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Civil Code Article 543 and the Problem of Partition by Licitation of Property Subject to a Usufruct

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CIVIL CODE ARTICLE 543 AND THE PROBLEM OF PARTITION BY LICITATION OF PROPERTY SUBJECT TO A USUFRUCT

The right of partition is specifically granted to coowners of property in Louisiana.[1] The Louisiana Civil Code prohibits stipulations that partition can never occur[2] and limits the amount of time a testator can prohibit partition among his heirs.[3] Although it is apparent that Louisiana law favors partition,[4] the right to partition is by no means absolute.[5]

One such limitation on the right of partition is when the property sought to be divided is subject to an outstanding usufruct.[6] When such property is susceptible to division in kind, a coowner "may demand its partition in kind to the extent necessary to enable him to obtain the perfect ownership of a determined part."[7] However, when the property cannot be divided in kind,[8] "[p]artition by licitation is not allowed even though there is a person who is both a usufructuary and an

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

2. LA. CIV. CODE art. 1297: "It can not be stipulated that there never shall be a partition of a succession or of a thing held in common. Such a stipulation would be null and of no effect."

3. LA. CIV. CODE art. 1300:

> But a donor or testator can order that the effects given or bequeathed by him, be not divided for a certain time, or until the happening of a certain condition.
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> But if the time fixed exceed five years, or if the condition do not happen within that term, . . . the judge, at the expiration of this term of five years, may order the partition . . . .

4. *See* LA. CIV. CODE arts. 1289, 1297, 1299, 1300, 1308, & 1311.

5. LA. CIV. CODE art. 2336 expressly prohibits judicial partition of community property during the existence of the community regime, and LA. CIV. CODE art. 1303 prohibits partition where ownership in common is indispensable.

6. LA. CIV. CODE art. 543:

> A coowner whether or not he is also a usufructuary of an undivided part of a thing may demand its partition in kind to the extent necessary to enable him to obtain the perfect ownership of a determined part. Partition by licitation is not allowed even though there is a person who is both a usufructuary and an owner.

7. LA. CIV. CODE art. 543.

8. LA. CIV. CODE art. 1339 provides: "When the property is indivisible by its nature, or when it can not be conveniently divided, the judge shall order, at the instance of any one of the heirs, . . . that it be sold at public auction . . . ." LA. CIV. CODE art. 1340 provides: "It is said that a thing can not be conveniently divided, when a diminution of its value, or loss or inconvenience of one of the owners, would be the consequence of dividing it."

owner."[9] The problem of partitioning by licitation property subject to a usufruct caused interpretation problems for Louisiana courts[10] well before the adoption of article 543 in the 1976 property revision of the Civil Code.[11] This codification has yet to provide a solution to these past interpretational problems,[12] although there is an interpretation which promotes the policies underlying the prohibition[13] and eliminates the problems created by past interpretations. Unfortunately, this interpretation has not yet been adopted by a Louisiana court.

Basis of the Right of Partition

The right of partition is based on the principle that "[n]o one can be compelled to hold property with another."[14] Inherent in this definition is the right to the "exclusive authority over a thing."[15] The proposition that two or more persons, as coowners in indivision, can exercise "exclusive authority" over the same thing creates theoretical[16] and practical difficulties.

Every coowner of property has the right to the use and enjoyment of the thing for its intended purpose[17] provided, however, that he does not interfere with use and enjoyment by other coowners.[18]

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9. LA. CIV. CODE art. 543.

10. The Third Circuit Court of Appeal and the Louisiana Supreme Court have had particular problems interpreting the prohibition. *See generally* Pasternack v. Samuels, 415 So. 2d 211 (La. 1982); Smith v. Nelson, 121 La. 170, 46 So. 200 (1908); Succession of Glancey, 112 La. 430, 36 So. 483 (1904); Devillier v. Devillier, 371 So. 2d 1230 (La. App. 3d Cir.), *cert. denied*, 373 So. 2d 546 (1979).

11. Article 543 did not appear in the Civil Code prior to the revision of book II in 1976.

12. *See generally* Pasternack v. Samuels, 415 So. 2d 211 (La. 1982); Devillier v. Devillier, 371 So. 2d 1230 (La. App. 3d Cir.), *cert. denied*, 373 So. 2d 546 (La. 1979).

