

FREEDOM OF DISPOSITION V. DUTY OF SUPPORT: WHAT’S A CHILD WORTH?

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INTRODUCTION

Mandating financial responsibility for the care of children during one’s lifetime is without question. Child support laws have been implemented in every state in America based on the inherent duty to financially support dependent children. Some laws even extend that

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duty to provide financial support to children over the age of eighteen when the child has a disability or pursues higher education.¹

Just as entrenched is the right of a decedent to dispose of his property as he pleases, known as freedom of disposition.² Every state has intestacy provisions that provide for disposition of property after a decedent's death, trumped by specific wishes of the decedent in the form of a Last Will and Testament or any other testamentary document.³ When these two principles clash, which public policy principle should prevail, freedom of disposition or duty to financially support children?

The duty to support children should be paramount in any just legal system, especially after death when a source of financial support is no longer available. As such, testamentary freedoms should be subordinate to the duty to financially support children. In order to ensure financial protection of children, forced shares should be implemented to provide financial provisions to minor children in testate estates. Additionally, an elective share system should be adopted to provide minimum financial support to adult children, based on age, in testate estates.

This Article explores historical justifications for favoring freedom of disposition and also provides a comparative analysis of how other countries deal with the duty to support families, specifically children, after death. The selected civil jurisdictions for the focus of this Article are Spain, Louisiana and British Columbia. The selected jurisdictions under common law systems are New Zealand, Canada and the United Kingdom.

Part I provides relevant historical information about the civil and common law systems. Part II focuses on the requirement that parents provide financial support to their minor children during their lifetimes. Part III concentrates on the financial responsibilities of decedents after death to their surviving children. Part IV discusses the history and justifications of financial responsibility of decedents to surviving

1. UNIF. INTERSTATE FAMILY SUPPORT ACT § 102 cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2008) ("There is a divergence of opinion among the several states regarding the appropriate age for termination of child support. The overwhelming number of states set ages 18 (legal adulthood for most purposes), or 19, or one of those two ages and high-school graduation, whichever comes later. Relatively few states have retained the formerly popular age of 21. And, some states extend the support obligation past age 21 if the person to be supported is engaged in higher education.").

2. See generally Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569 (2016); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6-9 (1992); Irene Johnson, *There's a Will, But There's No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 105 (2011).

3. See Glover, *supra* note 2, at 571.

spouses. Part V proposes ways to balance freedom of disposition with the duty of support and the conclusion follows.

I. A TALE OF TWO LEGAL SYSTEMS

A. *Civil Law and Common Law Legal Systems*

This Article is centered on the differences in treatment of a decedent's property as applied between the two major legal systems in the world, civil and common law.⁴ The civil law system is based on black letter law and foundationally based in Roman law.⁵ Civil law is primarily practiced in continental Europe (specifically Germany, France, and Spain), Russia, China, Japan, Latin America, and parts of Africa.⁶ Civil Law was also adopted by Louisiana, the only state in the United States to do so.⁷

The civil law system generally treats a decedent's property as belonging to the family unit.⁸ In other words, the decedent's property will be primarily, if not completely, distributed within the family unit. This system models the values of a collectivism based culture.⁹

On the other hand, the common law system is based on English Law and primarily practiced in the United States, Canada, India, Australia, and the British Commonwealth.¹⁰ The common law system generally treats a decedent's property as his own and affords him the inherent right to completely dispose of the property, with a few

4. Urs Martin Laeuchli *Civil and Common Law: Contrast and Synthesis in International Arbitration*, 62 DISP. RESOL. J. 81 (2007).

5. *Id.* at 82.

6. *See id.*

7. LA. CIV. CODE; Robert A. Pascal, *Louisiana Civil Law and Its Study*, 60 LA. L. REV. 1, 1 (1999). See also José Triás Monge, *Legal Methodology in Some Mixed Jurisdictions*, 78 TUL. L. REV. 333, 333-34 (2003) which indicates Puerto Rico, a Commonwealth under the jurisdiction of the United States, adopted a mixed legal system and has continued to operate under both civil and common law.

8. *See* George A. Pelletier Jr. & Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 VILL. L. REV. 323, 325 (1966).

9. C. Harry Hui & Harry C. Triandis, *Individualism-Collectivism: A Study of Cross-Cultural Researchers*, 17 J. CROSS-CULTURAL PSYCHOL. 225 (1986). Characteristics of a collectivist culture include a variety of ideals including the following: (1) society centered behavior in which material and on material resources are pooled and the members operate interdependently; (2) consideration of the implications and consequences individual acts will have on the collective; (3) conforming and approval seeking behavior and (4) significant involvement in the lives of others. *Id.* at 229-31.

10. Laeuchli, *supra* note 4, at 82.

exceptions.¹¹ As such, the common law system models the values of an individualism based culture.¹²

B. Collectivism v. Individualism: Which Is Better?

An article by co-authors Anthropologist C. Harry Hui and Professor Harry Triandis discussed the differences between individualism and collectivism based cultures. Their research indicated that social scientists have disagreed on whether one system is better.¹³

In the article, the authors indicated social scientists who have researched collectivity-orientated individuals found they consistently acted on behalf of the common interest.¹⁴ On the other hand, individualist-oriented individuals consistently acted in their own best interests.¹⁵

Further relationships in China were fundamentally based in conformity which received both social and cultural acceptance.¹⁶ Therefore, they asserted, there was a correlation between the collectivism based culture and the observation that Chinese children exhibited fewer instances of aggressive, disruptive, and antisocial behavior than American children.¹⁷

The authors found validation to support their assertion through other cross-cultural studies. In the article, they referenced a cross-cultural study conducted by Singh, Huang, and Thompson who compared the values of American, Chinese, and Indian students.¹⁸ In their study they also found the Chinese ranked highest in “society-centered orientation” and Americans rank highest in “self-centered orientation.”¹⁹ Consistent with these results, Americans also ranked highest on the need for autonomy.²⁰

The authors also discussed another hypothesis which indicated individual based acts may have societal benefit in that individuals may serve the group by taking care of his part.²¹ Seen through these lenses,

11. Johnson, *supra* note 2, at 105–06.

12. Hui & Triandis, *supra* note 9, at 229–31. Individualism is defined as the principle of operating in the best interest of oneself. *Id.*

13. *See id.* at 226–29.

