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Repository Citation

William H. Cook Jr., *Donations - The Effect of a Will Upon the Legal Usufruct Created by Article 916 of the Louisiana Civil Code*, 18 La. L. Rev. (1958)
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Notes

DONATIONS—THE EFFECT OF A WILL UPON THE LEGAL USUFRUCT CREATED BY ARTICLE 916 OF THE LOUISIANA CIVIL CODE

Testator bequeathed his entire estate, which consisted solely of community property, to his widow. This legacy was reduced to the testator's disposable portion,¹ and each of his four children was declared the owner of an undivided one-sixth interest in his succession.² No mention of a legal usufruct in favor of the surviving spouse³ was made in either the will or the judgment of possession. Suit was brought by the administratrix of the estate of one of the children to recover the rental value of his undivided interest in certain property from his co-heirs (including the testator's widow).⁴ The court of appeal affirmed the district court, holding that rent was due. On certiorari, *held*, reversed. The surviving spouse is entitled to the usufruct over the community property inherited by the children of the marriage whenever the testator has failed to dispose of his community estate *adversely* to such usufruct. Since the testator's will did not deprive the widow of this usufruct, she, as usufructuary, is not obligated to pay rent to the children for the use of their property. *Winsberg v. Winsberg*, 223 La. 67, 96 So.2d 44 (1957).

The usufruct created by law in favor of the surviving spouse was first enacted into Louisiana law in 1844⁵ and was incorporated into the Louisiana Civil Code of 1870 as Article 916. This article provides in part that the surviving spouse shall hold the usufruct over the community property inherited by the children of the marriage whenever the deceased spouse has "*not disposed by last will and testament of his or her share in the community.*"⁶ Although it is clear that the surviving spouse is entitled to this usufruct when the deceased spouse has died intes-

1. LA. CIVIL CODE art. 1493 (1870). Since the testator had more than three children, his disposable portion was limited to one-third of his estate. Therefore, the widow received one-third of the testator's estate in full ownership.

2. *Ibid.* Two-thirds of the testator's estate was distributed among his four children, each child receiving one-sixth of his estate.

3. *Id.* art. 916. Generally see Oppenheim, *The Usufruct of the Surviving Spouse*, 18 TUL. L. REV. 181 (1943).

4. The plaintiff is also the natural tutrix of the testator's granddaughter who is entitled to inherit all of her father's undivided interest in the testator's succession.

5. La. Acts 1944, No. 152, § 2.

6. See note 3 *supra*.

tate,⁷ some confusion has existed as to the survivor's right to the usufruct when the decedent has left a will. In the early cases,⁸ the fact that the deceased spouse elected to prescribe the distribution of his estate by will precluded his survivor from enjoying the usufruct. Typical of these cases is *Forstall v. Forstall*,⁹ decided in 1876, which presented a factual situation indistinguishable from that of the present case. The court held that, in order for the surviving spouse to hold the usufruct over the children's inheritance, she, as universal legatee, would have had to renounce her legacy.¹⁰ After this renunciation, the testator's estate would have been distributed in accordance with the provisions of the Civil Code involving intestate successions; and the surviving spouse would have been entitled to the usufruct over the community property inherited by the children of the marriage under Article 916 of the Louisiana Civil Code. However, in *Succession of Moore*,¹¹ decided twelve years later, the survivor was awarded the usufruct even though the deceased spouse had left a will. The decedent's will provided that his widow should have the usufruct over all of his property and, in addition, should have full ownership over the disposable portion of his estate. The court held that the widow was entitled to the usufruct by the *operation of law* under Article 916 rather than by the provision in the testator's will.¹² It announced the rule that the legal usufruct would attach to the children's inheritance whenever the deceased spouse had not disposed of his share in the community *adversely* to the survivor's usufruct.¹³ Although the provisions of the *Forstall* will were different from the provisions of the *Moore* will,¹⁴ it should be noted that the *Forstall* rule denies

7. *Succession of Russell*, 208 La. 213, 23 So.2d 50 (1945); *Kelley v. Kelley*, 198 La. 338, 3 So.2d 641 (1941).

8. *Ludowig v. Weber*, 35 La. Ann. 579 (1883); *Succession of Schiller*, 33 La. Ann. 1 (1881); *Forstall v. Forstall*, 28 La. Ann. 197 (1876); *Grayson v. Sanford*, 12 La. Ann. 646 (1857). *Cf. Matthews v. Matthews*, 13 La. Ann. 197 (1858). Usufruct was granted to the survivor in *Succession of Maloney*, 127 La. 913, 54 So. 146 (1911), but the court made it clear that the testator's will did not attempt to dispose of his property situated in Louisiana.

9. 28 La. Ann. 197 (1876).

10. *Id.* at 199.

11. 40 La. Ann. 531, 4 So. 460 (1888).

