The Changing Concept of Family and its Effect on Louisiana Succession Law

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In the 1800s, the Louisiana family was not only a social institution, but also "the most important unit of production in the countryside." At that time in the United States, family and marriage were directly related to social standing and economic status. Wealth was primarily in the form of land, and there was a belief that such wealth should stay within the bonds of blood.

The law, as reflected in the Louisiana Digest of 1808, promoted, what Professor Mary Ann Glendon has referred to as the "family of the Civil Code," similar to that contemplated by the Code Napoleon. Marriages were frequently arranged by parents of the bride and groom based on financial considerations, rather than romantic notions, and were generally considered to last until the death of one of the parties. Although separation from bed and board for cause was provided for in the Digest of 1808, "as it formerly existed under the laws of the country," divorce was not permitted.

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3. See supra notes 1 and 2 (discussing the role of family in 1800 America).
5. See id. (commenting on the concept of the "family of the Civil Code").
6. Historian Lillian Crete explains:
   For the young Creole woman, it was the pursuit of a husband, not the pursuit of love, that became her chief preoccupation. Her goal was to found a family of her own, and in the excitement and exhilaration of the wedding preparations she may seldom have had time to ask herself whether she loved the man who was about to become her husband. Lillian Crete, Daily Life in Louisiana: 1815-1830 106 (1978).
7. La. Civ. Code arts. 1-5 (1808) provided:
   Art. 1. Separation from bed and board as it formerly existed according to the laws of the country, shall take place for the following causes.
   Art. 2. The husband may claim a separation in case of adultery on the part of his wife.
until 1827. The act of marrying carried with it the obligation of supporting and educating children born of that marriage. The duty of maintenance extended reciprocally beyond the nuclear family to all needy ascendants and descendants.

When a marriage ended by death of one of the spouses, the decedent's legitimate children, usually being issue of the decedent and the surviving spouse, inherited the property of their deceased parent, in equal shares. Although a widow was not an intestate heir except in the absence of legitimate descendants, ascendants or collaterals, she was provided for by the provisions of community

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Art. 3. The wife may also claim a separation in case of adultery on the part of her husband, when he has kept his concubine in their common dwelling.

Art. 4. The married persons that reciprocally claim a separation, on account of excesses, cruel treatment or outrages of one of them towards the other, if such ill treatment is of such a nature as to render their living together insupportable.

Art. 5. Separation may also be reciprocally claimed in the following cases, to wit:

1stly, Of a public defamation on the part of one of the married persons towards the other.

2dly, Of abandonment of the husband by his wife and of the wife by her husband.

3rdly, Of an attempt of one of the married persons against the life of the other.

9. La. Civ. Code art. 46 (1808) provided:

Fathers and mothers, by the very act of marrying, contract together the obligation of nourishing, maintaining and educating their children.

10. La. Civ. Code art. 48 (1808) provided:

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.

11. La. Civ. Code art. 27 (1808) provided:

When a person has had several legitimate children who are living at the time of his death, they all participate to his succession by equal shares, and without distinction of sex or of primogeniture, as being in the first degree of consanguinity, to the exclusion of all other legitimate descendants.

The same thing takes place if all those children having previously died, have themselves left children; such grandchildren will then inherit alone and by equal portions to the exclusion of the great grand children; and so on for the great grand children, if there are neither children nor grand children; the descendants of the inferior degree being always called to inherit in defect of heirs of a superior degree.

12. La. Civ. Code art. 45 (1808) provided:

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

In all other cases they can only bring an action against their natural
property law," and the right to claim a marital portion.\textsuperscript{14} When a
decedent died testate, his children were protected by a provision in the Digest which recognized the right of his children to a forced portion of four-fifths of the decedent's estate, as provided by Spanish law.\textsuperscript{15} The amount was later changed by the Louisiana Civil Code of 1825 to a graduated system, similar to French law, although not providing as generous a forced portion as that provided for in the Code Napoleon.\textsuperscript{16}

This intricate, balanced system worked well in a society in which marriages lasted a lifetime, children were an economic asset,\textsuperscript{17} and the law encouraged a certain type of behavior. Christian Atias described the civil law as resting on an unspoken balance "between

\begin{quote}
father or his heirs for alimony, the amount of which shall be fixed as is
directed in the title of \textit{father and child}.
\end{quote}

\begin{itemize}
\item 13. La. Civ. Code art. 63 (1808) provided:
  
  Every marriage contracted within this territory, superinduces of right, partnership or community of acquests or gains.

  This community or partnership of gains takes place whether there be a marriage contract between the parties or not, and although in case there be one, said contract be entirely silent on this partnership or community.

\item 14. La. Civ. Code art. 55 (1808) provided:
  
  When the wife has not brought any dowry, or when what she has brought as a dowry is but trifling with respect to the condition of the husband, if either the husband or wife die rich, leaving the survivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the \textit{marital portion}; that is the fourth of said succession in full property, if there be no children, and the same portion as a usufruct only when there are but three or a smaller number of children; and if there be more than three children, the surviving whether husband or wife, shall receive only a child's share in usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife who died first.

\item 15. La. Civ. Code art. 19 (1808) provided:
  
  Donations either between \textit{inter vivos or mortis causa}, cannot exceed the fifth part of the property of the disposer, if he leaves at his decease, one or more legitimate children or descendants born or to be born.

