

Kinship Bonds and Emotional Ties: Lack of a Family Relationship as Ground for Disinheritance

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Abstract: A topical issue in the context of the general debate about the need to retain or abolish forced share in Spain is the question of whether to broaden the range of grounds for excluding a forced heir from his or her share of the estate. There is particular debate surrounding the appropriateness of adding estrangement or the lack of a family relationship to the list of grounds, with the aim of increasing testamentary freedom. Some countries have a tendency to allow ties of affection to prevail over purely family or kinship ties in this matter, but sometimes at the cost of legal certainty and – since such a vague ground is not necessarily more respectful with freedom of testation – despite the risk that the courts may not always achieve the justice sought by a testator who wishes to disinherit a forced heir that shows no affection for her. This paper considers the different approaches to this topic between different legal systems. The Catalan and the German ones just represent extreme examples of radical different tendencies. In Spain, recent case law has provided new arguments for thinking about what the law says, how the courts interpret, and, finally, what the society expects.

Resumée: Faut-il étendre les causes qui permettent d'exclure un héritier réservataire de sa part dans le patrimoine? Telle est une des questions brûlantes qui agitent le débat sur le maintien ou l'abolition de la réserve héréditaire en Espagne. Le débat porte en particulier sur le point de savoir s'il est opportun d'ajouter aux causes d'exclusion, la séparation ou l'absence de relations familiales, dans le but d'accroître la liberté testamentaire. Certains pays ont tendance à faire prévaloir les liens affectifs sur les liens de famille ou de parenté, parfois au détriment de la sécurité juridique. Le caractère vague d'un tel motif ne respecte pas nécessairement la liberté de tester, parce qu'il n'est pas sûr que les tribunaux y parviendraient à l'objectif de justice recherché par le testateur qui souhaite déshériter un héritier réservataire lorsqu'il ne montre pas de proximité affective avec lui. Cet article met en évidence les différentes approches de cette question par différents systèmes juridiques. Le système catalan et le système allemand donnent par exemple des réponses radicalement différentes. En Espagne, la jurisprudence récente a fourni de nouveaux arguments pour réfléchir à ce que dit la loi, ce que les tribunaux donnent comme interprétation et, enfin, ce que la société attend.

Zusammenfassung: Ein Aspekt im Kontext der generellen Debatte über die Notwendigkeit, den Pflichtteil in Spanien beizubehalten oder abzuschaffen, ist die

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Frage, ob die Gründe, wegen derer ein Pflichtteilsberechtigter von seinem Erbe ausgeschlossen werden kann, erweitert werden sollten. Konkret wird in diesem Zusammenhang die Angemessenheit der Aufnahme von Entfremdung oder fehlender familiärer Beziehung in die Liste der Ausschlussgründe, mit dem Ziel höhere Testierfreiheit zu gewähren, diskutiert. In einigen Ländern zeigt sich diesbezüglich die Tendenz, emotionale Bindungen über rein familiäre oder verwandtschaftliche Beziehungen zu stellen. Allerdings geschieht dies manchmal auf Kosten der Rechtssicherheit und - da ein solch vager Grund nicht zwingend mehr Rücksicht auf die Testierfreiheit nimmt - dem Risiko, dass das Gericht möglicherweise nicht immer die vom Erblasser, der einen ihm gegenüber keine Zuneigung zeigenden Pflichtteilsberechtigten testamentarisch enterben möchte, gewünschte Folge erzielen kann. Der Beitrag untersucht bezüglich dieses Problemkreises die unterschiedlichen Ansätze in verschiedenen rechtlichen Systemen. Das katalanische und das deutsche System repräsentieren dabei lediglich extreme Beispiele radikal unterschiedlicher Ausrichtungen. In Spanien bietet die jüngste Rechtsprechung neue Argumente für Überlegungen hinsichtlich der tatsächlichen Gesetzesintention, der richterlichen Auslegung und schließlich der gesellschaftlichen Erwartungen.

1. Introduction

1. In most European countries, certain individuals who have kinship ties with the deceased (descendants, ascendants, or spouse) are entitled to the forced share, that is, to part of the estate which the testator cannot dispose of freely, precisely because it is reserved for these individuals by law.¹ Forced share is still an expression of intergenerational solidarity in an ideal family that would remain united until the testator's death. It is therefore logical that the legislature provides for the possibility of depriving individuals of this right - known as 'disinheritance' in some countries² - if there are reasons showing that these

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- 1 On the need to maintain the institution, see the varying opinions of lawyers belonging to different legal systems in A. RÖTHEL (Hrsg.), *Reformfragen des Pflichtteilsrechts* (Köln-Berlin-München: Carl Heymanns 2007); C. CASTELEN, R. FOQUÉ, & A. VERBEKE (eds.), *Imperative Inheritance Law in a Late-Modern Society*, European Family Law Series, No. 26 (Antwerp-Oxford-Portland: Intersentia 2009); M. ANDERSON & E. ARROYO I AMAYUELAS (eds.), *The Law of Succession: Testamentary Freedom. European Perspectives* (Groningen: Europa Law Publishing 2011); F. TORSTEIN (ed.), *Inheritance Law. Challenges and Reform* (Berlin: BWV 2012); and R. ZIMMERMANN (ed.), *Freedom of Testation/Testierfreiheit* (Tübingen: Mohr 2012). Convincing arguments for its abolition can be found in J. BECKERT, *Inherited Wealth* (Princeton and Oxford: Princeton University Press 2004). F. LLEDÓ YAGÜE & Ó. MONJE BALMASEDA give an account of the issue in Spain recently in 'Reforma del sistema legitimario y libertad de testar', in F. Lledó Yagüe et al. (dirs.), *El patrimonio sucesorio: Reflexiones para un debate reformista*, Vol. I (Madrid: Dyckinson 2014), pp 649-718.
- 2 On the terminology question, see R. ZIMMERMANN, 'Erbunwürdigkeit. Die Entwicklung eines Rechtsinstituts im Spiegel europäischer Kodifikationen', in P. Apathy et al. (Hrsg.), *Festschrift für Helmut Koziol zum 70. Geburtstag* (Wien: J. Sramek Verlag 2010), pp 503-504, No. 300. There are no specific grounds for disinheritance in France or in other legal systems that follow the French model such as the Belgian (perhaps with the exception of the surviving spouse, who can

emotional ties weakened or broke while the deceased was alive. The problem lies precisely in establishing these reasons. If the law sets out an exhaustive list of serious and very stringent grounds for disinheritance, other forms of blameworthy behaviour may go unpunished³; on the other hand, if exclusion rests solely on the deceased's wishes, this would entail the de facto abolition of forced share. There may be a middle way which retains the need to find the forced heir to blame for the behaviour – an essential attributability for any grounds for exclusion from the forced share – while broadening testamentary freedom in accordance with prevailing social values.

