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Successions and Donations

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DISINHERISON

An additional ground for disinherison was added to the current list by Act 456 of the 1985 Legislative Session. The twelfth ground for disinherison of a child by his parent is "[i]f the child has known how

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* Much could be written about two court of appeal decisions concerning collation and when it is due: Succession of Dittmar, 458 So. 2d 163 (La. App. 5th Cir. 1984) and Succession of Lomonaco, 465 So. 2d 781 (La. App. 5th Cir. 1985). In Succession of Dittmar, supra at 166, the court opined: "It cannot be determined whether a collation debt may be due until the value of the estate as a whole is finally fixed in the succession proceedings and action is taken to have the succession property partitioned." In Succession of Lomonaco, supra at 784, the court first distinguished "fictitious" from "actual" collation, the latter defined as a "return in fact to the succession by the descending forced heir of property he has received from the ancestor by donations." "Actual" collation, according to the court, is "an incident of the partitioning of a succession." The demand in Succession of Lomonaco, supra, was treated as a demand for "fictitious" collation, defined as a demand "made in order to calculate the actual mass of the successions to enable the executor to determine the legitime of the forced heirs, and subsequently to determine whether that legitime has been impinged upon." Id.

The quotations excerpted from the two cases illustrate the courts' confusion of the action for collation (La. Civ. Code arts. 1227-1288) and the action for reduction (La. Civ. Code arts. 1502-1518). Furthermore, "fictitious" collation to calculate the active mass of the succession is nothing more than deciding whether or not the ancestor made a donation to the forced heir under La. Civ. Code art. 1505. In addition to the confusion of reduction, collation, and the active mass calculation under article 1505, the court concluded that collation is incident to a partition of succession property under La. Civ. Code arts. 1331-1335, even though the jurisprudence has established that a demand for collation can not be entertained after a judgment of possession is rendered. Kinney v. Kinney, 150 So. 2d 671 (La. App. 3d Cir. 1963) (citing Doll v. Doll, 206 La. 550, 19 So. 2d 249 (1944)). The articles on partition of successions are seldom relied upon in practice (except for the substantive principles of the law of co-ownership). Many of the articles were superseded or replaced by the Code of Civil Procedure articles on successions. La. Code Civ. P. arts. 2811-3462. Because of the complexity of interrelated issues, Succession of Dittmar and Succession of Lomonaco deserve more lengthy evaluation and development. The two cases, among others, will be the subject of a forthcoming article to be published on collation. See generally, Comment, The Louisiana Concept of Res Judicata, 34 La. L. Rev. 763 (1974); Comment, Some Aspects of Collation, 34 La. L. Rev. 782 (1974).

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to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after attaining the age of majority, except when the child is on active duty in any of the military forces of the United States."[1] Ascendants other than parents were denied the availability of the twelfth ground for disinheriting grandchildren and greatgrandchildren.[2] Denial of the ground for disinherison to other ascendants is a reasonable position considering the fact that society no longer recognizes the cohesiveness of the extended family. A grandchild, either during the life of his parent (the forced heir) or thereafter, may fail to communicate with his grandparent for a period of two years after his majority without intending disrespect and in conformity with normal societal behavior.

Much of the impetus for liberalizing the grounds for disinherison must be attributed to the proponents of forced heirship who recommended alternatives to abolition of the institution.[3] During the legislative session, as has been the case for the past four years, bills were introduced to amend the Louisiana Constitution by repealing the provision which prohibits the Legislature from abolishing forced heirship.[4] The bill introduced in the House of Representatives[5] received an unfavorable committee recommendation, and the Senate bill was never heard.[6] The legislative climate at the time Act 456 was passed becomes important in deciding how to interpret its amendments to the articles on disinherison. The avowed purpose of the authors of House Bill 111, which became Act 456, was to make disinherison less difficult for a parent under the enumerated grounds. Those legislators voting for House Bill 111, which passed, and against House Bill 115, which did not, concluded that a more permissive statutory scheme of disinherison is superior to repealing forced heirship. Against such a background, the new ground for disinherison should be interpreted liberally.

In addition to the legislative climate, the amendments to the disinherison articles provide further support for such a conclusion. The following language was added to article 1621 after the listing of grounds

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1. 1985 La. Acts No. 456.

2. La. Civ. Code art. 1622 (as amended by 1985 La. Acts No. 456):

> The ascendants may disinherit their descendants, coming to their succession, for the first nine and the eleventh causes expressed in the preceding article, when the acts there mentioned have been committed toward them or toward the parents, but they can not disinherit their descendants for the tenth or twelfth cause.

