Forced Heirship Changes: The Regrettable "Revolution" Completed

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Jules F. and Frances L. Landry Professor of Law, LSU Law Center. The author wishes to express her deepest gratitude to Professor Cynthia Samuel of Tulane University Law Center, who has served as a comrade in arms seeking to stem the tide of the "regrettable" revolution and who graciously has read this article and offered numerous invaluable suggestions for its improvement. Professor Samuel and this author have devoted fifteen years of time and effort to extolling the virtues and inherent morality of forced heirship. We will continue to safeguard it for future generations of Louisiana citizens.

The author also wishes to acknowledge the valuable assistance of Mr. Jerry Jones, senior attorney for the Natural Resources Committee of the Louisiana House of Representatives.
I. INTRODUCTION

During the 1995 legislative session, the Legislature passed a resolution that made significant changes in the Louisiana institution of forced heirship. The resolution proposed an amendment to Louisiana Constitution article XII, § 5 that...
would abolish forced heirship with two notable exceptions. The Legislature also adopted Act No. 1180 which was intended to implement the constitutional amendment in the event it was approved by the people of Louisiana. The amendment was approved by the people of Louisiana on October 23, 1995, and was promulgated by the Governor on November 2 of the same year. Act No. 1180 became effective on January 1, 1996.² This article examines the constitutional amendment and its temporal effect, and discusses in some detail the provisions of Act No. 1180.

The subject matter of forced heirship was included in the call for the special session that began in March, 1996, in an attempt to respond to criticism of "glitches" in Act No. 1180.³ During the special session the Legislature adopted Act No. 77, the avowed purpose of which was "to assist in implementing the new rules on forced heirship, with a systematic approach to the issues of defining who are forced heirs, what their rights are, and how those rights are implemented."⁴ More explicitly, the purpose was "to present the rules in a coherent framework that should be practical and workable."⁵ This article examines the coherency of the framework of Act No. 77, a revision that aspired to more than simply remedying the "glitches," and the error apparently made in the transition clause of Act No. 77. Act No. 1180, to the extent that it amended the same Civil Code articles as Act No. 77, may still be in effect even after the effective date of Act No. 77.⁶ After the discussion of each of the Civil Code articles amended by Act No. 77, this article contains a specific reminder that the Civil Code article was also amended by Act No. 1180 and that Act No. 1180 rather than Act No. 77 may govern.

This author acknowledges a distinct bias in favor of forced heirship. The author believes that forced heirship, an institution tested through the ages,


³. Among those criticizing Act No. 1180 were L. Paul Hood, IV and Gerald Le Van in 20 The Louisiana Estate Planner Nos. 7-10 (1996).


⁵. Id.

⁶. See supra note 2.
remains a sound social policy to date because it helps preserve and strengthen
the family by reminding parents of their societal responsibilities and by binding
family members together throughout life and beyond. Because of these beliefs,
this author has fought for the preservation of forced heirship in Louisiana and
against the constitutional amendment. The amendment passed and the fight has
been lost, for now, largely because the other side was able to exploit to its
advantage the fact that Louisiana was the only state in the United States to
adhere to this institution. While it is true that the other states do not have forced
heirship as such, much of the rest of the world does. Furthermore, the other
states are now beginning to realize that the rampant disintegration of the family
is not unrelated to legal institutions that promoted a selfish individualism by
glorifying the unrestricted freedom of testation. These states are now beginning
to consider the potential of institutions like forced heirship in stemming the
disintegration tide and restoring the family unit. It is ironic that Louisiana chose
this time to turn its back on that very institution that has served the family well
over the centuries.

Be that as it may, now the people have spoken. With this as a given, it is
still necessary to discuss the legal problems created by the legislation implement-
ing the constitutional amendment. This then is the purpose of this article.

II. THE CONSTITUTIONAL AMENDMENT: TEMPORAL EFFECT

The constitutional amendment referred to above provides as follows:

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

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

7. See generally Katherine S. Spaht et al., Developments in the Law, 1983-84, "What Has
8. See Ralph C. Brashier, Protecting the Child from Disinheritance: Must Louisiana Stand
9. Ralph C. Brashier, Disinheritance and the Modern Family, 45 Case W. Res. L. Rev. 83
(1994). See also in this symposium, Ralph C. Brashier, Protecting the Child From Disinheritance:
10. La. Const. art. XII, § 5 (emphasis added).
A. The Period Between 1990 and Adoption of the Amendment

The sequence of legal events affecting forced heirship that transpired from 1990 to October 23, 1995, when the constitutional amendment was approved by the people of Louisiana, includes: (1) the enactment of Act 147 of 1990 which revised the pertinent Civil Code articles significantly by reducing forced heirship for descendants;\(^\text{11}\) (2) the Louisiana Supreme Court decision of *Succession of Lauga* in 1993 which declared Act 147 unconstitutional;\(^\text{12}\) and (3) the passage of the constitutional amendment by the people of Louisiana on October 23, 1995.

These developments raise the question of which law applies for the period between 1990 and 1995. Suppose, for example, that a parent died during that period and by will left his entire estate to his second wife. Does it matter that he was survived by descendants who under the 1990 legislation would not have been forced heirs but were forced heirs once the Louisiana Supreme Court declared the legislation unconstitutional?\(^\text{13}\) If the widow argued that upon approval of the constitutional amendment in 1995 the bar to enforcement of the 1990 legislation was lifted and nothing prevented the application of that legislation as of its effective date in 1990, would she be successful?

The widow’s legal position that the 1990 legislation can now be enforced would probably consist of the following arguments: the declaration of unconstitutionality by the Louisiana Supreme Court in *Succession of Lauga*\(^\text{14}\) merely means that the statute was unenforceable because it was inconsistent with the Constitution;\(^\text{15}\) the statute remains as the solemn expression of the legislative will; thus once the impediment to its enforcement is removed, it “resumes its effectiveness” from the effective date of that legislation.\(^\text{16}\) As authority in

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13. See, e.g., *Succession of Villarubbia*, 666 So. 2d 312 (La. 1996), which involved the death of parent before the *Lauga* decision and the signing of a receipt for legacy by the grandchild that allegedly waived any rights of inheritance he may have had as a representative of his predeceased father. The issue that ultimately was decisive in the case was the interpretation and validity of the receipt for legacy signed by the grandchild and the judgment of possession in essence consented to by the grandchild. The Louisiana Supreme Court held that the heir could not reopen the succession to assert his rights as forced heir because of his actions in signing the receipt of possession and participating in the distribution of property of the succession with full knowledge of the possibility that the forced heirship legislation of 1990 might be unconstitutional.
14. 624 So. 2d 1156 (La. 1993). See also the companion case of *Succession of Terry*, 624 So. 2d 1201 (La. 1993).
16. William E. Crawford in the publication 1995 *Recent Developments in Torts* (pamphlet published by the Insurance/Workers’ Compensation Section of the Louisiana Bar Association) made a similar argument about a different constitutional amendment at pp. 13-14: The jurisprudential authority is solid that with the passage of the recent constitutional amendment allowing the legislature to limit the liability of the state, the statutes declared
support of the widow's argument that the 1990 legislation is "revived," she might well rely upon authorities cited elsewhere for the same arguments: a law review article and Dr. G.H. Tichenor Antiseptic Co. v. Schwegmann Brothers Giant Super Markets. Closer analysis reveals, however, that neither authority unconstitutional by Chamberlain were revived, and resumed effectiveness from the date of their enactment, as though the decree of unconstitutionality in Chamberlain had never been pronounced.

The basic authority of this position is set forth in the Louisiana jurisprudence in Tichenor v. Schwegmann, 83 So.2d 502 (Orleans Appeal, 1956), and on a national basis in 93 Columbia Law Rev. 1902, 1911. The reasoning is as follows:

Courts cannot repeal statutes because of the separation of powers doctrine, our tri-partite system of government.

When a court declares a statute unconstitutional and therefore unenforceable because of an impediment in the Constitution it has done no more than that. It has declared the statute unenforceable, but the statute is not repealed and remains a statute whose applicability has been blocked.

When the impediment in the Constitution is removed by constitutional amendment, there is nothing any longer blocking the effectiveness of the statute and it resumes its effectiveness as though the declaration of unconstitutionality had never occurred.

In the situation before us, it is crucial to recognize that this is not a question of the retroactivity of those statutes in Act 828 that come into effect upon the adoption of the constitutional amendment, but it is rather the springing back to life—the "unblocking"—of the original statutes as adopted in 1985. Thus, all causes of action not reduced to final and definitive judgments as of the effective date of the constitutional amendment are governed by the 1985 statutes as they were adopted.

In a footnote in the Louisiana Supreme Court case of Deumite v. State, 668 So. 2d 727 n.3 (La. 1996), the Court refers to the same argument made by the State:

Prior to oral argument before this Court and submission of this case for decision, the Louisiana electorate voted to amend La. Const. art. XII, § 10(C), to authorize the legislature to limit the extent of liability of the state and its agencies, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. 1995 La. Acts No. 1328. In brief and at oral argument, the state has argued that this amendment retroactively cures any constitutional defect in La. R.S. 9:2795(E). We pretermit consideration of the effect of the amendment upon the statute's constitutionality because we find that the facts presented do not require a ruling on the constitutionality of La. R.S. 9:2795(E). Further, we decline the parties' invitations to exercise our discretionary appellate jurisdiction over the numerous other issues presented by this appeal. La. Const. art. V, § 5(F).

See also Matherne v. Gray Ins. Co., 661 So. 2d 432 n.10 (La. 1995).


17. See authorities cited in quotation from Professor Crawford's argument in supra note 16.

18. The argument that the constitutional amendment to Article XII, § 5 "revived" 1990 La. Acts No. 147, § 1.

19. 83 So. 2d 502 (1956). At issue was the ability of the manufacturer of a product to set minimum prices by contract with one retailer and thereafter obtain injunctive relief against another retailer who sold the product at a price below the minimum set in the contract. Although the Louisiana Supreme Court originally upheld the constitutionality of the Louisiana statute and the United States Fifth Circuit Court of Appeal concluded that the statute was unenforceable because it...
supports entirely the legal position of the widow that the 1990 legislation is "revived." The law review article concerns the situation of a court's declaration of a statute's unconstitutionality that is subsequently overruled by the same court.  

The *Tichenor* case involved, first, the enforceability of a Louisiana statute in light of federal anti-trust laws and, then, federal legislation enacted to remove the impediment to enforcement of the Louisiana statute; thus, the case involved an issue of federalism not present in the widow's case. The law review article is no doubt cited for the proposition that United States Supreme Court cases favor revival of unconstitutional statutes; and the Louisiana case, for the proposition that a statute declared unconstitutional is merely unenforceable, not null and void.

violated federal anti-trust laws, Congress responded with the McGuire Act to remove the impediment of federal anti-trust laws to the enforceability of the Louisiana statute.

In the phase of the litigation cited above the court held the plaintiff was entitled to an injunction under the now enforceable Louisiana statute. Subsequently, the Louisiana Supreme Court reversed the court of appeal decision on grounds that the Louisiana Fair Trade Law was unconstitutional under the Louisiana Constitution. Obviously, the issue in *Tichenor* did not involve the "revival" of unconstitutional statutes by a change in the constitution. The Louisiana Fair Trade Law was not unconstitutional at the beginning of the litigation, but rather found in violation of federal anti-trust laws. The impediment to its enforcement of the statute was an Act of Congress implicating federalism issues, not a provision of a constitution.

20. William M. Treanor and Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 Colum. L. Rev. 1902 (1993). Professor Crawford cites page 1911 as authority. Presumably, the authority on page 1911 is the following statement: "Supreme Court case law thus weighs in favor of revival; in a variety of circumstances, the Court has found that statutes that were inconsistent with a previous decision automatically became enforceable when that decision was reversed. This does not, however, imply active consideration of the revival issue." (emphasis added). Obviously, the statement was addressed to the subject of the article, which was revival of statutes declared unconstitutional by a decision that is subsequently reversed, not state revival of a statute declared unconstitutional when the constitution is amended to remove the impediment.


23. 83 So. 2d at 508:

It was contended that since the first act when passed purported to affect imports, it was unconstitutional when passed and that after the Congressional act made it possible for a State to pass such a statute it could not be given effect unless re-enacted after the passage of the Act of Congress. The Supreme Court said (in U.S. v. Rahrer, 140 U.S. 545 (1891)): "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property."

The issue in the *Tichenor* case obviously involved issues of federalism not present in the issue of the revival of a state statute declared unconstitutional under the state constitution by the state supreme court and a subsequent amendment to the constitution removing the impediment to enactment of a similar state statute.

24. Magee v. Landrieu, 653 So. 2d 62, 65 (La. App. 1st Cir. 1995) ("Generally, when statutes are declared unconstitutional they are void ab initio and all acts done under such statutes are void.

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The widow's argument for revival of an unconstitutional statute by an amendment to the constitution overlooks at least in part the recognized effect of the declaration of unconstitutionality: once the Act is declared unconstitutional the applicable law "becomes that in effect prior to the unconstitutional amendment."2⁴ In the case of forced heirship the applicable law after the Lauga case is clear. The 1990 Act which would deny the widow's stepchildren forced heirship rights contained a repeal of prior law, and that repeal was also declared unconstitutional and without effect.²⁶ There is also the general proposition recognized in some cases that a constitutional amendment is not retroactive²⁷ unless the amendment expressly adopts or ratifies the legislation previously declared unconstitutional.²⁸ Furthermore, in some of those same

and of no effect." (citations omitted). See also Jefferson v. Jefferson, 244 La. 493, 500-01, 153 So. 2d 368, 370 (1963) ("For a rule of court, like a statute, has the force and effect of law and, when a law is stricken as void [declaration of unconstitutionality], it no longer has existence as law." (The remainder of the quotation pertains to the resurrection of a statute declared unconstitutional by a subsequent decision declaring the former decision incorrect because that "would constitute a reenactment of the law by the Court," id., which is the subject of the Columbia Law Review article cited in supra note 20.)).


26. The result described is different than that contemplated by La. Civ. Code art. 8 (in relevant part): "The repeal of a repealing law does not revive the first law." (emphasis added). There was no repeal of the repealing law but a declaration that the repealing law could not be enforced.

27. See La. Const. art. XIV, § 26. See, e.g., Calogero v. State, ex rel Treen, 445 So. 2d 736 (La. 1984); Succession of Clivens, 426 So. 2d 585 (La. 1982); State v. Shepherd, 332 So. 2d 228 (La. 1976); Harrison v. Trustees of Louisiana State Employees' Retirement System, 671 So. 2d 385 (La. App. 1st Cir. 1995). But see Fox v. Municipal Democratic Executive Comm. of City of Monroe, 328 So. 2d 171 (La. App. 2d Cir.), aff'd, 328 So. 2d 893 (1976), in which the Court opined that Section 26 of Article XIV was intended only to implement the transition from the old constitution of 1921 to the new constitution of 1974.

See also Long v. Insurance Co. of N. Am., 595 So. 2d 636 (La. 1992).

28. In Singer, supra note 15, § 2.07 at 38, the author states:

Amendment or repeal of the constitutional provision which had rendered a statute invalid is generally held not to place the statute in force without subsequent reenactment, except where the new constitutional provision adopts or ratifies previously unconstitutional legislation. In some cases, however, constitutional provisions have been construed merely to be obstacles to the enforcement of an act, which can take effect when the obstacle is removed by constitutional amendment. It has been held that if a decision declaring a statute unconstitutional is subsequently overruled, the operative force of the act is restored by the overruling decision without any necessity for reenactment.

(emphasis added). The implication of the last two sentences quoted is that the exception to the general rule stated in the first sentence occurs when a decision declaring a statute unconstitutional is reversed. Interestingly, as authority for the third sentence the author cites State v. Douglas, 278 So. 2d 485 (La. 1973) and adds the citation to Mark Graham, State v. Douglas: Judicial "Revival" of an Unconstitutional Statute, 34 La. L. Rev. 851 (1974).

For an instance in which the Legislature expressed explicitly that former statutes declared unconstitutional nonetheless be "resurrected," see Long v. Insurance Co. of N. Am., 595 So. 2d 636 (La. 1992). According to the court in its opinion: "We have held that a ratifying clause in a constitutional amendment can validate an unconstitutional statute from the date the statute would have
cases, the court cautions that a ratification of previously unconstitutional legislation can not deprive a person of vested rights.\textsuperscript{29} In \textit{Begnaud v. Department of Transportation and Development},\textsuperscript{30} the most recent court of appeal decision on this issue,\textsuperscript{31} the Louisiana Fifth Circuit considered the issue of revival of a statute previously declared unconstitutional by a constitutional amendment passed in 1995, at the same time as the amendment to Article XII, § 5 on forced heirship.\textsuperscript{32} Citing \textit{Long v. Insurance Co. of North Amer-
The court concluded that the former statute which imposed a cap on judgments and which had been declared unconstitutional did not apply to the plaintiff.

In the instant case the constitutional amendment does not expressly ratify the prior law. Instead, it gives the legislature the discretion to apply the cap “to existing as well as to future claims.” La. Const. Art. XII, §10(C), as amended 1995. In Long the court looked to the intent of the legislature.

In the Long case the intent of the legislature was to give retroactive validation. Additionally, the court also held that the retroactive application of the prior law did “not result in an impairment of contractual obligations or a loss of vested rights.”

In the case of forced heirship the Legislature expressed an intention contrary to retroactive validation of the unconstitutional statutes enacted in 1990. That intent can also be attributed to the people who voted on the constitutional amendment, to the extent there can be such attribution. Three important factors evidence the contrary intention of the Legislature: (1) Article XII, § 5 did not, expressly or otherwise, ratify the former provisions that had been declared unconstitutional in the Lauga case. (2) The Legislature expressed its intent as to the effective date of the changes made by the constitutional amendment and implementation legislation in a specific clause. (3) The

against the state, a state agency, or a political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims.” (emphasis added).

33. 595 So. 2d 636 (La. 1992).
36. Id. (emphasis added).
38. The old statutes that were amended were not the statutes declared unconstitutional in the Lauga case, supra note 12, but were instead the statutes that were enforceable on the effective date of the constitutional amendment and its implementation legislation. See discussion of the effective date in the text at infra notes 44-53.
Legislature had the choice to enact the Civil Code articles contained in Act No. 147 previously declared unconstitutional by the Louisiana Supreme Court. When the Legislature passed the constitutional amendment in 1995 the Civil Code articles in effect at the time were those amended by Act No. 147. The Legislature chose to adopt new Civil Code articles, different in some respects from those contained in Act No. 147 that had been declared unconstitutional. Therefore, there were no statutes previously declared unconstitutional that remained to be enforced.

In *Succession of Jurisich*, the testator died in 1991 having executed his will in 1990 after the passage of the statutory forced heirship changes. He was survived by his widow and six children by a former marriage, all of whom were over twenty-three years of age. He left all of his property by will to his second wife, stating that he was taking advantage of the 1990 statute that changed the definition of forced heirs. Nonetheless, the testator provided alternatively in his will that should the statute that permitted him to dispose of all of his property to his second wife be declared unconstitutional, he disinherited his six children for specified reasons as provided for by Civil Code article 1621. The bulk of the opinion is devoted to exploring the grounds for disinherison, because the court of appeal concluded that the testator could not rely upon the enforceability of the 1990 statute declared unconstitutional in the *Lauga* case:

The initial question to be addressed by this Court is what effect, if any, does this new legislation [La. Acts 1995, No. 1180] have on the case *sub judice*. . . . The legislative intent concerning the application of the

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40. There were differences between the statutes contained in the implementing legislation (1995 La. Acts No. 1180) and those in effect at the time of the passage of the constitutional amendment by the Legislature (those repealed by 1990 La. Acts No. 147 but later became effective because of the declaration of unconstitutionality). There were also differences between the statutes contained in the implementing legislation (1995 La. Acts No. 1180) and the statutes declared unconstitutional in *Succession of Lauga*, 624 So. 2d 1156 (La. 1993) (1990 La. Acts No. 147).

For example, the differences between the statutes contained in the implementing legislation and those declared unconstitutional include: La. Civ. Code art. 1493 (as amended by 1990 La. Acts No. 147, § 1) provided that only descendants of the first degree who were under the age of 23 would be forced heirs, whereas La. Civ. Code art. 1493 (as amended by La. Acts 1995 No. 1180, § 1) provided that descendants of any degree who were 23 years of age or younger are forced heirs. As a consequence, reprinting the comments to the 1990 legislation as if interpretive of the 1995 legislation (Act No. 1180) produced inconsistencies and discrepancies. See La. Civ. Code art. 1493 cmt. b (as amended by 1995 La. Acts No. 1180, § 1). Act No. 1180 was not introduced on recommendation of the Louisiana State Law Institute, thus no comments could appear in the Act. The comments reprinted under La. Civ. Code art. 1493, as amended in 1995, had appeared in 1990 La. Acts No. 147, § 1.

*Compare* Editor's Note to La Civ. Code art. 1493 (as amended by 1995 La. Acts No. 1180, § 1): "Acts 1995, No. 1180, 1, effective January 1, 1996, has reenacted Article 1493 to read as it was amended by Acts 1990, No. 147, 1."


42. La. Civ. Code art. 1621 provides for twelve different reasons for disinherison and as to each child the testator specified a reason under that Article and alleged facts to establish grounds.
new law is found in La. R.S. 9:2501 . . . . This legislation specifically states what law is to govern in cases where the testament was executed prior to January 1, 1996. The wording of the statute indicates that application of the new statute is limited to the successions of persons who die after December 31, 1995 . . . . In reaching this conclusion [that the new legislation does not apply to Mr. Jurisich’s estate], this Court is mindful of the ongoing debate concerning the revival of statutes by the subsequent recall of a decision by popular vote. However, having reviewed the newly enacted statute providing for changes in the forced heirship laws, we are convinced that any overruling of Succession of Lauga, supra, must be left to the Louisiana Supreme Court. In light of the holding in Succession of Lauga, supra, the trial court clearly erred in upholding the constitutionality of Article 1493 of the Civil Code.343

B. The Period Between Adoption of the Amendment and January 1, 1996

During the Regular Session of the 1995 Legislature, at the same time that the constitutional amendment was passed, the Legislature also adopted Act No. 1180 which was explicitly conditioned upon enactment of the amendment.44 The objective of this Act was to implement the otherwise unenforceable mandates contained in the amendment45 and to exercise the permissive authority accorded by the same amendment not previously exercised by the Legislature.46

43. Jurisich, slip op. at 7-9. Note that the emphasis placed on the word decision was emphasis by the Court.
44. La. Acts 1995 No. 1180, § 5:
   This Act shall become effective on January 1, 1996, but only if the proposed amendment of Article XII, Section 5 of the Constitution of Louisiana contained in the Act which originated as House Bill No. 9 or Senate Bill No. 43 of this Regular Session of the Legislature is adopted at the gubernatorial primary election to be held in 1995 and becomes effective. (emphasis added).
45. The Legislature is mandated to provide for “uniform procedures of successions and for the rights of heirs or legatees and for testate and intestate succession,” “the classification of descendants, of the first degree, twenty-three years of age or younger as forced heirs,” and “[t]he amount of the forced portion reserved to heirs and the grounds for disinherison . . . .” La. Const. art. XII, § 5. The Legislature had provided for uniform procedures of successions (see generally La. Code Civ. P. arts. 2811-3462) and for the rights of heirs and legatees (La. Civ. Code arts. 871-1755) and for testate (La. Civ. Code arts. 1467-1733) and intestate (La. Civ. Code arts. 888-901) succession. The companion Act (La. Acts 1995 No. 1180, § 1 (effective Jan. 1, 1996)) fulfilled the mandate to provide for the classification of descendants of the first degree twenty-three years of age or younger as forced heirs.
46. “The Legislature may also classify as forced heirs descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates. . . . Trusts may be authorized by law and the forced portion may be placed in trust.” (emphasis added). La. Const. art. XII, § 5 (B).
Act No. 1180 makes clear that the legislative intent expressed by the companion Act was that the law of forced heirship would not be changed before January 1, 1996. In fact the implementation legislation in Section 2 was very specific: "The provisions of Act No. 1180 of the 1995 Regular Session shall become effective on January 1, 1996, and shall apply to the successions of all persons who die after December 31, 1995."48

The constitutional amendment, however, contained one unusual sentence that was neither an unenforceable mandate nor permissible authority directed to the Legislature—"Except as provided in Paragraph B of this Section, forced heirship is abolished in this state." In a complete reversal of the limitation upon legislative power contained in Article XII, § 5, the Legislature was prohibited from expanding, rather than abolishing, forced heirship by statute. The language—"forced heirship is abolished in this state"—is preceded by "[e]xcept as provided in Paragraph B of this Section," thus limiting the abolition of forced heirship by an exception. It is as if the abolition was conditioned upon the provisions of Paragraph B, which contained mandates and permissible authority directed to the Legislature and conditioned upon action by the Legislature. Read together, the last sentence of Paragraph A and Paragraph B of Article XII, § 5 create a limitation upon the Legislature's power just as its predecessor had.49

The interpretation of the pertinent language of the two paragraphs of Article XII, § 5 as nothing more than an expression of limitation upon legislative power and conditioned upon action by the Legislature is relevant to ultimate resolution of the issue of the effective date of the forced heirship changes. This raises the question: Was forced heirship entirely abolished on November 23, 1995, or was it abolished, with two general exceptions, on January 1, 1996?

