

Succession of Hyde: New Alternatives in Estate Planning

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the lake, while only 25 percent is carried out.³⁸ On the basis of these findings, the court applied the multi-factor test to hold that Grand Lake—Six Mile Lake was a lake in 1812 and at present.³⁹

In stepping away from the contrived legal criteria developed in the *Cockrell* case, *State v. Placid Oil Co.* moves toward a more realistic approach to the problem of waterbody classification. The multi-factor test is more reasonable than the standard used in prior decisions in that it allows determination based upon a balancing of facts at hand rather than on a stringent judicial standard. The major problem inherent in the use of this test is the inability to predict with certainty, prior to judicial consideration, the classification of a particular body of water. However, the accretion-carrying standard of *Cockrell* does not furnish a test appreciably more certain for predicting classification, since there is no concrete standard to determine when a current crosses the judicial line between perceptibility and imperceptibility. In addition, the new standard is consistent, at least on the facts of *Placid Oil*, with French doctrine.⁴⁰

In practical terms, the decision allows the state to retain control of an important area of the Atchafalaya Basin, an expanse critical for conservation and flood control purposes as well as for its mineral revenues. In promoting these ends, and in providing a workable standard of classification, *State v. Placid Oil Co.*, if not a panacea for predicting future judicial characterization of all waterbodies, is a sound decision from both the legal and practical standpoints.

M. Thomas Arceneaux

SUCCESSION OF HYDE: NEW ALTERNATIVES IN ESTATE PLANNING

Testator bequeathed the usufruct of his entire estate to his second wife leaving the naked ownership to his forced heirs, issue of his

38. *Id.*

39. *Id.* As Louisiana entered the Union in 1812, this is the date that is determinative of status under the traditional notions of the equal footing doctrine. Under *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), the present status is also significant. See generally notes 1, 7 *supra*.

40. Post Argument Supplemental Brief for Appellant at 6-7, *State v. Placid Oil Co.*, 300 So. 2d 154 (La. 1974): "[I]f the body of water in question were not classified as an *etang salee* [arm of the sea or coastal lake], it would be classified in France as a *lake*. A body of water traversed by a river is a lake governed by the rule of Article 558 of the French Civil Code. 4 Fuzier-Herman, *Repertoire due droit Francais* 87 (1888)." This is true despite some language to the contrary in *State v. Erwin*, 173 La. 507, 138 So. 84 (1931), in which an argument was made based on French law. See generally note 10 *supra*.

first marriage. The forced heirs alleged that this bequest impinged on their legitime and demanded that the wife's usufruct be reduced to a usufruct of the disposable portion.¹ Although agreeing that the legitime had been impinged,² the Louisiana supreme court *held* the forced heirs were required either to execute the disposition or abandon the disposable portion in full ownership to the legatee. *Succession of Hyde*, 292 So. 2d 693 (La. 1974).

Forced heirship is the right of designated ascendants and descendants to receive a certain fraction of the decedent's property in full ownership.³ Whenever a disposition in full ownership exceeds the disposable quantum⁴ to the prejudice of the forced heirs, they can demand a reduction in accordance with Louisiana Civil Code article 1502.⁵ On the other hand, the reduction of an excessive donation of a

1. The forced heirs based their claim upon LA. CIV. CODE art. 1752 which provides: "A man or woman who contracts a second or subsequent marriage, having a child or children by a former marriage, can give to his wife, or she to her husband, either by donation *inter vivos* or by last will and testament, in full property or in usufruct, all of that portion of his estate, or her estate, as the case may be, that he or she could legally give to a stranger."

2. The testator was survived by two children of his first marriage and four grandchildren, issue of a deceased child of the first marriage. Since these heirs did not receive two-thirds of the estate in full ownership, the court concluded that their legitime had been impinged. *Succession of Hyde*, 292 So. 2d 693, 696 (La. 1974); LA. CIV. CODE art. 1493. See text at note 3 *infra*.