13. The policies underlying the prohibition include preserving the usufruct granted by LA. CIV. CODE art. 890 and preventing usufructuaries and naked owners from forcing a perfect owner to submit to a partition by licitation.

14. LA. CIV. CODE art. 1289.

15. LA. CIV. CODE art. 477.

16. *See, e.g.*, LA. CIV. CODE art. 480, comment (b). Because the right to alienate is inherent in ownership, theoretically no coowner can exercise exclusive authority over the property since no coowner can alienate the property without permission from another. Property such as jewelry cannot be enjoyed by one coowner without interfering with the enjoyment of other coowners.

17. *See* Toler v. Bunch, 34 La. Ann. 997 (1882); Becnel v. Becnel, 23 La. Ann. 150 (1871). In *Becnel*, one coowner sued another coowner for rent of the plantation the two owned. Defendant had cultivated a portion of the plantation, and plaintiff sought to collect rent for the use of the land. The court held that defendant had no obligation to pay rent; his enjoyment of one-half of the property in no way interfered with plaintiff's right to use and enjoy the other half. The *Toler* case involved essentially the same facts and had the same outcome.

18. *See* Moreira v. Schwann, 113 La. 643, 37 So. 542 (1904). In *Moreira*, coowners

A coowner must use property according to its intended use.[19] Furthermore, one coowner cannot sell the property or burden it with servitudes without the permission of all coowners.[20] When coowners of property cannot agree on its administration, the only legal remedy is partition.[21] Agreements among coowners not to partition their property can result in taking the property out of commerce because all decisions concerning management of the property must be agreed to by all coowners and no other remedy besides partition is afforded coowners who cannot agree.[22] In order to prevent property from being taken out of commerce indefinitely, coowners generally may not stipulate that partition shall never take place.[23] A donor or testator may not stipulate that things donated or bequeathed by him to two or more persons in common shall never be divided.[24]

Limitation of the Right of Partition

While the general rule is that the right of partition should be a remedy available to all coowners of property, there are instances when partition is limited or prohibited altogether. Partition is prohibited "when the use of the thing held in common is indispensable to the coheirs . . . of the succession falling to them,"[25] the common elements[26] of condominiums cannot be partitioned,[27] and community property can not be judicially partitioned[28] during the existence of the community property regime.[29] Some of the policy considerations which allow these deviations from the general rule include enabling coheirs to use and enjoy inherited property, keeping condominium property in commerce,[30] and promoting judicial efficiency by keeping

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of a storehouse could not agree on its administration. The supreme court held that the only remedy for such disagreement was partition.

19. *Tolar*, 34 La. Ann. 997; *Becnel*, 23 La. Ann. 150.

20. LA. CIV. CODE art. 714.

21. *Moreira*, 113 La. at 647.

22. *Id.*

23. LA. CIV. CODE art. 1297.

24. LA. CIV. CODE arts. 1297 & 1299. Coowners can agree that partition will not take place for a limited time. Such an agreement will be subject to the rules of a contract of partnership. Donors and testators can stipulate that partition shall not take place for five years.

25. LA. CIV. CODE art. 1303.

26. LA. R.S. 9:1121.103(5) (Supp. 1979): " 'Common elements' means the portion of the condominium property not a part of the individual units."

27. LA. R.S. 9:1122.108(C) & 9:1122.112(A) (Supp. 1979).

28. LA. CIV. CODE art. 1294 defines judicial partition as partition "made by the authority of the court, and according to the formalities prescribed by law."

29. LA. CIV. CODE art. 2336. The prohibition does not include voluntary partition, which may be done without court approval.

30. Because of the unique nature of condominium ownership, in which units are

marital agreements out of the courts until the community is terminated.[31]

Another exception to the right of partition concerns property owned in indivision that is subject to an outstanding usufruct over an undivided part; Civil Code article 543 places limitations on a coowner's right to partition. The language of article 543 restates the right of coowners to partition *in kind* regardless of the existence of a usufruct over an undivided part of the thing. It expressly prohibits, however, partition *by licitation* "even though there is a person who is both a usufructuary and an owner." Comment (b) to the article claims that the provision "restates a rule established by Louisiana jurisprudence and does not change the law."[32] The comment cites three cases[33] in support of this conclusion. This so-called "jurisprudential rule" appears to incorporate not only the holdings of these three cases but certain dicta as well, and although the comments "do not constitute provisions of law in themselves," they "are intended to be informative and illuminative of the meaning of the provisions of the Code."[34]