12. For cases which stress the fact that the usufruct arises by the operation of law rather than the testator's will, see *Succession of Lynch*, 145 So. 42 (La. App. 1932); *Succession of Brown*, 94 So.2d 317 (La. App. 1957).

13. 40 La. Ann. 531, 537, 4 So. 460, 463 (1888).

14. The *Forstall* will gave everything to the widow. The *Moore* will gave the widow a usufruct over all of the testator's property and full ownership over his disposable portion. There seems to have been some feeling that the *Forstall* case and the *Moore* case were not inconsistent and that a *confirmation of the usufruct* was required in the will to protect the widow's legal usufruct. See *Winsberg v.*

the usufruct whenever the decedent has disposed of his share in the community under a will, while the *Moore* rule denies the usufruct only if the will contains a distribution which is adverse to the usufruct.

Although subsequent cases would seem to indicate a preference for the *Moore* rule,¹⁵ the conflict between the *Forstall* and the *Moore* decisions was not presented to the court prior to the instant case. The administratrix of the deceased child's estate could not recover the rental value of his undivided interest in the property if the testator's widow held the usufruct over the property. Under the *Forstall* rule, the widow would not be entitled to the usufruct because the deceased spouse had left a will providing for the distribution of his share in the community. Under the *Moore* rule, however, the widow would be entitled to the usufruct since there was nothing in the will which could be considered a distribution adverse to the legal usufruct. The court applied the *Moore* rule, holding that the *Moore* case had in effect overruled the *Forstall* decision. Therefore, the widow became the usufructuary over the children's inheritance by the operation of law and was entitled to use the property without paying rent to the naked owners.

The granting of the usufruct to the survivor in the instant case seems appropriate. Act 152 of 1844 created a new right in the surviving spouse — the right to hold the usufruct over the community property inherited by the children of the marriage when the deceased spouse had not disposed of his share in the community.¹⁶ It would be inconsistent to deny the survivor this right after the deceased spouse had evidenced an intention to leave everything to the survivor. It is believed that the fact that the surviving spouse was the testator's universal legatee justifies this decision.

It is submitted that there is no conflict between the instant

Winsberg, 87 So.2d 362, 365 (La. App. 1956); Oppenheim, *The Usufruct of the Surviving Spouse*, 18 TUL. L. REV. 181 (1943); Note, 7 TUL. L. REV. 603 (1933). The instant case clearly dispels such an approach.

15. Succession of Glancy, 108 La. 414, 32 So. 356 (1902), involving a will making a donation to a third party. The court allowed the usufruct in spite of the will citing the "adverse disposition" rule of the *Moore* case. See also Succession of Baker, 129 La. 74, 55 So. 714 (1911); Succession of Brown, 94 So.2d 317 (La. App. 1957).

16. Before 1844, the surviving spouse had no right to the usufruct over the children's inheritance. See *Matchler v. Bank of Lafayette*, 31 La. Ann. 120 (1879).

decision and Article 1710 of the Louisiana Civil Code. That article prohibits a testator from imposing any burdens, such as a usufruct, upon his children's legitime.¹⁷ Thus a donation of a usufruct, the value of which exceeds the testator's disposable portion, is not binding upon his forced heirs and is subject to reduction under Article 1499 of the Louisiana Civil Code.¹⁸ However, the usufruct which is granted to the surviving spouse arises by the operation of law under Article 916 rather than the donation of the testator. Thus it is only the surviving spouse who may hold a usufruct over the children's forced portion.

Under the rule of the instant case, the testament must contain a distribution which is adverse to the survivor's usufruct before the usufruct will be denied. The opinion does not indicate which distributions might be considered "adverse distributions." Clearly, a bequest which prohibits the usufruct would be an adverse distribution. However, the failure of the testament specifically to deny the usufruct does not necessarily mean that the usufruct will be granted. For example, suppose that a testator bequeaths all of his property to his children in equal proportions. Although the usufruct was not specifically denied in the testament, it could be said that, by the very nature of a donation to the children, an adverse distribution had been made. In neither the *Moore* case nor the instant case did the testator make a donation directly to his children.¹⁹ Therefore, it is possible that a bequest to a child might be considered a distribution which is adverse to the survivor's usufruct. It is submitted that whether or not an "adverse distribution" has been made can best be determined by an examination of the intent of the testator. An investigation of this intent, as expressed in the will, would aid the court in determining whether or not the survivor's right to the usufruct under Article 916 of the Civil Code has been denied by the testament.

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17. *Clarkson v. Clarkson*, 13 La. Ann. 422 (1858).

18. Under Article 1499 the forced heirs of the testator have the right to surrender to the legatee full ownership of the testator's disposable portion in place of his usufruct. See also Article 1752 of the Civil Code which provides special rules for the reduction of a donation made by a testator to his second wife. *Succession of Braswell*, 142 La. 948, 77 So. 886 (1918).

19. See note 14 *supra*.