3. See Samuel, Shaw & Spaht, Developments in the Law, 1983-1984—Successions and Donations, 45 La. L. Rev. 575, 595-604 (1984); Lemann, In Defense of Forced Heirship, 52 Tul. L. Rev. 20 (1977).

4. La. Const. art. XII § 5.

5. H.B. 115, 1985 Reg. Sess.

6. S.B. 42, 1985 Reg. Sess.

for disinherison: "There shall be a rebuttable presumption as to the facts set out in the act of disinherison to support these causes."[7] Thus, the will that must contain the testator's reason for disinheriting his forced heir[8] may also include the relevant facts which shall be presumed true. The presumption being expressly rebuttable, the burden of persuasion falls upon the forced heir "to prove that the cause stipulated for disinherison did not exist."[9]

The presumption as applied to the new ground for disinherison imposes the burden of persuasion on the heir to prove (1) he did communicate with the parent and, furthermore, that two *consecutive*[10] years did not elapse between such communications; or (2) he did not know how to contact the parent;[11] or (3) his failure to so communicate was with just cause.[12] As to other grounds, the heir must prove such conduct did *not* occur—for example, the child did not strike the parent,[13] or treat the parent cruelly,[14] or attempt to take the parent's life.[15] The burden of proving that disrespectful conduct did not occur, which is a significant change in the law,[16] is somewhat analogous to the burden borne by the spouse who seeks alimony after divorce[17] to prove that

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7. La. Civ. Code art. 1621 (as amended by 1985 La. Acts No. 456).

8. La. Civ. Code art. 1624 (as amended by 1985 La. Acts No. 456):

> 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 obliged to prove that the cause stipulated for disinherison did not exist or that he was reconciled with the testator after the act or circumstance alleged to constitute the cause for disinherison.

9. Id.

10. The legislation does not specifically require that the two years be consecutive but that surely was the intention. The language utilized to express the twelfth ground resembles strongly that found in La. R.S. 9:422.1(3) (Supp. 1985), which has been interpreted to require two *consecutive* years of a failure to communicate. Adoption of Dore, 469 So. 2d 491 (La. App. 3d Cir. 1985); In re May, 441 So. 2d 500 (La. App. 2d Cir. 1983).

11. A condition of the twelfth ground for disinherison is that the child know how to contact the parent. La. Civ. Code art. 1621 (as amended by 1985 La. Acts No. 456): "12. If the child has known how to contact the parent . . . ."

12. The failure to communicate must be without just cause, which is identical to the provisions of La. R.S. 9:422.1(3) (Supp. 1985): "The other legitimate parent has refused or failed to visit, communicate, or attempt to communicate with the child, without just cause, for a period of two years." See discussion in text, infra at notes 24-41.

13. La. Civ. Code art. 1621(1).

14. La. Civ. Code art. 1621(2).

15. La. Civ. Code art. 1621(3).

16. La. Civ. Code art. 1624: "The testator must express in the will for what reasons he disinherited his forced heirs or any of them, and the other heirs of the testator are moreover obliged to prove the facts on which the disinherison is founded; otherwise it is null."

17. La. Civ. Code art. 160: "A. When a spouse has not been at fault and has not sufficient means for support . . . ."

he or she was without any fault which would be sufficient to entitle the other spouse to a separation or divorce.[18] As has been observed elsewhere, "if the grounds for disinherison were the failure of the disinherited heir to act, such as his failure to communicate with the testator parent for a period of years, shifting of the burden of persuasion would be appropriate and would make disinherison easier."[19]

What constitutes a communication by the child with his parent may present difficulties if some qualitative standard is applied. Communication surely includes "cards, letters, . . . gifts,"[20] telephone calls, telegrams, or similar modes. Since the forced heir will bear the burden of persuading the judge that he did communicate with his parent, it would be advisable for the heir to have independent corroboration of the communication, such as a letter sent certified mail, return receipt requested. If the fact of communication is established, the question remains whether the letter, for example, must meet some qualitative standard. Must the contents of the letter be examined to determine if it is respectful? Should a letter from a child who denounces the parent in derogatory and abusive language be treated as a communication? The answer must be that the contents of the communication will be examined to assure that the child has been respectful toward the parent. However, the contents of the communication need not be considered ineffective if the child chooses to disagree or argue with a parent, since a child of the age of majority is no longer under an obligation to obey his parent, only to respect him.[21]

Disinherison for failure to communicate only applies in instances where the child is a major. This limitation assures that the child will not suffer from a failure or refusal by another person, such as a tutor if the parents are separated or divorced,[22] to communicate with or to permit the child to communicate with the parent. Another exception to the non-communication ground is if the child is on active duty in any of the military forces of the United States.[23] Although in many instances

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18. Adams v. Adams, 389 So. 2d 381 (La. 1980); La. Civ. Code arts. 138-139. See discussion in Samuel, Shaw & Spaht, supra note 3, at 602-03.