In the earliest of these cases, *Succession of Glancey*,[35] the Louisiana Supreme Court held that a naked owner could not force a full owner who also held an interest in usufruct to submit to a partition by licitation. In *Glancey*, the children of the decedent inherited an undivided one-half interest in property, subject to a legal usufruct in favor of the decedent's surviving spouse.[36] The surviving spouse

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owned individually and common areas are owned collectively, the Louisiana Legislature enacted LA. R.S. 9:1121.101-9:1124.117 (Supp. 1979), known as "The Condominium Act." LA. R.S. 9:1121.102(A) states: "This Part shall apply only to property made subject to it by a condominium declaration duly executed and filed for registry."

31. LA. CIV. CODE art. 2336 prohibits only judicial partition. Judicial efficiency, rather than family harmony, is obviously the policy consideration behind the article.

32. LA. CIV. CODE art. 543, comment (b): "The second sentence of this article excludes partition of the entire property by licitation even though there is a person who is both usufructuary and naked owner. It restates a rule established by Louisiana jurisprudence and does not change the law."

33. Smith v. Nelson, 121 La. 170, 46 So. 200 (1908); Succession of Glancey, 112 La. 430, 36 So. 483 (1904); Fricke v. Stafford, 159 So. 2d 52 (La. App. 1st Cir. 1963).

34. Introduction by the Louisiana State Law Institute, preceeding LA. CIV. CODE Ann. book II (West 1980).

35. 112 La. 430, 36 So. 483 (1904).

36. LA. CIV. CODE art. 916 (as it appeared prior to its amendment by 1981 La. Acts, No. 911, § 1):

> 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 . . . [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, when the survivor shall enter into a second marriage.

owned the other one-half interest in the property. The court construed the statute creating the usufruct as being mandatory and found that "the purpose of the statute would be frustrated" if partition by licitation were allowed.[37] The court's reasoning was based in part on the policy of protecting the interests of a surviving spouse. "The property of the community is earned by the common industry of husband and wife, and in order to protect the survivor the legislature has chosen to offer the survivor the opportunity to enjoy the fruits of the community."[38]

The second case cited in support of this limitation on the partition of property is *Smith v. Nelson*.[39] In *Smith*, the supreme court refused to permit a naked owner to force a usufructuary to submit to a partition by licitation. The plaintiffs, children of the decedent, had inherited a one-half interest in property subject to a testamentary usufruct in favor of their stepfather, the decedent's surviving spouse.[40] The plaintiffs claimed that the usufruct had terminated when the stepfather remarried. However, the court found that "it [was] only the usufruct established by law . . . that ceased upon the remarriage of the usufructuary; and [since] the usufruct enjoyed by [the stepfather] was established by the will of his deceased wife . . . it [was] not affected by his remarriage."[41] Having found that the usufruct still existed, the court concluded:

> The law which confers the right to the partition of a "thing held in common" has no application to those who hold, respectively, the fragments of a dismembered title to the same immovable property, for the reason that in such a case, the title being dismembered, each part is a distinct thing, held by a different owner, and there is no "thing held in common."[42]

The final case cited to support the limitation on partition found in article 543 is *Fricke v. Stafford*.[43] In *Fricke*, the owner of an undivided one-sixth interest in perfect ownership[44] was denied partition by licitation of the property, which was subject to a usufruct over an undivided one-half interest. The suit involved a collateral attack on the testament granting the usufruct. After disposing of the case on the basis

37. 112 La. at 432, 36 So. at 483.

38. *Id.* The property in question was community property.

39. 121 La. 170, 46 So. 200 (1908).

40. *See, e.g.*, LA. CIV. CODE art. 544, comment (b). The usufruct had been granted to the stepfather by testament, rather than by operation of law.

41. 121 La. at 173, 46 So. at 200-01.

42. 121 La. at 174, 46 So. at 201.

43. 159 So. 2d 52 (La. App. 1st Cir. 1963).

