TESTAMENTARY FREEDOM AND FORCED HEIRSHIP: TWO SIDES OF THE SAME INHERITANCE COIN?

United States inheritance law varies state by state, but there is a general presumption that an individual has the autonomy to determine where and to whom real and personal property will be given upon death.[1] In contrast, civil law jurisdictions require individuals to distribute a specified portion of their estate to their legal heirs, commonly referred to as forced heirship.[2]

Forced heirship is mostly "prevalent amongst civil law jurisdictions and in Muslim countries, but also occur[s] in other major countries such as the U.S.A (in Louisiana) and Japan," and heavily based on the German Code (BGB) and the Napoleonic Code.[3] The civil law legal system is now the most widely adopted globally.[4] Former European colonies and many other countries have incorporated and refined their legal frameworks following this system to protect children from being disinherited by their parents.[5] Scholars tend to heavily distinguish forced heirship systems from freedom of testation systems, but both systems are legal vehicles by which family members are intended to be protected.

This Article explores the superficial contrast between forced heirship and testamentary freedom, revealing how, despite initial differences, both systems share a common objective of reconciling familial protection.

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[1] See generally Ryan McLearen, International Forced Heirship: Concerns and Issues with European Forced Heirship Claims, 3 EST. PLAN. & CMTY. PROP. L. J. 323 (2011).
[2] Kelly G. Dunn, Forced Heirship Lives: The Effects of Louisiana Revised Statute 9, Section 2501, 45 LOY. L REV. 619, 620 (2000).
[3] See McLearen, supra note 1.
[4] Id. at 324-325.
[5] Vincent D. Rougeau, No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law, 1 Civ. L. Comment. 3, 10 (2008).

Part I of this Article summarizes the fundamental differences between forced heirship and testamentary freedom in inheritance law, focusing on who controls asset distribution after death. Part II explores the historical development of inheritance rights for children, considering ancient practices of Germanic tribes and Roman society. It highlights how both cultures acknowledged the significance of familial ties in asset distribution and traces the evolution of inheritance from medieval England to postrevolutionary America.

Part III of this Article compares heirship laws across civil law jurisdictions, particularly throughout Europe and in Louisiana, highlighting the similarities and differences in forced heirship structures. Part IV examines how testamentary freedom jurisdictions balance personal autonomy with support obligations in inheritance, comparing strategies and approaches across the United States, New Zealand, and South Africa.

Part V highlights the conflict of laws in cross-border distributions, showcasing the significant value the United States places on an individual's autonomy in distributing assets, especially when determining the applicability of foreign inheritance laws in United States territories. Part VI delves into the inherent shortcomings within both systems, providing remedies to address these issues effectively. It further explores the complexities and obstacles linked to contested wills that stem from disinheritance.

I. WHY THE DISTINGUISHMENT?

Forced heirship and testamentary freedom are often distinguished because they represent contrasting approaches to inheritance law, primarily in terms of who has control over the

distribution of assets upon death.[6] Both systems offer a level of familial protection but use distinct methods to achieve this safeguarding.[7] Forced heirship mandates that certain family members receive a predetermined portion of the estate, typically children or spouses, regardless of the decedent's wishes.[8] This ensures a basic level of support and prevents disinheritance. On the other hand, testamentary freedom grants individuals the right to distribute their assets as they see fit, with limited statutory restrictions.[9] This distinction has led scholars to distinguish and analyze their respective implications, consequences, and societal impacts.

II. HISTORY OF FORCED HEIRSHIP AND TESTAMENTARY FREEDOM

The notion of ensuring inheritance for children is not a new concept; its history can be traced back to ancient times and is still practiced in various societies and many countries today.[10] However, pinpointing the precise legal history of the right of children to inherit is challenging. The main obstacle to this challenge lies in the fact that the practice of passing possessions from generation to generation predates the formal establishment of inheritance laws.[11]

Germanic tribes are often credited with creating the forced heirship construct. This construct draws on the time-honored tradition shared by much of continental Europe, where the formation of a family is akin to forming a community. Just as a spouse retains a right to the "community's" assets, the child also possesses a permanent claim to these resources.[12]

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[6] Id. at 11.
[7] Deborah A. 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, 1198 (1990).
[8] Id.
[9] Elaine Lam, Disinheritance vs. Forced Heirship, 37 GPSOLO 59, at 59 (2020).
[10] See Batts, supra note 7 at 1198.
[11] See SIR HENRY S. MAINE, ANCIENT LAW 172 (1908).
[12] See Rougeau, supra note 5, at 10.

Similarly to the Germanic tribes, historical sources indicate that Romans viewed children as having an innate right to inherit.[13] Curiously, the Romans are often cited as among the earliest pioneers of wills or testaments.[14] Such a document was necessary to legally recognize individuals who had been circumscribed by ancient Rome's inheritance law.[15] Sir Henry Maine suggests that the Roman community did not look at wills as, "a contrivance for parting Property and the Family . . . but rather as a means of making a better provision for the members of a household than could be secured through the rules of Intestate succession."[16]

Romans sought to allocate their possessions to adults or children they considered part of their "family," even if these individuals did not meet the requirements for heirs under existing laws of intestate succession.[17] Whether linked by blood or adoption, the family acted as the unified force upholding the entire social framework.[18] In Roman society, the liberty of making a will aimed to reinforce familial ties rather than promote disinheritance.[19] It served as a means to improve the well-being of household members, regardless of blood ties, by offering better provisions compared to what the default rules of intestate succession could offer. Despite the divergence in legal principles between Romans and Germanic tribes, both ideologies were deeply ingrained in their cultural perceptions of social organization.[20]

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[13] See Batts, supra note 7, at 1204.
[14] See MAINE, supra note 11, at 171.
[15] Id. at 180-185.
[16] Id. at 173.
[17] Id. at 119.
[18] Id. at 118-119.
[19] See Batts, supra note 7, at 1204.
[20] See Rougeau, supra note 5, at 10.

