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Of Charities and Clawbacks: The European Union Proposal on Successions and Wills as a Threat to Charitable Giving

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The recent European Union proposal to bring about a more uniform body of law governing choice of law and related issues in international inheritance cases is perhaps, a necessary response to the increasingly international nature of the EU’s (and the world’s) inhabitants and their assets. As written, though, it is rather heavily tilted toward the civil law values of continental Europe and threatens to collide jarringly with common law traditions, in particular the Anglo-American fondness for trusts and charitable giving. This article provides a look at these different traditions, and then examines the relevant inheritance law provisions of EU member states, the UK, and the US before looking at the proposal itself.

1. Bill Gates’ “giving pledge” and contrasting cultures of philanthropy

In June 2010 Bill Gates, the richest person in the US and, some of the time, in the world, introduced his “giving pledge,” asking his fellow billionaires to join him in pledging to give away the majority of their wealth to charity. He was enthusiastically joined by dozens of fellow US billionaires; from their European counterparts, however, the response was less enthusiastic. Germany’s Peter Krämer found the pledge “highly problematic.” Because some charitable contributions can be partially deducted from US income taxes, Krämer said, the wealthy have a choice: “Would I rather donate, or pay taxes?” Private philanthropy, he opined, could not and should not take the place of the state.

Oddly, considering that Krämer himself is a generous donor to schools in Africa, he though the billionaires of the US might do better to subsidize struggling local governments: “[W]e must not forget that the US has a desolate social system.... A greater act of Mr. Gates and Mr. Buffett would have been to give the money to small...
communities in the US for the fulfillment of public functions.” Of course, much charitable giving in the US is done in exactly this way, for public schools, libraries, hospitals, and other governmental services.

An unnamed asset manager for another German billionaire offered a different reason for the lack of interest shown by his compatriots: “For most people that is too ostentatious.” This may not be a universally shared aversion, however. Avoiding the public eye (as well as, perhaps, charity) seems to have been far from the mind of UK billionaire Alki David when he offered $100,000 to anyone prepared to strip naked in front of President Obama.

Outside Germany, some were even more unkind. UK columnist Peter Wilby saw the pledge in old-fashioned class struggle terms: “Their generosity… helps to legitimise inequality and head off political protest. Some of them may become even richer, because charitable giving is good marketing and, sometimes, can be used to tie recipients into buying the donors’ products and services.” Wilby’s argument was somewhat undercut by a misunderstanding of US income tax law: “[L]et’s be clear. Money paid to charity is exempt from tax... Those who already wield enormous economic power can determine social priorities too. Of course, the poor also contribute to charity but most don’t get the tax breaks because they don’t pay income tax.” The (partial) tax break for charitable donations is perhaps actually most personally valuable to the middle-class taxpayers rather than to the very wealthy, whose deductions are limited and whose immediate financial need to cut their tax bills is less pressing.

a. Different cultures of philanthropy

It seems unlikely, though, that anyone would question the assertion that different cultures of philanthropy exist in the US and Europe, especially continental Europe. The people of the US contribute nearly two percent of the country’s GDP to charities each year, a rate three or four times as high as that in most of continental Europe. The existence of a charitable-giving deduction in the US tax code is often cited as a reason. But that by itself seems insufficient; the tax code, as noted by Mr. Wilby above, provides no incentive to the low-income families who donate an even higher proportion of their income to charity than their wealthier compatriots, and little incentive to the wealthy whose tax relief from charitable contributions may be limited. In fact, a 2006 survey of

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7 “Man darf nicht vergessen, dass die USA ein desolates Sozialsystem haben…. Eine größere Tat von den Herren Gates oder Buffett wäre es gewesen, das Geld kleinen Gemeinden in den USA zur Erfüllung von öffentlichen Aufgaben zu geben.”
8 *Negative Reaction to Charity Campaign: German Millionaires Criticize Gates’ ‘Giving Pledge,’* Spiegel Online, Aug. 10, 2010 (in English).
11 Id.
wealthy donors found most claiming that the presence or absence of tax incentives had no impact on their decisions.\textsuperscript{13}

Nor do broader cultural factors alone seem sufficient to explain the disparity; notwithstanding the delight Americans and western Europeans alike take in discovering and exaggerating cultural differences, in reality the differences are not all that great. And while the level of government-provided social services is higher in most European countries than in the US, that does not eliminate the need for domestic charitable giving, and should have no effect at all on international giving.

While all of these factors – taxation, government services, and cultural differences – play a part, there may others as well. Much American charitable giving is done by bequest, including the popular planned giving options that allow a donor to continue to receive the income from a gift during his or her life. One possibility is that this is less frequently done in Europe because it is often not possible.

b. Difficulty or impossibility under many European countries’ inheritance laws

In the countries of the European Union (EU), the UK aside, it is more or less impossible for a testator with living children to cut those children out of their share of the estate. Forced heirship laws protect children who have been left less than their legally-determined share; a bequest to a charitable organization will fail if it cuts into this protected share. Even testators without children may have no choice but to leave a substantial portion of their estate to certain other surviving relatives. Nor can the problem be avoided by an inter vivos gift: Many EU countries also have “clawback” laws, which allow heirs to reclaim gifts given during the testator’s lifetime.

Analogues of forced heirship exist in other forms in the Anglo-American legal tradition; the idea that it should be difficult for a testator to completely disinherit a spouse (or, in some cases, a child) may invite disagreement from US and UK lawyers, but is unlikely to shock. Clawbacks are a different matter; with a few minor exceptions, the idea is alien to the legal systems of the England and Wales. In the US, where they remain a theoretical possibility in many states, they are rare; the reaction of a US or British lawyer (to say nothing of a client) encountering clawbacks for the first time is likely to be stunned disbelief. Clawbacks seem rooted in a completely different view of property; in common law terms it might be said that clawbacks assume a world in which every property owner is but a life tenant.

For centuries these inconsistent views of property and inheritance have existed with little interaction; to UK and, to a lesser extent, US lawyers clawbacks were a vaguely horrifying oddity but comfortably irrelevant oddity, found somewhere safely beyond the borders. The increasing interconnectedness of the world’s peoples and legal systems are diminishing that comforting distance, though. Today tens of millions, or even hundreds of millions, of people live, work, marry, have children, and acquire and dispose of property in more than one country during their lifetime. A charity in the UK or the US that accepts a large gift may find itself embroiled in litigation decades – perhaps even a century – later, if the donor later dies leaving an estate governed by (or at

least subject to a plausible, not instantly dismissible argument that it is governed by) some other country’s inheritance laws.

In the European Union there are now nearly half a million multistate successions – situations in which a decedent leaves assets in more than one country – each year. The free movement of people and property post-Maastricht makes it likely that this number will continue to rise. The EU may strive toward a single system of civil justice, accommodating local variations but eliminating the uncertainties and inconsistent results of the current regime. The states of the US have managed (more or less) to achieve such a system, spanning a large part of a continent, but it has taken over two centuries, and complexities still arise in multi-state inheritance cases. In addition, the states of the US share language, cultural expectations, and, for the most part, concepts of property and inheritance rooted in the Anglo-American common law; the countries of Europe are far more different from each other, and in some cases their expectations may prove incompatible. Even the shorter-term solution of a harmonized system of choice of inheritance law may prove unattainable, especially to the extent that the participation of the UK is necessary.

2. Differences in inheritance laws
   
a. Forced heirship and clawbacks

   It may be useful to begin by examining the laws of the EU countries regarding forced heirship and clawbacks. Two concepts will help in understanding the operation of clawbacks, each of which has analogues in US law: (1) Legitim or reserve, and (2) fictive hereditary mass. Neither of these terms is used universally; in this article they will be substituted, where appropriate, for the terms in local use, for the sake of simplicity.

