The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinherison, and the Unfinished Business of the Stepparent Usufruct

Katherine Shaw Spaht
The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinherison, and the Unfinished Business of the Stepparent Usufruct

Katherine Shaw Spaht

I. INTRODUCTION

As with every other remnant throughout history, forced heirship exists but as a mere shadow of its former self. A noble, distinguished institution that once served as legal recognition of family solidarity and members' contribution to the enterprise of intergenerational prosperity was reduced in 1996 to a proxy for...

Copyright 2000, by LOUISIANA LAW REVIEW.

* Jules F. and Francis L. Landry Professor of Law, LSU Law Center. The author wishes to dedicate this article to her dear close friend and colleague, Professor Cynthia Samuel of Tulane University Law School, who always willingly gives of her time to assist me and to assist the children of the State of Louisiana, and to my beloved parents, Mr. and Mrs. William M. Shaw, who taught me that some causes are worth persistently pursuing.

1. Remnant is a biblical term. The word appears in St. Paul's letter to the Romans 11:5-6: "So, too, at the present time there is a remnant chosen by grace. And if by grace, then it is no longer by works; if it were, grace would no longer be grace." The New International Version (NIV) of the Bible explains as follows: "Remnant. As it was in Elijah's day, so it was in Paul's day. Despite widespread apostasy, a faithful remnant of Jews remained, chosen by grace. The grounds for the existence of the remnant was not their good works but God's grace."

Interestingly, Justice Dennis in Succession of Lauga, 624 So. 2d 1156, 1171 (La. 1993), used the same term to describe the legislation passed in 1989 and 1990 and declared unconstitutional in the Lauga case: "Instead, they [proponents of the legislation's constitutionality] contend that the law does not abolish forced heirship because the legislature saw fit to leave intact a vestigial remnant of the former legal institution" (emphasis added). He summarized the arguments of the appellants as "[i]f there was any restriction on legislative power to alter the system . . . it would have been satisfied by any remnant the legislature deemed appropriate that plausibly could have been called 'forced heirship.'" Id. at 1163 (emphasis added).


2. See Katherine S. Spaht et al., What Has Become of Forced Heirship, 45 La. L. Rev. 575, 591-95 (1984). See also Connell-Thouez, supra note 1 at 17:

Successions law is in many respects a subset, although a very important one, of the larger area of the law of the family. The close historical links between the areas of family law and successions law have had the effect of creating and maintaining a social structure that was and, in some cases, still is based upon the traditional family.

In modern times this type of protection [patrimonial stability to children of a marriage] is extremely important. Present day solutions of parental authority and alimentary pensions are quite inadequate to compensate for emotional and economic upheaval and insecurity when the family unit, be it traditional or alternative, is dissolved. The institutions of successions law offer protection potentially to all children irrespective of the number of marriages of a parent.

Id. at 23. See generally Joseph Dainow, Forced Heirship in French Law, 2 La. L. Rev. 669 (1940); Joseph Dainow, The Early Sources of Forced Heirship: Its History in Texas and Louisiana, 4 La. L. Rev. 42 (1941).
support for the most vulnerable children—those younger than twenty-four or permanently incapable of caring for themselves or administering their property. Nonetheless, the remnant, a reminder of Louisiana’s rich and diverse legal heritage, does remain and continues to serve the state’s citizens, not only by providing support for the vulnerable children who receive their legitime but also by relieving the entire citizenry of that obligation.

This article examines the two categories of vulnerable children in an effort to identify the “core concept” of the new forced heirship. Isolating the “core concept” determines, in effect, the parameters of the Louisiana constitutional provision on forced heirship and serves as an evaluative tool for judging the constitutionality of legislation implementing the concept. This article also critiques recent jurisprudence interpreting the implementing and interrelated legislation, including the Civil Code article that defines one category of forced heir as those descendants who are permanently incapable of caring for their persons or administering their estates. Even though the Civil Code articles governing a testator’s capacity and undue influence were enacted before the implementing legislation, they are intricately related to the dramatic reduction in forced heirship, which previously had protected all children of the decedent regardless of the child’s age or condition.

4. The institution of forced heirship existed in Louisiana for almost two hundred years. See Connell-Thouez, supra note 1 at 11. “Elements of this institution have come to us from Roman law via the Spanish law as well as from the Coutume de Paris and the Code Napoleon. The Louisiana Digest of 1808 and the Civil Codes of 1825 and 1870 provided protection for heirs. Since 1921, the institution has been enshrined in the Louisiana Constitution.” Id. at 6. See also other authorities cited supra, note 2.

5. Kathryn V. Lorio, Forced Heirship: The Citadel Has Fallen—Or Has It? 44 La. B.J. 16, 19 (1996): “[T]he citadel of forced heirship is certainly difficult to recognize for those who remember the majestic fortress in its prime. Although renovation is generally contemplated to preserve and improve a structure, that has hardly been the case with forced heirship in Louisiana.”


“Because the nature and goals of the ‘new forced heirship’ are different from those of the classical institution, this new concept will be applied and interpreted differently.” Connell-Thouez, supra note 1, at 40. “There is little doubt that the ‘new forced heirship’ was conceived as an extension beyond death of the alimentary obligation to needy children and grand-children. . . . [A]lthough it is a good thing to protect children in need, this institution is no longer the classical institution of forced heirship that we have known. It does not provide equal and certain intergenerational economic support to the family. . . . Quite the opposite, it provides alimentary support to individuals on the basis of proven need.” Id. at 39.
8. As has been previously documented, at the time of the enactment of the legislation in 1989 and 1990 eliminating the protection of forced heirship for all children, the proscription against evidence of captation in La. Civ. Code art. 1492 was repealed. In fact the repeal was contained in the same Act. See 1989 La. Acts No. 788; 1990 La. Acts No. 147. The repeal of the proscription recognized that
influence, which involved litigation alleging undue influence by the surviving spouse and second wife of the testator, will be critically examined; the Louisiana Supreme Court granted a writ of certiorari, but the parties settled the case before it was argued.9

With the inadvertent repeal in 1997 of the series of Civil Code articles on disinherison10 and the failure of the Louisiana Legislature to enact new articles in 1999 before their effective repeal on July 1, 1999,11 can a parent still disinherit a forced heir, and if so, for what reasons? The Louisiana constitutional provision concerning forced heirship mentions disinherison;12 thus, understanding the context in which the Constitution mentions disinherison against the background of the "core concept" of forced heirship assists in resolving the issue of what, if any, grounds for disinherison exist after July 1, 1999: none, the old grounds, or any grounds that the proponents of the will can persuade the judge are "just"?13

Increasing recognition of the devastation wrought by divorce14 and the effect without the protection of forced heirship children of the decedent had to be permitted to prove undue influence on the testator, just as children in all other "common law" jurisdictions are permitted to do. See Spaht et al., supra note 4.

The Louisiana Supreme Court in *Succession of Lauga*, 624 So. 2d 1156 (1993), declared the two acts unconstitutional. However, in the meantime on recommendation of the Louisiana State Law Institute a revision of the Civil Code articles on capacity passed. 1991 La. Acts No. 363. The Act included a specific article, La. Civ. Code art. 1479, which attempted to define undue influence and permitted an action to declare a donation *inter vivos* or *mortis causa* null because of such influence; another article in the same chapter provided for the applicable standard of persuasion. La. Civ. Code art. 1483.


The author, with the assistance of Professors Cynthia Samuel of Tulane University Law School and Kathryn Lorio of Loyola University Law School, submitted an amici brief to the court, which is on file with the author (no compensation was received by us; in fact, we paid the filing fee). The brief posits that a spouse can exercise undue influence on the testator based upon the legislative history of the repeal of La. Civ. Code art. 1492 in 1989 and the enactment of La. Civ. Code art. 1479 in 1991. The legislature repealed the proscription of proving undue influence with the surviving spouse who is a stepparent of children of the testator clearly in mind.

10. 1997 La. Acts No. 1421, § 1: "Chapter 6 of Title II of Book III of the Civil Code, formerly comprising Civil Code Arts. 1570 through 1723, are hereby amended and reenacted to comprise Arts. 1570 through 1616. . . ." Within Civil Code arts. 1570 through 1616 as reenacted effective July 1, 1999 (Section 11 of Act No. 1421), there are no articles on disinherison which previously appeared in Articles 1617-1624.

11. See infra notes 105-118 for discussion of legislative history of two bills introduced during the 1999 legislative session.

12. La. Const. art. XII, § 5, (B): "The amount of the forced portion reserved to heirs and the grounds for disinherison shall also be provided by law."

13. See discussion infra notes 127-129.


The soon to be released report by Patrick Fagan entitled *The Effects of Divorce on Children and Society: Why Policy Makers Should End Easy Divorce for Parents of Young Children*, (2000)
of remarriage on children of divorce necessitates a reexamination of the stepparent’s usufruct over the forced heir’s legitime. This article first considers the extant social science literature and that of related disciplines about stepparent-stepchild relationships and then brings that information to bear upon the assumptions the law makes about the use of the income produced from the legitime. The legal assumptions of 1982 when the usufruct over the legitime was extended for the first time to a stepparent to permit a testator to take advantage of changes in federal estate tax advantages may have been reasonable; after all, the vast majority of forced heirs were adult, able-bodied children of the decedent and the legitime constituted legal recognition that property acquired by a parent was in essence “family” property. However, the “core concept” of forced heirship has changed, and the only forced heirs are vulnerable children in need of a readily accessible means of support. Is it reasonable for the law to assume that the stepparent will use the income for the needs of the stepchild? Is it constitutional for the legislature to create, or to permit the testator to create, a usufruct over the legitime, considering the “core concept” of forced heirship? This article explores the unfinished business of the stepparent’s usufruct over the legitime, unfinished because the legislature has not had the opportunity to fully consider its continuation in light of the new “core concept” of forced heirship.

Although the right of a descendant to a forced share can no longer be invoked against a majority of decedents’ estates in Louisiana, the right continues to exist for some children. It continues to exist for very important reasons—principally, for the protection of our most vulnerable children, but also for the benefit of all Louisiana citizens. Understanding the present circumscribed purpose of the legitime fosters an appreciation of the institution and, from a broader perspective, how insuring protection for the most vulnerable citizens on moral grounds also serves the general public’s interest. Why shouldn’t the parent who is morally and legally obligated to care for his needy child throughout his life be restricted in a minimal way from disinheriting that child at death? The parent is no longer in need of his property, and the child should be the primary responsibility of the parent, not the public.

II. THE REMAINING REMNANT

A. Constitutional “Core Concept” of Forced Heirship

The legislature shall provide for the classification of descendants of the first degree, twenty-three years of age or younger as forced heirs. The

observes: “Divorce is hurting American children very badly. Therefore, state officials should repeal domestic laws that provide for easy divorce.”

15. See discussion of literature from the fields of social science, sociobiology, and evolutionary psychology in text at notes infra notes 130-175.
17. See discussion infra notes 193-197.
18. See Spaht, supra note 2, at 591-95.
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. . . . 21

In *Succession of Lauga* 22 the Louisiana Supreme Court evaluated the constitutionality of an act revising the classification of forced heirs; 23 at the time the Louisiana Constitution prohibited legislation abolishing forced heirship. 24 To determine whether the legislation violated the proscription the court focused on the "core principle" of forced heirship, which included the following dimensions: (1) each child has an individual right to an equal share of the forced portion of his parent's estate; (2) each child inherits equally with his siblings the forced portion of his parent's estate; and (3) the state protects against the evil of unjust disinherison of children, "which leads to family disharmony and litigation among siblings and the concentration of family estates in fewer than all the children, to the economic detriment of society and the resulting impoverishment of the disinherited children." 25 The Louisiana Supreme Court held the legislation unconstitutional because it abolished "the legal institution of forced heirship with respect to all of its ends and purposes as effectively as would a simple repeal of all forced heirship laws." 26

Reversing the constitutional proscription, Article XII, § 5 abolished forced heirship, effective January 1, 1996, 27 "except as provided in. . . ." the language quoted above. Therefore, it is evident that the core principle of forced heirship, the remaining remnant, differs markedly from its predecessor. The first sentence endorsed by the people of the State of Louisiana phrased in mandatory terms directs the legislature to provide that descendants of the first degree twenty-three years of age or younger be forced heirs. Forced heirs, as understood historically and at the time the amendment was passed, assures that those descendants so classified will be reserved a portion of their parent's estate at death. The amount


22. 624 So. 2d 1156 (La. 1993).


