, the "wrong" is simply that of his presuming to take on the job at all! The situation of such a person is, in fact, is no different from that of a "lying promisor" who, at the time at which he makes his promise, knows that he can not fulfill it (because he lacks the wherewithal to do so). Such a promisor is, to be sure, less culpable than is one who, though he has the means to fulfill his promise, freely chooses, in advance of making the promise, not to use those means. But he is nonetheless still, to a significant degree, a "liar." In the same way, a would-be *post mortem* father is still, to a significant degree, a "deadbeat."

It might also be objected that my argument fails to take into account the would-be *post mortem* father's so-called "right" to

Law: A Text and Commentary can. 1135, at 809 (James A. Coriden et al. eds., 1985) ("... [T]he conjugal rights . . . [T]here are certain basic elements which the spouses have a right to expect from one another. First there is the right to heterosexual acts. The sexual act is the most intimate and complete expression of conjugal love . . ."); I *Corinthians* 7:3 ("Let the husband render/pay [ἀποδοτω] his debt/duty [ὀφειλην] to the wife and likewise also the wife to the husband.") (my translation). Thus, if a husband who has been diagnosed with a terminal illness or condition should abstain from sexual relations with his wife out of fear of breaching his "duty to rear" his offspring, he would, in so doing, end up breaching his "sexual duty" to his wife. How this "conflict of duties" should be resolved is a truly difficult moral question, one that I'm not prepared to tackle at present. In any event, one need not resolve this question before condemning *post mortem* conception as immoral.

reproduce himself. If this objection means something more than that such a father has an "interest" in reproducing himself (which is only a slightly more technical way of saying "he is likely to want it 'real bad'")²⁴, then it means, I suppose, that he has some "natural right" to reproduce. That such a natural right exists cannot be denied. But what this "natural" right has to do with *post mortem* reproduction is not at all clear. A "natural right" is, by definition, one that exists by virtue of "nature" or, to put it another, more traditional way, one that is enjoyed in "the state of nature." Now, it goes without saying that "nature" knows nothing of *post mortem* reproduction: in the state of nature, one's ability to reproduce comes to an end at one's death. There, too, must end any supposed "natural right" to reproduce. Even if this were not true—even if the supposed "natural right" of reproduction could somehow entail the privilege of resorting to "unnatural" means of reproduction—this right could not and should not be treated as if it were some sort of "absolute" value before which all other values must yield. This "natural right," as I've attempted to show, is intimately and indissolubly connected with a "natural duty,"²⁵

24. As does every human being, the would-be *post mortem* father has a legitimate interest (one grounded, no doubt, in a powerful natural instinct) in reproducing himself, be it to promote his own personal satisfaction and fulfillment or to assure the continuity of his "family line" or both. In addition to this "generic" human interest in reproduction, he may well have a special "therapeutic" interest, one that is a function of his unfortunate predicament: creating a child, a child that will serve as a living memorial of his life together with his wife, may provide him some measure of consolation in his final days. In addition, in his role as "husband" to his wife, he has a legitimate interest in "giving" her a child, in facilitating her wish to procreate: reproduction, after all, is one of the principal purposes of marriage.

But one can (and I do) deny that these interests are so "great" that they somehow "outweigh" the child's "interest" in being reared by *both* his parents. To begin with, I doubt whether it even makes sense to talk about "balancing interests" in this way. Many modern natural law theorists—chief among them, Germain Grisez and John Finnis—have shown, at least to my satisfaction, that human "interests" of the kind in question here are "incommensurable" and, therefore, cannot be effectively compared, at least not in a way that could pretend to some measure of "objectivity." See Germain Grisez, *Against Consequentialism*, 23 Am. J. Juris. 21, 29–49 (1978); John Finnis, *Natural Law and Natural Rights* 111–18 (1981). Further, even if the competing interests of the father and the child could be effectively compared, I would deny that such a comparison could provide a sound theoretical basis for answering the question of whether *post mortem* conception (or any other human act or practice) is "moral." When it comes to moral reasoning, "cost-benefit analysis," like all of the other modern "consequentialist" derivatives of utilitarianism, represents a theoretical dead end. See generally Grisez, *Against Consequentialism*, *supra* this note; Finnis, *Natural Law*, *supra* this note, at 111–18; see also Jacques Maritain, *Moral Philosophy: An Historical and Critical Survey of the Great Systems* ch. 6, § I, no 3, at 94 (1964) ("I do not believe that moral philosophy has any important lesson to learn from the utilitarianism of Bentham and Mill.").

25. A senior colleague of mine, Professor Emeritus Robert Pascal, once

namely, the duty of the right-holder to take care of that which results from the exercise of the right. This duty conditions—indeed, limits—that right, such that the right “ends” where the duty “begins.”²⁶

For these reasons, then, the reform of § 391.1 must be condemned. It sins twice. First, it leaves undone the good it ought to have done, namely, to repeal the section. Second, it does what it ought not to have done, namely, it expands opportunities as well as incentives for fathers to act in violation of their natural duties toward their children.

B. Spousal Usufruct

1. In General (Testamentary & Legal): Security: Permissible Forms

Prior to its revision in 1976, Chapter 2, Title III, Book II of the Civil Code (which concerns the personal servitude of “usufruct”) included two articles—Articles 558 and 562—that, together, limited the kinds of security that a usufructuary might post to two: suretyship and special mortgage.²⁷ In the revision, these articles were suppressed and were not reproduced, not even in altered form. The point of suppressing the articles, one must suppose, was to eliminate the limitation, in other words, to allow the usufructuary to post whatever kind of security might

suggested to me that if the Enlightenment had never occurred, the moral theologians and natural lawyers of the Roman church would eventually have developed some theory of natural or innate “duties,” one that would have paralleled, in at least some sense, the natural/innate “rights” theories of Hobbes, Rousseau, Locke, and their followers. It is interesting to speculate about what kind of political society might have emerged had some such theory ever been developed and had it then taken root in the popular consciousness (as the “rights” theories did in fact do, at least in the West). In such a society, one would suppose, the perennial political question would not have been, as it is in ours, under what circumstances and on what basis can the community can justify to the individual its limitation of the individual’s natural/innate right to do this or that, but rather under what circumstances the individual can justify to the community his defaulting on his natural/innate duty to do this or that. And perhaps “liberty” would have been understood not as “freedom from undue constraint to be or do what you *want*,” but rather “freedom from undue constraint to be or do what you *ought*.” Such a society would not be without its charms.

26. I recognize that my critique of the “natural right” objection may not be entirely consistent with the United States Supreme Court’s current appreciation of the supposed “fundamental right” of “sexual self-determination.” That, however, does not disturb me. The question I am trying to resolve is not one of federal constitutional law, but rather one of social morality. In regard to moral reasoning, the high court, as many of its decisions in the last several decades prove, can claim no particular expertise.

27. See La. Civ. Code arts.; see also A.N. Yiannopoulos, *Personal Servitudes* § 117, at 243 & n.9, in *Louisiana Civil Law Treatise* (4th ed. 2000).

seem appropriate in the discretion of the court. Out of concern that some might fail to draw this inference, the redactors took the precaution of stating it explicitly in a comment to one of the new articles: "The rules adopted impose no limitations on the kinds of security that the usufructuary may furnish."²⁸

Notwithstanding this revision, the point of which could hardly have been clearer, doubts have persisted (at least in the minds of some legal practitioners and perhaps of even a few judges) regarding what kinds of security are permissible, in particular, whether the usufructuary can, without the naked owner's consent, provide security other than that of "suretyship." This is particularly true insofar as the so-called "spousal usufruct" is concerned, with respect to which the standard practice has long been and continues to be that the usufructuary should "post a bond."

During this past session, the legislature took action to quell these lingering doubts, if only with respect to the spousal usufruct. This action, which was accomplished via Act No. 1207, comprised (i) the amendment of Article 1514 of the Civil Code, which since 1996 has addressed the security that is required for the spousal usufruct, and (ii) the enactment of a new § 1202 of Title 9 of the Revised Statutes (the so-called "Civil Code Ancillaries"). The changes to the Civil Code Article and the contents of the new Revised Statute are reflected in the following chart:

<i>Original Version</i>	<i>Original Version with Amendments</i>	<i>Amended Version</i>
<p>Art. 1514. Usufruct of surviving spouse affecting legitime; security</p> <p>A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse. A forced heir may also request</p>	<p>Art. 1514. Usufruct of surviving spouse affecting legitime; security</p> <p>A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse. A forced heir may also request</p>	<p>Art. 1514. Usufruct of surviving spouse affecting legitime; security</p> <p>A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse. A forced heir may also request security to the extent that a surviving spouse's usufruct over the legitime affects</p>

28. La. Civ. Code art. 572 cmt. (b); see also Yiannopoulos, *supra* note 26, § 117, at 243.

security to the extent that a surviving spouse's usufruct over the legitime affects separate property.

security to the extent that a surviving spouse's usufruct over the legitime affects separate property. The court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.

§ 1202. Form of security for legal usufruct of surviving spouse

If security is owed to the naked owner by the usufructuary who is the surviving spouse, the court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.

separate property. The court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.

§ 1202. Form of security for legal usufruct of surviving spouse

If security is owed to the naked owner by the usufructuary who is the surviving spouse, the court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.

The sole effect of the new legislation, as I have already explained, is to make unmistakably explicit that which, for one properly trained in the art of interpreting a Civil Code, should already have been obvious. As a general rule, legislation of this kind should be resisted, for it clutters up the code with unnecessary detail²⁹ and, further, it rewards (and therefore tends to perpetuate) the failure of those who clamor for it to develop proper interpretive skills. In this case, however, an exception to that general rule may well have been warranted. Prior to the amendment some policymakers, fearing that spousal usufructuaries might not be permitted to put up security in some less onerous form than "bonds" and that at least some spousal usufructuaries might not be able to bear that burden successfully, had begun to entertain proposals to scale back, if not eliminate entirely, the security requirement for such usufructuaries.³⁰ These proposals, as I shall argue later on in this Article, are for the most part imprudent.³¹ The new legislation, by making it clear that the spousal usufructuary need not "post a bond," may remove some of the "pressure" that some policymakers feel to adopt proposals of this kind.

29. The words of Portalis, the "father" of the French Code Civil, see Henri Capitant, Portalis: le Père du Code Civil, 56 Rev. Crit. Leg. Jur. 187 (1936), though uttered over 200 years ago now, still constitute sound advice for those who would undertake the awesome task of codification today:

We also kept clear of the dangerous ambition of wanting to forecast and regulate everything. Who would imagine that those to whom a code always seems too voluminous are the very people who dare imperiously to assign the lawmaker the arduous task of leaving nothing to the discretion of the judge?

No matter what we do, positive laws could never entirely replace the use of natural reason in the affairs of life. Society's needs are so varied, the intercourse between men so active, their interests so manifold, and their relations so extensive that the legislator cannot possibly provide for all eventualities.

In the very matters that particularly call for his attention, there is a host of details which either escape him or are too much open to contention or instability to become the subject of a legal provision.

* * *

The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of question which may arise in particular instances.

Discours Préliminaire, in 1 P.A. Fenet, Recueil Complet des Travaux Préparatoires du Code Civil 469-70 (1827), reprinted (in translation) in Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 Tul. L. Rev. 762, 769 (Shael Herman trans., 1969).

30. In fact, at least one of these proposals has already become law. In Act No. 548 (which amends La. Civ. Code. art. 1499), the legislature relieved testamentary spousal usufructuaries of the duty to post security, save in certain limited circumstances. That act is discussed *infra* in Part I.B.2.a.

31. See *infra* pp.339-45 and 349-50.

Even if it was, all things considered, wise for the legislature to try to “clear up” lingering doubts about the kinds of security to which a spousal usufructuary may resort, one can still quarrel with the particular form that this clarification assumed. In terms of the legislative technique that it exhibits, Act No. 1207 can be faulted on several scores.

First, the act is internally redundant, or so it would at first appear. The act seems to say the same thing twice, once in the form of an amendment to a Civil Code Article (1514) and then again in the form of a new Revised Statute (1202): aside from its introductory clause, the latter is, in fact, a verbatim reproduction of the former. Surely the legislature need not speak twice to achieve its wishes. And so, one is entitled to ask why it did so (or appears to have done so) here. The explanation lies in the legislature’s recognition that Article 1514, as it was last revised in 1996, is of indeterminate scope, to be precise, one cannot be sure whether the Article applies to legal, as well as testamentary, spousal usufructs. The cause of this uncertainty (technical deficiencies in the 1996 revision) will be reviewed later in this paper. Suffice it to say for now that the uncertainty is real and that it remains unresolved. Hence it was that the legislature, having decided that it wanted the “new” rule regarding the permissible forms of security for spousal usufructs to apply to legal as well as testamentary usufructs, felt that it could not safely “stop” at amending Article 1514 (which might, after all, end up being interpreted so as to apply only to testamentary usufructs), but had to “go on” to create a new “parallel” statute that specifically addresses “legal” usufructs (note the reference in the caption of § 1202 to “*legal* usufruct”). As a matter of legislative technique, this solution to the problem is, of course, less than ideal: it would have been better for the legislature to have revised Article 1514 to eliminate the uncertainty. But the legislature cannot be expected to “fix” everything at once, and as a “stop-gap” measure, this solution is perhaps not intolerable.

Second, the act contains phrasing that is, in some respects, less than felicitous and, in others, down right perplexing. For example, the act, in describing the property on which a spousal usufructuary may create a mortgage, speaks of “community or separate property, movable or immovable.” In standard English (as opposed to, say, standard French or Spanish), the noun follows the adjective, unless the adjective is part of a predicate nominative or an adjectival relative clause. Thus, a permissible phrasing would have been “community or separate, movable or immovable, property” or, perhaps, “property that is community or separate, movable or immovable,” but never this. Then, in the part of the legislation that describes the kinds of security interests that the court may “impose” (itself, a curious usage), there is the reference to “mortgage or lien.” Surely it would have

been sufficient to use one term or the other. Finally, there's the curious reference to "notes" in the part of the legislation that describes the kinds of documents the execution of which the court may order. Just what "notes" the legislature had in mind here is less than immediately clear. It is possible that the term refers to some kind of conditional promissory note made by the usufructuary in favor of the naked owner, perhaps something that reads like this: "If I default on my duties as usufructuary, then I will pay you \$X." Now, this is a peculiar form of "security" indeed, for it is not, in fact, "security" at all in the true sense of the word (that is, "real security," such as a mortgage or a pledge, or "personal security," that is, suretyship). Except for the fact that such a note would fix in advance the amount of the payment that the usufructuary would have to make to the naked owner in the event of his default (thereby acting as a kind of "liquidated damages" clause), it would do nothing but reproduce, in conventional form, a duty that the usufructuary already owes the naked owner as a matter of law: under Article 573 of the Civil Code, the usufructuary is by law "answerable for losses resulting from his fraud, fault, or neglect."

2. *Particular Types of Spousal Usufruct*

a. *Testamentary Spousal Usufruct: When Security is Required*

In Louisiana, it is not uncommon for a married person, when planning for the disposition of his estate, to provide for his surviving spouse by granting her a "usufruct" over all or some of the property that he shall leave at the time of his death. For the past several years (at least since 1996), there has been some uncertainty regarding whether and, if so, under what circumstances the holder of a such a "testamentary spousal usufruct" is required to post security. To this question, there were at least two possible answers.³²

One—the more obvious—was that such a usufructuary had to post security unless the creator of the usufruct provided to the contrary. The argument in support of this answer rested on two premises. The major premise was drawn from Articles 571 and 573 of the Civil Code, which set forth the general rules regarding security for usufructs. According to those Articles, holders of "conventional" usufructs, in contrast to holders of "legal" usufructs, are required to post security, unless the creator of the usufruct grants the holder a

32. See generally Yiannopoulos, *supra* note 26, § 194, at 399–400; Dian T. Arruebarrena, *Property Changes in the Proposed Successions Revision*, 57 La. L. Rev. 149, 162–63 (1996).

dispensation.³³ The minor premise was based on the seemingly reasonable assumption that all spousal usufructs granted by testament, without exception, should be qualified as “conventional.”³⁴

The other possible answer—the less obvious—was that the usufructuary did not have to post security at all unless some “forced heir” were entitled to and did request it or the creator of the usufruct were to require it. This answer was based on Civil Code Article 1514, which was enacted in 1996. That Article provided (and still provides) as follows:

A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse. A forced heir may also request security to the extent that a surviving spouse’s usufruct over the legitime affects separate property.

It is undisputed that this Article was intended to apply, at a minimum, to testamentary spousal usufructs.³⁵ Now, the very fashion in which this Article was written, at least in the minds of some, suggested that, as a general rule, no security had to be provided: the Article, by authorizing certain persons under certain circumstances to request security, seems to presuppose that otherwise no security would be required. Buttressing this interpretation of Article 1514 was its history. As the comments to the Article indicate, this Article was supposed to “reenact[] the provisions of the last paragraph of Civil Code Article 890” as it had read up until 1996.³⁶ That paragraph had then read as follows:

If the usufruct authorized by this Article affects the rights of heirs other than children of the marriage between the

33. See La. Civ. Code art. 571 (“The usufructuary shall give security that he will use the property subject to the usufruct as a prudent administrator and that he will faithfully fulfill all the obligations imposed on him by law or by the act that established the usufruct unless security is dispensed with.”) & art. 573 (“Security may be dispensed with by the grantor of the usufruct or by operation of law. Legal usufructuaries, and sellers or donors of property under reservation of usufruct, are not required to give security.”).

34. This assumption, strangely enough, did not become plausible until the Revision of 1996. Before that revision, it was possible for at least some “spousal usufructs” created by testament to be qualified as “legal,” namely, those that merely “confirmed” the *legal* spousal usufruct that is provided for in Article 890 of the Civil Code. Whether the 1996 revision eliminated this possibility, as its proponents claim it did, is still disputed. See Yiannopoulos, *supra* note 26, § 194, at 395–99; Arreubarrena, *supra* note 31, at 160–63.

35. It is disputed, however, whether the reach of this Article extends as well to *legal* spousal usufructs. See Yiannopoulos, *supra* note 26, § 194, at 399–400; Arreubarrena, *supra* note 31, at 162–63.

36. La. Civ. Code art. 1514 cmt. (c).

deceased and the surviving spouse or affects separate property, security may be requested by the naked owner.

Now, the "usufruct authorized by this Article" (that is, old Article 890) to which this paragraph referred was, according to the very terms of the Article, a "legal" usufruct.³⁷ As such, that usufruct, save under the circumstances spelled out in this paragraph, required *no security at all*.³⁸ If, as the comments to Article 1514 indicated, this new Article merely reproduced the provisions of the old, then the new Article likewise should not require security unless a naked owner/forced heir should demand it.

This past summer, the legislature finally resolved this uncertainty in favor of the latter alternative. The legislature's action took the form of Act No. 548 of the Regular Session of 2003, which amends Article 1499 of the Civil Code, the Article that, since 1996, has served to provide authority for the creation of testamentary usufructs in favor of surviving spouses. The changes in the Article that were effected by the amendment are depicted in the following chart:

37. By classifying all of the usufructs to which the old Article applied as "legal," the legislature was, in fact, guilty of distorting well-recognized juridical categories. As was noted in note 34 and will be further explained in the following note, not all of the usufructs to which the old Article applied were, by nature, "legal"; to the contrary, the old Article also governed a number of kinds of usufructs that were, by nature, "conventional." The reason that the legislature distorted the categories—called some "conventional" usufructs "legal"—was that it wanted to attach to all of the usufructs governed by the old Article, regardless of the true nature of those usufructs, the effects that are normally reserved for legal usufructs alone, including the usual rule that a "legal" usufructuary need not put up security. *See generally* Yiannopoulos, *supra* note 26, § 194, at 396–98; Arruebarrena, *supra* note 31, at 161.

38. The fault for this interpretive uncertainty lies with the redactors of new Article 1514. Prior to the creation of Articles 1499 and 1514, which took place simultaneously with the amendment of Article 890, old Article 890 was a hodge-podge of provisions that dealt with "spousal" usufructs, some of which genuinely amounted to legal usufructs ("true legal usufructs"), others of which were, in fact, testamentary usufructs that, for various reasons (most of them related to taxes), were assimilated to legal usufructs in terms of their effects ("faux legal usufructs"). One of the principal objectives of the legislation that produced new Articles 1499 and 1514 and amended old Article 890—an objective that was itself salutary—was to "separate out" the provisions of old Article 890 that applied to true legal usufructs from those that applied to faux legal usufructs. The plan for realizing this objective was as follows: put the provisions that dealt with the faux legal usufructs into new Articles (among them, 1499 and 1514) that would be situated in the part of the Civil Code that deals with impingements on the legitime (itself a less than obvious choice of location) and leave those that dealt with true legal usufructs in Article 890. On the assumption that the provisions in the last paragraph of old Article 890 applied only to faux legal usufructs, the architects of the revision relocated that paragraph among the new Articles. Sadly, this assumption was mistaken. That paragraph applied, at once, both to true and to faux legal usufructs—primarily to the former.