Under Article XIII, § 1, paragraph C of the Louisiana Constitution, the constitutional amendment became "effective" twenty days after promulgation; promulgation occurred on November 2, 1995. The Attorney General of Louisiana in a requested opinion about the effective date of the forced heirship changes distinguished between an act "becoming 'operative' and an act becoming 'effective.'"50 The definition in the opinion of "operative" is simply that the

The Legislature had already provided for trusts (La. R.S. 9:1721-2252 (1991 and Supp. 1996)) and for placing the forced portion in trust (La. R.S. 9:1841 (Supp. 1996)). 1995 La. Acts No. 1180 simply implemented the authority granted to the Legislature to classify as forced heirs descendants of any age, who because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates. See La. Civ. Code art. 1493 (as amended by La. Acts 1995 No. 1180, § 1 (effective Jan. 1, 1996)).


49. See discussion of the previous text and restriction upon the Legislature's power in Succession of Lauga, 624 So. 2d 1156 (La. 1993).

Act becomes "viable." Nonetheless, as the Attorney General opines, the Legislature by provision in the Louisiana Constitution has the power to express a later "effective" date. The Attorney General ultimately concluded "that Act 1180 [implementation legislation] became operative on November 23, 1995, with the effectiveness of the amendment to Article XII, Section 5, however; the effectiveness of Act 1180 is delayed until January 1, 1996." If the constitutional amendment's "effectiveness" on November 23, 1995 was conditioned upon action to be taken by the Legislature, the amendment's effectiveness is suspended until implementation of its provisions by legislative action. Legislative action in the form of Act No. 1180, according to the Attorney General, became "operative" on November 23, 1995, but not "effective" until January 1, 1996. Thus, "effective" legislative action occurred on January 1, 1996; and the changes in forced heirship law became EFFECTIVE as to successions of persons dying after December 31, 1995.

III. IMPLEMENTATION LEGISLATION—ACT NO. 1180 OF 1995

A. Forced Heir: Descendants of the First Degree Twenty-Three or Younger

Act No. 1180 became effective on January 1, 1996, and by specific statutory provision applied to "the successions of all persons who die after December 31, 1995." The paragraph containing that provision was followed by another paragraph with a special rule for the person who died testate after December 31, 1995. In fact, as will be discussed in greater detail later in this

51. Id.
52. La. Const. art. III, § 19.
55. La. R.S. 9:2501(B) (Supp. 1996) (as amended by 1995 La. Acts No. 1180, § 1): If the person dies testate, and the testament is executed before January 1, 1996, then the testator's intent shall be ascertained according to the following rules:

(1) That the testament shall be governed by the law in effect at the time of the testator's death in any of the following instances:

(a) When the testament manifests an intent to disinherit a forced heir or to restrict a forced heir to the legitime in effect at the time of the testator's death.
(b) When the testament leaves to the forced heir an amount less than the legitime in effect at the time the testament is executed.
(c) When the testament omits a 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.

(2) That in all other instances the testament shall be governed by the law in effect on December 31, 1995.

This statutory provision, virtually identical to that enacted by 1990 La. Acts No. 147, § 2, was subject to interpretation in Succession of Lawrence, 623 So. 2d 96 (La. App. 1st Cir. 1993). It is a
the substitution of "became" for "shall become" was the only significant change made in the transition clause during the 1996 Special Session. Thus, Act No. 1180, the implementation legislation that was supposed to "be cleaned up" during the First Extraordinary Session of 1996 by Act No. 77, literally continues to apply to articles and statutes it amended beyond the effective date of the "clean up" legislation, which was June 18, 1996.58

Forced heirs are defined in Act No. 1180 as "descendants of the first degree twenty-three years of age or younger,"59 rather than as "descendants of the first degree who have not attained the age of twenty-three years . . . ."60 Obviously, by comparison of the language of the two provisions, there is a difference between being "twenty-three years of age or younger" and having failed to attain "the age of twenty-three years." The common understanding of "twenty-three years of age or younger" is that the descendant is under the age of twenty-four; the descendant is twenty-three until his twenty-fourth birthday. Having failed to attain the age of twenty-three years clearly only included descendants until their twenty-third birthday. Therefore, Act 1180 in effect extended the protection afforded descendants of the first degree another year beyond that of the 1990 legislation61 in accordance with the precise language
difficult transitional provision to understand although the purpose of protecting the testator's intent at the time the will was executed is clear.

Perhaps relying upon the general rules on interpretation of testaments, La. Civ. Code arts. 1712-1723 would have been preferable since the testator who dies after December 31, 1995, may dispose of his property to whomever he chooses if his descendants of the first degree are over the age of 23 and even if not of the first degree, not mentally or physically incapable of caring for their persons or administering their estates. See La. Civ. Code art. 1493 (as amended by 1995 La. Acts No. 1180, § 1), as discussed in the text at infra notes 59 et seq. As a consequence of his freedom of testation, the court could conclude that at the time of execution of his testament he intended to bequeath to his children a fixed percentage of his property as determined under La. Civ. Code art. 1493 (prior to amendment by 1995 La. Acts No. 1180, § 1 (effective Jan. 1, 1996)).

56. See infra text accompanying notes 141-145.

57. The language "as provided therein" was added to modify Act No. 1180 of the 1995 Regular Session, which is another indication that the reference to Act No. 1180 was deliberate. La. R.S. 9:2501(A) (as amended by 1996 La. Acts No. 77).


For a detailed discussion of the issue, see infra text accompanying notes 141-145.


61. Although there was some esoteric debate about the meaning of "twenty-three years of age or younger," the weight of opinion is that the clause means under the age of twenty-four. In La. Civ. Code art. 1493 cmt. b (as amended by 1996 La. Acts No. 77, § 1), the redactors explain at length as follows:

Article XII, Section 5 of the Constitution requires the Legislature to enact legislation making all descendants of the first degree who are "twenty-three years of age or younger" forced heirs. Indisputably, a child who has not yet reached his twenty-third birthday is "twenty-three years of age or younger." Some scholars have raised the question, however.
of the constitutional amendment. To extend forced heirship to children between the ages of twenty-three and twenty-four gives children protection from unjust disinherison by their parent for another year sufficient "to cover most children until they [finish] college." The extension reiterates the Legislature's intent "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."

... whether, after reaching that birthday, and prior to reaching his twenty-fourth birthday, he is still "twenty-three years of age or younger." Arguably, a child who has reached his twenty-third birthday and is now midway into the year is twenty-three and one-half years of age and therefore not "twenty-three years of age or younger." (emphasis added).

Legislation passed at the First Extraordinary Session of 1996 clarifies the meaning of this clause by adding a new paragraph: "D. For purposes of this Article, a person is twenty-three years of age or younger until he attains the age of twenty-four years." 1996 La. Acts No. 77, § 1. As the Official Comments explain:

(a) The third sentence [sic] makes clear that the language "twenty-three years of age or younger" in Article XII, Section 5(B) of the Louisiana Constitution, as amended in October, 1995, means that the child has "not attained the age of twenty-four years." Act 147 of 1990 used the language "attained the age of twenty-three years" to clarify the exact age, but neither the amendment of Article XII, Section 5, nor the implementing legislation uses that language. Instead, both refer to descendants of the first degree "twenty-three years of age of younger." The assumption seems warranted that the Legislature meant that until the descendant of the first degree "attains" the age of twenty-four years he is "twenty-three years of age or younger" and therefore will be a forced heir. (b) The redactors believe, however, that the common sense meaning of "twenty-three years of age or younger" is that the child has not yet attained his twenty-fourth birthday and therefore that, throughout the child's twenty-third year he is still "twenty-three years of age." To assist the courts if this becomes an issue, this Article contains language to that effect in the third sentence [sic].

For the full official and revised comments to Article 1493, see the appendices A and B.

62. It is the constitutional amendment's language that particularly concerned the redactors of La. Civ. Code art. 1493 (as amended by 1996 La. Acts No. 77, § 1):

(b) Article XII, Section 5 of the Constitution requires the Legislature to enact legislation making all descendants of the first degree who are "twenty-three years of age or younger" forced heirs. . . . In order to avoid a constitutional issue in the very threshold definition of forced heirs, this Article contains the exact language of Article XII, Section 5 of the Constitution itself. . . . To assist the courts if this becomes an issue, this Article contains language to that effect in the third sentence [sic]. That statement in the third sentence [sic] should not jeopardize the constitutionality of the first and second sentences which, by using the exact same language that the Constitution uses, must of necessity be constitutional.


64. Id. at 438.

The restriction [of forced heirs to those who have not attained the age of twenty-three years under 1989 La. Acts No. 788, § 1] 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, 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
B. Forced Heir: Mentally or Physically Incapable Descendants of Any Age

By constitutional amendment, the Legislature is authorized, but not mandated, to classify as forced heirs descendants of any age who are mentally or physically incapable. In Act No. 1180 the Legislature did provide for this second category of forced heir: descendants of any age (and any degree) who are mentally or physically incapable of managing their affairs or caring for their persons. The statutory language of this Article differed significantly in structure from the formulation contained in the 1990 legislation, which expressly included only incapable descendants of the first degree. As the sentence was structured in 1995, identical to its formulation in the constitutional amendment, forced heirs included descendants of any degree—whether children, grandchildren or great-grandchildren—who are mentally or physically incapable of caring for their persons or administering their estates. In other words, such incapable grandchildren or great-grandchildren are forced heirs whether or not their parents, children of the decedent, are living. It is not representation; they

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.”

Id. at 417.

65. La. Const. art. XII, § 5(B) (in relevant part):
The legislature may also classify as forced heirs descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates.

66. The word degree in La. Civ. Code art. 900 means generation: “The propinquity of consanguinity is established by the number of generations, and each generation is called a degree.” Interestingly, the word children in La. Civ. Code art. 3506(8) is defined as: “those persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line.” La. Civ. Code art. 3509(8) (in relevant part) (emphasis added). Therefore, the word children with the same legal definition as descendants could have been used.

“A. Forced heirs are descendants of the first degree twenty-three years of age or younger, or descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates.”

68. La. Civ. Code art. 1493 (1990) (as amended by 1990 La. Acts No. 147, § 1) (in relevant part): “Forced heirs are descendants of the first degree who have not attained the age of twenty-three years, or of any age who because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates.”

69. See La. Const. art. XII, § 5 (as amended effective Nov. 23, 1995).

70. Representation is expressly addressed by the legislation in a separate paragraph in the same article: “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(B) (as amended by 1995 La. Acts No. 1180, § 1).

See also La. Civ. Code art. 881, which defines representation.
are forced heirs in their own right. Some commentators thought that the structure had simply been an inadvertent error. However, during the First Extraordinary Session of 1996 there was strong resistance by the author of the 1995 constitutional amendment to a proposed change recommended by the Law Institute in the structure of the Article, proving that the structure was intended to include incapable grandchildren. Ultimately, as will be discussed later in this article, a compromise was reached in the conference committee during the special session to protect incapable grandchildren whose parent predeceased the decedent grandparent.

The creation of this class of forced heir regardless of age reflects the policy "that a descendant unable to support himself is entitled to protection against unjust disinherison 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

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71. See Hood and Le Van, supra note 3, Nos. 7-10, at 1081.
72. The Louisiana State Law Institute, upon whose recommendation House Bill No. 55 was introduced, recommended that (1) descendants who are forced heirs be restricted to those of the first degree except for limited representation as provided for in paragraph (B) of La. Civ. Code art. 1493 (as amended by 1996 La. Acts No. 77, § 1) and (2) descendants who are incapable either mentally or physically be eliminated as forced heirs. Both recommendations were rejected by the Legislature. See infra text accompanying notes 152-172.

La. Civ. Code art. 1493 cmt. c (as amended by 1996 La. Acts No. 77, § 1) (in relevant part) read as follows:

The question whether to make grandchildren forced heirs is a policy decision as well as a legal decision. There has been comment both in reported decisions as well as discussion and debate in the Legislature and the Constitutional Convention, in some instances decrying the remoteness in today's world of grandchildren from their grandparents. One of the rallying cries of the proponents of the constitutional amendment adopted in October, 1995 was the fact that it would cut off rights of grandchildren to be forced heirs. It should be noted, however, that a constitutional challenge, when it comes, must come from a relatively narrow pool of potential claimants. The grandchild must have a parent who has predeceased him, and the predeceased parent must have been relatively young, and the grandparent against whose estate the claim is made must have failed to provide adequately for the grandchild. A grandchild whose parent is living would have no standing, nor would a grandchild whose predeceased parent would have been in his mid-twenties or beyond. Thus, the practical problem is relatively narrow in scope, but it nonetheless poses a very real constitutional threat theoretically.

73. For a discussion of this issue, see infra text accompanying notes 161-163.

However, when a descendant of the first degree predeceases the decedent, representation takes place in favor of any child of the descendant of the first degree, if the child of the descendant of the first degree, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or administering his or her estate at the time of the decedent's death, regardless of the age of the descendant of the first degree at the time of the decedent's death.


75. Spaht et al., supra note 63, at 438.
provisions of other jurisdictions that recognize a right to claim maintenance or support from the decedent’s estate.\textsuperscript{76}

The incapable descendant is described in the legislation as mentally incapable or physically infirm such that he is unable to administer his property or care for his person.\textsuperscript{77} The same descriptive language appears in the article of the Civil Code that permits limited interdiction.\textsuperscript{78} Thus, the articles in the same Title of the Code as the article on limited interdiction\textsuperscript{79} should be examined carefully to determine the meaning of the terms “mental incapacity” and “physical infirmity.” At least as to “mental incapacity” the Articles in Book I, Title IX use numerous terms to describe varying degrees of mental impairment—for example, habitual imbecility, insanity, madness, lunacy or idiocy;\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{76} Id.
\item \textsuperscript{77} La. Civ. Code art. 1493 (as amended by 1995 La. Acts No. 1180, § 1) (in relevant part):
\begin{quote}
“who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates.”
\end{quote}
\item \textsuperscript{78} La. Civ. Code art. 389.1 (in relevant part):
\begin{quote}
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.
\end{quote}
\item \textsuperscript{79} La. Civ. Code, Book I, Title IX. Of Persons Incapable of Administering Their Estates, Whether on Account of Insanity or Some Other Infirmity, and of Their Interdiction and Curatorship.
\item \textsuperscript{80} La. Civ. Code arts. 389, 422. For a criticism of the use of these terms, see Jeanne L. Carriere, \textit{Reconstructing the Grounds for Interdiction}, 54 La. L. Rev. 1199 (1994).
\end{itemize}
Mental retardation, mental disability, or other [mental?] infirmity. The first list contains the more serious descriptions of mental impairment; and at least one explanation may be that the second list appears in the article on limited interdiction, the consequences of which are less harsh than full interdiction in the deprivation of capacity and civil rights. Therefore, to be subject to limited interdiction the mental impairment need not be as serious as that required for full interdiction since the judgment need only deprive the person of such civil rights as necessary to sufficiently protect the person from imposition by others.

Mental incapacity as defined elsewhere in the Civil Code is synonymous with "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. Yet "mental disability" and "[mental?] infirmity" connote some impairment sounding less serious than derangement, as long as the impairment is sufficient to make the person incapable of caring for himself or administering his property. "Physical infirmity" is presumably "coextensive with the meaning of 'infirmity' for physical reasons under Louisiana Civil Code article 422 and the jurisprudence interpreting it." The jurisprudence is replete with examples of both "mental incapacity" and "physical infirmity." However, one should

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82. Id. (in relevant part):
   The rights of the limited interdict shall be infringed in the least restrictive manner consistent with his incapacities. 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.
   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.
86. Spaht et al., supra note 63, at 441. For a general discussion, see also Spaht, supra note 78, at 470-74.
88. Spaht et al., supra note 63, at 441.
89. In fact La. Civ. Code art. 1493 rev. cmt. c (as amended by 1996 La. Acts No. 77, § 1) (in relevant part) directs the reader to such jurisprudence:
   The new language was used in Act 147 of 1990, which provided that a child of any age would qualify as a forced heir if he were either incapable of taking care of his person or incapable of administering his estate, and which further made the disability exception applicable whether the disability was either physical or mental. The drafters of Act 147 of 1990 [the Louisiana State Law Institute] contemplated that the guidelines that the courts would use in interpreting and enforcing the disability provisions were the jurisprudence under Civil Code Article 389.1 concerning limited interdiction.
approach the jurisprudence with the recognition that any standard of “mental incapacity” or “physical infirmity” required for limited interdiction should be relaxed in the arena of forced heirship. For after all, a descendant alleging his “mental incapacity” is not seeking to deprive another natural person of civil rights afforded by the law. Rather, the descendant is seeking to avail himself of a right accorded to him by the law to claim a portion of his ascendant’s estate for his support so that he is not dependent upon the rest of society.

C. Representation Only If Parent Under Age Twenty-Three at Decedent’s Death

Although for purposes of succession generally representation occurs ad infinitum in the direct descending line,91 there is an exception for forced heirship. The right of representation is significantly restricted to permit the descendant to place himself in the degree of the person represented only if the person to be represented (1) is in the first degree of relationship to the decedent and (2) “would not have attained the age of twenty-three years” at the decedent’s death.92 Notice that there is a discrepancy between the age required of the descendant of the first degree to be a forced heir (twenty-three years or younger) and the age required of the predeceased descendant if he is to be represented (not attained the age of twenty-three years). The discrepancy was apparently inadvertent—in the former case copying verbatim the constitutional amendment and in the latter case copying the language of the 1990 statute.93 Recognizing the apparent error, the Legislature corrected the discrepancy during the 1996 First Extraordinary Session in Act No. 77.

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90. Spaht et al., supra note 63, at 438-43 nn.120-153; Spaht, supra note 78, at 470-474 nn.5-33.
91. See numerous cases cited and discussed in Spaht et al., supra note 63, at 438-43 nn.120-153; Spaht, supra note 78, at 470-474 nn.5-33.
92. More recent cases involving limited interdiction decided since those two articles were written include In re Heard, 588 So. 2d 799 (La. App. 2d Cir. 1991) (originally diagnosed with “chronic schizophrenia with depressive reaction” and then fourteen years later diagnosed with less severe “schizo affective disorder”; revocation of full interdiction and substitution of limited interdiction); Interdiction of F.T.E., 594 So. 2d 480 (La. App. 2d Cir. 1992), reh’g granted, 622 So. 2d 667 (La. App. 2d Cir. 1993) (multiple sclerosis with mild dementia; attorney’s fees); and In re Smith, 646 So. 2d 1052 (La. App. 5th Cir. 1994), writ denied, 649 So. 2d 407 (1995) (testimony of psychiatrists and lay persons as to bizarre behavior; daughter appointed curatrix not sister).
93. For an excellent article reviewing the law of interdiction and suggesting changes, see also Carriere, supra note 80.
A similar provision contained in both Act No. 788 of 1989 and Act No. 147 of 1990 was criticized for the following reasons:

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 disinherison. Under Article 1493 as amended by Act 788, if a child of thirty predeceases the de cujus and leaves a child who is three years old when the de cujus dies, the three-year-old grandchild will have no protection from disinherison. 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, 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 cujus dies. 6

Official Comment (c) to Article 1493 as amended in 1996 could be considered a response to the criticism that a young grandchild orphaned at a vulnerable age is denied the protection of forced heirship if his parent would have been over the age of twenty-four at the decedent's death. The comment first explained why the redactors permitted representation by a grandchild at all:

[R]epresentation of a deceased parent is a fiction of the law of long standing and general acceptance, 97 and it is certainly reasonable to accept the distinction that a grandchild who represents a deceased child is not a forced heir in his own right but standing in “the place and degree” of a child who would have been a forced heir if he were still alive. 98

or younger at the time of the decedent’s death.” (emphasis added). For a complete discussion of this provision, see infra text at notes 148-150.

The Official Comment (c) explains the correction:

In the redactors' view, Article 1493 of the implementing legislation [1995 La. Acts No. 1180, § 1] uses inconsistent ages: to be a forced heir in one's own right one must not have “attained the age of twenty-four years,” but for a grandchild to represent a predeceased parent, the parent must not have “attained the age of twenty-three years.”

Spaht et al., supra note 63, at 444.

Consider the following assessment:

In addition to leaving young descendants prey to an unjust disinherison 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 cujus; the predeceased parent was never the heir. It would follow that the new law should be concerned with the ages of the representatives who are the heirs in order to protect the young heirs from disinherison. But Act 788 is, on the contrary, only concerned with the age of the predeceased child who was never an heir.

Spaht et al., supra note 63, at 444-45.

Thereafter, the comment continued by explaining the lack of sympathy for grandchildren generally and why the redactors were unmoved by the three-year-old grandchild:

The question whether to make grandchildren forced heirs is a policy decision as well as a legal decision. There has been comment both in reported decisions as well as discussion and debate in the Legislature and the Constitutional Convention, in some instances decrying the remoteness in today's world of grandchildren from their grandparents. One of the rallying cries of the proponents of the constitutional amendment adopted in October, 1995 was the fact that it would cut off rights of grandchildren to be forced heirs.

After the passage of Act No. 77, however, the Reporter revised the comments and comment (d) replaced comment (c). Comment (d) now says simply that representation is a fiction of the law of long standing and general acceptance and it is reasonable because it accepts the distinction between the grandchild being a forced heir in his own right and simply standing in the shoes of his parent. References in the comments to the rallying cries of opponents of forced heirship about grandparents' remoteness from their grandchildren that help explain the failure to provide for the young and vulnerable grandchild were eliminated. So, the three-year-old child referred to above whose thirty-year-old parent predeceased him is still unprotected from disinherison by his grandparent regardless of who railed against grandchildren as forced heirs.

D. Size of the Disposable Portion

The size of the disposable portion is three-quarters of the active mass of the donor's succession if he leaves one forced heir, and one-half if he leaves two or more forced heirs. At least as to the general rule on the size of the disposable portion and the forced portion of the decedent's estate there has been

99. Id.
100. See 1996 La. Acts No. 77, § 4 which directed the following: "[T]he Louisiana State Law Institute is hereby urged and directed to include comments which are consistent with the provisions of this Act.” Utilizing Section 4 the Reporter for the Successions Committee of the Law Institute revised the comments to two Civil Code articles (La. Civ. Code arts. 1493, 1235) after the bill was enacted. The text of both the original and revised comments to Article 1493 are printed in the appendices to this article.
102. For a discussion of how this provision fails to protect vulnerable children and grandchildren of the decedent from unjust disinherison, see Spaht et al., supra note 63, at 445-47.
103. La. Civ. Code art. 1505 (as amended by 1995 La. Acts No. 1180, § 1) refers to the aggregate of all of the decedent’s property minus his obligations to which is fictitiously added back the donations inter vivos. For a discussion of the active mass calculation as fictitious collation, rather than actual collation, see Succession of Fakier, 541 So. 2d 1372 (La. 1988).
no change since 1981. Neither Articles 1494 nor 1495 use or define the words *forced portion*, although in later legislation the term implicitly refers to the aggregate of the decedent's property reserved for all forced heirs. Rather, it is *legitime* that is defined in Article 1494 as "the portion of the donor's estate reserved to him [the forced heir] by law." The necessity for defining only the *legitime*, often used interchangeably with the words *forced portion* to mean the same thing, becomes apparent in the second paragraph of Article 1495.

As an exception to the general rule of the first paragraph, "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." What is immediately obvious is that under the terms of this paragraph there can be a reduction of a forced heir's *legitime* if his *legitime* is greater than the fraction used to calculate his intestate share. Thus, the forced heir who has many siblings is disadvantaged in many cases when compared to a forced heir who is an only child or comes from a smaller family. The use of *legitime* assures that the two fractions being compared are the individual forced heir's reserved portion and his intestate portion. Thus:

For example, when a parent has five competent children, four of whom are twenty-four or older and one of whom qualifies as a forced heir because he is twenty-three or younger... the percentage used to calculate the forced portion under Article 1495 would be twenty-five percent, but the intestate share under Article 888 would be only twenty percent.

Remember that the fraction may be the intestate fraction used to calculate the *legitime* of the forced heir, but what he ultimately receives is not simply that fraction of the intestate estate but instead that fraction of the active mass which includes *inter vivos* donations.

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106. See La. Civ. Code art. 1494 cmt. b (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): "The legitime of a child is determined by dividing the *forced portion* by the number of qualified children living or represented at the death of the decedent." (emphasis added).
108. La. Civ. Code art. 1495(B) (as amended 1995 La. Acts No. 1180, § 1) begins with "Nevertheless...."
109. Id. (emphasis added).
110. For a discussion of this issue as a discrimination against a forced heir who comes from a large family when the decedent disposes of his property to a stranger, see Spaht et al., supra note 63, at 449-50.
111. This is the explanation of an identical provision contained in 1996 La. Acts No. 77, § 1, as La. Civ. Code art. 1495 cmt. b.
This Article reduces the amount that the forced heir may recover but does not eliminate the right of the forced heir to calculate his legitime in accordance with the formula of Civil Code Article 1505 by adding in the value of *inter vivos* donations to calculate the portion. Thus,
The solution is similar to that first adopted in the case of parental forced heirship in *Succession of Greenlaw*\(^1\) and later by amendment to Article 1494.\(^2\) The solution of reducing the forced portion to a forced heir who is “in need” by virtue of the only remaining two categories of forced heirs “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.”\(^3\) The second paragraph of Article 1494 in such circumstances “insures that the testator can treat his children equally as they would have been treated *ab intestato.*”\(^4\)

But when the other children do not receive the property, the forced heir’s share should not be scaled back. Furthermore, when the parent leaves everything to a stranger, 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.\(^5\)

In the situation where the other brothers and sisters receive the property, the countervailing policy to treat all children equally, reaffirmed as recently as the 1996 First Extraordinary Session by the retention of the concept of collation,\(^6\) is weighed against the policy reflected in the new forced heirship law, that is, protection of children of the decedent who are most vulnerable and “in need.” If a stranger receives the decedent’s property, the only countervailing policy is the “freedom of testation” of the decedent who is no longer alive to give away all of his property. This policy can not outweigh the interest of living members of society to exact support for these vulnerable descendants from a share of the decedent’s estate.