24. La. Const. art. XII, § 5 (1974): "No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law."

25. Id. at 1158.

26. Id. "In construing a constitutional provision, the courts may consider the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied, in light of the history of the times and the conditions and circumstances under which the provision was framed." Id. at 1160.


of the forced portion may be fixed by the legislature[28] "[s]ubject to and not inconsistent with"[29] the institution’s basic precepts. If, as Justice Dennis opined, "[t]he function of the court, in construing a constitutional provision, is to ascertain and give effect to the intent of the people who adopted it,"[30] what was the intent of the people in 1995 in adopting the directive that descendants under twenty-four years of age be forced heirs? What was "the purpose of the constitutional provision and the interests it furthers and resolves"?[31] The second sentence of the same constitutional provision permits the legislature to classify as forced heirs "descendants of any age [and any degree] who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates." This sentence can assist in identifying the "core principle" of forced heirship and what the people intended.

The core principle of the new forced heirship obviously includes:

1. the effective provision of support for needy incapable children through the mechanism of a fixed share of their deceased parent’s estate, which
2. combats the evil of unjust disinherison of such children,
3. relieves the people collectively of the responsibility of maintaining such children through the use of public funds, and
4. provides certainty as to the amount due the child (a sum certain) which has the effect of reducing litigation and encouraging settlement.[32]

Furthermore, the second sentence permitting, but not mandating, the legislature to classify incapable descendants as forced heirs was probably understood by the people of Louisiana as protecting another category of the most vulnerable of our citizens by exacting a small portion of the parent’s estate for the child’s support. In other words, the people undoubtedly failed to read the small print of the proposition and assumed that vulnerable children most in need would be protected from unjust disinherison; only adult, able-bodied children would no longer be the beneficiaries of a reserved portion of their parent’s estate. These conclusions have consequences.

28. "The amount of the forced portion reserved to heirs... shall also be provided by law...."
La. Const. art. XII, § 5.
30. Id. at 1164.
31. Id. "Because the question is how the constitution was understood by the people adopting it, not merely how it was viewed by the drafters..."
B. Meaning of Permanently Incapable

Despite the Louisiana State Law Institute’s recommendation to the contrary, the legislature chose to include incapable descendants within the classification of forced heirs considering “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.”

The protected descendants must be “permanently” incapable of caring for their persons or administering their estates, language, which absent “permanently,” constitutes the statutory formulation for limited interdiction. As has been discussed elsewhere, the adverb “permanently” in Civil Code article 1493 modifies incapable and refers to the duration, not extent of the incapacity, even though some of the original language of comment (c) drafted after legislative


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.

Id. at 87.


35. La. Civ. Code art. 1493 (A): “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.”

36. Spaht, supra note 33, at 91-94. “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. . . .” Id. at 92 (emphasis added).

37. Concern was expressed, too, that the broad scope of the terms might encourage spurious claims for relatively minor incapacities or infirmities, and also concerning the uncertainty whether a temporary, albeit severe, incapacity or infirmity 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 incapacity or infirmity, even if severe, should not apply.

La. Civ. Code art. 1493, cmt. (c) (emphasis added).

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.

Succession of Martinez, 729 So. 2d 22, 23-24 (La. App. 5th Cir. 1999). “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.” La. Civ. Code art. 1493, cmt. (c) (emphasis added).
passage suggested to the contrary. In 1998 the legislature by resolution directed the Law Institute to change the comment because the comment "incorrectly characterizes permanently incapable children by terms not included within the article as enacted by the legislature, such as 'severely disabled' and 'seriously handicapped' and thereby purports to limit the category of incapable children as defined by the legislature. . . ." Even the yearly edition of the Louisiana Civil Code published by West Publishing Company contained an Editor's Note to the following effect:

The legislature directed the Louisiana State Law Institute to edit the 1996 Revision Comment (c) under Article 1493 by deleting "all references describing incapable children in terms other than those used in that article, to-wit: children who are 'permanently incapable of caring for their persons or administering their estates' and instruct West Publishing Company to reprint the Comment (c), as edited."  

38. See discussion in Spaht, supra note 33 at 91-94. "The paragraph of the Revised Comment that follows the one quoted above [see supra note 37] belies the interpretation of intent of the Legislature in adding the word permanently. . . . 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." Id. at 92-93 (emphasis added).

In the new Editor's Note in the yearly published Civil Code (Special Millennium Edition by West Publishing Co.), there is reference to the comments: "Article 1493 was amended by La. Acts 1996, No. 77, § 1 (1st Extraordinary Session) with revision comments. The original revision comments, however, were modified by the Louisiana State Law Institute after the amendment of Article 1493 and the publication of Act no. [sic] 77 in the Session Laws Service. . . ." 290 (2000).

39. H.C.R. 1 1998 Extraordinary Session:

WHEREAS, the term "permanently" as used in Civil Code Article 1493 relates to duration of the incapacity; and

WHEREAS, the phrase "incapable of caring for his person or administering his property" relates to the extent of his incapacity; and

WHEREAS, the terms "disabled" and "handicapped" are terms not adopted by the legislature and not necessarily coextensive with the standard "incapable of caring for his person or administering his property"; and

WHEREAS, as a consequence, portions of comment (c) to Civil Code Article 1493 are not consistent with the provisions of the article as enacted by the legislature. . . .

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana hereby directs the Louisiana State Law Institute to instruct West Publishing Company to reprint the Revision Comments of 1996 to Civil Code Article 1493 (comment (c)) by deleting all references describing such incapable children in terms other than those used in the article, to wit: children who are "permanently incapable of caring for their persons or administering their estates." (emphasis added).

Nevertheless, in *Succession of Martinez* the Fifth Circuit Court of Appeal, without citing the 1998 Resolution, relied on Comment (c) before it was edited to deny a "permanently" incapable descendant his forced portion of his mother's estate. Just as anticipated by the legislature in the Resolution, the comment was cited as authority to limit the category of incapable children who are forced heirs:

The trial judge found that to be mentally incapable within the meaning of art. 1493, the person must be "severely handicapped." She cited the comments to the article in the third paragraph of Comments (c), relying on that part which states: "... *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.*"

In affirming the decision of the trial judge, the court of appeal also relied upon the language in comment (c) describing incapable forced heirs as only those who are "severely handicapped." As the thirty-three year old child was only mildly handicapped mentally and not "severely" handicapped, he was not a forced heir, "even though he is incapable of taking care of certain aspects of his life without assistance." By the court's own admission, the child "has difficulty with money transactions, banking, and he cannot perform more than one task at a time." His relatives, including the brother with whom the child lived, helped him with all of his banking tasks, keeping appointments, and purchasing groceries and other necessities. Someone, the brother with whom the child lived or a friend in the brother's absence, was required to stay with the child at all times: "Although plaintiff [the child] held a job for a short time some years in the past, he is unemployable." The court after reciting such facts then added, as if relevant, that

---

41. 729 So. 2d 22 (La. App. 5th Cir. 1999).
42. Id. at 23-24
43. Id. at 24:

La. C. C. art. 1493 states that, in order to become a forced heir after the age of 23, the person must be permanently incapable of taking care of their persons or administering their estates. The comments indicate that the intent of the legislature was to provide this remedy only for "severely handicapped" persons. Based on the evidence, plaintiff is considered mildly mentally handicapped, even though he is incapable of taking care of certain aspects of his life without assistance. Consequently, since he is not "severely handicapped," we find that the trial judge did not err in finding that plaintiff is not a forced heir under La. C.C. art. 1493.

(emphasis added).
44. Id.
45. Id.

He receives Social Security disability income and is enrolled in the U.S. Navy's
the "[p]laintiff does not consider himself severely handicapped and is socially active." Regardless of the opinion of the thirty-three year old mentally retarded child, he was clearly incapable of administering his estate and his incapacity was permanent, not temporary; he was a forced heir under Article 1493.

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.

The thirty-three year old child seeking to be recognized as a forced heir, which he most surely was, sought reduction of the legacy made to his father, the divorced husband of the testator, of the entirety of his mother's estate. The legatee whose second marriage to the testator ended in a divorce remained her universal legatee. Thus, despite a demand for a mere one-quarter of the estate of his

---

46. Id.
47. Spaht, supra note 33, at 94.
48. Even the author of the Louisiana Bar Journal notes on recent developments in Trusts, Estate, Probate and Immovable Property Law commented as follows on the Martinez decision: "Certainly Mr. Martinez is no invalid, but can any person who is 'unemployable' because of his mental disability be truly capable of administering his estate? The court's decision seems to indicate that a person is not a forced heir if he can administer his estate with the help of others, though he might not be able to do so on his own." 47 La. B. J. 252 (1999).
49. In her will the testator had provided that should she and the legatee, her husband, perish in the same event or he predeceased her, "that her four 'beloved' children and stepson were to inherit one-third of all of her property." Martinez, 729 So. 2d at 25 (emphasis added). The assumption is that the stepson, child of the legatee, her husband, resulted from a former marriage of the husband. It is, of course, possible that the stepson could have been illegitimate.
50. Id. at 23: "In 1979, Mary Margaret executed a will in favor of Frederick Baldamar Martinez, Jr. (Frederick), her husband and the father of plaintiff. In 1993, Mary Margaret and Frederick were divorced. Mary Margaret died in 1997."

In the opinion the court recognized that under La. Civ. Code art. 1608 (5) (July 1, 1999) the result would be different since there is revocation of a testamentary disposition by operation of law when the testator "is divorced from the legatee after the testament is executed and at the time of his death." Id. at 25.
deceased mother with whom he had lived before her death, the child’s own father refused to share with his son a portion of the estate of his ex-wife who had cared for the child before her death. Instead, the brother of the mentally retarded child who works offshore, and presumably the other relatives of the child’s mother, must continue to care for the child on a daily basis without the economic contribution from the mother’s estate in the form of the legitime.

Fortunately for the child and his family, the defendant is the biological father of the mentally retarded child and at least is obliged to support the child. Had the defendant been a current or former stepparent, no legal obligation of support exists and the injustice suffered by this needy, vulnerable child could be compounded.

The circumstances of the Martinez case illustrate in part the tension point at the intersection of family law and succession law: the human consequences of divorce and the impact on the law of succession. The prior law of forced heirship served to protect all children of divorce from the consequences of the decisions made by their parent or parents. Now, only the most vulnerable of the already vulnerable children of divorce are supposed to be protected; but sometimes even they are not.

