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Time for Uniformity in Inheritance Laws? Survey and Debate

'Degrees, observances, customs and laws, decline to your confounding contraries, and let confusion live!' (Shakespeare – *Timon of Athens* Act I)

Introduction and overview

We can all understand the desire to bequeath one's money as one sees fit, as well as the responsibilities of parents to those they have brought into the world. We can all imagine (and in many cases, the law reflects) some core rules that enforce a balance between these sometimes contradictory impulses, as well as the need to sometimes curtail these rights in the cases of clear pathology (for example, dramatically spendthrift and addicted children on the one hand, or vindictive and unbalanced parents on the other), or to accommodate the endless special cases that life presents. Yet, today, the law's ability to achieve this balance and achieve reasonable outcomes is increasingly hampered by a fragmented and inchoate patchwork of legal systems.

While some aspects of the current situation stem from the irresolvable tensions of the human condition, I suggest that the legal profession consider some modest reforms of an international nature can significantly reduce some of the human injury and inequity (not to mention legal headache) it causes. While there are no easy answers (and, if anything, this article will probably deepen this sense), I believe we can devise the outlines of a practical way for the international legal system to lessen the pain and waste caused by the current chaotic state of inheritance laws we have inherited. The arrangement will of necessity be partial, as it will have to honor continuity with the varied and often idiosyncratic legal traditions of myriad jurisdictions. But, at the same time, it would propose inserting a cross-jurisdictionally uniform

component better suited to our globalized and cosmopolitan times, able to protect the rights of both bequeathed and inheritors against some of the potentially sharper edges of any less than perfect inheritance decisions of those who pass on wealth or local legal systems that regulates these.

This chapter reviews the present situation as well as some of the social and other changes that so challenge contemporary inheritance laws, the main legal traditions in this respect, and the extent of local variation within these.

Global trends in the structure of families

In today's world, succession laws have to contend with the rapid social and cultural transformation that has caused several changes within the family structure. during the past few decades. Firstly, we have growing divorce rates in the western world[1]. Secondly, we have witnessed the emergence of complex and 'nontraditional' families or 'family situations', such as same-sex couples, single parents, childbearing outside marriage, surrogate mothers, the rights of frozen embryos, etc.

Have these changes found sufficient expression in the manner in which the legal systems presently deal with questions of inheritance, and in particular the age-old dispute regarding freedom of testation versus reserved portions?

Many other elements of family law have indeed adapted themselves to the radical changes in family structure. An obvious example is the way in which the law of many countries now deals with the question of custodial and visitation rights applying to children who form part of a 'same-sex family unit' (See for example a decision dealing with a dispute between two lesbian partners concerning custody of a child born to one of the partners, in which the court held that the biological partner was stopped from claiming sole custody)[2]. The development in this branch of the law would have been unthinkable a generation ago, and indeed would even have been regarded as abhorrent two generations ago.

Surely these social trends, amongst others, should also affect the manner in which the law should deal with inheritance, in parallel with many other elements of family law that have adapted to change?

It is not only changes in family structure, however, which would seem to demand a reassessment of the laws of inheritance. A century ago Doctor Ernest Schuster opined that "the steady expansion of international commercial

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1 As put by Waggoner, we are a "Multiple-Marriage Society", see: L.W. Waggoner, *The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code*, 76 Iowa L. Rev. 223 (1991).

2 K.H. v-Superior Court (2005) 37 Cal. 4th 156,33 Cl.Rptr.3d 81ף.

dealings, the greater frequency of marriages between members of different nationalities and the constantly growing number of causes facilitating and widening changes of domicile on the part of persons engaged in mercantile, industrial or scientific pursuits, have largely increased the number of occasions on which English lawyers have to consult an advocate practicing in the country of which the law has to be applied…'[3]. A fortiori, this is far more relevant in today's global village, where mobilization and globalization allow testators great freedom regarding their estates during their own lifetimes? Moreover, the enormous increase in the purchase of secondary homes in foreign countries for pleasure, business and investment, has led to a corresponding increase in the number of deceased estates which have a foreign element.

Were inheritance only a fiscal matter, it would tend to be found in the professional literatures of lawyers and accountants, not at pivotal junctures of canonical Western cultural texts, ranging from the Bible to Shakespeare (*King Lear*, *Henry V* etc.) to *Middlemarch* and *War and Peace* and even finding musical expression in Puccini's minor comic masterpiece *Gianni Schicci* (published by Ricordi in 1919) Money is at stake, for sure, but inheritance also invokes some of the most primal layers of psychological and family life: continuity, reward and punishment, loyalty, death and posterity, rivalry, and love. Add to this emotional undercurrent the myriad and changing permutations of family structures and emotional allegiances over time, and we can understand why the rules and rights related to passing on and receiving wealth after death have long troubled our profession. A scholar of Late Roman legislation (371–428 AD), referring to inheritance, reports this to be "a tangled web of seemingly conflicting constitutions" (Tate, 2008), whose detailed and shifting decisions related to children outside of marriage or from second marriages would be familiar to modern practitioners (though not, thankfully, the discussions of the offspring of master and slave).

While things were never simple, I will argue that the combination of vastly relaxed mores and practices related to structures of affiliation and birth, the increased sophistication of inheritance modalities (for example, an incentive trust, which imposes fixed conditions of distributions to encourage certain beneficiary behavior), and the exponential globalization of residence, property, and potential jurisdictions (and of forum shopping and asset shifting between them), have made the current complexity of inheritance law almost intolerable.

