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The New Forced Heirship Legislation: A Regrettable "Revolution"

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I. INTRODUCTION

This article is a labor of love. The authors have devoted approximately ten years to defending the institution of forced heirship in writing and in testimony before legislative committees. We feel that the portion of a decedent's estate reserved for descendants is of such importance to the citizens of this state that it is worthy of our passion and zeal. It will be obvious to the reader that each author favors retention of the legitime for descendants regardless of their age. However, the contents of the article focus on the specific provisions of Louisiana Acts No. 788 (1989).

The Act redefines descendants who are forced heirs as children under the age of twenty-three or those who are interdicted or subject to interdiction. For purposes of claiming the legitime, representation in the descending line is limited to descendants of a predeceased child who would have been under the age of twenty-three at the moment of the deceased's death. In an effort to afford protection to other descendants from unjust or inadvertent disinherison by a parent, the Act also repealed the prohibition against evidence of captation or undue influence. The result of the repeal is to permit such evidence in a will contest.

In analyzing the provisions of the Act, the authors' first subject the new definition of forced heirship to constitutional scrutiny under both the United States and Louisiana Constitutions. After exploring the

purpose of redefining forced heirs as children under twenty-three years of age and children who are mentally or physically incapacitated, the authors examine the effect of the purpose on the Louisiana constitutional prohibition against abolishing forced heirship. More particularly, the meaning of "forced heirship" is examined in the context of that prohibition. The authors then analyze the legislation creating the new category of forced heirs twenty-two years or younger under the equal protection clauses of both the federal and state constitutions. Arguably, the legislation discriminates arbitrarily against those children twenty-three years of age and older.

The remainder of the article concentrates upon the language of the statutory provisions contained in Act 788. Part II examines in detail the new definition of forced heirs—a child under age twenty-three and a child who is interdicted or subject to being interdicted. Related to the new definition is another provision modifying the rules of representation in the descending line; and, not surprisingly, the modification applies only to a claim of an heir's forced portion. Foreseeable problems created by the new categories of forced heirs include 1) a larger forced share than intestate share, as in *Succession of Greenlaw* and 2) the effect on collation when some children are forced heirs and others not. Special sections of the Act pertaining to its effective date and retroactivity are also the subject of the authors' commentary.

In an effort to afford some protection to otherwise vulnerable descendants, the legislature in Act 788 also repealed Louisiana Civil Code article 1492 prohibiting evidence of hatred, anger, suggestion, or capitation. The authors explore the meaning of those terms, the effect such evidence may have on a last will and testament, and the social costs of the repeal of the prohibition. Although not a part of the revision of forced heirship contained in Act 788, the legislature also amended the Civil Code article regulating proof of reconciliation between a parent and the disinherited forced heir. As the authors explain, the latter amendment reflects the same legislative attitude toward the forced portion as that reflected in Act 788.

Ultimately, the article uses the Act as an example of piecemeal, hasty, and ill-conceived code revision. The project of ongoing revision of the Louisiana Civil Code has been entrusted by the Legislature to the Louisiana State Law Institute. The authors suggest attention to the relationship between the Legislature and the Law Institute on the issue of Code revision. It is hoped that Louisiana private law, principally embodied in the Civil Code, will continue to serve as a model for other jurisdictions and as a statement of principles worthy of respect by future generations of Louisiana citizens.

II. CONSTITUTIONALITY OF 1989 LOUISIANA ACTS No. 788

A threshold question in the analysis of 1989 Louisiana Acts No. 788 is its constitutional vulnerability, specifically with regard to two

provisions of the Louisiana Constitution of 1974—article XII, section 5, which protects against the abolition of forced heirship, and article I, section 3, which guarantees equal protection without regard to age.

Constitutionality Under Louisiana Constitution Article XII, Section 5

Article XII, section 5 of the Louisiana Constitution of 1974 provides:

No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinheritance shall be provided by law. Trusts may be authorized by law, and a forced portion may be placed in trust.

Act 788 must be analyzed in light of that provision. Has the Act merely redetermined the forced heirs, as its proponents claim; or has it, in redefining forced heirs, abolished the very concept it is allegedly restructuring? Answering that question entails an analysis of the meaning of the constitutional provision, as well as an analysis of the effect of the new Act.

The Louisiana Constitution of 1921 also contained a protection for forced heirship, but was more succinct in stating:

No law shall be passed abolishing forced heirship; but the legitime may be placed in trust to the extent authorized by the Legislature.¹

The 1921 version did not contain the language authorizing the legislature to determine the members of the class of forced heirs, the amount they would take, and the grounds for disinheritance.²

The question becomes whether the revised language in the 1974 version so watered down the concept as to make the protection ineffective. Such appears to be the position taken by those who do not find Act 788 objectionable in light of article XII, section 5. This position is supported by the analysis presented by Professor Lee Hargrave, constitutional scholar and Coordinator of Legal Research for the Louisiana Constitutional Convention of 1973. In his article analyzing the various provisions of the 1974 constitution, he notes that the 1974 provision gave the legislature the right to determine the forced heirs and the amount of the forced portion, concluding, "There is not much else to determine."³ Yet, indeed, there is much more to be determined regarding

1. La. Const. of 1921, art. 4, § 16 (superceded 1974).

2. See IX Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 3073 (1977) [hereinafter IX Convention Transcripts], in which Delegate Ford Stinson, representing the Committee on Bill of Rights and Elections, acknowledged:

This makes very little change from the present [1921] provisions of the constitution, except it provides more that the legislature can set up what the forced portion shall be, what percentages as it is at the present time in the Civil Code.

3. Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 647, 658 (1983) [hereinafter Hargrave, Statutory].

the validity of the Act—specifically, whether the power to redetermine forced heirs and the amount reserved for them no longer falls within the ambit of determining rules within the framework of the concept of forced heirship, but instead effectively allows the legislature to redefine forced heirship to the point of abolishing the concept.⁴

In determining at what point the renovation of forced heirship amounts to its destruction and replacement by a different structure, we may contemplate the old English concept of primogeniture.⁵ Could the Louisiana legislature, consistent with article XII, section 5, designate the eldest son to be the only forced heir and the amount of the forced portion to be one hundred percent? Presumably, all would recognize this charade as primogeniture, the very antithesis of forced heirship. Thus, at some point agreement could be reached that forced heirship could be redefined out of existence. The difficulty is in determining that point.⁶

Intended Effect of the 1974 Revision of Article XII, Section 5

It is submitted that the constitutional provision allowing the legislature to determine the forced heirs, the amount of the forced portion, and the grounds of disinheritance is not an invitation to destroy the concept, but a grant of flexibility within the confines of the institution of forced heirship. As to determining the forced heirs, the new provision

4. For example, Professor Hargrave, in his analysis of the constitutional debate, quotes Delegate Max Tobias as stating, "As I presently read Louisiana Constitution and statutes, the legislature could very simply say that each child is a forced heir to the extent of one dollar." IX Convention Transcripts, *supra* note 2, at 3075. Yet, Hargrave does not note that Delegate Stinson, in introducing the proposal starts by attempting to explain forced heirship, stating, "For someone that may not know what forced heirship is, that is, that your children cannot be, as in Texas, for example, be left a dollar or five dollars; they have a forced portion depending on the number of children." *Id.* at 3073.

5. Black defines primogeniture as "[t]he superior or exclusive right possessed by the eldest son, and particularly, his right to succeed to the estate of his ancestor, in right of his seniority by birth, to the exclusion of younger sons." Black's Law Dictionary 1072 (5th ed. 1979).

6. Proponents of the new Act 788 frequently refer to the case of Succession of Earhart, 220 La. 817, 825, 57 So. 2d 695, 697 (1952), which, in upholding a trust, recognized that the constitutional provision of 1921 "[did] not prohibit the legislature from regulating or restricting the rights of forced heirs." Yet, when the regulation eclipses the very concept regulated, it is submitted that the situation is more analogous to the analysis in Succession of Burgess, 359 So. 2d 1006 (La. App. 4th Cir.), writ denied, 360 So. 2d 1178 (1978), in which the court declared "enough already." In *Burgess*, the court stated that a trust provision would be unenforceable if it could be shown that there would be no income from the trust property to satisfy the legitimate. By selecting non-income producing property as the subject of the trust, the testatrix was effectively attempting to circumvent the protection afforded to the forced heir of receiving net income from the legitimate in trust annually.

was a cue in 1974 that the often criticized concept of ascendant forced heirship⁷ be rejected. Consequently, legislation in 1979⁸ and 1981⁹ effectively abolished ascendant forced heirship, first as to community property and then generally. As to determining the amounts of the forced portion, the new provision indicated that portions could be reduced as they were in 1981 when the forced portion was reduced to one-fourth for one child and one-half for two or more.¹⁰ Finally, as to determining the grounds for disinheritance, it opened the door for reform in expanding the causes¹¹ and shifting the burden of proving the cause.¹² The new constitutional provision also paved the way for strengthening the position of the surviving spouse by expanding the property that can be subject to the survivor's usufruct,¹³ and by allowing the surviving spouse usufructuary, as full owner of an undivided interest, to demand partition of the property.¹⁴

7. See Nathan, *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 Tul. L. Rev. 5, 16 (1977) in which he refers to ascendant forced heirship as "archaic and outmoded." Compare with Professor Pascal's memorandum in which he states: "It could be argued that the deletion of parents of forced heirs so altered the institution as to amount to its partial abolition in violation of the Louisiana Constitution." Unpublished memorandum entitled "On Forced Heirship: The Unconstitutionality of Senate Bill 264 (Mr. Nelson, et al) to 'Amend' the Laws on Forced Heirship," prepared by Professor Robert Pascal, Professor of Law Emeritus, Paul M. Hebert Law Center, Louisiana State University, for the House Civil Law and Procedure Committee meeting of June 13, 1989, at 6.

8. 1979 La. Acts No. 702, § 1 repealed ascendant forced heirship as to community property.

9. 1981 La. Acts No. 442, § 1 repealed La. Civ. Code art. 1494 (1870) in its entirety, thus completely discarding the concept of ascendant forced heirship.

10. La. Civ. Code art. 1493 (1870) provided for a disposable portion of two-thirds if the decedent left one child, one-half if he left two children, and one-third if he left three or more. These portions were reduced by the amendment of Article 1493 by 1981 La. Acts No. 884, § 1.

11. Conviction of a felony was added as a cause by 1983 La. Acts No. 566, § 1, and failure to communicate without just cause for two years after attaining majority was added by 1985 La. Acts No. 456. As to disinheritance by ascendants other than parents, the ability to disinherit for acts committed against the ascendants or against the parents of the child being disinherited was added by 1985 La. Acts No. 456.

12. La. Civ. Code art. 1624 was amended by 1985 La. Acts No. 456, shifting to the forced heir the burden of proving that the cause for disinheritance did not exist.

13. 1975 La. Acts No. 680, § 1 allowed the usufruct to be confirmed by testament for life or any other period. 1979 La. Acts No. 678, § 1 allowed the usufruct to be granted by testament over separate property forming a part of the legitime. Restrictions of the sanctioned usufruct only as to issue of the marriage were removed by 1981 La. Acts No. 919. The latter was clarified further by 1982 La. Acts No. 445.

14. La. Civ. Code art. 543, as amended by 1983 La. Acts No. 535, which permitted a person having a share in full ownership of property held in indivision to demand partition in kind or by licitation, now allows for the possibility of the surviving spouse in community to bring such an action against the children who share in naked ownership.

Yet, the 1974 provision did not permit the legislature to alter the very essence of the institution. Although, as Professor Hargrave points out, one would prefer to find a greater debate in the constitutional transcripts,¹⁵ one cannot ignore the reference to the preservation of family ties.¹⁶

Indeed, it is this preservation of family ties, and more specifically family ownership of property without regard to the age of the children, that is the essence of forced heirship.¹⁷ Going to the very roots of forced heirship in Roman law, one notes that the concept was intended to insure that the family, "the natural recipients of the testator's bounty," not be ignored in the process of property distribution.¹⁸ Similarly, in drafting the forced heirship provisions of the French Civil Code, the redactors emphasized the duty to leave a certain portion of one's patrimony to one's children, as this was viewed as "part of the responsibility assumed when children are brought into the world."¹⁹ Thus, the concept was a "sanction of the moral obligation" stemming from the "natural duties" flowing between ascendants and descendants as well as a response to the social interest based on the idea that "the family is the basic social group."²⁰ In responding to the social interest, forced heirship was conceived to protect the family against extravagant liberalities to strangers and to alleviate disharmony among the children by limiting the inequality that a parent might impose.²¹

Similarity of Act 788 to a Support Provision

Forced heirship recognizes that special link between parent and child that exists without regard to the age of the child. It is not bound to

15. Hargrave, *Statutory*, supra note 3, at 659, states, "An examination of the convention transcript reveals an amazing lack of discussion of the underlying policy issues related to the institution of forced heirship."

16. See the statement of Delegate Stinson in IX Convention Transcripts, supra note 2, at 3076, in which he states:

Now, the reason is why should we have forced portions? I'm old-fashion[ed] enough to believe that children should still help in the family and they help while they are children in accumulating some of the property that their parents have. If you don't have forced heirship as in certain states you can leave them a dollar or five dollars, and say "That's all you're worth to me." The basis of our government and I believe all good government is our family group. I feel that a government, or a state, or a country is only as strong as the family ties.

17. See Pascal, supra note 7.

18. M. Radin, *Handbook of Roman Law*, § 153, at 416 (1927).

19. J. Dawson, *Gifts and Promises: Continental and American Law Compared* 47 (1980).

20. 3 M. Planiol, *Treatise on the Civil Law* No. 3049, at 490 (11th ed. La. St. L. Inst. trans. 1959).

21. H. Souleau, *Les Successions*, Collection U Serie Droit Prive § 477 (A. Colin ed. 1982).

the notion of support. Indeed, Planiol points out that, although support of family is a complementary concept, forced heirship is specifically distinct therefrom²² and co-exists with other codal provisions for support, such as the basic child support provisions for minors²³ and the alimentary duties, regardless of age, flowing between ascendants and descendants.²⁴

Act 788, as passed, provides that the status of forced heir be limited to children under twenty-three years of age and those over twenty-three who are interdicted or subject to interdiction. The restriction appears related to some idea of a need to support these vulnerable classes of heirs. This conclusion has been articulated by the legislators introducing the legislation,²⁵ and can also be discerned by analyzing the original Bill 265, which was later amended and blossomed into Act 788. The original bill provided for a *maximum* forced portion of one-fourth if the decedent died survived by one child under twenty-three, and a maximum portion of one-half if survived by two or more children under twenty-three. However, the actual amount of the estate going to any child was not a *fixed* portion, but would depend on "the amount necessary for the support, lodging, maintenance and education of each forced heir of the decedent, according to his station in life, until such forced heir attains the age of twenty-three."²⁶ Ironically, the provision was strikingly similar

22. See 3 M. Planiol, *supra* note 20, at 490, in which he notes:

The law has consecrated two specific obligations based on this blood tie: the alimentary obligation and the reserved portion. Under the first obligation, relatives in direct line must support each other during their lives, if necessary; under the second obligation, they must in their death leave a substantial portion of their estate to the survivors. The two obligations do not follow one from the other. They do not have the same importance or scope, the alimentary claim being attributed to more persons than the reserved portion.

23. La. Civ. Code arts. 227, 230.

24. La. Civ. Code art. 229.

25. When asked at the Civil Law and Procedure Committee Hearing on June 5, 1989, what factors were used to arrive at the age of twenty-three, Senator Sidney Nelson replied:

The factors that we used was another compromise. There was an amendment offered on the floor of the Senate to try to raise it to an age where a child would get through law school or medical school. The Senate said, "No, that's unreasonable. The parents put a child through high school and through four years of college and that's—if they want to support them further—fine.

When reminded by the party questioning him, "But we're not talking about support as I understand the bill. We're talking about limitations on forced heirship, right?"; Senator Nelson replied,

What we're talking about is how you determine what would be a fair amount to give the children, a right to claim against the parent's estate. . . . Well, of course, as opponents observed, my preference would be to repeal it outright, but it seems that twenty-three is a fair age under this concept. We debated in the Senate and chose not to go beyond twenty-three.

26. Senate Bill 264 as originally proposed.

to the now obsolete consolation prize available to illegitimate children, who were previously classified as irregular heirs and thus ineligible for forced heirship status.²⁷ Presumably aware of its resemblance to maintenance, the proponents attempted to distinguish it by providing that the amount needed would be determined at the decedent's death and not be altered if the heir experiences a change of circumstances.²⁸

Support Provisions in Other Jurisdictions

The analogy may also be drawn to other civilian jurisdictions that have repealed forced heirship, but have instead a concept of "alimentos," which reserves a portion of a decedent's estate for certain persons who were dependant on the decedent.²⁹ For instance, the Mexican Civil Code, from which forced heirship was repealed in 1884,³⁰ lists as potential claimants of alimentos: 1) Male descendants under the age of twenty-one, or over the age of twenty-one if incapacitated and unable to work; 2) unmarried daughters, regardless of age, who live honorably; 3) the surviving spouse with the restriction that the surviving husband shows an inability to work or the surviving wife shows that she lives an honorable life; 4) ascendants; 5) concubines with whom a male decedent had lived for five years immediately preceding his death or with whom he had children, provided that she was the sole concubine, remain unmarried, and observe good conduct; and 6) brothers, sisters, and other collaterals within the fourth degree who are incapacitated, under the age of eighteen, and have no property to provide for their needs.³¹ In Mexico, the amount given to such claimants is reduced to the actual amount needed for support³² and is further determined under the regular rules pertaining to alimony, except that the right to receive such support cannot be waived or compromised.³³

27. La. Civ. Code arts. 240-243 (1870). See particularly the second paragraph of Article 243 which states: "The debt of alimony ceases likewise to be due from the estate of the father or mother of the illegitimate child whenever either of them has provided during his or her life a sufficient maintenance for his or her illegitimate child, or have made to him donations or other advantages which may be sufficient for that purpose."

28. If this is indeed not a bill for maintenance, then the state's justification for limiting the "forced heirs" to those under twenty-three, interdicted or subject to interdiction becomes highly suspect in terms of equal protection.

29. See Costa Rica art. 595, Mexico art. 1368, and Salvador I. tit. 17, art. 338 (cited in J. Dawson, *supra* note 19, at 233).

30. See Introduction to the Civil Code for the Federal District and Territories of Mexico, translated by Otto Schoenrck, 1950, which relates the thorough revision of the civil code promulgated on March 31, 1884, and taking effect on June 1, 1884.

31. Civil Code of Mexico art. 1368.

32. *Id.* art. 1370.

33. *Id.* art. 1372.

In examining Act 788, one may also note the similarity to maintenance provisions in common law jurisdictions, such as Great Britain's Inheritance (Family Provision) Act of 1975³⁴ and New Zealand's Family Protection Act of 1955. These, along with the maintenance provisions of the states of Maine³⁵ and Massachusetts,³⁶ were cited years ago by Professor Gerald LeVan, not as forms of forced heirship, but rather as "alternatives."³⁷ In cautioning against the adoption of such provisions without adequate deliberation, he warned:

Given the choice between forced heirship and family maintenance, which is preferable? To settle for family maintenance is to place in our courts the 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.³⁸

Likelihood of Violation of Article XII, Section 5

The same sentiment prevailed in the debates over Bill 264³⁹ in legislative committees, resulting in the amendment of the bill to provide not for a case-by-case determination of need, but rather for a fixed portion for all those under the age of twenty-three.⁴⁰ The addition of interdicts and those subject to interdiction to the list of forced heirs in the revised version of Bill 264 reaffirms the link to a presumed need for support or maintenance.

If the selection of forced heirs in Act 788 was indeed motivated by a presumed need for support, then the concept is alimentary, not one of forced heirship.⁴¹ Even the scant transcripts of the 1974 Constitutional Convention indicate that the delegates contemplated that forced heirs

34. For a discussion of the British act, see Samuels, *Inheritance (Provision for Family and Dependents) Act 1975*, 39 *Mod. L. Rev.* 183 (1976).

35. *Me. Rev. Stat. Ann. tit. 18, § 801* (1981).

36. *Mass. Ann. Laws ch. 196, § 2* (Law. Co-op. 1981).

37. LeVan, *Alternatives to Forced Heirship*, 52 *Tul. L. Rev.* 29, 38 (1977).

38. *Id.* at 48.

39. Senate Bill 264 later matured into Act 788.

40. This change was accepted by way of compromise by the proponents of the bill despite the previous statement by Senator Nelson that he thought a set amount given regardless of need only to those under twenty-three would be "inequitable." Hearings of Civil Law and Procedure Committee, June 5, 1989.

41. See 3 *M. Planiol*, *supra* note 20, at 490.

not be limited to minors or those under the age of twenty-three.⁴² Thus, the reformation of this institution to an alimentary protection is a redefinition antithetical to the essence of forced heirship and not contemplated by the delegates of the constitutional convention who attempted to protect that revered legal concept.

Constitutionality Under the Equal Protection Clause

Age Discrimination

If the purpose of the new forced heirship law is not to provide alimony, then the twenty-two year age cutoff is arbitrary, capricious, and unreasonable because there would then be no rationale behind the age discrimination (except the purpose of limiting the effects of forced heirship). The equal protection provision of the Louisiana Constitution of 1974, article I, section 3,⁴³ would then be violated on the basis of age discrimination because the cutoff is not justified by a legitimate state purpose.⁴⁴

State constitutions cannot be interpreted to afford less protection than the federal Constitution because such an interpretation would violate the federal supremacy clause.⁴⁵ However, they can certainly be construed to afford greater protection. Of course, historically the state constitutions preceded the United States Constitution and served as models for the federal Bill of Rights, which served as a protection for the people against the new central government. Determining whether the particular state

42. The references to decedents "much older than we are [or] of advancing years" contemplate decedents with children older than twenty-three. IX Convention Transcripts, supra note 2, at 3076. Forced heirship has never been restricted to minor children. See Samuel, Shaw, and Spaht, Successions and Donations, Developments in the Law, 1983-1984, 45 La. L. Rev. 575, 599 (1984) (What Has Become of Forced Heirship?).

43. La. Const. art. I, § 3 provides:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

44. On the other hand, even if one could stretch the meaning of forced heirship into mere alimony, Act 788 would still arguably be unconstitutional under the state equal protection provision as an unreasonable, arbitrary, and capricious discrimination on the basis of age. Allowing a child of twenty-two to demand a forced portion, while denying that opportunity to a twenty-three year old sibling, without regard to actual need, is arbitrarily inequitable. Note the comments of the bill's author, Senator Sydney Nelson, who acknowledged the inequities of such a distinction in the Civil Law and Procedure Committee Hearing on June 5, 1989.

45. U.S. Const. art. VI, cl. 2.

constitutional provision affords greater protection than the similar federal provision involves a comparative analysis of the wording of the state and the federal provisions, and a consideration of the intention of the drafters of the state constitution as evidenced by the legislative history.

When the federal Bill of Rights, as applicable to the states through the fourteenth amendment, was interpreted very liberally, during the Warren Court years, for instance, there was little need to construe state constitutions differently from the federal. A state constitution could not be construed as providing less protection, and it could hardly provide more. But during the later years of the Burger Court, and today, with the Supreme Court becoming more conservative with regard to expanding constitutional protections, there is an incentive for a state court to interpret its constitutional provisions to provide more protection than the federal constitution.⁴⁶

Federal Equal Protection Analysis

In resolving cases involving the fourteenth amendment equal protection clause, the Supreme Court of the United States has developed a three-tiered analysis, consisting of: 1) strict scrutiny of legislation involving fundamental rights or suspect classes; 2) intermediate scrutiny primarily reserved for cases involving discrimination based on gender or illegitimacy; and 3) minimum scrutiny or a rational basis for other economic and social legislation.⁴⁷ Before article I, section 3 of the Louisiana Constitution came into existence in 1974, equal protection by the state courts was afforded solely by the fourteenth amendment.⁴⁸ Thus, the federal jurisprudence interpreting the fourteenth amendment was applicable to the state equal protection provision. And even after the Louisiana Constitution of 1974 became effective, Louisiana courts continued to rely on federal jurisprudence interpreting the fourteenth amendment.⁴⁹

46. Comment, *State v. Reeves*: Interpreting Louisiana's Constitutional Right to Privacy, 44 La. L. Rev. 183 (1983); Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379 (1980); Kay, State Constitutional Law, 25 Trial 67 (1989).

47. Perhaps a fourth level has been recognized. For instance, in a case involving the handicapped, the Court applied the minimum rationality standard but invalidated the law in question. The Court failed to afford the legislative judgment the special deference normally involved in minimum rationality. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 1055 S. Ct. 3249 (1985). See also, *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982).

48. *Chabert v. Louisiana High School Athletic Ass'n*, 323 So. 2d 774 (La. 1975); *Southland Corp. v. Collector of Revenue for La.*, 321 So. 2d 501 (La. 1975).

49. *Lovell v. Lovell*, 378 So. 2d 418 (La. 1979); *Desselle v. Liberty Mut. Ins. Co.*, 482 So. 2d 1009 (La. App. 3d Cir. 1986).

Louisiana Equal Protection Analysis

Yet the Louisiana equal protection provision does not track the wording of the fourteenth amendment. The third section of the first article of the Louisiana Constitution classifies individuals into three different categories: 1) classifications based on race or religious beliefs are completely prohibited; 2) classifications based on birth, age, sex, culture, physical condition, or political ideas or affiliations are prohibited unless the proponent of the classification demonstrates by a preponderance of the evidence that the classification is not unreasonable, arbitrary, or capricious; and 3) classifications on any other basis are prohibited only when a member of the class demonstrates that the classification does not properly further any appropriate state interest, i.e., that it is unreasonable, arbitrary, or capricious.⁵⁰ "The disjunctive 'or' is used, in the second classification, indicating a more rigorous scrutiny than if the conjunctive 'and' had been used."⁵¹ Professor Hargrave says that "[t]he background of the provision indicates that a grudging application of the guarantee is not warranted. Rather, an expansive application, independent of, and, in some instances, beyond the federal standard is suggested."⁵²

Jurisprudential Interpretation of Article I, Section 3

The case of *Sibley v. Board of Supervisors of Louisiana State University*⁵³ represents a watershed in equal protection guarantees in the State of Louisiana. Before *Sibley*, Louisiana courts had adopted the "federal levels of scrutiny" analysis in interpreting the state constitution. Indeed in many cases the state courts did not even mention the Louisiana Constitution, but relied exclusively on the fourteenth amendment either to uphold or strike down state legislation.⁵⁴

In *Sibley*, the Louisiana Supreme Court expressly held that the three-level system of federal equal protection analysis is inappropriate in interpreting the equal protection provision of the Louisiana Constitution of 1974.⁵⁵ After severely criticizing the federal approach, the *Sibley* court wrote:

50. La. Const. art. I, § 3; *Sibley v. Board of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1107-08 (La. 1985).

51. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 8 (1974) (emphasis added).

52. *Id.* at 9.

53. 477 So. 2d 1094 (La. 1985).

54. *Rudolph v. Massachusetts Bay Ins. Co.*, 472 So. 2d 901 (La. 1985); *Southland Corp. v. Collector Revenue for La.*, 321 So. 2d 501 (La. 1975).