C. Interrelationship of Undue Influence to the Remaining Remnant of Forced Heirship

Complementary to the enactment of the first statute redefining forced heirs as descendants in only two categories, the legislature repealed Civil Code article 1492, which prohibited evidence of undue influence. In 1991 the legislature

51. The claim had been urged on behalf of the child by an attorney for the New Orleans Pro Bono Project since the child and the family had insufficient resources to hire a private attorney. Id. at 23.
52. La. Civ. Code art. 229: “Children are bound to maintain their father and mother and other ascendants, who are in need, and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal. This reciprocal obligation is limited to life’s basic necessities of food, clothing, shelter, and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources.” See In re Tutorship of Blanque, 700 So. 2d 1077 (La. App. 5th Cir. 1997) (court held obligation to support disabled child under La. Civ. Code art. 229 not limited to basic necessities where child multi-handicapped and functioned at age equivalent to four years).
53. See authorities cited supra notes 41-50 and a more thorough discussion in text accompanying notes 130-175 infra.
adopted specific legislation permitting annulment of a donation *inter vivos* or *mortis causa* which resulted from undue influence. Clearly, the legislative intent was "to afford some protection to otherwise vulnerable descendants," who had previously been protected from disinherison by the institution of forced heirship. Thus, unlike common law jurisdictions where undue influence had developed first to protect the testator's autonomy and then to protect "family members," the legislature in Louisiana envisioned undue influence as a narrowly targeted protective device. Undue influence constituted the legislature's protective response to the severe curtailment of forced heirship, in other words principally for the sake of *otherwise unprotected descendants.*

The Third Circuit Court of Appeal in *Succession of Reeves* reversed the decision of the trial judge who had found that the heirs of the testator had proved by clear and convincing evidence undue influence by the testator's second spouse. In the opinion Judge Saunders, writing for the majority, opined that reversal of the trial judge's decision was primarily due to "marital status." Judge Saunders expressed the view that "while we are unable to categorically state that the charge of undue influence can never be leveled against a surviving spouse who is the main beneficiary of a testament by her spouse. . . ," the fact that the alleged "wrongdoer" is married to the testator makes the elements of proof "almost totally meaningless. . . ." Rather, undue influence exercised by a spouse of the testator should require proof of "physical abuse, emotional abuse, fraud, deceit, or criminal


58. Spaht et al., * supra* note 4 at 411-12: "In an effort to afford protection to other descendants [other than those designated as forced heirs] from unjust disinherison by a parent, the Act [No. 788 of 1989] also repealed the prohibition against evidence of captation or undue influence. The result of the repeal is to permit such evidence in a will contest."

59. Interestingly enough, at least one common law author has expressed the view that "the impact of undue influence doctrine is to act as a form of forced heirship." Ray D. Madoff, *Unmasking Undue Influence*, 81 Minn. L. Rev. 571 (1997) (arguing that the undue influence doctrine protects children). For an opinion at variance with that of Madoff only because he does not believe that undue influence sufficiently protects children from disinherison and is indirect and inefficient at best, see Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 Real Prop., Probate & Trust J. 405 (1997). Of course, other common law commentators have expressed the same view. See discussion and authorities cited in text accompanying notes 74-104 *infra*.

60. Spaht et al., * supra* note 4 at 453: "Prohibiting evidence of captation to accomplish such desirable social policies was part of a delicately balanced system, which offered concomitant protection by means of forced heirship to those not deserving of disinherison. The institution of forced heirship provided descendants with some protection against total disinherison at the whim of the parent. . . ." See also Spaht et al., * supra* note 2.


62. *Id.* at 260.

63. *Id.* at 258.

64. *Id.* at 259.
KATHERINE SHAW SPAHT

conduct."\textsuperscript{65} The Louisiana Supreme Court granted writs in \textit{Succession of Reeves};\textsuperscript{66} but before the case could be argued, the parties reached a compromise.

The court in \textit{Reeves} erroneously grafts onto the provisions of Civil Code articles 1479\textsuperscript{67} and 1483\textsuperscript{68} additional requirements for proving undue influence whenever the alleged "wrongdoer" is the spouse of the testator; these jurisprudential requirements seriously undermine the purpose of these articles. These two articles, the former that describes undue influence and the latter that imposes a different burden of proof when there exists a confidential relationship between the testator and the "wrongdoer," clearly establish that a spouse of a testator may indeed exercise influence over the testator that is undue. Article 1479 does not exclude a surviving spouse as the person exercising the influence; and Article 1483 specifically refuses to reduce the burden of proving undue influence, which is clear and convincing evidence, if the person accused of undue influence is "related to the donor by affinity."\textsuperscript{69} In fact the comment supports the inclusion of the surviving spouse within the ambit of "wrongdoer": "The Article does not lower the standard of proof where a challenge is made against a confidante who is related to the donor by marriage... because in many instances the most likely persons who would be involved would be a spouse or a child."\textsuperscript{70} Furthermore, to require proof of physical abuse, fraud, deceit, or criminal conduct renders Article 1478, which permits the annulment of a donation for fraud or duress, superfluous.\textsuperscript{71} The distinction between the conduct mentioned in Article 1478, such as fraud or duress, and undue influence is that the latter involves "psychological

---

\textsuperscript{65} Id.

\textsuperscript{66} No. 98-C-0581, 1998 WL 231451 (La. May 1, 1998). The author, with Professors Cynthia Samuel and Kathryn V. Lorio of Tulane University Law School and Loyola University Law School, respectively, submitted without compensation an amici brief in our individual capacities, expressing the same opinion about the meaning of La. Civ. Code arts. 1479 and 1483 as offered in this article. \textit{Id.}

\textsuperscript{67} "A donation \textit{inter vivos} or \textit{mortis causa} shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor." \textit{La. Civ. Code art. 1479.}

\textsuperscript{68} "A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. However, if, at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence." \textit{La. Civ. Code art. 1483.}

\textsuperscript{69} \textit{La. Civ. Code art. 1483.}

\textsuperscript{70} \textit{La. Civ. Code art. 1483, cmt. (c).}

\textsuperscript{71} \textit{La. Civ. Code art. 1478: "A donation \textit{inter vivos} or \textit{mortis causa} shall be declared null upon proof that it is the product of fraud or duress."}

\textit{See also} Laurie Dearman Clark, \textit{Louisiana's New Law on Capacity to Make and Receive Donations: 'Unduly Influenced' by the Common Law?}, 67 Tul. L. Rev. 183, 227 (1992): "Such relations [related by affinity, consanguinity or adoption] do not fall within the ambit of article 1483 because it is both normal and expected that family members will exert some influence over each other. Of course, this does not condone improper conduct by relatives, but in cases of truly egregious conduct, the opponent should be able to establish undue influence, fraud, or duress by clear and convincing evidence, making recognition of a relaxed standard in this context unnecessary."
manipulation. Other provisions of the Civil Code reflect the distinction: undue influence is only a ground for annulment of a donation inter vivos, and fraud and duress constitute grounds for annulment of all contracts.3

Even though the legislative will in Article 1483 is clearly expressed, the majority opinion in Reeves concluded that "where a spouse is the recipient of the testator's bounty, these elements [required to prove undue influence in common law jurisdictions] are almost totally meaningless in determining whether a person might have exerted undue influence." Immediately following this statement, the opinion lists the four traditional elements—susceptibility, opportunity, disposition, and coveted result—and discusses why none apply to a marital relationship. Susceptibility should not apply to spouses because they "should be responsive to the needs, desires and opinions of one another. . . ."74; either spouse should be "susceptible and sensitive to the desires of his or her mate. . . ."75 As to opportunity, the court correctly observed that "people who live together as man and wife see each other daily, discuss all manner of business and personal relationships and have unlimited opportunity to influence one another."76 Yet, from that observation the court concluded that "[i]n the case of a spouse, the existence of an opportunity to influence once again is inherent in the relationship, not contra bonos mores, and is thus not relevant in determining undue influence."77 The element of disposition, the court opined, "requires that the alleged influencer must have a disposition to procure 'an improper favor' for himself or another."78 Then, the court added rather ominously, "[w]e would shake the bedrock of matrimonial law if we were to rule that the disposition of one's property to a spouse, to provide for the surviving spouse after the donor's death is in any way an 'improper favor.'"79 The fourth element, coveted result "begs the question as without the result there would be no inquiry in the first place."80 According to the opinion,

72. Clark, supra note 71, at 221.

Without the more specific Article 1478, the provisions of Title IV of Book III, which includes the vices of consent, would apply to a donation inter vivos because it is a contract and to a donation mortis causa because of La. Civ. Code art. 1917: "The rules of this title are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations."

75. Id.: "In a marital situation, the element of susceptibility is inherent in the relationship and has no bearing on the issue of use of undue influence."
76. Id.
77. Id.
78. Id.
79. Id.
80. Id.
[a] review of these elements suggests that they are meaningful in a case where property is left to a person when the natural object of a testator's bounty is passed over in favor of strangers or persons of much lower claims to consideration. What then would be the proper inquiry as to undue influence on the part of a spouse? Several come to mind: physical abuse, emotional abuse, fraud, deceit, or criminal conduct.  

Obviously, a testator would be susceptible to the influence of his spouse, and she would have the opportunity to exercise influence; however, the influence must be undue, "that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor." If, as the comment to Article 1479 states, "creating resentment toward a natural object of a testator's bounty by false statements. . ." may constitute the kind of influence that is repudiated by this Article, then a second spouse may well be a wrongdoer. The spouse may create resentment toward the testator's children through false statements of a spouse's legal obligations under Civil Code article 98, that is, the obligations of fidelity, support, and assistance. "Susceptibility" to influence, as Judith Wallerstein explains in her report on her twenty-five year study of children of divorce, can exist in a second marriage when it would not exist to the same degree in a first marriage. The law does not preclude, it in fact permits, evidence of a testator's susceptibility to influence that exceeds mere sensitivity to the other spouse's desires. "Sensitivity" and "susceptibility" are not equivalents. After all, undue influence requires that proof be made by clear and convincing evidence that the wrongdoer has substituted her volition for that of the testator, and mere sensitivity to the desires of a spouse does not mean that the spouse may substitute her will for that of the "sensitive" testator.

Is the court in Reeves correct that the third element, disposition to procure an "improper" advantage, is meaningless when applied to a testator's spouse? Essentially the question posed is, can a second spouse ever be disposed to obtain an "improper" advantage for herself (or others)? A related inquiry in common law jurisdictions requires identifying who are the "natural objects of the testator's bounty." In most common law jurisdictions the "natural object of the testator's

81. Id. at 259.
83. Stepmothers, especially if they had children of their own, were often frank to say that if they resented the children of the husband's first marriage and saw them as intruders. While some second wives grew to love the father's children, many did not. As one woman said, "I wanted the man. Not the kids." These attitudes were powerful influences. Understandably, the father was eager for the new marriage to succeed and gave it priority. Fathers who sent their stepchildren to college did not always provide financial support for their own.


The Civil Code articles on successions recognize as much by providing a forced heir the right to request security from the usufructuary who is not the parent of the forced heir. La. Civ. Code art. 1514.
bounty” includes both the children and the spouse. As against a more remote relation or a stranger, the classification of “natural object of the testator’s bounty” clearly includes both. If the testator dies with both children and a spouse and one benefits to the exclusion or detriment of the other, who is the “natural object of the testator’s bounty” becomes more complicated. Nonetheless, even in common law jurisdictions, “[t]here exists a separate class of cases where a male testator is determined more prone to undue influence by a female: when he chooses to leave the bulk of his estate to his second wife and excludes his children from his first marriage.”

In these common law jurisdictions courts recognize that the spousal relationship is not “confidential” for purposes of undue influence, thus making proof of such influence more difficult, with one exception: “in the context of second wives.”

The burden of proving undue influence of the second wife is relaxed if the decedent has disinherited his children of the first marriage; thus, undue influence of a second wife is easier to prove, a position that not even the Louisiana Civil Code adopts.