14. *Id.* at 227 (citing TALCOTT PARSONS, *THE SOCIAL SYSTEM* 60 (1951)).

15. *Id.* (citing PARSONS, *supra* note 14, at 60).

16. *Id.* at 226.

17. *Id.*

18. *Id.* at 226–27.

19. *Id.* at 227.

20. *Id.*

21. *Id.* (citing E.E. Sampson, *Psychology and the American Ideal*, *J. PERSONALITY & SOC. PSYCHOL.*, 767, 771 (1977)) (“According to Sampson (1977), this may mean social synergy. In a society of high synergy, one’s gain is everyone’s

individualism and collectivism may serve a common goal but arrive at that goal through different paths. While the society-centered and self-centered cultures appear to have completely opposite goals, as applied to the civil law and common law systems, there are some overlapping principles such as the duty to support children during life.

II. LIFETIME FINANCIAL RESPONSIBILITY: PARENTAL FINANCIAL SUPPORT

The duty to support children is codified in child maintenance laws in the civil law systems.²² The European Union (EU) member countries codified laws based on the premise that child maintenance is a legal obligation to provide financial support to children.²³

The duty to support minor children is also codified in the uniform laws, and every state in America and deeply rooted in common law jurisdictions.²⁴ Many would be surprised to know that Common Law was not the original source of legally enforceable rights to receive financial support for children.²⁵ Professor Garrison explained how child support laws evolved from Elizabethan Poor Laws which authorized need based support to family.²⁶

Under both systems, the primary concern is the financial stability of the children.²⁷ Scholars have shown that single parents and divorced

gain. The ‘individual by the same act and at the same time serves his own advantage and that of the group . . . [which is the society, or even the nation] and non-aggression occurs not because people are unselfish and put social obligation above personal desires but because social arrangements make these two identical.’”).

22. See KAROLINA BEAUMONT & PETER MASON, DIRECTORATE GENERAL FOR INT’L POLICIES, CHILD MAINTENANCE SYSTEMS IN EU MEMBER STATES FROM A GENDER PERSPECTIVE 16 (2014).

23. *Id.* at 5 (“In straightforward terms, child maintenance may be defined as ‘a regular contribution from a non-resident parent towards the financial cost of raising a child, usually paid to the parent with whom the child lives most of the time.’ There are two reasons why the non-custodial parent should financially contribute to the wellbeing of the child. Firstly, in all EU countries, both parents have the legal obligation to financially support their child at least until his or her majority. Secondly, experience shows that the custodial parent, who is responsible for the child on a daily basis, should be assisted.”).

24. Marsha Garrison, *Autonomy or Community?: An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41, 44 (1998).

25. *Id.* at 50 (“A hundred years after Blackstone, American family recognized a parental support obligation that was enforceable on behalf of the child, rather than public, and which applied whether or not the child was in danger of becoming a public charge.”).

26. *Id.* at 49 (“The Laws restricted direct monetary assistance to those incapable of self-help; rather than receiving support in their parents’ home, children thus were indentured as apprentices.”).

27. BEAUMONT & MASON, *supra* note 22, at 7.

parents are the most vulnerable to poverty.²⁸ In the EU, child maintenance is required to specifically protect children against poverty.²⁹ If the child maintenance provisions do not provide satisfactory results, some countries guarantee child support.³⁰

In American jurisdictions, Professor Garrison explained how the law shifted away from the notion of family support based on morality to a legally enforceable system, with support based on equity, rather than need.³¹ In developing the laws to determine rights to lifetime financial support, the courts found a way to balance the economic interest of spouses, and ex-spouses, to receive alimony with the duty to support minor children without eliminating one or the other.³²

In America, the continuity-of-expenditure model (COEM) has made the greatest impact on child support laws.³³ The COEM operates from either the percentage-of-obligor-income formula or the income-shares formula.³⁴ Both formulas base the support amount on the parental responsibility to financially support the child or children.³⁵

Under both the common law and civil law systems, the intent of the parent is not a factor in determining the award amount.³⁶ Both systems enforce the duty to financially support children when a parent

28. Garrison, *supra* note 24, at 42, 65. See generally Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 1–3, 16–17 (2018).

29. BEAUMONT & MASON, *supra* note 22, at 19.

30. *Id.* at 6 (“When these legal provisions do not result in a satisfactory resolution, child support can be guaranteed in some countries by the State (in Austria, Estonia, Germany, Hungary, Italy and Sweden); by local authorities (in Czech Republic, Denmark and Finland); by special funds (in Latvia, Lithuania, Luxembourg, Poland and Portugal); or by a special administrative agency (in the Netherlands and the UK). In the other EU countries, child maintenance can be guaranteed by private agencies or insurance companies in certain cases. In most cases, child maintenance is advanced by the appointed body only after exhaustion of legal remedies, such as enforcing payment, sending a bailiff, and seizing and selling of assets.”).

31. Garrison, *supra* note 24, at 51.

32. For the detailed discussion of the evolution and rules regarding family’s right to financial support, see *id.* at 58–59.

33. *Id.* at 59.

34. *Id.* at 59–60. The “percentage-of-obligor income” formula is based on a percentage that varies with the number of children to be supported. This method is based on consumer surveys and model typical expenditure patterns in intact families and applied to the noncustodial parent’s income to determine the child support amount. The “income-shares” formula is also percentage based but the formula is calculated to exclude variable expenses to produce a standardized amount. Further, this method uses the income of both parents to and prorates the amount between the parents and factors in the child care costs.

35. *Id.* at 60–61.