*Original Version***Art. 1499.
Usufruct to
surviving spouse**

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period.

...

*Original Version
with Amendments***Art. 1499.
Usufruct to
surviving spouse**

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period, and shall not require security except as expressly declared by the decedent or as permitted when the legitime is affected.

...

*Amended Version***Art. 1499.
Usufruct to
surviving spouse**

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period, and shall not require security except as expressly declared by the decedent or as permitted when the legitime is affected.

...

The new legislation clarifies the law at two points. First, when a usufruct is created by testament under the auspices of Article 1499, the usufructuary is not, as a general rule, required to post security. Second, to this general rule, there are two and only two exceptions: (i) where the testator expressly requires that the usufructuary post security and (ii) where a forced heir, pursuant to a faculty granted to him by legislation (specifically, Article 1514), demands that the usufructuary post security.

Though the amendment to Article 1499 appears to be technically sound, one can question its soundness as a matter of policy. Exempting the holder of an Article 1499 usufruct from the duty to post security would perhaps be an acceptable general rule were that general rule to be accompanied by appropriate exceptions. But it is precisely here that the amended version of Article 1499 falls short. To be sure, the two exceptions that are recognized—(i) that which permits a naked owner who is a forced heir of the *de cuius*, but not a child of the usufructuary (in other words, where the naked owners are forced heirs and they and the usufructuary are, respectively, step-children and step-parent) to request security and (ii) that which permits a naked owner who is a forced heir of the *de cuius*, to the extent that the usufruct attaches to *de cuius*' separate property, to request security—are good as far as they go. The trouble is that the former of these exceptions doesn't go far enough. It is not enough to permit the *de cuius*' forced heirs to request security when the usufructuary is a step-parent; rather, one should go farther by according this privilege to any and all of the *de cuius*' descendants, regardless whether they are forced heirs, under such circumstances. In other words, any time that the naked owners and the usufructuary are, respectively, step-children and step-parent, the naked owners should be entitled to demand security.

My argument in support of this admittedly controversial proposition³⁹ starts from a premise that, at least for those who know of the civil law of usufruct, should not be controversial at all: as a general rule, every usufructuary ought to have to provide security for the benefit of the naked owners. This general rule, which has been around for nearly 2000 years⁴⁰ (at least) and is still in place in most civil law jurisdictions⁴¹ (Louisiana included⁴²), rests on a solid

39. As of this writing, the Council of the Louisiana Law Institute has taken up this question on a couple of occasions. On the most recent of these occasions, the council, by a closely divided vote, rejected the proposition for which I am now arguing.

40. See *Digest of Justinian* bk. VII, tit. I, law 13, in 3 *The Civil Law* 232 (S.P. Scott trans., 1932) ("Where the usufruct in any property has been bequeathed, the owner can demand security for the property, and this can be done by order of the court, for just as the usufructuary has a right to use and enjoyment, so also the mere [naked] owner has a right to be secure with reference to his property. This also applies to every usufruct, as Julianus states . . .") (attributed to Ulpian's *On Sabinus* bk. XVIII). Julian and Ulpian were among the jurisconsults of the so-called "classical period" of Roman law, which stretched from 100 to 250 A.D. Barry Nicholas, *An Introduction to Roman Law* 29–30 & 34 (1979).

41. This is true, at least, of jurisdictions within the "Latin" subtradition of the civil law. See, e.g., *Código Civil* (Argentina) art. 2851 ("The usufructuary, before entering into the use of the thing that is subject to the usufruct, must give security that [i] he will enjoy it and conserve it in conformity with legislation and [ii] that

he will completely fulfill all the obligations that are imposed on him by this Code or by the title that establishes the usufruct, and that he will return the thing at the end of the usufruct"); Código Civil (Brazil) art. 1400 ("The usufructuary, before assuming the usufruct, . . . will give security, be in personal or real, if he is required to do so, that he will stand watch over their conservation and will deliver them at the end of the usufruct."); Código Civil (Chile) art. 775 ("The usufructuary cannot have the thing to which the usufruct attaches without having provided security sufficient for [its] conservation and restitution"); Code Civil (France) art. 601 ("He [the usufructuary] [must] give security that he will enjoy the things as a prudent administrator"); Codice Civile (Italy) art. 1002, par. 3 ("The usufructuary must also give suitable security"); Código Civil (Mexico) art. 1006 ("The usufructuary, before entering into the enjoyment of the goods, is obligated: . . . II. To give appropriate security that he will make use of the things with moderation and will restore them to the [naked] owner, with their accessions, at the extinction of the usufruct, without their having been impaired or deteriorated by his negligence"); Código Civil (Portugal) art. 1468 ("Before taking account of the goods, the usufructuary must: . . . b) Provide security, if it is required of him, as much for the restitution of the goods or of their value, if they are consumable, as for the reparation of deteriorations that they may come to suffer by his fault, or for the payment of whatsoever other indemnity he may owe."); Quebec Civil Code art. 1144 (" . . . [T]he usufructuary shall . . . take out insurance or furnish other security to the bare [naked] owner to guarantee performance of his obligations"); Código Civil (Spain) art. 491 (Julio Romanach trans. 1994) ("Before entering upon the enjoyment of the property, the usufructuary is bound . . . 2. To give bond, committing himself to perform the obligations pertaining to him pursuant to this section.").

There the usufructuary is not required to post security as a matter of course; to the contrary, the naked owner must affirmatively demand it and, in order to get it, must show that the usufructuary's use of the property somehow imperils his rights. *See, e.g.,* Bürgerliches Gesetzbuch (German) § 1051 (Ian S. Forrester et al. trans. 1975) ("The [naked] owner may demand security if the conduct of the usufructuary gives ground for apprehension of a substantial violation of the [naked] owner's rights.").

As for the Swiss and the Greeks, they've adopted a hybrid approach. To usufructs of nonconsumables they apply the German rule (security available only for cause), but to usufructs of consumables they apply the Latin rule (security available of right). *See* Code Civil (Switzerland) art. 760, ¶¶ 1 & 2 ("The [naked] owner who proves that his rights are in peril can require security from the usufructuary. He can require it, even without this proof and before delivery, if the usufruct bears on consumable things or securities."); Αστικός Κώδικας (Greek) αρθς. 1159 ("If the usufruct is exercised in such a manner as to compromise gravely the rights of the [naked] owner, the [naked] owner has the right, in the absence of a different stipulation, to require that the usufructuary furnish security") & 1175 ("In the matter of consumable things, the usufructuary is bound, in the absence of a different stipulation, to furnish security before their delivery").

42. *See* La. Civ. Code art. 571 (rev. 1976) ("The usufructuary shall give security that he will use the property subject to the usufruct as a prudent administrator and that he will faithfully fulfill all the obligations imposed on him by law or by the act that established the usufruct unless security is dispensed with."); La. Civ. Code art. 558 (1870) ("The usufructuary must give security that he will use, as a prudent administrator would do, the movables and immovables subject to the usufruct, and that he will faithfully fulfill all the obligations imposed on him by

“common sense” policy judgment. Because the obligations that the usufructuary owes to the naked owner—to preserve and return the thing, if it is nonconsumable; to replace the thing or its value, if it is consumable—are so onerous and because these obligations, at least in the normal case, do not “come due” until the usufructuary is dead and gone, there is a significant risk that the usufructuary will shirk these obligations unless he is provided with a powerful incentive to fulfill them.

Because the general rule that requires security from every usufructuary serves such a salutary end, civil law legislators have, through the years, recognized exceptions to that rule only reluctantly and then only for good cause. Perhaps the most commonly invoked of these “good causes” is this: owing to the special nature of the relationship between the naked owner, on the one hand, and the usufructuary, on the other, one could expect the usufructuary to fulfill her “fiduciary” obligations toward the naked owner without the incentive provided by security. This, in fact, is the reason behind the exception to the general security requirement for “legal usufructs.”⁴³ Take, for example, the legal “parental” usufruct—that which married parents enjoy over certain property of their minor children.⁴⁴ In the case of such a usufruct, it is believed, there really is no need to require the usufructuary to post security: by virtue of the parents’ “natural affection” toward their own offspring, the parents will (at least in the general run of cases) conscientiously fulfill their fiduciary obligations toward their children anyway.⁴⁵

law, and by the title under which his usufruct is established.”); La. Civ. Code art. 551 (1825) (same); Digest bk. 2, tit. 3, art. 23, par. 1 (1808) (“The usufructuary must give security in the amount of the inventory, as a guarantee that he will enjoy the inventoried as a prudent administrator, if these are immovables; that he will return them in the condition in which they will be found, without any deterioration due to either his fraud or his fault, if the inventoried items are ordinary movables; and that he will restore the equivalent of the estimated value that has been made of them in the inventory, if these are things that are subject to being consumed by usage.”).

43. See La. Civ. Code art. 573 (“Legal usufructuaries . . . are not required to give security.”).

44. See La. Civ. Code art. 223.

45. See Diane M. Lloyd, Comment, *New Hope for the Survivor: The Changes in the Usufruct of the Surviving Spouse*, 28 Loy. L. Rev. 1095, 1103 & 1113–14 (1982); see also Succession of Lee, 9 La. Ann. 398, 399 (1854) (“The motive of the Legislature in giving the usufruct, where there were children of the marriage, may well have been to keep the family estate together, and provide a common home during the lifetime of the surviving father or mother, *who would naturally use the estate with an eye to the welfare of the children*, at all events until a second marriage; upon which event the lawgiver, with a jealous foresight for the children’s welfare, arrests the usufruct.”) (emphasis added); Hall v. Toussaint, 52 La. Ann. 1763, 1767, 28 So. 304, 305 (1900) (paraphrasing Lee).

Now, where the usufructuary is a step-parent of the naked owners, there is no such “good cause” for recognizing an exception to the general security requirement. Though there are, of course, exceptions, relationships between step-parents and step-children tend to be notably less harmonious than relationships between parents and children by blood.⁴⁶ This is so even when the affinitive who binds them together is still alive; once he is gone, the situation often gets even worse. It is not an accident that a disproportionate percentage of the “successions cases” decided by our appellate courts each year consists of contests between step-relations. For these reasons, one would be naive indeed to suppose that, as a general rule, step-parent usufructuaries can simply be “trusted” to tend to their fiduciary duties toward their step-children naked owners without the “assistance” of some external incentive (such as security).⁴⁷ And, because that is so, the general security requirement ought to be retained in such cases.⁴⁸

It is interesting to note that the history of the law of “spousal usufructs” in Louisiana supports this policy judgment. Back in 1844, when the Louisiana Legislature first recognized a legal spousal usufruct, the surviving spouse received that usufruct only if and to the extent that the naked owners were her own children. The original legislation read as follows:

In all cases, when the predeceased husband or wife shall have left *issue of the marriage* with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a [in] usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited *by such issue*.⁴⁹ . . .

Thus, at this early point in Louisiana’s legal history, the only way that a step-parent could have received a usufruct on property of which her step-children were naked owners was by testament, in other words, as a volitional usufruct. And that volitional usufruct, of course, unlike the legal usufruct established by this new legislation, would have been subject to the general security requirement.

To legislators, judges, and lawyers of the time, this distinction between blood parents and step-parents made perfectly good sense.

46. The troubles that beset step-relations, together with their biological, psychological, and sociological causes, are ably reviewed in Katherine S. Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What’s Become of Disinheritance, and the Unfinished Business of the Stepparent Usufruct*, 60 La. L. Rev. 637, 653–54, 661–69 (2000).

47. See *id.* at 664–69, 671 & 673.

48. Lloyd, *supra* note 44, at 1103 & 1113–14.

49. See La. R.S. §§ 629 & 3708.

The distinction was noted, with approval, in *Hall v. Toussaint*⁵⁰ at the turn of the century:

. . . The textual provisions of the law are that the surviving partner in community has [a] usufruct of [the] share of [the] deceased spouse who died without having ascendants or descendants. Here the deceased left a descendant, viz. plaintiff. . . . [T]hat usufruct, where there are children of the marriage, may have been to keep the family estate together, and provide a home for the surviving father or mother, who, in the nature of things, uses the estate with an eye to the welfare of the children. *It is manifest that the impulse is no longer the same between the daughter and the stepmother, and the nature of the law finds nothing to sustain it in such a case.*⁵¹

Years later, in 1981, the Louisiana Legislature, its suspicion of step-parents apparently having waned somewhat, decided to expand the scope of the legal "spousal" usufruct so as to make it available to step-parents as well as blood parents. But in so doing, the legislators were careful to add a special security requirement for the step-parent usufruct,⁵² one that read as follows:

If the usufruct authorized by this Article affects the rights of heirs other than children of the marriage between the deceased and the surviving spouse . . . , security may be requested by the naked owner.

What the creation of this special security requirement shows is that the legislators, though they trusted step-parents "more" in 1981 than they had in 1844, still did not trust them enough to give them a usufruct free of security. The legislators still recognized, in other words, that step-parents could not necessarily be counted on to "do the right thing" by their step-children.⁵³

This state of affairs did not change until the revision of the law of successions in 1996. In that year, the Louisiana Legislature simultaneously repealed the special security requirement for the step-parental spousal usufruct and created a new one, one set out in new Civil Code Article 1514: "A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse." Precisely why the legislators made this change is not entirely clear. It is possible,

50. 52 La. Ann. 1763, 28 So. 304 (1900).

51. *Id.* at 1767, 28 So. at 305 (emphasis added).

52. See Lloyd, *supra* note 44, at 1113-14.

53. *Id.*

however, that they made the change, as it were, unknowingly, specifically, that they did not fully appreciate that they were changing the law. This hypothesis rests on the content of the “official revision comments” that accompanied new Civil Code Article 1514, comments that were included with the projet for this legislation as it was submitted to the legislators. According to those comments, there was, in fact, no substantive difference between the old law and the new:

This Article essentially reenacts the provisions of the last paragraph of Civil Code Article 890 Article 890 expanded the law by which its predecessor Article 916 (1870) granted a usufruct to a surviving spouse that would terminate upon the death or remarriage of the surviving spouse, but only as to community property inherited by issue of the marriage. Civil Code Article 916 did not authorize a usufruct over community property that was inherited by children of a prior marriage When the law was expanded to permit a testator to grant such a usufruct to a surviving spouse, the last paragraph of Article 890 [the special security provision for the step-parental legal usufruct] was also added to authorize the naked owner in those instances to request security. . . . The legislature made a policy decision that children of a prior marriage . . . are entitled to greater protection than are children of the marriage, or, in other words, to treat a surviving spouse who is the parent of the naked owner different [sic] from a surviving spouse who is not the parent of the naked owner. This Article continues that policy, but the language has been revised slightly and the provision itself has been appropriately moved to a different section of the code

The message that the comments conveyed to the legislators, then, is “this does not change the substance of the law.”

That message, however, was erroneous. Unlike the former law (the law as revised in 1981), which accorded the right to demand security to any *descendant* who was not a child of the usufructuary, the new law (the law as revised in 1996) accords that right only to any *forced heir* who is not a child of the usufructuary. And, by 1996, the category “forced heir” became quite a bit narrower than the category “descendant.”⁵⁴

54. See La. Civ. Code art. 1493 (rev. 1996) (re-defining forced heirs as “descendants of the first degree” who, upon the death of the *de cuius*, either (i) are under twenty-four years of age or (ii) due to some “mental incapacity or physical infirmity,” are “permanently incapable” of caring for themselves or their property).

It might be argued in rebuttal that, insofar as the category "descendants" and the category "forced heirs" were, up until 1996, co-terminous, the old law had, in fact, as the comments implied, existed solely to protect the legitimes of forced heirs from predation by their step-parents. But that, too, would be an error. The truth is that the old law had protected descendants *qua* descendants not *qua* forced heirs. A few illustrations may help to demonstrate my point.

First, imagine a man Y, who is the husband of a woman X (his second wife) and the father of two children, A and B, by his first marriage to another woman Z. Before his death, Y makes no donations to anyone. At the time of his death, he leaves an estate that consists of \$400,000 (his half of a "community" worth \$800,000). He leaves no testament. Because there are no conceivable "impingements" on the "legitimes" of A and B here, they, though "forced heirs," would not have been in a position to assert reduction. Nevertheless, they would have been entitled, as descendants of Y, to demand that X, as the usufructuary of Y's half of the former community property (all that which they inherited from Y—400,000 dollars' worth), post security. Not only that, but this right to demand security would have gone beyond that which might have been theoretically necessary to protect their "forced portion." Under the law of forced heirship in place at that time, that forced portion would have stood at \$200,000 (1/2 of the active mass of \$400,000); the other \$200,000 would have constituted an "extra portion." And yet, A and B would have been entitled to demand that Y post security for her usufruct even with respect to this "extra portion."

Next, imagine the same man Y, with the same family, but with different property. This time, Y, before his death, donates \$100,000 to A and \$100,000 to B, out of his separate property, but otherwise makes no donations to anyone. At his death, his net estate is worth another \$200,000 (his half of a "community" worth \$400,000). He leaves no testament. Because there are here no conceivable "impingements" on the "legitimes" of A and B here, they, though "forced heirs," would not have been in a position to assert reduction. Nevertheless, they would have been entitled, as descendants of Y, to demand that X, as the usufructuary of Y's half of the former community property (all that which they inherited from Y—200,000 dollars' worth), post security. And, as before, this right to demand security would have gone beyond that which might have been theoretically necessary to protect their "forced portion." Indeed, this right would have had nothing whatsoever to do with their forced portion! Under the law of forced heirship that was then in place, that forced portion would have stood at \$200,000 (1/2 of an active mass of \$400,000, formed by "fictitiously collating" back to the \$200,000 in assets he actually left at death the \$200,000 in donations he had

made before his death⁵⁵), so that A and B each would have had a legitime of \$100,000. Now, thanks to imputation (the donation of \$100,000 to A would be imputed to his account; that to B, imputed to his account),⁵⁶ the legitimes would have been deemed to have already been satisfied, which would mean that, of the \$200,000 (Y's ½ of the "community") that they would have received from Y's estate, *all* of it would have been for them an "extra portion." Notwithstanding this—notwithstanding that not one dime of the community property that they would have inherited would have fallen within their legitimes—, still they would have been entitled to demand security from X, as the usufructuary of that property.

55. See La. Civ. Code art. 1505, par. 2.

56. I am assuming here that the enactment in 1996 of Civil Code Article 1501, which expressly required that certain *inter vivos* liberalities made by the *de cuius* to the forced heir be "imputed" to the forced heir's legitime as a prerequisite to reduction, did *not* change the law, that is, that "the law" of forced heirship in Louisiana has *always* entailed such a requirement. I make this assumption even though I recognize that, prior to that time, no legislative text even so much as alluded to the institution of "imputation of liberalities" to forced heirs much less established it on a firm footing. My assumption rests on what I know of the law of forced heirship in France, on which Louisiana's law of forced heirship was closely modeled. Like the parts of the Louisiana Civil Codes of 1808, 1825, and 1870 that pertained to forced heirship, the parts of the original French *Code Civil* that pertained to forced heirship said nothing whatsoever, not even by implication, about "imputation of liberalities" to forced heirs. See French Civil Code arts. 864–868 & 913–930 (1804); see also 5 Marcel Planiol & Georges Ripert, *Traité Pratique de Droit Civil Français: Donations et Testaments* no. 85, at 108 (André Trasbot & Yvon Loussouarn revs., 2d ed. 1957) ("The difficulty [regarding imputation] is all the greater inasmuch as the *Code Civil* is far from settling the question expressly and clearly . . ."); 12 François Laurent, *Principes de Droit Civil Français* no. 103, at 142 (2d ed. 1876) ("The calculation [of the mass] is very simply . . . After that, a very difficult question [regarding imputation] arises, one that the *Code Civil* has not resolved textually . . .") And yet both the doctrine and the jurisprudence in France consistently recognized that imputation of liberalities was an indispensable prerequisite to reduction. See, e.g., Planiol & Ripert, *supra* this note, nos. 85–98, at 107–20; 11 Aubry & Rau, *Droit Civil Français* § 684ter, at 55–70 (Paul Esmein rev., 6th ed. 1956); 1 Gabriel Baudry-Lacantinerie & Maurice Colin, *Des Donations et Des Testaments* nos. 924–64, at 431–48, in 9 *Traité Théorique et Pratique de Droit Civil* (2d ed. 1905); Laurent, *supra* this note, nos 103–136, at 141–82; 2 Raymond Troplong, *Droit Civil Expliqué: Des Donations Entre-Vifs et des Testaments* no. 891, at 280 (3d ed. 1872); 3 Victor Marcadé, *Explication Théorique et Pratique de Code Napoléon* no. 597, at 484 (5th ed. 1859); 7 Alexandre Duranton, *Cours de Droit Français* nos. 367–69, at 403–04 (3d ed. 1834); see also 3 Jean Grenier, *Traité des Donations, des Testaments et de Toutes Autres Dispositions Gratuites* no. 597, at 467–72 (4th ed. 1826) (tracing this rule to the works of the great commentators on the law of the French *ancien régime*, Ricard, Lebrun, Ferrière, and Dumoulin). French scholars and judges justified recognizing this seemingly extra-codal institution on the ground that it was somehow implied by or inherent in the very system of the law of forced heirship itself. Now, if that was true of French law, it could perhaps have been true of Louisiana law as well.