Described as “a disposition to procure ‘an improper favor’ for himself or another,” can a second spouse who wants to procure a legacy to the prejudice of the testator’s children be considered as desiring “an improper favor”? The

84. Veena K. Murthy, Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?, 4 Cardozo Women’s L. J. 105, 123 (1997). In footnote 105, authority for this statement, the author states:

These cases raise a separate inquiry from those where a male testator disinherits his family in favor of a nonrelative, and are not conducive to a similar statistical comparison. The socially sanctioned marriage with the second wife deems her to be part of the testator’s family, thus one set of traditional beneficiaries must inevitably lose to another. Therefore, the determination of undue influence in these cases often depends upon a variety of factors including, but not limited to: the age discrepancy between the testator and his second wife, the relative durations of the first and second marriages, whether the second marriage yielded children, the ages of the children involved, whether any provisions were made for the first wife and children.

Then the author cites cases in her own article in footnotes 109-28 and Ray D. Madoff, Unmasking Undue Influence, 81 Minn. L. Rev. 571, 585-86 nn. 67-68 (1997) which also collect cases.

In the analogous situation of a testator who dies with only children and some of them receive a larger testate share than others, the jurisprudence of other states considers the disposition unnatural although all are “natural objects of a testator’s bounty.” J. Dukeminier & S. Johanson, Wills, Trusts, and Estates 169 (3d ed. 1984).

85. Murthy, supra note 84, at 124. The author then quotes from Madoff, supra note 84, at 602:

Many courts take the position that as a matter of law, there is no such thing as a confidential relationship between a husband and a wife. For those states that do recognize the possibility of a confidential relationship between a husband and a wife, the application of the rule is generally limited to second marriages where children from the first marriage are disinherited. Moreover, in the spousal situation, greater proof of undue influence is required because of courts’ determination that a person “naturally” has influence over his or her spouse.

86. La. Civ. Code art. 1483. In relaxing the burden of persuasion of undue influence from clear and convincing to a mere preponderance of the evidence if a confidential relationship exists between the decedent and the wrongdoer, Article 1483 exempts spouses and makes no distinction between first and second spouses.

legislative history of undue influence in Louisiana, which demonstrates an inextricable link to the repeal of forced heirship protection for most descendants, confirms that such a disposition could be “an improper favor.” The law of intestate succession supports such a conclusion. The intestate succession law, which is supposed to reflect the presumed intent of the deceased as to the devolution of his property at death,\textsuperscript{88} provides that all descendants inherit all of the deceased’s property, both community and separate.\textsuperscript{89} It is accurate then to state that children, according to the law, have a higher claim to consideration by the deceased than a spouse\textsuperscript{90} and that a disposition to his spouse other than a usufruct,\textsuperscript{91} in preference to his children can be considered an “improper” favor.

As part of the legislative history, the political circumstances of the repeal of expansive forced heirship\textsuperscript{92} also reflect that undue influence as a protection for former forced heirs was designed to protect them not just from strangers but also from a second spouse. The natural resentment that may exist between a second spouse, especially a stepmother,\textsuperscript{93} and the children of a former marriage,
particularly a marriage terminated by divorce, has been well documented.\textsuperscript{94} Research shows stepchildren need protection from undue influence of a stepparent, who as a general proposition, has no natural affection for the stepchild.\textsuperscript{95} Even common law treatise writers on the subject of undue influence recognize that there is likely to be a will contest alleging undue influence in "the 'divided family'" situation in which there is a second spouse and children of a former marriage\textsuperscript{96} and, as earlier noted, describe a harsh position taken by some common law courts toward a second spouse if the testator has disinherited his children of a former marriage.\textsuperscript{97}

Finally, the trial court in Reeves concluded that the second wife's "desire to be included in the will, coupled with her ever-present ability to withhold intimacy, constituted a force strong enough to substitute her volition for his."\textsuperscript{98} Yet the court of appeal opined that "[o]n public policy grounds we decline to find these grounds adequate for reversing the stated will of the testator."\textsuperscript{99} Apparently, the public policy grounds consisted of the court's refusal to establish "ground rules for the granting or withholding of intimacy"\textsuperscript{100} which according to the court, is best left to the married couple rather than the civil courts. Civil courts consider on a regular basis whether a spouse has complied with the positive obligation of fidelity, the obligation to share one's sexual potential with one's spouse.\textsuperscript{101} The issue of unjustified refusal of sexual intercourse historically arose in connection with the

\begin{quote}
especially if they had children of their own, were often frank to say that they resented the children of the husband's first marriage and saw them as intruders. While some second wives grew to love the father's children, many did not. As one woman said, "I wanted the man. Not the kids." These attitudes were powerful influences. Understandably, the father was eager for the new marriage to succeed and gave it priority. Fathers who sent their stepchildren to college did not always provide financial support for their own.
\end{quote}

Wallerstein & Lewis, supra note 83 (emphasis added). See also discussion in text accompanying notes 130-175 infra.

\textsuperscript{94} See Wallerstein & Lewis, supra note 83 and further discussion in text accompanying notes 130-175 infra.

\textsuperscript{95} See discussion in text accompanying notes 130-175 infra.

\textsuperscript{96} Spahat et al., supra note 56 at 473 n.260 (quoting J. Dukeminier & S. Johanson, Wills, Trusts, and Estates 169 (3d ed. 1984)). See also Ronald Chester, supra note 59, at 410-11: Increasingly, disinheritance involves families reconstituted after divorce and remarriage. Before divorce and remarriage became as common as they are today, testators and legislators undoubtedly believed that a will or statute protecting surviving spouses would also serve to protect the children of a single marriage because the survivor of this marriage would necessarily have the children at heart... Today it is hardly surprising that the precipitating causes of one-third of will contests are divorce and remarriage. Most of these contests are brought by children and stepchildren.

\textsuperscript{97} See supra text accompanying notes 84-86.

\textsuperscript{98} Succession of Reeves, 704 So. 2d 252 (La. App. 3d Cir. 1997), writs granted, No. 1998 WL231451 (La. May 1, 1998)

\textsuperscript{99} Id.

\textsuperscript{100} Id.

Now the issue arises when a claimant seeks spousal support after divorce. Civil courts continue to examine whether the withholding of intimacy is a breach of a spouse's legal obligation of fidelity; the matter is not "reserved to the good judgment of the members of the marriage unit..." Public policy is implicated in the decision of Succession of Reeves, but not for the reason stated in the majority opinion. To immunize a spouse, or anyone else, from an accusation of undue influence permits the possibility of "legalized theft," which was the societal problem specifically addressed by the legislation on undue influence.

III. WHAT OF DISINHERISON?

A. Legislative History of the Repeal of Disinherison

In Act No. 1421 of 1997, which contained the Louisiana State Law Institute's comprehensive revision of the law of successions, the Civil Code articles on disinherison were inadvertently repealed. Discovery of the repeal in January, 1999, prompted the Law Institute to propose new articles on disinherison of forced heirs by amendment in the House Committee on Civil Law and Procedure to House Bill No. 933, 1999 Regular Session. With virtually little change in the law of disinherison, except the modernization and reduction of the number of just grounds, the bill as amended passed the House Committee on April 20. On April 29 the bill was returned to the calendar in the House of Representatives and not subsequently called from the calendar until approximately six weeks later on June 8. Although several floor amendments were proposed to the bill, the bill passed the House of Representatives with only a few amendments to different portions of


See also Official Digest, 1999 La. H.B. 933: "In Acts 1997, No. 1421, effective July 1, 1999, the present law of disinherison, Civil Code Arts. 1617 through 1624, were inadvertently repealed in connection with the successions revision.

Proposed law retains the present law of disinherison by redesignating those articles effective June 30, 1999."

In the Editor's Note to La. Civ. Code art. 1494 (Special Millennium Edition, 2000) at 290, the author of the note observes: "In dismantling the civil law of successions, the Successions Revision Committee of the Louisiana State Law Institute repealed Article 1621..."


107. Among the amendments proposed was one that would have conformed the provisions of House Bill No. 933 on disinherison to the content of Senate Bill No. 595, 1999 Regular Session which had already passed the Senate. The difference between the two bills (HB No. 933 and SB No. 595) principally concerned the burden of proof of reconciliation: House Bill No. 933 imposed the burden on the forced heir and Senate Bill No. 595 imposed the burden of proof on the other heirs. The amendment failed.
the bill. Senate Committee on Judiciary A scheduled a hearing for House Bill No. 933 on Monday, June 14, the last day for hearings before that Senate committee; but with only one senator present, the hearing was adjourned for lack of a quorum. Later the same day, June 14, in the House of Representatives, Representative Chuck McMain offered an amendment to Senate Bill No. 488 by Senator Ron Landry, relative to statutory wills, that would have retained the Civil Code provisions on disinherison. Representative Tom Thornhill requested a ruling from the Chair on the germaneness of the amendment, and the Chair ruled “that the ... amendments were not germane to the subject matter contained in the bill as introduced,” whereupon Representative McMain moved to withdraw the amendments. The legislature adjourned on June 21 without taking action to reenact the articles on disinherison. With that ambiguous legislative history, it is difficult to draw any clear inferences about the precise legislative intent as to grounds for disinherison.

Repeal of the articles on disinherison has created speculation ranging from the obvious conclusion, repeal eliminates all grounds for disinherison, to the opposite conclusion, repeal permits the parent to disinherit for any cause and the court ultimately determines its justice on a case-by-case basis. Furthermore, the speculation and diametrically opposed conclusions implicate the provision of the Louisiana Constitution that states the grounds for disinherison shall also be provided by law. The better view is that based upon the history of disinherison in Louisiana and the constitutional mandate that the grounds are to be provided by law, all of the provisions of the law of disinherison have been repealed. Thus,

109. Id. at 2787.
110. See Editor’s Note, La. Civ. Code art. 1494 (Special Millenium Edition, 2000) at 290: “In dismantling the civil law of successions, the Successions Revision Committee of the Louisiana State Law Institute repealed Article 1621. As a result, the ‘unless’ clause of Article 1494 is now devoid of meaning and a testator may no longer disinherit a forced heir.” (emphasis added). The Editor’s Note was written by Professor A.N. Yiannopoulos of Tulane University Law School, who compiles the yearly editions of the Louisiana Civil Code.

The author of this article agrees entirely with Professor Yiannopoulos.

111. See Max Nathan, Forced Heirship: The Unheralded “New” Disinherison Rules, 74 Tul L. Rev. 1027 (2000); Paul A. Hood, “Disinherison,” The Estate Planner 1336 (1999): Do we still have disinherison? Yes. Article 1494, Civil Code provides that a forced heir may be deprived of legitime if “the decedent has just cause to disinherit him.” What is just cause now? Neither the historical causes, nor the provision which restricted “just cause” to the ones expressly enumerated in the Civil Code, remain in the Civil Code. That brings us back full circle—what is “just cause?” The answer will be determined on a case by case basis by the judge, which might be as it should have been all along.

112. La. Const. art. XII, § 5(B). For text of the constitutional provision, see supra note 21.
113. See Editor’s Note, supra note 110:

It may be argued that courts may infuse meaning into Article 1494 and establish “just causes” for disinherison by resorting to equity under Article 4 of the Civil Code. However, Article 12, Section 5 of the Louisiana Constitution declares that “the grounds for disinherison shall also be provided by law,” and the sources of law in Louisiana are legislation and customs, not judicial decisions. See La. Civil Code Article 1. Moreover,
a forced heir may no longer be disinherited.\textsuperscript{114} To reach the opposite conclusion would require reliance upon the phrase in Civil Code article 1494, “unless the decedent has just cause to disinherit.” That clause must be understood in light of its amendment and re-enactment in 1996 as a means of cross-referencing the then existing provisions on grounds for disinherison.\textsuperscript{115} Unlike other Civil Code articles, such as the article that denies final support to a spouse “at fault,”\textsuperscript{116} the words \textit{just grounds for disinherison} have never been interpreted independently of the complementary provisions concerning the manner of disinherison, the grounds for disinherison, the burden of proof of those grounds, and proof of reconciliation between the decedent and the forced heir.\textsuperscript{117} Without the repealed articles to give those words in Article 1494 content, they have no independent meaning:

The Louisiana legislature has repealed Article 1621 of the Louisiana Civil Code that established the twelve grounds for disinherison and the re-establishment of those grounds by the courts as ‘just causes’ for disinherison under Article 1494 would be judicial legislation forbidden by Article 2, § 2 of the Louisiana Constitution.\textsuperscript{118}
B. Constitutional Power of the Legislature as to Disinheritson

"The amount of the forced portion reserved to the heirs and the grounds for disinheritson shall also be provided by law..."