36. See Carol Rogerson, *The Child Support Obligation of Step-Parents*, 18 CAN. J. FAM. L. 9, 53–54 (2001); see also Sue Nations, *Louisiana’s Child Support Guidelines: A Preliminary Analysis*, 50 LA. L. REV. 1057, 1059 (1990).

leaves the relationship, voluntarily or involuntarily.³⁷ These same concerns should be applied to protect children in testate estates. So while the two legal systems address the obligation of support through different approaches, they share the common goal of financial priority to children.

III. DEATH TIME FINANCIAL RESPONSIBILITY

A. Intestate Estates

The civil law jurisdictions continue the policy of making financial provision for children through intestate provisions. The common law system also includes minimum provisions for children in intestate estates. In both systems, the right to receive a share of the decedent's estate is based on their status as a child, regardless of age.³⁸ The children's interests are only subordinate to a surviving spouse in both legal systems.³⁹

B. Testate Estates—Civil Law

The Government has a vested interest to ensure decedents leave their families with adequate resources. In the civil law system, the guiding principle of treating property as property of the family significantly increases the likelihood that most of a decedent's resources will be provided to the family. Family maintenance laws range from setting aside minimum shares to forcing the entire estate to the family.⁴⁰

In the English system, The Inheritance Act 1975 authorized the spouse and dependents of the decedent to apply for provision from the decedent's estate.⁴¹ The other family protection provision, forced heirship, is based on the principle that children, by virtue of their status, are entitled to a portion of their parent's estate after death.⁴²

37. See Rogerson, *supra* note 36, at 53–54; Nations, *supra* note 36, at 1059.

38. See UNIF. PROBATE CODE § 2-103(a)(1) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2008); see also Estate Administration Act, R.S.B.C. 1979, c. 114, s. 96, 98 (Can.).

39. See § 2-103(a)(1); see also Estate Administration Act s. 96, 98.

40. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1210–11, 1243–44.

41. Helene S. Shapo, "A Tale of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 708 (1993).

42. Ryan McLearn, *International Forced Heirship: Concerns and Issues with European Forced Heirship Claims*, 3 EST. PLAN & COMMUNITY PROP. L.J. 323, 324–26 (2011).

Forced heirship provisions are prevalent in civil law jurisdictions.⁴³ The next sections provide a range of civil law family maintenance provisions, with a focus on child maintenance, that range from most restrictive to minimally restrictive provisions.

1. SPAIN—RESTRICTIVE

Spain has one of the most restrictive provisions for inheritance, with its forced share provisions for children and descendants.⁴⁴ The forced share amount sets the descendants' share at two-thirds of the hereditary portion if there is at least one descendant.⁴⁵ The right to receive a forced share is not subject to waiver.⁴⁶

The forced share may be satisfied with *inter vivos* gifts and/or gifts *motis causa* to permissible recipients.⁴⁷ If *inter vivos* gifts are made and the amounts extend beyond one-third to one-half share of the fictive hereditary mass, they are subject to clawback.⁴⁸ The clawback provisions are necessary to prevent decedents from avoiding the requirement by gifting the property before death.

Exceptions to the forced heirship rules include disinheritance for cause or unworthiness.⁴⁹ Disinheritance for cause is exclusion from the estate initiated by the testator in his will which must expressly state the grounds for disinheritance.⁵⁰ Grounds for unworthiness may also be

43. Barbara C. Spudis, *Avoiding Civil Law Forced Heirship by Stipulating that New York Law Governs*, 20 VA. J. INT'L L. 887, 887 (1980).

44. CÓDIGO CIVIL [C.C.] [CIVIL CODE] arts. 806, 807 (Spain) *translated in* MINISTERIO DE JUSTICIA, SPANISH CIVIL CODE (2013), <http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf> [<https://perma.cc/4HUS-J8QJ>].

45. Art. 808 (“Two thirds of the estate of the father and mother constitute the forced share corresponding to children and descendants. However, the parents may dispose of one of the two thirds which form the forced share, to apply it as betterment in favour of their children or descendants. The remaining third shall be freely disposed of.”). Exceptions for betterment are further discussed in Articles 823–33.

46. Art. 816.

47. Arts. 819, 820; *see also* Sergio Cámara Lapuente, *Forced Heirship in Spanish Law*, at 11 (July 25, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035829 [<https://perma.cc/QXT8-MHHS>], *forthcoming in* 3 FREEDOM OF TESTATION AND FAMILY CLAIMS (Kenneth G C Reid, Marius J de Waal & Reinhard Zimmermann eds., forthcoming 2018)).

48. Arts. 819, 820; *see also* Aaron Schesbach, *Of Charities and Clawbacks: The European Union Proposal on Successions and Wills as a Threat to Charitable Giving*, 17 COLUM. J. EUR. L. 447 (2011) (explaining that the descendant's share will be reduced by an *inter vivos* gifts received from the testator and that there is no statute of limitations for certain clawbacks, labeled as “[d]e las legitimas”).

49. Arts. 756, 848, 853.

50. Art. 849.

included the will but is not required.⁵¹ The heirs have the burden to prove the grounds are false or unfounded.⁵²

Some of the grounds indicated for unworthiness include abandonment, attempted murder, false accusations of crimes, and acts of violence.⁵³ The grounds for disinheritance include the same grounds set forth for unworthiness and further include mistreatment, refusal to support, and attempts against the testator's life.⁵⁴ The Spanish Code has strict protections for descendants and also provide for a range of exceptions to permit disinheritance for cause.