One cannot help but wonder whether the legislators, had they fully recognized the magnitude of the change that had been proposed to them—that it would transmogrify a right of security that had theretofore operated in favor of step-children regardless of and independently of their rights as forced heirs into one that would protect step-children only if and to the extent that they were forced heirs—would have agreed to it. It is at least possible that they would not have.

Be that as it may, even if it could be established that the legislators fully understood and knowingly approved of this change, I would still dare to argue that they made a mistake. Between 1981—the year in which the legislators decided that step-parents could not, as a general rule, be trusted with the responsibilities of usufructuaries without the guarantee of security—and 1996—the year in which the legislators approved the change, there did not take place, to my knowledge, any great change in the character or quality of step-relationships. To be sure, there were, by 1996, more such relationships, thanks to the intervening explosion in divorce and remarriage.⁵⁷ But relationships of that kind were just as troubled then as they had been in 1981. If step-parents couldn't be trusted in 1981, then they could not (and should not) have been trusted in 1996 either. The same, of course, could be said of them in 2003.

One might object that this argument of mine fails to appreciate fully the complexity of the difficulties posed by step-relations, in particular, that it fails to take into account the fact that the possibility of mistreatment within step-relations is bilateral rather than unilateral. The argument might look something like this. Just as step-parents cannot necessarily be trusted to do right by their step-children, so also step-children cannot necessarily be trusted to do right by their step-parents. Indeed, it is possible that step-children might even turn the security requirement, which was originally designed as a shield to be used when their step-parents try to injure them, into a sword whereby they might try to injure their step-parents. For example, the step-children might well invoke their right to demand security from their step-parent usufructuaries, not out of a genuine concern to protect their patrimonies, but rather out of a desire simply to place a serious financial burden on their step-parents, for the ultimate purpose of trying to coerce their step-parents into releasing the usufruct (or, perhaps, for some even more invidious purpose, such as sheer spite). It is not

57. See *Step-Family Problems*, in *American Academy of Adolescent & Child Psychiatry, Facts for Families*, No. 27, at 1 (Nov. 1999) (“With the high incidence of divorce and changing patterns of families in the United States, there are increasing numbers of stepfamilies.”). This publication is available at <http://www.aacap.org/publications/factsfam/stepfmly.htm> (last visited May 14, 2003).

difficult to imagine situations in which precisely this kind of thing might happen and in which the resulting burden for the step-parent would be more than she could bear.⁵⁸

Though this objection is not without substance, the conclusion in support of which those who make it argue—simply get rid of the security requirement for the step-parental usufruct entirely—does not follow from the premises. If one discovers that the established remedy for a certain problem may itself cause problems, one should not, without further analysis, leap to the conclusion that the remedy should simply be eliminated: that would leave the original problem—here, the risk of step-parental misconduct—unaddressed. To the contrary, one should first consider whether the remedy can be modified to avoid the problems it may cause and, if that is not possible, one should then try to devise some other remedy. Only if that, too, proves impossible should one consider eliminating the remedy for the original problem.⁵⁹

In my judgment, this is a case in which the remedy can be modified to avoid the problems it may cause. The solution lies in altering the security requirement itself. One possibility is to accord the judge discretion, when granting the step-children's request for security, to choose some mode of security that might be less burdensome for the step-parent than would traditional forms of security. Indeed, during its past regular session, the Louisiana Legislature clarified that the judge has discretion in this regard and did so for precisely this reason.⁶⁰ If according the step-parent such flexibility proves to be insufficient to avoid the problem, then other possible solutions can be attempted. It might be appropriate, for example, to require the step-children to prove, as a prerequisite to receiving security, that there is reason to believe that the step-parent will fail to perform her fiduciary duties towards them. Or, taking a different tack, one might authorize the judge to adjust the amount of security that the step-parent must post in proportion to the step-parent's means⁶¹ and, in those extraordinary cases where the step-

58. Under present law, the usufructuary must, as a general rule, post security in the amount of the value of the property to which the usufruct attaches. See La. Civ. Code art. 572.

59. Even then, it would not follow, without further analysis, that the remedy for the original problem should be done away with. That result would follow only if one were to conclude that cost of the remedy (in terms of the problems it causes) outweighs its benefit (in terms of the problems it solves).

60. This "clarification" is discussed elsewhere in this paper. See *infra* Part I.B.1. As I point out in that discussion, there is good reason to question whether this "clarification" was even necessary.

61. Even under current law, the judge has discretion to reduce the amount of security, "on proper showing," to a value less than that of the property to which usufruct attaches. But he cannot reduce it below the value of the movables that are

parent simply cannot afford to post security of any kind, even dispense her from it completely.

These proposed solutions to the the problem of the risk to step-parent usufructuaries posed by the traditional security requirement are all more than plausible. Until they have been tried and found wanting, there is no justification for eliminating the security requirement entirely. To do that is to "throw the baby out with the bathwater." And that, unfortunately, is precisely what the legislature has done.

b. Legal Spousal Usufruct

1) When Security is Required

Whether, and if so, under what circumstances the naked owners of property that is subject to a legal spousal usufruct can demand security from the usufructuary is, at present, open to question. The cause of the uncertainty is that there are no less than three distinct pieces of legislation that seem to speak to the question, each of which conveys a somewhat different message from those of the others. The first is Civil Code art. 573, which provides as follows:

Art. 573. Dispensation of security

Security may be dispensed with by the grantor of the usufruct or by operation of law. Legal usufructuaries, and sellers or donors or property under reservation of usufruct, are not required to give security.

The second is the first sentence of Civil Code art. 1514, which reads this way:

Art. 1514. Usufruct of surviving spouse affecting legitime; security

A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse.

...

Finally, there is CCP art. 3154.1, which provides as follows:

Art. 3154.1. Request by naked owners other than children of the marriage for security from surviving spouse

If the former community or separate property of a decedent is burdened with a usufruct in favor of his surviving spouse, successors to that property, other

than children of the decedent's marriage with the survivor, may request security in accordance with the preceding Article in an amount determined by the court as adequate to protect the petitioner's interest.

Though these three legislative provisions are not entirely consistent, they are not entirely inconsistent either, that is to say, there are at least some points of agreement among them. This agreement can be described as follows: if the naked owners of the property to which the legal spousal usufruct attaches are children of the usufructuary, then the naked owners can *not* request security. The disagreement among them, then, is confined to this question: whether the naked owners of the property to which the legal spousal usufruct attaches can request security if they are *not* children of the usufructuary, in other words, if the naked owners and the usufructuary are, as among themselves, step-children and step-parent. To this question, the first Article—Article 573—dictates a negative answer; the second—Article 1514—, a mixed answer, specifically, that the naked owners can demand security only if (i) they are forced heirs and (ii) the usufruct attaches to their forced portion; and the third—Article 3154.1—, an affirmative answer.

Of the three Articles in question, the first—Article 573—is, both by virtue of its location within the code (Book II, Title . . .) and its content, the most “general” of the three: it states a “general rule” that, in the absence of more specific legislation, purports to control all legal usufructs, including (but not limited to) legal spousal usufructs.⁶² The other two Articles are, at least by their terms, much narrower: if they apply to legal usufructs at all (which, as we shall see, is disputed), then they apply only to legal *spousal* usufructs. Thus, the question, stated in abstract terms, is whether and if so to what extent Article 1514 or Article 3154.1 might carve out an “exception” to the more “general” rule of Article 573.

Regarding whether Article 1514 carves out such an exception, it is difficult, at least at first glance, to see how anyone could possibly have any doubts. By its terms, the Article appears to apply to all spousal usufructs, for it makes no distinction as between those that are testamentary and those that are legal. This impression is reinforced by the comments to both this Article and Article 890—the Article that establishes the legal spousal usufruct. According to comment (a) to

62. I keep using the word “general” in inverted commas because this supposedly “general” rule is, itself, an “exception” to a still more “general” rule, namely, that of La. Civ. Code art. 571 (“The usufructuary shall give security that he will use the property subject to the usufruct as a prudent administrator and that he will faithfully fulfill all the obligations imposed on him by law or by the act that established the usufruct unless security is dispensed with.”).

Article 1514, “[t]he first sentence of this Article makes a limited exception to the rule that a legal usufructuary is not required to give security. See Civil Code Article 573.” Comment (b) to Article 890 is to the same effect:

Since this usufruct arises by operation of law, it is a legal usufruct under C.C. Article 544. Although C.C. Article 573 provides that a legal usufructuary is not required to give security, C.C. Article 1514, *infra*, provides an exception to that rule.

The text seems clear; the comments are certainly clear. On what possible basis, then, might one question whether Article 1514 creates an exception to Article 573?

The possible bases are two: the history of Article 1514 and the position of Article 1514 within the Civil Code. The immediate source of Article 1514 was the third paragraph of Article 890. That paragraph applied both to true legal spousal usufructs, provision for which was then made in the first paragraph of that Article, and to *faux* legal spousal usufructs (testamentary usufructs that were said to have merely “confirmed” the legal usufruct), provision for which was made in the last phrase of the first paragraph and in the the second paragraph of that Article. The revision of the law of spousal usufructs that took place in 1996, which (i) repealed, first, the last part of the first paragraph and the entirety of the second paragraph of Article 890 and, second, the entirety of the third paragraph of Article 890 and (ii) replaced them, respectively, with new Article 1499 and new Article 1514, was intended to separate out the parts of Article 890 that had concerned true legal spousal usufructs from those that had concerned *faux* legal spousal usufructs (in fact, testamentary usufructs)⁶³: those parts that had concerned true legal usufructs were to “stay” (in Article 890, that is), whereas those that had concerned testamentary usufructs were to “go.” New Article 1514 “went”: it is now situated elsewhere than in the Article that concerns true legal spousal usufructs (Article 890); indeed, it is now situated in the same part of the Civil Code to which Article 1499 was consigned (Book III, Title II, Chapter 3). For these reasons, it can be argued that Article 1514 applies only to testamentary spousal usufructs.⁶⁴

This argument, however, presumes an awful lot on the part of the revisers of Article 1514. First, it presumes that the revisers, having set themselves to the task of separating out the parts of Article 890 that pertain to legal spousal usufructs from those that pertain to testamentary spousal usufructs, would have remained “on task”

63. This was, in fact, the point of the revision of La. Civ. Code art. 890 that took place in 1996, at least if one can take the comments to that Article and to the new Articles seriously.

64. See Yiannopoulos, *supra* note 26, § 194, at 400, Arruebarrena, *supra* note 31.

throughout the revision. Second, it presumes that the revisers, if they had deviated from their original plan and had decided, for some unannounced reason, to remove from Article 890 a part of it that nevertheless was to continue to remain applicable to legal usufructs, would have situated the removed rule in the “right place” within the Civil Code, that is, among other rules that are applicable to legal usufructs or, at least, to legal spousal usufructs. The argument, in short, presumes that the revisers were proficient in civilian codificatory technique.

I am not sure that either of these presumptions is warranted. Here is my guess (and it is only a guess) about what “went wrong” in the thinking of the revisers. First, they decided, rightly and consistently with their original plan, to remove from old Article 890 the last part of the first paragraph and the second paragraph, both of which, as we have already seen, in fact concerned testamentary, not legal, usufructs, relocating them in a new Article. This new Article (numbered 1499) the revisers chose to locate in the part of the Civil Code on “forced heirship” among the Articles that concern impingements on the legitime, presumably because the new Article, tracking the language of the second paragraph of old Article 890, declares that a spousal usufruct does not constitute an impingement on the legitime. Then, the revisers turned their attention to the third paragraph of old Article 890. And here they encountered a little problem: the rule set forth therein, as we have already seen, applied to both legal and testamentary spousal usufructs. What were they to do? If they left the paragraph alone, that would create the impression that the rule applied only to legal spousal usufructs, but not to testamentary spousal usufructs, an impression that would be inaccurate. But if they simply moved the paragraph to Article 1499 along with the last part of the first paragraph and the second paragraph of old Article 890, that would create the impression that the rule applied only to testamentary spousal usufructs, but not to legal spousal usufructs, an impression that, likewise, would be inaccurate. At last a “solution,” if one can call it that, suggested itself. First, move the content of the third paragraph to a new, free-standing Article, separate from both revised Article 890 and new Article 1499. Second, why not situate this new Article among those that concern impingements on the legitime—if that was “okay” for the new incarnation of what used to be the last phrase of the first paragraph and the second paragraph of old Article 890 (that is, new Article 1499), it ought to be “okay” for the that was good enough for the new incarnation of what used to be the third paragraph of old Article 890 (that is, new Article 1514).

The revisers’ “solution” can be faulted on at least two scores. First, they did not, in fact, need to create a new free-standing Article

in order to achieve their objective. It would have been sufficient if they had simply left the third paragraph of old Article 890 where it was (so that it would have become the new second paragraph of that Article) and then "copied" that paragraph as a second paragraph of Article 1499. That way, readers of revised Article 890 would have recognized immediately that the rule still applied to legal spousal usufructs (the subject matter of Article 890), as readers of new Article 1499 would have recognized immediately that the rule still applied to testamentary spousal usufructs (the subject matter of new Article 1499). Second, they put their new Article in the wrong place. Indeed, their placement decision would be humorous were it not for the fact that the confusion it has caused is so serious. Now, it may be that the "right place" for the contents of the last phrase of the first paragraph and the second paragraph of old Article 890 was among the Articles that concern impingements on the legitime, though even this can be questioned. But the same cannot be said for the contents of the third paragraph of old Article 890. Unlike the content of new Article 1499, that of new Article 1514 has no direct connection with the subject matter of impingements on the legitime; indeed, if the text of Article 1499 is to be taken seriously, then testamentary usufructs, at least, do not constitute such impingements. To the contrary, the subject matter of new Article 1514 (at least as the revisers understood it) is, quite simply, the security that is required for all spousal usufructs, be they legal or testamentary. Given this understanding of the subject matter of the new Article, the proper place for it was not among the Articles on impingements on the legitime, a topic with which the Article's contents had only a most tangential connection, but rather among the Articles on usufructs in general, more precisely, those that concern security for usufructs.⁶⁵

65. As this statement indicates, I do *not* assert that the content of new Article 1514 has *no* relation to the subject matter of impingements on the legitime; to the contrary, there clearly is such a relation: by the terms of the Article, a naked owner can obtain security only if and to the extent that the spousal usufruct attaches to his "legitime." My contention, rather, is that the relation is incidental rather than essential. As the law stands *now*, yes, the right of security moves in lockstep with the right of forced heirship. But under the law in force between 1981 and 1996, as I explained above (*see infra* pp.345-49) that was not true: the naked owner step-child had a right to request security to the full extent of any property to which the usufruct of his step-parent attached, even if that property exceeded his legitime. And it is conceivable that, in the future, the law might be changed yet again so that the naked owner step-child's right to security will no longer be ratched to his right to his legitime. The point is this: the particular prerequisites for the right to demand security, inasmuch as they can and do change, are not of the essence of the right to security; they are, rather, "accidents" of that right. And in the civil law tradition, the location of legal institutions within the framework of a civil code, like the arrangement of that civil code itself, is supposed to be based on essence, not accidents.

Be that as it may, whatever one may say about the competence of the revisers as practitioners of the art of condification, their objective is not in doubt. As the comments to the Articles make clear, it was their intention that the relocation of the content of the third paragraph of old Article 890 to new Article 1514 *not change the law of "security" at all*, in other words, it was their understanding that the new Article, just like the third paragraph of old Article 890 before it, would apply to both legal and testamentary usufructs. To be sure, the comments, as some have pointed out,⁶⁶ are not themselves true "sources of law." But they are "authorities of law"⁶⁷—"doctrine," to be precise—and, for that reason, may and, indeed, should be consulted for interpretive guidance. Not only that, but these comments should carry particular weight in the interpretive calculus: unlike some "official revision comments," they were prepared in advance of the enactment of the new legislation and, in addition, were included in the bill that was put before the legislators for their approval.⁶⁸ Under these circumstances, the comments of the revisers provide a surer and more reliable guide to the "legislative intent" behind new Article 1514 than does either the "history" of the revision or the drafters' choice regarding the location of that Article.

That leaves Code of Civil Procedure Article 3154.1. Like Article 1514, this Article, by its terms, appears to apply to all spousal usufructs, for it makes no distinction as between those that are testamentary and those that are legal. Buttressing this impression is the history of this Article. Article 3154.1 was enacted through Act No. 919 of the Regular Session of 1981, an act that, among other things, comprehensively revised the Articles of the Civil Code that pertain to intestate successions. The preamble to the act, which singles out Article 3154.1 for special mention, notes that its purpose is to "provid[e] for the rights of certain naked owners of property burdened with the surviving spouse's usufruct to request security"⁶⁹ without further qualification.

66. Cf. Yiannopoulos, *supra* note 26, § 194, at 399 (brushing aside a comment to Article 1499 in part on the ground that comments are "neither law nor source of law").

67. See François Gény, *Methode d'Interpretation et Sources en Droit Privé Positif* no. 138, at 303–05, no. 145, at 322–25, & no. 149, at 335–39 (Jaro Mayda trans., La. Law Institute 1963).

68. See *Chotin Transp., Inc. v. Harbor Towing & Fleeting*, 804 So. 2d 78, 81 (La. App. 4th Cir. 2001) ("Revision comments do not form part of the law, but when they are presented together with proposed legislation they illuminate the understanding and intent of the legislators."); see also *Wartelle v. Women's and Children's Hosp., Inc.*, 704 So. 2d 778, 783 (La. 1997) (stating that because revision comments had been "presented together with proposed legislation," they "illuminate[d] the understanding and intent of the legislators").

69. See La. Acts No. 919 preamble (1981), *reprinted in* 2 Acts of the Legislature (State of Louisiana) 2066 (1981).

But Article 3154.1 is susceptible of another, much more narrow (not to mention more curious), interpretation. The argument on which this interpretation rests is known in the literature of juridical methodology as *argumentum pro subjecta materia*, that is, an argument from "subject matter."⁷⁰ The "subject matter" of the Article, judged by virtue of where the Article is situated within the scheme of the Code of Civil Procedure, is that of the "security owed by the administrator of a succession": the Article is the fifth (5th) of eleven (11) Articles in Section 6 (entitled "Security, Oath, and Letters of Succession Representative"), Chapter 1 (entitled "Qualification of Succession Representatives"), Title 3 (entitled "Administration of Successions"), of Book VI (entitled "Probate Procedure").⁷¹ If this is, indeed, the subject matter of the Article, then the Article should operate only within the context of the administration of a succession in which the administrator is also a spousal usufructuary. For this reason, some have suggested that the Article authorizes the naked owners to demand security from the spousal usufructuary only if and for so long as the succession out of which the usufruct was created (whether by the law of intestacy or by testament) is under administration and, in addition, only if the usufructuary and the administrator are one and the same.⁷²

Of the two alternative interpretations of Article 3154.1 presented above, the courts seem to prefer the former. Before Article 1514 was created, that is, when the rules it contains were still situated in the final paragraph of Article 890, the courts on a number of occasions applied Article 3154.1 in tandem with the final paragraph of Article 890, without, in so doing, suggesting that the two Articles differed in the least, either in terms of their effect or in terms of their scope.⁷³ And at least two of these cases seem not to have involved administrations at all.⁷⁴

To these cases one must now add *Succession of Richaud*.⁷⁵ That case involved the succession of a woman who, at her death, left behind her second husband and three children by a prior marriage, none of whom then qualified as a "forced heir." When the husband insisted that he was entitled to a legal spousal usufruct on his deceased wife's one-

70. Kenneth Murchison & J.-R. Trahan, *Western Legal Traditions & Systems: Louisiana Impact* 172 (2d ed. 2003).

71. See La. Code Civ. P. arts. 3151–59.

72. See 1 A.N. Yiannopoulos, *Louisiana Civil Code* art. 1514, editor's note, at p.301 (2004); Yiannopoulos, *supra* note 26, § 194, at 400.

73. *Succession of Becker*, 704 So. 2d 825 (La. App. 4th Cir. 1997); *Succession of Weidig*, 690 So. 2d 134 (La. App. 1st Cir. 1997); *Morgan v. Leach*, 680 So. 2d 1381 (La. App. 1st Cir. 1996); *Succession of Jones*, 537 So. 2d 825 (La. App. 5th Cir. 1989); *Succession of Watson*, 517 So. 2d 276 (La. App. 1st Cir. 1987).

74. *Weidig*, 690 So. 2d 134; *Morgan*, 680 So. 2d 1381.

