The Usufruct of the Surviving Spouse

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Louisiana law gives a surviving spouse many benefits, but the usufruct of the surviving spouse under Civil Code article 916 is probably the most important. This institution is relatively modern and seems to exemplify a feeling in civilian countries during the late nineteenth century that a surviving spouse should be given more benefits than those already provided. The principal purpose of the usufruct was obviously to help the surviving spouse more adequately sustain himself and his children after termination of the marriage by death. Today, after the inauguration of social security, various welfare programs, and private and public insurance and pension plans, the importance of the usufruct in terms of its fundamental purpose has certainly decreased. Yet it would be premature to conclude it no longer has vitality, for the usufruct has other useful functions. For example, if the husband predeceases the wife, the usufruct ensures that the wife may continue to live in the family home, and if the wife predeceases the husband he may continue operation of a community business unrestricted by the desires of her heirs. This Comment analyzes the statutory requisites for the usufruct and their judicial interpretation.

1. For example, the inheritance of the surviving spouse provided by La. Civil Code art. 915 (1870); the usufruct of the surviving spouse provided by id. art. 916; the marital fourth provided by id. art. 2382; the widow's homestead, provided by id. art. 3252.

2. Id. 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 (sic) usufruct, during his or her natural life, so much of the share of a 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."

3. Louisiana was one of the first civil law jurisdictions to award this benefit to the surviving spouse, it being established by La. Acts 1844, No. 152, § 2. France did not adopt a similar institution until 1891. For a comprehensive discussion of the French development of this institution see Oppenheim, The Usufruct of the Surviving Spouse, 18 Tul. L. Rev. 181 (1943).

4. See Succession of Teller, 49 La. Ann. 231, 21 So. 265 (1897); Succession of Moore, 40 La. Ann. 431, 4 So. 460 (188); State Dep't of Highways v. Costello, 158 So. 2d 850 (La. App. 4th Cir. 1964); Magee v. Gatlin, 51 So. 2d 154 (La. App. 1st Cir. 1951).
Requisites for the Usufruct

Under article 916 the surviving spouse acquires the usufruct of the deceased's share of the community property if certain conditions are fulfilled: first, the marriage must be under the community of acquets and gains; second, there must be issue of the marriage with the deceased spouse; third, the deceased spouse must not have disposed of his share in the community by testament; fourth, the usufruct attaches only to that portion of the deceased's share in the community which is inherited by issue of the marriage; and fifth, the usufruct endures only so long as the surviving spouse does not remarry. The first condition, that a community property regime exist, is self-explanatory. Each of the other conditions deserves consideration.

Two interesting questions may be posed: first, would the usufruct attach if there is no legal community, but purely conventional one established by marriage contract, or a modified legal community; second, why was not similar protection given to the survivor in the case where there was no community property?

The first question may be academic today, since seldom is the legal community modified by marriage contract. However, there is nothing to indicate that the usufruct would not exist if the community of property resulted from convention rather than operation of law. Additional problems may be presented as to whether the surviving spouse under other than a purely legal community could be deprived of the usufruct, as is possible in the case of the purely legal community. Article 2326 (1870) provides that the spouses may not by agreement “alter the legal order of descents, either with respect to themselves, in what concerns the inheritance of their children or posterity, or with respect to their children between themselves, without any prejudice to the donations inter vivos or mortis causa . . . .” It seems the better position would be to hold that this article would not prevent deprivation of the usufruct. Article 916, in relation to the purely legal community, clearly does allow deprivation of the usufruct, and there seems no sound reason to make a distinction here. Further, article 2326 is susceptible of the interpretation that granting the usufruct in other than the legal community would not be a change in the order of descent, but only in the quantum of the children's inheritance. It might be contended that the order is changed in regard to the surviving spouse; however, under the jurisprudence this could not be admitted as an answer since it is established that the usufruct does not pass by inheritance. See Succession of Marsal, 118 La. 212, 42 So. 778 (1907).

In relation to the second question, it seems at first glance that the policy underlying article 916 should operate even more strongly to favor a usufruct where there is no community property. However, if article 916 is construed as an impingement upon the legitime of forced heirs. Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888), it appears evident that the lawmakers simply were not willing to deviate so far from the principles of forced heirship. Where there is no community property, La. Civil Code art. 1710 (1870), quoted in note 11 infra, probably reflects the lawmakers' intent.
Issue of the Marriage

In accordance with the terms of article 916 the courts have refused to allow the usufruct to attach to decedent's community property inherited by children of a former marriage.\(^7\) If there are issue of the last marriage and children of a former marriage, the usufruct burdens only the part inherited by issue of the last marriage.\(^8\) Why did the lawmaker impose this requirement, when it seems more likely that children of a former marriage would prevent the surviving wife from keeping the family home or the surviving husband from continuing a community business than would issue of the last marriage? There are two possible justifications for this restriction. First, the surviving spouse is not legally obligated to support the deceased's children by a former marriage. Article 227\(^9\) of the Civil Code provides that parents, by the act of marrying, contract to support their children. Obviously, this rule was not intended to encompass the non-parental spouse under a second marriage, since he is in the position of a stranger to his stepchildren.\(^10\) Since the surviving spouse has not been placed under an obligation to support stepchildren, the lawmaker may have believed that he should not be permitted to encroach upon their legitime. The second possible justification for this restriction might be found in the rules regarding the burdening of the legitime\(^11\) and, especially, in article 1752\(^12\) of the Civil Code. At the time the usufruct of the surviving spouse was created,\(^13\) article 1752 allowed the deceased

