# Conflicts of International Inheritance Laws in the Age of Multinational Lives

Adam F. Streisand† & Lena G. Streisand‡



## Introduction

Today, more than ever, we have multinational lives. That is to say, we may have more than one home or spend significant amounts of time in more than one country. There can be nothing more sublime than to immerse oneself in a foreign culture, converse in a different language than one's own native tongue, and open the mind to ways of thinking that may even be anathema to the values instilled in us from our very first years. One can only benefit.

But what if you were someone like Douglas Raines Tompkins, founder of The North Face and Esprit apparel companies, and adventurist-turned-philanthropist? When Tompkins sold his companies, which he founded in San Francisco, California, where he lived most of his life, he committed to donating his entire wealth to land conservation and wildlife preservation.[1] Tompkins acquired millions of acres of land in Chile and Argentina and made grand bargains with the governments of those nations: he offered to donate his land to the governments as long as they too contributed land, and agreed to dedicate the entirety of those lands for national parks and wildlife preserves. For example, in January 2018, the charitable foundation created by Douglas Tompkins, Tompkins Conservation, made "the

† Adam F. Streisand is a partner in the law firm Sheppard Mullin Richter & Hampton LLP in its Los Angeles, California office and the Chair of its Private Wealth and Fiduciary Litigation Practice Group.

‡ Lena G. Streisand is a student of law at The George Washington University Law School in Washington, D.C.

1. *See* Pascale Bonnefoy, *With 10 Million Acres in Patagonia, a National Park System Is Born*, N.Y. TIMES (Feb. 19, 2018), https://www.nytimes.com/2018/02/19/world/americas/patagonia-national-park-chile.html [https://perma.cc/2RDJ-YBZD].

world's largest donation of privately held land" to the government of Chile, which, together with land donated by the Chilean government, created a nearly nine-million-acre park, which is "roughly the size of Switzerland."[2]

Tompkins wanted the world to be the beneficiary of his fortune and was adamantly opposed to allowing his wealth to enrich his already wealthy offspring. But that did not stop his San Francisco socialite daughter Summer Tompkins Walker from suing in California to overturn her father's estate planning documents after he died in a kayak accident in Chile in December 2015.[3] But Summer did not claim that her father lacked mental capacity to execute his California will and revocable trust or that those instruments in any way failed to reflect his true testamentary intentions. To the contrary, Summer claimed the documents reflected precisely what he wanted, but what he wanted was to violate the "forced heirship" laws of Chile.[4] She claimed that her father, as a consequence of his time working on his philanthropic projects, became a domiciliary of Chile.[5] Summer claimed that she was entitled, under Chilean law, not only to a share of her father's estate, but also of every gift and donation made by him during his life.[6]

Though Summer had no connection to Chile herself, she asserted she should benefit from Chile's "forced heirship" laws, which force the decedent to leave specified percentages of his estate, augmented by all lifetime gifts, to heirs predetermined by the government.[7] Of course, forced heirship laws, which are a hallmark of civil law nations, are anathema to the principles of free testation in common law countries, particularly in the United States.[8] Summer argued that her father had vocally and famously left the United States without an intention to return, particularly after President George W. Bush ordered the invasion of Iraq, and had spent so much time in Chile and Argentina on his philanthropic work, that her father had effectively become a Chilean domiciliary.[9] Chile applies its inheritance laws, including forced heirship, to its domiciliaries.[10]

In order to avoid the difficult, fact-intensive proceedings necessary to determine Tompkins' domicile, one of the authors of this article, Adam Streisand, moved the court for summary judgment, arguing that domicile was irrelevant, because Tompkins' trust contained a choice of law provision

2. Elizabeth Royte & Michael Greshko, *Chile Adds 10 Million Acres of Parkland in Historic First*, NAT'L GEOGRAPHIC (Jan. 29, 2018), https://www.nationalgeographic.com/news/2018/01/chile-new-national-parks-10-million-acres-environment/ [https://perma.cc/DY74-TQ7Y].

3. Walker v. Ryker, No. 285782, 2018 WL 4659621, at *1 (Cal. Ct. App. Sept. 28, 2018).

4. *See id.* at *2.

5. *See id.* at *1.

6. *See id.* at *2.

7. *See id.*

8. *See id.* at *6.

9. *See* Brief for Respondent at 10, Walker v. Ryker, 2018 WL 4659621, at *1 (Cal. Ct. App. Sept. 28, 2018) (No. 285782).

10. *See id.* at 6.

selecting California law to apply.[11] Under California law, a choice of law provision will be enforced and the selected law applies unless it violates California public policy.[12] Summer argued that allowing Tompkins to avoid Chile's forced heirship laws violated California's policy of comity to the laws of other nations.[13] But the trial court and the California Court of Appeal agreed that Summer's argument was tautological: the court would be forced to engage in the complicated domicile analysis the California statute was intended to avoid, determine whether the law of domicile conflicted with the law selected by the choice of law provision, and if so, honor the law of domicile.[14] In other words, a person would never be allowed to select a law if it were different than the law of the person's domicile and thus the statute would have no purpose at all. The California Supreme Court rejected Summer's pleas to reconsider the Court of Appeal's decision.[15]

Undeterred, Summer Tompkins filed a lawsuit in Chile seeking the aid of the Chilean courts to assure her an inheritance she claims she is entitled to under Chile's forced heirship laws.[16] It will take years for the courts in Chile to render a decision. The Tompkins case highlights the complexities that may arise for people with multinational lives, and the costs and burdens of litigation that arise as a consequence. The case also brings into focus the benefits and limits of laws that allow decedents to attempt to plan in advance ways to protect their estates.

As these cases are becoming more prevalent, including the 'tug of war' between France and California over the estate of the "French Elvis" Johnny Hallyday,[17] it is remarkable that virtually nothing has been written about forced heirship, freedom of testation, and the conflicts that can arise for those who straddle nations with these competing philosophies. In this article, the authors begin in Part I at a sensible place: ancient Rome, which gave birth to the foundation of civil law now firmly rooted in Europe and

11. *Walker v. Ryker*, 2018 WL 4659621, at *1

12. CAL. PROBATE CODE § 21103 (Deering 2019).

13. *In re* Estate of Tompkins, No. B292712, 2019 WL 4686980, at *1 (Cal. Ct. App. Sept. 26, 2019).

14. *See* Phil Matier & Andy Ross, *Daughter Seeks Millions from Espirit Co-founder Douglas Tompkins's Will*, S.F. CHRON. (Oct. 29, 2017), https://www.sfchronicle.com/bayarea/matier-ross/article/Daughter-seeks-millions-from-Esprit-co-founder-12314126.php [https://perma.cc/CMS6-7PEG] (last updated Oct. 30, 2017, 6:13 AM); Phil Matier & Andy Ross, *Daughter of North Face and Esprit Co-founder Douglas Tompkins Loses Latest Bid to Claim Inheritance*, S.F. CHRON. (Oct. 7, 2018) https://www.sfchronicle.com/bayarea/matier-ross/article/Daughter-North-Face-Esprit-founder-tomkins-summer-13285889.php [https://perma.cc/NEQ2-PMJX] (last updated Oct. 11, 2018, 10:55 PM).

15. *Walker v. Ryker*, 2018 WL 4659621, at *5.

16. *See* Cindy Leicester, *Disputing a Father's Charitable Legacy*, WILLS WORLDWIDE (May 15, 2018), https://www.willsworldwide.com/2018/05/15/disputing-fathers-charitable-legacy/ [https://perma.cc/RGT7-7RP8].

17. *Johnny Hallyday: Court Freezes Assets in Inheritance Dispute*, GUARDIAN (Apr. 13, 2018, 2:58 PM), https://www.theguardian.com/music/2018/apr/13/johnny-hallyday-court-freezes-assets-in-inheritance-dispute [https://perma.cc/74ZE-TVYM].

Latin America.[18] We trace the historical development of civil law in Part II and the common law in Part III, and in particular, the laws of succession. Within the context of that historical development, we look at the relationship of laws concerning the making of a will; the laws of intestacy, which apply when a person dies without a will; and the concepts of testamentary freedom and forced heirship. Given the importance of the topic of conflicts in inheritance laws, we discuss the succession regime in Islamic law nations in Part IV and Russia in Part V. In Parts VI and VII, we discuss modern forced heirship laws and free testation regimes, respectively. Part VIII focuses on how nations determine which laws of which nations to apply in given cases.

## I. Ancient Rome

As William Burdick wrote in his extraordinary 1938 work, *The Principles of Roman Law and Their Relation to Modern Law*, "Roman jurisprudence through its influence still remains a world power."[19] He notes that more than three-fourths of the "civilized globe" has adopted Roman legal principles in a modernized form.[20] Burdick emphasizes that the genius of the Roman Empire far exceeded its military might:

> As Rome expanded, her genius for government became more and more manifest. In time, she became great, and, later, colossal. As a world power history has yet to see her equal. Her ability to govern races and peoples of every type, greatly differing from each other in character and civilization, was marvelous. It is far from the truth to say that her government was merely a despotic military power. She ruled, indeed, with an iron hand where it was necessary, but Rome was also an adept in the art of diplomacy. The secret of her governmental power was not that her armies conquered the world, for other great conquerors before and since have done that, but for centuries she held together her conquered peoples. They did not, as in the case of Alexander, pass from her control upon the death of her great military commanders, but she organized and long retained under one central power may subdued races. . . . It was Rome's genius for statesmanship, political organization, world wide law that made her great. The mind of the typical Roman of the intelligent class was what may be called the legal mind. It was logical, practical, just. It was free from misapplied sentiment. When in time, the Roman became a cosmopolitan, he also became the most scientific law giver the world has known, sensible, equitable, tolerant, broad-minded. It is, perhaps, in the universality of its application, that the genius of the Roman Law is best appreciated. The customary laws of most peoples are restricted to themselves and, hence, *local*. . . . [B]ut the later Roman Law . . . became the law for the entire Roman Empire and was developed for the needs of a world.[21]

The term "civil law" comes from the Romans who established the

18. *See Code of Justinian*, ENCYCLOPÆDIA BRITANNICA (Aug. 27, 2019), https://www.britannica.com/topic/Code-of-Justinian [https://perma.cc/B67J-5UNE].

19. WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 1 (1938).

20. *Id.*

21. *Id.* at 1–3.

*Corpus Iuris Civilis* or "body of the civil law."[22] It comprises four primary sources, the *Code*, *Digest*, *Institutes*, and *Novels*.[23] The development of the civil law in Rome spanned a millennium, but is marked by Emperor Justinian's grand vision that the establishment of a comprehensive and comprehensible body of law would serve as the foundation for his goal of revitalizing the Empire.[24] Justinian reigned from A.D. 527 to 565.[25] Within the first year of his reign, Justinian brought together ten jurists to create a single Roman code by distilling, amending, and abridging the existing imperial constitutions.[26] The final edition of the *Code* consisted of 12 books consisting of 4,000 imperial constitutions dating back to the reign of Emperor Hadrian (A.D. 117-138).[27] In 530, Justinian appointed Tribonian to collate and arrange into one *Digest* the works of the most important jurists in the Empire.[28] Within three years, Tribonian succeeded in distilling three million lines into 150,000 in a series of 50 books.[29] Justinian published the *Institutes* in 533 as a student textbook for the study of the law, unique in that it also had legislative authority.[30] Although Justinian intended the *Code*, *Digest*, and *Institutes* to be definitive, in 564, at the end of his reign, he published 168 constitutions as the *Novels*.[31] The *Novels* became the highest level of legal authority, followed by the *Institutes*, the *Digest*, and finally the *Code*.[32] Eleven of the 50 books of the *Digest* and two of the books of the *Institutes* pertain to inheritance.[33]

The founding instrument of Roman law is the Twelve Tables.[34] The Twelve Tables were a set of laws inscribed on 12 bronze tablets in 451 and 450 B.C.E.[35] The Twelve Tables established the principle of *patria potestas*, which forms the basis of succession law in the civil law tradition.[36] In accordance therewith, the *pater familias*, or oldest living male and thus the head of household, exercised all power over person and property within his *familia*.[37] If the *patria potestas* died without leaving a will that complied with the formalities necessary for it to be a valid testament, or if the heirs

22. *Id.* at 170.

23. *Id.*

24. *See* PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 3 (1999).

25. *Justinian I*, ENCYCLOPÆDIA BRITANNICA (Sept. 5, 2019), https://www.britannica.com/biography/Justinian-I [https://perma.cc/82XY-KP7T].

26. *See* BURDICK, *supra* note 19, at 158.

27. *See* JAMES MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME 385-86 (2d ed. 1985).

28. BURDICK, *supra* note 19, at 159.

29. *See id.* at 160, 162.

30. *See* Stein, *supra* note 24, at 35.

31. *See* LORD MACKENZIE, STUDIES IN ROMAN LAW WITH COMPARATIVE VIEWS OF THE LAWS OF FRANCE, ENGLAND, AND SCOTLAND 28 (John Kirkpatrick ed., 5th ed. rev. 1880) (1862).

32. *See id.* at 29.

33. *See* BURDICK, *supra* note 19, at 162-63, 167.

34. *See* Stein, *supra* note 24, at 3, 4.

35. *See id.* at 3; *see also* BURDICK, *supra* note 19, at 100-01.

36. *See* MUIRHEAD, *supra* note 27, at 95-96.