\item 16. C. Nap. art. 913 (1804) provided:
  
  Donations, either by act \textit{inter vivos} or by testament, cannot exceed one-half of the property of the disposer, if he leaves at his decease one legitimate child; one-third, if he leaves two children; one-fourth, if he leaves three or a greater number.

La Civ. Code art. 1480 (1825) provided:

Donations \textit{inter vivos or mortis causa} cannot exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-thirds, if he leaves three or a greater number.

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

\item 17. See Glendon, \textit{supra} note 4, at 18.
a ‘normal behavior’ and an ‘abnormal behavior,’” noting that “[t]he nineteenth century legislator described the ‘normal behavior’ to regulate the ‘abnormal behavior.”’ The “normal behavior” was encouraged and promoted; “abnormal behavior” was suppressed.

As society changed in the twentieth century, so did the concept of family. As Louisiana became less agrarian, as the number of women in the work force increased dramatically, as divorce became not only possible but a usual occurrence, the precepts of the ‘family of the Civil Code’ were viewed as less relevant. It is estimated that in the early twentieth century, there were three divorces for every 1000 marriages. By 1997, 50% of all first marriages were doomed to end in divorce. As the number of divorces increased, so did the number of children living with only one parent, usually the mother. Additionally, most of those who divorced remarried, creating step-families with unique characteristics of their own. In the 1970s the percentage of marriages involving previously married spouses increased dramatically. Today, in about one-half of all marriages, for at least one of the spouses, the marriage is not a first marriage. In the United States today, sixty percent of those second marriages will end in divorce.

This changed family is not unique to Louisiana or even to the United States, but rather is a phenomenon shared by many Western nations. The legal response to this different concept of family is observable in the changes in Louisiana succession laws that were significantly influenced by Louisiana’s common law neighbors, who

20. Divorce was permitted by 1827 La Acts § 4 and provided for in the Code of 1870 in Article 139.
23. In 2000, there were 9.68 million female single parents, and 2.04 million male single parents. Id.
26. Id.
emphasized personal autonomy in dealing with one's estate. Two particular concepts, that of the usufruct of the surviving spouse and that of forced heirship, are illustrative of the distinctive approach taken in Louisiana, as compared to its ancestral counterpart, France.

In 1844, the concept of the usufruct of the surviving spouse was introduced in Louisiana. It was later incorporated into the Civil Code of 1870 as Article 916 and provided for a usufruct to the surviving spouse in community over community property inherited by issue of the marriage with the decedent, where the decedent had not disposed by will of his share in the community property. The usufruct was to end on the surviving spouse's death or remarriage.

The usufruct is an illustration of the balance the redactors were trying to achieve. By limiting the spousal usufruct to community property, the system did not affect the rights of the children to unfettered use and disposal of their deceased parent's separate patrimony. Also, by having the usufruct apply only to property inherited by issue of the marriage of the decedent and the surviving spouse, the possibility of a stepparent exercising rights over property inherited by the decedent's children was avoided. By terminating the usufruct on remarriage, the article recognized that the surviving spouse would probably not need the protection of the usufruct if she were to enter into a remarriage, and it also protected the children from the influence of their surviving parent's new spouse. Thus, this 1844 addition to the laws of Louisiana was consistent with the balance of interests between the decedent's surviving spouse and his children.

Although not formally amended until 1975, the usufruct article was the subject of much litigation, resulting in "judicial amendment" many times before the legislature took action. One of the first questions to be raised was the application of the usufruct when the decedent by will attempted to dispose of his community property in favor of his widow. In 1876, in the case of Forstall v. Forstall, the decedent had written a will leaving all of his share of the community property to his widow, without providing for his three children who

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28. La. Civ. Code art. 916 (1870) provided:
   In all cases, when the predeceased husband or wife shall have left issue of
   the marriage with the survivor, and shall not have disposed by last will and
   testament, of his or her share in the community property, the survivor shall
   hold a [in] usufruct, during his or her natural life, so much of the share of
   the deceased in such community property as may be inherited by such
   issue. This usufruct shall cease, however, whenever the survivor shall
   enter into a second marriage.

29. For a more thorough description of the changes prior to 1989, see A.N. Yianopoulos, Of Legal Usufruct, the Surviving Spouse, and Article 890 of the Louisiana Civil Code: Heyday for Estate Planning, 49 La. L. Rev. 803 (1989).
30. 28 La. Ann. 197 (1876).
were forced heirs. The Louisiana Supreme Court held that since the deceased, by writing a will, had disposed of his community property, Article 916 dealing with the spousal usufruct was not applicable. Rather, the court gave the widow the option of keeping her legacy of the disposable portion or renouncing the legacy and taking only the usufruct "by law" over the decedent's share of the community property inherited by the issue of the marriage. It was a question of either taking by intestacy or taking by will, but not a combination of the two.

Withdrawing from the rationale in Forstall, the 1888 case of Succession of Moore, allowed a widow to keep both the disposable portion in full ownership granted to her by the will of her deceased spouse, and the usufruct over the forced portion inherited by children of the marriage. In Moore, the decedent, who died possessed of only community property, had bequeathed the usufruct of all his property to his wife and also left a codicil giving her the disposable portion in full ownership. Introducing an "adversity test" for evaluation of the application of the usufruct, the court held that since the testator had not done anything adverse to granting the legal usufruct of Article 916, he had in effect confirmed it. Similarly, in the later case of Winsberg v. Winsberg, decided in 1957, the decedent died possessed only of community property, which he left entirely to his wife to the exclusion of his four children, as Mr. Forstall had done before him. That court also allowed the wife to keep both the disposal portion and the usufruct over the forced portion inherited by the four children.