   The legitim or reserve is the portion of the estate subject to forced heirship – that is, the portion the testator is not free to dispose of as he or she wishes, but which must pass instead to persons within a small category of close relatives, typically issue, ancestors, and spouse. In the US, a spouse’s elective share of an estate also limits a testator’s freedom to dispose of his or her property by will; forced heirship is thus not an alien concept to US lawyers, although it would be a mistake to conclude that the forced heirship provisions of any country are identical to those of another. The problem is perhaps best expressed in an addendum to the EU proposal:

   All Member States except for the UK (specifically, England and Wales) grant a compulsory share of the inheritance to close family members, regardless of any testamentary dispositions by the deceased. This share, the “statutory reserve”, can amount to between 25 and 100% of the inheritance, depending on the applicable

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16 Under Uniform Probate Code [UPC] §2-202, a surviving spouse’s elective share is half of the augmented estate or $75,000, whichever is more, and subject to certain exceptions and allowances.
law and the number of remaining family members, and also varies widely between the Member States.\textsuperscript{17}

The fictive hereditary mass is the combined value of the decedent’s assets and some or all gifts made inter vivos by the decedent, less debts.\textsuperscript{18} In countries applying clawbacks, the forced heirship share is assessed not as a percentage of the decedent’s estate, but as a percentage of the fictive hereditary mass. To complicate matters further, not all inter vivos gifts are included in the fictive hereditary mass, but the excluded gifts vary from one country to the next. Again, this concept – the fictive hereditary mass – has its analogue in the US concept of the augmented estate, which can include some of the testator’s inter vivos gifts.\textsuperscript{19}

In the US, however, there is at least an initial tendency to view gifts, once given, as gone, although there are some exceptions.\textsuperscript{20} The expectations of US donees are thus at odds with those of non-US potential forced heirs. The effect of this clash of expectations, expressed in actions to claw back charitable donations and assets placed in trust, is potentially disastrous: A donor might give three quarters of her wealth to, say, the San Diego Zoo, then live another sixty years. In some countries, her descendants might be able to claw back part of that money up to thirty years after the date of death – or ninety years after the original gift. A California court might, of course, refuse to recognize the judgment, although the Zoo’s assets in other countries, if any, might become vulnerable to it.

But courts in the UK, should pressure from the EU ultimately bring the UK to opt in to the current or a future proposal to reform cross-border successions, might find they lack that option. The EU, in material accompanying its current proposal, presents a similar hypothetical:

Example: An Englishman has invested most of his wealth in a collection of modern art paintings, which he gives away to a museum. Shortly thereafter, he moves to France, where he eventually marries a French woman, and the couple have two children who are also French citizens. When the father passes away years later, the children under the applicable French law of succession are entitled to a statutory share of the inheritance, which in this example would amount to $\frac{2}{3}$.


\textsuperscript{18} See \textit{Pau Delnoy, Les Liberalites et les Successions} 237 (Brussels : Larcier, 2d ed. 2006).

\textsuperscript{19} See \textit{UPC \S\S 2-203, 2-205}.

\textsuperscript{20} See, e.g., \textit{Am. Jur. Gifts} \S 4: “As a general rule, natural persons have the right to give away their property to whomsoever they wish and if they do so, and the gift is not induced by fraud or undue influence; only the creditors of the person who makes the gift may impeach it, \textit{citing} Matter of Conservatorship of Spindle, 1986 OK 65, 733 P.2d 388 (Okla. 1986) and \textit{In re Estate of Puetz}, 167 Ill. App. 3d 807, 118 Ill. Dec. 584, 587, 521 N.E.2d 1277, 1280 (2d Dist. 1988): “The owner of property has an absolute right to dispose of it during his or her lifetime in any manner he or she sees fit even if a trust is created to diminish or defeat the statutory marital interest of a surviving spouse unless the transfer lacks the essential element of a present donative intent and is, therefore, illusory and tantamount to a fraud on marital rights.”
of the estate. For the purposes of calculating the value of that share, the value of
the estate of the deceased including all gifts made during his lifetime is calculated.
Assuming that the value of the collection of paintings amounts to \( \frac{1}{2} \) of the estate’s
total value, the statutory share cannot be satisfied by the remaining assets in the
estate. In this case, the children can bring a so-called ‘claim for reduction’ against
the museum, forcing it to pay the remaining \( \frac{1}{6} \) of the estate to complete the
statutory share of the children.”

Even the countries permitting clawbacks permit them under widely varying terms;
courts in France may be nearly as shocked by the extent of clawbacks under Bulgarian
law as courts in the US or UK might be. A quick look at the provisions of some EU
countries might be helpful.

i. EU member states (other than the UK)

The list that follows addresses (hopefully without too many inaccuracies) the
older members of the EU, with Bulgaria, Cyprus, Malta and Poland representing the
newer (post-2000) members. Law is, of course, fluid everywhere. Inheritance law has
recently been a hot topic in such major EU players as France and Germany, and it seems
safe to assume that there will be – or in some cases already have been – changes in the
laws of at least some of the countries described below.

1. Austria

Austria takes a broad view of the persons to whom a forced inheritance share
\((\text{gezetzlicher Pflichtteil})\) should be granted: Not only a testator’s children, but
descendants generally, may be entitled to a forced share in the decedent’s estates, as well
as the decedent’s spouse. In the absence of issue, the decedent’s ancestors may claim a
share. The forced share of spouse and descendants is, as in many countries, equal to
one-half the intestate share. The forced share of the ancestors, in the absence of issue,
is equal to one-third the intestate share. Gifts to potential heirs are included in the
fictive hereditary mass no matter when given; other gifts, including to charities, are
included only if given within the last two years of the testator’s life. As in many
countries, potential heirs can waive their forced shares during the life of the testator; the

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21 Addendum 1, supra note 17, at 16, §3.2.1.
22 For the inheritance laws of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia,
and Slovenia, see ERBRECHT IN EUROPA 1099 (Angelbachtal, Germany: Zerb Verlag, Dr. Rembert Süss ed.,
2d ed. 2008).
23 Allgemeines Bürgerliches Gesetzbuch (ABGB) §764.
24 ABGB §765.
25 ABGB §766.
26 Franz Haunschmidt, Erbrecht in Österreich, in ERBRECHT IN EUROPA 1099 (Angelbachtal, Germany:
Zerb Verlag, Dr. Rembert Süss ed., 2d ed. 2008) [Yes, Dr. Süss☺]
waiver must be in a writing satisfying the requirements of a contract under Austrian law.\textsuperscript{27}

2. Belgium

In Belgium a decedent’s children have forced heirship rights; if the children predecease the testator, the grandchildren may claim forced heirship shares.\textsuperscript{28} If the decedent has one child, that child’s forced heirship share is one-half the fictive hereditary mass. Two children will each take one-third of the fictive hereditary mass, for a total of two-thirds. Three children each take one-fourth, for a total of three-fourths. The total amount of the estate subject to forced heirship never exceeds three-fourths; where there are more than three children, they divide three-fourths of the fictive hereditary mass among them.\textsuperscript{29} In the absence of issue, the testator’s surviving parents (but not other ancestors) may each claim a one-fourth share: half the estate for two surviving parents, or one-fourth for one.\textsuperscript{30}

With up to three-fourths of the fictive hereditary mass subject to forced heirship, the potential for clawback actions is considerable; inter vivos gifts totalling more than one-fourth of the donor’s wealth, let alone the 99% Warren Buffett has given or proposes to give away, would be vulnerable.

Even more alarmingly, from an Anglo-American point of view, Belgium’s forced heirship laws appear to include all inter vivos gifts within the fictive hereditary mass;\textsuperscript{31} a gift given early in the donor’s life might still be vulnerable when the testator died of extreme old age. One limiting factor, though, is adverse possession: Under Belgian law the period for adverse possession is thirty years,\textsuperscript{32} after which a donee could presumably perfect title if the other requirements were met. As adverse possession, however, does not run against one’s spouse under Belgian law, where a surviving spouse has forced heirship rights the period might not run until thirty years after the testator’s death.\textsuperscript{33} And, in the case of non-fungible assets (such as real property), the holder of the forced heirship right might be able to reclaim the property not only from the original donee but from remote grantees – that is, from someone, even a bona fide purchaser for value, who obtained the property from the original donee, as well as that person’s subsequent grantees.

