

Louisiana Law Review

Volume 45 | Number 2

Developments in the Law, 1983-1984: A Symposium

November 1984

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Repository Citation

Cynthia A. Samuel, William Marshall Shaw Jr., and Katherine Shaw Spaht, *Successions and Donations*, 45 La. L. Rev. (1984)

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SUCCESSIONS AND DONATIONS

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WHAT HAS BECOME OF FORCED HEIRSHIP?

At one time forced heirship stood like a citadel among the institutions of Louisiana private law.¹ Its impregnable walls offered limited egress to the testator and loomed as an inhospitable barrier to that outsider, the surviving spouse. The citadel contained draconian weapons with which to wrest property from the hands of unsuspecting third parties. Its menacing form intimidated the bravest of lawyers from foreign lands, and even a few title examiners and estate planners within the realm. Within its protection dwelt not only the innocent descendant but almost all manner of dissolute, disobedient, and ungrateful child and greedy parent. No wonder the citadel was assaulted.

The walls have not remained intact. An informed and unemotional evaluation of forced heirship must not proceed with the old citadel in mind, for the image of the old citadel only inflames and distorts. In fact the Louisiana Trust Code, the 1981 amendments to the Civil Code, and the 1981 amendments to the Internal Revenue Code have answered most of the criticisms of forced heirship. Present law gives testators much greater flexibility than they previously had in disposing of their property, while protecting descendants in a more just and less cumbersome fashion than before. Further reform is still necessary, but the rules of forced heirship today are much more closely tuned to modern society than were their antecedents.

The New Legitime—Its Claimants and Its Size

Although the Louisiana constitution forbids the abolition of forced heirship, it specifically empowers the legislature to decide who the forced heirs are and how much they are entitled to claim as their legitime.² In 1981 the legislature exercised this power and eliminated parents as forced heirs.³ Previously, if the decedent had no descendants his parents

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1. See Nathan, *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 Tul. L. Rev. 5 (1977).

2. La. Const. art. 12, § 5.

3. 1981 La. Acts, No. 442, § 1, repealing La. Civ. Code art. 1494.

were forced heirs, sometimes for one-third, sometimes for one-fourth of the estate.⁴ The elimination of ascendants' forced heirship seems to have been acceptable to both proponents and opponents of forced heirship.⁵ The justification offered was that social welfare programs were sufficient to care for elderly ascendants.⁶ Perhaps then it is no coincidence that several countries with pervasive social welfare systems have, like Louisiana, no forced heirship for ascendants while retaining it for descendants.⁷ One wonders whether this country is as committed politically to a welfare system as those countries, and whether in light of the growing elderly population and the precarious financial condition of Social Security and Medicare, reliance on social insurance to care for elderly parents will prove ill-founded.

With parents eliminated as forced heirs, descendants are the only category of forced heir still recognized in Louisiana.⁸ In 1981 the size of the disposable portion was changed for the first time since 1825.⁹ Instead of a disposable portion of two-thirds (one child), one half (two children), and one-third (three or more children),¹⁰ the testator now may dispose to anyone of three-fourths (one child) or one-half (two or more children) of his estate.¹¹ This was a significant move in the direction of testamentary freedom. Louisiana's disposable portion is now among the most generous of any of the jurisdictions having a forced share for descendants.¹²

Illegitimate children who have proven their filiation to the parent are now included in the class of forced heirs.¹³ In the discussion that

4. La. Civ. Code art. 1494 (1972 Comp. Ed., in 16 West's La. Stat. Ann.—Civ. Code). In 1979 the parents' forced share was restricted to the decedent's separate property only. 1979 La. Acts No. 778, § 1.

5. See Nathan, *supra* note 1, at 16; Lemann, *In Defense of Forced Heirship*, 52 Tul. L. Rev. 20, 26 (1977).

6. Nathan, *supra* note 1, at 16; Lemann, *supra* note 5, at 26.

7. See, e.g., Denmark: Inheritance Law, ch. 4, arts. 25-26; Norway: Inheritance Law, art. 29; Sweden: Book of Successions, ch. 7, arts. 1-3.

8. La. Civ. Code art. 1493.

9. La. Civ. Code art. 1480 (1825). The Digest of 1808 provided for a disposable portion of one fifth. See La. Digest of 1808 bk. III, tit. 2, art. 19.

10. La. Civ. Code art. 1493 (1972 comp. Ed., in 16 West's La. Stat. Ann.—Civ. Code).

11. *Id.*

12. See, e.g., *Codigo Civil* (Argentina) arts. 1832, 3593-95, 3602 (one fifth); *Inheritance Law* (Denmark) ch. 4, arts. 25-26 (one half); *Code Civil* (France) art. 913 (one child, one half; two children, one third; three or more children, one fourth); *BGB* (Germany) arts. 2303-2313, 2325-2329 (one half); *Codice Civile* (Italy) arts. 536-552 (one child, one half; two children, one third; three or more children, one fourth); *Inheritance Law* (Norway) ch. 4, art. 29 (one third, but forced portion can not exceed 500,000 Kroners per child); *Codigo Civil* (Spain) arts. 806-809, 818-820 (one third); *Book of Successions* (Sweden) ch. 7, arts. 1-3 (one half). These countries are a representative sample. There are many more countries which have a forced share for descendants.

13. La. Civ. Code arts. 3556, 1493.

accompanied the removal of discrimination against illegitimate children from the intestacy rules in 1981, it did not go unnoticed that whereas in other states a decedent may protect his estate from the potential claims of illegitimate children by making a will; in Louisiana, despite a will, the estate is still vulnerable to their claims. As a practical matter, the chances of an illegitimate child claiming his rights as a forced heir are severely curtailed by the stringent requirements for proof of filiation. The child must either have been formally acknowledged by the parent, or he must have proven his filiation in a civil suit brought within nineteen years of his birth or one year of the parent's death, whichever occurs first.¹⁴ If the parent has died, filiation must be proven by clear and convincing evidence instead of the usual preponderance standard for civil suits.¹⁵ The deadlines for proving filiation and the higher standard of proof after the parent's death combine to minimize the risk that unacknowledged illegitimate forced heirs will disrupt the decedent's estate plan. There is still the chance that a formally acknowledged illegitimate child, who is not cut off from the estate by the time periods for proving filiation, will surface after the other heirs and legatees have obtained a judgment of possession and transferred the decedent's immovable property. Louisiana Revised Statutes 9:5630 solves this problem by giving third parties who have acquired an interest in immovable property by onerous title from the heirs and legatees recognized in a judgment of possession an acquisitive prescription of two years from the finality of the judgment.¹⁶ The unrecognized forced heir's rights may not thereafter be asserted against the property, only against the co-heirs and legatees. Also, property sold pursuant to an administration of the decedent's estate would be immune to the claims of the unrecognized forced heir. Thus the inclusion of illegitimate descendants as forced heirs does not, practically speaking, increase the uncertainty of the devolution of property or of the title to immovable property. The spectre of illegitimate forced heirs is not great enough to justify abolishing forced heirship altogether in view of the proof of filiation requirements, prescription, and the availability of administration.

Remedies

Prior to 1981, if a donation *inter vivos* of immovable property was found to exceed the disposable portion, the forced heir, after discussing the donee's other property, could exercise the remedy of revendication against the donated property itself—even though the property had passed

14. La. Civ. Code art. 209.

15. *Id.*

16. La. R.S. 9:5630 (1983) shortened the prescription from ten years to two. The prescription was made retroactive and accrues against minors, interdicts, and posthumous children. La. R.S. 9:5631 (1983).

from the donee to a purchaser for value.¹⁷ Thus a donation of immovable property registered in the public records rendered title unmerchantable until the forced heirs' rights had prescribed or it was clear that their rights had been satisfied. To prevent title from becoming unmerchantable, donors of immovable property routinely disguised the donations as sales so that a subsequent purchaser could rely on the public record.¹⁸ Under today's rules of forced heirship this disguise is no longer necessary. The 1981 amendments eliminated the forced heir's right to revendicate donated immovable property in the hands of a purchaser for value.¹⁹ Nor can the forced heir invalidate a mortgage placed on the property by the donee, as was previously allowed.²⁰ These amendments are retroactive.²¹

The elimination of the revendication remedy (and the short two-year prescription under Revised Statutes 9:5630 on property conveyed by heirs or legatees) has virtually converted the forced heirs' remedies into a personal action by the forced heir against the donee or legatee for the value of the legitime.²² No longer must third parties wait for prescription to cure title defects caused by potential revendication. Nor must donors of immovable property resort to subterfuge to keep title merchantable.²³ But the loss of the revendication remedy does not render forced heirship an empty right. First, wealth today consists of movable property to a larger extent than before.²⁴ There never was a revendication remedy for donated movable property;²⁵ yet, no one has argued, despite

17. La. Civ. Code art. 1517 (1972 Comp. Ed., in 16 West's La. Stat. Ann.—Civ. Code). Property revendicated by the forced heir came back to the succession free of any mortgages created by the donee. Id. art. 1516.

18. Nathan, *supra* note 1, at 14.

19. La. Civ. Code arts. 1517-1518.

20. Cf. Civil Code article 1516, as it appeared before and after the 1981 amendment. Similar amendments were made for the revendication remedy for collation of immovable property. La. Civ. Code arts. 1270, 1264, 1281.

21. La. R.S. 9:5811 (1981).

22. See La. Civ. Code art. 1517. Collation, an action by a forced heir against his co-forced heirs, is likewise now virtually a personal action. See *supra* note 20. Only if the property is still in the possession of the donee or legatee or their successors by gratuitous title does the forced heir have a claim to the property itself.

23. The revendication remedy pertaining to donations *omnium bonorum* was abolished in 1982. La. Civ. Code art. 1497 (Supp. 1984). Thus forced heirship causes no more title problems for *inter vivos* donations of immovables.

24.

The bulk of modern wealth takes the form of contract rights rather than rights in rem—promises rather than things. The recent boom in residential real estate and collectibles should not obscure this point. Promissory instruments—stocks, bonds, mutual funds, bank deposits, and pension and insurance rights—are the dominant component of today's wealth.

Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1119 (1984).

25. See La. Civ. Code arts. 1516, 1517, 1284 (1972 Comp. Ed., in 16 West's La. Stat. Ann.—Civ. Code).

the growing importance of movables, that forced heirship was ineffective because it lacked such a remedy.²⁶ So *in personam* remedies should be sufficient for donated immovable property as well. Second, the existence of even an *in personam* remedy is enough to encourage voluntary compliance. Most donor-testators will plan in advance for the satisfaction of the legitime despite the forced heir's lack of a revendication remedy. Finally, from the standpoint of fairness the revendication remedy left something to be desired. It put the risk of a donee's or legatee's insolvency on a third party who paid value for the property. Arguably it is better for the forced heir to be paid his legitime only by those who were the objects of the decedent's bounty, not by those who subsequently acquired the property by paying for it. The abolition of the revendication remedy for donations of immovables demonstrates that the various problems attending forced heirship can be addressed without abolishing the institution in its entirety. While not significantly endangering the effectiveness of forced heirship, the amendments have confined the reach of forced heirship to those who are the objects of the decedent's bounty; whose interest, since they have paid nothing for their donations or legacies, may be fairly subordinated to the social policy implicit in forced heirship.