2. LOUISIANA—MODERATE

Louisiana is the only state in the United States that follows the civil law system.⁵⁵ Under the Louisiana law, the forced share is

51. See, e.g., art. 756.

52. Art. 850.

53. The following persons are incapable of succeeding on grounds of unworthiness:

1. Parents who should abandon, prostitute or corrupt their children.
2. A person who is sentenced in court for an attempt to take the life of the testator, his spouse, descendants or ascendants. If the offender should be a forced heir, he shall forfeit his right to his forced share.
3. A person who has accused the testator of a crime for which the law provides a sentence of long-term jail or imprisonment (*presidio o prisión mayor*), where the accusation is declared to be a calumny.
4. The overage heir who, being aware of the testator's violent death, should not have reported it within one month to the authorities, unless the authorities should have already acted ex officio. This prohibition shall cease in cases where, according to the law, there is no obligation to make an accusation.
5. A person who, by threats, fraud or violence, should force the testator to make a will or to change it.
6. A person who, with the same means, should prevent another from making a will, or from revoking a will previously made, or should replace, hide or alter another subsequent will.

Art. 756.

54. Art. 853 ("The following grounds shall also be just grounds to disinherit children and descendants, as well as those provided in article 756 under numbers 2, 3, 5 and 6: 1. Having refused, without legitimate reason, to support the parent or ascendant who disinherits him. 2. Having mistreated him in deed or seriously insulted him in speech."); *id.* art. 854 ("The following grounds shall be just grounds to disinherit parents and ascendants, as well as those provided in article 756 under numbers 1, 2, 3, 5 and 6: 1. Having forfeited parental authority on the grounds expressed in article 170. 2. Having refused maintenance to his children or descendants without legitimate reason. 3. An attempt by one of the parents against the other's life, if no reconciliation between them has taken place.").

55. Pascal, *supra* note 7, at 1.

referred to as the legitime.⁵⁶ The portion not subject to forced share is known as the disposable portion which the decedent may devise to anyone.⁵⁷ The legitime provides a forced share for children under the age of twenty three and for mental or physically disabled children at any age.⁵⁸

The forced share may be avoided through disinheritance for just cause.⁵⁹ Examples of just cause include acts of violence against the parent or conviction of a crime.⁶⁰ The burden of proof is on the testator to establish proof for the reason of *disinherison*.⁶¹ If a decedent attempts to circumvent the legitime and the estate is not sufficient to satisfy the

56. LA. CIV. CODE ANN. art. 1494 (2018) (“A forced heir may not be deprived of the portion of the decedent’s estate reserved to him by law, called the legitime, unless the decedent has just cause to disinherit him.”).

57. Art. 1495 (“The portion reserved for the forced heirs is called the forced portion and the remainder is called the disposable portion.”).

58. Art. 1493 (“Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.”).

59. LA. CIV. CODE ANN. art 1617 (2018) (“A forced heir shall be deprived of his legitime if he is disinherited by the testator, for just cause, in the manner prescribed in the following Articles.”).

60. Art. 1621.

A parent has just cause to disinherit a child if:

- (1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient.
- (2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury.
- (3) The child has attempted to take the life of a parent.
- (4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death.
- (5) The child has used any act of violence or coercion to hinder a parent from making a testament.
- (6) The child, being a minor, has married without the consent of the parent.
- (7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death.
- (8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time.

Id.

61. Art. 1624

requirements, then *inter vivos* gifts made within three years of death are subject to clawback to satisfy the forced portion.⁶²

Among the forced share jurisdictions, Louisiana is a moderate version. Louisiana limits the clawback to three years and limits the age and circumstances for eligible descendants.⁶³ Unlike Spain, Louisiana decedent's have a possibility to restore full testamentary disposition if the children are above the age of 23 and have no physical or mental incapacities.⁶⁴

3. BRITISH COLUMBIA—LEAST RESTRICTIVE

The family maintenance regime for British Columbia is modeled after the New Zealand Act of 1920 and properly referred to as the Wills Variation Act.⁶⁵ If the testator does not leave adequate provision for his children, then any one of the children may make application to the court for a greater share of the estate.⁶⁶ The statutes specifically permit spouses and children to apply for relief.⁶⁷ Because the status is not specifically need based, there is no certainty a request will be granted.⁶⁸ Further, whether adequate support was provided is based on a subjective standard.⁶⁹

The Canadian Supreme Court has broadly interpreted the adequate support standard to provide a moral obligation to support non-dependent adult children as well.⁷⁰ In *Tataryn*, the testator disinherited

62. LA. CIV. CODE ANN. art 1508 (2018) (“When the property of the estate is not sufficient to satisfy the forced portion, a forced heir may recover the amount needed to satisfy his legitime from the donees of *inter vivos* donations made within three years of the date of the decedent's death, beginning with the most recent donation and proceeding successively to the most remote.”).

63. *See id.*

64. *See infra* notes 39, 48 and accompanying text.

65. LAW REFORM COMM'N OF B.C., REPORT ON STATUTORY SUCCESSION RIGHTS, LRC 70 (Dec. 1983) (the governing statute is the *Estate Administration Act*).

66. *Id.*

67. *Id.*

68. *Walker v. McDermott*, [1931] S.C.R. 94, 96 (Can.) (“What constitutes “proper maintenance and support” is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence.”).

69. Wills Variation Act, R.S.B.C. 1979, c. 435, s. 2(1) (Can.) (“Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the wife, husband or children.”).

70. *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 808 (Can.) (“The first consideration in determining what is ‘adequate, just and equitable’ in the circumstances of the case must be the testator's legal responsibilities during his or her lifetime.

two of his adult sons in his Last Will and Testament.⁷¹ The court recognized the testator only owed a legal duty to his spouse, but still granted the disinherited sons a share of the estate.⁷²

In determining whether to grant or refuse the request of an applicant, the court may consider misconduct of the applicant.⁷³ While the statutory provisions do not outline applicable misconduct, the cases include reasons such as satisfaction by gifts made during lifetime, abandonment and neglect as valid bases to disinherit.⁷⁴ Reasons such as testator's personal feelings or disappointments about the children have not been sufficient reasons to deny applications for variation.⁷⁵ The burden is on the heir to prove the basis for disinheritance is false.⁷⁶

British Columbia does have a specific forced heirship codified, but courts have imposed the moral obligation and have routinely included disinherited adult children.⁷⁷ Because it is unnatural to disinherit children, policies to disallow disinheritance remain prevalent in civil law systems and specifically in British Columbia.