Gradually, this line of reasoning came to recognize two types of usufruct — a "legal" usufruct, being one that resulted from intestacy or confirmation by testament of the Article 916 usufruct, and a "testamentary" usufruct, being one created by testament in such a manner that it deviated from the Article 916 mold and, thus, was not permitted to impinge on the forced portion inherited by the decedent's issue. If the usufruct were deemed to be a "legal" usufruct, the usufructuary was exempt from providing security and from paying Louisiana inheritance tax. Additionally, such a "legal" usufruct was sanctioned by law over the forced portion inherited by the children of the decedent, thus not considered an impingement on the legitime of each forced heir. However, along with the advantages of such a "legal" usufruct for the surviving spouse came the balancing disadvantages necessary to protect the interests of the children. One of those limitations was that the original 916 usufruct was to

31. 4 So. 460 (1888).
32. 96 So. 2d 44 (1957).
33. Canal Bank & Trust Co. v. Liuzza, 143 So. 2 (1932); Succession of Dielmann, 43 So. 972 (1907); Succession of Glancey, 38 So. 826 (1905).
34. Succession of Marsal, 42 So. 778 (1907).
terminate upon the remarriage of the spouse, thus preventing a surviving parent’s new spouse from enjoying any benefit of the usufruct over property owned by the children of the decedent. Where a decedent was found to have confirmed the 916 usufruct by will to his wife, the court in the *Succession of Chauvin*, in 1972, made it clear that a legal usufruct confirmed by testament would end on remarriage over all the property inherited by the children of the decedent, just as would occur if the decedent had died intestate. A question later arose as to whether any deviation in a testator’s will from the prerequisites provided in Article 916 would render the usufruct “testamentary” rather than “legal” and thus not allow the usufruct to extend over the forced portion inherited by the decedent’s children. In the *Succession of Waldron*, decided in 1975, the decedent who was possessed of only community property left a will bequeathing to his daughter her forced portion, subject to the usufruct of his wife for life. Clearly deviating from the 916 usufruct that terminated on remarriage, the usufruct was challenged as being “testamentary” rather than “legal” and, thus, an impingement of her legitime. The court allowed the usufruct to stand as a “legal” usufruct, but reasoned that, should the spouse remarry, the usufruct would be converted into a “testamentary” usufruct and would cease as to the daughter’s forced portion.

It was beginning to become clear that testators were attempting to grant their surviving spouses usufructs with all the advantages of the 916 usufruct, and then some. As life expectancy of spouses increased over the years, testators wished to provide their surviving spouses the security and protection of an income and home for a lifetime. The first legislative recognition of this came in 1975 with the sanctioning of the confirmation of the legal usufruct beyond the remarriage of the surviving spouse. That same year, the legislature enacted a provision allowing a testator to grant a “legal” usufruct over the family home, which was defined as “community property last occupied by the deceased and the surviving spouse as a home.”

35. 257 So. 2d 422 (La. 1972).
36. 323 So. 2d 434 (La. 1975).
38. 1976 La. Acts No. 227, §1 added a new Article 916.1 which provided:

In all cases, when the predeceased husband or wife shall not have disposed by last will and testament of his or her share in the family home, the survivor shall hold in usufruct, during his or her natural life, the deceased’s share of the family home, in addition to any other benefit conferred by Article 916 and notwithstanding any other provisions to the contrary. This usufruct shall cease, however, whenever the survivor shall enter into a subsequent marriage unless the usufruct has been confirmed for life or any other designated period to the survivor by the last will and testament of the predeceased husband or wife, and the rights of forced...
Since the surviving spouse, who was granted this expanded "legal" usufruct, was also the parent of the decedent's children, the risk of depriving the children of their inheritance was minimal, and the balance between spouse and children was left relatively in tact. However, by allowing the surviving spouse to remarry and hold the usufruct, these changes did allow for the possibility that the spouse's new partner might benefit, perhaps at the expense of the decedent's own children.

Despite the judicial expansion of the usufruct and the radical changes in family structure, the state reaffirmed its commitment to the system of forced heirship by repeating in the 1974 Louisiana Constitution the protection against abolition of forced heirship that had been in the Constitution of 1921.39 The new provision, however, was altered to authorize the legislature to determine who were forced heirs, the amount of the forced portion, and the grounds for disinherison.40 Yet, despite this apparent reaffirmation, this also was the time when many questioned the wisdom of the concept of forced heirship. In 1976, a debate was held at Louisiana State University in which the proponents praised the utility of the institution,41 the opponents rejected it as "unsound in theory and . . . unsound in practice,"42 and others proposed alternatives such as a family maintenance system to replace the system.43

Heirs to the legitime shall be subject to any such usufruct, which usufruct shall not be an impingement upon the legitime.