37. BRUCE W. FRIER & THOMAS A.J. MCGINN, A CASEBOOK ON ROMAN FAMILY LAW 4 (2004).

legally refused the inheritance, there was an intestacy.[38] As stated,

> (1) By the Law of the Twelve Tables, the inheritances of those who die intestate fall first to their *sui heredes* (privileged heirs).
> (2) By *sui heredes* are meant descendants who are in the dying man's *potestas*, for example, a son or daughter, grandson or granddaughter through a son, (or) a great-grandson or great-granddaughter through a grandson born of a son. Nor does it matter whether the children are natural (i.e., biological) or adopted. All the same, grandchildren or great-grandchildren only count as *sui heredes* if the person above them in the family line has ceased to be in the power of a parent, whether this occurs through death or for some other reason, like emancipation. So, if at the point someone dies he has a son-in-power, for this reason his grand-son (by that son) cannot be a *suus heres*. And we understand the same rule to hold for other descendants.
> (3) A wife in *manus* also a *sua heres* to the man in whose *manus* he is, since she is in the position of a daughter (*filiae loco*) . . . .
> (4) Posthumous children are also *sui heredes* if they would be in their father's power had they been born while he was still alive.[39]

The Law of the Twelve Tables was later replaced by praetorian law which prevailed in Rome for centuries before Emperor Justinian's grand project.[40] Though it was greatly improved over ancient law, praetorian law had served its function and was not well suited to changing societal needs.[41] Justinian resolved to change the entire system of succession from the praetorian law that had prevailed in Rome for centuries.[42] Justinian's 118th Novel was intended to "correct the existing complexity, confusion, and artificiality of the law of succession, and to base it upon the natural law of blood relationship (cognitio) rather than upon the law of aganation (agnatio)."[43] Justinian established four new classes of heirs, and his laws applied equally to movable and immovable property.[44] The four classes began with descendants, whether male or female.[45] Descendants in the first degree took per capita, but descendants of remoter degrees inherited per stirpes.[46] Descendants excluded all others.[47] If no descendants, the intestate inheritance passed to ascendants and full brothers and sisters.[48] If ascendants only, half passed to the paternal and half to the maternal ascendants.[49] If ascendants and brothers and sisters, or brothers and sisters only, the inheritance divided equally per capita.[50] The third class consisted of half-brothers and sisters. The fourth were all remaining collaterals

38. *See id.* at 323.
39. *Id.*
40. *See* BURDICK, *supra* note 19, at 555–56, 570.
41. *See id.* at 570.
42. *Id.*
43. *Id.* at 570–71.
44. *Id.* at 571–72.
45. *Id.* at 571.
46. *Id.*
47. *See id.*
48. *Id.*
49. *Id.*
50. *Id.* at 571–72.

nearest in degree who shared equally.[51]

Novel 118 made no provision as between spouses.[52] The justification may have been that it was customary to provide the wife with dowry.[53] In the event of no dowry and no means of her own, a widow was entitled to a fourth of the estate, which became known as the "marital portion" or "marital fourth."[54] This was later amended by Justinian so that the widow received only an equal portion in the event of three or more children.[55] Further, this share in the case of children became a usufruct (from *usus*, or use, and *fructus*, fruit) for life, the fee or remainder being with the children.[56] The marital portion was a vested right which could not be taken from her by will.[57]

The Roman law of intestate succession as promulgated by Emperor Justinian has had a profound influence on modern laws of succession worldwide, as will be seen below.[58] Ironically, while the civil law finds its roots in the Roman Empire, the Twelve Tables formally gave birth to the concept of free testation.[59] Table Five states, "The testament of the father shall be law as to all provisions concerning his property and the tutelage thereof."[60] A "testament" from the Latin *testamentum* is thought to reflect the concept of proving the intention of a testator by witnesses.[61] The *Institutes* reveal two types of testaments.[62] *Comitia calata* was a biannual assembly of the people during which a testator could express his will to the witnesses in attendance.[63] The assembly had to provide consent, on a showing of cause, to deviate from the ordinary rules of succession.[64] The *testamentum in procinctu* evolved as a means to accommodate soldiers who were preparing to enter battle to express their dying wishes to other soldiers who served as witnesses.[65]

These oral testaments were replaced with the development of a method of devising property that was similar to a will inspired by Table Six of the Twelve Tables.[66] The *testamentum per aes et libram* (testament by bronze and scale), also referred to as a mancipatory will, required five witnesses

51. *Id.* at 572.
52. *Id.* at 572–73.
53. *Id.* at 573.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 574.
58. *Id.* at 575.
59. *Id.* at 580 (noting, however, that the ability to control property at death may have actually existed before creation of the Twelve Tables).
60. J.L.E. Ortolan, The History of Roman Law from the Text of Ortolan's Histoire de la Législation Romaine et Généralisation du Droit (ed. 1870) 108 (Iltudus T. Prichard, & David Nasmith trans., Butterworths 1871) (quoting Table V, of the Roman Twelve Tables).
61. Alan Watson, The Law of Succession in the Later Roman Republic 2 (1971).
62. Burdick, *supra* note 19, at 582.
63. *See id.*
64. *See id.*
65. *See id.* at 583.
66. *See id.*

above the age of puberty, a scales holder, and a wax tablet that comprised the will.[67] The mancipatory ceremony involved a fictitious sale of the estate to the *familiae emptor* who then demonstrated his asset by striking the scales with the bronze.[68] These procedures evolved over time leading ultimately to Emperor Justinian's reforms which led to the *testamentum tripartitum*.[69] The testator could make a will in writing that clearly expressed his intention executed in the presence of seven witnesses over the age of puberty, none of whom were in the testator's *potestas*, and who were in a position to see and hear the testator.[70]

In order to make a valid will, the testator had to name an heir.[71] It is important to understand that an heir under Roman law was more akin to an executor in modern law.[72] The heir succeeded to the entire estate including all debts and obligations.[73] As a consequence, the law distinguished between "domestic heirs" or "necessary heirs" on the one hand, and "extraneous heirs" on the other.[74] Necessary heirs had no right to refuse the inheritance, which, after all, could be quite a burden (imagine today if a named executor could not refuse to serve).[75] Indeed, slaves were "necessary heirs" and in circumstances of an insolvent estate, the testator, both to protect his family and reputation, could name his slave, who could not refuse, as heir.[76] In light of the importance of the heir, one can thus appreciate the significance of testamentary formality.[77]

Although Roman law had from its earliest years allowed free testation, this in time was met with a reaction by those who felt it unjust to ignore those "bound to him by the ties of natural affection."[78] He could thereafter do so only with cause.[79] Intestate heirs disadvantaged by a will could assert a cause of action to invalidate the will on the grounds that the complainant was unjustly disinherited.[80] Early on, there was no set amount that would remedy an unjust disinheritance.[81] The Falcidian Law in 40 B.C.E. granted the successful complainant one-fourth of that to which he would be entitled had the decedent died intestate.[82] This share became known as the *legitim*, or "statutory portion" or "birthright portion."[83] Justinian provided in the 18th Novel that a testator with four or fewer children

67. *See id.* at 583–84.
68. *See id.* at 584.
69. *See id.* at 586–87.
70. *See id.* at 587.
71. *Id.* at 595.
72. *See id.* at 547.
73. *See id.* at 548.
74. *Id.* at 549.
75. *Id.*
76. *Id.* at 549–50.
77. *See id.* at 600–01.
78. *Id.* at 607.
79. NOV. 115.3 (542).
80. BURDICK, *supra* note 19, at 607–08.
81. *Id.* at 608.
82. *Id.*
83. *Id.*

must leave to them at least one-third to be divided equally, and in the case of more than four children, one-half to be divided among them equally.[84] Justinian's Novel 115, however, codified a testator's ability to disinherit his legal heirs.[85] Novel 115 identified specifically the persons and the bases upon which one could disinherit heirs for cause.[86]

## II. Historical Development of the Civil Law Tradition

Spain was a Roman province for centuries until the Visigoths invaded the Iberian peninsula in the fifth century.[87] King Euric ruled from 466 to 484 and established the Laws of Euric, representing a compilation of Visigothic laws.[88] Euric's son Alaric II succeeded his father and decided to institute laws more suitable to his former Roman subjects, compiling laws from the Theodosian Code, published by Emperor Theodosius II in 438.[89] Alaric published his compilation in 506, 27 years before Justinian's *Digest*.[90] In 690, Spain adopted a new and general code of laws, which is now referred to as the Visigothic Code, taken from Roman, Gothic, and Ecclesiastical law.[91] When the Moors invaded in 711, the Visigothic kingdoms were conquered, and for the next seven-plus centuries, Christians and Muslims battled for supremacy on the peninsula.[92] Queen Isabella and King Ferdinand finally completed the *Reconquista* in 1492 when they retook Granada from the Moors.[93] As the Christians regained control of the Iberian peninsula, King Alfonso X, King of Leon and Castile, promul-

84. *Id.*; NOV. 18.1 (536).
85. NOV. 115.3.
86. *Id.*
87. BURDICK, *supra* note 19, at 13.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 14.
92. *Id.*
93. *Id.* In fact, the defeat of Sultan Boabdil resulted in large part from the Catholic Monarchs' ability to exploit an inheritance dispute. Aixa al-Hurra and Muley Hacen had three children: Boabdil, Yusuf, and Aixa. Muley Hacen refused to acknowledge Boabdil as the rightful heir of Granada because astrologists predicted on the day of Boabdil's birth that he would be the last Islamic emir of Granada. Muley Hacen took as a new wife a slave named Isabel who converted and whose name became Soraya. She bore two sons whom Muley Hacen named to be his successors. The Sultan imprisoned Aixa and Boabdil in the Tower of Comares. Aixa formed an alliance with an opposition party and after a bloody civil war Aixa and her son escaped, Muley Hucen was exiled, and Boabdil was placed on the throne. Taking advantage of the civil war, Queen Isabella went to battle and captured Boabdil in 1483. Aixa negotiated the release of Boabdil in exchange for his brother Yusuf. The Catholic Monarchs kept Yusuf under their protection but used him as leverage to keep Boabdil in check. Even in exile, Muley Hacen refused to acknowledge Boabdil and instead Muley Hacen named his brother Al Zagal as essentially regent until Soraya's son would be of age to rule. Al Zagal tricked Boabdil into a false alliance against Castile which only resulted in the ultimate surrender by Boabdil of Granada and the Alhambra in 1492. Aixa famously told her son, "Do not cry as a woman for what you could not defend as a man." *See* Sabera Ahsan, *"Do Not Cry as a Woman For What You Could Not Defend as a Man" - Who Was the Sultana of Granada?*, MVSLIM (July 2, 2017), https://mvslim.com/meet-aixa-al-hurra-unconquerable-sultana-granada/ [https://perma.cc/8V4M-3KRN].

gated a code of laws in about 1255, followed by an even more impressive work that was "virtually a digest of Roman Law" in 1263.[94] Later compilations of Spanish law culminated in the Spanish Civil Code of 1889, forming the basis of modern Spanish law.[95]

The Spanish Civil Code's forced heirship regime, discussed more fully below, has its roots in the Visigothic history:

> [H]istorical studies have shown that the configuration of the legitima as outlined in the Spanish Civil Code of 1889 has an origin that is clearly Visigoth, and thus Germanic, despite some technical contributions from Roman law, even without many of the most crucial features of Post-classical Justinian law (and particularly of his novel 115).[96]

Prior to the invasion of the Visigoths, the succession regime in Roman *Hispania* probably followed Roman concepts of free testation.[97] The Code of Euric incorporated Germanic concepts of forced heirship based upon communal family property and religious concepts.[98] In the mid-seventh century, the Visigoth King decreed that only one-fifth of an estate was freely disposable.[99] However, a portion of the four-fifths could be used to favor one or more descendants over others.[100] After the *Reconquista*, the Visigothic forced heirship regime, reserving four-fifths to the *legitima* while allowing one-third for *mejora*, i.e., for improvement of some heirs over others, continued in full force.[101] The concepts of *legitima* and *mejora* along with a right of usufruct were principal features of the Spanish Civil Code of 1889.[102]

After the fall of the Roman Empire, the Franks, another Germanic tribe, conquered the northern part of ancient Gaul.[103] The Franks brought with them their own tribal customs, having had little contact with Roman law during the time of the Empire.[104] The law in northern Gaul, which was unwritten and based on tribal customs, became known as "the law of customs," or customary law.[105] The law of customs took its particular name from its locality, such as "the Custom of Paris," "the Custom of Normandy," or "the Custom of Orleans."[106] Due to its prominence, the Custom of Paris spread throughout much of France.[107] In the eleventh century, due to a revival in Italy of the study of Roman sources, Paris too

94. BURDICK, *supra* note 19, at 15.
95. *See id.* at 16–17.
96. Sergio Cámara Lapuente, *Forced Heirship in Spanish Law*, at 4–5 (2017), to be published as ch. 6 *in* COMPARATIVE SUCCESSION LAW, VOLUME III: FREEDOM OF TESTATION AND FAMILY CLAIMS (Kenneth G. C. Reid et al. eds., Oxford Univ. Press) (forthcoming).
97. *See id.* at 5.
98. *Id.*
99. *Id.* at 5–6.
100. *Id.* at 6.
101. *Id.* at 6–7.
102. *Id.* at 10.
103. BURDICK, *supra* note 19, at 10.
104. *Id.*
105. *Id.*
106. *Id.* at 11.
107. *Id.*

became a center of study of Roman law, and the Custom of Paris began to pattern itself on Roman law.[108]

The sources of Roman law had been neglected for 500 years until the 1070s.[109] The *Digest*, including its wide breadth of succession law, received renewed attention ironically as a byproduct of an investiture feud.[110] Henry IV became Holy Roman Emperor and the German King in 1054.[111] Pope Gregory VII initiated the "Gregorian reforms" to reassert the Church's independence from imperial rule.[112] Henry IV succeeded in overthrowing Gregory VII, but later, Henry IV nevertheless succumbed to new ordinances stemming from the Gregorian reforms.[113] Study began anew to understand and expand the *Corpus Iuris Civilis* throughout Europe.[114] The twelfth century saw a renaissance and renewed faith in the civil law.

