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By Aaron Schwabach

The recent European Union proposal to bring about a more uniform body of law governing choice of law and related issues in international inheritance cases is, perhaps, a necessary response to the increasingly international nature of the EU's (and the world's) inhabitants and their assets. As written, though, it is rather heavily tilted toward the civil law values of continental Europe and threatens to collide jarringly with common law traditions, in particular the U.S. fondness for trusts and charitable giving.

Different cultures of philanthropy exist in the United States and Europe, especially continental Europe. The people of the United States contribute nearly 2% of the country's GDP to charities each year, a rate four or more times as high as that in most of continental Europe. The existence of a charitable-giving deduction in the U.S. tax code is often cited as a reason. But that by itself seems insufficient; the tax code provides no incentive to the low-income families, who donate an even higher proportion of their income to charity than their wealthier compatriots, and little incentive to the wealthy, whose tax relief from charitable contributions may be limited. In fact, a 2006 survey of wealthy donors found most of them claiming that the presence or absence of tax incentives had no effect on their decisions. Nor do broader cultural factors seem sufficient to explain the disparity. Notwithstanding the delight Americans and

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Western Europeans take in discovering and exaggerating their respective cultural differences, in reality the differences are not that great. And while the level of government-provided social services is higher in most European countries than in the United States, that does not eliminate the need for domestic charitable giving in those countries and should have no effect on international giving.

Although all of these factors—taxation, government services, and cultural differences—play a part, there may be others as well. Much American charitable giving is done by bequest, including the popular planned-giving options that allow a donor to continue to receive the income from a gift during his or her life. It may be that charitable giving by bequest is done less frequently in Europe because testamentary freedom is restricted under the legal systems of most European countries.

In most of the countries of the European Union, the United Kingdom aside, it is forbidden for a testator with living children to deny those children a share of the estate. Forced heirship laws protect children who have been left less than their legally determined share; a bequest to a charitable organization will fail if it cuts into this protected share. Even testators without children may have no choice but to leave a substantial portion of their estates to certain surviving relatives. Nor can the problem be avoided by an inter vivos gift; many EU countries have "clawback" laws that allow heirs to reclaim gifts given during the testator's lifetime.

Analogues of forced heirship exist in other forms in the Anglo-American legal tradition; the idea that it should be difficult for a testator completely to disinherit a spouse (or even a child) might be one many UK and U.S. lawyers would disagree with but is unlikely to shock. Clawbacks are a different matter; with a few minor exceptions, although they are a theoretical possibility, they are so rare that the reaction of an American or British lawyer (to say nothing of a client) encountering clawbacks for the first time is likely to be stunned disbelief. Clawbacks seem rooted in a completely different view of property, in which every property owner holds but a life estate, with his or her eventual heirs as remainderpersons.

For centuries these inconsistent views of property and inheritance have existed with little interaction; clawbacks were a vaguely horrifying but comfortingly irrelevant oddity, found somewhere safely beyond the borders. But the increasing interconnectedness of the world's peoples and legal systems is diminishing that comforting distance. Today hundreds of millions of people live, work, marry, have children, and acquire and dispose of property in more than one country; 5 million people born in Europe now live in the United States. A charity in the United States that accepts a large gift can find itself embroiled in litigation decades—perhaps even a century—later, if the donor dies leaving an estate governed by (or at least arguably governed by) another country's inheritance laws.

In the European Union, there are now nearly half a million multistate successions—situations in which a decedent leaves assets in more than one country—each year. This has inspired the EU to seek a unified system of inheritance law, or at least of choice of inheritance law, toward which the EU proposal is the first but surely not the last step. And the interconnectedness of the global economy in general, and the United States and the European Union in particular, means that changes made in Europe can have drastic effects on charitable giving and inheritance in the United States.

Differences in Inheritance Laws: Forced Heirship and Clawbacks

Two fundamental differences exist between the inheritance laws of most English-speaking countries and those of most of continental Europe: forced heirship and clawbacks.

Forced heirship or a rough equivalent exists for spouses in all U.S. states except Georgia, either through an elective forced share or through community property law. Community property states such as California may provide multiple protections. But a California testator can explicitly disinherit a spouse, and inheritance rights may be waived during the decedent's life by the spouse, for example, by a prenuptial agreement. Louisiana, the United States' lone civil-law state, provides forced heirship rights for children under age 23 or under an incapacity, but a child can still be disinherited for "just cause." See, e.g., Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinheirson, and the Unfinished Business of the Stepparent Usufruct*, 60 La. L. Rev. 637 (2000).

(discussing the extent to which forced heirship still exists after legislative changes in the late 1990s).