The quoted language comprises the third sentence of Article XII, § 5, B of the Louisiana Constitution (1995). It is virtually identical to its predecessor, the second sentence of Article XII, § 5 (1974),110 which the Louisiana Supreme Court interpreted in Succession of Lauga120.

Every provision must be interpreted in light of the purpose of the provision and the interests it furthers and resolves. When a constitutional provision is identical or very similar to that of a former constitution, it is presumed that the same interpretation will be given to it as was attributed to the former provision.121 The sentence on disinheritson in the 1974 Constitution, before its amendment in 1995, related to the power reserved to the legislature to pass laws relating to forced heirs, the amount of the legitime, and disinheritson: "the power reserved to the legislature to pass laws relating to . . . disinheritson is subordinate, ancillary, or supplementary to the purpose of preventing the abolishment of forced heirship."122 Nonetheless, as Professor A.N. Yiannopoulous observes in his Editor’s Note to Civil Code article 1494, the power to provide grounds for disinheritson resides with the legislature, not the courts.123

In the 1995 version of Article XII, § 5, the third sentence is subordinate to the first two sentences but clearly written recognizing the connexity of all three.124 The

legislation and customs, not judicial decisions. See La. Civil Code Article 1. Moreover, Article 4 of the Civil Code is not a blanket authorization to courts to create laws when the Louisiana legislature has not enacted laws, or, a fortiori, to resurrect laws that the legislature has repealed. Resort to equity under Article 4 is proper in exceptional circumstances for the mitigation of harsh results in the framework of existing laws, when neither legislation nor customs address a particular issue. Equity under Article 4 is thus a device for correction of law rather [than] creation of law. Louisiana courts have, indeed, resorted to equity in the past but sparingly; they have never resorted to equity in order to pass judicial legislation.

119. "The determination of forced heirs, the amount of the forced portion and the grounds for disinheritson shall be provided by law..." (emphasis added) La. Const. 1974, art. XII, § 5.
120. 624 So. 2d 1156 (La. 1993).
121. Id. at 1165. "It also is a well established rule of constitutional construction that where a constitutional provision similar or identical to that used in a prior constitution is adopted, it is presumed such provision was adopted with the construction previously placed on it by the jurisprudence." Id. at 1167 (internal citations omitted).
122. Id.
123. La. Civ. Code art. 1494, Editor’s Note, supra note 110 at 290: “However, Article 12, Section 5 of the Louisiana Constitution declares that ‘the grounds for disinheritson shall also be provided by law,’ and the sources of law in Louisiana are legislation and customs, not judicial decisions...”
124. One change in the language of the second sentence of 1974 La. Const. art. XII, § 5, made in the present language of the third sentence of Article XII, § 5, is insertion of the word also which
third sentence continues to be subordinate by virtue of a comparison of the structure of the first and third sentences: the first sentence directs the legislature to provide for the classification of the descendants, but the third sentence merely provides that the grounds for disinherison "shall also be provided by law." The virtually identical sentence in the 1974 version of Article XII, § 5 was interpreted in Succession of Lauga as "similar to the jurisprudential gloss on the 1921 provision to the effect that the legislature may implement and regulate forced heirship subject to and not inconsistent with the core principle...."125 Thereafter, in Lauga the Louisiana Supreme Court opined in language particularly important for the current version of Article XII, § 5 (B):

The wording of the second [now third] sentence and its placement make it so similar to the idea that the legislature may implement and regulate laws without changing the basic principle, right, and purpose of forced heirship that it is difficult to read into it an intention to make any major change in the law.... Furthermore, as we observed earlier, the second [now third] sentence's provision occupies a subordinate position following the first sentence's clear, explicit statement of Article XII, § 5's constitutional purpose—an express limitation on legislative power without which there would have been no point in including any of its three sentences in the constitution. Therefore, the second sentence [now third] may be construed reasonably only as a provision that makes explicit the jurisprudential interpretation that had been placed on the source provision, viz., that the legislative function is to mould and implement the legal institution of forced heirship without thwarting or destroying the fundamental and enduring rights, principle, or purposes that it encompasses.126

The third sentence of Article XII, § 5 (B), contains a grant of legislative power to implement the institution of forced heirship consistent with its "core principles" by enacting grounds for disinherison.

C. So What Has Become of Disinherison? Conclusions

The third sentence does not require that the legislature enact grounds for disinherison; in fact the legislature is prohibited from doing so if inconsistent with

likewise appears in the sentence preceding: "The legislature may also classify as forced heirs descendants of any age who, because of mental incapacity of physical infirmity, are incapable of taking care of their persons or administering their estates...." (emphasis added).

125. Succession of Lauga, 624 So. 2d 1156, 1165 (La. 1993).
126. Id. at 1167-68. (emphasis added).

As five of the leading forced heirship commentators have observed, "the constitution provision allowing the legislature to determine forced heirs, the amount of the legislature to determine forced portion, and the grounds of disinheriance is not an invitation to destroy the concept, but a grant of flexibility within the confines of the institution of forced heirship."

Id. (citing Spaht et al., supra note 4, at 414).
the "core principle" of forced heirship. In light of its history and placement the sentence does convey that if forced heirs are to be denied their forced portion it must only be for limited and just causes specified by the legislature.

The legislature exercised its power to implement the institution of forced heirship in a manner entirely consistent with the "core principles" of the new forced heirship. The legislature repealed all of the grounds for disinherison, an act consistent with the first principle of forced heirship,\(^{127}\) extracting effectively and efficiently support for needy incapable children.\(^{128}\) Even had the legislature so intended, it could not have repealed the limited causes for disinherison to permit a case-by-case determination of just cause, at least as to children under twenty-four, because the Louisiana Constitution permits the legislature to act as to disinherison only so long as the action does not violate the "core principles" of the institution. To permit the parent to disinherit children under twenty-four for any reason a judge deems just cause is to violate the core principle of the new forced heirship, understood to require limited, specified causes for disinherison as a way to assure support for needy children of tender age and to combat unjust disinherison of such children. Of course, the forced heir as any heir or legatee may be deprived of his inheritance by proof of his unworthiness—a successful or unsuccessful attempt on the life of the parent.\(^{129}\)

---

127. Considering that forced heirship is restricted to young and incapable children for the purpose of providing for their support, grounds for disinherison 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 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.


128. Other principles related to the first principle of the new forced heirship include combating unjust disinherison of such children, relieving the people of the state collectively of the responsibility of maintaining such children through the use of public funds, and providing certainty as to the amount due the child which has the effect of reducing litigation and encouraging settlement. *See* discussion in text accompanying notes 31-32 *supra*.

129. La. Civ. Code art. 941 (eff. July 1, 1999): "A successor shall be declared unworthy if he is convicted of a crime involving the intentional killing, or attempted killing, of the decedent or is judicially determined to have participated in the intentional, unjustified killing, or attempted killing, of the decedent. . . ."

A forced heir, although different from an intestate or testate successor since he takes a fraction of the active mass of the parent's estate despite the will of the parent, derives his right ab intestato. *See* K. A. Cross, *A Treatise, Successions* § 90 at 136 (1891).

*See also* Cynthia Samuel, *supra* note 92, at 187: "Now that forced heirs are only the young and the handicapped, a parent should not be able to disinherit them. A forced heir should be susceptible of disqualification only for acts of unworthiness like any heir ab intestato." (emphasis added).
IV. THE UNFINISHED BUSINESS OF THE STEPPARENT USUFRUCT

A. The Reality of the "Lumpy" Family

Although the stepfamily is more often referred to in popular literature as the "blended" family, reality more closely resembles a "lumpy" family, a label coined by Maggie Gallagher in The Abolition of Marriage: How We Destroy Lasting Love. Experts' optimism at the beginning of the 1980s about the widely assumed proposition that "what is good for adults of a family must be good for their children" suffered from two principal discoveries: "First, remarriages turned out to be even more unstable than first marriages. Second, and even more devastating in psychological terms, children in stepfamilies do no better on average than children in single-parent homes." The story on the cover of U.S. News & World Report on November 29, 1999, "The Rise of the Stepfamily," began with the apt subtitle, "When Strangers Become Family." Even though focused on giving advice about how to make the new family "work," the article acknowledged that:

A variety of studies have demonstrated that stepkids do more poorly on a variety of measures than do kids who live in traditional, two parent families—even adjusting for income level. They are more apt to repeat a grade in school, have disciplinary problems, and drop out of school altogether. In fact, these studies collectively indicate that stepchildren do

130. Paul Hood, Jr., a well-known estate planner, expressed the following opinion in Forced Heirship—Spousal Usufructs, Estate Planner 1328-35 (1999): “Let me begin by saying that I don’t disagree with the sociological studies or their conclusions which indicate that step-parents do not have the same bond with step-children that natural parents have.”


132. Id. The author adds that this assumption “turns out to be a myth.”

133. Id. For the first “discovery” the author cites Andrew Cherlin, Remarriage as an Incomplete Institution, Am. J. Soc. 84, 634 (1978); Frank F. Furstenberg, Jr., & Graham B. Spanier, Recycling the Family; Remarriage After Divorce 86-90, (Sage Publications 1987). For the second discovery, the author cites J.A. Jacobs & Frank F. Furstenberg, Jr., Changing Places: Conjugal Careers and Women’s Martial Mobility, Social Forces 64, 714.

But see Stepparenting: Issues in Theory, Research, and Practice 4-5 (Kay Pasley & Marilyn Iinger-Tullman eds., 1994) [hereinafter Stepparenting] in which in the introduction the editors observe: Similarly, no differences were found on measures of academic achievement between children from stepfamilies and those in first-marriage families [referring to 1987 and 1990 studies]. However, the results of these studies do suggest that children of divorce, single-parent households may be at greater risk for academic difficulties than children from either of the other two types of families. However, regarding behavioral problems and other antisocial conduct in children, the findings varied.
about as well as kids who live with a single parent, which is to say much worse than kids in traditional nuclear families.

And that's not the worst of it. According to extensive research by Martin Daly and Margo Wilson of McMaster University in Ontario, stepchildren are more likely to be abused, both physically and sexually, and even more likely to be killed by a parent—100 times as likely—compared with kids being raised by two biological parents. Another line of research indicates that they are less likely to be provided for. For example, American children living with a stepparent are less likely to go to college and to receive family financial support if they do. New research also shows that biological mothers around the world spend more of family income on food—particularly milk, fruit, and vegetables—and less on tobacco and alcohol, compared with mothers raising nonbiological children. The list goes on.4

Social scientists disagree as to the reasons why these "lumpy" families fare so poorly: some argue an overromanticization of the new family;3 others, a lack of consensus about the role of stepparents and stepchildren;3 and still others, a cultural bias against stepfamilies,3 formed these days most often by divorce of the

---


5. What psychologist Bray calls "romantic" stepfamilies picture themselves as the idealized nuclear family, and they do whatever they can to fit into that mold—usually with unhappy results. The main problem, Bray says, is that in their impatience to be seen as traditional, these families push things that should evolve slowly.... Romantic stepfamilies, on the other hand, spend a lot of time in forced camaraderie, and teens are especially quick to detect the falseness.