3. *Clarkson v. Clarkson*, 13 La. Ann. 422, 424 (1858); *Succession of Williams*, 184 So. 2d 70, 73 (La. App. 4th Cir. 1966); LA. CIV. CODE arts. 1493-95, 1710; 11 AUBRY & RAU, DROIT CIVIL FRANÇAIS §§ 679, 683 (6th ed. Esmein 1954) in C. LAZARUS, 3 CIVIL LAW TRANSLATIONS 191, 206 (1969) [hereinafter cited as AUBRY & RAU]; 3 PLANIOL, CIVIL LAW TREATISE pt. 2 no. 3077A, at 505 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as PLANIOL]; *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Successions and Donations*, 29 LA. L. REV. 193, 194 (1969). But see A. YIANNPOULOS, PERSONAL SERVITUDES § 16 in 3 LOUISIANA CIVIL LAW TREATISE 55-58 (1968) [hereinafter cited as YIANNPOULOS]; Pascal, *Some ABC's About Trusts and Us*, 13 LA. L. REV. 555, 566 (1953); Note, 13 LOYOLA L. REV. 193 (1967), where the authors criticize this view and contend that the Louisiana Civil Code is susceptible of the interpretation that the legitime may be satisfied with less than full ownership. See also note 10 *infra*.

4. "Donations *inter vivos* or *mortis causa* can not exceed two thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number." LA. CIV. CODE art. 1493. "[They] can not exceed two-thirds of the property, if the disposer, having no children, leaves a father, mother, or both . . ." LA. CIV. CODE art. 1494. For a detailed discussion of forced heirship see Dainow, *The Early Sources of Forced Heirship: Its History in Texas and Louisiana*, 4 LA. L. REV. 42 (1941); Comment, 37 TUL. L. REV. 710 (1963).

5. "Any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the quantum of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that quantum." LA. CIV. CODE art. 1502.

usufruct or an annuity is regulated by article 1499 which provides that if the value of the usufruct or annuity exceeds the disposable portion, the forced heirs have the option to execute the disposition or abandon the disposable portion to the donee in full ownership.⁶ The action in reduction, therefore, "is converted into an action in reduction with compensation for the donee of the usufruct."⁷ Although the language of article 1499 seems to require a valuation of the usufruct, the jurisprudence indicates that such a valuation is not a prerequisite to its operation.⁸ Several commentators⁹ support this view principally by pointing to the problems inherent in making an accurate estimation.¹⁰

6. "If the disposition made by donation *inter vivos* or *mortis causa*, be of a usufruct, or of an annuity, the value of which exceeds the disposable portion, the forced heirs have the option, either to execute the disposition or to abandon to the donee the ownership of such portion of the estate as the donor had a right to dispose of." LA. CIV. CODE art. 1499. This is essentially a translation of FRENCH CIV. CODE art. 917.

7. YIANNOPOULOS § 16, at 65.

8. In *Succession of Braswell*, 142 La. 948, 950, 77 So. 886, 887 (1918), the Louisiana supreme court in discussing the factors to be considered were such a valuation necessary, noted "how unreliable, unsatisfactory, and disagreeably inquisitorial would be an estimation based upon elements so personal and difficult of appreciation"

9. See, e.g., AUBRY & RAU § 684(a), at 220 n.7, 223 n.15; PLANIOL, no. 3135, at 533; *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Successions and Donations*, 29 LA. L. REV. 193, 195 (1969).

10. However, there is considerable debate on this question. The conflict may be traced to the divergence of opinion as to the nature of the legitime. Those who argue that the legitime must be given in full ownership necessarily point to the uselessness of such estimates since the legitime would be impinged whenever the forced heirs have failed to receive the *quantum* of the estate reserved to them. See notes 3, 9 *supra*. But those who support the position that the legitime need not be satisfied in full ownership exclusively, consider valuation of the usufruct necessary to ascertain whether the heirs have been given the *value* of the estate which represents the forced portion. YIANNOPOULOS § 16, at 53; Note, 13 LOYOLA L. REV. 193, 197 (1967). See L. OPPENHEIM, SUCCESSIONS AND DONATIONS § 161 in 10 LOUISIANA CIVIL LAW TREATISE 275 (1973); Comment, 37 TUL. L. REV. 710, 738-41 (1963). The case of *Succession of Chauvin*, 286 So. 2d 793 (La. App. 4th Cir. 1973) also demonstrates that the value question is far from settled. The testator bequeathed the usufruct of his entire estate to his wife, leaving the naked ownership to his sole forced heir. Although the case dealt primarily with the effect of a confirmed article 916 usufruct, the court offered a new twist to the valuation question. The widow offered proof that the value of the usufruct was less than the disposable portion and argued that, according to article 1499, the legitime was not impinged. The court followed the recent jurisprudence and held that the legitime was impinged since it had not been satisfied in full ownership. The widow then argued that the forced heir should be required to abandon the disposable portion in full ownership to her in accordance with the option in article 1499. Because the value of the usufruct was in fact less than the disposable portion, the court reasoned that article 1499 was inapplicable and reduced the usufruct to a *usufruct* of the disposable