Looking forward to 14th-century England, how an individual's property was distributed among their heirs after death depended on their kind of property, social status, residence, and sex.[21] In terms of spousal rights, when a married man died, his widow was provided for by a dower, a life estate in one-third of all the real property of which her husband.[22] The concept of dower rights, in a sense, has survived and transformed into a modernized version in common law jurisdictions. States have replaced dower rights with the spouse's elective share, which is appliable to real property and a vast majority of personal property and applies regardless of whether the decedent executed a will barring the surviving spouse inheriting any property from the estate.[23]

Turning to inheritance during the prerevolutionary period in the American Colonies, the deceased's eldest son was the sole heir by right of primogeniture, the idea being to keep the family property intact for the next generation.[24] During the postrevolutionary period following the separation from England, most of the United States abandoned primogeniture and provided statutes to address the division of land among children.[25] By 1800, the predominant approach was that each child received an equal interest to the estate and most states provided that widows were to receive cash sums in lieu of dower in the land, which has formed into what we know as a statutory allowance.[26]

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[21] See generally Robert C. Palmer, Contexts of Marriage in Medieval England: Evidence from the King's Court circa 1300 59 SPECULUM 42 (1984).
[22] John V. Orth, Then and Now in the Law of Property, 16 GREEN BAG 2D 413, 413-414.
[23] UNIF. PROBATE CODE §§ 2-202 – 2-207.
[24] See Orth, supra note 22, at 413-414.
[25] Carole Shammas, et al., Inheritance in America: From Colonial Times to the Present, 6 LAW & HIST. REV. 499, 499-504 (1987).
[26] Id. at 64-67.

III. JURISDICTIONS RECOGNIZED AS "FORCED HEIRSHIP" REGIMES

"Forced heirship" refers to the legal framework that restricts individuals' freedom to distribute their assets upon death as they see fit, instead requiring a portion of their estate to be allocated to specific predetermined heirs, commonly close family members such as children or spouses.[27] These laws are designed to guarantee that heirs receive their share of the deceased's estate, even if the deceased's will or testamentary plans try to designate assets otherwise.[28]

A. Comparing European Forced Heirship Laws

In France, family stability is of significant importance, as evidenced by their succession laws. The French legal system divides all estates into two segments: the reserved portion and the disposable portion.[29] The reserved portion, also termed the "réserve héréditaire," is a predetermined fraction of the entire estate depending on the number of heirs.[30] The reserved portion of the estate "cannot be disposed of by gift inter vivos, or by will, other than to descendants, ascendants and under certain conditions to the surviving spouse."[31] In a French marriage, property is categorized into communal property, consisting of residential real estate and any jointly purchased assets, and separate property, consisting of the property that each spouse holds in their own name or property that was acquired prior to the marriage.[32] Upon the first spouse's death,

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[27] See McLearen, supra note 1, at 325.
[28] Id.
[29] Id. at 326.
[30] See Lam, supra note 9, at 59-60.
[31] Jean-Marc Tirard, In Focus: Succession and Forced Heirship, 15 TRS. & TRUSTEES 8, 692 (2009).
[32] See McLearen, supra note 1, at 325.

communal property transfers to the surviving spouse, while the rule of forced heirship takes effect upon the second spouse's passing.[33]

The portion of the estate allocated as the reserved portion follows these guidelines: one-half of the estate is the reserved portion if there is only one heir, (2) two-thirds of the estate is the reserved portion if there are two heirs, and (3) three-quarters of the estate is the reserved if there are three or more heirs.[34] The remaining portion of the estate, the disposable portion, may be freely distributed as the decedent wishes.[35] Gifts made to non-heirs before the decedent's death may be revoked if the estate was significantly depleted by such gift, thereby frustrating the reserved potion.[36] Regardless of the decedent's will, or lack thereof, a portion of their assets must be given to their children.

Similar to France, Spanish citizens are required to designate certain portions of their estates to their children and other relatives.[37] In Spain, the decedent's descendants are entitled to two-thirds of the estate, and in the absence of descendants, ascendants are guaranteed a mandatory half-share of the estate.[38] Widows and widowers do not inherit the deceased's spouse's estate property outright but instead receive a life interest.[39]

In German law, the concept of family succession is prominent. The German Civil Code (BGB) outlines the order in which relatives of the deceased inherit according to the parentelic

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[33] Id.
[34] Id.
[35] Id. at 325-327.
[36] Id.
[37] Adam F. Streisand & Lena G. Streisand, Conflicts of International Inheritance Laws in the Age of Multinational Lives, 52 CORNELL INT'L L.J. 675, 701 (2020).
[38] Id.
[39] Id.

system.[40] There is a principle that the deceased's closest family members should benefit from the estate, even if the deceased explicitly disinherited or excluded them in a will.[41] This is because German law permits these close relatives to claim their "Pflichtteil," which can be translated as the "obligatory portion" or the "compulsory portion."[42] The individuals eligible for the compulsory share are confined to the deceased's descendants, parents, and surviving spouse.[43] However, distant descendants and the deceased's surviving parents are not eligible for this compulsory share if a descendant, who would otherwise exclude them in the event of intestate succession, has the right to claim it.[44]

Unlike French Law, Germany's forced heirship laws are only applicable to the first generation of the testator's descendants.[45] This limits the reserved portion of the estate for the surviving spouse and the deceased's surviving children exclusively.[46] Like many forced heirship jurisdictions, Germany adheres to the jurisdiction of the deceased's citizenship at the moment of death in determining the applicable law for succession.[47] If the deceased held dual citizenship at the time of death, with Germany being one of them, German law takes precedence, irrespective of the deceased's residence or other citizenship.[48] In contrast, French law does not apply if the testator was not domiciled in France unless the estate includes property situated in France.[49]

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[40] Reinhard Zimmermann, The Compulsory Portion in German Law 268, at 270 (2020).
[41] Id.
[42] Id.
[43] Id. at 273.
[44] Id. at 272-273.
[45] Max Riederer von Paar, The German-American Estate Plan, You Say Tomato and Ich Say Tomate, 21 JUN PROB. & PROP. 59, 60 (2007).
[46] Id.
[47] Id.
[48] Id.
[49] See McLearen, supra note 1, at 326.

