The Aftermath of the "Revolution": 1990 Changes to the New Forced Heirship Law

Katherine Shaw Spaht
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INTRODUCTION

The Louisiana State Law Institute, at the direction of the Legislature, recommended some changes in the 1989 legislation that substantially altered the law of forced heirship. The changes were principally semantic; however, amendments were made to the law of collation that alter some of the assumptions the law makes about a parent's intentions. This article examines the more significant changes made by the 1990 legislation to the definition of forced heirs, to the recalculation of the forced share when it would be larger than a descendant's intestate share, and to the extension of the obligation of collation to descendants "coming to the succession" whether they are forced heirs or not.

The article then considers the practical application of the new rules to the distribution of the estate of a decedent who dies intestate survived by descendants, some of whom are forced heirs and others of whom are not. The probate estate upon which a descendant's intestate share is calculated differs from the active mass upon which the forced share is calculated, the latter being composed not only of the probate estate but also of most donations inter vivos. Some of the questions to be resolved include: From whom may the forced heir seek redress and satisfaction of his legitime by the action in reduction? Against what "share" is an inter vivos donation credited (as an advance) to a descendant who succeeds intestate, but is not a forced heir? The article then explores the difficulties presented in applying the new principles of collation to a testate succession. For example, what if the descendant is "coming to the succession" solely because he is a particular legatee of a small sum of money in the decedent's will?

This article also discusses the transitional provisions of the 1990 legislation which address the interpretation of a will executed before

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July 1, 1990 when the testator dies after June 30, 1990. The transitional provisions are themselves not free from ambiguity. At least for the near future, there will be a number of cases in which the interpretation of wills executed before July 1, 1990 will be critical for distribution of the testator's estate.

1990 Modification of the Definition of Forced Heirs

The change in the definition of "forced heir" substituted descendants "of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates"5 for a descendant who "has been interdicted" or who is "subject to being interdicted because of mental incapacity or physical infirmity."6 The substitution clarifies the necessary elements of proof for an heir's inclusion in this category of forced heir by eliminating the references to interdiction.7

The language substituted in 1990 also appears in Civil Code article 389.19 that provides for limited interdiction.9 Thus, to establish what

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   The proposed recommendation removes the language of Act 788 regarding interdiction or being "subject to interdiction," which might be ambiguous, and substitutes the actual language of the Code articles concerning interdiction. Act 788 did not differentiate between full interdiction under Civil Code Articles 389 and 422 and limited interdiction under Article 389.1. The revision adopts the limited interdiction rule, so that a person who is either incapable of managing his affairs or incapable of caring for his person would qualify as a forced heir. 
   La. Civ. Code art. 1493, comment (c).
7. It should be noted that as to all children aged 18 or older, there is a presumption of capacity under Louisiana law. Anyone in the age group of 23 or older who asserts rights as a forced heir will thus have the burden of proving the basis of that claim, i.e. establishing his incapacity. . . .
   La. Civ. Code art. 1493, comment (c) (eff. July 1, 1990). See discussion of the category of "has been interdicted" or "is subject to being interdicted" in Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 438-43.
8. 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. . . .
9. For a discussion of the relevance of limited interdiction to the category of "has been interdicted" or "is subject to being interdicted" contained in 1989 La. Acts No. 788, § 1, see Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 442-43.
may constitute "mental incapacity" or "physical infirmity," beyond mental retardation or obvious mental impairment, it is appropriate to consult the cases involving limited interdiction. What the new language does make clear is that it is not necessary to prove "necessity" for the interdiction since qualification for this category of forced heir does not require an interdiction at all. Furthermore, since the result of proving the necessary mental incapacity or physical infirmity is not the harsh remedy of interdiction, it follows that the ordinary burden of persuasion in civil proceedings should apply, that is, preponderance of the evidence. In summary, it will be necessary to prove by a preponderance of the evidence that the descendant was either mentally or physically incapable of caring for his person or administering his property at the time of the decedent's death.

Should such a descendant predecease his ancestor, there is no representation provided for children or grandchildren of the predeceased descendant for purposes of the forced portion, regardless of the age of the ancestor's grandchildren. As has been observed elsewhere, "[t]he new rule . . . permitting representation only if the forced heir represented

10. "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 with rheumatoid arthritis who is incapable of caring for his person . . . would be a descendant subject to being interdicted." Id. at 441.
12. 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." The expression, according to the official comments, includes "all of the varieties of derangement that have been acknowledged by the Louisiana jurisprudence," including habitual drunkenness, drug sedation, and senility.
13. See, e.g., Interdiction of Badalamenti, 529 So. 2d 1376 (La. App. 4th Cir.), writ denied, 534 So. 2d 444 (1988) (53 year old stroke victim); In re Interdiction of Salzer, 482 So. 2d 166 (La. App. 4th Cir. 1986); Interdiction of Goldsmith, 456 So. 2d 198 (La. App. 3d Cir. 1984).
15. "Because interdiction has been considered such a harsh remedy, some courts have imposed a standard of persuasion of clear and conclusive proof." Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 440-41. See Julius Cohen Jewelers, 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 53 (La. App. 3d Cir. 1985); In re Interdiction of Adams, 209 So. 2d 363 (La. App. 4th Cir. 1968).
17. "For purposes of forced heirship, representation of a descendant of the first degree who predeceased the donor is permitted if that descendant would not have attained the age of twenty-three years at the donor's death." La. Civ. Code art. 1493 (eff. July 1, 1990) (emphasis added).
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 disinherison."

