INTERNATIONAL FORCED HEIRSHIP: CONCERNS AND ISSUES WITH EUROPEAN FORCED HEIRSHIP CLAIMS

I. INTRODUCTION

As inheritances and estate dispositions are increasingly contested in probate court, most of America has adopted the common law approach of will probation and execution.[1] This approach allows probate courts to explain exactly where and to whom personal and real property will be conveyed to.[2] However, in jurisdictions that still practice civil law opposed to common law—such as Louisiana and many European countries—there are existing and enforceable statutes which require testators to convey part of their estate to legal heirs.[3] This comment focuses on the application of international forced heirship and avoidance of European forced heirship statutes.

There is a substantial difference between civil law jurisdictions and common law jurisdictions.[4] Civil law is rooted in Roman law and has the functions of the legal system codified and compiled into a collection readily available for citizens to reference.[5] This legal structure requires the judge to rely on the black letter meaning of the law and disregards individual interpretation.[6] Common law, however, has its rules and regulations

1. GERRY BEYER, TEXAS WILLS AND ESTATES: CASES AND MATERIALS 3 (Author House 2008) (1985).
2. *Id.*
3. Kelly G. Dunn, *Forced Heirship Lives: The Effects of Louisiana Revised Statute 9, Section 2501*, 45 LOY. L REV. 619, 620 (2000).
4. *See id.* at 620.
5. *See id.* at 621–22.
6. *See id.* at 620.

administered by judges.[7] This type of individual judge administration and decision-making allows enforcement of the law to vary on a case-by-case basis rather than on the black letter meaning of the law.[8]

While there is a law review article explaining the Louisiana forced heirship statute and enforcement, there is no commentary on international conflict of law.[9] This comment discusses the approach that some jurisdictions take in international conflict of law scenarios and provides possible alternate solutions to such scenarios while primarily focusing on European countries. In Part II of this comment, I will begin by examining and explaining forced heirship statues and the ramifications of those statutes. Part III will look at individual foreign countries and their current structure of forced heirship distribution. Part IV will focus on the solution and explanation of international conflict of law. Part V will expand upon the differences between movable property, real property, and forced share interest. Part VI will focus on ways which heirs in civil law jurisdictions enforce forced heirship statutes and how those heirs can petition a claim for their inheritance. In addition, I will explain American jurisdictions that have chosen to allow enforcement of European forced heirship statutes and the reasoning behind their decision. Part VII of this comment will focus on American jurisdictions that have specifically implemented statutes that negate forced heirship and how those jurisdictions avoid conflict of law situations. Part VIII of this comment will focus completely on the Texas view of forced heirship and Texas public policy. Part IX will be a brief introduction and summary of the history of forced heirship in Texas. In Part X, I will explain avoidance techniques that could deter the enforcement of forced heirship. Finally, Part XI will summarize the material presented and make possible suggestions for the Texas court structure to implement into the legal system.

This comment is meant to broaden the perspective of estate planning and potential problems that may occur in international estate planning. As the United States continues to become a growing international market, it is inevitable that international wills will become an increasingly hot topic.

II. BACKGROUND OF FORCED HEIRSHIP

While the idea of heirs demanding a share of an estate, regardless of a will's instructions, is foreign to most common law jurisdictions in the United States, civil law jurisdictions still heavily rely on the established precedent of forced heirship.[10] The tradition of forced heirship has historically provided a

7. *See* BEYER, *supra* note 1, at 3.
8. *See* BEYER, *supra* note 1, at 3.
9. *See* Dunn, *supra* note 3, at 619–20.
10. *See* Dunn, *supra* note 3, at 620.

means for heirs to be guaranteed a share in a decedent's estate.[11] The notion of forced heirship originated with Germanic tribe traditions stemming from Germanic tribes, which sought to protect the family's legacy and tradition.[12] Forced heirship is mostly "prevalent amongst civil law jurisdictions and in Muslim countries, but also occur[s] in other major countries such as the U.S.A. (in Louisiana) and Japan."[13] Civil law jurisdiction laws are heavily based on the German Code (BGB) and the Napoleonic Code.[14] Today, the civil law legal system has become the most widespread of all the legal systems globally.[15] Continental Europe, as well as many former European colonies, has adopted and evolved their laws to abide by the civil law structure.[16] This has led to a continued reliance on the notion of forced heirship.

Under the laws of forced heirship, forced heirs are guaranteed their forced portion of the estate.[17] In order for a forced heir to be legitimate, the individual must be deemed by the legal system to be a legal heir.[18] Legal heirs can include siblings, ascendants, descendants, and collaterals, depending on the jurisdiction.[19] The decedents under forced heirship jurisdictions are only allowed to freely devise the disposable portion of their estate; the size of the disposable estate is dependent on the number of forced heirs that the decedent has left.[20] When a testator is allowed to freely devise their estate, they are allowed to dispose of their estate in whatever legal manner they deem fit. If the decedent has failed to leave an adequate forced portion of the estate, the forced heir has the right of reduction.[21] An heir who is claiming inadequate or no estate benefit would file an action against the "irresponsible" will.[22] The underlying intent of the claim is "that the testator failed in their family responsibilities."[23] The foundation of forced heirship has remained very strong and is still very evident throughout Europe.

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11. *See* FREDERICK WILLIAM SWAIM, JR. & KATHRYN VENTURA LORIO, 10 LOUISIANA CIVIL LAW TREATISE: SUCCESSIONS & DONATIONS § 11.1 (West 1995 & Supp. 1999).