75. 835 So. 2d 653 (La. App. 1st Cir. 2002).

half interest in the community, the children asked that he be required to post security, a request to which the district court acceded. On appeal, the husband challenged that determination. The court of appeal, assuming for the sake of argument that the husband had, in fact, acquired a legal spousal usufruct, turned back the challenge. The court's rationale was predicated squarely and solely on Article 3154.1 of the Code of Civil Procedure:

If, as Mr. Richaud contended, he had a usufruct over the decedent's property, the heirs were entitled to obtain security from him pursuant to La. Code Civ. P. Art. 3154.1. Accordingly, we feel the heirs were entitled to this security pending a judicial determination of whether the surviving spouse was, in fact, entitled to a usufruct.⁷⁶

Now, in this case, though there appears to have been an administration, the administrator was not the step-parent—usufructuary (the surviving husband), but rather was one of the step-children—naked owners. Thus, of the two alternative interpretations of Article 3154.1 that presented above, *Richaud* clearly confirms the former and contradicts the latter.

2) *Exclusion of the Usufruct Due to the Disposition of Community Property by Testament*

If a married person dies survived not only by his spouse but also by at least one descendant, that spouse, according to Civil Code Article 890, receives a usufruct (a so-called *legal* spousal usufruct) over the *de cuius*' one-half interest in the couple's community property "to the extent that the decedent has not disposed of it by testament." Making sense of the phrase "disposed of it by testament" has proven difficult.⁷⁷

One might be tempted to interpret the phrase literally. So understood, the phrase would mean that the usufruct is excluded if and to the extent that the testator-*de cuius* spouse makes a donation *mortis causa* of his one-half interest in the community. It was in this fashion that the Louisiana courts first interpreted the provision.⁷⁸

76. *Id.* at 655.

77. Through the years a substantial amount of literature on this topic has accumulated. See William H. Cook, Jr., Note, *Donations—The Effect of a Will upon the Legal Usufruct Created by Article 916 of the Louisiana Civil Code*, 18 La. L. Rev. 574 (1958); Charles G. Gladney, Comment, *The Usufruct of the Surviving Spouse*, 25 La. L. Rev. 873 (1965); Diane M. Lloyd, *supra* note 44; A.N. Yiannopoulos, *Of Legal Usufruct, the Surviving Spouse, and Article 890 of the Louisiana Civil Code: Heyday for Estate Planning*, 49 La. L. Rev. 803 (1989); Frederick W. Swaim, Jr. & Kathryn V. Lorio, *Successions & Donations* § 2.16, at 53–55, in 10 Louisiana Civil Law Treatise (1995); Yiannopoulos, *supra* note 26.

78. See, e.g., *Ludowig v. Weber*, 35 La. Ann. 579 (1883); Succession of

This literal interpretation, however, can lead to absurd results. Suppose that the husband donates his one-half interest in the community—the only property he has—to his wife, but that his children—all of them forced heirs—reduce this donation to the disposable portion. If one follows the literal interpretation, then one would be forced to conclude that the wife would not be entitled to a usufruct on the forced portion.⁷⁹ That property, after all, had been “disposed of by testament.” But such a result makes little sense. If the husband wanted to give his wife the full ownership of all of his community property, then surely, if he had been told that he had to leave part of that property to his children, he had have wanted to give her “the next best thing,” that is, a spousal usufruct over that part.⁸⁰

It was in part to avoid this kind of absurdity that another interpretation was developed, one that might be called “functional.” According to this interpretation, a testator—deceased spouse “disposes of it [his one-half interest in the community] by testament”

Schiller, 33 La. Ann. 1 (1881); Forstall v. Forstall, 28 La. Ann. 197 (1876); Grayson v. Sanford, 12 La. Ann. 646 (1857). These early cases are sometimes cited for the proposition that the deceased spouse has “disposed of” his “share of the community property . . . by testament,” thereby excluding the legal usufruct, any time that he “made a testament.” See, e.g., Cook, *supra* note 75, at 877. This manner of describing the rule of those cases invites misunderstanding. Taken literally, it would suggest that, as far as these courts were concerned, there would be a testamentary disposition of community property, sufficient to exclude the usufruct completely, if the testator spouse were to make a testament in which he gave away (i) only his separate property or (ii) less than all of his community property (as, for example, if a husband whose community property included a tract of land, a house, a boat, and a car, were to make a testament that said only this: “I leave my one-half interest in my boat to Ti-Boy”). These cases, however, say nothing of the kind. In each of them, the testator spouse made a testament in which he had purported to dispose of *all* of his community property. See Schiller, 33 La. Ann. at 1 (the testament provided: “It is my will and desire that *my estate* be distributed among my legal heirs, according to the laws now in force in Louisiana”) (emphasis added); Forstall, 28 La. Ann. at 197 (the deceased “bequeath[ed] to her [his wife] *his share of the community property*”) (emphasis added); Grayson, 12 La. Ann. at 646 (the testament provided: “I will and bequeath to my wife, Ann. L. Sanford, the use of all my property, both personal and real, during her life. However, if any of my children should sue for a partition during her life, I then will and bequeath to her *all of the property that I can dispose of by law*, forever.”). It would be preferable, then, when stating the proposition for which these cases stand, to do so as follows: the deceased spouse “dispose[s]” of his “share in the community property . . . by testament,” so as to exclude the legal usufruct completely, whenever he purports to direct the distribution of the entirety of the community portion of his estate by the terms of a testament. See Cook, *supra* note 75, at 575.

79. That, in fact, is precisely the result the court reached in the infamous case of Forstall, 28 La. Ann. at 197.

80. See generally Swaim & Lorio, *supra* note 75, § 2.16, at 54; Gladney, *supra* note 75, at 880.

only when he makes a disposition of it that is "adverse to" (incompatible with) the spousal usufruct.⁸¹

This interpretation, however, has its own Achilles' heel, namely, its indeterminacy. As Professors Swaim and Lorio, indulging in a bit of understatement, have noted,

[t]he question then becomes one of determining whether the will has indicated the testator's intent to deprive the spouse of the usufruct. Has the testator intended something *adverse* to the application of the usufruct? Interpreting wills to make that determination is not an easy task.⁸²

Like every other determination of "intent," this one is of necessity "fact intensive," that is, requires a discriminating evaluation of each and every fact that might have any tendency to illuminate what the testator was thinking and wanted.⁸³

Employing this approach, the courts have, through the years, identified a number of situations in which it is not appropriate to draw an inference of "adverse disposition." Where the testator grants to his surviving spouse precisely that to which she would have been entitled by law, in other words, where he "merely confirms" the legal usufruct by testament, there is no adverse disposition.⁸⁴ The same is true where the testator grants to his surviving spouse "more" than that to which she would have been entitled by law, for example, full ownership of his community property or full ownership of or a usufruct over his entire estate.⁸⁵ Where the testator disposes of less than all of his community property, there is no adverse disposition with respect to the rest of that property.⁸⁶

81. See Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888); Succession of Glancy, 108 La. 414, 32 So. 356 (1902); *Winsberg v. Winsberg*, 233 La. 67, 96 So. 2d 44 (1957); Succession of Waldron, 323 So. 2d 434 (La. 1975).

82. Swaim & Lorio, *supra* note 75, § 2.16, at 55; see also Lloyd, *supra* note 44, at 1109 ("The unsolved question is what constitutes an adverse disposition.").

83. See generally Yiannopoulos, *supra* note 26, § 193, at 393; Yiannopoulos, *Heyday*, *supra* note 75, at 815; Lloyd, *supra* note 44, at 1109-10.

84. See *Grayson v. Sanford*, 12 La. Ann. 646, 647 (1857); *Fricke v. Stafford*, 159 So. 2d 52 (La. App. 1st Cir. 1963); see also Yiannopoulos, *supra* note 26, § 193, at 394 & 395, & § 196, at 406; Yiannopoulos, *Heyday*, *supra* note 75, at 816 & 825.

85. See *Waldron*, 323 So. 2d at 434; *Winsberg*, 233 La. at 67, 96 So. 2d at 44; *Moore*, 40 La. Ann. at 531, 4 So. at 460; see also Yiannopoulos, *supra* note 26, § 193, at 394, & § 196, at 404, 405, 406; Yiannopoulos, *Heyday*, *supra* note 75, at 817, 817-18, 824 & 825; Lloyd, *supra* note 44, at 1106 & 1108.

86. See *Glancy*, 108 La. at 414, 32 So. at 356; see also Yiannopoulos, *supra* note 26, § 192, at 392, & § 193, at 395; Yiannopoulos, *Heyday*, *supra* note 75, at 814-15 & 817.

One interesting situation that the courts, until recently, had not addressed was that in which the testator, without making any reference to the spousal usufruct, simply disposes of all of his property in favor of his descendants. Among the few scholars (only three in all) who had addressed the question, there was disagreement regarding whether such a disposition supports an inference of "adverse disposition," two holding that it does,⁸⁷ the other, that it does not.⁸⁸

Late last year, a Louisiana appellate court finally weighed in on this question. The case was *Succession of Richaud*,⁸⁹ part of which I reviewed earlier. That case, it will be recalled, involved the succession of a woman who had died survived by her second husband and by three children of her first marriage, none of whom met the definition of "forced heir." In her testament, the woman "bequeathed the entirety of her estate and the residuary estate to her three daughters."⁹⁰ The husband, as was noted earlier, contended that he was entitled to a legal spousal usufruct over the woman's one-half interest in the community property. The district court, finding that the woman had "disposed of it [her share of the community property] by testament,"⁹¹ rejected that contention. On appeal, the husband argued that the district court had misapplied the "adverse disposition rule" in making that ruling.⁹² The court of appeal disagreed. "[W]e believe," the court of appeal wrote, "that leaving one's entire estate to three daughters certainly constitutes an 'adverse disposition'."⁹³ For this reason, the court of appeal affirmed the lower court's ruling "that the surviving spouse is not entitled to a usufruct over the decedent's share of the community property in this case and the heirs are entitled to a

87. Lloyd, *supra* note 44, at 1109; Cook, *supra* note 75, at 577.

88. Gladney, *supra* note 75, at 881.

89. 835 So. 2d 653 (La. App. 1st Cir. 2002).

90. *Id.* at 654.

91. La. Civ. Code art. 890.

92. The husband had an interesting "take" on the adverse-disposition rule. According to him, "a testator must specifically state 'there is no usufruct' in the will. Otherwise, . . . the legal usufruct is confirmed by a testator's silence." 835 So. 2d at 655. The husband's position, then, was that there could be no "adverse disposition" absent an *express* statement by the testator against the usufruct.

See Gladney, *supra* note 75, at 881 ("[T]he strong policy shown by the enactment of Article 916 should dictate some clear indication by the testator that he does not want the surviving spouse to have the usufruct before it will be denied.") To the contrary, the jurisprudence and doctrine both have consistently stated, or at least assumed, that an adverse disposition could be implied or tacit. See, e.g., Yiannopoulos, *Heyday*, *supra* note 75, at 816 ("Sometimes a testator's dispositions implicitly indicate an intention to disclaim the surviving spouse usufruct.") (emphasis added). Indeed, *all* of the major "adverse disposition" cases involve instances of implied or tacit adverse disposition.

93. 835 So. 2d at 655.

declaratory judgment to that effect.”⁹⁴ In reaching this conclusion, the court of appeal, then, aligned itself with the “majority” position within the doctrine.

C. Forced Heirship: “Permanently Incapable” Children: Expanded Definition

Thanks to the “revision” of the law of forced heirship that took place during the last decade, that law, which had theretofore served a variety of purposes—from that of assuring the equitable distribution of estates among descendants to conserving “family property” to deterring the excessive accumulation of wealth⁹⁵—now serves a different, much more modest purpose, namely, to accord some measure of financial support to those survivors of the *de cuius* who, due to their inability to provide for themselves, stand most in need of it.⁹⁶ That, at any rate, is the conventional wisdom regarding the supposed end of the revised law. But if one examines closely the provisions of this law that define “forced heirs,” in particular, Civil Code Article 1493, one soon discovers that the “means” chosen for implementing this supposed “end” are less than perfectly congruent with it. The trouble, in short, is that the recognized categories of forced heirs, considered in relation to this end, are, at once, too broad and too narrow.⁹⁷

Let us begin by considering the respects in which the categories are too broad. It does not require much imagination to devise hypotheticals that involve “forced heirs,” as that term was defined in the revision, who have no need of support whatsoever. Imagine, for example, a child “under 24 years of age” who has this profile: at age 20, upon being graduated *summa cum laude* in engineering from MIT (to which he had a full scholarship), he landed a job with IBM paying \$75,000 a year; now, three years later, at age 23, he is an executive vice-president with an IBM competitor pulling down \$125,000 a year. Such a person, clearly, needs no support from his parents. Or imagine a “permanently incapable” child who has this profile: at age 55, he was the head of a multi-national corporation, which paid him a salary of \$1,000,000 per

94. *Id.*

95. Succession of Lauga, 624 So. 2d 1156, 1160 (La. 1993); see also Katherine S. Spaht et al., *The New Forced Heirship Legislation: A Regrettable “Revolution,”* 50 La. L. Rev. 409, 416 (1990); Cynthia A. Samuel et al., *Recent Developments in the Law, 1983–84 – Successions and Donations*, 45 La. L. Rev. 575, 591–95 (1984); Harriett S. Daggett, *General Principles of Succession on Death in Civil Law*, 11 Tul. L. Rev. 399, 400–02 (1937).

96. Spaht, *supra* note 45, at 640–42 (2000); see also Cynthia Samuel, *Letter from Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage*, 12 Tul. Eur. & Civ. L.F. 183 (1997) (“[F]orced heirship in Louisiana now appears to partake as much of support as it does of inheritance.”).

97. See generally Samuel, *supra* 93, at 183–84.

year and he had a net worth of \$250,000,000; at that time, he suffered a spinal injury in a skiing accident that left him paralyzed from the neck down. However sympathetic a figure this fellow may cut, one cannot say that he "needs support."

Next, let us consider the respects in which the categories are too narrow. Imagine, for example, a child who, just days before his mother's death, turned 24 years of age, but who, thanks to his having "dropped out" of college for what would have been his sophomore and junior years in order to support and take care of his then ailing mother, still had not finished his undergraduate education at the time of her death. Surely this child stands in even greater need of support (and, morally speaking, better merits receiving support) than would a 23 year old who has already finished his undergraduate education or who, though he has not finished, has no such laudable excuse for not having done so. Or, again, imagine a mother with two children, both of whom suffer from "Huntington disease," a genetic disorder with a progressive pathology that inevitably produces, first, physical and mental disability and, finally, death. Suppose that, by the time the mother dies, the older child's disease has already reached the point at which he is "permanently incapable" but that the younger child's has not, though the younger child has already begun to show significant symptoms. The younger child, it seems clear, will soon stand just as much in need of support as does the older. To permit one but not the other to get that support in the form of forced heirship rights smacks of arbitrariness.

This past summer the legislature took a small step toward correcting at least one of these "incongruities" in the revised law of forced heirship, namely, the last of those that I have just illustrated. The legislators did this through the enactment of Act No. 1207, which adds a new paragraph—denominated paragraph (E)—to Civil Code Article 1493 (the Article that identifies forced heirs). The relationship between the original Article and the amended Article is reflected in the following chart:

<i>Original Version</i>	<i>Original Version with Amendments</i>	<i>Amended Version</i>
Art. 1493. Forced heirs ; representation of forced heirs	Art. 1493. Forced heirs; representation of forced heirs	Art. 1493. Forced heirs ; representation of forced heirs
A. Forced heirs are descendants of the first degree who,	A. Forced heirs are descendants of the first degree	A. Forced heirs are descendants of the first degree who,

at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.

B. When a descendant of the first degree predeceases the decedent, representation takes place for purposes of forced heirship only if the descendant of the first degree would have been twenty-three years of age or younger at the time of the decedent's death.

C. However, when a descendant of the first degree predeceases the

who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.

B. When a descendant of the first degree predeceases the decedent, representation takes place for purposes of forced heirship only if the descendant of the first degree would have been twenty-three years of age or younger at the time of the decedent's death.

C. However, when a descendant of the first degree

at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.

B. When a descendant of the first degree predeceases the decedent, representation takes place for purposes of forced heirship only if the descendant of the first degree would have been twenty-three years of age or younger at the time of the decedent's death.

C. However, when a descendant of the first degree predeceases the

d e c e d e n t , representation takes place in favor of any child of the descendant of the first degree, if the child of the descendant of the first degree, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or administering his or her estate at the time of the decedent's death, regardless of the age of the descendant of the first degree at the time of the decedent's death.

D. For purposes of this Article, a person is twenty-three years of age or younger until he attains the age of twenty-four years.

predeceases the d e c e d e n t , representation takes place in favor of any child of the descendant of the first degree, if the child of the descendant of the first degree, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or administering his or her estate at the time of the decedent's death, regardless of the age of the descendant of the first degree at the time of the decedent's death.

D. For purposes of this Article, a person is twenty-three years of age or younger until he attains the age of twenty-four years.

E. For purposes of this Article "permanently incapable of taking care of their persons or

d e c e d e n t , representation takes place in favor of any child of the descendant of the first degree, if the child of the descendant of the first degree, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or administering his or her estate at the time of the decedent's death, regardless of the age of the descendant of the first degree at the time of the decedent's death.

D. For purposes of this Article, a person is twenty-three years of age or younger until he attains the age of twenty-four years.

E. For purposes of this Article "permanently incapable of taking care of their persons or

administering their estates at the time of the death of the decedent" shall include descendants who, at the time of death of the decedent, have, according to medical documentation, an inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future.

administering their estates at the time of the death of the decedent" shall include descendants who, at the time of death of the decedent, have, according to medical documentation, an inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future.

This legislation has been widely criticized, sometimes vociferously. To the extent that the critics have addressed themselves to its merits⁹⁸, they have faulted it on two related grounds: its scope, they say, is (i) radically indeterminate and (ii) infinitely expandable.

98. In addition to attacking the legislation on the merits, many critics have challenged its constitutionality, in particular, have argued that it violates Article 12, § 5 of the Louisiana Constitution of 1974, as amended in 1995. That section reads as follows:

(A) The legislature shall provide by law for uniform procedures of successions and for the rights of heirs or legatees and for testate and intestate succession. Except as provided in Paragraph B of this Section, forced heirship is abolished in this state.

(B) The legislature shall provide for the classification of descendants, of the first degree, twenty-three years of age or younger as forced heirs. The legislature may also classify as forced heirs descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates. The amount of the forced portion reserved to heirs and the grounds for disinheritance shall also be provided by law. Trusts may be authorized by law and the forced portion may be placed in trust.

La. Const. art. 12, § 5 (rev. 1995). Because I do not pretend to have any special competence with respect to constitutional law, I will leave it to others who do to respond to this argument.

the terminology in terms of which the legislation is cast, the meaning of which, they contend, is supposedly novel, vague, and uncertain. Second, considerable uncertainty supposedly surrounds several of the key determinations that must be made under the legislation—first, uncertainty regarding the time at which the presence or absence of the attributes required of the new forced heirs is to be assessed and, second, uncertainty regarding how and by what standard the presence or absence of these attributes is to be proved. The “infinite expandability” of the legislation, the critics charge, stems from the use of the supposedly overly-expansive verb “may” as used in the phrase “disease or condition . . . that *may* render them incapable,” the effect of which may well be (so it is claimed) that “all persons are now forced heirs.” The end result of these deficiencies, the critics maintain, is that the new legislation introduces a radical new uncertainty into the question of “who is a forced heir,” one that will only serve to complicate both estate planning and the handling of successions.

What I propose to do now is to try to answer these criticisms, to the extent that that is possible. In offering this answer—which amounts to a qualified defense of the new legislation—I do not, by any means, mean to suggest that this legislation is altogether free of indeterminacy or “expandability” or other defects and in no way complicates estate planning or the handling of successions. On the contrary, it does, indeed, “muddy the waters” of forced heirship law a bit and, as a result, unavoidably creates new difficulties for those who plan estates and close successions. My argument, rather, is two-fold. First, the indeterminacies in the legislation are not nearly so great or the complications they will cause nearly so troublesome as the critics suggest. That is true, at least, if the only “real” problem (I will admit that there is only one) from which the legislation suffers is promptly fixed. Second, in view of the good that this legislation accomplishes, the cost of these complications is, all things considered, a price worth paying. I will present these two arguments *seriatim* below.

Having answered critics’ charges, I will then offer a “friendly” criticism of my own. My complaint, in short, is that the new legislation does not expand the category of forced heir far enough.

1. My Defense of the New Legislation

a. The Charges Made Against the Legislation Are Exaggerated

The first point of my defense is that critics of the new legislation, in their jeremiads against its supposed deficiencies, have been guilty of gross hyperbole. This is true not only of their complaints both

about its supposed “indeterminacies,” but also of their complaints about its supposed “expandability.” Let us begin by examining the charge of indeterminacy.

The first targets at which the critics take aim are the terms “inherited” and “incurable.” According to the critics, these terms, which they evidently regard as some sort of strange novelties, lack any fixed meaning and, in fact, are susceptible of multiple incompatible interpretations. I disagree.