Maintenance and provision for basic needs may or may not be sufficient to meet this legal obligation.”).

71. *Id.* at 810–11.

72. *Id.* at 809.

73. Wills Variation Act, R.S.B.C. 1996, c. 435, s. 6(b) (Can.).

74. *Hall v. Hall*, 2011 CanLII CA038102, ¶ 45 (Can. B.C. C.A.). The court denied an adult son's appeal regarding his application for variance based on the son's neglect of the testator. *Id.* (“Tony and Jean had been estranged at his instance not only for the eight years prior to her death, but for lengthy periods from 1980 to 1989 and in the mid-1990's. Their final alienation followed a relatively minor confrontation while she was in hospital. Instead of showing concern for her illness and seeking reconciliation, Tony had nothing more to do with her.”). *Sammon v. Stabblers et al.*, 2000 CanLII S043562, ¶ 28 (Can. B.C. C.A.) (“The law makes it clear that when assessing whether a testator has met obligations to adult independent children, the onus is on the plaintiff to establish on a balance of probabilities that there was an invalid or irrational reason for the failure to provide.”).

75. *Clucas v. Royal Trust Corp. of Canada*, 1999 CanLII A973288 ¶ 12 (Can. B.C. S.C.) (summarizing *Bell v. Roy Estate* (1993), 75 B.C.L.R. 2d 213 (B.C. C.A.)) (“Circumstances that will negate the moral obligation of a testatrix are “valid and rational” reasons for disinheritance. To constitute “valid and rational” reasons justifying disinheritance, the reason must be based on true facts and the reason must be logically connected to the act of disinheritance.”).

76. *Bell*, 75 B.C.L.R. 2d ¶ 36.

77. *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 (Can.); *see also Clucas v. Royal Trust Corp. of Canada*, 1999 CanLII A973288, ¶ 12 (Can. B.C. S.C.) (“Examples of circumstances which bring forth a moral duty on the part of a testator to recognize in his Will the claims of adult children are: . . . an implied expectation on the part of an adult child”); *McBride v. Voth*, 2010 CanLII S083207, ¶ 130 (Can. B.C. S.C.) (“A moral duty may arise where the testator's conduct has created a bona fide expectation on the part of the plaintiff to receive a benefit which does not come about on death.”); *McBride*, 2010 CanLII, ¶ 128 (“A number of years ago, this Court identified circumstances that might support or negate a testator's moral duty to recognize the claim of an adult child”).

C. Testate Estates—Common Law Jurisdictions

The government has a vested interest to ensure decedents leave their families with adequate resources in common law jurisdictions as well. In the common law system, the guiding principle allows decedents to exercise testamentary freedom over their property. With the testator's intent taking priority, the risks of disinheritance are higher. The next sections focus on family maintenance provisions for common law testate estates.

1. NEW ZEALAND—MOST RESTRAINT

New Zealand has led the way in providing protections against disinheritance for children through the Family Protection Act 1955 (FPA).⁷⁸ Under the FPA, if a decedent did not provide sufficient provision for certain categories of people, including children, then they were eligible to apply for provision from the estate.⁷⁹ Among those eligible to apply were children, grandchildren, and stepchildren who were maintained by the decedent or legally entitled to be maintained by the deceased.⁸⁰ Eligible applicants must apply within twelve months from the date of administration of the estate.⁸¹

The court has the discretion to order whatever provision it deems best for eligible applicants who apply for support.⁸² The court also has

78. FAMILY PROTECTION ACT 1955 [FPA] (N.Z.).

79. S 4(1) ("If any person (referred to in this Act as the **deceased**) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the court may, at its discretion on application so made, order that any provision the court thinks fit be made out of the deceased's estate for all or any of those persons.").

80. An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons:

(a) the spouse or civil union partner of the deceased:

(aa) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death:

(b) the children of the deceased:

(c) the grandchildren of the deceased living at his death:

(d) the stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death:

(e) the parents of the deceased.

S 3(1).

81. S 9(2)(b).

82. S 4 (1).

discretion to impose conditions or deny support to applicants based on character and conduct and the discretion to make payments over a period of time or in a lump sum.⁸³

As a common law jurisdiction, New Zealand was the first to prioritize duty of support over a decedent's freedom of disposition. There is no forced share provision specifically stated, but there is enough flexibility in the law for the court to use its judgment to make provisions for dependents. This elective system provides a direct method for dependents to use estate challenges to receive support. It also abdicates a lot of power to the judicial system and serves as one of the most restrictive versions of testamentary freedom.

2. CANADA—MODERATE RESTRAINT

The Canadian family maintenance provisions model the New Zealand FPA.⁸⁴ The act is triggered when dependants,⁸⁵ or someone on their behalf, file an application with the court alleging the decedent did not provide adequate financial provision in the estate or the intestate estate was inadequate.⁸⁶ Once the application is made, dependants must establish their relation to the decedent, their financial circumstances, and provisions made by the decedent during his lifetime for the applicants and any other dependents.⁸⁷

This is a court based process so the judge is permitted to hear any evidence deemed relevant to make the proper determination of support.⁸⁸ The judge has a lot of discretion to determine the proper amount and manner of support. The judge has the option to order the support be paid from part or all of the estate, payable from income or

83. S 5.

84. Family Relief Act, R.S.N.L 1990, c F-3 [FRA] (Can.); see Catherine Valcke, *Quebec Civil and Canadian Federalism*, 21 YALE J. INT'L L. 67, 69 (1996) (stating Quebec is the only province that is governed by civil law, the other nine provinces are governed by common law); see also FPA 1955 (N.Z.).

85. The correct spelling according to the Canadian Provisions is dependants, therefore, this version will be used in this section. Family Relief Act, R.S.N.L. 1990, c F-3, s 2(c).