It was not until the Code Napoleon that France united around a uniform code of laws.[115] In 1800, Napoleon, just as Justinian had done in ancient Rome, appointed a commission to prepare a civil code, which was delivered to eminent French jurists for comment, and thereafter adopted by legislative action, becoming law in 1804.[116] The Code Napoleon borrowed both from the Custom of Paris and Roman law.[117] Napoleon presided over the commission which drafted the civil code, and astonished its members as he frequently cited Justinian's *Digest*.[118]

The French Revolution also revolutionized the law of succession as it had evolved and been influenced by the Roman tradition.[119] It abolished the concepts of primacy of the eldest male and treated equally the descendants including extra-marital children.[120] The concept of "liberty" did not extend to testation as forced heirship was increased to nine-tenths of the estate.[121] Indeed, forced heirship was applied retroactively to decedents dying and estates settled prior to the enactment of these new laws.[122] The Code Civil of 1804 instituted greater liberality in testation, requiring a

108. *Id.*
109. *See* Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1597 (1991–1992).
110. *See* STEIN, *supra* note 24, at 42–43.
111. *Henry IV*, ENCYCLOPÆDIA BRITANNICA (Nov. 7, 2019), https://www.britannica.com/biography/Henry-IV-Holy-Roman-emperor [https://perma.cc/6TBG-GD85].
112. *Gregorian Reform*, ENCYCLOPÆDIA BRITANNICA (Sept. 23, 2011), https://www.britannica.com/event/Gregorian-Reform [https://perma.cc/NW52-EVFA].
113. *See Henry IV*, *supra* note 111.
114. *See* Thomas J. McSweeney & Michéle K. Spike, *The Significance of the Corpus Juris Civilis: Matilda of Canossa and the Revival of Roman Law*, WM. & MARY L. SCH. FAC. PUB. 21, 22 (2015).
115. BURDICK, *supra* note 19, at 11.
116. *Id.* at 11–12.
117. *Id.* at 11, 12.
118. *See id.* at 12.
119. *See* COMPARATIVE SUCCESSION LAW VOLUME II: INTESTATE SUCCESSION 36 (Kenneth G. C. Reid et al. eds., 2015).
120. *Id.*
121. *Id.*
122. *Id.*

reserved share that ranged from one quarter (in the case of only ascendants) to three quarters (with three or more children surviving the decedent).[123] The disposable share could be as large as the entire estate in the absence of ascendants or descendants.[124] While the Code Civil retained the Revolution's emphasis on equality and avoidance of gender discrimination, it did not, however, improve the standing of the surviving spouse.[125] The surviving spouse was viewed as a stranger who would take property away from the family and was thus relegated to the bottom of the hierarchy of succession, taking precedence only over the state.[126] The rights of the surviving spouse could be alleviated, however, by the matrimonial regime of community of acquests and by lifetime gifts from one spouse to the other.[127] The rules of intestacy under the Code Civil of 1804 were based both on the decedent's presumed affection and lawmakers' determination of the decedent's duty to protect the family.[128] However, in Italy, legislators rejected the primacy of the presumed intention of the decedent in drafting the Civil Code of 1865.[129]

Ironically, Italy's modern Civil Code was largely influenced and borrowed heavily from the Code Napoleon.[130] This is so even though the eleventh century saw a rebirth of study of Roman law particularly in the famous law school in Bologna which attracted students from all over Europe.[131] In Germany, there was no uniformity of laws, but Roman law influences began to take hold after the restoration of the Holy Roman Empire by Otto the Great in 962—whereby the Germanic kings were also kings of Italy—and the revival of Roman law education in eleventh century Italy.[132] In 1495, during the reign of Maximilian I, Roman law was considered "received" and over the next century Germanic customary law all but disappeared.[133] In the seventeenth and eighteenth centuries, with the increasing strength of loosely confederated states, such as Prussia, Saxony, and Schleswig-Holstein, independent codes developed though were generally influenced by Roman law.[134] In 1874, a commission was appointed to develop a code for the whole country.[135] So daunting a task was it that it took until 1900 for the German Civil Code to come into effect.[136]

The rules of intestate succession that evolved over the course of the nineteenth century in Europe had various underpinnings. The theoretical basis for these intestate laws originated with Natural-law jurists such as

123. *Id.*
124. *Id.* at 37.
125. *Id.*
126. *Id.* at 46.
127. *Id.*
128. *Id.* at 37.
129. *Id.* at 69.
130. *See* BURDICK, *supra* note 19, at 18.
131. *Id.*
132. *Id.* at 19.
133. *Id.* at 20.
134. *Id.* at 20–21.
135. *Id.* at 20.
136. *Id.* at 21.

Hugo Grotius, Samuel von Pufendorf, and Samuel Stryk.[137] They theorized that intestacy should effectuate the presumed intention of the decedent, and the decedent presumably would have intended to benefit his closest relatives for whom he would have a natural affection.[138] The drafters of the Code Civil of 1804 in France adopted this theory in formulating its laws of intestacy.[139] The legislature in Italy, however, asserted its right to mandate as intestate heirs those whom society deems should benefit in drafting the Civil Code of 1865.[140] A third theory underlying laws of intestacy as they developed in Europe, including in Italy in enacting the Code Civil of 1865, was founded on the social or moral duty to provide for one's family and to avoid the possibility that this responsibility might fall on the state.[141]

It can be said that certainly two of these theories that underpin intestacy laws are at play in restricting the right of testators to dispose of their estates. In the case of a will duly executed by a testator at a time when he was of sound mind, there can be no reason to presume what he may have intended; we already know with certainty. Yet the government dictates that the testator may freely dispose of only a portion of his estate and further dictates precisely how a portion of the testator's estate must be distributed.[142] Thus, it is clear that civil law nations treat their domiciliaries paternalistically, insisting that they have a moral duty to provide for persons dictated by the government.[143] It may be that civil law nations believe there is a moral duty to provide for close relations or a moral duty to ensure that the government does not have to provide for the testator's family members, or both.

## III. Historical Development in the Common Law Nations

The common law did not develop in the British Isles as an island onto itself devoid of influence from civil law. Gaius Julius Caesar landed in Britain in 55 B.C.E.[144] Roughly a century later, the Romans invaded Britain again in 43 A.D.[145] For the next three-and-a-half centuries, Britain was a province of the Roman Empire. When Roman legions withdrew in 410

137. Alexandra Braun, *Intestate Succession in Italy*, *in* COMPARATIVE SUCCESSION LAW VOLUME II, *supra* note 119, at 67, 69.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 71.
142. *See generally id.* at 69.
143. *See* 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, 1223 (1990).
144. Mark Waghorn, *First Evidence of Julius Caesar's Invasion of Britain Discovered in Kent*, INDEP. (Nov. 29, 2017, 1:10 AM), https://www.independent.co.uk/news/uk/home-news/julius-caesar-invasion-britain-uk-site-evidence-first-discovered-kent-a8081056.html [https://perma.cc/T83W-DYZR].
145. Neil Faulkner, *Overview: Roman Britain, 43 - 410 AD*, BBC (Mar. 29, 2011), http://www.bbc.co.uk/history/ancient/romans/overview_roman_01.shtml [https://perma.cc/5PGP-PJ37].

A.D., "it was not Britain that gave up Rome, but Rome that gave up Britain."[146] Constantine declared Christianity to be the state religion in 325 A.D. and it is believed to have been introduced to Britain thereafter.[147] But when the Romans withdrew, Christianity was reintroduced to Britain by St. Augustine who arrived with 40 Benedictine monks in Canterbury in 596 A.D.[148] Ethelbert, King of Kent, converted and permitted St. Augustine to preach throughout his kingdom.[149] St. Gregory, or Pope Gregory the Great, sent St. Augustine to Britain.[150] It is said that Pope Gregory was a Roman's Roman, intent on expanding the Church's influence over all of Europe.[151] He was steeped in Justinian's *Digest*, and King Ethelbert adopted a code of laws thereafter in the "Roman style" in 600 A.D., not even a full four decades after Justinian's death.[152]

Kings kept Roman law alive in one form or another in Britain from the seventh to eleventh centuries.[153] In 827, King Egbert united the kingdoms of Angles and Saxons into Angleland.[154] King Alfred drove out the Danes and ruled from 871 to 901.[155] He had visited Rome and brought to England influences from Roman law when he established "The Laws of King Alfred."[156] King Canute came from Denmark and ruled from 1016 to 1035 and had also brought Roman influence to his creation of laws that earned him the moniker as "the greatest legislator of the eleventh century."[157] Edward the Confessor, crowned King on Easter 1042, had spent 30 years in exile on the continent and Norman influence spread widely such that his reign is referred to as a "peaceful Norman conquest."[158] Edward died without issue in 1066. His wife's brother Harold succeeded to the throne, but William, Duke of Normandy, rejecting Harold's entitlement, defeated him at the Battle of Hastings on October 14, 1066.[159]

Notwithstanding that the influence of Roman law was certainly evident both on the continent and in Britain prior to the Norman Conquest, scholars have commented that the original sources, including the *Digest*, had largely been neglected for 500 years by the time of what has been called a twelfth century renaissance.[160] The revival of the civil law in twelfth century Europe spread to England, and the period between 1100

146. Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 456 (1961).
147. *Id.* at 458.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 459.
152. *Id.*
153. *Id.* at 460.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 461.
159. *Id.*
160. *See* Stein, *supra* note 109, at 1597; *see generally* Urban T. Holmes, Jr., *The Idea of a Twelfth-Century Renaissance*, 26 SPECULUM 643, 643 (1951).

and 1300 has been called the Roman period of English law.[161]

Prior to the Norman Conquest of 1066, little is known about inheritance law in England and Wales other than it varied widely from "shire to shire."[162] From 1066 to 1925, intestate succession distinguished between realty and personalty.[163] Between the Norman Conquest and the passage of law reforms in 1925, the rules of inheritance governed real property, while the rules of distribution governed personal property.[164] Under the rules of distribution, as codified by the Statutes of Distribution of 1670 and 1685, personalty devolved one-third to the widow and the rest to the children (who shared equally regardless of sex), while a widower took the entirety of the personal property.[165] Personal property could, however, be devised by will.[166] The ecclesiastical courts had jurisdiction over the distribution of personal property whether by testament or intestacy.[167] The ecclesiastical courts "proved" the authenticity of testaments and supervised the personal representative who would pay the decedent's debts and distribute the remaining personal property to those entitled to inherit it.[168] The term "personal representative" meant a fiduciary responsible for supervision of the devolution of personal property, though today the term refers broadly to a fiduciary who administers all assets, i.e., personal and real property.[169]

Realty consists of land and that which is attached to the land such as improvements. In the Middle Ages, the Crown granted tenure in land that could be free or unfree.[170] Tenure in land came with strings attached. Free tenures included, for example, knight service, which required military service to the crown; grand sergeantry, which required some personal service of honor; socage, which generally entailed agricultural service; and spiritual, which required clergy to tend to the spiritual needs of his parishioners.[171] By the end of the War of Roses in 1485, these various forms of free tenure became generally known as freehold estates.[172] Unfree tenure was more amorphous and characterized by a constant state of unknowing what service may be required.[173] Unfree tenants lived in indentured servi-

161. *See* Charles P. Sherman, *The Romanization of English Law*, 23 YALE L.J. 318, 321–23 (1914).

162. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, VOLUME II 255 (2d ed. 1968).

163. *See* Roger Kerridge, *Intestate Succession in England and Wales*, *in* COMPARATIVE SUCCESSION LAW VOLUME II, *supra* note 119, at 324.

164. *See id.* at 326.

165. *Id.*

166. *Id.* at 324.

167. *Id.*

168. *Id.*

169. *Id.* at 324–25; *see also* Boyd F. Goldsworthy, *Uniform Probate Code–Abolishing the Distinction Between Real and Personal Property in Estate Administration*, 46 N.D. L. REV. 311, 320–21 (1970).

170. *See* Kerridge, *supra* note 163, at 324 n.4.