Burdens on the Legitime

One of the cardinal rules of forced heirship is that the testator cannot place charges or conditions on the legitime.²⁷ The forced heir is entitled to his legitime in full ownership.²⁸ The forced heir may be given the disposable portion conditioned on his accepting charges or conditions on his legitime, but he has the option of abandoning the disposable portion and taking his legitime free and clear.²⁹

There are two giant exceptions to this rule. One is that the decedent is permitted to put the legitime in trust.³⁰ By the device of a legitime trust the decedent can effectively keep the forced heir from touching the capital of the legitime throughout the forced heir's life.³¹ The decedent can forbid alienation by the forced heir of his interest in the trust³² and can even specify that if the forced heir dies intestate and without descendants, his legitime is to go to another person designated

26. We are speaking here of remedies against the property that is subject to the forced heirs' claims. As will be seen, forced heirship has been weakened by exempting certain property from the reach of forced heirship altogether.

27. La. Civ. Code art. 1710.

28. Succession of Williams, 184 So. 2d 70 (La. App. 4th Cir. 1966), cert. denied, 250 La. 748, 199 So. 2d 183 (1967).

29. Succession of Turnell, 32 La. Ann. 1218 (1880). See La. Civ. Code art. 1499.

30. La. R.S. 9:1841 (1984).

31. *Id.*

32. La. R.S. 9:1843 (1965).

by the decedent.³³ Thus the legitime trust is a useful device both for the devoted parent who wants to see that the legitime assets are providently spent for the forced heir's benefit and for the parent who, for whatever motive, wants to keep control of the legitime away from the forced heir. In either case, the legitime trust does not thwart the purpose of forced heirship, because the forced heir must receive the present benefits of the legitime and has testamentary power over it.³⁴ The availability of this device, in the opinion of at least one notable authority, obviates any need for the abolition of forced heirship.³⁵

The second exception is the usufruct of the surviving spouse. Though technically neither a charge nor a condition, a usufruct over the legitime is generally an impermissible burden upon it.³⁶ But if the forced heir has, in addition to his legitime, received the disposable portion or the naked ownership of it, he can obtain his legitime free of the usufruct by abandoning the disposable portion to the usufructuary.³⁷ Thus the testator may induce the forced heir to suffer a usufruct over his legitime by giving him enough of the disposable portion to make its forfeiture too great a sacrifice. But it is the forced heir's choice; he cannot be forced to accept a usufruct over his legitime.

This rule is subject to the large exception concerning the usufruct of the surviving spouse. Beginning with *Succession of Moore*³⁸ the testator was allowed to leave his spouse both the disposable portion and a usufruct over the community property included in the legitime. The court's reasoning was that the usufruct over community property was the equivalent of the intestacy usufruct of the surviving spouse, and therefore the usufruct had been imposed by law rather than by the testator. The *Moore* court disregarded the fact that in an intestacy situation where a spouse survives, the forced heirs received the naked ownership of both the disposable portion and the legitime. *Moore* taught that despite the fact that someone other than the forced heir received the disposable portion, the forced heir could be made to suffer a usufruct over his legitime in favor of the surviving spouse under the same terms as the intestacy usufruct of the surviving spouse. Thus began the doctrine of "confirmation" by testament of the legal usufruct of the surviving spouse.

Over the years the doctrine of confirmation of the usufruct of the surviving spouse has been codified and expanded. It is presently found

33. La. R.S. 9:1841(2) (1984).

34. La. R.S. 9:1841(1) (1984).

35. Lemann, *supra* note 5, at 25.

36. *Clarkson v. Clarkson*, 13 La. Ann. 422 (1858).

37. La. Civ. Code art. 1499; *Succession of Hyde*, 292 So. 2d 693 (La. 1974).

38. 40 La. Ann. 531, 4 So. 460 (1888), followed in *Winsberg v. Winsberg*, 233 La. 67, 96 So. 2d 44 (1957).

in Civil Code article 890. The article states that any usufruct it authorizes is to be treated as a legal usufruct and is not an impingement on the legitime.³⁹ What is authorized is a very broad usufruct in favor of the surviving spouse: the testator may leave the surviving spouse the usufruct for life of all of his property, both separate and community, even if the naked owners are not issue of the marriage with the surviving spouse.⁴⁰ Forced heirs who are not issue of the marriage with the surviving spouse may demand security from the surviving spouse.⁴¹

The effect of article 890 bears repeating. Not only may the decedent leave the surviving spouse the disposable portion (at least half of the estate, and if there is only one child, three-fourths), but a usufruct over the rest for life. It must also be remembered that if the surviving spouse and the decedent were living under a matrimonial regime of community property, as are most spouses in Louisiana, the surviving spouse owns one half of the former community. Thus if a married person with two children has only community property and gives the surviving spouse the maximum allowed by article 890, the surviving spouse will be full owner of three-fourths of all their property, and usufructuary for life of the remaining fourth.⁴²

Yet the complaint is still heard that this scheme is unfair to the surviving spouse. Apparently nothing will do until the testator is free to dispose of his entire estate in full ownership to the surviving spouse. To decide whether the complaint has merit, one must first examine whether holding part of the property in usufruct causes any serious disadvantage to the surviving spouse's enjoyment of the property.

The usufructuary receives all attributes of ownership necessary for the present enjoyment of the property, except the power to dispose of nonconsumable property, including the possession, use, and revenue of the property.⁴³ The limitation on the usufructuary's power to dispose has been indicted as a cause of deadlock between the surviving spouse and forced heirs. For example, assume the surviving spouse usufructuary

39. La. Civ. Code art. 890. The trust code provides that the legitime in trust may be burdened with an income interest in favor of the surviving spouse to the same extent and for the same term as a usufruct may be created in favor of the surviving spouse. La. R.S. 9:1844 (1984).

40. La. Civ. Code art. 890.

41. *Id.*; La. Code Civ. P. art. 3154.1. Civil Code article 890 also provides that security can be demanded whenever the usufruct covers separate property.

42. If the decedent also has separate property, he may leave the surviving spouse the disposable portion of this property (three-fourths if one child, one-half if two or more children), and usufruct of the rest.

43. La. Civ. Code arts. 535-568. The usufructuary has the power to dispose of consumable property but owes a like amount to the naked owner at the end of the usufruct. Since the day of reckoning for having disposed of consumable property comes later, at the end of the usufruct, it does not impair the usufructuary's ability to derive the present benefit from the property.

wishes to sell the large family home and move to smaller quarters. The naked owners do not want to sell because they fancy moving into the house when the usufruct is over. The naked owners are unwilling to end the usufruct by paying the usufructuary the present value of the usufruct. Thus, goes the argument, the surviving spouse is stuck with a white elephant.

In the first place, if the surviving spouse usufructuary is also the full owner of an undivided interest in the property, a 1983 amendment to article 543 permits the surviving spouse to seek a judicial partition by licitation.⁴⁴ The surviving spouse will then have a usufruct over the proceeds of the partition sale.⁴⁵ Any time the property subject to usufruct was community property, the surviving spouse will be the full owner of an undivided one-half interest, and can demand partition under article 543. Moreover, article 543 protects the surviving spouse usufructuary from being ousted by the naked owners by providing that those whose share is only in naked ownership cannot force a partition. Thus, the breaking of any deadlock is entirely up to the surviving spouse. Any time the testator leaves the surviving spouse the disposable portion in full ownership and the rest in usufruct, the spouse will meet the requirements of article 543 because the spouse will have full ownership of an undivided interest. Thus, if the family home is the testator's separate property, he may avoid any potential deadlock by leaving the surviving spouse the disposable portion of the property in full ownership and usufruct of the rest. Since article 543 does not require that the undivided interest in full ownership be of any particular size, a small fractional interest given to the spouse in full ownership would, absent abuse of right, suffice to empower the usufructuary spouse to seek partition.

Second, the surviving spouse usufructuary has the right to grant a lease on the property; the spouse is not forced to choose between living there and letting the property stand vacant. Perhaps the mere threat of renting the property to strangers will often be sufficient to bring about compromise with the naked owners. But in some cases the rental alternative may not be very practical. Since a lease granted by a usufructuary ends when the usufruct ends, a lessee seeking a long-term lease would usually be reluctant to lease the property.

Third, depending on the value of other assets in the estate, the decedent might be able to leave the family home in its entirety to the surviving spouse as part of the disposable portion. Or the home, even if part of the legitime, could be put in trust, so that an independent trustee could determine whether the property should be sold.

Finally, Louisiana Civil Code article 568 permits the testator to grant

44. See La. Civ. Code art. 543, comment (c).

45. La. Civ. Code art. 616.

the usufructuary the power to dispose of nonconsumable property.⁴⁶ However, it is not clear whether, if the usufructuary were given this power over nonconsumable property included in the legitime, the usufruct would be treated as a nonimpinging legal usufruct. On the one hand, article 890 says that "a usufruct authorized by this Article is to be treated as a legal usufruct and is not an impingement on the legitime." It can be argued that the usufruct of which the article speaks is a usufruct to the surviving spouse over property inherited by descendants. The details of the rights and duties of the usufructuary are relegated to the articles on usufruct, of which article 568 is one. Since the power to dispose of nonconsumable property may be given to a usufructuary under article 568, it is likewise authorized under article 890. On the other hand, the judicial interpretation of old article 916, the predecessor of current article 890, leads to the opposite conclusion. Under article 916 the courts had reasoned that when a testament granted the surviving spouse a usufruct equivalent to the intestacy usufruct of the surviving spouse, the usufruct did not impinge on the legitime.⁴⁷ The intestacy usufruct does not give the usufructuary the power to dispose of non-consumables. Article 890 permits the testator to deviate in certain specific respects from the intestacy usufruct, but the power to dispose of non-consumable property is not one of the deviations specifically permitted by article 890. Thus, the question is whether, in light of the history of article 890, the legislature intended to permit only those deviations from the intestacy usufruct that are specifically mentioned in article 890 or others as well.