12. Dunn, *supra* note 3, at 621.

13. Carl Edward Jeffrey, *Forced Heirship: A Problem for the Ages. Private Wealth Design,* 5, http://www.scribd.com/doc/17246922/Forced-Heirship-A-Problem-for-the-Ages.

14. *Id.* at 18.

15. *Id.* at 21.

16. *Id.* at 18.

17. FREDERICK, *supra* note 11, § 11.1.

18. Jeffrey, *supra* note 13, at 23.

19. *See id.* at 13.

20. FREDERICK, *supra* note 11, § 11.3.

21. *Id.* at § 11.5. Reduction is the right a forced heir has to demand his percentage of the estate, even by reclaiming inter-vivos donations made to third party beneficiaries, or donations made after death. *Id.* Either action can be taken if the inter-vivos donation or mortis causa donation impinge on the forced heir's legitimate or forced portion of the estate. *Id.* A mortis causa donation is "a gift made in contemplation of the donor's imminent death." BLACK'S LAW DICTIONARY 710 (8th ed. 2004).

22. *See* Jeffrey, *supra* note 13, at 22. "When the head of family disinherits (or omits) their children without good reason, the aggrieved are allowed the complaint of an *irresponsible* will." *Id.*

23. *Id.*

III. EUROPEAN FORCED HEIRSHIP STRUCTURES

As examples of the continued practice of forced heirship, this section will include examples of prominent European law regarding forced heirship. In general, the French law of forced heirship does not apply if the testator was not domiciled in France, unless the estate includes property situated in France.[24] All estates under French law are divided into two categories: reserved and disposable portion.[25] The reserved portion of the estate "cannot be disposed of by gift *inter* vivos, or by will, other than to descendants, ascendants and under certain conditions to the surviving spouse."[26] When individuals are married under French law, their property interests are divided into three groups.[27] Residential real estate is considered community property, and the remaining two groups are the property interests that belong to each individual separately (property individually acquired before marriage or individually acquired during marriage).[28] With the death of the first spouse, the community property is passed to the surviving spouse.[29] Only when the second spouse passes away is the rule of forced heirship applied.[30] The French forced heirship reserved estate structure includes the following:

a. One half of the inheritance when there is only one heir
b. 2/3 of the inheritance if there are two heirs
c. 3/4 of the inheritance if there are three or more heirs.[31]

All descendants that the testator leaves are entitled to a share of the reserved estate.[32] Age is not a determining factor; neither is the legitimacy of the child.[33] The remaining portion of the estate, besides the reserved portion, is considered disposable and the testator is allowed to freely dispose of the property as he wishes.[34] Regarding non-descendents that were bestowed gifts during the testator's lifetime, unfortunately for a few individuals, any gift made by the testator during his lifetime can be taken into consideration during succession.[35] For example, if the deceased gave $1,000 to a neighbor as a wedding gift, that

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24. Jean-Marc Tirard, *In Focus*: *Succession and Forced Heirship,* 15 TRS. & TRUSTEES 8, at 693 (Oct. 2009).
25. *Id.*
26. *Id.*
27. Jeffrey, *supra* note 13, at 25.
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* C. CIV. FRAN. ARTS. 913–14.
32. Tirard, *supra* note 24, at 694.
33. *Id.* (discussing that adulterous children, incestuous children, or grandchildren are still entitled to a share of the estate. *Id.* However, when competing against legitimate children born into the marriage, adulterous children would not receive the same share. *See id.*).
34. *See* Jeffrey, *supra* note 13, at 25.
35. *See* Tirard, *supra* note 24, at 693.

gift may be revoked or demanded back by the legal heirs to the estate if the reserved portion of the estate is deficient.

Germany is another country that applies forced heirship statutes on their citizens.[36] Unlike French law, forced heirship rules are only applicable to "first degree" descendants.[37] This restriction limits the reserved portion of the estate to be available to the surviving spouse and the decedent's surviving children only.[38] German law treats the property passed to beneficiaries, in regards to the time of vesting, as if the decedent has given the property to the beneficiary directly.[39] When determining the appropriate law to apply for succession, Germany applies the jurisdiction of the deceased's citizenship at the time of death.[40] German law will prevail if the deceased had dual citizenship at the time of death, with Germany being one, regardless of the deceased's domicile or alternate citizenship.[41] For example, if an individual held both American and German citizenship and domiciled in Texas, German law would prevail. The personal property, meaning the movable property, would be governed by German law (unless explicitly stated otherwise) and disposed of in accordance with German law. The only exception recognized in German law is the treatment of real property, which would depend on situs of the property.[42]

Italian law has also maintained strong ties to the notion of forced heirship. Just as other forced heirship jurisdictions, Italian law dictates a minimum statutory share ("succession necessaria") of the estate to be given to immediate family members prior to freely disposing of the estate.[43] Within six months of the testator's death, the testator's heirs must make a declaration of succession ("dichiarazione di successinoe").[44] Under Italian law, the forced heir's share of the deceased's assets is called "legittima."[45] The individuals entitled to forced shares include the following: children (legitimate, illegitimate, or adopted); ascendants (when there are no children alive at the time of testator's death); and the surviving spouse.[46] A separated spouse has the same right as a non-separated spouse, as long as a judge has not declared the surviving spouse responsible for the separation.[47] However, a divorced partner does not have any

36. Max Riederer von Paar, *The German-American Estate Plan*, *You Say Tomato and Ich Say Tomate,* 21 JUN PROB. & PROP. 59, 60 (2007).