Family home, for the purposes of this Article, shall be limited to community property last occupied by the deceased and the surviving spouse as a home, and in the case of city, town, or village property, shall include not more than one lot or lots of ground on which the family residence is actually situated, and in the case of rural property, shall include not more than 20 acres of land on which the family residence is situated.

39. La. Const. art. 4, § 16 (1921) provided:

No law shall be passed abolishing forced heirship or authorizing the creation of substitutions, fidei commissa or trust estates; except that the Legislature may authorize the creation of trust estates for a period not exceeding 10 years after the death of the donor; provided, that where a natural person is the direct beneficiary said period may be made to extend until 10 years after his majority; and provided further, that this prohibition as to trust estates or fidei commissa shall not apply to donations strictly for educational, charitable or religious purposes.

40. La. Const. art. 12, § 5 (1974) provided:

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. Trusts may be authorized by law, and a forced portion may be placed in trust.


Another problem with Louisiana's succession law, which became apparent at the time of these intense debates regarding forced heirship and its structure, was that illegitimate children were denied equal protection as to the inheritance of their parents.\textsuperscript{44} Because the issue of rights for illegitimate children and the question of forced heirship were related, a Joint Legislative Subcommittee on Forced Heirship and Rights of Illegitimate Children undertook a study of these issues, while the Louisiana State Law Institute Successions Committee was engaged in a similar activity.

The 1981 legislative package included proposals from both groups and culminated in significant changes in Louisiana succession law. The changes of 1981 granted illegitimate children equal standing with legitimate children if the illegitimate children were acknowledged by the decedent or could prove filiation in a timely manner.\textsuperscript{45}

Pursuant to what some viewed as an invitation by the 1974 Constitution in its authorization of the legislature to determine who were forced heirs, the legislature eliminated parents as forced heirs to the community property of a decedent in 1979.\textsuperscript{46} In the 1981 legislation, the legislature went even further, and parents were also eliminated as forced heirs as to the separate property of the

\textsuperscript{44} For example, La. Civ. Code art. 919 (1870) provided:

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

For a full discussion of the rights of illegitimates at this time, see Katherine V. Lorio, \textit{Succession Rights of Illegitimates in Louisiana}, 24 Loy. L. Rev. 1 (1978).

\textsuperscript{45} 1981 La. Acts No. 720, § 1 amended and reenacted Article 209 and provided:

A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation as by acknowledgment under Article 203 must prove filiation by a preponderance of the evidence in a civil proceeding instituted by the child or an his behalf within the time limit provided in this Article.

B. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.

C. The right to bring this proceeding is heritable.

By 1982 La. Acts No. 527, § 1, this article was amended to provide that if the alleged parent was deceased, filiation would have to be provided by clear and convincing evidence.

Another amendment by 1984 La. Acts No. 810 included an exception to the prescription, allowing the action for filiation to be brought within one year of death of the alleged parent for purposes of recovering damages in tort.

\textsuperscript{46} 1979 La. Acts No. 778, § 1.
In addition, the amount of the forced portion was decreased for descendants from one-third to one-fourth if one child survived the decedent, remained at one-half for two children, but decreased from two-thirds to one-half for three or more children. In addition the law also was amended to result in an expansion of the disposable portion in cases of disinherison or unworthiness of heirs.

The manner of calculating the forced portion was also altered significantly. Excluded from inclusion in the mass estate were donations inter vivos, made within three years of the donor's death, to charitable, educational, or religious organizations, donations to a spouse of a previous marriage made during that marriage, and donations inter vivos by a donor to his descendants if each forced heir and the root represented by that forced heir received the same value of property by donation inter vivos in the same calendar year. Although life insurance proceeds to a named beneficiary were long regarded as sui generis and not includable in the mass estate, the 1981 legislation provided that when such proceeds were paid to a forced heir, that amount should be credited in satisfaction of the heir's legitime. The same treatment was afforded for pension benefits. Also, the concept of revendication allowing a forced heir to follow immovable property, which had been donated by the decedent and subsequently sold to a third person was eliminated as a form of relief for the forced heir.

The 1981 legislation also included a pivotal change in the spousal usufruct, affecting the precarious balance between the spouse and the descendants. Although the ability to grant a legal usufruct by testament over separate property was permitted in 1979, such a spousal usufruct would only extend to property inherited by children of the decedent and his surviving spouse. Yet, even that liberal
extension of the usufruct was deemed insufficient as the populace married, remarried, and remarried again. Deviating more from the balancing act of the original article, Article 916 was altered again by the 1981 legislation. Not only did Article 916 get renumbered and become Article 890, but it provided that even in an intestate succession, the spousal usufruct would extend over property inherited by all the decedent’s children, issue or non-issue of his marriage to his surviving spouse, thus allowing a stepparent to enjoy a usufruct over property inherited by the decedent’s children.

Despite all these changes, as well as amendments making it easier to disinherit descendants, the movement to eliminate forced heirship in Louisiana escalated. With a constitutional amendment protecting it from abolition, forced heirship could still only be eliminated by getting a two-thirds vote of the legislature followed by a statewide popular vote approving the abolition. Several attempts to get legislative support for that effort failed.