It thus appears that with appropriate planning the surviving spouse can be given the upper hand over the forced heirs concerning property subject to usufruct. The surviving spouse may be given not only possession and revenue for life, but also the power to change the nature of the property without losing the usufruct. The testator can give the surviving spouse this power either by creating the circumstances entitling the surviving spouse to provoke a partition or, if article 890 be so interpreted, by giving the surviving spouse the power to dispose of nonconsumable property. When one considers that a testament may now grant the surviving spouse a usufruct over the entire estate, the surviving spouse may be given everything necessary for the present enjoyment of all the decedent's property. Due to the legislative developments since 1981, which put the surviving spouse in the driver's seat for the present enjoyment of the property, the risk of the legitime being uncollectable

46. La. Civ. Code art. 568.

47. Thus when the testator attempted to give the surviving spouse a usufruct for life over the legitime, the usufruct was held to impinge the legitime after the surviving spouse remarried. *Succession of Waldron*, 323 So. 2d 434 (La. 1975). The legislature amended article 916 (now 890) specifically to permit such lifetime usufructs. See La. Civ. Code art. 1890.

at the end of the usufruct is entirely on the forced heirs, not all of whom are entitled to demand security.

A third, less significant exception to the rule that no conditions may be placed on the legitime was added in 1984. Act 957 of 1984 amended Civil Code article 1521 to provide that the testator may impose a suspensive condition on the legitime that the forced heir survive the testator for a period not to exceed thirty days, in default of which a third person may be designated to take the legitime.⁴⁸ By means of this condition the testator can prevent the legitime from being transmitted to the forced heir's heirs or legatees in a situation where the forced heir has not lived long enough to enjoy the legitime himself. The condition also would prevent an argument for taxation of the property in the forced heir's estate should he die within thirty days of the testator. Yet it is hoped that testators will use the condition with caution. The amendment does not require that if the forced heir has children, they be named the alternate takers. Apparently anyone can be named to take in default of the forced heir, whether or not the forced heir has descendants.⁴⁹ If someone else is named, and the forced heir's children are so unfortunate as to lose their parent shortly after they lose their grandparent, this misfortune is compounded by the loss of their parent's legitime. Absent the condition, the grandchildren would have had their parent's legitime by transmission.⁵⁰

Property Not Subject to the Rules of Forced Heirship

Whether the donor or testator seeks to satisfy the legitime or to avoid satisfying the legitime, he has greater flexibility after legislation passed in 1981. Avoidance is facilitated by the exemption of many common gratuitous transactions from the rules peculiar to forced heirship. The 1981 amendments to article 1505 codified the jurisprudential rule exempting life insurance proceeds from the reach of forced heirs,⁵¹ and created a similar exemption to cover benefits payable by reason of

48. 1984 La. Acts, No. 957, § 1, amending La. Civ. Code art. 1521. *Baten v. Taylor*, 386 So. 2d 333 (La. 1979), permitted such a condition on a universal legacy that did not involve the legitime.

49. Cf. La. R.S. 9:1973 (1984) (declaring that shifting interest in principal can take place only if beneficiary dies intestate and without descendants).

50. But see *Succession of Henican*, 248 So. 2d 385 (La. App. 4th Cir.), cert. denied, 259 La. 756, 252 So. 2d 454 (La. 1971), where a creditor of the forced heir was not allowed to assert the forced heir's right to reduce excessive donations. One implication of the case is that the forced heir's right is personal to him. If this conclusion is correct, the right to reduce excessive donations may not be transmissible.

51. The jurisprudential rule exempted proceeds paid to a named beneficiary. See *Ticker v. Metropolitan Life Ins. Co.*, 11 Orl. App. 55 (1914). The amendment to article 1505 appears to exempt all proceeds from insurance on the life of the decedent, even if payable to the estate. See La. Civ. Code art. 1505(c).

death, disability, retirement, or termination of employment under most deferred compensation or pension plans.⁵² Subsequent amendments exempted the premiums paid for such life insurance⁵³ and the employer and employee contributions to such plans⁵⁴ from the claims of forced heirs. Gifts to charitable, educational, or religious organizations are immune to claims by forced heirs if made more than three years prior to the donor's death,⁵⁵ as are gifts to a spouse of a previous marriage made during that marriage,⁵⁶ and donations to descendants when each forced heir and the root represented by each forced heir have received the same value in donations during the calendar year.⁵⁷ Furthermore, none of the property subject to these exemptions is fictitiously added to the active mass; the value of the exempted property does not increase the size of the legitime.⁵⁸

An available, but less practical, device for avoiding forced heirship is that of acquiring real estate out of state.⁵⁹ Another means surfaced recently when the highest court of New York, applying a New York statute permitting non-resident testators to designate New York law to govern the disposition of property located in New York, rejected the claim of a forced heir under French law to have his legitime satisfied from movable property located in New York.⁶⁰ The testator, a resident of France but a citizen of the United States who for many years had resided in New York, stated in her will that the disposition of her "New York property" was to be governed by New York law. The forced heir was a resident of California and a citizen of both France and the United States. While the facts of that case did not give the forced heir the strongest case under modern choice of law analysis, the decision does suggest New York as a possible venue to locate assets to avoid forced heirship.

For those testators who wish to satisfy the legitime, the recent amendments to article 1505 specify that a forced heir who is the beneficiary of life insurance proceeds or pension plan death benefits must credit them toward his legitime.⁶¹ This alternative provides a practical

52. La. Civ. Code art. 1505(d). This amendment legislatively reversed the holding of *T.L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1976).

53. La. Civ. Code art. 1505(c).

54. La. Civ. Code art. 1505(d).

55. La. R.S. 9:2372 (1981).

56. La. R.S. 9:2354 (1981).

57. La. Civ. Code art. 1502.

58. See legislation cited *supra* notes 49-55.

59. See *Hughes v. Hughes*, 14 La. Ann. 85 (1859).

60. *In re Renard*, 108 Misc. 2d 31, 437 N.Y.S.2d 860 (Sup. Ct. 1981), *aff'd mem.*, 85 A.D.2d 501, 447 N.Y.S.2d 573 (1981), *aff'd mem.*, 56 N.Y.2d 973, 439 N.E.2d 341, 453 N.Y.S.2d 625 (1982).

61. La. Civ. Code art. 1505(c), (d).

way to satisfy the legitime with specific assets so as to allow other assets to be disposable. This course might be desirable, for example, where a testator wishes to leave the family business to the child who has worked in it and assets of equal value to the other children.⁶² The other children may be given insurance proceeds to satisfy their legitime. It may be that the decedent's assets are hard to value at the time he makes his will. He may avoid impingement by making fractional legacies to the forced heirs and, thanks to a recent amendment of articles 1573 and 1302, empower his executor to choose specific property to satisfy each legacy.⁶³ Of course, the testator himself may specify which assets shall be used to satisfy the legitime.⁶⁴ Thus, with proper planning the legitime should not hinder a parent's allocating particular property among the heirs.

Estate Taxation

Prior to 1981, opponents of forced heirship pointed out that the legitime prevented decedents from taking full advantage of the federal estate tax marital deduction.⁶⁵ Legacies of property in full ownership to the surviving spouse qualify for the marital deduction, but in Louisiana such legacies were limited by the requirements of the legitime. Louisiana did permit the testator to leave the surviving spouse a usufruct for life, or a similar income interest in trust over the legitime, but such terminable interests did not qualify for the marital deduction. In 1981 Congress introduced the concept of "qualified terminable interest property" (QTIP) into the Internal Revenue Code.⁶⁶ Under the QTIP provisions a surviving spouse's lifetime income interest in property can qualify for the marital deduction. The income interest can be in trust or any similar lifetime income interest, such as a usufruct of the surviving spouse confirmed for life.⁶⁷ As long as QTIP remains in the Internal Revenue Code, there can be no tax argument against forced heirship with respect to the marital deduction. Furthermore, in 1981 Congress increased the amount

62. See Nathan, *supra* note 1, at 16.

63. La. Civ. Code arts. 1573, 1302.

64. La. Civ. Code art. 1302.

65. Nathan, *supra* note 1, at 18; LeVan, *Alternatives to Forced Heirship*, 52 Tul. L. Rev. 29, 47 (1977).

66. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, tit. IV, subtit. A, § 403(d), 95 stat. 172, 301 (codified in IRC § 2056(b)(7) & (8)).

67. Tax Reform Act of 1984 § 1027(a) amended the QTIP provisions to state specifically that a usufruct interest for life qualifies for QTIP treatment. There may be a slight marital deduction problem with a usufruct where the property, other than a residence, is converted from a non-productive asset to a productive one, for example, by selling it; the property may not qualify for the deduction because the surviving spouse arguably does not have an absolute right to the income for life, one of the requirements of the deduction. IRC § 2056(b)(7)(B)(ii)(I). Perhaps if the usufructuary has the right to partition under Civil Code article 543, he will be considered as having the power to convert a non-productive asset.

of property that a person can gratuitously transfer free of tax to anyone he chooses. For decedents dying after December 31, 1986 the amount will be \$600,000.⁶⁸ Thus a married couple, all of whose property is community, must amass more than \$1,200,000 before they have any federal estate tax worries at all. The potential tax problems of millionaire decedents do not justify abolishing forced heirship.⁶⁹ Tax law may not always stay the same, but as it presently stands it provides no argument for abolishing forced heirship.

Problems Yet to be Solved

Louisiana's law of forced heirship is still vulnerable to the charges that the rules on valuation of assets are conflicting and arbitrary,⁷⁰ and that some of the grounds for disinheritance are archaic.⁷¹ Perhaps in the light of modern choice of law theories the rule that Louisiana's law of forced heirship applies to real property located in Louisiana even if owned by a non-Louisiana decedent and claimed by non-Louisiana heirs ought to be reconsidered.⁷² These remaining problems are amenable to legislative solution; they are not of such magnitude as to justify rejecting forced heirship entirely. Unfortunately, no one will enthusiastically commit much time and effort to solving them while there remains a real chance that the whole institution might be eliminated.

WHAT WILL BECOME OF FORCED HEIRSHIP?

The choices facing the people of Louisiana are three: abolish forced heirship, retain the present system, or create another remedy for abuse of testamentary freedom. The first choice, to allow complete freedom of testation, implies that there is no such thing as abuse of testamentary freedom, that at death a person ought to be able to distribute his property as if his family did not exist. This approach can lead to intolerable results, as where there are needy children, and is inconsistent with the rest of Louisiana's civil law. Even most opponents of forced heirship do not advocate absolute testamentary freedom.⁷³ The third

68. See IRC § 2010. The unified credit of \$192,800 available to those decedents is the equivalent of an exemption from tax of \$600,000 of property.

69. Even if Congress were to keep the exemption where it is for decedents dying in 1984, \$325,000, a relatively small number of estates will incur federal taxes, particularly if inflation remains low.

70. Nathan, *supra* note 1, at 9-10.

71. *Id.* at 12. See *infra* text accompanying note 6.