Prima facie, a system based on freedom of testation seems inherently to cope with the complexities brought about by new family structures, while those systems that secure family shares may be considered outdated. On

[3] E. Schuster, *The principles of german civil law* (1907).

the other hand, however, despite this assumption, the law should surely not abandon the core values enshrined by the concept of the reserve – first and foremost, the need to protect the children's right to succeed their parents. We shall examine this divide and its consequences at a greater length.

Freedom of testation – a comparative perspective

When reflecting on the need for possible changes, adjustments or indeed adherence to the status quo, it would be valuable to engage in a brief survey of different jurisdictions in the two basic systems and note especially jurisdictions where there is variance.

Common Law Jurisdictions

Whilst the common law of England may be difficult to define in a brief introduction it can probably be best explained by way of contrast with statute law and especially in contrast with civil or international law. It is a body of law built up century by century, by custom and by a body of decisions decided in the highest courts of the land whose decisions are final. Whilst we are dealing with an enormous mass of case law, nevertheless even from the nineteenth century we have witnessed an increasing number of statutes dealing with specific topics-including, of course, matters of inheritance. Until the advent of the European Economic Community, common law has been relatively free from foreign influence and has been described as "the embodiment of the English and American genius for the practical as opposed to the theoretical." However this self-congratulation does not take into account the enormous influence that Canon law had on common law until a mere hundred years ago with its marked misogyny which was determined to keep women in a subordinate condition even, or especially, in matters of inheritance. This was the case not only in England, and certainly not only in common law. It was only in the late nineteenth century that Canon law regarding sole inheritance of sons was repealed in one of the Swiss Cantons. The complete inferiority and exclusion of the female sex was maintained both by civil and common law.

> My learned lord, we pray you to proceed,
> And justly and religiously unfold
> Why the law Salic that they have in France
> Or should or should not bar us in our claim.
> Shakespeare, Henry V, Act 1, Sc.2,9–12.

Poor King Henry's bewilderment is as relevant now as it was more than half a millennium ago. And so is the probable French response which would be: "Why do you think your system is better than ours?" and indeed Professor Lemann adds 'It was not based on moral principle of mutual duties between direct relatives, but on a political notion of preservation of family estates.' (27 supra) The Church, in the interests of that class which was alone admitted to the priesthood, was a determining factor in enabling the accumulation of wealth in the hands of men, and thereby did much towards keeping woman in a subordinate condition. This brings to mind Jane Austen's masterpiece *Sense and Sensibility* in which the young Mr. Dashwood, who has inherited his father's estate as sole heir because of the idiosyncrasies of English law at that time, wishes to honor his father's wish and provide for his stepsisters by giving them each one thousand pounds (equivalent to approximately two hundred thousand Euros, at that time) from the enormous estate that he inherited. His wife proceeds to whittle down this not particularly generous initial gesture (in stages) from five hundred pounds each to a small annuity. And in the end he agrees to his wife's argument: "I'm convinced within myself that your father had no idea of your giving them any money at all. The assistance he thought of was only was only such as may be reasonably expected of you… sending them presents of fish and game and so forth whenever they are in season".

Any practitioner in the field will certainly attest to examples of such self-serving sophistry when the inheritors have to deal with the disinherited.

It is important to note at the outset that a majority of countries in the world and in particular the overwhelming majority of countries in the Western world, have adopted laws based either on English common law or the Code Napoleon. Indeed the majority of countries worldwide adhere to some form of the Code Napoleon. English law has only taken root in those countries in which it was planted by conquerors and colonizers – or where there was a substantial English sphere of influence. Nevertheless, as is always inevitable when dealing with law, there are exceptions to any generalization, as will be more fully detailed below.

Common Law

As is well known, the general rule is that common law jurisdictions grant freedom of testation. Rationales:[4] "testation as a 'natural right' (though not

[4] A.J. Hirsch, *The Problem of the Insolvent Heir*, http://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3V-0DG0-00CW-80V9-00000-00&context=1000516, 74 Cornell L. Rev. 587, 636-637 (1989).

recognized as a constitutional one), utilitarian functions (the freedom to choose one's will as an encouragement for useful social behavior)[5].

Nevertheless, as we shall see, social or other pressures have led to much variation and adjustment in both the civil law jurisdictions as well as in those following the common law.

We cite a few examples of 'deviations' in 'common law' jurisdictions:

- **England and Wales** – There are no compulsory shares that must be left to any person under law[6]. However, provision is now made for the possibility of a dependent in need of support even after the age of majority. Gifts prior to death are not set off against the heir's inheritance under a will, unless specified to the contrary[7]. And there is a statutory exception from this doctrine with regard to gifts to children who predeceased the testator where the law substitutes beneficiaries not named in the will.
- **The United States**
  - **New York** – Even in what is possibly the world capital of capitalism, and despite any testamentary instructions, the surviving spouse is entitled to an elective share from the estate equal to $50,000 or one-third of the net estate, whichever is the largest, which includes all property in the deceased's name, whether moveable or immoveable and wherever located. The net estate is further augmented by taking into account 'testamentary substitutes' such as pension plan benefits and gifts which exceed the federal gift tax exclusion amount and which were made within one year prior to the deceased's death[8].
  - **California** – Individuals are generally permitted to devise their assets without limitation[9]. However, the California Probate Code states that a spouse or domestic partner who has been omitted from the will due to entering into a relationship with the testator after the will was completed (and given that it was not revised) is entitled to one half of the estate[10]. There are similar provisions regarding children, but they are less strict[11]. Gifts generally do not reduce the inheritance, unless there was evidence for the testator's intent[12].

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5 See also: A.J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 Minn. L. Rev. 2180 (2011).