**E. Collation Among Descendants, Not Confined to Forced Heirs**

In Act No. 1180\(^7\) as in the 1990 legislation,\(^8\) Article 1236 of the Civil Code, restricting collation to forced heirs, was repealed.\(^9\) The consequence

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\(^3\) Spaht et al., *supra* note 63, at 449.

\(^4\) *Id.* “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.” *Id.*

\(^5\) *Id.*


\(^7\) 1995 La. Acts No. 1180, § 3.

\(^8\) 1990 La. Acts No. 147, § 3 (effective July 1, 1990).


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.
of repealing the article is to extend collation to all "descendants succeeding to their fathers and mothers or other ascendants, whether ab intestato or by virtue of a testament." Thus, rather than determining if a descendant is a forced heir, the relevant inquiry is whether the descendant, forced heir or not, is coming to the succession as an heir or a legatee.

Collation, a concept independent of impingement of the legitime, 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." The difference between reduction and collation has been succinctly explained elsewhere: "Reduction is the protection of certain heirs from disinherison without cause, but collation is simply the evening up between co-heirs who have inherited." Extending the obligation of collation to descendants other than forced heirs, assures that younger children, even though forced heirs, are not treated unfavorably when compared to their older siblings. Consider the following compelling illustration which when written assumed that collation would remain an obligation owed only by forced heirs:

Assume a parent has three children, one of whom is under twenty-three when the parent dies. The parent has made inter vivos gifts totalling 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.

Therefore, natural children, inheriting from their mother or father, in the cases prescribed by law, are not liable to any collation between them, if they have not been expressly subjected to it by the donor, because the law gives them no right to a legitimate portion in their successions.

123. La. Civ. Code art. 876 (in relevant part): "Intestate successors, also called heirs."
127. Spaht et al., supra note 63, at 451-52.
Despite the important social purpose achieved by a concept that assures equality among children, there were unforeseen and unanticipated problems with "a descendant coming to the succession" in cases where he was only a legatee. Collation among descendant heirs who all received a share of the estate of the deceased under intestate succession law involved little complexity or subversion of one of the principal reasons for the concept—the gift represented a presumed advance on what the heir would one day receive. However, the collation among descendants when one or more are only legatees, needs reconsideration. Under French law, only intestate successors, including those who were not descendants, owed the obligation to collate; legatees did not. A sensible reform of collation would restrict its application to intestate succession but extend the obligation unambiguously to all descendants, not just forced heirs. The policy of treating children equally and solidifying the family after the death of the parents, as even the majority of letters received by Ann Landers would support, outweigh any arguments that implementing the policy is

129. Spaht, supra note 78, at 479.
131. Spaht, supra note 78, at 484-85. One "complexity" is that what the forced heir is entitled to receive is initially calculated on the active mass of the succession under La. Civ. Code art. 1505(A), (B); whereas, the value of the intestate shares of the other descendants are calculated on the net estate of the decedent.
132. Spaht, supra note 78, at 481:
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. (emphasis added).

The expectation at the time the gift is made may not be lasting, but it is reasonable if the descendant under La. Civ. Code art. 888 is a descendant who ultimately comes to the succession as an intestate successor because the decedent did not write a will presumably because he had knowledge of the law and chose not to vary the terms of the disposition of his property. In the case of a descendant who ultimately comes to the succession as a testate successor, or legatee, the descendant may do so as a particular legatee (La. Civ. Code art. 1625) and as such, the expectation is neither lasting nor reasonable at the time of the gift that the decedent gave in advance of what the legatee might otherwise receive.
133. Spaht, supra note 78, at 485-86.
134. Charles C. Aubry & Charles C. Rau, Droit Civil Francais § 629, at 370 in 4 Civil Law Translations (La. St. L. Inst. trans. 1971): "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."
too difficult and requires too complex a scheme. As the authors of the book Beyond the Grave: The Right Way and Wrong Way of Leaving Money to Your Children (and Others) expressed the sentiment:

If you care about maintaining family harmony after your death, leave your money and property to your children equally, regardless of their economic circumstances or their beau geste declarations.

* * *

Failing to equalize lifetime gifts is one of the most significant sources of dispute between my clients' children. Why such emotional upheaval? One child explained it to me this way: "My parents must not have loved me as much as my sister. While they were alive, they gave more to my sister than to me."

IV. ACT NO. 77 OF THE FIRST EXTRAORDINARY SESSION OF 1996

A scant three months after Act No. 1180 became effective, a special session was called by Governor Foster; he included within the call Item No. 121: "to legislate relative to forced heirship; to provide as to forced heirs, to disposable portion, the effect of testaments and otherwise to provide with respect thereto."

The inclusion of forced heirship within the call for the First Extraordinary Session of 1996 resulted from urging by the Louisiana State Law Institute as explained in the Introductory Note to Act No. 77:

The Council of the Louisiana Law Institute has reviewed the constitutional amendment to the law of forced heirship and the implementing legislation. The Council concluded that it would be beneficial to draft a new document to assist in implementing the new rules on forced heirship, with a systematic approach to the issues of defining who are forced heirs, what their rights are, and how those rights are implemented. The proposed revision seeks to present the rules in a coherent framework that should be practical and workable.

135. Some other states that are not civil law jurisdictions have a similar concept referred to as "hotchpot." "Hotchpot" is defined in Black’s Law Dictionary: Hotchpot, or the putting in hotchpot, is applied in modern law to the throwing the amount of an advancement made to a particular child, in real or personal estate, into the common stock, for the purpose of a more equal division, or of equalizing the shares of all the children. This answers to or resembles the collatio bonorum, or collation of the civil law.


137. Id. at 24.

The expressed purpose in the Introductory Note exceeded merely repairing the two "glitches," one perceived and the other real in Act No. 1180. A systematic approach, later referred to as a "coherent framework," suggested more extensive legislation than the few Civil Code articles amended by Act No. 1180; and that intention was bolstered by the additional language specifying the purpose of defining the rights of forced heirs and the implementation of those rights. As the Civil Code articles amended by Act No. 77 are examined in the sections of this article that follow, the framework is at times systematic and "coherent" and at times not. What is clear about the framework is that the underlying purpose was to reduce the number of forced heirs and the amount of the legitime and to eliminate collation and its principle that children should be treated equally.

Noneetheless, Act No. 77 may not yet apply to some forced heirship issues. In an ironic twist of fate the transition clause contained in Section 2 of Act No. 77 provides that "Act No. 1180 shall apply to the successions of all persons who die after December 31, 1995." The only exception is for a person who dies testate and executed his will before January 1, 1996; the testator's intent under some circumstances is deemed to be that the law in effect before January 1, 1996 (at the time of execution of the will) apply. Paragraph A of the Section that

139. See discussion of the two "errors" in text at supra notes 54-64, 91-102.
140. This article is not the first to appear describing the contents of 1996 La. Acts No. 77. See Kathryn V. Lorio, Forced Heirship: The Citadel Has Fallen—or Has It?, 44 La. B.J. 16 (1996).
142. La. R.S. 9:2501(B) (as amended by 1996 La. Acts No. 77, § 2)
   B. If the person dies testate, and the testament is executed before January 1, 1996, then the testator's intent shall be ascertained according to the following rules:
   (1) That the testament shall be governed by the law in effect at the time of the testator's death in any of the following instances:
      (a) When the testament manifests an intent to disinherit a forced heir or to restrict a forced heir to the legitime under the law in effect at the time of the testator's death.
      (b) When the testament leaves to the forced heir an amount less than the legitime under the law in effect at the time the testament is executed.
      (c) When the testament omits a forced heir and the language of the testament indicates an intent to restrict the forced heir to an amount less than the legitime under the law in effect at the time the testament is executed.
   (2) That in all other instances the testament shall be governed by the law in effect on December 31, 1995.
   (3) That the term forced heir, as used above, shall mean a forced heir at the time the testament is executed.
   (emphasis added).

The italicized words in La. R.S. 9:2501(B) above represent the only changes made by 1996 La. Acts No. 77, § 2 in this paragraph of the Section. 1990 La. Acts No. 147, § 2 contained a virtually identical transition clause that was interpreted in Succession of Lawrence, 623 So. 2d 96 (La. App. 1st Cir. 1993).
directs the application of Act No. 1180 of 1995 contained one change: the verb "shall become" was changed to "became." The change in verb tense establishes that the Legislature knew that Act No. 1180 became effective on January 1, 1996, and was in effect at the time that Act No. 77 of 1996 was passed. Despite, or on account of, that knowledge the Legislature directs that Act No. 1180 shall be applicable, not Act No. 77, to the successions of all persons who die after December 31, 1995. In fact Act No. 77, including Louisiana Revised Statutes 9:2501, makes no mention whatsoever of the applicability of Act No. 77.

As a general rule, had Act No. 77 contained no transition clause, it would have become effective sixty days after final adjournment of the First Extraordinary Session of 1996. For succession purposes, new law takes effect as to "successions opened" after the effective date of the Act—in other words, to the successions of all persons who die after June 18, 1996. Yet, Act No. 77 directs the continued applicability of Act No. 1180 of 1995; and the applicability of Act No. 1180 is not merely of academic interest. In the sections of this article that follow, the differences between Act No. 1180 and Act No. 77 will be highlighted as to the Articles of the Civil Code amended by both Acts, for it is as to those Articles that Act No. 77 directs that Act No. 1180 of 1995 apply. For example, Act No. 77 of 1996 restricts the concept of forced heirship to a greater degree than Act No. 1180 of 1995. As a consequence, a child who claims to be mentally incapable of caring for his person would fare significantly better under Act No. 1180 of 1995 than under Act No. 77 of 1996; so the fact that Act No. 77 does not apply under the terms of its own transition clause is extremely important.

In the commentary on the provisions of Act No. 77, the author will refer to Official Comments and then to Revised Comments. Section 4 of Act No. 77 contains the explanation: "in accordance with Joint Rule No. 10 of the Joint Rules of the Senate and House of Representatives, the Louisiana State Law

143. La. Const. art. 3, § 19: "All laws enacted during a regular session of the legislature shall take effect on August fifteenth of the calendar year in which the regular session is held and all laws enacted during an extraordinary session of the legislature shall take effect on the sixtieth day after final adjournment of the extraordinary session in which they were enacted. . . . However, any bill may specify an earlier or later effective date."


145. See discussion in text at infra notes 152-186.

146. Joint Rule No. 10:
A bill submitted on the recommendation of the Louisiana State Law Institute may be introduced and considered by the Senate and House of Representatives in pamphlet form and, whether in pamphlet form or not, may include introductory comments and explanatory comments following proposed sections or articles. Comments included in the bill shall not be enactments of the legislature, and shall be included only as explanatory language, and shall not be law, but may be printed in the official edition of the pertinent law with such changes to be made therein by the Louisiana State Law Institute as it may deem necessary to accurately reflect the sections or articles as enacted, or subsequently amended.
Institute is hereby urged and directed to include comments which are consistent with the provisions of this Act.”

Utilizing that section the Reporter for the Successions Committee of the Louisiana Law Institute redrafted the comments to Louisiana Civil Code article 1493 and drafted comments to Louisiana Civil Code article 1235. As a consequence, the author refers to Official Comments to mean those enacted with the legislation and Revised Comments to refer to those comments redrafted by the Reporter. Of course, Section 4 also cautions that “[t]he introductory note, headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act.”

A. Classification of Forced Heirs Under Act No. 77

1. Age

Article 1493, Paragraph D clarifies the meaning of the classification of forced heirs who are “twenty-three years of age or younger,” what arguably some scholars had concluded was ambiguous. Paragraph D provides that “a person is twenty-three years of age or younger until he attains the age of twenty-four years.” Furthermore, for purposes of representation by more remote descendants, Paragraph B. eliminates the discrepancy in ages by correlating the age the predeceased descendant of the first degree would have been at the decedent’s death and the age at which he would be a forced heir. Unfortu-
nately, Paragraph B. does not address the injustice to the grandchild who may have been orphaned while a minor and be in desperate need but whose predeceased parent would have been twenty-four years of age or older at the time of the grandparent’s death.\textsuperscript{150}

Reminder: This is a provision of Act No. 77 that may not be effective because the Civil Code article was also amended and affected by Act No. 1180.\textsuperscript{151} Louisiana Revised Statutes 9:2501(A) states that Act No. 1180 applies to the successions of all persons who die after December 31, 1995.

2. Incapable Descendants

The Louisiana State Law Institute recommended that descendants who are incapable of caring for their persons or administering their estates be eliminated as forced heirs.\textsuperscript{152} Because the constitutional amendment permits, rather than mandates, the Legislature to include such descendants, no constitutional objection could be raised to the elimination of these descendants.\textsuperscript{153} The concern was expressed by estate planners and others that the inclusion of incapable descendants within the protection of forced heirship created uncertainty in planning the disposition of a person’s estate.\textsuperscript{154} The Revised Comments also add additional elaboration: “concern has been expressed regarding a possible lack of precision
The result would have been a denial to those descendants of legal protection from unjust disinherison by the parents and the potential imposition of an increased responsibility on the State of Louisiana for the care of these descendants.

In both the Senate Committee on Judiciary A and in the House Committee on Civil Law and Procedure, the legislators rejected overwhelmingly\(^\text{156}\) the recommendation of the Law Institute after receiving testimony offered by representatives of the Department of Health and Hospitals and a letter from the Secretary of the Department of Social Services. From the perspective of the two departments, representatives testified about the potential economic impact of eliminating incapable descendants from the category of forced heirs and anticipated taxpayer indignation about bearing the cost of care for such children so that the parent could dispose of his own property after he died to other people or organizations. Essentially, the legislators accepted the view that certainty for those who are sophisticated enough to seek assistance in estate planning is not the only societal value to be weighed in the calculation. Uncertainty, to some extent, always exists: a person does not know whether he will die before or after each of his children reaches the age of twenty-four. The described uncertainties which can never be eliminated absolutely had to be weighed against the plight of descendants who would have no protection from unwarranted disinherison and be left either bereft of resources or as the taxpayers' responsibility, or both. This argument, moreover, does not even consider the moral responsibility of the parent.\(^\text{157}\)

\textit{a. First Degree}

As previously mentioned the Law Institute had recommended that incapable descendants not be forced heirs; however, the Legislature rejected the Law Institute's recommendation as to incapable descendants. In an attempt to "clarify" the language of Act No. 1180 to the effect that incapable descendants \textit{of any degree} are forced heirs, the Law Institute recommended in House Bill No. 155. La. Civ. Code art. 1493 rev. cmt. c (as amended by 1996 La. Acts No. 77, § 1) (in relevant part).


\textit{156.} In the Senate Committee on Judiciary A voting on Senator Roy Bean's Senate Bill No. 121 to amend La. Civ. Code art. 1493(A) the Committee voted unanimously to defer action on the bill. The House Committee on Civil Law and Procedure voted 10-1 to amend House Bill No. 55 to include descendants incapable of caring for their persons or administering their estates at the instance of one of the authors of the bill, Representative Charles Riddle. As will be explained later in this Article, the word \textit{permanently} was added to qualify the descendants in this category. See infra text accompanying notes 173-186.

\textit{157.} Spaht et al., supra note 7, at 593.
that descendants be restricted to those within the first degree\textsuperscript{158} with the single exception being the limited right of representation for a descendant who seeks to represent his predeceased ancestor who would have been under the age of twenty-four years at the time of decedent's death.\textsuperscript{159} Paragraph A. does restrict forced heirs to "descendants of the first degree" of any age who are permanently incapable of caring for their persons or administering their estates.\textsuperscript{160}

\textit{b. Extraordinary Right of Representation}

The one statutory expansion of forced heirship rights beyond descendants of the first degree permits representation by an incapable "child" of a descendant of the first degree who predeceases the decedent.\textsuperscript{161} Under the constitutional amendment and Act No. 1180 of 1995 "descendants of any age" and of any degree were forced heirs if they were incapable of caring for their persons or administering their estates. Therefore, grandchildren who were incapable were forced heirs even if their parent survived the decedent. Thus, it was possible that the "child" of the decedent, who was the parent of the incapable grandchild, might not be a forced heir because he was over the age of twenty-three years; however, the incapable grandchild would be a forced heir. The extension of representation to the incapable grandchild whose parent predeceases the decedent \textit{regardless} of the age the predeceased parent would have been at the death of the decedent\textsuperscript{162} represented a compromise between the preference of the Law Institute to limit forced heirship to those descendants of the first degree and the

\textsuperscript{158. La. Civ. Code art. 1493 (as amended by 1996 La. Acts No. 77, § 1).}

\textsuperscript{159. La. Civ. Code art. 1493(B) (as amended by 1996 La. Acts No. 77, § 1).}

\textsuperscript{160. La. Civ. Code art. 1493(A) (as amended by 1996 La. Acts No. 77, § 1): Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent. (emphasis added).}

\textsuperscript{161. La. Civ. Code art. 1493(C) (as amended by 1996 La. Acts No. 77, § 1): However, when a descendant of the first degree predeceases the decedent, representation takes place in favor of any child of the descendant of the first degree, if the child of the descendant of the first degree, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or administering his or her estate at the time of the decedent's death, regardless of the age of the descendant of the first degree at the time of the decedent's death.}

\textsuperscript{162. La. Civ. Code art. 1493(C) (as amended by 1996 La. Acts No. 77, § 1) begins with "[h]owever... " establishing that the paragraph is an exception to preceding Paragraph B, which restricts the right of representation for purposes of forced heirship. Furthermore, Paragraph C ends with "regardless of the age of the descendant of the first degree at the time of the decedent's death."}
preference of some legislators\textsuperscript{163} to expand forced heirship to protect all incapable descendants.

Interestingly enough, in the Official Comments to Article 1493 submitted with House Bill No. 55 that became Act No. 77 of 1996 the "redactors" explain the general rule of representation contained in Paragraph B. in the following terms:

One argument supporting the constitutionality of allowing representation as provided in this Article is the permissive provision in Article XII, Section 5 to the effect that the Legislature "may" provide that descendants of any age are forced heirs if for mental or physical reasons they are either unable to take care of their persons or administer their estates. By biological necessity, if the predeceased parent would be no older than his early twenty's, whether that age is twenty-three or twenty-four years, any grandchild who would represent that parent would of necessity have to be a very young infant, and grandchildren of that age would probably not be able to take care of their persons and, as minors, are legally incapable of administering their estates. However, even though a minor child would lack capacity to administer his estate, that disability is not a physical or mental handicap; it is a legal disability.\textsuperscript{164}

The language highlighted from Official Comment (c) suggests that a grandchild of the decedent who is a young infant would not be able to care for his person and because he is a minor be legally incapable of administering his estate.\textsuperscript{165} Yet, Paragraph C. requires that for representation of his predeceased parent a grandchild prove that "because of mental incapacity or physical infirmity" he is incapable of caring for his person or administering his property. The comment states that a minor child only lacks legal capacity to administer his estate, not that his inability to care for his person is a legal disability.

Is a three-year-old grandchild, for example, mentally incapable or physically infirm? If so, and there is some question as to whether a toddler can be accurately described as mentally incapable of caring for his person,\textsuperscript{166} the

\textsuperscript{163} Principal among the legislators concerned with incapable descendants of any degree was Senator James Cox of Lake Charles who was responsible for the final version of La. Const. art. XII, § 5 that incorporated incapable descendants of a degree beyond those of the first degree.

\textsuperscript{164} La. Civ. Code art. 1493 cmt. c (as amended by 1996 La. Acts No. 77, § 1) (emphasis added). The Reporter for the Successions Committee of the Louisiana State Law Institute revised the comments to Article 1493 and the substance of that portion of the comment quoted has not been retained. Section 4 of Act No. 77 of the First Extraordinary Session of 1996 directed that "the Louisiana State Law Institute is hereby urged and directed to include comments which are consistent with the provisions of this Act." (emphasis added).

\textsuperscript{165} La. Civ. Code arts. 28, 29, 1918, 1922.

\textsuperscript{166} See discussion of the meaning of mental incapacity in text at supra notes 77-90. Obviously, the three-year-old toddler is not physically infirm as that term is understood for purposes of interdiction under La. Civ. Code art. 422. He is not physically mature or adept, but not infirm.
argument proceeds that the young grandchild of a predeceased descendant of the first degree is by virtue of his age unable to care for his person and can represent his predeceased parent in the succession of his grandparent. At least one other author has suggested such an interpretation. Arguably, the law adjudges the minor child who is unemancipated incapable of caring for his person because his care is entrusted to his parents or tutor who have authority over him and concomitant custody. But assuming for purposes of argument only that the highlighted language from Official Comment (c) is correct, the grandchild who is three years old, issue of a predeceased child of the decedent who would have been thirty years of age at the time of the decedent's death, could not represent his parent under Paragraph B. of Article 1493 but could under Paragraph C. of the same article, if the child could prove he was permanently incapable of caring for his parent at the time of the decedent's death. It is the additional permanently that may preclude the argument that the grandchild can represent his parent and the solution to the injustice of denying that grandchild protection from unjust disinherison. The Revised Comment (e) emphasizes that

167. Hood and Le Van, supra note 3, Nos. 7-10, at 1079.
See Spaht, supra note 168, § 15.1, at 652:
Parental authority, in the limited use of the term, includes the following principal elements: a. Custody (care, supervision) of the child by both parents, with the will of the father prevailing in the event of a difference of opinion between them. Articles 216-218, 220, 235, 236; but see Article 99. . . . The right of the father (and sometimes the mother) to administer the assets of the minor. Article 221; but see Article 99.
Spaht, supra note 168, § 15.4, at 654: "Custody incidental to parental authority is the right to supervise and direct the care of the child and his activities with a view to his proper rearing and development and his health and safety."
170. La. Code Civ. P. arts. 4261, 4262. Article 4261 reads as follows:
The tutor shall have custody of and shall care for the person of the minor. He shall see that the minor is properly reared and educated in accordance with his station in life.
The expenses for the support and education of the minor should not exceed the revenue from the minor's property. However, if the revenue is insufficient to support the minor properly or to procure him an education, with the approval of the court as provided in Article 4271, the tutor may expend the minor's capital for these purposes.
See Spaht, supra note 168, § 16.2, at 682: "The office of tutor normally combines obligations to the person of the minor (obligations of custody) and to his patrimonial interests (administration and, as necessary, disposition of his assets)."
Id. at § 16.23: "It has already been mentioned that by the general rule the tutor has custody of the minor's person and supervision of his rearing and education; that where there are separate tutors of the 'person' and 'property' of the minor the first has the minor's custody and supervision; and that, in spite of the absence of civil legislation allowing it, there are decisions tending to regard custody as separate from tutorship in civil actions."
"It should be understood that the 'tutor of the person' who is not 'tutor of the property' of the minor may exercise all the rights and duties of a tutor so far as the person of the minor is concerned."
171. See supra notes 162-163.
"[t]he nature of the disability of the grandchild that is required for him to qualify as a forced heir under Paragraph C is the identical kind of disability that is required for a child to qualify as a forced heir." Can a three-year-old grandchild who because of mental incapacity is unable to care for his person prove that he is permanently incapable as of the moment of decedent’s death?

c. Permanently

Revised Comment (c) to Article 1493 explains why the adverb permanently was added to the clause describing incapable descendants:

Concern was expressed, too, that the broad scope of the terms might encourage spurious claims for relatively minor disabilities, and also concerning the uncertainty whether a temporary . . . disability might qualify a child as a forced heir. Article 1493 (A) clarifies the law in several respects and should help reduce unwarranted or inappropriate claims.