86. S 3(1) ("Where a person (a) dies testate without having made in his or her will adequate provision for the proper maintenance and support of his or her dependants or 1 of them; or (b) dies intestate and the share under the Intestate Succession Act of the intestate's dependants or 1 of them in the estate is inadequate for their or his or her proper maintenance and support, a judge, on application by or on behalf of those dependants, or 1 of them, may in his or her discretion and taking into consideration all relevant circumstances of the case, notwithstanding the provisions of the will or the Intestate Succession Act, order that adequate provision shall be made out of the estate of the deceased for the proper maintenance and support of the dependants or 1 of them.").

87. S 5(c), (d), (f).

88. S 5(2).

capital, lump sum or periodic payments, held in trust or satisfied by payment of specified property.⁸⁹

The judge may deny the application if it is not filed within six months of the grant of probate of the will.⁹⁰ A judge may also deny if the dependants' character or conduct was such that they should not be provided for under the act, or the decedent left proper justification, in writing, for disinheritance.⁹¹

While the primary goal is to make sure the dependants have proper financial support after the loss of a financial supporter, these provisions essentially grant the judge the authority to re-design each estate based on his or her moral code or judgement. While we trust judges to use the law to make judgments in most cases, such as child support for a non-custodial parent, there should be guidelines for judges to ensure consistency. While this system preserves testamentary freedom, it still provides leeway for judges to provide financial support to dependants of the testator.

3. UNITED KINGDOM—LEAST RESTRAINT

England, a common law jurisdiction, adopted the Inheritance (Family Provision) Act of 1938 which modeled the New Zealand Act.⁹² Under the Inheritance Act, the dependents may petition the court because the decedent did not adequately provide for his children.⁹³ If the court agreed that adequate provisions were not provided, then the court would have the authority to provide assets or resources from the estate to the children.⁹⁴

The Inheritance (Provision for Family and Dependents) Act of 1975 repealed and replaced the Family Provision Act.⁹⁵ While there are still no formal provisions that specifically mandate a forced share, children are among the class of potential applicants who may make a claim against the estate for support even if they were excluded in the will.⁹⁶

89. S 6.

90. S 14(1).

91. S 5.

92. Inheritance (Family Provision) Act 1938, 16 Geo. 6 c. 45 (Eng.); FPA 1955 (N.Z.).

93. Inheritance (Family Provision) Act, 6c. 45 § 1.

94. *Id.*

95. Inheritance (Provision for Family and Dependents) Act, 1975, c. 63 (Eng.).

96. *Id.* § 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: . . . (c) a child of 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

While these provisions do not provide any guarantee of support to children, they do provide the option to receive reasonable financial provision from the estate. These laws impose minimal restraint on the freedom of disposition of a decedent.

IV. ELECTIVE SHARE—A MODEL FOR PROTECTING CHILDREN

As previously mentioned, governments have a vested interest to ensure decedents leave adequate financial provision for their surviving family members. Under the English common law surviving husbands received curtesy rights and surviving wives received dower rights.⁹⁷

As to surviving spouses, laws have already been enacted and updated to ensure proper support is available after the death of the spouse. The majority of the common law jurisdictions in the United States have repealed dower and curtesy laws and replaced them with the elective share or community property regime.⁹⁸ Now, the risks of complete disinheritance of spouses have been eliminated.

Community property operates on the principle that each spouse owns a one-half vested interest in the marital property.⁹⁹ At the decedent spouse's death, he can only devise his half of the community property.¹⁰⁰ The surviving spouse owns her own one half interest of the

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.”).

97. 25 AM. JUR. 2D *Tenancies Created by Assignment; Tenancy by the Dower and by the Curtesy* § 35 (2004) (“A tenancy in dower, or by the curtesy in jurisdictions where curtesy is similar to dower, is created by an assignment of dower or curtesy. Both a tenant in dower and a tenant by the curtesy hold a life estate, with the usual rights, duties, and liabilities incident to a life estate, and the legal relationship of the surviving spouse to the heirs of the deceased spouse is the same as that of a life tenant to the holders of the remainder. Like any other life estate, the estate of a tenant in dower or by the curtesy may be conveyed and may be subject to the claims of the tenant's creditors.”).

A surviving spouse who receives dower or curtesy, rather than taking under a will or intestate succession statute, is not considered the decedent spouse's heir at law. A tenancy in dower is not an estate of inheritance because it never comes into existence if the wife or husband holding that interest predeceases the intestate.

98. The elective share is based in statutory law, not common law, but is used by a majority of the jurisdictions in the United States. In the United States, every state, except Georgia, adopted has adopted either the elective share or community property when they abolished dower and curtesy. Georgia abolished dower and curtesy. *See generally* GA. CODE ANN. § 53-1-3 (2017) (“There is no right of dower or tenancy by curtesy in this state.”); *see also* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 470 (8th ed. 2009) (indicating the nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin).

99. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 98.

100. *Id.*

community estate so there is no need for a minimum share of the decedent's spouse's estate.

In separate property states, each person of the marriage owns whatever property he or she brings to the marriage or earns during the marriage.¹⁰¹ It would be unfair to look at the contributions to the marriage strictly from a monetary or property titling perspective. Couples generally agree what each party will contribute to the marriage. Therefore, the breadwinner spouses should not have the ability to disinherit their stay at home spouses based on circumstances to which they both agreed.

Protecting spouses from disinheritance is based on multiple principles. The first principle, the partnership theory, is founded on the principle that parties to the marriage contribute in various ways to the success of the marriage.¹⁰² Even if the surviving spouses did not earn a salary through a traditional wage paying job, they still provided contributions to the marriage that provided flexibility for the working spouses.

The UPC currently follows the partnership theory reflecting the view that a marriage is an economic partnership.¹⁰³ The elective share operates by providing for a minimum percentage of a decedent's estate for surviving spouses and includes probate and nonprobate assets.¹⁰⁴ The augmented estate was implemented to prevent the decedent spouse from effectively disinheriting his spouse by transferring his property to non-probate assets via joint property schemes and will substitutes such as trusts.¹⁰⁵

101. Shapo, *supra* note 41, at 709.

102. *Id.* at 722.