55. La. Const. art. I, § 3.

We conclude that the federal jurisprudence should not be used as a model for the interpretation or application of that part of the Louisiana Declaration of Rights dealing with individual dignity which is at issue in this case. The federal three level system is in disarray and has failed to provide a theoretically sound framework for constitutional adjudication. Also . . . the state constitution calls for more than minimal scrutiny of certain types of classifications, and assigns the state the burden of showing that such legislation is not arbitrary, capricious or unreasonable.⁵⁶

The court continued by stressing that article I, section 3 was intended to provide greater protection than the fourteenth amendment: "With the adoption of those guarantees Louisiana moved from a position of having no equal protection clause to that of having three provisions going beyond the decisional law construing the Fourteenth Amendment."⁵⁷ The court replaced the federal system with a much simpler one. Under *Sibley*, when a law that discriminates on the basis of the specific classes mentioned in article I, section 3, except race or religious affiliation, is attacked, the proponent of the legislation must bear the burden of showing that the law does not arbitrarily, capriciously, or unreasonably discriminate by demonstrating that the classification "substantially furthers an appropriate state purpose."⁵⁸

56. 477 So. 2d at 1107. See also *Parker v. Cappel*, 500 So. 2d 771 (La. 1987); *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986); *State v. Barberousse*, 480 So. 2d 273 (La. 1985); *LaMark v. NME Hosp., Inc.*, 542 So. 2d 753 (La. App. 4th Cir.), writ denied, 551 So. 2d 1334 (1989); *Bridley v. Alton Oschner Med. Found. Hosp.*, 532 So. 2d 905 (La. App. 5th Cir. 1988); *Allen v. Burrow*, 505 So. 2d 880 (La. App. 2d Cir.), writ denied, 507 So. 2d 229 (1987); *Stuart v. City of Morgan City*, 504 So. 2d 934 (La. App. 1st Cir. 1987); *McLean v. Hunter*, 486 So. 2d 816 (La. App. 1st Cir.), rev'd on other grounds, 495 So. 2d 1298 (1986), writ denied, 513 So. 2d 1206 (1987); *Harlan v. Frazier*, 635 F. Supp. 718 (W.D. La. 1986), aff'd, 811 F.2d 601 (5th Cir. 1987).

57. 477 So. 2d at 1108; see also *Hargrave*, supra note 51, at 6; *Bridley v. Alton Oschner Med. Found. Hosp.*, 532 So. 2d 905 (La. App. 5th Cir. 1988); *Cooper v. Sams*, 532 So. 2d 380 (La. App. 3d Cir.), writ denied, 533 So. 2d 382 (1988).

58. 477 So. 2d 1094, 1108 (La. 1985); VI Records of the Louisiana Constitutional Convention of 1973; *Convention Transcripts 1016-18 (1977)* [hereinafter VI *Convention Transcripts*]; *LaMark v. NME Hosp., Inc.*, 542 So. 2d 753 (La. App. 4th Cir.), writ denied, 551 So. 2d 1334 (1989). It has been said of the *Sibley* analysis: "The approach is to focus on the specific merits of the individual case which necessarily entails a balancing or comparative evaluation of governmental and individual interests." *Allen*, 505 So. 2d at 887. The *Allen* case concerned those relations of a deceased not included under Louisiana Civil Code article 2315 as having standing to bring a survival action. The court held that this is a classification unenumerated in article I, section 3 and thus that the plaintiffs bore the burden to show that the classification did not suitably further any appropriate state interest. The appropriate state interest was to limit the number of beneficiaries of a survival action with a benefit to judicial efficiency and economy. The classification reasonably furthered that end. The survivors allowed to bring the action are those most affected by the loss, and thus the limitation to these classes reflects a reasonably appropriate limitation.

Actually, the *Sibley* court established the appropriate analysis that should have been employed when the 1974 Louisiana Constitution became effective. The 1973 Constitutional Convention proceedings are replete with references to the failure of federal jurisprudence interpreting the fourteenth amendment to provide adequate protection to certain classes. Delegates to the 1973 Convention enumerated those classes that needed express inclusion in article I, section 3 to ensure their protection.⁵⁹ Upon a party's challenge of a discriminatory law, the state would now bear the burden⁶⁰ of establishing that the classification is a means substantially

59. Succession of Clivens, 426 So. 2d 585 (La. 1982). As another commentator has observed:

In *Sibley v. Board of Supervisors*, the Louisiana Supreme Court recognized that the thrust of the state constitution's equal protection article was to provide greater protection against arbitrary discrimination to groups which the federal courts had failed to protect, and that the "tier" model of federal review of equal protection challenges was inappropriate as a guide to deciding such challenges under the state constitution. Instead, the *Sibley* court announced a very different standard of review under the state constitution's equal protection article

Devlin, Louisiana Constitutional Law, Developments in the Law, 1986-1987, 48 La. L. Rev. 335, 361-62 (1987). Devlin argues that selective enforcement of public gambling statutes would seem to contravene equal protection under the Louisiana Constitution as interpreted in *Sibley*. Both wagering on a public golf course on the outcome of the golf game and wagering somewhere else on the outcome of a card or dice game constitute public gambling. Why is the former tolerated and the latter prosecuted? "[I]t seems that if a defendant were to mount a challenge to the selective enforcement of the public gambling laws on these grounds, the state would have to come forward [under the *Sibley* approach] with a greater showing of need for the distinction than has thus far been articulated." *Id.* at 363. See *State v. Griffin*, 495 So. 2d 1306 (La. 1986). Although selective enforcement of criminal statutes might not violate federal equal protection, *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), for instance, because not directed against a traditional suspect class, under *Sibley* this does not foreclose the issue of Louisiana equal protection. Devlin, at 361.

60. As a spokesman for the Declaration of Rights Committee stated:

Mr. Roy: We feel that we have to enumerate these various rights because we think that our citizens are entitled to have our court protect them in the future. It's been too many times that even the Supreme Court of the United States has dodged the issue with respect to equal protection. We want to make sure that our justices can clearly understand that when you're going to discriminate, when the state will discriminate against a person for any one of these categories, then the state must show a reasonable basis for it.

VI Convention Transcripts, *supra* note 58, at 1017. Article I, section 3, as it came from the Declaration of Rights Committee of the 1973 Constitutional Convention, prohibited discrimination based on sex, age, birth, race, social origin, political or religious ideas. The Constitutional Convention, after defeating an effort to reduce the article's protection to that of the fourteenth amendment, *id.* at 1022-30, banned discrimination based on race and religious belief completely, and then added the requirement that discrimination on the basis of the other enumerated categories was forbidden only if the state could not show that the discrimination was not arbitrary, capricious, or unreasonable. *Id.* at 1016-

related to a legitimate purpose.⁶¹

As further indication that the Louisiana provision affords greater protection in this area, the proceedings of the 1973 Constitutional Convention reflect that an effort to conform the protection under article I, section 3 to that afforded by the fourteenth amendment was defeated.⁶² Although the article was amended by the convention, the final provision retained the original concept of enumerating specifically protected classes

18. This last requirement was added in response to fears that no classifications based on the enumerated grounds would be allowed under the original committee. *Id.* at 1016-29. It was felt, however, that the enumeration did serve a useful purpose.

“*Mr. Roy:* You may inquire, does there exist a need for specifically setting forth these classes as we have done? We believe there is, for two main reasons. First, the federal courts have failed to apply the Fourteenth Amendment to all of these classes. Thus, millions have been, are now, and will continue to be denied equal protection of our laws.” *Id.* at 1016.

“*Mr. Roy:* We feel that we have to enumerate these various rights because we think that our citizens are entitled to have our court protect them in the future. It’s been too many times that even the Supreme Court of the United States has dodged the issue with respect to equal protection. We want to make sure that our justices can clearly understand that when you’re going to discriminate, when the state will discriminate against a person for any one of these categories, then the state must show a reasonable basis for it. We consider that even for the physical condition. Why should there be a law that prevents a physically handicapped person who’s a computer genius from working for the State of Louisiana because he’s crippled and can’t walk? That’s the reason why we consider those categories, we don’t want the courts to be confused anymore.” *Id.* at 1017.

In the constitutional convention, Mr. Roy used as an example of unconstitutionality a law that provided that people fifty or older cannot work.

“*Mr. Roy:* We merely say this, . . . , that every citizen is entitled to be discriminated against, on a reasonable basis. Age is not a reasonable basis unless the legislature or the state shows that it is a fair consideration. Suppose, fifteen years from now, the legislature says no person may work for the state who is fifty years of age or older. I think that we should have some protection so that the courts may look into it and decide whether that is reasonable or not.” *Id.* at 1017.

“*Mr. Roy:* Now, we specifically list categories that we feel very strongly about, that need to be given some addressing to. We have not excluded that a person, other than one of these, may be denied the equal protection of the laws in the first sentence.” *Id.*

Roy argued that the specifically listed classes must receive more protection than those that fall under the lower federal standard of equal protection. In other words, a stricter state standard applies to specifically-enumerated classes and the normal federal standard applies to the rest.

“*Mr. Roy:* That doesn’t limit it to those [enumerated classes]. It just says, ‘for these in particular,’ if you discriminate, you’ve got to show a reasonable basis for the discrimination.” *Id.*

61. *Sibley*, 477 So. 2d at 1108. VI Convention Transcripts, *supra* note 58, at 1017. In determining whether a classification is reasonable or not, the courts should be guided by the constitutional convention’s purpose in expanding the equal protection guarantee beyond that of the federal Constitution and pre-existing Louisiana law. Comment, *supra* note 46, at 196-97, n.55; Hargrave, *supra* note 51, at 21.

62. *Id.* at 1022-30.

and placing the burden to prove the reasonableness of the discrimination on the state.

As one commentator has said of article I, section 3:

The equal protection guarantee that emerged is a broad one and was intended to be so. Surely the breadth of the provision will produce far-reaching changes in the state, perhaps more than with any other provision of the constitution [of 1974].⁶³

For the most part, however, until the *Sibley* case was decided in 1985, these changes were not forthcoming. In some equal protection cases decided after *Sibley*, the state constitutional guarantee is not even mentioned or cited.⁶⁴ One case held that the "two standards [state and federal] are quite similar."⁶⁵ The recent case of *Williams v. Kushner*,⁶⁶ however, involved, like *Sibley*, the question of the constitutionality of the limitation imposed on medical malpractice recovery. The Louisiana Supreme Court refused to decide the equal protection issue because the plaintiff had already settled with the health care provider and the question was regarded as moot. However, the court indicated that *Sibley* would have been applicable had the question not been moot.⁶⁷ Chief Justice Dixon, dissenting, argued that the constitutional question was properly before the court and went on to apply the *Sibley* analysis.⁶⁸ As Chief Justice Dixon put it:

Such classification violates Article I, Section 3 unless the statute's proponents . . . have demonstrated, by a preponderance of the evidence, that since it *substantially furthers* an appropriate state purpose, the discrimination is not arbitrary, capricious, or unreasonable.⁶⁹

The court of appeal in *Williams*⁷⁰ had expressly held that *Sibley* applied and that the test under the Louisiana Constitution was more

63. Hargrave, *supra* note 51, at 6.

64. In *Succession of Davis*, 509 So. 2d 838 (La. App. 1st Cir.), writ denied, 513 So. 2d 821 (1987), the court held La. Civ. Code art. 209, which sets strict time limits on filiation actions, to be constitutional under the fourteenth amendment, relying on *Reed v. Campbell*, 476 U.S. 852, 106 S. Ct. 2234 (1986). La. Const. art. I, § 3 was neither mentioned nor cited.

65. *Miller v. State Civil Serv. Comm'n*, 540 So. 2d 482, 486 (La. App. 1st Cir. 1989).

66. 549 So. 2d 294 (La. 1989).

67. 549 So. 2d at 296.

68. *Id.* at 304 (dissenting opinion).

69. *Id.* at 305 (emphasis added).

70. 524 So. 2d 191 (La. App. 4th Cir. 1988), *aff'd*, 549 So. 2d 294 (1989).

“meaningful” than that under the federal constitution,⁷¹ suggesting that a form of mid-level scrutiny should be applied to such classifications.

The court of appeal added that the proponents of the challenged legislation must prove that it is not unconstitutional.⁷²

As indicated by the above discussion, if the purpose of the enumeration in article I, section 3 was to specifically protect these rights, and if the protection afforded by the state equal protection provision was intended to have more bite than that afforded by the fourteenth amendment,⁷³ then apparently, under *Sibley*, the Louisiana standard of scrutiny for the listed classes is roughly equivalent to intermediate scrutiny on the federal level.⁷⁴ Assuming that this is true, then it is suggested

71. We agree . . . that the *Sibley* standard is appropriate *Sibley* expressly rejected the traditional three-tier scrutiny of federal equal protection analysis in favor of a *more meaningful test* which reflects the intent of the drafters of the Louisiana Constitution of 1974.

Id. at 193 (emphasis added).

72. In addition to this *new interpretation* of the appropriate standard for Louisiana equal protection analysis, *Sibley* also announced a departure from the longstanding rule that legislation is presumed constitutional with the opponent carrying the burden of proving that a statute violates the constitution.

Id. at 194 (emphasis added). See also *State v. Barberousse*, 480 So. 2d 273 (La. 1985).

73. *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986); *Bridley v. Alton Ochsner Med. Found. Hosp.*, 532 So. 2d 905 (La. App. 5th Cir. 1988); *Cooper v. Sams*, 532 So. 2d 380 (La. App. 3d Cir.), writ denied, 533 So. 2d 382 (1988); *McLean v. Hunter*, 486 So. 2d 816 (La. App. 1st Cir.), rev'd on other grounds, 495 So. 2d 1298 (1986), writ denied, 513 So. 2d 1206 (1987).

74. One commentator has said:

Two areas in which the Louisiana Constitutional Convention expanded the individual guarantees of the United States Constitution are: (1) the right to equal protection and (2) the right to privacy.

Messina, Corporal Punishment v. Classroom Discipline: A Case of Mistaken Identity, 34 Loy. L. Rev. 35, 99 (1988). And further:

Thus, [after quoting from *Sibley*] in contrast to the use of a “rationality” test for age discrimination under the federal standard, the Louisiana Constitution elevates a legislative “age” classification to a form of middle-tier scrutiny.

Id. at 100.

Succession of Brown, 388 So. 2d 1151 (La. 1980), cert. denied, 450 U.S. 998, 101 S. Ct. 1703 (1981), had suggested the same thing in holding that then La. Civ. Code art. 919 violated both federal and state equal protection.

The United States Supreme Court has held that the minimal rationality test applies to age discrimination under the fourteenth amendment. *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979) (mandatory retirement for foreign service employees at age sixty); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 95 S. Ct. 2562 (1976) (mandatory retirement for police at age fifty); L. Tribe, *American Constitutional Law*, 1588-1601 (2d ed. 1988) (deals with wealth classification).

In *LaMark v. NME Hosp., Inc.*, 542 So. 2d 753 (La. App. 4th Cir.), writ denied, 551 So. 2d 1334 (1989), the court clearly stated the difference in the standard required for

that a twenty-three year old child has been unlawfully discriminated against by the new law in favor of that child's twenty-two year old sibling. This is true if intermediate scrutiny applies to the enumerated classes, which seems to be the case since the court stated in *Sibley*, "the state constitution calls for *more than minimal scrutiny* of certain types of classifications, and assigns the state the burden of showing that such legislation is not arbitrary, capricious or unreasonable."⁷⁵ Here the court refers to those classifications specifically enumerated in article I, section 3, other than race and religion, which are simply prohibited.⁷⁶ "More than" minimal scrutiny is *at least* intermediate scrutiny.

In *Crier v. Whitecloud*,⁷⁷ the Louisiana Supreme Court, relying on *Sibley*, expressly held that a classification not involving the specifically enumerated categories in article I, section 3 is to be judged on the basis of minimal scrutiny. "A remand to the district court to afford plaintiff the opportunity to present evidence to carry her burden would serve no useful purpose because of the minimal level of scrutiny involved."⁷⁸ This was *expressly stated to be because* the classification involved was not one enumerated in article I, section 3.⁷⁹ Thus, it may be legitimately inferred that, had the classification been one based on a category expressly enumerated in article I, section 3, it would have received higher scrutiny—intermediate scrutiny—because the court expressly referred to the level utilized as "minimal," a federal category.⁸⁰ According to the

enumerated classes and non enumerated classes under Art. I, § 3.

[T]he statute does not classify individuals . . . on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, which would shift the burden to the . . . [state] to show the classification *substantially furthers a legitimate state interest*.

Id. at 755 (citing *Sibley*) (emphasis added).

Since application of the statute creates some other classification, it is incumbent on the party challenging the statute to show that the legislation does not *suitably further any appropriate state interest*.

Id. (citing *Sibley*) (emphasis added).

With an enumerated classification, the test is "substantially" and "legitimate." With a non-enumerated classification, the test is "suitably" and "any appropriate." This, along with the switch in the burden of proof, is the difference between intermediate scrutiny and minimal scrutiny.

75. 477 So. 2d 1094, 1107 (La. 1985) (emphasis added).

76. See also *McLean v. Hunter*, 486 So. 2d 816 (La. App. 1st Cir.), rev'd on other grounds, 495 So. 2d 1298 (1986), writ denied, 513 So. 2d 1206 (1987).

77. 496 So. 2d 305 (La. 1986).

78. *Id.* at 311.

79. *Id.*

80. See also *State v. Barberousse*, 480 So. 2d 273 (La. 1985); *Latona v. Department of State Civil Serv.*, 492 So. 2d 27 (La. App. 1st Cir.), writ denied, 496 So. 2d 1043 (1986); *McLean*, 486 So. 2d at 816.

In his *Crier* dissent, 496 So. 2d 305, 313 (La. 1986), Justice Dennis said the following

concurrence of Justice Lemmon in *Crier*,⁸¹ "this case is not as compelling [as *Sibley*] because of the lower level of scrutiny and the more apparent reasonableness."⁸²

Comparison of the Louisiana Equal Protection Provision to Its Federal Counterpart

It is suggested that the federal three-tier equal protection analytical scheme has been constitutionally built into the state equal protection and dignity clause, article I, section 3, by the state Constitutional Convention. This is the meaning of the following oft-quoted statement from *Sibley*:

Article I, Section 3 commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely [strict scrutiny]; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis [intermediate scrutiny]; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest [minimal scrutiny].⁸³

Strict scrutiny applies to a classification by race or religion in both the federal and state context. Actually, with regard to those two clas-

concerning the scrutiny required for the enumerated categories:

Close scrutiny is required when a statute classifies persons for treatment different from others because of a difference in their physical condition and the burden is on the party who seeks to uphold the classification.

It is submitted that, within the context of his entire dissent, this means intermediate scrutiny or higher than intermediate scrutiny.

81. 496 So. 2d at 311.

82. *Id.* at 313.

83. 477 So. 2d 1094, 1107-08 (La. 1985). See also *Parker v. Cappel*, 500 So. 2d 771 (La. 1987); *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986); *Miller v. State Civil Serv. Comm'n*, 540 So. 2d 482 (La. App. 1st Cir. 1989); *LaMark v. NME Hosp., Inc.*, 542 So. 2d 753 (La. App. 4th Cir.), writ denied, 551 So. 2d 1334 (1989); *Accountants' Ass'n of La. v. State*, 533 So. 2d 1251 (La. App. 4th Cir. 1988), writ denied, 538 So. 2d 593, cert. denied, 110 S. Ct. 60 (1989); *Airline Car Rental v. Shreveport Airport Auth.*, 667 F. Supp. 303 (W.D. La. 1987); *Stuart v. City of Morgan City*, 504 So. 2d 934 (La. App. 1st Cir. 1987); *Allen v. Burrow*, 505 So. 2d 880 (La. App. 2d Cir.), writ denied, 507 So. 2d 229 (1987); *Harlan v. Frazier*, 635 F. Supp. 718 (W.D. La. 1986), aff'd, 811 F.2d 601 (5th Cir. 1987).

sifications, the state provision offers more protection than the federal because under article I, section 3 such classifications are simply invalid. No scrutiny is required once it is determined that the classification is based on one of these grounds. Nevertheless, the highest level of scrutiny in both the state and federal schemes reach very similar results because under federal strict scrutiny, the discrimination is usually found to be invalid. A form of intermediate scrutiny applies to the other enumerated classes in article I, section 3 under the *Sibley* interpretation. Here the burden to show that the classification is not unreasonable, capricious, or arbitrary is placed on the proponent of the classification, and the standard utilized is a substantial furthering of a reasonable, legitimate state purpose. For classifications other than those expressly enumerated, a form of minimal scrutiny is utilized and the burden is placed on the challengers of the classification to show that it is unreasonable or does not further an appropriate state purpose.⁸⁴

84. 477 So. 2d at 1108. Justice Dennis, dissenting in the *Crier* case, regarded even the lowest level of scrutiny under La. Const. art. I, § 3 to be higher than federal minimal scrutiny. He cited *Sibley* for the proposition.

I cannot subscribe to the majority's precipitate assumption that our state constitution offers no more protection of equal laws at the general level than the Fourteenth Amendment's equal protection clause as currently interpreted. In *Sibley* . . . this court recognized for the first time that Article I, Section 3 of the 1974 Louisiana Constitution raises the threshold of equal protection and rejected the federal three level standard. In place of the minimal level of federal protection, under which judicial scrutiny is in reality non-existent, our constitution establishes its own minimal standard: when a law classifies individuals on any basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest. [citing *Sibley*] . . . This safeguard goes beyond the federal decisional law construing the Fourteenth Amendment, which this court previously adhered to, and provides a new and more protective standard *even at* the minimal level.

496 So. 2d at 313 (dissenting opinion) (emphasis added).

In *State v. Bradley*, 360 So. 2d 858 (La. 1978), a pre-*Sibley* case, the Louisiana Supreme Court considered an equal protection challenge to a state law providing that D.W.I. arrest records may not be expunged even though other types of arrest records may be. Both the state and federal constitution were relied upon. The court held that both equal protection guarantees were violated. The court, in reaching its conclusion, said, "that in the present case, there being no 'suspect classification' nor 'fundamental right' involved, the proper constitutional analysis to be applied is whether the classification created by the legislature bears a rational relation to a legitimate State interest." *Id.* at 861. This, of course, is an application of the minimal scrutiny standard and is arguably unchanged by *Sibley* because D.W.I. drivers are not an enumerated class in La. Const. art. I, § 3, and such discrimination is presumed constitutional under both the state and federal constitutions even after *Sibley*. But see Justice Dennis' dissent in *Crier*. See also *Bridley v. Alton Ochsner Med. Found. Hosp.*, 532 So. 2d 905 (La. App. 5th Cir. 1988); *Latona v. Department of State Civil Serv. Comm'n*, 492 So. 2d 27 (La. App. 1st Cir.), writ denied, 496 So. 2d 1043 (1986).

State v. Petrovich, 396 So. 2d 1318 (La. 1981), indulged, under both the state and

In federal equal protection jurisprudence construing the fourteenth amendment, the Supreme Court has held that with intermediate scrutiny the proponent bears the burden of proof,⁸⁵ just as *Sibley* and the Constitutional Convention records indicate is the case with the enumerated classifications, other than race and religion, under the Louisiana Constitution. This is further evidence that, although *Sibley* held that Louisiana does not recognize the three-tiered approach to equal protection analysis,⁸⁶ the federal tier most like the *Sibley* standard is the intermediate tier, and clearly Act 788, with its blatant age discrimination, would not pass constitutional muster if subjected to such scrutiny.⁸⁷ It may be suggested that, if age discrimination under the fourteenth amendment were subject to intermediate scrutiny, such discrimination, as found in the new forced heirship law, would be found to violate federal equal protection. It is only because age classifications under the fourteenth amendment, unlike the state equal protection provision, are subject to mere minimal scrutiny⁸⁸ that such discrimination could possibly pass muster on the federal level.⁸⁹

federal constitutions, a presumption of constitutionality and placed the burden on those challenging the statute on equal protection grounds. Since no class expressly mentioned in La. Const. art. I, § 3 was involved in the case this may be consistent with *Sibley*. But *DeFrancis v. City of Bossier*, 322 So. 2d 333 (La. App. 2d Cir. 1975), writ denied, 325 So. 2d 611, cert. denied, 429 U.S. 820, 97 S. Ct. 68 (1976), which dealt with classifications based on sex, also held in favor of the presumption of constitutionality and placed the burden on the challenger of the statute. However, the facts of the case apparently arose before the effective date of the Louisiana Constitution of 1974.

Louisiana courts have given deference to the legislative branch in cases dealing with economic and social welfare legislation and the preservation of the state's fiscal resources. In such cases, only a clear violation of the state or federal constitution would suffice to strike the legislation. *Parker v. Cappel*, 500 So. 2d 771 (La. 1987); *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981); *Vita v. United Gen. Ins. Co.*, 469 So. 2d 433 (La. App. 3d Cir.), writ denied, 478 So. 2d 900 (1985); *Airline Car Rental v. Shreveport Airport Auth.*, 667 F. Supp. 303 (W.D. La. 1987).

85. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331 (1982) (dealing with gender discrimination).

86. 477 So. 2d at 1105-07.

87. For examples of intermediate scrutiny on the federal level, see *Pickett v. Brown*, 462 U.S. 1, 103 S. Ct. 2199 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 102 S. Ct. 1549 (1982); *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459 (1977).

88. *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976).

89. 440 U.S. 93, 99 S. Ct. 939 (1979); 427 U.S. 307, 96 S. Ct. 2562 (1976). But in *Harlan v. Frazier*, 635 F. Supp. 718 (W.D. La. 1986), the federal court sitting in a diversity case said the following about the fourteenth amendment equal protection analysis and age discrimination:

It is beyond doubt that no fundamental right, as interpreted by the United States Supreme Court, is subject to violation in this case. Alternatively, where the classification is based upon gender, legitimacy *or, perhaps, age*, then the

Illustration of the Effect of a Heightened Level of Scrutiny

The federal analysis of age discrimination is simply not as rigorous as that mandated by the State of Louisiana in article I, section 3. The elevation of age discrimination to the second tier of analysis dictates a need for a substantial relationship between the regulatory scheme and the state interests involved. The difference that an elevation in a degree of scrutiny can make is strikingly illustrated in *Succession of Brown*,⁹⁰ which dealt with discrimination by birth. The same state statutory provision⁹¹ that was upheld by the earlier United States Supreme Court decision of *Labine v. Vincent*⁹² was again challenged, only this time successfully, in *Brown*. The Louisiana Supreme Court in *Brown* noted that the *Labine* Court "used a test of 'minimal rationality' under the old scheme of equal protection analysis."⁹³ Because discrimination by birth had been elevated by the United State Supreme Court to the middle level of analysis in the case of *Matthew v. Lucas*,⁹⁴ decided after *Labine*, the analysis required "a more critical examination of the statute."⁹⁵ Now gender and illegitimacy are middle tier cases on the federal level.⁹⁶ The standard suggested in *Reed v. Reed*⁹⁷ for middle tier scrutiny was that "a classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'"⁹⁸

statute will survive equal protection scrutiny only if it is substantially related to an important state interest.

635 F. Supp. at 724 (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 1055 S. Ct. 3249 (1985)) (emphasis added).

90. 388 So. 2d 1151 (La. 1980), cert. denied, 450 U.S. 998, 101 S. Ct. 1703 (1981).

91. La. Civ. Code art. 919 (1870), which dealt with the succession rights of illegitimate children to their intestate father, provided:

Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State.

.....

In all other cases, they can only bring an action against their natural father or his heirs for alimony, the amount of which shall be determined, as is directed in the title: *Of Father and Child*.

92. 401 U.S. 532, 91 S. Ct. 1017 (1971).

93. 388 So. 2d at 1152.

94. 427 U.S. 495, 96 S. Ct. 2755 (1976).

95. 388 So. 2d at 1153.

96. *Heckler v. Matthews*, 465 U.S. 728, 104 S. Ct. 1387 (1984); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331 (1982); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976).

97. 404 U.S. 71, 92 S. Ct. 251 (1971).

98. *Id.* at 76, 92 S. Ct. at 254 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561 (1920)).