171. *Id.*

172. *Id.*

173. *See id.*

tude.[174] Free tenures had the distinction of protection by the courts.[175] The Tenures Abolition Act of 1660 abolished knight service after the Civil War and the death of Lord Protector Oliver Cromwell and the restoration of the monarchy.[176]

By the thirteenth century, the rules of inheritance prevented a person from devising real property by will.[177] Instead, real property passed directly to the owner's "heir" without an intermediary.[178] The common law courts exercised jurisdiction over the devolution of real property.[179] The rules of inheritance provided a system of primogeniture.[180]

Freeholders in medieval times found a means of circumventing the restriction against devising real property by will.[181] They created "uses" which have been called the precursor to the modern day trust.[182] The Crown disfavored "uses" because they resulted in the avoidance of taxes, leading Henry VIII to persuade Parliament to pass the Statute of Uses in 1535.[183] The Statute of Uses helped restore to the Crown badly needed revenue, and in 1540, as recompense, Henry approved the passage of the Statute of Wills, which allowed for the first time the ability to devise real property by testament to someone other than the freeholder's heir.[184] Under the 1540 Act, real property passed by intestacy directly to the heir and by testament directly to the devisee, while personal property still could pass only through the intermediary of a personal representative.[185] The 1540 Act also did not change the jurisdiction of common law courts over the devolution of realty and that of the ecclesiastical courts over personalty.[186]

An important encumbrance on the right of the heir were the rules of dower and curtesy.[187] A wife who survived her husband was entitled to

174. *See id.*
175. *Id.*
176. *Id.*; Tenures Abolition Act 1660, 12 Cha. 2 c. 24 (Eng.).
177. THE LAW OF SUCCESSION: TESTAMENTARY FREEDOM 132 (Miriam Anderson & Esther Arroyo i Amayuelas eds., 2011).
178. *Id.*
179. Kerridge, *supra* note 163, at 324.
180. POLLOCK & MAITLAND, *supra* note 162, at 260. 1. If the decedent left an "heir of the body," a living descendant, no other person inherited. A living descendant of the closest degree to the decedent took priority and excluded his or her own descendants (thus, for example, if the decedent was survived by a child, that child excluded his or her own descendants). 2. A predeceased descendant was represented by his or her descendants. 3. Males excluded females of the same degree. 4. The eldest male excluded all others of the same degree. 5. In the absence of a male heir, females of the same degree inherited equally. 6. The rule of representation by the descendants of a predeceased descendant takes priority over the preference for a male heir (a granddaughter of an eldest son will inherit and exclude a younger son).
181. THE LAW OF SUCCESSION, *supra* note 177, at 132.
182. *Id.*
183. *Id.* at 132 n.7.
184. *Id.* at 132–33.
185. *Id.* at 133, 133 n.10.
186. Kerridge, *supra* note 163, at 325.
187. *See* Richard Schaul-Yoder, *British Inheritance Legislation: Discretionary Distribution at Death*, 8 B.C. INT'L & COMP. L. REV. 205, 207, 229 n.276 (1985).

dower in his freehold land comprising a life estate to one-third; a husband who survived his wife was entitled to curtesy, a life estate in the whole of his wife's freehold estate.[188] An 1822 decision of the King's Bench in *Ray v. Pung* limited the effectiveness of dower by approving a device of defeating the wife's right.[189] The Dower Act of 1833 allowed the husband to eliminate explicitly the wife's right of dower.[190]

In 1858, jurisdiction over testaments for personal property was transferred from ecclesiastical courts to a newly formed Court of Probate.[191] The new Court also had jurisdiction over disputes concerning wills over real property.[192] The advocates who practiced before the ecclesiastical courts became those who practiced before the new Court of Probate.[193] The effect, therefore, was in reality to move disputes over real property testaments to a reconstituted church court.[194] The Land Transfer Act of 1897 required that real property also be administered by and pass through a personal representative.[195] Thus, a "personal representative" was no longer simply a representative who administered solely "personal" property.[196]

Parliament passed major reforms in 1925 that included the Law of Property Act, the Land Registration Act, the Administration of Estates Act, the Trustee Act, and the Settled Land Act.[197] The changes to the law of intestacy were substantial and form the basis for today's rules of intestacy under English law.[198] The most important consequence was to improve the rights of the spouse and of female heirs.[199] In essence the 1925 Administration of Estates Act reformed the rules to bring them, in modified form, more in line with the rules of distribution.[200] If a decedent was survived by a spouse and children, the spouse received a statutory legacy of 1,000 pounds and the "personal chattels" as well as a life estate in one-half the residue.[201] If survived by a spouse and no "specified relative," the spouse received the whole of the estate.[202] If survived by a spouse and one or more specified relatives, the spouse received 1,000 pounds, the chattels, and a life estate in the whole.[203] In 1952, Parliament increased the statu-

188. *See id.* at 207, 229 n.276.
189. Ray v. Pung (1822) 106 E.R. 1296 (Eng.) (husband arranged to receive a fee simple but with a power of appointment; upholding exercise of power of appointment to defeat wife's right of dower).
190. Dower Act of 1833, 3 & 4 Wm. 4, ch. 105(6) (1833).
191. Kerridge, *supra* note 163, at 326–27.
192. *Id.* at 327.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 328.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

tory to 5,000 pounds with issue and 20,000 where there were none.[204] In cases where there was a spouse but no issue and one or more specified relatives, the survivor took an outright interest in half the residue.[205]

The Civil Partnership Act of 2004 gave same-sex couples who register their partnership the same rights of inheritance as married couples.[206] The Inheritance and Trustees' Powers Act of 2014 amended the 1925 Administrations and Estates Act, including the rules of intestacy.[207] Under the 2014 Act, the spouse takes the personal chattels outright, then a statutory legacy with interest which increases based upon the consumer price index.[208] The spouse then takes one-half of the residue.[209] The decedent's issue will take the rest.[210] If there are no issue, the spouse takes the entire residue outright.[211] If there are issue but no surviving spouse, the issue take in equal shares with the share of a deceased child passing to that child's issue equally per stirpes.[212] There are provisions for relatives in the circumstances where there is no surviving spouse or issue.[213]

Laws of intestacy are intended not only to provide for the decedent's family, but in the absence of testament, are also intended to replicate what a person in ordinary circumstances might have done by testament had he not failed to do so. As explained above, under English law, by the time of Henry VIII, a person could devise property, even real property, by will.[214] As it would turn out, the principle of freedom of testation in England and Wales is well-established and even considered sacrosanct.[215] But it has also been called an "historical accident," "unprecedented in history," and "unlike any other European system of law."[216] This is so, even though the spiritual court explained that "the whole of the testamentary law which we administer has its basis in the civil law; and, without an intimate knowledge of the Roman code, it would be impossible to acquire a knowledge of our practice, or understand the principles of our decisions."[217] By the nineteenth century, however, despite the roots of English law in the Roman code, English attitudes toward civil law were antagonistic, attributed to the general hostility toward papism after the Reformation and a view that civil law represented an authoritarian attack on English liberties.[218]

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204. *Id.*
205. *Id.*
206. *Id.* at 343.
207. *Id.*
208. *Id.* at 344.
209. *Id.* at 344–45.
210. *Id.* at 345.
211. *Id.*
212. *Id.* at 346.
213. *Id.* at 347.
214. *Id.* at 324–25.
215. *See* Schaul-Yoder, *supra* note 187, at 208.
216. *Id.* at 207–08 (in part quoting Kahn-Freund, *The [1938 Inheritance (Family Provision)] Bill Compared with the Continental Systems*, 1 MOD. L. REV. 296, 304–06 (1938)).
217. Moore v. Moore, 1 Phill. Ecc. 406, 433 (1817) (Eng.).
218. *See* Luigi Moccia, *English Law Attitudes to the 'Civil Law'*, 2 J. LEGAL HIST. 157, 158 (1981).

The "historical accident" of free testation in England saw a course correction beginning in 1938 as discussed *infra* in Part VI. Free testation, meanwhile, took hold with a vengeance in America and remains one of the bedrock principles of succession law in the United States.[219] The only exception is Louisiana, acquired by Thomas Jefferson's administration from France, which has a form of forced heirship founded in the Napoleonic Code.[220] Texas law provided for forced heirship emanating from its Spanish law origins, but the common law proliferated after Texas joined the Union in 1846, and in 1856, Texas abolished forced heirship.[221]

The British colonists also imported to the colonies in America the common law rule of primogeniture.[222] Rules governing the devolution of personalty varied widely in the colonies until the English Parliament enacted the Statute of Distribution of 1670.[223] By 1800, most of the sixteen states departed from the rule of primogeniture and the Statute of Distribution became the foundation for American intestacy law.[224] The ensuing years resulted in divergences not only from English law but as between and among the states.[225] Certain commonalities could be seen, including, in particular, providing for the surviving spouse.[226]

In 1969, the National Conference of Uniform Law Commissioners ("NCULC") drafted a model act called the Uniform Probate Code ("UPC") in an effort to provide the basis for bringing uniformity and consistency in laws governing decedent-owned estates in the United States.[227] NCULC revised the UPC in 1990 and again in 2008 (with minor amendments in other years). Only a minority of states have adopted the UPC.[228] Some other states have adopted just some parts of the UPC.[229] Even states that have adopted the UPC or parts of it have not done so wholesale but enacted laws that modified the provisions of the UPC.[230] The objective of creating

219. *See* Hodel v. Irving, 481 U.S. 704, 716 (1987).

220. *See* Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 n.1 (1996) ("La. Civ. Code art. 1493(A) (providing that decedent's children 23 years of age or younger, as well as other descendants who through mental incapacity or physical infirmity are incapable of taking care of themselves, are forced heirs); *id.* at art. 1494 (providing that a forced heir cannot be deprived of his portion of the testator's estate—the legitime—without cause); *id.* at art. 1495 (providing method for calculating portion to which forced heirs are entitled, typically either 1/4 or 1/2, depending upon the number of forced heirs").

221. Joseph Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 LA. L. REV. 42, 56-7 (1941).

222. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS' ESTATES 24 (2d ed. 1953).

223. *See id.* at 41.

224. *See id.* at 60.

225. *See id.* at 24-30.

226. *See id.* at 61.

227. Ronald J. Scalise, Jr., *Intestate Succession in the United States of America*, *in* COMPARATIVE SUCCESSION LAW VOLUME II, *supra* note 119, at 401, 404.

228. *See* Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 599 (1985).

229. *Id.* at 600.

230. *See id.*

uniformity and consistency of probate laws throughout the country remains elusive.[231]

One of the principal features of the UPC is its formulation of rules of intestacy. The laws of intestacy in the United States have been explained as a "will substitute," that is, a legislative attempt to substitute the judgment of the decedent based on notions of how an ordinary person would want his estate to pass having failed to make a will.[232] In general, that has meant distributing the estate among those whom the decedent would consider most closely related to him.[233] The UPC's basic provisions for intestacy begin with the share that must pass to the surviving spouse[234] and then to descendants.[235]

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231. *See id.* at 624.

232. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. 1, 3 (2000).

233. *Id.*

234. UNIF. PROBATE CODE § 2-102 (amended 2010):

> The intestate share of a decedent's surviving spouse is:
>
> (1) the entire intestate estate if:
>
> (A) no descendant or parent of the decedent survives the decedent; or
>
> (B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
>
> (2) the first [$300,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;
>
> (3) the first [$225,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;
>
> (4) the first [$150,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

*See also* UNIF. PROBATE CODE § 2-102A for Alternative Provision for Community Property States.

235. UNIF. PROBATE CODE § 2-103. As for the intestate share of descendants other than the surviving spouse, the UPC provides:

> (a) Any part of the intestate estate not passing to a decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:
>
> (1) to the decedent's descendants by representation;
>
> (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;
>
> (3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
>
> (4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:
>
> (A) half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and
>
> (B) half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking by representation;

Notwithstanding the philosophy behind intestacy laws in the United States as a "will substitute," the philosophy of free testation, that is, the absence of a right by the state to substitute its judgment when the testator has expressed it himself, remained sacrosanct in all states except Louisiana, as discussed more fully below.

## IV. The Islamic Model

In countries where the law of succession is based upon the religious sources of Islam,[236] freedom of testation without limits is anathema to the principle that property should pass in a predictive way to those considered most entitled for the benefit of the community at large.[237] The primary source of Islamic law on succession is the Qur'an, considered by the faithful to be the direct revelation of Allah. A second primary source are the traditions of the Prophet Muhammad, the *sunna*, which include narrations, *hadith*, consisting of the Prophet's teachings and those to which it is said are of his "implied consent."[238] A large body of writings and teachings on the law of succession developed with the aid of individual scholars during the first three centuries of Islam, such that a famous *hadith* of the Prophet Muhammad explains that such laws constitute "half of the sum of all useful human knowledge."[239]

While there is significant variation in the laws of the Islamic nations, there are also certain fundamental similarities. First, the testator has freedom to dispose of no more than one-third his estate.[240] Second, Islamic law provides for inheritance based on consanguinity (blood relation) and affinity (marriage);[241] adopted children and those born out of wedlock have no right of inheritance.[242] Third, males and females may inherit, but when there are heirs of the same class and degree, male heirs generally

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(5) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner described in paragraph (4).

(b) If there is no taker under subsection (a), but the decedent has:

(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation; or

(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.

236. Including the 22 members of the Arab League, Iran, Pakistan, Afghanistan, Indonesia, and Malaysia.

237. *See* N. J. COULSON, SUCCESSION IN THE MUSLIM FAMILY 1 (1971).

238. Nadjma Yassari, *Intestate Succession in Islamic Countries*, *in* COMPARATIVE SUCCESSION LAW VOLUME II, *supra* note 119, at 421, 423.