See also Lawrence H. Ganong & Marilyn Coleman, Adolescent Stepchild-Stepparent Relationships: Changes over Time in Stepparenting: Issues in Theory, Research, and Practice 87, 104 (1994) in which the first key point of the chapter is "1. Intimacy and closeness with the stepparent decreases over time as stepchildren become adolescents;" Donna S. Quick et al., Stepmothers and Their Adolescent Children: Adjustment to New Family Roles in Stepparenting 105 (1994).

6. See, e.g., Stepparenting, supra note 133, at 7.


"Although in most Western societies the stigma of divorce and remarriage has likely been reduced due to the relatively high rates of divorce and remarriage, in the United States there is still an undercurrent of moral outrage directed towards those who divorce. This moral outrage is often extended
parents rather than a parent’s death. Yet, Maggie Gallagher observes, that by “[f]ailing to understand the erotic relations that are at the heart of family life, . . .” experts failed to predict that remarriage is not only not a cure for the pain inflicted upon children by divorce; “it is often one of the risks children of divorce face.” Because the erotic interests of the families diverge with divorce and remarriage, the possibilities for conflicts in loyalty proliferate: “Recognition of this reality is what has made the stepfamily so suspect (from the child’s point of view), the object of fear and fairy tales that center on the child’s recognition that his interests and his stepparent’s interests are not the same: The wicked stepmother may want to kill me off to keep her husband’s goodies for her own children.”

138. Id. at 64.

According to historian Stephanie Coontz, author of The Way We Really Are: Coming to Terms With America’s Changing Families, stepfamilies are not a new phenomenon in American life, but the dynamics have changed in important ways. Before divorce rates exploded in the 1970s, stepfamilies were usually formed after the death of a parent, and those stepfamilies could in effect create a second nuclear family. But modern stepfamilies are mostly the product of divorce (or out-of-wedlock births), and it’s nearly impossible for these families to fit the traditional mold. Most have to deal with ex-spouses—the “ghost at the dinner table,” in one expert’s phrasing—and often with the exes’ new families as well.

139. Gallagher, supra note 131, at 73.

140. Id. “Remarriages are a fertile arena for conflicts between stepparent and a child whose young life has already been marked by many such conflicts.” Id. at 74. “Of all the risks to which remarriage exposes children, one of the most common and least remarked is redivorce.” Id. at 76.

The result for children is the repeated experience from an early age of love failing—both between adults and between adults and children. . . . The initial experience of love’s failure and the abandonment most children experience in the immediate aftermath of divorce is confirmed again and again in the years ahead.

141. Gallagher, supra note 131, at 75.

In the National Survey of Children, close to half of parents with both children and stepchildren agreed that their stepchildren did not think of them as real parents, it was more difficult to be a stepparent than a natural parent, it was more difficult to discipline their stepchildren, it was more difficult for them to love their stepchildren than their biological children, and their children would have been better off if they had grown up with two biological parents. (emphasis added).

Id. at 74. Cited as authority for these conclusions, was Furstenberg & Cherlin, Divided Families, supra note 133, at 81-82.
Tales about the wicked stepmother abound in cultures around the world, so social scientists have now been led to consider whether "this archetype might be rooted in fact." Social scientists who study stepfamilies "agree that families with a full-time stepmother do worse than families with a stepfather." There is

See the same sentiment expressed in Christina Hughes, Stepparent: Wicked or Wonderful?, (1999): "The responsibilities of parenthood prioritises children's needs. As Backett states 'the immediate needs of children were felt to be predominant in the everyday familial interactions.' Nevertheless, in the stepfamily the children's needs may be divergent to those of the stepparent and the natural parent." (internal citations omitted).

In W. Glenn Clingempeel et al., Toward a Cognitive Dissonance Conceptualization of Stepchildren and Biological Children Loyalty Conflicts: A Construct Validity Study, in Stepparenting: Issues in Theory, Research, and Practice 151, 173 (1994): "[m]ost stepfathers subscribed to an equity principle: a belief that equal amounts of personal resources should be given to stepchildren and biological children. However, they reported that they actually gave more time and money to stepchildren and more affection to biological children." (emphasis added). Judith Wallerstein's twenty-five year study confirmed such conduct by stepfathers. See supra note 93.

... As I have stated the starting point of the research was the myth of the wicked stepmother. Cinderella and Snow White are the most common examples of just how wicked stepmothers are supposed to be. Id. at viii (emphasis added). "I argue here (chapter 7) that myth is the prominent feature of the stepmother's experience of living in a stepfamily which is not equalled by the stepfather's experience." Id. at ix (emphasis added). Her study consists of participant observation in five stepfamilies over a twelve-month period.

Id. In a recent case Becnel v. Becnel, 732 So. 2d 489 (La. App. 5th Cir. 1999), the court reviewed a decision by the trial court denying the father's motion for a modification of a visitation restriction imposed earlier that child could not be in the presence of the stepmother. See also Things-Tallman, supra note 134, at 22, 23, 26, 27, and 31:

[A]lmost all of the research substantiates that the stepmother-stepchild relationship is the most difficult of all stepmember relations, more problematic than the stepfather-stepchild relationship.

When behavior and emotional problems were combined, girls in father-stepmother families were at greatest risk for problems.

The literature overwhelmingly suggests that relationships with stepchildren are more difficult for stepmothers than stepfathers. . . . Further, MacDonald and Demaris (1996) found stepmothers had a more difficult time rearing stepchildren than did stepfathers regardless of time spent in parenting activities or household tasks.

Some evidence suggests that daughters are at greater risk for behavioral problems than sons, and girls in stepmother families are at greatest risk for experiencing both behavior and emotional problems.

Fine and Kurdek (in a 1992 study) reported higher levels of self-esteem and fewer social problems among stepchildren living with stepfathers compared to those living with stepmothers.

See generally Donna S. Quick et al., Stepmothers and Their Adolescent Children: Adjustment to New Family Roles in Stepparenting: Issues in Theory, Research, and Practice 105-25 (1994); W. Glenn Clingempeel et al., Stepparent-Stepchild Relationships in Stepfather and Stepmother Families: A Multimethod Study, Fam. Rel., July 1984, at 33, 465, 472 ("The finding that the stepmother-stepdaughter relationship was more problematic was not expected. . . . [T]he remarriage of the father
disagreement again about why stepfamilies with a stepmother are more problematic: it may be that being a stepmother is simply more difficult or that contact with the biological mother causes more postdivorce competition and conflict. Focus on the difficulties of a stepfamily with a stepmother does not mean that there are no problems with a stepfather/stepfamily, which is the most common form of stepfamily; stepfathers “are often lustful and as well as cruel.” Sociobiologists

and the entry of a stepmother into the household may be perceived by girls as a major threat to the father-daughter relationships.”); Cheryl L. Ruett et al., Social Support Received by Children, in Stepmother, Stepfather, and Intact Families, J. of Div. & Rem. 165, 175 (1993) (“In general, the present study supported the proposition that children in stepfamily families receive less support from their stepmothers than children in other family structures receive from their biological mothers.”); Judith Zuker Anderson & Geoffrey D. White, An Empirical Investigation of Interaction and Relationship Patterns in Functional and Dysfunctional Nuclear Families and Stepfamilies, 25 Fam. Process 407 (1986); Marilyn Ihinger-Tallman, Research on Stepfamilies, 14 Ann. Rev. Sociol. 25, 31-33 (1988).

It may be that stepmothering is simply harder, because the children’s bond with the biological mother is often very powerful. As University of Nebraska-Lincoln sociologist Lynn White notes, a man can be a decent stepfather simply by being a provider and a nice guy, but a stepmother is often called upon to establish “gut-level empathy and attachment”—traits that are difficult, if not impossible, to fabricate. Whatever the reason, stepmothers and stepchildren are the “big losers” in these reconfigured families.

See also Ihinger-Tallman, supra note 134, at 23: “Guisinger, Cowan, and Schuldberg (1989) suggested that the greater involvement of stepmothers in the care of stepchildren results in more opportunities for limit-setting and conflict, a finding supported by Fine and his associates (1993).”

Christina Hughes, supra note 141, at 11 observes that “stepmothers are placed so centrally within the stepfamily whilst stepfathers become almost peripheral.”

Two researchers who have done the most significant work in this area [stepfamilies and abuse] are Martin Daly and Margo Wilson. Their work ascertained that preschool children who live with one biological parent and one stepparent were forty times more likely to become an abuse case than children living in an intact home.

Glenn T. Stanton, infra note 149, at 153. “Michael Gordon, from the University of Connecticut, reports that a girl is seven times more likely to be molested by a stepfather than a biological father. . . . The molestation by stepfathers was more severe than that of biological fathers.” Id. at 154.


But see Rachel Filinson, Relationship in Stepfamilies: An Examination of Alliances, 17 J. Comp. Fam. Studies 44, 58-59 (1986): “The willingness of most of the stepfathers of the sample to adopt the total responsibility for a stepchild and to display neither favoritism for their own child(ren) nor resentment for the stepchild (as described by their wives or girlfriends) was as striking as the close attachment of the stepchildren in the study to their stepfathers.”
and evolutionary psychologists' explain the behavior of stepmothers and stepfathers on biological bases that support the superiority of "genetically-related kin," to which evolutionary psychologists add the further explanation that "parents are shaped by evolutionary forces to discriminate in favor of their biological offspring." Either explanation "puts stepchildren at risk and perhaps even jeopardizes their safety." The biological tie internally motivates the parent who expects emotional rewards to develop the parent-child bond and to be committed to the long-term well-being of the child, as compared to a child and stepparent who enter their relationship on different terms—"it is a forced deal."
In his new book *The Evolution of Desire: Strategies of Human Mating*, David Buss explains the purpose of the relatively new discipline of evolutionary psychology as striving "to illuminate men's and women's evolved mating behavior." What women want, their preferences in a mate "are more complex and enigmatic than the mate preferences of either sex of any other species...." The reason, explains Buss, lies in the great initial parental investment of women which makes their limited, exceptional reproductive resources extremely valuable. Psychologically, this remains true despite modern birth control which has altered the costs, because "human sexual psychology evolved over millions of years to cope with ancestral adaptive problems." Women have evolved a preference for men with resources "for their children" determined by such cues as economic resources, social status, older age, ambition and industriousness, dependability, intelligence, compatibility, size and strength, good health, and commitment. As the title to Chapter 3 explains, "Men Want Something Else," a woman with the capacity to bear many children determined by such cues as youth, health, physical beauty related to reproductive capacity, and body shape. Men place a premium on physical appearance. Obviously, the short-term and long-term goals of women and men may be in conflict considering that they may be pursuing different goals and necessarily seeking different qualities.

Buss admitted that much of what he learned about human mating "is not nice. In the ruthless pursuit of sexual goals ... men and women derogate [sic] their rivals, deceive members of the opposite sex, and even subvert their own mates." The discoveries, according to Buss, disturbed him: "I would prefer that the

154. *Id.* at 11. "Sexual strategies do not require conscious planning or awareness." *Id.* at 6.
155. *Id.* at 19.
156. *Id.* at 19-20. Women produce far fewer eggs than men produce sperm; women bear the exclusive burden of gestation and lactation. Women are judicious, prudent, and discerning about the men they consent to mate with because they have so many valuable reproductive resources to offer. Those with valuable resources rarely give them away indiscriminately. The costs in reproductive currency of failing to exercise choice were too great for ancestral women. The benefits of choice in nourishment, protection, and paternal investment for children were abundant.