In Sweden, the law ensures the inheritance rights of children by declaring invalid any will that allocates a significant portion of the testator's estate to third parties.[50] This invalidation occurs when such distribution leaves the children with less than half of what they would have received under Sweden's intestacy laws.[51] In Belgium, the children, ascendants, and surviving spouses have a right to a reserved part of the deceased's estate; the specific amount of this entitlement varies based on the number of children and whether the spouse is still alive.[52] Notably, many people use marital contracts as a common strategy to safeguard spouses from the compelled inheritance rights of their children.[53]

A study of inheritance laws across European civil law jurisdictions reveals that while they undeniably aim to protect family interests and ensure a degree of stability in inheritance, there are notable variations and differences in the nuances of these laws. For instance, while France and Germany employ the concept of reserved portions, they apply forced heirship laws even beyond the first generation of descendants, unlike Germany. Additionally, the application of these laws may differ based on factors such as citizenship, domicile, or the presence of marital contracts, as seen in Sweden and Belgium.

B. Forced Heirship in the United States under Louisiana Law

Upon Louisiana's incorporation into the United States in 1803, the legal system retained a civil law foundation distinct from the common law tradition of the other states.[54] As a result,

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[50] See generally LARS TOTTIE, AN INTRODUCTION TO SWEDISH LAW 224 (1988).
[51] Id.
[52] Step Journal: The future of forced heirship https://www.step.org/step-journal/step-journal-october-2014/future-forced-heirship (last visited Mar 7, 2024).
[53] Id.
[54] Gerald Le Van, Alternatives to Forced Heirship, 52 TUL. L. REV. 29, 33-34 (1977-1978).

Louisiana's forced heirship laws were preserved and integrated into its legal system.[55] Presently, Louisiana is the only civil law jurisdiction in the United States.[56] The forced heirship provisions in Louisiana can be traced back to the Napoleonic Code, which was implemented during the French colonial era.[57] The Napoleonic Code, introduced by Napoleon Bonaparte, emphasized equality and protection of family property, including provisions that restricted testamentary freedom to ensure the protection of family members, particularly children.[58]

Similar to French law, the decedent's estate is divided into two shares: the forced portion and the disposable portion.[59] The forced portion goes to the forced heirs, and the disposable part is given out through intestacy or according to the person's will.[60] Eligible heirs, referred to as "forced heirs" in the Louisiana Civil Code, are entitled to a certain portion of a decedent's estate.[61] Louisiana defines a " forced heir" as: (1) a child of the decedent who is under age 24 at the time of the decedent's death, and (2) a child of the decedent of any age who is permanently incapacitated.[62] Much like its European counterparts, testamentary freedom in Louisiana is present but significantly limited. The disposable portion consists of the estate's remaining assets after the forced portion has been accounted for.[63] These assets can be distributed according to the instructions provided in the decedent's will, or if there is no will, assets will be distributed

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[55] Id. at 31.
[56] See Rougeau, supra note 5, at 10.
[57] See Le Van, supra note 54, at 31.
[58] Id. at 34.
[59] Ray D. Madoff, A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems, 37 B. C. INT'L & COMP. L. REV. 333, 337-339 (2014).
[60] Id. at 338.
[61] LA. CIV. CODE ANN. Art. 1493.
[62] Id.
[63] Katherine Connell-Thouez, The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections upon the Integration of New Structures into a Classical Civil Law System, 43 LOY. L. REV. 1, 14-15 (1997).

according to Louisiana's laws of intestate succession. Much like its European counterparts, testamentary freedom in Louisiana is present but significantly limited. [64]

Forced heirship structures in civil law jurisdictions share fundamental features, such as dividing the estate into predetermined portions and providing legal mechanisms to challenge testamentary dispositions that contravene forced heirship laws, thus ensuring the heirs receive their rightful share of the estate. These features collectively uphold the principles of forced heirship, attempting to balance the interests of the designated heirs with the testator's autonomy. Freedom of testation jurisdictions balance the same interests through an alternative route.

IV. DEGREE OF FAMILIAL PROTECTION IN TESTAMENTARY FREEDOM JURISDICTIONS

Strategies are employed in many common law jurisdictions to balance support obligations associated with marriage and parenthood in inheritance distribution while respecting testamentary freedom.[65] The imposition of support obligations necessarily restricts testamentary freedom to an extent. Statutory allowances are commonly utilized to safeguard specific beneficiaries, including surviving spouses, minor children, and dependents.[66] Similarly, elective share statutes serve as a safety net to prevent a surviving spouse's complete disinheritance, thereby averting potential spousal impoverishment.[67] Moreover, discretionary judicial interventions play a crucial role in

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[64] See generally A. N. Yiannopoulos, Real Rights: Limits of Contractual and Testamentary Freedom, 30 LA. L. REV. 44 (1969).
[65] Id.
[66] Richard F. Storrow, Family Protection in the Law of Succession: The Policy Puzzle, 11 N.E. U. L.R. 98, 124 (2019).
[67] See Lam, supra note 9, at 60.

preventing discriminatory or public policy-defying provisions from taking effect.[68] By exercising discretion, courts can impose on the distribution of assets.