Incongruously, in the case of a three-year-old grandchild, "[e]ven if [he] had been orphaned by the death of the parent and thus had been legally entitled to support from the grandparent while he lived [La. Civ. Code art. 229], ... [the law] does not protect him."

"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 cujas died." This special rule of representation is a departure from general principles which apply, for example, in intestate succession.

Even though ostensibly the categories reflect by fixed rule classifications of children (descendants in the first degree) who are in need of support, it cannot be said that the new law truly protects those

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19. Id.
20. Id.
21. Id.

Under the general rules of representation, the descendants who are the representatives of their predeceased parent are the heirs of the de cujas; the predeceased parent was never the 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 cujas. For example, Louisiana allows representation of a predeceased child who committed an act of unworthiness toward the de cujas or who was disinherited by him. ... 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. ...

Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 445.
23. "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."

Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 446.
24. 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, 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.

Id. at 446.
25. "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." Id.
FORCED HEIRSHIP

children “most vulnerable to an unjust disinheritance...”26 It does not protect descendants in the second degree or beyond who, because of tender age or mental or physical handicap, are in need of support. Nor does the law protect the child of any age who is vulnerable to unjust disinheritance because of the alienation of the parent’s affections through divorce, not an uncommon phenomenon.27 Furthermore, the determination of need is arbitrarily established as of the date of death of the de cujus.28

There is also the question of disinheritance for just cause.29 Assuming that a mentally impaired descendant is not excused from his acts which would constitute grounds for disinheritance,30 then a descendant who is under the age of twenty-three or mentally or physically handicapped can be disinheritance. Surely, then, the categories of forced heirs cannot be justified on the assumption of a need for support, which may be renounced by the obligor if, for example, the descendant has raised his hand to strike the parent.31 Raising a hand against a parent is not a defense to a claim for ordinary child support for a minor child32 nor for a major child who is incapable of providing for his own support.33

26. Id.
27. 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. Id. at 447.
28. 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. 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 or accident and become unable to support himself. 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 disinherit the child on the assumption, true at the time, that the child was able to support himself.
30. “In fact, a descendant who is incapable may be difficult to disinherit for just cause if his mental condition excuses his action that would otherwise constitute grounds for disinheritance.” Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 443.
and properly so. Thus, the obligor who resents the child support he
pays is literally better off dead, if he has cause to disinherit the child
and does so in a will. Is this a sensible result?

Calculation of the Forced Portion—
Succession of Greenlaw Problem

A. The Fraction Problem

Last year's article about the 1989 forced heirship legislation raised
the problem of inconsistent shares of the succession.\textsuperscript{34} Consider the
hypothetical situation where the decedent has five descendants, four of
whom are not forced heirs. If the decedent dies intestate, each of the
descendants is entitled to one-fifth of the decedent's net estate;\textsuperscript{35} however,
the forced heir's reserved share (legitime) under the 1989 legislation was
one-fourth of the decedent's estate.\textsuperscript{36} Therefore, it was impossible for
our hypothetical decedent to treat his descendants equally even if he so
intended.\textsuperscript{37}

An identical problem had arisen and been resolved earlier in the
context of ascendant forced heirship. In Succession of Greenlaw,\textsuperscript{38} \textquote[\{t\}he
court determined that whenever the forced share was greater than the
\textit{ab intestato} share, the parent would receive only the \textit{ab intestato} share.\textsuperscript{39} Thus, the Greenlaw solution to the problem 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."\textsuperscript{40}

\begin{footnotes}
\item[34] Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 448-50.
\item[36] La. Civ. Code art. 1493 (as amended by 1989 La. Acts No. 788, § 1; repealed
\item The word "estate" for purposes of calculating the forced portion of an heir has a
technical meaning (see La. Civ. Code art. 1505(A) and (B)) which raised an additional
fairness problem. See discussion in infra text accompanying notes 45-49.
\item[37] "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." Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 449.
\item[38] 148 La. 255, 86 So. 786 (1920).
\item[39] Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 448.
\item[40] Id. at 449.
\end{footnotes}
Not surprisingly, the legislative resolution to the problem of conflicting fractions was to adopt the theory of the *Greenlaw* case.41 Under the second paragraph of Article 1495, "if the fraction that would otherwise be used to calculate the legitime is greater than the fraction of the decedent's estate to which the forced heir would succeed by intestacy, then the legitime shall be calculated by using the fraction of an intestate successor."42 Thus, in our hypothetical scenario the one forced heir who survives the decedent will be entitled to a forced share of one-fifth, instead of one-fourth, because his intestate share would be one-fifth.

B. Different Sums Upon Which Forced Share and Intestate Share Are Calculated

The one-fifth portion of the forced heir is to be calculated, not on the probate estate, upon which the intestate share will be calculated, but on the mass estate, which is composed of the probate estate plus most donations *inter vivos*.43 This result was consciously chosen by the Legislature.44 For example, in our hypothetical situation in which the

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41. The second paragraph of this Article resolves an issue that would otherwise be unclear and left to the courts for resolution. . . . Any number of possible solutions to this problem are available, such as leaving the calculation of the legitime at the greater number, 25%, or reducing it to 20%, or even eliminating forced heirship altogether if the decedent in fact dies intestate, or conditioning a reduction on the requirement that the parent in fact treat all of this children equally if he dies testate. The proposed solution adopts a kind of "middle ground" approach; it reduces the amount that the forced heir may recover. . . . This proposed resolution is similar to the one adopted by the Louisiana Supreme Court as to parental forced heirship in Succession of *Greenlaw*, 145 La. 255, 86 So. 786 (1920), later codified in Civil Code Article 1494 in 1956. The solution in the *Greenlaw* case was to make the lower, intestate portion become the forced portion, in much the same manner as under this proposal.