Likewise, the age discrimination involved in Act 788 must be analyzed not in terms of the minimal scrutiny applied by the federal standard, but rather in terms of the higher level of scrutiny as mandated by article I, section 3 of the Louisiana Constitution. In *Succession of Grice*,⁹⁹ the Louisiana Supreme Court applied the "heightened scrutiny" standard and found that Louisiana Civil Code article 209, requiring that filiation actions against fathers be brought within nineteen years of birth or one year from the natural father's death if such occurs within the nineteen-year period, was constitutional under both the fourteenth amendment and article I, section 3. "Such classifications [based on illegitimate birth] are unconstitutional unless they are substantially related to permissible state interests."¹⁰⁰

Justice Calogero dissented in *Grice*¹⁰¹ regarding the conclusion, but agreed with the majority that "the scrutiny given a provision which does draw a classification based on birth is a heightened one."¹⁰² Justice Calogero expressed his view, which is the court's view, that, *because* birth is in the article I, section 3 enumeration, heightened scrutiny is required.¹⁰³ And because age is also listed in the enumeration, heightened scrutiny is required for it.

The Legislative Purpose for Act 788

To determine the validity of Act 788 under the equal protection provision, the legislative purpose for the distinction between those below age twenty-three and those twenty-three and older must be examined. The age of twenty-three is simply an arbitrary cutoff unless it is related to actual or potential need of support for younger, more vulnerable heirs. To overcome this objection to the discrimination as being arbitrary, the new law would have to simply abolish forced heirship as such because under forced heirship support is not a factor.

It has been argued in another section of this paper¹⁰⁴ that redefining the nature of forced heirship with alimony or support as its purpose would change the basic nature of the institution and would constitute an "abolition" of forced heirship in violation of article XII, section 5. The fact that the purpose violates another constitutional provision could render the purpose impermissible. If, to avoid this prohibition, the proponents of the new law argue that the age cutoff is not based on alimony or support, but is simply an arbitrary cutoff point, they would run smack against the horns of the article I, section 3 dilemma. The

99. *Succession of Grice*, 462 So. 2d 131, 133 (La. 1985).

100. *Id.* at 133.

101. *Id.* at 136 (dissenting opinion).

102. *Id.* at 137 (dissenting opinion).

103. *Id.*

104. See *supra* text accompanying notes 1-42.

Act as written truly leaves its proponents between a constitutional rock and a hard place.¹⁰⁵

If the state purpose of the new forced heirship law is not support of the needy child, then what could it be?¹⁰⁶ Perhaps the purpose is freedom of testation (the "It's my property and I'll do what I damn-

105. No legitimate state purpose is served by singling out for disinherison those children twenty-three years of age and older. *State v. Petrovich*, 396 So. 2d 1318 (La. 1981). This age discrimination fails to substantially further a legitimate state purpose—even assuming that a legitimate support rationale is behind the classification—because, even in this context, a twenty-two year age cutoff is arbitrary in that there may well be those without need below it. Under the equivalent of an intermediate level scrutiny, this simply will not pass constitutional muster. Assuming *arguendo* that the purpose of the legislation is viewed as permissible, the question becomes whether the particular classification is substantially related to the accomplishment of this permissible state purpose. Does the classification go beyond what is "necessary" to accomplish the goal? Are some children *needlessly* included in the classification and are some *unnecessarily* excluded from it? *Succession of Grice*, 462 So. 2d 131, 134 (La. 1985). Of course, this all depends on the nature of the "permissible" purpose.

If the purpose of the new forced heirship law is to provide support for children in need—and it is difficult to think of another purpose for the twenty-two year cutoff—the classification includes younger children who are not in need and excludes older children who are in need. A pre-set, statutory age discrimination that bestows a set percentage on one child without regard to actual need, indeed, without even inquiring into his circumstances, but bestows nothing on another child regardless of his circumstances and need, surely is not an efficient way to ensure the support of needy heirs. The provision unnecessarily includes some children and excludes others. If the discriminatory statutory classification attempts to supply the support needs of children, then it must be more closely directed to this purpose to survive intermediate scrutiny. A blanket age discrimination unrelated to actual need certainly does not satisfy the substantial relation requirement. Thus, under the *Sibley* analysis, the new forced heirship law violates article I, section 3 of the Louisiana Constitution of 1974 because it is an unreasonable discrimination based on age, even assuming that support is a legitimate goal within the context of forced heirship. This, of course, in no way implies that all classifications based on age are invalid. For instance, a statute providing support for minor children would be valid because the provision would be substantially related to the state purpose: *support* of children under a certain age. The child's needs would dictate the amount contributed for support. Contrast this with the new forced heirship law, which gives a percentage of the estate to the child regardless of need and thus is not substantially related to support. Other age classifications, such as driving age, drinking age, employment age, and retirement age, would have to be considered in light of the purpose to be furthered by the classification and the substantiality of the age to the purpose to be achieved under the requirements of intermediate scrutiny.

106. That it is based on need is strongly indicated by the fact that the form in which the new forced heirship bill passed the Senate and was presented to the House was expressly couched in terms of need. Under the original bill, the child under twenty-three could lose his "forced" share if others could establish that it was not necessary to his maintenance and education. Or it could be "reduced" (what an irony!) if it exceeded what was needed for his support on the date of the ancestor's death. The House committee, recognizing the constitutional problems pregnant in such an explicit foundation in support and alimony, amended the bill to the present version of Act 788.

well please with it!" argument) and the right to freely dispose of property that one owns. If this is the purpose, the new forced heirship law is not related to it *at all*. Even assuming that this would be a permissible state interest, the twenty-two year cutoff is simply unrelated in any rational way to this goal. The *abolition* of forced heirship would certainly be related to this purpose; but in Louisiana, article XII, section 5 of the Constitution prohibits such action.¹⁰⁷ A discrimination between children under twenty-three and those twenty-three and older is not related in any way to freedom of testation.¹⁰⁸

In sum, the constitutional argument is straight-forward:

- 1) *Sibley* requires one unitary standard for state equal protection of classifications based on sex, birth, age, etc.;¹⁰⁹
- 2) *Sibley* expressly holds that the state standard is stricter than the federal standard;¹¹⁰
- 3) *Sibley* also expressly holds that the state constitution calls for "more than" minimal scrutiny for classifications based on the enumerated categories in article I, section 3;¹¹¹
- 4) The standard with age classification is minimal scrutiny on the federal level,¹¹² but because of 2) and 3) above, must be above minimal scrutiny on the state constitutional level;
- 5) In light of 1) through 4) above, it follows that something akin to intermediate scrutiny is the *Sibley* standard for age classifications under the Louisiana Constitution. Thus, the state must defend the age classification as being substantially related to the permissible state purpose;
- 6) Under *Sibley*, when classifications are based on age, the burden is on the proponent to establish that the state purpose is not arbitrary, unreasonable, or capricious;¹¹³
- 7) If the classification in Act 788 does not constitute an impermissible discrimination in the equal protection analysis because it is based on support needs, then it violates article XII, section 5 of the Louisiana Constitution of 1974 because it so

107. See *supra* text accompanying notes 1-42.

108. The only other state purpose that comes to mind is that of accomplishing a violation of the Louisiana Constitution by changing the nature of forced heirship to such a degree that it is really abolished and thus La. Const. art. XII, § 5 is violated. See text accompanying *supra* notes 1-42. Of course, this is not a permissible state purpose.

109. 477 So. 2d 1094, 1107 (La. 1985); Devlin, *supra* note 59, at 361-62.

110. 477 So. 2d at 1108; Devlin, *supra* note 59, at 361-62.

111. 477 So. 2d at 1107.

112. *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976).

113. 477 So. 2d at 1107.

modifies the institution of forced heirship that it is actually abolished.¹¹⁴

III. DEFINITION OF FORCED HEIRSHIP UNDER THE NEW LEGISLATION

The New Forced Heirship: Child Under Twenty-Three

The main thrust of Act 788 is its amendment of Louisiana Civil Code article 1493, the article designating the forced heirs. Formerly all of the decedent's children, including his more remote descendants by roots, had been forced heirs. Under Act 788, unless a child is seriously incapacitated, he is a forced heir only if he is under the age of twenty-three when the decedent dies.

Efforts of the Courts and Legislature to Eliminate Distinctions Among Heirs

In classifying children according to age, the legislature reversed a trend it started in 1981 of removing from the law of inheritance any distinction or discrimination between children. In that year, illegitimacy was removed as a criterion excluding some children from heirship generally, as well as forced heirship.¹¹⁵ From that time until the appearance of Act 788, all children whose filiation was established to the decedent, and their descendants by representation, were forced heirs. Additionally, former Louisiana Civil Code article 916 (1870) made the existence of the surviving spouse's "legal" usufruct depend upon whether the property over which the usufruct would extend was inherited by children of the decedent's marriage with the surviving spouse. That distinction between the children of the decedent's marriage with the surviving spouse and the children of a previous marriage was also eliminated in 1981. Present Louisiana Civil Code article 890 subjects all children of the decedent, regardless of their marital origin, to the surviving spouse's "legal" usufruct.¹¹⁶

Purpose of Classification by Age

What prompted the legislature to adopt a classification of forced heirs based on age after having so recently made these major changes

114. See *supra* text accompanying notes 1-42.

115. Compare La. Civ. Code art. 1493, as amended by 1981 La. Acts No. 884, § 1, with La. Civ. Code art. 1493 (1870), and La. Civ. Code arts. 871-902, as amended by 1981 La. Acts No. 445, § 1 and 1981 La. Acts No. 919, § 1, with La. Civ. Code arts. 871-933 (1870).

116. The only distinction between children that remains in connection with the usufruct of the surviving spouse has to do with the right of certain naked owners to demand security from the usufructuary. La. Civ. Code art. 890.

in favor of not discriminating between children in the law of inheritance? One explanation is political. The age classification was the political tactic formulated by those who sought to abolish forced heirship in spite of the legislature's repeated refusal to approve a state constitutional amendment abolishing the institution. One of the many objections voiced in the legislature over the years to the abolition of forced heirship had been that abolition would leave young children without a remedy for an unjust disinherison. To satisfy this objection, the proponents of abolition proposed to retain forced heirship for children under twenty-three while abolishing it for other children. This approach also allowed the abolitionists to avoid the two-thirds vote necessary for a constitutional amendment by arguing that the proposal was a modification and not an abolition of the institution of forced heirship. In other words, the proponents of the age classification were simply trying to come as close as was politically feasible to the total abolition of forced heirship.

Another explanation for the age classification involves the concept of parental support. Although previously unknown to the Louisiana law of inheritance, age is a familiar classification in the law of parent and child. A child's minority subjects him to the authority of his parent, and subjects the parent to the obligation to support the child.¹¹⁷ As originally proposed in the Senate, the bill that resulted in Act 788 blatantly borrowed the familiar legal concept of parental support and injected it into the law of inheritance. Moreover, the bill introduced support as a means of further limiting the forced heirship claim of the children under twenty-three. It provided that the forced portion of a child under twenty-three could not exceed the amount necessary for the support, lodging, maintenance, and education of the child, according to his situation in life, until the child attained the age of twenty-three.¹¹⁸ According to the Senate bill, the court was to determine on a case-by-case basis the actual amount to which the child under twenty-three would be entitled.¹¹⁹ This proposal protected only the children that the decedent would likely have been supporting at the time of his death, and only insofar as they were in need of such support. The choice of age twenty-three as opposed to another age, such as the age of majority, was made by the proponents of Act 788 to cover most children until they finished college.

The House Committee on Civil Law and Procedure, weary of the litigation generated by judicial determination of need in the area of alimony and child support, refused to inject the subjective element of judicial discretion into the law of inheritance. The committee struck

117. La. Civ. Code arts. 214-245.

118. La. S. 264, 15th Reg. Sess., § 1 (1989).

119. *Id.*

from the bill the part concerning the judicial determination of need. The House Committee's intent was still to protect the children who are most probably being supported by the decedent at the time of his death, but by the objective means of a fixed share rather than a subjective evaluation of need. The parent's support was in effect continued in the form of a protected inheritance.

The New Forced Heirship: Interdicted or Subject to Interdiction

Although older than twenty-three, a descendant who "has been interdicted" or who is "subject to being interdicted because of mental incapacity or physical infirmity" is entitled to the benefits afforded by forced heirship.¹²⁰ Presumably, creation of the class of interdicted heirs reflects the policy that a descendant unable to support himself is entitled to protection against unjust disinheritance by a parent. The public is served by exacting a sum from the deceased parent that can be used for support of the descendant, relieving society of the ultimate burden of his support. Ostensibly, both new classes of heirs based on age and incapacity approximate by statutory rule the support provisions of other jurisdictions that recognize a right to claim maintenance or support from the decedent's estate.¹²¹

Interdiction, often used by heirs to protect against unwise dispositions by an ancestor,¹²² now affords a new protection to descendants. Rather than interdict the ancestor, the heir over twenty-three years of age must be interdicted or subject to interdiction for mental incapacity or physical infirmity to qualify as a forced heir. For the heir, the good news is that the language only requires that the descendant "has been interdicted" without reference to any point in time. Thus, an heir over twenty-two years old could have been interdicted, subsequently relieved of the disabilities of interdiction by judgment,¹²³ and be a forced heir regardless of when the decedent died. For the descendant heir who is averse to a formal interdiction complete with notice of suit and recordation of the judgment,¹²⁴ it is enough to be "subject to interdiction."

120. 1989 La. Acts No. 788.

121. See *supra* text at notes 29-38 for a discussion of maintenance statutes.

122. See, e.g., *Marceaux v. Marceaux*, 145 La. 345, 82 So. 365 (1919); *Succession of Cahn*, 522 So. 2d 1160 (La. App. 4th Cir.), writ denied, 523 So. 2d 1339 (1988).

123. La. Civ. Code art. 420:

Interdiction ends with the causes which gave rise to it. Nevertheless the person interdicted can not resume the exercise of his rights, until after the definitive judgment by which the repeal of the interdiction is pronounced.

See La. Code Civ. P. art. 4557.

See also *Interdiction of Dobbins*, 535 So. 2d 1079 (La. App. 2d Cir. 1988), writ denied, 536 So. 2d 1203 (1989).

124. La. Code Civ. P. art. 4552.

Because the present tense of the verb is used to describe the heir subject to interdiction, apparently the heir must be mentally or physically incapable at the time of the decedent's death.¹²⁵

Formal Interdiction Procedure

To be interdicted, a person must be "subject to an habitual state of imbecility, insanity or madness,"¹²⁶ or "owing to any infirmity . . . incapable of taking care" of his person and administering his estate,¹²⁷ or "an inebriate or habitual drunkard."¹²⁸ The meaning of imbecility, insanity, or madness, taken from translations of Code Napoleon article 489, reflect "the one ground of interdiction, to wit, mental alienation, consisting of absence of, or change in, the faculty of reasoning and discerning, and which renders the person incapable of taking care of himself and administering his affairs."¹²⁹ Many of the cases involve a person with senile dementia, resulting from arteriosclerosis.¹³⁰ In addition, just as with commitment,¹³¹ a person suffering from substance abuse of any type may be incapable of caring for his person and administering his estate.¹³²

125. La. Civ. Code art. 934.

126. La. Civ. Code art. 389:

No person above the age of majority, who is subject to an habitual state of imbecility, insanity or madness, shall be allowed to take care of his own person and administer his estate, although such person shall, at times, appear to have the possession of his reason.

127. La. Civ. Code art. 422:

Not only lunatics and idiots are liable to be interdicted, but likewise all persons who, owing to any infirmity, are incapable of taking care of their persons and administering their estates.

128. La. R.S. 9:1001-1004 (1965). See also La. R.S. 9:1021 (1965) which concerns interdiction of veterans in government institutions; *Francis v. Francis*, 529 So. 2d 110 (La. App. 4th Cir. 1988) (such interdiction likened to limited interdiction).

129. *Pons v. Pons*, 137 La. 25, 48, 68 So. 201, 209 (1915).

130. See, e.g., *id.*; *Succession of Cahn*, 522 So. 2d 1160 (La. App. 4th Cir.), writ denied, 523 So. 2d 1339 (1988). In *Andrus v. Andrus*, 136 La. 824, 825, 67 So. 895, 895 (1915), the supreme court remarks:

The various authorities on medical jurisprudence define "senile dementia" as one of the forms of insanity. It is characterized by a mental weakness and inability to reason, a state of enfeeblement of the brain, which comes to those whose other vital organs have served them to a very old age. It may be regarded as a venerable form of insanity, but it is insanity nevertheless.

131. La. R.S. 28:1-213 (1989 and Supp. 1990), entitled the Mental Health Law. See also *In re L.M.S.*, 476 So. 2d 934 (La. App. 2d Cir. 1985).

132. La. R.S. 28:2(10) (1989):

"Gravely disabled" means the condition of a person who is unable to provide for his own basic physical needs, such as essential food, clothing, medical care, and shelter, as a result of serious mental illness or substance abuse and is unable

Conveniently, a relation, such as a cooperative sibling or a spouse, may petition for the interdiction.¹³³ Older jurisprudence precludes a consideration of the motives of the person seeking the interdiction.¹³⁴ The interdict may by power of attorney nominate a curator while competent.¹³⁵ If he fails to do so, the spouse of a person interdicted has a prior right to be appointed curator.¹³⁶ The interdiction proceeding is tried summarily and by preference.¹³⁷ Generally, the petitioner must prove that 1) the defendant is incapable of caring for his person, 2) the defendant is incapable of administering his estate, and 3) the interdiction is necessary.¹³⁸ Because interdiction has been considered such a harsh remedy, some courts have imposed a standard of persuasion of clear

to survive safely in freedom or protect himself from serious harm; the term also includes incapacitation by alcohol, which means the condition of a person who, as a result of the use of alcohol, is unconscious or whose judgment is otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.

133. La. Civ. Code art. 390 and La. Code Civ. P. art. 4543.

134. *In re Corbin*, 187 La. 968, 175 So. 636 (1937); *Landry v. Landry*, 171 La. 280, 130 So. 866 (1930). *Contra Francke v. His Wife*, 29 La. Ann. 302 (1877) (protect defendant from hostile motive).

135. La. Code Civ. P. art. 4550:

. . . By power of attorney, a competent person may nominate the curator of his person, of his property, or both, to serve should he be later interdicted. The court shall appoint the person nominated upon his furnishing security and taking an oath, as provided in Articles 4131, 4171, and 4554, unless he is disqualified or, unless for some other reason, the court determines that the appointment would not be for the best interest of the interdict. . . .

136. *Id.*

. . . If the curator is not nominated by power of attorney, or if the nominee is not appointed, the spouse of an interdicted person has the prior right to be appointed curator.

If the interdict has no spouse or if the spouse does not apply for appointment as curator within ten days after the judgment of interdiction, the court shall appoint the applicant best qualified, personally, and by training and experience, to serve as curator. Article 4069 governs the appointment of a separate curator of the property and person.

See also La. Civ. Code arts. 404-406.

137. La. Code Civ. P. art. 4546.

138. *In re Fabre*, 371 So. 2d 1322 (La. 1979); *Interdiction of Scurto*, 188 La. 459, 177 So. 573 (1937); *In re Corbin*, 187 La. 968, 175 So. 636 (1937); *Landry v. Landry*, 171 La. 280, 130 So. 866 (1930); *Francke v. His Wife*, 29 La. Ann. 302 (1877); *Interdiction of White v. White*, 463 So. 2d 53 (La. App. 3d Cir. 1985); *Interdiction of Adams*, 209 So. 2d 363 (La. App. 4th Cir. 1968); *Doll v. Doll*, 156 So. 2d 275 (La. App. 4th Cir. 1963).

But see *Pons v. Pons*, 137 La. 25, 68 So. 201 (1915), interpreting La. Civ. Code art. 389 as mandatory, thus not requiring proof of necessity. See also Hargrave, *Persons, The Work of the Appellate Courts for the 1967-1968 Term*, 29 La. L. Rev. 171, 180 (1969).

and conclusive proof.¹³⁹ The proof offered may be written as well as parol, and the judge may interrogate the defendant or order his examination by physicians.¹⁴⁰

Subject to Interdiction

Yet, it is not even necessary that a descendant heir has been interdicted at some point in his life; it is sufficient that he is subject to being interdicted at the time of the ascendant's death. If the statutory provision only requires proof that a descendant is subject to interdiction, it should not be necessary to prove "necessity" for the interdiction. The fact that a descendant is not interdicted, although subject to interdiction, suggests that others who could have instituted the proceedings may have seen no necessity for the formal judgment, especially considering the expense; or they may have decided that they cannot prove "necessity." Furthermore, the "clear and conclusive" standard of persuasion need not be applied if the result is not the harsh remedy of interdiction with its accompanying deprivation of capacity and civil rights.

Act 788 expresses the mental alienation or other cause for interdiction as "subject to being interdicted because of mental incapacity or physical infirmity." Mental incapacity suggests mental deficiencies of a somewhat less serious nature than imbecility, insanity, or madness. A person without mental capacity is defined in the Civil Code as a person "deprived of reason."¹⁴¹ The expression, according to the official comments, includes "all of the varieties of derangement that have been acknowledged by the Louisiana jurisprudence,"¹⁴² including habitual drunkenness,¹⁴³ drug sedation,¹⁴⁴ and senility.¹⁴⁵ Physical infirmity presumably is coextensive with the meaning of "infirmity" for physical reasons under Louisiana Civil Code article 422 and the jurisprudence interpreting it. Potentially, a child who is a drug addict and homeless in a distant city, or a child with rheumatoid arthritis who is incapable of caring for his person and administering his estate would be a descendant subject to being interdicted.

139. *Julius Cohen Jeweler, Inc. v. Succession of Jumonville*, 506 So. 2d 535 (La. App. 1st Cir.), writ denied, 511 So. 2d 1155 (1987); *Interdiction of White*, 463 So. 2d at 53; *Adams*, 209 So. 2d at 363; *Doll*, 156 So. 2d at 275.

140. La. Civ. Code art. 393; La. Code Civ. P. art. 4547. See *Interdiction of Escat*, 206 La. 207, 19 So. 2d 96 (1944); *Interdiction of Haggerty*, 519 So. 2d 868 (La. App. 4th Cir. 1988).

141. La. Civ. Code art. 1918.

142. *Id.*, comment (b).

143. *Interdiction of Gasquet*, 136 La. 957, 68 So. 89 (1915).

144. *Brumfield v. Paul*, 145 So. 2d 46 (La. App. 4th Cir. 1962).

145. *Smith v. Blum*, 143 So. 2d 419 (La. App. 4th Cir. 1962).

Limited Interdiction

Thus far, the operating assumption is that at least two of the three elements¹⁴⁶—incapacity to care for one's person and administer one's estate—must be proved to be a forced heir. However, under Louisiana Civil Code article 389.1 it is possible to obtain a judgment of "limited interdiction"¹⁴⁷ by proving *either* incapacity. A person who is incapable because of mental retardation,¹⁴⁸ mental disability, or other infirmity under Articles 389 or 422 may be interdicted if he is incapable of caring for his person *or* administering his estate.¹⁴⁹ At least one Louisiana case has imposed an additional requirement of proof of necessity for the limited interdiction.¹⁵⁰ The benefit of a limited interdiction, especially

146. If there is a judgment of interdiction against the heir, all three elements have been proved: incapacity to care for his person, incapacity to administer his estate, and necessity. If the heir is simply subject to interdiction, at least the first two elements have been proved. See *supra* text accompanying notes 140-41.

147. La. Civ. Code art. 389.1.

148. If the mentally retarded person is a child above the age of fifteen who possesses less than two-thirds of the average mental ability of a normal person, he or she may be placed under continuing tutorship or permanent tutorship "without formal or complete interdiction." La. Civ. Code art. 354.

La. Civ. Code art. 362:

Persons subject to mental or physical illness or disability, whether of a temporary or permanent nature of such a degree as to render them subject to interdiction, under the provisions of Title IX hereof, remain subject to interdiction as provided in Articles 389 to 426, inclusive, and such other laws as may relate thereto.

See generally La. Civ. Code arts. 354-362.

149. La. Civ. Code art. 389.1:

When a person is declared incapable by reason of mental retardation, mental disability, or other infirmity under the provisions of Articles 389 or 422 of the Louisiana Civil Code, of caring for his own person or of administering his estate, a court of competent jurisdiction may appoint a limited curator to such person or his estate. Pending appointment of a limited curator, the court shall inquire into the specific abilities and disabilities of the incapacitated person and such limited curator shall have only those powers necessary to provide for the demonstrated needs of the incapacitated person. The powers, duties, responsibilities, and any liabilities of the limited curator shall be specifically set forth in a judgment of limited interdiction. . . .

See Ryder, *Other 1981 Acts of General Interest to the Bar*, 29 La. B.J. 121 (1981).

An article of interest proposing a change in the law of interdiction to adopt limited interdiction was Comment, *Interdiction Reform: The Need For a Limited Interdiction Article in the Louisiana Civil Code*, 54 Tul. L. Rev. 164 (1979). See also Coon, *The Law of Interdiction: Time for Change*, 27 La. B.J. 223 (1980).

150. *Interdiction of Goldsmith*, 456 So. 2d 198, 201 (La. App. 3d Cir. 1984):

However, the new article clearly retains—and now encodes—the former jurisprudential requirement that there be a showing of the necessity for the interdiction. By requiring that the rights of the limited interdict shall be infringed in the least restrictive manner consistent with his incapacities, and that the limited curator shall have only those powers necessary to provide for the "dem-

for a descendant over twenty-two who desires to be a forced heir, is that his rights "shall be infringed in the least restrictive manner consistent with his incapacities."¹⁵¹ Thus, the arthritic descendant who is only incapable of caring for his person—the most likely scenario—can be interdicted under Article 389.1, and the judgment need not deprive him of the right to contract or any other right to administer his property. Moreover, the arthritic descendant need not even have been interdicted by judgment; it is sufficient that he be subject to full or limited interdiction.

The new category of forced heir extends protection to a descendant who is incapable, including an adult child who is addicted to drugs or alcohol and has not recovered from his addiction. The descendant who is capable of caring for himself and administering his property, and in many instances serving society as a productive member, is not protected from his parent's simple disinheritance. In fact, a descendant who is incapable may be difficult to disinherit for just cause¹⁵² if his mental condition excuses his action that would otherwise constitute grounds for disinheritance.¹⁵³ It seems incongruous to deny a benefit to the child who lives a productive life contributing to society, yet at the same time extend legal protection to children who have become a burden on society.

The Modified Representation Rule Redefines Child as a Descendant of the First Degree

As originally proposed in the Senate, the bill that resulted in Act 788 also restricted forced heirship to descendants of the first degree,

onstrated needs" of the incapacitated person, the new article has unquestionably installed into this type of interdiction the requirement that there be proof that an actual necessity for the interdiction exists.

See also *Interdiction of Badalamenti*, 529 So. 2d 1376 (La. App. 4th Cir.), writ denied, 534 So. 2d 444 (1988) (fifty-three year old stroke victim, no need for limited interdiction).

151. La. Civ. Code art. 389.1:

... A judgment of limited interdiction shall not operate to deprive the incapacitated person of any civil right, the right to contract, or any right pertaining to any license, permit, privilege, or benefit unless specifically set forth in the judgment.

152. La. Civ. Code art. 1621.

153. Although there have been no such appellate court cases reported, the jurisprudence interpreting La. Civ. Code art. 138 recognizes the defense of mental or physical condition that excuses behavior which would otherwise constitute fault. See, e.g., *Robichaux v. Robichaux*, 525 So. 2d 321 (La. App. 1st Cir. 1988); *Asher v. Asher*, 521 So. 2d 645 (La. App. 1st Cir. 1988); *Credeur v. Lalonde*, 511 So. 2d 65 (La. App. 3d Cir.), writ denied, 513 So. 2d 822 (1987); *Morrison v. Morrison*, 395 So. 2d 909 (La. App. 2d Cir. 1981); *Courville v. Courville*, 363 So. 2d 954 (La. App. 3d Cir.), writ refused, 365 So. 2d 243 (La. 1978).