239. *Id.*

240. Muhammad Zubair et al., *The Laws of Inheritance in Islam*, J. BASIC. APPL. SCI. RES., Aug. 2014, at 84, 85 (2014).

241. *Id.* at 86.

242. *Id.* at 88.

receive twice that of female heirs.[243] The explanation for this differential is that males have a more significant burden to provide for the dower, *mahr*, and provide financially for women.[244] In fact, it is said that the difference in treatment of males and females is intended to balance these differing burdens and create greater equity between the sexes.[245] Fourth, descendants of a deceased heir do not inherit by representation as long as there is a living heir of the class that would inherit from the decedent.[246] Finally, the estate is distributed in order of priority first to funeral and burial expenses, next to debts and liabilities, and then bequests to the beneficiaries, and finally to the heirs.[247]

Notwithstanding these commonalities, there are significant disparities among Islamic nations. The greatest disparity exists between Sunni and Shiite nations due to the difference in interpretation of the sources of law by these two different traditions.[248] But there are also variations among different schools within each of the Sunni and Shiite traditions.[249] Disparities also exist depending on the degree to which an Islamic country adopts religious law into its national law. Certain countries, such as Iran, Egypt, Jordan, and Syria, have codified detailed laws of succession,[250] while other countries like Saudi Arabia and Bahrain do not and simply refer to religious sources as the basis of inheritance law.[251]

Succession under Sunni law is complex. Generally, there are three categories of heirs. The first consists of the Qur'anic heirs, *fara'id*, or heirs nominated in the Qur'an entitled to a fixed share of the estate.[252] Second are the agnatic heirs, *asaba*, who receive the residue once the shares of the Qur'anic heirs have been satisfied.[253] Third is the category of the "distant kindred," or *dhawu al-arhaim*, relatives who are neither Qur'anic nor agnatic heirs.[254]

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243. *Id.* at 87.
244. *Id.*
245. Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 105 J. ISLAMIC L. 41, 83 (1998).
246. *See* Zubair, *supra* note 242, at 86.
247. *Id.* at 85.
248. HAMID KHAN, PRACTITIONER'S GUIDE: ISLAMIC LAW 35 (INPROL 2014). A bloody feud followed the death of the Prophet Muhammad in 632 as the Traditionalists or Rationalists, ultimately knowns as Sunni Arabs, believed that the community should choose the leaders of the caliphate while the Shi'i believed that the caliphate should be led by members of the Prophet's bloodline. Doctrinal differences emerged, in particular, the difference between Imams, always capitalized by the Shi'i who believe that these leaders have the authority to interpret the Qur'an, while in the Sunni tradition imams are merely spiritual guides. *Id.* at 35–36.
249. The Hanafi school of Sunnis is followed in countries such as Saudi Arabia, Yemen, Oman, Egypt, Afghanistan, and Pakistan. The Twelver Shiite school of intestate succession law is followed in Iran, Iraq, and Shiite populations in Afghanistan, Lebanon, and Beirut. When explaining the principles of Sunni and Shiite law, reference is generally to Hanafi and Twelver, respectively. *Id.* at 26–27, 38, 55.
250. *See id.* at 66–67.
251. *See id.* at 28.
252. Chaudhry, *supra* note 245, at 66–67.
253. *Id.* at 67.
254. *Id.* at 66, 68.

The Qur'anic heirs, i.e., those identified expressly in the Qur'an, include six female heirs and three male heirs. The female heirs are the mother, surviving wife, daughter, the germane (those related to the deceased through the same parents), the consanguine (related only through the male bloodline), and uterine sisters (related through a female intermediate).[255] The male heirs are the father, husband, and uterine brothers.[256] The Sunni schools have added two female heirs (the son's daughter and the grandmother) and one male heir (the grandfather).[257] Sunni law follows the principle of proximity, meaning that certain categories of heirs, if they survive the decedent, will exclude the right of other heirs to inherit.[258] Parents, spouses, and children, however, are primary Qur'anic heirs who can never be excluded by the existence of other heirs.[259] The shares of the Qur'anic heirs depend on the existence and number of such heirs.[260] It is possible, however, that once the shares of all Qur'anic heirs are added together, they will exceed 100%, in which case the shares are reduced proportionately among all Qur'anic heirs.[261]

The agnatic or residuary heirs take after the Qur'anic heirs receive their shares. There are three groups of agnatic heirs: the male agnatic relatives, co-sharers, and female agnatic relatives. The male agnatic relatives are related to the decedent by a male germane or consanguine line.[262] The different categories exclude each other by proximity. Male agnatic heirs may inherit both as Qur'anic heirs and agnatic heirs. For example, a decedent survived only by his parents means that the father and mother will inherit the Qur'anic shares and the father will then inherit the residue as his male agnatic share.

Under Shiite law, the Qur'anic heirs include only those heirs expressly identified in the Qur'an.[263] Shiite law also specifies a category of residuary heirs called *qarâbat* meaning "kin" or "blood relative."[264] The heirs are first divided into three hierarchical classes with heirs in a higher class inheriting to the exclusion of the lower classes. In the first class are the descendants (regardless of the degree of separation) and the parents and they inherit together as a class.[265] The second class includes the grandparents, great-grandparents, and siblings (or if none, nieces and nephews).[266] The third class consists of the uncles and aunts, or in their absence, their

255. *See id.* at 67; Lucy Carroll, *The Hanafi Law of Intestate Succession: A Simplified Approach*, 17 MOD. ASIAN STUD. 629, 632, 635 (1983).
256. Yassari, *supra* note 238, at 426–27.
257. *Id.* at 427.
258. *Id.*
259. *Id.*
260. *See id.*
261. *Id.*
262. *Id.*
263. *Id.* at 429.
264. *Id.*
265. Shahbaz Ahmad Cheema, *Shia and Sunni Laws of Inheritance: A Comparative Analysis*, 10 PAK. J. ISLAMIC RES. 69, 71 (2012); Yassari, *supra* note 238, at 429.
266. Cheema, *supra* note 265, at 71; Yassari, *supra* note 238, at 429.

descendants.[267] Within the class that inherits (remembering that only one class will inherit because it will exclude any lower class or classes), the Qur'anic heirs take first and the residue is divided among the males and females based on the established male/female ratio.[268] When the Qur'anic shares exceed 100%, rather than reducing each heir's gift proportionately, there is a reduction from the share of the daughters and the germane and consanguine sisters.[269]

The surviving spouse or spouses under both Sunni and Shiite law occupy a unique position. They are Qur'anic heirs and thus never excluded, but they also do not exclude other heirs. They essentially take outside the system. The husband's share is one-half if there are no descendants and one quarter if the decedent was survived by descendants. The surviving wife's share is half of the shares available to a surviving husband.[270] If the husband is survived by more than one wife, the surviving wife's share is divided equally between or among all surviving wives.[271]

## V. Inheritance Laws in Russia

There can be no denying the importance to the topic at hand of Russian inheritance laws, particularly because the oligarchy in Russia has for some time been moving money out of Russia and acquiring assets, and especially real property, in Europe and the United States.

The Russian Revolution of 1917 constituted a unique break from the history of inheritance law, indeed revolting against the concept of succession itself. Marx and Engels had called for the complete abolition of inheritance in *The Communist Manifesto*: "[I]n most advanced countries, the following will be pretty generally applicable . . . 3. Abolition of all rights of inheritance."[272] Inheritance was inconsistent with their philosophy of abolishing all unearned income.[273] According to Marx and Engels, inheritance would be unnecessary since those who could work would be provided labor according to their abilities and social insurance would be provided to those unable to work.[274] The concept of private property would be abolished since it would allow capitalists to horde what belonged to the workers.[275]

As soon as they came to power, the Soviets immediately abolished the concept of an estate and all inheritance.[276] As the State dictated, "Inheri-

267. *See* Lucy Carroll, *The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia*, 19 MOD. ASIAN STUD. 85, 87 (1985).
268. *See id.* at 91–92.
269. *Id.* at 96.
270. QUR'AN 4:12.
271. *See id.*
272. KARL MARX AND FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 91 (Yale Univ. Press ed. 2012) (1948).
273. J. Anthony Griffin, *The About Turn: Soviet Law of Inheritance*, 10 AM. J. COMP. L. 431, 431 (1961).
274. *Id.*
275. *See id.* at 432.
276. *See id.*

tance, testate and intestate, is abolished. Upon the death of the owner his property (moveable and immoveable) becomes the property of the R.S.F.S.R."[277] However, the Soviet government also decreed that, temporarily (until it could institute universal social insurance), the family could keep the decedent's assets if less than 10,000 rubles, while, on the other hand, the government would decide on a minimal amount of support for the family, on a case-by-case basis, if the person died with more than 10,000 rubles.[278] In 1922, the Soviet government restored (supposedly) the right of inheritance but with significant restrictions.[279] In fact, the edict limited the amount of an estate that could pass to a very restricted class of relatives to 10,000 rubles with the excess going to the State.[280] In 1926, the Soviets ended the abolition, but with it, the government enacted a massive estate tax (which itself was repealed in 1943).[281] The Soviets, having attempted to abolish all forms of private property by seizing church properties, canceling stocks and bonds, confiscating private enterprises, and nationalizing all banking and foreign trade, accomplished little other than collapsing the economy and causing widespread famine.[282]

In 1945, an edict further relaxed the restrictions on inheritance in a manner somewhat similar to civil law nations, even if the Communist Party said differently.[283] The Soviets declared that this edict nor any future edict would ever resemble a system akin to the capitalist countries of Europe and that the purpose and content of the new Soviet system were radically different.[284] Shakespeare would have said thou "dost protest too much, methinks."[285] The Soviet system established three classes of heirs.[286] The first class consisted of the surviving spouse, children, parents, and persons whether or not they were related to the decedent who could establish that they had become dependent on the decedent for at least one year prior to his death.[287] Each person in that class took an equal share, and if any child died prior to opening the estate administration, the child's descendants took per stirpes.[288] Surviving spouses were also entitled to one-half of the community property.[289] In the absence of heirs in the first class other than parents, or if they refuse the succession, then "able-bodied" parents took in the second class.[290] The third class consisted of the brothers and

277. *Id.* (quoting R.S.F.S.R. Laws 1917–1918, text 456).
278. George A. Pelletier Jr. & Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 VILL. L. REV. 323, 338 (1966).
279. *See id.*
280. *See* Griffin, *supra* note 273, at 433.
281. *Id.*
282. *See id.* at 435.
283. *See* Pelletier Jr. & Sonnenreich, *supra* note 278, at 338.
284. *See* Griffin, *supra* note 273, at 433.
285. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2.
286. Pelletier Jr. & Sonnenreich, *supra* note 278, at 339.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*

sisters.[291] In the absence of any persons in the three classes, the estate escheated to the state.[292] Testation was also restored, allowing (or restricting depending on one's point of view) devolution of the estate to persons chosen by the testator from the three classes of heirs.[293] Free testation was permitted, however, in the absence of any persons within the three classes.[294]

Today, the Civil Code of the Russian Federation provides for four categories of intestate heirs, each in priority such that the existence of any heir in a category of higher priority excludes the right of persons in any category of lower priority to inherit.[295] In the first category are children, parents, and the surviving spouse with descendants of children inheriting from a deceased child by right of representation.[296] The second category consists of full and half-brothers and sisters, grandparents, and issue of brothers and sisters by right of representation if any should predecease.[297] In the third category are aunts and uncles with cousins by right of representation.[298] The fourth category consists of relatives in the third, fourth, and fifth degree of kinship.[299] A special provision is made for disabled relatives: persons in categories two, three, or four who might otherwise be excluded based on the existence of heirs in a higher category, who are disabled at the time administration is opened, and had been dependents of the decedent for at least one year (whether or not they lived with decedent), are entitled to share equally in the category of heirs otherwise entitled to inherit.[300]

The Russian Federation allows persons to bequeath property by will to any persons.[301] However, notwithstanding any provision in an otherwise valid will, certain shares must be reserved to forced heirs (who have a right to enforce their entitlement in the event of a will that derogates from the reserved shares).[302] Minor or disabled children, disabled spouses, disabled parents, or disabled dependents are entitled to one-half of what they otherwise would have received by intestacy.[303] The surviving spouse is entitled to her share of the common property regardless.[304] Generally speaking,

> foreign wills are recognised as valid in Russia if they are made in accordance with the legal provisions of the country where the testator had his or her last

291. *Id.*
292. *Id.*
293. *See* Griffin, *supra* note 273, at 437.
294. *Id.*
295. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1141 (Russ.).
296. GK RF [Civil Code] art. 1142 (Russ.).
297. GK RF [Civil Code] art. 1143 (Russ.).
298. GK RF [Civil Code] art. 1144 (Russ.).
299. GK RF [Civil Code] art. 1145 (Russ.).
300. GK RF [Civil Code] art. 1148 (Russ.).
301. GK RF [Civil Code] art. 1119 (Russ.).
302. *See generally* GK RF [Civil Code] art. 1149 (Russ.).
303. GK RF [Civil Code] art. 1149(1) (Russ.).
304. GK RF [Civil Code] art. 1150 (Russ.).