2. Spain provides two recent examples of the tendency to attach more importance to emotional ties than to those based strictly on kinship when making decisions about disinheritance. Firstly, its Supreme Court has reinterpreted the concept of abuse in Article 853.2 of the Spanish Civil Code (hereafter, Spanish CC) to include the emotional abuse suffered by a testator who has been neglected. This follows other legal systems in which the law expressly allows the testator to deprive forced heirs of their right, without any need to specify or list behaviour, if they openly contravene their duty of care and attention to the testator or her family. Secondly, the legislature had incorporated a new ground for disinheritance into Book IV of the Catalan Civil Code (hereafter, Cat CC) well before this, which consisted in the absence or breakdown of the family relationship for reasons exclusively attributable to the forced heir.⁴

be disinherited in case of de facto separation) and the Italian one. See M. COMPORTE, 'Riflessioni in tema di autonomia testamentaria, tutela dei legittimari, indegnità a succedere e diseredazione', 1. *Familia* 2003, p (27) at 36 et seq.; and E. MOSCATI, 'Questioni vecchie e nuove in tema di capacità di succedere e di indegnità', in S. Delle Monache (ed.), *Tradizione e modernità nel diritto successorio. Dagli istituti classici al patto di familia* (Milano: Cedam 2007), pp 62 et seq.

3 This is the criticism traditionally levelled at the German system, at least before the reform. See S. HERZOG, 'Comment to § 2333 BGB', in B. Daubner-Lieb, H. Grziwotz & C. Hohmann-Dennhardt (Hrsgs.), *Pflichtteilsrecht. Bürgerliches Recht/Prozessrecht/Wirtschaftsrecht. Handkommentar*, 2010, Rn. 14, p 370. It has also frequently been said in Spain that disinheritance as regulated by the Spanish CC is very difficult in practice: see Á.L. REBOLLEDO VARELA, 'Problemas prácticos de la desheredación eficaz de los descendientes por malos tratos, injurias y abandono asistencial de los mayores', in Á.L. Rebolledo Varela (coord.), *La familia en el Derecho de Sucesiones: Cuestiones actuales y Perspectivas de futuro* (Madrid: Dykinson 2010), p (380) at 384 et seq. However, this may be about to change: see comments in the text.

4 As readers may be aware, different legal systems coexist on an equal basis in the civil system in Spain, relating to each other via the conflict rules. Various autonomous communities thus have their own inheritance law independently from that in the Spanish CC. Catalan civil law is of particular interest here, essentially because of the modernity of Book IV of the Cat CC, which is devoted to inheritance and was passed fairly recently [Act 10/2008, 10 July; Official Gazette of the Catalan Government (*Diari Oficial de la Generalitat de Catalunya*) No. 5175, 17 July]. On the Cat CC, see now E. ARROYO I AMAYUELAS, 'Die Entwicklung des Zivilrechts in Katalonien und das neue katalanische Zivilgesetzbuch', 3. *ZEuP (Zeitschrift für Europäisches Privatrecht)* 2014,

2. Family Bonds and Emotional Ties: Between Morality and the Law

3. Forced share is a right of the testator's descendants (or other individuals), but the testator also has a right to disinherit those who during her lifetime have failed to show the solidarity that lies at the heart of the institution and upon which it is based. Naturally, in view of the serious nature of behaviour classified as an infringement of parent-child duties (which in some legal systems includes a referral to the grounds of unworthiness), there is absolute consensus on the fact that all disinheritance grounds provided for in the respective civil codes enshrine this lack of solidarity with the testator. However, it is also clear that these grounds do not necessarily take account of social developments occurring since these civil codes established the obligatory nature of forced share. There has been a decline in the family as a group with its own interests over and above those of its members, and so family cohesion cannot be presumed; consequently, the simple existence of blood ties does not mean that solidarity among family members can be taken for granted either. Longevity is increasing,⁵ and there is a growing need for family care, but providing this assistance is hampered by modern lifestyles and the increased independence enjoyed by children. If these situations create conflict, it is logical for a testator to wish to deny her descendants their mandatory share of the estate; meanwhile, the fact that some children may benefit to the detriment of others is no longer abhorrent to social standards.⁶

4. However, none of grounds for disinheritance in the German Civil Code (BGB), either before or after the reform that came into force in 2010,⁷ provided for the possibility of depriving descendants from the forced share on the grounds of their refusal to assist the deceased in the event of physical need (because of age or

p 584, and a further bibliography there. On the new Catalan inheritance law in particular, see the different contributions in the book edited by the same author jointly with M. ANDERSON, *The Law of Succession*.

5 According to data from the Organisation for Economic Co-operation and Development (OECD), average life expectancy in Spain in 2013 was 83.2 years (86.1 years for women and 80.2 years for men). Data at: www.compareyourcountry.org/health?cr=oe&lg=en (last accessed: 25 Nov. 2015).

6 J. FERRER I RIBA, 'La successió per causa de mort: llibertat de disposar i interessos familiars', in C. Florensa i Tomàs (dir.) & J.M. Fontanellas Morell (coord.), *La codificación del derecho civil de Cataluña- Estudios con ocasión del centenario de la Compilación* (Madrid-Barcelona-Buenos Aires: Marcial Pons 2011), pp 342-343.

7 *Gesetz zur Änderung des Erb- und Verjährungsrecht*, of 24 Sep. 2004 [Law amending the Inheritance Law and Limitations], which came into force on 1 Jan. 2010. For a succinct summary of the reform, see I. HAAS, *Die Reform des Erb- und Verjährungsrecht* (Freiburg-Berlin-München: Haufe Mediengruppe 2009).

infirmity) or emotional need.⁸ The legislature expressly rejected the introduction of a general disinheritance clause similar to that in §1579 No. 7 BGB, which allows a divorced spouse's maintenance entitlement to be refused or restricted if, contrary to fairness, he or she has engaged in behaviour that comprised manifestly serious misconduct towards the person obliged. It was argued that a general clause with these characteristics would not only be contrary to constitutional doctrine⁹ but would also create great legal uncertainty for all involved.¹⁰ Wilful failure in the legal duty to maintain is indeed a ground for disinheritance, but this always presupposes financial assistance and is not linked to a vague concept of care or ethical assistance in the event of need.¹¹ On the basis of pre-reform data from Germany, it is estimated that in 36.37% of cases the deceased cited the fact that the forced heir had never taken care of her as a ground for disinheritance and that this behaviour went unpunished, however, because it could not be categorized as any of the types of behaviour detailed in §2333 BGB.¹²

5. This situation is in contrast to other legal systems that do accept the refusal to maintain (material assistance) together with neglect in situations of need or particular vulnerability (moral support) as grounds for disinheritance. In Europe, this is the case in Austria,¹³ Croatia,¹⁴ Slovenia,¹⁵ the Czech

8 For critical comments, J. SCHMIDT, *Die Reform des Pflichtteilsrechts aus dem Blickwinkel des ordentlichen Pflichtteilsanspruchs und der Pflichtteilsentziehung* (Bonn: Zerb 2013), pp 252-258.

9 On this subject, see below 3.1.1.

10 *Drucksache* 16/8954, p 23.

11 A. RÜDEBUSCH, *Vorschlag für eine Reform der Pflichtteilsentziehungsgründe (§§ 2333 ff. BGB) und der Pflichtteilsbeschränkung in guter Absicht (§ 2338 BGB) unter Berücksichtigung rechtsgeschichtlicher Aspekte* (Berlin: Logos 2004), pp 109-110; proposals for change, pp 111 et seq.

12 J. VOLLMER, *Verfügungsverhalten von Erblassern und dessen Auswirkungen auf das Ehegattenerbrecht und das Pflichtteilsrecht: Ein Reformvorschlag anhand empirisch gewonnenen Tatsachenmaterials* (Frankfurt am Main: Peter Lang 2001), p 123; also covered in RÜDEBUSCH, *Vorschlag für eine Reform*, p 118, to theorize about the possibility of incorporating the lack of a family relationship as grounds for disinheritance in Germany (on this matter, see below 3.1.1).