19. Samuel, Shaw & Spaht, supra note 3, at 603.

20. In re May, 441 So. 2d 500, 504 (La. App. 2d Cir. 1983).

21. La. Civ. Code arts. 215, 217, and 218.

22. La. Civ. Code arts. 246, 248, and 250.

23. La. Civ. Code art. 1621 (as amended by 1985 La. Acts No. 456):

> The just causes for which parents may disinherit their children are twelve in number. There shall be a rebuttable presumption as to the facts set out in the act of disinherison to support these causes. These causes are, to wit:
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> * * *
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> 12. If the child has known how to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after attaining the age of majority, except when the child is on active duty in any of the military forces of the United States.

the failure to communicate while in military service may have been excused as "just cause," the legislative assumption made by the statutory exception is that the child is unable to communicate either as a practical matter or as a matter of national security. Obviously, there will be instances in which the child on active duty in the military will be excused from communicating with the parent even though there was no practical or security reason preventing him from doing so.

The heir may also prove as a defense to disinherison that his failure to communicate was with "just cause." "Just cause" explicitly provided by the statute includes lack of knowledge concerning how to contact the parent[24] and active military service.[25] Other examples of "just cause" can be borrowed perhaps from the statute dispensing with the natural parent's consent to an adoption.[26] A condition of the parent's failure to communicate with the child which makes his consent to the adoption unnecessary is that the failure to communicate be without just cause. A survey of the jurisprudence interpreting the adoption provision reveals that parents have urged the following circumstances as just cause: incarceration,[27] drug addiction,[28] and emotional state.[29] Incarceration urged

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24. La. Civ. Code art. 1621 (as amended by 1985 La. Acts No. 456): "12. If the child has known how to contact the parent . . . ."

Consider in connection with this statutory excuse from failure to communicate, the dilemma of an adopted child who does not know the identity of his biological parent. The child cannot discover the parent's identity unless he can prove a compelling necessity (which inheritance as a forced heir may be). Even if the child proves a compelling necessity, a curator is appointed to examine the original birth certificate to determine to what extent it is necessary to release the information to the adopted child. La. R.S. 40:81 (Supp. 1977); Massey v. Parker, 369 So. 2d 1310 (La. 1979), discussed in Spaht, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Persons, 40 La. L. Rev. 543, 554-58 (1980). However, for the adopted child who does know the identity of his biological parent—for example, in the case of a stepparent adoption where the natural parent has forfeited his right to consent by his conduct under La. R.S. 9:422.1 (Supp. 1985)—it is imperative under the literal language of the new grounds that the child communicate with the parent every two years so as not to lose the right of inheritance retained under La. Civ. Code art. 214.

The child who potentially has two fathers, in the case where the husband of the mother is presumed to be the father under La. Civ. Code art. 184 and another man has legitimated, acknowledged, or been allowed to establish his filiation under La. Civ. Code art. 209, must communicate with both so as to retain his inheritance rights as a forced heir in their successions. See, e.g., Succession of Mitchell, 323 So. 2d 451 (La. 1975); Warren v. Richard, 296 So. 2d 813 (La. 1974); but see, Griffin v. Succession of Branch, 452 So. 2d 344 (La. App. 1st Cir. 1984), writs granted, 458 So. 2d 108 (La. 1984).

25. La. Civ. Code art. 1621 (as amended by 1985 La. Acts No. 456).

26. La. R.S. 9:422.1(3) (Supp. 1985).

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

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

29. State ex rel. Haynes, 368 So. 2d 783 (La. App. 2d Cir.), rev'd sub nom. on other grounds, Haynes v. Mangham, 375 So. 2d 103 (La. 1979).

as just cause for failure to communicate with a child was rejected by the court: "We would think that a father situated such as this who had a real concern for his children would recognize that, in order to maintain a relationship under these circumstances, an extra effort is necessary."[30] The same should be true if the child is incarcerated and fails to communicate with the parent. It is also obvious that the Legislature intended to place the burden of making the effort to communicate on the child, since *failure*, not *refusal*, to communicate is the ground for disinherison. In the two cases where drug addiction[31] and the emotional state of the parent[32] were offered as "just cause" for failure to communicate or pay support,[33] the issue was avoided by the court.