> place of residence when making the will, or its form is in compliance with the requirements of the place of execution of the will or Russian law.[305]

## VI. Modern Rules of Forced Heirship in Civil Law

Modern forced-heirship regimes in the civil law nations share certain commonalities. The law specifies classes of heirs entitled to benefit from specified percentages of an estate that generally includes not only the decedent's assets at death but is also augmented, for calculating the shares of the forced heirs, by the value of gifts made by the decedent during his life. The laws of these nations establish mechanisms for obtaining recompense against recipients of lifetime gifts when those gifts impinge on the ability of the forced heirs to receive their shares of the augmented estate by adjustments made to the assets remaining at death.

Pursuant to the Spanish Civil Code, the *legitima* is two-thirds of the estate divided in two equal parts, such that the first third (the "strict forced share") must be divided among the children equally, and the second third is available for *mejora* to favor one or more children or remote descendants, even where there are children, as the testator wishes.[306] The strict forced share is divided among the children by right of representation so that descendants of a predeceased child will inherit that child's share of the strict forced share.[307] Ascendants have a right to *legitima* only in the absence of descendants.[308] If there is no surviving spouse, the forced share available to ascendants is one-half divided among the closest relations to the exclusion of more remote ascendants.[309] A surviving spouse is also a forced heir, but the right is always a usufruct, or life estate, in the remaining assets after payment of debts and legacies (which may with consent of all heirs be converted to payment of money, specific assets, or annuity).[310]

> The extension of the usufruct varies depending on the intervening parties: a) if it is with children or descendents [sic], the usufruct of the third devoted to *mejora*. b) if it is with ascendants, the usufruct of half of the inheritance (there is no *mejora* because there are no children). c) If there are no descendants or ascendants, the usufruct of two thirds of the estate.[311]

French inheritance law also restricts a person's right to dispose of assets at death.[312] A person's estate is divided between the *réserve*

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305. Maxim Alekseyev et al., *Russia*, *in* THE PRIVATE WEALTH & PRIVATE CLIENT REVIEW 353, 358 (John Riches ed., 2017).
306. Lapuente, *supra* note 98, at 12.
307. *Id.*
308. *Id.* at 13.
309. *Id.*
310. *Id.* at 13–14.
311. *Id.* at 14.
312. CODE CIVIL [C. CIV] [CIVIL CODE] art. 913 (Fr.):
> Les libéralités, soit par actes entre vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant ; le tiers, s'il laisse deux enfants ; le quart, s'il en laisse trois ou un plus grand nombre.

*héréditaire*, i.e., the share reserved for certain specified heirs, and the *quotité disponsible*, i.e., the share available for free disposition.[313] The *quotité disponsible* is limited to one-half if only one child survives the decedent (the *réserve héréditaire* is thus one-half), a third if two children survive (the *réserve héréditaire* is two-thirds), and a quarter if three or more children survive the decedent (the *réserve héréditaire* is three-quarters).[314] Descendants in whatever degree of a deceased child are entitled to his share of the *réserve héréditaire*, though the descendants take only the amount attributable to the child they replace.[315]

When calculating the value of the estate, and thus the *réserve héréditaire*, French law requires inclusion of lifetime gifts.[316] In other words, the value of the estate is calculated as the value of the assets in the estate at death (less debts) augmented by all lifetime gifts.[317] In order to protect the forced-heirship regime, the law provides for certain remedies which the *héritiers réservataires* (the heirs entitled to the *réserve héréditaire*) may pursue by legal process.[318] *Inter vivos* gifts to *héritiers réservataires* are treated as advances against their ultimate inheritance.[319] Gifts to *héritiers réservataires* that exceed their shares are, to that extent, considered gifts from the decedent's *quotité disponsible*.[320] When the assets remaining in the estate at death are insufficient to satisfy the shares of the forced heirs in the augmented estate, i.e., including all *inter vivos* gifts, the *héritiers réservataires* may seek recompense by monetary damages. Or, if the beneficiary is still in possession of the gift and has not encumbered it, he may return the asset for division if he elects to do so within three months of notice.[321]

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313. C. CIV [CIVIL CODE] art. 912 (Fr.):
La réserve héréditaire est la part des biens et droits successoraux dont la loi assure la dévolution libre de charges à certains héritiers dits réservataires, s'ils sont appelés à la succession et s'ils l'acceptent.
La quotité disponible est la part des biens et droits successoraux qui n'est pas réservée par la loi et dont le défunt a pu disposer librement par des libéralités.
314. C. CIV [CIVIL CODE] art. 913 (Fr.).
315. C. CIV [CIVIL CODE] art. 913-1 (Fr.).
316. C. CIV [CIVIL CODE] art. 922 (Fr.):
La réduction se détermine en formant une masse de tous les biens existant au décès du donateur ou testateur.
Les biens dont il a été disposé par donation entre vifs sont fictivement réunis à cette masse, d'après leur état à l'époque de la donation et leur valeur à l'ouverture de la succession, après qu'en ont été déduites les dettes ou les charges les grevant. Si les biens ont été aliénés, il est tenu compte de leur valeur à l'époque de l'aliénation. S'il y a eu subrogation, il est tenu compte de la valeur des nouveaux biens au jour de l'ouverture de la succession, d'après leur état à l'époque de l'acquisition. Toutefois, si la dépréciation des nouveaux biens était, en raison de leur nature, inéluctable au jour de leur acquisition, il n'est pas tenu compte de la subrogation.
On calcule sur tous ces biens, eu égard à la qualité des héritiers qu'il laisse, quelle est la quotité dont le défunt a pu disposer.
317. *Id.*
318. C. CIV [CIVIL CODE] art. 921 (Fr.).
319. C. CIV [CIVIL CODE] art. 919 (Fr.).
320. C. CIV [CIVIL CODE] art. 919-2 (Fr.).
321. C. CIV [CIVIL CODE] art. 924 (Fr.).

Spouses are entitled to a *réserve héréditaire* only if the decedent had no children; in such circumstances, the surviving spouse is entitled to one-fourth (thus, gratuitous transfers by *inter vivos* gift or will may not exceed three-fourths of the augmented estate).[322] Whether or not a spouse is entitled to receive a *réserve héréditaire*, the spouse has community property rights in one-half of all property earned by either spouse during the marriage.[323]

A surviving spouse may be entitled to a usufruct in property that would otherwise be subject to the *réserve héréditaire* by law or by testament.[324] The effect is one, to allow the surviving spouse the right of enjoyment of the property including all rents and issue during the time of the usufruct; and two, to delay the rights of the "owners" constituting the forced heirs to the property. In the absence of a legal right to a usufruct, a person by will may grant a usufruct for a term of years or life.[325] A surviving spouse is entitled to a usufruct for life in the property existing at the decedent's death, or outright ownership in one-quarter, at the surviving spouse's election, if there are children and all are the children of the couple.[326] If there are one or more children of the decedent who are not the issue of both the decedent and the surviving spouse, the survivor does not have the right to a usufruct.[327] The law recognizes that in circumstances of a blended family, delayed gratification of children who are not the biological children of the surviving spouse may create conflicts that would undermine the peace and security the usufruct right is intended to preserve. A usufruct may be converted to a life annuity or capital by agreement of the surviving spouse and the children who are the beneficial owners.[328]

Even apart from the usufruct right, a surviving spouse in France also has a right to a life estate in the matrimonial home owned by the decedent, whether as his separate property or community property, including a right of use in the furniture, as long as the spouse accepts the succession.[329] The value of the life estate is, however, deducted from the value of the surviving spouse's general inheritance.[330] However, the decedent can deny this right to a life estate to a spouse by a will that complies with specified formalities.[331]

In 2006, France adopted revisions to the Civil Code that included a mechanism that technically allows a person some freedom to avoid the forced-heirship regime.[332] The new law allows a person to obtain the

322. C. CIV [CIVIL CODE] art. 914-1 (Fr.).
323. C. CIV [CIVIL CODE] art. 1467–1480 (Fr.).
324. C. CIV [CIVIL CODE] art. 579 (Fr.).
325. *See id.*
326. C. CIV [CIVIL CODE] art. 757 (Fr.).
327. *See id.*
328. C. CIV [CIVIL CODE] art. 759, 761 (Fr.).
329. C. CIV [CIVIL CODE] art. 764 (Fr.).
330. C. CIV [CIVIL CODE] art. 765 (Fr.).
331. C. CIV [CIVIL CODE] art. 971 (Fr.).
332. C. CIV [CIVIL CODE] art 929 (Fr.).

advance consent of a forced heir to renounce his statutory right to all or a portion of his share of the *réserve héréditaire*.[333] The consent must comply with specific formalities and may not be procured by mistake, fraud, or duress.[334] The party providing the *renunciation anticipée à l'action en reduction* must have the capacity applicable to one who would make an *inter vivos* gift in order for it to be valid.[335]

In contrast to Spain and France, in Italy the surviving spouse has a greater advantage to a forced share.[336] In the case of one descendant of the first degree and a surviving spouse, the share of each is one-third.[337] With more than one descendant, the share of the descendants to be divided equally among them is one-half of the estate, while the share of the spouse is one-fourth.[338] Thus, for example, in the case of two children, each has a fourth equal to the share of the spouse, whereas the spouse's one-fourth will exceed the share of children in the event there are more than two.[339] In addition to the spouse's forced share, she always also has the right to reside in the family home and make use of the furniture and furnishings for life.[340] In the absence of a surviving spouse, the forced share in Italy in the case of one child (or the child's descendants by right of representation) is one-half of the estate.[341] In the case of two or more children, the forced share is two-thirds.[342]

Forced heirship is not limited to Europe, of course. Civil law nations in Latin America also have forced heirship regimes. In Chile, for example,

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333. *Id.*:

> Tout héritier réservataire présomptif peut renoncer à exercer une action en réduction dans une succession non ouverte. Cette renonciation doit être faite au profit d'une ou de plusieurs personnes déterminées. La renonciation n'engage le renonçant que du jour où elle a été acceptée par celui dont il a vocation à hériter.
>
> La renonciation peut viser une atteinte portant sur la totalité de la réserve ou sur une fraction seulement. Elle peut également ne viser que la réduction d'une libéralité portant sur un bien déterminé.
>
> L'acte de renonciation ne peut créer d'obligations à la charge de celui dont on a vocation à hériter ou être conditionné à un acte émanant de ce dernier.

334. C. CIV [CIVIL CODE] 930 (Fr.):

> La renonciation est établie par acte authentique spécifique reçu par deux notaires. Elle est signée séparément par chaque renonçant en présence des seuls notaires. Elle mentionne précisément ses conséquences juridiques futures pour chaque renonçant.
>
> La renonciation est nulle lorsqu'elle n'a pas été établie dans les conditions fixées au précédent alinéa, ou lorsque le consentement du renonçant a été vicié par l'erreur, le dol ou la violence.
>
> La renonciation peut être faite dans le même acte par plusieurs héritiers réservataires.

335. C. CIV [CIVIL CODE] art. 930-1 (Fr.).

336. Jelena Vidić Trninić, *Position of Forced Heirs in the Countries of Roman Legal Tradition*, 10 FACTA UNIVERSITATIS: L. & POL. 141, 149–50 (2012).

337. *Id.* at 150.

338. *Id.*

339. *Id.*

340. *Id.*

341. *See id.* at 146.

342. *Id.*

testators are forced to leave one-half to the *legitime* and one-fourth to legal heirs as the testator wishes.[343] The *legitime* refers to the share of the decedent's estate reserved to the legal heirs in the proportions dictated by law.[344] The legal heirs are entitled to one-half of the estate divided by head count.[345] The decedent's spouse inherits a share that is twice the share of each child.[346] Thus, for example, in the case of two children, the spouse inherits 25% while each child inherits 12.5%. The one-fourth that the law requires to be distributed to legal heirs as the testator wishes may be left to any individual or individuals who are among the surviving spouse, descendants, or ascendants.[347] The testator may freely dispose of the remaining one-fourth of his estate.[348] In determining the total estate to be divided, all *inter vivos* gifts are figuratively added to the estate remaining at death.[349] The legal heirs have the right to seek reformation of the will to accord to the forced heirship laws within four years of death.[350] Lifetime gifts that do not exceed the freely disposable share remain in effect, but legal heirs have a right to claw back gifts that exceed that portion in reverse chronological order, that is, by invalidating the most recent gifts first and working backwards.[351] Lifetime gifts made to one of the legal heirs are added figuratively to the *legitime* inherited by that heir, unless it is stated clearly in the will or other valid document that the gifts were intended to be counted against the one-fourth share the decedent is entitled to give to one or more of the legal heirs as the testator wishes.[352]

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343. CÓDIGO CIVIL [CÓD. CIV.] (Civil Code) art. 1167 (Chile).
344. CÓD. CIV. art. 1181-1182 (Chile).
345. CÓD. CIV. art. 1184, 988 (Chile).
346. CÓD. CIV. art. 988 (Chile):
> Los hijos excluyen a todos los otros herederos, a menos que hubiere también cónyuge sobreviviente, caso en el cual éste concurrirá con aquéllos. El cónyuge sobreviviente recibirá una porción que, por regla general, será equivalente al doble de lo que por legítima rigorosa o efectiva corresponda a cada hijo. Si hubiere sólo un hijo, la cuota del cónyuge será igual a la legítima rigorosa o efectiva de ese hijo. Pero en ningún caso la porción que corresponda al cónyuge bajará de la cuarta parte de la herencia, o de la cuarta parte de la mitad legitimaria en su caso. Correspondiendo al cónyuge sobreviviente la cuarta parte de la herencia o de la mitad legitimaria, el resto se dividirá entre los hijos por partes iguales. La aludida cuarta parte se calculará teniendo en cuenta lo dispuesto en el artículo 996.