The language quoted above suggests two "concerns"—the extent of the incapacity and the duration of the incapacity. Permanent as a legal term of art appears elsewhere in the law for a similar purpose. In the workers' compensation statute, the term is used to distinguish between disabilities that are temporary and those that are permanent. The workers' compensation statute establishes that the word permanent concerns the duration of the disability, not the extent or nature of the disability, and the jurisprudence is reasonably consistent. The extent of disability under the workers' compensation statute is reflected in the words total, or partial. Furthermore, disabled or disability

173. For an explanation of the use of the term "Revised Comment," see supra text accompanying notes 146-147.
176. Id. at (1) (regarding temporary total disability).
177. See, e.g., Franklin v. Le Meridien Hotel, 634 So. 2d 64 (La. App. 4th Cir. 1994); Henson v. Handee Corp., 421 So. 2d 1134 (La. App. 2d Cir. 1982); Delafield v. Maples, 2 So. 2d 704 (La. App. 2d Cir. 1941).
under the workers’ compensation statute is not coextensive with *incapacity to care for one’s person or administer one’s estate*. Thus, when the Revised Comments refer to the *extent* of the incapacity to care for one’s self or to administer one’s property, the comments do not constitute an accurate description of the statutory language. Consider the following statements from Revised Comment (c):

Concern was expressed, too, that the broad scope of the terms might encourage spurious claims for *relatively minor* disabilities, and also concerning the uncertainty *whether a temporary, albeit severe*, disability might qualify a child as a forced heir . . . . More important, the Legislature added the word “permanently” before the word “incapable” for the express purpose of emphasizing that a temporary disability, *even if severe*, should not apply. *The Legislature thereby expressly manifested its intent that the rule making disabled children of any age forced heirs should only apply to “seriously handicapped” individuals*. The Legislature requested specifically that these Comments be written to explain that it is the purpose of adding the word “permanently” to more effectively express the public policy intended, namely, to protect children who are over the age of 23 as forced heirs *if, and only if, they are severely disabled*. Although the jurisprudence on limited interdiction may be helpful, the new rule expressed in this Article is intentionally different and more restrictive than the standard for interdiction because of the use of the word “permanently” to *describe the nature of the incapacity*.179

The paragraph of the Revised Comment that follows the one quoted above belies the interpretation of intent of the Legislature in adding the word *permanently*. The next paragraph refers to a specific legislative request that the comments note that a descendant may be *permanently “disabled” but “on occasion have a temporary remission.”*180 The legislative request came as a response to the hypothetical of the descendant who suffers from multiple sclerosis or schizophrenia and may enjoy a temporary remission of the illness; but the *condition* that causes the physical infirmity or mental incapacity is permanent. The impact on state resources for the long term and intermittent care of these descendants may nonetheless be the same as for the descendant who is in a coma or mentally retarded at the time of the decedent’s death. The same comment does recognize that “[i]t is not intended to be the policy of the Article that a mere temporary remission at the time of the decedent’s death would disqualify an heir from being classified as ‘permanently’ disabled within the new

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180. *Id.* This specific legislative request by Senator John Guidry came during a hearing before the Senate Committee on Judiciary A.
definition of incapacity, provided that the disability is otherwise permanent.\textsuperscript{181} This paragraph recognizes and supports the proposition that "permanently" does not address the extent of the incapacity but only its duration. Therefore, references in the preceding paragraph of the Revised Comment, to severe and seriously handicapped that were not considered at the time the bill was heard find no support in the statutory language. Furthermore, comments are not the law.\textsuperscript{182}

\textbf{Permanently} incapable at the time of the decedent's death concerns the known or anticipated duration of the incapacity. How does the descendant, who should bear the initial burden of persuasion, prove that he is mentally or physically incapable of caring for his person or administering his estate as of the moment of the decedent's death\textsuperscript{183} and that the incapacity is permanent in nature? Clearly, although the term was borrowed from the workers' compensation statute, the parallel is not a perfect one. The strongest parallel from which to borrow to add meaning to permanently is the moment at which a temporary disability becomes permanent for the disabled worker. Under the workers' compensation statute, the moment the worker's disability becomes permanent occurs "when ... the employee's physical condition has improved to the point that continued, regular treatment by a physician is not required."\textsuperscript{184} Another way of phrasing the moment that the condition becomes permanent in a meaningful way for purposes of succession law is when it is determined that the physical condition of the employee will not improve.

In the context of succession litigation, the forced heir is permanently incapable at the time of the decedent's death if at that moment a determination is made that his condition will not improve even though he may have enjoyed temporary remissions or the benefit of technological devices, such as a prosthesis or hearing aid, that have eased the severity of his incapacity. The burden of persuasion that rests on the alleged forced heir should be somewhat relaxed as mentioned previously.\textsuperscript{185} Unfortunately, the difficulty for the forced heir will be that his incapacity is to be determined as of a particular moment in time—the decedent's death—regardless of his current condition. Consider, for example, the forced heir who is schizophrenic at the time of the decedent's death but at the time of the assertion of his claim or at the time of trial by virtue of effective medication appears normal and capable of caring for himself. For purposes of

\begin{itemize}
\item \textsuperscript{181} La. Civ. Code art. 1493 rev. cmt. (c) (as amended by 1996 La. Acts No. 77, § 1).
\item \textsuperscript{182} 1996 La. Acts No. 77, § 4: "The introductory note, headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act." (emphasis added).
\item \textsuperscript{183} La. Civ. Code art. 1493(A) (as amended by 1996 La. Acts No. 77, § 1): "Forced heirs are descendants of the first degree who ... because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent." (emphasis added).
\item \textsuperscript{185} See supra text accompanying note 90.
\end{itemize}
forced heirship law, as contrasted to workers’ compensation law that theoretically permits continuous monitoring of the disability, only the condition of the descendant as of the date of death of the decedent is relevant.186

Both the workers’ compensation scheme and forced heirship law involve social legislation designed principally to protect the worker (at least originally) and the descendant, respectively, and to provide for their support. Initially, because at the beginning the amount awarded the worker was modest, policy dictated that a judge should err on the side of the worker. Considering the unanimity with which the Legislature rejected the recommendation that incapable descendants should not be forced heirs and the fact that the law reserves only a portion, not the entirety of the decedent’s estate, policy dictates that the judge should likewise err on the side of the descendant if doubt exists as to the extent of his incapacity or its permanency.

Reminder: This is a provision of Act No. 77 that may not be effective because the Civil Code article was also amended and affected by Act No. 1180. Louisiana Revised Statutes 9:2501(A) states that Act No. 1180 applies to the successions of all persons who die after December 31, 1995.

B. Amount of the Forced Portion

The disposable portion continues to be three-fourths of the decedent’s estate if the decedent dies survived by one child and one-half if the decedent dies survived by two or more children.187 In an improvement over its predecessor, the same Article provides a definition of the forced portion: “The portion reserved for the forced heirs is called the forced portion and the remainder is called the disposable portion.”188 Notice that the forced portion is the term used to signify the total amount of the decedent’s estate reserved for all forced heirs; whereas, the legitime is defined as “the portion of the decedent’s estate reserved to him [the individual forced heir].”189 As in Act No. 1180, the legitime of a forced heir may be reduced if it is larger than his intestate fraction.190

Reminder: This is a provision of Act No. 77 that may not be effective because the Civil Code article was also amended and affected by Act No. 1180. Louisiana Revised Statutes 9:2501(A) states that Act No. 1180 applies to the successions of all persons who die after December 31, 1995.

188. Id. (emphasis added).
189. Id. (emphasis added).
190. La. Civ. Code art. 1495 (as amended by 1996 La. Acts No. 77, § 1). For an explanation of the application of this paragraph of Article 1495, see supra text accompanying notes 103-117.
What is new in Act No. 77 concerning the amount of the forced portion is the ability to recalculate the forced portion if a forced heir renounces. Under Article 1500, the forced portion is reduced not only if the forced heir is declared unworthy or adjudged disinherited as has been true since 1981, but also the forced portion is reduced if a forced heir renounces. Prior to the amendment to Article 1500 by Act No. 77, “the legitimate portion . . . being once fixed by the number of forced heirs . . . does not diminish by the renunciation of one or any of them.” The comment to Article 1500 acknowledges the change and explains, “[t]his . . . makes the effects of disinherison, renunciation and unworthiness consistent with each other instead of producing different results as provided under prior law.” That justification for the change in law may appear reasonable, treating all instances that deny a forced heir his legitime in the same manner. However, disinherison and unworthiness are distinct from renunciation. The former events, disinherison and unworthiness, occur despite the will of the forced heir generally by virtue of his extremely ungrateful or disrespectful behavior directed toward the decedent. Renunciation, on the other hand, occurs by virtue of a voluntary act by the forced heir that requires the solemnity of an authentic act.

Why did prior law not increase the disposable portion when a forced heir renounced? The purpose of the rule under prior law was to give a forced heir
who had received an *inter vivos* gift an incentive to accept the succession and to collate. If he renounced, the disposable portion would not be increased,\(^{200}\) and he was not permitted to keep more property donated by the decedent than a stranger could.\(^{201}\) The rule under prior law thus prevented the forced heir from increasing the disposable portion to his own advantage by renouncing the succession. As introduced, Act No. 77 recommended a repeal of collation. Implicit in this recommendation was the Institute's rejection of the equality principle embodied in collation. Thus, it would have been consistent with the rejection of collation to allow the renouncing forced heir to increase the size of the disposable portion to his own advantage.\(^{202}\) However, the Legislature disagreed with the Law Institute on the principle of equality and retained collation, albeit limited in form;\(^{203}\) so, prior law refusing recalculation of the forced portion upon renunciation of a forced heir should have been retained as well.\(^{204}\)

Another more subtle change made by Article 1500 is that the adjustment of the forced portion upon disinherison, unworthiness, and renunciation occurs by *reducing the forced portion by the renouncing heir's legitime*. His legitime, defined earlier under Article 1494\(^{205}\) as the portion reserved for the individual heir, becomes disposable. Under the predecessor to Article 1500, when a forced heir was disinherited or declared unworthy, "then the legitimate portion is determined by the number of other forced heirs of the deceased living or represented."\(^{206}\) The following hypothetical illustrates the difference. Suppose that at the time of the decedent's death there are three forced heirs, and one is

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Therefore, natural children, inheriting from their mother or father, in the cases prescribed by law, are not liable to any collation between them, if they have not been expressly subjected to it by the donor, because the law gives them no right to a legitimate portion in their successions.

The Article was originally repealed in 1990 La. Acts No. 147, § 3, declared unconstitutional in Succession of Lauga, 624 So. 2d 1156, (La. 1993), and most recently repealed in 1995 La. Acts No. 1180, § 3.


201. La. Civ. Code art. 1302 (in relevant part): "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." The possibility existed that the donation to the renouncing forced heir might be the subject of a reduction action by the remaining forced heirs.


203. La. Civ. Code art. 1235 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): "The right to demand collation is confined to descendants of the first degree who qualify as forced heirs, and only applies with respect to gifts made within the three years prior to the decedent's death, and valued as of the date of the gift."

204. For an explanation, see supra text accompanying notes 119-137 as to why collation should be retained and expanded and see infra notes 288-378 as to why Article 1501 (as amended by 1996 La. Acts No. 77, § 1) should be repealed.

205. La. Civ. Code art. 1494 (as amended by 1996 La. Acts No. 77, § 1): "A forced heir may not be deprived of the portion of the decedent's estate reserved to him by law, called the legitime, unless the decedent has just cause to disinherit him."

disinherited. Under prior law the legitimate portion at the time of the decedent’s death was one-half as the decedent was survived by two or more descendants. After disinherison of one of the forced heirs, the legitimate portion remains one-half since it is to be determined by the other two living forced heirs. By contrast, under Article 1500, the deduction of the legitime of the forced heir (one-third of one-half or one-sixth) from the legitimate portion means the forced portion is no longer one-half but instead is two-sixths, or one-third. This is one of many changes, the pattern of which is to reduce the forced portion to the greatest extent possible even if the only remaining forced heirs are children under twenty-four and those who are incapable, both of whom need support.

Reminder: This is a provision of Act No. 77 that may not be effective because the Civil Code article was also amended and affected by Act No. 1180. Louisiana Revised Statutes 9:2501(A) states that Act No. 1180 applies to the successions of all persons who die after December 31, 1995.

C. No Charges, Conditions Imposed on Legitime

Article 1496 continues to state the general proposition that “[n]o charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law.” Those authorized exceptions, however, have increasingly subsumed the general principle, the most important exception being the usufruct in favor of the surviving spouse. The usufruct, which by its nature

208. For additional examples of the same underlying theme, see infra text accompanying notes 209 et seq.
209. La. Civ. Code art. 1496 (as amended by 1996 La. Acts No. 77, § 1). The Comment explains: “It retains the fundamental principle of prior law, that a forced heir is entitled to his legitime in full ownership.” The Comment also explains that Article 1496 reproduces the substance of Article 1710 of the Louisiana Civil Code of 1870. Act No. 77 of the First Extraordinary Session of 1996 does not repeal Article 1710 because the first independent clause of the Article contains a very important proposition not reproduced in any of the articles in Act No. 77: “The same causes which, according to the foregoing provisions of the present title, authorize an action for the revocation of a donation inter vivos, are sufficient to ground an action of revocation of testamentary dispositions.”
210. Article 1496 itself explicitly mentions the surviving spouse’s usufruct as an example of a burden imposed by law upon the legitime: “No charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law, such as a usufruct in favor of a surviving spouse . . . .” See also La. Civ. Code art. 1499 cmt. a (as amended by 1996 La. Acts No. 77, § 1). The comment also explains that Succession of Suggs, 612 So. 2d 297 (La. App. 5th Cir. 1992), was effectively overruled by the repeal in 1995 of La. Civ. Code art. 1752, the theoretical support for that decision; however, Article 1499 leaves no doubt that the Suggs case has been repudiated. See also Succession of Gilbert, 668 So. 2d 1212 (La. App. 5th Cir. 1995), writs granted, 673 So. 2d 1021-22 (1996); Succession of Becker, 660 So. 2d 61 (La. App 4th Cir.), writ denied, 664 So. 2d 455 (1995).

The comment to Article 1496 provides: “Despite that general principle, however, there are well-recognized impingements on the legitime that are permitted. The two most prominent exceptions to the general rule are the usufruct of a surviving spouse, in Civil Code Articles 890 and 1499, and the
always includes the right to the "fruits" of property subject to the usufruct,211 may also under Act No. 77 include the explicit right to dispose of nonconsumables if the decedent grants the power by testament.212 The burden of the usufruct imposed on the legitime is greater after January 1, 1996 since the only forced heirs are those under the age of twenty-four or those who are incapable and consequently need support. It is also possible that the surviving spouse may not owe the forced heirs a legal obligation of support.213 She owns the fruits,214 may own other property215 of the decedent, and, with testamentary authority, dispose of nonconsumables.216 All of these rights are granted to the surviving spouse without any protection for the forced heir, unless, of course, the law permits the forced heir to request security.217 Despite a


212. La. Civ. Code art. 1499 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): "The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period."
216. La. Civ. Code art. 1499 cmt. b (as amended by 1996 La. Acts No. 77, § 1): This Article also clarifies an issue that has not yet been resolved in the courts, which is whether the testator may grant the usufructuary the power to dispose of nonconsumables as provided in the law regarding usufruct in Civil Code Article 568. There is disagreement among scholars as to whether the grant of such authority would constitute an impingement on the legitime. To remove any doubt and to establish that the grant of that right would not constitute an impingement, the Article expressly so provides.
217. There are conditions to his ability to request security when the usufruct affects his legitime: First, if the usufruct is legal, as the usufruct over community property is (La. Civ. Code art. 890 (as amended by 1996 La. Acts No. 77, § 1)), then no security is required. La. Civ. Code art. 573. See also La. Civ. Code art. 1514 cmt. a (as amended by 1996 La. Acts No. 77, § 1).
218. Second, if the forced heir is not a child of the surviving spouse, he may request security; or Third, if the usufruct affects separate property, to that extent the forced heir, even if a child of the surviving spouse, may request security.
comment suggesting that “there is no reason to require a bond”\textsuperscript{218} when the testator “donated something less than [the disposable portion], namely, a usufruct only,”\textsuperscript{219} a court should be reminded of the contents of a different comment to the same article:

The legislature made a policy decision that children of a prior marriage and illegitimate children are entitled to greater protection than are children of the marriage, or, in other words, to treat a surviving spouse who is the parent of the naked owner different from a surviving spouse who is not the parent of the naked owner. This Article continues that policy.\textsuperscript{220}

The policy decision made by the Legislature, to which this comment refers, was made before forced heirs were limited to young or incapable children and the underlying basis of forced heirship was changed. If the underlying rationale supporting the protection of forced heirship after January 1, 1996, is support, these vulnerable categories of children not related by blood to the surviving spouse deserve even greater protection from the surviving spouse usufructuary through security. Changes to the usufruct of the surviving spouse are more fully explored elsewhere in this symposium.\textsuperscript{221}

\textit{Cf.} La. Code Civ. P. art. 3154.1 (limits right to request security to forced heirs who are not children of the surviving spouse).


There are many forms of security, such as a surety bond, a legal or conventional mortgage, and perhaps, in a more colloquial sense, a designation of the nature of an investment. An example of that latter kind of provision is found in Civil Code Article 618, which applies when, for example, a usufruct of a nonconsumable is transformed into a usufruct of a consumable and the naked owner and the usufructuary are unable to agree on the investment of the proceeds within one year of the transformation of the property. In that case, Civil Code Article 618 authorizes the court to determine the nature of the investment. It is hoped that courts will not inflexibly apply the rule of this Article to require a usufructuary to post bond every time a naked owner requests security, but will consider all of the circumstances of the situation, such as the nature of the property that comprises the legitime, and whether the property is movable or immovable, consumable or nonconsumable, and what practical controls exist or may be used to protect the right of the naked owner without infringing on the rights of the usufructuary, or if so, by infringing in the least restrictive manner possible.

An additional consideration not mentioned in the comment is, of course, whether the forced heir requesting the security is a child of the usufructuary or not.


\textsuperscript{220} La. Civ. Code art. 1514 cmt. c.

\textsuperscript{221} Arruebarrena, \textit{supra} note 210, at 149 (this symposium).

An important change in the usufruct to the surviving spouse that is confirmed by testament is its duration. Under La. Civ. Code art. 1499 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): “The decedent may grant a usufruct to the surviving spouse over all or part of his property. . . . The usufruct shall be for life unless expressly designated for a shorter period.”

\textit{See also} La. Civ. Code art. 1499 cmt. d:
The second legally permissible charge under Article 1496 is "placing of the legitime in trust."\(^{222}\) The charge of a trust imposed on the legitime is not new; it has been permitted since the enactment of the Trust Code. However, the charge or burden of a trust imposed on the legitime does require that certain conditions be met for the protection of the forced heir.\(^ {223}\) Although not mentioned in the Article itself, three other conditions or burdens may be imposed on the legitime or, under prior law, consented to by the forced heir: (1) the "short-term survivorship provision presently authorized by Civil Code Article 1521,"\(^ {224}\) as described in the comment to Article 1496;\(^ {225}\) (2) the assignment by the testator or delegation of the authority to assign specific assets of the estate

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This Article legislatively overrules the case of *Succession of B.J. Chauvin*, 257 So.2d 422 (La. 1972) which held that when the will "merely confirmed" the legal usufruct to a surviving spouse over community property without specifying that it was for life, the usufruct was not a lifetime usufruct. . . . There is a transitional provision that continues this rule for testaments executed prior to the effective date of this Act.

That transitional provision is contained in Section 3 of Act No. 77 enacting La. R.S. 9:2441: "When a testament executed prior to the effective date of this Act leaves a usufruct to the surviving spouse without specifying its duration, the law in effect at the time the testament was executed shall govern the duration of the usufruct."

\(^{222}\) See La. Civ. Code art. 1496 (as amended by 1996 La. Acts No. 77, § 1). See also La. Civ. Code art. 1496 cmt.: "The two most prominent exceptions to the general rule are the usufruct of a surviving spouse, in Civil Code Articles 890 and 1499, and the ability of the testator to place the legitime in trust, in La. R.S. 9:1841 et seq. and La. Constitution, Article XII, Section 5."

\(^{223}\) See La. R.S. 9:1841 (Supp. 1996):

The legitime or any portion thereof may be placed in trust provided:

1. The net income accruing to the forced heir therefrom is payable to him not less than once each year; and

2. The forced heir’s interest is subject to no charges or conditions except as provided in R.S. 9:1843, 1844, 1891 through 1906 and Subpart B of Part III of this Chapter.

3. Except as permitted by R.S. 9:1844, the term of the trust, as it affects the legitime, does not exceed the life of the forced heir; and

4. The principal shall be delivered to the forced heir or his heirs, legatees, or assignees free of trust, upon the termination of the portion of the trust that affects the legitime.

Note that La. R.S. 9:1844 (1991), referred to in R.S. 9:1841 (2) and (3) above, permits the legitime in trust to be burdened with an income interest in favor of the surviving spouse to the same extent and for the same term as a usufruct. See supra text accompanying notes 210-221 about the burden of a usufruct in favor of the surviving spouse.

\(^{224}\) See La. Civ. Code art. 1521(A)(2): “That, with regard to the taking of a disposition by any heir, legatee, or trust beneficiary, including the legitime of a forced heir, a testator may impose as a valid suspensive condition that the donee, heir, legatee, or trust beneficiary must survive the testator for a stipulated period, which period shall not exceed ninety days after the testator’s death, in default of which a third person is called to take the gift, the inheritance, or the legacy; in such a case the right of the donee, heir, legatee, or trust beneficiary is in suspense until the survivorship vel non as required is determined.” (emphasis added).

See also Baten v. Taylor, 386 So. 2d 333 (La. 1979).

\(^{225}\) See La. Civ. Code art. 1496 cmt. (as amended by 1996 La. Acts No. 77, § 1): “Another example of a condition that may be imposed on the legitime is the short-term survivorship provision presently authorized by Civil Code Article 1521.”
"in satisfaction of the forced portion of his children," and (3) the usufruct or annuity donated by the decedent that exceeds the disposable portion with the resulting option of the forced heir to suffer the charge or abandon the disposable portion. The latter charge, the usufruct or annuity that exceeds the disposable portion, was implicitly repealed by Act No. 77. Article 1499 was amended and reenacted to contain provisions relating to the usufruct of the surviving spouse that is confirmed or granted by will of the decedent without reenacting the substance of former Article 1499 in a different provision.

Reminder: This is a provision of Act No. 77 that may not be effective because the Civil Code article was also amended and affected by Act No. 1180. Louisiana Revised Statutes 9:2501(A) states that Act No. 1180 applies to the successions of all persons who die after December 31, 1995.

D. Nature of the Forced Heir's Interest

"[T]he legitime may not be satisfied in whole or in part by a usufruct or an income interest in trust." Article 1502, by so expounding, merely reiterates prior law, particularly the jurisprudence, interpreting the word property that is...
reserved for the forced heir in Article 1495. The Article does, however, clarify that if the forced heir is both income and principal beneficiary of the same interest in trust, "that interest shall be deemed a full ownership interest for purposes of satisfying the legitime if the trust conforms to the provisions of the Louisiana Trust Code governing the legitime in trust." A comment to the Article explains that the result would have been the same even without express provision for that result, citing the parallel concept in the law of usufruct that treats an interest in usufruct and naked ownership as full ownership for purposes of a partition. Despite the fact that Article 1502 merely codified present law about the nature of the forced heir's interest, the Article begins with the word nevertheless. A comment expresses the opinion that the word nevertheless "is intended to make certain that the provisions of this Article modify and limit the provisions of Article 1501." The obvious intention of the comment was to address the implications of Article 1501 that the legitime

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231. La. Civ. Code art. 1493(A) (prior to Act No. 77 of 1996): "Donations inter vivos and 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." (emphasis added).

This Article was interpreted with La. Civ. Code arts. 1499, 1502, and 1710 by the jurisprudence to mean that the forced heir had to receive his interest in property and not "value." Succession of Douet, 395 So. 2d 383 (La. App. 1st Cir. 1981); Succession of Williams, 184 So. 2d 70 (La. App. 4th Cir.), writ refused, 199 So. 2d 183 (1967).

In fact comment (a) to Article 1502 recognizes as much: "This Article is consistent with Succession of Williams, which held that a child's forced portion may not be satisfied by a bequest to him of a usufruct." (citation omitted).


To remove any doubt as to that result the Article expressly states that an income interest and a principal interest combined should be treated as the equivalent of full ownership for legitime purposes, but it virtually goes without saying that would be the case even in the absence of such a provision.


235. "Nevertheless, the legitime may not be satisfied in whole or in part by a usufruct or an income interest in trust." La. Civ. Code art. 1502.


When a forced heir asserts his right to reduce excessive donations, the value of all donations inter vivos made at any time to him or in trust for his benefit, if the trust conforms to the provisions of the Louisiana Trust Code governing the legitime in trust, valued at the time of the gift, shall be credited toward satisfaction of his legitime. This rule does not apply to donations that are declared by the donor to be extra portions, and usual or customary donations, as well as expenses of board, support, or education, even those paid through the age of twenty-three.

In addition, the value of any inheritance or legacy to the forced heir, or for his benefit in a trust that conforms to the provisions of the Louisiana Trust Code governing the legitime in trust, shall be credited toward satisfaction of his legitime even if he renounces all or any part of the inheritance or legacy.

is nothing more than a "value" of the decedent's estate. That implication arises from Article 1501, because the Article directs that the "value" of donations inter vivos, an inheritance, or a legacy "shall be credited toward satisfaction of his [forced heir's] legitime." The comment makes the intention clear that the legitime, despite the implications of Article 1501, is not simply a "value" that can be satisfied by a usufruct or an income interest in trust.

E. Calculation of the Active Mass and Reduction Action

1. Reduction Action; Nature

If a donation inter vivos or mortis causa impinges upon the legitime of a forced heir, it is not null but merely reducible. As an illustration the comment uses the following hypothetical:

Under this Article [Article 1500], if the husband's will leaves all to his wife and there is a forced heir who is entitled to one-fourth, the legacy to the wife is reduced to the disposable portion in full ownership and a usufruct for life, with the power to dispose of nonconsumables, over the forced portion, since that usufruct could have been left to her expressly under Article 1499. This is the maximum extent to which reduction is needed to eliminate the excess that impinges upon the legitime, since the decedent could legally have made such a bequest to his surviving spouse. No further reduction is necessary or appropriate.