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7. Succession of Williams, 170 La. 245, 127 So. 615 (1930); Succession of Emonot, 109 La. 359, 33 So. 368 (1902); Hall v. Toussaint, 52 La. Ann. 1763, 28 So. 364 (1900).
8. See note 41 infra, and accompanying text.
9. LA. CIVIL CODE art. 227 (1870): "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children."
10. For discussion of the rights of an adopted child in regard to the usufruct see note 19 infra, and accompanying text.
11. See LA. CIVIL CODE art. 1710 (1870): "The same causes which, according to the foregoing provisions of the present title, authorize an action for the revocation of a donation \textit{inter vivos}, are sufficient to ground an action for revocation of testamentary dispositions; provided, however, that no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs, nor can they lose their inheritance for any act of ingratitude to the testator, prior to his decease. That he has not disinherited them shall be sufficient evidence of his having forgiven the offense."
12. Id. art. 1752: "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 \textit{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."
to give only a child's portion in usufruct to his second spouse, where there were issue of his former marriage. Had there been no restriction to property inherited by issue of the last marriage, then the usufruct would have attached to property inherited by children of a former marriage, thus necessarily emasculating the terms of article 1752. Arguably, later amendments to article 1752, lessening the restrictions on property that may be given to a second spouse, evidence the feeling that this restriction is no longer considered proper in modern society. This contention, at best, should be given only slight weight, and the courts should not deviate from the restriction of the usufruct to property inherited by issue of the marriage in absence of express legislative intent.

Surprisingly, the courts have sometimes had difficulty in determining who is "issue of the marriage." In *West v. Goodwin* 14 a judgment awarding the surviving spouse the usufruct over property inherited by a grandchild, taking concurrently with children of the marriage, was challenged by the grandchild on the ground that he, *taking in his own right*, was exempt from the operation of article 916. Without considering the validity of the contention that the grandchild inherited in his own right, the court concluded that his portion was subject to the usufruct, reasoning that "issue of the marriage" in article 916 must be read in pari materia with article 3556(8)15 defining "children" to include grandchildren. While the result achieved seems fair, the reasoning employed seems somewhat formalistic and arbitrary; it overlooks the possibility that the redactors, by using the term "issue of the marriage" in article 916, may have intended to preclude application of the article 3556(8) definition of "children." The court's conclusion might have been strengthened had they recognized that the grandchild could inherit only by representation, since *children* heirs of the first degree were alive and would otherwise exclude him.16 Under the general rules of representation, the grandchild would take only what the predeceased child would have taken:17 the naked ownership

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14. 176 La. 873, 147 So. 20 (1933).
15. LA. CIVIL CODE art. 3556(8) (1870): "Children—Under this name are comprehended, not only the children of the first degree, but the grandchildren, greatgrandchildren, and all other descendants in the direct line."
16. See id. arts. 888, 902.
17. In some cases the representative may have greater rights than the person being represented, but these exceptions are specifically provided by statute. For example, see id. art. 901, which allows the child of one either disinherited, or
burdened by the usufruct. Had the legislature intended to deviate from the doctrine of representation in article 916, seemingly it would have given a more definite indication. Furthermore, such an intention seems unlikely in view of the policy behind article 916 to provide for the surviving spouse, who might be obliged to support the grandchildren and yet be deprived of the family home if the grandchild inherited in full ownership. On this basis, the conclusion that grandchildren are “issue of the marriage” follows more plausibly.

Louisiana courts also had to decide if an adopted child could be considered issue of the marriage and thus subject to the survivor’s usufruct. The court answered this question affirmatively, reasoning that since legislation had placed the adopted child in the position of a child of the marriage with respect to the right of inheritance, then the adopted child should likewise be subject to the limitation upon the blood child’s inheritance. This conclusion seems sound for the additional reason that in view of the underlying policy of article 916 to provide support for the survivor and children, any distinction between natural and adopted children would be unfortunate.

Adverse Disposition by the Testator

The most troublesome requisite of article 916 is that the deceased “shall not have disposed by last will and testament, of his or her share in the community property.” Clearly the surviving spouse is entitled to the usufruct when the deceased spouse dies intestate, but when the decedent dies testate, the effect of particular types of bequests on the survivor’s right to the usufruct is uncertain. Language in early cases implied that the mere fact that decedent made a testament was enough to preclude operation of article 916. More recently, however, the
courts have held that only a testamentary disposition _adverse_ to the survivor deprives him of the usufruct. Additional problems have arisen from the question whether the legtime would be impermissibly burdened if the survivor received both the disposable portion of the decedent's estate and the usufruct over the remainder. The effect, or probable effect, of particular types of bequests on the operation of article 916 can best be understood through an examination of selected cases.

In two cases the court reached apparently conflicting conclusions on the effect of testaments which seemed merely to confirm the operation of the laws of intestate succession. In _Succession of Schiller_ the will provided that the estate was to be "distributed among my legal heirs, according to the laws now in force in Louisiana." The court held that the testator had disposed of his property within the meaning of article 916; and, consequently, that the usufruct to the surviving spouse did not accrue. The court reasoned that when the testator makes a will, it is presumed that he intends something different from the result accruing in the absence of a will. It was concluded that this presumption, when coupled with the testator's use of the word "distributed," evidenced an intent that the wife should not have the usufruct of his half of the community. In _Succession of Maloney_, however, the testatrix bequeathed all of her property in Biloxi, Mississippi, to her three daughters and then stated: "My interest of whatever character and wherever situated, outside of said city of Biloxi, Mississippi, I leave to be disposed of according to the laws where the same may be." The court, in upholding the surviving spouse's usufruct on the...