72. Nathan, *supra* note 1, at 8, 18. This approach would be especially useful if it encouraged other states to apply Louisiana law to property owned by Louisiana decedents and claimed by Louisiana forced heirs.

73. Nathan, *supra* note 1, at 6 (recognizing that testamentary freedom should be subject to appropriate limitations as to public policy and morality); LeVan, *supra* note 65, at 48 (proposing family maintenance as the alternative to forced heirship).

approach precisely aims at abuse resulting from absolute freedom of testation, but at the cost of increased litigation and increased uncertainty in estate planning. The second choice, preserving the status quo, prevents abuse of testamentary freedom while minimizing litigation and uncertainty. But to some the drawback of the present system is that it prevents not only abuse, but also legitimate exercise of testamentary freedom.

Abolition of Forced Heirship

In legislative hearings and other public discussions on forced heirship, the argument to abolish forced heirship usually proceeds from the assertion, "It's my property, I worked hard for it, and I ought to be able to decide what happens to it." Private property and freedom of disposition do have something in common: both respond to the same human need to provide a better life for oneself and one's family. But they are not linked together by an indisputable rule of natural law. Every society recognizes limitations on private ownership, and though all societies permit some kind of inheritance, they do not agree on the extent to which the owner can choose his successors.⁷⁴ Louisiana's civil law generally, not just its law of forced heirship, reflects a compromise between private ownership and freedom of disposition. The Civil Code repeatedly demonstrates that the power of an owner to deal with his property must at times be restricted for the good of society.

The redactors of the French Code Civil, in their zeal to incorporate liberty and equality into the principles of private law, did not forget fraternity. Men and women live in society, and the redactors sought to articulate the principles of an orderly, just society. To this end a person's freedom to deal with his property was hedged with certain restrictions forcing the individual to act decently toward his fellows.

Likewise, in the Louisiana Civil Code the spirit of individualism is strong, but not rampant. Even in the area of obligations, where the individual's autonomy is the strongest, there is the limitation that individuals may not by their contracts derogate from the rules made for the preservation of public order and good morals.⁷⁵ The nullity of contractual waivers of alimony *pendente lite*⁷⁶ and of waivers of the marital portion⁷⁷ are examples. The donation *inter vivos* of all of one's property is prohibited because of the fear of the public burden of supporting the destitute donor.⁷⁸

Other examples of prohibitions on the gratuitous disposition of

74. Halback, Introduction, in ABA Section of Real Property, Probate and Trust Law, Death, Taxes and Family Property 4 (1977).

75. La. Civ. Code art. 11.

76. Holliday v. Holliday, 358 So. 2d 618 (La. 1978).

77. La. Civ. Code art. 2330.

78. La. Civ. Code art. 1497.

property where such dispositions are considered detrimental to society include the prohibition against substitutions;⁷⁹ the prohibition against imposing impossible, illegal, or immoral conditions on the gift;⁸⁰ the prohibition against donations between persons living in open concubinage;⁸¹ the prohibition against donations to doctors and ministers attending a person during his last illness;⁸² the prohibition against donations to aliens whose country prohibits dispositions in favor of a citizen of this state;⁸³ and the prohibition against donations by minors to their tutors.⁸⁴ More extensive limitations on an individual's actions are found in the law of delict⁸⁵ and quasi-contract,⁸⁶ both of which compel the individual to do the decent thing (*e.g.*, repair the damage he has caused, pay back the money that was not due) despite his unwillingness to do so.

In the realm of property law, restrictions on an individual's autonomy are vital. As Professor Yiannopoulos states: "Laws which determine property rights, their limits, and effects, are too closely connected with the social organization to permit derogation by private agreement. The regime of property, therefore, is governed for the most part by mandatory rules of law."⁸⁷ Thus, an owner, although entitled to "direct, immediate, and exclusive authority over a thing,"⁸⁸ cannot create tenures in his property inconsistent with the real rights recognized in the Civil Code, make the property inalienable,⁸⁹ or designate future owners of the property in perpetuity.⁹⁰ Although the owner has the widest possible rights to enjoy his property, the Code imposes certain servitudes to insure that his enjoyment of his property will not defeat that of his neighbor.⁹¹

The alimentary obligations imposed by family law are yet another instance in which the law forces an individual to accept financial responsibility despite his will not to do so. If one has a spouse and children one is obligated to support them.⁹² Enforcement may be difficult as a practical matter, but alimony and child support awards are nothing if not limitations on the disposition of the obligor's hard-earned income.

79. La. Civ. Code art. 1500.

80. La. Civ. Code art. 1519.

81. La. Civ. Code art. 1481.

82. La. Civ. Code art. 1489.

83. La. Civ. Code art. 1490.

84. La. Civ. Code art. 1478; see also La. Civ. Code art. 1479.

85. La. Civ. Code art. 2315 expresses eloquently and succinctly the limit of individual autonomy: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

86. La. Civ. Code arts. 2293-2313.

87. A. Yiannopoulos, *Louisiana Civil Law System* 146 (1971).

88. La. Civ. Code art. 477.

89. A. Yiannopoulos, *supra* note 87, at 146.

90. La. Civ. Code art. 1520.

91. La. Civ. Code art. 655-696.

92. La. Civ. Code arts. 148, 160, 227.

The community of acquets and gains, an institution that, like forced heirship, concerns both family and property, illustrates the kind of restrictions the Code places on private ownership where family interests are considered paramount. Although the spouses may shun the community regime by making a matrimonial agreement to that effect, the community regime is still relevant to this discussion. It is, after all, the marital property regime that the Code deems the most equitable since it is the regime that is applied automatically to spouses in the absence of a matrimonial agreement.⁹³ Significantly, the community regime is the antithesis of "It's my property, I worked hard for it, so I should decide what happens to it." In the community regime, regardless of which spouse acquires the property onerously, each spouse owns an undivided one-half interest.⁹⁴ The legislature as recently as 1977 rejected a proposal that the spouse who acquired the community property have control over it,⁹⁵ in favor of a general rule of equal management by both spouses, and equal power in each spouse to obligate all community property.⁹⁶

The community property example illustrates that in the family context, Louisiana law shows a preference for sharing both ownership and control. The spouse who did not acquire the community property bears some resemblance to the forced heir because that spouse receives a fixed share whether that spouse deserves or needs it. Yet no one is proposing to abolish community property because it restricts the individual's power to own and to deal with his property. Community property seems acceptable even though Louisiana's approach to marital property is in marked contrast to the non-community property states, which do not recognize any such restrictions on ownership and control during marriage.⁹⁷ Admittedly the social policy justifying community property is

93. La. Civ. Code art. 2328. The legislature's preference for the community regime is also evident in the requirement of court approval for deviations from the regime made by matrimonial agreement during the marriage, yet no court approval is necessary for the adoption of the community regime during marriage. La. Civ. Code art 2329.

94. La. Civ. Code arts. 2336, 2338.

95. Spaht, Background of Matrimonial Regimes Revision, 39 La. L. Rev. 323, 331-36 (1979).

96. La. Civ. Code arts. 2345-2346. Only in the cases of community movable property, the ownership of which is registered in a spouse's name as required by law, and movable assets of a community business operated by one spouse alone, would the spouse who acquired the property have sole control over onerous disposition. See La. Civ. Code arts. 2350-2351. Most donations of community property, and all alienations, mortgages, and leases of community real estate require the concurrence of the spouses regardless of which spouse acquired the property. While it can not be denied that the exception for management of titled movables is an important one, the predominant management scheme, including the power to obligate community property, is one that disregards which spouse acquired the community property.

97. See W. Reppy & C. Samuel, Community Property in the United States 1-11 (2d ed. 1982). On divorce the trend in non-community states is to give the judges discretion

different from that justifying forced heirship. The point here is simply that if the principle of "It's my property, I worked hard for it, so I should decide what happens to it" is controlling, then it follows that Louisiana should abandon not only forced heirship, but also community property, alimony and child support, the rules prohibiting substitutions and other gratuitous dispositions,⁹⁸ and the other limitations on freedom of disposition imposed for the good of society. Once it is recognized that limitations on freedom of disposition are and always will be necessary for the good of society, the inquiry can properly be focused on whether there is a modern social purpose justifying a forced share for descendants.

The Legitime: Historical Perspective and the Underlying Purposes

Throughout the history of western civilization, ownership, property, family, clan, tribe, state, and nation have been inextricably intertwined. The institution of the legitime developed during that period whence "the memory of man runneth not to the contrary." Development of the legitime under Roman law and its successor systems has been described elsewhere.⁹⁹ Even among the early Germanic tribes and in ancient England, an analogous institution known as "birthright" guaranteed children a portion of the family property:

Now that such rights once existed in England and many other parts of Western Europe is not to be denied. When the dark age is over, they rarely went beyond this, that the landholder could not utterly disinherit his expectant heirs either by will or by conveyance; the father, for example, could not sell or give away the ancestral land without the consent of his sons, or could only dispose of some "reasonable" part of it. If he attempted to do more, then when he was dead his sons could revoke the land. However, it was not unknown in some parts of Germany that, even while the father lived, the sons could enforce their rights and compel him to a partition.¹⁰⁰

If the legitime is of such ancient and universal lineage, would it not be wise to inquire as to what purposes it served during its long and distinguished history? We do not have to be Darwinians to know that

to order the spouses to share all or some of their property. This concept of equitable distribution does not have any effect during the marriage. It does not make the spouses co-owners, or restrict a spouse's control over property he acquires.

98. See, e.g., *supra* text accompanying notes 80-84.

99. Dainow, *Forced Heirship in French Law*, 2 La. L. Rev. 669 (1940) [hereinafter cited as Dainow, *Forced Heirship*]; Dainow, *The Early Sources of Forced Heirship: Its History in Texas and Louisiana*, 4 La. L. Rev. 42 (1941) [hereinafter cited as Dainow, *Early Sources*].

100. 2 F. Pollock & F. Maitland, *The History of English Law* 248 (2d ed. 1898).

only the fittest of mankind's institutions long survive. Hence, before discarding this artifact of the civil law, we should search out the reasons for its creation: what purposes, if any, it has served through the ages, and what purposes it might serve today. It has been said that forced heirship serves social, civic, and moral purposes.¹⁰¹

A social purpose is served, in the authors' opinion, by helping to maintain the cohesiveness of the family, an economic and cultural unit of primary importance in society. There are social purposes behind all law, and forced heirship encourages "family bonding." The expectancy of an heir is what keeps the family together and ultimately interested in the success of its members, since self-interest is the greatest motivator of human behavior. Thus, the laws of forced heirship encourage loyalty by family members. The family, in return, provides security by furnishing its members a group identity; that identity should not be underestimated in a society with great mobility. Each member participates and shares with the others in the mutual prosperity of the family. Further, the family imparts a sense of the continuity of life and responsibility to future generations.