Article 1503 states that the donation is reducible "to the extent necessary to eliminate the impingement." The language of this Article is subtly different from that of its predecessor: "[a]ny disposal of property ... 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. The word quantum

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239. La. Civ. Code art. 1503 (as amended by 1996 La. Acts No. 77, § 1): "A donation, inter vivos or mortis causa, that impinges upon the legitime of a forced heir is not null but is merely reducible to the extent necessary to eliminate the impingement."
Compare La. Civ. Code art. 1502 (prior to 1996 La. Acts No. 77) (in relevant part): "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."
240. For a discussion of new Article 1499, see supra text accompanying notes 210-221.
means a fraction, a fraction that represents the disposable portion.\textsuperscript{244} The predecessor Article permitted the disposition to be reduced to the disposable portion, not to be reduced to the extent necessary to eliminate the impingement. Article 1503, by contrast, permits the disposition to be reduced \textit{ONLY} to the extent necessary to eliminate the impingement, making exempt from a reduction action the usufruct of the surviving spouse and the power to dispose of nonconsumables.\textsuperscript{245}

The action of reduction may only be instituted after the death of the donor\textsuperscript{246} which is no change in the law.\textsuperscript{247} Under Article 1504, however, the action to reduce is not limited to the forced heir or his heirs or assigns.\textsuperscript{248} The action may also be instituted by the legatees of a forced heir or “an assignee of any of them [forced heir, \textit{his heir or legatee}] who has an express conventional assignment, made after the death of the decedent, of the right to bring the action.”\textsuperscript{249} The comment acknowledges that the Article changes the law in part by “requiring an "express\textsuperscript{250} conventional" assignment’ for an assignee to be entitled to assert the personal action of the forced heir.”\textsuperscript{252} Personal action in this Article is not synonymous with personal actions under the Code of Civil

\begin{footnotesize}
\textsuperscript{245} This conclusion is supported by the language found in Article 1499 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part):

\begin{quote}
A usufruct over the legitime in favor of the surviving spouse is a permissible burden \textit{that does not impinge} upon the legitime, whether it affects community property or separate property, whether it is for life or a shorter period, whether or not the forced heir is a descendant of the surviving spouse, and whether or not the usufructuary has the power to dispose of nonconsumables.
\end{quote}

(emphasis added).

\textsuperscript{248} La. Civ. Code art. 1504: “On the death of the donor or testator, the reduction of the donation, whether \textit{inter vivos} or \textit{mortis causa}, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it.”
\textsuperscript{250} This term can only mean express as opposed to implied, a distinction that used to be explicitly made in La. Civ. Code art. 1811 (prior to revision effective Jan. 1, 1985):

\begin{quote}
The proposition as well as the assent to a contract may be express or implied: Express when evinced by words, either written or spoken; Implied, when it is manifested by actions, even by silence or by inaction, in cases in which they can from circumstances be supposed to mean, or by legal presumption are directed to be considered as evidence of an assent.
\end{quote}

The current equivalent Civil Code article that does not include the two terms, express and implied, is La. Civ. Code art. 1927 (effective Jan. 1, 1985).
\textsuperscript{251} The term \textit{conventional} obligations is coextensive with \textit{contracts}. See La. Civ. Code, Book III, Title IV, \textit{Conventional Obligations or Contracts}. A conventional assignment is a contractual assignment meaning nothing more than it was created by agreement of the parties and obligations were created, modified, or extinguished. La. Civ. Code art. 1906 (effective Jan. 1, 1985).
\end{footnotesize}
Procedure. Personal, furthermore, is not used in the context of this Article to mean strictly personal under the Civil Code. Nonetheless, in combination with other sentences in the comment it may have been an attempt by the author to suggest that a general creditor without an express conventional assignment may not assert the reduction action via an oblique action. The attempt may

253. La. Code Civ. P. art. 422 (in relevant part): “A personal action is one brought to enforce an obligation against the obligor, personally and independently of the property which he may own, claim, or possess.”

An obligation is strictly personal when its performance can be enforced only by the obligee, or only against the obligor.
When the performance requires the special skill or qualification of the obligor, the obligation is presumed to be strictly personal on the part of the obligor. All obligations to perform personal services are presumed to be strictly personal on the part of the obligor.
When the performance is intended for the benefit of the obligee exclusively, the obligation is strictly personal on the part of that obligee.
That is not true of the reduction action which is transferable between living persons (thus heritable under La. Civ. Code art. 1765) under Article 1504 (as amended by 1996 La. Acts No. 77, § 1) by express conventional assignment made after the death of the decedent and which is heritable because its performance may be enforced by a successor (assignee, heir or legatee) of the forced heir (obligee) under La. Civ. Code art. 1765.

255. “It changes the law in part by requiring an ‘express conventional assignment for an assignee to be entitled to assert the personal action of the forced heir.’” La. Civ. Code art. 1504 cmt. (as amended by 1996 La. Acts No. 77, § 1) (emphasis added). The same comment defined an assignee to include “a creditor as well as a donee or vendee.” (emphasis added).

256. La. Civ. Code art. 2044 (effective Jan. 1, 1985) (in relevant part): “If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is strictly personal to the obligor.” (emphasis added).

La. Civ. Code art. 2044 cmt. b elaborates on what is strictly personal: “Identification of those actions which are ‘strictly personal’ is left to the discretion of the courts, guided by the provisions of the relevant articles of this revision. See revised C.C. Arts. 1765 and 1766 (Rev. 1984), supra; Succession of Henican, 248 So.2d 385 (La. App. 4th Cir. 1971).”

Interestingly, although referring the reader back to La. Civ. Code arts. 1765 and 1766 may be circular, the last few sentences of the comment to Article 1504 (as amended by 1996 La. Acts No. 77, § 1) are elucidating:

There is some possible conflict in the jurisprudence because of the earlier case of Succession of Henican, 248 So.2d 385 (La. App. 4th Cir. 1971), which held that a bank as an unsecured creditor of a forced heir could not compel the forced heir to assert his rights as a forced heir because those rights were strictly personal. A later case, Succession of Hurd, 489 So.2d 1029 (La. App. 1st Cir. 1986), held that because of the supremacy of federal law over state law a trustee in bankruptcy could assert the personal right of the bankrupt to demand collation, which, like the right of the forced heir to assert an action to reduce, is also a personal right. To the extent possible, the Article clarifies that a creditor should not have the right to assert an action to reduce unless the creditor has an express conventional assignment. The rule is consistent with Henican in every context other than a bankruptcy context, and it is hoped, the rule will be held to apply even in that context.

At the time of the Henican case referred to in the comment to La. Civ. Code art. 2044 (effective Jan. 1, 1985) and in the comment to La. Civ. Code art. 1504 (as amended by 1996 La. Acts No. 77, § 1), Article 1991 of the Civil Code of 1870 read as follows:
not be successful, however, without express language to that effect similar to the language that appeared in the predecessor to Article 1504.\textsuperscript{257} Interestingly, the comment does not acknowledge the significant change contained in Article 1504—extending the “personal” action of the forced heir to reduce excessive donations to assignees of his heirs or legatees.\textsuperscript{258} Personal is thus stretched beyond recognition. Moreover, and most importantly, an expansion of the right to institute a reduction action makes less sense now that forced heirship is founded upon providing support for young or incapable descendants.

2. Calculation of the Active Mass

At least Article 1505, providing for “fictitious collation,”\textsuperscript{259} retains its number under Act No. 77, despite two arguably significant changes in present law contained in the first paragraph.\textsuperscript{260} As has always been the law under Article 1505,\textsuperscript{261} the first step in calculating the active mass of the “succession”\textsuperscript{262} is to determine the net estate of the decedent by deducting the debts owed by the decedent from the aggregate of his property.\textsuperscript{263} The first significant change made

\begin{itemize}
\item There are rights of the debtor, however, which the creditor cannot exercise, even should he refuse to avail himself of them. They can not require the separation of property between husband and wife; nor can they oblige their debtor to accept a donation inter vivos made to him, nor can they accept it in his stead. Neither can they call on a coheir of the debtor to collate, when such debtor has not exercised that right.

\begin{itemize}
\item By being explicit, prior law (Article 1991 (1870)) did not require utilizing a category of obligations that for purposes of exercise of the oblique action is not parallel.
\item \textsuperscript{258} La. Civ. Code art. 1504 (prior to 1996 La. Acts No. 77):
\item On the death of the donor or testator, the reduction of the donation, whether inter vivos or mortis causa, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased can require that reduction nor avail themselves of it.
\end{itemize}

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\item \textsuperscript{259} Succession of Fakier, 541 So. 2d 1372 (La. 1988).
\item \textsuperscript{260} La. Civ. Code art. 1505 cmt. a (as amended by 1996 La. Acts No. 77, § 1): “Civil Code Article 1505(A) has been modified slightly to coordinate with La. R.S. 9:2372 as adopted by act 402 of 1995, and to change the date of valuation.”
\item \textsuperscript{261} La. Civ. Code art. 1505(A), (B) (prior to 1996 La. Acts No. 77). In interpreting the two paragraphs together, in combination with La. Civ. Code art. 1504 (prior to 1996 La. Acts No. 77), which denies the creditors of the deceased an action in reduction, the debts are subtracted from the assets of the deceased before the donations inter vivos are added back. See Samuel et al., supra note 227, at 343.
\item \textsuperscript{262} Note that the title to this Article reads, “Calculation of disposable portion on mass of succession.” (emphasis added). Succession as used in the title to this Article is not used to describe the process of transmission of the decedent’s estate as the term is defined in La. Civ. Code art. 871. Instead the term is used to denote estate liberally interpreted in La. Civ. Code art. 872.
\item \textsuperscript{263} La. Civ. Code art. 1505(A), (B) (as amended by 1996 La. Acts No. 77, § 1). Literally, paragraph A suggests that before the debts of the deceased are subtracted the donations inter vivos must be added back to the extant property of the deceased. The more subtle language of La. Civ. Code art. 1504 (as amended by 1996 La. Acts No. 77, § 1) denying the reduction action to creditors
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by Article 1505(A) is that the donations to be added back "fictitiously" to determine the active mass of the decedent's "succession" are limited to those made within three years of the decedent's death, where under old Article 1505 all donations regardless of when made were added back. Restricting fictitious collation to donations *inter vivos* made within three years of the decedent's death represents the culmination of a series of amendments to the Revised Statutes begun in 1981 by applying the restriction to donations made within three years of death to a charitable, educational, or religious organization and a subsequent "attempt" in 1995 to extend the restriction to all donations made by the decedent. "Attempt" is used to describe the last amendment, because Section 2 of the 1995 Act read: "The provisions of this Act shall apply to all donations *inter vivos* made on or after January 1, 1996." The legislature amended and reenacted the same section of the Revised Statutes that had provided charitable organizations with significant protection from the action in reduction by forced heirs. In addition, the contents of the new section were made applicable only to gifts made after January 1, 1996. Thus, the protection afforded to charitable organizations, to whom gifts were made prior to 1996, may have been jeopardized. "Act 402 may have tacitly repealed previous R.S. 9:2372 which provided an exemption to gifts to charitable organizations made more than three years before the donor died, so that curative legislation is truly needed." Practically, the extension of similar protection to all donees may not have been achieved since the amendment only applied to gifts made after January 1, 1996. One view expressed in a comment to Act No. 77 noted: older Louisiana citizens would have made many more donations prior to January 1, 1996.

of the deceased who have no express conventional assignment still supports the interpretation of the two paragraphs (A & B) that the donations *inter vivos* are not added back before the deduction of debts owed by the decedent.

264. La. Civ. Code art. 1505(A) (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): "to that is fictitiously added the property disposed of by donation *inter vivos* within three years of the date of the donor's death."

265. La. Civ. Code art. 1505(A) (prior to 1996 La. Acts No. 77) (in relevant part): "to that is fictitiously added the property disposed of by donation *inter vivos* . . . in the state in which it was at the period of the donation."


Under La. R.S. 9:2372 there is a three year cut off on including gifts in the calculation of the "active mass" to determine the forced portion as well as to be subject to the action to reduce. Section 2 of Act 402 may have been unnecessarily restrictive, in limiting the application of that act to donations made on and after January 1, 1996, and this revision contains a provision to make it more effective. Under Article 1505(A) of this revision whether gifts are of an equal value or not in the same year, if they were given three or more years before the decedent dies, they would not be included under any circumstances.
The second change in the first paragraph of Article 1505 may well be as significant in impact as the first change described above—valuing the donations *inter vivos* as of the date of the donation.\(^2\) Prior to the amendment to Article 1505 by Act No. 77, property donated *inter vivos* that was fictitiously added back to the net estate of the deceased was valued as of the date of death.\(^2\) Valuing the property at the date of death was consistent with the theory that the law reserved to forced heirs a portion of the estate of the deceased as it would have existed at his death had he not disposed of some of his property by donation.\(^2\) The rationale underlying the legislative choice of a different valuation date is not as obvious. For what purpose, since it is clearly not to recreate the decedent’s estate as it would have existed at his death, would the Legislature choose the date of the donation?

The effect of the change in valuation dates is that appreciating assets, i.e. immovable property or certain incorporeal movables, will be included in the calculation at their lower value, the net effect of which is to reduce the total amount of the forced portion. By contrast, depreciating assets, i.e. many corporeal movables, will be added back at their highest value, the net effect of which is to increase the total amount of the forced portion. Where the decedent’s property consists principally of immovable or incorporeal property, the change in valuation date combined with the change of including only donations made within three years

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\(^2\) La. Civ. Code art. 1505(A) (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): “to that is fictitiously added the property disposed of by donation *inter vivos* within three years of the date of the donor’s death, *according to its value at the time of the donation.*” (emphasis added).

See also La. Civ. Code art. 1508 (as amended by 1996 La. Acts No. 77, § 1) that complements Article 1505 by providing “[w]hen the property of the estate is not sufficient to satisfy the forced portion, a forced heir may recover the amount needed to satisfy his legitime from the donees of *inter vivos* donations made within three years of the date of the decedent’s death.”

\(^2\) La. Civ. Code art. 1505(A) (prior to 1996 La. Acts No. 77) (in relevant part): “to that is fictitiously added the property disposed of by donation *inter vivos,* *according to its value at the time of the donor’s decease, in the state in which it was at the period of the donation.*” (emphasis added).

\(^2\) C. Civ. (Fr.) art. 922 provides as did La. Civ. Code art. 1505 (prior to 1996 La. Acts No. 77) that donations are fictitiously added back to the net estate at the value of the property given at the time of the donor’s death. In 1938 the French amended the Code Civil to provide that the day of valuation was the date of the gift, just as La. Civ. Code art. 1505 (as amended by 1996 La. Acts No. 77, § 1). This proved unsatisfactory and the jurisprudence invented a method of proportional reduction that was enacted by legislation in 1971. As of 1971, just as in the Code Napoleon, donations inter vivos in the active mass are valued as of the date of death and impingement is determined at this value.

However, C. Civ. art. 868, al. 1, was amended to provide that if a gift is partially reducible, one determines what is the fraction of the gift that impinges the legitime on the day of death. The reduction is equal to the excessive fraction of the gift, evaluated as of the day of the partition. For example, the de cujus has three children. Existing property at death is worth 40. He donated property to a third party worth 40 on the day of the donation, 80 on the day of death, and 100 on the day of the partition. The active mass is 40 + 80 = 120. (C. Civ. 922) The disposable portion under French law is one fourth, or 30. The excessiveness of the gift is thus (80 - 30)/80 = 5/8. The donee owes 5/8 of 100, or 62.5. Philippe Malaurie, *Cours de Droit Civil, Les Successions, Les Liberalites,* Nos. 667-670 (1989).
of the donor’s death will significantly decrease the value of the forced portion, which was reserved as support for young or incapable children. In such a case, this result is another example of a developing pattern evidencing a hostility to forced heirs who now include only those children whom the law assumes need support.

Article 1505 continues to exclude from the active mass calculation the premiums paid on and proceeds payable from life insurance on the donor’s life and the contributions paid to and benefits payable from governmental or otherwise qualified deferred compensation plans. However, the exclusion of gifts of equal value made to “each forced heir and the root represented by each forced heir” during a calendar year was eliminated, because the redactors concluded that “[t]here is no need for such a provision in light of the adoption of a three year cut off period as provided in La. R.S. 9:2372 as adopted by Act 402 of 1995, and Article 1505(A) of this revision.”

The calculation of the active mass only includes remunerative and onerous donations if the value of the thing given exceeds by one-half the services rendered or charges imposed and then only the difference between the value of the gift and the value of the services rendered and charges imposed may be included. In an effort to provide for two self contained articles, Act No. 77 incorporates the substance of Article 1526 into the two articles on reducing remunerative and onerous donations. The expression of the formula contained


276. La. Civ. Code art. 1502 (prior to 1996 La. Acts No. 77) (in relevant part): Any donation inter vivos, from the donor to his descendants, exceeding the quantum of which a person may legally dispose to the prejudice of forced heirs, is not reducible to that quantum if each such forced heir and the root represented by each forced heir receives the same value of property by donation inter vivos during the calendar year. Such donation inter vivos shall not be included in the calculation of the disposable portion as set forth in Article 1234 nor as set forth in Article 1505.


278. La.Civ. Code art. 1523: “There are three kinds of donations inter vivos: . . . The remunerative donation, or that the object of which is to recompense for services rendered.”

279. La.Civ. Code art. 1523: “There are three kinds of donations inter vivos: . . . The onerous donation, or that which is burdened with charges imposed on the donee.”

280. The comment to both La. Civ. Code arts. 1510 and 1511 (as amended by 1996 La. Acts No. 77, § 1) suggests that the two articles clarify “some ambiguities existing under prior law . . .”

281. For example, the comment to La. Civ. Code art. 1511 (as amended by 1996 La. Acts No. 77, § 1) reads as follows: “This Article reproduces the substance of Article 1514 of the Louisiana
in Article 1526, which was designed for the purpose of determining whether the principal reason the donor acted was to bestow a liberality or to compensate for past services rendered or to receive the advantages of charges imposed, has been changed by inverting the fraction on the other side of the equation.

The value of a remunerative donation is not included in the calculation of the forced portion, and the donation may not be reduced, unless the value of the remunerated services is less than two-thirds the value of the property donated at the time of the donation, in which event the gratuitous portion is included in the calculation and is subject to reduction.

Article 1526 remains in Chapter 5 of Title II of Book III of the Civil Code without change so that two differently worded formulas for determining the principal cause of the donor appear in the Civil Code as mirror images of each other. The result reached by the application of the Articles before and after Act No. 77 is the same. However, by repeating the formula in Chapter 3

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Civil Code (1870). It clarifies the law as to the formula to apply. Its provisions are similar to those of Civil Code Article 1526.

282. "Reason" is used to express "cause" which La. Civ. Code art. 1967 defines as "the reason why a party obligates himself."

283. The comment to La. Civ. Code art. 1510 (as amended by 1996 La. Acts No. 77, § 1) explains: "[I]t simplifies the formula to determine the value to be included in the calculation. Its provisions are similar to those of Civil Code Article 1526."


The value of an onerous donation is not included in the calculation of the forced portion, and the donation may not be reduced, unless the value of the charges is less than two-thirds the value of the property donated at the time of the donation, in which event the gratuitous portion is included in the calculation and is subject to reduction.

285. "In consequence, the rules peculiar to donations inter vivos do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services." La. Civ. Code art. 1526 (emphasis added).


287. The result before Act No. 77 of 1996 follows from interpreting Articles 1526, 1513, and 1514 (prior to 1996 La. Acts No. 77) together.

"In consequence, the rules peculiar to donations inter vivos do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services." La. Civ. Code art. 1526 (1870).

"Remunerative donations can never be reduced below the estimated value of the services rendered." La. Civ. art. 1513 (prior to 1996 La. Acts No. 77).

"Donations, by which charges are imposed on the donee, can never be reduced below the expenses which the donee has incurred to perform them." La. Civ. Code art. 1514 (prior to 1996 La. Acts No. 77).

that appears in Chapter 5, which was to apply for all purposes not simply the action in reduction, the redactors raise the specter of the necessity of repeating the formula in every other article where it may have specific application. Furthermore, the formula is expressed differently in the two chapters. For purposes of consistency and symmetry the formulas should be the same. The redactors have ignored the beauty and simplicity that the seamless whole of a civil code represents and instead have adopted what is becoming all too common in Louisiana, the drafting technique of a common law lawyer who attempts to make a statute contain every principle and every definition that could possibly govern its application.

Reminder: This is a provision of Act No. 77 that may not be entirely effective because Civil Code article 1505(B) was also amended and affected by Act No. 1180. Louisiana Revised Statutes 9:2501(A) states that Act No. 1180 applies to the successions of all persons who die after December 31, 1995.

F. Credits to the Legitime: "Defensive Collation" or "Imputation"

Even though the Louisiana State Law Institute had recommended the repeal of the law of collation it decided to retain the concept of "defensive collation" or "imputation" whenever a forced heir seeks reduction. The doctrine of "defensive collation" or "imputation," long recognized by Louisiana

288. Initially, the section of House Bill No. 55 (what became Act-No. 77) that recommended the repeal of the law of collation presented the problem of whether issues of collation were in the call for the special session. The call for the Special Session listed numerous items, and House Bill No. 55 that included amendments to the law of forced heirship was obviously contemplated by Item No. 121: "To legislate relative to forced heirship; to provide as to forced heirs, to disposable portion, the effect of testaments and otherwise to provide with respect thereto." (emphasis added).

The call for the special session was very specific and narrowly phrased purposefully to exclude from consideration the more comprehensive bill introduced in both the House of Representatives and then the Senate during the 1995 Regular Session of the Legislature on recommendation of the Louisiana State Law Institute that had included the repeal of collation. See S. 1379, 1995 Session. See discussion of some of the provisions of that bill in this symposium at 57 La. L. Rev. 147-99 and the Appendix to this Symposium at 57 La. L. Rev. 201, reproducing the bill.

On January 1, 1996, by virtue of the repeal of La. Civ. Code art. 1236 (1870), restricting collation to forced heirs, collusion had been divorced from forced heirship because the obligation had been extended to all descendants coming to the succession. La. Civ. Code arts. 1228, 1235. If the repeal of collation was not within the call for the special session then its inclusion in House Bill No. 55 threatened the nullity of the entire bill. La. Const. Art. III, § 2. Representative Jim Donelon on the floor of the House of Representatives requested a ruling from the Speaker of the House Hunt Downer about the germaneness of the repeal of collation. Speaker Downer ruled that the repeal of collation was within the call for the special session.

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jurisprudence,290 is now incorporated into the Civil Code by Act No. 77.291 Article 1501 provides that if a forced heir asserts his right to reduce excessive donations, lifetime inter vivos gifts received by him from the decedent with a few notable exceptions will be "credited" to his legitime.292 The "credit" need not be raised by another descendant as would be the case of "actual collation"; it is in the nature of a defense or exception of no cause of action to the forced heir's claim for reduction. The principle underlying the "credit," or defense, is that the forced heir can not complain that he failed to receive his forced portion if he received it or any part of it in advance. Thus, the court would "impute" those gifts made to the forced heir by the decedent when the issue was raised by any donee, descendant or not, as a defense to an action for reduction.293 What developed in doctrine and the jurisprudence recognizing imputation was the importation of rules from the law of collation that recognized some gifts were not intended to be imputed to the forced heir's inheritance—those designated by the parent as extra portions or treated by the law as exempt from collation. Article 1501 represents the statutory incorporation of "defensive collation" or imputation. Both "actual collation" and "defensive collation" purport to constitute a type of credit to the legitime of the forced heir once his share is determined under Article 1505. With the repeal of "actual" collation the possibility existed that "defensive collation" was also repealed, thus, the necessity for incorporating the concept in Article 1501.