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Sanford, 12 La. Ann. 646 (1857); cf. _Succession of Maloney_, 127 La. 913, 54 So. 146 (1911), where the usufruct was allowed, but the court made it clear that the testator's will did not attempt to dispose of his property located in Louisiana.  
24. _Succession of Baker_, 129 La. 74, 55 So. 714 (1911); _Succession of Moore_, 46 La. Ann. 531, 4 So. 460 (1888); _Succession of Brown_, 94 So. 2d 517 (La. App. Ori. Cir. 1957); _Succession of Lynch_, 145 So. 42 (La. App. Ori. Cir. 1932).  
27. _Id_. at 3: "A person that makes a will is to be presumed to own property, and be desirous of disposing of it in a manner in which the law would not convey it, in absence of such will. The presumption is, therefore, that such person designed to substitute his will to the provisions of the law, and so to derogate, entirely or partially, from the disposition which the law would have made of his property without such will. This is true, also, even as to the title of the bequest, or testamentary disposition."  
28. Apparently, the court thought "distributed" connoted an actual putting into possession of the forced heirs.  
29. 127 La. 913, 54 So. 146 (1911).  
30. _Id_. at 914, 54 So. at 146.
Louisiana property, distinguished the _Schiller_ case on the basis that a careful comparison of the language in respective testaments indicated that in _Maloney_ the testatrix did not purport to dispose of the Louisiana property by will, and that the will was intended to affect only the Mississippi property.

Despite a somewhat dubious interpretation of the testament, _Maloney_ appears to have reached the sounder result. The _Schiller_ presumption that merely drawing a will shows an intent to deviate from the rules of intestate succession seems highly questionable when applied to a will in which the testator has referred to the existing laws. Further, reliance on such a technical construction of "distributed" seems unwarranted in this instance. The quoted language from each testament seems to mean that the property be distributed in accordance with the laws of intestate succession. Article 916 is certainly located in the section of the Code dealing with intestate succession; thus both testamentary provisions probably should be taken to include a confirmation of the legal usufruct over the deceased's share of the community.  

More serious problems arise when the testament purports to give the surviving spouse more than he would have acquired if decedent had died intestate. In _Forstall v. Forstall_ the court reduced to the disposable portion the testator's donation of all his property to his spouse. The court reasoned that _any_ disposition by the testator of his interest in the community nullified the operation of article 916, so that the spouse was entitled either to the disposable portion or to the usufruct of the forced portion, since the former was all that the decedent could legally donate.  

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31. It was early recognized that the legal usufruct could be confirmed by will. In _Grayson v. Sanford_, 12 La. Ann. 646, 647 (1857), it was stated: "As the Act of 1844 only gives the right of usufruct in the portion of the community coming to the deceased, when he has left no will, it is clear that he can give, by his testament, the usufruct of said portion, which would belong to the surviving widow, without any will, or can declare that in the event of a particular contingency, his widow shall inherit the portion of his property, which the law authorizes him to bequeath." _But see_ text accompanying note 62 _infra_.

32. 28 La. Ann. 197 (1876).

33. _Id._ at 198: "The surviving widow is not entitled to the usufruct of this two-thirds, because the deceased disposed by last will and testament of his share of the community property. Article 916 must be construed with article 1493. Taken together, the meaning is: Where there has been no testamentary disposition of the disposable share of the pre-deceased husband or wife in the community property, the survivor shall be entitled to a usufruct during his or her natural life of so much of the share of the deceased in such community property as may be inherited by such issue. The condition upon which the survivor shall have a usufruct is, that the predeceased husband or wife, shall not have disposed of his or her share, that is the share that he or she was permitted by law to dispose of."
It should be noted that the court gave no consideration to the fact that the proposed donee was the surviving spouse. In *Succession of Moore*, however, the deceased left to his widow the disposable portion and the usufruct of the remainder. The heirs, relying on *Forstall*, contended that the testator could donate only the disposable portion, and that to award the usufruct would violate the prohibition of article 1710 forbidding the burdening of the legitime. The court rejected this contention on the basis that only a testamentary disposition which was *adverse to the survivor* precluded operation of article 916. Certainly it could not be logically argued that when the testator attempts to give his wife more than she would have otherwise taken, he is making a disposition adverse to her. Since an encumbrance placed on the legitime by law could not violate article 1710, neither could a mere confirmation of such an encumbrance. Although the court did not expressly overrule *Forstall*, it clearly advanced a proposition inconsistent with the holding in *Forstall*.

The apparent conflict between *Moore* and *Forstall* was presented to the court in *Winsberg v. Winsberg*. The court, when

34. 40 La. Ann. 531, 4 So. 460 (1888).
36. The court reasoned that the article 916 usufruct was given by operation of law; thus it could not be considered violative of article 1710, as the two articles must be read together to give effect to both. This usufruct does not constitute an abolition of the rights of forced heirship, but merely a modification of the rights of forced heirship. See *La. R.S. 9:1891-1922* (Supp. 1964), which contain other modification of the rights of forced heirship.
37. 40 La. Ann. 531, 538, 4 So. 460, 463 (1888): “Hence, where the deceased spouse, leaving issue of the marriage, and owning separate and common property, bequeaths to the survivor the disposable portion and the usufruct of his undisposed share in the community property, the disposition is valid and binding on the heirs inheriting the undisposed portion, and the *same is true where he institutes the survivor his universal legatee, for, the bequest is not null, but reducible to the disposable portion and the usufruct over the undisposed share*.” (Emphasis added.)