In addition to judicial oversight, governments must regularly review and reform inheritance laws. This ensures that legal frameworks remain aligned with evolving societal values and needs, thereby reinforcing the integrity of the inheritance process. Through continuous review and adaptation, jurisdictions can uphold both the autonomy of testators and the equitable treatment of beneficiaries.

A. United States Approach

The United States has fewer avenues to force an estate to provide support than civil law jurisdictions. [69] State law prioritizes freedom of testation as opposed to ensuring support for dependents.[70] In some states, this leaves dependents and courts to use indirect methods to enforce support obligations on an estate, methods that are not primarily focused on providing support.[71] However, there are certain jurisdictional requirements that the estate must satisfy before any testamentary dispositions can be made.[72] For example, the general distribution order in New York is for estate administration fees, funeral expenses, and estate debts and taxes to be paid before testamentary distributions may be made.[73]

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[68] Law Commission, He arotake i te āheinga ki ngā rawa a te tangata ka mate ana, Review of Succession Law: Rights to a person's property on death (NZLC R145, 2021) at [8.56].
[69] See generally Elizabeth Travis High, The Tension between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain, 17 CORNELL INT'L L.J. 321 (1984).
[70] Id. at 321.
[71] Id. at 321-322.
[72] See Batts, supra note 7, at 1244.
[73] New York Estate, Powers and Trusts § 11-1.5 (2022).

Many states have adopted, in whole or in part, the Uniform Probate Code (UPC), which recognizes certain statutory allowances, including the homestead allowance, the family allowance, and the exempt property allowance.[74] The homestead allowance is a statutory provision that grants surviving spouses or, in some cases, minor children the right to retain a portion of the family home (or the proceeds from its sale) free from the claims of creditors or other heirs.[75] Michigan, a state that has adopted the UPC in part, provides that the homestead and exempt property allowance are statutorily set and determined based on the decedent's date of death.[76] The family allowance is a provision designed to provide ongoing financial support to surviving family members, encompassing costs of education, housing, and basic living expenses, and is typically paid from the deceased's estate before other debts or claims are satisfied.[77]

At their core, these allowances are intended to offer assistance during a trying period when family members may require access to estate funds to support themselves and preserve their residences.[78] Moreover, statutory allowances serve to alleviate the state's burden of caring for financially struggling families.[79] The purpose of statutory allowances is similar to the principles guiding forced heirship laws in civil law jurisdictions, such as prioritizing the welfare and stability of family members and preventing indigence.

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[74] See UNIF. PROBATE CODE, supra note 23, at § 2-401-§2-404.
[75] See Storrow, supra note 66, at 121-124.
[76] See generally Sandra D. Glazier, Michigan's Homestead, Family and Exempt Property Allowances, 33 MICHIGAN PROB & EST PLAN J. 8 (2014).
[77] Id. at 12.
[78] See Storrow, supra note 66, at 124.
[79] Id.

When a surviving spouse is unsatisfied with what their deceased spouse provided for them in their estate plan, a spouse may "elect" against the will and receive their statutory share.[80] The elective share, sometimes called the spousal share or forced spousal share, is one way the state can "force" a portion of an estate to the surviving spouse.[81] The forced share statute mandates that the surviving spouse receives a predetermined fraction of the testator's probate estate, regardless of the estate's size, the survivor's financial needs, earning capacity, independent sources of wealth, or conduct during the marriage.[82] This rectifies the scenario of a decedent completely disinheriting their surviving spouse from their will.[83] New York's elective share statute was passed in 1929 to end "the glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death."[84]

In creating the spousal share, the state has interfered with testamentary freedom to protect the surviving spouse, overriding the deceased's wishes for reasons aligned with public policy.[85] The state is interested in preventing the spouse from becoming a ward of the state, while also recognizing the spouse's contributions toward the acquisition of the estate.[86] While this statute could be considered a form of forced heirship, it only protects the decedent's spouse but does not inherently protect the decedent's dependents. An ongoing debate suggests that these statutes should be revised to afford decedents more freedom in distributing their estates according to their

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[80] See Batts, supra note 7, at 1246.
[81] See Lam, supra note 9, at 60.
[82] Id.
[83] See Batts, supra note 7, at 1244-1248.
[84] Third Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, N.Y. LEG. DOC. NO. 19, 189 (1964).
[85] See Batts, supra note 7, at 1248.
[86] See State Commission, supra note 84.

wishes.[87] Nevertheless, even this modest inclusion of heirship protection is a subject of contention in the United States.

B. New Zealand's Solution to Balancing Freedom of Testation and Forced Heirship

Unlike the United States, which favors testamentary freedom but limits it when necessary, inheritance law in New Zealand occupies a unique position, representing a hybrid approach that blends elements of forced heirship and freedom of testation regimes.[88] Often characterized as a discretionary form of forced heirship, it nonetheless grants the deceased the freedom to distribute their property according to their wishes.[89] However, this freedom is tempered by discretionary powers granted to the courts, allowing them to intervene in cases where it believes the testator's distribution of assets is inequitable.[90] By striking this balance, New Zealand's succession law aims to address the dual policy objectives of preserving individual autonomy while safeguarding against the potential deprivation of deserving heirs.[91] In doing so, it seeks to ensure that the distribution of an estate is reflective of the deceased's intentions while also providing recourse for individuals who the court believes have been incorrectly excluded or disadvantaged.[92]

The Family Protection Act was initially enacted in New Zealand in 1908, and the current version in effect is the Family Protection Act of 1955, which has undergone minimal alterations.[93] Under this legislation, a court has the authority to mandate financial support from the estate of a

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[87] See Batts, supra note 7, at 1253-1256.
[88] See Law Commission, supra note 68, at [8.56].
[89] Id. at [2.4].
[90] Id. at [8.56].
[91] Id. at [2.7].
[92] Id. at [8.56].
[93] See generally Josie Te Rata, Fortifying Family Protection: The Need for Anti-Avoidance Provisions in the Family Protection Act 1955, 30 OTA. LAW. T. D. 3 (2016).

deceased individual for their family members if they have not been adequately provided for based on a perceived "moral duty."[94] Unlike forced heirship, this approach evaluates each case individually, fostering an adaptable method for estate distribution while ensuring the safeguarding of heirs in extreme situations.[95] In 1996, the Law Commission reviewed New Zealand's law of succession and stated:[96]

> The legislation, as it affects adult children, is not being applied with consistent principles and defined objects in mind. Rather, it depends upon judicial views of what is fair in the context of the particular case. This makes it difficult, at least in the view of some of those we have consulted, to advise will-makers on what provisions they might make which will clearly comply with their "moral duty."