The chief proponent of changes to Louisiana’s forced heirship law was a conscientious senator from the northern part of Louisiana who was prompted by some of his constituents to work toward the adoption of a system of “free testation,” which would allow a testator to leave nothing to his children if he so desired. Many of these constituents were military personnel from common law states who were serving at the time at Barksdale Airforce Base in Bossier, Louisiana, close to Shreveport. Since the constitutional amendment route appeared closed at the time, the idea of a “redefinition” of forced heirship was born. The theory was that the Constitution of 1974, by authorizing the legislature to determine who were forced heirs, allowed the legislature to “redefine” forced heirs as only those children of the decedent who were under the age of twenty-three at the time of the decedent’s death. As this was argued to be a mere “redefinition” within the allowable parameters of the Constitution, the advocates of this approach contended that no amendment to the Constitution would be necessary. All that would be required was the passage of a bill by the legislature by majority vote. Such a bill, “redefining” forced heirship to include children under the age of

59. See 1984 La. Acts No. 445, § 1 (permitting ascendants to disinherit descendants when the cause related to acts committed against the grandparent or the parent); 1985 La. Acts No. 456, § 1 (adding a cause for failure of a major child to communicate with a parent without just cause for a period of two years and shifting the burden for proving reconciliation or that the cause did not exist to the forced heir).
61. Senator Sydney Nelson represented the Bossier-Shreveport area of Louisiana which is the site of the Barksdale Airforce Base.
twenty-three and later amended to also include disabled children of any age, was introduced in 1989.

Joining in the alliance to "redefine" forced heirs to exclude children over the age of twenty-three were an influential former council President from Plaquemine Parish and his second wife who hired the former speaker of the Louisiana House of Representatives as a lobbyist to support the cause of "free testation." Supporters of the movement included other second and subsequent spouses who donned large "free testation" buttons as they testified in favor of the bill and unhappy parents who wished to disinherit children for causes not enumerated in the Civil Code. Opponents included some older

62. 1989 La. Acts No. 788 amended and reenacted Articles 1493, 1495, and 1496 to provide:

Art. 1493. Disposable portion

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

Under the name of children are included descendants of the first degree who are under the age of twenty-three, or who have been interdicted or who are subject to being interdicted because of mental incapacity or physical infirmity. Representation by descendants shall be permitted provided the child they represent would not have been twenty-three years of age on the date the donor's death.

Art. 1495. Forced heirs

In the case prescribed by the preceding article, the child or children under the age of twenty-three or the child or children who have been interdicted or who are subject to being interdicted because of mental incapacity or physical infirmity are called forced heirs, because the donor can not deprive them of the portion of his estate reserved for them by law, which portion shall be called the legitime, except in the cases where he has just cause to disinherit them.

Art. 1496. Disposable portion in absence of forced heirs

Where there are no forced heirs, donations inter vivos or mortis causa may be made to the whole amount of the property of the disposer, saving the reservation made hereafter.


64. E.L. "Bubba Henry" was hired to lobby for support of the changes. See Cynthia Samuel, Let's Rescue Forced Heirship, B.R. Advocate, Nov. 26, 1989, at 11B.

65. The causes for parents to disinherit children were listed in La. Civ. Code art. 1621 (1870), amended by 1983 La. Acts No. 566, § 1 and 1985 La. Acts 456, § 1 and included:

1. If the child has raised his or her hand to strike the parent, or if he or she
children who were the products of first marriages and a small group of law professors who referred to the entire movement as "regrettable."

The legislature passed the act "redefining" forced heirs, but deferred its effectiveness, pending work by the Louisiana Law Institute to integrate this "redefinition" into existing law. A new act, with essentially the same "redefinition" of forced heirs was passed in 1990 despite warnings from apprehensive scholars as to its dubious constitutionality. Eventually, a case challenging the "redefinition" found its way to the Louisiana Supreme Court. In the *Succession of Lauga,* decided on September 10, 1993, the Louisiana Supreme Court declared the entire act "redefining" forced heirship unconstitutional, as it in essence abolished the concept of forced heirship as contemplated by the Constitution, by depriving children of equal shares of a forced portion in a decedent's estate.

Thus, after the *Lauga* decision, all children remained forced heirs, regardless of age or disability. A change of that status would require

| has actually struck the parent; but a mere threat is not sufficient. |
|---|---|
| 2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury. |
| 3. If the child has attempted to take the life of either parent. |
| 4. If the child has accused a parent of any capital crime, except, however, that of high treason. |
| 5. If the child has refused sustenance to a parent, having means to afford it. |
| 6. If the child has neglected to take care of a parent become insane. |
| 7. If the child refused to ransom them, when detained in captivity. |
| 8. If the child used any act of violence or coercion to hinder a parent from making a will. |
| 9. If the child has refused to become security for the parent, having the means, in order to take him out of prison. |
| 10. If the son or daughter, being a minor, marries without the consent of his or her parents. |
| 11. If the child has been convicted of a felony for which the law provides that the punishment could be life imprisonment or death. |
| 12. If the child has known how to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after attaining the age of majority, except when the child is on active duty in any of the military forces of the United States. |


67. Since the original 1989 La. Acts No. 788 was not the product of the Louisiana Law Institute, nor had the Institute ever positively voted to abolish or redefine forced heirship, the role of the Institute was confined to one of "correlating" the new act with existing codal articles and revised statutes.

68. 1990 La. Acts No. 147.


70. 624 So. 2d 1156 (La. 1993).