The *Moore* court also distinguished *Grayson v. Sanford*, 12 La. Ann. 646, 647 (1857) and the unreported case of *Succession of Denegre*. In *Grayson* the deceased left a will containing the following clause: “I will and bequeath to my wife the use of all my property both personal and real during her life. However, if any of my children sue for a portion during her life, I then will and bequeath to her all of the property that I can dispose of by will, forever.” Suit was brought for partition and the question was what were the wife’s rights under the will. The court held that the usufruct was subject to a contingency—that of a child suing for a partition—and upon the happening of such the wife was to take the disposable portion in full ownership and the usufruct would be lost. In *Denegre* the testator had bequeathed $10,000 to one of his daughters, and directed that the rest of the property be administered for the benefit of his wife and children. The court held that the testator had disposed of his share in the community property, thus the widow was not entitled to the usufruct. *Moore* stated that *Denegre* involved an incorrect interpretation of the will, and intimated that the widow should have been allowed the usufruct.

38. 233 La. 67, 96 So. 2d 44 (1957).
faced with facts identical to Forstall, squarely overruled the latter and applied the reasoning of Moore: if a legacy of the disposable portion to the surviving spouse was not adverse to her, much less was a legacy of decedent's entire estate. Thus the usufruct attached to the forced portion after reduction of the universal legacy to the spouse. The court approved of the rationale that the prohibition of article 1710 was not violated when the usufruct was given by operation of law and confirmed by will. Since Winsberg, it has not been seriously argued that article 1710 operates as a restriction on article 916. If any conflict exists between the two provisions, it appears that as the later legislation article 916 should prevail.

Two conclusions may be suggested: if the testament confirms the laws of intestate succession, it should not be considered an adverse disposition, although Schiller may yet cast some doubt on this proposition; and if the testator attempts to give his spouse more than the laws of intestate succession would allow, he has not made an adverse disposition. Moreover, it seems that the strong policy shown by the enactment of article 916 should dictate some clear indication by the testator that he does not want the surviving spouse to have the usufruct before it will be denied. For example, if the testator leaves all his property to the children with no mention of the wife, then arguably under the clear policy of article 916 the same result should follow. Entirely different problems arise, however, where dispositions made to strangers are subject to reduction at the insistence of forced heirs. These problems are considered in the next section.

To What Share Does the Usufruct Attach?

Article 916 provides that the survivor shall hold in usufruct "so much of the share of the deceased in such community property as may be inherited by such issue." Article 1493, which regulates the forced portion for descendants, states that the forced portion is one-third if there is one child, one-half if there are two children, and two-thirds if there are three or more children. Reading this article in conjunction with article 916

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39. See note 4 supra and accompanying text.
40. But see Note, 18 La. L. Rev. 574, 577 (1958), which asserts a contrary position.
41. La. Civil Code art. 916 (1870), quoted in note 2 supra.
42. Id. art. 1493: "Donations inter vivos or mortis causa can not exceed two-
implies that the respective forced portion is the minimum to which the usufruct will attach. \(^43\)

If the legitime of the children may be fulfilled only by reduction of excessive donations, does the usufruct attach to the part necessary to make up the forced portion? Under Moore and Winsberg it is clear that a disposition of all or part of the decedent’s property to the surviving spouse does not constitute an adverse disposition, and Moore further states that an adverse disposition of part of the property, that is, the portion given to a stranger, only prevents the usufruct from attaching to that portion of the property which is affected. Thus, it is clear that if the disposable portion is given to a stranger, the usufruct will not attach to that part. If the disposition to the stranger is more than disposable portion, it becomes important to determine whether the usufruct will attach to the excess passing to the heirs by reduction. There are two possibilities: one is that since the excess over the disposable portion passes by intestate succession, the usufruct should attach, since it is a part of the laws on intestate succession; and the other is that the question should not be what actually happens, but rather, what intention was evidenced by the disposition, and as the disposition itself indicates that the testator did not wish his spouse to have any part of this property, the usufruct should not attach. In terms of policy, therefore, the problem seems to be one of balancing the interests of the wife against the desirability of giving the fullest possible effect to the testator’s wishes, and adhering as closely as possible to the principles of forced heirship. Realization of the policy of article 916, however, indicates that the spouse should be denied the usufruct in this situation.

Remarriage — Termination of the Usufruct

The usufruct under article 916 continues during the life of the surviving spouse, provided he does not remarry. \(^44\) Remarriage operates as a resolutory condition extinguishing the 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.

"Under the name of children are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent."

43. See Oppenheim, The Usufruct of the Surviving Spouse, 18 Tul. L. Rev. 181 (1943).

44. La. Civil Code art. 916 (1870): "This usufruct shall cease, however, whenever the survivor shall enter into a second marriage."
usufruct, and the surviving spouse then becomes a debtor of his children and must account to them for the things over which he enjoyed the usufruct.\footnote{Kelley v. Kelley, 198 La. 338, 3 So. 2d 841 (1941); Burdin v. Burdin, 171 La. 7, 129 So. 651 (1930); Succession of Gilmore, 154 La. 353, 90 So. 676 (1922); In re Tutorship of Jones, 22 La. Ann. 497 (1870); Dubois v. Police Jury of Grant Parish, 165 So. 468 (La. App. 2d Cir. 1936); Succession of Franklin, 127 So. 767 (La. App. 1st Cir. 1930).}