3. Bulgaria

Bulgarian law, interestingly, accords equal forced heirship shares to surviving children and a surviving spouse. That is, two surviving children (in the absence of a

\begin{thebibliography}{99}
\bibitem{27} Dr. Andreas Lintl, \textit{National Report for Austria}, in European Succession Laws 33, ¶2.51.44 (Jordans: David Hayton ed., 2nd ed. 2002).
\bibitem{28} Code Civil Belge [C. Civ. (Belg.)] Art. 914.
\bibitem{29} C. Civ. (Belg.) Art. 913.
\bibitem{30} C. Civ. (Belg.) Art. 915
\bibitem{31} C. Civ. (Belg.) Art. 922.
\bibitem{32} C. Civ. (Belg.) Arts. 2244, 2258, 2262.
\bibitem{33} \textit{See} C. Civ. (Belg.) 2253; \textit{see also} Ministry of Justice (UK), \textit{European Commission Proposal on Succession and Wills – A Public Consultation}, Consultation Paper CP41/09, Oct. 21, 2009, at 31 (“MOJ Wills Consultation Paper”).
\end{thebibliography}
surviving spouse) or a surviving spouse and surviving child each hold a one-third share of
the fictive hereditary mass, for a total of two-thirds. Three or more surviving children
divide two-thirds of the fictive hereditary mass among them, while two surviving
children and a surviving spouse fare slightly better, each taking one-fourth. Three or
more surviving children and a surviving spouse divide five-sixths of the fictive hereditary
mass, leaving only one-sixth to be otherwise disposed of either inter vivos or by will. 34
There does not appear to be any time limit on inter vivos gifts to be included in the fictive
hereditary mass, although the most recent gifts are the first to be reduced in the event that
the total gifts exceed the allowable amount. 35

4. Cyprus

Cyprus, under British administration for more than eighty years in the twentieth
and late nineteenth centuries apparently imbibed the British aversion to clawbacks.
British common law infiltrated the preexisting Ottoman legal system from 1878 onward,
and displaced it more or less completely from 1935 through independence in 1960. 36
Cyprus allows forced heirship shares for a testator’s spouse and children, and in their
absence for certain other family members, but the concept of fictive hereditary mass is
absent. The forced heirship shares are based solely on the value of the testator’s estate at
the time of death. 37

5. Denmark

Denmark, unusually among continental European countries, appears not to apply
the concept of fictive hereditary mass. Gifts given to a potential heir as an advance on
inheritance may be added to the notional value of the estate, but inter vivos gifts
generally are not. 38 (Gifts causa mortis, however, must be given in the form of a will. 39) In Denmark a surviving spouse and issue may claim forced shares equal to half the estate. Where a spouse alone survives, the spouse may claim the entire amount; where issue
alone survive, they divide the amount among them per stirpes. Where a spouse and issue
survive the spouse takes one-third of the amount (or one-sixth of the total), with the issue
dividing the remaining two-thirds (or one-third of the total estate) among them per
stirpes. 40 Because these are not assessed against a fictive hereditary mass, however, there
are no clawbacks.

6. Finland

34 MOJ Wills Consultation Paper, supra note 33, relying on Précis du Droit des Successions et Libéralités
35 MOJ Wills Consultation Paper, supra note 33, at 33.
37 See Campbell, supra note 36, at 862-863.
38 J. Qviste, “Denmark,” in Hayton, supra note 27, at 185, 192, ¶¶6.54-6.55.
Under Finnish law only issue may be forced heirs, and a testator may explicitly disinherit a potential forced heir. 41 Each forced heir may take half the share he or she would have received had the estate passed by intestacy. The time limit for a forced share claim is measured from the time the heir is informed of the will; he or she has six months from that date to claim the forced share. 42 A clawback action has a somewhat longer period - it must be brought within one year from the time the heir is informed of the testator’s death or within ten years of the testator’s death, whichever is sooner. The testator’s inter vivos gifts, subject to some exceptions, are taken into account in calculating the fictive hereditary mass against which forced shares are assessed, and gifts to a forced heir are taken into account in assessing that heir’s forced share.

7. France

French law provides forced heirship rights for a testator’s spouse and descendants, or in the absence of issue the testator’s ancestors. 43 The fictive hereditary mass includes inter vivos gifts, 44 unless consented to in advance by the potential forced heirs. 45 If the estate is insufficient to satisfy the forced heirship claims, the testator’s inter vivos gifts may be clawed back in reverse chronological order, so long as the clawback is pursued within five years from the rightholder’s discovery that the property has been given to someone else or within ten years of the date of the testator’s death, whichever is sooner. 46 In the event of a clawback, the donee has the option to return either the property or its value. 47

8. Germany

Germany’s forced heirship provisions are similar to Austria’s. 48 In Germany forced heirship shares (Pflichtteil) protect the inheritance rights of a testator’s spouse or registered domestic partner, descendants, and in the absence of these persons, the testator’s parents if living. 49 Each of these persons, if entitled to take a forced share, takes half the share he or she would have received had the estate passed by intestate succession. The fictive hereditary mass includes gifts made to persons (other than potential forced heirs) within the last ten years of the testator’s life. 50 Some gifts to

42 Kangas, supra note 41, citing Act of Inheritance 7:5.3.
43 C. Civ. (Fr.) Art. 913-14.
44 C. Civ. (Fr.) Art. 920.
46 MALAURIE, supra note 45.
47 C. Civ. (Fr.) Art. 924.
48 See notes 23-27, supra, and accompanying text.
49 Bürgerliches Gesetzbuch (BGB) Art. 2303.
50 BGB Art. 2325.
potential forced heirs may also be included, and in some cases these may be included even if made more than ten years before the testator’s death. A gift to the testator’s spouse (or presumably, by extension, domestic partner) is included in the fictive hereditary mass no matter when made. A statute of limitations protects persons receiving possession of property from the testator either inter vivos or by will, even if otherwise subject to forced heirship and clawback. Forced shares, including clawbacks if any, must be exercised within three years of the rightholder’s discovery that the property has been given to someone else or within thirty years of the date of the testator’s death, whichever is sooner. In contrast to the situation in, for example, Belgium, third parties who receive property in good faith from a donee are not subject to the clawback, and cannot be required to pay; the remedy is available only directly against the donee.

9. Greece

In Greece a testator’s spouse and children, or in the absence of children grandchildren, or in the absence of issue, ancestors, are entitled to a forced share equal to half of what each would have received had the estate passed by intestacy. The fictive hereditary mass includes all inter vivos gifts to potential forced heirs, plus all other inter vivos gifts made within the last ten years of the testator’s life, subject to certain exceptions. In the event a gift is clawed back, the donee has the option to return the property or pay its value.

10. Ireland

Ireland allows forced heirship shares only to surviving spouses; however, in the case of omission or disinheritance of a child, a court may (not must) disregard that omission and award the child a share in the estate. There is no fictive hereditary mass or clawback provision, although inter vivos gifts to a spouse or child are taken into account in assessing that person’s share, if any.

11. Italy

The Italian Civil Code provides forced heirship rights to a testator’s spouse and children, or in the absence of children grandchildren, or in the absence of issue, ancestors. Peculiarly, the Code draws a distinction between “figli legittimi” (legitimate

51 BGB Art. 2325.
52 BGB Art. 2332.
53 See notes 28-30, supra, and accompanying text.
55 A.K. Art. 1831.
children) and “figli naturali” (illegitimate – literally “natural” – children\(^\text{58}\)), although in modern times there seems to be no difference in the forced heirship rights of the two groups,\(^\text{59}\) although in the case of ancestors only legitimate ancestors (\textit{ascendenti legittimi}) may claim a share.\(^\text{60}\)

A surviving spouse or child may claim one-half the fictive hereditary mass; two or more children divide two-thirds among them.\(^\text{61}\) Where a spouse alone survives, the spouse takes one-half;\(^\text{62}\) where a spouse and one child survive, each takes one-third, while where a spouse and multiple children survive, the spouse takes one-fourth and the children divide one-half among them.\(^\text{63}\) Where a spouse and legitimate ancestors survive, the spouse takes one-half while the ancestors divide one-fourth among them,\(^\text{64}\) while if legitimate ancestors alone survive they divide one-third among them.\(^\text{65}\)

In all cases the elective forced shares are based on the fictive hereditary mass, which includes all inter vivos gifts by the testator whenever made, subject to a few exceptions, and potential holders of forced heirship rights cannot waive these rights at the time of the gift, although they may do so after the testator’s death.\(^\text{66}\) Gifts are clawed back in reverse chronological order, and while there seems to be a preference for in-kind restoration, donees may opt to pay the value of the property instead. In most cases property is clawed back free of any liens or mortgages placed upon it by the donee.\(^\text{67}\)

12. Luxembourg

Under the law of Luxembourg only children may take as forced heirs, although if a child is ineligible to take, has predeceased the testator, or has renounced any share in the estate, that child’s descendants may take the share.\(^\text{68}\) A single child, or descendants exercising that child’s right, takes half the fictive hereditary mass; two children divide two-thirds, while three or more divide three-fourths.\(^\text{69}\) A surviving spouse may either take a share as a child, or may claim a usufruct in all the real and personal property jointly possessed and occupied by the couple during the testator’s life.\(^\text{70}\)

\(^{58}\) Or, as Will Cuppy says, “All children are natural, but some are more so than others and are therefore known as natural children.” \textsc{Will Cuppy}, \textit{“Lucrezia Borgia,”} in \textsc{The Decline and Fall of Practically Everybody} 97 (Boston: David R. Godine, Publisher, 1984)(New York: Henry Holt & Co., 1950).