Article 1501 of Act No. 77 mandates, although the comment observes, "not inflexibly,"294 that donations inter vivos295 made at any time to the forced heir296 or "in trust for his benefit, if the trust conforms to the provisions of the

290. Succession of Hendrick, 430 So. 2d 734 (La. App. 2d Cir. 1983).
291. La. Civ. Code art. 1501 (as amended by 1996 La. Acts No. 77, § 1). The title to the Article describes its contents as "inter vivos donation to forced heir applied towards legitime, testator may declare otherwise."
293. 3 Aubry & Rau, supra note 289, § 684b, at 234 n.35:
It has been objected in vain that donees or legatees cannot demand collation of donations made to one of the successors, and that this would indirectly require the donee or legatee of a portion in advance of his inheritance, to collate in their favor by obligating him to impute his donation to the reserve. Indeed, this imputation does not constitute a collation. The donee or legatee who claims the imputation does not demand any portion whatever in kind of the things given or bequeathed to the successor, nor any portion of their value; in defending the action for reduction instituted against him, he is limited to an exception of no cause of action based upon the fact that the plaintiff has received his reserved portion in advance and consequently, has nothing to claim.
294. La. Civ. Code art. 1501 cmt. a (as amended by 1996 La Acts No. 77, § 1): "This Article does not apply inflexibly to make all gifts, inheritances or legacies automatically be credited towards the legitime. It only becomes operative when and if the forced heir asserts his rights."
296. One issue immediately to consider is whether forced heir includes the grandchildren who are mentally or physically incapable of caring for their persons or administering their estates who are
Louisiana Trust Code governing the legitime in trust” and “the value of any inheritance or legacy to the forced heir” be credited toward satisfaction of his legitime. “Not inflexibly” means, according to comment (a), that the “credit” only “becomes operative when and if the forced heir asserts his rights.” Clearly, the Article supports that observation since it begins, “[w]hen a forced heir asserts his right to reduce excessive donations.” This feature of the “credit” of Article 1501 distinguishes it from other similar concepts: the “credit” of proceeds of life insurance and benefits from pension and profit sharing plans is “inflexible” or automatic. Under Article 1501, the imputation is under the parent’s control; whereas, under Article 1505 the imputation appears to be automatic.

extended the right to represent their predeceased parent regardless of how old that parent would be at the time of the decedent’s death. La. Civ. Code art. 1493(C) (as amended by 1996 La. Acts No. 77, § 1). Article 1493(C) does not describe these grandchildren as “forced heirs” and their parent who was over the age of twenty-four at the decedent’s death is not a “forced heir.” La. Civ. Code art. 1493(A) (as amended by 1996 La. Acts No. 77, § 1). Consider the impact of La. Civ. Code art. 1493 rev. cmt. e (as amended by 1996 La. Acts No. 77, § 1): “It should be noted that a grandchild of any age who is disabled does not qualify as a forced heir unless the grandchild’s parent predeceases the grandparent.” (emphasis added). See also La. Civ. Code art. 1235 rev. cmt. c (as amended by 1996 La. Acts No. 77, § 1). See also Article 1501 cmnt. h:

If the gift or legacy to the forced heir is in trust, the provisions of the Louisiana Trust Code that mandate certain requirements for the protection of a forced heir, such as the requirement that income be distributed not less than annually, or that a legitime trust terminate upon the beneficiary’s death, unless it is subject to an income interest of a surviving spouse, obviously must apply to the trust or the legacy should not be credited toward satisfaction of the legitime. See La. R.S. 9:1841 et. seq. If the trust is a Louisiana trust, then the Trust Code would automatically make it subject to the provisions of the Trust Code, but if the trust is an out-of-state trust that could not be so amended, then the value of the gift or legacy to the trust should not be credited.

When a forced heir asserts his right to reduce excessive donations, the value of all donations inter vivos made at any time to him or in trust for his benefit, if the trust conforms to the provisions of the Louisiana Trust Code governing the legitime in trust, valued at the time of the gift, shall be credited toward satisfaction of his legitime. . . . In addition, the value of any inheritance or legacy to the forced heir, or for his benefit in a trust that conforms to the provisions of the Louisiana Trust Code governing the legitime in trust, shall be credited toward satisfaction of his legitime even if he renounces all or any part of the inheritance or legacy.


La. Civ. Code art. 1501 (as amended by 1996 La. Acts No. 77, § 1) exempts from the “credit” donations that are declared by the donor to be extra portions, usual or customary donations, as well as certain enumerated expenses. The proceeds of life insurance and the benefits from pensions and profit sharing plans are automatically “credited” to satisfy the forced heir’s legitime, and the insured does not enjoy the option of relieving the forced heir of the “credit” of such sums by his declaration.
Prior to Act No. 77, the legislative “credit” to the legitime of a forced heir that most closely resembles the “credit” of Article 1501 is the use of the proceeds from life insurance and the death benefits from pension and profit sharing plans to satisfy the forced heir’s legitime. In both instances the proceeds and the donations *inter vivos* to be credited are excluded from the active mass calculation upon which the legitime is determined. The result is to reduce the size of the legitime by first excluding those sums from the calculation. Article 1505 is legislative precedent for excluding proceeds payable at death received by the forced heir from the active mass calculation and then satisfying the legitime by the same proceeds. Article 1501 “credits” not only legacies or inheritances received at the death of the decedent and any life insurance proceeds and benefits from pension plans, but also all donations *inter vivos* made by the decedent at any time during the forced heir’s lifetime, even those made more than three years prior to death. So excluding the gifts for the purpose of calculating the forced heir’s legitime, but including the same gifts for purposes of assuming that the heir has already received his legitime in advance, further exacerbates the result for the forced heir.

The comments to Article 1501 explain that the rule for crediting lifetime gifts to the forced heir “implements a rule of fairness that a forced heir cannot claim that his legitime has not been satisfied and at the same time refuse to give credit for significant *inter vivos* gifts that the parent made to him.” This policy, noted later in the same comment, is referred to as the “anti-‘double-dipping’ rule.” The argument that “double-dipping” was the motive for Article 1501 would be more persuasive and convincing if the “credit” applied only to donations *inter vivos* made within three years of decedent’s death. Is it fair to use only donations *inter vivos* made within three years of the decedent’s death to calculate the forced heir’s inheritance rights and ALL donations *inter vivos* received by the forced heir during the decedent’s lifetime to satisfy those more limited inheritance rights?

As a consequence of assuring that a forced heir does not “double-dip” but that the rule is “a rule of fairness,” Article 1501 borrows from the law of collation, which the redactors had intended to repeal, for the purpose of achieving some balance. Just as “imputation” of gifts to the legitime had

302. La. Civ. Code art. 1505(C), (D) (prior to Act No. 77 of 1996).
303. The proceeds of life insurance and the benefits from pension and profit sharing plans under Article 1505(C) and (D) prior to Act No. 77 were excluded from the active mass calculation. The same proceeds and benefits continue to be excluded from the active mass calculation under Article 1505(C) and (D) (as amended by 1996 La. Acts No. 77, § 1), but in addition all donations *inter vivos* made more than three years before the decedent’s death are excluded under Article 1505(A) (as amended by 1996 La. Acts No. 77, § 1). Of course, the inheritances and legacies received by a forced heir are included in the calculation as assets belonging to the deceased from which inheritances and legacies are to be paid. La. Civ. Code art. 1505(A) (prior to 1996 La. Acts No. 77) and La. Civ. Code art. 1505(A) (as amended by 1996 La. Acts No. 77, § 1).
borrowed from the law of collation and, as a consequence is often referred to as "defensive collation," so, too, does the "credit" of Article 1501. The second sentence of the first paragraph of Article 1501 does not require the "crediting" of lifetime gifts to the forced heir if the donor declares them to be extra portions, or if they are usual or customary donations, or if they represent the expenses of board, support, or education, even those paid through the age of twenty-three years. According to the comment, "it would be . . . unfair to require a forced heir to account for every gift that he ever received, regardless of its value or the circumstances of its donation." Such gifts, after all, are rarely intended to be in advance of eventual inheritance rights.

Under Article 1501, if the decedent who makes a lifetime gift to a forced heir declares it "an extra portion," extra in the sense of over and above what the law has reserved for him and thus, not given in advance of what the forced heir one day would receive, the gift is not credited to the forced heir's legitime. The option to exempt life insurance proceeds or the benefits of pension and profit sharing plans does not exist. Although the ability of the donor to exempt a gift from the "credit" of Article 1501 is similar in this respect to collation, it differs from collation because Article 1501 does not prescribe any formal requirements for "the declaration." Declared suggests

306. La. Civ. Code art. 1501 (as amended by 1996 La. Acts No. 77, § 1): “This rule does not apply to donations that are declared by the donor to be extra portions, and usual or customary donations, as well as expenses of board, support, or education, even those paid through the age of twenty-three.”


308. Compare La. Civ. Code art. 1231:

But things given or bequeathed to children or other descendants by their ascendants, shall not be collated, if the donor has formally expressed his will that what he thus gave was an advantage or extra part, unless the value of the object given exceed the disposable portion, in which case the excess is subject to collation.

309. La. Civ. Code art. 1229:

The obligation of collating is founded on the equality which must be naturally observed between children and other lawful descendants . . . 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.


311. La. Civ. Code art. 1232, in relevant part: “The declaration that the gift or legacy is made as an advantage or extra portion may be made in the instrument where such disposition is contained, even afterwards by an act passed before a notary and two witnesses, or in the donor’s last will and testament.”


This Article intentionally does not set forth any formal requirements for the manifestation of the “declaration.” The declaration may be written or oral. It does not have to be in the form of a will; it may be in any form acceptable to the court to establish to the satisfaction of the court that the donor intends that the value of the gift not be applied toward satisfaction of the legitime. The thrust, then, is not form but substance: the donor must signify in a way that is satisfactory to the court that he intends an inter vivos gift to be exempt.
that the exemption of a gift from the "credit" of Article 1501 does require at least an oral or written statement\(^\text{313}\) by the decedent that is unequivocal\(^\text{314}\) and indicative of his intent.\(^\text{315}\) Although a comment to the Article contains an example that is ambiguous,\(^\text{316}\) actions of the decedent should not be sufficient. Furthermore, the declaration to exempt a gift from the "credit" can be made at any time by the donor prior to his death.

If a lifetime gift is usual or customary, the gift is likewise exempt from the "credit" toward his legitime in an effort to avoid "extortionate wrangling over relatively insignificant gifts."\(^\text{317}\) Under the law of collation, "things given by a father, mother or other ascendant, by their own hands, to one of their children for his pleasure or other use" are not subject to collation.\(^\text{318}\) As interpreted in *Succession of Gomez*,\(^\text{319}\) the gifts described are manual gifts of corporeal movables\(^\text{320}\) that are "things usual for parents of this country to give to a child without thought or regard to his having to account for them to his co-heirs."\(^\text{321}\) The court continued by adding, "[t]he word 'pleasure' has special significance in this respect because it best describes the motive that usually prompts the giving of such things."\(^\text{322}\) By contrast, Article 1501 credits "usual or customary" gifts, whether of corporeal or incorporeal property, or of movable or

315. La. Civ. Code art. 1927 (effective Jan. 1, 1985) recognizes that consent can be expressed orally, in writing, or by action or inaction "that under the circumstances is clearly indicative of consent."

The following example illustrates the importance of the predicate [that the forced heir be asserting his right to reduce excessive donations before the "credit" of this Article is triggered]. Suppose that the will leaves Blackacre to Child A and then "leaves the forced portion to my three children A, B and C." It should be apparent in that case that the testator intends the legacy of Blackacre to Child A as an extra portion, and A is not required to credit the value of that legacy toward satisfaction of the legitime. (emphasis added).

The example in the comment surely demonstrates the importance of the predicate as there will be no "credit" under the hypothetical facts of the example because A receives his legitime at the very least and will not be bringing an action to reduce "excessive donations." What is confusing about the comment is the italicized language: should the testator's intent be apparent if he does not "declare" he intends Blackacre to A as an extra portion? Furthermore, to be discussed in the text at infra note 349, the exemption from the "credit" of Article 1501 if the donor declares a donation to be an extra portion applies only to donations *inter vivos* by construction of the three sentences in the paragraph.

319. 223 La. 859, 67 So. 2d 156 (1953).
321. 223 La. at 875, 67 So. 2d at 161.
322. Id. at 875-76, 67 So. 2d at 162. "The language the redactors chose to describe this kind of giving was broad and elastic enough to keep pace of changes in our social development." Id. at 676, 67 So. 2d at 162.
immovable property. By extending the exemption from the “credit” to both incorporeal movable property and immovable property, the redactors abandon the notion that certain gifts based on the type of property given are of such negligible value\(^1\) that the donor would not have intended that such gifts be accounted for at his death by crediting the gifts to the donee’s legitime. Furthermore, “usual or customary” is not necessarily coextensive with the interpretation of “for his pleasure or other use.” The words usual or customary in Civil Code article 2349 require concurrence of the spouses for the donation of community property unless the gift is usual or customary “of a value commensurate with the economic position of the spouses at the time of the donation.”\(^2\) A gift is usual, even if not customary, when the gift is an ordinary one that a parent would give to a child—money for a movie, an allowance. A gift is customary if it is given on an occasion for which it is the custom or tradition to receive gifts, such as a birthday, Christmas, wedding, or anniversary.\(^3\) After admitting that the redactors borrowed the phrase “usual or customary” from matrimonial regimes law, the comment to Article 1501 continues by expressing an intent that the borrowed phrase receive the same interpretation given to Civil Code article 1245 in the law of collation,\(^4\) but, of course comments are not the law.\(^5\) Furthermore, by borrowing only part of the phrase from Civil Code article 2349,\(^6\) the redactors at least accomplish the purpose of adopting an objective, rather than subjective, standard by which to judge gifts. The court should consider whether these gifts are “usual or customary” for any family, rather than “usual or customary” for this particular

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\(^{1}\) La. Civ. Code art. 1501 cmt. b (as amended by 1996 La. Acts No. 77, § 1): “On the other hand, it would be equally unfair to require a forced heir to account for every gift that he ever received, regardless of its value.”


The examples recited in the text that find their source in the Matrimonial Regimes treatise also appear in La. Civ. Code art. 1501 cmt. b (as amended by 1996 La. Acts No. 77, § 1):

He [forced heir] should not be required to account for the silver spoon given to him as a baby, or any other gifts that parents in general regularly give to their children, such as birthday presents, Christmas presents, and the like. To avoid petty disputes in that regard, or extortionate wrangling over relatively insignificant gifts, the Article exempts “usual or customary” donations from the rule requiring that inter vivos gifts be credited toward satisfaction of the legitime.

\(^{4}\) La. Civ. Code art. 1501 cmt. b (as amended by 1996 La. Acts No. 77, § 1): “The phrase ‘usual or customary’ is taken directly from Civil Code Article 2349 regarding donations of community property but in fact is intended to be closer to analogous rules in the area of collation. Civil Code Article 1245 provided an exemption from collation for usual or customary manual gifts.” (emphasis added).


\(^{6}\) La. Civ. Code art. 2349: “The donation of community property to a third person requires the concurrence of the spouses, but a spouse acting alone may make a usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation.” (emphasis added).
The language of exemption for "usual or customary" gifts represents a hybrid resulting from borrowing indiscriminately from matrimonial regimes law to accomplish a purpose more recognizable in the law of collation.

Another exemption from the "credit" required for donations exists for "expenses of board, support, or education, even those paid through the age of twenty-three." Expenses for board, support, or education are not ordinarily considered "donations." During a child's minority, a parent is legally obligated to maintain, support, and educate the child. Even after a child reaches majority, an obligation continues to provide the basic necessities to a needy descendant, but not an education. Although expenses for support or education for a major child may not constitute a donation, such expenses may well fall within the rubric of "advantages." In fact, in Article 1501 the clause containing the enumerated expenses does not modify the noun donations, thus posing the larger question of whether Article 1501 restricts the "credit" to donations only or, by virtue of the exemption for certain expenses, contemplates that "advantages" as well as donations must be credited. The comment to Article 1501 suggests that the redactors were only concerned with eliminating the argument that such expenses, even if not legal obligations, were...

329. La. Civ. Code art. 1501 cmt. b (as amended by 1996 La. Acts No. 77, § 1): The focus of the provision is not what might be customary for this particular family, but what is usual or customary for families in general. If the gift is of the kind that parents customarily make to their children, then the gift should not be credited toward the legitime. If the parent gives the child a Rolls Royce for a birthday present, then a court should conclude that such a gift is not a "usual or customary" donation, but when the birthday gift is relatively modest or more normal one, then the policy of this Article is that the heir does not have to account for it.


333. La. Civ. Code art. 1501 cmt. d (as amended by 1996 La. Acts No. 77, § 1): "This provision clarifies, if not acknowledges, that the payment of educational expenses, even when it is not the result of a legal obligation to do so, does not constitute a gift. It thereby removes any argument that the payment of these kinds of expenses might constitute a donation."

"Advantages" is a term used in the law of collation to incorporate "advantages" that a parent bestows upon a child that are not donations in the strict sense but for which there should be an accounting to a forced heir's siblings. See, e.g., La. Civ. Code arts. 1246, 1248.

334. La. Civ. Code art. 1501 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): "This rule does not apply to donations that are declared by the donor to be extra portions, and usual or customary donations, as well as expenses of board, support, or education, even those paid through the age of twenty-three."
gifts.\textsuperscript{335} Yet, the more serious argument could be that the exemption from "the credit" for such expenses\textsuperscript{336} was intended to exclude certain "advantages" from the scope of the "credit."\textsuperscript{337} Thus, the argument can be made that Article 1501 contemplates that "advantages" as well as donations must be "credited" to a forced heir's legitime. Because the policy of Article 1501 is somewhat different from that of the law of collation,\textsuperscript{338} it is hoped that the "credit" will not be generally extended to "indirect" donations, or "advantages."

Whether expenses for board, support, or education constitute a donation or an advantage received by the forced heir, Article 1501 excludes them from the "credit" to the heir's legitime. More importantly, by contrast to collation, these expenses are not to be credited to the legitime of the forced heir even if the expenses were made after minority through the age of twenty-three. Although there is no legal obligation to educate a child beyond majority,\textsuperscript{339} the comment observes that "most parents continue to pay them [expenses of education] through the child's graduation from college."\textsuperscript{340} The comment expresses the view that, "[t]he policy of the Article is clear: the subvention of educational

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\textsuperscript{336} La. Civ. Code art. 1244: "Neither the expenses of board, support, education and apprenticeship are subject to collation, nor are marriage presents which do not exceed the disposable portion."

"This provision had [sic] a direct counterpart in Civil Code Article 1244, regarding exemptions from collation, but goes beyond that provision and clarifies that the rule applies to such expenses even when they are paid beyond age eighteen and through age twenty-three." La. Civ. Code art. 1501 cmt. d (as amended by 1996 La. Acts No. 77, § 1).

\textsuperscript{337} La. Civ. Code art. 1248:
The advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation. Thus, when a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, for [or] has spent money to improve his son's estate, all that is subject to collation.

See also La. Civ. Code arts. 2444; 2025-2027.

La. Civ. Code art. 1246: "The heir is not bound to collate the profits he has made from contracts made with his ascendant to whom he succeeds unless the contracts, at the time of their being made, gave the heir some indirect advantage."

These two examples appear to be the type of donation described in La. Civ. Code art. 1228 as indirect.


\textsuperscript{338} La. Civ. Code art. 1229 reflects the policy of collation to equalize gifts and advantages among children, and the policy reflected in La. Civ. Code art. 1501 (as amended by 1996 La. Acts No. 77, § 1) is to assure that the forced heir who is seeking reduction has not already received his inheritance from the decedent by lifetime gifts.

\textsuperscript{339} La. Civ. Code art. 230 (1992); La. R.S. 9:315.22(C) (1993). No obligation exists to educate a child after majority unless the child is under the age of nineteen, a full-time student in good standing in a secondary school and dependent on either parent.

expenses is considered to be laudable and should not enter the picture in determining the credit that a forced heir must give. 341

Nonetheless, expenses of board, support, or education after age twenty-three may be "credited" to the legitime of a child who is over the age of twenty-three but is a forced heir because of a mental or physical incapacity. Consider, for example, expenditures on behalf of such a child for the last two years of law school; medical school and training; higher education later in life; and board, support, and education for the mentally incapable child. In fact, by exempting expenses for board, support, and education when the child is below the age of twenty-four, the negative implication is that otherwise they would have been considered donations and "credited" against the child's legitime. Thus, the result is that board, support, or educational expenses paid for a child after age twenty-three will be subject to a "credit," reducing what he receives even though he is "permanently incapable of caring for himself or administering his property." Remember that this incapable child needs as much support as he can receive. Children who are mentally retarded and may have received board, support, and education through the age of forty-five may well be required to "credit" those expenses paid after they reached the age of twenty-four against what they will receive as a legitime for their support. The beneficiary of the "credit" that works to the serious detriment of the decedent's mentally retarded child and, ultimately to society at large, will be in many cases legatees of the decedent. Those legatees could be institutions, unrelated third persons, as well as other family members. Is this good social policy? One explanation for the failure to consider such hypothetical cases is that the Law Institute had recommended that the mentally retarded child twenty-four years of age or older not be a forced heir. 342

If the Article only "credited" donations _inter vivos_ made to, or "advantages" received by, the forced heir, it would be less objectionable; but the Article also "credits" the value "of any inheritance or legacy to the forced heir." 343 Furthermore, the Article "credits" the inheritance or legacy _EVEN IF THE FORCED HEIR RENOUNCES ALL OR ANY PART OF THE INHERITANCE OR LEGACY_. 344 Only one type of legacy will not be "credited" according to the comment 345—a legacy of a usufruct or an income interest in trust. 346 By

342. See supra text accompanying notes 152-157.
344. La. Civ. Code art. 1501 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): In addition, the value of any inheritance or legacy to the forced heir, or for his benefit in a trust that conforms to the provisions of the Louisiana Trust Code governing the legitime in trust, shall be credited toward satisfaction of his legitime even if he renounces all or any part of the inheritance or legacy.
"crediting" inheritances and legacies the "credit" of Article 1501 more closely resembles the treatment of proceeds from life insurance than collation by taking less; legacies are not subject to collation according to the majority of cases.\(^{347}\) Consider the forced heir who receives a particular legacy from the decedent and inherits testate with his siblings who are not forced heirs. If his legacy is not sufficient to satisfy his legitime because the decedent made large \textit{inter vivos} gifts to his siblings within three years of his death, he may assert his right to reduce those excessive donations. However, when the forced heir who is under the age of twenty-four or incapable institutes his reduction action, Article 1501 "credits" his legacy and all donations \textit{inter vivos} made to him during his entire lifetime, with the limited exceptions already discussed. Furthermore, despite a confusing hypothetical situation mentioned in a comment\(^{348}\) the structure of the two paragraphs of Article 1501 arguably precludes the decedent from declaring in a testament his intent that the particular legacy be an extra portion.\(^{349}\)

Inheritances and legacies are "credited" to the satisfaction of a forced heir's legitime not only when the forced heir accepts the "inheritance" or the legacy, but also when the forced heir "renounces all or any part of the inheritance or legacy."\(^{350}\) Presumably, the partial renunciation would result from a partial

\(^{346}\) See, e.g., Succession of Fakier, 541 So. 2d 1372 (La. 1988); Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929).

\(^{347}\) The conclusion that legacies are not subject to collation defies the mention in numerous Civil Code articles of the collation of donations and legacies. \textit{See, e.g.}, \textit{La. Civ. Code} arts. 1228, 1229, 1231, 1233, 1234.


The following example illustrates the importance of the predicate. Suppose that the will leaves Blackacre to Child A and then "leaves the forced portion to my three children A, B and C." It should be apparent in that case that the testator intends the legacy of Blackacre to Child A as an extra portion, and A is not required to credit the value of that legacy toward satisfaction of the legitime.

\(^{349}\) The second sentence of the first paragraph of Article 1501 (as amended by 1996 \textit{La. Acts} No. 77, § 1) begins with "[t]his rule" to which an explicit exception is "donations that are declared by the donor to be extra portions." "This rule" refers to the first sentence in Article 1501 and that sentence enunciates a rule that donations \textit{inter vivos} "shall be credited toward satisfaction of his [forced heir's] legitime." In a separate paragraph that begins, "[i]n addition" to the rules provided for in the first paragraph, the value of any legacy to a forced heir "shall be credited toward satisfaction of his legitime even if he renounces." The statement is categorical without exception.

No provision is made for the exemption for legacies if the testator "declares" his intention that the legacy be an extra portion. Even comment (b) to Article 1501 describes the first paragraph (two sentences) as applying "to lifetime gifts."

Further support for the conclusion is the analogy between the second paragraph of Article 1501 and \textit{La. Civ. Code} art. 2435 concerning deducting legacies from the marital portion. The analogy is mentioned in comment (f) to Article 1501. The deduction of legacies from the marital portion is automatic and the decedent can not declare that the legacy is an extra portion or over and above what the spouse receives as a marital portion.

acceptance as its mirror image, which is explicitly recognized in Article 986.\textsuperscript{351} Suppose the decedent leaves the forced heir who is under twenty-four years of age or is incapable Blackacre Plantation, which it so happens is worth his legitime. The forced heir who knows he either needs support immediately or may need it in the future would rather receive one-quarter of the estate instead of Blackacre. Without the "credit" of the legacy of Blackacre, he could renounce the legacy (elect against the will) and take his one-quarter of the estate as forced heir. The renunciation "credit" prevents him from choosing this alternative. It accomplishes what the parent is permitted to do elsewhere in the Civil Code, that is, to select particular assets to be used in satisfaction of the forced heir's legitime.\textsuperscript{352} The difference is that the "credit" of the renounced legacy under Article 1501 does not require that the parent's intention in this regard be explicit.