44. *Cf.* LA. CIV. CODE art. 477. A perfect owner has the right to use, enjoy, and alienate the thing.

of prescription, the first circuit went on to state, "It is the Court's appreciation of the law that so long as this property or any undivided portion thereof is burdened with a valid usufruct, no suit for partition by licitation of the property will lie."[45]

In short, this so-called "rule of jurisprudence" which Civil Code article 543 purportedly restates is based on one case which held that a naked owner could not force a full owner who was also a usufructuary to submit to partition by licitation,[46] another case which held that a naked owner could not force a usufructuary to submit to partition by licitation,[47] and a third case which held that a collateral attack on a testament which had been ratified more than five years before was barred by prescription.[48] Only in the dicta of *Fricke* is there any mention of an absolute prohibition of partition by licitation of property subject to usufruct. The first circuit, however, gave no basis for their conclusion that the property could not be partitioned by licitation "so long as [it was] burdened by a valid usufruct."[49]

Article 543—Problems of Interpretation

Comment (b) states that article 543 "does not change the law," yet, with the exception of the *Fricke* dicta, none of the cases cited as authority for the article support the absolute prohibition found in the article's wording. In his treatise on personal servitudes, Professor A. N. Yiannopoulos states:

> The second sentence of Article 543 accords with *dicta* in Smith v. Nelson that neither a usufructuary nor a naked owner may demand partition by licitation of the entire property free of the usufruct. The provision thus extends the narrow holding of that case so as to exclude partition by licitation of the entire property *in all cases* in which a person has an undivided interest in usufruct and also an undivided interest in naked ownership, perfect ownership, or both.[50]

Professor Yiannopoulos apparently does not interpret the article as an absolute prohibition of partition, but rather as a prohibition of partition by licitation whenever one person holds an undivided interest in both usufruct and ownership (perfect, naked, or both).

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45. 159 So. 2d at 55 (quoting the trial court's opinion).
46. Succession of Glancey, 112 La. 430, 36 So. 483 (1904).
47. Smith v. Nelson, 121 La. 170, 46 So. 200 (1908).
48. Fricke v. Stafford, 159 So. 2d 52 (La. App. 1st Cir. 1963).
49. 159 So. 2d at 55 (quoting the trial court's opinion).
50. A. YIANNOPOULOS, PERSONAL SERVITUDES § 8 in 3 LOUISIANA CIVIL LAW TREATISE 37-38 (1978) (emphasis added).

The Yiannopoulos interpretation of the article was relied upon by the Third Circuit Court of Appeal in *Devillier v. Devillier*.[51] A partition of inherited property was requested by a testator's daughter, who coowned the property with three siblings. The property was part of the decedent's separate estate and therefore was not subject to the legal usufruct in favor of the surviving spouse.[52] The plaintiff's siblings subsequently granted their father a conventional usufruct over their undivided portion.[53] The court distinguished the facts of the case from the situation contemplated by the last sentence of article 543.

> [T]here is no party in the instant case who is both a usufructuary and an owner. Therefore, insofar as *form* of ownership is concerned we do not run afoul of interpretation placed upon the new Article 543 of the Civil Code .... That the prohibition of LSA-C.C. art. 543 requires a holding of the two types of elements by one person is illustrated by the summarizing comment on that statement by Professor Yiannopoulos in his Louisiana Civil Law Treatise ....[54]

The *Devillier* court recognized the possibility for abuse if the trial court's contrary interpretation of the article was affirmed. "[S]uch an affirmance would permit the holder of only a very minor fractional interest in perfect ownership to tie up the entire ownership and enjoyment of the property by the simple expedient of granting a usufruct to a third party. The possibilities for collusion and abuse are evident."[55] The court held that the plaintiff, as a perfect owner, was entitled to a partition by licitation of the entire property "since her interest in perfect ownership [gave] her elements in common with all coowners, including the usufructuary"[56] and since she was not both a usufructuary and an owner.

Although the outcome of *Devillier* was correct, the third circuit evaded actually interpreting the article itself. An excellent commentary on the problems created by the last sentence of article 543 followed the *Devillier* decision.[57] The author criticized the third circuit's attempt to distinguish the *Devillier* facts from those contemplated by the code article.[58] An amendment to Civil Code article

51. 371 So. 2d. 1230 (La. App. 3d Cir.), *cert. denied*, 373 So. 2d 546 (La. 1979).

52. LA. CIV. CODE art. 916 (as it appeared prior to its amendment by 1981 La. Acts, No. 911, § 1), made no provision for a legal usufruct over the decedent's separate property.

53. LA. CIV. CODE art. 544.

54. 371 So. 2d at 1238-39.