\(^{59}\) See \textit{C.C. (Italy)} Art. 536.

\(^{60}\) \textit{C.C. (Italy)} Art. 536.

\(^{61}\) \textit{C.C. (Italy)} Art. 537.

\(^{62}\) \textit{C.C. (Italy)} Art. 540.

\(^{63}\) \textit{C.C. (Italy)} Art. 542.

\(^{64}\) \textit{C.C. (Italy)} Art. 544.

\(^{65}\) \textit{C.C. (Italy)} Art. 538.

\(^{66}\) \textit{C.C. (Italy)} Art. 5 556-57, 563.

\(^{67}\) \textit{C.C. (Italy)} Art. 561.


\(^{69}\) \textit{Code Civil de Luxembourg} [\textit{C. Civ. (Lux.)}] Art. 913, available online at \url{http://www.legilux.public.lu/leg/textescoordonnes/codes/code_civil/L3_T2_donations_testaments.pdf}.

\(^{70}\) This right covers “l’immeuble habité en commun par les époux et des meubles meublants le garnissant, à condition que l’immeuble ait appartenu au défunt en totalité ou conjointement avec le survivant.” \textit{C. Civ. (Lux.)} Art. 767-1.
testator’s inter vivos gifts are taken into account in determining the fictive hereditary mass, apparently without exception.  

No time limit is set in the Code Civil or in Luxembourg’s case law during which clawback rights must be exercised, although Jean-Claude Wiwinius believes it probable Luxembourg, with its version of the Napoleonic Code, would follow the lead of France (before its recent reform shortening the period, resulting in the terms noted above) and apply an upper limit of thirty years.  

Whether Luxembourg would now apply the shorter period recently adopted by France remains to be seen.  It may be worth noting that the prescriptive period under Luxembourg law is ten, twenty, or thirty years, depending on the type of property involved and several other factors.

13. Malta

Malta had twice as long an experience of British rule as did Cyprus.  Yet unlike Cyprus, Malta retains the concept of fictive hereditary mass, including within it all inter vivos gifts made by the testator to any person, subject to several exceptions, although a person claiming forced heirship must exclude from the claimed share any gifts given to himself or herself.  

The assignment of forced heirship is complex.  Four or fewer surviving children divide one-third of the fictive hereditary mass among them; five or more divide one-half.  Note that this produces the odd result that four children would each have a one-twelfth, or 8.33%, share, while five would each have a one tenth, or 10.00%, share, and each of six would have the same individual share as each of four.

Like Italy, Malta distinguishes between legitimate and illegitimate children.  Until 2004, it also discriminated; illegitimate children received a lesser share than legitimate children.  Where children predecease their testator, their children – the testator’s grandchildren – take from the testator per stirpes.

The legacy of 164 years of British administration can be seen both in the unusual complexity of Malta’s forced heirship and other inheritance laws, incorporating common law and civil law concepts, and also in provisions allowing a testator, in certain fairly broadly defined circumstances, to disinherit a person who would otherwise have been entitled to forced heirship rights.

71 See Wiwinius, supra note 68, at 570: “Toutes les libéralités consenties par le défunt sont prises en considération pour le calcul de la réserve, quels que soient la qualité du gratifié, l’objet de la libéralité ou sa forme.”

72 See Wiwinius, supra note 68, at 570: “En principe, le droit à la réserve ne se prescrit pas. Il n’existe pas de jurisprudence luxembourgeoise à ce sujet. Mais on pourrait concevoir, en s’inspirant de la jurisprudence française (cf. rapport français), que la prescription de droit commun de trente ans, à compter de l’ouverture de la succession, s’applique.”

73 C. Civ. (Lux.) Arts. 2262-70, esp. 2262, 2265.  See also Arts. 2271-81.


75 Malta Civil Code Art. 620.

76 Malta Civil Code Art. 620(4).

77 Malta Civil Code Art. 616.

78 See Malta Civil Code Arts. 640-46 (repealed).

79 Malta Civil Code Art. 618(2).

If a spouse and children survive, the spouse may claim forced heirship rights in one-fourth of the fictive hereditary mass. If the spouse alone survives, he or she may claim one-third. The surviving spouse also receives a life tenancy – as a usufructuary beneficiary – in the property occupied by the spouse and testator as their principal residence at the time of the testator’s death.  

81 Malta Civil Code Art. 631, 633.
82 Malta Civil Code Art. 845.
83 Netherlands Civil Code [BW] Art. 4.64; see generally Arts. 4.63 to 4.92.
84 BW Arts. 4.65 to 4.67.
85 BW Art. 4.85.
86 Polish Civil Code Art. 991, as translated and described in MOJ Wills Consultation Paper, supra note 33. See also generally Arts. 991-999 (forced heirship) and Arts. 1000-1007 (clawbacks).
87 Polish Civil Code Art. 994.

14. Netherlands

While most EU countries allow a variety if relatives of the testator to exercise forced heirship rights, in the Netherlands only descendants may be forced heirs.  

83 Each child (or, if a child predeceases the testator, that child’s issue) takes half the share the child would have received had the estate passed by intestacy. Shares are calculated based on the fictive hereditary mass, which includes gifts made to forced heirs during the testator’s life and gifts made to others in the last five years of the testator’s life, in both cases subject to some exceptions.  

84 Forced heirship rights must be exercised within five years of the testator’s death.

15. Poland

Poland follows a more typical model; forced heirship shares are available to the testator’s spouse and descendants, and in the absence of issue, ancestors.  

86 The share awarded these persons is somewhat less than usual, however: Each receives a forced heirship right equal to just one-third of the intestate share unless he or she is a minor or unable to work, in which case he or she receives the more usual one-half. All of these amounts are based on a fictive hereditary mass that includes most inter vivos gifts to potential forced heirs throughout the testator’s life, gifts to others within the last ten years of the testator’s life, and, in the case of forced heirship rights of descendants, gifts made more than three hundred days prior to the birth of the testator’s first child.

16. Portugal

In Portugal, as in so many other countries, forced heirship rights extend to the testator’s spouse and descendants, and in the absence of surviving issue the ancestors.  

88 The Where there is a surviving spouse but no descendants, the Legítima – the portion subject to forced heirship – equals half the fictive hereditary mass; in other words, the
spouse takes half.\textsuperscript{89} Where a spouse and one or more children survive, they divide the estate among them. When no spouse survives, a sole surviving child takes half while two or more children divide two-thirds.\textsuperscript{90} Where a child predeceases the testator, that child’s children – the testator’s grandchildren – take by representation – that is, as if a share had passed to them per stirpes.\textsuperscript{91} A spouse and surviving ancestors divide two-thirds among them, while if ancestors are the only survivors they divide one-half.\textsuperscript{92}

The fictive hereditary mass includes all inter vivos gifts by the testator, with a few exceptions including wedding gifts and gifts for children’s education and maintenance, “\textit{na medida em que se harmonizem com os usos e com a condição social e económica do falecido}” – that is, “to the extent to which they harmonize with the uses and with the social and economic status of the deceased.”\textsuperscript{93} The class assumptions behind that last provision might merit closer examination – like the distinctions drawn in some legal systems between legitimate and illegitimate children, they offer a hint of underlying social principles radically different from those in, say, California’s legal system. The effective statute of limitations for clawbacks under Portuguese law is quite limited; they must be exercised, if at all, within two years of the testator’s death.\textsuperscript{94}