In most European legal systems the main goal of forced heirship seems to be to keep assets in the line of descent, almost as if they were entailed. In those U.S. states that have elective share statutes, the statutes protect spouses, not children, parents, or other heirs; they are more an extension of marital property concepts than of heirship concepts. The elective share in the United States is thus a more modern form of the English law of dower and curtesy, which themselves still exist, in somewhat modified forms, in Arkansas, Kentucky, Michigan, and Ohio. In addition, statutorily created rights in other states may be essentially identical to common-law dower under other names and minus, of course, the explicit common-law gender bias. At common law, interestingly, freeholds given inter vivos by the husband were potentially subject to clawback to satisfy dower rights. See, e.g., *Hall v. McBride*, 416 So. 2d 986 (Ala. 1982) ("At common law, a widow who was not satisfied with the portion her husband gave her in his will, could seek a writ of dower *unde nihil habuit* against the tenant of the freehold. If she established her right to the writ, she assigned her dower to the sheriff. Finally, an action of ejectment was brought against the current land holder."). Other factors, including pretermitted heir statutes, the undue influence doctrine, and the financial and emotional cost of an inheritance battle, may reflect some of the social values codified in the civil law system, although they are far more restricted in scope.

As noted, forced heirship is the more easily acceptable part; clawbacks are less palatable. Two concepts, each of which has analogues in U.S. law, will help in understanding the operation of clawbacks: the legitim or reserve and the fictive hereditary mass. The legitim or reserve is the portion of the estate subject to forced heirship—that is, the portion the testator is not free to dispose of as he or she wishes but which must pass instead to persons within a small category of close relatives, typically issue, ancestors, and surviving spouses.

The fictive hereditary mass is the combined value of the decedent's assets and some or all inter vivos gifts made by the decedent, less debts. See Paul Delnoy, *Les libéralités et les successions* 237 (1st ed. 1991). In countries applying clawbacks, the forced heirship share is assessed not as a percentage of the decedent's estate but as a percentage of the fictive hereditary mass. To complicate matters further, not all inter vivos gifts are included in the fictive hereditary mass, but which gifts are excluded varies from one country to the next. The fictive hereditary mass has an inexact analogue in the U.S. concept of the augmented estate, which can include some of the testator's inter vivos gifts.

In the United States, however, there is at least an initial tendency to view completed gifts as gone, although there are some exceptions. The expectations of U.S. donees are thus at odds with those of non-U.S. potential forced heirs. The effect of this clash of expectations, expressed in actions to claw back charitable donations and assets placed in trust, is potentially disastrous: a donor might give three-quarters of her wealth to, say, the San Diego Zoo, then live another 60 years. In some countries, her descendants might be able to claw back part of that money up to 30 years after the date of death—90 years after the original gift. A California court might, of course, refuse to recognize the judgment, although the zoo's assets in other countries, if any, might become vulnerable to it.

The countries that permit clawbacks permit them under widely varying terms. For example, Bulgarian law may set aside up to five-sixths of the fictive hereditary mass for the children and surviving spouse, leaving only one-sixth to be otherwise disposed of either inter vivos or by will. See Stela Ivanova, *Erbrecht in Bulgarien*, in Erbrecht in Europa 702 (Rembert Süß & Ulrich Haas eds., 1st ed. 2004). At the other end of the spectrum, Denmark—within the independent Scandinavian legal tradition—accords testamentary freedom approaching that of the Anglo-American countries. Denmark appears not to apply the concept of fictive hereditary mass in most cases, and thus there are no clawbacks—although in contrast to U.S. practice the children as well as the surviving spouse are entitled to elective shares. In the countries lying between these extremes, specific provisions and applications can vary greatly; in Germany, for example, although the fictive hereditary mass and forced heirship (and thus clawbacks) exist, property may be clawed back only from the immediate donee; those who receive property in good faith from a donee are protected. In Belgium, on the other hand, nonfungible assets (such as real property) may in some circumstances be clawed back not only from the original donee but from remote grantees—even if the remote grantee is a bona fide purchaser for value.

The concepts of fictive hereditary mass and forced heirship are not, perhaps, utterly alien to U.S. law. The fictive hereditary mass has its rough counterpart in the augmented, net, or elective estate, while forced heirship, at least for spouses, exists in the form of the elective share. (The augmented estate, under Uniform Probate Code § 2-203, includes the net probate estate as well as the decedent's nonprobate transfers—including inter vivos gifts—and the surviving spouse's property and inter vivos transfers, less funeral and administration expenses and certain other exemptions and claims.) Even the clawback may exist where an elective share based on the augmented, net, or elective estate exceeds the probate estate—that is, where the testator has transferred more than half of his or her wealth inter vivos. Such clawback actions remain vanishingly rare in the United States, though, and are more likely to involve attempts to disinherit a spouse through transfers to a trust than with charitable gifts. See, e.g., *Dreher v. Dreher*, 634 S.E.2d 646 (S.C. 2006); *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984); *Burns v. Turnbull*, 41 N.Y.S.2d 448 (N.Y. App. Div. 1943), affirmed, 62 N.E.2d 785 (N.Y. 1945); *Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1937). Mortmain statutes, while they still existed, also acted as de facto clawbacks.

invalidating charitable bequests made shortly before death. See generally John R. Cunningham, *Mortmain Statutes: The Dead Hand Still Survives*, 27 Idaho L. Rev. 49 (1990–91); Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 Miss. C. L. Rev. 407 (1991–92); *In re Estate of Kirk*, 907 P.2d 794 (Idaho 1995). And gifts *causa mortis* may be revocable under certain circumstances, providing another form of stealth clawback.