La. Civ. Code art. 1495, comment (b) (eff. July 1, 1990). It is no coincidence that the author of the section of last year's article in Volume 50 Louisiana Law Review about the 1989 forced heirship legislation and the problem of conflicting fractions is also a member of the Successions Committee of the Louisiana State Law Institute, Professor Cynthia Samuel of Tulane University Law School.


44. If the *Greenlaw* approach is followed to answer the hypothetical question above [fraction if one forced heir and four other descendants], 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. Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 449.

In comment (b) to La. Civ. Code art. 1495 (eff. July 1, 1990), the author observes: The proposed solution adopts a kind of "middle ground" approach; it reduces the amount that the forced heir may recover, but does not eliminate the right
decedent who dies intestate is survived by one forced heir and four other descendants, the extant net estate will be divided equally among the intestate successors. Assuming the total probate estate (assets minus debts) is $100,000, then each descendant receives $20,000. Although the fraction for calculating the forced heir’s legitime remains at one-fifth, he is entitled to receive one-fifth of the mass, not one-fifth of the probate estated. If the decedent made inter vivos gifts to third persons of $25,000, not otherwise exempt from the mass calculation, the total estate upon which to calculate the forced portion is $125,000. Therefore, the forced heir is entitled to receive $25,000, and his intestate portion is only $20,000. From whom should the forced heir recover the additional $5,000 to which he is entitled?

There are two possibilities: he should recover either from the other intestate successors or, by means of reduction, from the donees of inter vivos gifts. The comment to Article 1493 does not suggest which of the two possibilities is more consistent with the spirit of the reform. There is literal statutory support for permitting the forced heir to recover the additional $5,000 from the donees of inter vivos gifts, beginning chronologically with the last such donee. The code articles on reduction assume that it is only donations inter vivos or mortis causa that may exceed the disposable portion and thus are reduced in accordance with the statutory rules. However, in the hypothetical situation, some of the dispositions were made by the law (intestate succession law) and others by donation inter vivos. What the code articles never contemplated was that a descendant forced heir might also be an intestate successor who takes in conjunction with other non-forced heirs.

47. “Thus, the forced heir may receive a greater share than the actual intestate share, which is 20% of the probate estate, but not as large a share as he otherwise would, namely 25% of the result of the Article 1505 calculation.” La. Civ. Code art. 1495, comment (b) (eff. July 1, 1990).
48. Any disposal of property, whether inter vivos or mortis causa, exceeding the quantum of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that quantum. Donations inter vivos can never be reduced, until the value of all the property, comprised in donations mortis causa be exhausted; and when that reduction is necessary, it shall be made by beginning with the last donation, and thus successively ascending from the last to the first. La. Civ. Code art. 1502.
Thus, under Article 1507, read literally, there being no donations mortis causa, only dispositions to the other descendants in accordance with law,\textsuperscript{49} the donations inter vivos must be reduced. Interestingly enough, the result is that in certain intestate successions there would be a greater possibility of reducing lifetime gifts than ever before. Such a result seems inconsistent with significantly increased freedom to dispose gratuitously during a person’s lifetime.\textsuperscript{50} It can be assumed that the legislation of the last two years “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. . . .”\textsuperscript{51}

The other possibility afforded the forced heir to receive his $25,000 legitime is to calculate the intestate share of the other descendants only after the heir receives his forced portion from the probate estate. In our hypothetical situation, the mass being $125,000 and the heir’s forced portion being $25,000, the forced heir would receive that sum first from the probate estate ($100,000), and then what remains ($75,000) would be divided equally among the other four descendants ($18,750). It may be preferable to think of such a conclusion as the forced heir “seeking reduction” and thus satisfaction of his forced share (the additional $5,000) against his intestate co-heirs, rather than against inter vivos donees.\textsuperscript{52}

It is clearer that “the spirit” of succession revision over the last ten years has been to protect third party transferees to the detriment of the forced heir.\textsuperscript{53} If the choice offered is to permit the forced heir to seek relief either from a third party donee of a lifetime gift or from other descendants, it is likely the legislature would have chosen the other

\textsuperscript{49} One might argue that intestate succession law merely reflects the presumed intention of the decedent and thus is nothing more than presumed dispositions mortis causa thus reducible.

See, e.g., Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 450: “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.” See also Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459 (1977); cf. Labine v. Vincent, 401 U.S. 532, 91 S. Ct. 1017 (1971).


\textsuperscript{51} Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 450.

\textsuperscript{52} The reason will be clearer when dealing with testate successions elsewhere in this article. See infra text accompanying notes 84-90.

descendants who had already lost the protection of forced heirship.

**Changes in the Law of Collation**

The law of collation changed more radically by virtue of the 1990 legislation than did any other principle affecting forced heirship. For the first time under Louisiana law, the obligation of collating what one receives in advance of his inheritance is not limited to forced heirs. Any descendant who succeeds to the estate of his parent or grandparent owes the obligation of collation whether he receives *ab intestato* or by *virtue of a testament*. The motivating sentiment for the change presumably was that if only descendants who are forced heirs owe the obligation of collation, the purpose of collation, which is achieving equality among children, would be undermined. In fact, without the changes in collation, younger descendants who are forced heirs would be disfavored by having to account for gifts received in advance. Fur-

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54. This result was predictable if one examines the 1989 article, Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 450-52, and the section entitled “The Effect of Act 788 on Collation.” The author of this section was Professor Cynthia Samuel of Tulane University Law School who is also a member of the Successions Committee of the Law Institute.