71. *Id.* at 1169-70.
a constitutional amendment. In the summer of 1995, those favoring abolition of forced heirship were successful in obtaining just such an amendment. By two-thirds vote of the Louisiana legislature, an act was passed resulting in placing a constitutional amendment on the state ballot the following October, which, in essence declared forced heirs to be children under the age of twenty-four or those mentally or physically incapable of taking care of their person or estate.\(^2\) Included was an “implementation” act contemplated to go into effect in case the constitutional amendment were to pass.\(^3\)

The latter was subsequently replaced with another act which was much more extensive in its breadth,\(^4\) and purported to revise, amend, and re-enact the entire chapter of the Civil Code dealing with the disposable portion and its reduction.\(^5\) The new act defined forced heirs as “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.”\(^6\) Grandchildren may also be forced heirs by representation in two instances: 1) when a descendant of the first degree predeceases the decedent and the “descendant of the first degree would have been twenty-three years of age or younger at the time of the decedent's death”\(^7\) and 2) when a descendant of the first degree predeceases the decedent, “if the child of the descendant of the first degree, because of mental incapacity or physical infirmity, is permanently incapable of taking care of his or her person or

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72. The proposition to amend Article XII, §5 of the Louisiana Constitution passed on October 21, 1995, provided:
   To abolish forced heirship, except to require forced heirship for children twenty-three years or younger and to authorize the legislature to classify as forced heirs children of any age who are incapable of taking care of their person or estate due to mental incapacity or physical infirmity.
77. La. Civ. Code art. 1493(B).
administering his or her estate at the time of the decedent's death, regardless of the age of the descendant of the first degree at the time of the decedent's death."

The 1996 Code revision also made some changes to the law regarding the spousal usufruct. Prior to the revision, all the accumulated changes to the spousal usufruct were incorporated into the one same intestate article. The revised articles trifurcated the provisions, keeping the intestate provision in the intestate portion of the Code, and created two articles, which were placed in the testate chapter of the Code, one to deal with the usufruct created by testament, and another dealing with the forced heir's right to request security when a usufruct affected the legitime and either the forced heir was not a child of the surviving spouse or the spouse's usufruct.

78. La. Civ. Code art. 1493(C).

If the deceased spouse is survived by descendants, and shall not have disposed by testament of his share in the community property, the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants. This usufruct terminates when the surviving spouse contracts another marriage, unless confirmed by testament for life or for a shorter period.

The deceased may by testament grant a usufruct for life or for a shorter period to the surviving spouse over all or part of his separate property.

A usufruct authorized by this article is to be treated as a legal usufruct and is not an impairment upon legitime.

If the usufruct authorized by this article affects the rights of heirs other than children of the marriage between the deceased and the surviving spouse or affects separate property, security may be requested by the naked owner.

80. La. Civ. Code art. 890 provides:

If the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent's share of the community property to the extent that the decedent has not disposed of it by testament. This usufruct terminates when the surviving spouse dies or remarries, whichever occurs first.

81. Both La. Civ. Code arts. 1499 and 1514 were placed in Chapter 3, The Disposable Portion and its Reduction in Case of Excess, of Title II, Book III.
82. La. Civ. Code art. 1499 provides:

The decedent may grant a usufruct to the surviving spouse over all or part of his property, including the forced portion, and may grant the usufructuary the power to dispose of nonconsumables as provided in the law of usufruct. The usufruct shall be for life unless expressly designated for a shorter period.

A usufruct over the legitime in favor of the surviving spouse is a permissible burden that does not impinge upon the legitime, whether it affects community property or separate property, whether it is for life or a shorter period, whether or not the forced heir is a descendant of the surviving spouse, and whether or not the usufructuary has the power to dispose of nonconsumables.
affected separate property. The testate provision permits the testator to grant the surviving spouse a usufruct over both separate and community property, including the forced portion, and the complementary security article allows non-issue of the marriage between the decedent and the surviving spouse to request security when the surviving spouse’s usufruct affects a forced heir’s legitime and allows all forced heirs to request security over their legitimes when separate property is affected.

Although Article 890, the intestate article, no longer speaks of security, Louisiana Code of Civil Procedure Article 3154.1, recognizing the right of non-issue of the marriage between the decedent and the surviving spouse to request security over community or separate property inherited by such non-issue was retained, with no limitation as to its application only to the legitime. Thus, arguably, unless the legislature provides otherwise, non-issue of the marriage may still request security over their entire inheritance if it is subject to the intestate 890 spousal usufruct. This would include non-issue who are not forced heirs, as well as forced heirs, without limitation only to their respective legitimes.