13 §768.2 of the Austrian Civil Code (ABGB) allows the disinheriting of a forced heir who neglects the testator 'in a state of need'. According to academic opinion, this refers to any state of distress - not only financial - which the forced heir could be expected to alleviate, in accordance with the basic principles of humanity (§7: principles of natural law). See P. APATHY, 'Comment to §768 ABGB', in H. Koziol, P. Bydlinski & R. Bollenberger (Hrsg.), *Kurzkomentar zum ABGB* (Wien-New York: Springer, 3rd edn 2010), p 644; and RÜDEBUSCH, *Vorschlag für eine Reform*, p 111.

14 Article 85 Inheritance Law. See P. ŠARČEVIĆ, T. JOSIPOVIĆ, I. GLIHA, N. HLAČA & I. KUNDA, 'Croatia', in R. Blanpain (ed.), *International Encyclopaedia of Laws*, Vol. I, Family and Succession Law (Suppl. 27) (The Hague-London-Boston: Kluwer 2005), pp 252-253; and R. Süß, 'Kroatien', in R. Süß (Hrsg.), *Erbrecht in Europa* (Bonn: Zerb, 2nd edn 2008), p 943.

15 On this subject, see S. KRALJIĆ, 'Freedom of Testation in Slovenia', in *The Law of Succession*, p 262.

Republic,¹⁶ and Malta;¹⁷ in Latin America, in Brazil¹⁸ and Peru¹⁹; and in Asia, it is accepted in the Japanese Civil Code, which expressly admits the possibility of disinheriting a forced heir who has committed a serious offence against the testator, which is a matter for the courts to decide in accordance with social standards.²⁰ Clearly, for such behaviour on the part of the forced heir to be cited as a ground for disinheritance, it has to be proved that the deceased was suffering from an illness, poor health, or extreme old age on one hand and that she had not refused the assistance whose omission was later cited as a ground for disinheritance on the other.

6. There is a recent trend in countries with no general forced share disinheritance clause to consider the forced heir's neglect of the testator to be emotional abuse. This can be seen in a Spanish Supreme Court (hereafter, SSC) decision of 3 June 2014²¹ on a case in which it emerged that the father of the

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- 16 §1646, *a*, CC: 'he has failed to provide needed emergency assistance'. For the repealed right, which is materially identical, see M. HRUŠÁKOVÁ, 'Czech Republic', in W. Pintens (ed.), *International Encyclopaedia of Laws*, Vol. I, Family and Succession Law (Suppl. 21) (The Hague-London-Boston: Kluwer 2002), pp 196-197. See current legislation at: <http://www.czechlegislation.com/en/89-2012-sb>.
- 17 Article 623, *b*, CC: 'if, where the testator has gone insane, the descendant has abandoned him without in any manner providing for his care'. Legislation at: www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580. On academic opinion, see S. TORTELL, 'Malta', in D. Hayton (ed.), *European Succession Laws* (Bristol: Jordans 2002), p 371. The ground detailed in *b* is clearly distinguished from those consisting in the refusal to maintain, the assessment of blame for striking the testator and any other form of cruelty or offence against her.
- 18 Article 1962 IV Brazilian Civil Code: 'desamparo do ascendente em alienação mental ou grave enfermidade'. This is a different and clearly separate ground from 'physical abuse' (I) and 'serious offence' (II). There is no specific ground referring to refusing to maintain the testator (or spouse, etc.). Legislation available at: www.planalto.gov.br/ccivil_03/leis/2002/110406.htm.
- 19 Together with the unjust refusal to maintain, Art. 744.2 *in fine* of the Peruvian Civil Code finds 'abandoning the ascendant when she is seriously ill or cannot look after herself' to be a ground for disinheriting descendants. This ground is clearly different from that specified in number 1, which provides for 'repeated physical or verbal abuse of the ascendant or her spouse, if the latter is also an ascendant of the offender'. Legislation available at: spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=default-codcivil.htm&vid=Ciclope:CLPdemo.
- 20 Article 892 of the Japanese Civil Code. Disinheritance on the ground of neglect during illness or any other type of abuse seems to be fair: see S. MINAMIKATA, S. MARUYAMA & H. TANAKA, 'Japan', in R. Blanpain (ed.), *International Encyclopaedia of Laws*, Vol. II, Family and Succession Law (Suppl. 9) (The Hague-London-Boston: Kluwer 1999), p 185.
- 21 SSC 3 Jun. 2014 (JUR 2014\181499). For some recent comments on this judgment, see J.A. MESSÍA DE LA CERDA BALLESTEROS, 'El maltrato psicológico como causa de desheredación: el menosprecio y abandono familiar', 11. *Actualidad Civil* 2014, p 1; E. ARROYO AMAYUELAS & E. FARNÓS AMORÓS, 'Entre el testador abandonado y el legitimario desheredado: ¿a quién prefieren los tribunales?', 2. *InDret* 2015, p 1 <www.indret.com>; S. ALGABA ROS, 'Maltrato de obra y abandono emocional como causa de desheredación', 2. *InDret* 2015, p 1 <www.indret.com>; and J.M. CARRAU CARBONELL, 'La desheredación por maltrato psicológico y su dificultad de

family had been genuinely neglected by his children over a long period, a behaviour motivated by the fact that the children had taken their mother's side when their parents separated. According to the Court, this behaviour amounted to conscious emotional abuse of the father on the children's part. The Court also found that the forced heirs' neglect of the testator - they had not visited him for seven years and he had been ostracised in the family home in Germany prior to his return to Spain - had impaired or harmed his mental health and that this behaviour was an offence against his dignity. Because of this, the Court found it reasonable that physical or verbal abuse (Art. 853.2 CC) should be subject to 'a flexible interpretation in conformity with social reality, cultural norms and the values of the time in which the abuse occurs'. The SSC equated emotional abuse with physical abuse and disregarded the far stricter line of case law mainly followed by the courts. This line held, conversely, that these or similar facts and circumstances, essentially concerning the lack of an affectionate relationship between parents and children, which materialized in emotional neglect of the father/mother during their last illness that sometimes culminated in non-attendance at the parent's funeral, could not be traced back to a legally typified ground. If true, this behaviour would therefore pertain to the moral sphere and be subject only to the court of the conscience.²²

The SSC's decision was well intentioned and could be said to respond precisely to the demands of one particular sector of Spanish society,²³ but the arguments used are confusing. On the one hand, the SSC deemed family neglect, which it identified with contempt or emotional abuse, incompatible with the basic respect and consideration that parents and children owe one another; on the other hand,

aplicación práctica', 2. *Revista de Derecho Civil* 2015, p 249 <nreg.es/ojs/index.php/RC>. The SSC of 30 Jan. 2015 (JUR 2015\73936) once again stresses emotional abuse as a ground for disinheritance.