It is appropriate to resort to La. Civ. Code art. 138 by analogy when considering such grounds for disinheritance as "[i]f the child has been guilty, towards a parent, of cruelty, ... or grievous injury." La. Civ. Code art. 1621(2). Cf. La. Civ. Code art. 138(3).

thus eliminating a grandchild's right to represent his predeceased parent for the purpose of forced heirship.¹⁵⁴ The House Civil Law and Procedure Committee's objection to the elimination of representation resulted in an amendment to that part of the bill. As finally passed, Act 788 amends Louisiana Civil Code article 1493 to state: "Representation by descendants shall be permitted provided the child they represent would not have been twenty-three years of age on the date of the donor's death."¹⁵⁵ Even as "softened" by the House committee, the Act drastically changes the law of representation in the context of forced heirship.

The new rule under Act 788 permitting representation only if the forced heir represented would not have attained the age of twenty-three when the parent died is inconsistent with the legislative assumption that young heirs would most likely be in need of support and hence deserved protection from unjust disinheritance. Under Article 1493 as amended by Act 788, if a child of thirty predeceases the *de cuius* and leaves a child who is three years old when the *de cuius* dies, the three-year-old grandchild will have no protection from disinheritance. Even if the three-year-old grandchild had been orphaned by the death of the parent and thus had been legally entitled to support from the grandparent while he lived,¹⁵⁶ Act 788 does not protect him. The grandchild, no matter how young and even if orphaned, cannot represent the predeceased parent unless the parent would not have attained the age of twenty-three when the *de cuius* dies. Nor is any exception made to allow a seriously incapacitated grandchild to represent his predeceased parent when the parent would have attained the age of twenty-three by the time the *de cuius* died.

Former Louisiana Rule of Representation

In addition to leaving young descendants prey to an unjust disinheritance contrary to the general intent of the Act, the new rule of representation for forced heirship is also inconsistent with the general theory of representation in Louisiana inheritance law. Under the general rules of representation, the descendants who are the representatives of their predeceased parent are the heirs of the *de cuius*; the predeceased parent was never the heir.¹⁵⁷ It would follow that the new law should

154. La. S. 264, 15th Reg. Sess., § 1 (1989).

155. Read literally, this provision excludes representation only of a predeceased child who would have been precisely twenty-three years old when the *de cuius* died. It would not exclude representation of a child who would have been any other age. It is safe to assume that this was an error in drafting and that the legislature meant "would not have attained twenty-three years of age" instead of "would not have been twenty-three years of age."

156. La. Civ. Code art. 229.

157. La. Civ. Code art. 953.

be concerned with the ages of the representatives who are the heirs in order to protect the young heirs from disinheritance. But Act 788 is, on the contrary, only concerned with the age of the predeceased child who was never an heir.

Furthermore, until now Louisiana law did not make representation depend on whether the predeceased child would have been an heir had he survived the *de cuius*. For example, Louisiana allows representation of a predeceased child who committed an act of unworthiness toward the *de cuius* or who was disinherited by him. Article 901 of the Louisiana Civil Code of 1870, which contained this rule, apparently adopted the view of representation espoused by the early French commentators of the Code Napoleon.¹⁵⁸ Although Article 901 was repealed in the 1981 revision of the intestate succession articles, the intent was not to change this rule of representation, but only to streamline it. The drafters of the revision felt that the result given by old Article 901 followed as well from other rules in the Civil Code that make it impossible to have a predeceased child declared unworthy or to disinherit him.¹⁵⁹ Thus in the general law of representation, Louisiana does not visit the sin of the predeceased parent on his child; however, as a result of Act 788, when forced heirship is involved, the disqualifying age of the predeceased parent will be visited upon his child. If the law of representation protects the child from the consequences of his parent's deliberate act, should it not, in the case of forced heirship, also protect the child from the consequence of something the parent is powerless to prevent, his own aging?

Inadequacy of the Twenty-Three Year Age Cutoff to Protect Vulnerable Heirs

The new rule classifying forced heirs according to age and the harsh rule limiting representation depending on the age classification of the predeceased heir lead one to question whether any social purpose has

158. C. Lazarus, *Succession and Donations, Cases and Reading Materials* 21 (1975). According to modern French commentators, French law, which has no counterpart to Louisiana's old Article 901, would not allow representation of a predeceased child who had committed an act of unworthiness or who was disinherited. 9 Aubry and Rau, 4 *Droit Civil Français* No. 597, at 35 (6th ed. La. St. L. Inst. trans. 1971).

159. See La. Civ. Code art. 967, which requires legal action to be taken against the heir to have him declared unworthy, thereby indicating that the heir must have survived the *de cuius* in order to be declared unworthy. Concerning disinheritance, Article 1624, as it read before amendment in 1985, did not explicitly require a suit to be brought against the forced heir himself to prove the grounds for disinheritance, but such a requirement was implied. In any event, *In re Andrus*, 221 La. 996, 60 So. 2d 899 (1952) held, based on old Article 901, that when the forced heir predeceased the testator, the attempted disinheritance was ineffective.

been accomplished by Act 788 other than to circuitously abolish forced heirship. Does the new law truly protect those children most vulnerable to an unjust disinheritance, or is its reach arbitrary? One instance in which a child is vulnerable is when he is in need. In such circumstances it would be cruel to permit his parent to disinherit him without cause. The assumption behind Act 788 seems to be that the children whom the parent is most probably supporting at the time of his death are the children most likely to be in need. Thus children under twenty-three and seriously incapacitated children remain forced heirs; the parent's support is transformed into a fixed share for these children. Children who are most probably supporting themselves at the time of the parent's death are assumed not to be needy and hence less vulnerable to disinheritance without cause.

By relating the heir's need to his ability to support himself, Act 788 rejects the notion that older children, though capable of supporting themselves, can desperately need an inheritance because of the heavy responsibility of supporting their own families. The old law made the decedent an indirect participant in the welfare of his successive generations by mandating a patrimonial link from descendant to descendant without regard to need or age. Now, as illustrated also by the representation rule that fails to protect young grandchildren unless their parent would not have attained the age of twenty-three when the decedent died, the decedent's familial responsibility does not extend beyond one generation. In earlier times many people did not live to see their succeeding generations, yet the law mandated a patrimonial connection between the decedent and the descendants unknown to him. Curiously, today, when many people actually live to see their grandchildren and even great-grandchildren, and when the law recognizes that grandparents have a legally enforceable right in some circumstances to participate personally in the grandchild's life,¹⁶⁰ the legislature has cancelled the decedent's duty to contribute part of his patrimony, directly or indirectly, to his posterity once his own children are over twenty-three.

Furthermore, the use of the date of death as the "cutoff" for determining which heirs are vulnerable and which are not appears arbitrary when need is the underlying theory of protection.¹⁶¹ By focusing on support at the time of death as the justification for protection from disinheritance, the new law turns a blind eye to the fact that an older child who was self-sufficient when the parent died may later suffer illness

160. 1972 La. Acts No. 4, § 1, enacting the precursor of La. R.S. 9:572 (Supp. 1990) concerning the grandparent's right to visitation.

161. When all children, regardless of age or condition, received protection from disinheritance, it made sense to determine who the forced heirs were and what their shares were as of the date of death. La. Civ. Code arts. 1498, 1505.

or accident and become unable to support himself. While this tragedy may befall anyone, not just a person whose parents could have left him property, it seems a shame that scarce state resources might have to be spent to support this person when his parent could well have provided for him. The new law recognizes that an incapacitated child has needs that entitle him to protection from disinheritance without cause. If the child's illness or accident is serious enough and occurs the day before the decedent died, the child might qualify as a forced heir under the new law; but if it occurs the day after the decedent dies, the child over twenty-three has no protection, even though the testator may have disinherited him on the assumption, true at the time, that the child was able to support himself.

Finally, the new law fails to recognize a second sense in which a child may be vulnerable to disinheritance. There may be circumstances beyond the child's control that cause the parent to be less inclined voluntarily to recognize the needs of his older children or their descendants. Divorce and remarriage strain the normal bond between the parent and the children of his first marriage. This is especially true when the children have lived with the divorced spouse with whom the decedent was not on friendly terms. The decedent may sincerely think his second family needs everything of which he dies possessed, but his perception may be colored by the attenuation of his relationship to the children of his first marriage. He simply may not know his older children as well as he knows his new family at the time of his death, or he may be antagonistic to them as a result of the divorce. In this situation, the older children are more vulnerable to unjust disinheritance because the parent is less likely to be sensitive to their need at the time of his death.

The New Disposable Portion

The legislature did not discuss changing the amount of the disposable portion and corresponding legitime during the debate over the new forced heirship concept. It was assumed that these amounts would stay the same as they were after the 1981 amendment to Article 1493: one forced heir, three-fourths disposable; two or more forced heirs, one-half disposable. Unfortunately that is not the way Article 1493 as amended by Act 788 literally reads:

Donations *inter vivos* and *mortis causa* can not exceed three-fourths of the property of the disposer, if he leaves, at his decease, one child under the age of twenty-three or one child who has been interdicted or who is subject to being interdicted because of mental incapacity or physical infirmity; and one-half, if he leaves two or more children under the age of twenty-three or two or more children who have been interdicted or who are

subject to being interdicted because of mental incapacity or physical infirmity.

The Act does not say what happens if the parent leaves one child under the age of twenty-three *and* one seriously handicapped child. There would then be two forced heirs, so presumably the legislature intended the disposable portion to be one-half. However, a literal reading of the Act would make the disposable portion three-fourths because there are not *two* children under twenty-three or *two* children seriously incapacitated, only one of each. Surely this is not the result the legislature intended.

Application of Prior Jurisprudence to Address the Problem of Inconsistent Shares of the Succession

Worse yet, under the new version of Article 1493, it is possible again to have the kind of problem that arose in *Succession of Greenlaw*.¹⁶² *Greenlaw*, involving ascendant forced heirship, was the Louisiana Supreme Court's *sixth* attempt to resolve what was perceived to be a conflict in the Civil Code between the size of a parent's forced share and the size of the parent's *ab intestato* share. The court determined that whenever the forced share was greater than the *ab intestato* share, the parent would receive only the *ab intestato* share. Subsequently the legislature tried to resolve the issue by amending Article 1494 to codify *Greenlaw*. When parental forced heirship was legislatively abolished in 1981 the *Greenlaw* problem disappeared, so it was thought, mercifully sparing future generations of law professors and students the study of that complicated situation.

Now *Greenlaw* haunts us again because under Act 788 an heir's forced share can be different from his *ab intestato* share. For example, assume that a decedent has five children, one of whom is under twenty-three when the decedent dies. The forced share of the child under twenty-three is one-fourth under Act 788, but his *ab intestato* share would be one-fifth since he would share equally *ab intestato* with his four brothers and sisters.¹⁶³ Suppose that the decedent, who has made no *inter vivos* gifts, makes to a stranger a particular legacy of cash that does not exceed the disposable portion and leaves the rest of his property undisposed of by will. Does the child under twenty-three get one-fourth

162. 148 La. 255, 86 So. 786 (1920). See Comment, The Legitime of a Surviving Parent When Any Brothers or Sisters Also Survive, 7 Tul. L. Rev. 259 (1933), for a history and criticism of *Greenlaw*.

163. Ignore for the moment the fact that the forced share is calculated upon an active mass consisting of the value of the donations *inter vivos* as well as the property left at death (minus the debts), whereas the *ab intestato* share applies only to property left at death (minus the debts).

or one-fifth of the undisposed property? Once the applicable fraction is determined, a second question arises regarding the amount of the forced heir's portion: Is the forced heir entitled to the fractional share of the active mass according to Article 1505 or only of such property that would have passed *ab intestato*? In terms of the example given above, does the child under twenty-three receive a fraction of the property before (as per 1505) or after (as per intestacy) deduction of the particular legacy from the decedent's property?

Greenlaw's answer to the question of the applicable fraction was to use the smaller intestacy fraction, the theory being that if the forced heir receives at least what he would have gotten had there been no will, he has not been prejudiced by the will and should not be allowed to improve his position simply because the decedent made a will. However, the court applied the fraction to the property before deduction of legacies. If no *inter vivos* gifts had been made, that property—that is, the property left at death minus the debts, but not the legacies—would have been the active mass for reduction of excessive donations under Article 1505. In this respect, the forced heir did improve his position over the intestacy situation because in a partially testate succession an heir's *ab intestato* share only applies to property undisposed of, that is, to the residue after deduction of the debts and the legacies. If the *Greenlaw* approach is followed to answer the hypothetical question above, the forced heir would have the lower intestacy fraction because there are four other children, but the active mass to which his fraction is applied would be the same as for reduction of excessive donations under Article 1505.

Critics of this solution, like the critics of *Greenlaw*, would no doubt ask why the presence of other children should affect the size of the forced share if those children do not inherit? For example, if the decedent leaves all his property to a stranger, why should the child under twenty-three receive one-fifth instead of one-fourth?¹⁶⁴ The *Greenlaw* solution makes sense when the decedent attempts to leave all his property to the other children, or attempts to leave one-fifth of his property to each child. Then the *Greenlaw* solution insures that the testator can treat his children equally as they would have been treated *ab intestato*. Without the *Greenlaw* solution, a testator in the assumed situation of five children would be prevented from treating his children equally because the youngest child would be entitled to one-fourth. But when the other children do not receive any property, the forced heir's share should not be scaled back.¹⁶⁵ Furthermore, when the parent leaves everything to a stranger

164. See Justice Dawkins' concurring opinion, 148 La. at 286, 86 So. at 798.

165. See Justice Provosty's concurring opinion, suggesting that the forced heir should receive the greater fraction in this situation. *Id.*

the *Greenlaw* solution arbitrarily discriminates against large families: the forced heir with no more than three brothers and sisters gets one-fourth, whereas the forced heir with more than three brothers and sisters gets one-fifth or less.

Intestate Succession in Light of Act 788

The *Greenlaw* solution assumes that the intestacy share is the measuring stick for what a forced heir ought to receive, either because the intestate order of succession represents the probable intention of the decedent or because it is society's preference for the distribution of a succession. At present the intestacy measuring stick registers equality among children. Does Act 788 indicate that the intestacy measuring stick should be altered to register inequality among children? Is it now the probable intention of the decedent that his children under twenty-three receive more than the older children? Does society now deem it desirable for the child under twenty-three to receive more than his older brothers and sisters? If so, the way to fix the *Greenlaw* problem is to amend the intestate order of succession to favor children under twenty-three.

It is doubtful that such an amendment will follow in the wake of Act 788. Act 788 was an attempt to come as close as the Louisiana Constitution and the legislature would tolerate to affording "absolute" freedom to a testator who has children and who perceives a need to vary the distribution of his estate from the usual; it was not an attack upon the usual situation as represented by the intestate order of succession. It is one thing for the law to allow a parent by testament or inter vivos donation to discriminate in favor of his younger children; it is another thing entirely for the law to presume that every parent would want to do so, or that a parent ought to do so. No such fundamental change in the law was suggested at any time during the deliberations on Act 788.

The Effect of Act 788 on Collation

Forced heirs have not only the right to reduce excessive donations, a right exercisable against any donee or legatee, they also have the right to demand collation from each other of any donations that were not intended as extra portions. Conversely, only forced heirs are obliged to collate. Collation does not depend upon impingement of the legitime. It is "founded on the equality which must be naturally observed between children and other lawful descendants, who divide among them the succession of their father, mother, and other ascendants; and also on the presumption that what was given or bequeathed to children by their ascendants was so disposed of in advance of what they might one day

expect from their succession."¹⁶⁶ Significantly, Louisiana Civil Code article 1236 imposes the obligation of collating only on those children or descendants who have a right to a legitimate portion. Thus a gift or legacy by a grandparent to a grandchild while the grandchild's parent is still alive is not collatable because the grandchild is not a forced heir.¹⁶⁷

Act 788 redefines forced heirs as only those children under twenty-three or seriously incapacitated children, but it does not amend the collation articles, which impose the obligation to collate only on forced heirs. Thus, only children under twenty-three would have to collate and would need to renounce the succession in order to avoid sharing equally their donations that were not extra portions.¹⁶⁸ The interaction of the new definition of forced heir with the unamended collation articles has the effect of undermining the purpose of collation of achieving equality among children in a way disfavorable to the younger children. For example, assume a parent has three children, one of whom is under twenty-three when the parent dies. The parent has made *inter vivos* gifts totaling at least three quarters of the succession but that were not designated extra portions to his two children who were over twenty-three when the gifts were made. The children over twenty-three are not obliged to collate those gifts because they are not forced heirs. The same result may follow when the donees were under twenty-three when the gifts were made, but are over twenty-three when the parent dies. Thus even though the parent did not manifest an intention to treat his children unequally, the child under twenty-three cannot demand collation of his older siblings and thus is relegated to his forced share of one-fourth, instead of an equal one-third share of all property donated to the children.¹⁶⁹

Because the two remedies of reduction and collation serve different purposes, there is no reason why the obligation of collating should be limited to the new forced heirs.¹⁷⁰ Reduction is the protection of certain

166. La. Civ. Code art. 1229.

167. La. Civ. Code art. 1239. See also La. Civ. Code arts. 1238, 1240, 1241.

168. La. Civ. Code art. 1237.

169. For another example of the inequality produced by the interaction of Act 788 and the unamended collation articles, assume the parent has five children, four of whom are under twenty-three. The parent has made *inter vivos* gifts to his child over twenty-three that total one-half of the active mass. These gifts were not designated extra portions. The children under twenty-three, who have only their claim for the forced portion, will split one-half of the active mass (one-eighth each of the total) while the child over twenty-three keeps the disposable one-half of the active mass even though there is no evidence of the parent's intent to create this inequality. Prior to Act 788, the donee-child would at least have been forced to renounce the succession to avoid having to collate.

170. In France, for example, the obligation of collation exists among all co-heirs *ab*

heirs from disinheritance without cause, but collation is simply the evening up between co-heirs who have inherited. Collation could have been made available among all children and descendants coming to the succession even though they are not all forced heirs. If that were the case, in the example above the child under twenty-three would be entitled to one-third of all the property donated to the children if the other children accepted the succession. It would be necessary also to amend Articles 1238 through 1241 concerning the obligation of grandchildren and more remote descendants to collate. The rules given in those articles turn on whether the grandchild was a forced heir at the time of the gift. The results given in these articles can be preserved if collation is extended to all descendants, but the articles must be rewritten to remove reference to the grandchild's status as forced heir.

IV. OTHER PROVISIONS OF ACT 788

Repeal of Louisiana Civil Code Article 1492—Captation or Undue Influence

Although the legislature had originally "close[d] the temple of justice"¹⁷¹ to allegations of captation or undue influence invalidating a will, eighty-two years later the doors will be flung open, and that event will have enormous impact on the law of this state. The motivations of those who closed the doors become important in assessing the implications of eliminating the prohibition against evidence of captation. As early as *Zerega v. Percival*¹⁷² the court eloquently expressed the motivations of those opposed to the admissibility of evidence of captation:

Their intention could not have been merely to declare what was the jurisprudence in France or in Louisiana at the time; on the

intestato, whereas only descendants, ascendants, and sometimes the surviving spouse are forced heirs. F. Terre and Y. Lequette, *Droit Civil: Les Successions, Les Liberalities*, Nos. 623-34, 884 (1983).

171. *Zerega v. Percival*, 46 La. Ann. 590, 610, 15 So. 476, 482 (1894):

[W]hen our legislators embodied in the Old Code the provision that "proof is not admitted of captation and suggestion," they must be held to have done just what Tronchet and the other authors of the *projet* desired, and what the French law-makers declined to do—i.e., close the temple of justice against all suits of nullity for cause of captation, whether unaccompanied or coupled with fraudulent practices.

See, for additional commentary, Cahn, *Undue Influence and Captation: A Comparative Study*, 8 Tul. L. Rev. 507 (1934); Comment, *Fraud, Undue Influence and Captation In Wills: A Comparative Study*, 34 Tul. L. Rev. 585 (1960); Note, *Donations-Testaments-Captation Under Article 1492*, 24 La. L. Rev. 925 (1964).

172. 46 La. Ann. 590, 15 So. 475 (1894).

contrary they must have meant to protest against it, to condemn it and to forever banish from the courts a species of litigation which, except in very rare instances, originates in disappointment, rancor or covetousness; which offers a strong temptation for perjury and subornation of perjury; which feeds on scandal and calumny, and which penetrates within the charnel house to pour obloquy upon the ashes of the departed.¹⁷³

Prohibiting evidence of captation to accomplish such desirable social policies was part of a delicately balanced system, which offered concomitant protection by means of forced heirship to those not deserving of disinheritance.¹⁷⁴ The institution of forced heirship provided descendants with some protection against total disinheritance at the whim of the parent,¹⁷⁵ and the spouse was offered protection by community property, the survivor's usufruct, and the marital portion.¹⁷⁶ Predictably, the litigation in Louisiana in which allegations were made of fraud and improper influence principally involved collateral relations of the decedent

173. *Id.* at 610, 15 So. at 482. The quotation continues: "Our State reports, be it said to the credit and honor of our people, and in proof of the wisdom of our law-givers, are almost barren of cases of this description." *Id.*

See discussion of French experience in 3 M. Planiol, *supra* note 20, Nos. 2880-84, at 413-15; 10 Aubry et Rau, 3 *Droit Civil Francais* No. 654, at 82 (6th ed. La. St. L. Inst. trans. 1969). The author of Note, *supra* note 171, at 926, explains the French history as follows:

To end these abuses, the Commission for the French Civil Code recommended an article to prohibit attacks on dispositions based on captation. Yet, the framers of the French Civil Code, fearful lest the Code would be said to sanction fraud, deleted the provision, leaving their Code silent on the subject. Nevertheless, the redactors of the Louisiana Code of 1808 included it, and it now appears as article 1492.

174. La. Civ. Code art. 1621 contains the 12 causes for disinheritance of descendants. See *infra* text at note 289 and following for a discussion of this topic.

175. La. Civ. Code art. 1493:

Donations *inter vivos* or *mortis causa* cannot exceed three-fourths of the property of the disposer, if he leaves, at his decease, one child; and one-half, if he leaves two or more children.

Under the name of children are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent.

The interrelationship of the protection afforded to descendants and the prohibition of admitting evidence of captation was noted by the authors elsewhere. Spah, Samuel, and Shaw, *Successions and Donations*, *supra* note 42, at 607 n.175.

"As those to whom the testator owes a duty of support and maintenance are protected by the Louisiana law of forced heirship, family protection does not normally justify invalidation of a will on the basis of fraud or captation in the inducement." Comment, *supra* note 171, at 597.

176. See La. Civ. Code arts. 890 (usufruct); 2432-2437 (marital portion); 2334-2369 (community property).

for whom contesting the will was an "all or nothing" proposition.¹⁷⁷

With the virtual elimination of the limited protection of forced heirship in an undisguised effort to emulate our common law neighbors' "freedom of testation," the legislature responded by repealing Louisiana Civil Code article 1492. The repeal was an attempt to extend what the legislators understood to be the corresponding protection offered by common law jurisdictions which permit "free testation," that is, the possibility of annulling a testament on the basis of undue influence. The inquiry then must focus on whether that objective was accomplished. The repeal of Article 1492 means only that evidence of a disposition¹⁷⁸ "having been made through hatred, anger, suggestion or captation"¹⁷⁹ is not prohibited. To determine the impact of the repeal, it is necessary first to explore the meaning of the four words contained in Article 1492 and then to suggest what effect the admissibility of such evidence will have on a disposition.

Vices of Consent

What should be apparent is that "hatred, anger, suggestion or captation" are words that convey a range of human motivations of less

177. See, e.g., Succession of Hamiter, 519 So. 2d 341 (La. App. 2d Cir.), writ denied, 521 So. 2d 1170 (1988); Succession of Andrews, 153 So. 2d 470 (La. App. 4th Cir.), writ refused, 244 La. 1005, 156 So. 2d 57 (1963); Succession of Willis, 149 So. 2d 218 (La. App. 2d Cir.), writ refused, 150 So. 2d 589 (1963); Succession of Franz, 232 La. 310, 94 So. 2d 270 (1957); Cormier v. Myers, 223 La. 259, 65 So. 2d 345 (1953); Succession of Price, 172 La. 606, 134 So. 907 (1931); Texada v. Spence, 166 La. 1020, 118 So. 120 (1928); Succession of McDermott, 136 La. 80, 66 So. 546 (1914); Zerega v. Percival, 46 La. Ann. 590, 15 So. 476 (1894); Chardon's Heirs v. Bongue, 9 La. 458 (1836).

One of the few cases involving allegations of undue influence or fraud by a descendant was Succession of Hernandez, 138 La. 134, 70 So. 63 (1915), which involved a will executed while the husband and wife (testatrix) were in New York. The argument by the husband was that New York law governed disposition of the property, in particular, movable property, which comprised the bulk of the value of her estate under the will. Of course, since New York does not have forced heirship, the descendants were in the same position as collaterals in this state—a will contest was an "all or nothing" proposition.

178. The disposition referred to in La. Civ. Code art. 1492 means not only donations mortis causa but also donations inter vivos, because the article appears in Title II of Book III of the Civil Code entitled Of Donations Inter Vivos and Mortis Causa. Article 1492 is contained in Chapter 2 entitled Of the Capacity Necessary for Disposing and Receiving by Donation Inter Vivos or Mortis Causa. The placement of Article 1492 in Chapter 2 suggests an interrelationship between such evidence and capacity to dispose which will be explored in the text later. For an example of allegations of undue influence as grounds for annulling a disposition other than a will, see State Mut. Life Assurance Co. v. Castille, 487 So. 2d 455 (La. App. 3d Cir.), writ denied, 488 So. 2d 1010 (1986).

A disposition need not be interpreted as the entire will, if the donation in question is mortis causa. Borrowing from common law authorities, it is possible that the court could invalidate only individual tainted dispositions, rather than the entire will. See 1 W. Page, Page on Wills §§ 192-93, at 389-92 (1941) [hereinafter Page on Wills].

179. La. Civ. Code art. 1492.

societal concern than the traditional vices of consent, "error, fraud or violence."¹⁸⁰ Hatred or anger may be internal only and is highly subjective by comparison to error.¹⁸¹ Suggestion or simple captation surely connotes conduct by a third person less serious in nature than fraud¹⁸² or duress.¹⁸³ The prohibition contained in Article 1492 was probably never intended to exclude evidence of vices of consent.¹⁸⁴ Yet, the

180. La. Civ. Code art. 1948.

181. La. Civ. Code art. 1949:

Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

There are greater similarities between unilateral error and anger or hatred than between mutual error and anger or hatred. In the former instance both may occur internally; however, proof of anger or hatred as an internal motivation is more subjective and thus less trustworthy than error. See La. Civ. Code art. 1949 comment (d):

When only one party is in error, that is, when the error is unilateral, there is theoretically no meeting of the minds, but granting relief to the party in error will unjustly injure the interest of the other party if he is innocent of the error. Louisiana courts have often refused relief for unilateral error for this reason. . . . Under this revised Article, it is not necessary that the other party have known of the mistake; it suffices that he knew or should have known that the matter affected by the error was the reason that prompted the party in error to enter the contract.

182. La. Civ. Code art. 1953:

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

See also La. Civ. Code arts. 1954-1958.