37. *Inheritance Law & Taxes in Germany*, http://germany.angloinfo.com/countries/germany/inheritance.asp (last visited Oct. 14, 2010).

38. *Id.*

39. Riederer von Paar, *supra* note 36, at 60.

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* Italian Wills: Making a Will and Inheritance in Italy, http://rome.angloinfo.com/countries/italy/wills.asp (last visited Nov. 9, 2010).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

right or claim to a forced share in the descendant's estate.[48] The Italian courts place a very important difference between divorces and separations. The distribution structure and rules of forced heirship are especially important, and more strictly enforced, if the testator was an Italian national.[49]

IV. CONFLICT OF LAWS

The traditional conflict of law approach helps to determine the proper distribution of estate interests.[50] In particular, sections 239, 263, and 265 of the Restatement (Second) Conflicts of Laws help explain choice of law provisions and choices under testamentary wills.[51]

Section 239 states the following: "(1) [w]hether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions."[52] Put in another way, "interest in land [is] determined by the law that would be applied by the courts of the situs."[53] The courts explained that the when the situs has the dominant interest, local laws will be applied.[54] Dominant interests can include categories of people that may own the land or conditions under which the land may be held and used.[55] However, if another state or foreign jurisdiction's interests "is so great as to outweigh the values of the certainty and predictability which would be served by application of their own local law," the courts may apply local law of another state.[56] In addition, if "the situs has no substantial interest in the disposition of the proceeds of sale" and it would not be prohibited by public policy, the courts may again apply local law of another state.[57] Another exception for the application of local law is if "the state where the testator was domiciled at the time of his death . . . has the dominant concern in protection of the testator's family."[58] Almost invariably, the courts of the situs will apply local laws regarding will violations, such as rule against perpetuities.[59]

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48. *Id.*
49. *Id.*
50. *Estate of Renard*, 108 Misc. 2d 31, 35 (N.Y. Sur. 1981).
51. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 239 (pertaining to the disposition of real property) (1971); RESTATEMENT (SECOND) CONFLICT OF LAWS § 263 (1971) (regarding the validity and effect of movables); RESTATEMENT (SECOND) CONFLICT OF LAWS § 265 (1971) (forced share interest of surviving spouse and election options).
52. RESTATEMENT (SECOND) CONFLICTS OF LAWS § 239 (1971).
53. RESTATEMENT (SECOND) CONFLICTS OF LAWS § 239 cmt. b (1971).
54. *See id.*
55. *Id.*
56. *Id.* at cmt. c (1971).
57. *Id.* at cmt. f (1971).
58. *Id.*
59. *Id.*

Section 263 states: "(1) [w]hether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death."[60] Section 263 refers to the interests in movable objects, or personal property, compared to section 239, which refers to real, immovable property.[61] The law that determines the interests and rights of movable property would be "the courts of the state where the decedent was domiciled at the time of his death."[62] When determining the legitimacy of the legatee's category that the testator leaves movable property to, the domicile courts would usually apply the local law.[63] Such determinations could pertain to charitable purposes or other dispositions by the will.[64] If after making a will the testator changes his domicile, the courts of his domicile would determine the effect of the will at the time of death, and "not by the law that would be applied . . . at the time of executing the will."[65] If the will is invalid under the law where the decedent was domiciled at death, the will may still be valid under the local law of another state that has a close relationship to the case, such as the state where the will was executed.[66] In such a situation, the courts where the will was executed would hold the will valid by local law and the forum state would do likewise.[67] This would especially be true if the courts where the testator was domiciled and died reasoned that applying local law would defeat the expectations or the testator's intent.[68] The ultimate decision of the distribution will rest with the "courts of the state where the testator was domiciled at the time of his death."[69] If the will disposes of both movable and immovable property, the situs courts control the immovable property while the domiciliary courts at the time of testator's death control the movable property.[70] While the status of either foreign or local jurisdictions control immovable property, movable property presents a greater problem since forced heirship demands a curtain percentage of the estate, which is sometimes taken by reclaiming gifts the testator disposed of during his or her life. To simplify this conflict, some states provide statutory authority allowing local law to apply and govern a non-resident testator if the testator "express[es] a desire in his will to have [a certain] law applied."[71]

Finally, regarding forced share interest of surviving spouse, section 265 states:

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60. RESTATEMENT (SECOND) CONFLICTS OF LAWS § 263 (1971).
61. *See id.*
62. *Id.* at cmt. b (1971).
63. *Id.*
64. *Id.*
65. *Id.* at cmt. d (1971).
66. *Id.* at cmt. g (1971).
67. *Id.*
68. *Id.* at cmt h (1971).
69. *Id. at* cmt b (1971).
70. *Id.* at cmt e (1971).
71. *See, e.g.*, New York Estates, Powers and Trusts Law § 3-5.1(h) (2006); *In re* Chappell's Estate, 213 P. 684 (1923).