157. *Id.* at 20. "We still possess this underlying sexual psychology, even though our environment has changed."
158. *Id.* at 23.
159. *Id.* at 22-40.
160. *Id.* at 50.

Why men marry poses a puzzle.... One solution to the puzzle comes from the ground rules set by women. Since it is clear that many ancestral women required reliable signs of male commitment before consenting to sex, men who failed to commit would have suffered selectively on the mating market.

161. *Id.* at 49-58.
162. *Id.* at 57-58.
163. *Id.* at 5.
competitive, conflictual, and manipulative aspects of human mating did not exist." Nonetheless, he recognizes that "the disturbing side of human mating must be confronted if its harsh consequences are ever to be ameliorated." So, what can we learn about stepmothers and stepfathers from the cross-lighting of sociobiology and evolutionary psychology? Women seek men with resources to support their children; men, who are far more interested in casual sex than women, seek a woman with reproductive capacity and place emphasis upon physical appearance. These respective goals assist in explaining why stepfathers without the taboo of incest may sexually abuse stepchildren more often than biological fathers; and stepmothers have difficulty feeling love for their stepchildren, express such sentiments as "I wanted the man, not the children," and, most importantly, justify stepchildren's fear of the diversion of resources to her children. After all it was tension between a second wife and the adult children of her wealthy husband's first marriage terminated by divorce that assured the repeal of forced heirship in Louisiana. Hence, "it is in the best interest of

164. Id. "Conflict, competition, and manipulation also pervade human mating..." Id. at 18. Not only do men compete for mates, but competition among women although less violent "pervades human mating systems." Id. at 9.
165. Id. at 5.
166. Id. at 73-96.
167. "Again the issue of biology comes to bear on this discussion. Daly and Wilson report that abusive stepparents are highly discriminant as the stepchildren suffer the brunt of abuse and the biological children are often spared." Stanton, supra note 149, at 154.
168. See supra notes 143-159.
169. See Wallerstein & Lewis, supra note 83.
170. "In agreement with Popenoe's biosocial argument, Margo Wilson and Martin Daly of McMasters University in Ontario explain that stepparents parent less effectively, not because they do not know what to do; rather just the opposite. They know what to do, but they don't have the internal motivation because they don't receive the same emotional rewards from their stepchildren as biological parents do." Stanton, supra note 149, at 153.
See also U.S. News & World Rep., supra note 134. The observation of Stephanie Coontz about historical stepmother/stepfamilies reminds us most pertinently:

[T]hese stepfamilies were often plagued by feuds, divorces, and even murders—not infrequently because of competition over inheritance. In societies like those of medieval Europe, she says, where primogeniture ruled inheritance, "it makes sense for people to be obsessed with wicked stepmothers who might try to substitute their own (often older) children for the oldest biological child of the dad."
Id. at 62 (emphasis added). Primogeniture may not be at stake, but the husband's resources are.
171. See Cynthia Samuel, supra note 92, at 185. As Professor Samuel explains, the wealthy couple hired a lobbyist to procure the two-thirds vote of the legislature required of a constitutional amendment and financed a campaign for repeal which included organization and advertising. She also commented that despite an amendment in 1982 to permit a stepparent the usufruct over the legitime of children of the decedent's first marriage, "pressure to abolish forced heirship continued for various societal reasons. The chief reason, in my opinion, was that divorce and remarriage had caused many parents to become estranged from the children of their earlier marriages. These parents wished to leave everything to the current spouse and the children of their current marriages." Id. at 184.
In Beyond the Grave the Condons who are California estate planners, thus from a common law jurisdiction without forced heirship, list the four reasons why a testator should not rely on his second wife's promise "to do the right thing" by the testator's children of a former marriage: "1. She Feels No
individuals and society to work diligently to preserve first marriages and to secure the incomparable benefits that institution brings; the truth is that the benefits of marriage for adults and children are not likely to be recovered in remarriage. Consider who repeats as the storyteller the tales of the wicked stepmother, such as Cinderella and Snow White—children's mothers: "It's not hard to imagine why mothers might prefer tales whose subtext runs: 'Remember, my dears, that the worst thing imaginable would be for me to disappear and for your father to replace me with another woman.' The more likely explanation for such repeated tales, which "[i]f a story is to persist through the ages... it must serve some social purpose....", is as a warning to her own children, understanding well a mother's impulse to assure resources for her own children. Just because women, including stepmothers, possess this natural impulse, does not mean that these aspects of human behavior can not and should not be ameliorated: "Judgments of what should exist rest with people's value systems, not with science [such as socio biology or evolutionary psychology] or with what currently exists.... All behavior patterns can in principle be altered by environmental intervention." The question is, should they be altered; should there be constraints imposed on these natural impulses?

B. Constitutional Parameters

Just as the constitutional parameters of the new forced heirship were critical for resolving the legal fate of disinherison, the same inquiry assists in evaluating the constitutionality of legislation that extends the stepparent's usufruct over the legitime intended for the vulnerable, needy child's support. By the use of

Moral Obligation": "2. She Has No Loyalty to the First Children"; and "4. Her Children Pressured Her to Change Her Mind."


173. Id. at 157.

174. Id.

175. Buss, supra note 148, at 17.


During the 1999 legislative session, two bills, Senate Bill No. 594 and House Bill No. 466, were introduced which would have eliminated the stepparent's usufruct over the legitime under both Civil Code articles 890 and 1499. Senate Bill No. 594 passed the Senate but the legislature adjourned without the bill being heard in the committee to which it was referred, House Civil Law and Procedure Committee.

The substance of the amendments to the existing articles consisted of the following:

Louisiana Civil Code article 890 would be amended to provide:

- If the usufruct affects the rights of descendants other than issue of the marriage between the decedent and the surviving spouse, security may be requested by these descendants.

B. Nevertheless, if the descendants are not issue of the marriage between the decedent and the surviving spouse and are forced heirs, the usufruct shall not extend to their legitime, except as hereafter provided. If satisfaction of the descendants' legitime would require the
mandatory language the legislature is directed to provide that descendants of the first degree twenty-three years of age or younger be forced heirs and is permitted to fix the amount "[s]ubject to and not inconsistent with" the institution's basic precepts. The "core principle" of the new forced heirship includes:

- effective provision of support for needy incapable children . . . , which combats the evil of unjust disinheritance of such children, relieves the people collectively of the responsibility of maintaining such children through the use of public funds, and provides certainty as to the amount (a sum certain) which has the effect of reducing litigation and encouraging settlement.  

The usufruct granted to a stepparent by the law or the testator falls within the legislature's discretion to fix the amount of the legitime; but is it "inconsistent with" the new forced heirship's basic precepts?

C. Unconstitutionality of Stepparent Usufruct

If the basic precept of the "core principle" of forced heirship for children under twenty-four is effective provision of support for needy children, the

sale of the family home which is subject to the usufruct of the surviving spouse and the extent of the impingement on the legitime is less than one-quarter of the value of the legitime, the usufruct shall be permitted.

(This entire provision is new.)

Louisiana Civil Code article 1499 also would be amended to read:

A. The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion except as hereafter provided... C. The decedent may not grant a usufruct over the legitime to the surviving spouse who is not the parent of the forced heir, except as hereafter provided. If satisfaction of the descendant's legitime would require the sale of the family home which is subject to the usufruct of the surviving spouse and the extent of the impingement on the legitime is less than one-quarter of the value of the legitime, the usufruct shall be permitted.

(italicized portion is new.)

See L. Paul Hood, Jr., Forced Heirship—Spousal Usufructs, in Estate Planner 1329 (1999):

I also don't disagree with the intended purpose of the bills [Senate Bill No. 594 and House Bill No. 447]. However, based upon my professional experience and study, SB 594 actually will impede and negatively impact familial relations. Enactment of SB 594 is more likely to result in the vast majority of stepchildren who are not forced heirs receiving less, while not providing the benefits to forced heirs sought by the bill.

This statement represents a portion of Mr. Hood's prepared testimony that was to be presented before the House Committee on Civil Law and Procedure and is reproduced in its entirety on the pages of the Estate Planner that follow.

177. See supra discussion in text accompanying notes 23-26.
178. See supra text accompanying note 32.
180. Louisiana Civil Code article 1499, which permits the testator to grant greater rights to the stepparent surviving spouse than the law would since the testator is permitted to give the surviving spouse the power to dispose of non-consumables.
stepparent usufruct is inherently inconsistent. The usufructuary owns the civil and natural fruits of the property comprising the legitime, and the parent-testator may even grant the usufructuary the power to dispose of nonconsumables. Hence, the fruits produced from the legitime that could be used to support the forced heir belong to a stepparent, who neither possesses the natural affection, especially if the prior marriage ended by divorce, nor owes a legal obligation to support the child. Without the ability of the forced heir to use the income produced from the legitime for his support because it belongs to another, the legislature exercised its discretion in fixing an amount for his legitime by burdening it with a usufruct that is "inconsistent with" the basic precept of forced heirship—effective provision of support for young, vulnerable, needy children. Therefore, to the extent that Louisiana Civil Code articles 890 and 1499 provide, or permit the testator to provide, a usufruct for the stepparent over a forced heir's legitime, the articles are unconstitutional.

182. Of course, before January 1, 1996, the stepparent usufruct, not to mention the parental usufruct, of the surviving spouse did not violate the constitutional protection afforded to forced heirs for the reason that the "core principle" of forced heirship was significantly different from its present purpose. See supra discussion in text accompanying notes 27-32.

A similar argument about unconstitutionality of legislation violative of the "core principle" of forced heirship could have been made about Civil Code article 1501 had it not been repealed in 1997. That Article provided for the imputation of lifetime gifts made to the forced heir who seeks reduction of excessive donations even though to calculate his legitime the legislation only includes donations made by the decedent within three years of his death. Jurisprudence and doctrine recognized the defense of imputation as "defensive collation"; thus, all donees were permitted to require the heir to impute gifts made by the decedent, coextensive with the historical obligation of forced heirs to collate. By retaining the law of collation in 1995, the legislature implicitly retained the coextensive "defensive collation," or imputation; yet, at the same time, enacted Article 1501 on recommendation of the Louisiana State Law Institute. The new Article created a statutory defense of imputation and dealt far more harshly with the forced heir who sought reduction. Because the evident purpose of Article 1501 was not the notion of fairness to the legatee but instead an indirect method of denying the forced heir the legitime mandated by the Louisiana Constitution, the legislature was fixing the amount of the forced heirs legitime in Article 1501, by means of a defense, in a manner "inconsistent with" the "core principle" of the new forced heirship.

With the subsequent repeal of Article 1501 in 1997, "defensive collation," or imputation coextensive with the law of collation, remains if the defense is consistent with the purpose to be served by the new forced heirship. In fact, "defensive collation" developed as a corollary to the notion that a child who had received gifts from the decedent as an advance on his inheritance could not claim an additional amount from the decedent's reconstituted estate—a form of double-dipping. After January, 1996, however, the "core principle" of the legitime reserved for children under eighteen (assumed by the law to be vulnerable and in need) is to provide an effective source of future support. Yet, the defense imputation in effect denies the child that source of support by crediting gifts to a child's legitime received by him within three years of the decedent's death without inquiry as to whether the property given is still owned by the child. Obviously, if the property given has been consumed by the child, it can not provide for his future support and the defense serves to defeat the basic precept of the new forced heirship.