This "sense of connectedness among the generations has had an important influence on human behavior."¹⁰² Today, "we have reached the point where, as members of an interdependent world society, indeed as a species, we urgently need once again to turn our thoughts to future generations . . ."¹⁰³ As Professor Mary Ann Glendon observed in her book *The New Family and the New Property*:

From this point of view, what is most arresting in what the French and English family historians are beginning to say is this: contrary to what lawyers have always believed, the dominant common factor among all the pre-modern family property strategies was not mere family egotism or the desire to keep the family heritage undivided. It was, rather, a "life-and-death proposition," a concern for the long-range survival of each family's own unborn generations, in a time when the modern state did not exist and political entities could not promise even bare subsistence to their subjects.¹⁰⁴

In the past in this country, children were born into a family which accepted responsibility for the aged, the infirm, the infants, and even those children who had grown up and moved away to start their own branch of the family. Although this phenomenon is generally associated with the farm families of America wherein it was universal, the fact is sometimes overlooked that this sense of responsibility is also the very foundation upon which the Irish, the Italians, the Germans, the Greeks,

101. Lemann, *supra* note 5, at 23.

102. M. Glendon, *The New Family and the New Property* 239 (1981).

103. *Id.* at 239-40.

104. *Id.* at 240 (footnote omitted).

and all other immigrant groups adapted and fought their way to prosperity and prominence in our country.

At a time when man is faced with threats to the survival of the species and to life on this planet, it is once again time to assume responsibility for future generations. Human beings are again beginning "to think of themselves less as owners and more as life tenants of this planet that is their habitat—here to enjoy it, tend it and pass it on unwasted to those who come afterward, rather than leaving behind an inheritance of poisoned ground, water and air."¹⁰⁵ To acquire this mentality, individuals need to be supported and nourished "first, in small *family*, work and political societies."¹⁰⁶ Hence, the importance of encouraging family bonding is demonstrated. The family is necessary to transmit to generation after generation the accumulations of knowledge, experience, and values which are essential to the continuation of civilization.

Forced heirship encourages family bonding not only by creating an expectancy, but also by according a legally protected status to each child, as well as a measure of equality among children. Such rules encourage family harmony and cooperative living within this basic unit. Especially when the basic unit may be strained by the consequences of successive marriages, rules bolstering the unit should be continued rather than condemned. Furthermore, Louisiana has by legislation and jurisprudence established rules which in practice preclude review of a testator's capacity or state of mind.¹⁰⁷ Forced heirship provides a child's only protection against the machinations of those who would influence a sick, senile, or impressionable parent.

The civic purpose served by forced heirship has two bases: one practical, the other philosophical. Obviously, the restrictions imposed on parents by forced heirship makes it more likely that the financial needs of the child, regardless of his age or condition, will be satisfied to some extent by the individual with primary responsibility for him. If a parent failed to provide for his minor child and fulfill this responsibility, it would, in all probability, devolve upon the state and, of course, ultimately upon the taxpayers.

Second, political observers were keenly aware that loyalty to the family helps prevent despotism.¹⁰⁸ All authoritarian governments insist that the

105. *Id.* at 241.

106. *Id.* at 240 (emphasis added).

107. La. Civ. Code art. 1497.

108.

Equally important, he refused to see (and the British with him) that the real alternative to Hitlerian Germany, something which would get the poison out of the system, was not a reconstruction of Bismarckian Germany on Social Democratic lines, with an all-powerful paternalist state, a Leninist centralized direction of nationalized industry, a huge, Prussian-style bureaucracy and a stress on equality, uniformity and collectivity. The real antithesis to National Socialism

state be the ultimate authority to which members of society owe allegiance, not the family. The family remains a bulwark against repressive government and helps to assure that the state is subservient to the people. If the family is the foundation of democratic, capitalistic nations, it should be protected and defended. If the legitime serves a purpose in this regard, it should not be discarded lightly. The authors believe that the legitime is a part of the cement of "family bonding," which assures the continued strength of the family unit.

Morally, forced heirship is an expression of the principle that a parent is obligated to support, maintain, educate, and provide for the future of his children. Balanced against this moral belief, its opponents would place an illusory right to dispose of property freely. But even during the parents' lifetime this right of free disposition is restricted, as has been discussed previously. Death renders less essential, not more, the liberty to dispose of property.

In response to those who argue that the motivation and values supplied by cultural traditions have been destroyed, Professor Glendon states:

[T]he cross-lighting we receive from the history of families, property and law affords some reassurance. It suggests that the

was individualism, a society where private arrangements took priority over public, where the family was the favoured social unit and where the voluntary principle was paramount. . . . A society in which the family, as opposed to the political party and the ideological programme, was the starting point for reconstruction, was the answer to the totalitarian evil.

P. Johnson, *Modern Times: The World from the Twenties to the Eighties*, 580-81 (1983).

The original right of property can only be justified by the accident or merit of prior occupancy; and on this foundation it is wisely established by the philosophy of the civilians.

The personal title of the first proprietor must be determined by his death; but the possession, without any appearance of change, is peaceably continued in his children, the associates of his toil, and the partners of his wealth. This natural inheritance has been protected by the legislators of every climate and age, and the father is encouraged to persevere in slow and distant improvements, by the tender hope that a long posterity will enjoy the fruits of his labour.

The principle of hereditary succession is universal A domestic monarch . . . might . . . (chastise) an unworthy son by the loss of his inheritance, and the mortifying preference of a stranger. But the experience of unnatural parents recommended some limitation of their testamentary powers. A son, or, by the laws of Justinian, even a daughter, could no longer be disinherited by their silence . . . Unless a legitimate portion, a fourth part, had been reserved for the children, they were entitled to institute an action or complaint of *inofficious* testament—to suppose that their father's understanding was impaired by sickness or age, and respectfully to appeal from his rigorous sentence to the deliberate wisdom of the magistrate.

2 E. Gibbon, *The Decline and Fall of the Roman Empire* 86-89, in 41 *Great Books of the Western World* (Encyclopedia Britannica ed. 1952).

world's reserves of values may indeed be greater than its supplies of fossil fuels, as well as more essential to survival [T]he older modes of behavior and attitudes about families, property and law referred to above have been merely latent; they have survived here and there.¹⁰⁹

Louisiana's forced heirship is just such an example. It is an expression of the moral values of society and the tradition in which they are rooted.

Potential Modifications of Forced Heirship

Even though the authors' conclusion is that the institution of forced heirship be retained, there are various modifications of the system that it is appropriate to consider. Some of the suggested variations have been proposed in the past, and others are of more recent vintage. Generally, the three categories subject to potential legislative modification are the extent of the reserve, the class of persons designated as forced heirs, and the rules regulating disinheritance.

As to the extent of the reserve, at least three variations are possible. One modification would be to provide a discretionary reserve, the size of which would depend entirely upon what a court decides concerning the "needs" of an heir, or what constitutes "reasonable financial provision" for an heir. Such a system would be similar to those of New Zealand¹¹⁰ and England.¹¹¹ Interestingly, there is historical evidence that

109. M. Glendon, *supra* note 102, at 244.

110. The system is described in Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 Mich. L. Rev. 1107 (1938) and LeVan, *Alternatives to Forced Heirship*, 52 Tul. L. Rev. 29, 37-38 (1977).

111. M. Glendon, *State Law and Family: Family Law in Transition in the United States and Western Europe* 280-82 (1977). In describing the 1975 legislation enacting the Provision for Family and Dependents Act, Professor Glendon made the following observation:

Recognizing the anomaly that existing English law was according greater rights to a divorced spouse than to a surviving spouse, the Law Commission proposed that the court's power to award family provision for dependents on death should be as wide as its power to award provision upon divorce. Thus, the new system is still a system of discretionary court awards, but no longer limits a surviving spouse to "maintenance". He or she can request "reasonable financial provision," on the analogy of the Matrimonial Causes Act of 1973, and the court has the same power as under that Act to award periodic payments or a lump sum or a combination of both, under guidelines similar to those of the 1973 Act. The new act, like the former Family Provision Act, applies to situations both of intestate and testate succession, and like the most recent American legislation, it provides for means to reach *inter vivos* transfers in attempted evasion of the proposed provisions.

Id. at 281 (footnote omitted).

For a representative example of the interpretation and application of the 1975 legislation, see *Re Coventry*, 3 All Eng. L. Reports 815 (App. Ct. 1979). For a description of the 1938 legislation restricting testamentary freedom, see Dainow, *Limitations on Testamentary Freedom in England*, 25 Cornell L. Q. 337 (1940).

prior to the end of the seventeenth century, English law required a fixed percentage "legitime" in that country's brief experiment with free testation.¹¹² A concomitant of a discretionary reserve would be a maximum limitation upon what the heir could receive; the Roman law once provided for children who were not mentioned in their parents' will, or who were given less than a designated portion of their parents' estates.¹¹³ Under Roman law, however, the heir for whom no provision was made had to allege unjust disinheritance, rather than "need." Furthermore, the necessity of allegations of unjust disinheritance encouraged attacks upon the presumed insanity or unjustness of the testator, which Louisiana has historically abhorred.¹¹⁴

A discretionary reserve presents the obvious difficulty of uncertainty, both as to the extent of the claim made by the heir against the estate and the likelihood of its success. No difficulty yet encountered by the present scheme of forced heirship, as complex as it is, rivals the problems presented by a discretionary reserve. With a system that creates vagaries of claims which ultimately depend on judicial discretion, negotiation and compromise between attorneys for the claimants and those representing the estate of the deceased would be extremely difficult. The result would be increased litigation. Unlike a fixed percentage, the discretionary re-

112. See 2 F. Pollock & F. Maitland, *supra* note 100, at 308, 348-56.

We have been speaking as though a man might by his will dispose of all his chattels. But in all probability it was only the man who left neither wife nor child who could do this. We have every reason to believe that the general law of the thirteenth century sanctioned some such scheme as that which obtained in the province of York until the year 1692 and which obtains in Scotland at this present time. . . . If he leaves both wife and child, then the division is tripartite; the wife takes a share, the child or children a share, while the remaining third is governed by the will; we have "wife's part," "bairns' part," and "dead's part." Among themselves children take equal shares; the son is not preferred to the daughter; but the heir gets no share unless he will collate the inheritance that has descended to him, and every child who has been "advanced" by the testator must bring back the advancement into hotchpot before claiming a bairn's right.

Id. at 348-49.