183. La. Civ. Code art. 1959:

Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.

Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.

See also La. Civ. Code arts. 1960-1964.

184. The author of Note, *supra* note 171, at 927-28, distinguishes between duress and fraud:

Thus it has been stated that the article prohibits proof of duress, force, violence, and all acts, conduct or motives of the testator. Nevertheless these decisions contain statements entirely consistent with the clear import of the article, and the inconsistent pronouncements may be mere indiscreet choices of words. It seems unthinkable that the court would not annul a disposition shown to be made under fear of harm or other duress.

. . . .

If captation means fraudulent inducements by someone to encourage the testator to make a certain disposition to him, there seems no logical reason to predicate admissibility *vel non* on the time of occurrence of the acts. It is submitted that an inducement made at the execution of the will is no more grievous than one made prior thereto. Of course, as a practical matter captation at the execution of the will is more susceptible of linkage with the reason for the disposition. Nevertheless, article 1492 and the policy behind it do not suggest such a distinction, and it is submitted that it is not justified.

judiciary drew a distinction between such objectionable conduct at the time of making of the will, and such conduct that occurred before the making of the will.¹⁸⁵ Evidence of the former was permissible, while evidence of the latter was not, ostensibly because of the prohibition of Article 1492.

As concerns error, the first vice of consent, the Louisiana Civil Code of 1825 explicitly recognized that "[i]n contracts of beneficence [donations inter vivos], the consideration of the person is presumed by law to be the principal cause."¹⁸⁶ Thus, at least as to error, there should have been no question that it was sufficient to annul a donation inter vivos despite the prohibition of Article 1492. It logically follows that the same rule should have been applied to donations mortis causa;¹⁸⁷

185. In *Zerega v. Percival*, 46 La. Ann. 590, 612, 15 So. 476, 483 (1894), the court states: "Or, in the further language of the court, the object of the compilers of the code was to preclude all evidence of acts, conduct or motives of the testator *antecedent* to the making of the will, as exercising influence over the testamentary dispositions therein contained; but same were not intended to prevent the admission of proof of what occurred *at the making* of the testament." Subsequent decisions also cite *Godden v. Executors of Burke*, 35 La. Ann. 160 (1883). See, e.g., *Succession of Andrews*, 153 So. 2d 470 (La. App. 4th Cir.), writ refused, 244 La. 1005, 156 So. 2d 57 (1963); *Succession of Willis*, 149 So. 2d 218 (La. App. 2d Cir.), writ refused, 244 La. 132, 150 So. 2d 589 (1963); *Succession of Franz*, 232 La. 310, 94 So. 2d 270 (1957); *Texada v. Spence*, 166 La. 1020, 118 So. 120 (1928); *Succession of Schlumbrecht*, 138 La. 173, 70 So. 76 (1915); *Succession of McDermott*, 136 La. 80, 66 So. 546 (1914).

Interestingly enough, in the *Zerega* case the first judge presiding in the trial court stated:

"Undoubtedly, . . . undue influence is sufficient to annul a will, when it is proven that undue influences have operated; but undue influences must be indicated in the proceedings by specific acts of malpractice or fraudulent practice, and showing that the intention of the testator was thereby deceived, and that the disposition is therefore tainted with fraud;" his theory being that the plaintiff could overcome the prohibition of the code by making specific charges, or facts of fraudulent practices, in the employment of the "undue influence" used; or, in other words, the prohibition of the code is directed against simple, and not against fraudulent captation.

Zerega, 46 La. Ann. at 607, 15 So. at 481. See also *Succession of Franz*, 232 La. 310, 322, 94 So. 2d 270, 274 (1957).

For a discussion of the judicial distinction between conduct at the time of the making of the will and conduct that occurs before, see Note, *supra* note 171, at 928: "Nevertheless, article 1492 and the policy behind it do not suggest such a distinction, and it is submitted that it is not justified."

186. La. Civ. Code art. 1835 (1870) (repealed January 1, 1985).

187. The donation mortis causa is not a contract but a unilateral declaration of will that is a source of obligations. La. Civ. Code art. 1917 now provides that the rules of conventional obligations apply to all obligations regardless of their source, if not inconsistent. Comments (a) and (b) explain that although the article is new it does not change the law, as the idea was clearly expressed in La. Civ. Code art. 1788(10) and (11) (1870) (repealed January 1, 1985). See *infra* note 199.

therefore, Article 1492 did not preclude the annulment of gratuitous dispositions for error.

Even though there is no longer an explicit article directed to error in a contract of beneficence, the official comment to Louisiana Civil Code article 1950¹⁸⁸ states: "If the contract is gratuitous, the presumption obtains that the person of the intended obligee was the reason why the obligor bound himself."¹⁸⁹ To annul a contract for error, the party seeking relief must also prove that the other party knew or should have known the reason why the party in error bound himself.¹⁹⁰ In the case of a donation, the donee will know he was the reason why the gift was made or he will be considered as having known by virtue of the same presumption. Error may also exist as to the donee's "qualities." The official comment explains: "Relief may be obtained when, intending to contract with a certain person or a person of a certain quality or character, a party has given his consent to a contract with a different person, or with a person who lacks the intended quality or character."¹⁹¹

188. La. Civ. Code art. 1950:

Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

189. La. Civ. Code art. 1950 comment (d).

190. La. Civ. Code art. 1949:

Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

As comment (d) explains: "Under this revised Article, it is not necessary that the other party have known of the mistake; it suffices that he knew or should have known that the matter affected by the error was the reason that prompted the party in error to enter the contract."

191. La. Civ. Code art. 1950 comment (d).

La. Civ. Code art. 1838 (1870) (repealed January 1, 1985), contained the following example: "Thus, a compromise with one, who is supposed to be the heir of a deceased creditor of the party contracting, is void, if he be not really the heir."

La. Civ. Code art. 1839 (1870) (repealed January 1, 1985):

But if the person, who is really entitled to the quality assumed by the one with whom the contract is made, has contributed to the error by his neglect or by design, it will not vitiate the agreement. And in the case above stated, a payment to, or a compromise with one, whom the true heir suffered to remain in possession of the inheritance, and to act as heir, without notice, would be valid.

La. Civ. Code art. 1840 (1870) (repealed January 1, 1985):

Contracts, which could only be made by persons possessing certain powers, either delegated by contract, given by virtue of any private or public office, or vested by the operation of law, are also void, when there is error as to the character, quality or office under color of which such contract was made. Contracts entered into under forged or void powers or assignments, or with

In *Texada v. Spence*,¹⁹² among the allegations made by the opponents of the will was that the legacy to "my dear husband, as I know him to be"¹⁹³ proceeded from error. The opponents argued that the testatrix thought Walter Spence "was her lawful husband, whereas, in fact, he was not."¹⁹⁴ The court found that the testatrix was not in error, but knew that the status of her marriage would depend upon the outcome of pending litigation.¹⁹⁵ Significantly, the court did not dispose of the allegation on the basis that error did not vitiate the consent of the testatrix.

Of course, there may be errors of fact or law other than that of the person of the donee or legatee. However, it will be more difficult to prove that such error was the cause without which the donor or testator would not have made the disposition.¹⁹⁶ Under French law, error vitiated a disposition contained in a testament if it related to the person (donee or legatee) or "a simple quality assumed in the latter, provided that in this case it is clearly shown that the legacy was made in view of the quality of the person rather than in favor of the individual."¹⁹⁷ Naturally, the error had to affect the reason without which the donor or testator would not have made the disposition.¹⁹⁸

persons without authority assuming to act as public or private officers, are governed by this rule. Contracts, however, made in the name of another, under void powers, will be valid, if ratified by the principal before the other contracting party has signified his dissent to the agreement.

192. 166 La. 1020, 118 So. 120 (1928).

193. *Id.* at 1023, 118 So. at 121.

194. *Id.*

195. The court stated:

At the time her will was executed, she knew that the legality of her marriage was hanging in the balance, depending upon the final action of this court on the application for a rehearing in the suit for the annulment of the judgment of divorce from Mrs. Sarilla O. Spence. She had intervened in that suit, appealing to the mercy of the court. When she referred in her will to the defendant as "my dear husband, as I know him to be," she was in no error whatever concerning his status. . . . It is plain from the mere reading of the provisions of the will that the testatrix desired and intended to make the bequest under attack herein to W. L. Spence, and to no other person.

Id.

196. La. Civ. Code art. 1950:

Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

197. 10 Aubry & Rau, *supra* note 173, No. 654, at 82.

198. The falsity of the motive which may have induced the testator to make a bequest does not carry with it the nullity of the legacy, even if such motive was stated in the testament, . . . unless it clearly results from the terms of the

The repeal of Article 1492 should permit the annulment of testaments for duress or fraud. Louisiana Civil Code article 1917 directs the application of the rules governing conventional obligations to obligations "that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations."¹⁹⁹ Thus, Article 1917 permits the court to apply the principles of vices of consent "to the extent that those rules are compatible with the nature of those [i.e., unilateral] obligations." The repeal of Article 1492, which may have been considered incompatible with the rules of vices of consent, should permit the annulment of a will on the more serious grounds of duress or fraud.²⁰⁰ To annul a testament for duress, a heritable action,²⁰¹

testament or from the circumstances of the case that the testator intended the effectiveness of the legacy to depend upon the existence of the motive.

Id. See also examples from the French jurisprudence, *id.* at 83 n.4.

199. La. Civ. Code art. 1917 comment (a) states:

This Article is new. It does not change the law, however. It articulates a basic systematic idea underlying the Civil Code. It is clearly understood in French doctrine that the general principles of the theory of obligations that the French redactors incorporated into the French Civil Code are intended to govern obligations in general, regardless of their source.

(citation omitted).

Comment (b) states: "Under this Article, the general rules of contracts are applicable to declarations of will contained in unilateral acts, an idea which is clearly expressed in C.C. Art. 1788(10) and (11) (1870)." (citation omitted).

Under La. Civ. Code art. 1757, "[o]bligations arise from contracts and other declarations of will." A last will and testament is a unilateral declaration of will that is a source of obligations.

In fact in 3 Planiol, *supra* note 20, No. 2878, at 413, observation is made that "[t]he Code is silent on the various cases in which the volition of the disposing person is not completely eliminated, but is simply vitiated for some reason. In the absence of specific statutory provisions general rules apply, except for the necessary adjustment to the particular character of the gratuitous transactions."

200. Under French law, a testamentary disposition could be annulled if made through error, or as a result of fraud or duress. 10 Aubry & Rau, *supra* note 173, No. 654, at 82.

La. Civ. Code art. 2031:

A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A contract that is only relatively null may be confirmed.

Relative nullity may be invoked only by those persons for whose interest the ground for nullity was established, and may not be declared by the court on its own initiative.

The applicable prescriptive period is five years from the time the ground for nullity ceased (duress) or was discovered (fraud). La. Civ. Code art. 2032.

The questions raised by the application of these rules to a donation *mortis causa* include: 1) are the intestate heirs of the deceased, persons for whose interest the ground for nullity was established? 2) can the testator confirm the will after duress ceases before it ever

it will be sufficient to prove duress of the nature required by Louisiana Civil Code article 1959.²⁰² In fact, it may be sufficient to prove duress less serious than that required by Article 1959. Under French law, "[a]s a general rule . . . to annul a testament on this ground [duress], the violence need not be as grave as that required for the nullity of a contract."²⁰³ The duress may be directed against the testator or a third person²⁰⁴ and need not be exercised by the beneficiary.²⁰⁵ In *Ambrose Succession v. Ambrose*,²⁰⁶ among the allegations made in support of a disinherison clause in the decedent's will were coercion and violence exercised by his daughter to make him execute a will.²⁰⁷ The duress

takes effect? and 3) does the prescriptive period begin to run at the moment the duress ceases even though the will is not yet effective simply because the testator is alive? The answers should be 1) yes; 2) yes; and 3) probably, yes.

201. La. Civ. Code art. 1765 defines a heritable obligation as one whose "performance may be enforced by a successor of the obligee."

La. Civ. Code art. 3556(28) defines successor:

There are in law two sorts of successors: the successor by universal title, such as the heir, the universal legatee, and the legatee by universal title; and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee.

La. Civ. Code art. 1765 also contains the rule that "[e]very obligation is deemed heritable as to all parties, except when the contrary results from the terms or from the nature of the contract."

It is stated in 10 Aubry & Rau, *supra* note 173, No. 654, at 86, that under French law:

The nullity of testamentary dispositions for vices of consent is a relative nullity. It may invoked only by the heirs, or by the universal legatee or legatee by universal title, as the case may be.

202. La. Civ. Code art. 1959:

Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.

Age, health, disposition and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.

203. 10 Aubry & Rau, *supra* note 173, No. 654, at 86 n.16.

204. La. Civ. Code art. 1960:

Duress vitiates consent also when the threatened injury is directed against the spouse, an ascendant, or descendant of the contracting party.

If the threatened injury is directed against other persons, the granting of relief is left to the discretion of the court.

In comment (c) to Article 1960 the second paragraph is explained as follows: "The second paragraph of this Article merely expands C.C. Art. 1853 (1870) to cover situations where the fear that is instilled is found upon close friendship or another relationship either based on or productive of strong affection."

205. "Consent is vitiated even when duress has been exerted by a third person." La. Civ. Code art. 1961.

206. 548 So. 2d 37 (La. App. 2d Cir. 1989).

207. The court considered such allegations and evidence as supportive of the grounds for disinherison in La. Civ. Code art. 1621(8): "If the child used any act of violence or

detailed in the will by the decedent included threats by the daughter to make his "last years on this earth quite miserable,"²⁰⁸ cursing and insults, and the statement by his daughter "that she would die and go to hell before she would apologize to me or her mother."²⁰⁹ The court considered these acts of duress sufficient to constitute "violence or coercion" for purposes of disinheritance under Article 1621. Obviously, the daughter's acts would not ordinarily be sufficient to constitute duress for purposes of annulling a contract.

Regarding the annulment of a testament for fraud, it is important to distinguish fraudulent captation from simple captation under French law. Fraudulent captation was influence or suggestion "accompanied by artifices or deceitful insinuations," and it resulted "from the circumstances . . . that the testator would not have disposed had he known the truth of the facts."²¹⁰ Simple captation, by contrast, was "the use of means designed to ingratiate ourselves to others."²¹¹ A will could be annulled for fraudulent, but not simple, captation. The definition of fraudulent captation is consistent with the principles of fraud under the Louisiana Civil Code articles.

To annul a contract for fraud by captation or other deceitful practices there must be a misrepresentation or suppression of the truth "made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."²¹² An exception to fraud exists if the party [testator] could have "ascertained the truth without difficulty." However, the exception does not apply "when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations."²¹³ In many cases in which fraud will be alleged, there will be a relation of confidence existing between the testator and the party who practices the fraud.

It is unnecessary that the beneficiary be the party who makes the misrepresentations or suppresses the truth because fraud may be practiced by a third person.²¹⁴ However, under Louisiana Civil Code article 1956, fraud vitiates a contract only when "the other party [beneficiary] knew

coercion to hinder a parent from making a will." In fact the daughter intended to accomplish the opposite result—make him *execute* a will.

208. 548 So. 2d at 39.

209. *Id.*

210. 10 Aubry & Rau, *supra* note 173, No. 654, at 84.

211. *Id.* at 83.

212. La. Civ. Code art. 1953: "Fraud may also result from silence or inaction." See also comment (b).

213. La. Civ. Code art. 1954.

214. La. Civ. Code art. 1956. See also 10 Aubry & Rau, *supra* note 173, No. 654, at 85.

or should have known of the fraud."²¹⁵ Interestingly, under French law there is no requirement that the fraud practiced by one other than the legatee "be imputable to him as having had knowledge."²¹⁶ The explanation offered by doctrinal authors is that the requirement of imputation of knowledge to the party who benefits applies only to contracts.²¹⁷ The explanation is another example of less rigidity in applying the contractual principles of vices of consent to testaments. The distinction is supportable because, unlike a contract, a testament does not involve the strong societal interest in protecting the expectations of the other contracting party, who has in most cases²¹⁸ given something in exchange for the obligation.²¹⁹

In *Ambrose Succession v. Ambrose*, the daughters alleged that the will disinheriting them was invalid because it "was part of a larger scheme to prevent the daughters from obtaining their inheritances."²²⁰ The children of decedent objected to the exclusion of evidence of a simulated sale of succession property that was forged by decedent's widow. The court of appeal responded:

It appears to us that appellants' attempt to demonstrate bias, interest or corruption on the part of Mrs. Ambrose was an attempt to question the motives of Mr. Ambrose in the making of the will at issue. The grounds for disinheriton exist independently and have been sufficiently demonstrated irrespective of motive. The finding of a valid disinheriton moots the question of the validity of the trial court evidentiary ruling.²²¹

Evidence of the motive of the decedent, allegedly resulting from fraudulent captation by his widow, was inadmissible under the Louisiana

215. La. Civ. Code art. 1956. See comment (b). What constitutes "should have known of the fraud" under La. Civ. Code art. 1956 is explained in comment (d). The comment cites as an example *George A. Broas Co., Inc. v. Hibernia Homestead and Sav. Ass'n*, 134 So. 2d 356 (La. App. 4th Cir. 1961).

Comment (c) to La. Civ. Code art. 1956 explains: "In the situation contemplated in comment (b) relief may nevertheless be obtained on grounds of error if the requirements of revised C.C. Arts. 1949 through 1952 . . . are met; and, in a proper case, the party injured in his interest may recover damages from the third person who committed the fraud." (citation omitted).

216. 10 Aubry & Rau, supra note 173, No. 654, at 85.

217. *Id.* at 85 n.10.

218. The donation is a contract; therefore, it requires an offer (La. Civ. Code arts. 1536-1539) and an acceptance (La. Civ. Code arts. 1540-1550). By definition, however, it is a gratuitous contract, the donor obtaining no advantage in return. La. Civ. Code art. 1910. The characterization of the donation as a gratuitous contract may be considered qualified to the extent of the definitions of the three kinds of donations inter vivos (La. Civ. Code arts. 1523-1525) and the formula contained in La. Civ. Code art. 1526.

219. La. Civ. Code art. 1909 (definition of onerous contract).

220. 548 So. 2d 37, 39 (La. App. 2d Cir. 1989).

221. *Id.* at 42-43.

jurisprudence.²²² However, after July 1, 1990, when Act 788 becomes effective, evidence offered of the motive of the decedent, if the result is fraud, is admissible. Furthermore, if fraud is proved, it is grounds for annulment of the testament.²²³

Hatred, Anger, Suggestion, or Captation

With the repeal of Article 1492, evidence of hatred, anger, suggestion, or captation is no longer prohibited. The question remains: what do those four words mean and what effect should such evidence have on the validity of a testament?

Hatred and anger are appropriately considered together and find their origin in a Roman fiction "of 'fury or madness'"²²⁴ invented to nullify a testator's will if he failed to bequeath a minimum of his estate to his dependents. According to one author, "[i]n this fiction of 'fury' or insensate rage, there lies the germ of the modern doctrines of captation."²²⁵ Under French customary law before the Code Napoleon, the action *ab irato*²²⁶ could be instituted by legitimate relatives, even a forced

222. See *supra* text accompanying note 185.

223. Allegations of fraud were made in *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894), *Texada v. Spence* 166 La. 1020, 118 So. 120 (1928), and *Succession of McDermott*, 136 La. 80, 66 So. 546 (1914).

In *Succession of Hernandez*, 138 La. 134, 136, 70 So. 63, 63 (1915), the allegations of the opponents of the will detailed the following conduct by decedent's husband:

That the said Walter Hernandez, scheming to possess himself of the large and valuable estate of his deceased wife, and to defraud his children of their interest and share of the same, advised his wife, who was then and there ill and about to undergo a dangerous operation, that in case of her death her estate would pass to her collateral kinspeople, and it would be taken away from her children unless she should make a will in favor of her said husband for the use and benefit of her said children and to protect them and preserve for them the said estate. Further advised her that, if she made a will in that manner, he would receive the property in trust for the said children, and would see that they were placed in possession of same. That he further advised his said wife that her said children were unable to take care of said estate, and that the only possible way for the children to receive the same was by and through the medium of their father, the said husband of Mrs. Hernandez.

Ultimately, the opponents claimed that the husband by use of fear, fraud, and duress forced his wife to sign the will.

224. Cahn, *supra* note 171, at 507.

225. *Id.*

226. The action is described in 3 Planiol, *supra* note 20, No. 2877, at 412. In Cahn, *supra* note 171, at 509, the author summarized the three prerequisites for the action as described by French commentators: "(a) an extraordinary or egregious hatred, (b) unjust in its source and unwarranted by any conduct of its object, (c) proximately causing the dispositions ordained."

heir,²²⁷ to invalidate a will. The action permitted proof that the provisions of the will proceeded from a blind, unjust and extraordinary hatred that affected the sanity of the testator.²²⁸ Although the projet of the Code Napoleon contained a proposed article to prohibit proof of hatred and anger, it was rejected by the French legislative body.²²⁹ Despite the fact that the action *ab irato* was not adopted by the Code Napoleon, and thus arguably abolished, French courts recognized that "[h]atred and anger, just or unjust"²³⁰ could nullify a will "only if of degree sufficient to unbalance the mind of the testator."²³¹ Thus, the relationship between hatred and anger and the testator's capacity was established.

Under French law the same relationship existed between simple captation, or suggestion, and the testator's capacity. Simple captation and suggestion were defined as the means to ingratiate one to the testator²³² or to persuade him to dispose in favor of certain persons.²³³ According to Aubry & Rau:

227. Actions *ab irato* became quite common, in view of the rule that they might be instituted by heirs who were not lawfully entitled to a legitime. The commentators agreed that the burden of proof was much heavier as to heirs of this category. The distinction has been made that, as to such heirs (usually collaterals), the motive of hatred must appear on the face of the will, whereas heirs in the direct line might establish its *dehors*.

Cahn, *supra* note 171, at 508-09.

In 3 Planiol, *supra* note 20, No. 2877, at 412 n.11, he explains:

The point of departure was the idea that gratuities should be inspired by a spirit of affection, for they are benevolent acts. If they are inspired by hatred, they should be set aside A series of decisions in the 17th Century set aside wills because the testators were moved by unjust passions against one or more of their children But decisions of 1643 and 1657 rejected such an action to collateral relatives, because the natural affections toward them are less strong and natural than toward lineal relatives. . . . The action *ab irato* had also some unfortunate effects. Sons and sons-in-law, who foresaw that their father or father-in-law will favor other children in his will, created on purpose family conflicts and started all kinds of litigation so as to prepare for future reference means of attacking the will as induced by hatred against them.

228. This was done with the help of a fiction that the anger has affected the sanity of the testator But the old action does not exist any more; the silence of the Code sufficed to have abolished it. *Still if the rage was strong enough to deprive the testator of the ordinary use of his mental faculties, it would be identified with insanity and the will could be annulled despite the fact that the action ab irato does not exist as a separate action.*

3 Planiol, *supra* note 20, No. 2877, at 412 (emphasis added).

229. *Id.*; Cahn, *supra* note 171, at 509-10; Note, *supra* note 171, at 925. This article was, of course, adopted by the Louisiana Legislature.

230. Cahn, *supra* note 171, at 511.

231. *Id.* See also *supra* emphasized quotation in note 228.

232. In 10 Aubry & Rau, *supra* note 173, No. 654, at 83, simple captation is defined as follows:

[T]he use of means designed to ingratiate ourselves to others, as for example,

He [the judge] would also have good reason to declare the nullity of the testament if it resulted from his findings that the practice of captation and suggestion by the legatee, *even if non-fraudulent*, was rendered easier by the naturally weak intelligence of the disposer, so that the latter was unable to resist the covetous influences.²³⁴

The structure of Chapter 2 of the Louisiana Civil Code supports the connection between proof of hatred, anger, suggestion or captation and the testator's capacity. Both Article 1492 and Article 1475, which pronounces that the testator must be of sound mind, appear in the chapter entitled "Of the *Capacity* Necessary for Disposing and Receiving by Donation Inter Vivos or Mortis Causa" (emphasis added). The logical conclusion is that with the repeal of the prohibition, evidence of suggestion or captation is admissible and relevant if it assists in establishing

demonstrations of simulated friendship, assiduous service, or presents, would not be sufficient to annul a disposition made in favor of the person who, by resorting to such means, has secured the benevolence of the testator, even though he acted solely with the view of securing liberalities for himself.

3 Planiol, *supra* note 20, No. 2881, at 414, describes an annulment action for inducement or suggestion under the old law before the Code Napoleon. "The Code has not reproduced the provision of the Ordinance of 1735. Its disappearance has been construed as giving the judges full freedom of appreciation." *Id.* at No. 2883.

233. "The same is true of suggestion, that is to say, means of persuasion used towards the testator to induce him to dispose in favor of certain persons, although his dispositions are in truth and in fact the result of these means." 10 Aubry & Rau, *supra* note 173, No. 654, at 83. In a footnote, the commentators explain that suggestion had a different meaning under ancient law. *Id.* at 83 n.6. A third meaning is ascribed to "suggestion" in 3 Planiol, *supra* note 20, No. 2881, at 414: "A 'suggested' disposition was one made so the testator would free himself from the annoying solicitation of persons around him."

234. (Emphasis added). 10 Aubry and Rau, *supra* note 173 No. 654, at 85.

In Cahn, *supra* note 171, at 511, after observing that to invalidate a will captation and suggestion must be fraudulent, he describes fraud as:

The evidence often takes the form of isolation of an aged and mentally weakened testatrix, false artifices and manoeuvres to create hatred of the natural objects of her bounty, and the like. The important principle is that mere attentions, gifts, pleadings and assiduities, even if designed for the sole purpose of inducing the desired disposition, will not invalidate the will, in the absence of deception, over-reaching or fraud.

A similar description appears in 3 Planiol, *supra* note 20, No. 2884, at 415:

By contrast, interception of correspondence, keeping the testator's old friends away from him, dismissal of faithful servants, slanders against the family, and constant interference of the legatee with the testator's affairs, were held to be typical fraudulent maneuvers, especially when the testator was of weakened mental capacity.

See also Green, *Fraud, Undue Influence and Mental Incompetency*, 43 Colum. L. Rev. 176 (1943) and *In re Rekasis v. Hogan*, 545 So. 2d 471 (Fla. 2d Dist. Ct. App. 1989).

that the testator is not of *sound mind*.²³⁵

Louisiana jurisprudence recognizes that a testator is presumed sane,²³⁶ and opponents of the will bear the burden of rebutting the presumption by clear and convincing evidence.²³⁷ However, the burden of persuasion

235. As a matter of fact, as grounds for nullity [of a contract], lack of capacity and fraud are flexible enough to provide redress for the victims of abusive persuasion, thereby eliminating the need for another category of vice of consent such as undue influence. Indeed, as once stated, it is clear that the weak, the timid, the anxious and the submissive are precisely those who receive the greatest protection through the concept of undue influence at common law. Flexible rules on contractual incapacity suffice to furnish efficient protection to such persons in the Louisiana system as well.

Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 100 (1989). Although the author was discussing principles as applied to contracts, Article 1917 applies the same rules to obligations that arise from different sources, such as a last will and testament. Furthermore, if Article 1918 (contractual capacity) is compared to Article 1475 (capacity to execute a donation or testament), the former pronounces incapacity if a party is deprived of reason, whereas the latter pronounces incapacity if the donor or testator is not of sound mind. The latter appears to be even more flexible than the former. See also Green, *supra* note 234, at 176.