> (1) [t]he forced share interest of a surviving spouse in the movables of the deceased spouse is determined by the law that would be applied by the courts of the state where the deceased spouse was domiciled at the time of his death. These courts would usually apply their own local law in determining such questions.
> (2) Whether a surviving spouse for whom provision has been made in the will of the deceased spouse may elect to take a forced share interest in the movables of the deceased spouse rather than to take under the will is determined by the law that would be applied by the courts of the state where the deceased spouse was domiciled at the time of his death.[72]

With the term "forced share," the Restatement references a percentage that specific individuals, such as children or a surviving spouse, have a right to claim against the specific will provisions.[73] The court located in the jurisdiction where the testator was domiciled at the time of death would ultimately have the authority to decide the disposition of the estate's movable interests, and then have the final judgment applied in other forums.[74]

V. THE UNITED STATES ENFORCEMENT OF FOREIGN JUDGMENTS

The universal idea of comity has led many American jurisdictions to enforce foreign judgment. Comity is the legal practice among political entities that mutually recognizes judicial or legislative acts.[75] Comity is not an absolute obligation to respect another jurisdiction's decision, rather for convenience of the judicial process and regard to international duty a court will respect the judicial act of another nation.[76]

In *Nahar v. Nahar*, a Florida court showed comity for the highest Netherland court, resulting in the deceased's adult children succeeding in their forced heirship claim.[77] In *Nahar,* the decedent, an Aruba domiciliary, died intestate in Florida with an estate governed and distributed under Dutch law.[78] Dying intestate means dying without a valid will, which disposes of the estate. The decedent was survived by his second wife and three minor children residing in Miami, as well as six adult children from his first marriage, all residing in Aruba and various Dutch territories.[79] At the time of his death, the decedent held six bank accounts in Miami along with various properties in Aruba and Miami.[80] The adult children petitioned an Aruban Court to have both the Aruban property and Florida bank accounts administered under

72. RESTATEMENT (SECOND) CONFLICT OF LAW § 265 (1971).
73. *Id.*
74. *Id.*
75. *See* BLACK'S LAW DICTIONARY 284 (8th ed. 2004).
76. *Id.*
77. *See* Nahar v. Nahar, 656 So.2d 225 (Fla. Dist. Ct. App. 1995).
78. *See id.*
79. *Id.*
80. *Id.*

Netherlands Antilles' law.[81] The adult children claimed their father's residence in Miami was temporary.[82] After the Aruban court ordered the widow to deposit the funds with a notary for safekeeping, the adult children "petitioned for ancillary administration in Florida . . . [wanting] to have the money from the Florida accounts transferred to Aruba for distribution pursuant to Dutch law."[83] While the widow was arguing the Aruban claim, she subsequently filed a claim in a Florida court seeking to have the Miami accounts turned over to her entirely.[84] The widow lost two appeals regarding the bank account transfer and The Hague held that Dutch law, not Florida law, controlled the decedent's estate.[85] After The Hague decided Dutch law applied, the adult children from the first marriage were able to succeed in their forced heirship claim.[86] After the Dutch ruling, the Florida trial court ruled that The Hague's decision was res judicata and granted final summary judgment for the decedent's adult children for the Florida claim.[87]

The Florida court relied heavily on section 98 and section 92 of the Restatement (Second) Conflict of Laws.[88] Based off of these sections, the court explained that The Hague court decision was a valid judgment and that comity must be given to The Hague decision.[89] The court explained that the widow was given sufficient notice and the "foreign decree [did] not offend the public policy of the State of Florida."[90] The fact that the widow contested the issue to the highest Dutch court solidified that she had sufficient notice and the opportunity to be heard.[91] Effectively, this decision set a precedent that with "proper notice in a foreign jurisdiction, the U.S. court may uphold such action."[92] This leaves the door open for potential heirs to race to forced heirship friendly forums to assert their claim.[93] Additionally, this could cause potential problems for actual costs borne by party opponents that must travel internationally to contest claims.

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81. *Id.*

82. *Id.*

83. *Id.* According to Dutch law, all of the children and the widow were entitled to equal shares in the decedent's estate. *Id.* at note 6. This would lead to a one-tenth share of the estate for each individual. *Id.*

84. *Id.* at 228.

85. *Id.* (also explaining that The Hague is the seat of government, but not the capital, of the Netherlands and the de facto judicial capital of the United Nations).

86. *Id.*

87. *Id.*

88. *Id.* at 229.

89. *See id.* ("A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned." RESTATEMENT (SECOND) CONFLICT OF LAWS § 98 (1940). "A judgment is valid if (a) the state in which it is rendered has jurisdiction to act judicially in the case; and (b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and (c) the judgment is rendered by a competent court . . ." RESTATEMENT (SECOND) CONFLICT OF LAWS § 92 (1940).

90. Nahar, 656 So.2d at 229.

91. *Id.* at 230.

92. FOREIGN TRUSTS AND INTERNATIONAL ESTATE PLANNING, 93 (Brian R. Bassett, MCLE, Inc. 2007).

93. *See id.*

In a similar case, decedent's daughter from a prior marriage asserted a claim to funds held in a Swiss bank account, opened in New York, against the widowed second wife.[94] The wife was an American citizen and the deceased husband was an Italian citizen.[95] Both were domiciled in France at the time of the husband's death.[96] In *Watts*, the widowed second wife sought to have a joint bank account with rights of survivorship turned over to her in its entirety after her husband passed away.[97] Before the bank could comply with the account transfer, the bank received notice from the decedent's daughter, from his prior marriage, in which she claimed the account funds.[98] The daughter sought declaratory judgment against the widow in the appropriate French Court to have the Swiss bank account funds turned over to her.[99] According to the French forced heirship laws, the spouse of the deceased is precluded from receiving more than one-fourth of the assets from the estate donations.[100]