55. *Id.* at 1238. The trial court sustained an exception of no cause of action, and dismissed the suit, based on an interpretation of article 543.

56. *Id.*

57. Note, *Civil Law Property—Civil Code Article 543 and the Prohibition of Partition by Licitation of Property Subject to Usufruct*, 55 TUL. L. REV. 224 (1980).

58. *Id.* at 236.

543 was suggested to prevent those who held no interest in perfect ownership from demanding a partition by licitation.[59] "With such a provision in the Code, a perfect owner would never be defeated in his attempt to force partition by licitation; and he likewise could never be forced to submit to partition unless required to do so by another perfect owner in indivision."[60] In that author's opinion, "the purpose of article 543 is to prevent forced dismemberments of title" and the "actual sentiment of article 543 would be better conveyed"[61] by the proposed amendment.

The Third Circuit Court of Appeal did not consider the commentary's interpretation of article 543 when it decided *Pasternack v. Samuels*.[62] The plaintiff had sought partition by licitation of property which he held in indivision with his sister, Betty Samuels. Mr. Pasternack and Mrs. Samuels had inherited from their father an undivided one-half interest in the property. The property had been community property and was subject to a testamentary usufruct in favor of their mother. The mother bequeathed half of her interest in the community—a one-fourth undivided interest—to the children of Mr. Pasternack. The other one-half interest was left to Mrs. Samuels' children, subject to a usufruct granted in Mrs. Samuels' favor. After a lengthy discussion of the *Smith* case, the court concluded that "[t]he jurisprudential rule of *Smith v. Nelson* which later became C.C. art. 543, [had] the effect of prohibiting partition by licitation of any of the succession property [therein] since Betty Samuels owned an interest in the same and had a usufruct over a portion of each parcel."[63] Thus Mr. Pasternack, a perfect owner, was defeated in his attempt to force partition by licitation. The court used the same rationale espoused by Professor Yiannopoulos: "partition by licitation [is excluded] *in all cases* in which a person has an undivided interest in usufruct and also an undivided interest in [ownership]."[64]

Although it affirmed the *Pasternack* decision, the Louisiana Supreme Court[65] interpreted this prohibition of partition to apply without any qualification that there be a person who is both a

59. The amendment proposed by the author reads: "One who holds no interest in perfect ownership may not obtain partition by licitation even though there is another person who holds interests in both perfect ownership and usufruct or naked ownership." *Id.* at 237.

60. *Id.*

61. *Id.* at 236.

62. 406 So. 2d 290 (La. App. 3d Cir. 1981), *aff'd*, 415 So. 2d 211 (La. 1982).

63. 406 So. 2d at 292.

64. A. YIANNOPOULOS, *supra* note 50, § 8, at 38 (emphasis added).

65. 415 So. 2d 211 (La. 1982).

usufructuary and an owner.[66] In a footnote to the decision,[67] the *Devillier* court was criticized for ignoring the *literal* wording of the article and for allowing partition by licitation of property subject to a usufruct.[68] Under the supreme court's interpretation in *Pasternack*, partition by licitation of property subject to a usufruct over an undivided part is prohibited, regardless of whether there is "a person who is both a usufructuary and an owner."[69] The court did not discuss the reasoning behind article 543 or its comments, nor was there any discussion of the problems that this interpretation may create. The court insisted that "[a]ny change in the article addresses itself to the legislature."[70]

In a dissenting opinion, Justice Calogero stated what he believed to be the correct interpretation of article 543:

> When we look to the underlying jurisprudence on which the article was based in order to flesh out its meaning, we find that the concern of the redactors in enacting the provision was to prohibit partition by licitation of property subject to a usufruct *only* where the party seeking the partition does not hold rights of the same nature in the same object, common elements with all others who hold an interest in the property. . . . Thus, under La. C.C. art. 543, a usufructuary or naked owner cannot affect the interests of the other, nor can either force a full owner to dismember his title by obtaining a partition by licitation.[71]

Referring to the commentary which followed the *Devillier* opinion,[72] the Justice stated that it "represents the proper interpretation and intent of Article 543 as presently written."[73]

Analysis and Conclusion

Neither the Yiannopoulos interpretation of the last sentence of article 543 nor the interpretation offered by the supreme court in *Pasternack* is satisfactory. Both offer possibilities for collusion and abuse by coowners who wish to prevent the partition of property not susceptible to division in kind. Some of the possibilities for abuse in

66. This was the interpretation followed by the trial court in *Devillier*, 371 So. 2d 1230 (La. App. 3d Cir.), *cert. denied*, 373 So. 2d 546 (La. 1979).