- 22 SSC 28 Jun. 1993 (RJ 1993\4792) and 4 Nov. 1997 (RJ 1997\7930). On academic opinion, see J. RIBOT IGUALADA, 'Comment to Article 451-17 CC Cat', in J. Egea i Fernández, J. Ferrer i Riba (dirs.) & L. Alascio i Carrasco (coord.), *Comentari al llibre quart del Codi civil de Catalunya, relatiu a les successions*, Vol. II (Barcelona: Atelier 2009), p 1400. For a criticism of this case law, see C. LASARTE ÁLVAREZ, 'Abandono asistencial de la tercera edad y desheredación de los descendientes en la España contemporánea', in C. Lasarte Álvarez (dir.), *La protección de las personas mayores* (Madrid: Tecnos 2007), pp 366-369; REBOLLEDO VARELA, 'Problemas prácticos', in *La familia en el Derecho de Sucesiones*, pp 410-416; and J. BARCELÓ DOMÈNECH, 'La desheredación de los hijos y descendientes por maltrato de obra o injurias graves o de palabra', 682. *RCDI (Revista Crítica de Derecho Inmobiliario)* 2004, p (473) at 496 and 508-516. For a different opinion, L.F. RAGEL SÁNCHEZ, 'Comment to Article 853 CC', in R. Bercovitz (dir.), *Comentarios al Código Civil* (Valencia: Tirant lo Blanch 2013), p 6288.
- 23 This was demonstrated by the barrage of reports and articles in the press, such as 'Desheredar, misión imposible' ['Disinheritance, mission impossible'] (*El País*, 31 Aug. 2014); 'Desheredación y libertad de testar' ['Disinheritance and testamentary freedom'] (*El Mundo*, 2 Sep. 2014); and 'Modernizar la regulación de las herencias' ['Modernising inheritance regulation'] (*El País*, 10 Sep. 2014).

it accepted that such neglect might be the expression of the *free* breaking of an affective or emotional tie. If, in the former, behaviour entailing a serious infringement of the family duties is condemned, the latter implies that courts would be hard-pressed to assess this *free* behaviour and even more so to penalize it.²⁴ All things considered, in reality nothing could be further from emotional abuse than total lack of contact, which is exactly what seems to have occurred in the case at issue in the SSC of 3 June 2014. However, can it be taken for granted that the forced heirs' behaviour was cruel, causing the testator emotional distress, if it turns out that the prolonged indifference or disaffection was caused by the latter? It is impossible to be sure on this point, as the judgment did not allude to it. Attempts to disinherit a child in scenarios where she had refused contact with the parent, generally because of a marital breakdown, had never previously been successful.²⁵

3. The Lack of a Relationship between Parents and Children as a Ground for Disinheritance

7. The Catalan legislature seems to be certain that the law should assess situations that fall into the private sphere of individuals. As mentioned previously, it deems the demise of the relationship between the deceased and the forced heir to be a ground for disinheritance, provided that this is exclusively attributable to the descendent (Art. 451-17.2, *e*, Cat CC). In incorporating this new ground for disinheritance, the legislature seems to have been seeking the closest possible match to the family basis of forced share and therefore the perception of greater fairness.²⁶ Although this scenario is not exceptional, other legal systems do not always share this view.

3.1. The Comparative Law Perspective

8. Academic opinion has frequently demanded greater freedom for a testator who believes that there are good reasons to disinherit a forced heir, and it has no doubt that one of these reasons could be the absence or breakdown of the family

24 This is precisely what the Spanish *Asociación Pro Derechos Civiles, Económicos y Sociales* ('Association for Civil, Economic and Social Rights') (www.adeces.org/) has been clamouring for. See also reports in *El Mundo* on 26 March 2014 ('Piden a Gallardón ampliar las causas para desheredar a hijos o padres cuando no haya afecto' ['Gallardón asked to broaden the grounds for disinheriting children or parents when there is no affection']); and *Tiempo* on 25 Apr. 2014 ('Quiero desheredar a mis hijos' ['I want to disinherit my children']).

25 See the judgments of the Castelló Provincial Court of Appeal (hereafter, PCA) of 27 Oct. 2004 (JUR 2005\23114) and the Palencia PCA of 28 Apr. 2005 (JUR 2005\134235).

26 Preamble §Art. VI, para. 5, Act 10/2008, 10 July.

relationship.²⁷ This view is also held by legislatures in societies that are highly wary of the institution of forced share (such as Louisiana). Conversely, countries where the forced share of descendants is a constitutionally protected right (such as Germany) reject this argument; in other cases, this ground for disinheritance is accepted only to a very limited extent and with less radical consequences (Austria, for example).

3.1.1. *Rejection in Germany*

9. In Germany, the *Gesetz zur Änderung des Erb- und Verjährungsrechts* (Law Amending Inheritance Law and Limitations), in force since 1 January 2010, reformed the grounds for depriving individuals of the forced share but did not incorporate the ground based on the lack of a family relationship between the deceased and the forced heir. The German Constitutional Court (hereafter, GCC) had previously made it clear that the forced share of children (and only children) was protected by the Constitution and that serious grounds were therefore needed for deprivation; that is, grounds involving a genuine breakdown in the family relationship which did not include a mere lack of contact between the deceased and the forced heir (§2333 BGB). According to the GCC, the principle of family protection justifies the need to impose restrictions on testamentary freedom. The deceased cannot deprive her descendants of the forced share for the sole reason that she has not had a family relationship with them; the possibility of not appointing them her heirs is enough. The right to the forced share prevents children born out of wedlock or from a previous marriage from being excluded from a material share in the estate for the sole reason that the relationship between parents and children has ceased to exist or has become more distant.²⁸

3.1.2. *Limited Effects in Austria*

10. In 1989 the Austrian legislature introduced the possibility that a testator could reduce the forced share by half if she had never had a close family relationship with the forced heirs (§773, a, ABGB).²⁹ The rule was criticized for

27 M.J. van MOURIK, 'Perspective 5. Comparative Law - The Netherlands', in *Imperative Inheritance Law*, p 121; J.C. SONNEKUS, 'The New Dutch Code on Succession as Evaluated Through the Eyes of a Hybrid Legal System', 1. *ZEUP* 2005, p (71) at 84; and D. HENRICH, *Testierfreiheit vs. Pflichtteilsrecht* (München: Beck 2000), pp 12-13.

28 GCC, *NJW (Neue Juristische Wochenschrift)* 2005, p 1561. See HERZOG, in *Pflichtteilsrecht*, Rn 1-4; W. PINTENS & S. SEYNS, 'Compulsory Portion and Solidarity Between Generations in German Law', in *Imperative Inheritance Law*, pp 172-174; and HAAS, *Die Reform*, p 17.

29 *Bundesgesetz v. 13 Dezember 1989 über die Gleichstellung des unehelichen Kindes im Erbrecht und die Sicherung der Ehwohnung für den überlebenden Ehegatten (Erbrechtsänderungsgesetz 1989 - ErbRÄG 1989)* (BGBl 29 Dezember 1989). As the law states, it was passed to recognize

its vague terminology but in particular because it encouraged opportunistic behaviour on the part of testators, who could themselves prevent a family relationship from existing. The rule was therefore reformed in 2001,³⁰ and a third paragraph limiting this possibility was introduced: if the deceased herself had refused to have a relationship with the family for no just cause, the ground for the breakdown was attributable to her and consequently the forced share could not be reduced.³¹ The rule was again modified in 2004 to limit it to parents and children. In the previous draft of the provision a grandparent could disinherit a child who was a forced heir, on the grounds that the latter had had no relationship with his or her own child (the testator's grandchild) and even though grandparent and grandchild had had a family relationship.³² The debate between the pros and cons of the rule and the eventual elimination of the attributability requirement in future reforms of Austrian inheritance law continues to this day.³³

3.1.3. *Full Recognition in Louisiana*

11. Louisiana is the only state in the USA to combine aspects of civil law and common law, and its inheritance law is notable for being the only one to recognize the right of a testator's children to forced share (Art. 1493 CC). However, changes aimed at weakening the institution have been gradually introduced.³⁴ Since 1989,³⁵ only children under 24 years of age or permanently incapacitated irrespective of age have had the status of forced heirs (Art. 1493 A and E CC)³⁶ and, in addition, the grounds for disinheriting forced heirs varied

the same inheritance rights for legitimate and illegitimate children. It is recalled in A. LINTL, 'Austria', in *European Succession Laws*, p 32.