This proves a favorable solution as family maintenance statutes allow the testator to determine provisions according to their judgment, restricting their autonomy only when there is evidence of misuse. However, meticulous estate planning can serve as a means to circumvent the implications of the Family Protection Act, as depleting the estate makes the option of initiating a claim under the legislation exceedingly challenging.[97] Many methods can be employed for this purpose; joint tenancy is among the most common.[98]

Property held through joint tenancy transfers through survivorship rather than becoming part of the deceased's estate. Generally, joint tenancies are not accessible for obtaining a family protection order. However, in New Zealand, there is a provision to access certain joint tenancies by applying for the division of relationship property under the Property (Relationships) Act 1976.[99]

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[94] Allardice v Allardice (1910) 29 NZLR 959, 972-973.
[95] Te Rata, supra note 93, at 4.
[96] Law Commission, Succession Law: Testamentary Claims (NZLC PP24, 1996) at 222.
[97] Te Rata, supra note 93, at 4.
[98] Te Rata, supra note 93, at 4-5.
[99] Property (Relationships) Act 1976, 88(2).

This approach is applicable when the joint tenant is the spouse or partner of the deceased—the distribution of relationship property results in severing the joint tenancies and returning the property to the estate. Nevertheless, the deceased's personal representative must seek the court's permission to file such an application, which will only be granted if there is a risk of injustice in its absence.[100]

Towards the end of 2021, the Law Commission released its final report on succession law, including recommendations for the enactment of the Inheritance Claims Against Estates Act (ICAE).[101] The proposal included anti-avoidance provisions intended to narrow the scope of eligible claimants and emphasize economic considerations in court decisions while reducing judicial discretion in awarding remedies.[102] An anti-avoidance statute would enable the court to recover certain property of a deceased person, and it would apply in two situations.[103] First, the court could recover property that was owned by the deceased as a joint tenant that has accrued to the remaining joint tenants by survivorship.[104] Second, the court could recover property that has been disposed of with the intent to defeat a claim.[105]

In June of 2022, the New Zealand Government responded to the proposals, agreeing that reform is required for the laws relating to the division and distribution of property to recognize a

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[100] Id.
[101] Law Commission, supra note 68, at [2.4].
[102] Id. at [5.92]- [5.175].
[103] Cabinet Office, Government response to the Te Aka Matua o te Ture (NZLC R145, 2022).
[104] Id.
[105] Id.

more diverse range of family structures and relationships.[106] As of March 2024, the proposed law has not been codified or implemented.[107]

C. South Africa's Limitations on Testamentary Freedom

Freedom of testation is constitutionally guaranteed in South Africa.[108] Succession in South Africa, much like in the United States, occurs in accordance with the deceased's will or, in the absence of a will, through intestate succession.[109] The Wills Act and the Intestate Succession Act govern, respectively, subject to the South African Constitution.[110] Under South African testate succession law, neither forced heirship nor mandatory asset claims can be pursued, but there are limitations.[111] In addition to maintenance statutes and other legislative limitations, property disposed of by will is balanced against public policy considerations.

The Trust Property Control Act 57 of 1988 (TPCA) affirmed that a testamentary provision may not contravene public policy.[112] The courts have used the public policy prohibition in the TPCA to negate the effect of unfairly discriminatory exclusions in testamentary charitable trusts.[113] A discriminatory bequest involves singling out certain traits of beneficiaries and individuals who are not included in receiving benefits and then using these characteristics as the basis for unfair treatment.[114]

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[106] Id.
[107] Id.
[108] François du Toit, The Constitutional Reshaping of South Africa's Succession Laws, 14 J. CIV. L. STUD. 368 (2022).
[109] Id.
[110] Id.
[111] Id. at 385.
[112] Trust Property Control Act 57 of 1988.
[113] Id.
[114] Matthew Harding, Some Arguments Against Discriminatory Gifts and Trusts, 31 OXF. J. LEG. STUD. 303, 322 (2011).

In Minister of Education v. Syfrets, the court held that a charitable provision benefiting students of European descent only and excluding persons of Jewish decent as well as females of all nationalities was a discriminatory bequest.[115] Similarly, the court held in Emma Smith Educational Fund v. UKZN, that a charitable bequest to European girls born of British South African or Dutch South African parents was discriminatory.[116]

Like the United States, South Africa has a statutory share for surviving spouses. The Maintenance of Surviving Spouse Act 27 of 1990 stipulates that upon the dissolution of a marriage due to death, the surviving spouse is entitled to claim against the deceased spouse's estate for their reasonable maintenance needs.[117] However, this claim is permissible only if the surviving spouse is unable to meet such needs from their own financial resources or earnings.[118] Notably, the surviving spouse must exhaust their own means before initiating a valid claim against the deceased spouse's estate.[119]

The Act identifies factors that will determine the extent of the "reasonable maintenance needs."[120] Factors include the available assets in the deceased's estate available for distribution, the financial resources of the spouse, the spouse's expected earning capacity, the duration of the marriage, the standard of living maintained by the surviving spouse throughout the marriage, and the age of the surviving spouse at the time of the deceased's spouse's passing.[121]

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[115] Minister of Education v. Syfrets Trust Ltd 2006 (4) SA 205 (C).
[116] Emma Smith Educational Fund v. UKZN 2010 (6) SA 518 (SCA).
[117] See generally Maintenance of Surviving Spouse Act, No 27 (1990).
[118] Id.
[119] Id.
[120] Id.
[121] Id at § 3.