56. *La. Civ. Code* art. 1236 was repealed by 1990 *La. Acts* No. 147, § 3. It provided: “Such children or descendants only are obliged to collate who have a right to a legitimate portion in the succession of their fathers, or mothers, or other ascendants....”

57. The obligation of collating is confined to children or descendants succeeding to their fathers and mothers or other ascendants whether *ab intestato* or by virtue of a testament.

Therefore this collation can not be demanded by any other heir, nor even by the legatees or creditors of the succession to which the collation is due.


Children or grandchildren, *coming to the succession* of their fathers, mothers or other ascendants, must collate what they have received from them by donation *inter vivos*, directly or indirectly, and they can not claim the legacies made to them by such ascendants unless the donations and legacies have been made to them expressly as an advantage over their coheirs, and besides their portion. This rule takes place whether the children or their descendants succeed to their ascendants as *legal* or as *testamentary heirs*, and whether they have accepted the succession unconditionally, or with the benefit of inventory.


58. 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. Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 451.
thermore, to limit collation to forced heirs, for example descendants under twenty-three, does not always accurately reflect the intention of the ascendant who gives to his twenty-year-old child "in advance of what he may one day receive," since his intention may change retroactively by law if the ascendant dies after the child reaches the age of twenty-three.\(^5\)

A descendant "coming to the succession" is not only the forced heir, but also a descendant to whom property of the ancestor devolves intestate and to whom property of the ancestor was left by will. Under the Civil Code articles,\(^6\) the latter (a descendant to whom property was left by will) may be a simple particular legatee\(^6\) and, although the legacy itself may not be subject to collation,\(^6\) the fact of the legacy makes all donations \textit{inter vivos} to the legatee subject to collation. Thus, should the legacy be small and the value of the donations \textit{inter vivos} great, it is likely that the descendant will renounce his legacy rather than be

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59. 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. 

Id. at 451.

60. There are two kinds of successors corresponding to the two kinds of succession described in the preceding articles:

Testate successors, also called legatees.

Intestate successors, also called heirs.


[T]his rule takes place whether the children or their descendants succeed to their ascendants as legal or as testamentary heirs. . . .


The obligation of collating is confined to children or descendants succeeding to their fathers and mothers or other ascendants, whether \textit{ab intestato} or by \textit{virtue of a testament}.


61. A particular legacy is defined by the Civil Code as a residual category: "Every legacy, not included in the definition before given of universal legacies and legacies under a universal title, is a legacy under a particular title." La. Civ. Code art. 1625.

A universal legacy is "a testamentary disposition, by which the testator gives to one or several persons the whole of the property which he leaves at his decease." La. Civ. Code art. 1606.

A legacy under universal title is "that by which a testator bequeaths a certain proportion of the effects of which the law permits him to dispose, as a half, a third, or all his immovables, or all his movables, or a fixed proportion of all his immovables or of all his movables." La. Civ. Code art. 1612.

forced to collate his donations *inter vivos*. On the other hand, consider the descendant who is not a forced heir but who received large lifetime gifts from the deceased. Should the deceased die testate and not mention the descendant as a legatee, the descendant is *not* "coming to the succession" and cannot be required to collate the gifts. Under French law, even though all intestate successors owed the obligation to collate, no legatees did.  

The articles that concern the collation of gifts if the descendant who "comes to the succession" is a grandchild or more remote descendant also were amended. A grandchild must collate gifts made by a grandparent to his or her parent only if the grandchild represents the parent in the succession of the grandparent. This will only happen if the parent would have been under twenty-three at the time of the grandparent's death and thus a forced heir, or if the grandparent dies intestate after the death of the parent. If the grandchild "comes to the succession" of his grandparent who dies testate other than by representation as a forced heir, he does so in his own right. Therefore, he is liable to collate all donations *inter vivos* made to him *after* the death of his parent.

63. If children, or other lawful descendants holding property or legacies subject to be collated, should renounce the succession of the ascendant, from whom they have received such property, they may retain the gift, or claim the legacy to them made, without being subject to any collation.

If, however, the remaining amount of the inheritance should not be sufficient for the legitimate portion of the other children, including in the succession of the deceased the property which the person renouncing would have collated, had he become heir, he shall then be obliged to collate up to the sum necessary to complete such legitimate portion.


64. The obligation to collate arises only in successions conferred by law.

It is not imposed by law on universal donees with regard to each other although they had, besides the title that calls them to the succession, the quality of presumptive heirs of the deceased, nor to donees under universal title, whether they concur only among themselves, or whether they concur with the heirs ab intestato.


In like manner, the grandchild, when inheriting in his own right from the grandfather or grandmother, is not obliged to refund the gifts made to his father, even though he should have accepted the succession; but if the grandchild comes in *only by right of representation*, he must collate what had been given to his father, even though he should have renounced his inheritance.


66. To make descendants liable to collation, as prescribed in the preceding Articles, they must appear in the quality of heirs to the succession of the
Now that the obligation to collate has been extended to any descendant "coming to the succession," it is more difficult to view the gift as one made "on the presumption that what was given or bequeathed to children . . . was so disposed of in advance of what they might one day expect from their [the ascendant's] succession." The presumption was more reasonable when the descendant "coming to the succession" was a forced heir and his expectation was grounded upon the law's guarantee of a reserved portion. Now, at the time the gift is made, is there a reasonable lasting expectation that the descendant will come to the succession of a parent? He comes to the succession if the parent dies intestate, but all the parent has to do to prevent the descendant's coming to his succession is to write a will. The parent can assure that the descendant does not come to his succession by not mentioning him in the will.