Though the terms “inherited” and “incurable” are, indeed, “new” to the law of *forced heirship*, they are hardly “new” to the law *in general*. To the contrary, the terms appear—often in tandem—in the legislation of all fifty states of the United States, as well as in that of the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.⁹⁹ In Louisiana alone, the term “inherited” appears in at least

99. The term “inherited,” used as an adjective to such nouns as “disease,” “disorder,” “illness,” or “characteristics,” appears in Ariz. Rev. Stat. §§ 20–826, 20–1057, 20–1342, 20–1402, 20–1404 & 20–2327 (2003); Ark. Code § 23–79–701 (2003); Cal. Gov’t Code § 12926 (2003); Cal. Health & Safety Code §§ 341, 412 & 125225 (2003); Colo. Rev. Stat. § 23–21–202 (2003); Conn. Gen. Stat. §§ 19a–59a, 38a–494c & 38a–518c (2003); Fla. Stat. §§ 393.063, 400.960 & 627.42395 (2003); Haw. Rev. Stat. §§ 346–67, 378–1, 431:10A–118, 431:10A–120, 431:10A–404.5, 432:1–607, 432:1–609, 432:2–404.5 & 432D–26 (2003); 20 Ill. Comp. Stat. 2310/2310–378 & 2310/2310–405; 750 Ill. Comp. Stat. 5/204 & 50/18.1b (form?); Ind. Code §§ 16–38–4–1, 27–8–24.1–1, 27–8–24.1–2, 27–8–24.1–3, 27–8–24.1–4, 27–8–24.1–5, 27–8–24.1–6 & 27–13–7–18 (2003); Ky. Rev. Stat. § 213.141 & 304.17A–139 (Baldwin 2003); Md. Code, Health § 19–705.5, & Ins. § 15–807 (2003); Mass. Gen. Laws ch. 32A, § 17A; ch. 111, § 6D; ch. 175, § 471; ch. 176A, § 8L (2003); ch. 176B, § 4K; & ch. 176G, § 4D (2003); Mo. Rev. Stat. §§ 191/320, 191.331 & 376.1219 (2003); Neb. Rev. Stat. § 71–645 (2003); Nev. Rev. Stat. §§ 689A.0423, 689B.0353, 695B.1923 & 695C.1723 (2003); N.H. Rev. Stat. §§ 415:6–c & 18–e; 420–A:17; & 420–B:8–ff (2003); N.J. Rev. Stat. §§ 17:48–6s, 48A–7q & 48E–35.16; 17B:26–2.1o, 27–46.1r, 27A–7.4 & 27A–19.6; 26:2J–4.17; & 52:14–17.29c (2003); N.Y. Dom. Rel. Law § 13–d (McKinney 2003); N.Y. Ins. Law § 3216, 3221, 4303 (McKinney 2003); N.Y. Pub. Health Law § 2730 (McKinney 2003); N.D. Cent. Code § 26.1–36–09.7 & 54–52.1–04.11 (2003); 3 Pa. Cons.Stat. § 2303 (2003); Tex. Health & Safety Code § 33.001 (Vernon 2003); Tex. Ins. Code §§ 1359.001 & art. 3.79 (Vernon 2003); Utah Code § 31A–22–623 (2003); Vt. Stat. tit. 8, § 4089e (2003); Wis. Stat. § 253.12 (2003).

The term “incurable,” used as an adjective to such nouns as “disease,” “illness,” “condition,” “insanity,” or “person,” or sometimes even as a substantive noun, appears in Ala. Code § 34–24–166 (2003); Alaska Stat. §§ 18.12.010, 18.12.100 & 25.24.050 (Michie 2003); Ariz. Rev. Stat. §§ 23–1045, 32–394, 32–1501, 32–1854, 32–2233, 32–2501, 32–2933 & 36–3262 (2003); Ark. Code §§ 9–12–301, 12–29–404, 17–95–409, 20–17–201 & 20–17–202 (Michie 2003); Cal. Bus. & Prof. Code § 2241 (2003); Cal. Civ. Code § 2983.3 (2003); Cal. Fam. Code §§ 2210, 2310, 2312, 2313, 2331, 2332, 4425, 4506 & 4510 (2003); Cal. Gov’t Code § 26859 (2003); Cal. Health & Safety Code §§ 1368.1, 11217, 10144.1 & 4662 (2003); Cal. Penal Code §§ 667.71, 1170; Cal. Prob. Code §§ 2105, 4658 &

one section of the Revised Statutes¹⁰⁰ and the term “incurable” appears in no less than four sections of the Revised Statutes¹⁰¹ and in

4701 (2003); Cal. Rev. & Tax. Code § 18836 (2003); Cal. Welf. & Inst. Code § 7288 (2003); Colo. Rev. Stat. §§ 12-32-107 & 15-18-103 (2003); Conn. Gen. Stat. §§ 19a-570, 19a-575, 19a-575a, 31-307, 52-175, 52-191c & 53a-56 (2003); 3 Del. Code tit. x, § 7405; 9 Del. Code tit. x., § 8106 (2003); 16 Del. Code tit. x § 2505 (2003); 19 Del. Code tit. x § 2326 (2003); 24 Del. Code tit. x, § 711 (2003); 24 Del. Code tit. x, § 1731 (2003); D.C. Code §§ 4-1101, 7-621, 7-622, 7-651.01 & 24-461 (2003); Fla. Stat. §§ 61.061, 765.102 & 828.05 (2003); Ga. Code §§ 19-5-3, 31-20-3, 31-32-2, 42-5-52 & 43-34-37 (2003); 10 Guam Code § 12209, 12820, 91102 & 91103; 19 Guam Code § 8101 (2003); Haw. Rev. Stat. §§ 327E-16, 386-31, 436E-10, 442-9, 453-8, 455-11, 560-12, 461J-12 & 463E-6 (2003); Idaho Code §§ 32-501, 32-801, 39-4504, 54-1814, 56-1021, 66-405 & 72-407 (Michie 2003); 20 Ill. Comp. Stat. 2310/2310-377; 225 Ill Comp. Stat. 60/53 & 75/19; 750 Ill. Comp. Stat. 50/1; 755 Ill. Comp. Stat. 35/2, 35/3 & 40/10 (form ?); Ind. Code §§ 15-2.1-18.15, 16-36-4-10, 16-36-4-11, 31-15-1-2 & 35-15-2-3 (2003); Iowa Code §§ 144A.2, 144A.3, 153.32, 226.32 & 600.14 (2003); Kan. Stat. §§ 38-315, 44-510c, 65-2837 & 65-28,103 (2003); Ky. Rev. Stat. Ann. §§ 311.595, 311.621, 342.0011, 615.040 (Banks-Baldwin 2003); Me. Rev. Stat. tit. 18-A, § 5-801 & 5-804; tit. 22, § 2842; tit. 39-A, § 212 (2003); Md. Code, Fam. Law § 7-103, & Health § 5-601 (2003); Mass. Gen. Laws ch. 152, § 34A (2003); Mich. Comp. Laws § 418.361 (2003); Minn. Stat. §§ 145B.02, 147.02, 518.06 & 609.215 (2003); Miss. Code §§ 21-29-147, 21-29-255, 41-41-209, 73-25-29, 73-27-13, 93-5-1 & 93-7-3 (2003); Mo. Rev. Stat. §§ 217.250 & 459.010 (2003); Mont. Code §§ 50-9-102, 50-9-103 & 81-2-201 (2003); Neb. Rev. Stat. §§ 20-403, 20-404, 30-3402, 71-148, 71-501.01, 83-339 & 83-340 (2003); Nev. Rev. Stat. 127.040, 449.590, 449.610, 449.613, 449.830, 562.420, 616C.453, 630A.350, 634.018 & 638.1404 (2003); N.H. Rev. Stat. §§ 137-H:2 & 137-H:3 (2003); N.J. Rev. Stat. §§ 36:2-23, 45:11-23 & 45:11-49 (2003); N.M. Stat. §§ 24-7A-4 & 31-21-25.1 (Michie 2003); N.Y. Dom. Rel. Law §§ 140 & 141 (McKinney 2003); N.Y. Pub. Auth. Law §§ 1676 & 1680 (McKinney 2003); N.Y. Pub. Health Law § 3351 (McKinney 2003); N.C. Gen. Stat. § 50-5.1, 90-321, 90-322 & 148-4 (2003); N.D. Cent. Code §§ 14-04-01, 23-06.4-02, 23-06.4-03, 23-07-07, 23-07-20, 43-05-01 & 43-17-31 (2003); Ohio Rev. Code §§ 1337.11, 1337.17, 2133.01, 4730.25, 4731.22, 4741.22 & 4762.13 (2003); Okla. Stat. tit. 43, § 101; tit. 59, §§ 509 & 698.14a; tit. 62, §§ 3080.2, 3101.3 & 3101.4 (2003); Or. Rev. Stat. §§ 127.800, 677.188, 677.190, 684.100, 685.110 & 686.120 (2003); 20 Pa. Cons. Stat. §§ 5403 & 54A03 (2003); Pa. Stat. tit. x, § 201-9.3 (2003); 11 P.R. Laws § 3 & 31 P.R. Laws § 321 (2003); R.I. Gen. Laws §§ 23-4-10-1.1, 23-4.11-2, 23-4.11-3 & 28-33-17 (2003); S.C. Code §§ 44-77-20, 44-78-15 & 62-5-504 (Law. Co-op. 2003); S.D. Codified Laws §§ 25-3-8, 25-4-18, 34-12D-1, 36-4-30, 40-5-9 & 43-31-24 (Michie 2003); Tenn. Code §§ 62-4-127 (2003); Tex. Health & Safety Code §§ 166.002 & 166.033 (Vernon 2003); Tex. Lab. Code § 408.161 (Vernon 2003); Utah Code § 30-3-1 & 58-28-2 (2003); Vt. Stat. tit. 15, § 551, 631, 635; tit. 18, § 5252; & tit. 21, § 644 (2003); Va. Code § 20-89.1 (Michie 2003); 19 V.I. Code §§ 186 & 187 (2003); Wash. Rev. Code § 49.78.020, 70.122.020 & 70.122.030 (2003); W. Va. Code §§ 16-30-3, 30-16-11, 35-2-1, 35-2-4, 48-3-103, 48-3-105 & 48-5-206 (2003); Wis. Stat. § 50.94, 154.01 & 302.113 (2003); Wyo. Stat. §§ 11-19-106, 33-10-110, 33-26-402 & 35-22-102 (Michie 2003).

100. La. R.S. 22:215.22.

101. La. R.S. 37:1285 & 2816; La. R.S. 40:1299.58.3 & 49:1299.61.

one Article of the Children's Code.¹⁰² The charge that these terms are bizarre neologisms is, then, clearly false.

Likewise unpersuasive is the charge that these terms are so indefinite that they could mean nearly anything. That these terms are in such widespread use in legislation, though it provides no guarantee that their meanings are "perfectly clear," does provide, at the very least, some evidence that their meanings are not unworkably amorphous. Indeed, one can not help but wonder why, if the terms "inherited" and "incurable" are as nebulous as the critics insist—so nebulous that they cannot help but invite endless litigation regarding their meanings—, so many legislators in so many places have chosen to use them not just once, but again and again.

Be that as it may, the very way in which these terms are used in this legislation itself suggests that their meanings are, in fact, quite clear. In not one of these pieces of legislation did the legislators find it necessary to offer up a definition for either of those terms; to the contrary, in many of those pieces of legislation the legislators used *those* terms to define *other* terms. This shows that, at least in the judgment of these legislators, the meanings of those terms is so clear as to be self-evident.

This judgment, by the way, is entirely sound: no one who bothers to consult either a common dictionary or a dictionary of medical terms could possibly doubt it. No matter which dictionary one may happen to consult, one finds the same simple definitions repeated over and over. The term "inherited" means "genetically transmitted from one generation to the next."¹⁰³ The term "incurable" means "not capable of being cured,"¹⁰⁴ and "cure," in turn, means "restoration to health" or "recovery from an illness."¹⁰⁵

"But," the critics of the new legislation retort, "it is unclear whether the determination of 'inheritedness' is to be made generically or individually." As the critics correctly note, some *diseases*, though they are normally contracted by genetic transmission, can in certain unusual cases have some non-genetic cause, for example, infection or injury.¹⁰⁶ Such a disease, the critics contend, might well be considered "inherited" not in the sense of "always and only inherited"

102. La. Ch. C. art. 1557.

103. Churchill's Illustrated Medical Dictionary 944 (1989) ("inherited").

104. Churchill's Illustrated Medical Dictionary 933 (1989) ("incurable"); Blackiston's Gould Medical Dictionary 669 (4th ed. 1979) ("incurable");

105. Churchill's Medical Dictionary 454 ("cure"); Gould Medical Dictionary 343 ("cure").

106. This is true, for example, of certain types of cancer: though in the typical case the cause is (in whole or in part) "genetic," in some cases the cause may be a virus, a physical agent (e.g., radiation), or a chemical (i.e., "carcinogens"). See Lawyers' Medical Cyclopedia §§ 38.6-38.10c (Charles J. Frankel et al. eds., 3d ed. 1984).

but rather in the sense of "usually inherited." And so, the critics ask, "What is one to say of a person who suffers from a disease that, though normally contracted genetically, he did not in fact inherit, that is, that he contracted through some other cause? Does he have an 'inherited disease'?"

This objection fails. Had the legislators intended that the determination of "inheritedness" be made on the basis of the characteristics typical of the *disease*, without regard to whether, in any given case, the disease of the particular purported forced heir had, in fact, been inherited, then they would have used the term "inheritable"—meaning that which can be, but need not necessarily be, inherited—not the term "inherited."

"But," the critics of the new legislation protest, "it is unclear whether a disease should be considered 'incurable' if, though its *root cause* cannot be eliminated, its *symptoms* can be controlled or perhaps even erased through effective 'treatment'." As a result, the objection continues, it is unclear whether a person who suffers from some disease, that, though ineradicable in terms of its causes, can be successfully treated if and when its symptoms finally manifest themselves, can claim "forced heir" status under the new law.

This objection, too, is without substance. In medical writing on the topic of "inherited, incurable diseases" (which is abundant), authors not uncommonly note that many diseases, though "incurable," are nonetheless "treatable." Consider, for example, the following excerpt from the Merck Manual of Diagnosis and Therapy, a standard medical reference work: "A common misconception is that some cancers are *untreatable*. Although the cancer may be *incurable*, the patient can be treated."¹⁰⁷ Here is another example, this one taken from the Lawyers' Medical Cyclopeda: "A recently developed drug, acyclovir (Zovirax) is now the *treatment* of choice [for *herpes simplex* type II] It reduces the number of infectious virus particles and the time required for an active infection to clear, but it does not *cure* the patient."¹⁰⁸ Finally, there is this example from the Attorneys' Textbook of Medicine: "Diabetes mellitus has no known *cure*, but its effective *treatment* can extend the patient's life and increase his comfort."¹⁰⁹ Underlying these statements (as well as countless others I could provide) is the notion that insofar as a disease or medical condition is concerned, "cure" is one thing and "treat" another, specifically, that "cure" means to eliminate the root cause of

107. The Merck Manual of Diagnosis and Therapy § 11, ch. 144 (17th ed. 2003).

108. 1 Lawyers' Medical Cyclopeda of Personal Injuries and Allied Specialties § 7.19, at 151 (James G. Zimmerly & Richard M. Patterson eds., Supp. 1992).

109. 3A Roscoe N. Gray & Louise J. Gordy, Attorneys' Textbook of Medicine ¶ 74.71, at 74-34 (Lois L. Caswell et al. eds., 3d ed. 1991).

the disease or condition, so that its symptoms cease to recur, whereas “treat” means merely to control, suppress, or alleviate the symptoms, which will recur if and when the treatment ceases. It seems reasonable to assume that the legislature, in drafting Article 1493(E), did so with this very commonly-recognized distinction in mind. Because that is so, it is reasonable to conclude that the expression “incurable disease,” as used in that paragraph, includes diseases that are “treatable.” If the legislature had intended to exclude “treatable” diseases from the scope of the paragraph, it could and undoubtedly would have said so, that is, added the word “untreatable” after the word “incurable.”

To this answer to their objection, the critics have something of a rebuttal (or so they think). “If one who suffers from an ‘inherited, incurable’ but ‘treatable’ disease that ‘may,’ in the future, ‘render [him] incapable of caring’ for himself or his property, at least if his disease is not ‘treated,’ qualifies as a forced heir, then what is to prevent him from forgoing treatment for the very purpose of assuring that he will end up being ‘incapable’ and, on that basis, will qualify as a forced heir? Would not such conduct constitute a ‘fraud on the law’?”

The rebuttal is not convincing. The truth is that to the extent that this objection identifies a real problem,¹¹⁰ it is not “new”: it was present under the original law as well. Roll back the clock to one year ago, before the enactment of the new paragraph, and consider this example. There is a person who, at the time of his parent’s death, suffers from an already full-blown case of severe bi-polar disorder. If he takes his lithium (that is, submits to “treatment”), which (we will suppose) he can afford to do financially and presents no significant adverse health risks to him, he can lead a normal life. But if he does not, he quickly loses his bearings to the point that he can not care for his person or his property. One could well have asked, “Is such a person ‘permanently incapable’ or not?” And the answer to the question would not have been clear, for the old law did not specify whether and, if so, under what circumstances, one should, in assessing someone’s “permanent incapacity,” take the “treatability” of his disease or condition into account.¹¹¹ Thus, the “problem” that

110. The probability that a person would, by willingly forgoing affordable and safe treatment, allow himself to become “permanently disabled” in order to qualify as a forced heir is remote. Except in the most extraordinary circumstances, a rational person would find the “cost” of this “benefit” just “too high.”

111. For what it is worth, my own opinion on this question of the “old law” is that a person who suffers from some “treatable” condition that, if left untreated, would render him “permanently incapable” of caring for himself or his property should nevertheless not be regarded as “permanently incapable” and, therefore, should not qualify as a forced heir if (i) he can afford to pay for the treatment

the critics have identified is one that plagued the old law no less than the new. Not only that, but whatever solution one might work out for the problem under the old law would work just as well as a solution for the problem under the new law. Suppose we said that our hypothetical sufferer from bi-polar disorder would *not* qualify as a forced heir under the old law, on the theory that, inasmuch as his condition was safely and affordably treatable (by lithium ingestion), he could not be regarded as now "permanently incapable." By the same token, then, one who, at the time of the *de cuius*' death, had just begun to show the symptoms of bi-polar disorder, but had not yet developed a full-blown case of it, but who, if he should later develop a full-blown case of it, could afford to undergo the same treatment (lithium ingestion) without significant risk, would *not* qualify as a forced heir either, for it could not be said of him that he suffers from a disease or condition that "may render him *permanently incapable*" in the future. As a matter of standard English usage, it can be said that some cause "may render" a person into some state or condition (we will call it A) in the future only if it is possible that this person might, as a result of that cause, "become A" in the future. Now, for any thing X to "become A," it must be the case that, at some point in the future, it will be possible to say that X "is *now* A." Here in our case, there is no such possibility: *if* we deny the title "permanently incapable" to a person who now suffers from some disease whose symptoms, at present, are such that they would render him "permanently incapable" were his disease not treated, but whose disease can now be safely and affordably treated, *then* with respect to a person who suffers from a disease whose symptoms can be safely and affordably treated if and when they eventually present themselves (X), there will not and cannot ever come a time at which it would be appropriate to say of him, "He is now permanently incapable."

In addition to the "indeterminacy" criticisms I have just reviewed, which are focused on the terminology of the new legislation, the critics, as I noted earlier, add several others that, for convenience of exposition, can be collected under two headings. Some of the complaints concern the supposed indeterminacy of the "burden of proof" that is to govern the determinations that must be made under the new legislation, for example, that of whether the supposed forced

without experiencing financial hardship and (ii) the treatment is one that a "reasonable" person who suffers from that condition would agree to undergo. I base this opinion on my appreciation of the purpose of the "revised" law of forced heirship, which, as we have seen, is to provide a modicum of financial support for the *de cuius*' economically vulnerable descendants. See La. Civ. Code art. 10. That purpose would be defeated if one were to exclude from the class of "forced heirs" those who can avoid "permanent incapacity" only by incurring substantial costs or taking inordinate risks.

heir in fact has some disease or condition or that of whether this disease or condition is, in fact, inherited and incurable.

That takes care of the “indeterminacy” objections; now let us deal with the “infinite expandability” objection. This criticism, as I noted earlier, is focused on the verb “may” as it is used in the phrase “disease or condition that may render them incapable . . . in the future.” The word “may,” so say the critics, is a sign for “mere contingency”: it can be said that a certain thing “may” happen so long as there is “any possibility” at all, no matter how remote it may be, of this thing’s occurring. According to the critics, there are few, if any, diseases or conditions of which it could not be said that there is at least “some chance” that it might, in the future, cause the person who suffers from it to become permanently incapable, even if the chance is infinitesimal (say, 1/1,000,000). As one lawyer in New Orleans is reported to have quipped, “Heck, every single lawyer in my office has some medical problem that *may* render him incapable in the future.” And so, the critics charge, the new legislation, acting through the “back door” as it were, comes close to reproducing the “old” law of forced heirship, that under which *all* descendants of the *de cuius* qualified as forced heirs.