347. CÓD. CIV. art. 1195 (Chile):
> De la cuarta de mejoras puede hacer el donante o testador la distribución que quiera entre sus descendientes, su cónyuge y sus ascendientes; podrá pues asignar a uno o más de ellos toda la dicha cuarta con exclusión de los otros.

348. CÓD. CIV. art. 1184 (Chile).
349. CÓD. CIV. art. 1185 *et seq.* (Chile).
350. CÓD. CIV. art. 1216 *et seq.* (Chile).
351. CÓD. CIV. art. 1186-1187 (Chile).
352. CÓD. CIV. art. 1198 (Chile):
> Todos los legados, todas las donaciones, sean revocables o irrevocables, hechas a un legitimario, que tenía entonces la calidad de tal, se imputarán a su legítima, a menos que en el testamento o en la respectiva escritura o en acto posterior auténtico aparezca que el legado o la donación ha sido a título de mejora.
>
> Sin embargo, los gastos hechos para la educación de un descendiente no se tomarán en cuenta para la computación de las legítimas, ni de la cuarta de

## VII. Common Law Freedoms of Testation

In England and Wales, the testator's right to disinherit completely his relations, or any of them, was sacrosanct for five centuries until the enactment of The Inheritance (Family Provision) Act of 1938, which took effect in July 1939 ("1938 IFP Act").[353] One author explained that the 1938 IFP Act made "the first breach in the doctrine that a testator may, through mere caprice, turn loose his dependents upon the public for support."[354] The 1938 IFP Act was the culmination of legislative initiatives in parliament that began with a report in 1908 on limitations on testation in France, Germany, Italy, Russia, and the United States.[355] However, the impetus for the report may have been New Zealand, which became the first common law nation to limit the freedom of testation in 1900, having firmly established the new regime with an updated and improved version in 1908.[356] The 1938 IFP Act, as originally enacted, provided that where a person dies domiciled in England leaving a spouse, an unmarried daughter or daughter disabled from maintaining herself, or an infant son or son disabled from maintaining himself, if any of them submit an application to a court that a will fails to make "reasonable provision as the court thinks fit," the court shall impose maintenance of the dependent in question from the estate.[357] The 1938 Act contained, however, what might be called a "safe harbor":

> Provided that no application shall be made to the court by or on behalf of any person in any case where the testator has bequeathed not less than two-thirds of the income of the net estate to a surviving spouse and the only other dependant or dependants, if any, is or are a child or children of the surviving spouse.[358]

The rules concerning "reasonable provision" no longer consist of a "safe harbor" and are set out in section 3 of the Inheritance (Provision for Family and Dependants) Act 1975 ("1975 Act"), as amended by section 2 of the Law Reform (Succession) Act 1995 ("1995 Act") and Schedule 2 of the Inheritance and Trustees' Powers Act 2014 ("2014 Act").[359] What is

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mejoras, ni de la cuarta de libre disposición, aunque se hayan hecho con la calidad de imputables.

Tampoco se tomarán en cuenta para dichas imputaciones los presentes hechos a un descendiente con ocasión de su matrimonio, ni otros regalos de costumbre.

353. Joseph Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL LAW Q. 337 (1939-40).

354. *Id.*

355. 187 Parl Deb HC (4th ser.) (1908) col. 291 (UK) (reports respecting the limitations imposed by law upon testamentary bequests in France, Germany, Italy, Russia, and the United States).

356. *See* Joseph Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107 (1938).

357. Inheritance (Family Provision) Act 1938, 1 & 2 Geo. 6 c. 45.

358. *Id.*

359. Inheritance (Provision for Family and Dependants) Act 1975, c. 63. The 1975 Act showing in brackets the amendments by the 1995 Act and 2014 Act is set forth hereinbelow:

1 Application for financial provision from deceased's estate.

(1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons:—

reasonable in the circumstances of any particular estate or decedent is considered a "value judgment."[360] The Law Commission set forth guidelines which have been followed extensively in a large body of case law that pro-

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[(a) the spouse or civil partner of the deceased;
(b) a former spouse or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership;]
[(ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) [or (1B)] below applies;]
(c) a child of the deceased;
(d) any person (not being a child of the deceased) [who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family;]
(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;
that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.
[(1A) This subsection applies to a person if the deceased died on or after 1st January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living—
(a) in the same household as the deceased, and
(b) as the husband or wife of the deceased.]
[(1B) This subsection applies to a person if for the whole of the period of two years ending immediately before the date when the deceased died the person was living—
(a) in the same household as the deceased, and
(b) as the civil partner of the deceased.]
(2) In this Act "reasonable financial provision"—
(a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;
[(aa) in the case of an application made by virtue of subsection (1)(a) above by the civil partner of the deceased (except where, at the date of death, a separation order under Chapter 2 of Part 2 of the Civil Partnership Act 2004 was in force in relation to the civil partnership and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a civil partner to receive, whether or not that provision is required for his or her maintenance;]
(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.
[(2A) The reference in subsection (1)(d) above to a family in which the deceased stood in the role of a parent includes a family of which the deceased was the only member (apart from the applicant).]
(3) For the purposes of subsection (1)(e) above, a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature.]

360. Ilott v Mitson [2011] EWCA (Civ) 346, at paras. 25, 27.

vide a "feel" for what might be considered "reasonable" in particular cases.[361] Of particular note, the courts will balance the claims or needs of the applicants and beneficiaries, but case law reminds the courts that the law requires reasonable provision for family, not equality, in the treatment of the beneficiaries.[362]

When the American revolutionaries forced the British to quit the colonies, the common law and its sacrosanct principle of free testation had already left an indelible mark on the American conscience. As the decades marched on and civil law principles of forced heirship inspired Britain to enact its own protections for a decedent's family, America remained unaffected and steadfast. The concept of free testation is deeply tied to our notions of liberty, to our self-image as pioneers and as the sole determiners of our fate, self-made and self-reliant. Freedom of testation is a cornerstone of American jurisprudence—"The right to dispose of property in contemplation of death is as old as the right to acquire and possess property, and the laws of all civilized countries recognize and protect this right."[363] The right may be abridged by the legislature, but the California legislature has clearly provided for the right of individuals to "disinherit" their adult children and dispose of personal property as they wish.[364] As stated in one case, "It has been said that the right to make a testamentary disposition of property is fundamental, is most solemnly assured by law, and does not depend upon its judicious use" and "usually a failure to provide for a living child is intentional" and "should be upheld in the usual case."[365] And, in another ruling,

> [I]t is well to remember that one has a right to make an unjust will, an unreasonable will, or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, is the will the spontaneous act of a competent testator?[366]

It is my money. I made it. It was my hard work and no one has any entitlement to it. Of course, ironically, there is no shortage in the sense of entitlement by heirs that guarantees that litigation will continue to flourish.

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361. *See* THE LAW COMMISSION, SECOND REPORTS ON FAMILY PROPERTY: FAMILY PROVISIONS ON DEATH, 1974, HC, at paras. 33, 34 (the guidelines include, (1) the financial resources and needs of an applicant currently or in the future, (2) the financial resources and needs of other applicants currently or in the future, (3) the financial resources and needs of beneficiaries of the estate currently or in the future, (4) obligations that exist by order to any applicant or beneficiary, (5) the size and nature of the estate, (6) any disability of an applicant or beneficiary, and (7) the conduct of the applicant or any other relevant factor the court deems appropriate for consideration).

362. Gold v Curtis [2005] W.T.L.R. 673.

363. *In re* Estate of Morey, 147 Cal. 495, 505-06 (1905).

364. Estate of Della Sala, 73 Cal. App. 4th 463, 467-471 (Ct. App. 1999).

365. *Id.* at 467, 470.

366. *In re* Estate of McDevitt, 95 Cal. 17, 33 (1892).

## VIII. Who Claims This Decedent?

In the United States, there are 50 states each with their own laws, including rules for addressing conflicts of laws. However, these laws have far greater similarities than distinctions.[367] Except as may be provided by law, the law of the decedent's domicile applies to the disposition of personal property whether by will or intestacy.[368] In the case of real property, the law where the property is situated will apply.[369] Thus, it is possible for the laws of multiple different jurisdictions to apply to the disposition of a decedent's property at death, depending on the location of real property and the decedent's domicile. By contrast, a central purpose of a trust is to eliminate personal ownership of assets in order to avoid probate. The trustor transfers legal title of property to the trustee, who administers the property for the beneficiary's benefit.[370] Since the trustor is not the personal owner of the property, the trustor's domicile is of no moment. Moreover, a trust can own property no matter where the property is located, whereas a probate estate is subject to the jurisdictional rules of a state court and limited by its borders.[371]

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367. In the States, a will disposes of property at death owned personally by the decedent. The U.S. also recognizes the right of persons to dispose of assets at death in accordance with a trust. A trust is not a legal or juridical entity, but a collection of assets, legal title to which is held by a trustee, while persons named in the instrument as beneficiaries are the beneficial owners. A trust may be revocable or irrevocable during the lifetime of the trustor. A revocable trust generally becomes irrevocable upon the trustor's death. While the trust is revocable, the trustor is generally the sole, vested beneficiary. The trust generally provides for distribution of assets at trustor's death to named beneficiaries whose interests remain contingent and may be changed while the trust remains revocable. A will has no effect until death and may be changed or superseded until then. In the absence of a will or trust, or where a will or trust fails to dispose of certain property, the laws of intestacy will fill in the gap. Alan Newman, *Revocable Trusts and the Law of Wills: an Imperfect Fit*, AKRON L. PUBLICATIONS 1, at 1-2, 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117668 [https://perma.cc/6D6W-9ABG].

368. *See, e.g.*, CAL. CIV. CODE § 946. ("If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."); *In re* Estate of Burnison, 33 Cal.2d 638, 639 (1949) (the law of the decedent's domicile applied to determine whether the decedent could make a testamentary gift to the United States); *In re* Estate of Barton, 196 Cal. 508 (1925) (applying California law, as the place of the decedent's domicile at death, to determine whether a gift under a will had lapsed); *In re* Estate of Hodges, 170 Cal. 492, 495 (1915) (recognizing in probating a will that "the domicile of the decedent draws to it in contemplation of law all the personal property of the decedent no matter where its actual situs may be at the time of his death"); *In re* Estate of Moore, 190 Cal.App.2d 833, 842 (Ct. App. 1961) (quoting Pickering v. Pickering, 64 R.I. 112, 117 (1940) ("It is clear that at common law a will of personal property is governed by the law of the place of the testator's domicile at the time of his death.").

369. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 (AM. LAW INST. 1971).

370. *See* Walgren v. Dolan, 226 Cal.App.3d 572, 576 (1990) ("Since the beneficiary holds only equitable title, the legal title residing in the trustee, the beneficiary has no power to convey absolute ownership of trust property.").

371. *In re* Estate of Buckley, 132 Cal.App.3d 434, 443 (1982) ("A probate proceeding is essentially an *in rem* proceeding, in which the decedent's assets within the state constitute the *res*.")

In the absence of a local choice of law statute or common law rule, states look to the Restatement (Second) Conflicts of Laws ("Restatement"), section 270, published by the American Law Institute to reflect generally the common law in the United States, to ascertain the law applicable to a trust.[372] Section 270 provides that a trust will be construed,

> under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6.[373]

The Restatement, section 6(1), provides: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."[374] Section 6(2) enumerates the following factors that courts may look to in order to determine if a choice-of-law provision in a trust deviates from the public policy of the jurisdiction that has the most significant relationship with the trust:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[375]

In the absence of a valid choice of law provision, a trust is construed according to the law where the trust has its most substantial relationship.[376] The determination of which state has the most substantial relationship to a trust requires a very fact-based analysis, such as the location where the trust is administered by its trustee, the location of assets, where taxes are paid, and so on.