Three types of usufructs must be carefully distinguished. First, the usufruct created by operation of law alone under article 916. Second, a confirmation of such a usufruct by will, that is, a legacy of the usufruct under conditions in which article 916 would have operated in intestacy. This type of usufruct was upheld in \textit{Succession of Moore,}\footnote{Succession of Carbajal, 154 La. 1060, 98 So. 666 (1924); Smith v. Nelson, 121 La. 170, 46 So. 200 (1908). Smith v. Nelson, however, was not a proper case for the application of article 916, since the heirs were issue of a former marriage. \textit{Carbajal} was a situation clearly coming within the terms of article 916.} as not violating article 1710's prohibition against burdening the legitime, on the ground that the usufruct was given by operation of law and the two articles must be construed together to give effect to both, so that a mere testamentary confirmation of this usufruct could not violate article 1710. Third, a testamentary usufruct bequeathed to the survivor over the deceased's community property under conditions in which article 916 was inapplicable. This type of usufruct is valid only to the extent that it does not impinge upon the legitime. If this usufruct does exceed the disposable portion, it violates article 1710, since the \textit{Moore} rationale is inapplicable if article 916 is not operative.

Only two cases are seemingly deviate with this requirement.\footnote{In re Tutorship of Jones, 22 La. Ann. 497 (1870); Dubois v. Police Jury of Grant Parish, 165 So. 468 (La. App. 2d Cir. 1936); Succession of Franklin, 127 So. 767 (La. App. 1st Cir. 1930).} In both the testator had confirmed the usufruct by will and the court reasoned that this transformed the legal usufruct into a testamentary usufruct. As a testamentary usufruct, it fell outside the scope of article 916, including the latter's termination-upon-remarriage rule. The court's conclusion, that a simple confirmation of the legal usufruct was sufficient to transform it into a pure testamentary usufruct, was probably based upon a failure to distinguish between the three types of usufructs. As these were only simple confirmations of the legal usufructs, they should have been placed in the second classification of usufructs and, as such, they should have been subject to the termination-upon-remarriage rule.\footnote{See note \textit{supra}.}
Had the Moore rationale been presented to the court, it seems that the heirs would have prevailed in the deviant cases, since under the court's reasoning article 916 was inapplicable. If article 916 is inapplicable, nothing prevents application of article 1710. Furthermore, refusal to apply the Moore rationale to the termination provision of article 916 seems undesirable. If the surviving wife remarries, she presumably acquires a new means of support, eliminating the need for the usufruct.\textsuperscript{49} In any event, the testator should not be able to defeat the restrictions provided by article 916 by simply confirming the right there provided.

\section*{Security}

Civil Code article 558\textsuperscript{50} requires the usufructuary to post security to insure his performance as a prudent administrator. However, applying by analogy article 560,\textsuperscript{51} which exempts the father or mother from the requirement of posting security when they have a legal usufruct over the estate of their children, the courts very early decided that the usufructuary under article 916 was not required to give security.\textsuperscript{52} This rule was developed in an era when immovable property represented the major source of wealth—thus potential injury to the naked owner was slight. Today, most wealth is in movable property and the possibilities

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\item If the surviving husband is continuing the operation of a community business and he remarries, the usufruct should be terminated, since under Louisiana law the profits from the business would fall into the new community. Allowing the usufruct to continue would result in a stranger impinging upon the legitime of the children of the first marriage.
\item LA. CIVIL CODE art. 558 (1870) : "The usufructuary must give security that he will use, as a prudent administrator would do, the movables and immovables subject to the usufruct, and that he will faithfully fulfill all the obligations imposed on him by law, and by the title under which his usufruct is established."
\item See id. art. 560: "Neither the father nor mother, having the legal usufruct of the estate of their children, nor the seller, nor the donor, under the reservation of the usufruct, is required to give this security."
\item This result is supported by the decision in Taylor v. Taylor, 189 La. 1084, 181 So. 543 (1938), holding that the usufruct under the marital fourth, article Costello, 158 So. 2d 850 (La. App. 4th Cir. 1964); contra, Waring v. Zuntz, 16 to article 560. The Taylor court stated in dictum that not only were the marital fourth and the usufruct of the surviving spouse to be so favored, but also that the widow's homestead (article 2382) and the situation expressly covered by article 560—the usufruct of the parents over the estate of their children—fell into the same category. As legal usufructs, Taylor would free each from the security requirements. See Canal Bank & Trust Co. v. Liuzza, 175 La. 53, 143 So. 2 (1932); Leury v. Mayer, 122 La. 468, 47 So. 839 (1908); Succession of Dielman, 119 La. 101, 43 So. 972 (1907); Succession of Glancey, 114 La. 1051, 38 So. 826 (1905); Boisse v. Dickson, 31 La. Ann. 741 (1870); Succession of Heckert, 160 So. 2d 375 (La. App. 4th Cir. 1964); State Dep't of Highways v. Costello, 158 So. 2d 850 (La. App. 4th Cir. 1964); contra, Waring v. Zuntz, 16 La. Ann. 49 (1861).
\end{enumerate}}
of injury to the naked owner by the usufructuary are correspondingly increased. As a corollary to the increased potential injury, the need for security increases. One recent case illustrates the need for security where the form of wealth subject to the usufruct is changed. In *State Department of Highways v. Costello* the highway department expropriated certain land which was subject to the surviving spouse's usufruct. The children, naked owners, opposed the withdrawal of the funds from the registry of the court by the father, relying on article 613, which provides that the usufruct expires before the death of the usufructuary, when there is a loss, extinction, or destruction of the thing subject to the usufruct. The court held that mere change in form of the thing subject to the usufruct was insufficient to extinguish the usufruct. Although this result appears proper under the general rules of usufruct, it re-emphasizes the need for some sort of security. Prior to the expropriation the naked owners were protected in part by the form of property subject to the usufruct, but due to events beyond their control this protection was lost and they became dependent upon the good faith of the usufructuary.