17. Spain

In Spain, as well, forced heirship rights extend to the testator’s spouse and descendants, and in the absence of surviving issue the ancestors.\textsuperscript{95} The size of the \textit{legítima} is less flexible than in many other EU countries; where it is to be shared among descendants, it is set at two-thirds the value of the fictive hereditary mass, regardless of the number of descendants.\textsuperscript{96} Where there are surviving ancestors but no surviving children, the ancestors’ share is one-half; where one or more ancestors share with a surviving spouse, the ancestors’ share is one-third.\textsuperscript{97}

The fictive hereditary mass includes all inter vivos gifts by the testator, with a few exceptions.\textsuperscript{98} As in most countries, gifts made to a forced heir are counted in computing the fictive hereditary mass for the benefit of other forced heirs, but are deducted from the forced share of the heir to whom they were previously given.\textsuperscript{99} Gifts in excess of the one-third to one-half of the fictive hereditary mass the testator is permitted to dispose of may be clawed back not only from donees but also, apparently, from a donee’s third party transferee.\textsuperscript{100} No statute of limitations for clawbacks appears under the heading “\textit{De las legítimas}” in the Spanish code, although the general terms of adverse possession (\textit{prescripción}; six years for personal property\textsuperscript{101} and thirty for real property\textsuperscript{102} might

\begin{itemize}
  \item \textsuperscript{89} C.Civ. (Port.) Art. 2158.
  \item \textsuperscript{90} C.Civ. (Port.) Art. 2159.
  \item \textsuperscript{91} C.Civ. (Port.) Art. 2160.
  \item \textsuperscript{92} C.Civ. (Port.) Art. 2161.
  \item \textsuperscript{93} C.Civ. (Port.) Art. 2110. \textit{See also} C.Civ. (Port.) Art. 2162.
  \item \textsuperscript{94} C.Civ. (Port.) Art. 2178.
  \item \textsuperscript{95} Codigo Civil Español [C.Civ. (Sp.)], Libro III, Art. 807.
  \item \textsuperscript{96} C.Civ. (Sp.) Art. 808.
  \item \textsuperscript{97} C.Civ. (Sp.) Arts. 809-10.
  \item \textsuperscript{98} C.Civ. (Sp.) Art. 818.
  \item \textsuperscript{99} C.Civ. (Sp.) Art. 819.
  \item \textsuperscript{100} \textit{See} C.Civ. (Sp.) Art. 636.
  \item \textsuperscript{101} C.Civ. (Sp.) Art. 1962.
\end{itemize}
protect donees and their transferees in some instances. Potential forced heirs may not waive their rights: “Toda renuncia o transacción sobre la legítima futura entre el que la debe y sus herederos forzosos es nula, y éstos podrán reclamarla quando muera aquél…” (‘Any waiver or compromise of the future legitim from the future testator and his or her heirs is void, and they may claim it when s/he dies…”103) It is not clear how this interacts with the law of prescripción, although the UK Ministry of Justice Consultation Paper takes the view that “The Spanish Civil Code excludes lifetime discharges of the Legítima and, presumably also, this applies to an exclusion of a right to recover a gift to pay the Legítima.”104 I’m not entirely certain this interpretation is correct, though; it may be that, as in several other countries, the law of prescription or adverse possession provides an upper limit to the time in which clawbacks may be exercised.

18. Sweden

Sweden, like the Netherlands, accords a forced share right only to descendants. To simplify matters yet further, the amount of the fictive hereditary mass subject to forced heirship – that is, the reserve or legitim – is constant, at one-half the total.105 Gifts exceeding half the fictive hereditary mass may be clawed back, but the clawback must be exercised no later than one year after the inventory of the estate is completed; note that this will be some time later than one year after the testator’s death.106

ii. The United Kingdom (England & Wales)

While in theory England and Wales reject the idea of forced heirship, in practice they provide somewhat analogous rights. Under the Inheritance (Provision for Family and Dependents [sic]) Act of 1975, a court may make provisions for the maintenance of certain persons from a decedent’s estate, even though the decedent omitted them from his or her will. These persons include spouses, domestic partners, and children, as well as certain persons not generally protected in other countries: Former spouses who have not remarried, the children of spouses (as part of the category “any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage”), and other former dependents or part-dependents.107

While the potential provisions for this rather wide range of persons is not automatic and thus not truly an elective share in the US sense or forced heirship in the European sense, it does provide at least a potential constraint on the testator’s freedom to

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103 C.Civ. (Sp.) Art. 816.
104 MOJ Wills Consultation Paper, supra note 33, at 48.
106 MOJ Wills Consultation Paper, supra note 33, at 49.
107 Inheritance (Provision for Family and Dependents) Act 1975, c.63, ¶¶ 1-2. Similar provisions are found throughout the British Commonwealth; in the US they have been rejected as likely to encourage litigation and yield inconsistent results. See, e.g., Kristine S. Knaplund, Grandparents Raising Grandchildren and the Implications for Inheritance, 48 ARIZ. L. REV. 1, 16 (2006).
dispose of his or her property. Nor is forced heirship completely alien to the English common law; it existed in England into the early eighteenth century.\textsuperscript{108}

iii. The United States

The concepts of fictive hereditary mass and forced heirship are not, perhaps, as alien to US law as to UK law. The fictive hereditary mass has its rough counterpart in the augmented, net, or elective estate, while forced heirship, at least for spouses, exists in the form of the elective share. Even the clawback may exist where an elective share based on the augmented, net, or elective estate exceeds the probate estate – that is, where the testator has transferred more than half of his or her wealth inter vivos. Such clawback actions remain rare in the US, though.\textsuperscript{109}

The augmented estate, under Uniform Probate Code [UPC] §2-203, includes the net probate estate as well as the decedent’s nonprobate transfers – including inter vivos gifts – and the surviving spouse’s property and inter vivos transfers,\textsuperscript{110} less funeral and


\textsuperscript{109} See, e.g., Newman V. Dore, 275 N.Y. 371, 9 N.E. 2d 966 (N.Y. 1937); Burns v. Turnbull, 266 App.Div. 779, 41 N.Y.S.2d 448 (1943), affirmed 294 N.Y. 889, 62 N.E.2d 785 (1945); Dreher v. Dreher, 370 S.C. 76, 634 S.E.2d 646 (2006); Sullivan v. Burkin, 390 Mass. 864, 460 N.E.2d 572 (1984). Note that these cases have involved bare attempts to disinherit spouses rather than to donate wealth to charity, although Sullivan states that motive doesn’t matter:

The rule we now favor would treat as part of “the estate of the deceased” ...assets of an inter vivos trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment, exercisable by deed or by will. This objective test would involve no consideration of the motive or intention of the spouse in creating the trust. ... Nor would we have to participate in the rather unsatisfactory process of determining whether the inter vivos trust was, on some standard, “colorable,” “fraudulent,” or “illusory.” Sullivan, 390 Mass. at 872-73.

\textsuperscript{110} The UPC offers considerably more complexity than this, including two alternative treatments of marital property:

(a) Subject to Section 2-208, the value of the augmented estate, to the extent provided in Sections 2-204, 2-205, 2-206, and 2-207, consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute:

1. the decedent’s net probate estate;
2. the decedent’s nonprobate transfers to others;
3. the decedent’s nonprobate transfers to the surviving spouse; and
4. the surviving spouse’s property and nonprobate transfers to others.

(b) The value of the marital-property portion of the augmented estate consists of the sum of the values of the four components of the augmented estate as determined under subsection (a) multiplied by the following percentage:

<table>
<thead>
<tr>
<th>If the decedent and the spouse</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>were married to each other:</td>
<td></td>
</tr>
<tr>
<td>Less than 1 year</td>
<td>3%</td>
</tr>
<tr>
<td>1 year but less than 2 years</td>
<td>6%</td>
</tr>
<tr>
<td>2 years but less than 3 years</td>
<td>12%</td>
</tr>
<tr>
<td>3 years but less than 4 years</td>
<td>18%</td>
</tr>
<tr>
<td>4 years but less than 5 years</td>
<td>24%</td>
</tr>
<tr>
<td>5 years but less than 6 years</td>
<td>30%</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>36%</td>
</tr>
</tbody>
</table>
administration expenses and certain other exemptions and claims. While the UPC has been adopted in only a minority of states and with significant local variation, a few non-UPC states have also adopted the concept. The concept of augmented estate is only necessary if there is also a forced heir whose share may be assessed against it. (Other valuations are used for other purposes, such as assessing estate tax.) And, as noted above, even the clawback is not outside the contemplation of the UPC. Section 2-209 provides:

(c) If, after the application of subsection (a), the elective-share amount is not fully satisfied, or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent’s net probate estate, other than assets passing to the surviving spouse by testate or intestate succession, and in the decedent’s nonprobate transfers to others under Section 2-205(1), (2), and (3)(B) are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent’s net probate estate and that portion of the decedent’s nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is apportioned among the recipients of the decedent’s net probate estate and of that portion of the decedent’s nonprobate transfers to others in proportion to the value of their interests therein.