To the modern Englishman our modern law, which allows the father to leave his children penniless, may seem so obvious that he will be apt to think it deep-rooted in our national character. But national character and national law react upon each other, and law is sometimes the outcome of what we must call accidents. Had our temporal lawyers of the thirteenth century cared more than they did about the law of chattels, wife's part, bairns' part and dead's part might at this day be known south of the Tweed.

Id. at 355-56.

113. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 321-24 (2d ed. 1932).

114. *Id.* at 327-31; La. Civ. Code art. 1497. "Proof of captation is prohibited not because captation is socially desirable but because, as a policy consideration, it was considered better to protect the innocent legatee from spurious attacks than to deprive the guilty one of his legacy." Note, *Donations—Testaments—Captation Under Article 1492*, 24 La. L. Rev. 925, 929 (1964).

serve does not have the "merit of serving as a framework for private ordering" of the financial claims of the parties "by enabling the spouses to know what the likely result will be if their affairs are settled by a judge."¹¹⁵ Even an opponent of the present structure of forced heirship who has considered the alternative of a discretionary reserve has said:

To settle for family maintenance is to place in our courts the

115. Glendon, *Family Law Reform in the 1980's*, 44 *La. L. Rev.* 1551, 1553 (1984). Although directed toward discretionary property distribution, Professor Glendon's comments likewise pertain to a discretionary maintenance allowance:

In the first place, the system of discretionary distribution, because of inconsistency in results among apparently similar cases, is widely perceived as unfair by litigants. Second, this unpredictability of outcome means the law in this area is not serving one of its most important purposes: to furnish a basis for negotiation and future planning by the parties. This is especially important in view of the fact that over ninety percent of divorce cases are settled by agreement. Third, these laws and their guidelines offer the opportunity for, and even encourage, abuse of the litigation and negotiation processes more than do systems of fixed rules In sum, the existing law in most states throws divorcing spouses—and their children—into a lottery whose outcome greatly depends on the luck of the judicial draw and the competence of counsel, and in which the only sure winners are the lawyers.

Id. at 1556.

In commenting upon the institution of forced heirship, she observed:

If, as is expected, this type of question becomes increasingly urgent in the near future, legislators may be tempted, or induced, as they were in the case of property division upon divorce, to turn the matter over to the judiciary for resolution by the exercise of discretion in each individual case. This was the choice made by England (following the example of New Zealand) in 1938. Given the American experience with discretionary distribution on divorce, however, it would be unfortunate indeed if recourse to this type of solution were to turn the relatively smooth-functioning of the law of decedents' estates into another field day for matrimonial lawyers. If comparative law teaches anything it is the necessity to be aware of the context of legal rules and institutions. Anyone who advocates the importation of the English system of applications for discretionary maintenance or allowances from a decedent's estate by disappointed relatives and others should ponder very carefully the differences between the English and the American judiciary and legal professions, as well as the differences in their law of civil procedure. A legal device that may operate in a relatively unobjectionable manner in a system like England's where most civil disputes are tried without a jury, where discovery is restricted, and where the expenses of litigation are borne by the losing party, can and probably would turn into a source of expensive and bitter litigation in the United States.

As with property division upon divorce, the alternative to a system of judicial discretion is some system of fixed rules. The latter has characterized the traditional approach of the civil law systems and Louisiana to the protection of children against disinheritance. It may be too soon for the common-law states to accept the idea of a forced share for children as a way of dealing with problems generated by the formation of successive families, but certainly Louisiana, which already has the forced heirship institution, should think long and hard before giving it up or further impairing it just as it seems to be responsive to a newly emerging and important social need.

Id. at 1572-73 (footnotes omitted).

power to vary estate plans, even where the estate plan is intestacy. Given Louisianians' proclivity to litigate, the legions of lawyers added annually to the profession, and the almost inevitable wounds that result from intrafamily squabbles over family property, the legislature must weigh carefully such a dramatic alternative to forced heirship.¹¹⁶

With a fixed percentage, it would be possible to vary the designated percentages with the size of the estate, so that in a large estate the testator could have greater freedom to dispose of property and take advantage of tax deductions. In fact, during the deliberations preceding adoption of the French Code, Napoleon suggested such a "sliding scale": "The First Consul suggested graduating the legitime according to the size of the succession instead of the number of children. For example, the father could be given the right to dispose of one-half his estate if it exceeded 1,000,000 francs; if less, he could only dispose of a child's part."¹¹⁷ The proposal was ultimately rejected because "very few fortunes exceed 100,000 francs"¹¹⁸ and "the greatest disadvantage . . . was that it would require an expensive and often uncertain appraisal."¹¹⁹ A proposal similarly dependent upon the size of the testator's estate has been made more recently.¹²⁰

Another modification of the fixed percentage reserve would be to restrict the type of property against which a forced heir may claim his legitime. For example, the fixed percentage might be demandable only against separate property of the deceased, which often is acquired largely from the decedent's family by donation or inheritance.¹²¹ The fixed percentage might be increased if the reserve were demandable only against separate property. The concept of restricting the type of property against which the reserve is demandable existed in the northern part of France; the customary law derived the restriction from the Germanic concept of collective family ownership.¹²² Under the customary law, where there was no ancestral property against which a forced heir could claim his reserve, "a modification was introduced that in default of ancestral property there should be substituted in its stead either the acquired property or, in default of both, the movable property."¹²³ Under Lou-

116. LeVan, *supra* note 65, at 48.

117. 12 P. Fenet, *Recueil complet des travaux preparatoires du code civil* 21 (Paris 1827), cited in Lemann, *supra* note 5, at 23.

118. Lemann, *supra* note 5, at 23.

119. *Id.* at 23-24.

120. "Why should not an estate of, say, less than \$100,000 pass outright to the surviving spouse by intestacy?" LeVan, *supra* note 65, at 48.

121. See, e.g., La. Civ. Code art. 2341.

122. See Dainow, *Forced Heirship*, *supra* note 99, at 672-75; see also J. Brissaud, *A History of French Private Law*, 738-45 (1912).

123. Dainow, *Forced Heirship*, *supra* note 99, at 673.

isiana matrimonial regimes law, since spouses have significant freedom to change the classification of separate property to community property,¹²⁴ distinguishing the type of property subject to the reserve would require restrictions, such as those enacted in northern France. The necessary restrictions would increase the uncertainty of the forced heirs' claims and conceivably could impinge on the recently acquired freedom of spouses to change the character of matrimonial property. These consequences make the distinction in property subject to the reserve a less desirable modification. Essentially, what would result would be the substitution of a new complicated procedure for a familiar one.

Another alternative is to redefine the class of persons entitled to the reserve. For example, forced heirs might be limited to minor children of the deceased, based upon the assumption that such children are "in need" and are generally supported by the parents' legal obligation to support, maintain, and educate their children. This proposal, with its arbitrary fixed percentage, assumes that all minor children have identical need. The proposal is thus subject to the criticism that it is not responsive to its underlying purpose, providing for a child "in need."

A "sliding scale" could be introduced so where the value of an estate exceeds a fixed amount, the minor child could claim more than his reserve. To be successful he would be required to prove "need" for an additional sum to defray expenses projected for support, maintenance, and education. To the extent that this proposal contains a discretionary factor, uncertainty is introduced. The proposal's lack of logical consistency lies in the fact that a fixed percentage was never really founded upon an assumption of the recipient's need. The reserve reflected the familial obligation of the parent; forced heirship was never restricted to minor children.

The category of forced heirs might be restricted to children, of whatever age, who are "in need" when the parent dies rich. The marital portion accorded to the survivor of a spouse who dies rich¹²⁵ could be used as a model. The vicissitudes of potential claims of uncertain amounts would multiply by the number of children surviving the deceased parent.

Another, more radical, proposal is to permit a grandchild to represent a living child if the child commits an act toward the parent which is considered offensive.¹²⁶ For example, if the child refuses to permit the parent to visit the parent's grandchild, the grandparent could substitute the grandchild for the child.¹²⁷ The permitted substitution would serve

124. La. Civ. Code arts. 2329, 2330, 2343.1. Spouses may change the character of property by matrimonial agreement or by transmutation agreement.

125. La. Civ. Code arts. 224, 227, 230.

126. La. Civ. Code arts. 2432-2437.

127. Representation is only permitted in instances where a descendant predeceases the *de cuius*, since only persons deceased at the time of the death of the *de cuius* may be represented. La. Civ. Code art. 886.

the dual purpose of punishing the child and protecting the grandchild; disinheriton would not suffice in instances where the offensive child has siblings.¹²⁸ If such a modification were adopted, the act committed by the child should be an offense that continues until the deceased's death without reconciliation between the parent and child, as the jurisprudence has required for successful disinheriton.

Probably the simplest modification is to amend the articles governing the disinheriton of forced heirs. If the argument is accepted that forced heirship serves a civil, moral, and social function, then it should be permissible to exclude a non-deserving child. The classification of non-deserving child should include not only the child who by the seriousness of his acts proves himself ungrateful, but also the child society would consider unworthy of receiving the benefits of an institution which serves an important moral and societal purpose.

Recent legislative proposals suggest that liberalizing the grounds for disinheriton may be the most acceptable modification of forced heirship. At the 1984 Legislative Session five bills were introduced to amend Civil Code article 1621, which lists the grounds for disinheriton of a child by a parent.¹²⁹ All five failed to pass.¹³⁰ Three of the measures would have permitted a parent to disinherit a child who had failed to communicate with the parent after reaching majority for a period of time varying from one year to five years.¹³¹ A condition is that the child knew or should have known how to contact the parent.¹³² The provision was obviously patterned after Louisiana Revised Statutes 9:422.1, which dispenses with the necessity of a parent's consent to the adoption of his child¹³³ under certain circumstances. Difficulty in interpreting "failure

128. Since a grandchild could not represent a living parent who was disinherited, he would be excluded by his aunts and uncles. The aunts and uncles, being descendants of the first degree, would exclude the grandchild, a descendant of the second degree. La. Civ. Code arts. 888, 899.

129. La. Civ. Code arts. 1617-1624.

130. La. H.B. 503, 504, 638 & La. S.B. 12, 13 of the 1984 Reg. Sess. Telephone interview with Andre LeBoeuf, Ass't Supervisor of Administrative Services, Louisiana State Capitol, Baton Rouge, Louisiana (Feb. 22, 1985).

131. La. H.B. 638, 1984 Reg. Sess. (1 year); La. H.B. 503 & La. S.B. 12, 1984 Reg. Sess. (5 years).

132. La. H.B. 503 & La. S.B. 12, 1984 Reg. Sess.

133.

If the spouse of the petitioner is the legitimate parent of the child or if the petitioner is the grandparent or grandparents of the child then the consent of the other legitimate parent is not necessary when the spouse of the petitioner or the grandparent or grandparents or the mother or the father have been granted custody of the child by a court of competent jurisdiction, and if any one of the following conditions exists:

(3) The other legitimate parent has refused or failed to visit, communicate, or attempt to communicate with the child, without just cause, for a period of two years.