- 30 *Kindschaftsrechts-Änderungsgesetz 2001 (KindRÄG 2001)* (BGBl 29. Dezember 2000 Teil I Nr. 135).
- 31 S. FERRARI, 'Familienerbrecht und Testierfreiheit in Österreich', in D. Heinrich & D. Schwab, *Familienerbrecht und Testierfreiheit im europäischen Vergleich* (Bielefeld: Gieseking 2001), p 183, and RÜDEBUSCH, *Vorschlag für eine Reform*, pp 119-121.
- 32 See *Familien- und Erbrechts-Änderungsgesetz 2004 (FamErbRÄG 2004)* (BGBl 21 Jun. 2004 Teil I 58). For a succinct reference, see L. WOLFF, *Pflichtteilsrecht - Forced Heirship - Family Provisions. Österreich - Louisiana - Schweiz - England und Wales* (Frankfurt: Peter Lang 2010), p 33, which incorrectly states that the third section of §773, a, ABGB was introduced by the 2004 reform (at 35).
- 33 R. WELSER, 'Die Reform des Pflichtteilsrechts in Österreich und Deutschland', 4. *ZfRV (Zeitschrift für Rechtsvergleichung)* 2008, p (175) at 178-179.
- 34 M. NATHAN, 'Forced Heirship: The Unheralded "New" Disinheritance Rules', 74. *TLR (Tulane Law Review)* 2000, p 1027.
- 35 Act 1989, No. 788.
- 36 This forced a change to the constitution to consolidate the condition of these children's forced shares. The reform took place in 1996, and a new Inheritance Act was passed in 1997 (Act 1997,

between 1808 and 2001.³⁷ Lack of a family relationship with the testator has been a ground for disinheritance since 1985 [Art. 1621 A (8) CC; formally, Art. 1621(12) CC]³⁸ and a parent can disinherit an adult forced heir who has failed to contact her over a two-year period, assuming that she had the wherewithal to do so - not, therefore, when the forced heir did not know the testator - and there was no just cause to prevent contact. An exception is made if the child was on active service in the US armed forces, and this has been interpreted in the sense of material impossibility or for security reasons.³⁹ Unlike Austrian law, Article 1622 of the Louisiana CC entitles a grandparent to disinherit a grandchild in similar circumstances, irrespective of whether it was the grandparent or the parent with whom the child did not have a relationship.⁴⁰

12. That Article 1621(8) CC was full of vagueness soon became apparent from warnings from the academic community.⁴¹ Case law has later had to confront ambiguities such as: what is to be understood by 'communication' and what its content should be, i.e., whether sending one or two postcards or a small gift is enough and whether this can be considered respectful communication⁴²; how the two years with no contact should be calculated, and particularly whether they need to have occurred immediately before the will was drafted,⁴³ and above all, how the failure of the relationship should be assessed. There seems to be agreement that

No. 1421; Act 1997, No. 3007). See V. ROUGEAU, 'No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law', 1. *Civil Law Commentaries* 2008 (3), p (1) at 17 et seq.

37 NATHAN, *TLR* 2000, p 1035. The 1997 Act, No. 1421, § 1, had the unexpected consequence of repealing Art. 1621 CC, the rule that laid down the grounds for disinheritance. According to NATHAN (pp 1036 et seq.), as the only rule remaining in force was Art. 1494 CC, which established that disinheritance had to be effected with just cause 'in accordance with the law', any 'just cause' set down in a will could be used to disinherit a forced heir, at the judge's discretion. Act 2001, No. 573, § 1 reintroduced the list of just causes for depriving an heir of the forced share into the CC, while at the same time reducing the list from twelve to eight.

38 Act 1985, No. 456. See NATHAN, *TLR* 2000, p 1037; in detail, K. SHAW SPAHT, 'Successions and Donations', 46. *LLR (Louisiana Law Review)* 1986 (3), p 707.

39 See SHAW SPAHT, *LLR* 1986, pp 710-711. On the casuistry, see the Louisiana Court of Appeals (Fourth Circuit), *Succession of Jurisich* [694 So. 2d 928 (1996)].

40 Following the 1985 reform, this ground for depriving an heir of the forced share did not initially apply to grandparents and great-grandparents. Academic opinion considered this logical because 'society no longer recognizes the cohesiveness of the extended family. A grandchild, either during the life of his parents (the forced heir) or thereafter, may fail to communicate with his grandparent for a period of two years after his majority without intending disrespect and in conformity with normal societal behaviour': see SHAW SPAHT, *LLR* 1986, p 708.

41 See SHAW SPAHT, *LLR* 1986, pp 710-713.

42 See the Louisiana Court of Appeals (Fifth Circuit), *Succession of Steckler* [665 So. 2d 561 (1995)] and the Louisiana Court of Appeals (First Circuit), *Succession of Gruce* [683 So. 2d 362 (1996)].

43 The Louisiana Court of Appeals (First Circuit), *Succession of Gruce* [683 So. 2d 362 (1996)] found that they did not.

the law should only sanction the child's refusal to attempt to make contact;⁴⁴ disinheritance is thus appropriate when there has been no such attempt, no matter how much the forced heir tries to justify this with the argument that it would have created tension in the testator's new family.⁴⁵ However, courts have also found that a child cannot be required to contact a parent if doing so would clearly be in vain in view of the lack of interest shown by the parent throughout the child's life; specifically if it transpires that the parent abandoned her shortly after or even before birth.⁴⁶

Since the ground cited by the testator is presumed to be true, it falls to the forced heir to prove either that two consecutive years with no contact have not passed or that she did not know how to contact the deceased. She also has to prove that she had just cause for not contacting the deceased or simply that the deceased had forgiven her or that they had been reconciled (Arts 1624 and 1625 CC).⁴⁷

3.2. *Legislation in Catalonia*

13. The clause providing for disinheriting a forced heir because of the lack of a family relationship - which has a parallel among the grounds for terminating a maintenance obligation (Art. 237-13.1, *e*, Cat CC)⁴⁸ - has not been unanimously praised by academic opinion.⁴⁹ In the first place, it is clear that the reasons individuals may have for ceasing to have a normal parent-child relationship can be

44 SHAW SPAHT, *LLR* 1986, p 712; and WOLFF, *Pflichtteilrecht*, p 125. Also, the Louisiana Court of Appeals (First Circuit), *Succession of Bertaut* [572 So. 2d 142 (La. App. 1991)] and the Louisiana Court of Appeals (Third Circuit), *Succession of Gray* [736 So.2d 902 (1999)].