Two cases in which the connection between mental feebleness and undue influence was made were *Jeanis v. Jeanis*, 202 La. 171, 12 So. 2d 691 (1943) and *Pons v. Pons*, 327 So. 2d 561 (La. App. 4th Cir. 1976). The *Jeanis* case was a suit for interdiction of an eighty-nine-year-old man alleged to be incapable of managing his person and his affairs. Among the allegations made to prove his lack of capacity was that he had fallen under the "influence" of his niece. In the *Pons* case a nephew sought an accounting from his uncle for money received from his aunt and for a judicial determination "as to whether or not Ms. Robinson [aunt] was coerced or unduly influenced" to make decisions she did not desire. *Id.*

236. Succession of Lyons, 452 So. 2d 1161 (La. 1984). The authors commented on the case in Spaht, Samuel, and Shaw, *supra* note 42. See also Johnson, *Successions and Donations, Developments in the Law, 1982-1983*, 44 La. L. Rev. 553 (1983).

See also Succession of Riggio, 405 So. 2d 513 (La. 1981); Succession of Lambert, 185 La. 416, 169 So. 453 (1936); and Succession of Mithoff, 168 La. 624, 122 So. 886 (1929).

See generally L. Oppenheim, *Successions and Donations* §§ 115-16, in 10 Louisiana Civil Law Treatise (1973).

237. Succession of Lyons, 452 So. 2d 1161 (La. 1984).

"The disputed fact is whether the testator understood the nature of the testamentary acts and appreciated their effects." Spaht, Samuel, and Shaw, *supra* note 42, at 606. See Succession of Moody, 227 La. 609, 80 So. 2d 93 (1955); Succession of Herson, 127 So. 2d 61 (La. App. 1st Cir. 1961). "[T]he question concerns the mental and emotional capacity of the testator to deliberate knowledgeably and to make an unconfused decision." Spaht, Samuel, and Shaw, *supra* note 42, at 607. See 3 M. Planiol, *supra* note 20, Nos. 2874 and 2876.

Additional cases in which there have been allegations of lack of testamentary capacity since *Succession of Lyons* include Succession of Landry, 545 So. 2d 1107 (La. App. 5th Cir. 1989); Succession of Cahn, 522 So. 2d 1160 (La. App. 4th Cir.), writ denied, 523 So. 2d 1339 (1988); Succession of Sauls, 510 So. 2d 715 (La. App. 1st Cir. 1987); Succession of Key, 502 So. 2d 199 (La. App. 3d Cir.), writ denied, 503 So. 2d 497 (1987). For an example of a case in which the opponents were successful in proving lack of testamentary capacity see Succession of Keel, 442 So. 2d 691 (La. App. 1st Cir. 1983).

was judicially imposed because "the court considers that the particular type of claim should be disfavored on policy grounds."²³⁸ By virtue of the repeal of Article 1492, a strong argument can be made that the policy that supported the intermediate level of persuasion has changed. The legislature evidenced the shift in policy by permitting evidence of captation to establish that the testator "was of weakened mental capacity."²³⁹ Arguably, after July 1, 1990, the standard of persuasion imposed upon opponents of a will to prove the testator was not of sound mind should only be a preponderance of the evidence.²⁴⁰

Despite the prohibition against evidence of captation, Louisiana decisions have permitted evidence of dominance by a person over the

238. *Succession of Lyons*, 452 So. 2d at 1165, quoting from McCormick on Evidence § 340(b), at 798 (2d ed. 1972).

Other examples of proceedings where the intermediate standard of persuasion is imposed include attorney disciplinary proceedings, community property litigation where a person is attempting to overcome the presumption that property acquired during the community is community property (La. Civ. Code art. 2340), and a suit by a child to establish filiation to a deceased parent (La. Civ. Code art. 209). "In all these situations, strong policy considerations mitigate against use of the preponderance of the evidence test." *Id.* at 1165. In the case of community property litigation and suits to establish filiation, "the sanctity of the family is protected." *Id.*

Cf. 8 ULA, Uniform Probate Code § 3-407: "Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. . . ." For cases in a neighboring state involving burden of persuasion in will contests where undue influence is alleged, see *Seigler v. Seigler*, 391 S.W.2d 403 (Tex. 1965); *Norton v. Clarks*, 160 Tex. 466, 333 S.W.2d 108 (1960); *Lipsev v. Lipsey*, 660 S.W.2d 149 (Tex. App.—Waco 1983); *Cravens v. Chick*, 524 S.W.2d 425 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.); *Carpenter v. Tinney*, 420 S.W.2d 241 (Tex. Civ. App.—Austin 1967); *Schmidt v. Schmidt*, 403 S.W.2d 531 (Tex. Civ. App.—Waco 1966).

239. 3 M. Planiol, *supra* note 20, No. 2874, at 410.

The proof of testamentary incapacity is 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." *Succession of Bey*, 46 La. Ann. 773, 789, 15 So. 297, 302 (1894).

"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." *Spaht, Samuel, and Shaw*, *supra* note 42, at 607 n.175. The full citation of *Succession of Dixon v. Guzik* is 269 So. 2d 323 (La. App. 2d Cir. 1972).

240. In Texas, the burden of persuasion is a preponderance of the evidence: "Those who seek in a new suit to set aside a will that has already been admitted to probate on the grounds of *testamentary incapacity or undue influence*, or both, have the burden of establishing such charges by a preponderance of the evidence." *Jowers v. Smith*, 237 S.W.2d 805, 807 (Tex. Civ. App.—Amarillo 1950) (emphasis added). See also *Reese v. Brittan*, 570 S.W.2d 528, 530 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

mind of a testator to establish lack of testamentary capacity.²⁴¹ As recently as 1988, in *Succession of Hamiter*,²⁴² the court concluded that the testator's fourth will was invalid because he "could not appreciate the nature or effect of his testament nor could he or did he employ independent judgment in making decisions concerning . . . his estate."²⁴³ According to the court, he did not understand the nature and effect of his testament because of his "susceptibility to undue influence and the actual practice of such influence upon Hamiter [testator] by Cox [legatee and sitter]."²⁴⁴ The court was assisted in reaching this conclusion by finding that the testator suffered from "a constant and continuing mental incapacity."²⁴⁵ The effect of the finding was to shift the burden of persuasion to the proponents of the will who failed to prove the testator executed his will during a lucid interval. The court observed:

The evidence . . . shows that his will was executed by Hamiter while under the overbearing influence of Mrs. Cox. The will was read to Hamiter by Cox as she knelt beside his chair. Though she left the room while the will was signed she waited outside to take Hamiter home. She had directed the preparation of the will. The will was as Mrs. Cox wanted it. . . . She made her desire for him to sign it clear by leaving him in the room for the purpose of doing so. He then did as she directed and expected.²⁴⁶

After July 1, 1990, there should be no question 1) that evidence of influence and suggestion are admissible to question the testator's capacity and 2) that the testator's lack of capacity may be established by a preponderance of the evidence.

241. *Succession of Hamiter*, 519 So. 2d 341 (La. App. 2d Cir.), writ denied, 521 So. 2d 1170 (1988). See also *Succession of Franz*, 232 La. 310, 94 So. 2d 270 (1957); *Cormier v. Myers*, 223 La. 259, 65 So. 2d 345 (1953); *Succession of Andrews*, 153 So. 2d 470 (La. App. 4th Cir. 1963); *Succession of Willis*, 149 So. 2d 218 (La. App. 2d Cir.), writ refused, 150 So. 2d 589 (1963). See also Comment, *supra* note 171.

In *Succession of Willis*, 149 So. 2d at 222, the court observed:

The basic and fundamental contention is that he was under the domination of Mrs. McKeithen. Much evidence was introduced on this point, and we pretermit any further comment on same except to say it did not show mental incapacity but at most tended to show "captation or suggestion" which is not permitted under LSA-C.C. Art. 1492.

This series of cases was criticized in Note, *supra* note 171, at 929.

242. 519 So. 2d 341 (La. App. 2d Cir.), writ denied, 521 So. 2d 1170 (1988).

243. *Id.* at 348.

244. *Id.*

245. *Id.* at 347. This finding was made on the basis of the testimony of both a psychiatrist and lay witnesses as to his behavior.

246. *Id.* The court continued by saying that "[t]his extraordinary involvement of the principal legatee in the formulation and execution of the will is very substantial evidence of undue influence present at the making of this will." *Id.*

Is Undue Influence Captation?

The extent to which there may be reliance upon decisions and commentaries about undue influence depends upon whether the definitions of undue influence and captation are identical, or at least very similar. In Louisiana judicial decisions, the terms ordinarily are used interchangeably.²⁴⁷ Yet, one author has described what he perceived to be the historical difference between the two concepts. In systems derived from Roman law, there was an emphasis upon the *effect* that influences and artifices had upon "the testator's natural office of piety;"²⁴⁸ in systems derived from the common law there was an emphasis upon "the licit or illicit character of the *means* of influence."²⁴⁹ An examination

247. In *Zerega v. Percival*, 46 La. Ann. 590, 595 (1894), the attorney for the defendant opined: "The charge of suggestion and captation is tantamount to what is understood elsewhere by undue influence. Fraud and undue influence are nearly synonymous." Later the court, quoting from the district judge's opinion, makes the same observation: "Undue influence is an expression unfamiliar to civilians. It is borrowed from a system of law not prevalent in Louisiana, and it is there used in the same sense as captation and suggestion in the civil law." *Id.* at 606. Ultimately, the district judge found it unnecessary to decide if captation and undue influence were the same: "I am, therefore, clearly of the opinion that whether undue influence be understood to mean simple captation and suggestion, proof of neither being admitted under the textual provisions of Art. 1492." *Id.* at 611. In the supreme court opinion, reviewing the decisions of Louisiana and other states, the term undue influence was used. *Id.* at 612.

In *Succession of McDermott*, 136 La. 80, 87, 66 So. 546, 548 (1914), the court, relying on *Zerega* stated that "'undue influence' is used in the same sense as 'captation and suggestion' . . ." See also *Cormier v. Myers*, 223 La. 259, 65 So. 2d 345 (1953); *Succession of Price*, 172 La. 606, 134 So. 907 (1931); *Succession of Andrews*, 153 So. 2d 470 (La. App. 4th Cir. 1963); *Succession of Willis*, 149 So. 2d 218 (La. App. 2d Cir.), writ denied, 150 So. 2d 589 (1963).

In *Succession of Hernandez*, 138 La. 134, 142, 70 So. 63, 65-66 (1915), the Louisiana Supreme Court identified undue influence as synonymous with *fraudulent* captation: "As to the alleged fraudulent suggestions, or undue influence, proof is not admitted under our law and jurisprudence." Furthermore, in *Texada v. Spence*, 166 La. 1020, 1024, 118 So. 120, 121 (1928) and *Succession of Franz*, 232 La. 310, 322, 94 So. 2d 270, 274 (1957), the court characterizes undue influence as "intimidation and fraud." Intimidation suggests duress. See Litvinoff, *supra* note 235, at 99-100 for a comparison of duress under contract law in Louisiana with undue influence at common law. See also Comment, *Duress and Undue Influence—A Comparative Analysis*, 22 *Baylor L. Rev.* 572 (1970).

248. Cahn, *supra* note 171, at 508. Cahn further stated:

The Roman law . . . has postulated a norm of testamentary disposition in the light of natural justice and the obligation of piety to family and society. Its problem, therefore, is whether the testator has violated that norm, whether, influenced or uninfluenced, he has ordained dispositions which the law and natural justice decline to recognize as the expression of a socially responsible will.

Id.

249. *Id.* at 508 (emphasis added). "Modern law, particularly the common law of England and of the United States, has laid its emphasis upon the licit or illicit character

of cases from common law jurisdictions and commentaries about undue influence reveal that the dichotomy is not nearly so pronounced, if it exists at all.

The theory underlying undue influence is that the "testator is induced by various means, to execute an instrument which, although his, in outward form, is in reality not his will, but the will of another person which is substituted for that of testator."²⁵⁰ Ultimately, the inquiry of whether undue influence exists focuses on the influence and its power over the mind of the testator.²⁵¹ After the repeal of Article 1492, it is accurate to describe Louisiana law as emphasizing the effect of captation, simple or fraudulent, upon the condition of the testator's mind. Thus, the two concepts are very similar, if not identical.

An examination of authorities on undue influence reveals some confusion and uncertainty. One commentator has opined: "Undue influence is one of the most bothersome concepts in all the law. It cannot be precisely defined."²⁵² By virtue of its nature as a factual question,

[i]t's impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.²⁵³

of the *means* of influence. Having postulated the free and unrestrained exercise of testamentary power, the gravamen of its inquiry is whether the testator has been influenced to make a disposition other than he himself wills." *Id.*

See as illustrative examples of cases focusing on the character of the means of influence, *In re Reddaway's Estate*, 214 Or. 410, 329 P.2d 886 (1958); *In re Estate of Swenson*, 617 P.2d 305 (1980).

250. Page on Wills, *supra* note 178, § 184, at 368-69.

251. *Id.* §§ 186-87, at 372-81. See also Green, *supra* note 234, which examines the relationship of the traditional legal concepts.

252. J. Dukeminier & S. Johanson, *Wills, Trusts, and Estates* 477 (3d ed. 1984) [hereinafter *Dukeminier*]. In *deFuria*, *Testamentary Gifts from Client to the Attorney-Draftsman: From Probate Presumption to Ethical Prohibition*, 66 *Neb. L. Rev.* 695, 697 (1987), the author comments: "The concept of 'undue influence' in probate law resists simplistic definition, primarily because it is an amorphous term used to characterize particular acts or conduct by someone other than the testator which improperly influence a testamentary disposition. The term is easier to recognize than to define."

In *Comment, Undue Influence—Judicial Implementation of Social Policy*, 1968 *Wis. L. Rev.* 569, 569 (1968), the author opines: "Due to the circumstantial nature of the evidence presented, the wide variety of factors considered, and the difficulty of evaluating and weighing each factor, the doctrine suffers from confused and not easily applied guidelines."

253. *In re Will of Coley*, 53 N.C. App. 318, 321, 280 S.E.2d 770, 772 (1981). See also Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 *Gonz. L. Rev.* 1 (1984-85).

In many jurisdictions, the question of whether undue influence exists is to be determined by a jury.²⁵⁴

Courts traditionally recite four elements of undue influence: "(1) a testator susceptible to influence; (2) an opportunity to influence; (3) a disposition to influence (meaning a willingness to use any means, fair or foul, to obtain the coveted result); and (4) a result which appears to be the product of undue influence."²⁵⁵ As to the first element, there is the logical connection between capacity and undue influence. Even though undue influence presupposes the minimum capacity to execute a will, the character and degree of mental capacity above the minimum that the testator possesses is extremely important.²⁵⁶ It is much easier to influence a weakened mind, than a firm and sound one. The opportunity to influence may result from a confidential relationship that

254. In Louisiana under La. Code Civ. P. art. 1732(3), as amended by 1988 La. Acts No. 147, § 1, there is no trial by jury in probate proceedings. Comment (c) to La. Code Civ. P. art. 1733 (renumbered Art. 1732 in 1983) provided:

The probate provision of Art. 1733 (3) is the customary Louisiana practice. . . . Of course, if a direct action were brought against . . . the succession proceeding itself [it] would not be governed by this limitation. On the other hand, a succession creditor could assert his right by an opposition rather than a direct action, and in such cases he would waive his right to a jury trial.

See also *Fellows v. Fellows*, 220 La. 407, 56 So. 2d 733 (1951).

According to Dukeminier, *supra* note 252, at 169: "The well-documented tendency of juries to rewrite a will in accordance with their idea of what is a fair distribution, rather than testing the will's validity according to the court's instructions, makes these cases fertile ground for will contests." In *deFuria, Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 *Notre Dame L. Rev.* 200, 201 n.7 (1989), Professor *deFuria* states: "According to one study done some years ago, not only do juries find for the contestant in over 75% of will contests submitted to them, but trial judges rarely withdraw cases from their consideration, or interfere with jury verdicts. See Comment, *Will Contests on Trial*, 6 *Stan. L. Rev.* 91 (1953). See also *Jaworski, The Will Contest*, 10 *Baylor L. Rev.* 87, 88 (1958)." See *Hassell v. Pruner*, 286 S.W. 2d 266 (Tex. Civ. App.—Amarillo 1956). See also *Sherman, Undue Influence and the Homosexual Testator*, 42 *U. Pitt. L. Rev.* 225, 228 (1981) and *In re Huber's Will*, 103 Misc. 599, 170 N.Y.S. 901 (Sup. Ct. 1918), *aff'd*, 199 A.D. 882, 175 N.Y.S. 906 (App. Div. 1919).

As an alternative solution to the increasing complexity in will contests, one author suggested eliminating juries in these disputes: "One alternative is to have will contests tried to the court. The right to jury trials in will contests was created by statute, and is mandated by neither the United States Constitution nor the Illinois Constitution." *Mason and Weisbard*, 16 *John Marshall L. Rev.* 499, 521-22 (1983).

255. *Rein-Francovich, supra* note 253, at 35. These elements are called the four categories approach. Note, *Undue Influence in Wills-Evidence-Testators' Position Changes After In re Will of Ferrill*, 13 *N.M.L. Rev.* 753, 758 n.28 (1983). Page on Wills, *supra* note 178, §§ 183-94, at 363-92; G. Thompson, *The Law of Wills* §§ 142-48, at 223-33 (3d ed. 1947).

256. Page on Wills, *supra* note 178, § 185, at 370. See also *Green, supra* note 234; *Rein-Francovich, supra* note 253.

exists between the testator and the person exercising the influence.²⁵⁷ In fact in some jurisdictions, the confidential relationship combined with suspicious circumstances gives rise to a presumption of undue influence.²⁵⁸ The third element concentrates on the motivations of the party exercising the influence.²⁵⁹ In assessing proof of the fourth element, many com-

257. Examples of confidential relationships include doctor-patient, nurse-companion and patient, and pastor-parishioner. Rein-Francovich, *supra* note 253, at 42.

Compare La. Civ. Code art. 1489 (doctors and ministers; relative incapacity to receive). There is a question as to whether Article 1489 should be repealed. It in essence was a statutory exception to La. Civ. Code art. 1492 as the law simply prohibited doctors and ministers from receiving either donations *inter vivos* or *mortis causa* from the donor during his last illness. The law recognized that the donor or testator might be vulnerable to influence from one with whom he had such a confidential relationship. With the repeal of Article 1492 there may no longer be a need for La. Civ. Code art. 1489.

Attorney-client relationships have also been considered confidential. See deFuria, *supra* note 252; Blank, *Problem Areas in Will Drafting under New York Law*, 56 *St. John's L. Rev.* 459 (1982). In Louisiana, see *Gibson v. Succession of Gumbel*, 333 So. 2d 340 (La. App. 4th Cir.), writ denied, 338 So. 2d 111 (1976). Louisiana State Bar Association's Model Rule 1.8(c) reads: "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." DeFuria urges an even stricter rule such that under no circumstances may an attorney draft a will for a client and be named a beneficiary.

Another relationship sometimes considered confidential is a meretricious one. See deFuria, *supra* note 254. This relationship has, however, been distinguished from that of a spouse, which has caused at least one commentator to ask why:

[C]ourts often assert that a wife is allowed greater freedom than others in urging the testator to make a will in accordance with her wishes—that conduct which would amount to undue influence in the case of someone other than a spouse is permissible in the case of a spouse. Why this should be so is not immediately apparent.

Sherman, *supra* note 254, at 230.

258. Rein-Francovich, *supra* note 253, at 39. "Most courts require the substantial gift and the existence of a confidential relationship coupled with evidence of the influencer's participation in preparing or procuring the will." *Id.* at 40.

See also Blank, *supra* note 257, at 478 n.75; deFuria, *supra* note 252, at 695-96; Jarratt, *Estates, Trusts and Wills*, 43 *Mont. L. Rev.* 295, 298 (1982); Note, *supra* note 255, at 756-58; Mason and Weisbard, *supra* note 254, at 515-22.

In deFuria, *supra* note 254, at 203 n.17, the author observes that confidential relationships usually include an element of unequal bargaining power between the parties and such relationships may include those that are familial and intimate. Fiduciary or confidential relationships include "any significant degree of practical domination and dependence between the proponent and the testator." Mason and Weisbard, *supra* note 254, at 516; Sherman, *supra* note 254.

See also *In re Estate of Harris*, 539 So. 2d 1040 (Miss. 1989), where the beneficiary was required to overcome the presumption of undue influence by clear and convincing evidence; *Haynes v. First Nat'l State Bank*, 87 N.J. 163, 432 A.2d 890 (1981).

259. "Some courts have downplayed the destruction of the testator's free agency and focused instead on the impropriety of the influencer's conduct." Rein-Francovich, *supra* note 253, at 33. The Oregon Supreme Court summarized this position in *In re Reddaway's*

mentators admit that the fact-finder in many instances will be influenced by the unnaturalness of the disposition. If a testator disposes of property to other than the natural objects of his bounty, his spouse or children, juries in particular tend "to rewrite a will in accordance with their idea of what is a fair distribution."²⁶⁰ "[F]reedom of testation has always been tempered by notions of fairness, justice, and especially morality."²⁶¹

Estate, 214 Or. 410, 419, 329 P.2d 886, 890 (1958): "The question is, has the influencer by his conduct gained an unfair advantage by devices which reasonable men regard as improper?" See also *In re Estate of Swenson*, 617 P.2d 305, 306 (1980).

260. Dukeminier, *supra* note 252, at 169. The example of such unnatural dispositions given in the text is a disposition in which the testator "cuts off heirs in favor of a friend or a charity or gives some children a larger testate share than other children." *Id.*

Interestingly enough, another example of a scenario where there is likely to be a will contest is "the 'divided family' situation in which there is a second spouse and children by a former marriage." *Id.* at 168-69. According to the authors, "[i]f the testator leaves the bulk of his estate to the spouse, this may produce a challenge by the embittered children against the disposition in favor of the second wife." *Id.* at 169.

T. Atkinson, *Law of Wills* 139-40 (2d ed. 1953):

When juries pass upon these issues, they doubtless let the unnatural provisions of the will influence their decision. Sympathy for the children may interfere with an impartial verdict. Even trial judges may be somewhat influenced by these considerations. Legislatures and appellate courts assert stoutly the principle of testamentary freedom and text-writers repeat it in the clearest language, but trial courts and particularly juries continue to deny it in their decisions. This is a factor not capable of measurement but almost everyone is realist enough to recognize its existence and importance.

For a practical example, see *Hassell v. Pruner*, 286 S.W.2d 266 (Tex. Civ. App.—Amarillo 1956).

Jaworski, *The Will Contest*, 10 *Baylor L. Rev.* 87, 88 (1958):

A fundamental truth to be borne in mind in writing a will is that the average jury, upon reviewing a will, is visited with a strong temptation to rewrite it in accordance with the jury's idea of what is fair and right rather than testing its validity according to the instructions of the court. The juror, although quite conscientious, has great difficulty refraining from substituting his own judgment for that of the testator and at times, especially in cases involving distributions considered *prima facie* unnatural, is inclined to show a marked sympathy for the contestant.

See also *Sherman*, *supra* note 254, at 228 n.21.

261. Comment, *supra* note 252. *DeFuria* states: "It becomes more meaningful to consider the notion of undue influence as a necessary judicial doctrine permitting courts to implement social policy by making judgments as to what degree of influence is proper or improper." *DeFuria*, *supra* note 254, at 200.

Essentially, pretermitted children statutes in some jurisdictions address the same problem. See, e.g., *Alcock, Estates and Trusts*, 13 *N.M.L. Rev.* 395, 401 (1983). The New Mexico statute provides:

If a testator fails to name or provide in his will for any of his children born or adopted before or after the execution of his will, the omitted child or his issue receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless: (1) it appears from the will

Today, legal systems in the other forty-nine states consider directly or indirectly the effect of such influences upon the ultimate disposition of the testator, and Louisiana law should in the future at least draw distinctions between the means of influence—i.e., fraudulent versus non-fraudulent. Thus, the perceived historical difference in approach of common law systems and that of Louisiana—one emphasizing the effect of the influence, the other emphasizing the means of influence²⁶²—has waned, if not disappeared.

Social Costs of the Repeal of Article 1492

Obviously, there will be an increased number of will contests in Louisiana, if for no other reason than the repeal of the explicit prohibition against offering proof of captation. Furthermore, the child who is no longer a forced heir is faced with the prospect of receiving nothing if a parent disinherits him by simply writing a will that does not include him. Because this creates an all or nothing proposition, the excluded relative has an incentive to litigate. The costs attendant to litigation fomented by undue influence allegations has been described in the following terms:

As a result, such trials generally represent unrestricted fishing expeditions into the life, the inner thoughts and the intimate personal relations of the decedent The family's right of privacy, the decent respect due to the dead do not avail. Estates are consumed with fees and expenses, costs being but rarely imposed upon unsuccessful contestants. Courts are congested with fruitless litigation The delays in probate occasioned by groundless contests often result in depreciation, waste or complete disappearance of valuable assets of the estate.²⁶³

In litigation in which the opponents of the will are successful, there is the ultimate irony—the deceased, who wished to disinherit his children, dies intestate. Hence, rather than receiving no more than one-half of his estate under the laws of forced heirship, the children will take it all.²⁶⁴

Section 4 of Act 788: Effective Date and Transitional Provisions

Section 4 of Act 788 contains the effective date and transitional provisions. The Act becomes effective July 1, 1990. Because it enacts

that the omission was intentional. . . .
N. M. Stat. Ann. § 45-2-302 A(1) (1978). See discussion in Laflin and Eisenberg, *Estates and Trusts*, 14 N.M.L. Rev. 153, 156 (1984). Cf. La. Civ. Code art. 1705. See generally, T. Atkinson, *supra* note 260, at 138-45.

262. See *supra* notes 248-49.

263. Cahn, *supra* note 171, at 517-18.

264. La. Civ. Code art. 888.

substantive law and the legislature did not express an intent to make it retroactive, it applies prospectively only.²⁶⁵ The new law is thus inapplicable to the succession of a decedent who died prior to the effective date of the Act.²⁶⁶

For decedents dying on or after July 1, 1990, things become more complicated. Section 4, rather than stating that the new law applies to the *successions* of decedents who die on or after the effective date, specifically makes the new law applicable to *testaments* written on or after the effective date. What law is to be applied, then, when the decedent has died after the effective date but has made donations *inter vivos* or has made his will prior to the effective date? If Act 788 had said nothing specific on this point, arguably the new law would apply because courts tend to apply the law in effect at the decedent's death to determine the validity of dispositions in his will.²⁶⁷ However, with respect to *testaments* written *before* the effective date, section 4 states:

The provisions of this Act shall not apply to, confirm, ratify, validate or invalidate any provision of any testament executed prior to July 1, 1990, regardless of the date of the testator's death. Specifically the provisions of the Act does [sic] not change the determination of the forced portion or disposable portion of any testament executed prior to July 1, 1990.

This section, though broadly worded, is not an attempt to "grandfather" all children who would have been forced heirs under the old law so that they would remain forced heirs after the new law came into effect. A proposed amendment to do so was rejected by the House of Representatives.²⁶⁸ Instead, the legislature was concerned specifically about the effect of the new law on the interpretation of some testaments made prior to the effective date of the new law. For example, a testator who did not intend to disinherit his children over twenty-three and wanted

265. La. Civ. Code art. 6.

266. Only rarely does the legislature seek to make new law applicable to successions of decedents who died before the new law became effective. Since an heir succeeds to his inheritance immediately upon the death of the decedent, due process objections would be raised were the legislature at a later date to try to rearrange or modify the already acquired rights of inheritance. The usual way to satisfy the due process objection when the legislature seeks to apply new law to old situations is to provide a statutory "grace period" during which those whose rights would be adversely affected by the new law can make their claims under the old law. E.g., La. R.S. 9:5630(B) (1983) (1981 amendment shortened prescription on unrecognized heir's claim against third person who took title from recognized heirs). The absence of any grace period in Act 788 is further evidence that no retroactive effect was intended.