The comment to Article 1501 offers an explanation for the renunciation "credit" and confirms the intent of the redactors to accomplish the result described in the hypothetical example above:

The second paragraph of this Article is new, and it clarifies the law. It is needed for theoretical consistency but deals with a \textit{very sophisticated and highly unlikely situation}. Technically, there is a distinction between accepting or renouncing a legacy on the one hand and asserting rights as a forced heir on the other hand. By way of example, if the decedent leaves a legacy to the forced heir worth $50,000.00, whether cash, securities or land, but the legitime of that forced heir is $100,000.00, the forced heir may renounce all or part of the legacy but nonetheless assert his rights as a forced heir. The price of his doing so is that he must credit the value of the inheritance or legacy that he has renounced, but he nonetheless may assert his rights as a forced heir for the balance.\textsuperscript{353}

\begin{footnotesize}
\begin{enumerate}
\item La. Civ. Code art. 986: "He who has the power of accepting the entire succession can divide and accept only a part, but with the same effect as to the debts of the succession as if he had accepted in full.”
\item La. Civ. Code art. 1302. See also La. Civ. Code arts. 1724-33. For a lengthy discussion in this article of those provisions, see infra text accompanying notes 360-361. The author criticizes this power of the parent/testator because of the altered nature of forced heirship.
\end{enumerate}
\end{footnotesize}
One of the comments to Article 1501 states that this second paragraph “is consistent with the rule regarding the marital portion set forth in Article 2435 . . . “ The same comment describes the parallel treatment of legacies attributable to the marital portion: “[L]egacies to a surviving spouse in the decedent spouse’s will, and payments due to the surviving spouse as a result of the decedent’s death, are to be deducted from the marital portion.” The language of Article 2435 is directly parallel to the “credit” of the second paragraph of Article 1501. Furthermore, the language implies that whether the surviving spouse accepts or renounces the legacy is immaterial; the condition of the Article is simply that a legacy is “left by the deceased to the surviving spouse . . . .”

Virtually identical language appeared in the predecessor to Article 2435 and the Louisiana Supreme Court interpreted the language of the predecessor to require the deduction of a legacy to the surviving spouse from the marital portion even if the spouse renounced the legacy. Article 2435 was enacted one year after that decision and a comment to Article 2435 cites the decision approvingly. The comment to Article 1501 likewise cites the same Louisiana Supreme Court opinion.

Another parallel in the Civil Code to the “crediting” of a renounced legacy to the legitime is the ability of the testator to designate property to satisfy a forced heir’s legitime. The testator may expressly assign specific assets of his estate in satisfaction of the forced portion of his children. The child has no

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354. La. Civ. Code art. 1501 cmt. f (as amended by 1996 La. Acts No. 77, § 1). “Louisiana courts have routinely enforced this rule [Article 2435] and have held that legacies left to the survivor by the deceased must be deducted from the marital portion. See Succession of Lichentag, 363 So.2d 706 (1978); Succession of Henry, 287 So.2d 214 (La. App. 3d Cir. 1973); Melacon’s Widow v. His Executor, 6 La. 105 (1833).”


357. Succession of Lichentag, 363 So. 2d 706, 710 (La. 1978). The court opined:

   To include within the meaning of the word “legacy” an acceptance of such legacy would be to disregard the letter of the law as it appears before us. If the redactors of the code had intended that the legacy must be accepted by the surviving spouse before its value was to be included in the marital portion, we believe they would have used express language to that effect.

358. La. Civ. Code art. 2435 cmt. b: “Legacies left to the survivor by the deceased must be deducted from the marital portion. See Succession of Lichentag, 363 So.2d 706 (La. 1978).”

359. La. Civ. Code art. 1501 cmt. f (as amended by 1996 La. Acts No. 77, § 1): “Louisiana courts have routinely enforced this rule and have held that legacies left to the survivor by the deceased must be deducted from the marital portion. See Succession of Lichentag.”

360. La. Civ. Code art. 1302:

   There is no occasion for partition, if the deceased has regulated it between his lawful heirs, or strangers, or if the deceased has expressly delegated the authority to his executor to allocate specific assets to satisfy a legacy expressed in terms of a quantum or value; and in such case the judge must follow the will of the testator or his executor.

   The same thing takes place when the testator has expressly assigned specific assets of his estate, or delegated the authority to assign specific assets of his estate, in satisfaction of the forced portion of his children.
other option but to accept his legitime and the property assigned to satisfy it, or to renounce his legitime. In effect, Article 1302 and the other complementary articles\(^3\) accomplish the same purpose as the second paragraph of Article 1501; but Article 1302, unlike Article 1501, requires that the testator be specific about assigning the property bequeathed in satisfaction of the legitime. Under Article 1501, all the testator need do is bequeath property to his forced heir. Then, the forced heir has no option but to accept the legacy or to be considered as having accepted it.

An even more direct parallel to the “credit” of property inherited by or bequeathed to the forced heir is shown in the Uniform Probate Code: property inherited through testate or intestate succession by a surviving spouse who asserted the right to an elective share was “credited” to the share even if the spouse renounced the legacy.\(^3\) However, in the revision of the Uniform Probate Code in 1993 the provision that directed that inherited property be deducted from the spouse’s elective share, even though renounced by the surviving spouse, was eliminated.\(^3\)

Consider another hypothetical situation that more fully demonstrates the application of Article 1501 to legacies bequeathed to a forced heir. A testament bequeaths the usufruct of all of the testator’s property to X, a bright young twenty-four year old student protégé of the testator. The naked ownership of the testator’s property is bequeathed to his only child, Y, who is forty-eight years old but permanently incapable of caring for his person. The legitime of Y is calculated by valuing the assets of the decedent at death, deducting the debts owed by the decedent, and adding back to the net estate the value of property donated within three years of the decedent’s death at the value that the property had at the time donated. Assume no gifts were made within three years of the decedent’s death. The legitime would be one-fourth of the value of the net estate. The value of the naked ownership will require actuarial computations (deducting the value of the usufruct from the value of the property). The naked ownership, although not very valuable considering the age of the usufructuary, may constitute one-fourth of the value of the decedent’s estate; but, the forced

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363. See Uniform Probate Code § 2-209 (1993). The Official Comment to § 2-209 explains the elimination of the deduction for inheritances or legacies renounced by the surviving spouse:

The provision that the spouse is charged with amounts that would have passed to the spouse but were disclaimed was deleted in 1993. That provision was introduced into the Code in 1975, prior to the addition of the QTIP provisions in the marital deduction of the federal estate tax. At that time, most devises to the surviving spouse were outright devises and did not require actuarial computation. Now, many if not most devises to the surviving spouse are in the form of an income interest that qualifies for the marital deduction under the QTIP provisions, and these devises require actuarial computations that should be avoided whenever possible.
heir is unlikely to receive any sums for his support due to the nature of his interest.

Renunciation of the legacy of the naked ownership to assert his right as forced heir to receive some property of the decedent in full ownership will not benefit Y. Article 1501 “credits” the value of the naked ownership to his legitime and all lifetime gifts he received except those excluded by the express provisions of Article 1501. A forty-five year old child who is incapable of caring for his person may well have received substantial gifts over forty-five years, not to mention expenditures on his behalf after he reached the age of twenty-four that may constitute indirect gifts. If he renounced, he would be in an even worse position than if he had accepted the legacy; because in the latter case at least he has the hope, remote though it may be, that he will ultimately receive something. In effect, this Article would permit the testator in the hypothetical facts to impose the equivalent of a charge or burden on the legitime in contravention of Article 1496 that provides “no charges or conditions may be placed on the legitime.”

Prior to June 18, 1996, the Civil Code provided for the hypothetical above by permitting the forced heir, who received the naked ownership of the entirety of the decedent’s estate, to elect to suffer the usufruct or to receive full ownership of his legitime after abandoning the naked ownership of the disposable portion. The Civil Code article that provided for this election constituted an exception to the more general principle that the testator could not impose conditions or charges upon the legitime of the forced heir. As applied to the previous hypothetical, the Article providing for the election by the forced heir prevented the testator from saddling the legitime with a usufruct or an annuity, but at a price to the forced heir of abandonment of the disposable portion. The content of that Article, as already mentioned elsewhere, was eliminated by amending and reenacting the Article. As an exception to prohibition against the testator’s imposition of charges, old Article 1499 gave the forced heir an

364. La. Civ. Code art. 1502 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): “Nevertheless [despite Article 1501], the legitime may not be satisfied in whole or in part by a usufruct or an income interest in trust.”

365. La. Civ. Code art. 1496 (as amended by 1996 La. Acts No. 77, § 1): “No charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law, such as a usufruct in favor of a surviving spouse or the placing of the legitime in trust.” (emphasis added).


369. See supra text accompanying notes 224-229.

inducement to allow the testator's dispositive plan to remain intact: eventually when X dies the forced heir will have the entire estate, not just the legitime. Without old Article 1499, new Article 1496 now could be interpreted to preclude the charge or usufruct to X over the legitime of Y. The charge in the form of a usufruct to X would be invalid without the necessity of Y having to make a choice between the legitime only and the entire estate subject to the charge or usufruct. Thus, Y could accept the succession and demand a termination of the usufruct of X over Y's legitime as an unauthorized condition. Y could argue that this action to remove a charge or burden on the legitime is not an action to reduce excessive donations provided for in Article 1503 that would trigger the "credit" of Article 1501. Instead, Y can argue that the action is a different one authorized by Article 1496 and Article 1710. The latter article appears in an entirely different chapter and contemplates that the forced heir has received his legitime but merely desires that the burden be removed. Y, who has received the naked ownership of the decedent's property, may in fact be in a better position under Act No. 77 of 1996 than he would have been previously under Article 1499 when he had to choose to relinquish the naked ownership of the disposable portion if he wanted his legitime in full ownership.

Just as the active mass calculation requires that donations inter vivos made within three years of the donor's death be included using the value at the time of the donation, lifetime donations to the forced heir are to be "credited" to the satisfaction of his legitime using the value at the time of the gift. Choosing the date of the gift for valuing a donation for purposes of the "credit" differs from Article 1501 where traditional rules of collation distinguished between immovable property valued at the date of death and movable property valued at the date of the donation. The only policy furthered by the change in valuation dates that this author can discern is that the result of choosing value as of the date of the donation is to treat the donee as absolute owner of the donated property. For example, in a case like Succession of Hendrick, the donated property was movable property that appreciated in value. The forced heir who received appreciating stock under Article 1501

371. La. Civ. Code art. 1710 (in relevant part): "[P]rovided, however, that no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs, nor can they lose their inheritance for any act of ingratitude to the testator, prior to his decease."
375. La. Civ. Code art. 1283:

When movables have been given, the donee is not permitted to collate them in kind; he is bound to collate for them by taking less, according to their appraised value at the time of the donation, if there be any annexed to the donation. In default thereof, recourse may be had to other evidence to establish the value of these movables at the time of the donation.
376. 430 So. 2d 734 (La. App. 2d Cir. 1983).
would be "credited" with the lower value, rather than the higher value as the court had done in the *Hendrick* case. One justification for using the value as of the date of the gift is that it was difficult under prior law for attorneys to speculate about the value of movable property no longer owned by the donee on the date of the decedent’s death. Is it easier to speculate about the value of gifts received by a child over a lifetime, some possibly as long ago as thirty years?

Objections to the "credit" as formulated in Article 1501 rest principally on the new purpose to be served by forced heirship. Even though a decedent has been able to satisfy the legitime by life insurance proceeds or by selecting and assigning property in his testament, those provisions assumed that the vast majority of forced heirs were able-bodied descendants. Should not any provision that affords the decedent such control over what property the forced heir receives be reconsidered in view of the fact that only the most vulnerable Louisiana children are forced heirs? If a forced heir received lifetime gifts

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377. The only explicit exception is that found in La. Civ. Code art. 1496 (as amended by 1996 La. Acts No. 77, § 1) (no charges or conditions on the legitime; can not satisfy legitime with a usufruct or income interest in trust).

378. The argument that the law on the marital portion which is intended to support the surviving spouse permits the decedent to control the property the survivor receives is unpersuasive. La. Civ. Code art. 2435, discussed *supra* text accompanying notes 354-359. The condition for awarding the marital portion is not dependent purely on the assumption of the need for support, but rather dependent upon proof that the deceased died rich only in comparison to the survivor. This condition suggests that rather than simply providing support for the survivor, there are social policies involved which are confined to the relationship of husband and wife. See La. Civ. Code art. 2432; *see also* La Civ. Code art. 2432 cmts. b, c.

Furthermore, the Louisiana Supreme Court’s decision in *Succession of Lichtentag*, 363 So. 706 (La. 1978), which included a renounced legacy in the marital portion can be criticized. In the opinion the interpretation of “left a legacy by the deceased” was literal and need not have been. Consider the enlightening discussion in the opinion about the policy supporting a literal interpretation:

*We are strengthened in our interpretation of the word “legacy” as it appears in article 2382 by the policy of the law that underlies the marital portion doctrine. As stated earlier in this opinion, the marital portion doctrine derives from the mutual marital obligations of fidelity, support and assistance. . . . It is apparent that whatever legacy a deceased spouse leaves the surviving spouse is, whether eventually accepted or renounced, at least a partial compliance with the obligation to provide created by the pre-existing marital relationship. Article 2382, on the other hand, contemplates that the decedent spouse has to some degree left unfulfilled his marital obligation to provide. In the instant case, the terms of the testament indicate that decedent intended to provide some financial support for his surviving wife. Hence, to hold the value of the legacy renounced by Mrs. Lichtentag is not to be included in the marital portion claimed by her would be to disregard the spirit as well as the letter of article 2382.*

*Lichtentag*, 363 So. 2d at 711.

One observation that can be made about the court’s description of the policy of the marital portion is that the testator by bequeathing a legacy may not always intend to provide some financial support. He may intend the opposite. If the purpose of the marital portion as well as the legitime is to provide support, then the testator should not be permitted to control without constraint what property satisfies that purpose. Secondly, a surviving spouse who is poor only by comparison to the decedent may need less protection than young children or those who are incapable of caring for their persons or administering their estates.
from the decedent, he may well have consumed that property. What he is to receive as his legitime involves a calculation that includes only gifts made within three years of the decedent's death. His legitime will be significantly smaller than it used to be with the possibility that what he has received in advance throughout his lifetime and thereafter consumed will be considered as having satisfied his legitime. Yet, at his parent's death, the law by reserving a fraction of the decedent's property intended to provide that the forced heir would receive additional property from the decedent parent, presumably because his need continues. Inheritance is a single-event beneficence, but support represents long term need.

Prior to January 1, 1996, when forced heirship was purely an inheritance concept, it was sensible to say that if the forced heir is owed an inheritance and he has already received it in advance, he should not receive any more property. Furthermore, it was difficult to criticize the latitude the law permitted the decedent to select the property found in his estate used to satisfy the legitime. However, forced heirship is no longer purely an inheritance concept; it is now a mechanism for enforcing the social policy of parental support of vulnerable children. Legislation should assure that forced heirship is an effective mechanism for providing support for vulnerable children and should not carry over from the old law concepts that tend to subvert the mechanism. To do so ultimately subverts the policy reflected in the new forced heirship. On balance, the policy of the new forced heirship is best served by eliminating the "credit" of Article 1501.

G. Actual Collation

Article 1235 was amended by Act No. 77 to read:

The right to demand collation is confined to descendants of the first degree who qualify as forced heirs, and only applies with respect to gifts made within the three years prior to the decedent's death, and valued as of the date of the gift. Any provision of the Civil Code to the contrary is hereby repealed.

The substantive content of the Article concerns (1) who can demand collation, (2) to what does collation apply, and (3) the value to be used. Thus, the

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379. Even though collation may occur in kind or by taking less, this article will only consider collation by taking less, or "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.

Collation in kind consists of delivering up the thing which has been given to be united to the mass of the succession. La. Civ. Code art. 1252. If an immovable was given to the donee and the donee still has possession of it, "he has the choice to make the collation in kind or by taking less, unless the donor has imposed on him the condition of making the collation in kind, in which case it can not be made in any other manner than that prescribed by the donor . . . ." La. Civ. Code art. 1255.
omnibus repealer in the second sentence that repeals provisions of the Civil Code to the contrary can only pertain to those three items. Even though only collation by taking less will be extensively analyzed in this article, remember that the forced heir who received a donation of immovable property has the choice of collating the property in kind or by taking less. Collation in kind concerns how the collation is to be made, not who can demand it, what collation applies to, or the value to be used. As a consequence, Article 1255 that permits the forced heir to collate in kind is not encompassed within the omnibus repealer. The interaction of Article 1235 that requires the forced heir to collate donations valued as of the date of the gift and Article 1255 that permits the forced heir to surrender the property itself may influence significantly the forced heir's choice.

Initially, it is important to emphasize that actual collation is different from the "credit" imposed in Article 1501 which has been referred to as "defensive collation" or "imputation." Actual collation is "the supposed or real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession."

The obligation of collating is founded on the equality which must be naturally observed between children and other lawful descendants, who divided 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.

Who owes the obligation of collation under new Article 1235? All of the articles that precede or follow Article 1235 speak of the obligation to collate, not the "right to demand" collation. The other articles state that the obligation to collate is owed by children or grandchildren "coming to the succession," not just by descendants of the first degree who qualify as forced heirs. In fact, the predecessor to the first paragraph of Article 1235 had used the language "[t]he obligation of collating is confined" to descendants coming to the succession; and then the second paragraph, which was not amended by Act No. 77, continued, "[t]herefore this collation can not be demanded by any other heir, nor even by the legatees or creditors of the succession..." The two

381. La. Civ. Code art. 1255 appears in Section 3. (How Collations are Made) of Chapter 11. (Of Collations) of Title I. (Of Successions) of Book III of the Louisiana Civil Code.
382. See supra discussion in part IV, F.
386. La. Civ. Code arts. 1227, 1228, 1229, 1234, 1237, 1238(A), 1238(B), 1239, 1240.
paragraphs of Article 1235, before the Article was amended by Act No. 77, connected the obligation to collate to the right to demand collation. Amended Article 1235 breaks the connection by the words selected by the redactors. Thus, it is possible to argue that even though only forced heirs of the first degree have the right to demand collation, other descendants coming to the succession owe the obligation to collate. Even the Revised Comment written after the Act passed through the legislative process is not necessarily inconsistent with such a conclusion. Furthermore, retaining the obligation to collate of descendants coming to the succession alleviates some of the unfairness to the young forced heir that may result from decedent’s numerous, large gifts made to his other children who were over twenty-four long before his death.

By contrast to the “credit” of Article 1501 that applies to all forced heirs who seek reduction, the right to demand actual collation is “confined to descendants of the first degree who qualify as forced heirs . . . .” Grandchildren who for purposes of forced heirship represent predeceased descendants of the first degree in the two instances when they are permitted to do so are “stepping into the shoes of the ancestor.” Representation is defined as “a fiction of the law, the effect of which is to put the representative in the place, DEGREE, and rights of the person represented.” Thus, it can be persuasively argued, despite a contrary comment drafted after the Act completed the legislative process, that by virtue of representation the descendant of the second degree

Collation is a presumption of the law that a parent wants to treat all of his children equally, but it is not required, as is forced heirship, and the donor may dispense with it. The rules of collation did not coordinate with the new law on forced heirship by which only children who are “23 years of age or younger” are forced heirs, because, without amendment collation would apply to all children, regardless of age. The amendment of Civil Code Article 1235 avoids the situation where an older child might have no claim as a forced heir but, because of an inadvertent failure of his parent to exempt inter vivos gifts from collation, the older child might nonetheless assert a claim against his siblings, even those who are forced heirs, to equalize the gifts. (emphasis added).

The first language italicized suggests that collation does not apply to all children. However, apply is ambiguous in this context. Does it mean that all children do not have a right to demand collation, or that all children do not owe an obligation to collate? The example that follows in the language italicized next in the comment is clearly correct; the older child has no right to demand collation from the forced heir, but it does not necessarily follow that he has no obligation to collate at the demand of the younger child who is a forced heir.

391. La. Civ. Code art. 1493(B) and (C) (as amended by 1996 La. Acts No. 77, § 1).
393. La. Civ. Code art. 1235 rev. cmt. c (as amended by 1996 La. Acts No. 77, § 1): “Under this article, if a child has attained the age of 25 and is not otherwise disabled, he is not permitted to demand collation; nor is a grandchild permitted to demand it, even if he qualifies as a forced heir.”


Compare La. Civ. Code art. 1493 cmt. c (as amended by 1996 La. Acts No. 77, § 1) prior to the comment’s revision after passage of the Act: “Since the grandchildren ‘stand in the place and
(the grandchild) is elevated to the degree of his ancestor and hence, in the first degree within the meaning of Article 1235.

Unlike the “credit” of Article 1501, the right to demand actual collation of donations is restricted to “gifts” made within three years of the decedent’s death.\(^{394}\) For purposes of collation, “gifts” that appear in the active mass calculation\(^{395}\) and those that are subject to collation are the same.\(^{396}\) Use of “gifts” in the first sentence of Article 1235 is troublesome because of the omnibus repealer clause in the second sentence. Is the collation of “indirect” donations, such as the advantage gained by the purchase of property at a very low price,\(^ {397}\) no longer intended by the use of the word “gifts”? Hopefully not. The purpose of the language “confining” collation was to emphasize that the right to demand collation would not apply to gifts whenever made, only those made within three years of the decedent’s death.\(^ {398}\)

Under new Article 1235, collation of the gift or advantage by taking less must be made by using the value of the donation at the time of the gift,\(^ {399}\) regardless of whether or not the property donated was movable or immovable. Prior to Act No. 77, the law of collation by taking less distinguished between the value to be used if the property was movable and the value to be used if the property was immovable. Movables were collated by taking less in accordance with their value at the time of the gift.\(^ {400}\) By contrast, immovables were

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\(^{394}\) La. Civ. Code art. 1235 rev. cmt. b (as amended by 1996 La. Acts No. 77, § 1): The amendment further simplifies the application of collation by limiting its range: even when the child qualifies as a forced heir, and has a right to demand collation because the inter vivos gifts have not been exempted from collation, his claim is now limited to those gifts that have been made within three years of the decedent’s death, valued at the time of the gift. The new rule thereby eliminates the inclusion of more remote gifts and also makes it easier to determine the value of those that are included.


\(^{398}\) La. Civ. Code art. 1235 rev. cmt. d (as amended by 1996 La. Acts No. 77, § 1): This provision repeals the rule that permitted a child to demand collation with regard to gifts that had been made many years previously, and intentionally adopts rules that are parallel to the new forced heirship rules, which now limit the “fictitious collation” for purposes of calculating the “active mass” to gifts that were made within three years, and which now require that the gifts be valued at the time of the gift.


\(^{400}\) La. Civ. Code art. 1283:

When movables have been given, the donee is not permitted to collate them in kind; he is bound to collate for them by taking less, according to their appraised value at the time of the donation, if there be any annexed to the donation. In default thereof, recourse may be had to other evidence to establish the value of these movables at the time of the donation.
valued in accordance with their value at the date of death. At least as to immovable property, the value for purposes of collation was the same value used for the active mass calculation. For movable property the value used for purposes of collation was different from the value used for the active mass calculation. The explanation is the redactors' assumptions that immovable property appreciates and movable property depreciates, and that the donee of movables became the absolute owner with no option to collate in kind. By using two different values with movable property that the redactors assumed would decrease in value after the gift, the redactors accomplished the purpose of recreating the estate of the deceased as it would have existed had he not disposed of property by gift and then charging the forced heir (collation) with the value of the advantage he received in advance of the decedent's death. In the case of depreciating movable property, the value the forced heir received was the value of its use, represented by the difference between the value at the time of the gift and the value at the date of death. Article 1235 changes the valuation date for immovables if the heir elects to collate by taking less; because, in the words of the revised comments, the change "makes it easier to determine the value of those [gifts] that are included" and "makes the collation and forced heirship rules more consistent with each other, especially as to . . . valuation." Despite the omnibus repealer clause of Article 1235, the clause does not repeal the Civil Code articles on how collations are made, which permit the heir who owes collation to collate an immovable in kind. When the heir collates an immovable in kind, he surrenders the immovable at its current value for the purposes of its division among those with a right to demand collation.

The omnibus repealer clause in Article 1235 purports to repeal any provision of the Civil Code contrary to the first sentence. "Contrary to" in the


When the donee has elected to collate the immovable property given him by taking less on the part which comes to him from the succession, the collation must be made according to the value which the immovable property had at the opening of the succession, a deduction being made for the expenses incurred thereon, in conformity with what has been heretofore prescribed.


403. La. Civ. Code art. 1235 rev. cmt. d (as amended by 1996 La. Acts No. 77, § 1): "The valuation rules for collation purposes were also different from the rules for valuation of gifts for forced heirship purposes: collation previously required that immovables be valued as of the date of death, not the date of gift, but that movables be valued at the date of the gift."


405. La. Civ. Code art. 1252: "The collation is made in kind, when the thing which has been given, is delivered up by the donee to be united to the mass of the succession."

See also La. Civ. Code arts. 1256-1268.

406. Any provision of the Revised Statutes, the Code of Civil Procedure, or other statute that mentions or affects "actual," as distinguished from "fictitious," collation is not repealed or affected.

407. La. Civ. Code art. 1235 (as amended by 1996 La. Acts No. 77, § 1) (in relevant part): "The right to demand collation is confined to descendants of the first degree who qualify as forced
first sentence means "contrary" to the following propositions: (1) the right to demand collation is confined to descendants of the first degree who qualify as forced heirs; (2) the gifts subject to collation include only those made within three years of the decedent's death; and (3) the gifts subject to collation must be valued as of the date of the gift. Clearly, the Civil Code articles dealing with collation by taking less of an immovable that value the immovable at the date of the decedent's death are repealed.408 If the reference in Article 1235 to "gifts" was intended to exclude advantages from collation,409 the three articles that describe such advantages are repealed.410 Likewise, if the obligation as well as the right to demand collation is limited to descendants of the first degree,411 then four other articles that regulate collation when grandchildren and great-grandchildren inherit are repealed.412

The socially desirable policy of seeking to achieve some measure of equality among children413 remains embodied in the Civil Code thanks to the members of the Senate Committee on Judiciary A who voted to delete the repeal of collation contained in the bill that became Act No. 77. As letters to Ann Landers and the excerpts from the book, Beyond the Grave, previously quoted414 indicate, siblings are remarkably conscious of and sensitive to actions of their parents that they perceive to be unfair treatment or demonstrative of favoritism, even after the death of the parent. Some modifications of collation and a reconsideration of the "credit" of Article 1501 would significantly improve Act No. 77.