Civil Code article 621 provides the only protection available to the naked owner whose usufructuary is not required to give security. This article provides that if the usufructuary abuses his right of enjoyment, the naked owners may have the usufruct decreed extinct or the judge may allow the naked owners to take possession of the property subject to the usufruct on condition that they pay annually the usufructuary a sum fixed by the judge in proportion to the value of the property. This remedy, however, is a last resort for the naked owner, since gross abuse must be shown before relief may be granted.

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53. 158 So. 2d 850 (La. App. 4th Cir. 1964).
54. *La. Civil Code* art. 613 (1870): "The usufruct expires before the death of the usufructuary, by the loss, extinction or destruction of the thing subject to the usufruct . . . ."
55. *Id.* art. 621: "The usufruct may cease by the abuse which the usufructuary makes in his enjoyment, either in committing waste on the estate, or in suffering it to go to decay, for want of repairs, or in abusing in any other manner, the things subject to the usufruct.
"In such cases, the judge may, according to the circumstances, decree the absolute extinction of the usufruct, or order that the owner shall reenter into the enjoyment of the property subject to the usufruct, on condition that he shall pay annually to the usufructuary or his representatives, until the usufruct expires, a sum which shall be fixed by the judge in proportion to the value of the property subject to the usufruct."
56. Thomas v. Thomas, 73 So. 2d 482 (La. App. 2d Cir. 1954); Magee v. Gatlin, 51 So. 2d 154 (La. App. 1st Cir. 1951).
Canal Bank v. Liuzza\(^57\) illustrates clearly the inadequacies of the remedies available to children who inherit subject to the usufruct of the surviving spouse, and it shows the precarious task of a court if it tries to provide additional protection. In this case the widow was placed in possession of the estate, half in her own right, and half in usufruct over the children's share. The widow then placed funds subject to the usufruct in the hands of her brother for investment. He promptly squandered these funds. Later the widow gave the plaintiff bank an unsecured note. In order to effect a settlement with the children the widow renounced the usufruct and consented that her part of some immovable property go to the heirs in part satisfaction of their share of the estate. Plaintiff bank brought suit on the note, alleging that the partition was made to place the property beyond the widow's creditors, and asked that the transfer to the children be rescinded. The court gave judgment on the note, but denied plaintiff's demand that the transfer be rescinded. The court pointed out that the Civil Code articles \(^3311\)\(^58\) and \(^3318\)\(^59\) gave the children a legal mortgage on the property of the surviving spouse "reckoning from the closing of the inventory." The court reasoned that since the children could have recorded and foreclosed under their mortgage, the partition by the widow gave the children no greater rights than that which they already possessed;\(^60\) and thus the transfer of the property was valid. The application of article \(^3318\) in this case seems doubtful; its language seems to indicate its purpose was to give the heirs protection in the interim between death and appointment of an administrator, during which interim care of the succession property was entrusted to the surviving spouse.\(^61\) Moreover, the

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\(^{57}\) 175 La. 53, 143 So. 2 (1932).

\(^{58}\) LA. CIVIL CODE art. 3311 (1870): "The law alone in certain cases gives to the creditor a mortgage on the property of his debtor, without it being requisite that the parties should stipulate it; this is called legal mortgage.

"It is also called tacit mortgage, because it is established by the law without the aid of any agreement."

\(^{59}\) Id. art. 3318: "There is legal mortgage, reckoning from the closing of the inventory, on the property of the surviving husband or wife, or heirs, who have been invested by the inventory with the care of the property of the community or succession, until they are relieved from their care or a partition has been made."

\(^{60}\) Under id. arts. 3342, 3347, and 3356 it is required that the inventory be recorded before it will be effective against third parties; thus it appears that the children in Liuzza were given greater rights than that which they already possessed.

\(^{61}\) See id. art. 1041, replaced by LA. CODE OF CIVIL PROCEDURE arts. 3094, 3098, 3181 (1960). See also id. art. 3151, which provides for security to be posted by the administrator.
jurisprudence now appears settled that the failure of the surviving spouse to take an inventory of the succession does not cause loss of the legal usufruct of article 916.\footnote{62} As the taking of the inventory is a prerequisite to the operation of article 3318, this remedy must be considered illusory, since it is defeasible by the usufructuary’s failure to take the inventory. It should be noted that the remedy allowed by article 621\footnote{63} was available to the heirs in Liuzza. A possible consequence of this remedy would be judgment creditor status for the heirs, but in such case they would be forced to compete for first place with the bank.\footnote{64}

It can be readily seen, therefore, that with the change in the form of wealth in modern society, the requirement of security becomes of the utmost importance. It is suggested that the courts reconsider this need and require the surviving spouse to post security.

\textit{Inheritance Tax Problems}

The Louisiana inheritance tax is levied upon all inheritances, legacies, and donations made in contemplation of death, unless otherwise specifically exempted.\footnote{65} As to the surviving spouse’s usufruct two questions must be considered: first, is the spouse’s usufruct a taxable item under the state inheritance tax law; second, may the heirs defeat the usufructuary’s right of enjoyment by refusing to pay the inheritance taxes?


\footnote{63} See note 55 \textit{supra}, and accompanying text.