6 L. Garb, J. Wood, *International Succession 233*, Oxford University Press 4th ed., 2015. See section 15.36 for certain exceptions recognized by the law in a case of a dependent not receiving "reasonable financial provision" (*Ibid.*, 234).

7 *Ibid.*, 235.

8 *Ibid.*, 777.

9 *Ibid.*, 746.

10 *Ibid.*

11 *Ibid.*, 746–747.

12 *Ibid.*, 748–749.

  - **Florida** – Florida too operates a common law system[13]. However, in this State there is forced heirship for the benefit of spouses only. The surviving spouse of a person who died domiciled in Florida may, in the absence of a marital agreement to the contrary, have homestead rights, pretermitted spousal rights, family allowance rights and exempt property rights[14].
  - **Louisiana** – Until recently, this state (which has a mixed common law and civil law jurisdiction) followed the civil law tradition of forced heirship[15]. In 1999 a new law took effect, which allowed parents more freedom over the disposition of their estates once a child reached 23 years of age[16].
- **Cyprus** – Despite being a common law system, Cyprus law restricts the freedom of testation under certain circumstances[17]. Thus, a portion of one's estate may be disposed of by will, while the remainder (called 'the statuary portion') is subject to forced heirship rules.
- **Guernsey** – Inheritance laws in this country differentiate between real property and personal property, both of which are subject to rules of forced heirship. This is an interesting variation on the usual and virtually universal rule that the law regarding the inheritance of real property is determined by the *lex situs* whereas the law regarding inheritance of personal property is determined either by domicile or by 'personal' law i.e. citizenship. On the other hand, in the case of real property, a testator with descendants must leave the same to one or more of the following: their spouse; their descendants and the descendants of their descendants; their step-children and their descendants[18]. Regarding personal property, however, the spouse has a right to one-half of the inheritance when there are no descendants and otherwise to one third[19]. In the second case, the children are each entitled to an equal share of the inheritance, unless they have shown themselves unworthy (*indigne*). An interesting coda is that an unworthy child will only be entitled to income, but upon the death of their child his or her descendants will be entitled to the share that their parents would have inherited.

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13 *Ibid.*, 759.

14 *Ibid.*, 762.

15 J. Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 La. L. Rev. 42 (1941).

16 V.D. Rougeau, *No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law*, 1 Civil Law Commentaries 1, 21 (2008).

17 Garb & Wood, 205.

18 *Ibid.*, 303.

19 *Ibid.*, 304.

- **India** – Generally speaking, India follows a common law system, derived from the British colonial legal system. However, due to the vast diversity of its peoples, there are some exceptions regarding the personal law. Indians, with the exceptions of Muslims, are therefore entitled to dispose of their property as they wish[20]. A married woman, however, may only dispose by will of any property that she herself could alienate during her lifetime. Muslims, on the other hand, do not enjoy freedom of testation – they may only dispose by will of up to one-third of their estate[21].
- **Pakistan** – here we have another example of a common law system with rules which also limit freedom of testation, as a result of Muslim religious laws.
- **South Africa** – There are no compulsory shares or minimum percentages for a surviving spouse, civil partner or child. However, a child who is not self-supporting will have a claim for maintenance against the estate of the deceased[22] and it does not appear that there is any age restriction. It is worth noting that the Supreme Court of Appeals in the country, even after the abolition of apartheid, gave preference to freedom of testation over racial equality[23] (The implications of this decision are more fully discussed below).
- **New Zealand** – The inheritance laws of this country give testamentary freedom to the will-maker, who is not bound to leave an obligatory share to any particular descendant[24]. Nevertheless, this freedom may be subject to the testator's *moral* duty to provide for the maintenance and support of certain close relatives *irrespective of age*[25]: the surviving spouse, civil or *de facto* partner and/or children may apply to the court in such a case.
- **Ireland** – Unusually, freedom of testation is limited by the rights of spouses but not of children. Therefore, the surviving spouse is entitled by law to one-half of the estate when there are no children and to one-third if there are children[26]. Children, however, are not entitled to a part of the estate by way of a right. At best, their right could be described as a 'right to apply'. The court has the authority to make provision for the children

[20] *Ibid.*, 335.
[21] *Ibid.*, 336.
[22] *Ibid.*, 642.
[23] See Ex Parte: BoE Trust Ltd NO and Others (SCA) (unreported case no 846/11, 28.09.2012) (Erasmus AJA), in dealing with an apartheid era will.
[24] Garb, Wood, 551.
[25] *Ibid.*, 552.
[26] *Ibid.*, 350.

where it believes that the testator has failed in his moral duty to provide for the child taking the testator's means into account. It is interesting that this jurisdiction and the preceding one referred to (New Zealand) have regard to the testator's *moral* duty, which in our opinion introduces a concept, albeit a complex one, which should surely find its place in any examination of the vexed question of freedom of testation. This is also echoed in the case of China referred to below.

- **Scotland** – Scotland is a mixed system, influenced both by English and Roman law. Accordingly, there are certain limits on freedom of testation, which derive from strict maintenance provisions[27]. A spouse/civil partner has the right to one-third of the moveable estate in respect of any will (increasing to one-half if there are no surviving children), and children have a right to a proportionate share of one-third (or one-half if the deceased is a widow/widower. However, it must be borne in mind that prior legal rights could exhaust the entire estate and lead to the disinheritance of children.

Civil Law Jurisdictions

It is difficult to conceive of a code of laws, statutes or any other form of 'legislation' since Sinai which has had the profound effect of the Code Napoleon promulgated in France on the twenty first of March 1804.