A month after the French action was filed, the widow instituted an action in New York against the bank to turn over the funds.[101] Subsequently, the bank interplead the daughter and an ancillary administrator of the estate.[102] The fact that the two cases occurred simultaneously allowed for the New York court to apply comity under the theory of res judicata.[103] During the litigation process, the widow died and appointed her three sisters as executors of her estate.[104] For legal purposes, the sisters replaced the widow in all of the ongoing litigation.[105] The French action arrived at a judgment before the New York court was able to render a verdict and found in favor of the daughter.[106] After the French decision was made, the sisters argued that the French court decision should not preclude the New York claim.[107] The New York court explained that since all parties agreed to be subject to French law in the daughter's claim, the "res judicata effect and finality in France would be the same as in New York."[108] In addition, since the New York case and French claim pertained to the same situation and all the parties were aware of the litigation, the sisters were precluded from re-filing a claim in the United States which would attack the French decision.[109] This decision helped to enforce the idea of comity and

94. *See* Watts v. Swiss Bank Corp., 27 N.Y.2d 270 (N.Y. 1970).
95. *Id.* at 270.
96. *Id.*
97. *Id.* at 273.
98. *Id.* at 271.
99. *Id.* at 274.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See id.* at 275.
104. *Id.* at 274.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 275.
109. *Id.* at 278.

proper notification of foreign judgments in the United States. The courts have continuously held that if the decision is not against public policy and the proper legal process has been followed, a foreign court's final judgment should be given full faith and credit.

VI. UNITED STATES DENIAL OF FOREIGN DECISIONS

Some states have enacted laws to allow avoidance of forced heirship by upholding the right of a testator domiciled in that particular jurisdiction.[110] States such as New York, Connecticut, Florida, and New Jersey have established laws that "govern the distribution of property located in that [particular jurisdiction]".[111]

In re Will of Meyer highlights the United States enforcement of wills over foreign law.[112] In this case, an estranged son sought to assert a forced heirship claim on a deceased French citizen's estate who resided in New York.[113] The estranged son asserted a claim against the various *inter vivos* gifts that his mother had made through her lifetime.[114] The central issue before the court was if "New York would apply forced heirship rights under French law to a decedent's inter vivos disposition of New York property."[115] The son argued that the decedent was domiciled and a citizen of France, which would mean that seventy-five percent of the estate should pass to him and his two other siblings.[116] However, in the mother's will she expressly stated that she resided in Bermuda and that her New York property would be probated according to New York law.[117] The fact that the testator intended New York law to govern —as evidenced by her will—solidified the use of the New York property distribution scheme "even though she was 'domiciled and residing' in Bermuda."[118] With these facts established, the estranged son could not prove that his mother was domiciled in France at the time of her death.[119]

Furthermore, the court explained that the parties had incorrectly assumed "that inter vivos transfers made in New York by a French domiciliary [were] subject to French forced heirship laws."[120] The New York court held that civil law provisions of forced heirship are inapplicable to gifts given *inter vivos* regarding New York property, no matter the transferor's domicile.[121] The court reasoned that *inter vivos* transfers are "governed by the law of the state where

110. FOREIGN TRUSTS AND INTERNATIONAL ESTATE PLANNING, *supra* note 92.
111. *Id.*
112. *See In re* Will of Meyer, 62 A.D.3d 133 (N.Y. App. Div. 2009).
113. *See id.* at 134.
114. *Id.*
115. *Id*.
116. *See id.* at 135–36.
117. *See id.* at 135.
118. *Id.*
119. *Id.* at 136.
120. *Id.*
121. *Id.*

the property was situated at the time of the transfer."[122] New York law clearly provides and supports the reasoning that when a "nondomiciliary directs [their] will to be probated in this state [New York] and governed by its law, the forced heirship laws of a foreign state do not apply."[123] New York courts have reasoned that the public policy regarding testamentary freedom from forced heirship should apply equally to *inter vivos* transfers just as they would to immovable assets situated in New York jurisdiction.[124] The court decisions moved New York to the forefront of international estate planning. As the world becomes more global and connected, more states will have to make decisions regarding the enforceability of foreign law.

Another example of New York's pioneer mentality in the field of international will probation enforcement and standards is *Neto v. Thorner*.[125] In *Neto,* a foreign national, domiciled in Brazil, established a trust naming Thorner as the beneficiary in a New York bank account.[126] Upon the testator's death, an unsigned will was probated under Brazilian law.[127] While the will was invalid by New York standards, under the Brazilian law it was a valid and executable will.[128] In the Brazilian will, the decedent divided all the Brazilian bank accounts and accounts abroad that were held in his name.[129] Learning of the testator's death, Thorner withdrew all of the funds from the trust that the testator established in the New York bank.[130] After learning of the withdrawal, the executor of the estate filed a claim for conversion against Thorner.[131] The executor claimed that the law of the testator's last domicile should govern the testamentary disposition of personal property.[132] The issue before the court was whether the law of New York or the laws of the decedent's domicile govern the disposition of the decedent's trust property.[133]

The courts in New York have consistently held that if the will of a testator does not strictly conform to the appropriate sections of New York law the terms of the trust remain in force under the New York law.[134] The court relied heavily on the fact that the testator's will did not conform with the New York requirements, even though under Brazilian law the will was valid.[135] The executor made the argument that the trust is personal property under New York Estate Powers and Trusts Law and should pass to the beneficiaries established

122. *See id.*
123. *Id.* at 138.
124. *See id.*
125. *See* Neto v. Thorner, 718 F. Supp. 1222 (S.D. N.Y. 1989).
126. *See id.* at 1223.
127. *See id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 1225.
133. *See id.* at 1222–23.
134. *Id.* at 1224.
135. *Id.* at 1225.

under the Brazilian will according to Brazilian law.[136] The court disagreed with this conclusion and stated that upon the passing of a revised section of law (New York Estate Powers and Trusts Law section 7-5.2(2)) in 1975, "the legislature did not intend to bring . . . trusts within the coverage" stated by the executor.[137] When the court explained the revised section's intent, the executor's argument failed as a matter of law.[138]