103. UNIF. PROBATE CODE pt. 2 cmt. (2008) ("The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993 and 2008. The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both the common-law and community-property states when a marriage ends in divorce.").

104. *Id.* ("[T]he elective share amount is equal to 50 percent of the value of the "marital-property portion of the augmented estate." The marital-property portion of the augmented estate, which is determined under Section 2-203(b), increases with the length of the marriage. The longer the marriage, the larger the "marital-property portion of the augmented estate." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of 15 years than in a marriage of 15 days."); *see also id.* ("As defined in Section 2-203, the "augmented estate" equals the value of the couple's combined assets, not merely the value of the assets nominally titled in the decedent's name.").

105. *See id.*

The augmented estate is defined as Section 2-203, the "augmented estate" equals the value of the couple's combined assets, not merely the value of

The other primary justification for the elective share is the support theory. The support theory is founded on the principle that spouses have a legal duty to support each other, and that duty extends beyond death.¹⁰⁶ Based on the support theory, jurisdictions vary on the amounts awarded, but a typical award of thirty percent is coincidentally the same fraction used in the obsolete dower provisions.¹⁰⁷ Under this support regime, each spouse has a right to access property accumulated over the course of the marriage, similar to the partnership theory.¹⁰⁸

The fact that a surviving spouse receives a substantial amount from the decedent's estate does not automatically ensure that children will ultimately receive any portion of the deceased parent's estate.¹⁰⁹ If the surviving spouse is limited to an elective estate that would leave fewer assets available to care for any children if they are also disinherited or provided inadequate support.

Whether the surviving spouse receives the property through community property or elective share, surviving spouses are entitled to minimum financial protections. The decedent's surviving children should have similar financial protections.

V. PROPOSAL

Determining a balance between a decedent's responsibility and testamentary freedom requires an evaluation of how much freedom

the assets nominally titled in the decedent's name. More specifically, the "augmented estate" is composed of the sum of four elements:

Section 2-204 – the value of the decedent's net probate estate;

Section 2-205 – the value of the decedent's nonprobate transfers to others, consisting of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse;

Section 2-206 – the value of the decedent's nonprobate transfers to the surviving spouse, consisting of will-substitute-type inter-vivos transfers made by the decedent to the surviving spouse; and

Section 2-207 – the value of the surviving spouse's net assets at the decedent's death, plus any property that would have been in the surviving spouse's nonprobate transfers to others under Section 2-205 had the surviving spouse been the decedent.

Id.

106. *Id.* ("Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate.")

107. *Id.* ("The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need.")

108. Shapo, *supra* note 41, at 722.

109. For instance, if the surviving spouse remarries, the amount she receives from the elective estate of her deceased husband may be subject to an elective share for a subsequent spouse or lost in property division from a divorce.

should be restricted. As we respect a testator's right to dispose of his property, that right should be tempered when the parent dies leaving surviving children or legal dependents, including adult children with disabilities.

This Article previously discussed the laws that provide financial protection for children during life through child support laws and inheritance rights in intestate estates.¹¹⁰ This article also discussed the financial protections for surviving spouses.¹¹¹

Further, this Article discussed the financial provisions for surviving children in testate estates in various international jurisdictions operating under civil and common law jurisdictions.¹¹² The prevailing principles were based on the duty to support or moral obligation to support children. These same principles justify creating provisions for financial support for children who were disinherited or left inadequate support in testate estates.

The selected jurisdictions varied on methods and amount of financial support but there were common policy themes among the various jurisdictions. First, minor children were consistently among the class of people who qualified for a forced share or to apply for maintenance. Second, the subject property was not limited to probate property, and specifically included nonprobate property and lifetime gifts to others. Third, exceptions provided for disinheritance for cause. The following multifaceted proposal is consistent with these policies and outlines a model for the Uniform Law Commissioners, and ultimately, American states, to adopt.

A. Forced Shares for Minor Children

Minor children and children with physical and mental disabilities that affect their ability to live independently should receive forced shares in decedent testate and intestate estates.¹¹³ The forced share estate should include the augmented estate model, including clawback provisions, currently used to satisfy a surviving spouse's elective share.¹¹⁴ The amount of the forced share should be thirty percent for the

110. *See supra* Sections II, III.A.

111. *See supra* Section IV.

112. *See supra* Sections III.B–C.

113. All references to children in this section refer to minor children.

114. UNIF. PROBATE CODE § 2-203(a) (2008).

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;

first two children and fifty percent with three or more surviving children if there is no surviving spouse.

If the decedent left a surviving spouse and only children of the relationship, and left all of his property to the surviving spouse; then the forced share should be limited to thirty percent. If decedent left the entire estate to the surviving spouse and decedent had minor children outside of the marriage, then the forced share amount should be fifty percent split between all children.

Wisconsin is not a forced share jurisdiction but, it has a special allocation provision for minor children.¹¹⁵ While these provisions provide a great start, there is no specified amount. As a result, the provisions are not enough to provide the type of financial protection children in Louisiana enjoy and all American children should enjoy.

In addition, the Wisconsin statutory provisions provide an exemption from the support provisions if the representative for the decedent's estate established that adequate support is already available through the surviving parent.¹¹⁶ This creates a conflict of interest between the surviving spouse and surviving children, especially if the child is not a child of the marriage. For those reasons, the Wisconsin statutory provisions are inadequate.

Using a fixed percentage model provides balance for support between the surviving spouse and children. The COEM is insufficient and inappropriate to determine support in estates. The COEM uses resources from both parents to determine the appropriate support amount.¹¹⁷ As a result, a fixed percentage model is the appropriate method to allocate support. By adopting this model, children in testate and intestate estates would receive the same financial protection.

B. Adult Children Financial Support

Adult children should also have an option to receive a part of the decedent's estate, subordinate to the claims of the surviving spouse and

- (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.

Id.