California, for example, has a choice of law statute applicable to both wills and trusts: Probate Code section 21103.[377] Section 21103 provides:

> The meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy of this state applicable to the disposition, or, in the case of a will, to Part 3 (commencing with Section 6500) of Division 6.[378]

One of the authors of this article, Adam Streisand, obtained victories in the trial court, California Court of Appeal, and California Supreme Court, arguing for application of section 21103 to a trust established by Douglas

372. *See generally* RESTATEMENT (SECOND), *supra* note 369, at § 270(a).
373. *Id.*
374. *Id.* § 6(1).
375. *Id.* § 6(2).
376. *Id.* § 270(a).
377. CAL. PROB. CODE § 21103 (West 2003).
378. *Id.*

Raines Tompkins, founder of The North Face and Esprit apparel companies, and later one of the greatest philanthropists in the World.[379]

Tompkins, a California native, acquired millions of acres of land in Chile and Argentina. He made a grand bargain with the governments of those countries. He agreed to donate the land on two conditions: (1) that the land be dedicated to use as national parks and wildlife preserves, and (2) that Chile and Argentina also dedicate lands already owned by them for the same use. For example, in January 2018, the charitable foundation created by Douglas Tompkins, Tompkins Conservation, made "the world's largest donation of privately held land" to the government of Chile, which, together with land donated by the Chilean government, created a nearly nine-million-acre park, which is "roughly the size of Switzerland."[380] Tompkins died in a kayak accident in Chile in December 2015.[381] He famously committed that 100% of his wealth would be used to continue his philanthropic mission, aspiring to donate his wealth to better the world, not the lifestyles of his (already wealthy) offspring.[382]

Following his death, one of Douglas Tompkins' daughters, Summer Tompkins Walker, brought suit in California seeking to invalidate the Douglas Raines Tompkins Living Trust on the grounds that it violated Chilean forced heirship laws. Summer argued that her father had abandoned his U.S. domicile and become a Chilean domiciliary as a result of his work there.[383] A person can only have one legal domicile at a time, even if he resides in multiple jurisdictions.[384] Domicile is the place where the person intends to make his primary and permanent home, even if he has multiple residences.[385] The determination of a person's domicile depends upon an extremely fact-intensive analysis. The question to be answered based upon the totality of the facts and circumstances is whether objectively we can infer that the decedent intended to become domiciled in a new locale.[386] On behalf of the trustees of Tompkins' trust, Streisand argued that domicile was irrelevant because the trust contained a choice of law provision and that under California Probate Code section 21103, the choice of law provision was valid.[387] To be valid, the choice of law provision must not violate California public policy (regardless of where the trust has its most substantial relationship). The trustees contended that selecting California law can never violate California public policy.[388] Summer argued that her father's

379. Royte & Greshko, *supra* note 2.
380. *Id.*
381. *Id.*
382. Diana Saverin, *The Entrepreneur Who Wants to Save Paradise*, ATLANTIC (Sept. 25, 2014), https://www.theatlantic.com/business/archive/2014/09/the-entrepreneur-who-wants-to-save-paradise/380116/ [https://perma.cc/72SY-RC72].
383. *In re* Estate of Tompkins, No. B292712, 2019 WL 4686980, at *1, *2 (Cal. Ct. App. Sept. 26, 2019).
384. Reich v. Lopez, 858 F.3d 55, 63 (2d Cir. 2017).
385. *In re* Estate of Nelson, 120 Ill. App. 3d 639, 654 (1983).
386. *Id.* at 655.
387. Walker v. Ryker, No. B285872, 2018 WL 4659621 (Cal. Ct. App. Sept. 28, 2018).
388. *Id.*

selection of California law violated California's public policy of international comity. She claimed that comity demanded that California not permit Tompkins to choose California law to avoid the "strong public policy" of forced heirship in Chile.[389] The trustees countered that Summer's position would render section 21103 meaningless, because Summer's construction of the statute would force the courts to replace "public policy of this state" with "comity," and thus the courts would first have to engage in the intensive fact-based analysis the statute was intended to avoid to determine the person's domicile, and then, if the law of domicile conflicted with the law selected by the decedent, comity would require application of the law of domicile.[390] In other words, the law of domicile would always govern and the statute would be a nullity. The California courts agreed at each level in the hierarchy.[391]

Another case of interest rages on in Nanterre, west of Paris. Johnny Hallyday, the "French Elvis," died in December 2017 at the age of 74 after a battle with lung cancer.[392] At the time of his death, Hallyday was married to his fourth wife, Laeticia. They split their time between Los Angeles and Saint-Barthélémy, a French Caribbean island, along with their two adopted children, Jade and Joy.[393] Shortly after Hallyday's death, his two adult children from previous relationships, actress Laura Smet and her half-brother singer David Hallyday, filed suit in the French court contending that Hallyday's California will and trust were invalid and violated French forced heirship laws.[394] Laura and David won an early battle when the French court froze Hallyday's French assets, though the court declined to enter orders seeking to freeze assets located in the United States (and it would have been an interesting situation if it had, since the assets are under the control of Bank of America in California which is not a party to the French proceedings).[395] In granting the request partially by freezing the French assets, the court explained that it appeared there was a real risk that such assets would be transferred to the trustee of the California trust, Bank of America.[396]

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389. *Id.*

390. *Id.*

391. *Id.*

392. William Grimes, *Johnny Hallyday, the Elvis Presley of France, Is Dead at 74*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/obituaries/johnny-hallyday-dead-french-elvis.html [https://perma.cc/8CWH-UK3Y].

393. *See generally* Marc Fourny, *Læticia Hallyday Left Saint-Barthélemy for Los Angeles*, LE POINT (Jan. 16, 2018), https://www.lepoint.fr/people/laeticia-hallyday-a-quitte-saint-barthelemy-pour-los-angeles-16-01-2018-2187132_2116.php [https://perma.cc/J5S6-EEAL].

394. Kim Willsher, *Johnny Hallyday's Children Seek to Freeze Estate in Row Over Will*, GUARDIAN (Mar. 15, 2018, 3:23 PM), https://www.theguardian.com/music/2018/mar/15/johnny-hallydays-children-seek-to-freeze-estate-in-row-over-will [https://perma.cc/VWF7-T4EY].

395. Aymeric Parthonnaud, *Héritage de Johnny Hallyday : Gel Partiel des Royalties Versées par les Maisons de Disques*, RTL (Dec. 18, 2018, 2:51 PM), https://www.rtl.fr/culture/medias-people/heritage-de-johnny-hallyday-gel-partiel-des-royalties-versees-par-les-maisons-de-disques-7795965145 [https://perma.cc/S3SY-NF68].

396. *Id.*

Though it does not appear that the estate planning documents have been shared publicly (they would be in the U.S.), news reports indicate that Hallyday left the entirety of his estate to Laeticia, and after she dies, to Jade and Joy.[397] Hallyday apparently left nothing to Laura and David.[398] As Laura has told the press, her father left her not a guitar, a motorbike, nor even a signed copy of the song "Laura" that Hallyday lovingly wrote for his daughter when she was very young.[399]

Laura and David claim in the French court that the California estate planning documents violate French laws of forced heirship which require a portion of the estate (75% in Hallyday's case because he had more than two children) to devolve to family members in certain percentages.[400] However, under French law, and particularly since August 2015 under the European Union's ("EU") new Succession Regulation ("EU Regulation"), the law governing the disposition of the estate of a French national, real and personal, and wherever located, is the law of the decedent's last habitual residence or domicile.[401] The only exception, not helpful to Laeticia, is

397. *See "Pas une Guitarre, Pas une Moto . . .": Ce Que Dit le Communiqué de Laura, BMFTV* (Feb. 12, 2018, 12:46 PM), https://www.bfmtv.com/police-justice/pas-une-guitare-pas-une-moto-ce-que-dit-le-communique-de-laura-smet-1371568.html [https://perma.cc/BE3J-7AA3].

398. *Id.*

399. *Id.*

400. C. CIV [CIVIL CODE] art. 913-14 (Fr.).

401. Regulation (EU) No. 650/2012, of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, 2012 O.J. (L 201) 107, 120 (art. 20–22):

> Article 20—Universal application
>
> Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.
>
> Article 21—General rule
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.
>
> 2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.
>
> Article 22—Choice of law
>
> 1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
>
> A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.
>
> 2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.
>
> 3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.
>
> 4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.

that a person can select the law of his nationality to apply to the devolution of his estate.[402] The EU Regulation applies to all member states except the United Kingdom, Ireland, and Denmark.[403]

Thus, therein lies the question: did Hallyday become a "habitual resident" of California? Analysis of that question is very fact-dependent. For persons who have homes in more than one place, this can be a difficult question to answer. There are numerous factors that can contribute to this analysis, everything from payment of taxes to the place of one's hair stylist. Meanwhile, a decision from the French court is reportedly years away.

An interesting question will remain as to the ability to enforce a judgment of the French court, were the decision adverse to Laeticia, against assets held by the California trust and trustee. No doubt, the trustee delivered the statutorily required notice to Laura and David advising them of their right to contest the California trust within 120 days thereof.[404] They did not contest the trust in California; rather, David and Laura brought an action in France to determine their rights to forced heirship.[405] Having failed to contest the trust in California in the statutory time frame, for California's purposes, the trust would thus be unassailable. The California court has exclusive jurisdiction over the internal affairs of trusts under its jurisdiction.[406] The California court has jurisdiction over trusts having their principal place of business, i.e., their day-to-day activities, in California.[407] The internal affairs of the trust include questions of its validity.[408] Moreover, the trustee, Bank of America, is not even a party to the proceedings in France. So, if a California court would conclude that the trust became uncontestable after the expiration of the 120 days, one would think that David and Laura have a different strategy, one that perhaps centers on recovering by way of offset their right to a forced share of the entire "estate." Presumably, the French court would have to have a basis for compelling Laeticia to turn over information she receives from Bank of America about the value of the trust assets for the French court to be able to make an offset.

These are all questions that remain with answers to come perhaps in the future. But the Hallyday case also demonstrates (1) the difficulties in determining what laws will apply to inheritance, particularly when the multinational resides in a civil law nation and a common law country; and (2) that there are very real challenges to enforcement of any relief to be obtained.

A related issue is the enforceability of a judgment which may be obtained in one jurisdiction which has claimed jurisdiction to render a judgment as to the effect of testamentary disposition. It is an issue of seri-

402. *Id.* at art. 22.
403. *Id.* at pmbl. par. 82.
404. *See* CAL. PROB. CODE § 16061.7.
405. Parthonnaud, *supra* note 395.
406. CAL. PROB. CODE §§ 17000(a), 17003.
407. CAL. PROB. CODE § 17002.
408. CAL. PROB. CODE § 17200(b)(3).

ous importance though somewhat beyond the scope of this particular article. Generally speaking, signatories to the Hague Convention have rights albeit limited to the respect of one's judgments in the courts of other signatory nations.[409] A much more robust system is applicable among the Member States of the EU under Council Regulation 1215/2015 ("EU 1215/2015 Regulation") on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[410] Layered on to it is the 2007 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention") that expands the enforceability of judgments as between and among EU Member States and European Free Trade Association States of Iceland, Norway, and Switzerland.[411] A problem that is receiving significant attention is the consequence of Brexit which will remove the United Kingdom from participation in the EU 1215/2015 Regulation and the Lugano Convention, and would make it exceedingly difficult if not impossible for the United Kingdom to negotiate an agreement to become included separately as a party to the Lugano Convention, particularly given that all 27 Member States of the EU would have to consent.[412]

A final topic worthy of mention here and of greater exploration though beyond the scope of this article is the conflict between inheritance laws and divorce. Indeed, disputes with surviving spouses over which nation's laws should apply can also look very much like an after-death divorce that can be greatly impacted by conflict-of-laws determinants.

## Conclusion

It is without a doubt remarkable to consider how our current inheritance regimes are so deeply impacted and influenced by laws from ancient civilizations. It is of course no surprise that the ancients were obsessed with succession. It was the laws and customs of succession and inheritance that built and destroyed kingdoms, empires, and even civilizations. Whether deliberate or by historical accident, the concepts of forced heirship and free testation took a substantial turn as between civil and common law nations. As we watch the United Kingdom convulse over Brexit,

409. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, art. 1, July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 [https://perma.cc/9XFM-SGP7].

410. Regulation (EU) No. 1215/2015 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L. 351) 1.

411. Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L. 339) 3.

412. *The Impact of Brexit on the Enforcement of English Court Judgments in the EU and Drafting the Jurisdiction Agreement*, DRUCES, https://www.druces.com/the-impact-of-brexit-on-the-enforcement-of-english-court-judgments-in-the-eu-and-drafting-the-jurisdiction-agreement/ [https://perma.cc/GW9G-B2GK] (last visited Apr. 12, 2020); Hogan Lovells, *The Impact of Brexit on the Enforcement of Judgments Between the UK and EU Member States Post-Brexit*, LEXOLOGY (Mar. 28, 2018), https://www.lexology.com/library/detail.aspx?g=df0733a4-9a20-4b3f-8a02-7e209178ec62 [https://perma.cc/46J3-STGF].

one marvels at how it resembles the debates of the early twentieth century over free testation, which in essence also asked the basic question: is Britain European? If so, can the United Kingdom's laws on succession so depart from its European counterparts? Or is the United Kingdom so different philosophically that free testation is a part of that freedom?

From the Prophet Mohammad's entreaty to study the laws of inheritance, since they constitute half of all human knowledge,[413] from the Roman Empire, Visigoths and Vikings, the Ecclesiastics of the Middle Ages, Emperors and Revolutionaries, our modern laws of inheritance in fact emanate from a rich and varied history as old as the concept of law itself, and have evolved with principles of philosophy and morality and our ancestors' efforts to build stable and peaceful societies. For this reason, the topic is worthy of exploration.

But the usefulness is practical as well. In light of the increasing occurrence of lives of persons we might call multinationals, it can be anticipated that protracted and expensive litigation will likewise grow due to the complexities of determining the law to be applied to *inter vivos* gifts and testamentary instruments. Concepts of "domicile" and "habitual residence" are invitations to litigate. The enforceability of choice of law provisions and the respect they will be afforded is also problematic. Meanwhile, there is insufficient literature and understanding of the historical, political, and philosophical underpinnings of national inheritance regimes. Advocates will be required to persuade tribunals in their jurisdictions to apply, or not apply, foreign laws. Understanding not only the letter of the law but also its purpose and policy is critically important to advocating effectively its application. Similarly, those who counsel multinationals must be conversant in the laws that may impact their clients and need to plan accordingly to ensure outcomes consistent with their intentions and/or strategize to take advantage of more hospitable inheritance laws.

413. SIRIAJ SAIT & HILAR LIM, LAND, LAW AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD 110 (Zed Books Ltd. 2006).