Arguably, the obligation to collate is now founded solely and shakily "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. . . ." "Divide among them" suggests equal division, which is the ordinary case with intestate succession. However, equal division does not occur when one of the descendants is a forced heir or when the testator leaves a will providing for an unequal division. If the basis of collation is equality, other provisions of the Civil Code are not strongly supportive since there are

ascendants from whom they immediately have received the gift or legacy.

Therefore, grandchildren, to whom a gift was made or a legacy left by their grandfather or grandmother, after the death of their father or mother, are obliged to collate, when they are called to the inheritance of the grandfather or grandmother, jointly with the other grandchildren, or by representation with their uncles or aunts, brothers or sisters of their father or mother, because it is presumed that their grandfather or grandmother had intended to make the gift, or leave the legacy by anticipation.


But gifts made or legacies left to a grandchild by his grandfather or grandmother during the life of his father, are always reputed to be exempt from collation.

The father, inheriting from the grandfather, is not liable to collate the gifts or legacies left to his child.


In like manner, the grandchild, when inheriting in his own right from the grandfather or grandmother, is not obliged to refund the gifts made to his father, even though he should have accepted the succession; but if the grandchild comes in only by right of representation, he must collate what had been given to his father, even though he should have renounced his inheritance.


exceptions for certain gifts\(^69\) and since dispensation from the obligation can be made by simple expression of the ancestor\(^70\) in one of the various forms provided.\(^71\)

There are provisions of the Civil Code not amended by the 1990 legislation that either affect collation or operate in much the same fashion. Consider, for example, Article 1248 which postulates that not only gifts but also "advantages" bestowed by a father upon his son are subject to collation. The example given in the article is "when a father has sold a thing to his son at a very low price,..."\(^72\) The difficult question the article raises is what constitutes "a very low price." Assistance in determining that sum is provided by the articles on simulation\(^73\) and a more specific provision in the law of sales.\(^74\)

The sale contemplated by Article 1248 is one intended to transfer title, thus not an absolute simulation.\(^75\) The sale as an absolute simulation would result in the property being considered as never having left the patrimony of the deceased and hence still in his estate. Article 2444 assists forced heirs by permitting them to attack a sale of immovable property from parents to their children (any descendant) as a donation in disguise if no price has been paid, or if "the price was below one-fourth of the real value of the immovable sold, at the time of the sale."\(^76\) Forced heirs are permitted the benefit of the discrepancy between the price paid and the value of the immovable property as proof of a donation, thus subject to collation (as well as reduction). Other descendants are not permitted this benefit. Relieving forced heirs of the

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69. La. Civ. Code arts. 1244, 1502, para. 2. As to Article 1502, this conclusion is based on the exclusion of the gifts described from the calculation under La. Civ. Code art. 1505 (mass of succession) and the reference to La. Civ. Code art. 1234. If excluded from the active mass calculation thus arguably not a donation or advantage, then such gifts should not be subject to collation. Furthermore, the gifts contemplated by Article 1502, second paragraph, accomplish the purpose of equality since the gifts to descendants or the root they represent must be equal in a calendar year. However, the article does expressly refer to reduction (gifts exceeding the disposable portion), as well as the actual language of Article 1234, so the court may justifiably limit its application to reduction. See, e.g., similar facts in Succession of Hendrick, 430 So. 2d 734 (La. App. 2d Cir. 1983).


71. La. Civ. Code art. 1232. Dispensation from collation can be made by will to include all gifts made before execution of the will or to be made thereafter.


75. "A simulation is absolute when the parties intend that their contract shall produce no effects between them. That simulation, therefore, can have no effects between the parties." La. Civ. Code art. 2026.

ordinary requirements of proving a donation\textsuperscript{77} to other descendants, but not vice versa, seems unjustified, particularly if the stronger policy underlying collation is to achieve equality among descendants. Even though the descendant who is not a forced heir but "comes to the succession" can attempt to prove a sale of an immovable to a forced heir is an advantage because it is at "a very low price," the forced heir is relieved of that burden if the price is less than one-fourth the value of the immovable.

Other provisions that operate in much the same fashion as collation "by taking less"\textsuperscript{78} include the credit toward the legitime of proceeds of life insurance policies\textsuperscript{79} and the benefits paid on account of death under a qualified plan of deferred compensation.\textsuperscript{80} Even though the proceeds do not appear as a donation or advantage in the active mass calculation of Article 1505,\textsuperscript{81} once the legitime is calculated the proceeds are credited in satisfaction of that amount. By way of contrast, upon the demand of another descendant who "comes to the succession," a forced heir must collate a gift of a movable "by taking less." The gift will appear in the Article 1505 calculation and, once the legitime is determined, the movable gift will be credited to that amount, just as are the proceeds of life insurance and retirement plans. Of course, the purpose of the credit of proceeds from life insurance and retirement benefits payable to a forced heir was to permit the deceased to satisfy the legitime by such proceeds. However, in that sense, the law now treats the forced heir differently from other descendants who may be "coming to the succession." Both have to collate lifetime movable gifts "by taking less"\textsuperscript{82} but only the forced heir has to credit the proceeds he receives

\textsuperscript{77}. See, e.g., La. Civ. Code art. 2464: "[I]t [the price] ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised."