267. See *Succession of Stewart*, 301 So. 2d 872 (La. 1974) (validity of testament establishing a trust determined by law in effect at time of settlor's death).

268. 42 *Journal of the Louisiana House of Representatives* (daily ed. June 27, 1989).

them to have the amount of property that would have been their legitime at the time the will was executed might have phrased the legacy he intended them to have as "the legitime." Or he might simply have left the "disposable portion" to a stranger, intending that the legitime as he then knew it would go to his children no matter how old they were. The legislature did not want these wills to be interpreted, once the new law went into effect, as leaving nothing to the children over twenty-three who would no longer have a legitime. Thus by means of section 4, the legislature made the old law apply to these "old" wills so that the children over twenty-three would not be disinherited contrary to the testator's intent.

Disinherison of children without cause is a most serious matter; if it is going to be permitted, the legislature was right to provide a safeguard against inadvertent or unintended disinherison at least for wills written before July 1, 1990. To accomplish the safeguard against unintentional disinherison in pre-July 1, 1990 wills, the legislature needed only to have given a transitional rule of interpretation of these wills. The rule should have specified that when the intention of the testator to disinherit his children is not clear, as when he leaves them their "legitime" in a pre-July 1, 1990 will, the old law would apply. If the legislature wished to discourage litigation in these instances, it should also have declared that extrinsic evidence of the testator's intent to disinherit the children over twenty-three would not be allowed.²⁶⁹ Had the legislature followed this approach, the children over twenty-three would take according to the old law unless the testator's pre-July 1, 1990 will clearly expressed his intention to leave as little to his children as the law permitted, including nothing.

Section 4, however, goes beyond a rule of interpretation for old wills that do not express an intent to disinherit children over twenty-three. It applies the old law to old wills regardless of the testator's intent. Under section 4, the old law will be applicable to a pre-July 1, 1990 testament even though the testament *does* express an intent to disinherit. For example, section 4 makes the old law applicable to a will that disposes of all the decedent's property to his spouse or a stranger, and even though the will expresses an intention to leave nothing to the children. Furthermore, if after the enactment of Act 788 but prior to July 1, 1990, a testator executes his will disinheriting his children over twenty-three in anticipation of the Act's becoming effective, the old law will apply to his will even though the testator dies after July 1, 1990. Thus section 4 means that if the testator does not execute or

269. The analogous situation in other states is that of the pretermitted child. Some states permit no extrinsic evidence to be introduced to show that the omission of the child was intentional, while others permit extrinsic evidence. Dukeminier, *supra* note 252.

re-execute his will after July 1, 1990, he will not have effectively disinherited his children over twenty-three despite his obvious intention to leave them as little as the law required, including nothing. The way section 4 is written, *when there is a testament executed prior to July 1, 1990* the children over twenty-three are "grandfathered" as forced heirs at least with respect to the property left at death. While it may not be a problem for most testators who wish to disinherit their children over twenty-three to execute or re-execute their wills after July 1, 1990, some testators may lack capacity at that time. Others may think their previous wills already address the issue by referring to an anticipated change in the law or by making dispositions consistent with the change. Common sense would not alert them to the fact that they must execute new wills to effectuate exactly what their wills already say. The "interpretation" approach, as opposed to the "grandfather" approach, would have avoided this problem.

Applying Law Inconsistently to Donations Inter Vivos

When the old law is applicable because of a pre-July 1, 1990, will, another problem arises due to section 4's silence with respect to *inter vivos* donations. Section 4 is framed in terms of the forced portion "of any testament," rather than "of any succession of a decedent who has made a testament prior to July 1, 1990." The Louisiana Civil Code provides only one way of calculating the legitime and disposable portion, the rule of Article 1505, which provides that the legitime and disposable portion are calculated upon an active mass consisting of the property left at death plus the value of the *inter vivos* donations minus the debts.²⁷⁰ Furthermore, donations *inter vivos* are reducible after the property included in the testamentary donations has been exhausted.²⁷¹ Both kinds of donations are thus linked within the concept of forced heirship as it exists in the Louisiana Civil Code, even as amended by Act 788. But did the legislature intend, by speaking of the forced portion "of any testament," that in transitional situations the forced portion would be calculated only upon the property left at death?

Curious results will follow if the old law is not applied both to the donations *inter vivos* as well as the testamentary donations when the decedent has made a will prior to July 1, 1990. For example, suppose that the decedent, who has made donations *inter vivos*, has a child under twenty-three and a child over twenty-three. If the will, written

270. Succession of Gomez, 226 La. 1092, 78 So. 2d 411 (1955). Some *inter vivos* donations and gratuities are, of course, excluded from the active mass by legislative exception, e.g., La. Civ. Code arts. 1502, 1505(c) and (d); La. R.S. 9:2372 and 2354 (Supp. 1990). These continue to be excluded.

271. La. Civ. Code art. 1507.

prior to July 1, 1990, disposes to a stranger all the property the decedent has at death, the calculation of the forced portion of the child over twenty-three would involve only the property left at death; however, unless the transitional rule changes the normal calculation of the forced portion also for the child whose status as forced heir is unaffected by the new law, the calculation of the forced portion of the child under twenty-three would be based on the active mass consisting of the value of the *inter vivos* donations plus the property left at death. This inconsistent application of donation *inter vivos* rules would in effect create two active masses. Presumably, only the property included in each child's active mass would be subject to reduction by that child.

On the other hand, if the old law applied without exception to pre-July 1, 1990 donations *inter vivos*, when the decedent disposed of all his property by will after that date, the *inter vivos* donations would be subject to reduction by his children over twenty-three even though the testamentary donations would not be. One solution for testate successions would have been to make the old law applicable to *inter vivos* donations only when the old law is applicable to testamentary donations. Thus, when the old law is applicable to a will written prior to July 1, 1990, the donations *inter vivos* should be included in the active mass and be subject to reduction. This is probably how a court would interpret the transitional provision to avoid using two active masses or restricting the legitime of the child under twenty-three to testamentary assets in the situation described above.

Should all donations *inter vivos*, regardless of when made, or only those *inter vivos* donations made prior to July 1, 1990, be included in the active mass whenever the old law is applicable to a will? If the "interpretation" approach had been used in the statute, then all donations would be included because presumably the testator would have intended the children to receive the legitime as he knew it under Article 1505. Under the "grandfathering" approach actually used, arguably the post-July 1, 1990 donations *inter vivos* should not be included because if the decedent had made the same post-July 1, 1990 donations by will instead of by donation *inter vivos*, the donations would not have been subject to the claims of children over twenty-three. Once again, unless all donations are included, there will be two different active masses whenever a testator has both a child over and a child under twenty-three: the former's active mass would only include donations *inter vivos* made prior to July 1, 1990, while the latter's would include all donations as per Article 1505.

Problematic Issues Resulting From Unanticipated Situations

Had the legislature been thorough in guarding against unintentional disinheritance it would have considered two other situations. The first is

that of unintentional disinheriton by *inter vivos* donation when the succession is intestate. Under section 4, there must be a will in order for the old law to be applicable. Suppose prior to July 1, 1990 a decedent made *inter vivos* gifts to strangers on the assumption that his children would either receive their legitime from the property he would leave at death or be able to reduce the *inter vivos* donations. If the decedent dies intestate after July 1, 1990 and leaves negligible property at death, should the children over twenty-three be considered disinherited with respect to the *inter vivos* gifts? Under section 4 they are disinherited even though if the same donations had been made by a will executed prior to July 1, 1990, they would not be disinherited because the donations by a pre-July 1, 1990 will would be reducible. Perhaps the legislature should have stated that for pre-July 1, 1990 *inter vivos* donations, there is a presumption that the decedent did not intend to disinherit his children over twenty-three; consequently, if he dies intestate, these gifts would be reducible by them if there is no evidence to rebut the presumption.

Second, some kind of safeguard against unintentional disinheriton should have been provided even for wills written after July 1, 1990. After all, almost all the other states, even though they do not embrace forced heirship, at least have pretermitted child statutes to guard against unintentional disinheriton. About half of the states protect children who are alive when the will was written, not just children born after the will was written, by giving them the share they would have received in intestacy when they have not been mentioned in the will.²⁷² Louisiana would thus not have been alone had it required a testator to express his intention to disinherit his child over twenty-three, and the requirement would have been consistent with the existing requirement of *express* disinheriton by a parent who has grounds to disinherit a forced heir.²⁷³

V. SECTION 5 OF ACT 788

A Cryptic Provision

It is true that the Legislature is not lightly presumed to do vain and useless things, but section 5 of Act 788 comes perilously close. Notwithstanding the statement in section 4 that the effective date of the Act is July 1, 1990, and its further admonition that the Act "shall not apply to, confirm, ratify, validate or invalidate any provision of any testament executed prior to July 1, 1990," section 5 provides:

272. Dukeminier, *supra* note 252, at 448.

273. When a parent has grounds to disinherit a child under twenty-three or a seriously incapacitated child, the disinheriton must nevertheless be *express*. La. Civ. Code art. 1624.

The provisions of this Act shall not invalidate the terms or conditions of any act of donation or assignment of rights, including any rights of reversion contained therein with respect to property acquired by children from a parent and donated or transferred by them to a surviving parent prior to July 1, 1990.

One must wonder how the Act could "invalidate the terms or conditions" of completed acts of donation and why the legislature felt the need to express particular concern for "any rights of reversion contained therein."

Retroactivity

The legislature's apparent concern about the retroactive application of Act 788 is misplaced. It is generally understood that laws are not given retroactive effect.²⁷⁴ There are, of course, exceptions to the rule; specifically laws that are remedial or procedural in character are applied retroactively.²⁷⁵ Act 788, however, is undoubtedly substantive in nature, and thus falls squarely under the general rule. Even so, assuming *arguendo* that Act 788 could be applied retroactively, it is unlikely that it could adversely affect previously-made donations. Prior donations could be affected if Act 788 diminished the portion available to donees by increasing the forced portion or otherwise giving broader rights to forced heirs;²⁷⁶ but to the contrary, it limits the class of forced heirs without increasing the forced portion. It seems unnecessary for the legislature to protect previously acquired rights that are not threatened by Act 788. The donees can only profit from its enactment.

Rights of Reversion

The unqualified reference in section 5 to "rights of reversion," as though it is an established category of rights having well-defined inter-relationships within the Codal scheme, is further evidence that section

274. La. Civ. Code art. 6 codifies the rule relative to retroactivity:

In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

See also *Anthony v. New Orleans Pub. Serv., Inc.*, 480 So. 2d 440 (La. App. 4th Cir. 1985), writ denied, 482 So. 2d 628 (1986); *Green v. Liberty Mut. Ins. Co.*, 352 So. 2d 366 (La. App. 4th Cir. 1977), writ denied, 354 So. 2d 210 (1978).

275. For an illustration of the remedial rule given retrospective application see *Savoie v. Savoie*, 482 So. 2d 23 (La. App. 5th Cir. 1986) (pension plan); for an illustration of an interpreting or clarifying rule given retrospective effect see *Brodnax v. Cappel*, 425 So. 2d 232 (La. App. 3d Cir. 1982) (overruled by *Kahl v. Baudoin*, 449 So. 2d 1334 (La. 1984)), see also *Pounds v. Schori*, 377 So. 2d 1195 (La. 1979).

276. The action for reduction of excessive donations would lie in favor of a forced heir to recover the legitime. An increase in the forced portion would therefore increase the possibility that an action for reduction would lie. La. Civ. Code arts. 1503-1518.

5 is not a solemn, well-conceived, highly-consequential provision. There are several such rights, each serving distinct purposes, none of which implicates forced heirship. A quick scan will suffice here.

Louisiana Civil Code article 897 provides for the "legal return" of property from the donee to the donor under certain circumstances. The legal return is implicit in every donation of immovable property to a descendant if the donee-descendant 1) dies without posterity, and 2) the property is found in the succession. If the donee has disposed of the property, either by onerous title or by gratuitous act *inter vivos* or *mortis causa*, the return fails.²⁷⁷ The legal return is traceable to early Germanic law, which regarded a gratuitous transfer as conditional, that is, the property passed from the donee to his heirs only if the donee survived the donor. Thus, if the donor survived the donee, the thing given was returned to the donor.²⁷⁸

Article 1534 permits the donor explicitly to reserve the return of the thing given in case the donee, or the donee and his descendants, predeceases the donor. This right of return, called the "conventional return" in contradistinction to the "legal return" discussed above, may be stipulated in favor of the donor alone.²⁷⁹ The effect of this right of return is to dissolve the donation retroactively so that the thing given returns to the donor free of alienations or encumbrances.

Article 1560 permits revocation of donations *inter vivos* for ingratitude. The Civil Code provides three causes for revocation, each involving acts of the donee against the donor: 1) attempting to take the life of the donor, 2) cruel treatment of the donor, and 3) refusing the donor food if he is in distress. The action, which is said to be "punitive" in nature, is personal to the donor and can only be invoked against the donee, not his heirs.²⁸⁰ If the donee has alienated the property, the action will not lie against the transferee.

Article 1568 authorizes revocation in the instance of non-performance of a charge imposed. Because the donor may impose any charge he wishes,²⁸¹ a donation subject to a charge becomes revocable if the donee

277. The legal return applies when the object given is "found in the succession." A disposition *mortis causa* vests the property in the legatee at the instant of the testator's death, thus the property is no longer "found in the succession." La. Civ. Code art. 897; Succession of Christensen, 248 So. 2d 45 (La. App. 1st Cir.), writ refused, 252 So. 2d 451 (1971).

278. 3 J. Brissaud, *History of French Private Law* § 458, at 646-47 (1912).

279. A stipulation of the return in favor of one other than the donor has the earmarks of a prohibited substitution, which is a nullity under La. Civ. Code art. 1520. See 11 Aubry & Rau, 3 *Droit Civil Francais* No. 700, at 364-65 (6th ed. La. St. L. Inst. trans. 1969).

280. See generally *Perry v. Perry*, 507 So. 2d 881 (La. App. 4th Cir.), writ denied, 512 So. 2d 465 (1987); 11 Aubry & Rau, *supra* note 279, No. 708, at 403-15.

281. La. Civ. Code art. 1527; L. Oppenheim, *supra* note 236, § 199, at 301.

fails to fulfill the condition.²⁸² This action, brought by the donor or his heirs, will lie against the donee, his heirs, and his donees. As with revocation for ingratitude, if the donee has alienated the thing by onerous title, it cannot be claimed in the hands of a third party transferee.²⁸³

Article 1565, concerning the dissolution of a donation inter vivos "of right" if it is made subject to a suspensive condition that can no longer be accomplished, and Article 1740, providing for nullity of a donation made in contemplation of a marriage that does not occur, are not, strictly speaking, "rights of reversion." If the condition imposed is suspensive and does not take place, the donation falls automatically—no judicial declaration of dissolution is needed. But if the condition is potestative, a judicial decree of non-fulfillment is required.²⁸⁴

Relevance of Rights of Reversion to Forced Heirship

Some of these rights of reversion and the corresponding obligations may exist in the patrimonies of persons who are coincidentally also forced heirs, but those rights exist in the patrimonies of others as well. Forced heirship is not the common theme of these various rights of reversion. It is entirely conceivable that the legislature, in section 5, wanted to single out one or more of these rights only insofar as forced heirs are involved, and assure their survival after the forced-heirship curtailment. But because none of the purposes of the rights of reversion seem frustrated by the new approach, the effort to protect them from an unintentional subversion seems quixotic.

Puzzled by the apparent irrelevance of section 5, the writer investigated and discovered a clue that is hardly legislative history, but interesting nonetheless. The rescue of "rights of reversion" by section 5 was inspired by the prodding of a legislator whose sense of the typicality in his own family situation was exquisite.²⁸⁵ Consider the following hypothetical.

282. Board of Trustees of Columbia Road Methodist Episcopal Church of Bogalusa v. Richardson, 216 La. 633, 44 So. 2d 321 (1949); Orleans Parish School Board v. Manson, 241 La. 1029, 132 So. 2d 885 (1961); Hero v. City of New Orleans, 135 So. 2d 87 (La. App. 4th Cir. 1961).

283. La. Civ. Code art. 1568. It can be recovered from a third party transferee by gratuitous title.

284. When the condition can no longer be accomplished the donation is dissolved "of right." La. Civ. Code art. 1565. If, however, the fulfillment of the condition depends solely on the will of the donee the dissolution must be "sued for and decreed judicially." La. Civ. Code art. 1566.

285. Telephone interview of Representative John Travis, September 11, 1989 by Professor Picou.

Following the death of one parent, the children—all over age twenty-three—donate their interest in the succession to the surviving parent.²⁸⁶ The donor-children believe that the property thus donated will in due course return to them via intestate or testate succession at the death of the donee-parent. Although the legal return will not apply and the donor-children do not stipulate the conventional return, they nonetheless erroneously believe that their status as forced heirs gives them a “right of return,” in effect, of at least a portion of the donated property upon the death of the donee-parent in the form of the legitime.²⁸⁷

It is apparently this “right of reversion” that the legislation sought to protect. Section 5 does not, of course, afford such protection. In the absence of the protection afforded by forced heirship, descendants who have previously donated property in the circumstances described above have no *de facto* “right of return” to any portion of the property thus donated, *as forced heirs*.²⁸⁸ Thus Act 788 does have a flavor of retroactivity in that the rights of donors who were formerly forced heirs are altered by the redefinition of forced heirship; and the Act’s concern for “rights of reversion” makes a certain amount of common sense.

In sum, section 5 is probably useless because Act 788 has no direct effect on acts of donation other than to protect them by eliminating some actions for reduction. However, given the underlying motive for section 5—admittedly not ascertainable without the aid of its author’s explanation—the section illustrates the existence of undebated, and perhaps unsuspected, results of the legislation.

286. A donation might occur in the form of a renunciation made in favor of one who was not otherwise entitled to take by accretion. La. Civ. Code arts. 1003, 1022.

287. With the elimination of the right of revindication of donated immovable property in the hands of onerous third party transferees and the amendments to Civil Code article 1505, that excluded retirement benefits payable to named beneficiaries under governmental plans and certain private plans from the active mass calculation, there were already serious inroads on the forced heir’s protection from gratuitous transfer of the legitime. Additional methods available to divert the legitime are: life insurance, La. R.S. 22:645 and, perhaps U.S. Saving Bonds. See *Osterland v. Gates*, 400 So. 2d 653 (La. 1981); *Succession of Guerre*, 197 So. 2d 738 (La. App. 4th Cir.), writ denied, 199 So. 2d 925 (1967) (U.S. Saving Bonds, subject to reduction if excessive); see also *Free v. Bland*, 369 U.S. 663, 82 S. Ct. 1089 (1962) and *Yiatchos v. Yiatchos*, 376 U.S. 306, 84 S. Ct. 742 (1964).

288. Although the hoped for return of the property thus donated is not a legally enforceable right, it is certainly an expectancy entitled to some consideration in the legislative undoing of forced heirship.

The term “right” in expectancy was one of art at early Germanic law referring to the “collective right of the members of the household, . . . [which] made it impossible for the head of the community, the house-lord (“*Hausherr*”), to dispose of the collective estate by his individual act.” 4 R. Huebner, *History of Germanic Private Law* § 42, at 305 (1918).

VI. DISINHERISON AND RECONCILIATION

The principal means of mitigating, indirectly, some of the results of forced heirship, which all would agree to be harsh—for example, when a forced heir is entitled to receive a forced portion even though he engages in flagrant misconduct, thus forfeiting any morally meritorious claim he might otherwise have advanced—has been the testator's power of disinherison. Thus it is to be expected that when those disfavoring forced heirship in general, finding harshness in its very existence, hold sway in legislative halls, the power of disinherison, i.e., "freedom of testation," will be correspondingly augmented. To achieve this goal, the Louisiana Legislature amended Article 1624 in 1989.²⁸⁹ The 1989 legislation understandably amended Article 1624 as follows:

The testator shall express in the will for what reasons he disinherited his forced heirs or any of them, and the forced heir so disinherited is obligated to prove that the cause stipulated for disinherison did not exist or that he was reconciled with the testator after the act of circumstance alleged to constitute the cause for disinherison.

Proof that he was reconciled with the testator after the act or circumstance alleged to constitute the cause for disinherison must be clear and unequivocal, evidenced in writing and signed by the testator.

Section 2.

This act shall become effective upon signature by the governor or upon lapse of time for bills to become law without signature by the governor, but shall apply to all testaments executed before and after the effective date hereof, provided that the death of the testator occurs after the effective date hereof.

Historical Perspective

Although it seems that opponents of forced heirship held sway across the board in the 1989 legislative session, the recent amendments to the Civil Code, when viewed in historical perspective, are less fearsome to the devotees of forced heirship than at first appear. Though most of what follows relevant to the history of the institution of forced heirship has been portrayed elsewhere it is hoped that viewing the history from the focus of disinherison may furnish insight, gained from the experiences of other peoples in other times, on this most recent legislative movement. What has been touted as a modernization and liberalization of Louisiana

289. 1989 La. Acts Nos. 82 and 367. The acts are identical except for an additional comma in Act No. 82.

law may in reality be little more than a retrogression from the family-oriented society of earlier times. For this seems to be but another turn in what has even been "an oscillation between the owner's complete freedom to dispose of his own by last will, and the family's claims upon the property of its member."²⁹⁰ This account is thus little more than an account of forced heirship told from the perspective of disinheritance.

Roman Law

The concept of disposing of property by will dates back to the earliest period of reliably recorded Roman history.²⁹¹ Indeed, it has been said that "at Rome no honorable citizen dies without having made his will."²⁹² Although children were first in line in intestate rules, freedom of testation was virtually absolute: other than satisfying requirements of form, the testator needed only to express in testamentary form his desire to exclude his children.²⁹³ No mention of the reason for the disinheritance was required.

By the beginning of the Early Roman Empire, limitation on disinheritance had arisen in the form of the action *querela inofficiosi testamenti*. This action was founded on the premise that one who chose to totally exclude descendants presumptively did not have the capacity to make a will because such an act was contrary to natural paternal sentiments. Technically, a successful claimant could have the will voided as being the product of an unsound mind, although this was not always the case. Some wills were left partly effective.²⁹⁴

The *querela* could be dismissed if there were just cause for the exclusion of the child, but the claimant had the burden of proving that the cause was unjust. A determination of the legal sufficiency of the cause shown was then somewhat within the discretion of the judge, as there were no prescribed grounds for disinheritance.²⁹⁵ The *querela* was

290. *Id.* § 112, at 752.

291. Professor Radin writes: "Now, we must assume that at Rome, also, there was a period that preceded the existence of wills, when all decedents were necessarily intestate. All over the Mediterranean, wills are known to have been introduced at a definite time. But, at Rome, that time lies before any period of reliably recorded history." M. Radin, *supra* note 18, at 399.

292. 3 J. Brissaud, *supra* note 278, § 445, at 621. Professor Dainow attributes the Roman predilection to testation to a desire to perpetuate the family cult, the "sacra" rather than to the desire for disposition of property. See Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 *La. L. Rev.* 42, 44-45 (1941).

293. L. Oppenheim, *supra* note 236, at 141.

294. W. Buckland, *A Text-book of Roman Law From Augustus to Justinian*, at 327 (1921). Dainow, *supra* note 292, at 49.

295. R. Sohm, *Institutes of Roman Law* § 113, at 558 (1901).

barred after only five years from the date of death, because it "implied a slur on the personal character of the testator."²⁹⁶

The *querela* was limited by Justinian. The action was available thereafter only to those claimants who had received nothing under the will; if a claimant had been given anything, however small, the *querela* would not lie. Instead, an action to increase the legacy to the statutory amount, the *action ad supplendam legitiman*,²⁹⁷ was the appropriate remedy.

While curtailing the power of an heir to void the will, Justinian, in the late Empire, also limited the power of testation by further increasing the statutory amount—the legitime or legal share—to one-third if three or fewer children survived, and one-half if four or more. Moreover, disinherison, although still permitted, was limited to statutorily defined causes, which the testator was required to specify in the will.²⁹⁸ Once stipulated, the disinherison could only be revoked by a subsequent testamentary provision.

Early Germanic Law

Unlike under Roman law, disposition by will was unknown in Early Germanic law, where it was viewed as both unnatural and unwise—unnatural to take orders from a dead man, and unwise to substitute "the wish" or even

the caprice, of the individual for the traditional usage, and the shortsightedness of a man for the wisdom of generations. By choosing his successor to please his fancy the head of the family runs the risk of upsetting the formation of this group.²⁹⁹

Freedom of testamentary disposition of property was incompatible with the venerated notion of family ownership of property and with the

296. *Id.*

297. L. Oppenheim, *supra* note 236, § 63, at 142.

298. *Id.* Radin enumerates the grounds as follows:

(a) Wrongs against the testator: A child who (1) assaulted his father; (2) held him up to public disgrace; (3) prosecuted him for any crime but treason; (4) informed against him to his damage; (5) attempted his life; (6) committed adultery with his father's wife; (7) prevented him from making a will; (8) refused to be his bail; (9) or to redeem him from captivity; (10) neglected him, if he became insane. (b) Personal unworthiness: A son was justly passed over if (11) he engaged in witchcraft; (12) became an actor or gladiator, unless his parents were of that class; (13) became a heretic. A daughter might be disinherited (14) if she became a prostitute or married a freedman without her parents' consent, unless they had themselves neglected to provide for her marriage.

M. Radin, *supra* note 18, § 165, at 444.

299. 3 J. Brissaud, *supra* note 278, § 445, at 621, 622.

nature of the Germanic law of inheritance as the "law of kinship based exclusively upon blood relationship."³⁰⁰

It was only gradually that any freedom of gratuitous disposition to the disadvantage of the family was permitted; however, it was not technically testamentary in nature.³⁰¹ From the custom of burying or cremating with the dead a portion of his belongings—to aid him on his journey to the kingdom of the dead and to live upon once there—developed the concept of the "dead man's portion," a fraction, one-third of the movables, of his own estate due to the decedent himself. Under the influence of the Christian Church, the dead man's portion ceased to be interred with the dead, but was given instead to the Church, so that it might do good service for his soul. The death-portion thus became the "soul portion" and, with the passage of time, the "free portion."³⁰²

The balance of the estate was reserved for the children and the wife. The "reserve" was based on the perceived need to preserve the family property, unlike the Roman "legal share," which was apparently founded on recognized alimentary obligations between persons of the direct line.³⁰³ It was this evolution of the "free portion" and the Church's interest in and influence upon its disposition that, historians speculate, led to the evolution of the medieval will.³⁰⁴ Freedom of alienation under the Germanic medieval will was in fact limited to that "free portion." Again, with the encouragement of the Church, this portion gradually increased, but a "Pflichttheil, or compulsory portion," was reserved for the "children and other close relatives."³⁰⁵

Over a period of three or four hundred years, Roman law achieved acceptance in medieval Germany. By the end of the fifteenth century, "the Imperial Chamber of Justice was established [and] its judges were instructed to recognize Roman law as the common law of the Empire."³⁰⁶ The "Roman substantive law of the compulsory portion was adopted, though to be sure with important changes, especially the abrogation of the formal requisites of the Roman succession by necessity. Thenceforth all kinsmen were obliged to submit to a restriction of their statutory right of inheritance; but descendants and ascendants, to some extent

300. 4 R. Huebner, *supra* note 288, § 110, at 740.

301. For a detailed description of the mode of transmission of the dead-man's portion see *id.* at 740-52.

302. Dainow, *supra* note 292, at 53; 4 R. Huebner, *supra* note 288, § 110, at 742-43; 3 J. Brissaud, *supra* note 278, § 490, at 691.