"The influence of the French civil code has been great in Europe; it has dominated Baden and the Prussian Rhine provinces for nearly a hundred years; the codes of Belgium and Luxembourg follow it, in many titles, almost literally; its spirit is conspicuous in the codes of the Netherlands, Italy, Spain and Portugal; and beyond the Seas in Egypt's, in South America, in Louisiana, in lower Canada, the lawyer conversant with the formulae and the institutions of French law will find himself at home. Throughout these wide regions it is not too much to say that divergences from the French law, where they are to be found, are deliberate and exceptional, while the resemblances or unconscious and therefore normal and all-was pervasive" – Professor Neville Brown *Introduction to French law*, third edition, p. 5. As we all know, in general, civil law jurisdictions provide for strict family shares (forced heirship provisions). A main justification given in the past for this custom is that testimonial freedom can be regarded as a 'moral hazard', due to the fact that testators may act irresponsibly if they do not have to live with the consequences

[27] *Ibid.*, 624.

of their actions[28]. Whilst the concept of forced heirship may have found its detailed expression in the code Napoleon, as Professor Lemann notes on p. 27, its origins certainly antedate the 19th-century. "An institution that has been part of our law since time immemorial hardly needs defense" – The early French commentator Louiet, writing in 1693, claimed to find scriptural authority for forced heirship in the books of Genesis and Numbers. The latter authority states: "Thou shalt cause the inheritance of their father to pass unto them". In Roman law the Falcidian portion (abolished in article 1616 of the Louisiana Civil Code) assured a forced share to descendants, and the doctrine of *querela inofficiosi testamenti* originally ordained for descendants and later for other members of the testator's family. In the regions governed by customary law and the barbarian codes, the doctrine of the reserved portion likewise protected heirs, though the *reserve* was quite different from the Roman *legitime* (p. 5).

However, despite any hymn of praise for the civil law system of inheritance, we should not expect to find uniformity in the inheritance law governed by this system.

This is shown by a few examples:

- France – The legal right to inheritance is a cornerstone of the French private legal tradition, and therefore results in severe limitations on the freedom of testation[29]. Compulsory shares apply to all descendants, regardless of their degree of relation to the deceased[30]. Where there is more than one heir, lifetime gifts may impact the receiver's share of the inheritance[31]. As a result, the law requires an heir to return all gifts to the estate in order to maintain equality between all successors[32]. France is also one of the few jurisdictions where the reserved percentage increases (up to three-quarters) – depending on the number of children. It is interesting to note that in 2001 the law was changed with regard to the rights of surviving spouses and in 2006 with regard to the compulsory shares for ascendants. To have two significant changes within such a short period is positively breaking the speed limit when compared with the usual tectonic shifts in inheritance law described below.
- China – there are strict provisions concerning compulsory shares for beneficiaries who cannot provide for themselves, although the law is un-

[28] Hirsch 1989, pp. 639; see also: T.B. Lemann, *In Defense of Forced Heirship*, 52 Tul. L. Rev. 20 (1978).

[29] Garb, Wood, 251–253.

[30] *Ibid.*, 252.

[31] *Ibid.*, 254.

[32] *Ibid.*, 254–255.

clear about forced heirship aimed at limiting and preventing abuse[33]. In China there is a fascinating inclusion of spouse, children and parents (in the first tier of heirs) in case of intestacy. Widowed daughters-in-law or sons-in-law who made significant contributions in supporting their parents-in-law are also amongst the primary heirs in the case of intestacy. Furthermore, Article 19 of the Succession Law and Article 37 of the 'Several Opinions' provide that compulsory shares must be saved for a beneficiary who lacks the capacity to work and obtain a source of income – irrespective of age, i.e. this is not to be regarded as maintenance for a minor and clearly here too the *moral* element finds expression.

- Germany – German private law (the German Civil Code, BGB) guarantees freedom of testation, although its legal system is the civil law. However, there are certain restrictions derived from safeguards protecting the rights of certain family members[34] For instance, the law requires that close relations will be entitled to a certain share (without stating a specific percentage) of the inheritance, in the form of a monetary payment. Also, certain provisions for maintenance are required by the estate[35].
- Mexico – Despite belonging to the civil law system, there are no compulsory shares or forced heirship rules in Mexico, other than those for maintenance[36]. Contracts for inheritance made prior to death are not valid or binding[37].

The perils of testimonial freedom due to global changes:

One of the questions this article has already posited is whether or not freedom of testation should be re-examined in light of global social trends in the family structure.

While it has been argued that freedom of testation may be viewed as a better instrument than provisions for protected portions when dealing with changes in the family and other global trends, it may well be argued that in fact such freedom poses a greater threat of injustice than in the past. Furthermore, because descendants are far more vulnerable and now possibly in greater need than they were in the past, there is a greater danger that they may be left without protection, and this inter alia because of the phenomenon of multiple marriages in different jurisdictions.

33 *Ibid.*, 192.
34 *Ibid.*, 271.
35 *Ibid.*, 272.
36 *Ibid.*, 496.
37 *Ibid.*, 497.

It is the author's contention, however, that the possible need to consider a reassessment of the principle of freedom of testation reaches far beyond questions of the changes in the modern family and global mobility, but rather that these changes should give an impetus for a reconsideration of the *psychological* effects of disinheritance. This is a consideration which would seem to have been somewhat neglected by our lawmakers and indeed in the literature on the subject.