The concept of the augmented estate is necessary only if there is a forced heir whose share may be assessed against it. Other valuations of the estate are used for other purposes, such as assessing estate tax. And the clawback is not outside the contemplation of the UPC. UPC § 2-209(c) provides:

> If . . . the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of the remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

In other words, the decedent's inter vivos gifts may be reached to satisfy the surviving spouse's elective share. For example, assets placed in a charitable remainder trust "may be included in the augmented estate and, therefore, may be used to determine and satisfy the elective share amount."

Why It Matters

The differences between the treatments of forced heirship and clawbacks in the Anglo-American and civil law traditions have existed for centuries. Only recently, however, have these differences become a problem, because of the increasing mobility of persons worldwide and the increasing individual and societal wealth that has made possible a culture of retirement. More people do and will continue to grow old and die in countries other than those in which they were born, acquired their wealth, and had children. Other recent developments, such as the current S.1746, proposing to grant legal residence to persons purchasing homes in the United States, may greatly increase the number of foreign retirees in the United States and thus the eventual number of international inheritance cases. And even in the absence of changing one's residence, it is now relatively simple to acquire property and financial interests in other countries without ever leaving home.

The EU Proposal

The most administratively appealing long-term solution to any international conflict of laws is also the most politically impossible (and, perhaps, politically and culturally undesirable): harmonization of national laws to eliminate the differences. Even in areas where the advantages are obvious, such harmonization can be difficult. For example, the harmonization of copyright law, measured from the foundation of the Association Littéraire et Artistique Internationale in 1878 to the time the last three major holdouts (the United States, China, and Russia) became parties to the Berne Convention, took well over a century. And relatively few people in any country hold copyrights of any value; nor does copyright touch deeply held cultural values concerning the relationship of the individual, the family, and society. Even so, the harmonization achieved after more than a century of diligent efforts remains imperfect and requires constant adjustment.

Death, in contrast, touches every individual in every country. A global law of inheritance is thus unlikely. Even the European Union, with its enhanced ability to bring about regional harmonization of laws, acknowledges that "[a]s full harmonisation of the rules of substantive law in the Member States is inconceivable, action will have to focus on the conflict rules." But even this may prove impossible: because most of the countries of the European Union draw their inheritance laws from the civil law tradition and because that tradition is so greatly at odds with UK expectations, achieving any compromise palatable to both sides is likely to prove unusually difficult.

In the earlier stages of the process, few seemed to perceive the magnitude of the problem. The 2005 EU Green Paper comments blithely that "[t]he legal systems of all the Member States protect the near relatives of a deceased person who tries to disinherit them." In fact, the legal system of the United Kingdom does no such thing, beyond the protections against being left in poverty provided by the Inheritance Act.

The House of Lords responded to the Green Paper with alarm, identifying the clawback issue as the single greatest problem with the EU proposal, and one which would make the proposal unacceptable to the UK. Article 27 of the EU Proposal all but guarantees that the proposal will remain unacceptable to the United Kingdom. States may refuse to apply the law of another state "only if such application is incompatible with the public policy of the forum," adding "[i]n particular, the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum." In other words, the United Kingdom's objection to clawbacks cannot form the public policy grounds for refusing to apply the foreign state's law. Given these apparently insurmountable obstacles to agreement, the United Kingdom has decided not to opt in to the EU proposal but is continuing to keep a careful eye on its evolution. (Denmark, another EU member outside the civil law tradition, has also chosen not to opt in.)

Conclusion: How Does This Affect the United States and Other Non-EU Countries?

The EU proposal, as it currently stands, is clearly unacceptable to the United Kingdom and seems to have been drafted in blatant disregard of the United Kingdom's concerns. The conflict with U.S. law is possibly less drastic, and in any event the European Union has no obligation to take into account the law of the United States or any other nonmember state. Nonetheless, the problem now facing the United Kingdom faces the United States as well.

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

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

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

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

The question, as always, is one of degree rather than of kind. Attempted clawbacks, an extraordinary and unusual device available in some U.S. states under some circumstances, may begin to show up more frequently as foreign claimants or U.S. claimants seek to enforce forced heirship rights under foreign law against U.S. donees. The process is likely to be a gradual one and can be addressed as it becomes a problem; a more likely undesirable consequence is not that clawbacks may become an actual problem for the U.S. legal system, but that the increased possibility of clawbacks may act as a deterrent to some donors and thus reduce charitable giving. ■