\footnote{64} It seems that the heirs in this case would be forced to obtain, first, extinguishment of the usufruct under article 621 of the Civil Code and, second, a judgment against the widow so that they would have the status of a judgment creditor.

\textit{LA. CIVIL CODE} art. 549 (1870) provides: "If the usufruct includes things, which can not be used without being expended or consumed, or without their substance being changed, the usufructuary has a right to dispose of them at his pleasure, but under the obligation of returning the same quantity, quality and value to the owner, or their estimated price, at the expiration of the usufruct." Arguably, it seems that the heirs could, under this article, be classified as revindicating owners and as such should prime all creditors of the usufructuary.

\footnote{65} \textit{LA. R.S. 47:2401} (1850) : "There is hereby levied a tax upon all inheritances, legacies and donations and gifts made in contemplation of death, except such as are hereinafter specifically exempted."

The exemptions listed in \textit{id. 47:2402} are: a $5,000.00 exemption on gifts to a direct descendant by blood or affinity, or to a surviving spouse or ascendant of the deceased; a $1,000.00 exemption on gifts to collateral relations of deceased, which includes brothers and sisters by affinity; a $500.00 exemption on gifts to a stranger; and any gifts to charitable, religious, or educational institutions located within the State of Louisiana.
Taxability of the Usufruct

In Succession of Marsal the deceased died intestate leaving a wife and children of the marriage. The tax collector contended that the usufruct was acquired by inheritance, thus taxes were due on the value of the usufruct. The court held that the usufruct was not acquired by inheritance but by "operation of law." It was reasoned that, although the usufruct is defeasible at the will of the deceased, it is nevertheless a right conferred by law which enters into and forms part of the marriage contract. Reliance was placed upon Succession of Teller, in which it was stated that the child of the marriage inherits the deceased's share in the community subject to the usufructuary rights of the surviving parent.

Succession of Norton makes a startling extension of the Marsal rule. In Norton the wife died intestate leaving a husband and children of the marriage. The children, as heirs in the nearest degree, renounced the succession. The husband, as heir in the next degree, accepted, and the tax collector claimed that as a result of the renunciation a tax was due upon the value of the whole estate inherited by the husband. On the other hand, the husband claimed the right to deduct the value of the usufruct he would have taken absent the renunciation, as under the Marsal rule. The court agreed with the husband, reasoning that under Marsal he acquired the usufruct by operation of law; the only interest passing by inheritance was that which the first forced heirs renounced, the naked ownership. This reasoning implies that the usufruct was in existence for some period prior to the time the surviving spouse took the naked ownership by renunciation and confusion extinguished the usufruct.

66. 118 La. 212, 42 So. 778 (1907); accord, Succession of Gremillion v. Downs, 165 So. 481 (La. App. 2d Cir. 1938).
67. This reasoning was followed in Succession of Baker, 129 La. 74, 55 So. 714 (1911), where the court held that the confirmation by will was not sufficient to change the legal usufruct into a testamentary usufruct for the purpose of taxes. Accord, Succession of Brown, 94 So. 2d 317 (La. App. Orl. Cir. 1957); Succession of Lynch, 145 So. 42 (La. App. Orl. Cir. 1932).
68. 49 La. Ann. 281, 21 So. 265 (1897).
69. Id. at 282, 21 So. at 265.
70. 157 So. 2d 909 (La. App. 1st Cir. 1963).
71. See LA. CIVIL CODE arts. 915, 948 (1870); cf. Palin v. Heroman, 211 La. 64, 29 So. 2d 473 (1947).
72. It is well settled, however, that the usufruct arises at the moment of death. See Succession of Marsal, 118 La. 212, 42 So. 778 (1907); Boyle v. Sibley, 22 La. Ann. 446 (1870); Succession of Smith, 9 La. Ann. 107 (1854); Succession of Bringier, 4 La. Ann. 389 (1849); Succession of Fitzwilliams, 3 La. Ann. 489 (1848).
Two analytical tools which aid in understanding Norton may be suggested. First, language in Marsal possibly indicates that the author-in-title of the usufruct is not the deceased spouse but the heir. If this be true, then obviously there could be no inheritance tax, as the right passes from a living person to the surviving spouse, rather than from the deceased. The other possible rationale finds its basis in the language of article 916: "[T]he survivor shall hold a (sic) 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." (Emphasis added.) The usufruct, therefore, could not exist on property not inherited by issue of the marriage.

Obviously, while superficially in line with Marsal, Norton in fact deviates from the former's rationale. Under the Civil Code it is clear that a renouncing heir is treated as never having received the succession, and that heirs in the next degree are treated as having succeeded to the inheritance from the moment of deceased's death. How then could the renouncing heirs in Norton serve as authors-in-title of a susfruct which would never have come into existence? The dissent appears to have adopted the correct approach, reasoning that under article 946 the heirs who renounce are treated as never having existed, so that no usufruct was created under the terms of article 916. The result that no usufruct was created would also follow under the other suggested rationale. It is fundamental that a renouncing heir is treated as never having inherited.