The theme of disinheritance is of the utmost antiquity and indeed is to be found at the very beginning of the Bible. It could very well be argued that the book of Genesis which is known in Jewish tradition as 'the book of the family' could also be called a 'tragic book' because of this very theme. When we reconsider the ur-story of Cain and Abel, the banishment of Ishmael (which could well be construed as having significant overtones in the twenty first century), the story of Jacob and Esau and the birthright granted by their father Isaac and the preferential treatment given by Jacob to Joseph as opposed to his other sons, we are left with a strong feeling that we are not dealing with a question of money or goods or even title. The plaintive cry of Esau "bless me too, father," upon learning that Jacob, through deception, received the blessing – forcibly demonstrates the need of the child to feel that he is equal in the eyes of the parent, whether or not there are any financial considerations. (It is significant that in recognition of this pain, the Hebrew commentators went to great length down the centuries to find excuses for Jacob's behavior)[38].

Cain's anger that his offering was not accepted by God led to murder. Esau also expressed a desire to kill his brother and of course Joseph's brothers forced his sale into slavery. It is important to note that in the biblical texts there is no suggestion of a child complaining of *financial* deprivation, and indeed promises to the contrary were made to Ishmael and Esau.

Any practitioner who has dealt with wills which dispossess a natural heir can attest to the fact that the harm caused will resonate far beyond the immediate siblings but to their children and grandchildren, with different branches of the same family not being on speaking terms with each other whilst possibly not even remembering how the feud originated. It is in this light that we can understand Niccolo Machievelli's famous statement in *The Prince*: "A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair". This is not a cynic's claim, but a statement of psychological reality: the son knows and has always known of the eventual 'loss of his father', but the 'loss of his inheritance' is a slap in the face from the very

[38] See for example Rashi (1040–1105) on Genesis XXVII, 35–38.

grave which may cast into profound doubt the sons feeling of confidence in the veracity of his father's love for him. It is not the money but the removal of that which he had always thought was the solid rock of his existence that 'may drive him to despair'[39].

Two cases in which the author was personally involved will, I think, further illustrate some of the problems involved.

Firstly, there was a case in which five New York siblings inherited a very small property to which two of the children claimed sole rights by virtue of a 'quit deed' that their late father had signed. I successfully maintained on behalf of the other three siblings whom I represented that because of *lex situs* the quit deed was of no effect. The property was then sold and each of the five siblings received approximately $8,000 after the deduction of my fees which in fact exceeded each sibling's share! The absurdity of the situation was highlighted by the fact that all five siblings were people in their sixties and seventies who enjoyed financial circumstances varying from comfortable to wealthy. Quite obviously, therefore, this case was not about financial need or indeed a search for financial justice, but stemmed from a problem whose familial roots lay far deeper, namely the need for a child to feel equally loved by a parent even in retrospect! The 'solution' of going to law, however, must have not only exacerbated the rift between siblings but without doubt the lasting effect involved their offspring as well.

The other case involved a son of extremely wealthy expatriate Libyan parents who had been discriminated against by his parents and in particular by his mother in favor of his other siblings (including a twin!) since a very early age. Upon the father's death, the *biological* mother, to the detriment of this particular son, endeavored to obtain probate in a common law jurisdiction so as to avoid the protected portion that her son would have received had the estate been decided according to the true domicile of the father, which was in a certain civil law jurisdiction. There he would have been entitled to approximately fifteen percent of the extremely large estate. After years of litigation in three continents, the case was eventually settled – as the lawyers on both sides knew *ab initio* would in fact be the end result. However, the lawyer's joke about 'an injury which can be alleviated by the frequent application of hundred dollar bills to the injured area' did not apply, and the millions of dollars the excluded child received did not and will not help him overcome the pain of rejection.

Is the principal of freedom of testation worth the pain of these kinds of cases, and does not the claim 'a person is entitled to do what he wants with

[39] Niccolo Machiavelli (1469–1527), *The Prince*.

his own property' ring hollow? Can the testator ignore the fact that freedom of choice notwithstanding, the upbringing, education and one could even argue, his or her genes must have contributed to some extent at least to the character and behavior of the prejudiced child. If the state has the right to interfere with a person's property by means of taxation of income during his lifetime, and in many jurisdictions impose inheritance tax after his death, should not the state be entitled to interfere with his estate in order to achieve more harmonious family life, and thereby a more just society?

The above-mentioned examples of New Zealand and China in particular, illustrate what a society may do to modify its adherence to the individualistic rule of freedom of testation by bringing moral considerations into play.

On the other hand, and to further muddy the waters, the second of the two cases I related above, also illustrates the danger of 'forum shopping' and asset shifting in order to try and avoid the effects of the protected portion system.

Professor Deborah Batts has written an interesting article titled 'I Didn't Ask to Be Born'[40], to be recommended for its lengthy, learned (with nearly four hundred footnotes!) and indeed passionate discussion of the problem. Following on the provocative (yet in our opinion appropriate) title of the article, the learned author proposes various ingenious solutions to the injustices referred to above. Her main proposal regards setting a ceiling, rather than a floor, of what she calls "protected inheritance"[41]; the idea being that the needs of surviving minor or dependent children will be met before those of the surviving spouse, adult children and other kin and dependents[42]. The rationale behind this proposal is that "the adult children already benefited from the assets of the decedent while growing up and being educated"[43]. The author provided certain exceptions to this rule, and also accepts circumstances[44] in which the right to inherit can be thwarted by freedom of testation, thus resulting in an objective standard for disinheritance[45].

Professor Batts argues (page 1268) that 'Parents should not force children to be what they want them to be, or do what they want them to do. The fact that children are independent human beings and not merely extensions of their parents, however, does not diminish either parental responsibility for

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40 D. Batts, *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 (1989).