Whereas Civil Code articles 1493 and 1494 fix the disposable portion generally, article 1752 specifically governs donations *inter vivos* and *mortis causa* between spouses when there are children of a prior marriage. Before 1916 this article permitted donations in full ownership or in usufruct not in excess of one-third of the donor's property.¹¹ Thus, a testator who wished to leave the maximum revenue to his spouse was restricted to either donating a third of his estate in full ownership or giving a usufruct over a third of his property.¹² Applying this version of the article, the Louisiana supreme court in *Succession of Braswell*¹³ held article 1499 inapplicable when the validity of a donation was controlled by article 1752. Assuming that article 1493 "speaks of full ownership only, saying nothing of usufruct . . ." ¹⁴ the court reasoned that article 1499 was adopted solely to avoid the necessity of valuing a usufruct to ascertain an equivalent donation of full ownership.¹⁵ Since article 1752 furnished a distinct disposable portion of one-third for donations of *usufruct* between spouses, "there was no necessity or reason for [article 1499]."¹⁶ Consequently, the court reduced an excessive donation of usufruct to a *usufruct* of the disposable portion.¹⁷

portion. When *Chauvin* reached the Louisiana supreme court for the second time, the court denied writs because of the "peculiar procedural posture of this case . . ." 293 So. 2d 166 (La. 1974).

11. 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 1752, as amended by La. Acts 1882, no. 13 (J. Dainow ed.): "A man or a woman who contracts a second or subsequent marriage, having children by a former one, can give to his wife, or she to her husband, either by donation or by last will and testament, in full property or in usufruct, *not exceeding one-third of his or her property.*" (Emphasis added.)

12. "[T]he proper reading [of article 1752] evidently is that one-third may be given, and that this third may be given either in full ownership or in usufruct." *Succession of Braswell*, 192 La. 948, 951, 77 So. 886, 888 (1918).

13. 192 La. 948, 77 So. 886 (1918). Although the case was decided in 1918, the court applied the pre-1916 version of article 1752 since the operative facts arose prior to the 1916 amendment.

14. *Id.* at 950, 77 So. at 887.

15. *Id.* The court's view of the purpose of article 1499, although convenient for disposing of the facts of the case, seems questionable. Instead of obviating the necessity for valuing the usufruct, article 1499 may be construed as requiring such a valuation by the phrase "*the value of which exceeds the disposable portion.*" (Emphasis added.) See note 10 *supra*.

16. *Succession of Braswell*, 192 La. 948, 951, 77 So. 886, 888 (1918). Had the court not considered the function of article 1499 as being solely to avoid an estimation of the value of the usufruct, it seems that a persuasive argument could have been made for applying article 1499 as the remedy for the forced heirs whose legitime had been impinged under article 1752 due to an excessive donation of usufruct.

17. In so doing, the court relied on French jurisprudence and doctrine interpreting articles 917 and 1094 of the Code Napoleon. *Id.* at 952-54, 77 So. at 888-89. Although

Article 1752 was amended in 1916 to allow spouses to donate to each other, in full property or in usufruct; that portion of their estate which they could legally give a stranger.¹⁸ This amendment seemed to give the courts the opportunity to apply the option in article 1499 to cases in which a disposition in usufruct exceeded the disposable portion. However, in all but one case¹⁹ the lower courts followed *Braswell* and reduced an excessive donation of usufruct between spouses to a usufruct of the disposable portion.²⁰

In the instant case, the forced heirs demanded that the donation to the widow of the usufruct of the entire estate be reduced to a usufruct of the disposable portion. They argued that the amendment

the *Braswell* court did not mention LA. CIV. CODE art. 1502, the remedy provided therein seems to be a basis for the court's decision to reduce the donation to a usufruct of the disposable portion.

18. See note 1 *supra*. "The phrase [in full property or in usufruct] is a remnant of the legislation as first enacted, and is now apparently inconsequential for it merely gives the donor the right of doing what he has the faculty of doing anyhow, that is, of disposing of the disposable portion in any manner he sees fit." *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Successions and Donations*, 29 LA. L. REV. 193, 197 n.17 (1969).