Even if the suggested analysis of Norton is accepted, there still remains the need to distinguish between the two closely related fact situations, which seem to compel totally different

73. LA. CIVIL CODE art. 916 (1870), quoted in note 2 supra.
74. Id. art. 946: "Though the succession be acquired by the heir from the moment of the death of the deceased, his right is in suspense, until he decide whether he accepts or rejects it.
   "If the heir accept, he is considered as having succeeded to the deceased from the moment of his death; if he rejects it, he is considered as never having received it."
   Id. art. 948: "When all the heirs in the nearest degree renounce the succession, which is accepted by those in the next degree, these last are considered as having succeeded directly and immediately to the rights and effects of the succession from the moment of the death of the deceased.
   "Therefore the heirs, thus succeeding by the renunciation of relations nearer in degree, transmit the succession to their own heirs, if they die before having accepted it, in the same manner as if they had succeeded in the first degree to the deceased."
75. 157 So. 2d at 910-11.
tax results. Assume that $H$ and $W$ had two children, $C^1$ and $C^2$, and that $W$ died survived by $H$ and the two children. If both children renounce the succession of $W$, composed entirely of her half of the community property, in favor of $H$, the Norton facts would arise, and under the analysis suggested above there should be a tax upon the entire succession passing to $H$, without any consideration for the value of a hypothetical usufruct. On the other hand, if $C^1$ renounced his interest in $W$'s succession in favor of $H$, and $C^2$ accepted in his own behalf, under Louisiana jurisprudence the order of succession would be changed and $C^1$ would be treated as having accepted the succession and then donated it to $H$.\footnote{E.g., Aurienne v. Mt. Olivet, 153 La. 451, 96 So. 29 (1923).} There would be someone to serve as author-in-title of the entire usufruct, albeit the usufruct would be partially extinguished by confusion when $C^1$ donated his naked ownership to $H$. It seems that here the Marsal rule should apply in full force, exempting the entire usufruct from taxation. The same result should follow under the other rationale, since the usufruct would be preserved by the one child who inherited.

The general rule that there is no death tax upon the surviving spouse's usufruct does not hold true in all cases. Under the federal estate tax law the value of the usufruct does not escape taxation, as the basis for the tax includes "the value of all property to the extent of the interest therein of the decedent at the time of his death."\footnote{INT. REV. CODE of 1954, § 2033.} Further the state, through the estate transfer tax\footnote{La. R.S. 47:2431-2435 (1950). This tax was enacted for the express purpose of obtaining the full benefit of the credit allowed by the United States on the federal estate tax. See Comment, 22 Tul. L. Rev. 635 (1948).} which siphons part of the revenue from the federal estate tax, receives the benefit of the federal law's inclusion of the value of the usufruct. It has been suggested that the federal rule that the spouse's usufruct is subject to the federal estate tax is of doubtful validity in light of the Erie doctrine and state decisions such as Marsal.\footnote{Oppenheim, The Usufruct of the Surviving Spouse, 18 Tul. L. Rev. 181 (1943).} It is submitted that the Erie doctrine has no application, since what interests are subject to the estate tax is a federal question, and as such is decided according to federal law.
Effect of Non-payment of the Inheritance Taxes by the Heirs

Even though under some of the fact situations set forth above, the taker of the naked ownership in the succession property will be liable for an inheritance tax, it should not be immediately assumed that this constitutes an unfair burden. True, the naked owner will not receive any immediate income from the property subject to the usufruct. However, the statute is carefully drafted so that the tax is computed only upon the present value of the naked ownership, discounted by the life expectancy of the usufructuary. The naked owner's plight is thus not too heavy. Should, then, the naked owner's refusal to pay inheritance taxes prejudice the usufructuary's enjoyment of his rights as a surviving spouse?

Article 2951 of the Code of Civil Procedure provides that no judgment of possession shall be rendered unless the inheritance taxes have been paid, or satisfactory proof has been given that no taxes are due, or the maximum amount claimed by the tax collector has been deposited in the registry of the court. In addition to this general necessity for a judgment of possession, the legislature has enacted certain statutes which prohibit banks, homestead associations, corporations, and other depositary institutions from delivering the deceased's property to anyone until satisfactory proof is given that the inheritance tax laws have been complied with. The usual mode of proof is a judgment of possession issued by the court having jurisdiction over the succession proceedings.

A reading of these statutes leads to the conclusion that the usufructuary is not entitled to enjoyment of the property until the inheritance taxes are paid. It may be hastily surmised that the heirs may therefore deny the usufructuary this enjoyment by failing to pay the taxes. However, this would be inexact,
because certain remedies are accorded to the surviving spouse which operate to prevent this inequitable result. If the surviving spouse is also the succession representative, he can eliminate the problem by paying the taxes and then claim compensation from the heirs when he delivers their virile share to them. Appointment of anyone else as succession representative practically insures payment of the taxes, since his discharge is conditional on payment.\(^8\) Finally, if no succession representative is appointed, and the heirs refuse to pay the tax, the tax collector has the authority to obtain a judgment and order sufficient succession property sold to satisfy this judgment.\(^9\)

**Conclusion**

Although the usufruct of the surviving spouse has decreased in importance due to the advent of various public and private programs, it seems that the institution still plays an important role in affording financial security to the surviving spouse.

Some improvements on the present law may be suggested. First, the requirement of issue of the marriage should be strictly construed; second, the court should look to the intention of the testator to determine what constitutes a disposition adverse to the surviving spouse; third, the jurisprudence allowing the usufruct to continue after the survivor's remarriage should be disapproved; and fourth, the surviving spouse should be required to post security.

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**PROPERTY TRANSACTIONS BETWEEN SPOUSES**

Among the numerous articles of the Louisiana Civil Code dealing with marriage are those governing donations and contracts between spouses. But the code provisions are sketchy and the jurisprudence slight, especially on the rules affecting interspousal donations. The purpose of this Comment is to clarify the law of interspousal transactions generally.

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\(^9\) *La. R.S. 47:2408(b)* (1950); *id.* 47:2409(c).