The court in *Neto* went further and explained that New York courts "should recognize [the] physical and legal submission of the property to [their] laws, even though under the laws of [another country] a different method of fixing such rights would be pursued."[139] When the testator elected to have his trust fund governed and established in New York, the testator essentially elected to have the laws of New York determine and govern such funds.[140] The court concluded that the revocation of the testator's trust was invalid under New York law and the originally named beneficiary, Thorner, was allowed to keep the funds received from the trust.[141]

Another example of local American law superseding foreign law is *Sanchez v. Sanchez*.[142] In *Sanchez*, the decedent, a domicile and national of Venezuela, had opened a trust account in Florida naming two of his sons as beneficiaries.[143] The father died intestate in Venezuela a few years after establishing the trusts.[144] Upon his death, the sons converted the trust accounts into separate accounts in their own names.[145] After the two sons converted the trusts into separate accounts, twelve other "putative children" made a forced heirship claim under Venezuelan law.[146] Under Venezuelan law, all fourteen individuals had a pro rata claim and share to the accounts.[147] The trial court ruled that Venezuelan law controlled the accounts and that all the children were entitled to equal shares of the trusts.[148] However, on appeal the court held that Florida law—not Venezuelan law—controlled the distribution of the trust and not Venezuelan law.[149] The court explained that it was well established that bank accounts were "governed by the law of the situs of the account regardless of the domicile of any party to the account."[150] Because the two original sons

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1227.
142. *See* Sanchez v. Sanchez, 547 So. 2d 943 (Fla. Dist. Ct. App. 1989).
143. *Id.* at 944.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See, e.g.*, Seng v. Corns, 58 So. 2d 686 (Fla. 1952); Lieberman v. Silverstein, 393 So. 2d 565, (Fla. Dist. Ct. App. 1981). *See also* § 655.55, Florida Statutes (Supp. 1988) (codifying the choice of law rules as to bank accounts situated in Florida).

were specifically named as beneficiaries and the rule of situs was well established, the appellate court reversed and remanded the trial court's decision.[151]

The most evident case of American judicial enforcement contradicting foreign law came in *Wyatt v. Fulrath*. In *Wyatt,* both husband and wife were nationals and domiciliaries of Spain.[152] During a time of political uncertainty, the couple decided to open New York joint accounts and transfer cash and securities for safekeeping and investment.[153] Neither of the individuals had ever visited or been to New York at all.[154] Under the law of Spain, the New York joint accounts were considered community property of the spouses.[155] When the husband and wife opened the joint accounts, both expressly agreed in writing that the New York law pertaining to survivorship would apply.[156] After the husband's death, the wife controlled the property in the New York joint accounts and disposed of the property according to the will executed and in accordance with New York law.[157] An ancillary administrator on behalf of the deceased husband's estate in New York filed a claim against the widowed spouse to establish a claim of title.[158] One-half of the property at the time of the husband's death should have been distributed in accordance to the laws of Spain.[159] The main issue in front of the court was "whether the law of Spain should be applied to the property place[d] in New York . . . or the law of New York."[160] Under Spanish law, the surviving spouse would only receive half of the community property deposited in the joint New York bank accounts.[161] However, under the laws of New York, all joint accounts would have gone to the wife as the survivor.[162] The court addressed the issue of whether citizens and domiciliaries of Spain could enter into a valid "agreement as to their community property inconsistent with Spanish law."[163] The court decided that as a matter of public policy, New York should "apply its own rules to property in New York of foreigners who choose to place [their property in New York] for custody or investment."[164] The laws of Spain directly contradicted with the New York decision. Under Spanish law, dispositions such as the New York decision were void.[165]

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151. *Sanchez*, 547 So. 2d at 945.
152. Wyatt v. Fulrath, 211 N.E.2d 637 (N.Y. 1965).
153. *Id.* at 638.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 638.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

In Spain, all assets "of a marriage shall be deemed to be community property until it is proved they belong to either" spouse individually.[166] The ancillary administrator argued that wills executed by individuals who were domiciliaries and citizens of Spain were usually governed by the law of the domiciliary jurisdiction.[167] In this instance, the law of Spain would have prevented either spouse "from agreeing that community property go entirely to the survivor on the death of either."[168] The court continued to rely upon the physical move of the couple's assets to New York, stating that if "property which foreigners are able to get [in New York] physically, and . . . request New York law to apply" should be recognized by the physical and legal submission of the property to New York jurisdiction.[169] The fact that the assets and securities were movable property was the main argument that the ancillary administrator made to the court. While real property is always subjected to the applicable law of the situs courts, the laws of the domicile govern movable property (considered incidental) at the time of testator's death.[170] The reasoning behind the distinction is that every sovereign should control their own property when the land is situated in their territory.[171]

Even though the domiciliary jurisdiction at the time of testator's death controls movable property, the New York court stated that upon the expressed agreement, the local laws of survivorship would rule the joint accounts; thus, the joint accounts became a matter of public policy.[172] The court reasoned, based on New York policy and the physical transfer of the assets to New York during the lifetime of the spouses, it was sufficient to allow New York jurisdiction and law to override Spanish law.[173] Expressly stating applicable laws has become a trend for movable assets such as investments and various financial accounts, even when the notion of comity would provide a different outcome.