\textsuperscript{78}. Collation "by taking less" is required of the donee of movables (La. Civ. Code art. 1283) and is defined as "when the donee diminishes the portion he inherits, in proportion to the value of the object he has received, and takes so much less from the surplus of the effects as is explained in the chapter which treats of partitions." La. Civ. Code art. 1253. See also La. Civ. Code arts. 1361-62.

\textsuperscript{79}. La. Civ. Code art. 1505(C): "Moreover, the value of such proceeds [from life insurance policies] at the donor's death payable to a forced heir, or for his benefit, shall be deemed applied and credited in satisfaction of his forced share."

\textsuperscript{80}. La. Civ. Code art. 1505(D): "[H]owever, the value of such benefits [benefits payable by reason of death . . . under a plan of deferred compensation adopted by any public or governmental employer or any plan qualified under Sections 401 or 408 of the Internal Revenue Code] paid or payable to a forced heir, or for the benefit of a forced heir, shall be deemed applied and credited in satisfaction of his forced share."

\textsuperscript{81}. Both types of proceeds are explicitly excluded. See La. Civ. Code art. 1505(C), (D).

\textsuperscript{82}. Against what property or sum this credit is to take place in the case of a descendant "coming to the succession" will be discussed in the next section. See infra text accompanying notes 83-92.
from life insurance and death benefits of retirement plans. The descen-
dant who comes to the succession but is not a forced heir takes the
proceeds from life insurance and retirement plans free and clear of the
claims of other descendants.

**Concrete Examples of How the New Collation Law Operates**

**A. Intestate Successions**

Assume a decedent dies intestate survived by one forced heir and
four other descendants and leaves a probate estate valued at $100,000.
If the decedent made lifetime gifts of $25,000 to two of the children
(the forced heir and another descendant), the mass is $125,000 (repre-
senting the probate estate plus *inter vivos* gifts under Article 1505). The
forced heir's legitime is one-fifth (Article 1495, second paragraph) of
the active mass ($25,000).

Assume that a gift of $15,000 was made to the forced heir. The
articles on collation explain that the collation of movables is to be "by
taking less." Thus, he is entitled to receive only $10,000 from the estate
of the decedent to satisfy his legitime. However, he is also an intestate
successor and, as normally calculated, he is entitled to receive one-fifth
of the probate estate ($20,000), which is $10,000 more than necessary
to satisfy his legitime.

The other descendant who is not a forced heir received a lifetime
gift of $10,000 from the decedent and, under the new rules of collation,
even though he is not a forced heir, he is obligated to collate *inter
dios* gifts. The gift of the movable ($10,000) is to be collated "by
taking less," but by taking less from what? The descendant is obligated
to collate because he is "coming to the succession" as an intestate
successor who is entitled to one-fifth of the probate estate. If he is to
collate "by taking less," the only thing he is entitled to as an inheritance
is his intestate share ($20,000). If his donation is credited to what he
would receive, then he is entitled to receive $10,000 from the probate
estate as his share of the inheritance.

Thus, with credits to both the forced heir and another descendant
coming to the succession, there is an excess in the probate estate of
$20,000. In keeping with the purpose of collation and the fact that
collation can only be demanded by and thus benefit other descendants
coming to the succession, it is appropriate to divide the excess $20,000
among the five descendants "coming to the succession," $4,000 to each.

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83. La. Civ. Code art. 1235: "[T]herefore this collation can not be demanded by
any other heir [other than descendant who succeeds *ab intestato*], nor even by the legatees
or creditors of the succession to which the collation is due."
The forced heir would receive $29,000 from the decedent, composed of his $15,000 *inter vivos* gift and $14,000 from the probate estate ($10,000 to satisfy legitime, $4,000 in collation); the other descendants would receive $24,000 each but the descendant who received the lifetime gift of $10,000 would receive only $14,000 from the probate estate.

This hypothetical is simple because all *inter vivos* gifts were made to descendants "coming to the succession", not to strangers. Earlier, when the same hypothetical was used to demonstrate how to calculate the forced share based upon the mass, all *inter vivos* gifts were made to strangers.

**B. Testate Successions**

Using the same hypothetical fact pattern, a decedent survived by five children, only one of whom is a forced heir, assume he dies testate. In his will he leaves a particular legacy of $5000 to one of the children who is not a forced heir, another $5000 to a child who is not a forced heir, and the residue of his property to the forced heir. Assume that, just as in the earlier hypothetical for intestate succession, the decedent had made lifetime gifts of $25,000-$10,000 to one of the children who received a legacy but is not a forced heir and $15,000 to the forced heir.

The probate estate consists of $100,000 and the active mass of $125,000. The legitime of the forced heir is one-fifth of $125,000, or $25,000. The gift of $15,000 is to be credited to the legitime of the forced heir, meaning he is to receive $10,000 from the estate to satisfy his forced portion. However, the deceased expressed the intention in his will that the forced heir was to receive the residue of his estate, a universal legacy calculated by deducting the particular legacies from the probate estate and amounting to $90,000 ($100,000 minus $10,000). The nature of the legacy to the forced heir, even without an explicit expression by the testator, implies an intention that the forced heir receive the residual legacy as an extra portion, meaning that it is not subject to collation. Thus, at this point it can be safely said that any "excess" over and above the legitime of the forced heir need not be shared with other descendants coming to the succession.