41 *Ibid.*, 1253.

42 *Ibid.*, 1255.

43 *Ibid.*

44 *Ibid.*, 1258–1259.

45 *Ibid.*, 1260.

the child or the familial experiences that forge and nurture the parent-child bond. Society should not condone parental abandonment by permitting subjective disinheritance. "…one could argue that a child has "earned" the right to inherit by having to do what the parent wanted during minority, and even beyond. Because the child did not ask to be born, and the parents consciously chose to have the child, the parents are responsible for making decisions for the child that the child cannot make herself… In many instances, daily decisions affecting all children… are all determined by the parents".

While she admits "The parent is not «wrong» in exercising the decisive role in these choices; that *is* the role of the parent. In many instances, the child is not capable of making the choice…" She countermands this argument which would of course find favor in the eyes of those who propose freedom of testation, by writing that "the child's role does permit the child to «earn» her way in the family by doing those things she would prefer not to do, or not doing those things she would prefer to do. These non-choices, which may result in unhappiness and disappointments for the child, are the contribution the child makes to the family assets… thus earning the child the right to partake in family assets" (p. 1269).

I find it difficult to conceptualize these 'non-choices' as being assets and would rather position them within the framework of contributing to a possible compelling moral imperative for the parent.

Her conclusion is that "Parents have an obligation to their children that continues even after death. This obligation arises from the parent-child bond that the parents initiated and created and continues whether support is actually needed…"

In this 'chessboard of life' however Professor Batts would seem to convert the parents into fairly impotent pawns whilst conferring upon the children far greater powers, i.e. rights and elevating them to at least the rank of bishops and knights. However, and we must perforce introduce an 'however', in answer to Professor Batts' initial question in the title of her article, a rejoinder could very well be – and one may also want to borrow from the realm of popular literature or movie titles – "Whose Life (And Money) Is It Anyway?" A criticism of Batts' proposal which echoes that of Professor Paul Haskell (43), is that the basic idea would seem to be conflate the desire to revert to some form of protected portion with the need for providing maintenance and hence the somewhat contrived proposed sliding scale[46]. The sliding scale on the one hand, or minimum amount of the estate on the other, certainly do nothing to satisfy any wish for a moral resolution to the question.

[46] P. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 Geo. L.J. 499, 506 (1964).

As against her arguments, are we not duty-bound to give considerable weight to the fact that in many of those countries which have a Constitution, there is a clause which protects a person's property and/or which states that "a person's property shall not be violated or infringed upon". Those arguing for freedom of testation will use such a clause as a further hook on which to hang their contention. A fascinating example of the right to freedom of testation is to be found in all places in post-apartheid South Africa in the case referred to in footnote 22 above of Ex Parte BoE Trust Limited. The South African Supreme Court dealt with a 2002 will that included a bursary to be established for *white* South African students at one of four South African universities. The bursars at all these universities notified the trustees that they would not participate in any bursary unless it was made available to students of all races. They argued that the discrimination against potential non-white beneficiaries was contrary to public policy and infringed on the right to equality as enshrined in Section 9 (1) of the South African Constitution. The court examined Section 25 of the Constitution and held that recognition must be given to freedom of testation and that failure to do so would fly "in the face of the founding Constitutional principle of human dignity… which allows people the peace of mind of knowing that their last wishes would be respected after they have passed away". The court therefore refused to delete the word white and instead, in an obvious attempt to balance between the two principles of the Constitution, held that the money should be donated to those charitable organizations named in the will as an alternative provided by the testatrix in anticipation of any objection to probate of the will.

Despite the fact that the South African court to some extent 'dodged the bullet', those advocating freedom of testation have to contend with the possibility of wills with discriminatory measures based on phobias of multiple varieties. Where do they draw the line? And if a line has to be drawn, then why should a phobia against one's natural heirs receive greater protection than say homophobia?

It would seem to us that the wish to take into account moral and psychological considerations may lead to a balance between the opposing 'movie titles' suggested by Professor Batts and myself.

A valuable discussion appearing in the Batts article, and which has not only financial implications but also those of a moral nature, is regarding the question of equality between siblings. Discrimination between siblings may be justified on the grounds that an adult sibling who has already enjoyed more years of support including education should not be treated on the same basis as a child who has all these expenses ahead of him. This is a considera-

tion which, to the best of my knowledge, is not taken into account or assessed in any of the protected portion systems, which not only provide for equality between siblings in enjoying those portions but do not seem to take into account the attainment of majority as well as the financial situation of the siblings. This is not to deny that it would be complicated in the extreme to find some kind of calculation to take these factors into account.

A possible variation of Batt's proposal solution offered in this article which could be applied in countries with freedom of testation, and which is arguably a simplified and more practical variation of the Batts' proposal, would be to provide a limited reserve of say 30% to 50% of the estate for descendants, which percentage the testator can reduce by half if he/she details in the will the reason for deviation – with or without the prejudiced child having the right to bring any objection to the change.

Of course a radical idea such as this raises not a few questions concerning this solution: How will the judge assess the reason? Perhaps by "reasonableness"? Why these percentages? Should the law not take into account the number of descendants, as in the case of France, and, as mentioned above, their respective current positions in life?