La. R.S. 9:422.1 (1980).

to communicate” may occur where the child argues that he was justified in his failure to act in accordance with the statute because of his circumstances.¹³⁴ Under 9:422.1, the courts have had to consider whether incarceration,¹³⁵ drug addiction,¹³⁶ or the emotional state of the parent¹³⁷ constitutes justification for failure to comply with court orders of support, another circumstance under which a parent’s consent to an adoption is not required. The same questions exist where the failure to communicate with the child is without just cause.

Two other bills proposed a ground for disinherison of a child where the child unreasonably refused his parent permission to visit his grandchild for one year.¹³⁸ As mentioned earlier, a more successful remedy would be to permit the parent to substitute the grandchild for the child. This solution would serve as an effective punishment of the offending child, yet protect the innocent grandchild.

Additional grounds for disinherison could be borrowed from Roman and Spanish law. For example, grounds for disinherison might exist where the child has “heaped gross and opprobrious insults”¹³⁹ upon his parent; where the child is a malefactor and habitually associates with criminals against the will of his parent;¹⁴⁰ or where the child does such injury to the parent as to expose him “to the loss or deterioration of the greater part of his estate.”¹⁴¹ These suggestions are not intended to foreclose other possibilities.

In 1979 a Joint Legislative Subcommittee was created to study forced heirship and illegitimates’ rights. One of the proposals submitted was to liberalize the grounds for disinherison under Article 1621. As a substitute for the list which presently appears in that article, the following was suggested: “The just causes for which parents may disinherit their children are where he has *seriously* failed in the *duties imposed* upon him *by law* toward the parent or the latter’s family or where he has been convicted of an offense involving moral turpitude.”¹⁴² Objection

134. See, e.g., *Adoption of Latiolais*, 384 So. 2d 377 (La. 1980).

135. *State v. Jones*, 373 So. 2d 1331 (La. App. 4th Cir. 1979); *In re Brannon*, 340 So. 2d 654 (La. App. 2d Cir. 1976).

136. *In re Daboval*, 377 So. 2d 459 (La. App. 4th Cir. 1979), cert. denied, 380 So. 2d 101 (La. 1980).

137. *State ex rel. Haynes*, 368 So. 2d 783 (La. App. 2d Cir.), rev’d on other grounds, 375 So. 2d 103 (La. 1979).

138. La. H.B. 504 & La. S.B. 13, 1984 Reg. Sess. (not passed).

139. *Constitutions of Justinian*, Eighth Collection: *The Civil Law* 41 (S. P. Scott trans. 1932); see also 2 *Las Siete Partidas* part. 6th, tit. 7, L. 4.

140. At Roman Law the cause for disinherison was expressed as follows: “Where, in opposition to the will of his parents, the son associates with actors or buffoons, and continues to do so, unless his parents belong to the same profession.” *Constitutions of Justinian*, supra note 139, at 42. In *Las Siete Partidas*, the same ground was expressed in Law 5 as “[T]he father may disinherit his son, if the latter turn juggler against his wish” 2 *Las Siete Partidas* part. 6th, tit. 7, L. 5.

141. 2 *Las Siete Partidas* part. 6th, tit. 7, L. 4.

142. Joint Legislative Subcomm. Studying Forced Heirship and Illegitimates’ Rights,

was raised by committee members to the inclusion of conduct directed toward members of the parent's family. Acts which permit the parent to disinherit his child ordinarily involve those that are seriously disrespectful, for the child by law owes a duty of respect to his parent regardless of his age.¹⁴³ The difficulties encountered in interpreting the words "seriously," "duties imposed by law," and "moral turpitude" resulted in the rejection of the proposal to liberalize disinheriton. However, as an intermediate position, the grounds for disinheriton might be simplified by consolidating the first nine grounds presently appearing in Article 1621,¹⁴⁴ substituting: "If the child has been guilty of cruel treatment of his parent, whether physical or mental." Comments could reflect the intention to consolidate the current grounds for disinheriton, and encourage reliance by analogy on the jurisprudence interpreting Article 138 on what conduct constitutes mental or physical cruel treatment sufficient to obtain a separation from bed and board.¹⁴⁵

Another proposal presented to the legislative subcommittee in 1979 was to shift the burden of persuasion in an action to disinherit from the heirs of the testator to the heir who has been disinherited. The proposal was to amend Article 1624 to read as follows:

The testator must express in the will for what reasons he disinherited his forced heirs or any of them, and *the forced heir*

Alternative Suggestions for Amendment of the Law of Successions 4 (1979) [hereinafter cited as Joint Subcomm., Alternative Suggestions].

143. La. Civ. Code art. 215.

144.

1. If the child has raised his or her hand to strike the parent, or if he or she has acutally struck the parent; but a mere threat is not sufficient.

2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.

3. If the child has attempted to take the life of either parent.

4. If the child has accused a parent of any capital crime, except, however, that of high treason.

5. If the child has refused sustenance to a parent, having means to afford it.

6. If the child has neglected to take care of a parent become insane.

7. If the child refused to ransom them, when detained in captivity.

8. If the child used any act of violence or coercion to hinder a parent from making a will.

9. If the child has refused to become security for a parent, having the means, in order to take him out of prison

La. Civ. Code art. 1621.

145.

Separation from bed and board may be claimed reciprocally for the following causes: . . . "3. On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them towards the other, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable"

La. Civ. Code art. 138. See also Comment, The Degree of Cruelty Necessary to Justify Separation from Bed and Board in Louisiana, 16 La. L. Rev. 533 (1956).

*so disinherited is obliged to prove he is not guilty of the cause stipulated by the testator for disinheriton or that he was reconciled with the testator after the act which constituted cause for disinheriton.*¹⁴⁶

Requiring the forced heir to move forward with the evidence may not accomplish much if what he is required to prove is negative—that he never treated the testator cruelly, for example. However, if the grounds for disinheriton were the failure of the disinherited heir to act, such as his failure to communicate with the testator parent for a period of years, shifting of the burden of persuasion would be appropriate and would make disinheriton easier.¹⁴⁷

Furthermore, the legislature could reconsider the doctrine of reconciliation, which was jurisprudentially created as a defense to an action to disinherit.¹⁴⁸ Legislation could delineate the essence of reconciliation—what type of conduct between parent and child will be required to eliminate the ground for disinheriton stated in the parent's testament. The legislature could even provide that the reconciliation, just as the disinheriton, would have to be evidenced by reference to the conduct in some particular form.¹⁴⁹ Because disinheriton is in derogation of what the law assumes to be the natural affection a parent has for his child and the respect owed by a child to his parent, stricter formalities might apply for disinheriton than reconciliation. Furthermore, requiring the reconciliation to be in writing may seem inconsistent with the article on unworthiness of an heir, which permits an implied reconciliation between the deceased and an unworthy child.¹⁵⁰ Inconsistency results because two of the three grounds for unworthiness¹⁵¹ are the most serious of the

146. Joint Subcomm., Alternative Suggestions, *supra* note 142, at 5. "The testator must express in the will for what reasons he disinherited his forced heirs or any of them, and the other heirs of the testator are moreover obliged to prove the facts on which the disinheriton is founded; otherwise it is null." La. Civ. Code art. 1624.

147. For one of the few reported instances in which the testator was successful in disinheriting a child, see *Succession of Chaney*, 413 So. 2d 936 (La. App. 1st Cir. 1982).

148. *Successions of Lissa*, 198 La. 129, 3 So. 2d 534 (1941); see also La. Civ. Code art. 1710.

149. See La. Civ. Code art. 1618.

150.

Suits to establish the unworthiness of heirs can not be sustained, if there has been a reconciliation or pardon on the part of him to whom the injury was done.

If, therefore, a father has full knowledge of an injury done to him by one of his children, and dies without disinheriting him, though he has sufficient time to make his will since he has had this knowledge, he will be considered as having forgiven the injury, and the child can not be deprived of the succession of his father on account of unworthiness.

La. Civ. Code art. 975.

151. The first two categories of unworthiness are:

1. Those who are convicted of having killed, or attempted to kill, the deceased; and in this respect they will not be the less unworthy, though they may have

eleven causes for disinheritance. Therefore, unworthiness is considered the more serious disqualification, involving the most offensive conduct of an heir.

There are other possible modifications of forced heirship. The preceding discussion illustrates some of the myriad of possibilities, and gives a brief evaluation of the proposed modifications.

Conclusion

The legitime survives in a modified form because it continues to serve important societal purposes. Actually, it may serve better the common good of citizens of this state today than it has in a number of years. The authors, who favor its retention, do accept the possibility that it may be further modified, particularly in the area of disinheritance, to tailor more closely the functioning of the institution to its purposes. Fundamentally, however, it embodies a universally accepted moral principle, historically synthesized, that is peculiarly adapted to current social and moral problems.

TESTAMENTARY CAPACITY

In an admonition on the standard of persuasion required to overcome the presumption of testamentary capacity, Professor Alston Johnson has suggested that a "legislative statement would probably be of little assistance, so the judiciary must be much more careful in assessing the standard of proof required in such cases and in re-evaluating some of the supposed holdings which continue to be cited."¹⁵² The Louisiana Supreme Court recently reexamined the standard to resolve the conflicting jurisprudence.¹⁵³ Rather than impose the burden of proving beyond a

been pardoned after their conviction.

2. Those who have brought against the deceased some accusation found calumnious, which tended to subject the deceased to an infamous or capital punishment.

La. Civ. Code art. 966. Cf. La. Civ. Code art. 1621.

The just causes for which parents may disinherit their children are eleven in number, to wit:

2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.

3. If the child has attempted to take the life of either parent.

4. If the child has accused a parent of any capital crime, except, however, that of high treason. La. Civ. Code art. 1621.

152. Johnson, *Developments in the Law, 1982-1983—Successions and Donations*, 44 *La. L. Rev.* 553, 566 (1983).

153. *Succession of Lyons*, 452 *So. 2d* 1161, 1164 (La. 1984).

reasonable doubt that the testator lacked a sound mind, the court required clear and convincing evidence to overcome the presumption of testamentary capacity.¹⁵⁴

In *Succession of Lyons*, the evidence concerning the testator's capacity, which consisted mostly of testimony of those interested in the outcome, was contradictory. Impartial evidence consisted of the attending nurses' notes on the day of execution of the testament and the days immediately preceding and following execution, and the attending physician's testimony. The nurses' notes indicated that even though the testator had fever, he was on the various occasions "easily aroused," "alert," and "alert and oriented."¹⁵⁵ On the other hand, the doctor testified that he had trouble communicating with the testator, and that in his opinion the testator was "not able to understand business transactions such as the disposition of his property at the time."¹⁵⁶ The court apparently considered the fact that the testator had signed consent forms for emergency treatment and operative procedures with the doctor as casting "some doubt on his [doctor's] assertion that decedent lacked understanding."¹⁵⁷

Recognizing that some courts had adopted the stringent criminal standard of persuasion to overcome the presumption of testamentary capacity,¹⁵⁸ the court commented, "a criminal standard of proof . . . is inappropriate and can lead to anomalous results."¹⁵⁹ Although the criminal standard of persuasion was considered "inappropriate," the ordinary standard in civil cases was likewise rejected since strong policy considerations are involved when testamentary capacity is disputed.¹⁶⁰ Quoting from *Kingsbury v. Whitaker*,¹⁶¹ the court compared the taking of property from legatees to "post-mortem robbery."¹⁶²

154. *Id.* at 1165-66.