19. In *Succession of McLellan*, 144 So. 2d 291 (La. App. 4th Cir. 1962) the testator left to his widow the usufruct of the legitime as well as the disposable portion in *full ownership*. In removing the encumbrance from the legitime, the court grounded its decision on *Braswell*. This reliance upon *Braswell* was improper since the facts of the two cases were clearly distinguishable. Since the disposable portion was bequeathed to the widow in *full ownership*, the court needed only to remove the usufruct from the legitime by application of article 1502. However, by granting the spouse the full ownership of the disposable portion, the court reached a proper result, but for the wrong reason.

20. In *Succession of Young*, 205 So. 2d 791 (La. App. 1st Cir. 1967), the testator bequeathed the usufruct of his entire estate to his second wife and the naked ownership thereof to his only child, issue of his first marriage. Although article 1499 was not specifically pleaded, it appears to have been the basis of the widow's argument because the wife contended that the value of the usufruct was not in excess of the disposable portion. Perhaps the failure to plead article 1499 led to the court's decision to rely solely on *Braswell* and article 1752, and consequently, to reduce the usufruct to a usufruct of the disposable portion. In *Succession of Ramp*, 205 So. 2d 86 (La. App. 4th Cir. 1967), *aff'd on the other grounds*, 252 La. 660, 212 So. 2d 419 (1968), the testator bequeathed to his third wife the usufruct of the entire estate; to his children of a previous marriage, their legitime in naked ownership; and to three people, one of whom was his child, the disposable portion in naked ownership. Although the case dealt primarily with the validity of a compromise agreement, the court reduced the widow's usufruct to a usufruct of the disposable portion. This result appears to be correct insofar as all but one of the heirs were concerned since, due to the particular bequest of the disposable portion, they could not abandon the same to the legatee of the usufruct. It is arguable, however, that article 1499 requires the heir who received a third of the disposable portion in naked ownership to forfeit that interest in order to acquire his forced share in full ownership. *But see* YIANNPOULOS § 16, at 72 n.310.

to article 1752 had left unaltered the crucial words allowing a gift "in full property or in usufruct," which they alleged had compelled the court in *Braswell* to conclude that article 1752 was self-contained, thereby precluding the application of article 1499. The court disagreed, characterizing that clause as an inconsequential remnant of the previous legislation,²¹ and correctly pointed out that the decision in *Braswell* was based on the phrase, "not exceeding one-third of his or her property," which was deleted in the revised article.²² Since spouses were now free to give to each other all that they could legally donate to a stranger, the court reasoned that "reference must be made to the rules regulating forced heirship,"²³ including article 1499, to ascertain the validity and effect of testamentary dispositions. To this extent the appellate cases following *Braswell* were specifically overruled.²⁴

The *Hyde* decision makes it clear that, notwithstanding article 1752, the forced and disposable portions will always be determined in accordance with articles 1493 and 1494. With the exception of the legal usufruct provided for in article 916,²⁵ article 1499 will control the reduction of excessive donations of usufruct, whether made to a stranger or a spouse, and whether the testator has children or not.

Due to the paucity of cases applying article 1499,²⁶ guidelines of construction are not readily available for future cases. Read literally, article 1499 would seem to require that *all* the forced heirs concur in

21. Succession of Hyde, 292 So. 2d 693, 695 (La. 1974), citing *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Successions and Donations*, 29 LA. L. REV. 193, 197 n.17 (1969).

22. Succession of Hyde, 292 So. 2d 693, 695 (La. 1974).

23. *Id.* at 696.

24. *Id.* It should be noted that the court discussed the issue of valuation as a prerequisite to the operation of article 1499 but reached no conclusion, other than to mention the prevailing view. *Id.* at 697 n.4. However, since the court agreed that the legitime must be satisfied in full ownership, if the question is ever before the court, the valuation of the usufruct will probably not be required. See note 10 *supra*.

25. LA. CIV. CODE art. 916: "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a [in] usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage." Because the legal usufruct does not burden the legitime, article 1499 is inapplicable. See, e.g., Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888); YIANNPOULOS § 104 at 341.