This approach requires a comprehensive factual inquiry and evaluation of the circumstances surrounding the marriage. This stands in contrast to the United States, where the receivable amount is statutorily set with virtually no inquiry into the factors noted above. The lack of a comprehensive evaluation process often results in inequities and disparities in spousal distribution outcomes in the United States. Adopting a more holistic approach, akin to South Africa's considerations, the United States can strike a better balance of interests in inheritance law, ultimately better serving the needs of surviving spouses and promoting societal welfare.

V. UNITED STATES APPROACH TO CHOICE OF LAW

Despite the similarities in forced heirship and testamentary freedom structures, the choice of law governing inheritance matters often becomes a contentious issue. As globalization increases mobility and cross-border transactions, the issue of choice of law in inheritance matters becomes increasingly relevant, demanding a coordinated approach to address conflicts and promote predictability in asset distribution.[122] Determining the applicable law becomes particularly complicated in situations where individuals possess assets in multiple jurisdictions or have connections to differing domiciles.[123]

The idea of comity has steered numerous American jurisdictions to enforce foreign judgment. While recognizing a foreign jurisdiction's decision is not required, it is a common practice among political entities to acknowledge legislative or judicial acts mutually.[124] However,

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[122] See generally In re Estate of Ahmad, 2023 Md. App. LEXIS 205.
[123] See generally Neto v. Thorner, 718 F. Supp. 1222-1223 (S.D. N.Y. 1989).
[124] BLACK'S LAW DICTIONARY at 303-304 (9th ed. 2009).

United States' common law courts notably adopt a stringent stance when presented with matters concerning the enforcement of foreign forced heirship laws.

In re Estate of Renard, the decedent resided in New York for more than three decades but was domiciled in France upon her death.[125] She owned property in both France and New York.[126] She executed two wills: a New York will to govern the distribution of her assets held in New York and a French will to govern the distribution of her assets held in France upon her death.[127] According to the provisions of her will, her son was to inherit a substantial portion of the assets located in France, thereby receiving an amount exceeding what was mandated under French forced heirship law.[128] However, despite this, the son, a resident of France, filed an action arguing that forced heirship laws should be applied to the assets held in New York because his mother was domiciled in France at the time of her death.[129] The court held that the son could not claim forced heirship under French law against the decedent's New York property, even though she died domiciled in France, because her will specified that New York law governed the disposition of her New York assets.[130] The court further noted that legislative history supports the notion that a nonresident testator is permitted to invoke New York law with respect to his assets physically situated here and thereby avoid the forced heirship at his domicile.[131] The discussion illustrates the court's view on forced heirship laws, indicating that the court frowns upon forced heirship regulations and supports the right of nonresident testators to invoke testamentary freedom.

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[125] See Estate of Renard, 437 N.Y.S 2d 860 (1981).
[126] Id. at 862.
[127] Id. at 861.
[128] Id. at 862-863.
[129] Id. at 862.
[130] Id. at 866-867.
[131] N.Y. EST. POWERS & TRUSTS LAW § 3-5.1.

Occasionally, individuals take legal action and demand the application of foreign heirship laws to govern to avoid disinheritance. In re Estate of Ahmad, Ahmad left Iran in the late 1970s during the Iranian Revolution and settled in Maryland.[132] While in Maryland, he validly executed a will and revocable trust, leaving his assets to two of his three children.[133] In 2018, Ahmad died domiciled in Maryland.[134] The disinherited son, Abraham, took repeated legal to avoid the effect of his disinheritance.[135] Among other arguments, Abraham asserted that regardless of where his father was domiciled at the time of his death, the court should have applied the Iranian Civil Code regarding primogeniture inheritance because that law fixes an eldest son's inheritance at the time of his birth.[136]

The court noted that the comity is inapplicable to the circumstances of this case, and even if it were applicable, there are limits on its application "when strong public policies of the forum are vitiated by the foreign act" requesting to be applied.[137] First, the court reasoned that the concept of primogeniture heirship conflicts with Maryland law's statutory provision, allowing any competent person over the age of 18 to dispose of their estate as they see fit.[138] Secondly, the court explained that enforcing Islamic primogeniture inheritance laws would include provisions that discriminate based on sex and religion and, therefore, would be contrary to Maryland public policy to disregard Ahmad's right to freedom of disposition.[139]

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[132] See Ahmad, supra note 122, at 1.
[133] Id. at 1-2.
[134] Id.
[135] Id. at 2.
[136] Id. at 7.
[137] Aleem v. Aleem, 175 Md. App. 663, 931 A.2d 11123 (2007), aff'd, 404 Md. 404, 947 A.2d 489, 420 (2008).
[138] See Ahmad, supra note 122, at 10.
[139] Id.

In the cases of In re Estate of Ahmad and In re Estate of Renard, the courts emphasized the importance of testamentary freedom and the preservation of individual rights, ultimately rejecting attempts to apply foreign heirship laws that were incompatible with local statutes and public policy.[140]

VI. CRITIQUES OF BOTH LEGAL FRAMEWORKS AND PROPOSED SOLUTIONS

A. Forced Heirship Restricts Philanthropy

Beyond family dynamics, inherited wealth poses challenges to social and economic equality. Bill Gates has observed its tendency to concentrate on wealth, deepening the divide between the rich and poor.[141] Countries like France, with forced heirship laws, may inadvertently perpetuate such inequalities. In contrast, the United States offers a potential solution to address social disparities. Redirecting inherited wealth into the public sector can help level the economic playing field and provide opportunities for upward mobility in low-income households.[142] While there is no mandatory provision for an individual to allocate their estate to the public sector, the mere freedom for a decedent to choose heirs has a positive effect on social equality.[143] However, the French restrictions on testamentary freedom have lower rates of charitable bequests compared to the United States.[144] This contrast emphasizes the notable influence of testamentary freedom levels in a country on the scale of charitable contributions in wills, consequently molding social and philanthropic outcomes.