This argument rests on a mistaken assumption, namely, that the term “may” is univocal, that is, has one and only one possible meaning—*mere* contingency. A moment’s reflection on how the term “may” is used in everyday speech points at the mistake. Suppose that one day I notice that my daughter, who is heading out to play on a sunny day, is taking an umbrella with her. Puzzled, I ask, “What’s up with the umbrella?” In reply she says, “Well, the other day, as I left to go out to play, Mom told me that I should take my umbrella with me ‘because it may rain today.’ And so, this morning, I checked the Weather Channel to see if it ‘may rain’ today. According to the forecast, there’s a 5% chance of rain today. So, I’m taking my umbrella with me.” At this point, I would be entitled, I think, to conclude that she does not understand what the term “may” as it is used in the phrase “because it may rain” really means (or, perhaps, that she is a bit daft). Here, *in this context*, the term “may” points not to *mere* contingency, but to *significant* contingency. Thus, “may” does not always mean “if there is *any* possibility, no matter how remote it may be”; to the contrary, sometimes it means “if there is a *significant* possibility.”

Now, as the term “may” is used in Article 1493(E), it has this latter, more restricted, sense. That this is (and must be) so becomes clear when one interprets the Article “teleologically,” that is, in the light of its purpose (*telos*),¹¹² and in a way that pays proper respect to

112. La. Civ. Code art. 10; *see also* Kenneth Murchison & J.-R. Trahan,

the principle that interpretations which lead to “absurd consequences” ought to be resisted.¹¹³ The purpose of the legislation was not, of course, to re-create the “old” law of forced heirship, but rather was, as I have already explained, to extend the “support” benefits of the new law of forced heirship to yet another group of economically vulnerable successors, namely, those who, though still in good health and still fully capable of caring for themselves and their property at the time of the *de cuius*’ death, will later lose that capability due to some inherited, incurable disease. If the term “may” as used in the new legislation were to be interpreted as a sign for *mere* possibility, then the legislation in all likelihood would end up forcing property distributions in countless situations in which, at the end of the day, the possible “permanent incapacity” would never in fact materialize. Imagine a certain inherited, incurable disease X that has a 1% probability of at some point reducing its victim to “permanent incapacity.” If everyone who suffers from this disease were entitled to claim forced heirship status (and did so), then the “final outcome” of the legislation, with respect to these persons, would be this: out of every one hundred of them, ninety-nine would have received forced shares of estate property that they never, in fact, “needed.” In these ninety-nine cases, of course, the purpose behind the new legislation would not have been furthered at all. The drafters of the legislation could not possibly have intended such an outcome, that is, one in which the final results are so far out of line with the objective sought. Indeed, one might even, with some justification, speak of such an outcome as absurd. The only way to avoid this absurd result, of course, is to read the legislation in such a way that it will produce a tighter “fit” between final results and objective sought. And the only way to do that is to interpret the word “may” in such a way that it refers to some probability that is more substantial than *mere* contingency. In short, given the *purpose* of the new legislation, it would be *absurd* to interpret the term “may” so expansively that it means “any possibility at all, no matter how remote”; rather, it must be interpreted to mean something like “a significant possibility.”

b. The Good that the Legislation Accomplishes is Worth its Cost

The second point of my defense is that any increased indeterminacy or uncertainty that the new legislation may have injected into the law of forced heirship is “worth it.” It must not be

Western Legal Traditions & Systems: Louisiana Impact 176, 178 (2d ed. 2003).

113. La. Civ. Code art. 9; see also Kenneth Murchison & J.-R. Trahan, Western Legal Traditions & Systems: Louisiana Impact 171–72 (2d ed. 2003).

forgotten that “freedom of testation” and “ease of application of law” and “efficient administration of justice”—the very values that the critics of the new legislation believe it threatens—are by no means the *only* values that are at stake in this affair. Alongside these, there is at least one other: it is, if I may borrow a phrase from St. James, “to look after orphans . . . in their distress.”¹¹⁴ The very purpose of this new legislation, it must be recalled, is to bring under the protective umbrella of the law of forced heirship yet another group of “vulnerable” successors of the *de cuius* – a group that, improvidently and unjustifiably in my judgment, was not covered by the law of forced heirship as it was originally revised—namely, those who, though not yet in fact “permanently incapable” at the time of the *de cuius*’ death, stand a reasonable chance of becoming so thereafter. To do this not only is consistent with the purported purpose of the revised law of forced heirship; it is also highly desirable in itself, both as a matter of political economy and as a matter of ethics. In my judgment, the goods achieved by this new legislation—bringing the letter of the law into closer alignment with its spirit; protecting the public fisc; and, most important of all, enhancing the morality of our law—are worth the “costs.” Though this may be a judgment with which reasonable persons can disagree, it is not, as some of the critics of the legislation have asserted, unreasonable.^{115, 116}

114. *James* 1:27 (RSV).

115. I suspect that the critics of the new legislation, most of whom are practicing attorneys who do “successions work,” will scoff at this proposition. “This,” they may well say, “is an opinion only an ‘academic’ – one cloistered away in his ivory tower, far removed from the ‘reality’ of legal practice – could hold. If he ever had to deal with a succession in which the new legislation was implicated, he’d feel differently.”

When it comes to assessing the costs of the new legislation, then, the “practitioners” do have an advantage over the “academics.”

But there’s more to evaluating legislation than just assessing its costs: one must also assess the good that it will accomplish. And it is with respect to this other evaluation that the practitioner may well be at a disadvantage. The practitioner, of course, invariably—and quite properly—identifies with his clients (that’s his job): their needs and wants are his needs and wants; what frustrates them frustrates him; what pleases them pleases him. Now, when it comes to “successions attorneys,” few there be who’ve built their careers representing “forced heirs.” No, their clients are (i) persons who want to plan their estates and /or (ii) beneficiaries of those plans. And it is these persons, of course, who will, in the course of time, find the new legislation to be a source of irritation, for it will, as we’ve seen, make the planning of estates and the execution of estate plans (incrementally) less certain. Is it at least possible that many “successions attorneys,” by virtue of their close identification with clients such as these, may have difficulty arriving at an “objective” assessment of the good that the new legislation will accomplish—something that their clients do not themselves personally experience—or of making an “objective” judgment about whether that good

outweighs the costs of the new legislation—something that their clients do personally experience?

What prompts me to ask this admittedly presumptuous question is my own experience as a practicing lawyer. When I was in practice, where I did a tremendous amount of “environmental law” work—most of it for major industrial clients—, I had little, if anything, good to say about environmental legislation or regulations, be it or they federal or state. The legislation and regulations all struck me as poorly written, in no small measure because they were, at many points, irritatingly “indeterminate” (or so it seemed to me then). Not only that, but the good that many of the statutes or regulations were supposed to achieve struck me as obscure or speculative or both, while the costs (including frustration of well-laid, investment-backed industrial expansion plans) were ever before me. Now, some eight years out of practice, I perceive things a bit differently. From my vantage point here in the “ivory tower,” I can now see, much more clearly than I ever could before, the interests of those to whom the interests of my former clients were opposed as well as the value of giving at least some measure of protection to those interests, even if it be at the expense of the interests of my former clients.

Just as it’s possible to be “too far” from a situation to understand it properly, it’s also possible to be “too close” to a situation to get a proper perspective on it.

116. Rumor has it that the enemies of forced heirship, who are greatly piqued at the enactment of Act 1207, have decided to retaliate thereto by seeking an amendment to the state constitution that would abolish forced heirship entirely. Such an extreme measure is called for, they say, because without it the friends of forced heirship will never stop trying to secure the enactment of legislation like Act 1207 and, from time to time, will even succeed.

This plan, if it in fact exists, can be faulted on two scores. (i) First, the plan is directed against a phantom. The chance that another piece of legislation like Act 1207 will ever again be enacted is slight indeed. That is so for two reasons. (α) For one thing, this act, constitutionally speaking, “pushes the envelope” about as far as it can possibly go. Of all the items on the “wish list” of the friends of forced heirship—a list that includes extending coverage to incapable ascendants and siblings, just to mention a few—that which is instantiated in Act 1207—extending coverage to future incapables—is the *only* one that is even *arguably* constitutional. Any attempt to extend coverage to other persons, for example, incapable ascendants, would be so patently unconstitutional that no one in his right mind would ever try it. (β) For another thing, the enactment of Act 1207 was made possible only by a temporary alignment of political interests that is about as likely to be repeated as it is likely that lightning will strike the same place twice. (ii) Second, the plan is socially irresponsible. Unlike the “old” law of forced heirship, the “new” provides special inheritance rights only to those descendants of the *de cuius* who are the most economically vulnerable—those who are too young or too incapacitated to be self-supportive. If anyone “deserves” *post mortem* financial support, these people do, something that even the freedom-of-testation-obsessed “common law” states, some of which have now set up schemes for *post mortem* financial support, have finally begun to recognize. See generally Christina Donato Saler, Comment, *Pennsylvania Law Should No Longer Allow a Parent’s Right to Testamentary Freedom to Outweigh the Dependent Child’s “Absolute Right to Child Support,”* 34 Rutgers L.J. 235 (2002). To abolish the law of forced heirship without instituting some other means of meeting the needs of these “orphans” and “handicapped persons” is an act so callous that it would make even Satan’s courtiers wince.

2. My "Friendly" Criticism of the New Legislation

Though the criticisms that the opponents of Article 1493(E) have directed against it prove, upon close analysis, to be unfounded, the legislation is not, in my judgment, entirely above criticism. To the contrary, it seems to me that the legislation is open to at least one major criticism, one that the "unfriendly" critics of the legislation would never themselves even be able to see, much less be willing to voice: the legislation is too narrow, arbitrarily so. As it is written, the legislation limits its benefits to those "future incapables" whose future incapacity stems from some disease or condition that is "inherited." It would be better—more consistent with the purpose of the legislation—to extend these benefits to *all* future incapables, regardless of what may be the cause of the future incapacity. Imagine a child of the *de cuius* who, at the time of the *de cuius*' death, suffers from asbestosis, which he contracted as a result of his exposure to asbestos in the workplace. If this person's condition deteriorates to the point at which he can no longer care for himself, will he not stand as much in need of assistance as would a child who, at the time of the *de cuius*' death, suffered from some degenerative condition that he had inherited? My point is this: given the purpose of the new legislation, which is to accord the advantages of forced heirship to those who, though not yet incapable of caring for themselves when their ancestors die, are likely to become so incapacitated in the course of time, what matters is not *why* they will become incapable, but rather and only *that* they will become incapable. For these reasons, I would recommend that the word "inherited" be removed from the legislation.

II. DONATIONS

A. Capacity to Donate: Interdiction & Inability to Understand

Art. 395. Capacity to make juridical acts

A full interdict lacks the capacity to make a juridical act, except as otherwise provided by law. A limited interdict retains the capacity to make a juridical act, except as otherwise provided

Art. 395. Capacity to make juridical acts

A full interdict lacks the capacity to make a juridical act; ~~except as otherwise provided by law.~~ A limited interdict ~~retains the~~ lacks capacity to make a juridical act pertaining to the

Art. 395. Capacity to make juridical acts

A full interdict lacks the capacity to make a juridical act. A limited interdict lacks capacity to make a juridical act pertaining to the property or aspects of personal care that the judgment of

by law or the judgment of limited interdiction. A judgment of interdiction does not remove the capacity of the interdict to make or revoke a disposition mortis causa, except as otherwise provided by law, but it does remove the capacity of the interdict to make a donation inter vivos.

Art. 1482. Proof of incapacity to donate

A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation inter vivos or executed the testament. However, if the donor made the

property or aspects of personal care that the judgment of limited interdiction places under the authority of his curator, except as provided in Article 1482,—except as otherwise provided by law or in the judgment of limited interdiction. A judgment of interdiction does not remove the capacity of the interdict to make or revoke a disposition mortis causa, except as otherwise provided by law, but it does remove the capacity of the interdict to make a donation inter vivos.

Art. 1482. Proof of incapacity to donate

A. A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation inter vivos or executed the testament. However, if the donor made the

limited interdiction places under the authority of his curator, except as provided in Article 1482 or in the judgment of limited interdiction.

Art. 1482. Proof of incapacity to donate

A. A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation inter vivos or executed the testament.

donation or executed the testament at a time when he was judicially declared to be mentally infirm, then the proponent of the challenged donation or testament must prove the capacity of the donor by clear and convincing evidence.

~~donation or executed the testament at a time when he was judicially declared to be mentally infirm, then the proponent of the challenged donation or testament must prove the capacity of the donor by clear and convincing evidence.~~

B. A full interdict lacks capacity to make or revoke a donation inter vivos or disposition mortis causa.

B. A full interdict lacks capacity to make or revoke a donation inter vivos or disposition mortis causa.

C. A limited interdict, with respect to property under the authority of the curator, lacks capacity to make or revoke a donation inter vivos and is presumed to lack capacity to make or revoke a disposition mortis causa. With respect to his other property, the limited interdict is presumed to have capacity to make or revoke a donation inter vivos or disposition mortis causa. These

C. A limited interdict, with respect to property under the authority of the curator, lacks capacity to make or revoke a donation inter vivos and is presumed to lack capacity to make or revoke a disposition mortis causa. With respect to his other property, the limited interdict is presumed to have capacity to make or revoke a donation inter vivos or disposition mortis causa. These

presumptions may
be rebutted by a
preponderance of
the evidence.

presumptions may
be rebutted by a
preponderance of
the evidence.

To understand the new legislation, one must first understand the old. It was in large part to eliminate certain perceived deficiencies in the old that the new was enacted.

The edifice of "old law," that is, the law as it stood prior to the amendment, was constructed in two phases. The first phase, completed in 1991, was part of a substantial Civil Code revision project, one that covered all of Chapter 2, Title II, Book III of the Civil Code, a chapter entitled "Of the Capacity Necessary for Disposing and Receiving by Donation Inter Vivos or Mortis Causa." The second phase, completed in 2000, was part of yet another substantial Civil Code revision project, this one of Title IX, Book I of the Civil Code, a title entitled "Of Persons Incapable of Administering their Estates, Whether on Account of their Insanity or Some Other Infirmary, and of Their Interdiction and Curatorship."

Let us begin by looking at "phase 1." Its contribution to the "old law" consisted of two Articles—Article 1477 and Article 1482. The former (1477) described the basic mental capacity necessary for a donor, namely, that one must "be able to comprehend generally the nature and consequences of the disposition." This Article made no mention of interdiction. That topic was left to the latter Article (1482). Under that Article, a judgment of interdiction¹¹⁷ did not, in itself, strip the interdict of capacity to donate, be it *inter vivos* or *mortis causa* (in other words, interdiction produced no *per se* incapacity). Instead, the interdict was merely *presumed* to lack the basic mental capacity required of a donor, as that capacity was described in Article 1477, so that, if a donation made by an interdict were challenged under that other Article, then the proponent of the donation would bear the burden of proving that the interdict, notwithstanding his interdiction, nevertheless had this basic mental capacity.

Though the legislation enacted in "phase 1" was, relatively speaking, free of serious technical problems, one aspect of it did strike many (myself included) as curious, at least as a matter of policy. This "curiosity" was that the legislation did not create a *per se* incapacity for the interdict. Such a result seemed anomalous in

117. When Article 1482 was enacted, the law of interdiction did not distinguish judgments of interdiction into various grades, such as "full" and "limited." This distinction would not be injected into that law until the year 2000. See La. Civ. Code arts. 389 & 390 (rev. 2000).

the light of the kind of “competency” finding that a judgment of interdiction necessarily entailed and in the light of the other, non-donative capacity effects that such a judgment produced. In order to obtain a judgment of interdiction under the law that was then in force, the petitioner had to prove that the target of the interdiction action was “subject to an habitual state of imbecility, insanity or madness.”¹¹⁸ Thus, what the new legislation on donative capacity did was to accord this capacity to persons who had been adjudged “habitually mad.” And that is strange, indeed, especially when one considers that, under the law that was then in force, such a person suffered from a *per se* incapacity to transfer his property onerously.¹¹⁹ Now, which kind of transfer poses a greater threat to the interdict: one by gratuitous title or one by onerous title?

Next, let us consider the second phase. Its contribution to the “old law” consisted of one Article—Article 395, entitled “Capacity [of interdicts] to make juridical acts.” This Article, first of all, set out a rule regarding the effects of a judgment of interdiction upon the capacity of an interdict to make juridical acts in general, a rule that distinguished “full” and “limited” interdicts. According to the Article, whereas the former lacked capacity to make juridical acts (except as otherwise provided by law), the latter retained that capacity (except as otherwise provided by law). The term “juridical act,” which refers to any act of will that is aimed at producing the very legal consequences that, by law, are attached to such an act,¹²⁰ was certainly broad enough to include donations. After this general rule, the Article next laid down a special rule for capacity to make donations. According to the Article, whereas a “judgment of interdiction” did not deprive the interdict of the capacity to make a donation *mortis causa*, it did deprive him of the capacity to make a donation *inter vivos*.

The completion of this second phase of the “construction” of the “old law,” obviously enough, created a few problems. The first problem was “internal” to article 395 itself. And the problem was this: it was not at all clear whether the term “interdiction,” as used in the special rule laid down for donative capacity, referred to “full” interdiction, to “limited” interdiction, or to both. The second, and

118. La. Civ. Code art. 389 (1870).

119. La. Civ. Code art. 1918.

120. Kenneth Murchison & J.-R. Trahan, *Western Legal Traditions & Systems: Louisiana Impact* 554, 561–63 (2d ed. 2003); A.N. Yiannopoulos, *Civil Law System: Louisiana & Comparative Law* § 236, at 447 (2d ed. 1999); Saúl Litvinoff & W. Thomas Tête, *Louisiana Legal Transactions: The Civil Law of Juridical Acts* vi (1969).

much more serious, problem was "relational," specifically, involved the relationship between Article 395 and Article 1482. There was, in fact, a clear and undeniable antinomy between the two Articles insofar as the capacity of an interdict to donate *inter vivos* was concerned: whereas the former provided that the interdict lacked such capacity, period, end of story (in other words, this Article created a *per se* incapacity with respect to donations *inter vivos*), the latter provided that the interdict was merely *presumed* to lack such capacity, a presumption that could possibly be rebutted (in other words, this Article created only a presumption of incapacity with respect to donations *inter vivos*). How this antinomy should have been resolved was less than entirely clear. Perhaps the most plausible way of resolving it would have been to invoke the principle of "implied abrogation": when a new law is enacted that "contains provisions that are contrary to, or irreconcilable with, those of the former law," the former law is deemed to have been superseded by the new law to the extent of the inconsistency. On this theory, as between the contradictory rules for the capacity of interdicts to donate *inter vivos* laid down in Articles 395 and 1482, the former would have prevailed. But who could be certain?

The new law alters the old in two respects. First, it expands in certain respects the *per se* incapacity to donate that results from certain judgments of interdiction. Second, it alters the rules that govern the proof of mental incapacity; in particular, it changes the effects that certain judgments of interdiction have upon that proof. In the process of effecting these changes, the new law clears away many of the uncertainties that were created by "phase 2" of the construction of the old law.

Under the new legislation, both a judgment of full interdiction and a judgment of limited interdiction creates an incapacity to donate (a *per se* incapacity). That resulting from full interdiction is total, that is, it extends to both kinds of donations—*inter vivos* and *mortis causa*—and to all of the interdict's property. That resulting from limited interdiction is partial, and that in two respects: first, it extends only to donations *inter vivos* (not to donations *mortis causa*) and, second, it extends only to property that, by virtue of the interdiction order, has been confided to the care of his curator (not to property not addressed in the order).

Under the new legislation, a judgment of limited interdiction, in addition to creating a *per se* incapacity under the circumstances described above, also alters the normal rules for proof of mental incapacity to make donations in other circumstances. The normal rules are these: (i) the person who challenges the donor's mental capacity bears the burden of proof—in other words, mental capacity

is presumed—and (ii) the standard of proof is clear and convincing evidence. These rules are altered in two different situations.

The first is that in which the limited interdict attempts to make a donation *mortis causa* of property that, by virtue of the interdiction order, has been confided to the care of his curator. With respect to this kind of donation of such property, the donor is presumed to lack mental capacity—in other words, the person defending the donor's capacity bears the burden of proof—and the standard of proof is merely a preponderance of the evidence.

The second is that in which the limited interdict attempts to make either a donation *mortis causa* or *inter vivos* of property that has not been confided to the care of his curator. With respect to either kind of donation of such property, the donor is still presumed to have mental capacity—in other words, the person who challenges the donor's mental capacity still bears the burden of proof, but the standard of proof is now “lowered” from clear and convincing evidence to a mere preponderance of the evidence.

With perhaps one exception, the new legislation is unexceptionable as a matter of policy. The exception concerns the rule that the legislation sets up for the capacity of a limited interdict to make or revoke donations *mortis causa* of property that is under the authority of his tutor. That rule, again, is that the interdict suffers from no particular incapacity. There are at least two problems here. First, the rule is inconsistent with the rule that the legislation sets up for the capacity of a full interdict to make or revoke donations *mortis causa* of property that is under the authority of his tutor. A full interdict, it will be recalled, is *per se* incapable of making such donations. Second, the rule still bears within it the anomalous “curiosity” that plagued the original version of Article 1482. Why one who has been determined to lack the ability to consistently make “reasoned decisions” regarding certain property (a prerequisite to a judgment of limited interdiction) should nevertheless be deemed capable of donating that property *mortis causa* defies understanding.