26. *Clarkson v. Clarkson*, 13 La. Ann. 422 (1858), is the only reported case which applied article 1499 before the issue was raised in *Succession of Braswell*, 142 La. 948, 77 So. 886 (1918).

exercising the option²⁷ and that the forced heirs hold at least the naked ownership of the entire disposable portion to abandon to the legatee of the usufruct.²⁸ However neither of these propositions is a necessary conclusion. Surely the fundamental principle of partition that no one should be compelled to hold property with another²⁹ should apply in this instance. Each forced heir should be allowed to abandon his interest in the disposable portion and receive his share of the legitime free of the usufruct.³⁰ Moreover, if article 1499 were strictly limited to cases in which the forced heirs held the entire disposable portion, the operation of the article would be defeated by the donation of even one dollar out of the disposable portion to a third person. This unfortunate result may be avoided by construing article 1499 to require each forced heir to abandon whatever interest in the disposable portion he has received in order to acquire his forced portion.³¹

Even if a limited scope is given to article 1499, the *Hyde* decision will cause a significant impact on estate planning. For example, a testator may wish to provide sufficient revenues for his spouse yet guarantee the ultimate control of his property to his forced heirs. Prior to *Hyde*, the testator who wished his spouse to receive the maximum potential revenues was in a dilemma. If he bequeathed her the usufruct of his entire estate and his forced heirs attacked the will, they could demand the usufruct be reduced to a usufruct of the disposable portion, thereby leaving the spouse with less income than intended by the testator. However, if he bequeathed her the disposable portion in full ownership, the property no longer remained in his family.

After *Hyde*, if the testator bequeaths the usufruct of the entire estate and the forced heirs demand their legitime, the spouse will at least receive the ownership of the disposable portion in accordance with the testator's presumed intention had he foreseen an attack on his will. If however, the testator prefers to keep his property under the control of his ascendants and descendants, he may preclude the

27. "[T]he forced heirs have the option" (Emphasis added.); LA. CIV. CODE art. 1499.

28. See AUBRY & RAU § 684(a), at 218; *The Work of the Louisiana Appellate Courts for 1967-1968 Term— Successions and Donations*, 29 LA. L. REV. 193, 195-96 (1969). But cf. *Clarkson v. Clarkson*, 13 LA. ANN. 422 (1858).

29. "No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition." LA. CIV. CODE art. 1289.

30. See AUBRY & RAU § 684(a), at 223.

31. If however, article 1499 is held inapplicable, the usufruct will simply be reduced in accordance with article 1502.

operation of article 1499 by imposing a resolutive condition on his spouse's usufruct to the effect that if his forced heirs demand their legitime, his spouse shall only have the usufruct of the disposable portion. Such conditions find considerable support in Civil Code articles 542 and 608,³² provided they contain nothing contrary to law or good morals.³³ In addition, since article 1499 imposes a costly option on the forced heirs seemingly in an attempt to effect the presumed intention of the testator, the testator's desire to relieve the heirs of this burden should be controlling.³⁴

Estate planners should also note the effectiveness of article 1499 in deterring attacks on the will. Whenever the estate is so large that a forfeit of even a small interest in the disposable portion would be costly, heirs will not likely demand their legitime in full ownership but will be content to suffer the temporary encumbrance of the usufruct to keep the entire succession. Likewise, if there is only one forced heir so that the disposable portion represents two-thirds of the testator's property, the heir apparently will choose to retain the naked ownership of the whole estate rather than satisfy himself with full ownership of a third. If the attack is prevented because of such considerations, the testator will achieve the twin aims of providing sufficient revenues for his spouse and preserving the ultimate control of his property to his heirs.

Robert W. Booksh, Jr.

SUMMARY SUSPENSION OF ATTORNEYS CONVICTED OF CRIME

An attorney was convicted of income tax fraud.¹ The Louisiana State Bar Association through the Committee on Professional Re-

32. LA. CIV. CODE art. 542: "Usufruct may be established simply, or to take place at a certain day, or under condition; in a word, under all such modifications as the person who gives such a right may be pleased to annex to it." LA. CIV. CODE art. 608 provides in part: "If the title of the usufruct has limited the right to it to commence or determine . . . in the event of a certain condition, the right does not commence or determine till the condition happens . . ." Cf. *Grayson v. Sanford*, 12 La. Ann. 646 (1857).

33. "The donor may impose on the donee any charges he pleases, provided they contain nothing contrary to law or good morals." LA. CIV. CODE art. 1527. Although this article appears in the chapter treating donations *inter vivos*, it should have equal application to donations *mortis causa*.

34. AUBRY & RAU § 684(a), at 223; YIANNPOULOS § 16, at 62 n.273; cf. *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Successions and Donations*, 29 LA. L. REV. 193, 199 n.22 (1969).

1. *U.S. v. Ehmig*, Crim. Doc. No. 71-381 (E.D. La., Aug. 1, 1972). Ehmig was convicted of violating 26 U.S.C. § 7206(1) (1954) which makes it unlawful for anyone