115. WIS. STAT. § 861.35(1m) (2009–10) (“If the decedent is survived by a spouse, domestic partner, or by minor children, the court may order an allowance for the support and education of each minor child until he or she reaches a specified age, not to exceed 18, and for the support of the spouse or domestic partner. This allowance may be made whether the estate is testate or intestate. If the decedent is not survived by a spouse or domestic partner, the court also may allot directly to the minor children household furniture, furnishings, and appliances.”).

116. *Id.*

117. *Supra* notes 33–35 for explanation of COEM.

minor children. This process should model the Family Protection Act in New Zealand.¹¹⁸ No minimum amount of support should be awarded but adult children should have the option to apply for financial support if they were disinherited or left inadequate support.

Rather than leave the decision to the discretion of judges, this Article proposes guidelines for courts to use in determining whether and under what circumstances financial support should be granted. First, the application for support will have a six month statute of limitations from the date of formal notice of administration. This timeframe balances the need for orderly administration with adequate opportunity to submit an application.

Applicants would be required to provide financial disclosures of available financial resources. While the application should not be strictly based on need, this information would be necessary to determine an appropriate amount to award, if any, while balancing the testamentary freedom with moral obligation to support. Just as adult children in intestate estates are not excluded, there should be a process to provide financial maintenance or support for adult children in testate estates.

Finally, the process for determining support should be based on age and circumstances. While there is no legal requirement to financially support adult children in most jurisdictions, children between the ages 18–25 years are not necessarily self-sufficient. There is more of a moral obligation to support these children because they are the most likely to be financially vulnerable.

As a result, children between those ages should have presumptive approval. The court should focus on establishing an appropriate amount of support, not whether to award support, unless disinheritance is for cause as established in the next section. Further, adults 26 years and older should also have the opportunity to apply for support. Canada's legal system, primarily the courts, imposes a moral obligation to support adult children. American legal systems should follow that model for adult children 26 years and older. These adult children should be required to establish need and their claims would be subordinate to minor children, surviving spouses, and young adults between the ages 18–25.

C. Disinherit for Cause

Testators have their reasons for disinheriting children. Because disinheriting a child is generally perceived as an unnatural act, children may view this act as a betrayal. Feelings of betrayal invite will

118. See FPA 1955 (N.Z.).

contests. Because there is no formal process, undue influence has been used as proxy to force an inheritance.¹¹⁹

Some reasons children may be disinherited include acts of violence, bad behavior, or lack of relationship. A lack of a relationship may be due to distance caused by a rift in the relationship between the custodial and noncustodial parent. Other contributing factors may include the custodial parent's intentional interference with visitation or complete apathy by the noncustodial parent.

Whatever the reason a parent may decide to disinherit a child, those reasons are inapplicable as a basis to deny a minor child lifetime support via child support and maintenance laws. As such, disinheritance for cause should not apply to minor children or children with disabilities at any age. Children should not be held to a higher standard than spouses. In most jurisdictions, surviving spouses do not lose the right to an elective share because of a breakdown in the relationship.¹²⁰ Disinheritance for cause should be limited to the most serious circumstances, similar to those set in Louisiana, including the following behavior and circumstances:

(1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient.

(2) The child has been found guilty, of cruel treatment, crime, or grievous injury towards a parent.

(3) The child has attempted to take the life of a parent.

(4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death.

(5) The child has used any act of violence or coercion to hinder a parent from making a testament.

(6) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death.

These standards are a compilation of the standards set forth for disinheritance in civil and common law jurisdictions.¹²¹ Most, if not all, of the stated criteria have objective methods to prove. Therefore, the burden to establish cause should be on the testator. The accused person would have the opportunity to dispute the cause by preponderance of evidence.

119. See generally Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 42 (2008); Laurie Dearman Clark, Comment, *Louisiana's New Law on Capacity to Make and Receive Donations: "Unduly Influenced" by the Common Law?*, 67 TUL. L. REV. 183, 221-22 (1992).

120. The breakdown in relationship reference does not include neglect or abandonment.

121. See *supra* Section III.

Requiring forced shares and opportunities to apply for support may also promote family harmony. When there are multiple children and some of the children are completely disinherited, it will likely affect the relationship between the siblings. Testator will not be around to deal with the consequences; therefore testator should have a moral obligation to refrain from creating disharmony between the surviving family members. Therefore, all children regardless of age, should have an opportunity to share in the estate.

CONCLUSION

By adopting the proposals in this Article, children would be eligible or required to receive support after the death of a parent. Just as child support orders are enforced regardless of the relationship of the parents, and regardless of the relationship with child, this duty of support should extend to minor children after death in testate and intestate estates.

As this Article has demonstrated, the two main law systems approach freedom of disposition and the duty to support in similar fashion at key stages of life, except one. The civil and common law systems are in sync as applied to child maintenance and support laws that mandate financial support for minor children during life. The two systems are also in sync for spousal and children's share of intestate estates and for spousal shares in testate estates.

The civil and common law systems depart at providing minimum financial support for children in testate estates. While the civil law jurisdictions provide, at a minimum, the opportunity for children to receive provision from testate estates; American jurisdictions, generally, do not.

Some of the justifications used to support the elective estate and child support law should be blended to provide forced shares and provisions for an elective estate for the children of a decedent. Just as a spouse is entitled to an elective share of the estate, the children of the decedent should have similar rights.

We can no longer presume the surviving parent will provide the financial stability that surviving children need given the traditional family setting has become less common. The current laws place all the risk on the children who almost never have the power of decision for the events that could affect their livelihoods. The proposals in this Article are designated to prioritize protection of children over protection of property.

Other common law systems have already adjusted their laws and policies to subordinate freedom of disposition to duty of support. American jurisdictions are behind all civil law jurisdictions and most first world common law jurisdictions in demonstrating the value placed

on supporting children. While the objective is not to provide uniform international law regarding duty of support, a thread of common principles regarding the duty to support children is achievable. Parental responsibility should trump freedom of disposition and uniform laws and American states should implement rules consistent with these principles.