83. La. Civ. Code art. 1514 provides:
A forced heir may request security when a usufruct in favor of a surviving spouse affects his legitime and he is not a child of the surviving spouse. A forced heir may also request security to the extent that a surviving spouse’s usufruct over the legitime affects separate property.
84. La. Civ. Code art. 1499, supra note 82.
86. La. Code Civ. Proc. art. 3154.1 provides:
If the former community or separate property of a decedent is burdened with a usufruct in favor of his surviving spouse, successors to that property, other than children of the decedent’s marriage with the survivor, may request security in accordance with the preceding article [Article 3154 deals with the right of forced heirs and a surviving spouse in community to compel an executor to furnish security] in an amount determined by the court as adequate to protect the petitioner’s interest.
87. House Bill number 724, proposed to the Louisiana legislature on recommendation of the Louisiana State Law Institute, to amend Civil Code Article 573 and to repeal Code of Civil Procedure Article 3154.1, limiting the request for security by descendants to the extent their respective legitimes were affected, was not adopted. H.B. 724, 2003 Leg., Reg. Sess. (La. 2003). See J. Randall Trahan, Cynthia A. Samuel, and Katherine S. Spaht, Minority Report (departing from the recommendation of the Council at the Law Institute as to one paragraph of the proposed amendment to Civil Code Article 573, supporting the unanimous position of the Property Committee of the Law Institute), H.B. 724 (La. 2003) (Louisiana State Law Institute, 2003). The report notes that when Article 573, which exempts legal usufructuaries from giving security, was revised in 1976 by La. Act 103, the spousal usufruct of Article 916 only applied to issue of marriage of the decedent and the surviving spouse. It posits that “[f]or a proper interpretation and application, Civil Code Article 573 must be read together with Civil Code Article
Civil Code Article 1499, the testamentary usufruct article, also allows the testator to grant the usufructuary the power to dispose of nonconsumables subject to the usufruct. Additionally, so as to ensure the opportunity of taking full advantage of the tax benefit afforded by the marital deduction, the article states that the usufruct granted pursuant to this article "shall be for life unless expressly designated for a shorter period." Obviously, the changes in Louisiana succession law were influenced by the changes in the society it serves. One of those changes was the weakening of familial ties beyond the nuclear family of father, mother, and children, and another was the rise of dependence on the government for obligations previously undertaken by the family. Supported by the argument that Social Security benefits would be available for aging parents, the Louisiana legislature eliminated parents as forced heirs as to community property in 1979 and as to separate property in 1981. Yet, at the same time that life expectancy increased, the desire to provide for one's surviving spouse also seemed to increase. The response was to increase the disposable portion available to the surviving spouse, and to expand the usufruct of that spouse for a lifetime over property inherited by descendants of the decedent.

As the form of wealth changed from being predominantly in the form of land to including more movable property and from inherited familial wealth to earned compensation, often in the form of work-related benefits such as insurance and pensions, the value of such movable work-related benefits increased. For some decedents, their largest assets ARE their pension plans. Thus, when the legislature exempted this major asset from inclusion in the active mass, making it available to be freely given to the surviving spouse, a major blow was rendered to forced heirs. As marriages ceased to last a lifetime and serial polygamy became commonplace, facilitated by easier

divorce laws, the surviving spouse was often not the parent of the decedent’s children. At the same time the favoring of the surviving spouse at the expense of the decedent’s children, fueled by federal tax provisions encouraging the decedent to bequeath as much as possible to the surviving spouse in order to take advantage of the unlimited marital deduction, continued.96

The law in Louisiana seemed to become, not necessarily what was best for society as a whole, but what was desired by each individual testator. The choices reflecting those desires changed as the institution of marriage itself changed. As marriages became more based on “emotional,” rather than “economic” considerations,97 the bonding between spouses became simultaneously “close” and “intense” while it lasted.98 It is not surprising that spouses, while happily married and with a tax structure encouraging it as well, expressed a desire to leave their entire estates to their surviving spouses, even when children also survived the decedent.99 When the children were issue of the decedent and the surviving spouse, that arrangement was often wise in that it protected the spouse, and since the spouse would presumably also have an interest in the well-being of her own children, the children of the decedent would ultimately be cared for at the time of death of the second spouse. It is the other aspect of this “new” marriage that creates more difficulty. For, although spouses tend to be close while the marriage last, marriages are much more “fragile” and “unstable” and often of limited duration.100 The interests of the children become much more precarious when the surviving spouse is a step-parent of the children of the decedent, a not uncommon phenomenon in our society of “serial polygamy.”101 The preference of most spouses as to “appropriate distribution of the estate between spouse and children [in such cases] becomes uncertain.”102 In fact, in analyzing the results of a survey conducted in 1978, it was concluded that most intestate decedents actually preferred a split distribution where the second or subsequent spouse would receive about 60 to 70% of the decedent’s estate with the rest shared equally by the decedent’s children and that

sort of legitimization of polygamy by way of legalizing multiple, successive marriages or relationships of persons who have continuing legal, financial and social ties to prior partners and children.”

97. See Glendon, supra note 4, at 29.
98. See Glendon, supra note 4, at 28.
100. Glendon, supra note 4, at 28.
101. See Krause & Meyer, supra note 95.
102. See Fellows, supra note 99, at 364.
such an arrangement would actually "best accommodate societal needs." Such an estate plan could easily have been fashioned in Louisiana prior to the radical changes in forced heirship. If the spouses shared a community of acquets and gains, the surviving spouse could receive her half of the community and could also receive one-half of the decedent's portion by will, effectively leaving the spouse with 75% of the community property. Yet, despite that possibility, some testators wished to leave the surviving spouse even more. Hence, the law was changed, limiting forced heirs to children in need of maintenance and increasing the powers of a surviving spouse usufructuary, even over the now-limited forced portion. The preference of a testator to determine the distribution of his estate, based on his own desires, rather than on a perceived societal ideal, came to emerge as a right of the individual.