67. 415 So. 2d at 213 n.4.

68. The court went on to say that the situation in *Devillier* was not presented in the instant case.

69. LA. CIV. CODE art. 543.

70. 415 So. 2d at 214.

71. *Id.* at 214-15 (Calogero, J., dissenting).

72. Note, *supra* note 57. See text at notes 57-61, *supra*.

73. 415 So. 2d at 215.

the *Pasternack* situation were discussed in the *Devillier* decision.[74] Under the Yiannopoulos interpretation, partition by licitation of property owned in indivision by three or more coowners could be prevented by the granting of a usufruct by one coowner to a fellow coowner, thus creating "in one person an individual interest in usufruct and also an undivided interest in . . . perfect ownership." This interpretation could also be used by a donor or testator to indefinitely postpone a partition of things donated or bequeathed by him to his successors. A donor could donate a one-half interest in perfect ownership in a house to A and donate the other one-half interest to B, subject to a usufruct in A's favor. Since houses are not subject to division in kind, the donor could delay partition of the property for the term of the usufruct or until A's death if no term was specified. This defeats the codal provisions which limit the amount of time a donor can stipulate against such a partition.[75]

The interpretation by the third circuit in *Devillier* prohibits partition by licitation by perfect owners where "there is a person who is both a usufructuary and an owner."[76] Because perfect owners hold elements in common with both naked owners and usufructuaries,[77] perfect owners should be allowed to sue for partition of the usufruct and the naked ownership separately.[78] Separate partition by licitation of the usufruct and the naked ownership would enable the owner to obtain perfect ownership over a determinable part of the proceeds. The same result could be obtained in a single partition by licitation of the entire property with the usufruct attaching to that portion of the proceeds commensurate with the interest held by the usufructuary.[79] There is no apparent reason, policy or otherwise, why a perfect owner should be precluded from accomplishing in one action what he could accomplish anyway in two separate actions.

The policy reasons for limiting the right to partition in other situations are not applicable to the partition by licitation of property subject to a usufruct. With respect to condominiums[80] and common ownership which may be indispensable to coheirs,[81] the policy to keep property in

74. See text at note 55, *supra*.

75. *See* LA. CIV. CODE art. 1300.

76. LA. CIV. CODE art. 543. *See* A. YIANNOPOULOS, *supra* note 50, § 8.

77. *See generally*, Note, *Civil Law Property—Partition of Land Subject to a Usufruct*, 24 LA. L. REV. 885, 886 (1964).

78. Since perfect ownership includes the right to use and enjoy the thing, a perfect owner owns elements in common with the usufructuary. His enjoyment of the right to alienate gives him elements in common with the naked owner.

79. *Cf.* LA. CIV. CODE art. 616.

80. LA. R.S. 9:1122.108(C) (Supp. 1979).

81. LA. CIV. CODE art. 1303.

commerce and available for use and enjoyment outweighs the general policy which favors partition. The prohibition against judicial partition of community property during the existence of the community regime is an attempt to keep marital disagreements outside the courtroom unless and until the spouses have decided to terminate the community altogether. Prohibiting partition of property subject to usufruct does not further either of these policies. In fact, prohibition of partition because of the existence of a person who is both owner and usufructuary may keep property *out* of commerce until the usufruct is renounced or terminated.[82]

Protection of the surviving spouse's legal usufruct[83] is the probable policy behind the prohibition of partition found in article 543. The policy of preventing partition during the existence of this legal usufruct predates the Louisiana Civil Code of 1870.[84] In *Day v. Collins*,[85] the Louisiana Supreme Court held that a child "is not entitled . . . to sue for or recover her interest in the community property of her father during the life or widowhood of her mother"[86] when such property is subject to a legal usufruct in favor of the mother.[87] The usufruct in favor of a surviving spouse was once limited to a legal or testamentary usufruct over the decedent's share of the community, but now a testator may grant his surviving spouse a usufruct over his separate

82. Unless established for a limited time, the usufruct expires upon the death of the usufructuary. *See* LA. CIV. CODE art. 607.