In further defense of freedom of testation

There are many cogent arguments which have been raised in favor of this freedom. Does not any attempt to interfere with it signify an infantilization of adults who in all probability are in their mature years. Is a person not to be given credit for the ability to regularize not only his own life, but also what s/he deems fit and proper for his or her children – as he has done throughout his own lifetime? A person who has grown up with his children from anything from twenty and, in today's world, even seventy years surely should be trusted to come to a sensible and indeed, to echo an earlier consideration, *moral* choice. Should a parent not have the right to distinguish between a child in sore need and one who is a multi-millionaire?! (Although with regard to this last consideration, I personally try to insist that in such a will, at the very least the client should explain the reason for his discrimination). And what of the consideration of *idigne*? We are not so naïve as not to take into account situations of abusive or grossly neglectful children. Should such a child be treated in the same way as a loving one and would not this instance too lead to tremendous resentment on the part of the 'good' child, who in addition to being a devoted child may have introduced the parents for the last several years of his of her life into the household-sometimes at great emotional and financial cost? This resentment too could last for generations.

Furthermore the obverse of the argument concerning the existence of death duties and other taxation as being proof of the right of the state to interfere with a person's inheritance, is that the state ought not to impose restrictions on the manner of the distribution of an individual's assets on his death that it does not impose in his life.

When I started writing this article I was firmly of the belief, for many of the reasons outlined above, that the time has come for a radical reassessment of the principle of freedom of testation. Indeed, the initial title for this article was 'Time to Revise Freedom of Testation'. However, after having mulled over the question at length and having had the benefit of reading many learned articles on the subject, I must confess to having far more doubts than I did at the outset and to thinking that the arguments are fairly well balanced, despite the fact that virtually every article I have read comes down on one side of the other whether passionately or dispassionately.

Quo vadis?

Whilst it is not clear what the possible outcome of such a reassessment could or should be, I am convinced, however, that there *is* a need for reassessment. To give just one example: in today's global village, why are there artificial divisions between the two systems? And if so, there will be some who will of course argue that for the sake of unity and the comity of nations as well as the avoidance of artificial mechanisms (usually only available to the wealthy to circumvent the effects of the protected portion), the whole world should move in the direction of freedom of testation!

It is our contention that the above details and analysis demonstrate the confusion which reigns in the field of succession when scrutinized on a worldwide basis.

But must this confusion be set in stone? Cannot this stone be chiseled in a manner more appropriate to the 21st century and the concept of comity of nations? In today's world, the so-called 'global village', is it not something approaching the bizarre that two countries, England and France, for example, which are separated by approximately thirty kilometers, and with many mutual interests, should have such widely different systems of succession and testation, whatever the original roots of their legal systems?

And if already in France, what logical, ethical or practical reason could there possibly be for such marked differences regarding protected portions between France and its neighbor Germany, which has the concept of monetary compensation as opposed to protected portions? Why should Argentina have the world record for protected portions (four-fifths of the estate

including gifts made during the testator's lifetime), whilst Mexico, with its common language and roots, has no protected portion at all?! And indeed if one considers protected portions, why should there be such bizarre differences of protected portions in those countries adopting this 'sacred' principle, differences ranging from one-third to four-fifths?! Why should Switzerland give testators of a different nationality the privilege of avoiding the Swiss law regarding the protected portion by allowing them to use the law of their own nationality to govern the inheritance, thus avoiding the law of the country where they may have accumulated their assets, established their families, and lived all their lives? The more one examines different systems throughout the world the more one is impelled to remember the hoary joke about England and America being "two countries separated by a common language". Why should a world governed by a common concept of the need for law be separated by its laws of inheritance? Virtually the whole world accepts the principle of *lex situs*, albeit for the practical reason that countries are jealous of their own real estate, yet when it comes to moveable property we again have an inexplicable division between those countries which hold that the applicable law is based on domicile while others believe that the deceased's nationality is the determining factor.

Clearly there is no benefit from diversity based on a genuflection to some historical or religious cause now forgotten in the mists of time. Surely, we must accept that the benefits of uniformity are clearly too manifold to be listed.

More than half a century ago, the Hague Convention of 5th October 1961 on 'The Conflict of Laws Relating to the Form of Testamentary Dispositions' adopted a less insular and rigorous approach to the form of wills. Yet this was only one small step made by the lawmakers and only *one* small step for mankind – for after all this is only one clearing in the thicket of inheritance law, bearing in mind too that many countries have not even ratified *this* convention.

The diversity of assets and complex family relationships already referred to above, abetted by increasing mobility, leads to frequent contacts with multiple legal systems, not to say manipulation of such systems. Inevitably this leads to questions of conflicts of laws and attempts, sometimes artificial, to avoid and indeed evade the consequences of inheritance law in a particular country – including egregious forum shopping. This so often results in protracted and expensive litigation, further damning the fabric of family life and, all too frequently, irrevocably so. Moreover, evasion and avoidance of methods which are usually only available to the wealthy, therefore introducing a two-tier society in civil law jurisdictions when dealing with inheritance

issues – in addition to other existing inequalities. So, *quo vadis*? Is it not undeniable that greater uniformity in the law would save enormous expense (colleagues will I trust forgive me for harming their fees) and grave (you will excuse the pun) distress. Why should we insist on continuing eternal litigation and dissension in the 21st century?

This is clearly a subject which evokes passions probably to a greater degree than any other legal bone of contention. A LLM law student, Juan Francisco Pardini, in what must assume was the fervor of youth, wrote his term paper for 2009–2010 entitled "Trusts vs. Foundations: Issues of Forced Heirship in Different Jurisdictions", and wrote as his conclusion in a paper proposing a method of avoiding implementation of forced heirship:

'Forced heirship is the *Black Plague of the 21st Century*. (My italics, L.G.) And with wealths (sic) and fortunes being made every second, individuals will constantly seek protection. Rich individuals, family businesses, and the likes have constantly been searching for ways to ensure the security and protection of their estates, and as such, the legal world has always provided the necessary alternatives… Forced heirship has plagued and hindered the intentions of men for years… This legal bear trap… sprouts its entrapping roots on a person's deathbed to later on *slither* (sic) into his or her inter vivos actions'.