155. *Id.* at 1166. Nurses' notes were also used in *Succession of Dubos*, 422 So. 2d 444, 447 (La. App. 4th Cir. 1982), to refute testimony concerning lack of testamentary capacity.

156. 452 So. 2d at 1166.

157. *Id.* It seems to the authors that capacity of the patient to sign his name to a consent form for treatment is distinguishable from capacity of the patient to exercise the mental functions necessary to formulate dispositions of property remaining at his death. Furthermore, the urgency of the execution of the consent form, as well as the consequences of failure to execute it, distinguish it from the drafting and execution of a will.

158. McCormick on Evidence § 341, at 962 (E. Cleary 3d ed. 1984); see cases cited in *Succession of Lyons*, 452 So. 2d at 1164.

159. 452 So. 2d at 1164.

160. *Id.* at 1165. Examples of other instances in civil cases in which clear and convincing evidence is required are attorney disciplinary proceedings, suits to annul transactions induced by fraud, suits to establish filiation to a deceased parent, and instances where a person is attempting to overcome the presumption that property possessed during marriage by one spouse is community property. *Id.*

161. 32 La. Ann. 1055 (1880).

162. 452 So. 2d at 1165.

An example of the anomalous results that have been reached by courts of appeal is *Successions of Collins v. Hebert*.¹⁶³ In that case the medical testimony of a board certified neuropathologist¹⁶⁴ established that the testator had "destroyed 50 to 90 per cent of his brain cells by drinking,"¹⁶⁵ and that he sometimes "consumed 80 bottles of liquor per month."¹⁶⁶ Yet the third circuit court of appeal held that the opponents of the will alleging testamentary incapacity had failed to overcome the presumption of capacity by proof of insanity beyond a reasonable doubt. Judge Watson concurred, observing that "the jurisprudence has placed an almost impossible burden on those who attack a will on the basis asserted in this case."¹⁶⁷ Not surprisingly, Justice Watson was the author of the majority opinion in *Succession of Lyons*.

Although the articulated standard of persuasion is less than "beyond a reasonable doubt," it is, as Professor Johnson describes, "still substantial,"¹⁶⁸ and "even that slightly more lenient standard is more than most opponents can achieve."¹⁶⁹ As described in *Lyons*, "The existence of the disputed fact must be highly probable, that is *much* more probable than its nonexistence."¹⁷⁰ The burden of persuasion rests upon the party challenging the presumption to convince the fact-finder that his proposed conclusion is much more correct than the presumed one.¹⁷¹

The disputed fact is whether the testator understood the nature of the testamentary acts and appreciated their effects.¹⁷² Thus, rebuttal of the presumption of sanity is not exactly proof of insanity. Under the jurisprudence, it is unnecessary to prove that the testator be found "completely 'mad' or depraved or notoriously insane."¹⁷³ Applying the

163. 377 So. 2d 516 (La. App. 3d Cir. 1979), cert. denied, 379 So. 2d 15 (La. 1980).

164. Medical testimony has been received skeptically in some cases, particularly where conflicting, as in *McCarty v. Trichel*, 217 La. 444, 46 So. 2d 621 (1950); *Successions of Collins v. Hebert*, 377 So. 2d 516 (La. App. 3d Cir. 1979), cert. denied, 379 So. 2d 15 (La. 1980). In *Kingsbury v. Whitaker*, 32 La. Ann. 1055 (1880), the medical testimony was too general to be helpful, and in *Succession of Lyons*, 452 So. 2d 1161 (La. 1984), too inconsistent. The court considered the doctor's testimony suspicious in *Succession of Dubos*, 422 So. 2d 444 (La. App. 4th Cir. 1982), because he was a legatee under a prior will, and a plaintiff challenging the validity of the second will. But see *Succession of Keel*, 442 So. 2d 691 (La. App. 1st Cir. 1983); *Succession of Dixon v. Guzik*, 269 So. 2d 323 (La. App. 2d Cir. 1972).

165. *Successions of Collins*, 377 So. 2d at 520.

166. *Id.* at 519.

167. *Id.* at 520.

168. Johnson, *supra* note 152, at 565.

169. *Id.*

170. *Lyons*, 452 So. 2d at 1165.

171. See *Turner v. Turner*, 455 So. 2d 1374 (La. 1984) (describing the proof required to rebut the presumption).

172. *Succession of Moody*, 227 La. 609, 80 So. 2d 93 (1955); *Succession of Herson*, 127 So. 2d 61 (La. App. 1st Cir. 1961).

173. *Succession of Dixon v. Guzik*, 269 So. 2d 323, 325 (La. App. 2d Cir. 1972);

standard of persuasion imposed by *Lyons*, it is accurate to state that the party alleging testamentary incapacity must prove that it is highly probable that the

brain or other physical organ . . . which is the medium through which the action of the mind is manifested is so diseased or impaired as to make it an untrustworthy vehicle for the conveyance of the true wish or will of the testator, unbiased by any delusion which may be the result of disease.¹⁷⁴

More succinctly, the question concerns the mental and emotional capacity of the testator to deliberate knowledgeably and to make an unconfused decision.¹⁷⁵

see also *Succession of Mithoff*, 168 La. 624, 122 So. 886 (1929). Such a description of the state of mind of the testator conforms to general notions of incapacity, for not only does insanity create incapacity, but also a "temporary derangement of intellect, whether arising from disease, accident or other cause . . . creates an incapacity pending its duration" La. Civ. Code art. 1789. Planiol describes the state of mind of the testator as follows:

No distinction is made between various kinds of insanity for the purpose of applying Art. 901. The absence of mental capacity can be permanent (complete insanity) or merely recurrent (phases of insanity alternating with lucid intervals), or entirely accidental and isolated (effects of drunkenness, fever, accident causing a temporary derangement). These different causes are unimportant. The only essential element is that the disposing person failed to have clear or free mind at the time he made his donation or will (Art. 901).

Imbecility resulting from senility is considered analogous to insanity. Although the disposition in the will may be perfectly reasonable, it can be set aside on the grounds that the testator did not have the required mental capacity.

3 M. Planiol, *Treatise on the Civil Law* pt. 2, no. 2874, at 410 (11th ed. La. St. L. Inst. trans. 1959) (footnotes omitted).

The proof can be made by all possible evidence, the court of first instance judging the facts autonomously. Sometimes the facts are very delicate. Obviously the court can not set the will aside unless it does not seem to be a product of reasonable volition. In that regard the courts have been quite conservative. A simple derangement which affects only the speculative phase of intellect can still leave the person sufficiently capable to administer his estate, and thus capable to testate.

Id. no. 2876, at 411 (footnotes omitted).

174. *Succession of Bey*, 46 La. Ann. 773, 789, 15 So. 297, 302 (1894).

175. Omitted from this definition appearing in *Succession of Dixon*, 269 So. 2d at 325, is reference to the testator's capacity to act independently. In that case there was evidence that the testatrix had copied a will furnished by her daughter-in-law, named as universal legatee in the testament. Proof of inability to act independently might include proof of undue influence, which is prohibited by Civil Code article 1497. Permitting such proof to establish testamentary incapacity "completely undermines the purpose of this article, which is to protect against divulgence of scandalous matter and multitudinous attacks on testaments." Note, *supra* note 114, at 929. The policy underlying the prohibition was that "it was considered better to protect the innocent legatee from spurious attacks than to deprive the guilty one of his legacy." Id. at 929. Furthermore, those who needed protection from such "undue influence" were protected by the institution of forced heirship under Civil Code article 1493.

Applying this new standard of persuasion to the facts of individual cases is unlikely to have tremendous practical impact. Considering its application to the facts in *Succession of Lyons*, it should rarely change the results even in cases utilizing the criminal standard of persuasion.¹⁷⁶ Maybe that is as it should be. At least the newly articulated standard does comply with the ordinary rules of evidence governing civil litigation, which has theoretical appeal; the practical result is that few cases will be decided differently under the new standard.¹⁷⁷ Thus, the sanctity accorded to testaments by the jurisprudence, as an expression of the deceased's intentions concerning distribution of his property, will be safeguarded.

176. See, e.g., *Succession of Lambert*, 185 La. 416, 169 So. 453 (1936); *Succession of Mithoff*, 168 La. 624, 122 So. 886 (1929); *Succession of Bey*, 46 La. Ann. 773, 15 So. 297 (1894); *Succession of Price v. Price*, 448 So. 2d 839 (La. App. 2d Cir. 1984); *Succession of Dubos*, 422 So. 2d 444 (La. App. 4th Cir. 1982); *Succession of Herson*, 127 So. 2d 61 (La. App. 1st Cir. 1961). In *Kingsbury v. Whitaker*, in reversing the lower court's judgement annulling the will of the deceased because of lack of capacity, the court stated that the will contained "no contradictions, no extravagance, not a sentence, not a word indicating that it was the offspring of a 'mind diseased.'" 32 La. Ann. 1055, 1056 (1880). Cf. La. Civ. Code art. 1788 ¶ 6, which refers to onerous contracts, with id. ¶ 8, referring to donations, and id. ¶ 19, referring specifically to testaments. But see *Successions of Collins v. Hebert*, 377 So. 2d 516 (La. App. 3d Cir. 1979), cert. denied, 379 So. 2d 15 (La. 1980).

177. Cases representative of successful challenges to testamentary capacity include *Succession of Keel*, 442 So. 2d 691 (La. App. 1st Cir. 1983) and *Succession of Dixon v. Guzik*, 269 So. 2d 323 (La. App. 2d Cir. 1972). In the former case the decedent was hospitalized, disoriented, unable to sign the will himself and unresponsive; in the latter case the deceased was declared senile, placed in a nursing home, and the daughter-in-law furnished her a copy of the will. In both instances the medical testimony was strong and consistent with lack of testamentary capacity. See also *Succession of Riggio*, 405 So. 2d 513 (La. 1981).