VII. THE TEXAS APPROACH TO INTERNATIONAL FORCED HEIRSHIP

"Texas does not have a 'forced heirship' statute protecting children against disinheritance by either mother or father."[174] "Under the law of Texas a court has the power by decree to compel a party over whom it has jurisdiction" over and issue an in personam verdict.[175] However, the Texas Supreme Court

166. *Id*.
167. *See In re* Hernandez*,* 219 N.Y. 566 (N.Y. 1916).
168. *Wyatt*, 16 N.Y.2d at 173.
169. *Id.* at 169.
170. *Id.* at 176.
171. *Id.*
172. *Id.* at 173.
173. *Id.* at 175.
174. Najvar v. Vasek, 564 S.W.2d 202, 207 (Tex. Civ. App.—Corpus Christi 1978, writ ref n.r.e.).
175. McElreath v. McElreath, 162 Tex. 190, 231 (1961).

has held that a "Texas court could not acquire jurisdiction of land beyond its borders."[176]

VIII. EVOLUTION AND HISTORY OF FORCED HEIRSHIP IN TEXAS

When Texas was originally settled as a Spanish civilization, "[f]orced heirship was a recognized institution of the original law, but within a comparatively short time after the entry of Texas into the Union it was abolished."[177] The background of forced heirship in Texas has its roots in Spanish law, where forced heirship was an "operation as a matter of course."[178] However, when Texas was established as a Republic, a new phase began where the common law rule of the neighboring Union conflicted with the civil law of historical Spanish society.[179] The pervasive effects of common law seemed to spread quickly throughout the newly formed Republic of Texas.[180] As Texas continued to grow and evolve as a Republic, the previously practiced civil law became modified and began to fade away.[181] On December 18,1837, a statute was passed which modified the current forced distribution and restricted the forced heirs "only [to] legitimate descendants."[182] Two years later another modification occurred which included a list "of legal causes for disinheritance."[183] In 1840, a large amount of Spanish law was repealed from the Texas legal system.[184] Finally, on July 24, 1856, forced heirship was abolished—ten years after the Republic of Texas joined the Union.[185] As a result, most of the litigation involving forced heirship in Texas ended around 1900.[186]

IX. THE COURT'S FINAL SAY ON TEXAS FORCED HEIRSHIP

"Since the passage of the act in 1856 repealing the law of forced heirship, the Legislature has enacted no statute prohibiting a testator from disposing of his property as he may see fit . . . ."[187] Once this decision was made, Texas courts have continuously held that a testator should be allowed to freely dispose

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176. Holt v. Guergin, 163 S.W. 10, 12 (Tex. 1914).

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

178. *Id.* at 56.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *See* Crain v. Crain, 17 Tex. 81, 91 (1856).

185. Dainow, *supra* note 177, at 57.

186. *See generally* Orr v. O'Brien, 55 Tex. 149 (1881); Davis v. Kirksey, 37 S.W. 994 (1896); Runge v. Freshman, 216 S.W. 254 (1919).

187. Bartlett v. Terrell, 292 S.W. 273 (Tex. Civ. App.—San Antonio 1927).

of his estate as he sees fit.[188] To date, no courts have addressed an international case regarding forced heirship in Texas and a European country. However, Texas courts have used the notion of comity to enforce a judgment in international cases.[189] The closest European probate proceeding in Texas has been a case involving a claim originating in the Philippines.[190] In *Boman*, the deceased wife's heirs brought a suit to "restrain [the] husband's heirs from asserting a claim in Philippine probate proceedings that husband's estate was entitled to recover 100%" of jointly owned estates at the time of her death.[191] The court reasoned that personal property is under the jurisdiction of the testator's domicile—in this case, the Philippines.[192] However, in regard to real property, "the place where the property is situated is to govern not only as to the capacity of the testator and the extent of his power to dispose of the property, but also as to the forms and solemnities necessary to give the Will its due attestations and effect."[193] Based on the court's interpretation and explanation of this case, Texas courts, presumably, would apply the traditional approach of comity and the Restatement (Second) Conflicts of Law to a contested European forced heirship suit. The Texas legal structure regarding European will probate cases is still a largely unexplored frontier.

X. INTERNATIONAL FORCED HEIRSHIP AVOIDANCE

"To avoid forced heirship, wealthy individuals sometimes seek to circumvent forced heirship laws by transferring assets into an offshore company, and seeking to settle the shares in the offshore company in a trust governed by the laws of a jurisdiction outside their domicile."[194] This kind of structure allows for the property to fall under the jurisdiction of a different legal structure and process other than the forced heirship jurisdiction.

Another solution to the forced heirship problem is to use a foreign trust structure. If an individual transfers property into a trust and holds the assets indefinitely, the heirship rules will not be triggered "since a trust never *dies*."[195] This adds extra security because "trust law is universally considered to be *well-*

188. *See generally* McQueen v. Stephens, 100 S.W. 1053 (Tex. Civ. App.—Amarillo 1937); Bartlett v. Terrell, 292 S.W. 273 (Tex. Civ. App.—San Antonio 1927); Hughes v. Titterington, 168 S.W.45 (Tex. Civ. App.—Dallas 1914).

189. *See* Dart v. Balaam, 953 S.W.2d 478 (Tex. App.—Fort Worth 1997) (A judgment creditor brought suit and sought recognition of an Australian judgment for money damages); *see also* Hernandez v. Seventh Day Adventist Corp., Ltd., 54 S.W.3d 335 (Tex. App.—San Antonio 2001) (A Hong Kong judgment was entered against a debtor and the debtor filed a motion to vacate the judgment).