(d) If, after the application of subsections (a) and (c), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent’s nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is apportioned among the recipients of the remaining portion of the decedent’s

7 years but less than 8 years .................... 42%
8 years but less than 9 years .................... 48%
9 years but less than 10 years ..................... 54%
10 years but less than 11 years ................... 60%
11 years but less than 12 years ................... 68%
12 years but less than 13 years ................... 76%
13 years but less than 14 years ................... 84%
14 years but less than 15 years ................... 92%
15 years or more .................................. 100%

[Alternative Subsection (b) for States Preferring a Deferred-Marital-Property System]

[(b) The value of the marital-property portion of the augmented estate equals the value of that portion of the augmented estate that would be marital property at the decedent’s death under [the Model Marital Property Act] [copy in definition from Model Marital Property Act, including the presumption that all property is marital property] [copy in other definition chosen by the enacting state].

112 Including Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah.
113 See, e.g., Payne v. Stalley, 672 So. 2d 822, 823 (Fla. 2d DCA 1995)(“We cannot rewrite Florida probate law to accommodate a Michigan attorney more familiar with the Uniform Probate Code”).
114 See William Winter, UMPA Fights for Recognition, ABA J., June 1984, at 76, 77-78.
115 See, e.g., Internal Revenue Code § 2035(b), including gifts made within three years prior to death in the value of the decedent’s estate.
nonprobate transfers to others in proportion to the value of their interests therein.\footnote{UPC §2-209 (2008 revision).}

In other words, the decedent’s inter vivos gifts may be reached to satisfy the surviving spouse’s elective share. For example, assets placed in a charitable remainder trust “may be included in the augmented estate and, therefore, may be used to determine and satisfy the elective share amount.”\footnote{Lawrence P. Katzenstein, Charitable Remainder Trusts: Charity Can Begin at Home, ALI-ABA Continuing Legal Education, SK088 ALI-ABA 39, June 9-10, 2005. \textit{See also generally} Lawrence W. Waggoner, \textit{The Uniform Probate Code’s Elective Share: Time for a Reassessment}, 37 U. Mich. J.L. Reform 1, 9-11 (2003); Grayson M.P. McCouch, \textit{A Comment on Unification}, 43 REAL PROP. TR. & EST. L.J. 499 (2008)(“The elective share is satisfied first from amounts passing to or already owned by the surviving spouse. Only if those amounts are insufficient are other beneficiaries liable for the deficiency, and liability is apportioned ratably except for two narrow categories of transfers occurring during marriage and within two years before death”); Jeffrey N. Pennell, Minimizing the Surviving Spouse’s Elective Share, 32 Inst. on Est. Plan. 9-1 (1998) (claiming that most spouses would acquiesce in an estate-equilization QTIP trust rather than elect against the will), cited in Joseph M. Dodge, \textit{Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System, and Abandoning the Generation-Skipping Tax}, 56 SMU L. REV. 551, 577 n. 95 (2003).

The scope of the elective share, however, is far less in the US than in continental Europe. In most of the European legal systems examined above the main goal seems to keep assets in the line of descent, almost as if they were entailed. In those US states that have elective share statutes, the statutes protect spouses, not children, parents, or other heirs; they are more an extension of marital property concepts than of heirship concepts. All US states but one provide some mechanism to guarantee the surviving spouse a share in the estate. Although in theory community property states have no need for separate elective share statutes, as community property rules serve the same purpose, they tend to have at least partial equivalents nonetheless.\footnote{See, e.g., Cal. Probate Code §§21610-21612 (California’s pretermitted spouse statute). But note that a decedent can explicitly disinherit a spouse (§21611(a)) and that the right may waived during the decedent’s life by the spouse who would otherwise inherit (for example by a prenuptial agreement)(§21611(c)).} Among the separate property states deriving their marital property laws from English common law, Georgia has no elective share statute.\footnote{See, e.g., Dodge, supra note 117, at 577 n. 95; 1 JEFFREY A. SCHONBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING 10.03.4 (2009).} The lone civil law state, Louisiana, remains a somewhat ambiguous case.\footnote{See, e.g., Katherine Shaw Spaht, The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What’s Become of Disinherison, and the Unfinished Business of the Stepparent Usufruct, 60 LA. L. REV. 637 (2000).} The elective share in the US is thus a more modern form of the English law of dower and curtesy. Dower gave a surviving widow a life estate in one-third of her deceased husband’s freehold property; curtesy, most inequitably, gave a surviving widower a life estate in \textit{all} of his deceased wife’s freehold property, where there were issue of the widower and his wife born alive. Dower and curtesy themselves still exist, in somewhat modified form, in the US states of Arkansas, Kentucky, Michigan, and Ohio.\footnote{In addition, statutorily created rights in other states may be essentially identical to common-law dower – minus, of course, the explicit common-law gender bias. \textit{Consider, e.g.}, Connecticut:}
Other factors, not least the financial and emotional cost of an inheritance battle, may act as a surrogate for forced heirship in the US: “forced heirship and systems of community marital property serve the same function as the undue influence of restricting excessive improcious gifts outside the family and protecting the natural recipients of the testator’s bounty.”  

In particular, “the impact of the undue influence doctrine is to act as a form of forced heirship.”  

In addition, pretermitted child (or issue) statutes provide a partial equivalent, as do pretermitted spouse statutes.  

As with a spouse, though, the child may be explicitly disinherited, or may not be entitled to the protection of the statute for a variety of reasons; it is by no means a s powerful a tool for the testator’s descendants as civil law forced heirship.  (Note also that under a pretermitted child statute the pretermitted child may be entitled to a larger share of the estate than those children mentioned in the will.)  

Pretermitted (or, in the case of the UPC, “omitted”) child statutes, however, protect only against unintentional disinheritance; in every state except Louisiana, a testator may intentionally disinherit a child.  Louisiana’s constitution protects the state’s civil law tradition of legitime and, to some extent, forced heirship: While forced heirship for ascendants is abolished, 

The legislature shall provide for the classification of descendants, of the first degree, twenty-three years of age or younger as forced heirs.  The legislature may also classify as forced heirs descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates.  

And even in Louisiana, a child can be intentionally disinherited for “just cause,” as defined by statute.  

3. Why it matters  

(a) On the death of a spouse, the surviving spouse may elect, as provided in subsection (c) of this section, to take a statutory share of the real and personal property passing under the will of the deceased spouse.  The “statutory share” means a life estate of one-third in value of all the property passing under the will, real and personal, legally or equitably owned by the deceased spouse at the time of his or her death, after the payment of all debts and charges against the estate.  The right to such third shall not be defeated by any disposition of the property by will to other parties.  

(b) If the deceased spouse has by will devised or bequeathed a portion of his or her property to his or her surviving spouse, such provision shall be taken to be in lieu of the statutory share unless the contrary is expressly stated in the will or clearly appears therein; but, in any such case, the surviving spouse may elect to take the statutory share in lieu of the provision of the will.  

C.G.S.A. § 45a-436.  See also Dalia v. Lawrence, 226 Conn. 51, 627 A.2d 392 (1993).  


See, e.g., Cal. Probate Code §§21620-21623 (California’s pretermitted child statute); UPC 2-302 (the UPC equivalent).  


The differences between the treatments of forced heirship and clawbacks in the Anglo-American and civil law traditions have existed for centuries. Only recently, however, have these differences become a problem. The increasing mobility of peoples worldwide, and especially the free movement of persons within the European Union, is one cause. A second is the increasing individual and societal wealth that has made possible a culture of retirement. The combined effect of these two is that many people do and will continue to grow old and die in countries other than those in which they were born, acquired their wealth, and had children. In particular, many persons from the north of Europe, including the UK, choose to retire in the more clement south of the continent. To complicate matters further, it is now a simple matter to acquire property and financial interests in other countries, without leaving one’s home, let alone one’s country of residence.