There are two other descendants "coming to the succession," particular legatees of a sum of money. They are obligated to collate under

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84. See supra text accompanying notes 43-52.
86. See Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929); King v. Succession of Lowderback, 567 So. 2d 716 (La. App. 2d Cir. 1990); In the Matter of Kendrick, 361 So. 2d 309 (La. App. 1st Cir.), writ denied, 362 So. 2d 1119 (1978).
the Civil Code articles as amended, since they are literally testamentary heirs. The fact that they are named as particular legatees under the jurisprudence suggests an intention on the part of the testator that the two legacies of cash be an extra portion. It is at this point that one may ask, "extra" as to what. At the least, it means that neither legatee is obliged to collate the legacy itself. However, the descendant who received a donation \textit{inter vivos} from the testator is obliged to collate that donation. The gift was of $10,000 cash, meaning he is to collate "by taking less," but less of what? The only portion of the estate to which he is entitled is the particular legacy of $5,000. Does he credit the $10,000 against the $5,000 legacy? If so, he owes the other descendants coming to the succession, the forced heir and other particular legatee, one-third of the difference between $10,000 and $5,000, or one-third of $5,000. It would be to the advantage of this descendant to renounce the succession and his legacy, keeping the $10,000 gift. The particular legacy would then devolve to the universal legatee, the forced heir.

The remaining particular legatee, who is also a descendant coming to the succession, received no donations \textit{inter vivos} and thus has nothing to collate. He received nothing in advance. The other two descendants who were neither forced heirs nor descendants "coming to the succession" receive nothing from the estate and, if they had received lifetime gifts (which under the facts they did not), they would not be obliged to collate. Descendants who do not come to the succession are treated as strangers who are only obligated to make up the portion of the forced heir if he failed to receive his forced portion.

Thus, the particular legatee of $5,000, who is a descendant coming to the succession, receives his legacy in preference to the universal legatee and the universal legatee receives the remainder of $95,000 with no obligation to share any portion with other descendants.

\textbf{Undue Influence and Related Provisions}

Despite the recommendation of the Law Institute to narrow the scope of admissibility of evidence of undue influence, the legislature ultimately decided to permit any person to introduce evidence of cap-

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87. La. Civ. Code art. 1235. It is not improbable that the words "testamentary heir" referred to "instituted heir," a term eliminated with the 1981 revision of the intestate succession articles. See comment (a) to La. Civ. Code art. 880. The "instituted heir" contemplated a legatee who was a universal legatee. Under the intestate succession articles which also define terms to be used in the law of succession there is no "testamentary heir," only "legatee," a testate successor, and "heir," an intestate successor.
88. See cases cited supra note 86.
tation or undue influence exercised against the testator in the making of his will. The Institute had proposed that the article be retained with its prohibition against introduction of evidence that a disposition has been made through captation (undue influence), "except that a descendant who is not a forced heir may introduce such proof if avoidance of the dispositions would inure to his benefit." 92

The proposed article was removed from the bill by amendment in Senate Committee on Judiciary A, restoring the prohibition against admission of such evidence. 93 Among the arguments of the proponents of the Senate committee amendment were the likelihood of nasty litigation by permitting persons, even descendants, to attack a will for undue influence and the desirability of relieving charities, frequent donees and legatees, of such claims. However, when the bill was heard in the House Committee on Civil Law and Procedure, the committee members were unconvinced and, on the floor, restored the repeal of the prohibition against introduction of evidence of undue influence. The reasoning of


La. Civ. Code art. 1492 provided: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation."

92. La. Civ. Code art. 1492 (Senate Bill No. 625, Reg. Sess., 1990): "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation, except that a descendant who is not a forced heir may introduce such proof if avoidance of the dispositions would inure to his benefit." See supra note 74. The comments to La. Civ. Code art. 1492, as proposed by the Law Institute, read as follows:

(a) Act 788 of 1989 repealed this Article. The Law Institute was concerned, however, that the repeal of Article 1492 in its entirety would have ramifications that extended far beyond the issue of forced heirship. That repeal might have "opened the door" to introduction of the common-law concept of undue influence in challenging wills generally, i.e. whether or not there were forced heirs. The Institute intends to study and review the issue of undue influence in due course as part of the ongoing revision of the law of successions. At that time repeal or modifications may be recommended, but it will be as part of a systematic revision which will be significantly easier to implement than a blanket repeal of this Article now.

(b) To accommodate the legislative intent in Act 788 of 1989 to grant to those persons who would otherwise have been forced heirs (i.e. persons 23 years of age or older), the right to introduce evidence of hatred, anger, etc., the Institute has revised Article 1492 to exclude such persons from its effect. This limited exception is not intended to create a cause of action where none existed, but merely to reinstate Civil Code Article 1492 for all persons except those "forced heirs" under prior law, for whose benefit the repeal was originally sought.

93. In the engrossed version of Senate Bill No. 625, Reg. Sess., 1990, there is an amendment to La. Civ. Code art. 1492 as proposed by the Law Institute. The article simply reads: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation." Furthermore, comment (b) to the Law Institute proposed Article 1492 had been deleted. See supra note 92.
the members of the House was that the remedy of attacking the testator’s will for undue influence was necessary to protect those who had previously enjoyed the ‘protection of forced heirship,’ as well as other intestate heirs. Therefore, as was stated in last year’s article on the 1989 legislation, “[a]fter July 1, 1990, there should be no question . . . that evidence of undue influence and suggestion are admissible to question the testator’s capacity.”

Under Civil Code article 1489, doctors and ministers are prohibited from receiving gifts or legacies from the donor or testator if the doctor or minister “attended” the donor or testator during his last illness. Since Article 1492 has been repealed, “[t]here is a question as to whether Article 1489 should be repealed.” The argument for its repeal proceeds as follows:

It [Article 1489] 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.