45 The Louisiana Court of Appeals (First Circuit), *Succession of Cure* [(633 So. 2d 590 (1993)].

46 The Louisiana Court of Appeals (First Circuit), *Succession of Bertaut* [572 So. 2d 142 (La. App. 1991)]. However, see The Louisiana Court of Appeals (First Circuit), *Succession of Del Buno* (665 So. 2d 172 (1995)).

47 See the Louisiana Court of Appeals (Third Circuit), *Succession of Emile Vidrine* [562 So. 2nd. 52 (1990)], the Louisiana Court of Appeals (First Circuit), *Succession of Gruce* [683 So. 2d 362 (1996)] and the Louisiana Court of Appeals (First Circuit), *Succession of Gray* [736 So.2d 902 (1999)]. On the new development that the rules about reversing the burden of proof represented, see K. SHAW SPAHT, K. VENTURATOS LORIO, C. PICOU, C. SAMUEL & F. W. SWAIM Jr., 'The New Forced Heirship Legislation: A Regrettable "Revolution"', 50. *Louisiana Law Review* 1990 (3), p (409) at 490-491; and SHAW SPAHT, *LLR* 1986, p 709.

48 J. RIBOT IGUALADA, 'Aliments entre parents: novetats del Codi civil de Catalunya i jurisprudència recent', 13. *RCDP (Revista Catalana de Dret Privat)* 2013, p 99; and J.A. PÉREZ FENOLL, *La ausencia de relaciones familiares como causa de extinción de la obligación de prestar alimentos en el Codi civil de Catalunya* (Sevilla: ePraxis 2012).

49 Among the most favourable and least sceptical, see A. VAQUER ALOY, 'Freedom of Testation, Compulsory Share and Disinheritance Based on Lack of Family Relationship', in *The Law of Succession*, pp 91-104.

very difficult to assess, and in most scenarios, there will be blame on both sides.⁵⁰ Moreover, the proposed rule is plagued by ambiguities⁵¹ and probably overlaps with other grounds for disinheritance, which are now very loosely categorized (in particular, the former serious ‘physical’ abuse has become serious ‘abuse’ in the new Art. 451-17.2, *c*, Cat CC). However, it appears that testators, on their notaries’ advice, are resorting to this ground with increasing frequency,⁵² and thus, there are already a significant number of judgments that demonstrate the practical problems involved in disinheritance on this basis.⁵³

3.2.1. *Too Many Ambiguities*

14. A family relationship must be associated with affection, a close relationship, and even the explicit absence of rejection,⁵⁴ but it cannot be identified with living together, essentially, because under normal circumstances children would not be living with their parents when the right to forced share came into being. Even so, the relationship between the testator and the forced heir can surely not be understood to have broken down, whatever the degree of discord, if they live under the same roof, nor, clearly, when they do not live together but the forced heir visits the testator, if only occasionally.⁵⁵

Establishing how many years are necessary for the lack of a relationship to be found ‘clear and continued’, as Article 451-17.2, *e*, Cat CC requires, is also difficult. If parents and children had a relationship in the past but then ‘ceased to have contact’ it would probably not be enough for disinheriting a forced heir if this occurred towards the end of the deceased’s life, precisely two or three years

50 M. GARRIDO MELERO, *Código civil de Cataluña. Libro cuarto, relativo a sucesiones (Ley 10/2008, de 10 de julio)* (Madrid: Marcial Pons 2008), p 406; RIBOT, in *Comentari al llibre quart*, p 1402; A. LAMARCA I MARQUÈS, ‘We Are Not Born Alone and We Do Not Die Alone: Protecting Intergenerational Solidarity and Refraining Cain-ism through Forced Heirship’, 4(2). *OSLS (Oñati Socio-Legal Series)* 2014, p (264) at 276; and M. ANDERSON, ‘An Outline of the Catalan Forced Share System’, 42. *International Journal of Legal Information* 2014 (1), p (35) at 45.

51 See below 3.2.1.

52 J. GÓMEZ TABOADA, *Derecho de sucesiones de Cataluña. Teoría y práctica* (Pamplona: Lex Nova 2012), p 404; and L. JOU MIRABENT, ‘Institucions successòries a la pràctica notarial dels darrers anys’, in L. Arnau Raventós & M. L. Zahino Ruiz (eds.), *Cuestiones de Derecho sucesorio catalán. Principios, legítima y pactos sucesorios* (Madrid-Barcelona-Buenos Aires: Marcial Pons 2015), p 131.

53 See below 3.2.2.1.

54 RIBOT, in *Comentari al llibre quart*, p 1400; and M.C. GETE-ALONSO CALERA, ‘Comment to Article 443-5 CC Cat’, in *Comentari al llibre quart*, p 1307. Can there be a commercial or professional relationship between parent and child, which does not include a family relationship? Barcelona Provincial Court decision of 30 April 2014 (JUR 2014\135504) stated, obiter dictum, that there can.

55 RÜDEBUSCH, *Vorschlag für eine Reform*, p 127.

before her death, as this behaviour clearly only shows a deterioration in the relationship.⁵⁶ Conversely, if the forced heir showed some interest in the testator during her last illness, after a long time without contact, the question is whether this is sufficient to find that the family relationship had been resumed, especially if the situation could be the result of opportunistic behaviour on the part of the forced heir.⁵⁷ Perhaps it is not, unless it can be deduced from the specific circumstances that this was an unequivocal gesture of reconciliation that should overturn the disinheritance (Art. 451-9 Cat CC). Or, maybe it is, if it is accepted that the requirement for a continued lack of a family relationship disappears in that case.

The legislature should have specified how many years with no contact constitute a clear and continued lack of relationship. Five years is not the same as twenty or thirty, and inexactness facilitates arbitrariness. Academic opinion considers a very long period – which thirty years would be⁵⁸ – counterproductive. With current life expectancy at around eighty years of age,⁵⁹ the lack of a family relationship would have to start when the testator were fifty, or, if it occurred before that, either when the forced heir were still a minor or very shortly after she came of age. In short, this would exclude a significant number of scenarios, on one hand the most common, such as adult children abandoning parents in their old age. Conversely, if the period is too short – which the two years required by the aforementioned Article 1621 A (8) Louisiana CC certainly is – it is not definitive because it does not indicate that family ties can no longer be re-established. A ten-year period is more than reasonable for using this ground for disinheritance.⁶⁰

3.2.2. *The Problem of Attributability*

15. The rules regulating the consequences of the breakdown of a marriage or partnership no longer require investigating who is responsible for the breakdown, yet blame is present in the ground for disinheritance because of a lack of a family relationship with the deceased (Art. 451-17.2, *e*, Cat CC), exactly as it is with any other ground for disinheritance. However, proving that the forced heir is

56 It is far less likely that the relationship will be found to have broken down if this was observed during the last months of the deceased's life. See Barcelona Provincial Court decision of 13 Feb. 2014 (JUR 2014\85318).