Many of the societal changes which took place in Louisiana were also common to other western nations, including France, and were reflected by changes in the laws of those nations. Although the Code Napoleon placed the surviving spouse at the end of the line for inheritance in an intestate succession after all other relations capable of inheriting, the status of the spouse has improved considerably in France. Today, the surviving spouse inherits the entire intestate succession if the decedent is not survived by any descendants, or by his father or mother. When a decedent is survived by descendants of the marriage with the surviving spouse, the surviving spouse has an option to either take the usufruct of all the property or the ownership of one quarter of the estate. Where the surviving descendants are not issue of the marriage with the decedent, the surviving spouse does not have that option, but inherits the one quarter ownership of the decedent's property.

103. Id. at 367.
104. See Glendon, supra note 4, at 32, in which she notes:
Marriage law in the countries considered here tracks this social evolution precisely. It was moved from a situation once characterized by family or parental selection of spouse, to the gradual introduction of a veto by the child, then to choice of one's own spouse limited by the retention of a parental veto, then to unfettered choice, and now finally to a situation where people may and often do "correct" their original choices.
105. C. Nap.1804 art. 767 provided:
When the deceased leaves neither relations of a degree capable of succeeding, nor natural children, the property of his succession belongs to his conjunct not being divorced surviving him.
106. C. Civ. art. 757-2 provides:
In the absence of children or descendants of the deceased or of his father and mother, the surviving spouse shall take the whole succession.
107. C. Civ. art. 757 provides:
Where a predeceased spouse leaves children or descendants, the
In testate successions in France, there are limitations on the amount that may be freely disposed of by the decedent. The disposable portion is one-half if one child survives, one-third if two children survive, and one-fourth if three or more children survive.\footnote{108}

Another code article gives a testator who is survived by children, whether they are issue of marriage with the surviving spouse or not, the opportunity to choose from among three options to favor his surviving spouse. He may leave the spouse the entire disposable portion, he may leave the spouse one-quarter of his property in full ownership and three-quarters in usufruct, or he may leave her all the property in usufruct only.\footnote{109} By legislative action in 2001, the surviving spouse has been promoted to a forced heir as to one-quarter of the decedent’s estate, in the absence of descendants and ascendants.\footnote{110}

Perhaps as we in Louisiana make changes in our law, we should carefully examine the amendments made by our precursor. This is not to suggest that we blindly follow the path taken by France or any other nation, but that, where the cultural changes promoting legislative reaction are similar, we compare and, where appropriate, adopt an approach resembling that of our civilian brothers and sisters. As opinion surveys in France indicated a desire to improve the status of the surviving spouse in inheritance, those surveys also revealed a “continuing attachment to the traditional idea that property surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses and the ownership of the quarter in the presence of one or several children who are not born from both spouses.

\footnote{108} C. Civ. art. 913 provides:

Gratuitous transfers, either by inter vivos acts or by wills, may not exceed half of the property of a disposing person, where he leaves only one child at his death; one-third, where he leaves two children; one-fourth, where he leaves three or a greater number; without there being occasion to discriminate between legitimate and illegitimate children.

\footnote{109} C. Civ. art. 1094-1 provides:

Where a spouse leaves children or descendants, either legitimate, born or not of the marriage, or illegitimate, he or she may dispose in favour of the other spouse, either of ownership of what he or she may dispose of in favour of a stranger, or of one-fourth of his property in ownership and of the other three-fourths in usufruct, or else of the totality of property in usufruct only.

\footnote{110} C. Civ. art. 914-1 provides:

Gratuitous transfers, either by inter vivos acts or by wills, may not exceed three-fourths of the property where, failing descendants and ascendants, a deceased leaves a surviving spouse, not divorced, against whom does not exist an order of judicial separation which has become res judicata and who is not a party to divorce or judicial separation proceedings.
should be preserved for children.” Similar opinions were revealed in the American surveys, with particular ambivalence as to treatment of a second or subsequent spouse when the decedent died survived by children of a former marriage. Additionally, the American study indicated a marked preference to treat all surviving children equally, regardless of the marriage from which they were born.

Yet, in the eagerness to provide a larger disposable portion and to accommodate the surviving spouse in Louisiana, legislators lost sight of the usual preference for equality among children. For example, where children of a prior marriage exist as well as children of the marriage of the decedent with the surviving spouse, the surviving spouse may hold a usufruct over the property of all the children, even those who are stepchildren of the survivor. This is particularly troublesome in a nation in which one-third of will contests relate to issues of divorce and remarriage, and most of these are brought by children and stepchildren. For, it seems quite possible that children may not be treated the same by a parent and a stepparent. Additionally, by defining forced heirs in such a way that only those under twenty-four are forced, inequality becomes even more of a problem. Consider an estate where the decedent has made gifts during life, which would be included in the mass estate for purposes of calculating the forced portion. If the decedent is survived by five children, only one of whom is under the age of twenty-four, that child must receive one-fifth of the mass estate. If that mass is much greater than the net estate because of the gift giving, a parent cannot treat the children equally, even if that is his desire.

Rather than succumb to the demands of free testation for each individual, Louisiana may have been better served by improving the status of the surviving spouse, while still balancing the interests of the decedent’s children. Perhaps if we had examined more closely the path taken by the countries that had provided us our original model for our Code, we may have also struck a balance that would have better served our state.

112. See Fellows, supra note 99, at 364-68.
113. Id. at 368-73.