In deciding what constitutes just cause for failure to communicate by the *child*, the child's psychological state of mind presents the most difficulty. Drug addiction with its accompanying dependency and anxiety, other serious psychiatric problems that can be clinically identified, or psychological disturbances created by such events as an argument with the parent or a stepparent may be urged by the heir as "just cause."[34] Consider, for example, the factual circumstances of *Succession of Landry*.[35] If the case had been decided under Civil Code article 1621 as amended, the heir would have been compelled to argue "just cause" for his failure to communicate with his mother from 1947 until her death in 1980.[36] The "just cause" for his failure to communicate was an acrimonious incident involving the removal of the heir's refrigerator from an apartment owned by his mother. In her will the mother wrote, " 'My son, Wilbert, never apologized for striking me or for the above referred to attack upon me and although he has always lived in the City of New Orleans or the Greater New Orleans Area, he has never come to see his mother even on many occasions (sic) when I was confined

30. In re May, 441 So. 2d 500, 505 (La. App. 2d Cir. 1983).

31. In re Daboval, 377 So. 2d 459 (La. App. 4th Cir. 1979), cert. denied, 380 So. 2d 101 (La. 1980). See also State v. Jones, 373 So. 2d 1331 (La. App. 4th Cir. 1979).

32. State ex rel. Haynes, 368 So. 2d 783 (La. App. 2d Cir.), rev'd sub nom. on other grounds, Haynes v. Mangham, 375 So. 2d 103 (La. 1979).

33. La. R.S. 9:422.1(1), (2) (Supp. 1985).

34. Adoption of Dore, 469 So. 2d 491 (La. App. 3d Cir. 1985). Under La. R.S. 9:422.1(3) (Supp. 1985), the father claimed that his failure to communicate with the child was justified because (1) the divorce decree did not establish visitation rights, and (2) the mother only allowed him to visit in her home, with her and her new spouse present. The court ultimately found that the failure to communicate was without just cause. According to the court, the parent's failure to communicate must be due to factors beyond his control.

35. 463 So. 2d 681 (La. App. 4th Cir. 1985).

36. "It is uncontroverted that Wilbert and his mother did not reconcile after their argument in 1947. They did not speak or see each other." Id. at 684.

to the hospital because of a heart condition or other physical ills.' "[37] The court suggested in its opinion that the mother was as much at fault as the child in failing to heal the breach: "Respect between parent and child is a mutual obligation."[38]

However, in *Succession of Landry*, the executrix was seeking to prove that the disinherited heir had been guilty of cruelty to his mother.[39] The court responded to the allegations of cruel treatment in the following manner: "An argument which results in prolonged indifference by both parties cannot be characterized as 'cruelty' by one of the parties."[40] It then added gratuitously, "[d]isinherison cannot result from a child's failure to communicate with a parent."[41]

The law has changed. Because the legislation now imposes a responsibility upon the child to communicate with a parent, an argument that creates strained relations with the parent should not constitute "just cause." The communication by the child need not apologize to the parent for an argument where both parties were at fault, but it should be respectful in tone, as was previously discussed. Furthermore, reliance upon the jurisprudence interpreting "just cause" under the adoption statute should proceed cautiously because the policies underlying adoption and disinherison differ substantially. Whereas the adoption statutes dispensing with the natural parent's consent must be strictly construed as in derogation of the natural parent's rights, the disinherison legislation should be interpreted liberally to permit a parent greater freedom in disinheriting an unworthy child. The motivation of the law regulating parent-child relations[42] is to assure the natural parent the opportunity to establish strong emotional ties to the child. If the parent is dead, there is no reason to deny the disinherison to encourage such emotional relationship. Yet, balanced against the strict interpretation of the adoption statutes is a consideration also not present in the laws on disinherison—the critical need to provide a stable, warm, loving environment for the minor child.