Though the new legislation, with this one exception, is sound as a matter of policy, it nevertheless exhibits a number of irksome technical defects. Let us start with new Article 395. After stating that “[a] limited interdict lacks capacity to make a juridical act pertaining to the property or aspects of personal care that the judgment of limited interdiction places under the authority of his curator,” the second sentence adds “except as provided in Article 1482 or in the judgment of limited interdiction.” The language used suggests that the proposition “a limited interdict lacks capacity to make a juridical act pertaining to the property or aspects of personal care that the judgment of limited interdiction places under the authority of his curator” is a general rule, one that admits of

exceptions, and that at least one such exception is to be found in Article 1482. That other Article, however, far from setting out an exception to the “general rule” of Article 395, sent. 2, merely confirms it categorically: according to paragraph C of Article 1482, “[a] limited interdict, with respect to property under the authority of the curator, lacks capacity to make or revoke a donation *inter vivos*.” Thus, the phrase “except as provided in Article 1482,” as used in Article 395, is superfluous: it refers to nothing.

Now, let us look at new Article 1482. Here we encounter at least three closely related, yet conceptually distinct, technical flaws.

First, the heading of the Article is now incommensurate with its content. According to that heading, Article 1482 concerns “proof of incapacity to donate.” To some extent, specifically, to the extent that the Article still contains “evidentiary” rules on assignment of the burden of proof, standards of proof, and presumptions, the heading remains accurate. In addition to those rules, however, the Article now contains rules of a very different kind, specifically, “substantive” rules that establish a new incapacity (as opposed to a mere presumption of incapacity), namely, a *per se* incapacity due to interdiction. To take account of these other rules, the heading should have been changed accordingly.

Second, the Article is now thematically incoherent. The two sets of rules it now contains differ not only in kind, but also in subject matter. On the one hand, the evidentiary rules pertain to the incapacity to donate due to “mental condition of the donor,” which is established by Article 1477. That is the particular “incapacity to donate” the “proof” of which is governed by those rules.¹²¹ On the other hand, the substantive rules pertain to the newly-minted incapacity to donate due to interdiction, an incapacity that, alongside the incapacity to donate due to the mental condition of the donor established by Article 1477 and the incapacity due to minority that is established by Article 1476, forms a third distinct, independent and free-standing incapacity.

Third, Article 1482 is not the proper place within the series of Articles of which it is a part in which to set out the new substantive rules. To the contrary, the new substantive rules belong among the “earlier” Articles that recognize and enumerate the various

121. See Frederick William Swaim, Jr. & Kathryn Venturatos Lorio, *Successions and Donations* § 10.4, at 251, in 10 Louisiana Civil Law Treatise (1995) (“Revised Article 1482 deals with the proof necessary to invalidate a donation due to *mental* incapacity.”) (emphasis added); see also Succession of Miller, 803 So. 2d 1021 (La. App. 2d Cir. 2001) (interpreting Article 1482 as a statement of rules of proof for proving up mental incapacity under Article 1477); Succession of Chauffepied, 775 So. 2d 555 (La. App. 3d Cir. 2000) (same).

incapacities rather than among the “later” Articles that concern proof of those incapacities. The general plan underlying the original arrangement of the chapter of which these Articles are a part (Chapter 2, Title 2, Book III of the Civil Code) is as follows:

- I. Capacity in general, both to give and to receive (arts. 1470–1474)
 - A. General principle of capacity (art. 1470)
 - B. Time at which capacity *vel non* must be assessed (arts. 1471–1474)
 1. Capacity to give (art. 1471)
 2. Capacity to receive (art. 1472–1474)
 - a. General principle (art. 1472)
 - b. Exceptions (arts. 1473–1474)
 - 1) Conditional donations (art. 1473)
 - 2) Conditional donees: unborn children (art. 1474)
- II. Specific capacities (arts. 1471–1483)
 - A. Capacity to receive (art. 1475)
 1. Sanction for incapacity to receive: nullity (art. 1475)
 - B. Capacity to give (arts. 1476–1483)
 1. Enumeration of incapacities, sometimes with sanctions¹²² (arts. 1476–1481)
 - a. Incapacities properly so called: enumeration (arts. 1467–1477)
 - 1) Incapacity due to minority (art. 1467)
 - 2) Incapacity due to mental condition (art. 1467)

122. This part of the chapter (i.e., that which concerns the enumeration, etc. of the various incapacities), as it was originally constructed, exhibits a disturbing lack of “symmetry.” Whereas there are provisions (actually, two Articles) that spell out the sanction for a donation made by a donor whose consent is not free due to fraud, duress, or undue influence (arts. 1480 and 1481), there is no corresponding Article that spells out the sanction for a donation made by a donor who is incapable of donating due to minority or mental condition. This omission becomes all the more puzzling when one considers that there is also an Article, set out earlier in the chapter, that spells out the sanction for a donation made to a *donee* who is incapable of *receiving* (art. 1475). If the chapter is going to spell out the effects of incapacity to receive and the effects of vitiated consent, should it not also spell out the effects of incapacity to give? Of course it should.

It is the failure of the drafters of the “new” Articles on the law of successions and donations (i.e., those revised after 1990) to attend to this and other technical niceties (see the footnotes below) that has justly earned those Articles the unenviable label “neo-barbarian.” See A.N. Yiannopoulos, *Requiem for a Civil Code: a Commemorative Essay* 19 & 21 (2002).

- b. Pseudo-incapacities (vices of consent)¹²³ (arts. 1478–1481)
 - 1) Enumeration
 - a) Fraud (art. 1478)
 - b) Duress (art. 1478)
 - c) Undue influence (art. 1479)
 - 2) Sanctions
 - a) Effect on the donation (art. 1480)
 - b) Effect on the perpetrator (art. 1481)
- 2. Proof of incapacities
 - a. Proof of mental incapacity (art. 1482)
 - b. Proof of vices of consent (art. 1483)

Obviously enough, the proper place within this system for new substantive rules that set up a new “true” incapacity to receive is not II.B.2, but rather II.B.1.a.¹²⁴

B. Consent to Donate: Vices: “Undue Influence”

Between 1808 and 1990, the civil law of Louisiana ruled “out of bounds” challenges to donations based on what, in common law jurisdictions, has long been and still is known as “undue influence.” Article 1492 of the Civil Code of 1870, like Article 1479 of the Civil Code of 1825 and Article 18 of Book III, Title II of the Digest of 1808 before it, prohibited the introduction of “[p]roof . . . of the dispositions having been made through . . . suggestion or

123. The inclusion of the Articles on “fraud,” “duress,” and “undue influence” within this chapter represents another embarrassing technical gaff. This chapter, so says its heading—“Chapter 2. Of the Capacity Necessary for Disposing and Receiving by Donation Inter Vivos or Mortis Causa”—, is about “capacity.” Now, even a first-year student of the civil law knows that “fraud,” “duress,” and the like pertain not to “capacity” but to “consent” (to be precise, to the “freedom” of consent), which, in the law of juridical acts, is a prerequisite for validity that is conceptually distinct from that of capacity. This fundamental distinction is reflected throughout the Civil Code, most notably in Book III, Title IV which concerns the law of contracts. See, e.g., La. Civ. Code arts. 1918 et seq. (which appear in a chapter entitled “Chapter 2. Contractual Capacity and Exceptions”) and arts. 1927 et seq. (which appear in a separate chapter entitled “Consent”).

This technical defect could (and should) have been avoided in either of two ways. First, the provisions on “fraud,” “duress,” and “undue influence” might have been set off in a separate chapter. Second, the heading of chapter 2 could have been reworded to reflect the chapter’s “consent”-related content (e.g., “Chapter 2. Of the Capacity and Consent Necessary for Disposing and Receiving by Donation Inter Vivos or Mortis Causa”).

124. Those who would like to see what the legislation might have looked like had its authors incorporated my technical suggestions should direct their attention to Appendix A.

captation.”¹²⁵ The rationale underlying this prohibition was eloquently set forth in *Succession of McDermott*:

The authors of our Civil Code intended “to forever banish from the courts a species of litigation which, except in very rare instances, originates in disappointment, rancor, or covetousness; which offers a strong temptation for perjury and subornation of perjury; which feeds on scandal and calumny; and which penetrates within the charnal house to pour obloquy upon the ashes of the departed.”¹²⁶

In short, the point of the prohibition was to protect the memory of the *de cuius* against selfishly-motivated and perhaps even fabricated attacks on his character and competence.

Though many today seem to be unaware of it, the introduction of this prohibition into Louisiana law, which took place in 1808, represented something of an innovation, one that set Louisiana apart from most of the rest of the civil law world.¹²⁷ Under the law that was in force in Louisiana during the first French colonial period,¹²⁸ nothing prohibited one from challenging a donation on the ground that it was the product of “suggestion” or “captation.”¹²⁹ To the

125. The precise relationship between the civil law notions of “suggestion or captation,” on the one hand, and the common law notion of “undue influence,” on the other, has long been debated. See Laurie Dearman Clark, Comment, *Louisiana’s New Law on Capacity to Make and Receive Donations: “Unduly Influenced” by the Common Law?*, 67 Tul. L. Rev. 183, 221–22 (1992); Katherine Spaht et al., *The New Forced Heirship Legislation: A Regrettable “Revolution”*, 50 La. L. Rev. 409, 469–70 (1990); Wood Brown III, *Fraud, Undue Influence and Captation in Wills—A Comparative Study*, 34 Tul. L. Rev. 585, 591–92 (1960); Edmond Nathaniel Cahn, *Undue Influence and Captation: A Comparative Study*, 8 Tul. L. Rev. 507 (1934). The position I’ve adopted here—that the two are, in terms of their content, virtually indistinguishable—reflects what, in my estimation, is the present consensus among Louisiana civil law scholars. See Clark, *supra*, at 222; Spaht et al., *supra*, at 470; Brown, *supra*, at 592.

126. 136 La. 80, 87–88, 66 So. 546, 548 (1914).

127. Challenges to donations based on “suggestion” or “captation” are (and have long been) permitted in many civil law jurisdictions. In some of these jurisdictions (the majority), suggestion and captation are treated as a special species of fraud; in others, as vices similar to, yet distinct from, fraud. Examples include France, Spain, Italy, Argentina, and Brazil.

128. This law included, among other things, the *Coutume de Paris* and the various ordinances of the French kings. J.-R. Trahan, *The Continuing Influence of Le Droit Civil and El Derecho Civil in the Private Law of Louisiana*, 63 La. L. Rev. 1019 (2003).

129. See Brown, *supra* note 126, at 591; see also 1 Baron Jean Grenier, *Traité des Donations, des Testaments et de Toutes Autres Dispositions Gratuites* no 143, at 423 (4th ed. 1826) (“There was recognized in the ancient legislation an action whereby testamentary dispositions could be annulled upon proof of facts of *captation* or *suggestion*. The state of seduction or obsession in which one imagined

contrary, such challenges were entirely permissible. The same seems to have been true under the law of the Spanish colonial period.¹³⁰

Be that as it may, Louisiana's "experiment" with its novel prohibition against challenges to donations based on suggestion and captation or undue influence came to an end in 1991. In that year the Louisiana Legislature, through Act No. 363 of the Regular Session, enacted new Article 1479, which provided (and still provides) as follows:

A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of undue influence by the donee or another person that so impaired the volition of the

the testator excluded his liberty of mind"); 6 Philippe Antoine Merlin, *Suggestion* § I, I, in *Répertoire Universel et Raisonné de Jurisprudence* 759 (5th ed. 1828) ("It is a certain principle, and one consecrated by Article 47 of the Ordinance of 1735, that suggestion annuls those acts of liberality that are its handiwork."); l'Ordonnance de 1735 art. 47 (adding, after what purported to be an exhaustive list of the grounds for the nullity of donative instruments, "Without prejudice to other means [of nullification] drawn from the suggestion or captation of the said acts."); 1 Jean-Marie Ricard, *Traité des Donations Entre-Vifs et Testamentaires* pt. III, ch. 1, nos 1 & 5, at 467-68 (1783) ("*Despice concupiscentes hæreditatem tuam, & dividentes jam inter se substantiam tuam, qui non te, sed patrimonium tuum diligunt: Imò qui cupiditate rerum tuarum te execrantur, non respicias adulationes eorum, gladii sunt jugalatores tui. Salvian. ad Eccles. Cath. Lib. 3.* [Despise those who, striving after your estate and already dividing among themselves your substance, esteem not you but your patrimony: Nay, give no heed to the flattery of those who are cursed by lust for your goods; they will cut your throat with a sword.] It is not only out of favor for heirs and of concern to conserve successions for those who are called to them by law that we must favorably hear false inscriptions and the means of suggestion that are proposed against testaments: The public is likewise interested in this, as much because every supposition contains in itself a species of furtiveness and larceny, which always stimulates public vengeance, as because it is a question of protecting the infirm against traps that are set up for them (*gladii sunt jugalatores tui*); . . . [the] public interest . . . is always engaged in the protection of the weak For these reasons, we do not doubt . . . [that it is appropriate] to receive proof of all sorts of facts, be they by criminal or civil procedures, when they are of the quality of those that we have just expressed . . . , as, in particular, falsity and suggestion")

130. In the so-called *de la Verne Manuscript*, an ancient copy of the Digest of 1808 that is widely believed to have belonged to Moreau-Lislet (the principal drafter of the Digest), the annotation to Article 18 is "empty," that is, *no* sources are cited. *Id.* at 212. Because Moreau-Lislet (or whoever else may have written the *Manuscript*) diligently cited all of the Spanish and Roman law authorities he could find that bore any resemblance to the rules set forth in the Digest, one can safely infer that, in the case of the rule of Article 18, there were no such authorities. This inference is confirmed by the research of Professor Batiza, who has identified the final paragraph of Article IV, Book III, Title II of the *Projet du gouvernement* for the French *Code Civil* as the true "source" of Article 18. See Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4, 85 (1971) (App. C).

donor as to substitute the volition of the donee or other person for the volition of the donor.

Though the *substance* of this legislation was not altogether “new” to Louisiana (inasmuch as French and Spanish law, as we have seen, allowed attacks on donations based on suggestion or captation), its *form* was a different matter. The legislators, instead of resurrecting Louisiana’s ancient civil law notions of “suggestion or captation” and then modernizing them in the light of developments that have occurred in other civil-law jurisdictions in the past two centuries, simply imported the analogous common law notions of “undue influence.”

The legislature’s decision in 1991 to “reverse course” with respect to claims for suggestion and captation or undue influence, it bears noting and remembering, was intimately connected with its decision in that same year to change the law of forced heirship in various respects, indeed, almost certainly would not have been made but for that other decision. As Professor Katherine Spaht has recently explained,

the legislative intent was “to afford some protection to otherwise vulnerable descendants,” who had previously been protected from disinheritance by the institution of forced heirship. Thus, unlike common law jurisdictions where undue influence had developed first to protect the testator’s autonomy and then to protect “family members,” the legislature envisioned undue influence as a narrowly targeted protective device. Undue influence constituted the legislature’s protective response to the severe curtailment of forced heirship, in other words principally for the sake of *otherwise unprotected descendants*.¹³¹

Thus, the return of suggestion and captation or undue influence was designed as a “consolation prize” for those descendants who had “lost out” under the revised law of forced heirship.

To date, the recognition of claims based on suggestion and captation or undue influence has proved to be cold comfort for those it was intended to protect. Since 1991, claims of undue influence have been treated in nineteen appellate court opinions.¹³² In only two of

131. Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What’s Become of Disinheritance, and the Unfinished Business of the Stepparent Usufruct*, 60 La. L. Rev. 637, 648 (2000) (citations omitted) (emphasis original); see also Katherine Shaw Spaht, *What We Had and What We Lost*, 43 Loy. L. Rev. 43, 48 (1997); Succession of Reeves, 704 So. 2d 252, 264 (Yelverton, J., dissenting).

132. See Appendix B.

these did the claimant succeed,¹³³ that is to say, the failure rate for such claims has been 89.5%.

Some critics of the new legislation (myself included), pointing to the high failure rate of undue influence claims,¹³⁴ charge that the institution has thus far “failed” to do its job, that is, to protect the donor’s descendants from successorial piracy. Though it is less than entirely clear what is responsible for this failure, there would seem to be at least two possibilities.

First, the standard of proof that undue influence claimants must normally meet—“clear and convincing evidence”—may simply be “too high.”¹³⁵ This was, in fact, the applicable standard of proof in ten of the fourteen cases in which such claims were rejected on the merits. One can not help but wonder whether the results in at least a few of these cases might not have been different had the applicable standard of proof been that of “preponderance of the evidence,” the ordinary standard of proof in “civil” cases.¹³⁶

Second, it could be that the courts (or at least some of them) have interpreted the new legislation too restrictively. The notorious case of *Succession of Reeves*¹³⁷ provides an illustration of this unfortunate phenomenon. Not long after divorcing his first wife (who had born him ten children), Reeves, an attorney, began dating and soon married Jarrett, a much younger woman who was a friend of one of his daughters. Nearly a decade later, after he was diagnosed with cancer, Reeves made out a testament in which he left one-half of his estate to

133. See Appendix B. The two cases that feature successful undue influence claims are *Kraus v. Wheat*, 856 So. 2d 45 (La. App. 4 Cir. 9/3/03) and *Succession of Lounsberry*, 824 So. 2d 409 (La. App. 3 Cir. 2002).

134. The failure rate is “high” not only in absolute terms, but also in comparative terms. Between 1977 and 1999, American appellate courts decided 177 “undue influence” cases. Of these, 66 were successful and 11, unsuccessful. Thus, nationwide the failure rate for such claims is only 62.7%. Eunice L. Ross & Thomas J. Reed, *Will Contests* § 7:14, at 7–85 (2d ed. 1999).

135. The rules governing the standards of proof applicable to claims of undue influence, which are found in Article 1483, consist of (i) a general rule and (ii) an exception. The general rule is that such claims must be proved by “clear and convincing evidence.” By way of exception, the claim need be proved only by a “preponderance of the evidence” if (i) there is a “relationship of confidence” between the alleged undue influencer and the donor and (ii) the alleged undue influencer and the donor are not related to each other by affinity (i.e., marriage), consanguinity (i.e., blood), or adoption. Thus, if the alleged undue influencer and the donor are relatives of each other, then the applicable standard is “clear and convincing evidence,” even if there should exist between them a relationship of confidence.

136. This problem was foreseen by many of the critics of the original law of undue influence, among them Professor Spaht. See Spaht, *What We Had*, *supra* note 132, at 48. Their warnings went—and still go—unheeded.

137. 704 So. 2d 252 (La. App. 3d Cir. 1997).

Jarrett in full ownership and the other one-half to his children in naked ownership, subject to a usufruct in Jarrett's favor. After Reeves's death, which occurred three months later, the children challenged the testament on the ground that it had been procured through Jarrett's "undue influence." The principal form of this influence, the children argued, was "sexual extortion." According to the children's expert medical witness (a forensic psychiatrist), Reeves had an "extreme need for love and sexual intercourse . . . [and] for companionship" and deeply feared "being alone."¹³⁸ Jarrett exploited these weaknesses, the children contended, by threatening to abandon him and, therewith, to deprive him of sexual intercourse if he did not do as she asked. The trial court, finding this evidence persuasive, voided the testament. On appeal, a highly divided appellate court (the split was three to two) reversed that judgment. In the course of the "opinion of the court," which managed to garner only two votes,¹³⁹ the author made a number of statements regarding the law of "undue influence" that raised more than a few eyebrows in Louisiana's legal community. Here are those statements, which, for convenience of reference, I shall refer to as "Reeves rules 1, 2, and 3:"

(1) *Reeves* rule 1: "[W]hile we are unable to categorically state that the charge of undue influence can never be leveled against a surviving spouse who is the main beneficiary of a testament by her spouse . . . , we do believe that a surviving spouse is not the intended target of Article 1479. . . ." ¹⁴⁰

(2) *Reeves* rule 2: The elements of the standard "common law" test for assessing claims of undue influence – "susceptibility," "opportunity," "disposition," and "coveted result" – "are almost totally meaningless in determining whether a person might have exerted undue influence" "[i]n a case such as the present . . . where a spouse is the recipient of the testator's bounty."¹⁴¹

(3) *Reeves* rule 3: "What then would be the proper inquiry as to undue influence on the part of a spouse? Several come to mind: physical abuse, emotional abuse, fraud, deceit, or criminal conduct" ¹⁴²

138. *Id.* at 258.

139. The author of the "opinion of the court," Judge Saunders, *id.* at 253, was joined by only by Judge Woodward, *id.* at 261 (Woodward, J., concurring). Judge Doucet simply "concur[red] in the result." *Id.* at 261 (Doucet, J., concurring). Judges Amy and Yelverton dissented. *Id.* at 261 (Amy, J., dissenting) & at 264 (Yelverton, J., dissenting).

140. *Id.* at 258.

141. *Id.* at 259.

142. *Id.* at 259.