H. How Reduction Is Accomplished

Donations that impinge upon the legitime are not null, but merely reducible "to the extent necessary to eliminate the impingement."415 The language chosen to express this principle differs from its predecessor that had used references to the disposable portion instead of "impingement."416 Presumably,
the choice of "impingement" was to permit the article creating an action in reduction to be read with the article permitting a testamentary usufruct in favor of the surviving spouse, which describes the usufruct as "a permissible burden that does not impinge upon the legitime." Thus, if the decedent leaves all of his property to the surviving spouse and a forced heir also survives, the legacy to the surviving spouse may be reduced to full ownership of the disposable portion (three quarters of the estate) with a usufruct over the legitime for life and the power to dispose of nonconsumables. "This is the maximum extent to which reduction is needed to eliminate the excess that impinges upon the legitime, since the decedent could legally have made such a bequest to his surviving spouse. No further reduction is necessary or appropriate." Without the language of "impingement," the legacy could have been reduced to the disposable portion in full ownership, and under some jurisprudence a usufruct over the legitime but without the power to dispose of nonconsumables.

Reduction begins with donations mortis causa under Article 1507. The testator is permitted to express a preference in his testament that a legacy is to be paid in preference to others. However, if he does not, the articles amended in Act No. 77 do not provide for how the donations mortis causa are to be reduced. One possibility is to proportionately reduce the donations mortis causa. Another is to reduce the donations in order of preference based upon their characterization as particular legacies, legacies under universal title, or universal legacies. Article 1511 directed that the reduction among legacies was to be pro rata without any distinction between particular and universal dispositions. Thus, under Article 1511 particular legatees had to bear a proportionate share of the reduction; the amount needed to satisfy the forced heir could not be taken entirely from the universal legatee. That Article was repealed by virtue of its amendment and reenactment without providing for its content elsewhere. Interestingly, Article

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1511 was cited as a source of Article 1507, although Article 1507 does not contain the rule of Article 1511. The only remaining article of the Civil Code that does pertain to how legacies are to be paid provides: "Particular legacies must be discharged in preference to all others, even though they exhaust the whole succession, or all that remains after the payment of the debts and the contributions for the legitimate portion, in case there are forced heirs." Act No. 77 has eliminated one of the two different articles addressing the reduction of legacies that exceed the disposable portion. As a consequence, Article 1634 remains to provide that particular legacies are paid in preference to all others; conversely, universal legacies and legacies under universal title are reduced first.

If the estate is not sufficient to satisfy the legitime, a forced heir may reduce donations inter vivos made within three years of the decedent's death, "beginning with the most recent donation and proceeding successively to the most remote." A complementary provision permits the action against the donee "or his successors by gratuitous title in accordance with the order of their donations, beginning with the most recent donation." It is not entirely clear from reading the two provisions together whether direct donees of the decedent must be pursued first in order of their donations before proceeding against the gratuitous transferees. Another possible reading is that gratuitous transferees of donees must be pursued first in the order of their donations and the donation to the donee, beginning with the most recent first. The next sentence of Article 1513 suggests that it is the latter because it treats the donee and his successors as a unit if the donee or successor still owns the donated property:

When the donated property is still owned by the donee or the successors, reduction takes place in kind or by contribution to the payment of the legitime, at the election of the donee or the successors, who are accountable for any diminution in the value of the property attributable to their fault or neglect and for any charges or encumbrances imposed upon the property after the donation.

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425. La. Civ. Code art. 1634 (emphasis added). Note that the comment to Article 1507 (as amended by 1996 La. Acts No. 77, § 1) states that Article 1507 restates the concept of Article 1635, a cross reference which suggests that Article 1634 also affects the reduction of excessive donations.

426. Even among particular legacies the Civil Code directs how they are to be paid:


By use of the word "property" in Article 1513 without an adjective preceding the word, the option of the donee or his successor who still owns the property to surrender it is not limited to immovables. Even though the title to old Article 1513 read "[i]mmovables subject to real rights," the language of the article did not restrict its application to immovable property.\textsuperscript{430} Thus, the donee or his successor who owns naturally depreciating movable property or immovable property may surrender the property without any further responsibility, absent fault or charges imposed on the property, rather than contribute to the payment of the legitime "to the extent of the value of the donated property \textit{at the time the donee received it}.'\textsuperscript{431}

The manner in which the sentences in Article 1513 are constructed allow that only donees or their successors who own the donated property are accountable for its diminution in value, whether they elect to reduce in kind or by contribution to the payment of the legitime. If the donee or his successors no longer own the donated property, they must contribute to the payment of the legitime to the extent of the value of the donated property at the time the donee received it. Presumably, despite the two introductory clauses to the sentences in Article 1513\textsuperscript{432} that distinguish between donees who own and donees who do

\begin{quote}
When the \textit{property} given is owned by the donee or his successors by gratuitous title, reduction takes place in kind or by taking less at the election of the donee or his successors. Property that it brought into the succession through the effect of reduction is brought into it subject to any real rights created by operation of law or by onerous title. In such a case, the donee and his successors by gratuitous title are accountable for the resulting diminution of the value of the property.
\end{quote}

\begin{quote}
When the property given is no longer owned by the donee or his successors by gratuitous title, the donee and the successors must contribute to the payment of the legitime. A donee or his successor who contributes to payment of the legitime is required to do so only to the extent of the value of the donated property at the time the donee received it.
\end{quote}

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"This Article combines the substance of Articles 1516 through 1518 of the Louisiana Civil Code (1870). It changes the law in part by using the date of gift value for purposes of determining the amount of liability of the donee. Under prior law, the date of death valuation is used."
\end{quote}
not own the property, only the donee or his successor who opted to reduce in kind, by surrendering the property, should be accountable for diminution in the value of the property. Such a result is just like that provided by the predecessor to Article 1513. The donee or his successor who contributes to the payment of the legitime to the extent of the value of the donated property at the time the donee received it necessarily accounts for any diminution in value of the property.

The donee or his successor who opt to surrender the property become accountable for any diminution in the value of the property attributable “to their fault” or neglect” and “for any charges or encumbrances imposed upon the property after the donation.” The donee’s accountability for diminution in the value of property due to his “fault or neglect” is new. The language is virtually identical to that of Article 1260 that imposes responsibility on a donee who collates an immovable in kind for deterioration that has diminished the value of the property “when caused by his fault or negligence.” In addition, Articles 576 and 2369.3, which impose responsibility upon usufructuaries and spouses who are co-owners of former community property respectively, contain similar language and concepts. The predecessor to Article 1513 had imposed responsibility upon the donee for a diminution in value as a result of real rights created on the property when he elected to reduce in kind. Article 1513 does not restrict the responsibility of the donee or his successor for diminution in value to the property caused by the creation of real rights, but instead extends the responsibility to charges to do so only to the extent of the value of the donated property at the time the donee received it.

(emphasis added).


Property that it brought into the succession through the effect of reduction is brought into it subject to any real rights created by operation of law or by onerous title. In such a case, the donee and his successors by gratuitous title are accountable for the resulting diminution of the value of the property.

(emphasis added).


436. La. Civ. Code art. 1260: “The donee, who collates in kind the immovable property given to him, is accountable for the deteriorations and damage which have diminished its value, when caused by his fault or negligence.”


438. La. Civ. Code art. 2369.3:

A spouse has a duty to preserve and to manage prudently former community property under his control, including a former community enterprise, in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. He is answerable for any damage caused by his fault, default, or neglect.

See also La. Civ. Code art. 2369 cmt. e.


440. A real right is defined as “a right in the thing that can be held against the world.” La. Civ. Code art. 1763 cmt. b (b) (1985), quoting from 1 A.N. Yiannopoulos, Property 380 (2d ed. 1980).
or encumbrances imposed on the property after the donation, whether or not the charges or encumbrances are real rights and regardless of which donee or his successor created the charge or condition.

Fruits and products of donated property belong to the donee "except for those that accrue after written demand for reduction is made on him."441 Fruits are "things that are produced by or derived from another thing without diminution of its substance"442 and products are "derived from a thing as a result of diminution of its substance..."443 The Article makes the donee, or his successor presumably, the owner of fruits and products until written demand is made on the donee.444 Written demand, "not necessarily a judicial demand,"445 marks the point at which the donee or his successor by gratuitous title is required to restore the fruits to the forced heir, rather than, as under previous law, from the day of the donor's death "if demand for reduction was made within one year of the death of the donor."446 This is another instance of changing the law to the disadvantage of the forced heir. Old Article 1515447 gave the forced heir one year to "get his act together" and make the demand to be entitled to the fruits from the date of death. Under the provisions of Act No. 77 the forced heir will have to make demand on the date of death in order to be entitled to the fruits from the date of death.

V. ANTICIPATED SUCCESSION LAW CHANGES—1997

Other articles published in this symposium concern anticipated changes in succession law to be introduced during the 1997 Regular Session.448 The

444. La. Civ. Code art. 1512 cmt. b (as amended by 1996 La. Acts No. 77, § 1): Under Article 1504 of the Civil Code, the demand for reduction cannot be made until after the donor has died. Therefore, the donee owns, and therefore is clearly entitled to keep all of the fruits and products that accrue before the donor's death as well as those received after death and before demand.
445. La. Civ. Code art. 1512 cmt. b (as amended by 1996 La. Acts No. 77, § 1): "The 'demand' contemplated by this Article is not necessarily a judicial demand, as in an action to reduce excessive donations, but a written demand of any kind."
446. La. Civ. Code art. 1512 cmt. a (as amended by 1996 La. Acts No. 77, § 1): This Article changes the law by providing that the donee is to restore fruits only from the time of demand in all cases. Under Article 1515 of the Louisiana Civil Code (1870), the donee restored fruits from the day of the donor's death if the demand for reduction was made within one year of the death of the donor. Compare La. Civ. Code art. 1515.
447. La. Civ. Code art. 1515: "The donee restores the fruits of what exceeds the disposable portion only from the day of the donor's decease, if the demand of the reduction was made within the year; otherwise from the day of demand."
448. Some of the anticipated changes have been discussed elsewhere. See Cynthia Picou, Around the Bar 20-22 (Baton Rouge Bar Association newsletter, September, 1994) (on file with the Louisiana Law Review).
changes constituting the subject matter of the articles are anticipated because they were contained in Senate Bill No. 1379 introduced during the 1995 Regular Session of the Legislature, upon recommendation of the Louisiana State Law Institute but not acted upon during that session. In any case, this author will not address the proposed revisions except to express the necessity for a careful and deliberate consideration of the content of those revisions. Act No. 77 only contained twenty-three Civil Code articles; yet as the discussion in this article has demonstrated, there were “glitches” and serious policy issues not sufficiently debated and considered. Unlike the articles on forced heirship, there is simply no urgency for enacting new Civil Code articles on seize, acceptance and renunciation, capacity, legacies, payment of debts, forms of testaments and codicils, and revocation of testaments that would prevent their careful study.

However, there is one area of succession law not included within the revisions proposed by Senate Bill No. 1379 of 1995 and directly related to forced heirship—disinherison.\textsuperscript{449} Considering that forced heirship is restricted to young and incapable children for the purpose of providing for their support, grounds for disinherison\textsuperscript{450} should be carefully considered with a view to paring them down significantly. In fact, in 1989 one member of the House Committee on Civil Law and Procedure\textsuperscript{451} asked whether Louisiana law should permit disinherison if forced heirship was nothing more than a substitute for support. Furthermore, Article 1624, which imposes an onerous burden of proof upon the forced heir challenging disinherison, needs serious rethinking.

The legislative committees responsible for hearing bills concerning succession law should hold interim hearings to fully explore the subject and become educated on the important policy choices to be made. The seriousness of succession law to all Louisiana citizens deserves careful and deliberate attention by those responsible for enacting our law. Citizens of the State of Louisiana can not postpone their deaths, absent some new scientific discovery, until a regular session during which faulty statutes can be corrected.

VI. CONCLUSION

The principal purpose of this article has been to explain, to the extent possible, the current state of succession law in Louisiana and to inform the profession about events that occurred at the time of the enactment of the new legislation. Understanding the context in which amendments were offered and the expressed motivations of some of the legislators and the redactors permits a better understanding of the legislation itself. In addition, this author hopes to interest members of the profession in future developments in the area of succession law, for there most assuredly will be continued legislative activity

\textsuperscript{450}. La. Civ. Code art. 1621.
\textsuperscript{451}. Representative Naomi E. White-Warren Farve.
affecting the law of succession. Greater involvement from the profession could prove enormously helpful.

This author has also sought to explain how the institution of forced heirship, even today, accomplishes critically important societal goals. That forced heirship clings heroically to life is of more than symbolic importance. It clings to life supported by humane considerations of caring for those most vulnerable of Louisiana citizens, the young and the incapable offspring of a deceased parent. Despite its tenuous hold on the psyche of Louisiana citizens, it is an institution worth preserving. At a time when opinion elites and both major political parties express concern about the disintegration of the family, forced heirship serves as a reminder of the special relationship between parents and children and the importance of law in binding them together as a way of strengthening the family. The Louisiana law of forced heirship tells a story about our citizens; and as long as the story lasts it depicts a fundamental understanding of human beings and the necessity of aspiring to loftier goals. Human existence begins with the family, and the law must protect the family as an institution from all onslaughts.
(a) Article 1493 is the threshold Article of the forced heirship revision. The first sentence of the Article defines forced heirs and limits them to children, i.e. "descendants of the first degree." The second sentence provides for representation of a predeceased child in a very limited instance to be consistent with the legislative policy expressed in the enabling legislation. The third sentence makes clear that the language "twenty-three years of age or younger" in Article XII, Section 5(B) of the Louisiana Constitution, as amended in October, 1995, means that the child has "not attained the age of twenty-four years." Act 147 of 1990 used the language "attained the age of twenty-three years" to clarify the exact age, but neither the amendment of Article XII, Section 5, nor the implementing legislation uses that language. Instead, both refer to descendants of the first degree "twenty-three years of age or younger." The assumption seems warranted that the Legislature meant that until the descendant of the first degree "attains" the age of twenty-four years he is "twenty-three years of age or younger" and therefore will be a forced heir.

(b) Article XII, Section 5 of the Constitution requires the Legislature to enact legislation making all descendants of the first degree who are "twenty-three years of age or younger" forced heirs. Indisputably, a child who has not yet reached his twenty-third birthday is "twenty-three years of age or younger." Some scholars have raised the question, however, whether, after reaching that birthday, and prior to reaching his twenty-fourth birthday, he is still "twenty-three years of age or younger." Arguably, a child who has reached his twenty-third birthday and is now midway into the year is twenty-three and one-half years of age and therefore not "twenty-three years of age or younger."

Act 147 of 1990 used different language in determining the age at which a child no longer was a forced heir. Act 147 provided that a descendant of the first degree was a forced heir until he had "attained the age of twenty-three years." That language is not used in Article XII, Section 5 of the Constitution, although, ironically, it is used in the second paragraph of Article 1493 of the enabling legislation which provides for grandchildren to represent a predeceased parent who would not have "attained the age of twenty-three years."

In order to avoid a constitutional issue in the very threshold definition of forced heirs, this Article contains the exact language of Article XII, Section 5 of the Constitution itself. The redactors believe, however, that the common sense meaning of "twenty-three years of age or younger" is that the child has not yet attained his twenty-fourth birthday and therefore that, throughout the child's twenty-third year he is still "twenty-three years of age." To assist the courts if this becomes an issue, this Article contains language to that effect in the third
sentence. That statement in the third sentence should not jeopardize the constitutionality of the first and second sentences which, by using the exact same language that the Constitution uses, must of necessity be constitutional.

(c) This Article provides for representation of a predeceased child by his children. Article XII, Section 5 states emphatically that "except as provided in Paragraph B," forced heirship is abolished. Paragraph B nowhere provides for grandchildren to be forced heirs. Nonetheless, representation of a deceased parent is a fiction of the law of long standing and general acceptance, and it is certainly reasonable to accept the distinction that a grandchild who represents a deceased child is not a forced heir in his own right but standing in "the place and degree" of a child who would have been a forced heir if he were still alive. For that reason, Article 1493 clarifies a provision in the enabling legislation which provides that the grandchild may represent his parent only if the parent would not "have attained the age of twenty-three years." If being "twenty-three years of age or younger" is the same as "not having attained the age of twenty-three years," then the enabling legislation is consistent in the same way that the provisions of this Article are consistent, but the redactors believe that they are not consistent. In the redactors' view, Article 1493 of the implementing legislation uses inconsistent ages: to be a forced heir in one's own right one must not have "attained the age of twenty-four years," but for a grandchild to represent a predeceased parent, the parent must not have "attained the age of twenty-three years."

One argument supporting the constitutionality of allowing representation as provided in this Article is the permissive provision in Article XII, Section 5 to the effect that the Legislature "may" provide that descendants of any age are forced heirs if for mental or physical reasons they are either unable to take care of their persons or administer their estates. By biological necessity, if the predeceased parent would be no older than his early twenty's, whether that age is twenty-three or twenty-four years, any grandchild who would represent that parent would of necessity have to be a very young infant, and grandchildren of that age would probably not be able to take care of their persons and, as minors, are legally incapable of administering their estates. However, even though a minor child would lack capacity to administer his estate, that disability is not a physical or mental handicap; it is a legal disability.

Civil Code Article 881 defines representation as "a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented." Since the grandchildren "stand in the place and degree" and have the same rights of the predeceased child who is being represented, it would appear that representation should be constitutionally permissible for grandchildren where the representation is consistent with the age requirement for the predeceased parent himself.

The question whether to make grandchildren forced heirs is a policy decision as well as a legal decision. There has been comment both in reported decisions as well as discussion and debate in the Legislature and the Constitutional Convention, in some instances decrying the remoteness in today's world of
grandchildren from their grandparents. One of the rallying cries of the proponents of the constitutional amendment adopted in October, 1995 was the fact that it would cut off rights of grandchildren to be forced heirs.

It should be noted, however, that a constitutional challenge, when it comes, must come from a relatively narrow pool of potential claimants. The grandchild must have a parent who has predeceased him, and the predeceased parent must have been relatively young, and the grandparent against whose estate the claim is made must have failed to provide adequately for the grandchild. A grandchild whose parent is living would have no standing, nor would a grandchild whose predeceased parent would have been in his mid-twenty’s or beyond. Thus, the practical problem is relatively narrow in scope, but it nonetheless poses a very real constitutional threat theoretically.
(a) Article 1493 is the threshold Article of the forced heirship revision. Paragraph A defines forced heirs and limits them to children, i.e. "descendants of the first degree." Paragraph B provides for representation of a predeceased child in a very limited instance to be consistent with the legislative policy expressed in the enabling legislation. Paragraph C provides for representation of a predeceased child of any age in favor of children of the predeceased child that, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or estates. Paragraph D makes clear that the language "twenty-three years of age or younger" in Article XII, Section 5(B) of the Louisiana Constitution, as amended in October, 1995, means that the child has "not attained the age of twenty-four years." Act 147 of 1990 used the language "attained the age of twenty-three years" to clarify the exact age, but neither the amendment of Article XII, Section 5, nor the implementing legislation uses that language. Instead, both refer to descendants of the first degree "twenty-three years of age or younger." The assumption seems warranted that the Legislature meant that until the descendent of the first degree "attains" the age of twenty-four years he is "twenty-three years of age or younger" and therefore will be a forced heir.

(b) Article XII, Section 5 of the Constitution requires the Legislature to enact legislation making all descendants of the first degree who are "twenty-three years of age or younger" forced heirs. Indisputably, a child who has not yet reached his twenty-third birthday is "twenty-three years of age or younger." Some scholars have raised the question, however, whether, after reaching that birthday, and prior to reaching his twenty-fourth birthday, he is still "twenty-three years of age or younger." Arguably, a child who has reached his twenty-third birthday and is not midway into the year is twenty-three and one-half years of age and therefore not "twenty-three years of age or younger."

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In order to avoid a constitutional issue in the very threshold definition of forced heirs, this Article contains the exact language of Article XII, Section 5 of the Constitution itself. The redactors believe, however, that the common sense meaning of "twenty-three years of age or younger" is that the child has not yet
attained his twenty-fourth birthday and therefore that, throughout the child's twenty-third year he is still "twenty-three years of age." To assist the courts if this becomes an issue, this Article contains language to that effect in the third sentence. That statement in the third sentence should not jeopardize the constitutionality of the first and second sentences which, by using the exact same language that the Constitution uses, must of necessity be constitutional.

(c) Article XII, Section 5, of the Louisiana Constitution, as amended in 1995, requires the Legislature to provide implementing legislation to the effect that all children who are "twenty-three years of age or younger" are forced heirs, but it also permits the Legislature to provide that descendants of any age who, "because of physical incapacity or mental infirmity, are incapable of taking care of their persons or administering their estates" are also forced heirs. Utilizing that authorization, Article 1493(A) makes provision for such disabled children to be forced heirs.

The origin of the double disjunctive "either/or" approach to disability may be found in Act 147 of 1990 and its predecessor, Act 788 of 1989, which provided that descendants of any age who were "subject to interdiction" were forced heirs. The phrase "subject to interdiction" in Act 788 was considered to be unclear, among other reasons, because it did not differentiate between the two different kinds of interdiction, namely, the full interdiction in Civil Code articles 389 and 422, and the limited interdiction in Civil Code article 389.1. A decision was made to change the terminology and employ the terms found in the concept of limited interdiction, rather than the full interdiction. The new language was used in Act 147 of 1990, which provided that a child of any age would qualify as a forced heir if he were either incapable of taking care of his person or incapable of administering his estate, and which further made the disability exception applicable whether the disability was either physical or mental. That identical approach is followed in the amendment to Article XII, Section 5, of the Constitution that was adopted in 1995. The drafters of Act 147 of 1990 contemplated that the guidelines that the courts would use in interpreting and enforcing the disability provisions were the jurisprudence under Civil Code Article 389.1 concerning limited interdiction.

Nevertheless, concern has been expressed regarding a possible lack of precision in the double disjunctive "either/or" approach, and also concerning difficulties involved in taking criteria that may work to determine when appointment of a curator is needed and applying them in a different context, namely inheritance rights. Concern was expressed, too, that the broad scope of the terms might encourage spurious claims for relatively minor disabilities, and also concerning the uncertainty whether a temporary, albeit severe, disability might qualify a child as a forced heir. Article 1493(A) clarifies the law in several respects and should help reduce unwarranted or inappropriate claims. For one thing, the article specifies that the time at which the disability is determined to be relevant is at the donor's death, which was always intended but may not have been fully clear in the earlier legislation. More important, the Legislature added the word "permanently" before the word "incapable" for the express
purpose of emphasizing that a temporary disability, even if severe, should not apply. The Legislature thereby expressly manifested its intent that the rule making disabled children of any age forced heirs should only apply to “seriously handicapped” individuals. The Legislature requested specifically that these Comments be written to explain that it is the purpose of adding the word “permanently” to more effectively express the public policy intended, namely, to protect children who are over the age of 23 as forced heirs if, and only if, they are severely disabled. Although the jurisprudence on limited interdiction may be helpful, the new rule expressed in this Article is intentionally different and more restrictive than the standard for interdiction because of the use of the word “permanently” to describe the nature of the incapacity.

The Legislature also requested that these Comments note that as a factual matter a person can be permanently disabled but on occasion have a temporary remission. It is not intended to be the policy of the Article that a mere temporary remission at the time of the decedent’s death would disqualify an heir from being classified as “permanently” disabled within the new definition of incapacity, provided that the disability is otherwise permanent.

(d) This Article provides for representation of a predeceased child by his children. Article XII, Section 5 states emphatically that “except as provided in Paragraph B,” forced heirship is abolished. Paragraph B nowhere provides for grandchildren to be forced heirs. Nonetheless, representation of a deceased parent is a fiction of the law of long standing and general acceptance, and it is certainly reasonable to accept the distinction that a grandchild who represents a deceased child is not a forced heir in his own right but standing in “the place and degree” of a child who would have been a forced heir if he were still alive.

(e) Paragraph C of this Article is new. It expands the narrow rule regarding the ability of a grandchild to represent a predeceased parent that is set forth in Paragraph B by extending the right of representation to disabled grandchildren of any age. Paragraph B requires that a predeceased parent not have attained the age of twenty-four by the time of the decedent’s death for the grandchild to be able to represent him. Paragraph C, on the other hand, permits representation irrespective of the age of the predeceased parent, if the grandchild is disabled at the time of the death of the decedent. The nature of the disability of the grandchild that is required for him to qualify as a forced heir under Paragraph C is the identical kind of disability that is required for a child to qualify as a forced heir, namely, the grandchild must be severely disabled. See the discussion in Comment (c) above. It should be noted that a grandchild of any age who is disabled does not qualify as a forced heir unless the grandchild’s parent predeceases the grandparent. Representation of a living person is not permitted, and Paragraph C is consistent with that requirement.