57 In this way, RÜDEBUSCH, *Vorschlag für eine Reform*, p 127.

58 This time frame was suggested by HERZOG, in *Pflichtteilsrecht*, p 21.

59 See above fn. 5.

60 On what is said in the text, RÜDEBUSCH, *Vorschlag für eine Reform*, pp 128-129. See also WELSER, *ZFRV* 2008, p 179 on the ten-year period and when it should start to be calculated. The Barcelona PCA decision of 30 Apr. 2014 (JUR 2014\135504) found that the 11 years during which father and child had had no relationship in the case analysed were more than enough.

responsible for the breakdown and, moreover, that she is the only person responsible is not easy. Some judgments have underscored the complexity of family relationships and the consequent difficulty of attributing blame solely to one party when they break down.⁶¹ Furthermore, this requirement (the forced heir's being to blame) is especially controversial in the current context, characterized as it is by a high number of crises among married couples and partners that result in the break-up of families with joint minor children. According to the Spanish National Institute for Statistics (INE), the majority of married couples that break up have at least one minor child.⁶² Establishing who is to blame for the absence of a relationship is difficult in all family disputes and even more so when the origins of this absence lie in the parents' prior separation or divorce. In some cases, especially when one parent has been granted sole custody, the break-up results in minor children becoming estranged from the parent who does not have custody, and this tendency persists - or even intensifies - when the children come of age. When this time comes, even though it is the child who shuns all contact with this parent, can it be said that the former is responsible for the lack of a family relationship in that case? Clearly, it cannot, at least in a general sense.⁶³

3.2.2.1. *What Are the Judges' Interpretations?*

16. Some judgments address the specific ground for disinheritance in Article 451-17.2, *e*, Cat CC, and others refer to it in litigation requesting the terminating of the maintenance obligation (Art. 237-13.1, *e*, Cat CC). Judgments concerning the latter are included here, because they help to demonstrate the judges' reasoning when perceiving and assessing attributability. In most cases, the courts do not require proof of the decisive cause of the absence of a relationship and consequently nor do they find it necessary to judge this because of the difficulties entailed in its assessment.⁶⁴ Blame for the absence of a relationship is not

61 The Tarragona PCA decision of 18 Dec. 2013 (JUR 2014\21780) and the Barcelona PCA decision of 13 Feb. 2014 (JUR 2014\85318) found '[...] very difficult to assess [...] circumstances that fall within the scope of private family matters, such as ideological, character or any other type of difference which leads to a distance developing between the forced heirs and the deceased'.

62 See the annulment, separation, and divorce statistics (2014) on the Spanish National Institute for Statistics website on 15 Sep. 2015 (www.ine.es/prensa/np927.pdf) (last accessed: 25 Nov. 2015).

63 Favours this view, LAMARCA, *OSLS* 2014, p 276. It makes it dependent on the circumstances, BARCELÓ, *RCDI* 2004, p 516.

64 With the probable exception of the Barcelona PCA decision of 23 Jul. 2013 (JUR 2013\334928) handed down on a case regarding the terminating of the maintenance obligation. It was precisely the impossibility of proving, on the part of the father with a duty to maintain, why the relationship had broken down that led the judge to reject the daughter's exclusive responsibility for the cause of the breakdown, although she refused to see her father in spite of his efforts to maintain contact with her.

generally exclusively attributed to the forced heir if it is proved that the deceased had shown no interest in re-establishing contact or if her behaviour had contributed to the forced heir's rejection of her. If, on the other hand, in spite of the lack of contact, the forced heir scorned the deceased's wish to rebuild the relationship, then blame is found to lie solely with the former.

17. In one of the first cases,⁶⁵ the court deemed it to be sufficiently proved that in spite of the forced heir's efforts to re-establish the relationship with her mother (the deceased), the latter wanted nothing to do with her because she could not forgive her daughter for trying to incapacitate her. The judgment expressly stated that the testator was deeply convinced of her wish to disinherit her daughter and that she knew what she was doing, adding the important detail that 'it is clear, without being able to enter into an analysis of whether the decision was fair or not', which is to say, without elucidating whether the cause justified the fact that mother and daughter were not on speaking terms. The disinheritance was declared unfair because on numerous occasions the daughter had expressed her determination to resume and rebuild a painful family relationship that was dear to her in some way. In other words, the breakdown of the relationship was not attributable to her, or at least not exclusively, as the testator for her part had done nothing to restore the relationship. Despite the importance of this decision, it is useful to note that it could not be deduced from the facts that there had been a clear and continued absence of family relationship because the differences arose in 2007 and the will was made in 2009, shortly before the testator's death. However, it is questionable whether the ground for disinheritance could have been successful under the 'serious abuse of the testator' alluded to in Article 451-17.2, *c*, Cat CC, especially taking into account the fact that the testator was fully capable of making a will.⁶⁶

Article 451-17.2, *e*, Cat CC was not applied in other scenarios because the court found that the deceased's rejection of the forced heir was proved because of the contemptuous treatment he showed the forced heir during his lifetime. Consequently, the forced heir was not deemed solely responsible for the breakdown of the relationship.⁶⁷

65 Barcelona PCA 22 March 2012 (JUR 2012\144625).

66 The Spanish CC has not found attempting to incapacitate the deceased to be 'abuse or serious offence', but it should not be forgotten that judgments that did find it thus revoked decisions made by lower courts which had found the opposite: see Asturias PCA decision 23 May 2011 (AC 2011\1279) and Pontevedra PCA decision 10 Mar. 2000 (AC 2000\969). The application of the rule is clearly conditioned by the circumstances surrounding each case.

67 The testator publically doubted that his grandson was actually his son's child: see Tarragona PCA decision of 18 Dec. 2013 (JUR 2014\21780).

18. The case law application of Article 451-17, *e*, Cat CC as the basis for terminating the maintenance obligation almost always shows the same rationale.⁶⁸ This case law is especially interesting because the context is usually one of separated or divorced parents, and a certain restrictive tendency has been observed among judges when assigning blame to children who have had no relationship with one parent for some time. This lack of relationship is precisely the reason why the father or mother with a duty to maintain may seek to terminate the allowance once the child comes of age. In one case, this was refused because the only support the parent had provided was financial and she was not remotely concerned about the child's personal development. The court found that the parent with a duty to maintain could not seek to terminate the maintenance obligation when it was her behaviour that had brought about the absence of a relationship. It was said that not only was the breakdown of the relationship not attributable to the maintained child but that it was exclusively attributable to the parent with a duty to maintain.⁶⁹ The courts have also refused to accept that the behaviour of adult children was to blame when the parent wishing to end the maintenance allowance had done nothing to keep up the relationship for over seven years.⁷⁰ The judges concluded once again that the absence of a relationship could not be attributed exclusively to the adult child. However, one judgment did find that blame was attributable to an adult child where, in spite of the father's numerous attempts to maintain the relationship, the child showed 'total detachment from and contempt for the father figure' (she had even changed her surname). The maintenance allowance was then terminated.⁷¹

3.2.2.2. *Is There Scope for a Different Interpretation?*

19. There may be times when neither the deceased nor the forced heir can be expected to re-establish a broken family relationship. If the testator neglects the relationship because she is offended by the forced heir's behaviour, can she always legitimately be required to make efforts to re-establish it, at the risk of the disinheritance otherwise being unfair? Probably not.⁷² The fact is that the law does not set down a catalogue of reasons or causes for the breakdown or absence of a family relationship, and the problems already noted are therefore inevitable. If the forced heir engages in *socially unacceptable* behaviour, is this sufficient

68 A note concerning the first judgments, in RIBOT, *RCDP* 2013, pp 117-118.

69 Barcelona PCA 18 Nov. 2010 (JUR 2011\80033).

70 Tarragona PCA 28 Jan. 2014 (JUR 2014\46676).

71 Barcelona PCA 15 Mar. 2012 (JUR 2012\195522). It was not clear how many years had had to pass after the child came of age for her refusal to have a relationship with her father to be found continuous and repeated. The maintenance allowance was set on 13 Dec. 2002 (when the child was still a minor) and was terminated on 14 Sep. 2010 (when the child had come of age).