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[140] Id. at 8-10; Renard, 437 N.Y.S.2d 860, 865-867.
[141] See Lam, supra note 9, at 59.
[142] Id. at 59.
[143] Id. at 60.
[144] Id.

Introducing a solution to the issue of forced heirship that impedes philanthropy involves a nuanced approach. Limiting the recovery rights of adult children would create a greater space for philanthropic endeavors within estate planning. When there are surviving minor or dependent children, it is essential to prioritize meeting their needs before addressing the provisions for the surviving spouse, adult children, other relatives, and non-familial devisees from the decedent's estate.[145] In cases where there is one or more children of any age, half of the intestate share automatically becomes subject to the protected inheritance plan.[146] This plan ensures that the needs of dependent and minor children are satisfied first from this share, potentially resulting in adult children receiving fewer assets.[147] If any money remains from this share after all children reach emancipation, they would collectively be entitled to an equal share of the remaining assets.[148]

This approach is rationalized by the belief that adult children have already benefited from the decedent's assets during their growth and education.[149] The protected share aims to guarantee minor and dependent children the same financial support that the decedent has already provided to adult children.[150] Through this approach, assets are preserved for the upbringing and support of minor heirs, allowing for a more flexible distribution of resources for philanthropic purposes among adult offspring and other beneficiaries.

This proposed solution is similar to what is known in the United States as a pot trust. A pot trust is a trust held for the shared benefit of a group of beneficiaries who may or may not receive

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[145] See Batts, supra note 7, at 1260.
[146] Id. at 1255.
[147] Id.
[148] Id. at 1255-1256.
[149] Id. at 1256.
[150] Id. at 1255-1256.

benefits of equal value from the trust.[151] Perhaps the most important benefit of a pot trust is its ability to "discriminate" in the allocation of the testator's wealth. In other words, a pot trust gives flexibility and discretion to the trustee to distribute assets amongst heirs as they see fit, and distributions may not necessarily be made in an equal manner.[152] Settlors often create a pot trust when they can foresee that one child may have more future financial needs than the others; this can be based on a number of things, such as the ages and medical needs of the children.[153] Minor children or disabled children often receive more financial support from their parents compared to healthy siblings, as parents naturally prioritize providing the best care for each child.[154]

Forced heirship jurisdictions could implement a new forced distribution system, similar to a pot trust, as opposed to how it currently stands. A pot trust's flexibility can be useful in fulfilling the goals of forced heirship inheritance while still allowing for some discretion in how assets are managed and distributed.

B. The Risk of Disinheritance in Freedom of Testation Jurisdictions

The main contention of those who oppose testamentary freedom is the risk of disinheritance of spouses, adult children, and, specifically, the disinheritance of minor children.[155] American legal scholar John H. Langbein noted that United States inheritance law is "[u]inque in how little cares

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[151] See RSCH. INST. AM., EST. PLANNING § 16,863 (Westlaw 2024).
[152] Id.
[153] See generally Audrey Light and Kathleen McGarry, Why Parents Play Favorites: Explanations for Unequal Bequests, 94 AM. ECON. REV. 1669 (2004).
[154] Id.
[155] See Lam, supra note 9, at 60.

to protect children against disinheritance—or, put differently, in how strongly it values the parent's right to disinherit the child."[156]

When a parent elects to disinherit a minor child, it may result in the child being left without the means to support themselves, relying solely on the surviving parent if one is present.[157] If the surviving parent is not the biological parent of the deceased's children or if the testator is not legally obligated to provide for their child postmortem due to a court decree or contractual agreement, the minor child may end up receiving nothing from the deceased parent's estate.[158]

The fundamental principle behind freedom of testation is that a person may dispose of their estate as he or she wishes, even if that wish includes disinheriting their child. There are not many "solutions" to protect from disinheritance. Implementing more statutory restrictions to prevent this from happening would essentially transform the freedom of testation to be indistinguishable from forced heirship. While there are limited protective measures, there are grounds for asserting and overturning disinheritance in testamentary freedom jurisdictions.[159] In addition to legislation that "protects" total disinheritance of spouses by implementing elective share statutes and statutory allowances, as noted above in this Article, courts have the power to overturn the disinheritance of a child if the testator's will was invalidly executed.

C. Contesting a Will to Thwart Disinheritance

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[156] John H. Langbein, Will Contests, 103 YALE L. J., 2039, (1994) (reviewing DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1994)).
[157] Id.
[158] Id. 59-60.
[159] See generally Milton D. Green, Fraud, Undue Influence and Mental Incompetency, 43 COLUM. L. REV. 176 (1943).