The upshot of all three rules is that, if claims of undue spousal influence can be received at all, then they must meet certain additional heightened requirements if they are to succeed.¹⁴³

Because the *Reeves* case has already been thoroughly and ably criticized—with devastating effect, in my judgment—by my colleague, Professor Katherine Spaht,¹⁴⁴ there would be little point in my now setting forth a full-blown critique of my own. There is, however, at least one respect in which I might be able to supplement the good professor's critique.

As I pointed out earlier, Louisiana derived its law of "undue influence" from the "common law" tradition. It might, therefore, be worth asking whether, within that tradition, there is any sort of support to be found for the curious rules that were adopted by the *Reeves* court, in other words, if there is any "historical basis" for those rules.¹⁴⁵ My own survey of doctrinal writing on and jurisprudential decisions involving "undue influence" in other American states convinces me that the answer to this question is "no."

Let us consider, first, the doctrine. The topic of "undue influence" has been treated in scores of writings by American legal scholars. The principal works (at least of the last century) include treatises of wills by Page,¹⁴⁶ Thompson,¹⁴⁷ and Rollison¹⁴⁸; Atkinson's hornbook on wills¹⁴⁹; and the two Restatements on "donative transfers."¹⁵⁰ Though not yet "classics" like the other treatises and hornbooks, two recent works—one entitled "Will Contests," written by Judge Ross and Professor Reed, the other, entitled "Wills, Trusts, and Estates"—also merit special mention.¹⁵¹ The authors of some of

143. See Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinheritance, and the Unfinished Business of the Stepparent Usufruct*, 60 La. L. Rev. 637, 649 (2000).

144. *Id.* at 647–55.

145. To tell the truth, Professor Spaht explored this question, too. See Spaht, *Remnant*, *supra* note 144, at 651–52. But the tack she took in answering it differs a bit from my own.

146. 1 William J. Bowe & Douglas H. Parker, *Page on the Law of Wills* §§ 15.1–15.13, at 711–43 (1960) (originally written by William Herbert Page).

147. George W. Thompson, *The Law of Wills* §§ 142–47, at 223–32 (3d ed. 1947).

148. William D. Rollison, *The Law of Wills* §§ 67–69, at 118–23 (1939).

149. Thomas E. Atkinson, *Handbook of the Law of Wills* § 55, at 255–62 (2d ed. 1953).

150. Restatement (2nd) of Property: Donative Transfers § 34.7, at 302–11 (1990); Restatement (3rd) of Property: Wills and Other Donative Transfers § 8.3, at 143–64 (2001).

151. Eunice L. Ross & Thomas J. Reed, *Will Contests* §§ 7:1–21, at 7–1–7–109 (2d ed. 1999); William M. McGovern, *Wills, Trusts and Estates* § 7.3, at 281–91

these works do point out that claims of undue influence made against surviving spouses are (relatively speaking) difficult to win,¹⁵² possibly because courts allow “greater latitude . . . between husband and wife with respect to persuasion or suggestion, because of the marital relation.”¹⁵³ But none of the authors even intimates, much less expressly states, that spouses are not among the “intended targets” of the law of undue influence (*Reeves* rule 1); that the standard test for evaluating claims of undue influence, as applied to claims made against surviving spouses, is “meaningless” (*Reeves* rule 2); or that a claim of undue spousal influence, to be successful, must be predicated on proof of “physical abuse, emotional abuse, fraud, deceit, or criminal conduct” (*Reeves* rule 3). To the contrary, all of them note that a spouse can, indeed, be guilty of undue influence¹⁵⁴ and, further, suggest that claims of undue spousal influence are evaluated on the same basis as are other undue influence claims. As Thompson notes,

where either spouse is charged with having overcome the volition or free agency of the other, resort may be had to proof of circumstances to establish the charge, and if the evidence shows that the testator disposed of his property differently than he would have done if he had been left free to exercise his own judgment, the will is invalid.¹⁵⁵

Next, let us consider the jurisprudence. In the past several decades, the appellate courts of the other American states decided dozens of cases in which it was alleged that the testator’s spouse (usually a “second,” “third,” etc. . . spouse) had “unduly influenced” the testator.¹⁵⁶ Though the courts ultimately rejected the claims of

(2d ed. 2001).

152. Ross & Reed, *supra* note 152, § 7:14, at 7–86, & § 7:15, at 7–86–7–87; McGovern, *supra* note 152, § 7.3, at 286.

153. Thompson, *supra* note 148, § 144, at 228; *see also* Rollison, *supra* note 149, § 67, at 120 (“But if she [the wife] has specially exerted such influence to procure a will of such kind as to be peculiarly acceptable to her, and to the prejudice and disappointment of other who have claims to the testator’s bounty, the influence is undue.”).

154. *See, e.g.,* Atkinson, *supra* note . . . , § 55, at 258 (“The influence of a mistress is not necessarily undue, while that of a wife under certain circumstances may be so regarded.”).

155. Thompson, *supra* note 148, § 144, at 228.

156. *See, e.g.,* Ruestman v. Ruestman, 111 S.W.3d 464 (Mo. App. 2003); Estate of Lachmich, 541 N.W.2d 543 (Iowa App. 1995); Estate of Montgomery, 881 S.W.2d 750 (Tex. App. 1994); Estate of Pendleton, 1993 WL 97521 (Ark. App. 1993); Morse v. Volz, 808 S.W.2d 424 (Mo. App. 1991); Fields v. Mersack, 577 A.2d 376 (Md. App. 1990); McKee v. Stoddard, 780 P.2d 736 (Or. App. 1989); Hodges v. Hodges, 692 S.W.2d 361 (Mo. App. 1985); *Water’s Estate*, 629 P.2d

undue influence in the vast majority of these cases, in none of them did the court ever suggest that the "bar" which the claimant had to jump over was somehow "higher" when the alleged "undue influencer" is the testator's spouse. To the contrary, in each and every one of these cases, the court applied to the claim of undue spousal influence the same standards that courts of its jurisdiction apply to every claim of undue influence, even those that involve "strangers."¹⁵⁷ Not only that, but in at least a few of these cases, the courts found that the testator's spouse had "unduly influenced" the testator and, on that basis, struck down the wills.¹⁵⁸ In not one of those cases, however, did those who challenged the will even allege, much less produce evidence, that the testator's spouse had engaged in "physical abuse, emotional abuse, fraud, deceit, or criminal conduct."¹⁵⁹ An apt summary of the American courts' attitude toward claims of undue spousal influence can be found in this quip from the Maryland Court of Appeals: "a wife's importuning of a husband, while perhaps more understandable and less blameworthy [than importuning by others], [i]s no less importuning and affected whether the will expressed the decedent's will or that of his wife."¹⁶⁰

For these reasons, one can safely conclude that the history of the institution of "undue influence" provides no warrant for drawing the kind of distinction between spouses, on the one hand, and other potential "undue influencers," on the other, that the *Reeves* court recognized. Thus, not only is the *Reeves* rule inconsistent with the texts and the purposes of the pertinent Civil Code Articles—that which Professor Spaht has already convincingly demonstrated; it also is an historical novelty, one wholly without "precedent."

470 (Wyo. 1981); *Henderson v. Sims*, 591 S.W.2d 593 (Tex. Civ. App. 1979); *Gill v. Gill*, 254 S.E.2d 122 (1979); *Hall's Estate v. Milkovich*, 492 P.2d 1388 (1972); *Hannah v. Hannah*, 461 S.W.2d 852 (Mo. 1971); *Steffke's Estate*, 179 N.W.2d 846 (1970); *Ritter's Estate*, 168 N.W.2d 588 (1969); *Kishfy v. Kishfy*, 241 A.2d 827 (1968); *Hughes v. Averza*, 161 A.2d 671 (1960); *Hammonds v. Hammonds*, 297 S.W.2d 391 (1957); *See v. See*, 293 S.W.2d 225 (Ky. 1956); *Lindinger v. Lindinger*, 130 N.E.2d 75 (1955); *Street v. Street*, 22 So. 2d 35 (1945); *Teel's Estate*, 154 P.2d 384 (1944); *Martin v. Martin*, 166 N.E. 820 (Mass. 1929); *Emery v. Emery*, 111 N.E. 287 (1916); *see also Reddaway's Estate*, 329 O.2d 886 (1958) (the claim was that the testator's spouse, along with others, had unduly influenced the testator to destroy his will).

157. This finding is inconsistent with *Reeves* rule 2.

158. *Fields*, 577 A.2d at 376; *McKee*, 780 P.2d at 736; *Water's Estate*, 629 P.2d at 470; *Street*, 22 So. 2d at 35; *Teel's Estate*, 154 P.2d at 384; *Martin*, 166 N.E. at 820; *Emery*, 111 N.E. at 287; *see also Reddaway's Estate*, 329 P.2d at 886 (finding testator's spouse guilty of having "unduly influenced" testator to destroy will).

It's worth noting that the mere fact that there's even one "undue influence" decision in which the court found against a second spouse negatives *Reeves* rule 1.

159. This finding is inconsistent with *Reeves* rule 3.

160. *Fields*, 577 A.2d at 378.

Despite the manifest and multiple deficiencies in *Reeves*, its pernicious influence continues to be felt. That became clear late last year when the Second Circuit announced its decision in *Succession of Cooper*,¹⁶¹ another case of alleged (second) spousal “undue influence.” After the death of his first wife, the donor, Cooper, “began seeing” a certain Juanita. Though Cooper’s children (by his first wife) were initially cool to the relationship, they eventually reconciled themselves to it. Nearly two decades later, after Cooper suffered a debilitating stroke, Juanita began to care for Cooper in his home. A month or so later, Cooper and Juanita, without the knowledge of Cooper’s children, were married in Cooper’s home by a justice of the peace. A few days after that, Juanita showed up at Cooper’s bank, marriage license in hand, asking that her name be placed on all of Cooper’s accounts. Bank officials, after putting her off by telling her that she would need to obtain a “power of attorney” from Cooper to make such changes, informed Cooper’s son Gary, a co-signatory on Cooper’s accounts, of these developments. Gary responded by setting up a new account in his name and the name of his sister, Patsy, and then transferring into this account the funds that had been in his joint accounts with Cooper. According to the children, Juanita, upon learning of the funds transfer, told Cooper that they had “stolen” his money. In addition, the children claimed, Juanita told Cooper that they wanted to put him in a nursing home, further poisoning his relationship with them. A few days later, Cooper made out a testament (which his attorney had brought to him at his home) in which he left everything to Juanita, save for \$1 to each of his children. After Cooper’s death, the children challenged the testament, arguing that it was the product of Juanita’s “undue influence” over Cooper. The trial court, relying on *Reeves*, turned back the challenge. The children appealed from that judgment, arguing that the trial court had “erroneously interpreted *Reeves* to stand for the proposition that a spouse cannot be guilty of undue influence.”¹⁶² The court of appeal affirmed the judgment. In doing so, the court largely side-stepped the question of “what *Reeves* means.” After rejecting the contention that the trial court had interpreted *Reeves* as the children had alleged (an allegation that, if the truth be told, had more merit to it than the court of appeal let on), the court of appeal made no further mention of that case. Instead, the court seems to have evaluated the evidence on the basis of the texts of and comments to Articles 1479 and 1483 themselves, without the benefit of any particular jurisprudential “gloss” on the Articles, whether derived from *Reeves* or elsewhere. According to the court, that evidence, so evaluated, was “circumstantial at best, if not mere assumption.”¹⁶³

161. 820 So. 2d 1087 (La. App. 2d Cir. 2002).

162. *Id.* at 1092.

163. *Id.* at 1093.

Though the *Cooper* court is to be applauded for its not having repeated any of the errors of the *Reeves* opinion, it can nevertheless be criticized for its having failed to avail itself of this ideal opportunity to repudiate those errors. Until the courts of appeal openly denounce *Reeves*, it will, like a kind of judicial Sirens' song, continue to lead trial courts off course into error.

When the standard of proof falls to a "preponderance of the evidence"¹⁶⁴ and when the court does not interpret Article 1479 in an unduly restrictive manner, the claimant has at least a chance of success. That this is so is proved by the recent case of *Kraus v. Wheat*.¹⁶⁵ After his wife of forty-three years died, the donor, Kraus, who had depended on his wife for nearly everything (personal care included), was devastated. Soon he was befriended by a neighbor, Wheat, who began to help him around the house. In time, as Kraus's confidence in Wheat grew, he began to seek her advice on a number of matters, including his finances. On her advice, he hired her attorney to open his former wife's succession. One month later, again on her advice, he "signed some papers" at the office of her notary. These papers included an act of donation whereby Kraus purported to donate to Wheat his interest in his house and lot. What Wheat told Kraus about the papers prior to his signing them was disputed. According to Kraus, Wheat told him that the papers would simply facilitate her ability to care for him, as a result of which Kraus, who did not read the papers, assumed they contained some sort of "power of attorney." According to Wheat, Kraus knew full well that the papers included an act of donation. In fact, Wheat claimed, Kraus had told her that he wanted to give her his house and lot so that his grandchildren would not get it. In any event, some months later Kraus, claiming he had only then discovered that he had made an act of donation to Wheat, filed suit against her to have the donation nullified, arguing that he had been the victim of Wheat's "undue influence." At the trial, Kraus's version of events was backed by the testimony of just one witness, his son's girlfriend; that of Wheat, by her attorney, her notary, and her daughter. After making appropriate determinations of credibility and weighing the evidence, the trial court concluded that Kraus had met his burden of proving undue influence by a preponderance of the evidence and, on that basis, set the donation aside. That determination was affirmed on appeal.

164. That happens when (i) there is a relationship of confidence between the alleged undue influencer and the donor and (ii) they are not relatives of each other. See *supra* note 135 (explicating La. Civ. Code art. 1483).

165. 856 So. 2d 45 (La. App. 4th Cir. 2003).

APPENDIX A

Art. 1476. Minors; incapacity to make donations, exceptions

A minor under the age of sixteen years does not have capacity to make a donation either *inter vivos* or *mortis causa*, except in favor of his spouse or children.

A minor who has attained the age of sixteen years has capacity to make a donation, but only *mortis causa*. He may make a donation *inter vivos* in favor of his spouse or children.

Art. 1476.1. Interdicts; incapacity to donate

A. A full interdict lacks capacity to make or revoke a donation *inter vivos* or disposition *mortis causa*.

B. A limited interdict, with respect to property under the authority of the curator, lacks capacity to make or revoke a donation *inter vivos*, except as provided in the judgment of limited interdiction.

Art. 1477. Capacity to donate, mental condition of donor

To have capacity to make a donation *inter vivos* or *mortis causa*, a person must also be able to comprehend generally the nature and consequences of the disposition that he is making.

Art. 1478. Nullity of donation procured by fraud or duress

A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of fraud or duress.

...

Art. 1481. Fiduciary appointment, termination

Any person who, whether alone or with others, commits fraud or exercises duress or unduly influences a donor within the meaning of the preceding Articles, or whose appointment is procured by such means, shall not be permitted to serve or continue to serve as an executor, trustee, attorney or other fiduciary pursuant to a designation as such in the act of donation or the testament or any amendments or codicils thereto.

Art. 1482. Proof of incapacity to donate due to mental condition

A. A person who challenges the mental capacity of a donor must prove by clear and convincing evidence that the donor lacked that capacity at the time the donor made the donation *inter vivos* or executed the testament.

B. A limited interdict, with respect to property under the authority of the curator, is presumed to lack mental capacity to make or revoke a disposition *mortis causa*. With respect to his other property, the limited interdict is presumed to have mental capacity to make or revoke a donation *inter vivos* or disposition *mortis causa*. These presumptions may be rebutted by a preponderance of the evidence.

Art. 1483. Proof of fraud, duress, or undue influence

A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. However, if, at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.

APPENDIX B

Appellate Opinions Treating of Claims of Undue Influence
 (arranged in reverse chronological order)

19 Kraus v. Wheat, 856 So.2d 45, 2003-0393 (La.App. 4 Cir. 9/3/03), La.App. 4 Cir., Sep 03, 2003	Neighbor (non-relative)	Preponderance	Successful	Sufficient evidence
18 Succession of Gilbert, 850 So.2d 733, 37,047 (La.App. 2 Cir. 6/5/03), La.App. 2 Cir., Jun 05, 2003	Caretaker (non-relative)	Preponderance	Failed	Insufficient evidence
17 Haynes v. Haynes, 848 So.2d 35, 2002-0535 (La.App. 1 Cir. 5/9/03), La.App. 1 Cir., May 09, 2003	Son	Clear & convincing (?)	Failed	Lack of standing

16 Succession of Tanner, 836 So.2d 1 2 8 0 , 2002-1570 (La.App. 4 C i r . 2/5/03), La.App. 4 Cir., Feb 05, 2003	Attorney (n o n - relative)	Prepon- derance	Failed	Insuffi- c i e n t evidence
15 Succession of Cooper, 830 So.2d 1 0 8 7 , 3 6 , 4 9 0 (La.App. 2 C i r . 10/23/02), La.App. 2 Cir., Oct 23, 2002	Wife	Clear & convincing	Failed	Insuffi- c i e n t evidence
14 Succession of Linder, 824 So.2d 5 2 3 , 0 2 - 1 0 6 (La.App. 5 C i r . 7/30/02), La.App. 5 Cir., Jul 30, 2002	CPA (non- relative)	Prepon- derance	Failed	Insuffi- c i e n t evidence
13 Succession o f Lounsberr y, 8 2 4 So.2d 409,	Son	Clear & convincing	Successful	Sufficient evidence

2001-1664 (La.App. 3 C i r . 5/8/02), La.App. 3 Cir., May 08, 2002				
12 Succession of Miller, 803 So.2d 1 0 2 1 , 3 5 , 2 4 4 (La.App. 2 C i r . 12/7/01), La.App. 2 Cir., Dec 07, 2001	Grandson	Clear & convincing	Failed	Insuffi- cient evidence
11 Succession of Poland, 784 So.2d 7 0 1 , 3 4 , 2 9 1 (La.App. 2 C i r . 4/4/01), La.App. 2 Cir., Apr 04, 2001	Son	Clear & convincing	Failed	Untimely
10 Succession o f Burguieres, 802 So.2d 6 6 0 , 0 0 - 1 4 7 (La.App. 5 C i r . 10/18/00), La.App. 5	Sister	Clear & convincing (?)	Failed	Preter- mitted (donor lacked capacity)

Cir., Oct 18, 2000	Caretaker & first cousin once- removed in-law	Clear & convincing	Failed	Insuffi- cient evidence
9 Cupples v. Pruitt, 754 So.2d 328, 32,786 (La.App. 2 Cir. 3/1/00), La.App. 2 Cir., Mar 01, 2000	Grand- niece	Clear & convincing	Failed	Insuffi- cient evidence
8 Succession of Gates, 746 So.2d 193, 32,348 (La.App. 2 Cir. 10/27/99), La.App. 2 Cir., Oct 27, 1999	Daughter	Clear & convincing	Failed	Insuffi- cient evidence
7 Succession of Deshotels, 735 So.2d 826, 1998-1467 (La.App. 3 Cir. 5/12/99), La.App. 3 Cir., May 12, 1999	Second	Clear &	Failed	Insuffi-
6 Succession of Reeves,				

<p>704 So.2d 252, 97-20 (La.App. 3 C i r . 10/29/97), La.App. 3 Cir., Oct 29, 1997</p>	<p>wife</p>	<p>convincing</p>		<p>c i e n t evidence</p>
<p>5 Succession of Jurisch, 694 So.2d 9 2 8 , 94-1262 (La.App. 4 C i r . 4/25/96), La.App. 4 Cir., Apr 25, 1996</p>	<p>S e c o n d wife</p>	<p>Clear & convincing (?)</p>	<p>Failed</p>	<p>P r e t e r - mitted</p>
<p>4 Succession o f Anderson, 656 So.2d 42, 26,947 (La.App. 2 C i r . 5/10/95), La.App. 2 Cir., May 10, 1995</p>	<p>Niece</p>	<p>Clear & convincing</p>	<p>Failed</p>	<p>I n s u f f i - c i e n t evidence</p>
<p>3 Succession of Braud, 646 So.2d 1 1 6 8 , 94-0668 (La.App. 4 C i r . 11/17/94), La.App. 4</p>	<p>Caretaker (n o n - relative)</p>	<p>P r e p o n - derance</p>	<p>Failed</p>	<p>I n s u f f i - c i e n t evidence</p>

<p>Cir., Nov 17, 1994</p> <p>2</p> <p>Succession of Duboin, 649 So.2d 617, 94-446 (La.App. 3 Cir. 11/2/94), La.App. 3 Cir., Nov 02, 1994</p>	<p>Adopted step- daughter</p>	<p>Clear & convincing</p>	<p>Succeeded (per concurring judge)</p>	<p>Sufficient evidence (per concurring judge)</p>
<p>1</p> <p>Succession of Cole, 618 So.2d 554, La.App. 4 Cir., Apr 28, 1993</p>	<p>Caretaker & sister-in- law</p>	<p>Clear & convincing</p>	<p>Failed</p>	<p>Insuffi- cient evidence</p>