Tens of millions of Europeans now live outside their countries of citizenship, and far more have financial interests abroad. The European Commission, in adopting the EU proposal on cross-border inheritances, pointed out that there are “450,000 international successions opened in the EU every year… estimated by some to be worth more than EUR 120 billion.”\(^{127}\) The US foreign-born population of over 37 million includes nearly five million born in Europe.\(^{128}\) And while Mexico, the greatest single source of immigrants to the US, has eliminated forced heirship,\(^{129}\) many other countries in the Americas have not. In Colombia, for example, the reserve or legitim may account for three-fourths of the fictive hereditary mass, and clawbacks are possible.\(^{130}\)

4. *The EU Proposal*

The most administratively appealing long-term solution to any international conflict of laws is also the most politically impossible, and perhaps undesirable: Harmonization of national laws to eliminate the differences. Even in areas where the advantages are obvious, such harmonization can be difficult. For example, the harmonization of copyright law, measured from the foundation of the Association Littéraire et Artistique Internationale in 1878 to the time the last three major holdouts (the

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\(^{129}\) *See* C. Civ. (Mex.) *Motivos* 25-27.

\(^{130}\) *See* C. Civ. (Col.) §§1244-1245.
US, China, and Russia) became parties to the Berne Convention\(^{131}\) took well over a
century.\(^{132}\) And relatively few people in any country hold copyrights of any value; death,
in contrast, touches everyone, in every country. Nor does copyright touch deeply-held
cultural values on the relationship of the individual, the family, and society. Even so, the
harmonization achieved after more than a century of diligent efforts remains imperfect
and requires constant adjustment.

A global law of inheritance is thus unlikely. Even the European Union, with its
enhanced ability to bring about regional harmonization of laws, acknowledges that “As
full harmonisation of the rules of substantive law in the Member States is inconceivable,
action will have to focus on the conflict rules.”\(^{133}\) It disavows any intent to bring about a
harmonization of substantive domestic laws regarding inheritance: “This initiative is
aimed neither at replacing nor harmonising succession law, property law or family law in
the Member States.”\(^{134}\) Any harmonization would thus apply only to transboundary
inheritance cases; national law, and inheritance cases without a transboundary aspect
(which in most countries are probably still the majority of cases) would remain
unaffected.\(^{135}\) But even this may prove impossible: because most of the countries of the
EU draw their inheritance laws from the civil law tradition, and because that tradition is
so greatly at odds with UK expectations, achieving any compromise palatable to both
sides is likely to prove unusually difficult.

In the earlier stages of the process there seemed to be a lack of perception of the
magnitude of the problem. The 2005 EU Green Paper comments blithely that “The lega-
systems of all the Member States protect the near relatives of a deceased person who tries
to disinherit them. The protection commonly takes the form of a reserved portion of the
estate but the mechanism is not recognised everywhere in the European Union.”\(^{136}\) In fact,
the legal system of the UK does no such thing, other than the protections against being
left in poverty provided by the Inheritance Act.\(^{137}\) The House of Lords responded with
alarm, identifying certain ‘‘red lines’ which European legislation should not cross if it

\(^{131}\) Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic
Works (Berne Convention), Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), 25 UST.
1341, 828 U.N.T.S. 221.

\(^{132}\) The United States became a party in 1988, China in 1992, and Russia in 1995. Neither the Soviet Union
nor the government of Taiwan, formerly recognized by the United States and many other countries as the
government of China, had been parties to the Convention. Some other relatively large economies have
joined even more recently, including Saudi Arabia and Vietnam in 2004; the most recent state to become a
party is Yemen, in 2008.

\(^{133}\) Commission of the European Communities, Green Paper: Succession and Wills, COM(2005) 65 final,

\(^{134}\) MEMO/09/447, Simplification of regulation on international successions, Oct. 14, 2009,

\(^{135}\) Nonetheless, there seems to be a certain regret in the Commission’s tone: “Although their harmonisation
remains outside the competence of the European Community, it is important to understand that the starting
point for the problems currently faced by citizens are the national substantive rules on successions which
diverge widely between the Member States.” Addendum 2, supra note 127, at 3, §2.1

\(^{136}\) Commission of the European Communities, Green Paper: Succession and Wills, COM(2005) 65 final,

\(^{137}\) Inheritance (Provision for Family and Dependants) Act 1975, c.63, ¶¶ 1-2. See note 107, supra, and
accompanying text.
was to be acceptable to the UK.” 138 In the view of the committee’s expert, “The problem of clawback features more heavily than any other issue in the responses.” 139 The committee “agree[d] that the first, if not the most important, red line in the present context relates to the issue of so-called clawback. The Union measure should not in any way call into question the validity of otherwise valid inter vivos dispositions.” 140

Private-sector nonprofit groups in the UK were, not surprisingly, alarmed, 141 and the Committee has taken their part and continued to point out its unwillingness to countenance clawbacks: “This is the single most contentious issue in the proposal for the UK... In the law of England and Wales and that of Northern Ireland there is no forced inheritance and therefore no clawback. Nor will the courts entertain a claim for clawback even if they are applying a law which includes it.” 142

The EU proposal, the Lords noted with alarm, would change this: “Under Article 19(2)(j) of the proposal, clawback claims would specifically be within the scope of the applicable law and therefore would operate in the UK when the law being applied to a succession provides for clawback.” 143 Dire consequences might result, including insecure title to gifts and to property received from donees, difficulty in valuing such assets,
increased legal complexity and costs, and undermining of trusts, insurance policies, pensions, and title registries.\footnote{Lords’ Select Committee on the European Union, The EU’s Regulation on Succession, HL 75, Mar. 24, 2010, ¶¶89-90.}

The House of Lords report provides a hypothetical “extreme example”:

A British national domiciled in, and entirely connected with, England gives away a significant proportion of his property. Forty years later he dies, having moved to France, having become domiciled, bought property, married and raised a family there. The forced inheritance claims and clawback will apply to the gifts made when he was domiciled in England as far as French law is concerned. They are liable to be returned to the estate to meet these claims.\footnote{Lords’ Select Committee on the European Union, The EU’s Regulation on Succession, HL 75, Mar. 24, 2010, Box 6.}

In a sense, the problem already exists: The surviving relatives of such a person could already bring an action in France under French law. But, given the UK courts unwillingness to “entertain a claim for clawback,” the UK donees and their successors would remain secure in their possession of the donated property. This would be true whether the action was brought in France and enforcement later sought in the UK, or whether it was brought in the UK – because the UK would not apply French clawback law. Even in the UK, however, the Inheritance (Provision for Family and Dependants) Act of 1975 allows courts to set aside inter vivos gifts if made within 6 years of death with the intention of defeating a claim under the Act.\footnote{Lords’ Select Committee on the European Union, The EU’s Regulation on Succession, HL 75, Mar. 24, 2010, ¶92.}

While the clawback is the most contentious issue – the brightest of the red lines – there are others: The EU proposal would invade several other areas of law in which the UK differs significantly from the majority of its fellow EU members, including “administration of estates and questions relating to the validity and operation of testamentary trusts, matrimonial property law, and interests terminating on death such as joint tenancies.”\footnote{Supplementary letter from Lord Grenfell, Chairman of the European Union Committee, to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice, reproduced in Select Committee on the European Union, Green Paper on Succession and Wills: Report with Evidence, HL 12, Dec. 4, 2007, at 10, 11, available at http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/12/1202.htm; see also Lords’ Select Committee on the European Union, The EU’s Regulation on Succession, HL 75, Mar. 24, 2010, ¶6 n. 5.}

Given these apparently insurmountable obstacles to agreement, the UK has decided not to opt in to the EU proposal, but is continuing to keep a careful eye on its
evolution.\(^\text{149}\) (Denmark, another EU member outside the civil law tradition, has also chosen not to opt in.\(^\text{150}\))

The EU proposal, as it currently stands,\(^\text{151}\) contains multiple references to the problem of clawbacks. Paragraph 9 of the preamble states:

The validity and effects of gifts are covered by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).\(^\text{18}\) They should therefore be excluded from the scope of this Regulation in the same way as other rights and assets created or transferred other than by succession. However, it is the law on succession determined pursuant to this Regulation which should specify if this gift or other form of provisions inter vivos giving rise to an immediate right in rem can lead to any obligation to restore or account for gifts when determining the shares of heirs or legatees in accordance with the law on succession.\(^\text{152}\)

In other words, if the applicable law under the choice of law rules set forth in the proposal permits clawbacks, then the gift may be clawed back. The decision on whether a gift should be clawed back would be made by a court in the country that was the habitual residence of the decedent,\(^\text{153}\) applying (ordinarily) its own law.\(^\text{154}\) When the law of another state is to be applied, only that other state’s rules of substantive law, not its choice of law rules, will be applied, avoiding renvoi.\(^\text{155}\)

Article 27, however, all but guarantees that the proposal will remain unacceptable to the UK. States may refuse to apply the law of another state “only if such application is incompatible with the public policy of the forum,”\(^\text{156}\) which might seem to give the UK an out – clawbacks seem incompatible with UK public policy. But Article 27 goes on to qualify this exception: “In particular, the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum.”\(^\text{157}\) The “clauses regarding the reserved portion of an estate” include the ways in which the reserve is calculated and in which it may be satisfied – in other words, they include clawbacks. A UK court would thus be unable to refuse to apply the clawback laws of, say, France on public policy grounds. Even the application

\(^{149}\) Lords’ Select Committee on the European Union, The EU’s Regulation on Succession, HL 75, Mar. 24, 2010, ¶17.

\(^{150}\) EU Proposal, supra note 2, pmbl. ¶36.

\(^{151}\) EU Proposal, supra note 2; see also Addendum 1, supra note 17; Addendum 2, supra note 127.

\(^{152}\) EU Proposal, supra note 2, pmbl. ¶ 9.

\(^{153}\) EU Proposal, supra note 2, art. 4: “Notwithstanding the provisions of this Regulation the courts of the Member State on whose territory the deceased had habitual residence at the time of their death shall be competent to rule in matters of successions.”

\(^{154}\) EU Proposal, supra note 2, art. 16: “Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death.”

\(^{155}\) EU Proposal, supra note 2, art. 26: Where this Regulation provides for the application of the law of a State, it means the rules of law in force in that State other than its rules of private international law.

\(^{156}\) EU Proposal, supra note 2, art. 27.1.

\(^{157}\) EU Proposal, supra note 2, art. 27.2.
of laws of non-EU members, if dictated by the choice of law rules, would be mandatory.\textsuperscript{158}

Nor is this the only reason opting in might subject UK donee beneficiaries and their successors to clawbacks. Under the proposal, once a court in the decedent’s state of habitual residence has issued a decision – possibly requiring clawbacks – all other member states (that is, other EU members that have opted in\textsuperscript{159}) would then be obliged to recognize that decision.\textsuperscript{160} Although a few grounds for non-recognition are set forth in Article 30, clawbacks alone would not justify non-recognition. The four grounds permits a state to refuse to recognize a judgment in certain situations if entered against a person who did not appear\textsuperscript{161} or was not served with process,\textsuperscript{162} or if inconsistent with another decision between the same parties.\textsuperscript{163}

UK courts (or the courts of any member state) would not only be required to recognize these judgments, but also to enforce them,\textsuperscript{164} and would have no power to review the substantive decision – the findings of fact and conclusions of law – of the foreign court.\textsuperscript{165} Opting in to the proposal would thus inevitably place the UK in the position of having its courts enforce clawbacks decreed by foreign courts against UK subjects.

Choosing not to opt in provides only limited protection. Courts in other states can, and will continue to be able to, decide inheritance cases in ways that adversely affect the interests of UK subjects, including clawbacks against UK donees and their successors. While those judgments may not be enforceable in UK courts, they will be enforceable in the courts not only in the country entering the judgment (where they would have been enforceable in any event) but also, under the proposal, in the courts of most other EU countries.

\textsuperscript{158} EU Proposal, \textit{supra} note 2, art. 25: “Any law specified by this Regulation shall apply even if it is not the law of a Member State.”

\textsuperscript{159} EU Proposal, \textit{supra} note 2, art. 1.2: “In this Regulation, ‘Member State’ means all the Member States with the exception of Denmark, [the United Kingdom and Ireland].” (Brackets in original, indicating countries that had not yet made a final decision on opting in at the time the proposal was adopted.)

\textsuperscript{160} EU Proposal, \textit{supra} note 2, art. 29: “A decision given pursuant to this Regulation shall be recognised in the other Member States without any special procedure being required.”

\textsuperscript{161} EU Proposal, \textit{supra} note 2, art. 30(a): “A decision shall not be recognised... (a) where it was given in default of appearance, such recognition is manifestly contrary to public policy in the Member State in which recognition is sought, it being understood that the public policy criterion may not be applied to the rules of jurisdiction[.]”

\textsuperscript{162} EU Proposal, \textit{supra} note 2, art. 30(b): “A decision shall not be recognised... (b) if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so[.]”

\textsuperscript{163} EU Proposal, \textit{supra} note 2, art. 30(c,d): “A decision shall not be recognised... (c) if it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which recognition is sought; (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State addressed.”

\textsuperscript{164} EU Proposal, \textit{supra} note 2, art. 33: “Decisions given in a Member State and enforceable there and legal transactions shall be carried out in the other Member States in accordance with Articles 38 to 56 and 58 of Regulation (EC) No 44/2001.”

\textsuperscript{165} EU Proposal, \textit{supra} note 2, art. 31: “Under no circumstances may a foreign decision be reviewed as to its substance.”
5. Conclusion: How does this affect the United States and other non-EU countries?

The EU proposal, as it currently stands, is clearly unacceptable to the UK and seems to have been drafted in blatant disregard of the UK’s concerns. The conflict with US law is less drastic, and at the same time the EU has no obligation to take into account the law of the US or any other non-member state. Nonetheless, the problem now facing the UK faces the rest of the non-EU world as well.

The House of Lords, considering the proposal, posed a hypothetical question involving real property in the US:

A separate issue of scope is the extent to which any EU instrument should apply to non-Member States; for example, to determine the governing law where the testator died habitually resident in the UK but having a house in Florida. We discussed the pros and cons with Professor Harris. A key consideration, in our view, would be whether the Community had competence to prescribe a rule having extra-Union consequences. It will not surprise you that the Committee takes a strict view of the scope of Article 65 TEC and we note that the new Article 69d proposed by the Reform Treaty refers to “civil matters having cross-border implications”. The instrument would therefore not apply on the facts posited above to property outside the Union.166

This seems perhaps overly optimistic. Real property is a special case, being by its nature immovable and thus permanently located within the jurisdiction of a single state. Given the inherent difficulties involved in deciding the title to real property located in the territory of another sovereign, many legal systems instead choose to recognize the state in which that property is located as the authority on title to that property.167

A better question might be what would happen where the testator died habitually resident in, say, France (the UK not having opted in to the EU proposal) leaving valuable personal property in Florida. If the French court awarded the property to A, while under Florida law it went to B, and B had other personal property in France (or in any of the other EU members that had opted into the proposal), there seems no reason to assume B’s European assets would be safe from attachment to satisfy the French judgment. Similarly, the US (or other non-EU) donee beneficiary, having assets in Europe, of a person habitually resident in an EU state allowing clawbacks might find its European assets attached to satisfy a clawback judgment against the donated US assets. As noted above, this is already possible where the assets and the court decreeing the clawback lie within a single country; the effect of the EU proposal will be to expand the number of countries in which assets might be vulnerable to the same clawback.

The question, as always, is one of degree rather than kind. Attempted clawbacks, an extraordinary and unusual device available in some US states under some


167 But see, e.g., Addendum 1, supra note 17, at 12: “Example: An Italian citizen dies in England, leaving a house there. English courts will apply English succession law (law of the place of location). Italian courts would apply Italian succession law to the whole estate including the house in England.”
circumstances, may begin to show up more frequently as foreign claimants (or US claimants claiming under foreign law) seek to enforce forced heirship rights against US donees. The process is likely to be a gradual one, and in any event can be addressed as it becomes a problem. A more likely undesirable consequence is not that clawbacks may become an actual problem for the US, but that the increased possibility may act as a deterrent to some donors.