185. By contrast, a usufruct under the same Louisiana Civil Code articles afforded to a biological parent of the forced heir should not be unconstitutional. The biological parent owes his child under eighteen the duty of support. See La. Civ. Code arts. 227, 230; La. R.S. 9:315.22 (1994). Even though
The effect of the stepparent usufruct on the legitime of forced heirs must be distinguished from legislation entirely consistent with the "core concept" of the new forced heirship. Act No. 967 of 1999 amended the provision of the trust code that imposes certain conditions upon a decedent's placing the legitime in trust.\textsuperscript{186} Rather than requiring the net income accruing to the forced heir to be paid to him not less than once a year, the provision now gives the trustee authority, taking into account all of the other income and support the forced heir receives "\textit{during the year}," to distribute "funds from the net income in trust sufficient for the health, maintenance, support, and education of the forced heir."\textsuperscript{187} The statutory change eliminating the requirement that all of the income from the legitime be distributed to the forced heir at least once a year is nonetheless entirely consistent with assuring that the forced heir, a child under twenty-four or permanently incapable of caring for himself or administering his property, receive funds sufficient for his health, maintenance, support and education. Considering the lack of maturity or capacity of these two categories of vulnerable and needy children, repealing the requirement that all income be distributed to the forced heir seems eminently wise, as long as the forced heir is assured a sum sufficient for his support, the legislation implies, \textit{once a year}. In fact this 1999 statutory change recognizes that the purpose of forced heirship has changed and that the "core concept" of the new forced heirship differs radically from that of the old when all descendants regardless of age or capacity were forced heirs.

\section*{D. Stepparent Usufruct Defeats Purpose of Legitime for Permanently Incapable}

Although the legislature is permitted and not mandated to provide that incapable children are forced heirs,\textsuperscript{188} it is reasonable to conclude that the people of Louisiana assumed that such children would be constitutionally protected from disinheritance by their parents.\textsuperscript{189} The situation of the legitime of permanently

\begin{footnotes}
\item[187.] \textit{Id.};

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

(1) The trustee after taking into account all of the other income and support to be received by the forced heir during the year shall distribute to the forced heir, or to the legal guardian of the forced heir, funds from the net income in trust sufficient for the health maintenance, support, and education of the forced heir.

(2) The amount distributed shall be at least the sum of $2,000 per year.

(3) The trust shall be irrevocable and shall be administered in accordance with the terms of the trust.

\item[188.] For text of constitutional provision, see \textit{supra} note 21.
\item[189.] See discussion in text accompanying notes 31-32 \textit{supra}.
\end{footnotes}
incapable children subject to the surviving spouse's usufruct differs constitutionally, but not practically, from the situation of children under twenty-four. In fact the position of the adult incapable children, who may be older than the stepparent, may be more perilous than that of children under twenty-four. Such children are less likely to have been survived by a stepparent and thus subject to her usufruct. Furthermore, the incapable child may suffer more immediate need for support than the child under twenty-four, a need that will continue into the indefinite future. Support for the incapable child, if not satisfied by the legitime, will in all likelihood have to be provided from state resources at the taxpayers' expense. To conclude, it is reasonable to predict that a usufruct afforded a stepparent over the legitime of a forced heir will most often adversely affect the permanently incapable child of the decedent, and the potential adverse effect on that child and scarce state resources can be devastating.

Consider the stepparent of an incapable adult child who is the usufructuary of the child's legitime. The usufruct entitles the stepparent to all of the income produced from the property without any responsibility to account at termination of the usufruct because the usufructuary owns the income. If the testator granted the usufruct in his testament, he may also have given the usufructuary the right to dispose of non-consumables, such as immovable property. The stepparent does have a duty to account for the property sold, but the obligation arises only at termination of the usufruct. If the usufruct happens to terminate upon the death of the usufructuary, the stepparent may be younger than the incapable adult child, thus effectively depriving the adult child throughout his life of any support. Why should the stepparent, who feels no natural affection for the incapable adult child and in fact may feel hostility towards him, share the income from the usufruct with the child, whom the state of Louisiana must otherwise support? The stepparent owes no legal obligation to support the stepchild so there is no mechanism to compel her to contribute to his support.

Some estate planners whose goal of minimizing federal estate taxes outweighs other considerations object to any partial elimination of the usufruct of the surviving spouse, even if limited to a stepparent. A lifetime usufruct (or the equivalent) qualifies for the QTIP marital deduction that serves as a mechanism to reduce the federal estate tax presently payable on the decedent's estate. The QTIP marital deduction, however, serves only to postpone, not eliminate, federal estate tax liability. Ultimately, upon the death of the surviving spouse, taxes which

190. This fact is extremely important when the usufruct terminates at the death of the usufructuary, which occurs in the case of the legal usufruct under Louisiana Civil Code article 890 if the surviving spouse does not remarry prior to death and, even more significantly, under Louisiana Civil Code article 1499 if the testator does not expressly limit the usufruct to some time period or event other than death.


192. Now that the biological parent of the child is dead, there is no reason to disguise, if there ever was a reason, the stepparent's feelings toward the child.

193. The proposal concerns only eliminating the usufruct over the legitime, not other property of the decedent.

were postponed upon the death of the decedent, are due. Thus, the effect of eliminating the stepparent usufruct would be that the estate would have to pay some tax when the first spouse dies, rather than paying all estate taxes when the surviving spouse dies. In other words, the change would affect the timing of the payment of the tax, but not the obligation ultimately to pay the tax. Furthermore, with the current exemption from estate tax liability ($675,000) which will rise to $1,000,000 in 2006, the decedent can bequeath a forced heir his legitime of one-quarter tax-free, if equal to or less than the exemption, and then bequeath the rest to his spouse, which will qualify for the marital deduction. As a consequence, no taxes will be owed by the decedent’s estate in such a scenario unless the estate is larger than $2,700,000 (2000) or $4,000,000 (by 2006), in which case the legitime will exceed the exemption. Conclusion: Only in the case of a decedent with a very large estate (in excess of four million dollars by 2006), a permanently incapable child, and a surviving spouse who is a stepparent of the child would his estate be required to pay estate taxes sooner rather than later.

Balancing the interests of the few very wealthy in Louisiana who desire to postpone the payment of taxes against the plight of the permanently incapable forced heir who is at the mercy of his stepparent, the law should protect the forced heir. Estate tax problems of the very wealthy should not drive the policy of Louisiana concerning those in need of protection; the complaints about the estate tax should be addressed to Congress which has the power to completely eliminate the tax. From the standpoint of state policy, when the forced heir is an incapable adult child and the law creates or permits a stepparent a usufruct over his legitime, the usufruct destroys the "core concept" of the new forced heirship; and it frustrates the will of the people of Louisiana who conceived of forced heirship as a legal means of conserving scarce public resources for the needy by procuring some of those resources from the needy child’s own deceased parent. The legislature should not assume that in all cases the surviving spouse who is the usufructuary will generously provide support for the needy adult child. If the surviving spouse is a usufructuary and also a stepparent, the law’s assumptions according to social science empiricism prove unreasonable.

V. CONCLUSION

The new forced heirship, a truncated version of the old, continues to evolve and necessitate a more thorough examination of related statutes reenacted in 1996 without substantial change. Understanding the history of the institution and the "core concept" of the new forced heirship are vital as a preliminary step to examining the interrelated provisions of succession law, such as undue influence. Without carefully considering what statutory provisions were consistent with the

“core concept” of the new forced heirship, the legislature failed to assure that the purpose of providing support to these vulnerable children was actually served. Disinherison of the forced heir by his parent and the usufruct of a stepparent over the legitime, considering both sociology and evolutionary psychology, preclude accomplishing the objective intended by the new forced heirship. Disinherison, fortunately, was repealed by the legislature; but to the extent that the Louisiana Constitution does not prohibit it, the specter of the stepparent usufruct continues to effectively thwart support for the forced heir.

Professor Thomas Oldham theorizes that despite generations of commentators’ criticisms of American inheritance law that fails to protect children from disinherison by their parents198 state legislatures have not responded. The reasons he believes are that “American parents need a threat of disinherison because the American parent-child bond generally is weaker than that in other countries . . .”;199 “the right to disinherit also gives American parents substantial potential power over the lives of their children after a parent’s death, if a parent chooses to exercise it. . . .”;200 and “a reflection of American resistance to government control. . ..”201

In summary, it may be appropriate to characterize these reasons as “the extreme individualism of American culture.”202 None of these suggested reasons after examination and reflection prove noble—a weaker parent-child bond because of the proliferation of divorce, remarriage and illegitimacy; the natural yet destructive human desire to control other people, even those one should love


In virtually every article that urges adoption of a system of protected inheritance for children the authors recognize that it is divorce and remarriage that necessitates a reevaluation of the American system. For example, Deborah A. Batts in I Didn’t Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance, 41 Hastings L. J. 1197, 1269-70 (1990), observed:

The modern phenomena of multiple marriages and divorces, statutory protections for some family members but not others, and limited resources of parents of multiple families tip the balance in favor of protected inheritance for children at the expense of the romantic theory of testamentary freedom, which is already besieged by prior public policy restrictions. It is time for the state legislatures to champion the “tails” side of the two-sided coin of inheritance.

199. Oldham, supra note 198, at 272.

200. Id. at 273. (emphasis added). Later in the same article, Professor Oldham opines:

Another explanation could stem from American views toward old age. While older people in some other societies are respected as elders, American popular culture tends to view older people as objects of derision. It is possible that American parents may perceive that they need the right of disinherison as a means to maintain respect within the family.

Id. at 275.

201. Id. at 273.

202. Id. at 274.
unconditionally;\textsuperscript{203} and the desire for no constraints on one's behavior regardless of who that behavior affects or hurts. Should Professor Oldham be correct in his assumptions about the reasons for refusal to provide a system of protected inheritance for American children, the reasons themselves reveal the type of characteristic human behavior law should constrain, in the case of protected inheritance for children, in the interest of a parent's own children.\textsuperscript{204}

Fortunately, Louisiana because of its legal heritage grounded in thousands of years of human experience and in the principles of natural law still provides a system of protected inheritance, albeit diminished in breadth.\textsuperscript{205} It is a legacy of which the citizens of Louisiana should be justly proud\textsuperscript{206} and should guard with renewed resistance from the influence of other American states, particularly considering the reasons postulated which underlie their choice not to provide a humane, just system to protect vulnerable children from their own parents.

\begin{footnotesize}
\begin{enumerate}
\item For a current pop culture example, see Trust Me, Baby: The House, the Money—It'll All Be Yours: There's Just One Thing, The Wall St. J., Nov. 17, 1999, at A1.
\item "We may well say that the American form of democratic or republican government owes much to the Christian conviction that human beings are not merely fallible, but fallen, and require much watching to be kept out of serious trouble: this is what is called the First or Political Use of the Law, namely as a curb to sin (1 Tim. 1:8-10)." (emphasis added). Harold O.J. Brown, Unfettered Individualism, 16 The Religion & Soc'y Rep. 1, 3 (Sept. 1999).
\item See Kathryn V. Lorio, supra note 5.
\item In recognition of Louisiana's distinguished legal heritage, Governor M.J. "Mike" Foster proclaimed November 1999, as Louisiana Civil Law Month. Included within the introductory "whereas" clauses were the following:
  \begin{quote}
  WHEREAS, the civilian tradition of law is a part of Louisiana's precious cultural heritage; and
  WHEREAS, the civilian tradition was established in Louisiana nearly three centuries ago and is recognized as being based on esteemed principles of law and reason; and
  WHEREAS, the civilian tradition of Louisiana's legal system is unique among the 50 states of the United States of America; and
  WHEREAS, the esteemed principles of law and reason that form the civilian tradition are embodied in the Louisiana Civil Code dating back to its first edition in 1808.
  \end{quote}
\end{enumerate}
\end{footnotesize}