Another downside to testamentary freedom is the extent to which disinherited children are willing to go in order to secure the right to a portion of the estate. A disinherited child may contest the validity of the will on the basis, among others, that the testator lacked the requisite capacity to draft a will or undue influence was exerted on the testator at the time the will was drafted.[160] The ability to challenge a will serves to protect the testator's intent and ensures his fundamental freedom to give or withhold property upon his death is upheld.[161]

Over time, will contests evolved into a vehicle in which disgruntled disinherited children challenge a will in an attempt to thwart disinheritance, ultimately frustrating the purpose of will contests.[162] Disinherited children have been successful in such claims and have inherited a portion of the estate as a result.[163] It's remarked that judges are more likely to find undue influence or incapacity if the testator's dispositions appear unfair.[164]

A testator must possess the requisite capacity at the time of the drafting of the will, which requires the testator to understand the nature and extent of his property, the natural objects of his bounty, the nature of the testamentary act, and how these considerations are interrelated.[165] In terms of disinheritance, individuals rely on these grounds when they believe they were wrongfully disinherited due to the testator's lack of mental capacity.[166] Ensuring the protection of families of

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[160] Id. at 179-182.
[161] Alexis A. Golling-Sledge, Testamentary Freedom vs. the Natural Right to Inherit: The Misuse of No-Contest Clauses as Disinheritance Devices, 12 WASH. U. JURIS. REV. 143, 146-147 (2019).
[162] Id. at 154.
[163] See generally Gregge v. Hugill, 1 Cal. App. 5th 561 (Cal. Ct. App. 2016) (grandson contesting validity of grandfather's will and alleging undue influence).
[164] Frances H. Foster, The Family Paradigm of Inheritance Law, 80 N.C. L. REV. 199, 210-212 (2001).
[165] See generally Matter of Conservatorship of H.D.K., 405 Mont. 479 (2021).
[166] Reid Kress Weisbord & David Horton, The Future of Testamentary Capacity, 79 WASH. & LEE L. REV. 609, 630 (2022).

testators with limited mental capacity from inadvertent disinheritance is justified and necessary; however, issues may arise when an individual's right to contest a will is abused.

Unlike undue influence, contesting a will on the grounds of lack of capacity applies in the absence of any wrongdoing.[167] However, extensive evidence of incapacity is needed to overcome the presumption that the testator had sufficient capacity.[168] Most jurisdictions employ the "preponderance of the evidence" standard to determine whether the testator lacked mental capacity.[169] Scholars argue that the doctrine is an arbitrary determination and in desperate need of reform.[170] For example, proof of an illness or condition, such as Alzheimer's disease, drug addiction, or schizophrenia, does not preclude the existence of testamentary capacity, although courts consider these types of conditions to support a determination that the testator lacked the necessary capacity.[171] Scholars disagree on whether overturning a will based on a lack of testamentary capacity is effective in any situation, whether asserted in good faith or bad.[172]

Another ground to challenge disinheritance is undue influence. The law of undue influence attempts to protect a testator's autonomy by invalidating wills that are not a result of the testator's genuine free will and are subject to undue pressure or manipulation.[173] The law attempts to remedy situations where an individual, or heir, feels they were wrongly disinherited due to a third party's influence over the testator.[174] For example, a daughter may influence her father to disinherit his son, resulting in a larger distribution to the daughter and leaving the son with nothing. The son's

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[167] Id. at 633.
[168] Id.
[169] Looney v. Est. of Wade, 839 S.W.2d 531, 533 (1992).
[170] See Pamela Champine, A Blueprint for Testamentary Capacity Reform, 5-7.
[171] See generally Estate of Schlueter, 994 P.2d 937 (2000); Estate of Verdi, 733 N.E.2d 25 (2000).
[172] See Champine, supra note 170, at 8-14.
[173] Melanie B. Leslie, The Myth of Testamentary Freedom, 38 ARIZ. L. REV. 235, 236-237 (1996).
[174] Id.

contention of the will would be in accordance with the purpose of this doctrine. On the other hand, if the father disinherited the son with free will, the son could contest the will and claim that his father was unduly influenced as a way to avoid disinheritance of his father's estate.

A will is presumed to represent the true intent of the testator and places the burden of proof on the contesting party to overcome that presumption.[175] The doctrine is not without flaws of its own; navigating claims of undue influence presents the challenge of distinguishing between acceptable persuasion and unjust coercion.[176] Moreover, critics of this doctrine argue that it merely allows the courts to invalidate perfectly executed wills when necessary to ensure that the testator meets their familial duty.[177]

In summary, the ability to challenge a will due to a lack of testamentary capacity or undue influence exists to guard against disinheritance that might not align with the testator's intentions at the time of the drafting of the will. The potential risks associated with disinheritance, especially concerning minor children, underscore the need for protective measures. However, balancing the preservation of testamentary freedom with the prevention of undue influence and addressing unintended disinheritance poses significant challenges. Whether the current legal approaches effectively address these concerns remains a subject of debate among legal scholars, highlighting the ongoing need for examination and potential reform in inheritance law.

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[175] Id. at 245-246.
[176] See generally Ronald J. Scalise Jr., Undue Influence and the Law of Wills: A Comparative Analysis, 19 DUKE J. COMP. & INT'L L. 41 (2008).
[177] See Leslie, supra note 173, at 238.

CONCLUSION

While forced heirship and testamentary freedom may appear as opposing concepts on the surface, a closer examination reveals that both systems intend to achieve analogous goals in inheritance law. Forced heirship, as seen in civil law jurisdictions like France, Spain, and Germany, ensures that certain family members receive a predetermined portion of the estate regardless of the decedent's wishes. This guarantees a basic level of support and prevents disinheritance, thereby safeguarding family interests.

On the other hand, testamentary freedom, as practiced in common law jurisdictions like the United States and New Zealand, grants individuals the right to distribute their assets as they see fit, with limited statutory restrictions. While this affords individuals autonomy over their estates, it may also lead to potential injustices or inequalities if certain family members are excluded or inadequately provided for.

However, both systems incorporate mechanisms to address these concerns. In civil law jurisdictions, compulsory shares protect specific beneficiaries, such as surviving spouses and minor children. Similarly, in common law jurisdictions, statutes like elective shares and family maintenance laws serve to ensure that surviving spouses and dependents are adequately provided for, even if it means overriding the testator's wishes. Forced heirship and testamentary freedom, operating within distinct legal frameworks, both fundamentally aim to maintain and balance familial interests with individual autonomy to varying degrees.