72 RÜDEBUSCH, *Vorschlag für eine Reform*, pp 130-131.

reason? Catalan law provides for this as a ground for revoking gifts (*ex* Art. 531-15.1, *d*, Cat CC), and it is reasonable to ask why it should be easier to revoke a gift (which could perhaps even be added to the forced share) than to deprive the forced heir of her right in the will. Even so, when establishing the forced heir's responsibility for the lack of a family relationship is not straightforward, the tendency would probably be to consider that only behaviour similar to that expressly categorized as grounds for disinheritance will be taken into account.⁷³ Therefore, the testator's disapproval of the forced heir's joining a sect, gambling, or abusing alcohol would probably not be enough, especially taking into account the fact that leading a dissolute, immoral, or dishonest life does not count as a ground for disinheritance in Catalonia.⁷⁴

3.3. The Difficulty of Finding Alternative Models or a Final Attempt to Save the Forced Share?

20. If the disinheritance clause or the descriptive part of the will contains a reasonably specific allegation about the forced heir's behaviour, with the aim of making it easier to prove exclusive blame,⁷⁵ this does not avoid problems that may arise regarding the ground for disinheritance analysed here. The law does not establish a presumption of truth regarding the testator's statements, and the person who has to prove the veracity of the ground (the heir) will not always be able to prove that the forced heir is exclusively to blame if the latter contests the ground for disinheritance (Art. 451-20.1 Cat CC). Part of academic opinion in Catalonia would therefore prefer to dispense with blame and lean towards a purely fact-based model in which all that matters is that a family relationship has broken down or is non-existent,⁷⁶ perhaps without realizing that this destroys the symmetry with the other grounds for disinheritance. Some authors in other legal systems have suggested that both parties should be presumed *ex lege* to be equally

73 RÜDEBUSCH, *Vorschlag für eine Reform*, p 131; and PINTENS & SEYNS, "Compulsory Portion", p 187.

74 RÜDEBUSCH, *Vorschlag für eine Reform*, p 131.

75 This is suggested by L. JOU MIRABENT, 'Comment to Article 451-17 CC Cat', in L. Jou Mirabent (coord.), *Sucesiones. Libro Cuarto del Código Civil de Cataluña* (Barcelona: Sepín 2011), p 1145. See also Barcelona PCA decision of 13 Feb. 2014 (JUR 2014\85318).

76 GARRIDO MELERO, *Código civil de Cataluña*, p 406, and the same autor, 'El nuevo Derecho sucesorio catalán: de la Compilación hasta la actualidad', in Col.legi de Notaris de Catalunya, *50è aniversari Compilació del Dret Civil de Catalunya* (Madrid - Barcelona -Buenos Aires: Marcial Pons 2012), p 66. See also, R. CARPI MARTÍN, 'La sucesión forzosa en el libro cuarto: incertidumbres en torno a su fundamento', in Àrea de Dret civil - Universitat de Girona (coord.), *El nou dret successori del codi civil de Catalunya* (Girona: Documenta Universitaria 2009), p 525.

to blame⁷⁷ and consequently the testator should only be allowed to deprive a forced heir of half the individual forced share.⁷⁸ This proposition could probably not succeed in Catalonia as the legislature has eliminated the possibility that the blame for the situation of need allows the reduction of the maintenance allowance (*cf.* Arts 260.4 Catalan Family Code 1998 and 237-4 CC Cat). Furthermore, the legislature abandoned the proposal in the draft law that allowed an individual to be deprived of the forced share whether blame lay exclusively with her or was shared with the testator.⁷⁹ This model made deprivation more straightforward – because the latter situation could have been assumed – but was deliberately ruled out. For this reason, it has rightfully been said that the rule represented a final attempt on the legislature’s part to save forced share rather than a desire to weaken it.⁸⁰

4. Final Thoughts

21. The German legislature – and others that follow it – eschew general or blank clauses, and judges are generally strict in their assessment of the legally classified grounds for disinheritance. This is in contrast to the Catalan legislature’s approach, which leans towards incorporating open clauses, and to the Spanish Supreme Court’s broad interpretation of the grounds legally provided for in the Civil Code. In a general sense, the differences can be summarized by the contrast between clarity and legal certainty, on one hand (the German model), and fairness (the Catalan/Spanish model), on the other. The latter model favours freedom to dispose of property upon death, but at the cost of making it difficult for judges to resolve such cases fairly, obliged, as they are, to make risky moral assessments on matters that perhaps nobody other than the affected parties can be sure about. In short, regulations of this type can potentially lead to an increase in litigation among family members where the outcomes are uncertain because the parties are unlikely to be able to provide proof of the intimate details of their lives.⁸¹

77 Before the recent reform of inheritance law in the German Civil Code, this was proposed in S. HERZOG, ‘Reform der Pflichtteilsentziehung – Ein Vorschlag’, 1. *Forum Familienrecht* 2003, p (19) at 21.

78 SCHMIDT, *Die Reform des Pflichtteilsrechts*, pp 258-259, clearly considers that the resolution would be contrary to current German constitutional doctrine.

79 Article 451-21, *e.*, Book IV Draft: ‘[...] clear and continued breakdown in the family relationship between the forced heir and the deceased, provided this were not for a cause exclusively attributable to the deceased’. See the Official Gazette of the Catalan Parliament (*Butlletí Oficial del Parlament de Catalunya*) No. 33, 19 Feb. 2007.

80 RIBOT, in *Comentari al llibre quart*, p 1402.

81 Concerning the Catalan regulation, FERRER, in *La codificación del derecho civil*, p 356; and RIBOT, in *Comentari al llibre quart*, p 1402.

This confronts the delicate question of whether the law should assess situations pertaining to the private sphere of individuals.⁸² It is somewhat contradictory to see value judgments being removed from the scope of family law only to be introduced into inheritance law.⁸³ Perhaps the underlying problem is not the ground for disinheritance analysed here, which is more a way of avoiding outcomes that could guarantee forced share in clear cases of injustice, but the current legal form of the institution of forced share. Increasing testamentary freedom would require abolishing forced share and pave the way for its conversion into a maintenance entitlement. Any attempt to weaken it through broadening the grounds for disinheritance will always be incomplete and, therefore, insufficient to satisfy any of the parties.

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- 82 The same question has been raised in Spain with regard to the possibility of compensation for harm with no criminal implications caused within families. There are powerful arguments against compensation in these cases, which allude to the self-sufficient nature of solutions in family law and to the legislature's express rejection of the criterion of blame in this context with the passing of Act 15/2005 concerning no-fault or groundless divorce: see M. MARTÍN-CASALS & J. RIBOT IGUALADA, 'Daños en Derecho de familia: un paso adelante, dos atrás', LXIV. *Anuario de Derecho Civil* 2011 (II), p 503.
- 83 FERRER, in *La codificación del derecho civil*, p 356. See also, RIBOT, in *Comentari al llibre quart*, p 1402.

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Index

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