83. LA. CIV. CODE art. 890:

> If the deceased spouse is survived by descendants and shall not have disposed by testament of his share in the community property, the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants. This usufruct terminates when the surviving spouse contracts another marriage, unless confirmed by testament for life or for a shorter period.
>
> The deceased may by testament grant a usufruct for life or for a shorter period to the surviving spouse over all or part of his separate property.
>
> A usufruct authorized by this Article is to be treated as a legal usufruct and is not impingement upon legitime.
>
> If the usufruct authorized by this Article affects the rights of heirs other than children of the marriage between the deceased and the surviving spouse or affects separate property, security may be requested by the naked owner.

84. 1844 La. Acts, No. 152, § 2 established the legal usufruct in favor of the surviving spouse.

85. 5 La. Ann. 588 (1850).

86. *Id.* at 589.

87. The legal usufruct was provided for the surviving spouse only when there was issue of the marriage and only if the decedent's share of the community had not been disposed of by testament. Smith v. Nelson, 121 La. 170, 46 So. 200 (1908), was the first case to recognize that a usufruct granted to a surviving spouse by testament does not necessarily terminate upon remarriage. However, the testament must be more than a mere acknowledgement of the legal usufruct.

property as well.[88] Both the *Glancey* and *Smith* fact situations contemplated partition of property subject to spousal usufructs. The protection of the surviving spouse was admittedly a strong factor in the *Glancey* court's decision not to allow partition to take place. Even the *Devillier* court recognized the policy considerations which favor preserving both legal and testamentary spousal usufructs.[89]

The most reasonable interpretation of article 543 is the one suggested by Justice Calogero in his dissent in the *Pasternack* case.[90] According to Justice Calogero, the prohibition should apply "only where the party seeking the partition does not hold . . . common elements with all others who hold an interest in the property."[91] This interpretation prevents naked owners and usufructuaries from forcing a partition by licitation upon a perfect owner, even when the perfect owner also owns an interest in usufruct. Under the community property regime, a surviving spouse is often "a person who is both a usufructuary and an owner."[92] The wording of article 543 was aimed presumably at protection of this individual. Since children who inherit either separate property or community property subject to a usufruct in favor of a surviving spouse are naked owners, they cannot force the surviving spouse to submit to a partition by licitation, whether the spouse is a mere usufructuary[93] or a perfect owner who also has an interest in usufruct.[94] Acceptance of Justice Calogero's interpretation will preserve usufructs granted in favor of surviving spouses by law and by testament over both community and separate property.[95] This interpretation prevents the granting of usufructs for the purpose of delaying partition indefinitely, except as provided for by article 890. The granting of a usufruct by one coowner to another[96] or by one coowner to a third party will not prevent other coowners from obtaining a partition by licitation provided the other coowners hold

88. LA. CIV. CODE art. 890. The original provision provided for a legal usufruct over the decedent's share of the community only if it had not been disposed of by testament. This usufruct terminated upon remarriage of the survivor. Today's provision is much more liberal; a decedent may leave a usufruct over either separate or community property to the surviving spouse, and it may be for life or a shorter period of time.

89. 371 So. 2d at 1236.

90. 415 So. 2d at 214.

91. *Id.* at 214-15 (Calogero, J., dissenting).

92. LA. CIV. CODE art. 543.

93. A usufruct granted to a surviving spouse over a decedent's separate property would make the survivor a mere usufructuary.

94. A usufruct granted to a surviving spouse over a decedent's share of the community would make the surviving spouse both a perfect owner and a usufructuary.

95. LA. CIV. CODE art. 890.

96. This could become a problem when dealing with succession property that is not susceptible to division in kind, such as the family home.

an interest in perfect ownership. The policy of protecting usufructs granted in favor of surviving spouses will be served without depriving perfect owners of the right to partition.[97]

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97. The Louisiana State Law Institute Committee for the Revision of the Law of Property recently has proposed a tentative draft of a new article 543:

> When a person holds a share in full ownership, and other persons hold shares in full ownership, in naked ownership, or in usufruct over the same thing, he may demand partition in kind or by licitation.
>
> When an undivided share in ownership is burdened by a usufruct the naked owner and the usufructuary may jointly petition for partition, and their interests shall be treated as an interest in full ownership.
>
> A person holding a share in naked ownership only or in usufruct only may not compel a partition in kind or by licitation against a person who holds a share in full ownership.