Now that there is no prohibition against the introduction of evidence of the use of undue influence by the doctor or minister, there may be no need for an explicit rule to protect the donor or testator at a time that he may be vulnerable to influence by one in whom he places enormous trust.

Article 1489 was another example, as was forced heirship for descendants, of a fixed rule that may have excluded some worthy donees
and legatees who were doctors or ministers, but surely excluded others who had violated their trust in prevailing upon the good offices of the deceased.\footnote{See, e.g., Cormier v. Myers, 223 La. 259, 65 So. 2d 345 (1953); Zerega v. Percival, 46 La. Ann. 590, 15 So. 476 (1894); Succession of Letard, 468 So. 2d 768 (La. App. 1st Cir. 1985); Coleman v. Winsey, 183 So. 2d 118 (La. App. 1st Cir.), writ refused, 248 La. 1101, 184 So. 2d 25 (1966); Succession of Andrews, 153 So. 2d 470 (La. App. 4th Cir.), writ refused, 244 La. 1005, 156 So. 2d 57 (1963).} Without a doubt, the absolute prohibition contained in Article 1489 discouraged, if not eliminated, such conduct and resulting bedside gifts. To that extent, it may still serve a useful societal purpose but it does need to be reevaluated in light of the 1990 legislative changes.

**Transitional Provisions**

The effective date of the new Act was July 1, 1990. The special section of the Louisiana Revised Statutes further provides that the Act shall apply to the successions of all persons "who die after June 30, 1990."\footnote{La. R.S. 9:2501 (eff. July 1, 1990): "A. The provisions of Act No. 147 of the 1990 Regular Session shall become effective on July 1, 1990 and shall apply to the successions of all persons who die after June 30, 1990." See also La. Civ. Code art. 934.} The more difficult transitional provisions apply to the decedent who died after June 30, 1990, leaving a testament executed before July 1, 1990. The detailed provisions address how one discerns the testator's intent.

The provisions first address when the new law applies to a testament executed before July 1, 1990, because of the testator's intention. The new law applies if the testament: 1. manifests an intent to disinherit a forced heir;\footnote{La. R.S. 9:2501(B)(1)(a) (eff. July 1, 1990).} 2. restricts the forced heir to the legitime in effect at the time of the testator's death;\footnote{Id.} 3. leaves the forced heir an amount less than the legitime he is entitled to at the time the testament is executed;\footnote{La. R.S. 9:2501(B)(1)(b) (eff. July 1, 1990).} and 4. omits the forced heir and "the language of the testament indicates an intent to restrict the forced heir to an amount less than the legitime in effect at the time the testament is executed."\footnote{La. R.S. 9:2501(B)(1)(c) (eff. July 1, 1990).} If the testament does not reflect any of the four above mentioned characteristics, the testament will be governed by the law in effect before July 1, 1990.\footnote{La. R.S. 9:2501(B)(2) (eff. July 1, 1990): "That in all other instances the testament shall be governed by the law in effect on June 30, 1990."} These rules for interpretation should be strictly construed because the law deprives a class of descendants protection it previously afforded. It is reasonable to conclude that if the testament does not affirmatively reflect such an
intention as is described in the four categories mentioned, the testament should be governed by the law in effect on June 30, 1990.

The difficulty presented by the transitional provisions is deciding when the testament manifests an intent to disinherit a forced heir or to restrict the heir to the legitime in effect at the time of the testator’s death. In fact, the third and fourth category of testamentary provisions described in the transition section are, arguably, examples of the manifestation of intent described in category two—an intent to restrict the heir to the legitime in effect at the time of the testator’s death. The most difficult category of testamentary provision to identify is the manifestation of an intent to disinherit a forced heir. How strong need that manifestation be? Is simply not naming the descendant as a legatee in his will enough? Surely, some additional expression by the testator should be required, such as, “I leave John [his son] nothing.”

The transitional provisions, intended to make interpretation of the provisions of a decedent’s will easier, require their own interpretation. Courts will be occupied for years seeking the meaning of the provisions of the testator’s will executed before July 1, 1990. However, the longer the period of time elapsing between July 1, 1990 and the testator’s death, the stronger the argument will be that the testator intended that the will be governed by the law in effect on June 30, 1990, because the testator had the opportunity to change the provisions by executing a new will and did not do so.

CONCLUSION

The charge of the Law Institute in 1989\textsuperscript{106} was a limited one and subject to serious time constraints. In ensuing years, the Law Institute will have the opportunity to carefully research, consider, debate and fine tune the law of successions.\textsuperscript{107} Every attempt should be made by the Institute to coordinate all related provisions of the Civil Code and the Revised Statutes and to assure that the underlying policies are as clearly articulated and consistent as humanly possible. By the time the Law Institute has completed this ambitious project, there will be ex-

\textsuperscript{106} 1989 La. Acts No. 788, § 3: “The Louisiana State Law Institute is hereby directed to prepare amendments of the Louisiana Civil Code, the Louisiana Revised Statutes and the Code of Civil Procedure to correlate all provisions thereof in accordance with the provisions of this act.”

See discussion of the restrictive charge in Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 496-99.

\textsuperscript{107} See discussion in Spaht, Lorio, Picou, Samuel & Swaim, supra note 3, at 496-99.
experience with the new forced heirship legislation which undoubtedly will uncover other problems and inconsistent theories. To those embarked on this task, the author and her progeny wish the best of luck.