In non-legal language one can only say, 'wow'!

Its youthful fervor aside, the article is one of great interest, particularly as it points out that no successful forced heirship claim has ever been made against private interest foundations in Lichtenstein and Panama. Obviously, on the other hand, here too, this kind of construction is only available for the wealthy so for the less fortunate members of mankind they may have no antidote to the alleged 'Black Plague'. On a personal note, it was of interest to me to see that the supervisor of this paper was Professor Paul Matthews of King's College, who graciously wrote the introduction to the work *International Succession*, referred to many times throughout this article.

At the outset, as I said above, when planning this article I was firmly on the side of expanding the protected portion to common law countries. This was probably under the influence of the litigation, sometimes tragic, in which I had been involved, in particular after representing the son in the second case referred to above.

Nevertheless, the incisive comments of my assistant, Adv. Noa Zeira, for which I am grateful, helped persuade me that there are no facile answers.

When I was a law student in the distant days when only 'snail mail' was known to mankind, and the idea of an electronic signature was in the realm of science fiction, I remember being puzzled by the fact that in some juris-

dictions acceptance of an offer occurred when the letter was received and in others, when the letter was posted. This puzzlement about a relatively minor legal question has turned to absolute bewilderment when researching this article and rediscovering the absolute chaos of the present situation in matters of inheritance. Any excuse of custom, history, culture or even religion should be spurious when confronting the harm done and the enormous cost in 'life and treasure' in what is allegedly today's global village. The introduction of uniformity into inheritance law at a global scale is necessary, urgent, and daunting.

Perhaps, as Professor Mariusz Zalucki's valuable work *Uniform European inheritance law: Myth, dream or reality of the future* suggests[47], "despite the current differences it seems that little effort is needed to harmonise these solutions at the *European level*" (my emphasis).

But, even here, there will probably be debate regarding the substance of this proposed shared core; I differ, for example, with some of the suggestions, such as extending the framework of entitlement to non-family members. Yet I think we agree that the need for such reforms is not myth but a pressing human need, with consequences felt daily. Much hard work is still ahead of us in order to translate the dream of more workable and harmonized legislation into reality. Perhaps this effort itself is a worthy legacy we can pass on to coming generations.

It will have been noted that this article addresses itself to the question of the problem of freedom of testation. Because of strictures of time and space, I have not dealt with the discrepancies in the law of *intestate* succession. Although by no means as marked as in the case of the question of testamentary disposition, here too there are differences and discrepancies between various jurisdictions, e.g. in the different tiers, the rights of the common law spouse, adopted and illegitimate children etc. However, this is a subject for another time and another place.

I would also point out that apart from a few historical observations I have not addressed the issue of the effect of religion on the law of inheritance. In today's world this effect is in fact a matter of purely historical or academic relevance – except of course for the case of Islam. Many Arab and Islamic states have adopted the law of Shari'a (Moslem personal law) as the 'superior law in both intestate and testamentary succession of Moslems (Garb & Wood page 644). Although it is too much to expect to have any conformity between Islamic inheritance laws and those of the rest of the world – both in the matter

[47] M. Zalucki, *Uniform European Inheritance Law – Myth, Dream or Reality of the Future*, Krakow 2015.

of practicality and respect, it should be possible despite the theological rift to have greater uniformity between Sunni and Shi'ite states.

I have only wished to pose a question and am certainly not ambitious enough to propose any solution. However, such a solution, or at least a partial one, should not be beyond the ability of an international forum consisting not only of jurists but also of psychologists and ethicists who may well come up with valuable answers.

Despite the obvious manifold difficulties and whatever the end result, the call for much greater uniformity is indeed a legal clarion call in our times.

Abstract
Time for Uniformity in Inheritance Laws? Survey and Debate

In today's world, succession laws have to contend with the rapid social and cultural transformation that has caused several changes within the family structure during the past few decades. Have these changes found sufficient expression in the manner in which the legal systems presently deal with questions of inheritance, and in particular the age-old dispute regarding freedom of testation versus reserved portions? This article reviews the present situation as well as some of the social and other changes that so challenge contemporary inheritance laws, the main legal traditions in this respect, and the extent of local variation within these.
Key words: child, Civil law, common law, death, deceased, forum shopping, freedom of testation, heir, jurisdiction, maintenance, minor, parent, reserve, restricted portion, testament, will

Streszczenie
Czas na jednolitość w prawie spadkowym? Przegląd i spór

W dzisiejszym świecie, prawa spadkowe muszą się zmagać z gwałtownymi zmianami kulturowymi i społecznymi w strukturze rodzinnej przez ostatnie dekady. Czy owe zmiany są wystarczająco odzwierciedlane w ustawodawstwie spadkowym, szczególnie w wiecznym sporze o wolność dziedziczenia i zachowku? Tematem niniejszej pracy jest przegląd obecnej sytuacji i niektórych zmian społecznych i innych które stanowią wyzwanie współczesnemu ustawodawstwie spadkowemu, najważniejszych tradycji prawnych w tej dziedzinie i różnic lokalnych.
Słowa kluczowe: dziecko, prawo cywilne, zgon, zmarły, forum shopping, wolność dziedziczenia, dziedzic, jurysdykcja, utrzymanie, nieletni, rodzic, zachowek, testament