303. 3 J. Brissaud, *supra* note 278, § 449, at 624.

304. 4 R. Huebner, *supra* note 288, at 751.

305. Dainow, *supra* note 292, at 53-54.

306. *Id.* at 54.

brothers and sisters, and also a surviving spouse, received in exchange an absolute right to a certain share of their statutory portions."³⁰⁷

The eventual Germanic solution has been to recognize freedom of testation, but limited by the portion the family can claim, apparently as creditors of the legatees. The family portion was in turn limited by the power of disinheriton for specified causes. Such a broad description must suffice for the present purpose.³⁰⁸

Pre-Code French Law

Pre-revolutionary France was governed by different systems of law: Customary Law, greatly influenced by Germanic law,³⁰⁹ governed in the North of France, whereas Written Law, based on Roman Law, prevailed in the South. Hence it is difficult to state precisely the dominant "rules" that were relevant to forced heirship and disinheriton.

While the rules regarding forced heirship were not uniform, one author has noted that disinheriton was permitted in all parts of France, and further, that there were three methods of revocation of the disinheriton: 1) expressly, by a legal instrument; 2) tacitly, by the recall of a codicil or subsequent testament; and 3) by reconciliation.³¹⁰

Revocation by reconciliation, the subject of the most recent amendment to Louisiana Civil Code Article 1624, was the most unsettled of the pre-Civil Code French methods of revocation of disinheriton. As was the case in Louisiana prior to 1985, written law in pre-revolutionary France made no mention of reconciliation as a means of negating the effect of disinheriton. The commentators treated the subject in different fashions. Those who favored reconciliation viewed disinheriton as punitive in nature, so that once the parent had forgiven the child the offense, it could no longer be used as a subsequent basis for disinheriton.³¹¹ Proof of reconciliation was equally troublesome because the French commentators differed on the question of whether parol testimony could be used. By the late Eighteenth Century there was jurisprudence to the effect that proof of reconciliation could not be made by parol evidence unless a foundation of written evidence had first been laid.³¹²

307. 4 R. Huebner, *supra* note 288, at 753.

308. For general reference see C. Beecher, *Wills and Estates Under German Law, A Comparative Treatise of Civil and Common Law* (1958) (an elementary review of German Law of Wills). See also A. Yiannopoulos, *Civil Law in the Modern World* (1965); 4 R. Huebner, *supra* note 288, at 752-53.

309. 4 R. Huebner, *supra* note 288, § 112, at 753.

310. L. Oppenheim, *supra* note 236, § 65, at 144.

311. *Id.* at 145.

312. *Id.* at 146.

The Code Napoleon

In the Code Napoleon, the law relative to the forced portion is found under the chapter entitled *Of Donations During Life, and of Wills*.³¹³ It provides for freedom of disposition of the "disposable portion," a fraction determined by the number of children, or in the absence of children, by the number of surviving parents. There is no provision for disinherison, although any heir can be excluded for unworthiness, of which there are three types.³¹⁴ Professor Dainow reports that, in the discussions on the limitation of disposition, "not a single opinion was expressed against the limitation of a parent's power of disposition;"³¹⁵ the debate was instead over the extent of the limitation. "Far from contemplating the proclamation of the freedom to make a will . . . the Revolutionary Assemblies came almost to suppress the will—the theoretical lawfulness of which they contested and the effects of which they feared in practice."³¹⁶

As a perceived consequence of Rousseau's "social contract,"³¹⁷ ownership expired with the person; the right to make a will was contrary to nature. It was also considered injurious to the state, allowing the formation of great domains of wealth and encouraging "the despotism of the father over his children, and . . . [giving] rise to jealousy and hatred between the latter as a consequence of the inequality of fortune."³¹⁸

Those who favored greater freedom of testation viewed the right of disposition as a natural concomitant of ownership. "One only works and economizes and acquires wealth in order to be able to dispose freely of the possessions which one has acquired,"³¹⁹ a theme familiar to the present-day Louisiana reader.

The Spanish Law

The history of Spanish law has been referred to as "long and involved and reflects the Roman, Visigothic, Mohammedan and Christian

313. Code Napoleon arts. 893-930.

314. Code Napoleon art. 727. The causes are virtually identical with those found in La. Civ. Code art. 966: 1) attempting to kill or killing the deceased, 2) bringing against the deceased a capital charge, adjudged calumnious, and 3) knowing the identity of the murder, failing to bring him to justice.

315. Dainow, *Forced Heirship in French Law*, 2 La. L. Rev. 669, 679 (1940).

316. 3 J. Brissaud, *supra* note 278, § 518, at 745.

317. *Id.* at 746. Brissaud quotes Robespierie: "He who only respects his father because he hopes for a greater share of his succession comes pretty near to awaiting with impatience the time when he shall take it, and pretty near to hating his father." *Id.* at n.5.

318. *Id.* at 746.

319. *Id.*

influences."³²⁰ There were several codes before the 1889 code, which is basically intact to this day, among which *Las Siete Partidas* was described as "the most perfect system of Spanish laws."³²¹ This "code" contained provision for the legal share, for the action *querela inoffisosi* as in Roman Law, and for disinheriton.

The multiplicity of Codes gave impetus to the movement toward a unified code. Interestingly, the Spanish Civil Code of 1889 was greatly influenced by the Louisiana Civil Code.³²²

The Spanish Civil Code of 1889 provides for forced heirship, disinheriton, and reconciliation.³²³ Disinheritance must be made in the form of a will and can only be founded on the grounds enumerated in the Code. Article 856 of the Code provides for reconciliation. Under that article, reconciliation has the effect of 1) revoking a previously executed disinheriton clause, or 2) removing the forgiven cause for disinheriton so that a subsequent testamentary disinheriton clause based on that clause will be ineffective.

The Spanish Civil Code of 1889 further permits exclusion of heirs for unworthiness, for which Article 756 provides seven grounds. Grounds for unworthiness have no effect if the testator has "condoned them in a public instrument."³²⁴

The Louisiana Civil Code and Jurisprudence

The successive Louisiana Civil Codes of 1808, 1825, and 1870 contain provisions for forced heirship tempered by articles allowing both disinheriton and unworthiness. The unworthiness grounds are identical to those found in the Code Napoleon; the grounds for disinheriton are remarkably similar to those found in Roman Law.

Under all the codes, disinheriton must be made in the form of a will, and the testator is required to express the cause for the disinheriton. Prior to 1985, the burden of proving that the cause in fact existed was placed on the other heirs who sought to enforce the disinheriton. In 1985, Article 1624 was amended to provide that "the forced heir so

320. Dainow, *supra* note 292, at 54.

321. 1 *The Laws of Las Siete Partidas*, at vii (L. Moreau & H. Carleton trans. 1820) (Preface).

322. Herman, *Louisiana's Contribution to the 1852 Projet of the Spanish Civil Code*, 42 *La. L. Rev.* 1509 (1982); Vazquez, *Reciprocal Influences Between the Laws of Spain and Louisiana*, 42 *La. L. Rev.* 1473 (1982).

323. Forced heirship: Spanish Civ. Code, arts. 806-822; Disinheriton: Spanish Civ. Code arts. 848-857; Reconciliation: Spanish Civ. Code art. 856. Sanchez Roman, *Estudios de Derecho Civil el Codigo Civil 2 Historia General de la Legislation Espanola*, Tomo Sexto, Vol. 2.

324. Spanish Civil Code art. 757.

disinherited is obligated to prove that the cause stipulated for disinheriton did not exist.”

Reconciliation in Louisiana

One means of protecting against unjust disinheriton was the reconciliation doctrine. Although none of the codes made express provision for reconciliation as a means of revoking or of “cancelling” the cause for disinheriton, a provision of that kind is Article 975, involving unworthiness. Under Article 975, the action for unworthiness does not lie if the decedent, knowing of the cause for unworthiness and having had the opportunity to do so, did not disinherit; the failure to disinherit thus constitutes “reconciliation or pardon.”

In 1941, the Louisiana Supreme Court, in *Succession of Lissa*,³²⁵ reviewed the history of forced heirship and disinheriton, noted the above mentioned article on unworthiness, and concluded that a reconciliation in fact would have the effect of erasing a previously existing cause for disinheriton and of revoking an earlier disinheriton based on the cause.

The *Lissa* case involved disinheriton clauses in wills of both parents. On the one hand, the mother’s will, disinheriting her daughter for marrying as a minor without parental consent, was executed shortly after the daughter’s marriage. Some twenty-odd years later the mother died, never having altered her will. There was ample evidence that both parents had reestablished amicable relations with their daughter and maintained the relationship for many years before their deaths. On the other hand, the father’s will, disinheriting the daughter for the same grounds, was executed just before his death many years after the reconciliation had occurred. The court found that the cause for disinheriton existed at one time but that it had been forgiven by each parent—“whenever the injury which gives rise to the disinheriton is forgiven by the injured person, the cause for the disinheriton is defeated or stricken down, and such forgiveness may be established by parol testimony.”³²⁶ Thus neither of the testamentary provisions relative to disinheriton were given effect—the first, because of revocation based on reconciliation; the second, because the cause no longer existed when the will was written.

In 1985, the Legislature amended Article 1624 to place the burden of proving that the cause did not exist upon the disinherited forced heir. At that time, the words “or that he was reconciled with the testator,” as an alternate means of avoiding disinheriton, were also added, apparently to codify the jurisprudentially recognized doctrine of reconciliation set forth in *Lissa*.

325. *Succession of Lissa*, 198 La. 129, 3 So. 2d 534 (1941).

326. *Id.* at 147, 3 So. 2d at 540.

The 1989 Amendment to Article 1624

Against this historical backdrop we now consider the 1989 amendment to Article 1624, the scope of its application, and the problems of interpretation it may present. Moreover, some attention must be given to its possible retroactive applications and to the prescriptive period under which the disinherited forced heir must prove "the cause did not exist."

Act 82 amended Article 1624 to provide:

Proof that he was reconciled with the testator after the act or circumstance alleged to constitute the cause for disinherison must be clear and unequivocal, evidenced in writing, and signed by the testator.

The new requirement of a writing to prove reconciliation and to revoke the disinherison provision previously made does not *ipso facto* alter the rule enunciated by the court in *Lissa* with regard to non-existence of the cause for disinherison because the parties reconciled prior to the attempted disinherison. Under the first paragraph of Article 1624, the forced heir is bound to "prove that the cause stipulated did not exist or that he was reconciled with the testator after the act or circumstance." No requirement as to mode of proof that the cause did not exist is made by Article 1624 before or after the amendment. Thus it should not overrule *Lissa's* holding that allows parol evidence to prove that the cause no longer existed because of reconciliation before the attempted disinherison. A simple hypothetical, based on the *Lissa* facts, will illustrate the difference between reconciliation as revocation of a disinherison clause and reconciliation as eliminating the cause for disinherison.

A minor marries without the consent of the parent. The parent disinherits the child. If the "reconciliation" occurs only after the execution, or writing, of the will, then the proof under the new legislation must be "clear and unequivocal, in writing, signed by the testator"—for this is proof of reconciliation as revocation of a disinherison clause. If, however, the reconciliation occurred *before* the writing of the will that cited the marriage of the minor without consent as cause for disinherison, then proof may be made by parol evidence—for this is proof of reconciliation to show the cause did not exist at the time of execution of the attempted disinherison.

Confining the effects of the amendment to post-disinheritance reconciliation no more strains the language of the amendment that refers to being "reconciled . . . after the act or circumstance" than it is strained by limiting it to pre-disinheritance reconciliation, and thereby giving a cause for disinherison a perpetual effect unless there is written contrary proof. This latter view is at odds with the approach to unworthiness,³²⁷

327. La. Civ. Code art. 975:

obstructive of easy restoration of family harmony, and productive of an enormous power to forever hold a cause over a child's head.

Such an interpretation of the 1989 amendment is similar to the treatment of reconciliation in family law under Louisiana Civil Code article 152: "A ground for separation once forgiven, cannot be the basis of a subsequent suit." Similarly, as noted earlier, pre-code French law and Article 856 of the Spanish Civil Code recognize the "erasure" effect of a reconciliation. On the other hand, the new requirement of a writing to show proof of reconciliation—when it serves as revocation of a disinherison clause—is consistent with the previously mentioned jurisprudence of France of the late eighteenth century that required a foundation in writing of proof of reconciliation before parol evidence could be introduced.

Is a will the kind of writing required? If so, it would seem that the legislature would have made specific provision for the problem as it did in the case of disinherison.³²⁸ Furthermore, while there is reason for solemnity in the form of a disinherison, the same reason does not exist in proof of reconciliation. Disinherison is at odds with the natural affection that a parent feels for a child, while reconciliation comports with normal parental care and concern for a child.³²⁹

Finally, the revocation of a will—the means required for a disinherison—is *either* by a subsequent will (express revocation) *or* a subsequent act of the testator that manifests a change of intent (tacit revocation). It would therefore be untenable to read into the "writing" requirement the additional necessity of the formality of a will as the *sole* method of revocation of the disinheritance. As an example of tacit revocation of a bequest in a will, Article 1695 furnishes the illustration of an attempt after execution of the will to donate *inter vivos* the previously bequeathed property. The donation, even if null, amounts to a revocation of the testamentary disposition. By analogy, any writing that reflects a change in attitude from one of condemnation to one of forgiveness should suffice to prove the reconciliation.

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.

328. "A disinherison, to be valid, must be made in one of the forms prescribed for testaments." La. Civ. Code art. 1618.

329. Samuel, Shaw, and Spaht, *supra* note 42, at 603.

One can envision the situation of a letter from parent to child, evidencing an affirmative intent to forgive the child.³³⁰ This kind of writing should suffice to fulfill the writing requirement of proof. If the substantive content is clear and unequivocal as to change of attitude, it should be effective as a revocation of this disinherison.

Scope of Application

The new legislation will be effective on July 1, 1990. It applies to successions that are "opened" by the death of the testator³³¹ after the effective date, regardless of when the testament was executed and regardless of when the events constituting reconciliation occurred.³³² Because the rights of heirs do not vest until death, the provision should not apply retroactively. This was the approach of the third circuit in *Succession of Vincent v. Vincent*.³³³ The case involved the applicability of the then new presumption, under Article 1621, that the facts set forth by the testator as grounds for disinherison are correct. The will was written in 1984; the amendment to Article 1621, providing the presumption, became effective in 1985; and the testator died in 1986. Rejecting the disinherited forced heir's argument that the presumption created by the amendment could not apply because at the time the will was written the favored heirs enjoyed no such rebuttable presumption, the court simply stated: "We disagree. Rights in a succession do not vest until death."³³⁴ The fifth circuit has taken the same approach in a converse factual situation. Where the testator died *before* the effective date of an amendment adding a new cause for disinherison, the court did not apply the subsequently enacted legislation, observing, "All substantive rights to the succession are fixed as of that time and cannot be affected by subsequent legislation."³³⁵

The approach of both circuits is in harmony with that taken by Planiol, who draws a distinction between the vesting of the property and the writing of the will. As to the former, the law in force on the

330. "Affirmative" acts flowing from the testator to the disinherited heir as opposed to "passive" acceptance, by the testator, of acts of kindness by the disinherited heir were required by the first circuit in *Succession of Chaney*, 413 So. 2d 936 (La. App. 1st Cir.), writ denied, 420 So. 2d 449 (1982).

331. "The succession, either testamentary or legal, or irregular, becomes open by death or by presumption of death caused by long absence, in the cases established by law." La. Civ. Code art. 934.

332. "This Act . . . shall apply to all testaments executed before and after the effective date hereof, provided that the death of the testator occurs after the effective date hereof." La. Civ. Code art. 1624, as amended by 1989 La. Acts No. 367, § 2.

333. *Succession of Vincent*, 527 So. 2d 23 (La. App. 3d Cir. 1988).

334. *Id.* at 26.

335. *Succession of Hymel*, 546 So. 2d 816 (La. App. 5th Cir. 1989).

date of death should apply; as to the latter: "The making of a testament and the regularity of its form are tested solely in the light of the law in force when it was made."³³⁶

Disinherison, which of necessity involves a transfer of property rights to one other than the disinherited heirs, should be governed by the law in effect at the time the transfer takes effect, the date of opening of the succession—that is, the death of the decedent.

Prescription

The question of prescription seems to have been answered by the Louisiana Supreme Court insofar as the characterization of the forced heir's attack on the disinherison clause is concerned. The court in *In re Andrus*³³⁷ described the challenge as one for reduction of an excessive donation, prescribing in five years. It should be noted that *Succession of Smith*,³³⁸ cited as authority in *In re Andrus*, was a case that in fact dealt with reduction. In *Smith*, the ground for disinherison urged was not one permitted by the Code; thus, the court did not consider disinherison at all.

The characterization of the forced heir's remedy as one for reduction of an excessive donation *mortis causa* seems correct, at least in instances where the testator disinherits and expressly disposes of the disinherited forced heir's share. As an action for reduction of a donation *mortis causa*, it should prescribe in five years, running from the date of probate of the testament. On the other hand, if the testator merely disinherits, with no disposition made, perhaps the action would more properly be described as one to annul a testament. But, even so, the prescriptive question seems unimportant because the prescriptive period of five years also applies to the action to annul testaments, and likewise runs from the date of probate.³³⁹

A final observation. The disinherited forced heir might pursue another approach to restitution of "his" part by attacking the validity of the disinherison itself on the ground of its having been made, not out of a desire to disinherit, but rather out of "hatred, anger, suggestion or captation." The former Article 1492 of the Louisiana Civil Code prohibited this type of proof, but it was repealed in 1989.

Discussion of the repeal of Article 1492 appears elsewhere in this article and is beyond the scope of this section.³⁴⁰ One has a sense of

336. 1 M. Planiol, *Treatise on the Civil Law* No. 247, at 177 (12th ed. La. St. L. Inst. 1959).

337. *In re Andrus*, 221 La. 996, 60 So. 2d 899 (1952).

338. *Succession of Smith*, 182 La. 389, 162 So. 21 (1935).

339. La. R.S. 9:5643 (Supp. 1990) provides a five year period, running from judicial opening of the succession, within which to probate a testament.

340. See *supra* text accompanying notes 153-262.

deja vu, however, when its repeal is viewed in connection with the increased power of disinheritance, or "freedom of testation." For in sixteenth century France, when disinheritance of the entire succession became legally possible, the courts found means to protect the interest of the family, even as to the disposable portion, by annulling legacies as having been made, not by a desire to gratify the legatee, but by hatred or anger against an heir—the action "ab irato."³⁴¹

In conclusion, the amendment to Article 1624, placed in historical and current legislative perspective, seems to be a typical example of the "oscillation" between the interest of the individual, the interest of the family, and the larger interest of society. If, as predicted by adherents of forced heirship, the result is a threat to familial and societal interests the pendulum will undoubtedly swing back from whence it came.

VII. THE LEGISLATURE, THE LAW INSTITUTE, AND THE CIVIL CODE

Section 3 of 1989 Louisiana Acts No. 788 directs the Louisiana State Law Institute to prepare amendments to the Louisiana Civil Code, Revised Statutes, and Code of Civil Procedure "to correlate" the provisions of those laws with Act 788. If this section is taken literally, the legislature envisioned no change to the provisions of Act 788, only to other provisions affected by it. No thoughtful consideration of alternatives to Act 788 is desired; the Law Institute's task would be a purely mechanical one of adjusting old law to fit new law.

Behind this ostensibly uncontroversial section lies an issue of crucial significance regarding the legislative process of Louisiana: who is managing the ongoing process of Civil Code revision, the legislature or the Law Institute? Of course, the legislature alone has the power to enact proposed provisions into law; therefore, in that sense, the legislature is always in charge. Yet the legislature seems to be altering the role it had wisely ordained for the Louisiana State Law Institute in the lawmaking process.

In 1938, the legislature realized it was not able to devote to its enactments the in-depth consideration needed to achieve comprehensive law revision and codification. It chartered the Louisiana State Law Institute as the body to perform this careful study and to prepare legislation to be submitted to the legislature. This two step process, whereby the institute proposes and the legislature disposes, would afford Louisiana the most mature and well-considered system of laws possible.³⁴²

341. 3 J. Brissaud, *supra* note 278, at 661.

342. La. R.S. 24:201-208, enacted by 1938 La. Acts No. 166.

When it was created in 1938, the Institute presumably was intended to become a major factor in the development of legislation, legal culture and legal schol-

In 1948, the legislature gave the Law Institute a specific mandate to prepare a comprehensive revision of the Civil Code,³⁴³ and began financially supporting the project in 1975.³⁴⁴ Thus, the legislature itself put the Law Institute in charge of the initiation and preparation of Civil Code revision.

The division of labor between the Law Institute and the legislature is essential to an orderly process of Code revision. If Louisiana is to have the most thoughtful and well-considered codification possible, both as to substance and form, the legislature must have the benefit of scholarly research,³⁴⁵ expert drafting,³⁴⁶ and careful article-by-article deliberation by knowledgeable people.³⁴⁷ If the Code is to endure, its substance must not merely facilitate the desires of those who have the political power of the day, but must contain principles worthy of respect in the future as well. The Code "must seek to strike a delicate balance

arship in the state, and was potentially the most significant step in Louisiana legal history—a step fraught with national implications as well.

Morrow, *The Proposed Louisiana Criminal Code—An Opportunity and a Challenge*, 15 *Tul. L. Rev.* 415, 416 (1941).

343. 1948 La. Acts No. 335.

344. *The Twenty-Fifth Biennial Report of the Louisiana State Law Institute to the Legislature of Louisiana*, at 11 (1988).

345. The heart of intelligent law improvement and reform is research. It guards against immature decision based on incomplete consideration resulting from insufficient knowledge of the total factual atmosphere affecting a given problem. It provides a constant challenge to provincialism. It uncovers benefits that may be gained from the experience of others and from the mistakes of the past.

Smith, *Law Revision in Louisiana in Retrospect*, 19 *La. L. Rev.* 34, 41 (1958).

346. What is a "code in the civilian sense?" This means at least that the code must exist as an organically harmonious unit, reflecting the same consistent point of view throughout, and that its provisions shall be formulated at the same time, and with reference to each other, by the same person or group of persons. It means also that the language of the code must be simple, clear, and as non-technical as possible.

Morrow, *supra* note 342, at 417-18.

347. Any proposed new Code could not be debated article by article in the Legislature, or even in legislative committee. No new Code will ever be passed unless the work of the Institute is accepted largely on faith, including major policy decisions The draftsmen cannot be expected to be mere mechanics who assemble neatly the product of others' policy decisions. Of course, the fullest possible expert advice, discussion, publicity, opportunity to be heard and debate must accompany both the drafting process and the deliberations of the Council for a prolonged period of time. But in the last analysis we must rely upon the good faith, the objectivity, the sound judgment and the skill of a relatively small group of persons.

Morrow, *Current Prospects for Revision of the Louisiana Civil Code*, 33 *Tul. L. Rev.* 143, 151 (1958). 1989 La. Acts No. 788 seems to confirm Professor Morrow's fear that reliance on the small group of experts would not occur.

between *reflecting* and *molding* the prevailing climate of opinion."³⁴⁸ Individual legislators and their staffs cannot provide the necessary time and expertise, nor do they always have the objectivity to strike this delicate balance. By contrast the Law Institute brings to bear upon a project the full range of expertise within the legal profession—practitioners, judges, academics, and deliberates in an atmosphere detached from political pressure.³⁴⁹ One need only observe the above described difficulties created by the 1989 legislature's haphazard attempt to change forced heirship to see that the legislature needs the Law Institute.

The Law Institute committee on successions, with Max Nathan as reporter, is currently at work drafting a revision of the law in this area, and eventually would have dealt with forced heirship. The committee, in this revision effort, would have considered all of the possible variations and alternatives in drafting a coherent revision of present law. The Law Institute Council would then have debated the revision article by article, a process that often exposes problems requiring further attention from the committee. Finally, the Institute would have handed the legislature a recommendation that had been drafted, reviewed, and approved as to substance and form by many of the most experienced jurists in Louisiana. Unfortunately, the legislature circumvented this sensible process of deliberation by presenting the state with a *fait accompli*.

The reaction of the Law Institute to the legislature's preemption of its role in Civil Code revision is critical to the ultimate success of the project of Code revision. As the Institute's first director, Professor J. Denson Smith, cautioned, "Since the provisions of a true code are very carefully interrelated, the effect of particular amendments on related provisions must be thoroughly studied. Great mischief can come from hastily considered amendments designed to achieve some particular purpose."³⁵⁰ He hoped the Institute would be a watchdog over codification projects "in order to foster and protect the unity of design of the new codes against the inevitable inroads that would come from their judicial construction *and from statutes hastily passed by the Legislature*."³⁵¹ The Institute's protective function that he described must also include parts of the Code presently under revision as well as completed revisions, lest progress toward completion be constantly impeded.

348. Morrow, Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation, 17 Tul. L. Rev. 537, 558 (1943).

349. Professor J. Denson Smith, the first director of the Louisiana State Law Institute, emphasized that no other state agency, including the old Legislative Council whose functions have now devolved upon the staff attorneys for the various legislative committees, "answers the need for a permanent organization charged with the responsibility of maintaining a continuing program of basic law revision and reform." Smith, The Role of the Louisiana State Law Institute in Law Improvement and Reform, 16 La. L. Rev. 689, 692 (1956).

350. *Id.* at 697.

351. Smith, *supra* note 345, at 38 (emphasis added).

Thus, the Institute has a duty to protest legislative attempts to disrupt the existing articles before a considered Institute recommendation is ready. It should resist circumvention of the procedure established to ensure the quality of its recommendations—especially the attempt to preclude the study of policy alternatives. If, instead, for political reasons the Institute believes it must obediently do the legislature's bidding no matter how destructive to the orderly process of Code revision, it will put at risk the goal of producing the best Code possible. The legislature, knowing that the Institute stands ready to clean up any ill-prepared and ill-considered legislation, will be encouraged to continue using the Institute as a mere mechanic, forfeiting the Institute's role as the intellectual workhorse of Code revision and eventually thwarting the Institute's mission of facilitating conceptual consistency throughout the Code.

In the end, the most the Institute can realistically do to stop haphazard amendments is to update the legislators regarding the progress of the Institute's current projects and to suggest respectfully that legislators refer any ideas for improvements in these and other areas to the appropriate Institute official.³⁵² If the legislature wishes to emphasize the need for improvement, it should adopt a concurrent resolution directing the Institute to study a particular matter.³⁵³ The legislature should, however, avoid imposing deadlines on the Institute unless there is an emergency. Code revision is a long term undertaking, even in jurisdictions that devote much more resources to the project than Louisiana.³⁵⁴ Only if the legislature restrains itself while the Institute does its job will Louisiana have a satisfactorily revised Civil Code.

352. In the 1950s, legislators submitted their proposals for amendments to the Civil Code to the Institute *prior* to adoption. Smith, *supra* note 349, at 697.

353. E.g., La. H.R. 6, Reg. Sess. (1989) (requests Institute to study community property reimbursement rules).

354. Morrow, *An Approach to the Revision of the Louisiana Civil Code*, 23 Tul. L. Rev. 478, 483 (1949), noting that it took Germany twenty years to draft its civil code. See also Pascal, *A Report on the French Civil Code Revision Project*, 25 Tul. L. Rev. 205 (1951). The French began their revision in June, 1945 and have yet to complete it. The *projet* for the central articles on successions (opening of successions, capacity to succeed, acceptance, renunciation, acceptance with benefit of inventory, and partition) was only recently unveiled in January, 1989. If the French revision is a standard by which to judge, the pace of the Louisiana State Law Institute in revising the Louisiana Civil Code is commendable.