190. *See* Boman v. Gibbs, 443 S.W.2d 267 (Tex. Civ. App.—Amarillo 1969).

191. *Id.* at 267.

192. *Id.* at 271.

193. *Id.*

194. *Forced Heirship*, Holborn Assets Limited http://www.holbornassets.com/financial-planning/estate-planning/forced-heirship.php (last visited January 12, 2011).

195. Swift Solutions: Forced Heirship, Swift Financial Group, http://www.swiftfinancialgroup.com/ docs /Heirship_eng_A4.pdf (last visited January 12, 2011).

settled—stable and predictable."[196] However, when considering which jurisdiction to establish the trust in, it is important to look at jurisdictions that are not "generally considered to be tax havens, nor on [the] international black lists."[197] There are of course additional steps to consider when establishing a foreign trust structure, as many "civil law jurisdictions generally do not recognize trusts."[198] In order to be completely prepared and protected, it is very important to research the additional steps necessary to create an effective trust in a foreign jurisdiction. For example, the client could establish a Delaware-U.S. limited liability company (LLC) that would actually own the assets the client wants to protect and transfer, and the testator then could transfer the newly established LLC into the foreign trust structure.[199]

Depending on the jurisdiction, drafting a legal document explaining the testator's intent will suffice and is another possible solution to avoid forced heirship. For example, in France an individual can sign a deed before a French Notaire electing, "within French law, a special status . . . to govern [the] French property between" a husband and wife.[200] This kind of designation allows the property to pass to the surviving spouse and avoid French forced heirship rules.[201] Another alternative to avoid French forced heirship rights is to purchase property through a company.[202] This alternative is especially viable if the purchaser plans to domicile in a U.S. city instead of France.[203] The purchaser should also incorporate the company in France.[204] This kind of structure allows the company to hold the property, which then allows the company to broken into shares of ownership. This is a preferable structure since "the company's shares, being subject to French law as movable assets, will be governed by the inheritance law of the domicile of the deceased."[205]

New York law indicates that a testator might escape forced heirship by transferring his or her assets "to another jurisdiction and directing that the law of the other jurisdiction govern his testamentary dispositions."[206] Estate planners should be wary of using this scheme, however, because the New York Court of Appeals has not completely resolved this issue.[207] To help clarify and affirm the testator's intent, consider the following:

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196. *Id.*
197. *Id.*
198. *Id.*
199. *See id.*
200. Notaires de France: French forced heirship rules (May 8, 2010), *available* at http://www.Notaires.fr/notaires/en/doc/documentation?page_id=516&document_id=907&portlet_id=725 (last visited January 12, 2011).
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. Barbara C. Spudis, *Avoiding Civil Law Forced Heirship By Stipulating That New York Law Governs*, 20 VA. J. INT'L L. 887, 887 (1979-1980).
207. *Id.*

> "The inclusion of certain provisions in wills may help to allay conflict of law problems. First, the drafter should satisfy the internal law requirements of the desired jurisdiction for formal validity of the will. Second, the will should contain a clause that expressly indicating the intention of the owner. Finally, the will should specify that the testator is aware of the forced heirship requirements of his domicile, but nevertheless directs that his national law govern the disposition of his estate."[208]

The best and most definite defense to avoid forced heirships is for the estate planner to consider which jurisdiction a potential claim could come from. Then, the estate planner needs to understand the forced heirship rules of enforcement pertaining to that jurisdiction. Most jurisdictions rely upon the decedent's domicile or citizenship status at the time of death, while others look at the domicile of the descendants. The most important thing for an estate planner to remember is that real immovable property falls under the jurisdiction of the situs in the majority; this will help alleviate some of the estate planning stress when dealing with international heirs and estates.

XI. CONCLUSION

The notion of forced heirship has been around since the Romans and Germanic tribes.[209] The idea of the family structure and providing for future heirs has long been present in both civil and common law.[210] Even though most civil law jurisdictions originated from the Napoleonic Code, today, European countries have an array of forced heir distribution structures as a result of years of cultural evolution.[211] While courts rely heavily on the Restatement (Second) Conflict of Laws, American states can give comity to foreign jurisdiction by understanding the foreign jurisdictions practices.[212] The United States has gone both ways with foreign enforcement of forced heirship. However, states such as Florida and New York have taken proactive steps to clearly communicate their stances on international probate enforcement.[213] These clear stances put these states, and others who have taken similar steps, on the forefront of globalization.

It is inevitable that the Texas courts will eventually have to rule on a forced heirship claim from a European country that still enforces the civil law statute. Our world is evolving into a globalized society where the United States and Europe will be considered neighbors instead of different countries. It is important that estate planners and Texas probate courts consider this notion of international forced heirship now before they are confronted with an actual

208. *Id.* at 911.
209. *See* Dunn, *supra* note 3, at 621.
210. *See* Spudis, *supra* note 206, at 890.
211. *See* Dunn, *supra* note 3, at 621.
212. *See* Spudis, *supra* note 210, at 891.
213. *See id.* at 897.

enforcement situation. Even though Texas courts can rely on the Restatements to resolve conflicts of law, it would behoove the state's probate structure if it took actual steps in implementing and communicating its stance on international enforcement. If Texas implements statutes such as Florida and New York, it would save estate planners from future headaches and doubt. By taking these kinds of proactive steps, Texas would allow its financial and estate planners to better plan wills and estate distribution on the global stage. If Texas were to wait for a situation or case to arise before taking a firm stance on enforcement, the state might miss out on the opportunity to be on the forefront of globalization.

by Ryan McLearen