The forced heir is also permitted to establish reconciliation with his parent as a defense to any of the twelve grounds. For the first time reconciliation is referred to in the legislation,[43] although it has been recognized by the jurisprudence since 1941.[44] Reconciliation, referred to

37. Id. at 683.
38. Id. at 684.
39. La. Civ. Code art. 1621(3).
40. 463 So. 2d at 684.
41. Id.
42. La. Civ. Code arts. 215-237.
43. La. Civ. Code art. 1624 (as amended by 1985 La. Acts No. 456). For the text of this article, see supra note 8.
44. Succession of Lissa, 198 La. 129, 3 So. 2d 534 (1941); La. Civ. Code art. 1710. See also discussion in Samuel, Shaw & Spaht, supra note 3, at 603-04.

in Civil Code article 152,[45] means essentially forgiveness, and the jurisprudence contains examples of the type of conduct implying forgiveness[46] and the type of conduct that does not.[47]

The new ground for disinherison can be asserted in successions if the testator dies after September 6, 1985, the effective date of Act 456. The rights of forced heirs vest only at the moment of the testator's death.[48] In *Hughes v. Murdock*,[49] the court, foreseeing legislation such as Act 456, opined:

> No one can be said to have any vested right in any existing legal capacity, in reference to any future contract or advantage to result from that capacity. He who to-day is by law a forced heir, in expectancy, may to-morrow, by a new law, be declared liable to be disinherited by will, or incapable even of succeeding ab intestato. It may be assumed, as a general rule, that the mere capacity or incapacity of particular classes of persons to contract or to inherit depends upon the legislative will.[50]

Even though the conduct of the heir occurred before the effective date of the legislation and was not considered *specifically* offensive,[51] the testator may utilize the new grounds for disinherison. So if the testator drafts a will disinheriting the heir for failure to communicate and dies after September 6, 1985, it is an example of the immediate

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45. La. Civ. Code art. 152: "The action of separation shall be extinguished by the reconciliation of the parties, either after the facts which might have given ground to such action, or after the action has been commenced."

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

47. Succession of Chaney, 413 So. 2d 936 (La. App. 1st Cir. 1982).

48. La. Civ. Code art. 934; Henry v. Jean, 238 La. 314, 326, 115 So. 2d 363, 367 (1959). In 1 M. Planiol, Traite Elementaire de Droit Civil No. 247, at 177 (12th ed. La St. L. Inst. trans. 1959), the author states: "The attribution of property in virtue of the testament is accomplished on the contrary, only on the day of the death of the testator. The consequence is that if, during this interval, a law comes into being which reduces the disposable portion of the estate, it is applicable."

49. 45 La. Ann. 935, 13 So. 182 (1893) (syllabus of court). See also Hyde v. Planters Bank, 8 Rob. 416 (La. 1844).

50. Hughes v. Murdock, 45 La. Ann. at 935, 13 So. at 182. Obviously, what the court said concerning the legislative will being determinative of the particular class of persons that will inherit was before the constitutional provisions prohibiting the Legislature from abolishing forced heirship. La. Const. art. XII, § 5 (1974); La. Const. art. IV, § 16 (1921).

51. Despite what the court says in Succession of Landry, if the failure to communicate is not the parent's fault, it should be considered cruel treatment, just as indifference and neglect are treated as cruel treatment under La. Civ. Code art. 138(3). See Dollar v. Dollar, 159 La. 219, 105 So. 296 (1925); R. Pascal & K. Spaht, Louisiana Family Law Course 151 (3d ed. 1982); Comment, The Degree of Cruelty Necessary to Justify Separation from Bed and Board in Louisiana, 16 La. L. Rev. 533 (1956).

application of the law drawing upon antecedent facts.[52] An analogy would be a new ground for divorce based upon the spouses' living separate and apart for a period of time which occurred before the effective date of such legislation. In *Hurry v. Hurry*,[53] the court awarded the husband a divorce based upon the fact that the spouses had lived separate and apart, even though they had done so before the effective date of the legislation. Arguments by the wife that application of the new legislation would be unconstitutional because it denied her property without due process and divested her of vested rights were rejected. Disinherison, like divorce, is an instance described by Planiol where judicial intervention is necessary, for no one is disinherited until adjudged so.[54] In such a case, "if intervention of a court is necessary to bring about a new juridical situation (for example, divorce or separation of property) there will be no retroactivity and the court will apply the law in force at the time judgment is pronounced."[55]

By choosing to liberalize the laws on disinherison rather than to repeal the constitutional provision protecting forced heirship, the Legislature weighed the policies underlying the legitime[56] against the advantages of free testation. The scales tipped in favor of forced heirship, but not without necessary concessions to those parents of children who purposely ignore their parents, thus rendering themselves unworthy to inherit. The institution of forced heirship has survived another year.

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52. 1 M. Planiol, supra note 48, No. 243A, at 175.
53. 144 La. 877, 81 So. 2d 378 (1919).
54. La. Civ. Code arts. 1498 and 1624.
55. 1 M. Planiol, supra note 48, No. 243A, at 175.
56. Samuel, Shaw & Spaht, supra note 3, at 591-95.